

# Principle and Pragmatism on the Constitutional Court of South Africa

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*Though lacking in public support, the Constitutional Court of South Africa (CCSA) today finds itself in a position of relative institutional security. At the same time, it has built up an enviable reputation among constitutional courts in new democracies for the quality of its jurisprudence, or legitimacy in the legal sense. This essay attempts to explain how this situation has come about by developing a theoretical account of the relationship between legal legitimacy, public support and institutional security, and then testing this account against the CCSA's record from 1995 to 2006. The defining feature of South African politics over this period has been its domination by a single political party. In this context, the theoretical account suggests, a constitutional court in a new democracy should largely be able to ignore public opinion in favor of its relationship with the political branches. In particular, one would expect such a court to trade off gains in legal legitimacy, achieved by principled decision making, against the likely impact of its decisions on its institutional security. An examination of the CCSA's record reveals that it has indeed acted strategically in this way, both in politically controversial cases, where it has used its considerable forensic and rhetorical skills to avoid confrontation with the political branches, and in more routine cases, where it has developed a number of context-sensitive review standards.*

## 1. Introduction

A little more than a decade after deciding its first case,<sup>1</sup> the least that can be said about the Constitutional Court of South Africa (CCSA) is that it is still handing down decisions the political branches do not always like.<sup>2</sup> By some accounts, the CCSA has been remarkably successful, with a reputation among constitutional courts in new democracies second to none. The truth, of course, lies somewhere in between, and depends on whom you talk to, and on what the criteria for success are taken to be.

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<sup>1</sup> S v. Zuma, 1995 (2) SALR 642 (CC) (decided on 5 April 1995).

<sup>2</sup> Recent examples include Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs, 2006 (1) SALR 524 (CC) (holding the common-law definition of marriage and sec. 3(1) of the Marriage Act, No. 25 of 1961 unconstitutional to the extent that they discriminated against homosexual couples) and Minister of Health v. New Clicks South Africa (Pty) Ltd, 2006 (2) SALR 311 (CC) (setting aside various regulations relating to the pricing of medicines).

Among legal academics, both inside and outside South Africa, the CCSA is generally regarded as having made a legally credible start to its work of interpreting the two post-apartheid South African Constitutions.<sup>3</sup> Although social surveys suggest that the Court does not enjoy a great deal of public support,<sup>4</sup> this fact may be attributed to the peculiar nature of South African politics, in which a dominant political party frees the CCSA from the need to court public opinion.<sup>5</sup> That party, the African National Congress (ANC), has periodically criticized the judiciary,<sup>6</sup> but has not as yet threatened to close the Constitutional Court down, despite several significant policy

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<sup>3</sup> S. AFR. CONST. 1993 (which came into force on 27 April 1994) and the S. AFR. CONST., 1996 (which came into force on 4 February 1997). The South African commentaries on the CCSA's record are too numerous to mention in full. The leading texts are STUART WOOLMAN *ET AL.* (EDS), *CONSTITUTIONAL LAW OF SOUTH AFRICA* (Juta & Co., Ltd 2005) and IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* (5<sup>th</sup> edition, Juta & Co. Ltd 2005). *See also* JONATHAN KLAAREN (ED.), *A DELICATE BALANCE: THE PLACE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY* (SiberInk 2006) (collection of essays in honour of former Chief Justice Arthur Chaskalson, focusing mostly on the review of executive and administrative action). The most stridently critical South African account of the CCSA's record is DENNIS DAVIS, *DEMOCRACY AND DELIBERATION: TRANSFORMATION AND THE SOUTH AFRICAN LEGAL ORDER* (Juta & Co., Ltd 1999) (criticizing the CCSA's equality rights jurisprudence in particular for focusing on individual rather than group-based disadvantage). The CCSA's socio-economic rights jurisprudence has been subjected to sustained critique in DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* (Oxford Univ. Press 2007) (arguing that the CCSA's failure to attribute a minimum core content to socio-economic rights has rendered these rights essentially meaningless). Favorable international accounts include: CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221-337 (Oxford Univ. Press 2001) (approving the CCSA's judgment in *Government of the Republic of South Africa v. Grootboom* 2001 (1) SALR 46 (CC)); ALAN C. HUTCHINSON, *IT'S ALL IN THE GAME: A NON-FOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* 202-214 (Duke Univ. Press 2000) (discussing, without approving or disapproving, the CCSA's decision in *S v. Mhlungu* 1995 (3) SALR 391 (CC)); Ronald Dworkin, *Response to Overseas Commentators* 1 INT'L J. CONST. L. (I-CON) 651, 652-53 (2003) (approving the CCSA's socio-economic rights jurisprudence as according with the principle of equal concern and respect); GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 149-182 (Univ. of Chicago Press 2006) (approving the CCSA's constitutional property rights jurisprudence); Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137 (2003) (approving the balance struck in the CCSA's socio-economic rights jurisprudence between rights-enforcement and deference to democratic decision-making); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004) (describing the "weak remedy" granted by the CCSA in *Grootboom* as a plausible judicial response to strong social welfare rights).

<sup>4</sup> *See* James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy?: Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POL. 1 (2003) (reporting 27.9 per cent "attentive" public support for the CCSA in 1997, i.e. among citizens who had heard about the Court); James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court* in ANTIJE DU BOIS-PEDAIN & FRANCOIS DU BOIS (EDS), *JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA* (Cambridge Univ. Press forthcoming 2008) ch. 9 (reporting 34 per cent public support for the CCSA in 2004).

<sup>5</sup> The ANC won 69.68 per cent of the vote in the 2004 election. The political context in South Africa is in this sense almost exactly the opposite of that in India, where the Supreme Court uses its popular legitimacy to survive fairly intense confrontations with the political branches.

<sup>6</sup> The best example of this is the ANC National Executive's 93rd anniversary statement of January 2005, in which it accused certain members of the judiciary, without naming them, of being out of touch with the aspirations of South Africa's black majority.

reversals.<sup>7</sup> If not universally liked, therefore, the CCSA is today at least relatively secure. A convincing explanation of how this situation has come about promises to contribute both to our understanding of the role of constitutional courts in new democracies and to some of the enduring debates about the legitimacy of judicial review.

In its legal sense, Part 2 of this essay argues, the legitimacy of judicial review depends on a court's capacity to decide cases according to forms of reasoning acceptable to the legal community of which it is a part. Defined in this way, legal legitimacy may be distinguished from two closely related concepts with which it is sometimes confused: public support (confidence in the court among the population as a whole) and institutional security (the court's capacity to resist real or threatened attacks on its independence). Any attempt to compare the record of the CCSA with the record of constitutional courts in other new democracies must take the peculiar South African configuration of these three factors into account.

Part 3 argues that political science accounts of constitutional adjudication in new democracies have much to teach legal theorists. The limitation of such accounts, however, is that they lack any real conception of legal legitimacy, and consequently have little appreciation for the restraining influence of legal doctrine on the behavior of constitutional courts. The problem with currently available theories of judicial review, on the other hand, is that none of them is directed at constitutional courts in new democracies.<sup>8</sup> What is required, therefore, is a new account, drawing on some of the political science insights, but expressed in terms acceptable to legal theory.

A fully developed theory of judicial review in new democracies is beyond the scope of this essay. Part 3 nevertheless suggests a way forward by contrasting and then particularizing to the situation of constitutional courts in new democracies two well-known theories of judicial review in *mature* democracies: Ronald Dworkin's theory of constructive interpretation and Richard Posner's claim that appellate courts in the United States should, and often do, act pragmatically. At a theoretical level, this part argues, a mix of principle and pragmatism seems likely to provide the best way for a constitutional court in a new democracy to build its legal legitimacy without sacrificing its institutional security. "Principle" because deciding cases according to law is what legitimates courts in the legal sense, and "pragmatism" because, given the

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<sup>7</sup> In addition to *Grootboom*, *supra* note 3, the other decision often cited as a significant policy reversal for the ANC is *Minister of Health v. Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)* (reviewing and declaring unconstitutional the national Department of Health's programme on mother-to-child-transmission of HIV).

<sup>8</sup> The exception is Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009 (1997) (examining different conceptions of the rule of law in transitional democracies, but not providing a theory of judicial review as such). See also RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (Oxford Univ. Press 2000)

inherent weakness of their position, constitutional courts in new democracies must perforce temper their commitment to principle with strategic calculations of the likely impact of their decisions on their institutional security.

The last part of this essay, Part 4, is devoted to showing how the CCSA's record since 1995 can be explained as having been driven by just such a mixture of principle and pragmatism, and that this in turn largely explains how the CCSA has been able to establish its legal legitimacy without sacrificing its institutional security. Four aspects of its record are considered: (1) the CCSA's approach in cases where the principled decision ran counter to public opinion; (2) cases in which the principled decision and the preferences of the political branches were in conflict; (3) cases in which the CCSA converted conceptual tests into multi-factor balancing tests; and (4) cases in which the CCSA resorted to rhetoric to manage its relationship with the political branches.

## 2. Legitimacy, public support, and institutional security

The principal concern of this essay is not the moral legitimacy of judicial review according to some or other theory of justice,<sup>9</sup> or even the moral legitimacy of judicial review in the specific circumstances of South Africa.<sup>10</sup> Rather, the principal concern

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<sup>9</sup> The terms for the debate over the moral legitimacy of judicial review are generally agreed to have been set by ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press 1962). Two well-known attempted refutations of the democratic objection to judicial review are Ronald Dworkin's three-parted claim that (1) democracy assumes that individuals should be treated with "equal concern and respect", (2) judicially enforced fundamental rights help to guarantee such treatment, and hence (3) judicial enforcement of fundamental rights is integral to democracy; and John Hart Ely's claim that judicial review is justified where it strengthens the democratic process. See RONALD DWORKIN, *LAW'S EMPIRE* 355-99 (Harvard Univ. Press 1986); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (Harvard Univ. Press 1996); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harvard Univ. Press 1980). Other attempted refutations of the democratic objection to judicial review are based on courts' capacity to give effect to the democratic Constitution. Such theories may either be conservative (restricting the court's capacity to re-interpret the framers' purposes in light of new social circumstances and values) or progressive (requiring the court to give effect to changing public understandings of the Constitution, in dialogue with the political branches). An example of the former is Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) and, of the latter, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). For a skeptical account of the dialogical justification for judicial review, see Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures* 3 INT'L J. CONST. L. (I-CON) 617 (2005).

<sup>10</sup> Cf. Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006) (arguing that "a system of strong judicial review" is not morally justified in countries with well-functioning democratic institutions, but conceding that there may be situations where the "costs of obfuscation and disenfranchisement [entailed by a strong system of judicial review] are worth bearing for the time being"); Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORD. L. REV. 1407 (2004) (explaining John Rawls's views on judicial review as being that judicial review is contingently necessary to secure the requirements of justice in certain

is to explain how the CCSA has interpreted the two post-apartheid Constitutions in a way that appears to have met with general approval among legal academics, and yet has not resulted in any sustained threat to its institutional security. For this purpose, the relevant forms of legitimacy are the legal legitimacy of the CCSA's record since 1995, and the sociological legitimacy of the CCSA as an institution, which is rendered here (for reasons explained later) by the term "public support".

Legal legitimacy is analytically distinct from, but not unrelated to, moral and sociological legitimacy. In a recent contribution to the *Harvard Law Review*, Richard Fallon has contrasted these three types of legitimacy in the context of the ongoing debate over the legitimacy of judicial review in the United States. For Fallon, the legitimacy of judicial review in that country depends on a complex interaction between the justifiability of the institution in moral terms, the sociological acceptance of the institution as a matter of fact, and the legal legitimacy of particular decisions. On this approach, legal legitimacy is partly a function of the decision's conformity to the U.S. Constitution (which may or may not itself be morally justified), and partly – where constitutional norms run out – a matter of sociological acceptance.<sup>11</sup>

In the United States, because of uncertainty surrounding the Supreme Court's constitutional mandate, arguments about the legitimacy of particular decisions often become confused with arguments about the legitimacy of judicial review in general.<sup>12</sup> In South Africa, this problem is less severe because the CCSA's mandate to interpret and enforce the Constitution is relatively clear.<sup>13</sup> Although legal professionals will still disagree about whether a particular decision comports with the CCSA's mandate, such arguments must be conducted with reference to the constitutional provisions governing the CCSA's power to act.<sup>14</sup> Many of the points Fallon raises regarding the

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polities). The fact that a particular country has made a clear constitutional choice in favor of a system of strong judicial review, does not, of course, resolve questions about the moral legitimacy of judicial review in that country. Where there has been such a clear choice, however, objections to the exercise by a court of its constitutional powers must be directed against the moral justifiability of the constitutional design, rather than the moral justifiability of particular decisions.

<sup>11</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-1795 (2005). See also John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. OF CHICAGO L. REV. 775, 777 (2001) (utilizing the same tripartite distinction in an article defending the legitimacy of the U.S. Supreme Court's decision in *Bush v. Gore* 531 US 98 (2000)).

<sup>12</sup> The main fault-line in the U.S. debate about the legitimacy of judicial review lies between those who argue that the U.S. Supreme Court's role is to give effect to the original intentions of the constitutional drafters, and those who argue that its role is to develop constitutional law in line with evolving norms of political and social morality. Clearly, that fault-line is highly likely to produce disagreement over the legal correctness of particular decisions, which may be justified according to one conception of the U.S. Supreme Court's mandate, but not the other.

<sup>13</sup> See S. AFR. CONST., 1996, *supra* note 3, secs. 2, 165(2), 167(3)(c).

<sup>14</sup> This is not to deny that the legal legitimacy of the CCSA's constitutional mandate in the end depends on the sociological acceptance of the South African Constitution as the supreme law. See Fallon *supra* note 11 at 1804.

confusion of claims of moral and legal legitimacy in the United States accordingly do not arise in South Africa.

As used here, the term “legal legitimacy” refers to the plausibility (rather than correctness) of a judicial decision or body of decisions according to conventions of legal reasoning accepted by the South African legal community. The statement that the CCSA has succeeded in establishing its legal legitimacy is thus a statement that its decisions are generally regarded as having been founded on credible interpretations of the two post-apartheid South African Constitutions. I do not attempt to establish an independent basis for this statement, but rely instead on the consensus of opinion in the academic literature on the CCSA’s record.<sup>15</sup> The statement does require some conceptual elaboration, however, in order to clarify the relationship between legal legitimacy and the other concepts considered in this essay, and also to lay the groundwork for the theoretical remarks in the next section about how constitutional courts in new democracies might go about building their legal legitimacy.

The first thing to note about the conception of legal legitimacy used here is that it sets a fairly low standard, treating as legitimate decisions that some members of the legal community might think were erroneous.<sup>16</sup> It also sets a standard that can be met to varying degrees, with decisions being more or less plausible, and thus more or less legitimate, according to the applicable conventions. The potential danger of this approach is that it makes the achievement of legal legitimacy too easy, thus rendering the various strategies that the CCSA has deployed to establish its legal legitimacy inconsequential. Any plausible techniques of legal reasoning would have crossed the threshold, and where is the interest in that? The answer to this point is to stress that legal legitimacy is a variable standard, with decisions being more or less legitimate according to their persuasiveness in legal professional terms. From this perspective, the significance of the statement that the CCSA has achieved some measure of legal legitimacy is that its record is regarded by most legal academics, not just as having passed the minimum threshold, but as having gone far beyond it. What intrigues many, mostly foreign, observers about the CCSA is the way in which it has fulfilled its constitutional mandate to give meaningful effect to the South African Constitution without, thus far, attracting significant opposition from the political branches.<sup>17</sup> This is a considerable achievement that warrants proper explanation.

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<sup>15</sup> See note 3 above.

<sup>16</sup> Cf. Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. OF CONST. STUD. 101, 115 (2003) (distinguishing the legitimacy of a legal act from its “rightness on the merits”).

<sup>17</sup> See particularly SUNSTEIN, *supra* note 3. South African commentators, in the nature of things, tend to be more grudging, welcoming rights-upholding decisions but tending always to expect more of the CCSA in doctrinal terms.

The other advantage of the conception of legal legitimacy used here is that it accepts as inevitable the fact of disagreement over the correctness of legal decisions. This approach is thus capable of accommodating, on the one hand, moderately rule-skeptical accounts of adjudication, in which legal indeterminacy is taken to be a problem for the establishment of courts' legitimacy, but not an insuperable one,<sup>18</sup> and, on the other, all but the most extreme formalist accounts. Within this range it is sensible to talk about legal legitimacy because anyone who espouses a view about the determinacy of legal rules that falls within this range is likely to accept that legal decisions can be more or less "right", and therefore more or less legitimate, according to the applicable conventions of legal reasoning. Outside of this range, talk of legal legitimacy makes little sense since legal rules are seen to be either so *indeterminate* as to be incapable of legitimating the exercise of judicial power,<sup>19</sup> or so *determinate* that the interpreter's personal views about the correctness of the decision must necessarily distort the analysis. If one had to put down clear markers, the bottom end of the range would exclude most Critical Legal Studies accounts of adjudication, whereas the top end would be maximally expressed by Ronald Dworkin's "right answer" thesis.<sup>20</sup>

Defined in this way, legal legitimacy may be distinguished, on the one hand, from sociological legitimacy and, on the other, institutional security. Sociological legitimacy, as Fallon points out, has at least three distinct meanings in the literature on judicial review: "institutional legitimacy" (by which is meant fluctuating public confidence in the court concerned), "substantive legitimacy" (public opinion about the correctness of particular decisions)' and "authoritative legitimacy" (acquiescence in, or obedience to, particular decisions, with or without a belief in their correctness).<sup>21</sup>

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<sup>18</sup> Cf. Leslie Gielow Jacobs, *Even More Honest than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Argumentation*, 1995 U. ILL. L. REV. 363, 388, 392, 396 (arguing that "principled decision making" is a necessary but not sufficient condition of legal legitimacy, and that openness about the "sources and moral visions informing constitutional decisions", consideration of "a wide range of perspectives", and "honesty" are also necessary conditions).

<sup>19</sup> See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory* 94 YALE L.J. 1 (1984) (denying that legal reasoning is sufficiently objective or neutral as to legitimate the exercise of judicial power); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (Harvard Univ. Press 1997) (arguing that liberal and conservative ideology are so written into appellate court decisions in the United States that it is possible to find legal support for divergent outcomes in any controversial case); Kenn Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (summarizing the Critical Legal Studies (CLS) position on legal indeterminacy and defending law's claim to legitimacy in the face of such accounts).

<sup>20</sup> See RONALD DWORIN, *A MATTER OF PRINCIPLE* 119-45 (Harvard Univ. Press 1985) (conceding that there will always be disagreement about the correctness of legal decisions, but nevertheless arguing that the rhetorical practice of courts and legal professionals is founded on the assumption of a single "right answer").

<sup>21</sup> See Fallon, *supra* note 11 at 1828. Cf. James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCIENCE 354 (2003) (raising some methodological concerns about the measurement of public confidence in the U.S. Supreme Court, but concluding that such measures are nevertheless useful).

Of these three meanings, the sense of sociological legitimacy most relevant to this essay is the first. My principal concern, as I have said, is to explain the record of a court that is widely admired by legal academics and which is relatively institutionally secure, but which has never enjoyed a great deal of public confidence.

Although “institutional legitimacy” is the standard term for fluctuating public confidence in a court, I will use the simpler expression “public support” here to avoid confusion with “institutional security”. In keeping with the literature, public support is understood to mean the extent to which different social groups in South Africa approve of what the CCSA is doing, and express confidence in it as an institution. These attitudes will, of course, be informed by a number of factors, including prior socialization, whether these groups think that judicial review is morally justified, and by what they think about the legitimacy of particular decisions.<sup>22</sup> The concern in this essay, however, is not the reasons for the CCSA’s lack of public support, but simply the fact of its lack of support, as evidenced by social surveys.<sup>23</sup>

“Institutional security”, in turn, is understood to mean the CCSA’s capacity to survive attacks on its independence by the political branches. Institutional security is something like “authoritative legitimacy” in Fallon’s typology in so far as it includes the political branches’ willingness to respect the CCSA’s decisions. But it is a wider concept than this, since attacks on the CCSA’s independence may include, in addition to a refusal by the political branches to obey the Court’s decisions, such things as public statements calculated to undermine the reputation of the Court, the actual or threatened reduction of its powers by constitutional amendment, and the appointment of more politically compliant judges. Whereas public support may be assessed by way of social surveys, institutional security is a function of the CCSA’s ability to withstand actual or threatened attacks on its position, and may be inferred both from the frequency of such attacks, and from a qualitative assessment of the CCSA and other political actors’ responses to them.

Thus defined, legal legitimacy, public support and institutional security are clearly interrelated, but not in any simple or predictable way. A court that achieves some measure of legal legitimacy may become more popular and thus more secure, but not necessarily. Conversely, a court may enjoy considerable public support and hence institutional security, without ever having acted legitimately in the legal sense. The precise relationship between legal legitimacy, public support and institutional security will vary from country to country. It is possible, however, to hypothesize at

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<sup>22</sup> See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights* 43 DUKE L.J. 703 (1994) (examining the psychology of public support for the U.S. Supreme Court’s assertion of the power to decide the abortion issue).

<sup>23</sup> See Gibson *et al.*, *supra* note 21 at 356 (noting that the factors that condition public support for courts are more complicated than simply whether the public approves of particular decisions).

least two basic rules about the relationship between these factors that should hold for most situations. First, it would seem to be fruitless for a constitutional court in a new democracy to pursue legal legitimacy at the expense of its institutional security, unless the price of institutional security (in the form of lost legal legitimacy) was so high that it was not worth paying. In all but the most extreme cases, in other words, it would seem to make sense for a court to trade off some legal legitimacy gains in exchange for protecting its institutional security. The extreme case, where this rule would not apply, would be one where the court's failure to decide the case in accordance with its constitutional mandate would destroy forever its reputation for legally legitimate decision-making. Such cases have proven to be very rare in the history of judicial review.<sup>24</sup>

The second basic rule about the relationship between legal legitimacy, public support and institutional security is that institutional security typically follows from public support. In most multi-party democracies, a constitutional court that enjoys public support is unlikely to face threats to its position because there would be no political advantage in making or implementing such threats. Likewise, an unpopular constitutional court may become subject to threats because this was seen to be a way of gaining political advantage. This rule does not hold for all cases, however. In certain contexts, a constitutional court may be able to afford a substantial loss in public support without becoming institutionally insecure. This is in fact the situation in South Africa, where the ANC mediates the CCSA's lack of public support in a one-party-dominant state.<sup>25</sup> Because South Africans vote overwhelmingly for the ANC for a variety of historical, ideological and ethnic reasons, lack of public support for the CCSA is unlikely to ever be translated into votes for a rival political party intent on reining in the Court or reducing its institutional powers.<sup>26</sup> In this context, it may be assumed, the CCSA's overriding concern should be to manage its relationship with

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<sup>24</sup> The best example is the Indian Supreme Court's failure to resist the executive's suspension of the writ of *habeas corpus* during the 1975-1977 emergency. But even in this case, the Indian Supreme Court has survived with its reputation largely intact. See Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 JOURNAL OF DEMOCRACY 70, 71, 79 (2007). The same may be said of the U.S. Supreme Court's decision in *Bush v. Gore* 531 US 98 (2000). For differing views on this question, see BRUCE ACKERMAN (ED.), *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Yale Univ. Press 2002) (containing essays mostly despairing of the U.S. Supreme Court's claim to legitimacy after *Bush v. Gore*) and Yoo, *supra* note 11 (defending *Bush v. Gore* against claims that the decision was legally illegitimate).

<sup>25</sup> See the various chapters pertaining to South Africa in HERMANN GILIOMEER & CHARLES SIMKINS (EDS.), *THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY* (Tafelberg 1999) and Herman Giliomeer, *South Africa's Emerging Dominant Party Regime*, 9 J. OF DEMOCRACY 124 (1998).

<sup>26</sup> It may also be that constitutional courts in new democracies are relatively immune to low public support because the political elite, even where power changes hands, regards the support of external interests (such as foreign investors) as more important. I am indebted to Patrick Lenta for this point.

the political branches.<sup>27</sup> Provided there was some reason why the political branches preferred the CCSA to take a particular decision,<sup>28</sup> or otherwise benefited from the decision, the mere fact that a decision was unpopular would not undermine the CCSA's institutional security. Even unpopular decisions that thwarted the political branches' policy choices would not necessarily be the subject of political reprisals, so long as the CCSA fulfilled some function useful to the political branches over the long run.<sup>29</sup>

In an article published in the *International Journal of Constitutional Law*, Lynne Berat argued that the CCSA "has failed to acquire institutional legitimacy".<sup>30</sup> If this statement is meant to refer to the CCSA's lack of public support, it is correct and clearly supported by the surveys on which Berat relies.<sup>31</sup> The CCSA's lack of public support should not, however, be equated to a lack of institutional security. In her article, for example, Berat cites a ministerial proposal that the CCSA should be merged with South Africa's highest court on non-constitutional matters, the Supreme Court of Appeal, as evidence of the "the government's hostility to the Constitutional Court".<sup>32</sup> In fact, the draft Constitution Fourteenth Amendment Bill, in which this proposal was eventually contained, contemplated the *expansion* of the CCSA's powers vis-à-vis the Supreme Court of Appeal.<sup>33</sup> At the same time, to be sure, the Bill did include more sinister proposals regarding executive control of court budgets and the contraction of the CCSA's powers to review the constitutionality of statutes

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<sup>27</sup> The Indian case is by all accounts exactly the opposite. In that country, the Supreme Court's institutional security flows not from careful management of its relationship with the political branches, but from high levels of public support. See Mehta, *supra* note 24 at 75

<sup>28</sup> For example, because there were significant divisions within the party elite, or between the party elite and its political support base, about the decision. In South Africa, this is true about such issues as the morality of the death penalty, abortion, and gay and lesbian equality. Although social surveys reveal generally conservative attitudes on these issues among the general population, the ANC political elite is divided between progressive and conservative factions on abortion and gay and lesbian equality. Although it supported the abolition of the death penalty, the ANC political elite was significantly at odds with its constituency on this issue. See the detailed discussion in Part 4.3.1 below.

<sup>29</sup> Cf. CHARLES BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 56-86 (Macmillan, 1960) (describing the "legitimizing" function of judicial review during the New Deal era in the United States). For a similar argument in relation to the CCSA, see Theunis Roux, *Legitimizing Transformation: Political Resource Allocation on the South African Constitutional Court*, 10 *DEMOCRATIZATION* 92 (2003) (arguing that the CCSA's legitimacy and the legitimacy of the political branches' transformation efforts are locked into a relationship of mutual dependence).

<sup>30</sup> See Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?* 3 *INT'L J. CONST. L. (I-CON)* 39, 74 (2005).

<sup>31</sup> See Gibson & Caldeira, *supra* note 4.

<sup>32</sup> Berat, *supra* note 30 at 74.

<sup>33</sup> See clause 3 of the draft Constitution Fourteenth Amendment Bill (General Notice 2023 in *Government Gazette* 28334 of 14 December 2005). An earlier draft of this bill is discussed in Carole Lewis, *Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa*, 21 *S. AFR. J. HUM. RTS.* 509 (2005).

between their enactment and coming into force.<sup>34</sup> The draft Constitution Fourteenth Amendment Bill was, however, withdrawn after public condemnation of these provisions by former judges and lawyers sympathetic to the ANC.<sup>35</sup> If anything, therefore, this incident indicates that the CCSA has the capacity to withstand such attacks.<sup>36</sup>

In summary, then, the CCSA is today widely respected for the quality of its judgments, relatively secure from political attack, but lacking in public support. The latter fact may be explained by the peculiar nature of South African politics. The CCSA's position of relative institutional security, on the other hand, is not so easily explained, especially when considered in combination with its reputation for legally credible decision-making. How has the CCSA managed to establish this reputation without sacrificing its institutional security? The next part of this essay attempts to lay a theoretical basis for answering this question by comparing a leading political science account of judicial review in new democracies with two well-known accounts of judicial review in mature democracies.

### 3. Theorizing judicial review in new democracies

According to the political science literature on courts,<sup>37</sup> the most important task facing a constitutional court in a new democracy is to ensure its own survival.<sup>38</sup> Whatever other tasks such a court may set itself, it must remain in the adjudication business long enough to achieve them. Remaining in the adjudication business is in turn thought to

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<sup>34</sup> Clauses 1 and 7(b), discussed in Catherine Albertyn, *Judicial Independence and the Constitution Fourteenth Amendment Bill*, 22 S. AFR. J. HUM. RTS. 126 (2006).

<sup>35</sup> *Id.* at 1.

<sup>36</sup> Two other factors which suggest the CCSA has a fair measure of institutional security are the fact that the ANC has not as yet tried to use its control of the judicial selection process to appoint more politically compliant judges (see Part 4.1 below), and the fact that none of the CCSA's judgments has thus far been disobeyed.

<sup>37</sup> There is a long political science tradition of studying courts and judicial behavior in the United States. The field-defining article is Martin Shapiro, *Political Jurisprudence* in MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION 19 (Oxford Univ. Press 2002) (first published in 52 KENTUCKY L.J. 294 (1964)). Another oft-cited article is Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. OF PUBLIC LAW 279 (1957).

<sup>38</sup> See for example Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 88, 92 (1996); Lee Epstein, Olga Shvetsova & Jack Knight, *The Role of Constitutional Courts in the Establishment of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 128, 130-131 (2001); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (Cambridge Univ. Press 2003); SIRI GLOPPEN, ROBERTO GARGARELLA & ELIN SKAAR (EDS), DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES (Frank Cass 2003).

depend on a constitutional court's capacity to build and maintain its legitimacy. An illegitimate constitutional court, political scientists postulate, is vulnerable to control by the political branches, and, in the worst-case scenario, to being closed down.<sup>39</sup>

The political science sense of the term “legitimacy”, of course, is not the same as the legal sense. When political scientists talk of constitutional courts building their legitimacy what they typically mean is some combination of public support and institutional security. Certain studies, for example, attempt to measure legitimacy by conducting social surveys of public attitudes towards the court in question, with the court seen as more or less legitimate according to the extent to which different social groups approve of what it is doing.<sup>40</sup> To be sure, legitimacy as used in these studies is not equivalent to public support for a *particular* decision, since it is integral to these accounts that a court should be able to build a “store” of legitimacy, and then use this store to help it survive popular disapproval of particular decisions.<sup>41</sup> Legitimacy in these accounts is nevertheless always in the eye of the beholder, with the beholder's view conditioned not by a professionally well-informed understanding of the court's record, but by some or other (usually intuited) moral theory of the way the court ought to behave.

In addition to their focus on this form of legitimacy, political science accounts make two assumptions about the behavior of constitutional courts in new democracies that legal theorists may find hard to accept. First, these accounts assume that such courts are unified political actors – that the judges on these courts, despite their differences in background, temperament and ideology, are capable of acting in concert to promote the interests of their court as an institution.<sup>42</sup> Second, political science accounts assume that constitutional courts in new democracies are capable of pursuing a determinate political strategy over time, whatever the imperatives driving the resolution of particular cases may be.

For legal theorists, neither of these assumptions is self-evident. Constitutional courts may sometimes be described as engaging in coordinated action,<sup>43</sup> but more often than not are seen to be divided into different ideological or doctrinal camps, with no single, coherent strategy, and certainly none that they are capable of pursuing across a range of decisions in different areas of law. Nevertheless, there are some reasons to think that these assumptions may not be entirely alien to legal theory.

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<sup>39</sup> As happened to the Russian Constitutional Court in 1993 under President Yeltsin.

<sup>40</sup> See Gibson & Caldeira, *supra* note 4 at 2 (defining legitimacy as “moral authority” in the eyes of social groups); Gibson, *supra* note 4 *passim* (defining legitimacy as “institutional loyalty”).

<sup>41</sup> Gibson & Caldeira, *supra* note 4 at 5.

<sup>42</sup> See SHAPIRO & STONE SWEET, *supra* note 37 at 21 (“courts as political agencies”).

<sup>43</sup> In the United States, for example, the appointment of a new Chief Justice is generally taken to signal a new era in the life of the Supreme Court.

Constitutional courts in both new and mature democracies are understood by lawyers as having to adhere to the law/politics distinction as a condition of their legitimacy. Judges who decide cases on nakedly political grounds are thus thought to bring the legal profession into disrepute, and are subject to harsh criticism in the law journals for failing to apply the law.<sup>44</sup> To this extent, the political science account and the legal-theoretical account of the imperatives driving constitutional courts in new democracies may overlap, since a court that loses the respect of its professional community is more vulnerable to political reprisals than one that does not.<sup>45</sup> The difference between the two fields is really one of emphasis, with political science departing from the premise that judicial review is inherently political, and legal theory striving to show that it need not be.<sup>46</sup>

The other conceptual leap required of legal theory in order to engage with the political science account is a willingness to view judges as being capable of collective action *over time*. In mature democracies, this leap may be hard to make since there seems to be little reason why judges serving in courts whose institutional security is already established would need to behave in this way. In new democracies, however, where constitutional courts' institutional security is by definition not yet established, the notion that judges may decide cases with a view to their court's long-term safety from political attack does not seem so far-fetched. In this setting, constitutional judges cannot draw on a long history of mutual respect between the three branches. Instead, they face the difficult task of having to maintain their independence even as they exercise their controversial powers of judicial review.

Accepting, then, the plausibility (if not the correctness) of the political science account, how might a constitutional court in a new democracy go about building its legal legitimacy without at the same time endangering its institutional security? One particular version of the political science account suggests that such courts should simply behave as any other political actor might behave, making strategic trade-offs between the interests they wish to assert and the consequences of asserting those interests more forcefully than the balance of political power allows.<sup>47</sup> From this perspective, what a constitutional court in a new democracy needs to do is to ensure

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<sup>44</sup> And, of course, also to criticism by their fellow judges.

<sup>45</sup> Cf. SHAPIRO & STONE SWEET, *supra* note 37 at 175 ("The epistemic community of law has an enormous self-interest in defending constitutional courts, most basically in proclaiming their courtness").

<sup>46</sup> For a survey of and engagement with Anglo-American legal theory on this issue, see RONALD DWORKIN, *A MATTER OF PRINCIPLE*, 9-71 (Harvard Univ. Press 1985). Dworkin is himself, of course, the legal theorist who has perhaps striven hardest to shown that constitutional adjudication need not be political in the political science sense.

<sup>47</sup> Epstein *et al.*, *supra* note 38.

that its decisions fall within the political branches' "tolerance interval".<sup>48</sup> For every decision, this argument runs, a constitutional court's preferred policy choice may be mapped against the range of outcomes that the political branches would be prepared to tolerate. Provided that the court tailors its decision to fall within this range, it will be respected.<sup>49</sup> Over time, by ensuring that every decision it makes falls within the tolerance interval for each case, a constitutional court may strengthen its institutional security to the point where it has a wide discretion to decide cases in accordance with its policy preferences.<sup>50</sup>

Although this version of the political science account might accord with some legal-theoretical accounts of judicial review,<sup>51</sup> it presents two insuperable problems for liberal legal theory. First, it ignores the role of legal doctrine in narrowing the range of policy preferences that a constitutional court in a new democracy may seek to assert. For liberal legal theorists, as noted in Part 2, an adequate description of the behavior of such courts must take into account the way legal doctrine constrains a court's capacity to act. Second, this version of the political science account dismisses out of hand the possibility that a constitutional court may have no policy preferences in relation to a particular decision. Of course, any decision by a constitutional court expresses a policy preference in the sense that it distributes benefits and burdens between competing interest groups.<sup>52</sup> It is important to most liberal legal theorists, however, that this fact should be seen as a mere side effect of politically "neutral" adjudication according to law.<sup>53</sup> There is a vital distinction, these theorists would argue, between the incidental effect of a decision and the "naked" assertion by a court of its policy preferences.<sup>54</sup> A constitutional court that allowed its policy preferences

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<sup>48</sup> *Id.* at 128-129.

<sup>49</sup> *Id.* at 131.

<sup>50</sup> *Id.*

<sup>51</sup> See the discussion of legal legitimacy in Part 2 above.

<sup>52</sup> Cf DWORKIN, A MATTER OF PRINCIPLE, *supra* note 46 at 9.

<sup>53</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (accepting that constitutional adjudication deals with political questions but arguing that "what is crucial ... is not the nature of the question but the nature of the answer that may validly be given by the courts"); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L.J. 1 (1972) (applying Wechsler's concept of neutral principles to the U.S. Supreme Court's decisions on freedom of speech); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978) (defending Wechsler's views against subsequent criticism). The denial of the possibility of neutral principles is, of course, the essence of the CLS critique of liberal legalism. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (arguing that the appeal to neutral principles assumes the possibility of consistent legal meanings that, if true, would render the appeal to neutral principles unnecessary as a legitimating device).

<sup>54</sup> See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 124 (Gerald Duckworth & Co. 1977).

to determine the outcome of a case would not be acting like a court at all, quite apart from the political repercussions that might follow from this sort of behavior.<sup>55</sup>

This version of the political science account is thus unlikely to persuade many liberal legal theorists. This does not mean, however, that liberal legal theory should not try to develop its own account. A convincing explanation of how constitutional courts in new democracies may (and in fact do) establish their legal legitimacy would be of immense value, not only to those interested in the behavior of constitutional courts in new democracies, but also to theorists working on the legitimacy of judicial review in established democracies.

Two main possibilities suggest themselves.<sup>56</sup> The first is that a constitutional court in a new democracy should adhere to the law/politics distinction in every case. By acting as a “forum of principle”<sup>57</sup> in this way, such a court would be able to build a reputation for politically neutral adjudication. Because of the nature of the questions presented to it, some of the decisions it took, particularly in the early years of its existence, would no doubt be seen as political, and might therefore expose the court to attempts by the political branches to rein it in or close it down. Over time, however, by steadfastly adhering to principle, these threats to its institutional security would gradually decline.

The leading advocate of this approach to constitutional adjudication in mature democracies is, of course, Ronald Dworkin. From his early engagement with Hartian legal positivism,<sup>58</sup> to his later focus on the work of the US Supreme Court,<sup>59</sup> Dworkin has been concerned to show how judges, notwithstanding the open texture of legal rules and the seeming need to exercise discretion in hard cases, may remain faithful to the ideal of principled adjudication. The essence of his argument is that, when

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<sup>55</sup> This conception of the court’s role corresponds to the plurality view in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866 (1992) (locating the U.S. Supreme Court’s legitimacy in its ability to make “legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation”). See Tyler & Mitchell, *supra* note 22 (finding empirical support for the Court’s conception of the factors bearing on its institutional legitimacy).

<sup>56</sup> I do not explore the implications of the claims of legal positivism for my research question in this essay, mainly because legal positivism lacks a theory of constitutional adjudication. I also do not take seriously the possibility that, by deferring to the intentions of the constitutional drafters or, when the constitutional text is unclear, the preferences of the political branches, a constitutional court in a new democracy may build its legal legitimacy. The weaknesses of intentionalism are well known. See, for example, RONALD DWORKIN, *LAW’S EMPIRE* 359-369 (Harvard Univ. Press 1986).) The problem with the second, “passivist” approach is that it permanently relegates the court to an institutional position of no consequence. *Id.* at 369-379.

<sup>57</sup> The term was coined by DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 46 at 33. See also Wechsler, *supra* note 53 at 15-16.

<sup>58</sup> See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 54; DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 46; DWORKIN, *LAW’S EMPIRE*, *supra* note 56.

<sup>59</sup> DWORKIN, *FREEDOM’S LAW*, *supra* note 9.

presented with a hard case in which the legal materials appear to provide no obvious answer, judges should work out the single “right answer”<sup>60</sup> to the case by first identifying and then weighing the contending legal principles.<sup>61</sup> The weight to be accorded to each principle is in turn something that judges should deduce from the political theory that best interprets the “moral convictions” and institutions of the community in which they are working.<sup>62</sup>

Although Dworkin himself has not considered the implications of his theory for constitutional courts in new democracies,<sup>63</sup> it is fair to assume that he would argue that it provides the best prescription for the way such courts should go about building their legal legitimacy. By grounding their decisions in the political theory that best interprets their community’s moral convictions and institutions, Dworkin would presumably argue, constitutional courts in new democracies would be able to counter any allegations of political bias, and in this way resist all but the most determined threats to their institutional security.

Ranged against this approach are those who would advise constitutional courts in new democracies to temper principle with pragmatism.<sup>64</sup> On this view, judges should not pursue principle at all costs, but rather take into account the likely consequence of every case that they decide, and then tailor their decision to promote the interests of their community.<sup>65</sup> The leading proponent of this approach is Richard Posner, whose reading of the U.S. Supreme Court’s decision in *Bush v. Gore*<sup>66</sup> as having been justified by the need to avert a constitutional crisis has attracted much attention.<sup>67</sup>

Like Dworkin’s theory, Posner’s arguments are not directed at courts in new democracies, and therefore require some extrapolation. To operate as a prescription for how constitutional courts in new democracies should behave one would have to graft onto Posner’s account the notion that the establishment of its institutional

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<sup>60</sup> DWORKIN, A MATTER OF PRINCIPLE, *supra* note 46 at 119-45.

<sup>61</sup> See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 54 at 105-30.

<sup>62</sup> *Id.*

<sup>63</sup> Ronald Dworkin has spoken approvingly of the CCSA’s socio-economic rights jurisprudence (Ronald Dworkin, *Response to Overseas Commentators* 1 INT’L J. CONST. L. (I-CON) 651, 652-653 (2003)), but I am unaware of any article or book in which he has considered the situation of constitutional courts in new democracies in any detail.

<sup>64</sup> Dworkin does not deny the role of pragmatism in his theory of adjudication, but limits judges’ pragmatic discretion to compromising on principle where this is required to achieve the support of other judges (see DWORKIN, LAW’S EMPIRE, *supra* note 56 at 380). On the whole, as his sometimes-acerbic exchanges with Richard Posner indicate, Dworkin’s theory is antithetical to pragmatism, which he pejoratively associates with activism (*id.* at 378).

<sup>65</sup> Cf. Dworkin’s definition of legal pragmatism in LAW’S EMPIRE, *supra* note 56 at 147.

<sup>66</sup> 531 US 98 (2000).

<sup>67</sup> RICHARD POSNER, LAW, PRAGMATISM AND DEMOCRACY 322-356 (Harvard Univ. Press 2005).

security might be something that a constitutional court in a new democracy could pragmatically pursue. In every case that comes before it, this revised account would hold, a constitutional court in a new democracy should assume that the interests of its community would be best served by the decision that most enhanced its institutional security. There would be no point, according to this approach, in attempting to give a principled answer to a case if doing so undermined the court's ability to continue functioning. Rather, a constitutional court in a new democracy should expand its capacity to give principled decisions over time by calibrating the level of principle in each decision to the likelihood that the decision will be accepted, both by the public and by the political branches.

Although this revised pragmatic account removes some of the flexibility essential to legal pragmatism (the judge's freedom to determine how the community's interest may best be served) it also resolves one of legal pragmatism's persistent problems (the fact that this freedom may be wielded by different judges for cross-cutting purposes). Instead of the make-it-up-as-you-go-along brand of pragmatism Posner advocates, constitutional judges in new democracies would be advised to see the security of their court from political attack as being closely connected to the success of their community's constitutional project. Since the success of that project could reasonably be assumed to be in the community's interest, the court would have a good, pragmatic reason in every case to favor a decision that enhanced its institutional security.

Revised in this way, the pragmatic account comes close to the political science account of the imperatives driving constitutional adjudication in new democracies, with two differences. First, the revised pragmatic account would need to accept that a constitutional court in a new democracy must work within the constraints of legal doctrine. Whatever the outcomes it was trying to achieve, a pragmatic constitutional court would have to pursue those outcomes as a court of law, meaning that it would have to respect the conventions of legal reasoning applicable to the legal community in which it was operating. Second, the purpose behind a court's building its institutional security, for the revised pragmatic account, would not be to enable the court to assert its policy preferences with ever-greater freedom. Rather, the purpose would be to enhance the court's capacity to decide cases in furtherance of the constitutional project, so that, with time, the court could promote that project in even the most difficult case.

In an intriguing passage towards the end of *Law's Empire* Dworkin appears to make some concession to the practical limits on principled constitutional adjudication when remarking that:

An actual justice must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices *and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.*<sup>68</sup>

If one understands the reference in this passage to “the spirit of a community of principle” as meaning something like the constitutional project that the revised pragmatic account would advise judges to promote, the difference between the two approaches narrows considerably. The precise import of Dworkin’s concession is that principled decision-making is an ideal to which individual judges should aspire, but one which may be compromised for two reasons: (1) to convince a sufficient number of the judge’s colleagues to support a weaker version of the principle at stake; and (2) to make the decision “more acceptable to the community”. The thinking behind the first reason is evidently that a weaker principled decision by a majority of judges may on occasion be better, *strategically speaking*, than a stronger principled decision by a judicial minority. The second reason contemplates that a judge, in compromising on principle in order to win the support of fellow judges, may be additionally motivated by the thought that the community of which the judge is a part may not be capable of accepting the more strongly principled decision. Rather than risking rejection by that community, Dworkin suggests, a judge may prefer to “adjust” her reasons for decision in order to ensure its acceptance by the community, and by this device, the continued functioning of her community as a community of principle.

Dworkin does not go on to explain exactly what he means by the term “adjust” or the circumstances in which compromises on principle would be justified in order to keep the ideal of a community of principle alive. Self-evidently, any adjustment of a principle could not extend to its abandonment, since that would do violence to the term and make the last part of the passage, in which the community of principle is assumed to continue, contradict the first. More than this, however, we cannot say. In any case, Dworkin’s argument, as noted earlier, is not directed at constitutional courts in new democracies. But what if it were? What sorts of adjustments and what sorts of circumstances could one envisage? Imagine that a case came before a court that was plainly controversial, either because the principled outcome contended for by one of the parties contradicted the political branches’ express policy preferences or because a significant section of the population was known to be opposed to it. In such a case, a court composed of judges who were individually committed to deciding cases on principle might find itself weighing the consequences of deciding the case on

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<sup>68</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note 56 at 380-381, emphasis added.

principle against the long-term institutional costs of such a decision. Possessed of certain knowledge that a case like this, if decided on principle, would bring the court into institution-threatening conflict with the political branches, some of the judges might decide to compromise on principle, or to hand down a decision less forceful as a matter of principle than it otherwise might have been. If pressed, the judges who joined such a decision might justify their behavior as being in the overall interests of the constitutional project, arguing that the success of that project depended on their preparedness to make pragmatic compromises of this sort. “We decided the case this way”, one might imagine them saying, “in order to survive to fight another day.”

Of course, the decision whether or not to compromise on principle in a particular case would depend on a very difficult judgment call. Some highly charged cases would present questions of principle that could not be avoided, even if it were to mean the immediate closing down of the court, or the replacement of its judges by more compliant ones. One could think here of a constitutional challenge to conduct on the part of the political branches that went to the very heart of the constitutional project. Compromising on principle in such a case would be self-defeating for a constitutional court, since it could never hope to recover its reputation for principled adjudication, and in any case the constitutional project would have no point if it required a court to compromise on principle in such cases. Between this type of case, however, and the many routine cases that constitutional courts in new democracies decide, there would be other less clear-cut cases that a court might think were not worth deciding on principle for fear of the consequences. Examples here might be a difficult case involving the conduct of foreign relations or the structure of the electoral system. In respect of these cases the court might decide that a tactical retreat from principle was required, thus avoiding confrontation with the political branches and permitting the court to build its legal legitimacy through principled adjudication in other, less controversial cases.

In addition to this type of pragmatic behavior in controversial cases, one could imagine a constitutional court in a new democracy developing its jurisprudence in routine cases in such a way as to create greater discretion for itself. For example, a court might devise, in the first case that came to it under a particular section of the Bill of Rights, a context-sensitive review standard that enhanced its ability to decide later cases on their particular facts. Behavior of this sort would also indicate a pragmatic attitude on the part of the court, since the development of doctrinal rules calculated to maximize the court’s discretion fits with legal pragmatism’s preference for consequence-sensitive decision-making. Similarly, a court, aware of the potential implications of an expansive, principled decision for later cases, might develop a collective judicial ethic of saying only as much as necessary to dispose of a case. Cass Sunstein has described this kind of strategy as amounting to the striking of

“incompletely theorized agreements”.<sup>69</sup> According to this understanding, the output of a constitutional court in terms of principle is necessarily less than the sum of its parts since principled judges do not always agree, either among themselves or with competing principled views in their community. If true, the record of a constitutional court in a new democracy should resemble less the triumphant march of a forum of principle than the cautious output of a group of judges collectively sensitive to the need for a certain unanimity of purpose.

The remainder of this essay argues that something like this mix of principle and pragmatism provides the best explanation for the CCSA’s record to date. In three politically controversial cases, the CCSA can be shown to have compromised on principle in order to avoid confrontation with the political branches. As a proportion of its record the number of these decisions is very low, and there have been at least as many other controversial cases in which the CCSA did not compromise on principle. Nevertheless, the three decisions should not be dismissed as aberrations – as mistakes rather than pragmatic compromises – for two reasons: first, because in two of these cases a judge writing for the minority set out principled arguments that the majority was at liberty to accept, but chose for strategic reasons not to; and, second, because in numerous other, less controversial cases, the CCSA can be seen to have compromised on principle in the other sense just discussed. In these cases, the CCSA’s pragmatism manifests itself in the form of doctrinal choices calculated to maximize its discretion to decide cases on an all-things-considered basis. Another recurrent theme has been the CCSA’s use of rhetoric, both as a substitute for moral reasoning, and as a way of aligning itself with the ANC’s social transformation policies. Along with the cases in which the CCSA can be shown to have compromised on principle, these features of its record may be seen as pragmatic strategies aimed at safeguarding its institutional security.

#### **4. Assessing the record of the CCSA**

Since its establishment in 1994, and the hearing of its first case in 1995, the CCSA has handed down approximately 300 decisions.<sup>70</sup> It is impossible to analyze all of these decisions here. Instead, what this part does is to offer an interpretation of some of the major decisions and the more important trends. Before doing so, it may be helpful to say something about the jurisdictional competence, composition, method of

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<sup>69</sup> See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (Oxford Univ. Press 1996). For an application of Sunstein’s work to the record of the CCSA, see Iain Currie, *Judicious Avoidance*, 15 S. AFR. J. HUM. RTS. 138 (1999).

<sup>70</sup> An up-to-date list of the CCSA’s decisions can be found at [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za).

appointment and caseload of the CCSA, and also its separation of powers doctrine. Taken together, these factors constitute the narrow institutional context in which the CCSA has been operating, and may thus assist in supplementing the account of the broader political context given in Part 2.

#### **4.1 Competence, composition, method of appointment and caseload**

The CCSA is a specialized constitutional court on the German model, with some unique features.<sup>71</sup> Its jurisdiction is limited to constitutional matters, and the CCSA makes the final decision whether a matter is constitutional or not.<sup>72</sup> This institutional feature is significant for the argument of this essay because it means that the CCSA, unlike courts of mixed jurisdiction, is not able to build its legal legitimacy in non-constitutional matters – even when deciding routine matters, the CCSA is declaring constitutional law that may have application in later, more politically controversial cases. If the theoretical reflections in the previous part are sound, this means that the CCSA must be alert in every case it decides to the potential impact of its decision on its institutional security.<sup>73</sup>

The CCSA is composed of 11 judges appointed for a non-renewable 12-year term.<sup>74</sup> The racial and gender composition of the CCSA bench was at first not very representative of South Africa's population, with six white male judges,<sup>75</sup> one white female,<sup>76</sup> one black female,<sup>77</sup> and three black males.<sup>78</sup> During this initial period, the CCSA's public support depended on two factors: (1) the fact that it was a newly

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<sup>71</sup> See Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT'L J. CONST. L. (I-CON) 44, 50-54 (2007) (describing the German Federal Constitutional Court's assertion of its jurisdiction). The South African model is a hybrid one, in as much as the lower courts have limited powers of judicial review, subject to appeal and confirmation by the CCSA. See S. AFR. CONST., 1996 *supra* note 3 at secs 169, 172. Lower courts are required to decide ordinary civil and criminal cases without reaching a constitutional issue if possible. See CURRIE & DE WAAL, *supra* note 3 at 24-25 (citing *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, 2000 (2) SALR 1 (CC) at para. 21).

<sup>72</sup> S. AFR. CONST., 1996, *supra* note 3 at sec. 167(3).

<sup>73</sup> This is all the more so in light of the formalist character of South African legal culture, which requires strict adherence to precedent, even on the part of the CCSA. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998).

<sup>74</sup> S. AFR. CONST., 1996, *supra* note 3 at sec. 176(1). Judges who turn 70 before the end of their 12-year term must retire at this point. Some of the judges appointed under the 1993 Constitution have sat for more than 12 years in accordance with sec. 4 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, which provides for 15 years' "active service" and a mandatory retirement age of 75 years. Section 176(1) of the 1996 Constitution expressly allows for the statutory extension of the term of office of a CCSA judge.

<sup>75</sup> President (later Chief Justice) Chaskalson and Justices Ackermann, Didcott, Goldstone, Kriegler and Sachs.

<sup>76</sup> Justice O'Regan.

<sup>77</sup> Justice Mokgoro.

<sup>78</sup> Deputy President Mahomed and Justices Langa and Madala.

created court, whose reputation was largely unaffected by the black majority's poor regard for the apartheid judiciary; and (2) the fact that many of the judges had been prominent human rights lawyers or apartheid-era judges with a reputation for liberal activism. Over the last twelve years, as a result of death and retirement, there has been a fairly high turnover rate on the CCSA bench, and the racial (but not gender) composition of the Court has been completely reversed, with the current bench consisting of six black males,<sup>79</sup> two black females,<sup>80</sup> one white female<sup>81</sup> and two white men.<sup>82</sup> Although a prior commitment to human rights is still a recommendation for appointment, the CCSA is today composed of fewer judges who can boast a long career at the bar or on the lower courts. There is some anecdotal evidence to suggest that this change in the composition of the bench has undermined the CCSA's legitimacy in the eyes of practising lawyers.<sup>83</sup> This issue may also be behind the resistance of some of the judges of the Supreme Court of Appeal, South Africa's highest court on non-constitutional matters, to the proposal that the CCSA be given final appellate powers in respect of all matters.<sup>84</sup>

The CCSA appointments process is inevitably political, with the Chief Justice and the Deputy Chief Justice appointed by the President after consultation with the leaders of the political parties represented in the lower house and a nominally independent, but in reality ANC-dominated, Judicial Service Commission (JSC).<sup>85</sup> Other members of the CCSA are appointed by the President from a list of names supplied by the JSC.<sup>86</sup> To date, all the members of the CCSA have been either former

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<sup>79</sup> Chief Justice Langa, Deputy Chief Justice Moseneke and Justices Madala, Ngcobo, Skweyiya and Yacoob.

<sup>80</sup> Justices Mokgoro and Nkabinde.

<sup>81</sup> Justice O'Regan.

<sup>82</sup> Justices Sachs and Van der Westhuizen.

<sup>83</sup> At a conference I attended in Johannesburg in 2004, for example, the legal practitioners present (both advocates and attorneys) apparently approved a distinction drawn by one speaker (a former law professor and current member of the Johannesburg Bar) between "hard law" and "soft law", with the latter being equated to constitutionally-inspired, and therefore vague, judicial decision-making.

<sup>84</sup> *Cf.* Lewis, *supra* note 33 (arguing that, if the CCSA is to become an apex court with final appellate powers in respect of all matters, the method of appointment of its judges will have to be changed).

<sup>85</sup> S. AFR. CONST., 1996, *supra* note 3 at sec. 174(3). Section 174(3) provides for 20 members of the JSC, of whom seven may be ANC parliamentarians (three from the lower and four from the upper house) and four direct Presidential appointees. The other clearly ANC-aligned member is the Cabinet member responsible for the administration of justice. In addition, the President appoints the two members of the attorneys' profession and the two members of the advocates' profession nominated by their respective professional bodies. After a reasonable start, the JSC has been widely criticized in the South African media for the sometimes sexist nature of the questions put to candidates and for its failure properly to sanction the Judge President of the Cape High Court, Justice Hlophe, for receiving payments from a private company. Before his interest in the company became known, Justice Hlophe failed to recuse himself from an application by the company for permission to sue a fellow judge.

<sup>86</sup> *Id.* at sec. 174(4).

members of the ANC or people broadly sympathetic to the ANC government's social transformation policies.<sup>87</sup> Far from being a weakness, this fact has probably contributed to the CCSA's capacity to assert its independence, since a Court composed of minority-party-aligned judges would have had little prospect of saying "no" to the executive and "making it stick".<sup>88</sup>

The CCSA has a comparatively light caseload, handing down on average 25 decisions per year from a docket that has never been larger than 100 cases in any one year.<sup>89</sup> This institutional feature is both a strength and a weakness. On the one hand, it has allowed the CCSA to pay great attention to the rhetorical construction of its judgments and to foreign authority. These factors have probably contributed to its favorable reputation among legal academics. On the other hand, the CCSA's light caseload hinders the fulfillment of its mandate to subject the entire South African legal system to the constitutional normative order.<sup>90</sup> With so few cases to decide, the CCSA sometimes has only one opportunity every few years to infuse a particular area of law with the values underlying the Constitution.

#### **4.2 The CCSA's approach to the separation of powers**

The CCSA's formal concern for the impact of its decisions on the political branches is expressed through its separation of powers doctrine, including its associated doctrines of judicial restraint and non-justiciability.<sup>91</sup> Anyone familiar with the CCSA's record

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<sup>87</sup> In *President of the Republic of South Africa v. South African Rugby Football Union*, 1999 (4) SALR 147 (CC), five members of the CCSA were asked to recuse themselves on the grounds that there was a "reasonable apprehension" that they would be biased. The case involved, in part, the credibility as a witness of former President Nelson Mandela. The Court unanimously rejected the application for the five judges' recusal, holding that it would be "surprising", given South Africa's history, "if many candidates for appointment to the bench had not been active in or publicly sympathetic towards the liberation struggle", but that this did not mean that these judges were incapable of adjudicating matters involving the ANC impartially. *Id.* at para. 75. For a discussion of this judgment, and of the CCSA's pragmatic approach in politically controversial cases generally, see Hugh Corder, *Judicial Authority in a Changing South Africa*, 24 *LEGAL STUD.* 253 (2004).

<sup>88</sup> See Owen Fiss, *The Limits of Judicial Independence*, 25 *U. MIAMI INTER-AMERICAN L. REV.* 58 (1993); C. M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 *AM. J. COMP. L.* 605 (1996).

<sup>89</sup> From 1996, the *South African Journal on Human Rights* has published annual statistics on the previous year's CCSA decisions. From 2006 it has also published statistics on cases in which no decision was delivered.

<sup>90</sup> See *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa*, 2000 (2) SALR 674 (CC) (holding that the doctrine of legality is an implied rule of constitutional law, and therefore that there is only one normative legal order in South Africa); *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC) para. 56 (holding that the Constitution embodies an "objective, normative value system" that permeates the entire South African legal system). These decisions are illuminatingly discussed in Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, in WOOLMAN *ET AL.* (EDS), *supra* note 3 at ch. 11.

<sup>91</sup> See John Daley, *Defining Judicial Restraint*, in TOM CAMPBELL & JEFFREY GOLDSWORTHY (EDS), *JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM* 279 (Ashgate 2000).

will know that it is scattered with frequent references to the need for the Court to stay within the limits of its constitutionally mandated powers.<sup>92</sup> In a formalist account, analysis of these doctrines would be all that needs to be said about the way the CCSA has built its legal legitimacy. For proponents of this approach, principle never needs to be compromised because consideration of the likely impact of the Court's decision on the political branches is a legally relevant consideration, and thus all decisions are in theory capable of principled resolution.

The problem with the formalist approach is that it does not explain all of the decisions in which the separation of powers doctrine is invoked, or indeed the way in which the doctrine is on occasion not invoked when past decisions suggest that it should have been. There is also a contradiction at the heart of the doctrine that defies formalist rationalization. According to the separation of powers doctrine, a court should not intrude into areas reserved for the political branches unless such intrusion is necessarily entailed by the court's duty to interpret and enforce the Constitution. Since any case, however, involving an alleged violation of the Constitution is a case that requires the court to interpret and, if necessary, enforce the Constitution, this rationale provides no principled restraint on the court's decision-making powers.<sup>93</sup> Rather, as Alexander Bickel argued in relation to the U.S. Supreme Court, the separation of powers doctrine is best understood as a prudential doctrine invoked on an *ad hoc* basis as a way of managing the court's relationship with the political branches.<sup>94</sup> As such, it is no more determinate than any other legal doctrine, and its application in controversial cases will be the subject of reasonable disagreement. If this point is conceded, the CCSA's record becomes open to explanation in terms of the extrinsic, non-legal factors that may have influenced its decisions, including the strategic issues considered here.

In what follows, I do not offer a separate discussion of the CCSA's use of the separation of powers doctrine, but instead treat the application of this doctrine as a cross-cutting issue affecting the analysis of all the cases. The doctrine is clearly implicated, for example, in any decision on the part of the CCSA to adopt a deferential standard of review, or to characterize a particular part of a case as non-justiciable. My concern, however, is not with the legal merits of such decisions, but with the factors that may have driven the CCSA to manage its relationship with the political branches in this way. My sub-hypothesis is that in cases where the only thing that stands between the CCSA and a decision of principle is public opinion, it

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<sup>92</sup> For an analysis of these cases, see Patrick Lenta, *Judicial Restraint and Overreach*, 20 S. AFR. J. HUM. RTS. 544 (2004).

<sup>93</sup> Rights violations, for example, must be effectively remedied, even where this has budgetary implications. See Treatment Action Campaign, *supra* note 7 at para. 38.

<sup>94</sup> BICKEL, *supra* note 9.

will tend to ignore the separation of powers doctrine as a restraint on principle, provided that the political branches are able to insulate it from the repercussions of its decision. In cases where the CCSA's relationship with the political branches is directly implicated, on the other hand, one should expect the Court to deploy the separation of powers doctrine, along with other legal devices, as a way of adjusting the level of principle in the decision to the need to protect its institutional security. I begin my account with a discussion of the control group of cases, i.e. those cases where the principled decision ran counter to public opinion, but where the CCSA was insulated by the political branches from the immediate repercussions of its decision.

### **4.3 Analysis of the cases**

#### **4.3.1 Cases where decision of principle ran counter to public opinion, but where CCSA insulated from repercussions of its decision**

The record of the CCSA contains a number of decisions that bear out the supposition, canvassed in Part 2, that a constitutional court in a new democracy should be able to ignore public opinion as a limit on principle in certain circumstances. The case that best illustrates the point is the CCSA's decision on the constitutionality of the death penalty, *S v. Makwanyane*.<sup>95</sup> The use of the death penalty against political criminals, and its disproportionate use in respect of black offenders in ordinary criminal matters, was one of the most grievous of many apartheid evils. There was thus a strong view in the ANC political elite at the time of the transition to democracy that the death penalty should be abolished.<sup>96</sup> At the same time, however, South Africa's high rate of violent crime and generally conservative views on the moral justifiability of capital punishment meant that the vast majority of South Africans, including the ANC's own political support base, favored the retention of the death penalty. In the result, the 1993 South African Constitution did not contain an express abolition clause along the lines of article 102 of the German Basic Law. Instead, it included strong rights to life<sup>97</sup> and to freedom from cruel, inhuman or degrading punishment.<sup>98</sup> The inclusion of these rights undoubtedly weighted the outcome in favor of abolition, but left the actual decision on the constitutionality of the death penalty to the CCSA to make.<sup>99</sup>

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<sup>95</sup> 1995 (3) SALR 391 (CC). This was the first case heard by the CCSA and the second to be decided.

<sup>96</sup> See RICHARD SPITZ WITH MATHEW CHASKALSON, *THE POLITICS OF TRANSITION* 331 (Witwatersrand Univ. Press 2000) (noting that "[t]he ANC's wish for capital punishment to be abolished was well known, and is clearly stated in its draft Bill of Rights").

<sup>97</sup> S. AFR. CONST., 1993 sec. 9.

<sup>98</sup> S. AFR. CONST., 1993 sec. 11(2).

<sup>99</sup> See *Makwanyane*, *supra* note 95 at paras 20-25 (describing the 1993 Constitution's failure to deal with the issue of capital punishment as "not accidental" and locating the CCSA's power to decide the issue in the delegation of it to the Court to decide). See Heinz Klug, *Striking Down Death*, 12 S. AFR. J. HUM. RTS. 61, 65 (1996) (describing the delegation of so important an issue to the CCSA as

Although all of the judges in *Makwanyane* wrote separate concurring opinions, the opinion of Justice Chaskalson, the President of the CCSA (as the position of Chief Justice was then known), is the most significant for present purposes, not just because it was the main judgment, but also because it contained the leading discussion of the relevance of public opinion.<sup>100</sup> In argument, the Attorney-General had contended that statistical evidence showing strong public support for the death penalty in South Africa should have some bearing on the CCSA's interpretation of the constitutional rights at issue. Justice Chaskalson rejected this contention in strident terms:

Public opinion may have some relevance to the inquiry, 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 Constitution.<sup>101</sup>

For South African lawyers, steeped in a formalist legal culture, this passage would not have been all that noteworthy as a statement of constitutional law doctrine. Of course the CCSA, having been tasked with the duty of enforcing constitutional rights, should do so without regard to extrinsic, non-legal considerations like public opinion. From the perspective of the CCSA's interest in the preservation of its institutional security, however, and the often halting efforts of constitutional courts in new democracies to win public support for their role, this statement is remarkable for the forcefulness of its rejection of the relevance of public opinion to the case. How could the CCSA afford to be so cavalier about the loss of public support that its decision to abolish the death penalty would surely trigger?<sup>102</sup>

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“extraordinary” and reflective of “a failure to understand the delicate institutional role the Court will find itself in”).

<sup>100</sup> See *Makwanyane*, *supra* note 95 at paras 87-89. Other judgments in this case that largely followed Justice Chaskalson's lead on the relevance of public opinion include Justice Didcott's judgment (at para. 188) and Acting Justice Kentridge's somewhat more qualified judgment (at paras 200-201).

<sup>101</sup> *Makwanyane*, *supra* note 95 at para. 88. For academic commentary on this passage, see Max du Plessis, *Between Apology and Utopia: The Constitutional Court and Public Opinion*, 18 S. AFR. J. HUM. RTS. 1, 2 (2002) (citing this passage in the context of an article explaining how the CCSA has sought to educate the public through the use of critical morality); Myron Zlotnick, *The Death Penalty and Public Opinion*, 12 S. AFR. J. HUM. RTS. 70, 73 (1996) (noting that Justice Chaskalson does concede that public opinion might have “some relevance to the inquiry” but pointing out that he does not in the end indicate “what weight is to be given to public opinion”).

<sup>102</sup> Cf. Klug, *supra* note 99 at 62 (arguing that the “blunt dismissal” of the relevance of public opinion in Justice Chaskalson's judgment was “mediated” in other judgments by “recognition of a national will

The answer to this question, Part 2 of this essay suggests, lies in the fact that, in a one-party-dominant democracy like South Africa, a constitutional court may find that its institutional security is relatively immune to low public support. Where a single party dominates a country's electoral politics for a variety of reasons, lack of public support for a constitutional court is unlikely ever to be translated into votes for a rival political party. In such a situation, the court may be able to ignore public opinion as a constraint on principle, provided that the dominant political party insulates it from the immediate repercussions of its decision.

This was precisely the political context in which the *Makwanyane* case was decided. As noted already, the negotiations leading up to the adoption of the 1993 Constitution had failed to produce a clear consensus on the abolition of the death penalty, at least in part because the ANC political elite was at variance on this issue with its supporters. In these circumstances, there was almost no cost to the CCSA in institutional terms in striking down the death penalty: the ANC political elite favored this outcome, and was content for the CCSA to take the burden of the decision onto itself. On the other hand, there was a considerable amount of legal legitimacy to be gained in writing a decision of principle. Reading the passage quoted above, it is almost as if Justice Chaskalson deliberately uses the Attorney-General's argument as a foil to define the CCSA's institutional role, sending out a clear signal in this, the second case to be decided by the Court that its claim to legitimacy would be based on strict adherence to the law/politics distinction.<sup>103</sup> In a different political setting – one in which the CCSA's institutional security was dependent on popular support – this strategy might have backfired. In the special circumstances of the *Makwanyane* case, the strategy arguably succeeded. Although the CCSA undoubtedly lost support as a result of this decision,<sup>104</sup> its institutional security was never threatened, and its legal legitimacy was considerably enhanced.

For American readers, it may be interesting to contrast Justice Chaskalson's views on the weight to be accorded to public opinion with the plurality opinion of the U.S. Supreme Court in *Planned Parenthood of Southeastern PA. v. Casey*.<sup>105</sup> In that case, it will be recalled, the plurality defended its decision not to overturn *Roe v*

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to transcend the past"); Corder, *supra* note 87 at 268 (arguing that the CCSA attempted to "trigger" public support for its decision elsewhere in the judgment by grounding its decision in "traditional African concepts of human solidarity").

<sup>103</sup> Cf. Klare, *supra* note 73 at 173 (arguing that the rejection of public opinion in *Makwanyane* flows from the CCSA's desire to "buttress the legitimacy – the 'law-ness,' if you will – of its decision by repeated affirmation of the law/politics distinction").

<sup>104</sup> See Du Plessis *supra* note 101 at 5-6 (reporting on the results of a survey conducted in December 1995, six months after the decision in *Makwanyane* was handed down, showing 75 per cent support for the re-introduction of the death penalty).

<sup>105</sup> 505 U.S. 833 (1992).

*Wade*<sup>106</sup> on the grounds that doing so would undermine public support for the Court as a politically neutral arbiter, and thereby respect for the rule of law.<sup>107</sup> Far from rejecting the relevance of public opinion, the plurality in *Casey* cites the public's likely negative response to judicial "flip-flopping"<sup>108</sup> on abortion as a reason to keep faith with *Roe*. The primary issue of principle in *Casey* was thus adherence to past decisions, rather than the constitutional defensibility of the right to freedom of choice. Nevertheless it is significant that a plurality of the U.S. Supreme Court, which enjoys far higher levels of public support than the CCSA,<sup>109</sup> should have regarded public opinion as a legally relevant factor. Justice Chaskalson's dismissal of the relevance of public opinion in *Makwanyane* is much closer to Justice Scalia's dissenting opinion in *Casey*,<sup>110</sup> with whose approach to constitutional adjudication one would not ordinarily expect him to agree.

The point of this comparison is not to show that the CCSA in *Makwanyane*, despite all appearances to the contrary, was pursuing a conservative political agenda. Far from it. The point of the comparison is rather to illustrate that judicial attitudes towards the relevance of public opinion may differ according to the political context, and that in South Africa, the trend has been to ignore public opinion where (a) the issue of principle has been left to the CCSA to decide; and (b) the CCSA is shielded from the political repercussions of its decision by the ANC political elite.

The second issue of constitutional principle on which South African public opinion is overwhelmingly conservative and significantly at variance with the ANC political elite's views is abortion. As with the death penalty, the 1993 Constitution did not produce a clear consensus on this issue,<sup>111</sup> and it was accordingly again left to the CCSA to decide. In this case, however, despite the enactment of a fairly liberal

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<sup>106</sup> 410 U.S. 113 (1973).

<sup>107</sup> *Id.* at 866 ("the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the nation"). Note the similarity between this statement and Dworkin's views on the circumstances in which judges may compromise on principle (DWORKIN, *LAW'S EMPIRE*, *supra* note 56 at 380-381).

<sup>108</sup> This is not the Court's term, of course, but a term that entered the political lexicon during John Kerry's campaign for the U.S. Presidency. I use it here because I think it succinctly captures the danger that the *Casey* Court wished to avoid.

<sup>109</sup> In a 2001 survey, 82.7 per cent of respondents showed institutional loyalty to the Court. See Gibson *et al*, *supra* note 21 at 358.

<sup>110</sup> *Supra* note 105 at 998 ("the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening").

<sup>111</sup> The 1993 Constitution contained rights to life, privacy, and freedom and security of the person, all of which would have had a bearing on the determination of the constitutionality of abortion had the issue come before the CCSA. The 1996 Constitution contains similar rights, with the significant addition, in the section on freedom and security of the person, of the right of everyone "to make decisions concerning reproduction" and "to security in and control over their body" (sec. 12(2)). See Michelle O'Sullivan, *Reproductive Rights*, in WOOLMAN *ET. AL.* (EDS), *supra* note 3 at ch. 37.

abortion regime,<sup>112</sup> no litigation has thus far reached the CCSA.<sup>113</sup> It is therefore not possible to consider the abortion example in relation to the argument of this essay, other than to suggest that one of the reasons that a constitutional challenge to South Africa's liberal abortion regime has not yet reached the CCSA is that it is clear that the Court would reject such a challenge on grounds of constitutional principle. Under the 1993 Constitution, the rejection of a pro-life challenge would have required the CCSA to discover a right to freedom of choice in a constellation of other rights, such as the right to privacy and freedom and security of the person. Under the 1996 Constitution, this outcome is virtually compelled by the inclusion of a "right to make decisions concerning reproduction".<sup>114</sup> In relation to abortion, therefore, the CCSA's imperviousness to public disapproval of a pro-choice decision, if it eventually comes to that, would be as much a function of the constitutional text as a consequence of the delegation of this issue to it to decide.

At first glance, the third issue of constitutional principle on which South African public opinion is overwhelmingly conservative – the right of gay and lesbian people to equal treatment – seems to share many of the same features as the abortion example. Both the 1993 and the 1996 Constitutions include sexual orientation as a listed ground of unfair discrimination.<sup>115</sup> The constitutional status of gay and lesbian rights is thus not one that could be said to have been left to the CCSA to decide: the battle of principle was mostly won by gay and lesbian groups in the constitutional negotiations process,<sup>116</sup> with litigation under both the 1993 and the 1996 Constitutions mainly being about bringing old-order South African legislation into line with the constitutional compact. Nevertheless, there is something of relevance to this essay in the way this litigation has progressed. First, despite the early success of two cases brought by the National Coalition for Gay and Lesbian Equality,<sup>117</sup> the political

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<sup>112</sup> Choice on Termination of Pregnancy Act 92 of 1996 (providing for abortion on demand in the first 12 weeks of pregnancy; for abortion for medical, psychological or socio-economic reasons in the 13th to 20th week of pregnancy; and for abortion to save the life of the mother or to prevent the birth of a severely malformed child in the remainder of the pregnancy).

<sup>113</sup> There have been two High Court decisions: *Christian Lawyers' Association of South Africa v. Minister of Health*, 1998 (2) SALR 1113 (T) (holding that the 1996 Constitution does not extend rights to an unborn fetus) and *Christian Lawyers' Association of South Africa v. National Minister of Health*, 2005 (1) SALR 509 (T) (dismissing a challenge to provisions of the Choice on Termination of Pregnancy Act allowing a minor to obtain an abortion without parental consent).

<sup>114</sup> S. AFR. CONST., 1996, *supra* note 3, sec. 12(2)(a). See CURRIE & DE WAAL, *supra* note 3 at 288-289.

<sup>115</sup> S. AFR. CONST., 1993, *supra* note 3, sec. 8(2) and S. AFR. CONST., 1996, *supra* note 3, sec. 9(3).

<sup>116</sup> See SPITZ, *supra* note 96 at 306-307 (describing the history of the inclusion of "sexual orientation" as a listed ground of unfair discrimination in the 1993 Constitution).

<sup>117</sup> See *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SALR 6 (CC) (challenge to various laws criminalizing sodomy) and *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, 2000 (2) SALR 1 (CC) (challenge to immigration legislation). See Du

branches did not initiate a comprehensive law reform process to eliminate the remaining instances of discrimination on the statute book.<sup>118</sup> Instead, this task has been left to litigation by the gay and lesbian equality movement and individual claimants. In all of these cases, despite deeply conservative public attitudes, the CCSA has had little difficulty in enforcing rights to equal treatment of gays and lesbians.<sup>119</sup> Up to this point, therefore, the South African experience illustrates the rather trite point that a court, enforcing a Constitution that provides incontrovertible normative support for gay and lesbian rights, may decide such cases on principle even in the face of strongly prejudicial public attitudes. Conscious of these attitudes, the ANC political elite has been content for the law reform process to be driven by litigation, neither hindering the progress of such litigation, nor rendering it unnecessary by comprehensively amending the statute book.<sup>120</sup>

The final goal of all this litigation, of course, was the recognition of same-sex marriage. At this point, the history of gay and lesbian rights litigation becomes more interesting. The key case of *Fourie*<sup>121</sup> involved a constitutional challenge to the common-law definition of marriage and to a provision of the Marriage Act that made the institution of marriage the exclusive preserve of heterosexual couples.<sup>122</sup> Given the CCSA's past decisions, and the inclusion of sexual orientation as a ground of unfair discrimination in the 1996 Constitution, the issue of principle was never in doubt.<sup>123</sup> What was not a foregone conclusion, however, was the nature of the remedy the CCSA would devise. In an opinion written by Justice Sachs,<sup>124</sup> the majority of the Court reasoned that, since the question of same-sex marriage was one of "status", the Court's remedy needed to be "secure", and that the best way of ensuring this outcome

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Plessis, *supra* note 101 at 19-23 (discussing the CCSA's treatment of the issue of public opinion in the first *National Coalition* case).

<sup>118</sup> See *Fourie*, *supra* note 2 at para. 116 (criticizing the law reform effort for being "episodic rather than global"). As the Court points out in this passage, some pre-1994 statutes have been amended without litigation. Statutes passed after the *National Coalition* decisions have also tended to refer to same-sex partners where relevant.

<sup>119</sup> See *Satchwell v. President of the Republic of South Africa*, 2002 (6) SALR 1 (CC) (pension benefits); *Du Toit v. Minister of Welfare and Population Development*, 2003 (2) SALR 198 (CC) (adoption rights); *J v. Director-General, Department of Home Affairs*, 2003 (5) SALR 621 (CC) (parental rights of same-sex life partners where one of partners artificially inseminated).

<sup>120</sup> Although there is no statistical evidence to support this point, the CCSA's involvement as the lead institution in this process has probably not done anything for its public support. In a sense, the CCSA has been used by the political branches to get the politically awkward business of gay and lesbian law reform done.

<sup>121</sup> *Supra* note 2.

<sup>122</sup> Sec. 30 of the Marriage Act 25 of 1961.

<sup>123</sup> For a general discussion of the legal issues in this case, see Beth Goldblatt, *Same-sex Marriage in South Africa: The Constitutional Court's Judgement*, 14 FEMINIST LEG. STUD. 261 (2006).

<sup>124</sup> *Fourie*, *supra* note 2 at paras 115-161.

was to give Parliament an opportunity to amend the Marriage Act so as to provide for same-sex marriage.<sup>125</sup> In lone dissent, Justice O'Regan argued that the Court's duty to provide appropriate relief meant that any delay in the amendment of the marriage laws would amount to a failure of constitutional justice.<sup>126</sup>

The difference between the majority and minority judgments was not really a difference of constitutional principle, since Justices Sachs and O'Regan were agreed that the marriage laws needed to be amended.<sup>127</sup> Rather, the difference between the two judgments concerned the appropriate institutional role of the CCSA in effecting this amendment. For Justice Sachs, the applicants' equality claims were best served by "respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter."<sup>128</sup> This was a clever conceit, implying as it did that constitutional rights may sometimes be better vindicated by legislative amendment than by judicial fiat, and therefore that the separation of powers doctrine and the CCSA's duty to enforce constitutional rights are not necessarily in conflict. Justice O'Regan's response to this point was two-parted, combining aspects of a "justice delayed is justice denied" argument with an argument that the judicial amendment of South Africa's marriage laws would not necessarily mean disrespect for the separation of powers.<sup>129</sup> There would be nothing to prevent Parliament, Justice O'Regan noted, from later amending the Marriage Act according to its own sense of the constitutional rights at issue, provided that the amendment was in line with the principles laid down in *Fourie*.<sup>130</sup>

Although the formal difference between the two *Fourie* judgments thus had to do with the requirements of the separation of powers doctrine, it is clear that the legal rules on this point were fairly indeterminate. Neither of the judgments was obviously more compelling on the application of this doctrine than the other. Instead, what separates the judgments is a difference of opinion about the way in which the CCSA should go about building public support for decisions of constitutional principle. For Justice Sachs, it was important for the CCSA to enlist the legislature's co-operation in the enforcement of a legal change that was likely to be highly divisive, and ran the risk of further weakening public support for the Court. For Justice O'Regan, the constitutional text was sufficiently clear to suggest that the CCSA would lose legal legitimacy if it did not grant the applicants an immediate remedy, and that this was

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<sup>125</sup> *Id.* at para. 136.

<sup>126</sup> *Id.* at para. 170.

<sup>127</sup> Justice O'Regan dissents only from the remedy ordered by the majority, not the reasoning in respect of the substantive issues at stake. *Id.* at paras 163-165.

<sup>128</sup> *Id.* at para. 139.

<sup>129</sup> *Id.* at para. 170.

<sup>130</sup> *Id.* at para. 169.

ultimately a more important factor in securing public support for the Court. In her words:

It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.<sup>131</sup>

In *Fourie*, then, there is a developed appreciation on the part of the CCSA, ten years after the *Makwanyane* decision, of the importance of taking into account public attitudes towards the Court, not just in the way it justifies its decisions,<sup>132</sup> but also in the remedies it gives. Having delivered a series of judgments enforcing the rights of gays and lesbians to equal treatment, the majority seems to have deemed it prudent for the Court to check itself, recognizing perhaps the danger of further widening the gap between its constitutional morality and public attitudes. Taking a different view of the strategic question, Justice O'Regan would have enforced the applicants' rights with immediate effect, trusting that public support for the Court would eventually flow from its reputation for principled adjudication.

Whichever of the two views is correct, concerns for the impact of the CCSA's decision on its public support seem to have figured more prominently in *Fourie* than they did in *Makwanyane*. And yet the ANC's electoral dominance, if anything, had become more entrenched in the ten years separating these decisions.<sup>133</sup> How can this change in the judges' attitude be explained? Part of the answer, it is suggested, lies in a difference in the ANC political elite's capacity to shield the CCSA from the repercussions of its decision. Unlike the death penalty, the issue of gay and lesbian equality is one on which there is considerable disagreement within the ANC political

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<sup>131</sup> *Id.* at para. 171. See further Justice O'Regan's judgment at paras 166-167 (recognizing "the important democratic and legitimating role of the Legislature in our society" but arguing that, since the definition of marriage had been developed by the courts at common law, the "responsibility" for changing the definition in line with the Constitution lay primarily with the courts).

<sup>132</sup> See Du Plessis, *supra* note 101 (describing how the CCSA has tried to educate public opinion through the use of critical morality).

<sup>133</sup> In the first democratic election in 1994, the ANC's support stood at just over 62 per cent. In the last general election, in 2004, the ANC won just short of 70 per cent of the votes.

elite.<sup>134</sup> It was therefore important for the majority to frame the Court's order in a way that would embed the decision in democratic politics, and disassociate the recognition of same-sex marriage from the CCSA as far as possible.

The CCSA's decisions on the death penalty and same-sex marriage may be contrasted with its decisions on three other issues of public morality that have arisen in other jurisdictions as well: drug use for religious purposes, sex work, and the rights of cohabiting partners.<sup>135</sup> In a series of decisions that were severely criticized at the time, the CCSA turned down constitutional challenges in all three of these areas, apparently deferring to the conservative public morality rejected in *Makwanyane* and *Fourie*. Although none of these decisions is so clearly wrong as to be legally illegitimate, they all represent instances in which the CCSA failed to give full effect to constitutional principle.

Feminist scholars have been especially critical of this part of the CCSA's record, arguing that the sex work and cohabiting partners decisions reveal a lack of understanding on the part of the Court of the socially and economically constrained choices South African women are forced to make.<sup>136</sup> In the conceptual framework developed in this essay, the explanation for these decisions is less dependent on the attribution to particular judges of a conservative morality.<sup>137</sup> From this perspective, what these decisions have in common is that they all involved issues of public morality in respect of which there was little divergence of opinion between the ANC political elite and its constituency. In all three cases, the state thus raised strong separation of powers objections against judicial interference with the legislative choices made. In the drug use case, the state's argument was that allowing an exception to the criminal prohibition against the use of cannabis for religious purposes would be practically unenforceable, and would undermine the state's ability to combat non-religious drug use.<sup>138</sup> In the sex work case, the state's argument was that the

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<sup>134</sup> The ANC supported the inclusion of "sexual orientation" as a ground of unfair discrimination in the 1993 Constitution (see SPITZ, *supra* note 96 at 306-307), but some of its leading members, including former Deputy President Jacob Zuma, are openly homophobic.

<sup>135</sup> See *Prince v. President, Cape Law Society*, 2002 (2) SALR 794 (CC) (freedom of religion challenge to statutory prohibition on use and possession of cannabis); *Jordan v. S*, 2002 (6) SALR 642 (CC) (equality-, privacy-, and dignity-based challenge to criminalization of brothels and sex workers); *Volks N.O. v. Robinson N.O.*, 2005 (5) BCLR 446 (CC) (equality clause challenge to Maintenance of Surviving Spouses Act for failing to extend benefits of Act to permanent life partners).

<sup>136</sup> See Rósaan Krüger, *Sex Work from a Feminist Perspective: A Visit to the Jordan Case*, 20 S. AFR. J. HUM. RTS. 138, 148-149 (2004); Nicole Fritz, *Crossing Jordan: Constitutional Space for (Un)civil Sex?*, 20 S. AFR. J. HUM. RTS. 230 (2004); Catherine Albertyn & Beth Goldblatt, *Equality in WOOLMAN ET AL.* (EDS), *supra* note 3 at 35—83.

<sup>137</sup> That the CCSA is not morally conservative on all issues is demonstrated by decisions such as *Phillips v. Director of Public Prosecutions, Witwatersrand Local Division*, 2003 (3) SALR 345 (CC) (striking down prohibition on the sale of alcohol in premises where nude performances held).

<sup>138</sup> *Prince*, *supra* note 135 at paras 130, 134, 139.

legislature's judgment on the criminalization of prostitution – absent an express constitutional injunction to the contrary – should be respected.<sup>139</sup> And in the cohabiting partners case, the state's argument was that the legislature was engaged in reforming the law relating to domestic partnerships and hence that the Court should exercise judicial restraint.<sup>140</sup> All of these arguments were at least debatable, and feminist scholars are correct to point to the majority judges' failure to appreciate the true nature of the constitutional principles at stake. At the same time, however, the political context driving the outcome of these cases should not be overlooked. In all three decisions, the majority appears to have been reluctant to enforce a higher-order constitutional norm in the face of popular opinion and determined opposition from the political branches.

There are two dimensions to the CCSA's pragmatism in this respect. The first is an evident desire on the part of the Court, which is discernible in other decisions as well,<sup>141</sup> to enlist the political branches as partners in the working out of the South African constitutional project. In *Fourie*, this inclination manifested itself in the form of a remedy that required the legislature to reconcile gay and lesbian rights with sincerely held religious beliefs. In the three other decisions on public morality, the majority seems to have accepted the plausibility of the state's interpretation of the rights at issue, and of the way they ought to be balanced against the public interest. Finding themselves in a situation of reasonable disagreement in this way, the majority deemed it prudent to defer to legislative determinations of the constitutional balance to be struck. The CCSA's decisions in these cases, in other words, were premised on a pragmatic judgment that it is not always desirable for a constitutional court in a new democracy to strike down legislation just because it can. If the political branches are to share in the constitutional project, a court must on occasion defer to their views on how that project ought to be promoted.

Such notions are, of course, at the heart of the dialogical approach to judicial review that is currently in vogue.<sup>142</sup> Although this approach has principally arisen in the context of the debate about the democratic justification for judicial review, there are practical considerations in support of it as well, especially in new democracies. In South Africa, where the ANC's electoral dominance means that the judiciary is often the only independent check on the ruling party's ambitions, the dialogical approach is almost inevitable – the CCSA cannot risk being seen to be the sole driver of the

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<sup>139</sup> Jordan, *supra* note 135 at para. 30.

<sup>140</sup> Volks, *supra* note 135 at para. 29.

<sup>141</sup> The CCSA's declaratory order in *Grootboom*, *supra* note 3, for example, could be seen as an attempt by the Court to involve the political branches in dialogue about the best way of realizing the right of access to adequate housing.

<sup>142</sup> For an assessment of the literature, see Tremblay, *supra* note 9.

constitutional project, and must thus continually search for ways in which to include the political branches in the work of constitutional interpretation. Sometimes, as in *Fourie*, this means restraining itself from providing overly detailed resolutions of constitutional disputes, even though the issue of constitutional principle may be clear. On other occasions, where the issue of constitutional principle is less self-evident, the inclusion of the political branches as constitutional interpreters may mean exercising judicial restraint.

The second dimension of the CCSA's pragmatism in these three decisions is the dimension already discussed in relation to *Makwanyane* and *Fourie*, i.e. the ANC political elite's inability (or, in this case, disinclination) to shield the CCSA from the political repercussions of its decisions. In Dworkinian terms, the CCSA's decisions on religious drug use, sex work and cohabiting partners were all decisions in which the majority seems to have decided that there would be insufficient support in the community for the principled decision at stake.<sup>143</sup> There was such lack of support in *Makwanyane* and *Fourie*, too, of course. The difference in those cases, however, was that, in *Makwanyane*, the principled decision had been delegated to the CCSA to take in a situation where the ANC political elite clearly supported it, and in *Fourie*, the principled decision was sufficiently clear from the constitutional text, allowing the Court to dictate to Parliament the way in which the marriage laws should be amended. In the other decisions on public morality, neither of these factors was present.

Several other decisions might be adduced to illustrate the CCSA's relative capacity to decide cases on principle in the face of countervailing public opinion,<sup>144</sup> but enough has been said to make the point. In conclusion of this section, it will be instructive to discuss a case in which the usual relationship between public support and the CCSA's institutional security was reversed. On this occasion, by the time the CCSA came to make its decision, public opinion had been mobilized overwhelmingly in support of the principled outcome, whilst the ANC political elite was, for once, isolated.

The facts surrounding the CCSA's decision in *Treatment Action Campaign*<sup>145</sup> are notorious, but bear repeating. The case concerned a constitutional challenge to the government's program on the prevention of mother-to-child transmission of HIV, the virus that causes AIDS. The program was based on the supply of a particular anti-retroviral drug, Nevirapine, which had controversially been made available only at a

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<sup>143</sup> DWORKIN, LAW'S EMPIRE, *supra* note 56 at 380-381.

<sup>144</sup> See *Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa*, 1996 (4) SALR 671 (CC) (constitutionality of the Promotion of National Unity and Reconciliation Act 34 of 1995, in so far as it extended immunity from civil and criminal prosecution to the perpetrators of apartheid human rights abuses) and *Christian Education South Africa v. Minister of Education* 2000 (4) SALR (CC) (constitutionality of corporal punishment in schools).

<sup>145</sup> *Supra* note 7.

select number of research and training sites. The Treatment Action Campaign, a well mobilized, politically astute and charismatically run social movement, challenged the restriction of the drug's availability under sections 27(1)(a) and (2) of the 1996 Constitution, which guarantee everyone "the right to have access to ... health care services", but limit the state's obligation to fulfill this right in certain respects.<sup>146</sup> In its earlier decision in *Grootboom*,<sup>147</sup> the CCSA had decided that the standard of review in such cases was "reasonableness", but had restricted itself to an order declaring the challenged programme unconstitutional, without mandating specific relief. In *Treatment Action Campaign*, the constitutional claimants applied for an order mandating the extension of the government's anti-retroviral program to everyone. The intrusive nature of the remedy sought, together with a climate of public distrust over the ANC government's policies on AIDS, made *Treatment Action Campaign* one of the most politically controversial cases to come before the CCSA in the first ten years of its existence.

Although there is no statistical evidence for this view, most commentators accept that, at the beginning of the *Treatment Action Campaign* case, and certainly by its conclusion, there was overwhelming public support for the extension of the government's anti-retroviral programme.<sup>148</sup> In the mainstream newspapers, President Mbeki's denialist views on AIDS had long been the subject of public ridicule, with the President caricatured either as an obsessive, late-night Internet surfer, desperately searching for empirical support for his opinions, or as a Stalinist enforcer, silencing dissent in his Cabinet by the sheer power of his personality.

After an inconclusive exchange of legal letters, the applicants launched their case in the Pretoria High Court, where they won a wide-ranging order mandating the government forthwith to supply Nevirapine or other suitable drugs where medically indicated.<sup>149</sup> Despite the forcefulness of the High Court's reasoning, it was obvious to all that the real battle would be fought in the CCSA, where the government clearly anticipated getting a more sympathetic hearing. The state's case was duly founded on strongly worded separation of powers arguments,<sup>150</sup> the emotional undercurrent of which was betrayed by a statement by the Minister of Health on national television

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<sup>146</sup> Subsection (2) provides that: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of this right.

<sup>147</sup> *Supra* note 3.

<sup>148</sup> See for example Mark Heywood, *Preventing Mother-to-child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign's Case against the Minister of Health* 19 S. AFR. J. HUM. RTS. 278, 306 (2003).

<sup>149</sup> *Treatment Action Campaign v. Minister of Health*, 2002 (4) BCLR 356 (T).

<sup>150</sup> Available at [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za).

that she would disobey the CCSA's decision if it went against her.<sup>151</sup> Although the Minister was almost immediately forced to retract this statement, the ANC political elite's opposition to the *Treatment Action Campaign* case could not have been clearer.

Against this politically fraught background, it is remarkable that the CCSA's eventual decision not only vindicated the constitutional rights at issue, but did so with apparent ease. Dismissing the state's separation of powers arguments as irrelevant and ill founded,<sup>152</sup> the CCSA handed down a unanimous decision, in the name of the Court as a whole, declaring the restriction of the government's anti-retroviral program to the research and training sites unconstitutional against the applicants' right to have access to health care services, and imposing a wide-ranging order, with immediate effect, mandating the provision of Nevirapine in all public hospitals where medically indicated.<sup>153</sup>

Like the U.S. Supreme Court's decisions in *Lochner*<sup>154</sup> and *Brown v. Board of Education*,<sup>155</sup> the CCSA's decision in *Treatment Action Campaign* must be explained by anyone who hopes to offer an adequate theoretical account of its record. From the perspective of this essay, the explanation for the apparent ease with which the CCSA dealt with the *Treatment Action Campaign* case lies partly in the rhetorical crafting of its judgment, and partly in the fact that the decision was less politically awkward than at first appeared. The first issue is discussed in Part 4.3.4 below. The second issue is relevant here.

As noted above, the applicants in *Treatment Action Campaign* had pursued an effective mass mobilization strategy, through which they had succeeded in creating a groundswell of public support for the principled outcome. In response to this strategy, key members of the ANC government had already begun to break ranks with the President and his Health Minister by the time the CCSA delivered its judgment.<sup>156</sup> In particular, three months before the case was heard in the CCSA, the Premier of Gauteng, South Africa's wealthiest province, had announced that his province would implement a comprehensive antiretroviral program to prevent the mother-to-child transmission of HIV. Although the Minister of Health criticized this decision, and forced the Premier to give the appearance of backing down, the implementation of the program continued.<sup>157</sup> By the time the CCSA came to hand down its decision,

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<sup>151</sup> See Heywood, *supra* note 148 at 308.

<sup>152</sup> See *Treatment Action Campaign*, *supra* note 7 at paras 96-106.

<sup>153</sup> *Id.* at para. 135.

<sup>154</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>155</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>156</sup> See Heywood, *supra* note 148 at 292 (commenting that the "disjuncture between the provinces was to be the undoing of the government's legal case").

<sup>157</sup> *Id.* at 304.

therefore, President Mbeki and his Health Minister were politically isolated, and had, in the view of one closely involved commentator, already lost the battle in the “court of public opinion”.<sup>158</sup> Far from inhibiting the CCSA’s ability to hand down a principled decision, this situation made it much easier for the Court to enforce the Constitution. With the ANC government sliding towards an embarrassing political defeat, the Court’s decision could even be said to have rescued it by providing an “objective” legal basis for the reversal of its policies.

The CCSA’s decision in *Treatment Action Campaign* may thus be read as a mirror image of its decisions in *Makwanyane* and *Fourie*. Whereas the latter two decisions show that the CCSA has been able to use the ANC political elite’s generally more progressive views on capital punishment and gay rights to shield it from adverse public opinion, *Treatment Action Campaign* is the leading example of a case in which the CCSA relied on favorable public opinion to overcome significant opposition by the ANC political elite. The common thread running through the three decisions is the CCSA’s ability on occasion to exploit the political context to hand down decisions of principle, and in this way to build its legal legitimacy. The next section discusses three politically controversial cases in which the political context was less propitious, and in which the CCSA was therefore forced to compromise on principle in order to avoid direct confrontation with the political branches.

#### **4.3.2 Politically controversial cases in which the CCSA compromised on principle to avoid confrontation with the political branches**

In addition to the decisions on religious drug use, sex work, and cohabiting partners discussed in the last section, the CCSA has delivered three other decisions that have attracted almost universal criticism from legal academics in South Africa. Two of these decisions dealt with the structure of the electoral system, and the third with foreign policy. In other jurisdictions, such as the United States, the issues these cases presented might have been treated as political questions, and therefore beyond the Court’s remit.<sup>159</sup> In South Africa, where the CCSA’s mandate is very clear, and where it is required to decide every case falling within its jurisdiction, the CCSA was not able to avoid deciding these cases.<sup>160</sup> Instead, in keeping with the assumption

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<sup>158</sup> *Id.* at 306.

<sup>159</sup> This is not the place to write a long treatise on the troubled history of the political question doctrine in the United States. The leading discussions include Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) and Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N. CAR. L. REV. 1203 (2002). Despite disagreement over the applicability of the doctrine, and the strongly held view on the part of some commentators that it must be treated as a justiciability doctrine, almost all commentators agree that matters of foreign policy are reserved for the political branches to decide.

<sup>160</sup> The CCSA has never formally considered whether the political question doctrine could be applied in South Africa, but the thrust of the jurisdictional provisions in sec. 167 of the 1996 Constitution makes

made in Part 3, it resorted to a variety of legal devices, including the separation of powers doctrine, to minimize the impact of these cases on its institutional security.

The first such case, *New National Party of South Africa v. Government of the Republic of South Africa*,<sup>161</sup> concerned an application by a minority political party (the successor party to the party that had ruled South Africa under apartheid) for an order declaring certain sections of the Electoral Act<sup>162</sup> unconstitutional against the right to vote. The impugned sections, which had been enacted only nine months before the 1999 general election, provided that citizens who wanted to register as voters on the national common voters' roll, and vote in an election, had to be in possession of a particular kind of identity document or temporary identification certificate. Surveys conducted before the law came into effect revealed that five million otherwise eligible voters, constituting 20 per cent of the voting population, did not have the requisite documents.<sup>163</sup> About half of these potential voters had no identification documents at all, whilst the other half were in possession of documents that had been issued under since repealed national legislation or legislation of the former apartheid homelands.<sup>164</sup>

On its face, the applicant's case therefore challenged a race-neutral electoral rule that it argued unreasonably prevented a significant number of citizens from voting. Underlying the case, however, was the fact that many of the people who were prevented from voting were members of South Africa's white minority, and as such likely to vote for the applicant or one of the other minority parties.

In a convoluted majority opinion the logic of which is hard to follow, Justice Yacoob held that the requirements for registering as a voter and voting in the national elections should be understood as measures taken to facilitate the exercise of the right to vote, rather than as limitations on the right.<sup>165</sup> The appropriate standard of review for the case was therefore whether there was a "rational relationship between the [electoral] scheme ... and the achievement of a legitimate governmental purpose."<sup>166</sup> In addition to, or in specification of, this standard (it is not clear), Parliament, in designing the electoral scheme, was under a duty to ensure that "people who would

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this possibility extremely unlikely. See also L.W.H. Ackermann, *Opening Remarks on the Conference Theme*, in KLAAREN, supra note 3 at 10 (retired justice of the CCSA remarking that, "[i]n a substantive constitutional state such as ours, there can be no so-called 'political question' doctrine leading to a conclusion different to that dictated by the Constitution"). See further the cases discussed in note 185 below.

<sup>161</sup> 1999 (3) SALR 191 (CC).

<sup>162</sup> Act 73 of 1998.

<sup>163</sup> *New National Party*, supra note 161 at paras 29-30.

<sup>164</sup> *Id.* at para. 30. The validity of the identification documents issued under old-order legislation had been preserved. *Id.* at para. 34.

<sup>165</sup> *Id.* at para. 15.

<sup>166</sup> *Id.* at para. 19.

otherwise be eligible to vote are able to do so if they want to vote and if they take reasonable steps in pursuit of the right to vote”.<sup>167</sup>

Unusually for the CCSA, the majority opinion did not cite a single authority, local or foreign, in support of these two holdings. In addition, apart from a few perfunctory remarks about the “importance of the right to vote”,<sup>168</sup> the majority made no effort to develop a principled understanding of the right in its constitutional and political context. In fact, the only argument offered by the majority in support of its rational basis standard of review was an attempt to rebut Justice O’Regan’s argument, in dissent, that, given the importance of the right to vote, it was appropriate for the Court to set a stricter standard.<sup>169</sup> The majority’s response to this argument was to assert that the separation of powers doctrine placed an absolute bar on the power of courts to review statutory provisions on the grounds of reasonableness.<sup>170</sup> This sweeping statement contradicts both the express language of the 1996 Constitution<sup>171</sup> and the standard of review the Court later adopted in relation to socio-economic rights.<sup>172</sup> As Justice O’Regan pointed out,<sup>173</sup> the centrality of the right to vote to the democratic process suggests that, if any right is deserving of stricter scrutiny, it should be this right.<sup>174</sup> In addition to this principled argument, Justice O’Regan provided strong historical,<sup>175</sup> contextual<sup>176</sup> and comparative-law<sup>177</sup> support for rejecting the majority’s deferential approach.

Reading Justice O’Regan’s powerful dissenting opinion, it is difficult to come to any conclusion other than that the majority failed to give a principled reading of the

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<sup>167</sup> *Id.* at para. 21.

<sup>168</sup> *Id.* at para 11.

<sup>169</sup> *Id.* at para. 24.

<sup>170</sup> *Id.*

<sup>171</sup> *See* S. AFR. CONST., 1996 secs 26(2) and 27(2) (expressly giving the Court the power to decide whether the state has adopted “reasonable legislative and other measures” progressively to realize socio-economic rights). *See also* Justice O’Regan’s opinion at para. 123 (pointing out that there are other rights, apart from the right to vote, “which contain broad equitable defining characteristics”, and that there is therefore no hard-and-fast rule against the “inclusion of an equitable consideration at the threshold level of the right”).

<sup>172</sup> *See* Grootboom, *supra* note 3 and Treatment Action Campaign, *supra* note 7.

<sup>173</sup> New National Party, *supra* note 161 at para. 122.

<sup>174</sup> *Cf.* JEREMY WALDRON, LAW AND DISAGREEMENT 282 (Oxford Univ. Press 1999) (calling the right to participate in the making of laws “the right of rights” and conceding the importance of the judicial protection of this right in a book otherwise skeptical of judicial review).

<sup>175</sup> New National Party, *supra* note 161 at para. 120 (referring to the fact that “[m]any of the injustices of the past flowed directly from the denial of the right to vote”).

<sup>176</sup> *Id.* at paras 120 and 121 (referring to the “relative youth” of South Africa’s constitutional democracy and the “need to establish a culture of participation in the political process”).

<sup>177</sup> *Id.* at para. 122 (referring to various U.S. Supreme Court decisions in which it was held that “a more stringent test than rational scrutiny is appropriate to voting”).

Constitution. It is not just that the majority opted for a deferential standard of review. It is that the reasons in support of its preferred standard were so perfunctory. Having asserted the importance of the right to vote, the majority devised a review standard that allowed the state to condition the exercise of the right on the obtaining of an identity document that the state was plainly not capable of providing to all potential voters in time for the next election. Not just that, but the onus was placed on citizens to take “reasonable steps in pursuit of [their] right to vote”.<sup>178</sup> Constitutional rights, on this approach, are not really human rights at all, but entitlements that accrue to people because of what they do to deserve them.

It is impossible to prove, of course, that the majority’s deferential approach in *New National Party* was influenced by its concern for the potential negative impact of the case on its institutional security, but the circumstantial evidence is strong. Unlike the situation at the time of the Court’s decision in *Treatment Action Campaign*, there was no groundswell of support for the principled outcome. Instead, the applicant was the successor party to the reviled National Party, which had ruled South Africa for 46 oppressive years and taken it to the brink of civil war. The nature of the applicant’s case was also deeply ironic, involving as it did the assertion of a right for which the applicant in its former political guise had shown little regard. Would the political branches accept that such an unsympathetic litigant was entitled to succeed, and, if not, would a decision to compromise on principle do more long-term damage to the constitutional project than could be off-set by the institutional security gains to be made? On both counts, the Court in *New National Party* appears to have decided not.

The second politically controversial case in which the CCSA can be seen to have compromised on principle also concerned political rights – in this case the right of voters to determine the conduct of their representatives between elections. The main applicant in *United Democratic Movement v. President of the Republic of South Africa*<sup>179</sup> was once again a minority political party, this time a splinter party that had broken away from the ANC after its charismatic leader, a former homeland leader, had been sidelined. The case arose after the ANC, initially with the support of some of the other parties, tabled two constitutional amendments and two supporting statutes aimed at enabling members of the national, provincial and municipal legislatures to cross the floor. As it stood, the 1996 South African Constitution stipulated that the electoral system should be based on proportional representation, with floor-crossing expressly banned in terms of an anti-defection provision.<sup>180</sup> A sub-clause in this provision, however, contemplated the amendment of the Constitution by ordinary

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<sup>178</sup> *Id.* at para. 21.

<sup>179</sup> 2003 (1) SALR 495 (CC).

<sup>180</sup> Section 46(1), read with item 23A of Annexure A to Schedule 6 of the 1996 Constitution.

legislation to allow members of the national and provincial legislatures to cross the floor, provided it was enacted “within a reasonable period after the new Constitution took effect”. The second of the two supporting statutes at issue in *United Democratic Movement* purported to effect this amendment, five years after the 1996 Constitution had come into effect. In a unanimous decision, the CCSA struck down this statute on the grounds that it had not been enacted “within a reasonable time”,<sup>181</sup> but left the other supporting statute and the constitutional amendments intact. Although the Court’s decision thus went against the state in one respect, it erected no principled hurdle in the way of the amendment of the Constitution to allow for floor-crossing. As a result, floor-crossing became immediately permissible in the local government sphere and, after a further constitutional amendment to cure the defect with the first supporting statute,<sup>182</sup> in the national and provincial legislatures as well.

The argument of principle raised by the applicants and rejected by the CCSA in *United Democratic Movement* was twofold: (1) whether a closed-list proportional representation system that allowed floor-crossing contravened the guarantee in section 1(d) of the Constitution of a “multi-party system of democratic government”; and (2) whether it infringed the various political rights in section 19, including the freedom to make political choices.<sup>183</sup> Writing unanimously as “the Court”, the CCSA began its judgment by expressly addressing the public controversy surrounding the case:

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional. It ought not to have been necessary to say this for it is true of all cases that come before this Court. We do so only because of some of the submissions made to us in argument, and the tenor of the public debate concerning the case which has taken place both before and since the hearing of the matter.<sup>184</sup>

The first striking thing about this passage is the Court’s use of the term “political question”, which it deploys in a non-technical sense to mean the wisdom of a policy choice, irrespective of its justiciable content. “Non-technical” because there is nothing in this judgment or any other judgment of the CCSA to suggest that this

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<sup>181</sup> The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

<sup>182</sup> Constitution of the Republic of South Africa Amendment Act 2 of 2003.

<sup>183</sup> Section 74(1) and (2) of the 1996 Constitution provide for special majorities for constitutional amendments that impact on the founding values and constitutional rights.

<sup>184</sup> *United Democratic Movement*, *supra* note 179 at para. 11.

passage marked the introduction of a formal political question doctrine.<sup>185</sup> Rather, what the CCSA appears to be doing in this passage is rhetorically to deny, as it did in *Makwanyane*, the political nature of its role. Clearly conscious of the controversy surrounding the case, the Court here proclaims its institutional role as being to keep law separate from politics, and to decide the case according to neutral principles.

At face value, then, this passage appears to confirm the CCSA's commitment to building its legitimacy through law-governed adjudication. But this is merely the surface appearance of things. Read in the context of the judgment as a whole, the underlying purpose of the passage is to equate the assessment of the merits of the disputed legislation with the realm of politics, and in this way to justify a retreat from principle. By playing on the ambiguity of the word "merits", the Court implies that it lacks the institutional competence to decide the case. This is plainly not true. Under a supreme-law Constitution, a court is constantly called on to assess the merits of legislation according to the standards embodied in fundamental rights and other constitutional norms.

That this passage is an early signal of the CCSA's intention to compromise on principle is confirmed by its eventual treatment of the substantive issues for decision. On the question whether the disputed legislation infringed the guarantee of a multi-party system of democratic government, the CCSA held that the term "democracy" was too indeterminate to permit it to substitute its view of the appropriate form of South Africa's electoral system for that of the legislature;<sup>186</sup> and, on the question whether the disputed legislation infringed political rights, the CCSA held that such rights were relevant only at the time of elections, and that citizens accordingly had no right to control the conduct of their representatives once elected.<sup>187</sup> Neither of these holdings finds very much support in the constitutional text,<sup>188</sup> and both have since

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<sup>185</sup> In *Ferreira v. Levin N.O.*; *Vryenhoek v. Powell N.O.*, 1996 (1) SALR 984 (CC) at para. 180 the majority held that: "Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court." The use of the phrase "political question" in this passage is similar to its use in *United Democratic Movement*, and should be read as meaning nothing more than that the decision whether or not to enact a particular statute is the prerogative of the legislature. Somewhat confusingly, the term "political question" can also be found in decisions involving the CCSA's exclusive jurisdiction to decide matters under sec. 167(4) of the 1996 Constitution (such as the constitutionality of bills or intergovernmental disputes). In *President of the Republic of South Africa v. South African Rugby Football Union*, 1999 (4) SALR 147 (CC) at para. 72, the CCSA held that sec. 167(4) vests in it exclusive jurisdiction with regard to certain "crucial political areas", suggesting that the CCSA's function is precisely to resolve politically controversial cases that the ordinary courts are not suited to deciding. In *King v. Attorneys' Fidelity Fund Board of Control*, 2006 (1) SALR 474 (SCA) at para. 23, the Supreme Court of Appeal, citing the SARFU case, declined jurisdiction to hear the matter on the grounds that it involved a "'crucial political' question", which sec. 167(4) of the 1996 Constitution reserved for the CCSA.

<sup>186</sup> *Id.* at paras 23-75.

<sup>187</sup> *Id.* at para. 49.

<sup>188</sup> See Theunis Roux, *Democracy*, in WOOLMAN ET AL. (EDS), *supra* note 3 at ch. 10 (analyzing the principle of democracy in South African law); Glenda Fick, *Elections*, in WOOLMAN ET AL. (EDS),

been contradicted by other decisions that articulate a deep, participatory conception of democracy more in keeping with South Africa's political tradition.<sup>189</sup> Once again, therefore, the CCSA appears to have compromised on principle in a case in which (1) the risk to its institutional security was high; and (2) the principle at stake was not so vital that its denial would permanently set back the constitutional project.

The third case in which this strategy is apparent concerned the executive's conduct of foreign relations, the classic instance in which the political question doctrine has been applied in the United States. The applicants in *Kaunda v. President of the Republic of South Africa*<sup>190</sup> had been arrested in Zimbabwe on suspicion of participating as hired mercenaries in a planned military coup against the President of Equatorial Guinea. Amidst allegations of poor treatment in Zimbabwe and threatened extradition to Equatorial Guinea, where they alleged they were likely to face even harsher treatment and the possible imposition of the death penalty, the applicants launched an urgent application in the Pretoria High Court demanding that the South African government seek their release or extradition. After the High Court dismissed the application, the applicants appealed directly to the CCSA for relief.

The issue of principle in *Kaunda* was whether the South African government was under a duty to intervene to safeguard the applicants from threatened violation of their human rights, either under the right to diplomatic protection at international law, or under municipal constitutional law. Dismissing the international law argument on the grounds that the right to diplomatic protection was not an individually enforceable human right, but a prerogative that could be exercised by a state at its discretion,<sup>191</sup> the majority turned to what it said was the key question for determination in the case: the extra-territorial application of the Bill of Rights. Section 7(1) of the South Africa Constitution provides: "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." Over another strong dissent from Justice O'Regan,<sup>192</sup> the majority held that this provision should be interpreted literally to mean that South Africans enjoy the protection of the Bill of Rights only when they are physically *in* South Africa. The majority presented this reading as though no other interpretation of section 7(1) were even remotely possible: "The bearers of the rights

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*supra* note 3 at 29-17 (expressing concern that the CCSA does not indicate which aspect of democracy it is referring to).

<sup>189</sup> See *Doctors for Life International v. Speaker of the National Assembly*, 2006 (6) SALR 416 (CC) (striking down several health-related bills for failure by legislature to facilitate public involvement in its processes); *Matatiele Municipality v. President of the Republic of South Africa* (2), 2007 (1) BCLR 47 (CC) (striking down constitutional amendment for same reason).

<sup>190</sup> 2005 (4) SALR 235 (CC).

<sup>191</sup> *Id.* at paras 23-29.

<sup>192</sup> *Id.* at paras 212-271.

are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.”<sup>193</sup>

As with the *New National Party* decision, the majority’s reliance in these two sentences on assertion rather than reasoned argument betrays its equivocation on the point of principle. In decision after decision, both before and after *Kaunda*, the CCSA has expressed a preference for interpreting the Bill of Rights and other constitutional provisions in a “generous” and “purposive” way.<sup>194</sup> According to this approach, any ambiguity in the constitutional text must be resolved in favour of the interpretation that gives best effect to the purposes and values underlying the new constitutional order. And yet, in *Kaunda*, the majority relies on the literalist approach it elsewhere condemns.<sup>195</sup> The ordinary meaning of the phrase “all people in our country” in the context in which it is used is not “all people physically present within South Africa” but “all South Africans, without exception”. The stress in the phrase, in other words, falls on the word “all”. At the very least, the phrase is ambiguous and thus needed to be purposively construed in the light of the Constitution’s underlying values.

The majority’s disinclination to embark on such a reading is indicative of its sensitivity to the separation of powers issues raised by the case.<sup>196</sup> Denied the luxury of a political question doctrine, the majority uses its literalist reading of section 7(1) as a device to avoid the institutionally awkward consequences of the application of the Bill of Rights. As noted in Part 4.2, the fundamental contradiction at the heart of the separation of powers doctrine is that, as soon as an issue is construed as involving the interpretation and enforcement of constitutional rights, the rationale for the doctrine falls away. Had the majority interpreted section 7(1) purposively to mean that the Bill of Rights binds the state in all its dealings with its citizens, wherever they happen to find themselves, it would have had little option but to enforce the state’s obligation to provide diplomatic protection.

For Justice O’Regan, this conclusion followed not from a purposive reading of section 7(1), but from the insight that, in fact, the case had nothing to do with the

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<sup>193</sup> *Id.* at para. 37.

<sup>194</sup> See for example *S v. Zuma*, 1995 (2) SALR 642 (CC) paras 13-18; Makwanyane, *supra* note 95 at paras 9-10; *Executive Council, Western Cape Legislature v. President of the Republic of South Africa*, 1995 (4) SALR 877 (CC) at para. 100; and *Mashavha v. President of the Republic of South Africa* 2005 (2) SALR 476 (CC) at para 32.

<sup>195</sup> The CCSA is particularly fond of citing the judgment of the Privy Council in *Minister of Home Affairs (Bermuda) v. Collins McDonald Fisher*, [1980] AC 319, 328H in which Lord Wilberforce contrasts the correct approach to constitutional interpretation with “the austerity of tabulated legalism”. See *S. Mhlungu*, 1995 (3) SALR 867 (CC) at para. 8, *Shabalala v. Attorney-General, Transvaal*, 1996 (1) SALR 725 (CC) at para. 27, *Transvaal Agricultural Union v. Minister of Land Affairs*, 1997 (2) SALR 621 (CC) at para. 44, and *United Democratic Movement*, *supra* note 179 at para 113.

<sup>196</sup> The majority acknowledges these concerns at para. 19 of its judgment.

extra-territorial application of the Bill of Rights.<sup>197</sup> Since the officials against whom the Bill of Rights was being applied were at all relevant times in South Africa, the real question was whether section 3 of the Constitution, which confers on all citizens “the rights, privileges and benefits of citizenship”, imposed a duty on the state to provide diplomatic protection in circumstances where it was entitled under international law to do so.<sup>198</sup> Reading the entire Constitution purposively, Justice O’Regan answered this question in the affirmative. When presented with clear evidence of a threatened breach of its citizens’ human rights under international law, she held, the state was under a constitutional obligation to act.<sup>199</sup> The only real question was whether it was competent for the Court, in light of the separation of powers doctrine, to enforce this obligation. Although primarily the responsibility of the executive, the conduct of foreign relations involved the exercise of public power and was thus subject to the Constitution.<sup>200</sup> At best for the state the Court’s lack of expertise meant that it should not lightly interfere with decisions made by the executive in this area. It did not follow, however, that the state’s obligation to provide diplomatic protection was not justiciable.<sup>201</sup>

As was the case in *New National Party* and *Fourie*, therefore, the difference between the majority opinion in *Kaunda* and Justice O’Regan’s dissenting opinion can be traced to a disagreement about how best to trade off the competing concerns of legal legitimacy and institutional security. In all three of these cases, Justice O’Regan chose principle over pragmatism, refusing in *New National Party* to adopt the weaker standard of review that the majority deemed more appropriate to the highly charged nature of the case, refusing in *Fourie* to make any concession to the need to embed the Court’s remedy in democratic politics, and refusing in *Kaunda* to defer to the executive’s prerogative in the conduct of foreign relations. If one were to examine these decisions from the perspective of the group dynamics on the Court, one might conclude that Justice O’Regan’s freedom to decide these cases on principle was made possible by the majority’s pragmatism, and that her approach might well have been more cautious had she not been writing in dissent. From the theoretical perspective adopted here, Justice O’Regan’s repeated dissents may be attributed to her different conception of the separation of powers doctrine. Whereas the majority in *New National Party* and *Kaunda* took the view that this doctrine supplied a legally valid reason for reducing the level of principle in those cases, Justice O’Regan’s dissents

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<sup>197</sup> *Kaunda*, *supra* note 190 at para. 231.

<sup>198</sup> *Id.* at para. 237.

<sup>199</sup> *Id.* at paras 237-238.

<sup>200</sup> *Id.* at paras 243-244.

<sup>201</sup> *Id.* at para. 247.

are premised on a more absolutist conception. For her, where the issue for decision falls squarely within the Court's competence, as any issue involving the interpretation of the Bill of Rights must, the separation of powers doctrine has little relevance. At most, it requires the Court to be conscious of the possible impact of its decision on the political branches' ability to perform their constitutional functions. The doctrine can never be used, however, as a justification for compromising on principle.

It is an impossible counterfactual to argue that the CCSA would have been worse off in institutional security terms had it been composed of eleven judges who shared Justice O'Regan's absolutist conception of the separation of powers doctrine. What we know is that the tendency of most of the judges on the Court has been to temper principle with pragmatism, and that these judges' more flexible conception of the separation of powers doctrine has been integral to this strategy. In *New National Party* the doctrine was used as justification for the majority's deferential approach to the enforcement of the right to vote. In *United Democratic Movement*, a decision that Justice O'Regan joined, the doctrine provided background justification for the Court's reluctance to give substantive content to the principle of democracy. And in *Kaunda*, the separation of powers doctrine figured strongly in the majority's disinclination to question the executive's prerogative to conduct foreign relations. A Court steadfastly committed to principle would have decided all of these cases differently. Whether it would still have existed today, with all its powers and independence intact, was the risk that the majority judges were not prepared to take.

#### ***4.3.3 Cases in which the CCSA converted conceptual distinctions into multi-factor balancing tests***

All of the cases considered thus far have been cases of high constitutional moment, either because the principled decision ran counter to strongly-held public attitudes, or because the principled decision threatened to bring the Court into direct confrontation with the political branches. In the absence of a political question doctrine, the CCSA was not able to avoid deciding these cases, but had to work with the political context and the legal materials to ensure that the decision it took did not impact negatively on its institutional security.

In less controversial cases, one might expect that the CCSA would have been able to cast off these strategic concerns to hand down decisions of principle. As noted in Part 4.1, however, the CCSA's jurisdiction is restricted to constitutional matters. Even in routine matters, the CCSA declares constitutional law that it will be bound in later, perhaps more politically awkward cases, to apply. It should not be surprising, therefore, that the CCSA's record in routine cases is not that different from its record in politically controversial cases. What differences there are have to do with the kinds of strategy that the CCSA has pursued.

The best example of a routine case in which the CCSA acted strategically is *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service*.<sup>202</sup> Although this case involved a challenge under the property clause, the type of challenge that certainly has the potential to be politically controversial in South Africa, *First National Bank* was the sort of case that might have arisen in any liberal democracy. The statutory provision impugned, section 114 of the Customs and Excise Act,<sup>203</sup> provided that the Commissioner for the South African Revenue Service could attach and sell in execution property found in the possession or under the control of a customs debtor, including property belonging to a third person. The applicant, one of South Africa's largest financial institutions, brought its case after several of its motor vehicles, which it had leased to a customs debtor, were attached under this provision.

The first part of the property clause, section 25 of the 1996 Constitution, provides:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
  - (a) for public purposes or in the public interest; and
  - (b) subject to compensation, the amount, timing and manner of which must be agreed, or decided or approved by a court.

On their face, these provisions invited the CCSA, in this, its first property rights case under the 1996 Constitution,<sup>204</sup> to build its jurisprudence around four conceptual distinctions:<sup>205</sup> a distinction between interests that constitute property and those that do not; a distinction between the deprivation and expropriation of property; a distinction between arbitrary and non-arbitrary deprivations of property; and a distinction between expropriations undertaken “for a public purpose or in the public interest” and those that are not. In the United States, conceptual distinctions like these have preoccupied the Supreme Court for some time, leading on occasion to arbitrary results.<sup>206</sup> In a decision that says much about its general approach to constitutional

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<sup>202</sup> 2002 (4) SALR 768 (CC).

<sup>203</sup> Act 91 of 1964.

<sup>204</sup> The CCSA had earlier decided one property rights case under the 1993 Constitution, *Harksen v. Lane* N.O. 1998 (1) SALR 300 (CC) (also a routine case, involving a challenge to a provision of the Insolvency Act 24 of 1936 and decided mainly under the equality clause).

<sup>205</sup> See Theunis Roux, *Property*, in WOOLMAN ET AL. (EDS), *supra* note 3 at ch. 46; Theunis Roux, *The Constitutional Property Vortex*, in MICHAEL BISHOP ET AL. (EDS), *CONSTITUTIONAL CONVERSATIONS* (Pretoria Univ. Law Press, forthcoming 2008).

<sup>206</sup> The literature on this topic is vast. For a representative example, see BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (Yale Univ. Press 1977).

adjudication, the CCSA in *First National Bank* cut through all of these conceptual distinctions and reduced the constitutional property clause inquiry to a single, multi-factor balancing test. Holding that expropriations were a form of deprivation, and therefore that all challenges under section 25 had to be heard first under section 25(1),<sup>207</sup> the Court remarked that the main issue to be decided in any challenge under the constitutional property case was whether the impugned law provided “sufficient reason” for the deprivation.<sup>208</sup> This question, the Court continued, fell to be decided by examining “a complexity of relationships”, including “the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question”; “the relationship between the purpose of the deprivation and the person whose property is affected”; and “the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property”.<sup>209</sup>

The last part of the test was even more open-ended, with the Court holding that the level of review in any particular case could fall anywhere between rationality and proportionality according to the nature of the property in question and the incidents of ownership affected. “Whether there is sufficient reason to warrant the deprivation,” the Court concluded, “is a matter to be decided on all the relevant facts of each particular case.”<sup>210</sup> It is hard to conceive of a more flexible review standard than this one. In place of the conceptual distinctions that section 25 invited the Court to make, this test substitutes a discretionary standard that makes the outcome of future cases highly unpredictable.<sup>211</sup> Although the test will no doubt become more certain with time, there are enough variable elements in it to allow the Court to adjust the level of review, and therefore its decision, to virtually any contingency.

To take just one example: One of the most politically controversial issues likely to come before the CCSA under the property clause is a challenge to a land reform statute. In explaining its test, the Court says that, “[g]enerally speaking, where the property in question is ownership of land ... a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different.”<sup>212</sup> This

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<sup>207</sup> *First National Bank*, *supra* note 202 at para. 57.

<sup>208</sup> *Id.* at para. 100.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> The unpredictability of the *First National Bank* test for arbitrariness is illustrated by the fact that, in the next constitutional property rights case to come before the CCSA, the two lower courts reached diametrically opposed results by applying different levels of review to roughly the same set of facts. See *Mkontwana v. Nelson Mandela Metropolitan Municipality*, 2005 (2) BCLR 150 (CC).

<sup>212</sup> *First National Bank*, *supra* note 202 at para. 100.

statement would appear to require strict scrutiny of land reform legislation, since such legislation in the nature of things interferes with land ownership. Elsewhere in the test, however, the Court stresses the need to have regard to the “purpose” of the law in question,<sup>213</sup> suggesting that a property clause challenge to a statute enacted in pursuit of a constitutionally valued purpose, like land reform,<sup>214</sup> might attract a fairly low level of scrutiny. It is impossible to tell from these two contrasting statements what the level of review in a land reform case is likely to be. Whilst less than optimal from a rule of law point of view, this result is highly convenient, enhancing as it does the CCSA’s capacity to adjust the level of review in a future land reform case to the likely impact of its decision on its institutional security.

Adjudicative moves like this are not unconscious or whimsical. They are part of a deliberate strategy on the part of the CCSA to make its leading doctrines more context-sensitive. To appreciate this point, imagine for a moment the consequences that would ensue from an attempt by the CCSA to read into section 25 a principled theory of property, i.e., a fully worked out moral justification for protecting certain interests in property (but not others) against certain types of state interference (but not others). Quite apart from the fact that the development of such a theory would require a Herculean effort, its consequence would be to fetter the CCSA’s discretion to decide future cases in a way that took account of its legitimate institutional security concerns.<sup>215</sup>

A similar strategy may be discerned in the CCSA’s socio-economic rights jurisprudence, though none of these decisions could be described as routine. In both *Grootboom*<sup>216</sup> and *Treatment Action Campaign*,<sup>217</sup> the applicants had argued that the CCSA should define the “minimum core content” of the rights at issue.<sup>218</sup> As it did in *First National Bank*, the CCSA declined to develop the conceptual test that conceding this argument would have required, substituting instead a single, overarching review standard for reasonableness.<sup>219</sup> Like its test for arbitrary deprivation of property, the CCSA’s reasonableness standard in socio-economic rights cases is highly context-

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<sup>213</sup> *Id.*

<sup>214</sup> See S. AFR. CONST., 1996, *supra* note 3, sec. 25(5) (imposing a positive obligation on the state to take “reasonable legislative and other measures” to enable citizens to gain access to land).

<sup>215</sup> See Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753, 765 (2002) (noting that part of the problem with “developing overarching theories regarding the South African Constitution” is that there is no consistent political ideology running through the 1996 Constitution).

<sup>216</sup> *Supra* note 3.

<sup>217</sup> *Supra* note 7.

<sup>218</sup> *Grootboom*, *supra* note 3 at paras 31-33; *Treatment Action Campaign*, *supra* note 7 at paras 26-39.

<sup>219</sup> *Cf.* also Martin Shapiro’s argument that all constitutional rights in the end reduce to reasonableness (SHAPIRO & STONE SWEET, *supra* note 37 at 179).

sensitive. In *Grootboom*, for example, the CCSA held that, when determining the reasonableness of state measures adopted to fulfill socio-economic rights, the Court should have regard to the comprehensiveness and coherence of the program. The first issue was to be determined by reference to the geographic coverage of the program<sup>220</sup> and the extent of involvement in it of different levels of government.<sup>221</sup> The second issue depended on the potential of the program to realize the right in question, though it need not be the only or even the best means of doing so.<sup>222</sup> Both of these factors give the Court a tremendous amount of discretion to take the specific details of the challenged program into account. In relation to the question of geographic coverage, the Court thus held, in language very similar to that used in *First National Bank*, that “the state’s obligation to provide access to adequate housing depends on context, and may differ from province to province, and city to city, from rural to urban areas and from person to person.”<sup>223</sup> And, in relation to the test for coherence, the Court held that “the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive”.<sup>224</sup>

Many South African legal academics were quite indignant at the time about the CCSA’s rejection of the minimum core content approach, which they argued amounted to an abdication of its responsibility to enforce socio-economic rights.<sup>225</sup> As soon as one accepts, however, that the CCSA’s concern in these cases may have been to devise a review standard that allowed it greater flexibility to manage its relationship with the political branches, much of the force of the criticism falls away.<sup>226</sup> It is the proper function of legal academics to try to convince the CCSA that its socio-economic rights jurisprudence falls short of the constitutional ideal. But it is equally the proper function of the CCSA to devise review standards that allow it to remain sensitive to the political nature of its role.<sup>227</sup>

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<sup>220</sup> *Grootboom*, *supra* note 3 at para. 37.

<sup>221</sup> *Id.* at para. 40.

<sup>222</sup> *Id.* at para. 41.

<sup>223</sup> *Id.* at para. 37.

<sup>224</sup> *Id.* at para. 41.

<sup>225</sup> See Theunis Roux, *Understanding Grootboom – A Response to Cass. R. Sunstein*, 12 CONST. FORUM 41 (2002); David Bilchitz, *Giving Socio-economic Rights Teeth: The Minimum Core and its Importance* 119 S. AFR. L.J. 484 (2002); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1 (2003); Danie Brand, *The Proceduralisation of South African Socio-economic Rights Jurisprudence, or “What are Socio-economic Rights For?”*, in HENK BOTHA ET AL. (EDS), RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION (SUN Press 2003).

<sup>226</sup> See Mark S. Kende, *The South African Constitutional Court’s Construction of Socio-economic Rights: A Response to Critics*, 19 CONN. J. INT’L L. 617, 622 (2004) (arguing that my original response to *Grootboom* was based on “unrealistic assumptions and expectations”, a point I now concede).

<sup>227</sup> See also *Fraser v. ABSA Bank Ltd* (National Director of Public Prosecutions as *amicus curiae*), 2007 (3) BCLR 219 (CC) (holding that the test for deciding whether a concurrent creditor should be

#### 4.3.4 *The CCSA's strategic use of rhetoric*

In *Law, Pragmatism, and Democracy* Richard Posner lists sympathy to “the sophistic and Aristotelian conception of rhetoric” as one of eleven characteristic features of the pragmatic mode of adjudication.<sup>228</sup> “Difficult legal questions,” he argues, “tend not to have ‘right’ answers in a sense that Plato would recognize. Instead they have better or worse answers – and often it is unclear which are which.”<sup>229</sup> In the face of such “uncertainties”, “a penetrating insight, aphoristically expressed, though reflecting merely partial truth ... may rightly play an influential role in the development of the law.”

In the jurisprudence of the CCSA, rhetoric plays a particularly important role. This is partly a matter of opportunity: the CCSA, as noted earlier, has a comparatively light caseload and is thus able to invest a tremendous amount of energy into getting the tone and register of its judgments right. But it is also partly a function of the stage of democratic consolidation that South Africa has reached. The CCSA is all too aware of the delicacy of its position, of the absurdity almost of the power that it has been given to overturn majority decisions. Unsurprisingly, therefore, one of the most pronounced features of the CCSA’s record has been its repeated attempts rhetorically to align itself with the ANC government’s social transformation policies. The CCSA will, for example, quite often begin a judgment in which it ultimately finds against the state by indicating its general agreement with the policy being pursued. In other cases, when finding in favor of the state, it will resoundingly endorse the policy, often going quite far beyond what is necessary for purposes of making its decision.

I have written about these aspects of the CCSA’s record elsewhere.<sup>230</sup> Here I want to concentrate on the Court’s strategic use of tone and register, using as my first example the opening paragraph of the *Treatment Action Campaign* decision:

The HIV/AIDS pandemic in South Africa has been described as “an incomprehensible calamity” and “the most important challenge facing South Africa since the birth of our new democracy” and government’s fight against “this scourge” as “a top priority”. It “has claimed millions of lives, inflicting

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allowed to intervene in an application under sec. 26(6) of the Prevention of Organized Crime Act 121 of 1998 is a discretionary one based on a range of factors). In the same judgment the CCSA declined to give a conceptual distinction between constitutional and non-constitutional matters for purposes of sec. 167(3) of the 1996 Constitution, preferring to list the instances in which a constitutional matter had been found to be raised (*id.* at paras 35-47).

<sup>228</sup> POSNER, *supra* note 67 at 60.

<sup>229</sup> *Id.* at 83.

<sup>230</sup> See Theunis Roux, *Legitimizing Transformation: Political Resource Allocation on the South African Constitutional Court*, 10 DEMOCRATIZATION 92 (2003).

pain and grief, causing fear and uncertainty, and threatening the economy”. These are not the words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier publication.<sup>231</sup>

As legal doctrine, this passage is entirely redundant: nothing in this opening paragraph is essential to justifying the decision handed down in the *Treatment Action Campaign* case.<sup>232</sup> As legal rhetoric, however, the passage is masterful, and entirely necessary to the CCSA’s long-term strategy. The punch-line – the revelation that the quoted words are taken from official government documents – is cleverly withheld until the last sentence, maximizing its rhetorical effect and setting up at an emotional level the doctrinal argument that follows, viz. that where government has already committed itself to providing a particular kind of medical treatment to a certain group of people, it is unreasonable to deny other similarly situated groups the same treatment. “These are your own words, this is your own policy,” the opening paragraph intones, “how can there be any objection to our helping you to implement it properly?” Lest there be any doubt about the impact of these remarks, the fourth paragraph continues the rhetorical assault, calling the South African government’s program for the prevention of mother-to-child-transmission of HIV “part of a *formidable* array of responses to the pandemic”.<sup>233</sup> In this way, the Court presents its decision as a minor constitutional correction to an otherwise impressive policy.

The foremost exponent on the CCSA of this style of adjudication is Justice Sachs. His judgment for a unanimous court in *Port Elizabeth Municipality v. Various Occupiers* may be taken as a representative example.<sup>234</sup> The case concerned an application by a municipality for leave to appeal against a decision of the Supreme Court of Appeal overturning a lower court decision to grant an order for eviction against the respondents. After setting out the nature of the case in the first seven paragraphs, the next 40 paragraphs are devoted to “[t]he constitutional and statutory context”,<sup>235</sup> the structure of the eviction statute in question,<sup>236</sup> and an excursus on the value of mediated settlements.<sup>237</sup> It is with something of a jar, then, that paragraph 48 of the judgment begins: “It is necessary now to consider whether the application for

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<sup>231</sup> Treatment Action Campaign, *supra* note 7 at para. 1 (footnotes omitted).

<sup>232</sup> See the discussion of the CCSA’s socio-economic rights jurisprudence in Part 4.3.3 above.

<sup>233</sup> Treatment Action Campaign, *supra* note 7 at para. 4 (emphasis added).

<sup>234</sup> 2005 (1) SALR 217 (CC).

<sup>235</sup> *Id.* at paras 8-23.

<sup>236</sup> *Id.* at paras 24-38.

<sup>237</sup> *Id.* at paras 39-47.

leave to appeal should be granted.” This, after all, was the sole issue for decision in the case.

It would be instructive to scrutinize all the doctrinally redundant passages in this judgment, but one must suffice. In paragraph 41, Justice Sachs writes:

Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time, those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of moral agency.<sup>238</sup>

There is nothing in this passage with which one could possibly disagree. Doctrinally speaking, however, the entire passage is redundant. Did the landowner in this case in fact “rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances”? Or did the landowner wake up one day to find that the fruits of her labor had been destroyed by a well-orchestrated land invasion? Were the occupiers in this case “compelled by poverty and landlessness to live in shacks on the land of others”? Or did they cynically invade the land because they had heard that it was about to be designated for a low-income housing project? These are all factual questions going to the equities of the matter that Justice Sachs eventually goes on to decide in the last fourteen paragraphs of his judgment. We discover there that the respondents were not in fact “queue jumpers” but people who genuinely believed that they had been given permission to stay on the land in question.<sup>239</sup> This factual finding, however, could have been reached 40 paragraphs earlier, with no weakening, from a doctrinal point of view, in the justificatory force of the judgment. So why did Justice Sachs, and the entire CCSA in signing on to this judgment, think that the above passage and others like it were necessary? Is it just, as a former South African Minister of Justice once alleged, that the judges of the CCSA have too much time on their hands?

The answer, once one allows that the CCSA may be acting strategically, is obvious: these passages *are* necessary, not in a doctrinal sense, not because they constitute rigorous moral reasoning, but because they express an attitude – an ethic of

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<sup>238</sup> *Id.* at para. 41.

<sup>239</sup> *Id.* at para. 55.

compassion if you like – that the CCSA collectively believes to be an important part of the South African constitutional project. The moral message of the Constitution, these passages imply, is not always – perhaps never – best communicated through abstract moral reasoning, but is rather something to be intuited at an emotional level.

This is not an approach that legal formalists would find particularly appealing, or worthy of concern. But it is nevertheless a more accurate description of the judicial work being done in these passages. It is also arguably a more realistic conception on the part of the CCSA of what its job entails. Even in the United States, with its more sophisticated public sphere, the legitimacy of judicial review does not depend on the philosophical rigor of the U.S. Supreme Court’s judgments. Rather, it depends on the more intangible notion of judicial integrity, on the public’s faith in the “neutrality” of constitutional principles, and on judges’ commitment to law-governed adjudication. In South Africa, where the public has all the more reason to be suspicious about elite moralizing, it matters even more that the CCSA should be seen to be deciding cases according to the spirit of the Constitution, rather than on the basis of an elaborate moral and political theory that the judges purport to be developing philosophically from its underlying values.

## **5. Conclusion**

The foregoing analysis of the various strategies used by the CCSA to safeguard its institutional security is not capable of demonstrating that the Court is in a better position today than it would have been had it not engaged in such strategies. That conclusion depends on a counterfactual and must be left to speculation. However, to the extent that the CCSA is today still handing down decisions that the political branches do not always like, the cases discussed in Part 4 provide strong evidence that a willingness to compromise on principle in certain cases might be a viable way for some constitutional courts in new democracies to safeguard their institutional security. More importantly, the South African case shows that such compromises do not necessarily damage a court’s overall reputation for law-governed adjudication.

The key to the CCSA’s success has been its ability to exploit the political context to hand down decisions of principle in cases where other courts might have balked. This is most evident in the *Makwanyane* and *Treatment Action Campaign* decisions, in which the CCSA first used the ANC’s electoral dominance to hand down a principled decision that flew in the face of public opinion, and then used favorable public opinion to support a principled decision on the extension of the government’s anti-retroviral program. Without these decisions of principle in controversial cases,

the CCSA would not have built the reputation for legally credible decision-making it currently enjoys.<sup>240</sup>

In *New National Party*, *United Democratic Movement* and *Kaunda*, where the political circumstances surrounding the CCSA's decision were less propitious, the Court can be seen to have compromised on principle. For the majority judges, these decisions were justified by the Court's separation of powers doctrine, which provided a legally valid reason for the strategic compromises the majority thought needed to be made. Justice O'Regan's dissents in *New National Party* and *Kaunda*, together with her dissent in *Fourie*, cast serious doubt, however, on the determinacy of this doctrine. As much as the Court would like us to think that its separation of powers doctrine is reducible to clearly defined rules, there are at least two versions of the doctrine in its case law. The first, which can be found in Justice O'Regan's dissenting judgments, but also in the Court's unanimous judgments in *Makwanyane* and *Treatment Action Campaign*, focuses on the nature of the question to be answered. Where that question is one of rights interpretation, the fact that the constitutionally required decision may intrude into areas primarily reserved for the political branches is simply an inevitable side-effect of the fulfillment by the Court of its constitutional mandate. The second version of the doctrine, which was applied by the majority in *New National Party* and *Kaunda*, and by the unanimous Court in *United Democratic Movement*, holds that separation of powers concerns may be taken into account by the Court when deciding on the level of review to be applied in the case, and that such considerations may trump arguments of principle relating to the importance of the rights at stake and their place in the constitutional normative order.

Given this level of indeterminacy, the explanation for the CCSA's record must lie outside formal legal doctrine (although the constraints imposed by formal legal doctrine still form part of the explanation). As this essay has attempted to show, one explanation for the CCSA's record lies in the peculiar South African configuration of three factors: legal legitimacy, public support and institutional security. Unlike other constitutional courts in new democracies, the CCSA has not needed to court public opinion in order to safeguard its institutional security. The main reason for this is that the ANC political elite has shielded the Court from the political repercussions of its most unpopular decisions, allowing it to build its legal legitimacy through principled decision-making in several important cases. In return, the CCSA has been careful to manage its relationship with the political branches, retreating from principle where such compromises were in the long-term interests of the constitutional project, and endorsing the ANC government's policies wherever possible. In this way, a mutually

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<sup>240</sup> See Kende, *supra* note 215 at 766 (referring to the CCSA's decisions on the death penalty and gay and lesbian equality and arguing that "the Court has been pragmatic in selecting only a few cases on which to expand its institutional capital").

beneficial relationship has developed between the CCSA and the ANC government, with the CCSA's reputation for legally credible decision-making lending considerable legitimacy to the ANC's social transformation policies, and the ANC government's continued respect for, and obedience to, the CCSA's decisions helping to cement the CCSA's reputation as one of the most successful of the post-1990 constitutional courts.