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The Struggle for the Rule of Law in South Africa (Symposium: Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy)

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The Struggle for the Rule of Law in South Africa

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I. INTRODUCTION

The blight of apartheid was partly its horrendous discrimination, but also its lawlessness. South Africa was lawless in the bluntest sense, as its rulers maintained their power with the help of death squads and torturers.¹ But it was also lawless, or at least unlawful, in a broader and more pervasive way: the rule of law did not hold in South Africa. Apartheid, as was often said, ruled *by* law, and quite elaborately so, but the law that applied to black people in South Africa was not a law of limits but of powers.²

Nevertheless, perhaps because South Africa aspired to membership in the Western rule of law world, and because the legal system for whites *was* in large part a rule of law modeled on British principles, the struggle against South Africa's lawlessness was waged, in part, in South Africa's courts, where anti-apartheid lawyers could invoke South Africa's notional liberties to sometimes undercut its actual injustices. Apartheid was not defeated in the courts but in the world of politics, mass mobilization, military force, and international sanctions—but the events in the courts were a part of this story.³

Moreover, the heritage of law proved to be a path to agreement in the negotiations. South Africa's old Parliament formally voted itself out of existence and the new order into being (although the terms of its departure had been negotiated by the African National Congress (ANC) and the other contesting parties outside Parliament's walls).⁴ The Interim Constitution, adopted in 1993, contained "Constitutional Principles" by which the new Constitutional Court would judge the validity of the

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1. See, e.g., GEORGE BIZOS, NO ONE TO BLAME? IN PURSUIT OF JUSTICE IN SOUTH AFRICA (1998) (describing legal battles to identify those responsible for the many deaths of security police detainees under apartheid).
 2. For a classic study of the law of apartheid South Africa, see JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978). Dugard discusses the ambiguity of the concept of the "Rule of Law," *id.* at 37–49, and alludes to the interpretation of it as merely "Rule by Law," *id.* at 45.
 3. For an appraisal of the contributions of anti-apartheid lawyering by a leader of that effort who later became the first President of South Africa's Constitutional Court, and then Chief Justice of the nation, see Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African Law*, 1 INT'L J. CONST. L. 590 (2003). I argued for the value of the legal struggles against the State of Emergency powers wielded by South Africa's apartheid government in its last decade in STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY 248–74 (1992).
 4. In an effort to stave off the end of apartheid, South Africa adopted a constitution in 1983 that gave whites, "Coloureds," and Indians representation in three separate houses of Parliament. "Africans" had no representation in South Africa's Parliament; apartheid imagined them to be citizens of tribal homelands such as Bophuthatswana (the supposed nation of the Tswana people). For obvious reasons, the representatives of the liberation struggle could hardly have negotiated the constitutional transition within the state's structures. Negotiations instead went on in a series of fora created precisely for that purpose, and the results were enacted into law by the old Parliament. The resulting constitution, enacted as Constitution of the Republic of South Africa Act 200 of 1993 (the "Interim Constitution"), with last-minute amendments just before South Africa's first nonracial elections in 1994, was then replaced in 1996 by the final Constitution, which was negotiated and adopted by the first post-apartheid Parliament, sitting as a constitutional assembly. For a discussion of the constitutional negotiations, see generally THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 22–301 (Penelope Andrews & Stephen Ellmann, eds., 2001) [hereinafter THE POST-APARTHEID CONSTITUTIONS].

final Constitution to be written after the first democratic elections.⁵ And the various parties, after endorsing—perhaps somewhat to their own surprise—a substantial set of enforceable constitutional rights in the Interim Constitution,⁶ expanded that set to embrace socioeconomic rights in the final document.⁷

The overthrow of apartheid was, then, not only an abolition of many deep, discriminatory injustices, but also the establishment of the rule of law in the new, post-apartheid country. The final Constitution says as much: its first section declares that among the founding values of the nation is “[s]upremacy of the constitution and the rule of law.”⁸

But it turns out that the battle to establish the rule of law was not over. South African democracy is now twenty years old, and, like other democracies around the world, is far from perfect. I do not want to overstate the gravity of the challenges the nation faces; every country faces problems, and perhaps most countries’ politicians seem unequal to the tasks before them. South Africa, moreover, faces a huge task in righting the economic inequalities between blacks and whites left over from its past, and I cannot say what the best policy for approaching this problem may be. In addition to profound social policy challenges, however, South Africa now faces another problem: the danger that the people will not rule, because the political system meant to empower them has been sapped by corruption and arbitrariness. South Africa has become, as Sujit Choudhry and others have demonstrated, a “dominant party democracy,” one in which a single party, the ANC, wins every national election (and almost all provincial elections as well).⁹ The essence of a dominant party democracy is the gradual erosion of all checks on the dominant party’s power, the law itself potentially among them.¹⁰ The result has been that today South Africa’s courts find themselves increasingly called upon to preserve the rule of law without the support of the government as a whole.

This article sketches the course of events that brought the courts—particularly the Constitutional Court—to this role, a role I do not think the drafters of the

5. S. AFR. (INTERIM) CONST., 1993, sched. 4 (setting out the thirty-four “Constitutional Principles”).

6. *Id.* §§ 7–35.

7. S. AFR. CONST., 1996, §§ 7–37. For a discussion of the socioeconomic rights provisions of the final Constitution, see *infra* Part IV.

8. S. AFR. CONST., 1996, § 1(c).

9. Sujit Choudhry, ‘He Had a Mandate’: *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 3, 8–19 (2009); see also Samuel Issacharoff, *The Democratic Risk to Democratic Transitions*, 5 CONST. CT. REV. 1 (2013). Pierre de Vos notes that “[w]hether South Africa can indeed be characterised [as a “dominant party democracy”] . . . has been the subject of intense debate,” Pierre de Vos, *Between Promise and Practice: Constitutionalism in South Africa More Than 20 Years After the Advent of Democracy* 6 n.23 (2015) (unpublished manuscript) (on file with author), and himself “contend[s] that the electoral dominance of one political party in South Africa has had a significant effect on governance, not because of the dominance of the party *per se* but because that dominance is amplified by other factors which have a tendency to weaken constitutional structures, procedural safeguards, independent bodies and mechanisms of checks and balances,” *id.* at 7–8; see *id.* at 8–11 (describing these factors).

10. See Choudhry, *supra* note 9, at 32–33.

Constitution expected. Part II describes the role they did anticipate, in which, I believe, the Constitutional Court and the other branches of government were expected to act fundamentally as partners, and then begins the story of the past twenty years. One part of that story is the sheer breadth of the courts', and above all the Constitutional Court's, authority under the Constitution. Part III discusses just how far-reaching, and demanding, that authority is. But while the courts' broad authority meant that they would inevitably be called upon to address a host of South Africa's problems, the way the courts would use that authority was not foreordained. Nor was the courts' approach simply a reaction by the judges to the nation's increasingly apparent societal problems. Though judges read the newspapers, as the distinguished South African lawyer Geoff Budlender has observed¹¹—and there has been plenty of bad news¹²—how they react to what they read depends on the perspective they bring to it.

That perspective was shaped over twenty years, and understanding its development is essential to understanding the work of the courts today. This development can be laid out in three stages, though to some extent the stages actually overlap. In Part IV, I focus on the first of these stages, the rise of socioeconomic rights jurisprudence and, as a key part of that jurisprudential process, the Constitutional Court's encounter with arbitrary, and deeply harmful, government decisionmaking. In Part V, I turn to the next element in this development, the Constitutional Court's growing attention to the importance of protecting South Africans' right to participate in decisions affecting their lives. It was only after the Court had developed both an awareness of government arbitrariness and an appreciation of the importance of popular participation in government that it then confronted directly the growing corruption of South African public life, and Part VI traces that multi-faceted confrontation.

While it is important to tell this story, once it is told the next question is how the story will end. To answer that question, our first task is to characterize the approach the Constitutional Court is taking, or in other words to ask how sharp the clash between the Court and the political leaders of South Africa has become. Though the Court is sometimes criticized for not pressing the demands of the Constitution far enough, Part VI argues that the Court has been determined and even bold, and that although it has certainly tried to moderate the tenor of its clashes with the government, those clashes have in fact been intense. The second task is to appraise the risks the Court now runs. To do that, Part VII looks both to evidence from the current South African political scene and to the experience of other courts in other nations,

11. Geoff Budlender, *People's Power and the Courts: Bram Fischer Memorial Lecture, 2011*, 27 SAJHR 582, 589 (2011).

12. The urgency of South Africa's situation is plain for all to see: in the economic inequality that has persisted or even deepened since the end of apartheid; in the high rates of crime and the low rates of educational success; in the endless saga of the arms deal; in the internecine politics of the ANC; in the frightening police shootings of strikers at Marikana; and in the long-running, almost comic scandal around the elaborate improvements at state expense to President Jacob Zuma's personal residence in the village of Nkandla. Across the border in Zimbabwe is an even more chilling reminder that things can go from bad to worse.

particularly the U.S. Supreme Court. But other nations' experiences can only be instructive, and we will also need to place South Africa's courts in the particular context of South African political and legal culture. When we have done all of this, we will be in a better position to gauge whether and how South Africa's Constitutional Court, and its lower courts, can successfully play the role they have undertaken — though even then we will not be able to know for sure what the future holds.

II. THE FRAMERS' VISION OF THE CONSTITUTIONAL COURT'S ROLE

When apartheid ended, every sitting judge in South Africa had been appointed by the government responsible for apartheid—after all, it was the appointing authority until it gave up power—and all but three of them were white men.¹³ South Africa's constitutional negotiators chose to allow these judges to remain in office as long as they took an oath under the new, post-apartheid Constitution.¹⁴ At the same time, the negotiators created a new court, the Constitutional Court, to be the sole appellate court with authority to rule on constitutional issues.¹⁵ Then Nelson Mandela, the first President of post-apartheid South Africa, selected the justices of the Court and chose eleven men and women who, by virtue of their legal ability and their unmistakable, often heroic, opposition to apartheid, could be relied upon to oversee the new legal order.¹⁶

Undoubtedly, the negotiators expected that the Constitutional Court would excise the leftover laws of apartheid, root and branch. From the first case the Constitutional Court heard, its commitment to a vigorous interpretation of the Constitution was apparent. That first case, *S v. Makwanyane*, dealt with the constitutionality of the death penalty.¹⁷ Many, quite possibly most, people in South Africa, white and black, believe the death penalty is a legitimate punishment, and the Constitution—though it protects the right to life,¹⁸ the right to human dignity,¹⁹

13. Penelope E. Andrews, Commentary, *The South African Judicial Appointments Process*, 44 OSGOOD HALL L.J. 565, 566 (2006).

14. S. AFR. (INTERIM) CONST., 1993, §§ 241(2), (7). I use “drafters,” “framers,” and “negotiators” interchangeably throughout this article to identify the group of people who wrote the South African Constitution.

15. *Id.* § 98. Today the Constitutional Court shares its constitutional review authority with the Supreme Court of Appeal, but the Constitutional Court retains the last, and often essential, word. S. AFR. CONST., §§ 167–168. The Constitutional Court has also acquired authority over non-constitutional issues “of general public importance” as well, so that it is truly the “apex court” of South Africa. S. AFR. CONST., Seventeenth Amendment Act of 2012 § 3(a). In establishing this new court, the South African negotiators may well have been following the example of post-war West Germany, which similarly created a constitutional court to shape the new legal order even though “[t]he entire judiciary was compromised as an institution” by the years of Nazi rule. Issacharoff, *supra* note 9, at 12–13.

16. For brief biographies of the eleven original members of the Constitutional Court, see THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005*, at 220–31 (2013).

17. 1995 (3) SA 391 (CC).

18. S. AFR. CONST., 1996, § 11; S. AFR. (INTERIM) CONST., 1993, § 9.

19. S. AFR. CONST., 1996, § 10; S. AFR. (INTERIM) CONST., 1993, § 10.

and many other rights relevant to punishment—simply does not say that the death penalty is forbidden.²⁰ The Constitutional Court unanimously held, however, that the death penalty was unconstitutional,²¹ and that decision has remained firmly the law of the land ever since. Arthur Chaskalson, the first President of the Court and later South Africa’s Chief Justice, wrote for the Court that it had a duty to render decisions in the face of contrary public opinion:

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 [Interim] Constitution.²²

The *Makwanyane* decision, as impressive as it was, did not involve the Court in a confrontation with the political branches of the country. In fact, the government’s counsel informed the Court that the government itself considered the death penalty unconstitutional.²³ Popular as the death penalty may have been with the South African people, it was deeply unpopular with the ANC’s leadership, some of whom—Nelson Mandela among them—had been on trial for their lives during the apartheid years.²⁴ The case was important, then, not as a confrontation between the Court and the politicians but rather as the forthright demonstration of the Court’s intention to remove from South African law the many provisions left over from the old order that violated the new nation’s principles—just as the constitutional negotiators no doubt envisaged. In this effort, the Court was fundamentally engaged in the same work as the political branches, and I think should best be seen as allied with, rather than opposed to, the executive and Parliament.

Still, the drafters of the Constitution undoubtedly recognized that inter-branch conflicts would sometimes arise, and in fact one arose quite soon. The case was *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa*.²⁵ The issue was whether proclamations issued by President Nelson Mandela, dealing with the process of establishing election districts in the Western Cape province, were outside his constitutional authority²⁶—and the Constitutional Court

20. *Makwanyane* was decided under the Interim Constitution, since the final Constitution had not yet been completed. But neither constitution contains an explicit prohibition of capital punishment.

21. *Makwanyane*, 1995 (3) SA 391 at para. 151.

22. *Id.* at para. 88.

23. *Id.* at para. 11. I perhaps should add that I assisted in the preparation of an American legal memorandum that was submitted to the Constitutional Court in support of holding the death penalty unconstitutional.

24. Roux, *supra* note 16, at 239.

25. 1995 (4) SA 877 (CC).

26. *Id.* at paras. 1–6.

held, by a vote of 9–2, that they were.²⁷ Mandela accepted the decision without hesitation, and in a speech one year later, commemorating the Sharpeville massacre,²⁸ he said that “[w]e owe thanks to the Constitutional Court which has proved a true and fearless custodian of our constitutional agreements.”²⁹ Albie Sachs, a member of the Court at the time, remembers Mandela’s reaction vividly:

We were told that [Mandela] would appear on television . . . We’d struck [the *Executive Council of the Western Cape Legislature* proclamations] down. We said parliament itself has to pass that law. It was very inconvenient because parliament was in recess then. They had to summon over 400 members of parliament to rush the matter through and he went on to television and he said, “When I issued those proclamations I did so on legal advice. I now accept that that legal advice was incorrect and I as president of the country must be the first to show respect for the [C]onstitution as interpreted by the Constitutional Court.” For me that moment – that day was as important as the day when we all stood in line and voted. When we voted, that was to establish that South Africa was a democracy, but when Nelson Mandela accepted the decision of our court, and did so with so much grace, that was the day when we became a constitutional democracy in which everybody would be bound by the terms of our [C]onstitution.³⁰

At that moment, although the Constitutional Court had declared an action of President Mandela’s unconstitutional, the Court and the President were not adversaries. The Court was independent of the rest of the government, but the branches shared the commitment to remaking, and transforming, the country.³¹

27. *Id.* at para. 101. The nine justices were not unanimous in their reasoning, *id.* at para. 101, but only two, Justice Tholakele Madala and Acting Justice Bernard Ngoepe, concluded that the President had authority to issue the challenged proclamations, *id.* at paras. 211–30 (Madala, J. & Ngoepe, AJ., dissenting).

28. In his autobiography, Nelson Mandela describes the massacre that took place in Sharpeville in 1960 after an anti-apartheid group, the Pan Africanist Congress, had organized a demonstration of “several thousand” people against the pass laws:

The police force of seventy-five was greatly outnumbered and panicky. No one heard warning shots or an order to shoot, but suddenly, the police opened fire on the crowd and continued to shoot as the demonstrators turned and ran in fear. When the area had cleared, sixty-nine Africans lay dead, most of them shot in the back as they were fleeing.

NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 238 (1995).

29. Pierre de Vos, *Lest We Forget*, CONSTITUTIONALLY SPEAKING (Dec. 8, 2011) (quoting Nelson Mandela’s speech at the signing of the final Constitution in Sharpeville on December 10, 1996), <http://constitutionallyspeaking.co.za/lest-we-forget/>.

30. Albie Sachs, Speaking at the University of Michigan-Flint on “Nelson Mandela: A Leader and a Friend” (June 4, 2013), <http://www.mott.org/news/news/2013/20130815-Albie-Sachs-UM-Flint-Lecture-Video-and-Transcript>.

31. Theunis Roux provides an important limit on this characterization. He emphasizes that the ANC, which has led South Africa since the 1994 election, encompasses many strands and that its positions rest on many calculations. He persuasively suggests that the ANC most needed the Court in the early years, to help legitimize its accession to power, and that after that power was consolidated “the ANC’s interest in the Court’s independence became less certain, varying as it did with the particular policy goals being pursued and changes to the party leadership.” Roux, *supra* note 16, at 162–64.

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That shared commitment would often be joyful and exciting, as the new nation became a reality, but could be deeply painful as well. The justices, like their counterparts in the political branches, shared an understanding that the constitutional transition had not been easy and had involved hard choices. Among these, the hardest may have been the decision to authorize amnesty for the killers and torturers of the past if they confessed their offenses—a decision upheld by the Constitutional Court.³² Justice Ismail Mahomed, the first black person to serve as a judge in South Africa, wrote that:

The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect and the pursuit of the act might inherently support the message of Kant that “out of the crooked timber of humanity no straight thing was ever made.”³³

In a somewhat similar—though much less dramatic—vein, the Constitutional Court read the Interim Constitution not to subject laws carried over from the apartheid era to the limits on delegation of legislative authority to executive ministers that the new Constitution might now embody.³⁴ Justice John Didcott, a fierce opponent of apartheid even as he sat on the bench during the apartheid years, explained why this approach to delegation might have been the drafters’ intention by pointing out that *all* of the laws carried over had been enacted “by a Parliament that had been elected undemocratically and was not representative of all our people. . . . It seems scarcely surprising . . . that, having swallowed the camel of illegitimate origin, those concerned saw no need to strain at the gnat of unbridled delegation.”³⁵ To put the point more generally: transition was not easy, or simple, and the Constitutional Court would oversee the process, but it would do so in fundamental solidarity with the political branches.

In the first years of the new South Africa, the Constitutional Court performed one more function that both relied upon and confirmed the Court’s ability to render judgments that would not only remake South Africa but also would do so in a way that all sides could trust. Perhaps no court in the world has been assigned as much responsibility for transforming a country as South Africa’s Constitutional Court. Here I am not speaking about the many rights and requirements over which the

32. *Azanian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SA 672 (CC) at paras. 1–5, 21, 50–51.

33. *Id.* at para. 21 (quoting Isaiah Berlin in ISIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 170 (reprt. 1971)).

34. *Ynuico Ltd. v. Minister of Trade & Indus.* 1996 (3) SA 989 (CC) at paras. 5–7.

35. *Id.* at para. 7.

Court exercises jurisdiction all the time but rather about one of the founding moments of the new South Africa: the requirement in the Interim Constitution that the Constitutional Court review the proposed final Constitution once it was negotiated and determine whether that draft complied with the set of Constitutional Principles adopted in the Interim Constitution.³⁶ In effect, the Constitutional Court was called upon to decide whether the proposed constitution was itself constitutional. The Court did just that, and in an immense judgment found that in certain respects, the draft first presented to it did not comply with the Principles.³⁷ Parliament revised the draft, and only then did the Court approve the Constitution which it has since that time enforced.³⁸ And even now the Court retains, under this Constitution, the authority to “decide on the constitutionality of any amendment to the Constitution.”³⁹ This was, from the start, a court from which much was asked.

It was not an accident that the Constitutional Court was assigned this remarkable responsibility. I mentioned at the start of this essay the heritage of law in South Africa.⁴⁰ This was a complicated heritage, because South African law under apartheid was deeply unjust. So was apartheid as a whole. But my sense is that for some, perhaps many, South Africans, the law’s injustice had a special flavor; it was not only wrong but also *disappointing*. It was a breach of faith. South African law had enough of justice in it, and enough claim to a heritage of judicial independence and protection of rights (particularly through the rule of law as developed in Britain, where liberty slowly grew despite the absence of a written constitution), that South Africans could trace the shadows of fairness beneath the elaborate structures of apartheid. Such idealism may have been easier to entertain for whites than for blacks, since whites, even if they were outraged by apartheid’s injustice, generally suffered far less from apartheid than did blacks, but there is some reason to believe that even black South Africans accorded “a measure of legitimacy” to the country’s courts under apartheid.⁴¹

36. S. AFR. (INTERIM) CONST., 1993, § 71.

37. *Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC). For a unique account of the multi-day argument before the Court when the draft constitution was presented to it, see Carmel Rickard, *The Certification of the Constitution of South Africa*, in *THE POST-APARTHEID CONSTITUTIONS*, *supra* note 4, at 224. Rickard summarizes the Court’s extensive decision, noting that it found problems with the labor-management rights section; the attempted exemption of two statutes from constitutional review; the insufficiently demanding method provided for amendment of the constitution; the lack of sufficient protection for the independence of the Public Protector and other, similar institutions; the failure to sufficiently lay out the powers of local government; the lack of proper “fiscal arrangements” concerning municipal taxation; and the failure to protect the powers of the provinces vis-à-vis the national government as fully as in the Interim Constitution. *Id.* at 267–69.

38. *Certification of the Amended Text of the Constitution of the Republic of S. Afr.* 1997 (2) SA 97 (CC) at paras. 2–3, 205.

39. S. AFR. CONST., 1996, § 167(4)(d).

40. *See supra* Part I.

41. *See generally* Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 *LAW & SOC. INQUIRY* 407 (1995). No less an authority than Nelson Mandela, however, commented in his autobiography that he never expected justice from South Africa’s courts, though he sometimes received it. MANDELA, *supra* note 28, at 260.

III. THE SCOPE OF THE CONSTITUTIONAL COURT'S AUTHORITY

To understand the Constitutional Court's current encounters with the political branches, we must begin with the law, and specifically with the extent of the authority the Court enjoys. As we've already seen, the Court exercises the power of judicial review of constitutional issues.⁴² Moreover, the Constitution is emphatic about its own supremacy. This is not a matter of rhetoric; establishing a constitution that could not be disregarded by a supreme and unreviewable Parliament, as it could have been in the Westminster model of government that South Africa took over from the British when it became independent, was a central element of the transition from apartheid.⁴³ The Constitution declares that "[t]his 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."⁴⁴ Moreover, South Africa's extensive Bill of Rights, Chapter Two of the Constitution, begins with the mandate that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights,"⁴⁵ and goes on to spell out that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."⁴⁶

These supreme provisions are laid out in detail. South Africa's Bill of Rights has thirty-three sections, most with multiple subparts, and runs nineteen pages in a pamphlet edition. The rights protected include an array of rights long recognized in constitutional democracies, as well as a wide range of socioeconomic rights. By way of comparison, the U.S. Constitution's Bill of Rights, the first ten amendments of our Constitution, runs about a page and a half in one reprint.⁴⁷ The full South African Constitution includes 243 sections and 133 pages, not including seven supplementary "Schedules" which cover another forty-nine pages. The entire U.S. Constitution, including two centuries' worth of amendments, runs seventeen pages in the same reprint.⁴⁸ The South African Constitution addresses, or so a first read might suggest, every possible issue of governance that the new South Africa might encounter.

42. S. AFR. CONST., 1996, § 167.

43. As has often been noted, the great difference between Britain and South Africa was that in South Africa, parliamentary supremacy was exercised by an almost exclusively white electorate, which employed its power to rule over the country's black majority. As John Dugard has written, "it is difficult not to fault the founding fathers and the British Parliament for handing South Africa over to a white driver behind the wheel of the Westminster machine." DUGARD, *supra* note 2, at 27.

44. S. AFR. CONST., 1996, § 2.

45. *Id.* § 7(2).

46. *Id.* § 8(1).

47. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1321–23 (4th ed. 2011). This book's pages are larger than those in the pamphlet edition of the South African Constitution, but there's no doubt that South Africa's Bill of Rights, and its Constitution as a whole, are vastly more elaborated than the provisions of the Constitution of the United States.

48. *Id.* at 1313–29.

A constitution that protects so many rights, and that regulates government power in such detail, obviously provides many potential occasions for litigation. Moreover, it has been clear since the start of the new nation that the Constitutional Court's justices were committed to interpreting the Constitution's elaborate text in a purposive manner, to give proper play to all of its guarantees, rather than in ways that might have been narrower—entirely by the plain meaning of its text, for instance, or the specific intentions of its drafters.⁴⁹

The Constitution is also emphatic about the role of courts. It tells us that: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”⁵⁰ To underline the point, the next subsection instructs that “[n]o person or organ of state may interfere with the functioning of the courts.”⁵¹ On the contrary, “[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”⁵²

South African law also puts pressure on the courts, and in particular the Constitutional Court, to rule on cases before it. This proposition might seem odd—what else do courts do but rule on the cases that come to them? But in the United States, several different longstanding doctrines often enable, and sometimes require, the courts *not* to rule.⁵³ Many U.S. cases, for example, are dismissed because the would-be plaintiffs lack the personal stake we require for “standing” to litigate;⁵⁴ in South Africa, section 38 of the Constitution explicitly grants standing to “anyone acting in the public interest.”⁵⁵ Even when a litigant has standing, it does not always follow that a court will hear the litigant's case. Our courts sometimes decline to rule on cases that too directly involve the fundamental decisions of other branches of government on the ground that these issues involve non-justiciable “political questions”;⁵⁶ South Africa seems to have no such doctrine at all, and in fact such a doctrine would be flatly inconsistent with the South African constitutional premise

49. See *S v. Makwanyane* 1995 (3) SA 391 (CC) at paras. 9–10.

50. S. AFR. CONST., 1996, § 165(2).

51. *Id.* § 165(3).

52. *Id.* § 165(4).

53. Frank Michelman has noted this contrast between South Africa and the United States. Frank I. Michelman, *On the Uses of Interpretive 'Charity': Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa*, 1 CONST. CT. REV. 1, 42 n.156, 59 (2008).

54. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.”).

55. S. AFR. CONST., 1996, § 38(d).

56. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (setting out the criteria for determining whether an issue before the court is a “political question”).

that all public action is subject to review.⁵⁷ And while South Africa does have a mootness doctrine, the rule can be overridden when “the interests of justice require.”⁵⁸

Even when a case is otherwise appropriate, a court might choose not to hear it—if it has that prerogative. The Supreme Court of the United States has almost total control over its docket, and therefore can simply decline to hear a case; indeed, the usual procedure requires that four of the nine members affirmatively vote in favor of hearing a case (“granting certiorari”) for it to actually become part of the Supreme Court’s docket, and Rule 10 of the Supreme Court’s rules provides that “[a] petition for a writ of certiorari will be granted only for compelling reasons.”⁵⁹

The situation is quite different in South Africa. To be sure, the South African Constitution does not tell the Constitutional Court it must hear every case, and instead provides for it to employ an “interests of justice” rule in deciding whether to hear many or most of the cases presented.⁶⁰ Nevertheless, the Constitution confers a number of critical responsibilities on the Court that seem hard to evade. For example, “[o]nly the Constitutional Court may . . . decide that Parliament or the President has failed to fulfil a constitutional obligation.”⁶¹ This particular duty is not as broad as it might seem, because the term “constitutional obligation” has been construed narrowly.⁶² But “[t]he Constitutional Court makes the final decision” on constitutional rulings from the lower courts, “and *must confirm* any order of invalidity made by” lower courts “before that order has any force.”⁶³

Moreover, while the Constitutional Court was at one time limited to deciding “only constitutional matters, and issues connected with decisions on constitutional matters,”⁶⁴ that limit has now been erased, and the Court may also decide “any other matter, if the Constitutional Court grants leave to appeal on the grounds that the

57. Two South African scholars, Mia Swart and Thomas Coggin, observe that “South Africa has declined to adopt any doctrine resembling the political question doctrine.” Mia Swart & Thomas Coggin, *The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in National Treasury v Opposition to Urban Tolling*, 5 CONST. CT. REV. 345, 362 (2013).

58. *Indep. Electoral Comm'n v. Langeberg Municipality* 2001 (3) SA 925 (CC) at para. 11. U.S. courts will not rule on cases that are “moot”—that is, cases in which there is no longer any actual controversy between the parties, even if there remains an unresolved and significant question of law potentially affecting others. South Africa has a mootness doctrine too, but the Constitutional Court has explained that its mootness doctrine “does not necessarily constitute an absolute bar to [a case’s] justiciability. This Court has a discretion whether or not to consider it.” *Id.* at para. 9. “That discretion must be exercised according to what the interests of justice require.” *Id.* at para. 11.

59. SUP. CT. R. 10.

60. S. AFR. CONST., 1996, § 167(6).

61. *Id.* at § 167(4)(e).

62. Since only the Constitutional Court can rule on breaches of “constitutional obligation,” a broad interpretation of this term would correspondingly dislodge the constitutionally vested authority of the lower courts to rule on the constitutionality of legislation and of “conduct of the President.” *See, e.g., Daniel v. President of the Republic of S. Afr.* 2013 (11) BCLR 1241 (CC) at para. 11.

63. S. AFR. CONST., 1996, § 167(5) (emphasis added).

64. *Id.* § 167(3)(b) (as originally adopted).

matter raises an arguable point of law of general public importance which ought to be considered by that Court.⁶⁵ Even when the earlier limit was in force, it turned out to be virtually no limit at all. What, after all, is a “constitutional matter”? That issue came directly before the Constitutional Court quite early in its history in *Pharmaceutical Manufacturers Ass’n of South Africa*.⁶⁶ The immediate question in *Pharmaceutical Manufacturers* was whether a claim that the President had acted beyond his lawful powers (*ultra vires*) raised a constitutional issue, which would be a matter on which the Constitutional Court could speak, or a non-constitutional issue that could only be ruled on by another court, the Supreme Court of Appeal.⁶⁷ The second possibility created the prospect of a judicial system at war with itself, and Constitutional Court President Chaskalson emphatically ruled it out on behalf of the Court:

I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁶⁸

Concretely, that meant that the various common law principles by which South African courts had long reviewed government action were now *constitutional* principles and therefore within the domain of the Constitutional Court:

The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.⁶⁹

One of those common law principles, the “doctrine of legality,” is particularly important to an understanding of how broad and demanding the Court’s responsibilities quickly became. This doctrine, long a part of South African common law,⁷⁰ begins from the seemingly modest proposition that “the exercise of public

65. *Id.* § 167(3)(b)(ii) (as amended by S. AFR. CONST., Seventeenth Amendment Act of 2012, § 3(a)).

66. 2000 (2) SA 674 (CC).

67. *Id.* at paras. 1, 14–15.

68. *Id.* at para. 44.

69. *Id.* at para. 33. The common law principles referred to here were not originally intended to invalidate statutes—that would have been beyond the bounds of the world of parliamentary supremacy—but rather were used to assess the lawfulness of what was done by the government under the laws Parliament had enacted. *See id.* at para. 38.

70. Frank Michelman has observed that “[n]ot within memory has the legality principle’s formal status as a component of South African common constitutional law been doubted.” Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA 11–1, 11–1 n.5 (Stu Woolman et al. eds., 2d ed. 2008).

power is only legitimate where lawful.⁷⁷¹ But if this requirement now finds its basis in the post-apartheid Constitution, then any violation of law governing public power is a breach of the Constitution. The Court first laid down this principle under the Interim Constitution; in that document, the Court said, a principle of legality is “fundamental” and “necessarily *implicit*.”⁷⁷² In the final Constitution, the principle is somewhat more explicit in section 1’s declaration that the country is founded in part on the “rule of law,”⁷⁷³ but it seems fair to infer that the Court was prepared to understand this principle as integral to constitutional order even without the final Constitution’s rather imprecise reference to it. Elaborate as the constitutional text is, the Court had now concluded that understanding its true meaning required not just a plain reading but also broad doctrinal inference.⁷⁷⁴

Perhaps the most important implication of the doctrine of legality is that government actions must be “rational.”⁷⁷⁵ This requirement holds even if no specific provision of law regulates a particular action taken by a government official; the Constitution itself forbids any action that is not rational, and the courts can always review actions for rationality.⁷⁷⁶ But what is rationality? It is the requirement—familiar in American law as well—that any government action be rationally related to a legitimate governmental purpose.⁷⁷⁷ In the United States, “rational relationship” constitutional scrutiny is most often known for its extremely deferential character,⁷⁷⁸ and if that were all South African law envisioned, we might not consider this basis of judicial power very significant. But in South Africa, the rationality requirement turns out to have teeth. As South African scholar Alistair Price recently summed it up:

Rationality . . . requires public functionaries to exercise their powers so as to serve the legitimate purposes of those powers: they must not act arbitrarily, for no purpose, with an ulterior motive . . . or for an improper purpose; they must not ignore relevant considerations . . . and they must act with procedural rationality.⁷⁷⁹

71. *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metro. Council* 1999 (1) SA 374 (CC) at para. 56 (judgment of Chaskalson, P., Goldstone, J., & O’Regan, J.).

72. *Id.* at paras. 58–59 (emphasis added).

73. S. AFR. CONST., 1996, § 1(c); see also *Fedsure*, 1999 (1) SA 374 at para. 57.

74. Michelman characterizes the Court’s development of the principle of legality as “no tame or paltry act of judicial lawfinding but rather an event of conscious, active constitutional interpretation by the [Constitutional Court], and one fraught with far-reaching consequences for the administration of law in South Africa.” Michelman, *supra* note 70, at 11–4.

75. *Pharm. Mfrs. Ass’n of S. Afr.* 2000 (2) SA 674 (CC) at para. 85. “Rationality” is not the only component of the principle of legality. Legality, as already noted, encompasses the obvious duty not to violate applicable law, such as the statutory provisions regulating a government ministry’s operations. It also requires that the power-holder “act in good faith and . . . not misconstrue the powers” he or she wields. *President of the Republic of S. Afr. v. S. African Rugby Football Union* 2000 (1) SA 1 (CC) at para. 148.

76. See, e.g., *Democratic All. v. President of the Republic of S. Afr.* 2013 (1) SA 248 (CC) at paras. 27, 36.

77. *Id.* at paras. 27, 32.

78. As Erwin Chemerinsky has observed, “The Supreme Court generally has been extremely deferential to the government when applying the rational basis test.” CHEMERINSKY, *supra* note 47, at 695.

79. Alistair Price, *The Evolution of the Rule of Law*, 130 SALJ 649, 656 (2013).

In short, the Constitutional Court had early armed itself with a doctrine, largely discernible only by inference from the text rather than from its explicit words, that gave it potentially incisive authority to review all governmental action.

This discussion of the scope of the Constitutional Court's authority, and the pressure on the Court to exercise that authority to the fullest, would not be complete without taking account of one further strand of South African legal culture. Many years ago, a leading anti-apartheid legal scholar, Etienne Mureinik, articulated a vision of the future that is still recalled and quoted:

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.⁸⁰

This is a profoundly demanding vision, and perhaps not one fully attainable. But I believe this vision has deeply engaged many of South Africa's lawyers and judges. Plainly, this vision cannot accept the corrosion of the country's ideals through abuse of power or corruption of any sort. Equally plainly, this vision cannot easily tolerate the judges' standing aside from the task of combatting that corrosion.

IV. SOCIOECONOMIC RIGHTS AND THE COURT'S ENCOUNTER WITH ARBITRARINESS

The earlier harmony between the Court and the political branches did not last. South Africa's political unity, so amazing and wonderful at the time of the first democratic elections in 1994, was bound to fray since fundamental issues of redistribution of wealth were at hand.⁸¹ Meanwhile the lures of individual wealth and power insinuated themselves into the new governing party, the ANC. A lucrative arms deal in 1999 generated charges of corruption, which have neither been resolved nor forgotten to this day.⁸² But the first real confrontations between the Court and the government may have been around issues of redistribution or, in constitutional terms, socioeconomic rights.

80. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR 31, 32 (1994).

81. See generally *South Africa's Key Economic Policies Changes Since 1994–2013*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/south-africa's-key-economic-policies-changes-1994-2013> (last visited Feb. 15, 2016).

82. The 1999 arms deal involved “a multi-billion-rand military acquisition project,” *The Arms Deal – What You Need To Know*, CORRUPTION WATCH (Jan. 24, 2014), <http://www.corruptionwatch.org.za/the-arms-deal-what-you-need-to-know-2/>, purchasing “naval craft, submarines, fighter aircraft, helicopters and other equipment,” much or most of it from European manufacturers, *What Can You Get for R70-Billion?*, CORRUPTION WATCH (Jan. 17, 2015), <http://www.corruptionwatch.org.za/what-can-you-get-for-r70-billion/>. For examples of the ensuing allegations that ANC leaders had been bribed as part of the deal, see *Mbeki 'Paid R30m Arms-deal Bribe'*, MAIL & GUARDIAN (Aug. 3, 2008), <http://mg.co.za/article/2008-08-03-mbeki-paid-r30m-armsdeal-bribe>, and see also Sarah Evans, *Arms Deal 'the Shakiest Acquisition I Have Ever Seen'*, MAIL & GUARDIAN (Mar. 10, 2015), <http://mg.co.za/article/2015-03-10-arms-deal-the-shakiest-acquisition-i-have-ever-seen>.

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As is well known, South Africa's Constitution contains pathbreaking guarantees of socioeconomic rights. These include rights to housing;⁸³ health care, food, water, and social security;⁸⁴ education;⁸⁵ and environmental protection.⁸⁶ There are also protections for children's rights⁸⁷ and a constitutional guarantee of land restitution for those whose land was taken during the years of white rule.⁸⁸ Most of these rights, however, come with a very important qualifier: that the state's duty is not to provide all of them today but to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."⁸⁹ Exactly how demanding these guarantees would be was a matter that remained to be worked out.

The Constitutional Court's first encounter with these issues, in *Soobramoney v. Minister of Health*, involved a claim by a man with chronic kidney failure to a constitutional right to dialysis, for which he could not afford to pay.⁹⁰ Under the Constitution, "[n]o one may be refused emergency medical treatment,"⁹¹ but the Court concluded that his chronic illness was not an emergency under the Constitution.⁹² Nor did the general right to health care support Soobramoney's claim. The hospital in question provided dialysis to patients with chronic renal failure only if they were eligible for a kidney transplant, and Soobramoney, because of his other illnesses, was not.⁹³ The Court concluded that the hospital authorities had indeed made reasonable judgments, which the Court would not second-guess, in allocating their scarce resources.⁹⁴ There was little sign in this decision that the Court was disposed to set itself against the government in social policy decisionmaking. Constitutional Court President Chaskalson wrote, in fact, that:

These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions

83. S. AFR. CONST., 1996, § 26.

84. *Id.* § 27.

85. *Id.* § 29.

86. *Id.* § 24.

87. *Id.* § 28.

88. *Id.* § 25(7). More precisely, the guarantee of land restitution is available only to those whose land was taken after June 19, 1913, *id.*, the date of enactment of the Natives Land Act 27 of 1913, which "was passed to allocate only about 7% of arable land to Africans and leave the more fertile land for whites," *The Native Land Act is Passed*, S. AFR. HIST. ONLINE, www.sahistory.org.za/dated-event/native-land-act-passed (last visited Feb. 15, 2016).

89. S. AFR. CONST., 1996, § 26(2). There are similar qualifiers in sections 24(2) and 29(1)(b) and a somewhat similar provision bearing on property in section 25(5).

90. 1998 (1) SA 765 (CC) at paras. 1, 3–5, 7.

91. S. AFR. CONST., 1996, § 27(3).

92. *Soobramoney*, 1998 (1) SA 765 at para. 21.

93. *Id.* at paras. 3–4.

94. *Id.* at paras. 25, 29.

taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.⁹⁵

But in hindsight we know that the Court's conclusion rested not on an unwillingness to challenge the government but on its respect for this particularly harrowing decision.

We know this because the Court did subsequently confront the government in the field of socioeconomic rights. The Court's first finding of a breach of a socioeconomic right came in *Government of the Republic of South Africa v. Grootboom*, a case brought by homeless people in the Cape Town area who had been evicted "from their informal homes situated on private land earmarked for formal low-cost housing."⁹⁶ The homeless people took shelter on a sports field, in the winter rains, living in housing made of plastic sheeting.⁹⁷ The Court concluded that it was not reasonable for the government to make plans for housing that made no provision for the neediest of all, such as Mrs. Grootboom.⁹⁸ Justice Zac Yacoob wrote for the Court: "Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."⁹⁹

The Court declared that the Constitution:

requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing. . . . The programme must include reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.¹⁰⁰

This was a striking declaration, but it was a declaration rather than a direct order of specified action—and indeed Mrs. Grootboom died, years later, "penniless and still homeless."¹⁰¹ Even so, a recent appraisal concludes that "[d]espite the extraordinary disappointment one feels regarding the situation of Mrs. Grootboom herself, it must be stressed that the Grootboom case has had a significant and tangible effect in a number of broader respects."¹⁰²

95. *Id.* at para. 29.

96. 2001 (1) SA 46 (CC) at para. 4.

97. *Id.* at para. 11.

98. *See id.* at para. 52 (acknowledging the national "housing development" law's lack of a "provision to facilitate access to temporary [housing] relief" for "people in desperate need").

99. *Id.* at para. 44.

100. *Id.* at para. 99.

101. STEVEN BUDLENDER, GILBERT MARCUS & NICK FERREIRA, PUBLIC INTEREST LITIGATION AND SOCIAL CHANGE IN SOUTH AFRICA: STRATEGIES, TACTICS AND LESSONS 44 (2014) (citing Pearlle Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN (Aug. 8, 2008), <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>).

102. *Id.* at 45.

Twenty-one months later, the Court went further. *Minister of Health v. Treatment Action Campaign* considered whether the government had violated the constitutional guarantee of health care by failing to establish a national program using the drug nevirapine to prevent “mother-to-child transmission of HIV at birth.”¹⁰³ This time, the Court not only decided that the government’s performance was unconstitutional but also ordered the new treatment program undertaken.¹⁰⁴ It did so quite self-consciously, declaring that “[w]here a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted.”¹⁰⁵

Even here, however, the Court refrained from a more elaborate order, “a structural interdict requiring the appellants [the government] to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution.”¹⁰⁶ Instead, the Court wrote: “We do not consider . . . that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.”¹⁰⁷ The Court handed down this judgment during the presidency of Thabo Mbeki, whose deep skepticism about the scientific understanding of AIDS helped shape policies that likely cost hundreds of thousands of South Africans their lives;¹⁰⁸ the government muttered about disobedience before the decision was issued, but in the end did not challenge the Court’s order.¹⁰⁹

What is most striking about *Treatment Action Campaign*, it seems to me, is that the Constitutional Court confronted an arbitrary and deeply harmful policy that unmistakably belonged solely to the post-apartheid government. Even with the government having the benefit of the discretion built into the idea of “reasonable legislative and other measures within its available resources,” the Court found the government’s action unbearably unjust.¹¹⁰ In this case, in a way that was not true at all of *Executive Council of the Western Cape Legislature*, the Court and the state found themselves truly at odds.¹¹¹ It is also important to remember, however, that, despite his AIDS skepticism, President Mbeki submitted to the Court’s judgment.¹¹² Constitutional Court Justice Edwin Cameron has observed that “[i]n bowing to the

103. 2002 (5) SA 721 (CC) at paras. 4–5.

104. *Id.* at para. 135 (declaring the government’s action unconstitutional and further ordering the government to take specified steps “without delay”).

105. *Id.* at para. 106.

106. *Id.* at para. 129.

107. *Id.*

108. Mbeki’s biographer, Mark Gevisser, offers a careful account of President Mbeki’s views on AIDS, in MARK GEVISSER, *A LEGACY OF LIBERATION: THABO MBEKI AND THE FUTURE OF THE SOUTH AFRICAN DREAM* 276–96 (2009). Gevisser cites a “credible Harvard study” attributing the deaths of 330,000 people to Mbeki government policies. *Id.* at 277.

109. See ROUX, *supra* note 16, at 298–99.

110. See *Treatment Action Campaign*, 2002 (5) SA 721 at paras. 17, 28–30, 94, 122, 135.

111. For my discussion of *Exec. Council of the W. Cape Legislature*, see *supra* pp. 62–63.

112. See ROUX, *supra* note 16, at 298–99.

courts when they disclaimed his own dogma, President Mbeki, more signally even than President Nelson Mandela, ensured a victory for the rule of law in South Africa.”¹¹³

Socioeconomic rights litigation has blossomed since *Treatment Action Campaign*. The Constitutional Court has issued decisions on the right to water;¹¹⁴ the right to electricity;¹¹⁵ the right to social security;¹¹⁶ and, perhaps most importantly of all, on the right to housing, especially the constitutional protections against eviction.¹¹⁷ Collectively, these cases have surely impressed on the Court the need for its direct involvement in matters that countries with less far-reaching constitutional rights provisions would consider questions of policy rather than of constitutional principle. In addition, the Court has again, on more than one occasion, encountered facts that reflect not only human suffering but also arbitrary and indifferent government policies contributing to that suffering.¹¹⁸

At the same time, it would be a mistake to say that the Court has taken over the field of social policymaking. On the contrary, its decisions have often been criticized by South African commentators for not going far enough—in particular, for failing

113. EDWIN CAMERON, *JUSTICE: A PERSONAL ACCOUNT 199–200* (2014). Theunis Roux, in his reconstruction of the detailed history of *Treatment Action Campaign*, concludes that by the end of the case “Mbeki’s only chance of saving face lay in the issuing of a court order that would force him to do what he was in any case politically compelled to do.” ROUX, *supra* note 16, at 299.
114. *See Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC). In this case, which some socioeconomic rights advocates have criticized, the Court found that the government’s policies did *not* violate the right to water. *Id.* at paras. 1, 169. It does seem likely, however, that the City of Johannesburg’s desire to successfully defend this case led it to make significant improvements in the programs at issue. *See generally* BUDLENDER, MARCUS & FERREIRA, *supra* note 101, at 63–66.
115. *See Joseph v. City of Johannesburg* 2010 (4) SA 55 (CC). The right to electricity is not listed in the Constitution. It might have been seen as an implicit component of the right to housing, but instead the Court reasoned that “electricity is an important basic municipal service which local government is ordinarily obliged to provide,” as a matter of “constitutional and statutory obligations.” *Id.* at para. 40. The residents, correspondingly, had a right to receive electricity, and therefore its cut-off had to be procedurally fair. *Id.* at para. 47.
116. *See, e.g., Khosa v. Minister of Soc. Dev.* 2004 (6) SA 505 (CC) at paras. 47, 85 (holding, in part, that the right to social security, S. AFR. CONST., 1996, § 27(1)(c), applies to noncitizen permanent residents as well as to citizens).
117. For examples of these cases, see *infra* note 120. Additionally, important lower court cases have addressed the right to education when it has been jeopardized by abysmal school conditions, which the government seemed unable or unwilling to remedy. *See Madzodzo v. Minister of Basic Educ.* 2014 (3) SA 441 (ECM) at paras. 14, 36, 41 (finding an ongoing violation of the right to basic education because of the persistent failure to deliver adequate and appropriate school furniture); *Section 27 v. Minister of Educ.* 2013 (2) SA 40 (GNP) at para. 32 (finding a violation of the right to basic education due to the failure to timely provide textbooks).
118. *See, e.g., Njongi v. Member of the Exec. Council* 2008 (4) SA 237 (CC) at paras. 2, 4, 92 (responding to the Eastern Cape province’s “mercilessly” denying payment of disability grants); *Nyathi v. Member of the Exec. Council for the Dep’t of Health* 2008 (5) SA 94 (CC) at paras. 7–15, 45, 92 (holding unconstitutional a statute that barred execution of judgment against the state, and keeping jurisdiction over all orders not yet complied with by the state); *see also Pheko v. Ekurhuleni Metro. Municipality (No. 2)* 2015 (5) SA 600 (CC) at paras. 62–63, 68 (declining to hold municipality in contempt in a housing case but sharply criticizing two municipal officials’ disclaimers of responsibility for noncompliance with prior court orders as “unseemly and highly inappropriate”).

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to constitutionalize a “minimum core” content of the socioeconomic rights that the courts would be prepared to enforce.¹¹⁹ Moreover, many of the Court’s housing cases have focused on shaping remedies that require the government and the residents facing eviction to enter into “meaningful engagement” through which they themselves would find workable solutions to their situation.¹²⁰ As pathbreaking as the socioeconomic rights cases have been, and as much of an intrusion into socioeconomic policymaking as they are, still these cases do not reflect a broad breach between the government and the courts.¹²¹

V. THE COURT INTERVENES IN POLITICS

Perhaps in part because of its increasing awareness of the shortcomings of the post-apartheid government, the Court began to look closely at the processes by which the new government operates. The Court’s decisions reflected its commitment to reading the Constitution so as to maximize its democratic aspects and to limit the power of the government—that is to say, the parliamentary majority—to rule in disregard of public or minority party objections.¹²²

After initial hesitation,¹²³ the Court took its first clear step in this direction with *Doctors for Life International v. Speaker of the National Assembly*.¹²⁴ This case presented

119. See, e.g., David Bilchitz, *Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?*, 5 CONST. CT. REV. 296 (2013); see also Jackie Dugard, *Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing*, 5 CONST. CT. REV. 264 (2013).

120. See, e.g., *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) at para. 18 (holding that the Constitution “obliges every municipality to engage meaningfully with people who would become homeless because it evicts them”); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at para. 43 (“[A]bsent special circumstances it would not ordinarily be just and equitable [for a court] to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.”). For a detailed exposition of the strengths and limitations of judicial remedies in housing cases, see Brian Ray, *Evictions, Aspirations and Avoidance*, 5 CONST. CT. REV. 172 (2013).

121. So, too, in *Joseph v. City of Johannesburg*, 2010 (4) SA 55 (CC), while the discernment of a protected right to receive electricity is striking, the procedural remedy granted is quite modest. The Court decided that the residents were entitled to two weeks’ advance notice, *id.* at para. 61, and during that period they could “approach City Power to challenge the proposed termination or to tender appropriate arrangements to pay off arrears,” *id.* at para. 63. The Court did not rule on whether City Power had an obligation to respond to these approaches, but “presumed” that it would (as indeed City Power had committed to doing). *Id.* at paras. 63–64.

122. The “engagement” cases, two of which are cited *supra* note 120, can also be seen as expressing this commitment to maximizing democracy. Michael Bishop links the political participation and housing engagement cases together in his essay, Michael Bishop, *Vampire or Prince? The Listening Constitution and Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*, 2 CONST. CT. REV. 313 (2009).

123. Here I am referring to the Court’s decision in *United Democratic Movement v. President of the Republic of S. Afr. (No. 2)*, 2003 (1) SA 495 (CC). In this judgment, the Constitutional Court accepted the constitutionality of a new provision for “floor crossing,” in which members of legislative bodies elected as members of one party “cross the floor” to join another party, while remaining in the legislative bodies. That decision may well have facilitated ANC domination of the South African political process. For sharp criticism of this case, see Choudhry, *supra* note 9, at 34–48 and Roux, *supra* note 16, at 351–62.

124. 2006 (6) SA 416 (CC).

a challenge to the procedures by which several pieces of legislation, including an abortion statute, had been enacted.¹²⁵ The case called upon the Constitutional Court to consider whether it indeed had the power to “interfere in the processes of other branches of government,” and the Court answered that it should not exercise such power “unless to do so is mandated by the Constitution.”¹²⁶ But the Court quickly determined that the Constitution “entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations.”¹²⁷

The Court then construed section 72(1)(a) of the Constitution,¹²⁸ which requires the National Council of Provinces¹²⁹ to “facilitate public involvement in the legislative and other processes of the Council and its committees.”¹³⁰ It might have been thought that this provision was not much more than general encouragement with little or no enforceable content; the government, while acknowledging that the provision did have meaning, urged that “what is required is *some opportunity* to make either written or oral submissions on the legislation under consideration.”¹³¹ Justice Sandile Ngcobo on behalf of the Court, however, read the language more demandingly. He looked to international human rights law and found there the “idea of an evolving human right to political participation,” which “comports with this Court’s view of human rights as open to elaboration, reinterpretation and expansion.”¹³² Looking to the history of the anti-apartheid struggle in South Africa,¹³³ the Court decided that:

[O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.¹³⁴

125. *Id.* at paras. 1–4.

126. *Id.* at para. 37.

127. *Id.* at para. 38 (citing S. AFR. CONST., 1996, § 167(4)(e)).

128. *Id.* at paras. 73–75.

129. The National Council of Provinces (NCOP) and the National Assembly are the two Houses of South Africa’s Parliament. S. AFR. CONST., 1996, § 42. The NCOP, which bears a modest resemblance to the U.S. Senate, was designed to provide representation in the national legislature for the views of South Africa’s nine provinces. *See id.* § 42(4); *see also id.* §§ 60–72.

130. S. AFR. CONST., 1996, § 72(1)(a). As the Court explained, “[i]dentical duties are imposed on the National Assembly [the other House of Parliament] by section 59 and on the provincial legislatures by section 118.” *Doctors for Life*, 2006 (6) SA 416 at para. 74.

131. *Doctors for Life*, 2006 (6) SA 416 at para. 76 (emphasis added).

132. *Id.* at para. 97.

133. *Id.* at paras. 112–15.

134. *Id.* at para. 116.

The Court concluded that while Parliament has considerable discretion in deciding how to implement these principles, it must do so in an objectively reasonable fashion—and whether it has achieved that is reviewable in court.¹³⁵

Even as the Court asserted its power to review parliamentary processes, it still deferred to Parliament’s judgments. Thus it emphasized that it would “pay particular attention to what Parliament considers to be appropriate public involvement.”¹³⁶ But the Court proceeded to find that Parliament itself had manifested the view that public hearings needed to be held in the provinces.¹³⁷ These public hearings had by no means fully taken place, and the Court stated:

[O]nce the [National Council of Provinces] has decided on a particular mode of involving the public in its legislative process and has communicated its decision to do so to interested parties, it must be held to its decision unless there is sufficient explanation for failure to give effect to that decision.¹³⁸

On that basis, the Court held the statutes invalid, though it also suspended the declaration of invalidity for eighteen months to “enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.”¹³⁹

The power to regulate Parliament’s proceedings to ensure that they honor the participatory nature of South African democracy is a striking one and has been used on other occasions as well.¹⁴⁰ The Court has also moved to regulate parliamentary proceedings in two other important respects.¹⁴¹ First, in *Oriana-Ambrosini v. Sisulu*, the Court decided that parliamentary rules that it saw as preventing individual members of Parliament from introducing legislation without the consent of the majority of Parliament were unconstitutional.¹⁴² Second, in *Mazibuko v. Sisulu*, it found that Parliament’s rules did not properly provide for consideration of motions for a vote of no confidence in the President and concluded that the rules in question were

135. *Id.* at paras. 124–28.

136. *Id.* at para. 128.

137. *Id.* at para. 156.

138. *Id.* at para. 165.

139. *Id.* at para. 214. The power to suspend the declaration of invalidity is provided by S. Afr. CONST., 1996, § 172(1)(b)(ii).

140. See, e.g., *Matatiele Municipality v. President of the Republic of S. Afr.* (No. 2) 2007 (1) BCLR 47 (CC) (overturning the transfer of a municipality from one province to another due to failure to “facilitate public involvement,” while suspending the declaration of invalidity for eighteen months); *Merafong Demarcation Forum v. President of the Republic of S. Afr.* 2008 (5) SA 171 (CC) (finding no violation of the duty to “facilitate public involvement” in the case of another area’s transfer from one province to another).

141. This development has not been confined to the Constitutional Court. See, e.g., *Malema v. Chairman of the Nat’l Council of Provinces* 2015 (4) SA 145 (WCC) (finding that a decision by the NCOP chair, barring Julius Malema—the leader of the Economic Freedom Fighters, a new opposition party in Parliament—from charging in parliamentary debate that the government had murdered striking workers in the shootings at Marikana, was an irrational exercise of power).

142. 2012 (6) SA 588 (CC) at paras. 75–82, 96.

also unconstitutional.¹⁴³ In each of these cases, the Court in effect said that the power of Parliament's majority—that is, ever since the end of apartheid, the power of the ANC¹⁴⁴—had to be constrained in the interests of democracy.¹⁴⁵ In a similar vein, the Court not long ago struck down an effort by the ANC to limit the scope of permissible campaigning in parliamentary elections by affirming the freedom of the Democratic Alliance, the leading opposition party, to send a text message telling readers that a recent report by South Africa's ombudsperson, the Public Protector, “shows how [President Jacob] Zuma stole your money to build his . . . home.”¹⁴⁶

When we think about South Africa, moreover, we need to remember that power does not reside solely in the elaborate Western institutions that the Constitution closely regulates. Many South Africans still live largely, or even primarily, under customary law and customary authorities such as chiefs.¹⁴⁷ The Constitution explicitly

143. 2013 (6) SA 249 (CC) at para. 82.

144. The ANC has won no less than 62.1% of the national vote in each of the five national elections held since the end of apartheid, Manuel Álvarez-Rivera, *Election Resources on the Internet: General Elections in the Republic of South Africa*, ELECTION RESOURCES, www.electionresources.org/za/ (last visited Feb. 15, 2016), and a corresponding number of seats in the National Assembly, since the Constitution requires “an electoral system that . . . results, in general, in proportional representation,” S. AFR. CONST., 1996, § 46(1)(d).

145. For a thoughtful critique of the *Mazibuko* decision by a former South African provincial legislator, see Firoz Cachalia, *Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint*, 60 N.Y.L. SCH. L. REV. (forthcoming 2015–2016).

146. See *Democratic All. v. African Nat'l Cong.* 2015 (2) SA 232 (CC) at paras. 142–53, 167. The Court has also regulated the internal processes of the ANC itself. In *Ramakatsa v. Magashule*, the Constitutional Court held, by a vote of 7–3, that “[t]he provincial elective conference of Free State province of the [ANC] . . . and its decisions and resolutions [were] . . . unlawful and invalid.” 2013 (2) BCLR 202 (CC) at para. 133. This decision, which rested on the majority's conclusion that the pleadings established essentially unadmitted internal party election irregularities, was a striking intervention into the affairs of the ANC, all the more so because the Court heard the case on an urgent basis and issued its order on December 14, 2012, one or two days before the ANC's national conference. See *id.* at paras. 26, 121. The majority's decision was also a judgment against the ANC as an entity (since the ANC was one of the respondents in the case), and a rejection of the national ANC's acceptance of the Free State ANC's actions. See *id.* at para. 26. But in certain respects the case seems less doctrinally or jurisprudentially expansive than some of those I am discussing in this article. The decision rested, at least in part, on a relatively clear textual provision of the Constitution, explicitly guaranteeing every citizen “the right . . . to participate in the activities of . . . a political party.” S. AFR. CONST., 1996, § 19(1)(b). Moreover, the majority in the end chose not to order the national ANC to take any particular action. Instead, the majority observed:

We are disinclined to determine how the political party concerned should regulate its internal process in the light of the declaration made by this Court. We are satisfied that the ANC's constitution confers on the NEC [National Executive Committee] or the National Conference adequate authority to regulate its affairs in the light of the decision of this Court.

Ramakatsa, 2013 (2) BCLR 202 at para. 125.

147. Despite the importance of customary law in the lives of many South Africans, the meaning of this term is not easily stated. One scholar of this field has offered this explanation:

Customary law derives from social practices considered to be obligatory by the communities in which they operate. By implication, rules imposed by external authorities and rules having no local support cannot be considered valid. . . . Because the authentic

affirms the validity of customary institutions and rules, “subject to the constitution,”¹⁴⁸ but exactly what that means was left for future determination. It is striking, then, that the Court has sharply curtailed discriminatory features of customary law¹⁴⁹ and has welcomed (though it has not so far mandated) the infusion of principles of equality into the selection of customary leaders.¹⁵⁰ In these respects, as in its regulation of parliamentary processes, the Court has made clear that it believes it can and must safeguard South African democracy in all its aspects.

VI. SCANDAL AND ITS CONSEQUENCES

A. *Jacob Zuma and the Arms Deal*

Although the sources of the Court’s encounter with scandal date back at least to the arms deal of 1999,¹⁵¹ the Court did not immediately confront the issues that scandal generated. In the intervening years, it developed the doctrines that extended the Constitution’s reach to review of all government action, it encountered arbitrariness and sought to respond to injustice and human need in the socioeconomic rights cases, and it began its effort to regulate parliamentary procedure to protect South Africans’ rights to participate in the decisions shaping their lives. All of this work no doubt echoed in the justices’ thinking as they confronted new problems in the late 2000s. The justices had gone to school on the Constitution, and that

customary law is distilled directly from current social practice, it is subject to continual, often imperceptible, change and is most likely to exist only in an oral tradition.

Tom Bennett, ‘Official’ vs ‘Living’ Customary Law: Dilemmas of Description and Recognition, in *LAND, POWER & CUSTOM: CONTROVERSIES GENERATED BY SOUTH AFRICA’S COMMUNAL LAND RIGHTS ACT 138* (Aninka Claassens & Ben Cousins eds., 2008).

148. S. AFR. CONST., 1996, § 31(2) (“[Cultural rights] may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”); *id.* § 211(1) (recognizing traditional leadership “subject to the Constitution”); *see also id.* § 15(3) (permitting legislation recognizing traditions and systems of marriage and family law, provided it is “consistent with” the Constitution); *id.* § 31 (providing a right to culture, religion, and language, but “not [to] be exercised in a manner inconsistent with any provision of the Bill of Rights”).
149. *Mayelane v. Ngwenyama* 2013 (4) SA 415 (CC) at para. 75 (developing the customary law in light of constitutional values, to require the consent of the first wife before a husband can enter a polygamous marriage); *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at para. 136 (striking down the customary law “rule of male primogeniture . . . to the extent that it excludes or hinders women and extra-marital children from inheriting property”).
150. *See, e.g., Shilubana v. Nwamitwa* 2009 (2) SA 66 (CC); *see also Bakgatla-Ba-Kgafela Communal Prop. Ass’n v. Bakgatla-Ba-Kgafela Tribal Auth.* 2015 (6) SA 32 (CC) at paras. 54–55 (ordering the registration of the “Communal Property Association” as the entity to take possession of land restored to the community and observing that “[w]here a traditional community or the majority of its members as was the position in this case, have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority,” even if “a traditional leader or some members of the traditional community” would prefer otherwise); *Pilane v. Pilane* 2013 (4) BCLR 431 (CC) (overturning a lower court judgment that operated to prevent members of a traditional community from meeting to seek secession from that community).
151. *See supra* note 82 and accompanying text.

experience undoubtedly shaped what they would do in the scandal cases that were about to arrive.¹⁵²

Perhaps no single event better encapsulated the insidious impact of money on post-apartheid South African politics than the arms deal of 1999. Among those whose fates began to turn on the outcome of this scandal was Jacob Zuma himself, a senior leader of the ANC and now the President of South Africa. A close associate of Zuma, Schabir Shaik, was convicted of corruption and fraud in 2005,¹⁵³ and the Constitutional Court, in affirming Shaik's conviction, observed that Shaik's counsel "very properly conceded in argument that, given the criminal conviction of Mr Shaik, it must be accepted for the purpose of these proceedings that Mr Shaik did pay bribes to Mr Zuma."¹⁵⁴ When the Court issued the *Shaik* judgment in 2008, Zuma was President of the ANC; he would become the President of South Africa one year later.¹⁵⁵ It is no small thing for a court to "accept for the purpose of these proceedings" that the leader of the country's ruling party, soon to be the country's President, took bribes.

Legal proceedings continued, as prosecutors and investigators sought to build a case against Zuma himself. One element of this effort was an intensive search directed at a corporation, Thint, that was alleged to be part of the corrupt transactions, and against two of Zuma's residences, two of his former offices, and his lawyer's offices.¹⁵⁶ In due course, the validity of this search made its way to the Constitutional Court in *Thint v. National Director of Public Prosecutions*.¹⁵⁷ That would have been troubling enough. But worse was to come, as the Judge President of the High Court in Cape Town, Judge John Hlophe, allegedly asked two members of the Constitutional Court to decide *Thint* in favor of Zuma.¹⁵⁸ That prompted the Constitutional Court justices to file a complaint with the body responsible for judicial discipline in South Africa, the Judicial Service Commission (JSC), and generated an extraordinary tangle of legal proceedings and controversy that has not yet concluded.¹⁵⁹ Simply as a human matter, these proceedings have surely been nightmarish for the justices of the Constitutional Court.

152. In saying the justices went to school on the Constitution, I mean no disrespect, but instead have in mind the comment that Judge Elbert Tuttle, a leader of the Fifth Circuit United States Court of Appeals during the extremely challenging desegregation years of the fifties and sixties, made to me long ago, probably when I was clerking for him: that he and the other judges of the Fifth Circuit had gone to school on the Constitution in the desegregation cases, and those had affected his reading of the Constitution on other issues thereafter.

153. *S v. Shaik* 2008 (5) SA 354 (CC) at para. 1 & n.1.

154. *Id.* at para. 44.

155. *Jacob Zuma: Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/jacob-zuma-262727> (last visited Feb. 15, 2016).

156. *Thint (Pty) Ltd. v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) SA 1 (CC) at para. 15.

157. *Id.* at paras. 1, 15.

158. *See id.* at para. 4.

159. *See infra* text accompanying notes 163–69.

But the challenge to the search was still pending, and the justices of the Constitutional Court still had to decide it—unless, of course, their own involvement in these events now rendered them unable to serve. Pius Langa, the Chief Justice, wrote for the Court that that was not the case:

All the members of the Court . . . have considered their position in the light of the events mentioned above and their responsibilities as Judges of this Court. We are satisfied that the alleged acts that form the basis of the complaint to the JSC by Judges of this Court have had no effect or influence on the consideration by the Court of the issues in these cases and in the judgments given. . . . It is however important to emphasise that the cases have been considered and decided in the normal way, in accordance with the dictates of our Oath of Office and in terms of the Constitution and the law, without any fear, favour or prejudice.¹⁶⁰

Having concluded that they were able to decide the case, the members of the Court did so and ruled against Zuma.¹⁶¹ I believe that decision was appropriate, but it shouldn't be misunderstood: as I've written elsewhere, "[t]he members of the Constitutional Court surely felt many strong emotions as a result of the events that led them to file a complaint with the Judicial Service Commission."¹⁶²

That was not the end of the Constitutional Court justices' direct engagement with the Hlophe affair. The JSC undertook an inquiry into the justices' complaint (and a cross-complaint Hlophe had filed), in the course of which several members of the Court gave written statements and oral testimony.¹⁶³ The JSC decided, however, that neither side's complaints had been proven, and decided not to pursue them further.¹⁶⁴ That decision was also challenged. The Supreme Court of Appeal, South Africa's second highest court, handed down two separate decisions finding that the proceedings of the JSC were unlawful.¹⁶⁵ Judge Hlophe sought to appeal—but the only court that could hear this appeal was the Constitutional Court itself. Three members of the Court recused themselves, but the remaining eight members ruled on Hlophe's application for leave to appeal and dismissed it.¹⁶⁶

The result is that proceedings still continue before the JSC. The JSC has begun a formal inquiry, but the lawfulness of that inquiry has been challenged—by Justices Chris Jafta and Bess Nkabinde, the two members of the Constitutional Court with

160. *Thint*, 2009 (1) SA 1 at para 6.

161. *See id.* at para. 226.

162. Stephen Ellmann, *Marking the Path of the Law*, 2 CONST. CT. REV. 97, 129 (2009).

163. *See Freedom Under Law v. Acting Chairperson: Judicial Serv. Comm'n* 2011 (3) SA 549 (SCA) at paras. 1–15.

164. *See id.* at para. 15.

165. *Id.* at paras. 50, 65; *Acting Chairperson: Judicial Serv. Comm'n v. Premier of the W. Cape Province* 2011 (3) SA 538 (SCA) at paras. 22–26.

166. *Hlophe v. Premier of the W. Cape Province* 2012 (6) SA 13 (CC) at paras. 17, 48–50.

whom Hlophe originally spoke!¹⁶⁷ The Gauteng High Court ruled against this challenge in 2014,¹⁶⁸ but in January 2015 Justices Jafta and Nkabinde asked the Supreme Court of Appeal for leave to appeal.¹⁶⁹ In short, the case has never gone away.

Nor has the underlying prosecution of Zuma come to an end. A criminal investigation of the arms deal began in 2000 and, as already mentioned, led to the prosecution of Zuma's friend Shaik.¹⁷⁰ In 2003, Bulelani Ngcuka, the National Director of Public Prosecutions (NDPP) who had indicted Shaik, announced that he would *not* prosecute Zuma.¹⁷¹ But in 2005, Ngcuka's successor, Vusumzi "Vusi" Pikoli, announced that he planned to indict Zuma.¹⁷² It was in connection with this prosecution that the searches directly at issue in *Thint* took place.¹⁷³ The prosecution approved by Pikoli began, but it was "struck from the roll" of the court in 2006 because the government was not ready to proceed.¹⁷⁴ Pikoli, meanwhile, was suspended from his office by then-President Mbeki in 2007,¹⁷⁵ and Pikoli's replacement, acting NDPP Mokotedi Mpshe, also decided to indict Zuma and did so.¹⁷⁶ Zuma challenged the new indictment, partly on procedural grounds and partly based on the suggestion that the prosecution had been tainted by political influence (presumably attributable to President Mbeki, whom Zuma successfully bested in an ANC power struggle in 2007).¹⁷⁷ A lower court ordered the prosecution halted, but the Supreme Court of Appeal overturned this decision.¹⁷⁸ Subsequently, however, acting NDPP Mpshe made his own decision to end the prosecution because of this

167. Justice Jafta had been an Acting Justice at the time of his conversation with Hlophe, but has subsequently become a full member of the Court.

168. *Nkabinde v. Judicial Serv. Comm'n* 2015 (1) SA 279 (GJ).

169. *ConCourt Judges Ask SCA to Hear Appeal*, NEWS24, (Jan. 21, 2015), <http://www.news24.com/SouthAfrica/News/ConCourt-judges-ask-SCA-to-hear-appeal-20150121>. According to a recent report, "[t]he Supreme Court of Appeal has not granted leave to appeal, but has said it would hear oral argument on whether it should entertain the appeal." Franny Rabkin, *Hlophe Disciplinary Process Returning to Court*, BUS. DAY (Jan. 8, 2016), <http://www.bdlive.co.za/national/law/2016/01/08/hlophe-disciplinary-process-returning-to-court>.

170. *Thint (Pty) Ltd. v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) SA 1 (CC) at para. 11; *see also supra* p. 81.

171. Mariette Le Roux, *Zuma Off The Hook, 'For Now'*, MAIL & GUARDIAN (Aug. 24, 2003), <http://mg.co.za/article/2003-08-24-zuma-off-the-hook-for-now>.

172. Sam Sole, *Zuma Tapes: A Timeline*, MAIL & GUARDIAN (Nov. 2, 2012), <http://mg.co.za/article/2012-11-02-00-zuma-tapes-a-timeline>.

173. *Thint*, 2009 (1) SA 1 at paras. 12–15.

174. *Zuma Case Struck From the Roll*, MAIL & GUARDIAN (Sept. 20, 2006), <http://mg.co.za/article/2006-09-20-zuma-case-struck-from-the-roll>.

175. *Mbeki Suspends NDPP's Vusi Pikoli*, IOL NEWS (Sept. 24, 2007), <http://www.iol.co.za/news/politics/mbeki-suspends-ndpp-s-vusi-pikoli-1.371979#Ve1PSnip3ww>.

176. *Nat'l Dir. of Pub. Prosecutions v. Zuma* 2009 (2) SA 277 (SCA) at para. 6. *See generally Zuma Charged with Corruption, Fraud*, MAIL & GUARDIAN (Dec. 28, 2007), <http://mg.co.za/article/2007-12-28-zuma-charged-with-corruption-fraud>.

177. *Nat'l Dir. of Pub. Prosecutions*, 2009 (2) SA 277 at para. 3.

178. *Id.* at paras. 1, 88. I've relied in part on this case for the summary of events in this article.

alleged political influence.¹⁷⁹ That decision in turn has been challenged in the courts, and in 2012, the Supreme Court of Appeal held that the prosecutor's choice to terminate the case was subject to judicial review.¹⁸⁰ Then litigation began over what materials the NDPP must produce as the basis for review.¹⁸¹ That particular sub-dispute was concluded, at least in part, with a 2014 Supreme Court of Appeal decision that firmly, in fact impatiently, required the NDPP to hand over crucial tape recordings and other materials.¹⁸²

This elaborate and convoluted tale reflects one thing above all: the issues growing out of the investigation of Zuma for corruption have never ceased to occupy the attention of the South African courts. Every other decision the Constitutional Court makes needs to be understood in this light; the work of South Africa's judges is now, regularly, embroiled in dealing with the possibility of scandal.¹⁸³

As these events accumulated, the sense of partnership that judges and politicians felt in the early years of democratic South Africa has surely faded. Perhaps it was bound to fade, as people who had learned to trust each other deeply during the struggle years—such as Nelson Mandela and Arthur Chaskalson¹⁸⁴—passed from the scene and the inevitable multiplication of controversies gradually pushed the different branches of government apart. These controversies may have multiplied especially quickly because the South African Constitution's expansive provisions make so many issues, from HIV treatment to corruption, potentially the subject of

179. Media Statement, Nat. Prosecuting Auth., Statement by the National Director of Public Prosecutions Mokotedi Mpshe on the matter of *S v. Zuma* (Apr. 6, 2009), <http://www.politicsweb.co.za/news-and-analysis/why-i-decided-to-drop-the-zuma-charges--mpshe>.

180. *Democratic All. v. Acting Nat'l Dir. of Pub. Prosecutions* 2012 (3) SA 486 (SCA) at paras. 23, 52.

181. *See id.* at para. 33.

182. *Zuma v. Democratic All.* 2014 (4) All SA 35 (SCA) at paras. 1–2, 42. In March 2016 the Gauteng High Court is to hear the case challenging the dropping of the charges. Franny Rabkin, *Two Cases Cast Their Shadows on Zuma*, *BUS. DAY* (Dec. 17, 2015), <http://www.bdlive.co.za/national/law/2015/12/17/news-analysis-two-cases-cast-their-shadows-on-zuma>.

183. The scandals discussed in the text are not the only ones with which the courts have had to wrestle. *See, e.g., Democratic All. v. S. African Broad. Corp.* 2015 (1) SA 551 (WCC) (addressing allegations of misconduct by senior management in the South African Broadcasting Corporation). In *Allpay Consol. Inv. Holdings (Pty) Ltd. v. Chief Exec. Officer of the S. African Soc. Sec. Agency*, the Court closely regulated the conduct of the bidding process for a massive government contract, and defended “insistence on compliance with process formalities” in part because, “[a]s Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process.” 2014 (1) SA 604 (CC) at para. 27. For an overview of current problems in South Africa's state-owned enterprises, see Songezo Zibi, *UNEMBARGOED: Too Many Actors Keep SOE Drama Going*, *BUS. DAY* (July 20, 2015), <http://www.bdlive.co.za/opinion/columnists/2015/07/20/unembargoed-too-many-actors-keep-soe-drama-going>.

184. Arthur Chaskalson was a young lawyer when he represented Nelson Mandela and his co-accused in the Rivonia trial, in which Mandela stood trial for his life. Almost three decades later, Chaskalson, by then a leading figure in the South African bar, would throw himself into the negotiations of the first post-apartheid constitution on behalf of the ANC, and Mandela chose him to be the first head of the new nation's Constitutional Court. For my effort to describe the many contributions these two men made to law and life in South Africa, see Stephen Ellmann, *Two South African Men of the Law*, 28 *TEMPLE INT'L & COMP. L.J.* 431 (2014).

litigation, and because South Africa's politics, so fully dominated by the ANC's parliamentary majority, press activists to find other routes of advocacy, from demonstrations to lawsuits.

There have also been particularly painful moments along the way that may have played a part. Deputy Chief Justice Dikgang Moseneke was sharply criticized for reportedly saying, *at his sixtieth birthday party*, that he served the people of the nation rather than the ANC.¹⁸⁵ Justice Edwin Cameron, a gay man who came close to death from AIDS, chose to speak out against the government's AIDS policies when he was already a judge of the country's second-highest court.¹⁸⁶ These individual moments no doubt contributed to the fading of fellowship, just as the Hlophe saga must have.

B. *Glenister and the Integrity of South African Policing*

In August 2008, one month after issuing its decision in *Thint*, the Constitutional Court heard argument in another case growing out of these ongoing scandals: *Glenister v. President of the Republic of South Africa (Glenister I)*.¹⁸⁷ This was a challenge brought by a private citizen, Hugh Glenister, seeking to bar the Cabinet from initiating legislation to move the Directorate of Special Operations (nicknamed the "Scorpions"),¹⁸⁸ from the National Prosecuting Authority into the South African Police Service.¹⁸⁹ Glenister argued that the result of this move would be to undercut the Scorpions' effectiveness.¹⁹⁰ Probably not coincidentally, "[s]ince its establishment in 2001, the [Scorpions] ha[d] undertaken a number of high-profile investigations, some of which have involved prominent members of the African National Congress (ANC)."¹⁹¹ Among them was the investigation into Zuma that led to *Thint*.¹⁹² Perhaps it is not surprising that the ANC's national conference in 2007 "adopted a resolution

185. See *ANC Takes Issue with Deputy Chief Justice*, MAIL & GUARDIAN (Jan. 15, 2008), <http://mg.co.za/article/2008-01-15-anc-takes-issue-with-deputy-chief-justice>.

186. Having recovered his health with anti-retrovirals while other South Africans lacked the wealth, or the government support, to purchase them, Justice Cameron writes, "I bore witness to my wellness, and the horror and folly of President Mbeki's scepticism. I could not remain silent." CAMERON, *supra* note 113, at 149.

187. 2009 (1) SA 287 (CC).

188. Chief Justice Langa described the Scorpions as a "specialist unit . . . vested with powers of investigation, including the power to gather, keep and analyse information, and the power to institute criminal proceedings, where appropriate, relating to organised crime or other specified offences." *Id.* at para. 1. Both the National Director of Public Prosecutions (NDPP) (head of the National Prosecuting Authority, which housed the Scorpions) and the Investigating Director of the Scorpions were respondents in *Glenister I*.

189. *Id.* at paras. 1-2.

190. *Id.* at para. 5.

191. *Id.* at para. 9.

192. See *Thint (Pty) Ltd. v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) SA 1 (CC) at para. 3.

calling for a single police service and the dissolution of the [Scorpions]¹⁹³—despite a report from a commission of enquiry largely approving of the Scorpions’ work.¹⁹⁴

Glenister I is notable as an instance of judicial restraint. The Court declined to intervene in Parliament’s consideration of the proposed legislation, saying that it “must proceed on the basis that Parliament will observe its constitutional duties rigorously,” and that if unconstitutional legislation were ultimately enacted “appropriate relief can be obtained thereafter.”¹⁹⁵ In addition, the Court addressed an argument that the Court should do more than the Constitution, as originally enacted, envisaged. As the Court first described this argument, it was:

that since the separation of powers doctrine is dynamic, it should be adapted to the prevailing conditions (in which there is a danger of “one-party domination”) and accommodate institutional developments that have crucially shifted the balance of power between the branches of government. The relative marginalisation of the legislature . . . has a disastrous impact on the ability of opposition parties to make their voices heard in policy formulation. The Court should act as a counterweight if the ruling party overreaches itself and, it contends, if the Court does not act, it is unlikely anyone else will.¹⁹⁶

When the Court later addressed this argument, however, it construed the point in a rather unwelcoming way. After referring again to the contention that “the Court should act because no-one else will,” Chief Justice Langa wrote, “I cannot agree. The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it.”¹⁹⁷

The argument, as originally presented, did not precisely assert that the Court should assume powers not conferred upon it—a stark proposition that would likely be anathema to most judges. Rather, *Glenister’s* argument could be read to urge that the powers conferred upon the Court should be understood in a flexible way in light of current circumstances—a kind of interpretation by no means alien to South African law. But the Court chose not to embrace that invitation to expand its domain.

In three subsequent cases, however, the Court made clear that it was in fact prepared to employ the law vigorously to resist the reality of or the potential for governmental corruption.¹⁹⁸ The first was the second round of the *Glenister* case:

193. *Glenister I*, 2009 (1) SA 287 at para. 14.

194. *Id.* at paras. 10–11.

195. *Id.* at para. 56.

196. *Id.* at para. 22.

197. *Id.* at para. 55. He added: “Moreover, the considerations raised . . . do not establish that irreversible and material harm will eventuate should the Court not intervene at this stage.” *Id.*

198. Another case might also be taken to reflect the Court’s impatience with the government’s identification of its own wishes with the national interest. In *Indep. Newspapers (Pty) Ltd. v. Minister for Intelligence Servs.*, the Court addressed whether materials submitted to the Court in an earlier case (*Masetlha v. President of the Republic of S. Afr.* 2008 (1) SA 566 (CC), dealing with the firing of the Director-General of the National Intelligence Agency, Billy Masetlha, by then-President Mbeki), should now be available to the public as well. 2008 (5) SA 31 (CC) at para. 2. Though the justices differed on how much disclosure should be permitted, it is notable that the majority, which was more sympathetic to national

Glenister II.¹⁹⁹ After *Glenister I*, the statute disbanding the Scorpions and replacing that body with the Directorate of Priority Crime Investigation (nicknamed the “Hawks”), located within the South African Police Service, became law.²⁰⁰ The challenge *Glenister* now brought in the second case did not present the special problems of interfering with Parliament in midstream that his previous case had featured. In this case, although the Court was divided—holding by a 5–4 vote that the statute was unconstitutional—every justice appeared to agree that the Constitution creates a duty to fight corruption.²⁰¹ This consensus is quite striking, since the Constitution does not anywhere state that there is such a duty.

The *Glenister II* dissent, written by then-Chief Justice Sandile Ngcobo, maintained that the Constitution did not prescribe where in the government a corruption-fighting investigative body should be located.²⁰² But the dissent recognized that there was:

an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption. The establishment of an anti-corruption unit is one way of meeting the obligation to protect the rights in the Bill of Rights. The Constitution is not prescriptive, however, as to the specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit.²⁰³

This in itself was a significant inference from section 7(2) of the Constitution, which establishes the obligation to “protect . . . the rights in the Bill of Rights”²⁰⁴—quite a distance, textually, from an explicit directive concerning the shape of anti-corruption efforts.

Ngcobo also gave weight to section 205(2) of the Constitution, which, as he wrote, “requires that the legislature ‘establish the powers and functions of the police service’ in order to ‘enable the police service to discharge its responsibilities effectively.’ I accept that for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence.”²⁰⁵ Ngcobo went on to note that an amicus in the case had argued:

that for an anti-corruption agency or body to be independent, it must: have the power to initiate its own investigations; allow investigators and prosecutors autonomous decision-making powers in handling cases; not be subject to

security needs than the other members of the Court, nevertheless ruled that the Court was entitled and bound to decide what should be disclosed and what should not, and that the Court “would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material,” but instead should weigh all of the relevant circumstances for itself. *Id.* at para. 55.

199. *Glenister v. President of the Republic of S. Afr.* 2011 (3) SA 347 (CC) (*Glenister II*).

200. *Id.* at paras. 1, 160.

201. *See infra* pp. 88–89.

202. *Glenister II*, 2011 (3) SA 347 at para. 65 (Ngcobo, CJ., dissenting).

203. *Id.* at para. 84 (Ngcobo, CJ., dissenting).

204. S. AFR. CONST., 1996, § 7(2).

205. *Glenister II*, 2011 (3) SA 347 at para. 116 (Ngcobo, CJ., dissenting) (quoting S. AFR. CONST., 1996, § 205(2)).

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undue influence from any of the branches of government or any third party; and have structural and operational autonomy.²⁰⁶

Ngcobo largely agreed: “Save to point out that the second criterion must not be understood to suggest that an anti-corruption unit must be located within the [National Prosecuting Authority, where the Scorpions had been located], there is support for these broad criteria for independence.”²⁰⁷ In short, though Ngcobo argued at length that the newly constituted investigative body had sufficient guarantees of independence despite being located within the South African Police Service rather than in the National Prosecuting Authority,²⁰⁸ he accepted the chain of inference that drew a constitutional obligation to combat corruption from text that did not directly declare it.

Deputy Chief Justice Moseneke and Justice Cameron wrote the majority judgment, holding the new arrangement unconstitutional.²⁰⁹ They acknowledged that the Constitution did not specify where an anti-corruption unit should be located,²¹⁰ as Ngcobo had argued, but they developed the argument for a constitutional duty to preserve independence with particular intensity. They were quite unmoved by the lack of explicit text:

The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.²¹¹

Moseneke and Cameron argued that the measure of the degree of independence necessary was to be found by consulting international law:

[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state’s conduct in fulfilling its obligations in relation to the Bill of Rights.²¹²

But they also maintained that the same conclusion would have followed without reference to international law:

[E]ven leaving to one side for a moment the Republic’s international law obligations, we consider that the scheme of our Constitution points to the

206. *Id.* at para. 117 (Ngcobo, CJ., dissenting).

207. *Id.*

208. *Id.* at paras. 117–56 (Ngcobo, CJ., dissenting).

209. *Id.* at para. 164. As in several previous cases, the majority suspended the declaration of invalidity for eighteen months to allow Parliament to cure the problem. *Id.*

210. *Id.* at para. 162.

211. *Id.* at para. 175.

212. *Id.* at para. 178.

cardinal need for an independent entity to combat corruption. Even without international law, these legal institutions and provisions point to a manifest conclusion. It is that, on a common sense approach, our law demands a body outside executive control to deal effectively with corruption.²¹³

Even more bluntly, they observed that to allow a Ministerial Committee authority over the new investigatory body is perilous:

The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They “oversee” an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function.²¹⁴

This is almost to say, from the bench, that the politicians themselves are the problem.

Glenister II attested to the Court’s willingness to infer important obligations from text that is by no means clear-cut—despite the Court’s stated commitment not to claim powers that it was not granted by the Constitution. For the majority, the case was an occasion for implicit, but striking, suggestions about their perception of the roots of corruption in today’s South Africa. Finally, though, the case came down to a very detailed analysis by the majority²¹⁵—and equally detailed counterargument by the dissent²¹⁶—about exactly how much independence the new investigative body would have. I won’t recount here the details of that analysis. Rather, what is striking about it is that measuring the degree of independence is necessarily a nuanced, multi-factored assessment of complex governmental structures. This is not the stuff of classic categorical legal analysis; it is rather more the stuff of policy analysis, and the justices have undertaken to perform this sort of analysis as part of resisting the scourge of corruption.

Indeed, the Court has performed this analysis not once but twice; when the government revised the statute creating the Hawks in response to *Glenister II*, the Court once again struck down several aspects of the amended statute for their failure to sufficiently ensure the new investigatory body’s “adequate structural and operational independence.”²¹⁷ This focus on the importance of independence is not at all novel. Instead, it has deep roots in South African legal culture; even in the grimmest years of apartheid, the idea of an independent bar and an independent bench drawn from that bar remained important and contributed to a human rights tradition preserved within the law.²¹⁸ As we will see, this concern with independence informs the Court’s other dramatic encounters with corruption as well.

213. *Id.* at para. 200 (citing S. AFR. CONST., 1996, §§ 181–194).

214. *Id.* at para. 232.

215. *Id.* at paras. 208–47.

216. *Id.* at paras. 117–56 (Ngcobo, C.J., dissenting).

217. *Helen Suzman Found. v. President of the Republic of S. Afr.* 2015 (2) SA 1 (CC) at paras. 2, 112.

218. ELLMANN, *supra* note 3, at 205–30.

C. *The Court Overturns the Appointment of a National Director of Public Prosecutions*

The Constitutional Court's second dramatic corruption case, *Democratic Alliance v. President of the Republic of South Africa*, also reached far into the operation of the government.²¹⁹ Here, the Constitutional Court unanimously rejected President Zuma's appointment of Menzi Simelane as the National Director of Public Prosecutions.²²⁰ Acting Deputy Chief Justice Zac Yacoob, writing for the Court, reasoned that "[t]he Constitution by necessary implication," though not in so many words, "requires the National Director [of Public Prosecutions] to be appropriately qualified."²²¹ The qualifications, stated in the National Prosecuting Authority Act 32 of 1998, were that the director "must . . . be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity."²²² Was this merely a hortatory encouragement, perhaps a subjective standard, the equivalent of telling the President to appoint whomever he believed was the right person for the job, or was it an objective criterion? The Court responds that the Act provides an objective measure, in part on the ground that "[a] construction that renders the determination of the qualification criteria to the President's subjective opinion is not in keeping with the constitutional guarantee of prosecutorial independence."²²³

By virtue of the doctrine of legality, the President's appointment decision, employing this criterion, must be "rational."²²⁴ We have already seen that the principle of legality is a potentially expansive one,²²⁵ and here the Court elaborates on the meaning of the rationality requirement, holding that it requires that "both the process by which the decision is made and the decision itself must be rational,"²²⁶ in that they "must be rationally related to the achievement of the purpose for which the power is conferred."²²⁷ Moreover, the Court notes that "a failure to take into account relevant material" might render the process, and therefore the decision, irrational as a whole.²²⁸

The American scholar Samuel Issacharoff has argued that "[t]o an outside observer, the South African rational relations standard of review seems a poor institutional choice for addressing the distinct problems presented by the

219. 2013 (1) SA 248 (CC). This decision upheld the judgment rendered by the Supreme Court of Appeal in *Democratic All. v. President of the Republic of S. Afr.* 2012 (1) SA 417 (SCA).

220. *Democratic All.*, 2013 (1) SA 248 at paras. 86–89, 95. One judge, Raymond Zondo, concurred in the result on slightly different grounds from the majority's. *Id.* at paras. 96–101 (Zondo, AJ., concurring).

221. *Id.* at para. 13.

222. *Id.* (quoting National Prosecuting Authority Act 32 of 1998 § 9(1)(b)).

223. *Id.* at para. 24.

224. *Id.* at para. 12.

225. *See supra* Part III.

226. *Democratic All.*, 2013 (1) SA 248 at para. 34.

227. *Id.* at para. 36.

228. *Id.* at para. 39.

entrenchment of a dominant political party.”²²⁹ It seems to me, however, that the doctrine of “rationality” in South African constitutional law is becoming a much more supple and powerful instrument of review than the “rational relationship” test of U.S. constitutional law to which Issacharoff looks.²³⁰ The South African scholar Alistair Price has reflected that “an examination of the cases leaves little doubt that the constitutional principle of legality [which encompasses the rationality requirement] is developing inexorably into ‘a complete parallel universe of administrative law.’”²³¹ This case itself was part of that development, and as Price dryly observes, “[f]urther development seems likely.”²³²

Certainly one attractive feature of this field of doctrine for the courts is its apparent modesty. Thus the Court here insists that none of its reasoning undercuts the separation of powers, citing an earlier case that had applied the rational basis test to legislative action and had observed:

The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society.²³³

This principle, the Court says, “applies equally to executive decisions.”²³⁴ There is no need to disagree with the Court’s analysis in order to acknowledge that the Court is describing a separation of powers in which the other branches of government are significantly subject to judicial oversight.

All of this is interesting as a matter of doctrine, but the case is perhaps most notable for what follows: the facts. These, as set out by the Court, include lengthy transcripts of Simelane’s testimony before a commission of enquiry. The 2007 Commission, known as the Ginwala Commission, was asked to inquire into the fitness of an earlier National Director of Public Prosecutions (NDPP), Vusi Pikoli, to serve.²³⁵ Simelane had himself been involved in the events surrounding Pikoli’s

229. Issacharoff, *supra* note 9, at 23. Sujit Choudhry, similarly, urges South Africa to adopt a set of doctrines specifically targeted at the dangers of dominant party democracy. Choudhry, *supra* note 9.

230. Issacharoff invokes U.S. rational relationship scrutiny. Issacharoff, *supra* note 9, at 23–24; notes 85–86. See *supra* Part III for a brief discussion of the rational relationship doctrine in U.S. constitutional law.

231. Price, *supra* note 79, at 656 (quoting CORA HOEXTER, *ADMINISTRATIVE LAW IN SOUTH AFRICA* 124 (2d ed. 2012)).

232. *Id.*

233. *Democratic All.*, 2013 (1) SA 248 at para. 43 (quoting *Affordable Meds. Tr. v. Minister of Health* 2006 (3) SA 247 (CC) at para. 86).

234. *Id.*

235. *Id.* at para. 4. President Mbeki had suspended Pikoli in 2007. *Id.* Pikoli, as noted earlier, *see supra* p. 83, had undertaken a prosecution of Jacob Zuma, but those events do not seem to have been the source of this suspension. Instead, a central reason for Mbeki’s action apparently was that Pikoli, in his capacity as NDPP, had moved to prosecute the then-National Commissioner of the South African Police Service, Jackie Selebi. See Jenni O’Grady, *Pikoli Stands by Selebi Investigation*, MAIL & GUARDIAN (July

removal from office, and the Ginwala Commission report described Simelane's conduct in the inquiry as having "left much to be desired. His testimony was contradictory and without basis in fact or in law."²³⁶ The Court sets out page after page of Simelane's testimony to confirm this characterization.²³⁷ The Court's final conclusion is less colorful than much that has preceded it:

The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively.²³⁸

It is hard to imagine a more clear-cut judicial encounter with government misconduct than this one.

D. *The Court Protects Its Own Institutional Integrity*

The third of these cases, *Justice Alliance of South Africa v. President of the Republic of South Africa*,²³⁹ is the saddest, for it involved a senior and rightly respected jurist, Chief Justice Ngcobo. But the case is also particularly striking because it involved the Constitutional Court ruling on an issue involving itself—the proposed extension of the Chief Justice's term in office for five years beyond its normal length.²⁴⁰ The Constitution, by virtue of a 2001 amendment,²⁴¹ expressly permitted Parliament to

8, 2008), <http://mg.co.za/article/2008-07-08-pikoli-stands-by-selebi-investigation>. Selebi ultimately was convicted and imprisoned. Mike Cohen, *Jackie Selebi Dies at 64; South Africa Police Chief Convicted of Corruption*, L.A. TIMES (Jan. 23, 2015), <http://www.latimes.com/local/obituaries/la-me-jackie-selebi-20150124-story.html>. Pikoli's plan to proceed against Selebi led to a clash with Mbeki, though why Mbeki supported Selebi against Pikoli is not known. GEVISSER, *supra* note 108, at 343. Presumably on Mbeki's behalf, Brigitte Mabandla, the Minister of Justice, attempted to block Pikoli from moving forward until she was satisfied that doing so was appropriate—a directive Pikoli rejected as unlawfully interfering with his responsibilities. See *Democratic All.*, 2013 (1) SA 248 at paras. 54–57. After suspending Pikoli, Mbeki "appointed a commission of enquiry headed by a former Speaker of Parliament, Dr Frene Ginwala (Ginwala Commission) to inquire into Mr Pikoli's fitness to hold office as the National Director." *Id.* at para. 4. Ultimately the Commission found that Pikoli *was* fit to hold office, and recommended he "be restored to the office of NDPP." DR F N GINWALA, REPORT OF THE ENQUIRY INTO THE FITNESS OF ADVOCATE VP PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 212 (2008), http://www.justice.gov.za/commissions/2008_ginwala.pdf [hereinafter GINWALA COMMISSION REPORT]. But in the process, as the text will discuss, the Ginwala Commission also found reason for serious criticism of Simelane.

236. GINWALA COMMISSION REPORT, *supra* note 235, at 12.

237. *Democratic All.*, 2013 (1) SA 248 at paras. 59–75.

238. *Id.* at para. 89.

239. 2011 (5) SA 388 (CC). Chronologically, this case is not the third, because it preceded the *Democratic Alliance* case I have just discussed. I discuss it last because it so strikingly encapsulates the character of these three judicial encounters with the problem of corruption.

240. *Id.* at para. 1.

241. S. AFR. CONST., Sixth Amendment Act of 2001.

“extend[] the term of office of a Constitutional Court judge” by statute.²⁴² Parliament in fact had enacted a general extension, but it had also enacted a specific authorization for the Chief Justice to “continue to perform active service as Chief Justice of South Africa for a period determined by the President,” until he or she reaches the age of seventy-five.²⁴³ Interestingly, Parliament enacted this specific authorization at the same time that it approved the amendment to the Constitution itself.²⁴⁴ Chief Justice Ngcobo’s term was to expire in 2011, but President Zuma exercised his authority under the statute to ask him to continue in office for another five years.²⁴⁵ Ngcobo agreed.²⁴⁶ Public interest litigants invoked the procedure for “direct access”²⁴⁷ to the Constitutional Court to challenge the extension.²⁴⁸

Chief Justice Ngcobo took no part in the decision, but the other ten members of the Court sat, and decided unanimously that the extension was unconstitutional.²⁴⁹ The Court was wholly unpersuaded by the suggestion that Parliament, having enacted the constitutional amendment and the statute supposedly founded on it at the same time, must have meant the amendment to authorize the statute.²⁵⁰ Instead, the Court insisted on its own duty “to determine objectively the meaning of the constitutional provision irrespective of the meaning as perceived by Parliament.”²⁵¹ The Court found that the Constitution authorized only Parliament—and thus not the President—to grant extensions,²⁵² and moreover that even Parliament could not single out individual judges for extensions but must treat them all alike.²⁵³

Perhaps what is most striking about the Court’s reasoning in *Justice Alliance* is that it is so deeply rooted in principles of judicial independence and the avoidance of the potential for interference. The Court said that “the Constitution’s delegation to Parliament must be restrictively construed to realise [the] protection” of judicial

242. S. AFR. CONST., 1996, § 176(1).

243. *Justice All.*, 2011 (5) SA 388 at para. 4 (quoting Judges’ Remuneration and Conditions of Employment Act 47 of 2001 § 8(a)).

244. *Id.* at para. 60.

245. *Id.* at paras. 6–7.

246. *Id.* at para. 9.

247. “Direct access” to the Constitutional Court in this case meant that the case was not heard in a lower court but instead was brought immediately and directly to the Constitutional Court. S. AFR. CONST., 1996, § 167(6); CONST. CT. R. 18; *see also Justice All.*, 2011 (5) SA 388 at paras. 1, 11, 17–19.

248. *Justice All.*, 2011 (5) SA 388 at para. 11.

249. *Id.* at para. 116. The sole judgment is issued by “The Court.” The ten justices who sat are listed following the Court’s order at para. 116.

250. *Id.* at para. 60.

251. *Id.*

252. *Id.* at para. 69.

253. *Id.* at paras. 84–85. On this point the Court was not quite unanimous; three judges felt that in principle a distinction could be drawn between the Chief Justice and other members of the Court, but that the distinction drawn here was invalid, notably because “it is uncertain that [the special treatment of the Chief Justice] furthers judicial independence.” *Id.* at paras. 95–96.

independence.²⁵⁴ For Parliament to grant the President the unfettered power to extend or not extend the Chief Justice's term, as the Court felt the statute did:

may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.²⁵⁵

And even more bluntly:

[I]t must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. . . . The power of extension . . . must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.²⁵⁶

The Court never accused its Chief Justice of any sort of dishonesty (nor in any way do I), but it seems clear that this case, like *Glenister II* and *Democratic Alliance*, is a part of the Court's struggle against the danger of corruption. In its aftermath, Chief Justice Ngcobo revoked his acceptance of the extension and left the bench when his term expired.²⁵⁷

The Court's insistence on its own duty "to determine objectively the meaning of the constitutional provision irrespective of the meaning as perceived by Parliament" offers a particularly clear lens through which to understand *Justice Alliance*.²⁵⁸ Two elements of the Court's statement stand out.

First, the Court maintains that the judgments it renders are "objective" determinations. It has explained elsewhere that its decisions rest on the Constitution's "objective, normative value system."²⁵⁹ The members of the Court are of course aware that they may differ in their interpretations of that value system and its demands, but in resting on the Constitution's objective value system and their own ability to make

254. *Id.* at para. 67.

255. *Id.* at para. 68. Moreover, the Court emphasizes that: "[i]t is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment." *Id.* at para. 73.

256. *Id.* at para. 75.

257. Nickolaus Bauer, *Chief Justice Sandile Ngcobo Hangs Up His Gavel*, MAIL & GUARDIAN (July 27, 2011), <http://mg.co.za/article/2011-07-27-chief-justice-sandile-ngcobo-to-step-down>.

258. *Justice All.*, 2011 (5) SA 388 at para. 60.

259. See, e.g., *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at para. 54. I discuss the implications of the idea of an "objective, normative value system" for the role that judges' values play in decisionmaking, in Ellmann, *supra* note 162, at 107–14.

objective determinations, the justices are invoking South Africa's legal traditions²⁶⁰—what the scholar Theunis Roux calls South Africa's "relatively formalist legal culture."²⁶¹

Second, the emphasis on independence is particularly striking here. Since Parliament enacted the statute and the constitutional provision at issue *at the same time*, it is hard not to conclude that Parliament believed its constitutional amendment authorized the new statute. But the Court felt no obligation to take its lead from Parliament in interpreting the meaning of the Constitution. This resistance to following Parliament's lead has deep roots in South African law as a judicial strategy against injustice. The achievements of anti-apartheid judges who firmly resisted seeing themselves as in any way the partners of the apartheid state—a judicial stance far removed from the "legal process school"²⁶² that for a time guided much legal thinking in the United States—may thus contribute to the commitment of today's judges to stand on their own as well.²⁶³

VII. THE CLASH BETWEEN THE STATE AND THE COURT

How should we characterize this body of case law? Some observers, as I have already mentioned, maintain that the Court has not gone far enough in articulating particular doctrines or in directly asserting its role as the champion of true South African democracy.²⁶⁴ In contrast, Theunis Roux, while not always satisfied with the work of the Court, contends that overall the Court has deftly negotiated a very challenging political environment while effectively shaping law to address the nation's difficulties.²⁶⁵ Roux argues that the Court has "stuck closely to the constitutional text and never once suggested that the problems it was asked to address were symptomatic of some more general breakdown in the ANC's capacity to govern associated with its ongoing dominance of South African politics."²⁶⁶ Noting that "all the decisions have been obeyed, none has attracted very much legal-professional or broader public

260. See ELLMANN, *supra* note 3, at 231–44.

261. Theunis Roux, *The South African Constitutional Court's Democratic Rights Jurisprudence*, 5 CONST. CT. REV. 33, 63 (2013); see also Roux, *supra* note 16, at 192–201.

262. The Legal Process School, of which Henry Hart and Albert Sacks were leading exponents, broadly saw legislatures and courts as jointly engaged in the enterprise of governance. Each had its own contribution to make, but the two were not fundamentally in opposition. Courts, in particular, might take guidance from statutes in shaping judicial rules of decision. See ELLMANN, *supra* note 3, at 50 & n.117 (citing HENRY M. HART, JR. & ALBERT M. SACKS, *LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1224, 1406, 1413 (part II tent. ed. 1958)).

263. Indeed, Justice Cameron in the 1980s was himself a cogent critic of judges' using "inference from statute" as a guide to decisionmaking where they were not compelled to do so. See ELLMANN, *supra* note 3, at 50 (discussing Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice—L C Steyn's Impact on South African Law*, 99 SALJ 38, 70–71 (1982)).

264. See *supra* pp. 75–76 and sources cited in note 119; see also Choudhry, *supra* note 9; Issacharoff, *supra* note 9; Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146 (1998); David Landau, *Aggressive Weak-Form Remedies*, 5 CONST. CT. REV. 243 (2013).

265. Roux, *supra* note 16, at 391.

266. Roux, *supra* note 261, at 71.

criticism and none appears as yet to have triggered an attack on the Court's independence," he urges us to consider the possibility that it is "precisely . . . the absence of any substantive theorisation of the pathologies attendant on South Africa's dominant-party democracy" that has enabled the Court to be so successful.²⁶⁷

I agree with Roux both that the Court has so far successfully navigated the treacherous waters in which it finds itself, and that it has done so in large part by charting a relatively circumspect course through those waters.²⁶⁸ The Constitutional Court's judgments I have discussed in this article are strikingly legalistic—often long, usually reasoned with great precision, carefully footnoted, and almost always written in dispassionate tones, though also always founded in the values articulated in the post-apartheid Constitution. All of this might be seen as a regrettable continuation of the legalism of the old South Africa, but I believe that "the goal should be to reduce the pretensions of the judiciary – in ways that the Constitutional Court has already sought to do – while maintaining what might be called its formalist core, that is, its claim to a special expertise and responsibility in interpreting law and protecting rights."²⁶⁹

Moreover, in a variety of ways, the Court's judgments, even as they challenge government policies and practices, stop short of simply displacing the judgments of elected leaders. Quite often, for example, the Constitutional Court chooses to rely on the good will and support of the political branches, rather than seeking to bluntly impose its mandates. Thus, in *Treatment Action Campaign*, the Court declared its confidence that the government would obey its order.²⁷⁰ In *Doctors for Life*, it rested its judgment that public participation had not been sufficient on the plans for that participation that the legislature had itself announced.²⁷¹ In a series of housing cases, it chose to rely on the parties to the cases to "meaningfully engage" in finding solutions to their intractable situations.²⁷² Even in *Glenister I* and *II*, it first refused to rule on the government's plans until they were actually enacted and then suspended the declaration of constitutional invalidity to give Parliament eighteen months to enact a constitutional statute governing priority crimes investigation.²⁷³ And there

267. *Id.* at 72.

268. I am grateful to William Simon for reminding me of this point in his comments about this article at the Twenty Years of South African Constitutionalism symposium. William Simon, Arthur Levitt Professor of Law, Columbia Law Sch., Comments at the New York Law School Law Review Symposium: Constitutional Rights, Judicial Independence, and the Transition to Democracy: Twenty Years of South African Constitutionalism (Nov. 16, 2014).

269. Stephen Ellmann, *A Bittersweet Heritage: Learning from The Making of South African Legal Culture*, 28 *LAW IN CONTEXT (FOR MARTIN CHANOCK: ESSAYS ON LAW AND SOCIETY)* 76, 87 (2010).

270. *See supra* pp. 74–75. The Court took a similar approach vis-à-vis the ANC itself in the *Ramakatsa* case. *See* discussion and case cited *supra* note 146.

271. *See supra* pp. 76–78.

272. *See supra* pp. 75–76 and note 120.

273. *See supra* pp. 85–89.

are other cases, outside the fraught contexts on which I have focused, where the Court has seemed supportive, even indulgent, of the government's positions.²⁷⁴

And yet I think it is important to recognize how bold the Court has also been. The text of the Constitution, far-reaching as it is, did not make clear just how vigilantly to enforce socioeconomic rights, nor how strictly to understand requirements of public input into parliamentary decisionmaking, nor the dimensions of the required independence of the police unit responsible for investigating corruption, nor the many elements of the doctrine of legality's requirement of rationality. Reasonable jurists could have decided at least some, perhaps all, of these cases differently, and in a number of them the Court itself was not unanimous.²⁷⁵ None of this means that the decisions the Court reached were illegitimate. But looking at these decisions, I am struck by how determinedly the Court has met each case that came before it, how ready it has been to bear the burden of decision, and how un-intimidated it has been by the possibility of political reaction. I would not deny that the Court has in important ways been circumspect, but I think it has been steadfast and forthright, and even bold, as well.

It is clear, moreover, that in taking these positions, the Court has run real risks. It should not be surprising that as Jacob Zuma became ensnared in legal difficulties, his supporters began to challenge the courts. Crowds supported him as he appeared in court.²⁷⁶ In 2008, Julius Malema, then perhaps Zuma's most notorious supporter and today a leading opponent, told a crowd that "[w]e are prepared to die for Zuma. We are prepared to take up arms and kill for Zuma."²⁷⁷ Zuma has so far escaped the corruption charges against him (and was also acquitted on a charge of rape),²⁷⁸ and became the President of South Africa, but his difficulties with the judiciary did not end.²⁷⁹

In subsequent years, and perhaps particularly provoked by the *Glenister II* and *Democratic Alliance* cases, a number of ANC politicians spoke out against the

274. See, e.g., *S. African Reserve Bank v. Shuttleworth* [2015] ZACC 17 (CC) at paras. 1–2, 71, 83 (upholding exchange-control fee imposed on a “prominent South African entrepreneur[s]” transfer of capital from South Africa abroad); *Liebenberg v. Bergrivier Municipality* 2013 (5) SA 246 (CC). In *Liebenberg*, the Court rejected an attack on local taxation and reiterated the view that “[a] narrowly textual and legalistic approach is to be avoided,” 2013 (5) SA 246 at para. 25 (quoting *African Christian Democratic Party v. Electoral Comm'n* 2006 (3) SA 305 (CC) at para. 25), in “assessing a municipality’s compliance with statutory prescripts,” *id.* at para. 21.

275. *Glenister II*, notably, was the product of a 5–4 split among the justices.

276. Justin Pearce, *Analysis: SA's Zuma in the Dock*, BBC NEWS (Oct. 10, 2005), <http://news.bbc.co.uk/2/hi/africa/4328360.stm>.

277. ‘Kill for Zuma’: I Can Explain, Says Malema, MAIL & GUARDIAN (June 17, 2008), <http://mg.co.za/article/2008-06-17-kill-for-zuma-i-can-explain-says-malema>.

278. For Zuma’s acquittal of rape, see *S Africa’s Zuma Cleared of Rape*, BBC NEWS (May 8, 2006), <http://news.bbc.co.uk/2/hi/4750731.stm>.

279. See *supra* pp. 80–85 (discussing the legal proceedings growing out of the arms deal); see also, e.g., Jenni Evans, *Judgment Reserved in Nkandla Concourt Application*, MAIL & GUARDIAN (Feb. 10, 2016), <http://mg.co.za/article/2016-02-10-judgment-reserved-in-nkandla-concourt-application> (describing the Constitutional Court’s hearing of a challenge to the government’s spending on Zuma’s home in Nkandla).

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courts.²⁸⁰ George Bizos, a prominent anti-apartheid lawyer who has continued to defend human rights under the new government, has catalogued some of these remarks.²⁸¹ Perhaps the most startling commentary was from Gwede Mantashe, Secretary-General of the ANC, who told *The Sowetan* newspaper that: “[T]he judiciary is actually consolidating opposition to government,’ and that ‘there is a great deal of hostility that comes through from the judiciary towards the Executive and Parliament,’ and that judges were ‘reversing [sic] the gains of transformation through precedents.’”²⁸²

Fueled by rhetoric of this sort, the government began proposing initiatives whose apparent purpose was to challenge the direction of the courts’ decisions. One of these proposals was for a commission to study the work of the Constitutional Court. Bizos observed that: “The Cabinet’s pronouncement . . . that it will appoint a body to assess the decisions of the Constitutional Court must give rise to great concern. This undefined and amorphous assessment body dangerously risks repeating our unhappy history.”²⁸³

Another was the proposed Legal Practice Bill, which Arthur Chaskalson sharply criticized in his last public speech, in 2012, as a measure “calculated to erode” the independence of the legal profession.²⁸⁴ Chaskalson emphasized the power that the bill would give to the Minister of Justice and to an “Ombud”.²⁸⁵

280. See generally Budlender, *supra* note 11, at 598–99 (“The courts have an important role to play in this democracy. The criticism that they are anti-democratic rests on a number of false premises. . . . The real source of the criticism, I think, is often that the critics simply do not like the outcome of particular cases.”).

281. George Bizos, Presentation of Honorary Doctorate to George Bizos SC – Blame Neither the Constitution, nor the Courts (Dec. 9, 2011), <http://www.chr.up.ac.za/index.php/centre-news-2012/929-presentation-of-honorary-doctorate-to-george-bizos-sc.html>.

282. *Id.* (quoting ANC’s Secretary-General Gwede Mantashe interview with Sowetan editor Mpumelelo Mkhabela, originally transcribed in Mpumelelo Mkhabela, *FULL INTERVIEW: ANC’s Mantashe Lambasts Judges*, SOWETAN LIVE (Aug. 18, 2011), <http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges>) (citing Pierre de Vos, *Full Sowetan Interview with Gwede Mantashe*, CONSTITUTIONALLY SPEAKING (Aug. 18, 2011), <http://constitutionallyspeaking.co.za/full-sowetan-interview-with-gwede-mantashe/>).

283. *Id.*

284. Arthur Chaskalson, *The Rule of Law: The Importance of Independent Courts and Legal Professions: Address to the Cape Law Society* (Nov. 9, 2012), <http://www.politicsweb.co.za/news-and-analysis/arthur-chaskalsons-warning-on-legal-practice-bill>.

285. An “Ombud”—a term derived from the older, and more gendered, word “ombudsman”—is an official “[a]ppointed by governments to investigate complaints from citizens against large organizations (e.g. public bodies, corporations, the media). Typically, ombudsmen have wide-ranging investigative authority, but their punitive powers tend to be limited.” *What is Ombudsman*, LAW DICTIONARY, <http://thelawdictionary.org/ombudsman/> (last visited Feb. 15, 2016). South Africa’s most prominent “Ombud” is its Public Protector; Thulisile Madonsela, who holds that office today, has courageously reported on government misconduct. Alexis Okeowo, *Can Thulisile Madonsela Save South Africa From Itself?*, N.Y. TIMES MAG. (June 16, 2015), http://www.nytimes.com/2015/06/21/magazine/can-thulisile-madonsela-save-south-africa-from-itself.html?_r=1. The “Ombud” of the proposed Legal Practice Bill would have been a different official entirely. See Chaskalson, *supra* note 284.

[They] are both appointed by the President which means that members of the executive have significant powers to control important aspects of the functioning of the legal profession. There is no reason to believe that these powers will be abused. But that is not the point. We do not know what might happen in the future. A structure is being proposed which opens the door to important aspects of the profession being controlled by the executive, and that is inconsistent with an independent legal profession.²⁸⁶

These particular threats have eased; the commission was never created and the version of the Legal Practice Bill that ultimately became law appears to be less acutely threatening to legal independence than Chaskalson had feared.²⁸⁷ But rhetoric has heated up again recently, in part triggered by the government's failure to obey a High Court decision that required the government not to permit Omar al-Bashir, President of Sudan, to leave the country until the courts could decide whether South Africa's obligations to the International Criminal Court required his arrest and transfer to the court for trial.²⁸⁸ In response, ANC Secretary-General Gwede Mantashe spoke out again:

286. Chaskalson, *supra* note 284.

287. In a number of ways (though not all) the statute as enacted, Legal Practice Act 28 of 2014, somewhat reduces the authority of the executive, acting through either the Minister of Justice and Constitutional Development or the Ombud, over the legal profession, in comparison to the provisions of the 2012 draft bill that Chaskalson critiqued, Legal Practice Bill, B 20—2012. Compare Legal Practice Bill § 14(3), *with* Legal Practice Act § 14(3) (adding a requirement that the Minister obtain a court order to dissolve the South African Legal Practice Council); Legal Practice Bill § 34(2), *with* Legal Practice Act § 34(2) (transferring authority to make rules governing an aspect of the integration of South Africa's advocates (barristers) and attorneys (solicitors) from the Minister to the Legal Practice Council); Legal Practice Bill 94(1)(i), *with* Legal Practice Act § 94(1)(k) (taking authority to regulate lawyers' fees from the Minister's sole purview and instead requiring the Minister to implement recommendations on the subject to be developed in a two-year study by the South African Law Reform Commission); Legal Practice Bill § 41, *with* Legal Practice Act § 42 (sharply reducing the Ombud's authority to oversee decisions of legal disciplinary bodies); Legal Practice Bill § 48(2) (requiring that the Ombud be a "South African citizen . . . fit and proper . . . to hold such office" and, *inter alia*, who has practiced as an advocate or attorney for at least ten years), *with* Legal Practice Act § 47(1) (requiring that the Ombud be a retired judge); Legal Practice Bill § 50(4) (granting the President the authority to set the Ombud's term), *with* Legal Practice Act § 49 (specifying a seven-year term, renewable once, for the Ombud). For an apparent exception, compare Legal Practice Bill § 50(2)–(3) (guaranteeing that the Ombud's salary must not be less than the salary of a High Court judge, and cannot be reduced during the Ombud's term), *with* Legal Practice Act § 50(3) (providing that the President determine the Ombud's "remuneration, allowances and other terms and conditions of service and service benefits").

288. See, e.g., Mike Cohen, *Al-Bashir Sets Up High Court and Zuma Administration Clash*, MAIL & GUARDIAN (June 23, 2015), <http://mg.co.za/article/2015-06-23-al-bashir-cause-of-clash-between-south-african-courts-and-state>. In *Southern Africa Litigation Centre v. Minister of Justice & Constitutional Development*, [2015] ZAGPPHC 402 (NGHC), the North Gauteng High Court found that the government had not complied with its earlier order concerning Bashir, *id.* at paras. 2–9. After declaring that "[w]here the rule of law is undermined by Government . . . the court must fearlessly address this through its judgments," *id.* at para. 38, the court invited the National Director of Public Prosecutions to "consider whether criminal proceedings are appropriate," *id.* at para. 39. This controversy continues, with the government's request for leave to appeal from this High Court decision to be heard by the Supreme Court of Appeal in February 2016. See Peter Fabricius, *SCA to Start Case on SA's ICC Obligations*, IOL NEWS (Jan. 16, 2016), <http://www.iol.co.za/news/politics/sca-to-start-case-on-sas-icc-obligations-1.1971908>.

There is a drive in sections of the judiciary to create chaos for governance; that's our view. . . . We know if it doesn't happen in the Western Cape High Court, it will happen in the Northern Gauteng—those are the two benches where you always see that the narrative is totally negative and create [sic] a contradiction.²⁸⁹

Mantashe is not alone. According to another report, “Higher Education Minister Blade Nzimande . . . said ‘sections of the judiciary tend to somehow overreach into areas that one would expect even in a constitutional state to tread very, very carefully.’”²⁹⁰ That might all just be rhetoric—and not the most forceful rhetoric at that—but the same article reports that “[a]ctivists and lawyers have pointed to a long list of cases that show a blatant disregard for court orders by state organs and government at various levels.”²⁹¹

The judges have reacted. Constitutional Court Chief Justice Mogoeng Mogoeng convened a meeting of senior judges and representatives of the legal profession,²⁹² and then “held a press conference where he announced that he has requested a meeting with President Jacob Zuma following unwarranted attacks on the judiciary.”²⁹³ South African Deputy President Cyril Ramaphosa welcomed the upcoming meeting and declared that “[t]he independence of the judiciary is something the ANC will always defend.”²⁹⁴

Whatever the results of this flare-up, the ANC does not currently have the two-thirds majority in Parliament necessary for constitutional amendments that might directly attack the power of the judiciary.²⁹⁵ But perhaps the strongest weapon available to the executive in the long run, and a weapon not requiring any constitutional revision for its exercise, is the executive's power over the appointment of judges. Judges are appointed by the President, but only after input from the Judicial

289. Susan Comrie, *Gwede Mantashe Singles Out 'Problematic Courts,'* NEWS24 (June 22, 2015), <http://www.news24.com/SouthAfrica/News/Gwede-Mantashe-singles-out-problematic-courts-20150622>.

290. Charl du Plessis et al., *ANC Tells Judges to Back Off,* NEWS24 (June 21, 2015), <http://www.news24.com/SouthAfrica/News/ANC-tells-judges-to-back-off-20150621>.

291. *Id.*

292. Stephen Grootes, *When Judges of the Land Said Enough! to the ANC,* DAILY MAVERICK (July 8, 2015), <http://www.dailymaverick.co.za/article/2015-07-08-when-judges-of-the-land-said-enough-to-the-anc/#.Va1-gSpVhBc>.

293. Qaanitah Hunter, *Ramaphosa: ANC Will Defend Independence of Judiciary,* MAIL & GUARDIAN (July 10, 2015), <http://mg.co.za/article/2015-07-10-ramaphosa-anc-will-defend-independence-of-judiciary>.

294. *Id.* The meeting has since taken place. Natasha Marrian, *Zuma, Judges Agree on 'Mutual Respect,'* BUS. DAY (Aug. 28, 2015), <http://www.bdlive.co.za/national/law/2015/08/28/zuma-judges-agree-on-mutual-respect>.

295. Amendments to the Constitution require at least a two-thirds majority vote in the National Assembly. S. AFR. CONST., 1996, § 74(3). For an example of political difficulties recently faced by the ANC as a result of its lack of this strong a majority, see Wyndham Hartley, *News Analysis: ANC's Two-Thirds Problem Means Honeymoon is Over,* BUS. DAY (June 29, 2015), <http://www.bdlive.co.za/national/politics/2015/06/29/news-analysis-ancs-two-thirds-problem-means-honeymoon-is-over>.

Service Commission (JSC).²⁹⁶ The JSC, in turn, is made up of twenty-three members, and of those the President seems to be in a strong position to choose many, perhaps a majority, on whom he can confidently rely.²⁹⁷ When President Zuma's proposed extension of Chief Justice Ngcobo's term was invalidated by the Constitutional Court, the immediate result was that a new Chief Justice needed to be appointed.²⁹⁸ Zuma's choice, a member of the Court named Mogoeng Mogoeng, was controversial,²⁹⁹ but after a bruising hearing before the JSC, he was in due course appointed.³⁰⁰ While presidents—in the United States and no doubt in South Africa—are frequently surprised by the decisions of those whom they appoint as judges,³⁰¹ over time the appointment power is a profound one.

VIII. CONCLUSION: THE PROSPECTS FOR THE COURT AND FOR SOUTH AFRICA

The path the Court has followed is a perilous one. Courts do periodically oppose politicians, but even in the United States, where the judiciary's power and prestige are long established, they are often circumspect about doing so. The Constitutional Court has challenged South Africa's political branches repeatedly and boldly.

Just how firmly the Constitutional Court stands in the estimation of the South African people may be debated; there is certainly survey research data suggesting

296. More precisely, the President chooses the Chief Justice and Deputy Chief Justice after consulting with the JSC. S. AFR. CONST., 1996, § 174(3). For judges of lower courts (the Supreme Court of Appeal and the High Courts), the President must make selections from lists of nominees submitted by the JSC. *Id.* § 174(4), (6). Not surprisingly, the JSC's nomination decisions have become the subject of litigation. For example, in *Judicial Service Commission v. Cape Bar Council*, the Supreme Court of Appeal found “the failure by the JSC . . . to fill . . . two [judicial] vacancies . . . irrational and unlawful.” 2013 (1) SA 170 (SCA) at para. 51. The JSC had considered seven candidates for three judicial vacancies, and recommended one of them, the only black candidate, for one vacancy, while making no other recommendations. *Id.* at para. 2.

297. S. AFR. CONST., 1996, § 178(1). This section lists the twenty-three members of the Commission, who include “the Cabinet member responsible for the administration of justice,” six members of the National Assembly, of whom three can be from the majority party, four delegates to the National Council of Provinces, provided six of the nine provinces support them (eight of the nine provinces are currently governed by the ANC), and four more people “designated by the President.” *Id.* § 178(1)(d), (h)–(j). Of course, other members—such as representatives of the legal profession and law teachers—may also support the President's preferences. *See id.* § 178(1)(f)–(g). When appointments are being made to a particular division of the lower courts, two additional members are added, one the Judge President of the division and the other the Premier of the province in question. *Id.* § 178(1)(k). For a relatively sanguine view of the Judicial Service Commission's role, however, see de Vos, *supra* note 9, at 14–15.

298. *See supra* pp. 92–95.

299. Robyn Dixon, *South Africa's Zuma Names Controversial New Chief Justice*, L.A. TIMES (Sept. 9, 2011), <http://articles.latimes.com/2011/sep/09/world/la-fg-south-africa-jurist-20110909>.

300. I was a signer of a letter expressing concern at this prospective appointment.

301. Chief Justice Mogoeng may well be an example of such a judge. *See* Niren Tolsi, *Applause for Mogoeng's Judicial Cadenza*, MAIL & GUARDIAN (Oct. 18, 2013), <http://mg.co.za/article/2013-10-17-applause-for-mogoengs-judicial-cadenza/>.

that it may by no means enjoy unhesitating adherence.³⁰² In the first years of the new nation, however, the position of the judiciary in the eyes of South Africa's leaders seems to have been quite strong.³⁰³ Even now, the government does not seem disposed to challenge the justices head-on. Some of the comments that defenders of the courts have singled out as disturbing actually seem, to American ears, relatively mild.³⁰⁴ The courts enjoy some considerable degree of respect—and that position gives the courts some potential to speak effectively to power, even though the ANC's political power is still immense. Moreover, this respect is likely founded on the courts' being the objective voice of the law and of the culture of justification—and these sources of the courts' legitimacy themselves generate the courts' obligation to continue to act.

And so what should we expect? No one knows what the future will bring, but it is easy to trace two possible scenarios. Both have their analogues in recent U.S. history.³⁰⁵ In the bleak version, political leadership grows steadily more determined to challenge the courts' power. Ultimately, if they could muster the two-thirds majority required to amend the Constitution,³⁰⁶ opponents could directly reduce the role of the Court. Less dramatically, and more plausibly, over time those who want to tame the courts can seek to appoint judges to do their bidding; in the United States, we have repeatedly seen the impact a president can have, even long after having left office, as a result of careful use of the power to appoint federal judges.

In the bright version, something quite different happens. Here we should think back to the case of *Cooper v. Aaron*.³⁰⁷ In that case, the U.S. Supreme Court confronted the intransigent resistance of Arkansas authorities to the enforcement of an order for the desegregation of schools.³⁰⁸ Here is part of the Court's response:

302. See James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 229 (François du Bois & Antje du Bois-Pedain eds., 2008); James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POLITICS 1 (2003).

303. Theunis Roux incisively analyzes the politics of the ANC government's relations to the Constitutional Court in its first decade in ROUX, *supra* note 16, at 143–90. In an unpublished work, Thomas Karis reviews parliamentary reaction to Constitutional Court decisions and in general finds challenges to the Court's legitimacy singularly absent. Thomas G. Karis, *Promoting Constitutional Patriotism in South Africa* (2015) (unpublished manuscript) (on file with author).

304. See *supra* pp. 97–100 and notes 281–83, 289–92.

305. And in events elsewhere. Issacharoff invokes the struggles of the Indian and Hungarian constitutional courts and observes that “[t]he Indian Court survived and plays an important role in Indian democracy; the Hungarian Constitutional Court is, by contrast, a much weakened institution.” Issacharoff, *supra* note 9, at 30. For a more complete telling of the grim story of the Hungarian Constitutional Court, see Martin Krygier, *What About the Rule of Law?*, 5 CONST. CT. REV. 74, 79–85 (2013). For one more comparative example, an encouraging one, see the accounts of the Colombian Constitutional Court's dramatic initiatives in Landau, *supra* note 264, at 252–61, and in Issacharoff, *supra* note 9, at 13–18.

306. S. AFR. CONST., 1996, § 74(3).

307. 358 U.S. 1 (1958).

308. *Id.* at 4–5.

However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine. Article VI of the Constitution makes the Constitution the “supreme Law of the Land.” In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of *Marbury v. Madison* . . . that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 “to support this Constitution.”³⁰⁹

It is quite possible that this eloquent and timely declaration was overstated. Strictly speaking, judicial decisions bind only the parties to the case being decided, and they are binding only for what is necessary to the result the court reaches. Every government official is obliged to adhere to the Constitution, and there may well be some role for conscientious officials to disagree with the courts’ interpretations of the Constitution, as long as those interpretations were not a holding in a case in which the officials were parties. But these points of constitutional theory were not the point of *Cooper v. Aaron*.

Instead, the reason for the *Cooper v. Aaron* decision was to invoke the full prestige and authority of the Supreme Court at a time when the political branches in the United States were far from committed to uprooting segregation. The Supreme Court could not have won the battle against segregation on its own, and it took the newfound commitment of the political branches in the 1960s to enable the United States to make the imperfect progress in race relations that it has.³¹⁰ But the task of the Supreme Court was to do what it could, while it awaited, and hopefully encouraged, others to join the effort.

It is worth noting that the Supreme Court was in many ways quite circumspect in its efforts. In 1954 *Brown v. Board of Education* declared the unconstitutionality of school segregation,³¹¹ but one year later *Brown II* directed the nation to remedy this wrong not at once but “with all deliberate speed.”³¹² After both *Brown* decisions, the Supreme Court struck down segregation in many walks of life without hesitation, but it did not hold unconstitutional the various state laws barring marriage between

309. *Id.* at 17–18.

310. See Michael O’Donnell, *How LBJ Saved the Civil Rights Act*, THE ATLANTIC (Apr. 2014), <http://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/>.

311. 347 U.S. 483 (1954).

312. 349 U.S. 294, 301 (1955).

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people of different races until *Loving v. Virginia* in the late 1960s.³¹³ Whether there are ways the South African Constitutional Court should similarly calibrate its jurisprudence to help itself stay the course as long as possible is an important question—but even if such steps are conceivable, doctrine and culture leave less room for such maneuver in South Africa than in the United States.

In any event, this is the task the Constitutional Court is now undertaking. It cannot prevail on its own. It can prevail—that is, it can contribute to the rise of a more principled and democratic political culture in South Africa—if South African politics shifts to support this. In the meantime, the Constitutional Court must hope that its efforts are the basis for a new era rather than the vestiges of an era now departing. And we must hope the same.

313. 388 U.S. 1 (1967).

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