The South African Constitutional Court's Democratic Rights Jurisprudence

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In five cases decided in 2011 and 2012, the Constitutional Court of South Africa (CCSA) enforced a series of what may broadly be termed democratic rights – rights, that is, to a well-functioning, competitive, multiparty democratic system, the operation of which is safeguarded by independent institutions staffed by persons of integrity. In the first such case, the Court struck down legislation that had dissolved a state agency centrally involved in the fight against corruption.[1] In the second, it held that Parliament had improperly delegated its power to the President to extend the Chief Justice's term of office.[2] In the third, it overturned a presidential decision appointing a new National Director of Public Prosecutions for disregarding findings made by a commission of inquiry about the appointee's reliability as a witness.[3] In the fourth, it held that certain parliamentary rules preventing members of minority parties from introducing bills in the lower house were unconstitutional.[4] And, finally, in the fifth, it set aside all the decisions taken at a provincial conference of the ruling African National Congress ('ANC') on the ground that the delegates to the conference had been improperly selected.[5] In his lead essay in this volume, Sam Issacharoff notes the emergence of this new phase in the CCSA's democratic rights jurisprudence, but is critical of the Court's overall record. In particular, he suggests that, by following the example of the Colombian Constitutional Court and the Indian Supreme Court, the CCSA might have done more to protect South Africa's democratic system from the adverse effects of the ANC's ongoing electoral dominance.[6] This response argues that the comparison Professor Issacharoff draws between these three courts is insufficiently attentive to the different political and institutional circumstances in which they find themselves. Once these differences are taken into account, the CCSA's democratic rights jurisprudence can be seen to be no less effective than that of the other two courts.

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[1] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

[2] *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

[3] *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

[4] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

[5] *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC).

[6] S Issacharoff 'The Democratic Risk to Democratic Transitions' (2013) 5 *Constitutional Court Review* 1.

The argument is divided into three parts. In the next section, I review Issacharoff's account of the role of constitutional courts in enforcing democratic rights, not just in his lead essay but also in several other papers he has written over the past 15 years. While sympathetic to much of Issacharoff's analysis of the 'democratic hedging' phenomenon, that section suggests two qualifications: first, that in certain settings, as indicated by the South African literature on the ANC, a dominant party may temporarily support processes of democratic consolidation, and therefore that it might make sense for a constitutional court that finds itself in that situation to build a co-operative working relationship with the dominant party, at least during the initial period of democratic stabilisation; and, secondly, that there are other situations that require effective constitutional-design solutions before constitutional courts can be expected to play a role in enforcing democratic rights.

The second section of this response targets what I will argue is the main weakness in Issacharoff's account: his tendency to treat constitutional courts in new democracies as relatively autonomous from the political conditions they are trying to influence. Impressed by the forcefulness of some of these courts' decisions on democratic rights, Issacharoff implies that it is just other courts' lack of courage or creative constitutional imagination that prevents them from following suit. The cases that Issacharoff examines, however, are a particular subset of the whole, reflecting instances in which constitutional courts have been permitted by fortuitous political circumstances and comparatively weak legal constraints to play the forceful role he describes. Where these two variables register differently, a court will need to adapt its decision-making behaviour accordingly. To understand the phenomenon we are looking at in its entirety thus requires a different comparative method. Rather than piling up examples of successful intervention for other courts to follow, we need a theorisation of the phenomenon that pays more attention to the different institutional and political settings in which constitutional courts work.

The rest of this section introduces an alternative theorisation of this sort. Pivoting off the traditional account of constitutional courts as largely passive institutions, I argue that a proper theorisation of the role of such courts in democratic consolidation needs to explain both how judges might be able to adapt the implementation of their constitutional mandate to democratic pathologies as they emerge, and also how they might be able to take the institutional repercussions of their decisions into account. None of the existing theorisations meets these requirements. As soon as we break down the universe of all conceivable courts into a limited number of ideal types, however, it becomes possible to map a plausible democratic consolidation trajectory for each type and then to test such conjectures against real-world examples. In this way we might be able to build a theorisation of the role of constitutional courts in democratic consolidation that is both comprehensive and empirically informed.

The final section uses this insight to offer a more optimistic analysis of the CCSA's record in enforcing democratic rights. Two main points are made: first, that the three periods in that record that Issacharoff identifies track developments in the quality of South African democracy, and that this in itself tells us something about the context-sensitivity of that record; and, second, that the period through which the CCSA is currently passing, though less spectacular perhaps than the record of some of the other post-1989 constitutional courts, is well suited to the

situation in which it finds itself. For a constitutional court like the South African one, working in a relatively well-developed legal culture that favours firm textual bases for democratic rights and in a political context marked by an ever-present threat of populist attacks on the Constitution, the role it plays in democratic consolidation must necessarily be quite cautious. In particular, courts in this situation need continually to strike an optimal balance between the risk to their independence posed by a failure to protect the democratic system from dominant-party attack and the risk to their independence posed by over-zealous, legally unsupported enforcement of democratic rights. Measured against that standard, the CCSA's recent record, though not without flaws, is generally to be admired.

I The 'Democratic Hedging' Phenomenon

Professor Issacharoff's lead essay in this volume is just the latest in a series of articles on the role of constitutional courts in enforcing democratic rights. Beginning with an interest in the 'law of democracy' in the United States,[7] Issacharoff has, over the past 10 years or so, broadened his research focus to include the role that constitutional courts in new or otherwise fragile democracies play in preventing elected majorities from using their democratic mandate permanently to entrench themselves in power.[8] South Africa has featured prominently in this body of work, with each treatment signalling a growing sense of unease on Issacharoff's part, not only about prospects for democratic consolidation in that country, but also about whether the CCSA is doing enough to prevent what he sees as an all-too-familiar slide back into authoritarianism, only this time under the ostensibly legitimating cover of democratic elections. Since much of the intellectual foundation for Issacharoff's argument in the lead essay is laid in this earlier body of work, it is necessary briefly to reflect on it before moving on to the lead essay itself.

The first paper in the series was co-authored with Richard Pildes in 1998.[9] On the surface, this paper, which concerns the legitimate role of the US Supreme Court in preventing 'partisan lockups' of the American democratic system, has nothing much to do with the problems facing new democracies. But the seeds of the later argument are sown here. In particular, the concentration in this paper on the way in which the Democratic and Republican parties have entrenched their dominant position in the United States foreshadows much of what follows in Issacharoff's later work on *one-party* dominant democracies in other parts of the world. We thus see here for the first time his interest in the analogy between political and economic markets, and the way in which dominant political parties can abuse their market power in a manner akin to dominant corporations, by closing down opportunities for other political players to enter the market and compete.[10] In its application to the American democratic system this analogy is used to justify greater curial intervention in the democratic

[7] S Issacharoff, PS Karlan & RH Pildes *The Law of Democracy: Legal Regulation of the Political Process* (4th Edition, 2012).

[8] S Issacharoff 'Fragile Democracies' (2007) 120 *Harvard Law Review* 1405.

[9] S Issacharoff & RH Pildes 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643 ('the joint paper with Pildes' or 'Issacharoff & Pildes').

[10] Ibid. See also S Issacharoff 'Gerrymandering and Political Cartels' (2002) 116 *Harvard Law Review* 593.

process, on the model of anti-trust law.[11] In the same way that anti-trust doctrine is no longer preoccupied with enforcing first-order fiduciary duties, Issacharoff argues, the US Supreme Court should focus its attention on the 'background markets in partisan control' rather than first-order civil and political rights.[12] The thrust of the argument is decidedly normative: he is not describing what the US Supreme Court is already doing to enforce democratic rights, but arguing that the usual counter-majoritarian worry falls away when the Court is acting to safeguard the integrity of the democratic process. In this way, his work can be seen as an extension of the argument first made by John Hart Ely,[13] albeit in a more economistic register and with greater emphasis placed on issues of background structure.

In 2004, Issacharoff turned his attention publicly for the first time to new democracies in a paper on 'Constitutionalizing Democracy in Fractured Societies'.[14] As the title suggests, the focus of this piece is not so much the role of constitutional courts in enforcing democratic rights as the role of the constitution-making process in providing solutions to long-standing political animosities that have prevented the emergence of well-functioning democracies. Within this focus, Issacharoff's particular concern is with the idea that 'judicially enforced constitutionalism' might provide a more durable solution than consociationalism to the problems facing politically divided societies.[15] By limiting majoritarian power, without constitutionally entrenching the ethnic, religious and other cleavages that have hitherto thwarted the emergence of democracy, he is inclined to argue, judicially enforced constitutionalism promises to promote the kind of well-functioning democratic system that may eventually lead to the decline in political importance of those cleavages. To this end, Issacharoff compares the South African constitution-making process, which he sees as exemplary of the constitutionalist approach, with the ethnic power-sharing arrangements agreed to as part of the Dayton Accords process in Bosnia. His analysis of the South African case, as was customary for most foreign commentators at the time, is positively glowing, with the Kempton Park multi-party negotiations process held up as a leading example of the way in which creative constitutional-design solutions may be used to induce an authoritarian regime to hand over power. He is also clearly impressed by the CCSA's 'majestic ruling' in the *First Certification Judgment*,[16] and particularly its insistence, in the face of possible accusations of protecting minority privileges, that various constitutional safeguards against the abuse of majoritarian power be strengthened.[17] This paper, then, represents the high-water mark of Issacharoff's positive assessment of the South African case.

After a brief detour into the question of what well-functioning democratic societies may legitimately do to protect themselves against anti-democratic groups that seek to use their democratic freedoms to promote their illiberal

[11] Issacharoff & Pildes (note 9 above).
[12] Ibid at 648.
[13] JH Ely *Democracy and Distrust* (1980).
[14] S Issacharoff 'Constitutionalizing Democracy in Fractured Societies' (2004) 82 *Texas Law Review* 1861.
[15] Ibid 1865.
[16] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) ('*First Certification Judgment*').
[17] Issacharoff (note 14 above) at 1868.

views,[18] Issacharoff addressed himself squarely to the question of the role of constitutional courts as 'hedges' against democratic authoritarianism. (He first proferred this notion in a 2011 paper published in the *Georgetown Law Journal*.[19]) The Democratic Hedging paper provides the immediate backdrop to the lead essay, although many of the themes in it, as noted, had been circulating in his earlier work. The key idea, on my reading, is that there is a necessary conceptual (and perhaps even causal) link between the political rationale for the post-1989 turn to liberal constitutionalism and the relative success many post-1989 constitutional courts have enjoyed in enforcing democratic rights. As to the former, Issacharoff draws on the work of Tom Ginsburg and others to show that it is precisely the promise that there will be some limit on majoritarian power that has prompted the simultaneous turn to democracy and judicially enforced constitutionalism after the end of the Cold War.[20] What he adds to this is the idea that many post-1989 constitutional courts have been able to draw on this political rationale quickly to establish their authority, often taking decisions that the US Supreme Court took much longer to take, and which even now tend to trigger accusations of counter-majoritarianism. How is it, Issacharoff asks, that constitutional courts in countries as diverse as Ukraine,[21] Mexico,[22] Hungary,[23] Mongolia,[24] Bangladesh,[25] Albania,[26] the Czech Republic[27] and Romania[28] have moved so rapidly into the democracy-protection arena? The answer, he surmises, must lie in the fact that these courts were mandated to do precisely that – that there is some continuity of political rationale between the establishment of judicial review in these countries and the democracy-protecting role that their constitutional courts have been performing.[29]

As noted at the outset, this argument does not come out of nowhere but is a logical extension of arguments that Issacharoff has been developing for some time. In his joint paper with Richard Pildes, for example, he wrote that '[w]here there is an appropriately robust market in partisan competition, there is less justification for judicial intervention'.[30] The insight in the 'Democratic Hedging paper' is simply the flipside of this idea. New democracies, the argument runs, are by definition characterised by some measure of political-market dysfunctionality. It follows that judicial intervention to enforce democratic rights is more easily justified in such settings.

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[18] Issacharoff (note 8 above).

[19] S Issacharoff 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 961 965 (hereafter, 'the Democratic Hedging paper').

[20] Ibid at 986 (citing T Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003)).

[21] Ibid at 969.

[22] Ibid at 969, 979.

[23] Ibid at 972–73.

[24] Ibid at 974–75.

[25] Ibid at 975.

[26] Ibid at 975–976.

[27] Ibid at 976.

[28] Ibid.

[29] Ibid at 986.

[30] Issacharoff & Pildes (note 9 above) at 648.

Left like that, the point is a normative one, and is not dissimilar, Issacharoff might be happy to concede,[31] from the point that his colleague Jeremy Waldron makes in his well-known treatment of this topic.[32] The novel contribution Issacharoff makes in the 'Democratic Hedging paper', however, is to give this normative point an explanatory inflection by arguing that the reason the post-1989 constitutional courts he discusses have been able to play such an effective role in enforcing democratic rights is that the moral objection to their playing this role is undercut by the democratic pathologies they are addressing. In new democracies – countries that are by definition emerging from sometimes intense political conflict, and which are often still characterised by ethnic and religious cleavages – constitutional courts have been established precisely for the purpose of preventing those cleavages from tearing the society apart. Their mandate, far more explicitly than was the case in the United States, is to police the terms of the constitutional commitment to multiparty democracy and to prevent any sliding back into authoritarianism, and especially the more pernicious kind of authoritarianism that proceeds under the legitimating cover of regular elections, but where in fact the democratic system is locked up in favour of a dominant political party.[33]

In the course of setting out this argument, South Africa is once again singled out for special attention as a 'wonderful example of the process of constitutional formation'. On this occasion, however, Issacharoff immediately adds that the South African case also 'provides … perhaps a sobering cautionary note'.[34] After reiterating his positive assessment of the *First Certification Judgment*, Issacharoff gives a much more critical appraisal of the CCSA's decision in *United Democratic Movement*,[35] arguing that the Court missed a vital opportunity in that case to assert its role as guarantor of the 'structures of democracy'.[36] While recognising that the constitutional amendment to the anti-defection provision at issue did not directly contribute to South Africa's growing one-partyism (given that the ANC itself later repealed the amendment), Issacharoff implies that the decision nevertheless damaged the Court's reputation for bold decision-making, which in the end may be just as regrettable. The normative prescription underlying this critique, in other words, is that constitutional courts should take every opportunity given to them to assert their democracy-protecting role lest the salutary threat of their playing that role in future cases decline. This argument is further spelled out in an extended reference to the Indian Supreme Court's 'basic structure' jurisprudence,[37] which Issacharoff suggests is the path that the CCSA ought to have followed. What he

[31] Issacharoff (note 19 above) at 971 (Distinguishes his argument from Waldron's position).

[32] J Waldron 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346 (Waldron argues that the force of the democratic objection to judicial review declines in settings where the democratic system is deficient in some way.)

[33] Issacharoff (note 19 above) at 980–993.

[34] Ibid at 994.

[35] *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 1)* [2002] ZACC 21, 2003 (1) SA 495 (CC).

[36] Issacharoff (note 19 above) at 997.

[37] Ibid at 999–1001.

finds particularly disappointing in *United Democratic Movement*, this comparison makes clear, is that the 'Court retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights'[38] when, with a little more substantive reasoning, it might have justified a decision enforcing broader structural guarantees, as indeed it had done in its *First Certification Judgment*. 'Although floor crossing is no longer part of the political challenge to democracy in South Africa', Issacharoff concludes, 'the consequences of deference to a dominant party remain an act in progress'.[39]

The central thrust of this critique of the CCSA's democratic rights jurisprudence remains unchanged in Issacharoff's lead essay, save that on this occasion the Indian comparison is supplemented by a discussion of the Colombian Constitutional Court's record in resisting President Uribe's attempt to win a third term.[40] The point of this additional comparison seems to be to reinforce the idea that constitutional courts need to act boldly if they are to safeguard the democratic system, even to the extent of risking their reputation for legally motivated decision-making. While the Indian Supreme Court's jurisprudence is still preferred for its better reasoned, more substantive engagement with the democratic pathologies the Court was addressing, the Colombian Constitutional Court, we are told, at least grasped the fact that its status as the acknowledged guardian of the constitutional project was a powerful enough source of legitimacy to enable it to overcome the weakness of its decision in purely legal terms. This is evidently seen to be a particularly instructive example for South Africa because of the close parallels between Colombia and South Africa in two respects: the existence of a constitutional court charged with flying the flag of a new, post-authoritarian constitutional order and the threat posed to democracy by a popular President.

In addition to the extended Colombian example, the lead essay also contains a useful tripartite periodisation of the CCSA's democratic rights jurisprudence into an initial phase, typified by the *First Certification Judgment*, an intermediate phase, marked by the disappointment engendered by *United Democratic Movement*, and the current phase, in which the CCSA is once again actively enforcing democratic rights, albeit still not by way of the forceful, substantively reasoned judgments that Issacharoff would prefer. The periodisation accurately identifies the different stages in the Court's developing jurisprudence. Nevertheless, there is some ambiguity in the way the three periods are set out, which betrays what I shall argue is the main weakness in Issacharoff's argument. The ambiguity concerns whether the periods are in the end defined by Court-independent developments in the quality of South African democracy or whether the CCSA itself has defined them by deliberate changes in its adjudicative strategy. Thus, Issacharoff starts by saying that, in the first phase, 'the Court enshrined a period of … "constrained democracy"',[41] suggesting that it was the Court that gave this phase its basic

[38] Ibid at 998.

[39] Ibid at 1001.

[40] Issacharoff (note 6 above).

[41] Ibid at 1 (citing Bruce Ackerman 'Meritocracy v Democracy' *London Review of Books* (8 March 2007)).

character. In explaining the second phase, however, he notes that South Africa during this time 'was a democratic state with the ANC a triumphant, strong party riding the crest of its mandate as the driver of the successful anti-apartheid struggle'.[42] The Court in this phase, we are told, 'continued to exercise its role as protector of individual rights', but was on the whole 'relatively quiescen[t] as to democratic governance'.[43] In this instance, therefore, the period is defined both by the ANC's growing confidence as a governing party – a political development independent of the Court's jurisprudence – and by the more deferential institutional role the CCSA adopted during this time. Finally, in the third phase, the CCSA is 'confronting some of the efforts of the ANC government to place itself beyond customary forms of legal and democratic accountability',[44] which again suggests that the periodisation is principally being driven by external events, to which the CCSA is merely responding.

This ambiguity about what really defines the periodisation – independent political developments or the Court's own actions – affects the entire analysis, I think, so that in the end we are not entirely certain whether Issacharoff is arguing that *United Democratic Movement* was a unique opportunity for the CCSA forcefully to assert its role or whether he thinks that the Court's more recent jurisprudence provides some hope of redemption. With Sujit Choudhry's 2009 lead essay,[45] this is nevertheless an important contribution to the local South African debate about the CCSA's role in democratic consolidation. That debate has been hamstrung for too long by a conversational divide between South African political scientists, who seldom write with any understanding about the Court, and legal academics, who are still cautious about bringing notionally extra-legal, political considerations into their analysis. In the case of legal academics, the situation has been exacerbated by Karl Klare's influential article on transformative constitutionalism,[46] which has encouraged them to think that the CCSA necessarily has a central role to play in democratic consolidation, without thinking about whether the preconditions for the Court to play this role are satisfied. While Issacharoff's account shares some of these problems, he at least draws attention to the need for the Court to enforce rights to the background structural conditions that make a well-functioning democracy possible. His lead essay is a very welcome addition to the literature from that point of view.

The second part of this response addresses the political realism point. In the rest of this section I want to make two smaller points that go to the delimitation of the issue we are discussing. The first has to do with a theme in the South African political science literature that suggests that the ANC's dominance of South African politics has not always been antithetical to the goal of democratic consolidation, and the second with Issacharoff's argument

[42] Ibid at 2.
[43] Ibid at 2.
[44] Ibid at 3.
[45] S Choudhry '"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.
[46] KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 12 *South African Journal on Human Rights* 146.

in the 'Constitutionalizing Democracy' paper that the advantage judicially enforced constitutionalism has over consociationalism is that it provides a device for mediating political cleavages without entrenching those cleavages in the constitution itself.

There is now a vast comparative politics literature on political regimes that find themselves somewhere between the ideal of a well-functioning multiparty democracy, in which the rule of law and human rights are generally respected, and pure authoritarianism. Much of this literature has arisen in response to the 'third wave' of democracy, which began in the mid-1970s, but accelerated after 1989.[47] One of the main preoccupations of this literature has been to point out that the third wave has not been unilinear or monolithic – that different countries have travelled different paths to democracy and that there has been a lot of slipping back. While some claim to being democratic is now a condition for regime legitimacy almost everywhere in the world, that claim is bolstered in many different ways and has resulted in many different types of regime. Unfortunately, each theorist seems to have his or her own preferred way of carving up the space between authoritarianism and democracy, resulting in a bewildering proliferation of terms, from 'competitive authoritarianism'[48] to 'hybrid regimes',[49] 'electoral democracy',[50] 'electoral autocracy',[51] 'polyarchy'[52] and so on. Nevertheless, we now know vastly more than we previously did about the myriad ways in which countries can vacillate (even stabilise) at some point between out-and-out authoritarianism and fully competitive multiparty democracy.

While South Africa appears in some of these comparative studies,[53] the local literature, in the nature of things, has focused on the impact of the ANC's repeated electoral victories on the quality of democracy in South Africa. In a series of papers, Hermann Giliomee[54] and Roger Southall[55] have thus set out the case for treating South Africa as a dominant-party democracy, with all the pathologies this categorisation implies. This assessment has not gone uncontested, however.

47 See SP Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1991); L Diamond (ed) *Consolidating the Third Wave Democracies: Regional Challenges* (1997).

48 N van de Walle 'Between Authoritarianism and Democracy' (2012) 23:1 *Journal of Democracy* 169 (Review of S Levitsky & LA Way *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (2010)).

49 L Diamond 'Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21.

50 L Diamond 'Introduction: In Search of Consolidation' in Diamond (note 47 above) xiv.

51 A Schedler 'The Logic of Electoral Authoritarianism' in A Schedler (ed) *Electoral Authoritarianism: The Dynamics of Unfree Competition* (2006) 1.

52 Robert A Dahl *Democracy and its Critics* (1989) 233.

53 See, for example, J Møller & S-E Skaaning 'Regime Types and Democratic Sequencing' (2013) 24 *Journal of Democracy* 142 at 148 (classifying South Africa as a 'polyarchy').

54 H Giliomee & C Simkins (eds) *The Awkward Embrace: One-Party Domination and Democracy* (1999); H Giliomee, J Myburgh & L Schlemmer 'Dominant Party Rule, Opposition Parties and Minorities in South Africa' (2001) 8 *Democratization* 161.

55 R Southall 'The Centralization and Fragmentation of South Africa's Dominant Party System' (1998) 97 *African Affairs* 443; R Southall 'Opposition in South Africa: Issues and Problems' (2001) 8 *Democratization* 1.

Heinz Klug,[56] Steven Friedman,[57] Anthony Butler,[58] Raymond Suttner[59] and Tom Lodge[60] have all in various ways either disputed the usefulness of the term 'dominant-party democracy' or the inevitability of its associated pathologies. Klug, for example, in his most recent book on South Africa constitutionalism,[61] has stated his preference for the term 'unipolar' democracy, while Butler has been forceful in arguing that the ANC has played a useful role in controlling South Africa's ethnic cleavages and in pushing through necessary economic reforms, neither of which would have been possible under a more divided government.[62] These dissenting voices have become more muted as the ANC's collapse into populism has progressed; however, Daryl Glaser,[63] for one, still warns against liberals getting all of what they wish for. In his view, the undoubted benefits in theory of a well-functioning, competitive, multiparty democracy must always be assessed against the actual effects of such a system in concrete political circumstances.

Issacharoff's unstinting commitment to the value of competitive, multiparty democracy means that he misses this nuance in the South African debate. For him, there is no such thing as a beneficent or 'better-the-devil-you-know' dominant-party democracy. Dominant parties are inherently bad for democratic consolidation, period. It follows that there is only one thing that a constitutional court committed to democratic consolidation should do when confronted by such a party, and that is immediately and boldly to begin enforcing democratic rights. Far from supporting this argument, however, the South African case illustrates its uncertain generalisability. If the dissenting line in the local literature is right, or at least has some grain of truth in it, the immediate and bold enforcement of democratic rights may not have been the optimal strategy for the CCSA to have pursued. The ANC's long history as a political movement in exile meant that it came to power representing a broad cross-section of the South African political spectrum, having successfully resisted attempts at various points to turn it into either an ethnic nationalist or radical socialist party. That political identity was tremendously useful to South Africa during the constitutional transition. For one, it meant that there were many in the ANC who were genuinely committed to the value of liberal constitutionalism, in addition to those who were prepared to support this form of political system as the compromise the ANC needed to make to drive the transition forward.[64] The ANC's political history as an opposition movement also meant, as Butler in particular has argued, that it was able after

[56] H Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 298.

[57] S Friedman 'No Easy Stroll to Dominance: Part Dominance, Opposition and Civil Society in South Africa' in H Giliomee & C Simkins (eds) *The Awkward Embrace: One-Party Domination and Democracy* (1999) 97.

[58] A Butler 'Considerations on the Erosion of One-Party Dominance' (2009) 45 *Representation* 159.

[59] R Suttner 'Party Dominance "Theory": Of What Value?' 2006 (33) *Politikon* 277.

[60] T Lodge 'The ANC and the Development of Party Politics in Modern South Africa' (2004) 42 *Journal of Modern African Studies* 189.

[61] Klug (note 56 above).

[62] Butler (note 58 above).

[63] D Glaser 'South Africa: Toward Authoritarian Populism?' (2009) 1 *Johannesburg Salon* 9.

[64] See T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 152–161.

the transition to contain South Africa's ethnic and class cleavages within its own organisational structures, and in this way to stabilise the economy.[65] These were not inconsiderable benefits. More to the point: the original members of the CCSA, seeing these benefits, might reasonably have decided that the Court needed to play a different role than the one Issacharoff prescribes, at least initially. Provided there were materials in the Constitution that could later be drawn on to protect the democratic system from attack, their immediate task, the judges might justifiably have thought, was to build a co-operative working relationship with the ANC in the interests of cementing the transition to democracy.

The first general qualification I would place on Issacharoff's overarching thesis, then, is to suggest that there may be circumstances, particularly immediately after a transition, in which the wisest strategy for a constitutional court might be to enlist the dominant party's support in stabilising the democratic system. The second qualification is that there may be circumstances where active democratic rights enforcement is not and never will be a prophylactic against a slide into democratic authoritarianism absent a constitutional-design solution of the sort that Issacharoff appears reluctant to endorse. His original reason for admiring the South African solution, it will be recalled, was that the constitutional drafters deliberately avoided any kind of consociationalism. The reason for that in turn was the not unfounded fear that consociationalism simply entrenches the political cleavages that a democracy ultimately needs to overcome if it is to function properly. The counter to this argument, however, is that, in certain settings, constitutional courts, absent a constitutional settlement that takes certain issues off the table, cannot avoid becoming drawn into the political conflict they are trying to police. No one would suggest that the current Egyptian crisis, for example, could be resolved by enacting a liberal-democratic constitution in which a constitutional court enforced individual rights to religious freedom. The very nature of the Egyptian state as religious or secular is what is in dispute. Unless that issue is resolved through some sort of constitutionally guaranteed mutual veto, the Egyptian Constitutional Court will inevitably be drawn into the political conflict (as indeed it already has been, for other reasons). We might say the same about Palestine, where the proposal for the establishment of a Constitutional Court faltered after the initial political fallout between Fatah and Hamas.[66] Unless there is some kind of federalist solution in terms of which each of these parties is guaranteed a certain measure of autonomy in its respective geographic sphere of influence (the West Bank and Gaza), the Constitutional Court will never begin functioning properly, let alone contribute to democratic consolidation. What these examples indicate, in other words, is that some balance must be found between perpetuating political cleavages in the constitutional-design process and taking sufficient account of them so that a constitutional court can begin to play its appointed role. Where political cleavages run so deep that poor performance in government, even catastrophically poor economic performance does not

[65] Butler (note 58 above).

[66] At the time of writing, the Palestinian Supreme Court was exercising constitutional jurisdiction pending the establishment of a Constitutional Court, but the three decisions it had handed down had all been rejected by Hamas as reflecting the partisan political leanings of the Fatah-appointed judges.

affect voter allegiance, then even the most activist constitutional court is not going to be able to contribute to democratic consolidation; however 'unlocked' the democratic system is, voters are still going to vote in line with the existing political cleavages. In turn, democracy will remain a system through which even a narrow majority is able to oppress its opponents. The best that could be hoped for in such a situation is that a constitutional court might keep the idea of a competitive, multiparty democracy alive pending a more durable constitutional solution.

To put the point in its positive form: any theorisation of the role of constitutional courts in democratic consolidation must start from some assumption about what sources of political conflict have been taken off the table by an adequate constitutional-design process. Similarly, any empirical investigation into examples of successful democratic rights enforcement by a constitutional court must take account of these constitutional design features, in addition to variations in political conditions that may account for different curial practices. The next section develops this argument in greater detail.

II Closing the Feedback Loop: A Dynamic Theory of Constitutional Court Agency

In introducing his change of focus in the 'Democratic Hedging paper' to the new, post-1989 constitutional courts, Issacharoff says:

> There is by now a recurring pattern through which courts in many different constitutional regimes have had to confront surprisingly similar issues, regardless of the precise constitutional regime at play. A simple example: most constitutional regimes at present – particularly those of recent vintage – have provisions for constitutional courts. By their nature, these are courts that stand apart from the ordinary appellate chain of the regular judiciary. They have no warrant for their existence save the need to subject the normal outputs of the political process to constitutional scrutiny by the judiciary. *Not surprisingly, these courts are little detained by concerns over the authority for judicial review or over the countermajoritarian consequences of constitutional challenge.*[67]

This passage struck me when I first read it as a strange thing for an American constitutional theorist to write, steeped as I take such theorists to be in a tradition of thinking about constitutional courts as essentially political institutions. The highlighted sentence, in particular, came across as quite formalist in its assertion that 'concerns' about constitutional courts' 'authority' to intervene in democratic politics disappear where, as is the case with most of the post-1989 constitutional courts, the mandate for the exercise of their powers is clear. Having since read more of Issacharoff's work, I now appreciate the *normative* insight on which this passage is based. Nevertheless, as a *descriptive* claim, the point still strikes me as somewhat forced.[68] While the express conferral of a power of judicial review on a court may well put the general existence of that power beyond doubt, there are

[67] Issacharoff (note 19 above) at 963–964 (emphasis added and footnotes omitted).

[68] The only support Issacharoff supplies for this statement, apart from his normative argument, is a reference to W Sadurski *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005) xiii (cited in Issacharoff (note 19 above) at 964 n 10).

invariably still complex questions about how far the power reaches and whether the judges have legitimately exercised it. In controversial cases especially, post-1989 constitutional courts (and certainly the CCSA) can work just as hard as the US Supreme Court to justify their intrusion into politics, with constant appeals both to the legitimacy of their interpretive methods and to the political neutrality of their institutional function. The best known instance of this in the CCSA's case law is *United Democratic Movement*, where the Court found it necessary, despite the clarity of its mandate, to remind South Africans of the distinctively legal nature of its role.[69] But this is just one of many such instances, both in the CCSA's jurisprudence and in that of the other new constitutional courts.[70] On a purely descriptive level, therefore, I would question the correctness of Issacharoff's assertion that 'these courts are little detained by concerns over the authority for judicial review'. On the contrary, those concerns are often real and pressing, and an appreciation for how post-1989 constitutional courts mediate them is crucial to a proper understanding of their capacity to act as a hedge against democratic authoritarianism.

As the first step in developing this argument, notice how the highlighted sentence, in addition to misstating the extent of the authority problem for new constitutional courts, also betrays a broader formalism that runs through the rest of the Democratic Hedging paper and, to a lesser extent, the lead essay as well. In both these pieces, it seems to me, constitutional courts are treated as relatively autonomous institutions, somewhat divorced from the political context in which they find themselves. To be sure, considerable attention is given to matters of context in setting out the democratic deficiencies these courts are addressing. But the courts themselves – their institutional power and their capacity to act – are depicted as relatively unaffected by that context. Instead, they are assumed to be in a position roughly equivalent to that of courts in mature democracies, with little threat to their independence and consequently free to focus their efforts on developing the required constitutional law doctrines. The problem with this assumption is that it ignores the fact that a constitutional court's capacity to act as a hedge against democratic authoritarianism may be inhibited by the same political conditions that interventions of this sort are aimed at addressing. Not just that, but a court's intervention to protect the democratic system necessarily has an effect, either positive or negative, on its capacity to intervene in future cases. The interaction we are discussing, in other words, is best depicted as a dynamic feedback loop, with a court's capacity to act first constrained by the political conditions it is trying to influence, and then by the repercussions for it as an institution of whatever action it takes. If wisely and astutely handled, the decision

[69] *United Democratic Movement* (note 35 above) at para 11 ('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.')

[70] See, for example, *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) at para 99 (Court defends 'intrusion into the domain of the executive' as 'an intrusion mandated by the Constitution itself'.) On other new constitutional courts, see A Stone Sweet 'Constitutional Courts' in M Rosenfeld & A Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (2011) 816, 828 ('In every system in which a CC has been successful … legitimacy questions have been raised.')

might well trigger a virtuous circle in terms of which each successive intervention progressively improves the conditions for future intervention. But equally, if mishandled, the attempted intervention might trigger a downward spiral in terms of which the court becomes progressively less and less capable of intervening to arrest the slide into democratic authoritarianism. By ignoring the dynamic nature of the law/politics interaction in these kinds of cases, Issacharoff's account is trapped at the level of observation, never progressing to offer a convincing theorisation of the circumstances in which a constitutional court might be able to sustainably contribute to democratic consolidation.

The source of this uncharacteristic formalism, I think, is the particular kind of comparative method that Issacharoff uses, one that concentrates on exhaustively documenting numerous examples of the phenomenon he identifies, but which necessarily proceeds at the expense of contextual detail. In their sheer proliferation, these examples are indeed noteworthy and, from an American perspective, even surprising, revealing as they do the capacity of some of the new constitutional courts to play an institutional role that it took the US Supreme Court, with it less explicit mandate, centuries to fashion. But the American perspective on these events, and the focus on the scale of the phenomenon rather than its detailed dynamics, is a little distorting. The rapid-fire summation of instances in which post-1989 constitutional courts have resisted attempts by dominant parties to lock up the democratic system tells us little about the underlying circumstances that made these sorts of intervention possible. More importantly, this method also leaves us none the wiser about the institutional repercussions for these courts of their actions.[71] In each instance there is thus likely both a complicated back-story to be told about how the court came to be able to take the action that it did, and an equally complicated sequel to be related about what happened to the court after it acted. But this sort of detail is left out. Instead, what we get is a piling-up of examples, each one indicative of the observed phenomenon but none presented in a richly textured enough way to give us a clear idea of what is going on.[72]

In this section I want to suggest that a different comparative method, one that concentrates on giving fewer but deeper accounts of these interventions, with full and sustained attention to the political context in which they occur, might help to provide both a more satisfactory explanation for the rise of the 'democratic hedging' phenomenon and a more powerful theorisation of its preconditions and modalities. In addition to its preference for depth over breadth, the alternative method is characterised by a particular view of the relationship between law and politics in constitutional adjudication, one that sees these two conceptual fields not as flipsides of the same judicial politics coin, but as mutually interacting social systems, susceptible to influence by the other, but each in the end subject to its own distinctive rationale. Scholars deploying this method thus resist the crude

[71] Issacharoff's discussion of the Hungarian Constitutional Court in the 'Democratic paper', for example (Issacharoff (note 19 above) at 973) fails to take account of the Court's decline after the non-reappointment of its first President, László Sólyom.

[72] Issacharoff's lead essay, in focusing on Colombia and India, remedies the problem somewhat, but even here the treatment is focused on the respective courts' forcefulness rather than on the political conditions that allowed them to be forceful.

legal realist notion that, because each of the contending outcomes in politically controversial cases is typically amenable to legal rationalisation, law plays only an ex post justificatory role. Rather, law is seen as capable of shaping and constituting judicial preferences, and in this way acting both as a significant constraint on judicial decision-making and also as a source of legitimacy. In disciplinary terms, the method belongs to the so-called 'historical institutional' school in (comparative) judicial politics, the proponents of which take law seriously as an independent reason for judicial action, and conceive of court/political-branch interactions as having deep roots in a country's legal and political culture.[73]

From the perspective of this alternative method, the key to a better understanding of our topic is to develop a dynamic account of constitutional court agency – an account, that is not only of how constitutional courts come to be able to intervene in the democratic system and take the kinds of decisions Issacharoff describes, but also of how they are able to play this role over the long run, without suffering a debilitating attack on their independence. Is it in fact the case, as Issacharoff suggested in the spoken version of his lead essay, that constitutional courts are unlikely ever to be able to resist a sustained dominant-party assault on the democratic system, or is there something that judges who find themselves in this sort of situation can do to resist and eventually turn back even the most ferocious attack? What would motivate constitutional court judges in the first place to play this kind of role: only a noble vision of the rule of law and the value of multiparty democracy, or some less noble, but perhaps no less effective, motivation, such as a self-interested desire to build their court's institutional power?[74] If the latter, could a motivation of that sort be exploited by friends of the rule of law and multiparty democracy (public interest litigators, liberal opposition parties, human rights groups, and legal academics) to arrest a slide into democratic authoritarianism? How, finally, might the fate that Issacharoff hints at in his article – of the one-shot, two-shot, perhaps even three-shot-wonder court eventually succumbing to the political reality of its situation – be avoided?

That is a complex set of questions and we need to proceed cautiously if we are to answer them properly. The starting point, if only as a foil to get us going, might as well be the traditional account of constitutional courts as essentially passive institutions, deciding the cases that happen to be brought to them according to pre-existing law, with no capacity either to elicit certain types of case or to fashion the law in a way that would enhance their ability to intervene in future

[73] See, for example, H Gillman 'The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-making' in CW Clayton & H Gillman (eds) *Supreme Court Decision-Making: New Institutionalist Approaches* (1999) 65; Ginsburg (note 20 above); KE Whittington *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (2007); B Friedman *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); and G Silverstein *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (2009). Note that I am not suggesting that Issacharoff holds a crude legal realist view of law. In fact, his work is clearly sympathetic to the view I am advocating. It is just that he does not spell out the implications of that view for the 'democratic hedging' phenomenon.

[74] See A Trochev 'Under Pressure: How Post-Communist Judges Resist Political Interference' Paper presented at *Annual Meeting of the Law & Society Association* (Boston, 30 May 2013).

cases.[75] If we can unpack what is wrong or unconvincing or deficient with that account, we will be well on our way to articulating a more dynamic conception of the role of constitutional courts in democratic consolidation.

Beginning, then, with the passive account: On this view of things, a constitutional court's capacity to protect the democratic system is beholden to whatever set of democratic rights happens to have been constitutionalised, together with litigants' ability to frame cases in a way that allows the court to enforce those rights. It follows that, if the framers failed to foresee the particular problem with the democratic system that has emerged, there is nothing much the court can do about it. By definition, no case can be brought that would allow the court to intervene in a way that would be compatible with the Constitution's democratic vision. Should a case nevertheless be brought, and should the court choose to intervene, its decision would necessarily be seen as political – as impermissibly inventing democratic rights that the framers had not seen fit to include. The court would consequently be vulnerable to political attack,[76] and its capacity to intervene in future cases compromised. If, on the other hand, the framers *did* foresee the particular threat to the democratic system that has emerged, a plausible case could be brought and, in upholding it, the court would necessarily be seen to be acting according to law. Protected by the clarity of its mandate, the court need not fear that it might be drawn into the process it was trying to counteract.

On the passive account, then, everything depends on the wisdom of the constitutional framers in foreseeing potential problems with the democratic system and the resourcefulness of litigants in bringing the necessary cases to court. Constitutional judges themselves have no ability either to adapt the Constitution's conception of democracy to changing political conditions or to take account of the impact of their decisions on their court's continued capacity to perform its institutional role. Nor can the judges, by framing their doctrines in creative ways, invite particular types of litigation in defence of democratic rights that would not in any case already have been possible under the Constitution. For all these reasons, the court would lack agency: beholden on the one hand to the immutable content of its constitutional mandate and on the other to the cases that happened to come before it, it would not itself be able to influence the course of democratic consolidation or its own institutional fate. Like a clockwork mouse incapable of avoiding obstacles in its path, the framers would have set it up either for success or failure, but the court itself would have no particular control over the matter.

The obvious problem with this account is that it attributes too much importance to the formal content of a court's mandate and too little importance to constitutional judges' capacity to build support for an understanding of

[75] There is a good (critical) summary of the traditional conception in D Samararatne 'A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka (May 2009 – August 2012)' *International Centre for Ethnic Studies*, Research Paper 5 (March 2013).

[76] By 'political attack', I simply mean an attack on the Court's institutional independence that undermines its capacity to decide future cases according to law. Typical examples embrace court-packing or amendments to the judicial appointments process that make it more likely that partisan-political judges will be appointed, and amendments to the Court's decision-making powers and jurisdiction.

their mandate different from (or perhaps just more specific than) the one constitutionally codified. The Indonesian Constitutional Court, for example, is generally agreed to have overstepped the parameters of its 'negative legislator' mandate in the first 10 years of its institutional life. Predictably, the Court's intervention in democratic politics triggered a backlash in the form of a 2011 legislative proposal for the pegging back of its jurisdiction to what had originally been envisaged.[77] Less predictably, however, the Court has been able thus far to resist this attempted attack, largely due to its overwhelming popular support in the aftermath of many decades of authoritarian rule.[78] Examples like this, and indeed the Colombian example Issacharoff gives in his lead essay, illustrate that at least some of the post-1989 constitutional courts have been able to build support for their role as protectors of the democratic system, and that they have been able to do this even where they have overstepped the strict terms of their mandate. The question is: can we build a general theory of the preconditions for such success and the strategies other post-1989 constitutional courts need to pursue if they are to emulate these examples?

To cure the problems with the passive account, any such general theory must explain how a constitutional court in a new or otherwise fragile democracy might be able to adapt the framers' vision of its institutional role in protecting the democratic system in two respects: (1) by creating new democratic rights to counteract unforeseen democratic pathologies as they emerge; and (2) by taking account of the potential impact of its decisions on its capacity to continue performing its institutional role. Both of these required adaptations implicate questions of 'authority' (in Issacharoff's terminology) or legitimacy (the term more commonly used in the literature). If the court moves beyond the clear terms of its constitutional mandate to protect the democratic system, this necessarily raises questions about the legal and moral legitimacy of what it is doing, which may impact on its institutional legitimacy more broadly. How might the court, our general theory would need to tell us, be able to adjust its existing democratic doctrines, or construct new ones, without falling victim to the charge of politicisation? Likewise, how might a court take account of the impact of its decisions on its future capacity to perform its institutional role? Is it ever constitutionally and morally legitimate for a court to do that? And how might a court do that without being accused of outcomes-based decision-making, the avoidance of which most commentators take to be a precondition for constitutional court legitimacy?

As soon as we discard the passive account, these questions reveal, the major challenge is to explain how constitutional courts overcome the legitimacy concerns associated with the two adaptive strategies required. As to the first, there has been an ongoing debate in the academic literature over the extent to which a constitutional court may legitimately depart from the precise terms of its mandate, with originalists holding that courts should stick closely to the historically discoverable meaning of the Constitution, and living-tree theorists

[77] M Mietzner 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) 10 *Journal of East Asian Studies* 397, 404.

[78] See S Butt & T Lindsey *The Constitution of Indonesia: A Contextual Analysis* (2012) 144–157.

allowing for some adaptation to changing circumstances.[79] Likewise, the extent to which a court may legitimately take the consequences of its decisions into account is disputed within liberal legal theory, with Posnerian pragmatists and legal positivists treating certain forms of consequentialist reasoning as legitimate policy reasoning,[80] and Dworkinians treating any consequentialist reasoning as per se anathema to the pursuit of constitutional principle.[81] Since the constitutional and moral legitimacy of what a court does must at some point influence its institutional legitimacy,[82] these concerns are more than just abstract legal-theoretical worries: they appear to present real challenges to a court committed to playing a sustainable role in democratic consolidation. If a court strays too far from a morally or constitutionally justifiable understanding of its mandate, we would expect this to undermine its ability to present its decisions as legally required, with knock-on consequences for its capacity to defend its independence. Similarly, if a court is too sensitive to the way its decisions might be perceived by powerful political actors, we would expect this to have knock-on consequences for its reputation as a legally motivated actor, and thus again for its capacity to resist political attack.

And yet, the empirical evidence suggests otherwise. As we have seen, the Indonesian case serves as an example of how a post-1989 court may be able to depart from the strict terms of its constitutional mandate to build a powerful role in the political system. Indeed, on some accounts, it was precisely the Indonesian Constitutional Court's capacity to depart from its mandate that was vital to its success.[83] The Colombian Constitutional Court, too, on Issacharoff's account, had little obvious legal backing for its decision to block President Uribe's attempt to amend the Constitution to win a third term. And yet it not only survived this confrontation, but grew stronger as a result. Other examples of courts in new or fragile democracies overstepping the strict terms of their mandate to play important roles in democratic consolidation include Estonia, where the Supreme Court has acted as a 'conduit' for democratic reform, not by enforcing the literal terms of the Constitution, but by using international democratic norms as a guide to the 'pathways' to be followed;[84] and Korea, where the Constitutional Court, '[t]hough expected by the constitutional drafters to be a relatively quiescent institution … has become the embodiment of the new democratic constitutional order'.[85]

[79] Two representative examples are A Scalia *A Matter of Interpretation* (1996) and WJ Waluchow *A Common Law Theory of Judicial Review: The Living Tree* (2007).

[80] See, for example, RA Posner *Law, Pragmatism, and Democracy* (2003); J Raz 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 *Legal Theory* 1.

[81] Dworkin does concede the practical need sometimes to make such 'adjustments' to constitutional principle to take account of the political community's capacity to live in the 'spirit of a community of principle'. R Dworkin *Law's Empire* (1986) 380–381.

[82] See RH Fallon, Jr 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787.

[83] Mietzner (note 77 above).

[84] N Maveety & A Grosskopf '"Constrained" Constitutional Courts as Conduits for Democratic Consolidation' (2004) 38 *Law & Society Review* 463.

[85] T Ginsburg 'The Constitutional Court and the Judicialization of Korean Politics' in A Harding & P Nicholson (eds) *New Courts in Asia* (2009) 113, 113.

What all these examples indicate is that at least some post-1989 constitutional courts have been able to sustainably assert their institutional role as protectors of the democratic system *notwithstanding doubts about the constitutional and moral legitimacy of what they are doing*. This is an anomaly that is worth exploring. Perhaps it simply means that our existing theorisations of the legitimacy of judicial review are inadequate? Perhaps when we take account of all relevant considerations, including the circumstances in which the post-1989 constitutional courts are operating, we will be able to see that there is in fact no divergence between the role that they are justified in performing and the role that they have in fact performed. Certainly it is true that normative constitutional theory tends not to be terribly well grounded in politically realistic accounts of the challenges confronting constitutional courts. Many comparative constitutional scholars, myself included, are thus sympathetic to Barry Friedman's call for some adjustment in this respect.[86] There is also Jeremy Waldron's well-known argument that the moral objection to judicial review weakens where the democratic system is dysfunctional in some way.[87] At a normative level, therefore, there is clearly work to be done to ensure that our theorisations of the role courts may legitimately perform in processes of democratic consolidation are appropriately sensitive to the political conditions in which they are operating. But this aspect of the theoretical challenge is not currently our concern. Our concern for the moment is simply to sketch an *explanatory* theory of how courts have, in fact, adapted the implementation of their mandate in the two aforementioned ways and, in so doing, answer the following two-part question: what is it about the environments in which they have worked that has allowed them, (1) not only to get away with these departures from the strict terms of their mandate, (2) but also to use such departures to build their institutional power?

Are there any existing attempts (apart from Issacharoff's insufficiently contextualised account) to provide such a theory? There is certainly a vast and sprawling literature on the role of constitutional courts in democratic consolidation. Few contributions to date, however, attempt anything like a general theorisation of this issue, and there are none that address the two specific adaptive strategies that our examination of the passive account suggested are necessary. Of those accounts that rise above a purely descriptive level to offer some explanation of what is going on, almost all are single-country studies whose authors (perhaps wisely) do not attempt to extrapolate their findings beyond the particular case they are considering.[88] The difficulty with these accounts is thus the reverse of the problem with Issacharoff's account. While offering rich explanations

[86] B Friedman 'The Politics of Judicial Review' (2005) 84 *Texas Law Review* 257.

[87] Waldron (note 32 above). As we have seen, this is the precisely the point that Issacharoff develops in his account. But the problem with his argument is that it assumes that constitutional courts in new democracies are unconstrained, both by institutionalised norms of legal reasoning conditioning how they should go about responding to their mandate, and by the political context in which they are working. As a consequence, the examples that he cites only fit one particular type of institutional and political setting: the situation of the Unconstrained Court. I develop this account more fully below.

[88] See, for example, Maveety & Grosskopf (note 84 above); Ginsburg (note 85 above); C J Walker 'Toward Democratic Consolidation: The Argentine Supreme Court, Judicial Independence, and the Rule of Law' (2008) 4 *High Court Quarterly Review* 54.

of individual cases, they do not progress to offer a general theorisation of the circumstances in which constitutional courts might be able sustainably to play a role in democratic consolidation.

The most studied individual instance of the role of constitutional courts in democratic consolidation, of course, is that of the US Supreme Court. Martin Shapiro, in particular, has been industrious in drawing out the lessons that the American experience has to teach scholars in other countries.[89] While useful in suggesting general pathways and possibilities, however, Shapiro's work on this topic is too piecemeal and suggestive to be of much use. Of the many other explanatory accounts of the US experience, few are self-consciously offered as comparative lessons. Keith Whittington's account of the political foundations for judicial supremacy in the United States is thus instructive,[90] as is Barry Friedman's legal-historical study showing that the US Supreme Court's opinions have never diverged too far from public opinion, and that this has been central to its capacity to build a 'constituency' for judicial review.[91] But neither of these accounts is intended as, nor easily translatable into, a general theory of the role of constitutional courts in democratic consolidation. Of all the American theorisations, the most generalisable, perhaps, is Alexander Bickel's account of the US Supreme Court as an essentially prudential institution that has always been careful to calibrate its decisions to the political temperature of cases.[92] While again instructive, the problem with this account when applied comparatively is that it does not explain the precociousness of some of the post-1989 courts' capacity to protect the democratic system. Whereas Bickel's explanation for the US Supreme Court's success points to the need for careful judicial statesmanship, some of the most successful post-1989 constitutional courts have been anything but careful. And yet they have been all the more effective for that reason.

Outside the United States, accounts of how constitutional courts in other *mature* democracies have built their institutional power (in Europe, Australia and Canada) are hamstrung by the fact that they perforce take up the explanation in a context where a political culture of respect for judicial independence had already been established by the time the courts began their work. Alec Stone Sweet's otherwise path-breaking account of the process of the judicialisation of politics in four European countries (Germany, France, Italy and Spain) and in the European Union itself is affected by this drawback,[93] as is Brian Galligan's insufficiently recognised study explaining how the Australian High Court pursued a self-

[89] See, for example, M Shapiro 'Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience' in W Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (2002) 37; M Shapiro 'Judicial Review in Developed Democracies' in S Gloppen, R Gargarella and E Skaar (eds) *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (2004) 7.

[90] Whittington (note 73 above).

[91] Friedman (note 73 above).

[92] AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2ed, 1986). See also RG McCloskey *The American Supreme Court* (1960).

[93] A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (2000). Stone's account is at once too abstract (dealing as it does with the legitimacy of 'triadic' decision-making generally) and too specific (applying the general theory only to the European case).

consciously legalist path to independence over the course of the last century.[94] The same is true of the various Canadian accounts, most of which are in any event aimed at providing a normative justification of the particular practice of judicial review in that country.[95]

In all the literature, the only two attempts, as far as I am aware, to build a general theorisation of post-1989 constitutional courts' role in democratic consolidation are Epstein, Knight and Shvetsova's account of the Russian Constitutional Court's suspension by President Boris Yeltsin and Tom Ginsburg's chapter on 'building judicial power' in his comparative study of three Asian constitutional courts.[96] According to both these theorisations, what constitutional courts need to do in order to build their institutional power is to ensure that every decision they take falls within the political branches' 'tolerance interval' for the case, by which is meant the range of decisions in two-dimensional policy space that powerful political actors are likely to respect. By acting in this way, these theorisations contend, courts can ensure that all their decisions are enforced, which in turn may help to build their institutional legitimacy (understood as diffuse public support) to the point where they have the power to decide a wide range of cases.

Attractive as it is, the problem with the 'tolerance interval' theory is that a court that pursues the recommended strategy could only ever hope to build a reputation as a politically shrewd actor. However powerful it becomes, it could never acquire the sort of reputation for legally motivated decision-making that most commentators agree is integral to a court's capacity to play an enduring role in democratic politics. While this theorisation might thus work quite well in settings where law has never established its autonomy from politics, and where courts are therefore not expected to be anything but shrewd political actors, it works less well in settings where a court's institutional legitimacy depends on its capacity to build or maintain a reputation as a legal actor.[97] In such settings, constitutional courts that pursue the kind of political strategy that this theorisation recommends are likely to incur significant legal legitimacy costs, which may undermine whatever beneficial impact on the court's institutional independence such a strategy confers. In any case, judges socialised in a legal culture in which

[94] B Galligan *The Politics of the High Court* (1987).

[95] See, for example, DM Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Law* (1990); PW Hogg & AA Bushell 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgood Hall Law Journal* 76; Waluchow (note 79 above).

[96] L Epstein, J Knight & O Shvetsova 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117; Ginsburg (note 20 above) 65–89. Epstein and Knight had earlier applied their theorisation to the US Supreme Court at its founding in J Knight & L Epstein 'On the Struggle for Judicial Supremacy' (1996) 30 *Law & Society Review* 87.

[97] The Indonesian case, for example, where decisions have been thinly reasoned, but where the Court can count on its reputation as one of the few incorrupt governmental institutions, fits Epstein, Knight and Shvetsova's framework quite well. But their framework does not explain instances like Chile or South Africa, where long histories of legal institutionalisation have imposed greater legal constraints on constitutional courts' room for manoeuvre. In these sorts of settings, it matters a great deal whether the court is seen to be acting politically, since any departure from law entails legal legitimacy costs for a court.

law matters are unlikely ever to find such purely political strategies attractive. Even in countries with less developed legal cultures, a constitutional court that pursues the kind of strategy this theorisation advocates must eventually convert politically acquired institutional capital into more durable legal-reputational capital, lest the political conditions that support its independence turn against it.

To be sure, the US Supreme Court – the most successful and (until recently) powerful of all constitutional courts – no longer founds its institutional independence on a reputation for legally constrained decision-making.[98] But this situation has come to pass after a long period of political and legal-cultural development. The influence of ideology on the US Supreme Court's decision-making record (as captured in the so-called 'attitudinal model'[99]) is thus a sign of its peculiar institutional strength – some would say, of its late-stage decadence – rather than an example for constitutional courts in new democracies to follow. In less developed democracies, where there is a societal commitment to the separation of law and politics, but where judicial review has not been as long institutionalised, constitutional courts first need to build a reputation as a legally constrained actor before they can confidently assert their institutional role. In this sense, constitutional courts in countries where there has been a longer history of legal institutionalisation paradoxically face a more complex set of challenges than courts in countries like Indonesia, where it is the judges' reputation for incorruptibility, rather than the legal legitimacy of their reasoning processes, that matters.[100]

All of this suggests that, if we are to offer a general theory of the role of constitutional courts in democratic consolidation, we need to pay attention to the dynamic interaction of law and politics in constitutional adjudication, and to the varieties of political and institutional setting in which that interaction is played out. In countries where a commitment to decision-making according to law is weakly institutionalised, constitutional courts may well be able to pursue a purely political path to institutional independence and thus to a powerful role as protector of the democratic system. On the other hand, where a commitment to decision-making according to law is well institutionalised, constitutional courts will have to mediate any political strategy with attention to the requirements of law. Similarly, variations in the external political conditions for judicial independence will have an impact on any strategy pursued. Where courts are insulated from attack by fortuitous political conditions, they obviously have far greater room for manoeuvre than where this is not the case.

In previous work, I have suggested that the dynamic interaction between law and politics in constitutional adjudication is best conceived as two competing sets of constraints, each of which may be either strongly or weakly registered.[101] A court might thus work in a legal culture in which law really matters and where legal norms are experienced as a socialised constraint on judicial action – both

[98] JL Gibson & GA Caldeira 'Has Legal Realism Damaged the Legitimacy of the US Supreme Court?' (2011) 45 *Law & Society Review* 195.

[99] JA Segal and HJ Spaeth *The Supreme Court and the Attitudinal Model Revisited* (2002).

[100] I am grateful to Fritz Siregar, one of my PhD students at UNSW Law, for this insight.

[101] Roux (note 64 above).

internally, in the subjective consciousness of the judges, and externally, in as much as deviating from conventionally accepted methods of legal reasoning entails legal legitimacy costs for the court. Likewise, political constraints may be strongly or weakly registered. For a whole host of reasons, some long-term institutional, others just short-term strategic, courts may be more or less exposed to political attack – more or less free, that is, to get on with the business of judging, whether motivated by law or personal policy preferences. Depending on these factors – on how strongly or weakly the political and legal constraints impacting on the court are registered – its capacity to contribute to democratic consolidation is going to be vastly different. Any theorisation of this issue must thus start there – with an understanding of the different institutional and political circumstances in which courts in new or fragile democracies find themselves and the different trajectories open to them.[102]

For comparative purposes, four main types of constitutional court may be identified: a *Principled Court*, operating in circumstances where a strong political culture of respect for judicial independence together with a well-developed legal-cultural commitment to adjudication according to law not only allows, but also requires it to pursue a morally and constitutionally principled understanding of its mandate; a *Political Court*, operating in circumstances of weak legal institutionalisation and comparatively high exposure to political attack, where the only strategy open to the court is to build its institutional independence in the manner suggested by the 'tolerance interval' theory; a *Constrained Court*, operating in a well-developed legal culture but exposed by a rapid transition to a new and uncertain constitutional order to a relatively serious risk of political attack, and where the court must thus constantly mediate the demands of law and politics; and an *Unconstrained Court*, operating in a legal culture that has either lost faith in the tenability of the law/politics distinction or in which a commitment to that distinction has yet to develop, but which is relatively well insulated from political attack, either by fortuitous political circumstances or because the political culture in the country concerned has developed to tolerate a situation in which constitutional judges take decisions relatively unconstrained by law.[103]

The advantage of this conceptualisation is that it allows us to tie our theorisation of the role of constitutional courts in democratic consolidation to four ideal-typical situations that capture the different kinds of political and institutional setting in which courts work. This approach thus provides a basis for theorising the role of these courts that is somewhere between the particularism of the individual country accounts and the sweeping generalisation of accounts that fail to take these varying circumstances into account. In addition, the conceptual logic of each ideal-typical situation may be used to drive an empirically testable conjecture

[102] This approach thus parallels the currently dominant approach in democratic consolidation theory more generally. See JJ Linz & A Stepan *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (1996) 38 (Linz and Stepan contend that there are different pathways to democratic consolidation depending on the situation a country finds itself in, and that the analysis of this issue must therefore start with an analysis of the 'prior [nondemocratic] regime type'.)

[103] For more on these ideal types, see Roux (note 64 above) at Chapter 2.

about the democratic consolidation strategy open to courts approximating the ideal type. By typifying a court according to its proximity to one of the above four ideal types, it becomes possible to see whether the conjecture is empirically supported and, if not, how it might be refined.

This is not the place to provide (and empirically test) a fully reasoned conjecture for each ideal type.[104] In the remainder of this section I want simply to provide a brief illustration of what each ideal-typical conjecture looks like, giving more attention to the ideal type that the CCSA fits. In the final section of this paper, I will then preliminarily test the plausibility of that conjecture against the CCSA's record to date.

Courts approximating the Principled Court ideal type are by definition already working in a democratic system that is well consolidated. Their challenge is thus not so much to contribute to democratic consolidation as to further enhance the quality of democracy, notably by developing doctrines aimed at enabling minority and other marginalised groups to more effectively participate in the democratic system. Issacharoff's and Richard Pildes' work on the US Supreme Court's role in opening out the two-party American democratic system addresses this type of situation,[105] although the US Supreme Court is probably best classified as an Unconstrained rather than a Principled Court in terms of the above typology.[106] A better example of a Principled Court attempting to improve the quality of democracy is the Australian High Court's effort in the 1980s to develop a hitherto unrecognised 'implied freedom of political communication'. One of the original justifications given for the implied freedom was that it was necessary to ensure that a system for the regulation of political broadcasting did not lock up democratic politics to the exclusion of minority parties.[107] In inferring the existence of this freedom from the system of representative and responsible government established under Australia's 1901 Constitution, the responsible High Court judges encountered significant resistance from judges who felt that the justificatory arguments used ran contrary to Australian legal culture's traditional dislike of substantive political theorising. The majority judges were thus eventually required to reformulate their arguments so as to ground them more firmly in the 'text and structure' of the Constitution.[108] Nevertheless, the content of the resulting implied freedom of political communication remained largely unchanged and has since been used to review the constitutionality of numerous statutes.

The Political Court ideal type covers courts in countries like Russia and Argentina, where law has never fully established its autonomy from politics, and where political conditions do not support assertive judicial decision-making. Courts in this situation may in theory pursue the consolidation strategy mapped out by 'tolerance interval' theory. The empirical evidence, however, suggests that

[104] I hope to present a fuller version of the argument at the University of Oxford African Studies Conference on *Twenty Years of South African Democracy* in April 2014.

[105] Issacharoff & Pildes (note 9 above).

[106] The arguments for this classification are given in Roux (note 64 above) at Chapter 2.

[107] *Australian Capital Television PTY Ltd v Commonwealth* (1992) 177 CLR 106.

[108] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

propitious changes in the political environment for judicial review might also be required.[109] Ginsburg's own study of the Korean Constitutional Court, for example, argues that one of the main reasons for its success was 'the particular political configuration of Korean democratization, with a military intent on withdrawal from active politics and three major civilian political forces more or less evenly balanced'.[110] Ginsburg's nuanced analysis of this environment suggests that courts that succeed in building their institutional independence by pursuing a politically shrewd, tolerance-interval-respecting strategy are often assisted by propitious background political factors, making their classification as 'Political' or 'Unconstrained' Courts uncertain.

Unlike the other ideal types, the Unconstrained Court has two different empirical manifestations: the constitutional court in a mature democracy, like the United States, where the legal culture has lost faith in the tenability of the law/politics distinction and where the political culture has adjusted to tolerate a relatively high degree of legally unconstrained, 'attitudinal' decision-making; and the constitutional court in a new democracy, like Indonesia or Colombia, where fortuitous political circumstances (in the Indonesian case – popular distrust of other governmental institutions, in the Colombian case – the identification of the court in the popular mind with the constitutionally-driven democratic transformation project) help to insulate the court from political attack. The potential role of this first variant of this type in enhancing the quality of democracy has already been briefly touched on in relation to the US example. In the case of the second variant, the court's fortuitous insulation from political attack allows it to play a precociously strong role in democratic consolidation, going beyond the literal or at any rate envisaged terms of the court's constitutional mandate. At the same time, the absence of a developed legal culture means that the court is able to engage freely in both of the adaptive strategies earlier described: (1) creating new democratic rights as unforeseen pathologies emerge (the Indonesian Court's policing of electoral politics; the Colombian Court's novel doctrine to block President Uribe's popular, but democracy-threatening attempt at a third term) and (2) adjusting decisions to take account of the likely institutional repercussions for the court (in both the Indonesian and Colombia cases, the judges correctly assessing that a forceful decision would only enhance their court's power).

This sort of bold strategy, however, is not necessarily optimal for courts that approximate the Constrained Court ideal type. Inhibited as these courts are by legal-cultural expectations about how their decisions ought to be justified and by political conditions that do not generally support a robust assertion of their institutional role,[111] they must continually seek out an optimal balance between the institutional-independence-enhancing effects of robust protection of the democratic system and the institutional-independence-damaging effects of overstepping their constitutional mandate. Their democratic consolidation

[109] See, for example, Walker (note 88 above) at 65 (Walker offers reasons for hope in Argentina).

[110] Ginsburg (note 20 above) at 207.

[111] There may be exceptions of course, where the micro-politics of a case mean that the court is fairly well insulated in relation to a particular decision. See, infra, the discussion of *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC),.

strategy is thus likely to be much more cautious than that for courts resembling the Unconstrained Court type. Working as these courts do in a legal culture in which law matters, their ability to protect the democratic system while maintaining their institutional independence depends on their capacity to always present their decisions as legally justified. This means that the two adaptive strategies that courts committed to democratic consolidation are required to pursue present complicated challenges for courts approximating this ideal type: creating new democratic rights requires careful justificatory work, and taking account of the institutional repercussions of decisions must occur within a general justificatory framework antithetical to outcomes-based decision-making.

As soon as the peculiar challenges confronting the Constrained Court are acknowledged, the problem with Issacharoff's suggestion that the CCSA should follow the Colombian Constitutional Court's or the Indian Supreme Court's example becomes apparent. The strategy that worked in those countries will not necessarily work in South Africa. If the CCSA most resembles the Constrained Court ideal type, as I have argued elsewhere it does,[112] its strategy for contributing to democratic consolidation must take account of the need to transform legal-cultural expectations about the court's appropriate role in democratic politics even as it asserts that role to keep open the space for political competition. Since the focus of this symposium is on the CCSA, it is worth fleshing out the dynamics of this required strategy a little more before turning to assess the CCSA's record.

As noted, a court approximating the Constrained Court ideal type must progressively build support for its institutional role by managing legal-cultural expectations of what its legitimate role is. The court's mandate to protect the democratic system may in general terms be clear and thus of some assistance to the court, but the case-by-case working out of the democratic rights required to give effect to this mandate may be subject to something like a legal-cultural lag-effect – to resistance from within the legal culture, that is, to the court's playing the required role. The court must thus seek in its initial decisions on democratic rights carefully to explain its new institutional role in terms which take account of the new constitutional order while at the same time resonating with previously authoritative forms of argument. A new constitutional court operating in a previously formalist legal culture, for example, might seek to justify its decisions in less substantive political terms than a court accustomed to reasoning in this way.[113] The court might thus say that 'section so and so of the Constitution grounds this democratic right' rather than saying 'current democratic pathologies require the court to act in this way'. To outside observers (and Americans in particular), this sort of reasoning will come across as formalistic: on the one hand unconvincingly claiming to deduce the democratic right from the posited constitutional provision by semantic reasoning alone, and on the other hand failing fully to embrace the

[112] Roux (note 64 above).

[113] Note that this might be a matter not only of caution on the part of the judges in bringing the legal culture around, but also a matter of their own legal-professional socialisation, which initially inhibits them from being able to present more substantively reasoned reasons.

justificatory possibilities opened up by the new Constitution.[114] But this is just the distorted view of the kind of comparative constitutional law scholarship that fails to take account of the different institutional and political settings in which constitutional courts work. From the perspective of the situation in which the court actually finds itself, the more cautious strategy makes perfect sense.

None of this really matters, of course, if the democratic system does not come under attack. But when it does, the Constrained Court's task is further complicated by the heightened political controversy surrounding its decisions on democratic rights. In addition to managing legal-cultural expectations of how it might legitimately derive democratic rights, the court will need to take account of the likely impact of its decisions on its capacity to continue playing its constitutionally prescribed role. Fortunately, the court might here be helped by something like the politico-legal dynamic that develops in the second variant of the Unconstrained Court case. As the pathologies with the democratic system become more obvious, the very dysfunctionality of the system might drive popular support for more robust judicial intervention. The domain of law, in other words, might expand in line with the collapse of democratic politics, thus assisting the Court to intrude ever further into that arena under the guise of implementing its constitutional mandate. As corruption increases, for example, the Court might find it easier to justify interventions specifically targeted at this pathology. This does not guarantee that the Court's intervention will be successful, of course – and there is in the end little solace in the thought that law's domain expands as democratic politics becomes more dysfunctional – but the theoretical logic at least suggests that the court's institutional power to intervene in the democratic system may be enhanced as the pathologies emerge. Whether that ultimately means that the democratic system can be saved depends on other actors, particularly civil society groups capable of partnering the court, and ultimately the people themselves, exercising their court-enforced democratic rights.

The virtuous circle a constitutional court in the position of the Constrained Court needs to trigger is thus one in which each successive intervention in the democratic system enhances the conditions for future intervention in a very specific sense: viz by transforming legal-cultural expectations about the appropriateness of the court's playing the asserted role. To be sure, actual democratic consolidation depends in the end on the democratic system's being opened up to greater competition. But that is not something the court can control. The feedback loop we are talking about is not: decision protecting openness of democratic system → democratic system opened up → greater electoral competition → enhanced curial power to protect openness of democratic system. Rather, the loop is: legally justifiable decision protecting openness of democratic system → transformed legal-cultural expectations about court's legitimate role in protecting openness of democratic system → enhanced curial power to protect openness of democratic system. Assuming there are no exogenous attacks on the court's independence,

[114] Karl Klare's intervention in the South African debate is beset by this sort of problem. See Klare (note 46 above).

the virtuous circle triggered by such a decision-making record may be depicted as follows:

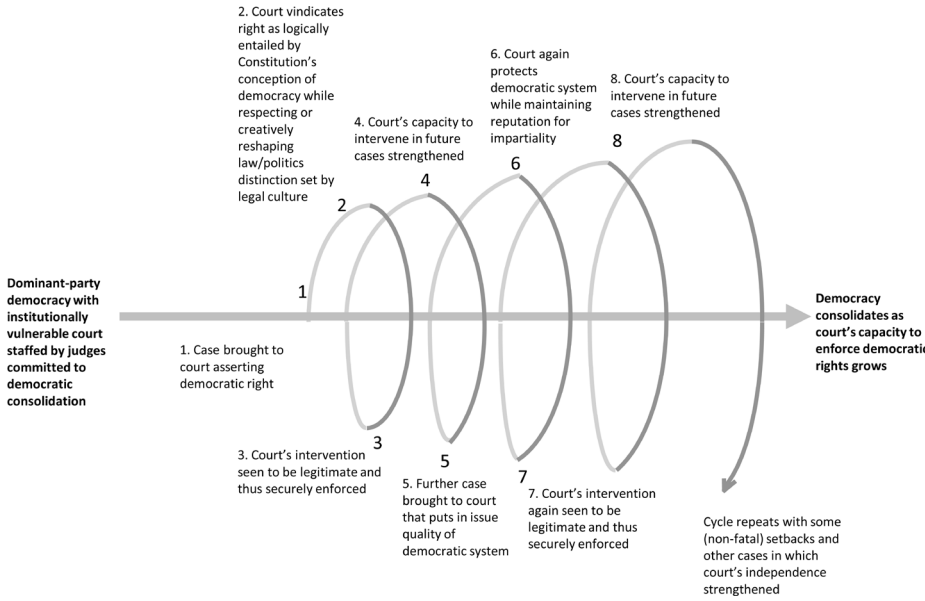

Figure 1: Virtuous circle triggered by curial strategy aimed at managing legal-cultural expectations about court's legitimate role in enforcing democratic rights

As noted, the virtuous circle depicted in Figure 1 assumes there are no exogenous political developments affecting the court's independence. Whatever a court resembling the Constrained Court ideal type does to manage legal-cultural expectations about its appropriate role in enforcing the democratic system, political conditions for independent judicial review can deteriorate for reasons beyond its control. Factional struggles within the dominant party, for example, might see the rise of a grouping less committed to judicial independence than the one it deposed. It is also conceivable that a case might be brought to the court that required it to protect the openness of the democratic system before it had built the necessary legal basis for the decision. In that situation, the court would be faced with a 'damned-if-you-do, damned-if-you-don't' choice between protecting the openness of the democratic system at the risk of exposing itself to political attack and refraining from acting at the risk of missing a crucial opportunity to protect the system. There is accordingly no guarantee that a court resembling the Constrained Court ideal type will be able to resist a determined dominant-party assault on the democratic system, only a theoretically possible trajectory, the following of which is dependent on willing judges with the requisite insight and a certain amount of luck.

How plausible in fact is the posited scenario? Do we have any evidence of a constitutional court actually following this trajectory? The next section argues

that this is more or less how we should understand the CCSA's democratic rights jurisprudence over the past two decades.

III An Alternative Reading of the CCSA's Democratic Rights Jurisprudence

This response began by listing five decisions handed down by the CCSA in 2011 and 2012. At face value, they portray a Court that is deeply involved in the enforcement of democratic rights. Indeed, in his lead essay, Issacharoff acknowledges that one of these decisions – *Democratic Alliance*[115] – involved 'what [was] clearly a matter of political appointment generally outside the bounds of judicial review in most if not all democratic countries'.[116] And yet, his assessment of the Court's record is lukewarm. The judges are getting the outcomes mostly right, we are told, but have yet to develop an adequate doctrinal basis for their decisions. Issacharoff is particularly disappointed with the rational basis review standard adopted in *Democratic Alliance* and the Court's recourse to international law in *Glenister*.[117] What was required of the Court in both of these cases, he thinks, was 'to articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures that fall under its constitutional mandate'.[118] While *Justice Alliance*[119] and *Oriani-Ambrosini*[120] show that the Court can 'reach deeper' when it wants to,[121] we are left with the impression that the judges are only just beginning to grasp what is required of them.

This critique is driven by more than just Issacharoff's typically American preference for substantively reasoned decisions. The strength of his comparative analysis is that he shows that there are real issues at stake – that much can depend on whether a constitutional court adequately theorises its institutional role in enforcing democratic rights. Notwithstanding his scepticism about whether constitutional courts in new democracies can withstand a determined assault on their independence, therefore, he does think that there are things that such courts can do more or less well. If it is to stand any chance of preventing a slide back into authoritarianism, a court must act forcefully and quickly, while the memory of why the Constitution was adopted and why the court was given the powers that were given to it, is still fresh in the public mind. Any hesitation, Issacharoff's adverse reading of *United Democratic Movement* implies, could be fatal to its later capacity to fulfil its mandate. His work in this way makes an important and novel contribution to the literature on the role of constitutional courts in democratic consolidation.

[115] *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

[116] Issacharoff (note 6 above) 23.

[117] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

[118] Issacharoff (note 6 above) 27.

[119] *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

[120] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

[121] Issacharoff (note 6 above).

Nevertheless, the previous section argued, there is a crucial weakness in Issacharoff's account. That weakness has to do with his inattention to the variety of political and institutional settings in which constitutional courts in new democracies work. Not all such courts operate in circumstances where they are free to assert their powers without fear of political attack, and not all such courts are unconstrained by background legal-cultural expectations about how they should go about enforcing democratic rights. When we put these two variables back into the equation, Issacharoff's normative prescription that constitutional courts should always act forcefully, justifying their decisions by recourse to substantively reasoned theorisations of the democratic pathologies they are addressing, appears somewhat inflexible. What we need, therefore, is a more context-sensitive theorisation, one whose starting point is to acknowledge that some constitutional courts may need to go about contributing to democratic consolidation in a different way.

It is not possible conclusively to establish the superiority of the more context-sensitive theorisation in this response. Even if it effectively explains what the CCSA has been doing, it may still be the case that the Court, and South African democracy more generally, would have been better off had the judges pursued the approach that Issacharoff advocates. Since the ultimate force of his critique depends on a counterfactual, we cannot be certain. There is also the apples-and-pears problem of comparing what is essentially a normative prescription for what the Court should have done with an explanatory account of what it has in fact done. While the explanatory account can be given a normative inflection – while we could say that this is why the CCSA did what it did *and it is a good thing too* – we would still need to agree the overarching terms by which the Court's record should be assessed. What is more important: the sophistication and subtlety of its jurisprudence, the outcomes it reached, or the fact that it safeguarded its institutional independence? And what causal connection between these three things would we in any case be able to establish?

The aim of this final section is thus not to try to settle which of the two theorisations is the more powerful. Rather, the aim is to offer an alternative, less disappointed reading of the CCSA's democratic rights jurisprudence, and to show how this alternative reading is facilitated by the theoretical and methodological approach outlined in the previous section. If this alternative reading is plausible, we will have cast some doubt on the force of Issacharoff's critique and thus the generalisability of his normative prescription. At the same time, we will have demonstrated the explanatory usefulness of the more context-sensitive approach.

The alternative reading of the CCSA's democratic rights jurisprudence hinges on its classification as a Constrained Court. The argument in support of that classification is complex and cannot be set out here. In previous work, however, I have explained why the CCSA should be regarded as a court that is, in comparative terms, both quite strongly constrained by law and easily exposed to political attack.[122] That analysis, which allowed for an initial window period when the Court was briefly insulated by the terms of the negotiated settlement,

[122] Roux (note 64 above).

was directed at the first 10 years of the CCSA's institutional life. Since Arthur Chaskalson's retirement as Chief Justice in 2005, however, little has happened to suggest that the Court's classification should be fundamentally revised. Indeed, if anything, the Court has become more constrained along both dimensions: it is still working in a relatively formalist legal culture that disfavours textually unsupported theorisations of its mandate, and the external political environment for judicial review has, by most accounts, deteriorated. As a result, the Court is more exposed than ever before to the risk of independence-threatening political attack. The only thing that has clearly changed over the past eight years is that the ANC has lost much of its moral stature. While it still enjoys a considerable amount of popular support, proven allegations of corruption, maladministration and nepotism have permanently damaged the ANC's reputation for good governance. According to the conjecture set out in the previous section, this suggests that we should expect to see the Court expanding law's domain into areas of democratic politics directly affected by the ANC's reputation decline – including, for example, standards of integrity for those in public office – albeit still with careful attention to the textual basis for its decisions.

To make the full case for the alternative reading would require a comprehensive assessment of the CCSA's democratic rights record over the past 20 years. There is insufficient space to do that here.[123] Happily, however, Issacharoff's tripartite periodisation provides the basis for a truncated version of the argument. His first phase of the CCSA's democratic rights jurisprudence thus corresponds to the initial window period to which reference has just been made. As noted, the Court was temporarily insulated from political attack during this period by the terms of the negotiated settlement, and in particular by the fact that the ANC needed an independent court to legitimise the transition from apartheid to black majority rule. After the end of this window period, marked by the *First Certification Judgment*, South African politics entered a period of heady optimism, during which it was thought by many that the ANC would exploit its international support and accumulated reputational capital to fundamentally transform the country through law, using the 1996 Constitution as a kind of programmatic guideline. During this time the Court became increasingly exposed to political attack: with each successive election, the ANC's reliance on the Court to legitimate its social transformation project declined. Nevertheless, the Court was able to work out a modus vivendi with the ANC by carefully positioning itself as a partner in the achievement of the ANC's main policy objectives, which the judges were plausibly able to show were consonant with the 1996 Constitution's vision for social transformation. From around 2005 or so, however, triggered by the events leading up to Jacob Zuma's dismissal as Deputy President, the shine came off the ANC's constitutionally limited democratic transformation project, and the current period of unabashed populism was ushered in. During this time, the Court has come under increasing (albeit thus far still unsuccessful) political attack: the aborted 2005 Constitution

[123] See T Roux 'The Constitutional Court and Democratic Consolidation in South Africa: Past Lessons and Future Possibilities' paper will be presented at the African Studies Centre Conference on *Twenty Years of South African Democracy* (Oxford, April 2014).

Fourteenth Amendment Bill threatened to remove its jurisdiction to review the constitutionality of bills before enactment;[124] in 2008, ANC Secretary-General, Gwede Mantashe, accused the Court of being a 'counter-revolutionary force' in South African politics;[125] and some of the appointments to the Court have begun to look more partisan in the sense that ideological loyalty to the President has been valued more highly than the candidates' legal-professional seniority or commitment to the 1996 Constitution's values (as evidenced by prior decision-making).[126]

In this way, Issacharoff's tripartite periodisation matches what I would argue are significant shifts in the institutional and political context in which the CCSA has been working. What separates our respective accounts is how we go about assessing the way the Court has operated in this changing environment. Whereas Issacharoff criticises the Court for not playing a uniformly bold and assertive role, my theorisation endorses the Court's more careful approach, not only as the approach that we should have expected given the circumstances in which it has been working, but also as an approach that is normatively justified from the point of view of the ideal democratic consolidation strategy open to it.

Consider, for example, the CCSA's decision in the *First Certification Judgment*.[127] As we saw in section I of this response, it was this decision that prompted Issacharoff's interest in South Africa, providing as it did a leading example of the sort of forceful decision that his normative theorisation suggested was required. Here was a Court, Issacharoff argued,[128] that was using its express constitutional mandate to protect the democratic system and strike an early blow against a draft Constitution that would have tilted the balance too far in favour of one-partyism. How and why was the Court able to do this? On Issacharoff's account, it was because the usual democratic objection to a court's playing this kind of role was absent. The CCSA, after all, had been expressly asked to perform this function. The authority problem, in this sense, had fallen away. Like so many other courts Issacharoff had been observing, albeit in a very explicit and extraordinary way, the Court was free to construct the rules of future democratic politics.

Is this an adequate explanation? It certainly adds something to existing discussions.[129] And yet it does not quite account for the unusual forthrightness of the *First Certification Judgment*. Why in this *particular* decision, and not in any of the others, did the Court reach for a robust theorisation of the potential problems attendant on South Africa's dominant-party democracy? On Issacharoff's

[124] Constitution Fourteenth Amendment Bill (GN 2023 in *GG* 28334 of 14 December 2005).

[125] The comments were reported in the *Mail & Guardian* (4 July 2008) at http//: www.mg.co.za.

[126] The current Chief Justice, Mogoeng Mogoeng, was controversially appointed in September 2011 amidst allegations of insensitivity to the 1996 Constitution's values and a lack of seniority on the Court. As a Supreme Court of Appeal judge, he had handed down several judgments in sexual violence cases that suggested that he did not appreciate the extent of this problem in South Africa. In addition, at the time of his appointment, Chief Justice Mogoeng had served only two years on the Constitutional Court, far less than several of the other judges. To record these things is not to take sides in the debate over the wisdom of his appointment. The point is simply that Chief Justice Mogoeng's appointment may mark the beginning of a shift in the ideological composition of the Court from liberal to conservative.

[127] Note 16 above.

[128] Issacharoff (note 14 above).

[129] Cf Klug (note 56 above) at 243–245.

account, the *First Certification Judgment* looks aberrational. The Court complied with his normative prescription and thus he was full of praise for it. But later, when the Court declined to do the same in *United Democratic Movement*, he could only express disappointment. The same goes for all the later decisions, including those in the current phase, when the Court is still not doing exactly what he wants it to. If the judges knew what was required of them right at the beginning, why did they go astray in the later cases? Issacharoff's account is both one-dimensional and incomplete to this extent: one-dimensional because his praise or disapproval turns on a single issue and incomplete because he cannot explain the change in the Court's approach.

It is only when we place the *First Certification Judgment* in its full institutional and political context – when we consider exactly what the Court's mandate was, in what sort of legal tradition it was working, what alignments of past and future political power the judges must have had in mind, and the character of the ANC and its leadership at the time the decision was taken – that we can begin fully to explain, not just this decision, but also how it fits into the Court's democratic rights jurisprudence as a whole. On this view of things, the bold and forceful approach in the *First Certification Judgment* was driven by the fact that the outcome of the case affected the very text and structure of the 1996 Constitution and thus the legal materials available to the Court in future cases to prevent any slide back into authoritarianism. Faced by that prospect, the judges did everything in their power to preserve the 1996 Constitution's capacity to be used as a check on the abuse of majority power. But they were at the same time assisted by the propitious political conditions then pertaining – the fact that the decision was handed down during the brief window period in the immediate aftermath of the transition to democracy during which the ANC had not yet taken full control of the levers of political power and in which it still needed minority party support for untrammelled passage of the 1996 Constitution. It was not just that the ordinary objection to judicial review had fallen away. It was that the ANC required the Court to display its independence – to reassure both minority parties and the international community of the sincerity of its commitment to the new constitutional order, and of its willingness to be disciplined by the judges it, after all, had chosen for this task.

The first phase of the CCSA's democratic rights jurisprudence may thus be seen to be a function not just of the Court's assertiveness, but also of the underlying institutional and political conditions that allowed it to be assertive. During the second phase, as Issacharoff acknowledges, the ANC had consolidated its control of South African politics. But it was at this stage also playing the largely constructive role that the more optimistic line in the South African dominant-party democracy literature identifies.[130] Rather than dangerously deferential, the CCSA's jurisprudence during this time may be understood as having been driven by an appreciation for the contribution the ANC was making, if not to democratic consolidation, then at least to stabilisation of South African democracy, which the judges might reasonably have thought was a precondition for the former. To be

[130] See the discussion at the end of section I above.

sure, *United Democratic Movement*, like the *First Certification Judgment*, concerned an amendment to the text of the Constitution, and therefore to the legal materials on which the Court might later need to draw. But the applicant's case required the Court expressly to identify the ANC as a threat to the democratic process, when everything that had gone before suggested that it had been the principal agent of the democratic transition. A positive answer to the legal question posed by the case also required the Court to theorise the meaning of democracy in South African constitutional law.[131] While the judges had done that in the *First Certification Judgment*, the heightened political controversy surrounding the *United Democratic Movement* case arguably did not favour the degree of creative legal argument that would have been required to justify upholding the claim. At any rate, the judges seem to have calculated that the benefits to the Court's long-term institutional independence of blocking further concentration of political power in the hands of the ANC were outweighed by the potential damage to the Court's independence of a decision that might have been plausibly justified, but which was certainly not legally compelled.[132]

As noted, the watershed moment in the move to the third phase of the Court's democratic rights jurisprudence was the political battle between Thabo Mbeki and Jacob Zuma in 2005–2007. Even before this time, however, certain downsides to the otherwise stabilising effects of the ANC's electoral dominance had started to become apparent. These were particularly manifest in the ongoing debate over South Africa's HIV/AIDS policy, in the course of which Mbeki's technocratic centralism, which in other areas had been understood as a necessary push for policy coherence,[133] had taken on a more autocratic cast. It is no coincidence, then, that the first decision in which the CCSA deviated from its co-operative working relationship approach was *Treatment Action Campaign*.[134] At the time this decision was handed down, few would have said that the case was centrally about the health of South Africa's democracy, but with hindsight it is possible to read it that way. As Mark Heywood has powerfully shown,[135] what lent this case its distinctive character was the way the applicant ran it from inside the ANC, as a case that concerned Mbeki's leadership style and his capacity to enforce his idiosyncratic views on HIV/AIDS over the objections of leaders more in touch with the ANC's rank and file. The Treatment Action Campaign (TAC) was thus careful to enlist the support of COSATU, South Africa's umbrella trade union organisation and one of the three members (with the ANC and the South African

[131] See T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10.

[132] This conclusion does not mean that *United Democratic Movement* cannot be criticised on legal grounds – only that there may have been prudential factors in play that explain why the Court did not give a fully principled answer.

[133] See R Calland *Anatomy of South Africa: Who Holds the Power?* (2006) 43.

[134] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC).

[135] M Heywood 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health' (2004) 19 *South African Journal on Human Rights* 278.

Communist Party) of the so-called 'Tripartite Alliance'.[136] By running the case in this way, the TAC skilfully managed to present its demand for antiretroviral treatment for pregnant mothers as a demand that emanated from within the ANC itself rather than from an opposition group making expedient use of the Constitution to win a policy battle it could not win through the ballot box. In this sense, the successful outcome of the case is attributable less to the CCSA's judicial statesmanship and more to the applicant's skill as a public impact litigator. But the Court was not an entirely passive actor in the drama. As more fully explained in the next paragraph, its carefully articulated reasonableness review standard in *Grootboom*[137] had facilitated the TAC's strategy, and the diplomatic way Chief Justice Chaskalson worded the Court's decision did much to ease its passage. If Mbeki had felt politically isolated before the *Treatment Action Campaign* case, his polite and respectful treatment by the Court allowed him to accept defeat with some measure of dignity.

As Anthony Butler has argued, the significance of the *Treatment Action Campaign* case to South African democracy is thus the way it provided the Court with an opportunity 'to address critically the actions of the executive in a context in which policy debate was stifled and the ruling party caucus in an ANC-dominated legislature prevented effective legislature oversight'.[138] Indeed, it is easy to forget that, at the height of Mbeki's reign, it was impossible for even fairly senior government Ministers to say anything about the ANC's HIV/AIDS policy without first consulting the President. This is no longer the situation, largely in consequence of *Treatment Action Campaign*, and this aspect of South Africa's democratic politics, at least, is less authoritarian to that extent. At the same time, *Treatment Action Campaign* illustrates that constitutional courts, even those that work in a fairly formalist legal culture, do possess some measure of agency. As much as it depended on the skill of the social movement in question, the litigation strategy pursued by the TAC was facilitated by the Court's decision in *Grootboom*. In particular, the reasonableness review standard adopted in that case, which many commentators at the time, myself included,[139] thought was overly deferential, was the very review standard that the TAC was able to exploit. Without directly theorising the pathologies associated with the centralisation of power in the hands of the ANC, the Court in *Grootboom* shaped the law in a way that allowed an admittedly well-resourced litigant to bring rational, scientifically informed arguments to bear on a policy issue that had been influenced for too long by a single set of eccentric views. The emphasis in *Grootboom* on the need for government at 'all levels'[140] to play a role in realising socio-economic rights likewise allowed the ANC's provincial leadership to contest Mbeki's stranglehold

[136] COSATU, along with the ANC and the South African Communist Party, form the Tripartite Alliance.

[137] *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC)('*Grootboom*').

[138] A Butler 'The Negative and Positive Impacts of HIV/AIDS on Democracy in South Africa' (2005) 23 *Journal of Contemporary African Studies* 3, 13.

[139] T Roux 'Understanding *Grootboom*: A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41

[140] *Grootboom* (note 137 above).

on the formulation of HIV/AIDS policy.[141] Far from occupying a marginal place in the CCSA's democratic rights jurisprudence, therefore, *Grootboom* and *Treatment Action Campaign* should be placed front and centre – as powerful examples of the way the Court has been able to exploit aspects of its institutional and political environment to unblock policy logjams and oil the wheels of the ruling party's internal democratic processes.

The CCSA's socio-economic rights jurisprudence, viewed in this manner, casts doubt on Issacharoff's thesis that, for a Court in a dominant-party democracy to play an effective role in democratic consolidation, it must necessarily theorise the pathologies of one-party dominance and justify its decisions as emanating from its general constitutional mandate to protect the democratic system. While that approach may work in certain settings, in a developed and still fairly formalist legal culture like the South African, the Court's interventions in democratic politics, for good reason, will tend to be grounded in the text and structure of the Constitution. Importantly, this does not mean that the Court will never engage in substantive theorising. What it means is that any such theorising will proceed from the text and structure, paying closer attention to the problems the Constitution was intended to remedy than the problems the country is currently facing. The rhetorical effect that the judges will continually try to produce, in other words, is not that *they* think that the actions of the dominant party threaten the Constitution's democratic vision and therefore need to be counteracted, but that the Constitution's democratic vision is such and such, and that the particular democratic right asserted by the constitutional claimant is consonant with that vision. This may seem like a subtle difference, but in South Africa's legal culture (and similar cultures elsewhere) it marks the boundary between permissible legal reasoning and illegitimate political theorising.

In *Grootboom* and *Treatment Action Campaign* the CCSA's principal concern was with elaborating its role in the enforcement of socio-economic rights. The Court's articulation of the principle of democracy underlying the 1996 Constitution was in this sense incidental to its main task of justifying its intervention in this controversial area of democratic politics. In two other cases decided during the transition period from Mbeki to Zuma, however, the Court did have occasion directly to theorise the 1996 South African Constitution's conception of democracy. In *Doctors for Life*,[142] the Court's majority judgment, written by Chief Justice Sandile Ngcobo, went to some length in articulating the extent to which the Constitution could be said to promote the value of participation in democratic politics. In the face of two strong dissents,[143] the Court rejected the argument that Parliament should be in sole charge of deciding the content of its constitutional obligation to facilitate public involvement in its processes. This decision was followed shortly after by *Matatiele II*.[144] Like *United Democratic Movement*, *Matatiele*

[141] Heywood (note 135 above).

[142] *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC).

[143] Ibid (Justices Van der Westhuizen and Yacoob dissenting).

[144] *Matatiele Muncipality & Others v President of the Republic of South African & Others* [2006] ZACC 12, 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

II involved a constitutional amendment. In this instance, however, the Court was assisted by the fact that the case revolved around the provision on public involvement in parliamentary processes that it had already interpreted in *Doctors for Life*. Backed by clear constitutional language and the precedential force of its earlier decision, the Court in *Matatiele II* overturned the amendment, once again without identifying the government action in question as indicative of some more general pathology.

All of the Court's decisions during the second phase of its democratic rights jurisprudence can be seen in this way to have cleaved quite closely to the text and structure of the 1996 Constitution. After Zuma's confirmation as ANC President in 2009, there has been a distinct change in the *type of case* that has come to the Court. This change, together with the ANC's shift to a more populist mode of governance, justifies Issacharoff's identification of the Court's post-2009 jurisprudence as comprising a new phase. The Court's basic interpretive methodology, however, has remained essentially unchanged. The judges still pepper their decisions with references to the constitutional text and the reasons for its adoption, and still avoid describing the ANC's dominance of South African politics as the central threat to the constitutionally prescribed democratic system. All that has happened is that the judges have begun applying this tried and tested interpretive methodology to a new type of case.

As exemplified by *Justice Alliance*, *Glenister* and *Democratic Alliance*, the new type of case concerns the standards that need to be respected when making appointments to, or organisationally restructuring, independent institutions established under, or necessarily required by, the Constitution to protect the integrity of South Africa's democracy. The Court has entertained similar kinds of cases previously.[145] What marks the new type out as different, however, is the extent to which the Court's attention has been directed at the conduct of *particular* individuals and the taking of *particular* political-branch decisions. Thus, in *Justice Alliance*, the issue was whether Parliament could delegate to the President its power to extend the term of the Chief Justice, not just in the abstract, but in relation to the actual purported extension of the term of the sitting Chief Justice, Sandile Ngcobo. Making extensive reference to the relevant constitutional provisions, the reason for their adoption, and their place in the overall constitutional scheme, the Court unanimously held that Parliament had acted improperly.[146] In *Glenister*, the most controversial of the three decisions, a narrow majority relied on a fairly convoluted reading of the constitutional text and South Africa's international legal obligations to invalidate the attempted restructuring of the Scorpions, an elite corruption-fighting unit.[147] The controversy surrounding the case had to do both with its political salience (there were allegations that the unit was being

[145] See, eg, *S & Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8, 2002 (5) SA 246 (CC)(Court considered the criteria governing the independence of the magistrates' court system.)

[146] *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

[147] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

closed down as punishment for its investigation of President Zuma) and also with the less than convincing legal basis for the majority's decision (as to which, more below). In *Democratic Alliance*, the Court unanimously rescinded the appointment of Advocate Menzi Simelane as National Director of Public Prosecutions. It based its decision on the constitutional specifications for the position and on incidental findings made by a Commission of Inquiry about Advocate Simelane's reliability as a witness.[148]

All three of these cases turned on whether the criteria supporting the independence of constitutional institutions established, or impliedly required, to support South Africa's unique form of constitutional democracy, had been accorded due respect. The other two cases in the series are slightly different. In *Ramakatsa*,[149] the issue was whether the ANC had respected its own internal procedural rules for the selection of delegates to a provincial congress. The Court's decision effectively held that first-order rights to political participation may be violated by background irregularities of this sort. Finally, in *Oriani-Ambrosini*,[150] the Court was asked to review the constitutionality of parliamentary rules governing the initiation of bills by minority political parties. This case was thus, quite similar to *Doctors for Life* and *Matatiele II*[151] in as much as it concerned itself with the question of whether the Court or Parliament was the appropriate standard-setting institution. Unsurprisingly, given its decisions in the two previous decisions, the *Oriani-Ambrosini* Court held that it did have jurisdiction to entertain the matter, and that the 1996 Constitution's commitment to multiparty democracy meant that the right to initiate a bill could not be conditioned on the approval of an office (the Speaker) that the majority party controlled.

In vindicating all of these claims the CCSA was, of course, simply responding to the cases that happened to have been brought before it. The actual driver for these cases, it may be thought, was not the Court's jurisprudence but the changing nature of South African politics. As the ANC has entrenched itself in power, and as what Issacharoff calls the three Cs of one-partyism (clientelism, cronyism and corruption) have inevitably followed,[152] so, too, has the nature of the cases brought to the Court changed. A closer look at the sequence of cases, however, reveals that the Court is driving much of the action. Thus, the latest democratic rights case to be brought to the Court (at time of writing in August 2013) again concerns the office of the National Director of Public Prosecutions (NDPP). On this occasion, the applicant, the Council for the Advancement of the South African Constitution (CASAC), is requesting an order compelling President Jacob Zuma to exercise his powers under the 1996 Constitution to appoint a permanent

[148] *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

[149] *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC).

[150] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

[151] *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC); *Matatiele Muncipality & Others v President of the Republic of South African & Others* [2006] ZACC 12, 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

[152] Issacharoff (note 6 above).

NDPP.[153] Significantly, CASAC's application would not have been necessary but for Advocate Simelane's court-enforced removal from office in November 2011 and the fact that the Acting NDPP appointed in his stead, Ms Nomgcobo Jiba, was deemed unsuitable for permanent appointment according to the standards set by the CCSA in *Democratic Alliance*. Significantly, too, President Zuma, after initially failing to respond to CASAC's letter of demand requesting that he exercise his constitutional powers to appoint a permanent NDPP, revealed, in an answering affidavit to CASAC's Constitutional Court application, that the process of appointing a permanent NDPP was far advanced, and would be finalised by the end of August 2013. The mere threat of litigation, in other words, has produced the outcome sought. Such a response suggests that the constitutional standards at issue are being institutionalised.

The CCSA has achieved this result without significantly altering the textualist, minimally theorised interpretive approach it used during the second phase of its democratic rights jurisprudence. To be sure, there were some minor adaptations. In *Democratic Alliance*, it used repeated quotations from the transcript of Advocate Simelane's evidence in the Ginwala Commission of Inquiry so that his inappropriateness for appointment as NDPP could speak for itself. In *Glenister* the Court stretched the bounds of legal plausibility by arguing that unincorporated international legal norms supported an understanding of the required degree of independence that was not supported by the constitutional text itself. But on the whole the Court stuck closely to the constitutional text and never once suggested that the problems it was asked to address were symptomatic of some more general breakdown in the ANC's capacity to govern associated with its ongoing dominance of South African politics.

Importantly, too, only one of the cases (*Ramakatsa*) had to do with first-order political rights. Of the other four, as we have seen, three concerned whether standards safeguarding the independence of institutions supporting democracy were being respected and the fourth with the protection of the 1996 Constitution's commitment to multiparty democracy in the functioning of Parliament itself. These four cases are thus exactly the sort of case that Issacharoff argues constitutional courts in new democracies ought to be encouraging and deciding. His complaint about the cases therefore cannot be that the CCSA is formalistically obsessed with enforcing first-order political rights (the charge directed against its decision in *United Democratic Movement*). The critique must now be limited to a single failing: the absence in the Court's reasoning of a fully worked out theorisation of the pathologies attendant on South Africa's dominant-party democracy and the development of doctrines *explicitly* directed at addressing those pathologies.[154]

Is this is a fair criticism? Would South African democracy, and South Africans themselves, have been better off had the Court justified its decisions in these five cases in the way Issacharoff prefers? As noted already, the answer to this question

[153] See G Underhill 'CASAC: Zuma Failed in his Constitutional Obligation' *Mail & Guardian* (4 July 2013) at http://www.mg.co.za.

[154] In this way, Issacharoff's position may be seen to be very similar (as one would expect, given their similar departure points) to the position taken by Sujit Choudhry in his 2009 lead essay in this volume. See Choudhry (note 45 above).

depends on a counterfactual, and thus we cannot be certain. But now, with some of the institutional and political context filled in, we have reason to doubt the force of his critique. At least, we can see the rationale behind what the Court has been doing. In each of the five most recent democratic right cases to come before them, the judges have been careful to present their decisions as legally required – as motivated not by their own analysis of the problems attendant on South Africa's dominant-party democracy but as simple applications of the constitutional provisions at issue. In *Glenister*, that claim was somewhat forced, but in the other four cases it was more than plausibly supported by the admittedly quite unexciting, even fairly plodding, arguments used. That assessment depends on my own subjective assessment of the decisions, of course. But it is also borne out by certain empirical facts: all the decisions have been obeyed, none has attracted very much legal-professional or broader public criticism and none appears as yet to have triggered an attack on the Court's independence. The key to the CCSA's effective extension of its democratic rights jurisprudence in this new phase, it is therefore at least worth considering, may be precisely the feature of these decisions that Issacharoff finds disappointing – the absence of any substantive theorisation of the pathologies attendant on South Africa's dominant-party democracy. The Court has succeeded in asserting its institutional role, in effectively policing the most serious of the pathologies emerging from South Africa's dominant democracy, without ever once conveying the impression that the democratic rights it has been enforcing were not always already there in the text and structure of the Constitution.

Living in Australia, as I now do, I cannot help but see the parallels between this adjudicative strategy and the strategy that the Australian High Court relentlessly pursued over the course of the last century. As famously articulated in Sir Owen Dixon's speech on the occasion of his swearing-in as Chief Justice in 1952: 'There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism'.[155] This quote can be understood in a number of different ways, of course. On the one hand, it might mean that Dixon really did believe that law (however that term is defined) is capable of constraining judicial choice, and that he committed himself to this conception of his institutional role. On the other, it might simply mean that he thought it politically prudent to depict the Court's decision-making practices in that way. The High Court's most perceptive interpreter, Brian Galligan, certainly thinks that this stance and that of the Court over much of the last century should be understood as a noble lie.[156] Nevertheless, the strategy proved tremendously effective in insulating the High Court from attack and in allowing it on occasion to take important, political-deadlock-breaking decisions, including decisions on the two most delicate Australian political issues: indigenous land rights and the rights of asylum-seekers.

In South Africa, as in Australia, this strategy has come in for considerable criticism. The CCSA needs to be candid, Karl Klare famously argued, about the

[155] (1952) 85 CLR xi (as quoted in T Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* (5ed, 2010) 271).

[156] Galligan (note 94 above).

political nature of its function, and win South Africans' trust on that basis.[157] But it is not at all clear that such a strategy would work under South African conditions. Judicial candour requires a certain level of legal-cultural maturity, or perhaps just cynicism. In the United States it may well be acceptable to justify decisions by reference to the judges' personal assessment of the social and political problems facing the country. In South Africa, such an approach runs the risk of exposing the Court to the charge of opposing the 'national democratic revolution'.[158] The judges must thus continually seek refuge in the clear terms of their mandate, even if that approach on occasion, as it did in *Glenister*, leads to strained, formalistic reasoning. The noblest instantiation of the rule-of-law ideal may well be one in which judges own up to every last legal, political, ideological and plain fear-driven influence on their decision-making practices – to say in *Glenister*, for example, that the reason to keep the Scorpions alive is that the ANC cannot be trusted to police itself. However, that version of the rule-of-law ideal has to be carefully constructed, and any too sudden move towards it, as Phillipe Nonet and Philip Selznick argued,[159] runs the risk of triggering a reversion back to a purely instrumental or political conception.

[157] Klare (note 46 above).
[158] The ANC uses this term to describe its democratic social transformation project.
[159] P Nonet & P Selznick *Towards Responsive Law: Law and Society in Transition* (1978).