Beyond the Bold Standard:
Reconsidering the South African constitutional canon

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Introduction[1]

If we try to explain 'South Africa constitutionalism' to someone, we know it will not be enough to hand them the constitutional text, but we also know we cannot hand them everything. No-one can read all the relevant constitutional materials. Instead, when we talk about a constitutional system, we end up, almost despite ourselves, speaking and arguing in terms of quite a small set of famous cases: a canon.

A canon is a way of expressing a system by using a manageably limited number of key examples deemed representative or especially important. It is a form of institutional memory in a particular professional community. It represents what we choose to remember and forget, and it sets the terms on which we confront the future. What we choose to put into the canon, therefore, can matter a great deal.[2]

I believe the South African canon needs re-examination.[3] The most important problem is not the examples selected (though there are, of course, debates to be had here too). The main concern is the terms in which the cases are understood. The

[1] This paper draws on my research in James Fowkes *Building the Constitution: The practice of constitutional interpretation in post-apartheid South Africa* (Cambridge Studies in Constitutional Law, forthcoming); I do not cite it repeatedly hereafter.
[2] See esp. Jack M. Balkin & Sanford Levinson 'The Canons of Constitutional Law' 111 *Harvard LR* 963 (1997-1998); Jack M. Balkin (eds) *Legal Canons* (2000); Bruce Ackerman *We the People Vol. III: The Civil Rights Revolution* (2014), 7, 32-36
[3] See also James Fowkes 'Right After All: Reconsidering *New National Party* in the South African canon' (forthcoming)

current canonical perspective is court-centric, and highest court-centric. It is suspicious of politics and its influence on law, and it usually treats the ANC as, at best, a potential threat. It prioritizes rights over institutional issues, seeing the question of what should happen as more important than who should do it. It takes it as an article of faith that the constitutional currency must be backed by boldness: at bottom, it is felt that the system's credibility rests on whether ultimately a strong court will act as the guarantor of the constitution. In each of these respects, I contend, the current canon misleads us about the reality of constitutional practice in South Africa over the last twenty years – and because of the importance of the canon to how a legal professional community operates going forward, much more is at stake here than the historical record.

The canon and its features

The current canon looks, in a very brief sketch, something like the following. (I make no claim of completeness; it will be enough to talk about central members of the canon and some key lines of interpretation.) It is focused on the Constitutional Court. There is a set of cases, much celebrated, in which the Court is understood to have acted in a bold, counter-majoritarian fashion. The set includes *Makwanyane*; the LGBT equality cases up to but not including the same sex marriage judgments in *Fourie*; *Hoffman* on HIV/AIDS, and *Doctors for Life* on democracy and participation.

Understood in stark contrast to this set of cases is a second set in which the Court is seen as having done the opposite of bold principled counter-majoritarianism. This set includes *Lawrence*, not objecting to Apartheid-era Sunday closings rules; *Prince*, not assisting Rastafarians; *Volks*, not assisting surviving partners to permanent, opposite-sex partnerships where the parties are not married; and *Jordan,* not responding to the criminalization of sex work and the gendered basis of that criminalization. The inconsistency between these two sets of cases is emphasized and often seems to be seen as frankly rather puzzling. Why does the Court help some vulnerable or unpopular communities, but not others? Why does the Court

that could hand down the expansive, creative decision in *Doctors for Life* also hand down the clipped and restrained decision on floor crossing in *UDM (2)*?

Other subject areas have their own special features, but there is the same puzzlement about the Court's restraint. Socio-economic rights discussion, for example, tends to be preoccupied with the idiosyncratic issue of whether socio-economic rights are justiciable in the ordinary way. But the split still tends to be between those who sometimes want the Court to do more and those who always do, and there is often the same puzzlement about why the Court does not seem to agree.

The degree to which this bold standard prevails from area to area may be the single most striking feature of scholarship on South African constitutionalism, especially domestically. So often, nothing other than a bolder, more creative, more expansionary approach is seen as defensible in constitutional terms. Disagreements tend to be about details – *how* to be bolder – or about explanations (not justifications) for why the Court is not bolder. In most other systems, even in emerging states, there is an established, respectable strain of constitutional scholarship worrying about the pitfalls of judicial action and calling for more restraint. Yet it remains strikingly rare – in South African constitutional scholarship – to find the Court criticized on the basis that it should have done *less*.

Why is this? Possible reasons are not hard to find. Some are historical. The prevailing diagnosis of Apartheid judging is that it was complicit in evil because it was too restrained, too formalist, too deferent or executive-minded. So there is a post-1994 tendency to favour the opposite. Historical memory damns those who did not fight injustice then, or those whose reformist responses were cautious and incrementalist, so there is a tendency now to favour bolder action. Other reasons are drawn from current imperatives. Observers note the enormous and unstable social problems in South Africa, and argue that large-scale urgent need demands large-scale urgent action. South Africa's constitutional experiment is treasured as a world-leading and admired exercise in progressive transformative constitutionalism, and

there is a desire to stay at the forefront (and the fear that South Africa is losing that place to more expansive judiciaries such as, say, Colombia's). The ANC is seen as a looming threat, a liberation party ageing gracelessly with a growing list of moral and constitutional failings, and the Constitution and the Court are seen as the chief guardians against it. If you seek a protective wall, better that it be tall and thick, and you will want to build it right away, in case – hence the call for boldness, now.

I have some reservations about some of these ideas, but the interesting question I want to ask here is a general one: if these ideas are so powerful and so obviously imply boldness, as the Court's critics believe, does that mean that the insufficiently bold Constitutional Court does not subscribe to these ideas? After all, this is a bench with many veteran anti-Apartheid activists on it. Its members back to 1995 have scarcely been unaware of South Africa's social problems. They have tended to be fiercely proud of the Constitution and its reputation internationally. They have been meaningfully independent, and have checked the ANC too often to be plausibly thought puppets. So why, then, do the judges not seem to draw the lessons from these big ideas that seem so obvious to their scholarly critics? Scholarly observers are sometimes honestly unable to answer this question, and are left in genuine puzzlement to consider the implausible. Might the judges really be out of touch with South African reality? Do they somehow not see the dangers? Do they not care?[4]

Before we resort to these rather unlikely explanations, however, we should try more seriously to understand what it is the judges believe themselves to be doing. Often, scholarship on South Africa is so preoccupied with arguing how the Constitution should work that too little attention is paid to how it does work. Instead of coming up with a vision of the constitution and then objecting that the judges are not fulfilling it, we might try asking what reasons the judges have for acting as they do.

[4] For some recent examples, see e.g. Stuart Wilson & Jackie Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' *Stell LR* 644 (2011); Cameron Mcconnachie & Chris Mcconnachie 'Concretising the right to a basic education' 129 *SALJ* 554 (2012)

Existing work of this sort is in the minority, but it mainly points to the Court's precarious position. If South African society lacks a meaningful social consensus on many issues and is deeply divided, then the Court has a good reason to stay vague and minimalist. If the Court's level of public support is low and the ANC's grip on power is very strong, then the Court has a powerful incentive to stay cautious and avoid fights it is unlikely to win. These sorts of insights inform work like Alfred Cockrell's 1996 description of the Court's 'rainbow jurisprudence', Iain Currie's 1999 defense of minimalism in the South African Court's position, and Theunis Roux's more recent arguments that the Court has made occasional prudent 'compromises on principle' and regular diplomatic efforts in its style of judgment writing in order to avoid clashing too squarely with the ruling party.[5]

Of course, not everyone who departs from insights like these believes the lesson is that the Court is right to be cautious. Dennis Davis argued in 1999 that the weak social consensus underpinning the Constitution was a reason for the courts to do more work to generate constitutional dialogue.[6] Various forms of this argument, as we will see shortly, have been attracting defenders ever since. Others argue more aggressively that the Court should articulate content unilaterally to fill the gaps or defects. Cockrell's 'rainbow jurisprudence' was a critical description, and he wanted the Court to engage in much deeper articulation of the open-ended value terms of the Constitution. More recent important examples include David Bilchitz's argument that judges should push for animal rights as much as feasible given the absence of public support for the idea, and Drucilla Cornell and Nick Friedman's advocacy of the thickest version of Dworkinian interpretation for the South African context.[7]

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[5] Alfred Cockrell 'Rainbow Jurisprudence' 12 *SAJHR* 1 (1996); Iain Currie 'Judicious Avoidance' 15 *SAJHR* 138 (1999); Theunis Roux 'Principle and Pragmatism in the Constitutional Court of South Africa' 7 *I.CON* 106 (2009); Theunis Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013)

[6] Dennis Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999)

[7] Drucilla Cornell and Nick Friedman 'The Significance of Dworkin's non-positivist jurisprudence for law in the post-colony' 4 *Malawi LJ* 1 (2010); David Bilchitz 'Does transformative constitutionalism require the recognition of animal rights?' in Stu Woolman & David Bilchitz (eds.) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012); I

The question that tends to go unasked these debates is an interesting one. What does it mean for these arguments that the Court is *sometimes* bold? Why is the charge that the Court is *inconsistent*? If the society is fractured or the values are vague or the ANC is dominant and threatening, on what basis has the Court sometimes issued the bold, globally admired judgments that it has?

Roux's theory is one of the few with some resources to answer this question, because the Court's inconsistency is one of the key insights from which his account departs. His answer is that the inconsistency reflects the fact that not every case poses the same sort of potential threat to the ANC. The Court is bolder when it does not expect reprisal (because the judges, absent political constraints, are seriously committed to constitutional ideas and their advancement). It is cautious the more squarely it confronts a core position or interest of the dominant party.

As a canonical understanding, however, Roux's account faces two objections. The first, which has tended to inform the early reaction to his recent work within South Africa, is that his account is political. It follows in the political science tradition of scholars like Martin Shapiro and Tom Ginsburg, a tradition that can take the idea of legal constraint seriously but nevertheless is ultimately concerned to describe how courts act and not how the law might require courts to act. That he is connecting the South African case to this scholarly tradition is another of the important contributions of his theory, since the politically informed scholarship that is sweeping the comparative constitutional law world is often neglected within South Africa and one cannot appreciate the limitations of the current canonical views without it. (Conversely, the fact that his politically informed account takes legal commitments seriously is why his account contributes, in turn, to the broader comparative scholarship). But this very feature of his account means it will have a hard time convincing the South African legal mainstream that it can offer a

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discuss both in James Fowkes 'The People, the Court, and Langa Constitutionalism' in Michael Bishop & Alistair Price (eds) *A Transformative Justice: Essays in Honour of Chief Justice Langa* (forthcoming)

justification for the Court's behaviour, as opposed to an explanation or an excuse.[8] Roux's description of strategic retreats as 'compromises on principle' is suggestive here, implying as it does that the Court has not always upheld the best legal interpretation of the text. As such, many will reject the adequacy of his account as a gloss on the constitutional canon because to many it will imply giving up on the idea that the canon is a legal one. At least – most importantly for my purposes here – they would insist on accompanying the political account with the familiar arguments that the course of action legally required by the constitutional text was really a bolder one. The canonical view of the case law, then, remains substantially in place. Dislodging it requires consideration of a second and quite different objection.

Taking constitutional politics seriously

Roux's argument may bring politics in, but his political account is a partial one. When the Court retreats, it is because of politics; when it advances, it is at best because the politics does not prevent this, and is really to be traced to something else: to the progressive text, to judicial conviction, to the unfettered operation of law. Roux's primary focus, in short, is on the threats posed by politics to courts and judicial independence that preoccupy much recent political science scholarship on courts, especially in emerging systems. This is undoubtedly an important dynamic. But simply to state it as such is to see that it leaves out the logical possibility of a more positive, constructive politics – a possibility that, I think, is generally neglected by constitutional scholarship around the world.

Start with a simple question. Where does constitutional content come from? The simplest answer is that it comes from the text. Having lived through Legal Realism

[8] Roux at one point suggests that one might defend the legitimacy of a Court taken into account the sort of political factors he discusses, if one adopted a weak Raz-style legitimacy and treated them as non-legal considerations that a court might legally be permitted to take into account: see Roux, *Politics of Principle*, 98-100. His argument is speculative, however, and he concedes that his account would not meet a more rigorous legitimacy condition such as Dworkin's, which is what mainstream South African scholarship is likely to demand.

and CLS and post-modern approaches to law, this simplest answer is seldom accepted without qualification. What is important, however, is the way that answers still tend to abstract from politics as a source of constitutional content. Politics produces the text, to be sure. But thereafter, content comes from the text and from the principled judicial articulation of it. Dworkin illustrates this way of thinking, and in this respect his importance in the South African legal community is telling. Dworkin understands constitutional content to be rooted in the actual political community concerned. That is what separates his account of law from pure moral philosophy. But in fact this link to the political community has very little to do with Dworkin's account in any ongoing way, especially in his later books (whose approach Cornell and Friedman advocate).[9] His account is about judges working out the implications and values of the text in heavily abstract, philosophical terms. This way of thinking about constitutional law is often happy to celebrate the political activity leading up to the drafting and passage of the constitution. Indeed, it will often insist on doing so, since that is the basis of its claim that the subsequent work of the judges is legitimate because politically authorized. But once the drafting is over, this view turns away from the political to focus on the text and its principles.

Several features of this way of thinking should be noted. On this view, the great *positive* politics happen before or as the Constitution comes into force: the struggle, the negotiations and the drafting, the moral leadership of Mandela, the founding election of 1994, the TRC. After that point, however, 'positive' politics quickly becomes, from the point of the textualist, all about faithful obedience: about complying with the text, supporting the Court, and acting respectfully on its rulings about what compliance requires. At least in a system like South Africa's, where the authority of the text and court are less than settled, the lawyer's focus turns to 'negative' politics, from small failures to comply with individual orders promptly to the largest-scale challenges to the basic authority of the Constitution and the Court.

[9] Compare his *Taking Rights Seriously* (1977) and *Law's Empire* (1986) with, especially, Ronald Dworkin 'Keynote Address: Rawls and the Law' 72 *Fordham Law Review* 1387 (2004) and *Justice for Hedgehogs* (2011). See also, understanding the evolution of Dworkin's views in the same way, Cornell & Friedman, e.g. 3-4

Even Roux's account, far more politically sophisticated than most other writing on South African constitutionalism, operates largely within this world.

This is not to say that current scholarship is blind to the importance of an ongoing, post-drafting political dynamic. Roux himself is heavily concerned with the post-drafting dynamics within the ANC. He underlines the importance of its centrist faction's commitment to judicial independence, especially under Mandela; he is chiefly concerned with its deterioration thereafter.[10] Another important strand of scholarship heads in the direction of Karl Klare's 1998 call for open, candid engagement with the reality that constitutional interpretation was a matter of ongoing political activity and Dennis Davis' Habermasian argument in 1999.[11] This work draws on a range of politically aware resources – dialogue theory, discourse theory, experimentalism, work on social movements – to offer a more sophisticated view of the sources of constitutional content. The best of this scholarship denies that meaning should be thought of as 'in' the text; is aware of the important role that social actors outside courts play in producing constitutional meaning (as well as enforcing that meaning once arrived at); and understands that the text, in some rich sense, is only the beginning of an enduring process.

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[10] Roux, *Politics of Principle*, esp. 125-28, 160, 174-82, 186-90

[11] Karl E. Klare 'Legal Culture and Transformative Constitutionalism' 14 *SAJHR* 146 (1998); Davis, *Democracy and Deliberation, supra*. Other important (and diverse) contributions include Loot Pretorius 'A response to Professors Michelman and Van der Walt' 1998 *Acta Juridica* 282; AJ van der Walt 'Dancing with Codes: Protecting, developing and deconstructing property rights in a constitutional state' 118 *SALJ* 258 (2001); Henk Botha 'Metaphoric Reasoning and Transformative Constitutionalism' (Part 1) 2002 *TSAR/JSAL* 612, (Part 2) 2003 *TSAR/JSAL* 20; Henk Botha 'Freedom and Constraint in Constitutional Adjudication' 20 *SAJHR* 249 (2004); Johan van der Walt *Law and Sacrifice: Towards a Post-Apartheid theory of law* (2005); Gilbert Marcus and Steven Budlender *A Strategic Evaluation of Public Interest Litigation in South Africa* (2008); Mark Heywood 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' 1 *Journal of Human Rights Practice* 14 (2009); Dennis Davis and Karl Klare 'Transformative constitutionalism and the common and customary law' 26 *SAJHR* 403 (2010); David Bilchitz 'Does Sandra Liebenberg's new book provide a viable approach to adjudicating socio-economic rights?' 27 *SAJHR* 546 (2011); Stu Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) and recent writing on the Court's engagement remedy, including Kirsty McLean 'Meaningful Engagement: One step forward or two back? Some thoughts on *Joe Slovo* 3 *CCR* 223 (2010); Brian Ray 'Proceduralisation's Triumph and Engagement's Promise in Socio-economic Rights Litigation' 27 *SAJHR* 107 (2011); Sandra Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' 12 *African Human Rights Law Journal* 1 (2012); Brian Ray 'Evictions, Avoidance and the Aspirational Impulse' 5 *CCR* (forthcoming)

Why then do I say that existing scholarship does not adequately grapple with the positive contributions of politics? The reason is that, in the South African context, this scholarship only partially cashes out its own implications. Imagine we asked an observer of South African constitutionalism for an example where a non-court actor had contributed to the realization of the constitution and the development of its meaning. The observer's mind will likely go immediately to the *Treatment Action Campaign* case, or perhaps the *National Coalition for Gay and Lesbian Equality* judgments, and think of the eponymous social movements. This is emblematic of the way that most of the time, even those who use more multi-actor models of interpretation in South Africa are usually still court-centric. They are attempting to deal with the problems of the court having to develop so much content, and are seeking ways to assist it, or to deal with the problems of the lone court having to design and monitor its orders and are thinking about ways to use allies to help it.

It is less likely that the South African observer, on being asked to give an example of a non-court contribution to the Constitution, will think of the Treatment Action Campaign's activities insofar as they were not closely linked to litigation (as has often been the case in an organization that seeks to avoid litigating). And it is much less likely that the observer will think of the ANC, in government or out. It is true that the best of this scholarship is taking increasing account of government activity: statutes, executive policies, the role of officials on one side of engagement remedies and other dialogic devices. Heinz Klug's 2010 introductory text on South African constitutionalism engages quite extensively with political activity and confines the judiciary to one chapter of a more broadly multi-institutional book. The most important recent contribution in this area, Stu Woolman's *Selfless Constitution,* works to break with court-centrism and is replete with other actors, including

officials, and sources of constitutional meaning other than court judgments, something is also true, for example, of his work with Brahm Fleisch on education.[12]

Yet even at this elevated level, one thing is not altered: the great positive moments of constitutional politics, post-drafting, are not associated with the ANC, or indeed with political narratives more generally in which the Court might be only a minor player. Political actors may feature as obstacles or as incompetents, or as reluctant or defensive but involved parties, or sometimes even as potentially sincere and helpful collaborators, but what they are not, after about 1997, are anything like heroes. The highlights of post-drafting constitutionalism are Court decisions, and the stars are judges or social movements or individual plaintiffs. Even someone as skeptical of courts and constitutions as Ran Hirschl allocates credit this way in South Africa.[13] To find comparable great stories that are about political actors, one has to travel back to the time of the drafting, or before it. Even the analysis that strains most away from court centrism in trying to understand how constitutional law works, in other words, may acknowledge the government but never quite *celebrates* it. As it result, it does not succeed in toppling the way that politics and the ANC are seen in the canonical understanding of South African constitutionalism.

To see this, we have only to roll the standard credits. *Makwanyane* is a bold exercise in principled counter-majoritarianism, with some standard question marks about whether aspects of the judgment are as strong as they could have been. The *National Coalition* decisions, plus *Satchwell, J* and *Du Toit*, are similarly principled judicial defenses of a vulnerable minority – again, with some standard question marks, especially in response to the same-sex marriage judgments in the two *Fourie* decisions. *Hoffman* is understood in similar vein, and the HIV/AIDS story is rounded off by the obvious judicial courage against outrageous government inaction in the two *TAC* decisions – accompanied, once again, by criticisms that more could have

[12] Heinz Klug *The Constitution of South Africa: A Contextual Analysis* (2010); Woolman, *Selfless Constitution, supra;* Stu Woolman and Brahm Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994-2008* (2009)
[13] Ran Hirschl *Towards Juristocracy: The origins and consequences of the new constitutionalism* (2007)

been done. *Doctors for Life* is celebrated as richly creative judicial boldness in the face of sloppy provincial legislatures, with its promise vindicated the same day in *Matatiele (2)* but rather let down thereafter in the subsequent public participation decisions that have declined to find another violation to date. We are told to value these as things the court has done and to wonder only why it did not do more.

The place of the government or politicians in these stories, insofar as it is not a more or less straightforwardly negative one, is at best muted. We know that the death penalty reached the Court as the result of a negotiated compromise (and Roux is unusual here in acknowledging the ANC's greater role in this story, which I discuss below).[14] But otherwise government actors tend to be either absent or confined, at best, to grumbling compliance. Thus by contrast Roux sees the sexual orientation clause as something 'whose detailed working out the ANC was content to leave to public impact litigation.'[15] The same-sex marriage story, as standardly told, shows the Cabinet initially trying to find a way not to recognize same-sex 'marriage' before reversing course only to the minimum extent necessary to comply with *Fourie (2)*. This is the sort of political story we saw earlier, in which the government's post-drafting positive contribution is limited to compliance, and so analysis tends to be confined to taking marks off if that compliance is grudging, or worse. If, on the other hand, the government complies without complaint, then that is something of a no-score win: one doesn't get credit for simply doing what one is supposed to do.

Revisiting the great canonical cases

It is hardly outlandish to imagine a system in which a party of national liberation supports a constitution and then turns its back on it, especially over time. Nor is it outlandish to imagine a system that achieves important constitutional successes notwithstanding a hostile political environment. Such systems exist, and writing on them is rightly preoccupied with criticism of the government and anxious debates

[14] Roux, *Politics of Principle*, 174-75, 238-48
[15] *Id.,* 164

about whether a court in these circumstances should be bold and build a public following or be circumspect in order not to invite attack. My contention is only that South Africa since 1994 has simply, to a significant extent, not been like this.

South Africa has, of course, experienced problems of compliance with orders, a certain amount of institutional fragility and a degree of resistance from powerful political actors. Some of these problems have indeed worsened in recent years. But we should not let this prevent us from seeing the record of the last twenty years for what it truly has been, and one good way to see this is by returning to the great cases in the canon and re-examining their associated politics more carefully.

We might begin with a question about *Makwanyane* that seldom seems to be asked. Why has this strongly counter-majoritarian decision not been challenged by the party representing the majority? Why was the issue of the death penalty not put to a referendum, as FW de Klerk argued it should be during a parliamentary debate after *Makwanyane* was handed down? The answer is that *Makwanyane* is counter-majoritarian in relation to the views of South Africa's population, but not in relation to the position adopted by the majority party. When De Klerk made his suggestion, it was Nelson Mandela who rose to reply, effectively silencing the protest by stating that if the issue of the death penalty were put to a referendum than so should the issue of land reform. There were dissenting views within the ANC, to be sure, but *Makwanyane*'s outcome was supported by the party's leadership, consistent with their opposition to the death penalty during the constitutional negotiations. Despite holding power for twenty years and the power to amend the constitution for most of them, the ANC has not introduced a bill seeking the return of the death penalty.

If it is so admirable that the Court declared the death penalty unconstitutional, why is this ANC stance not admirable, too? If *Makwanyane* is celebrated as a bastion of minority rights and dignity, why is the ANC support that has underpinned it not celebrated as well – as opposed to being ignored or, at best, treated as part of the explanation for the Court's triumph? Perhaps *Makwanyane* would have been handed

down anyway; perhaps it would have survived even if the ANC had turned its back on the decision. We don't know – and the reason is that this classic dynamic, of a court standing up to politics, is just not the dynamic that *Makwanyane* represents.

Next, let us consider LGBT equality. The first concrete application of ideas of LGBT equality in South Africa was – not the *National Coalition* decision invalidating the criminalization of consensual sodomy. It was the Special Pensions Act 69 of 1996, providing that same-sex partners of struggle veterans would be eligible for pensions just like opposite-sex ones, passed by Parliament after lobbying by lesbian members of MK. This should prompt the same question as *Makwanyane*: if we celebrate the Court and the National Coalition and the plaintiffs in the LGBT equality cases, why do we not celebrate these women, and the Parliament that responded to them?

The LGBT equality story should also drive us to consider some further crucial questions, once we fill in a few more facts. After all, the Special Pensions Act and the 'sexual orientation' text in s 9(2) were passed by the same Parliament that had still not acted, two years later, to remove the criminalization of consensual anal sex between adult men. Indeed, the first *National Coalition* decision notes the contradiction: male same-sex couples who had sex in this way would (at least in principle) commit a criminal offence – which would thereby disqualify them from receiving the pensions under the Special Pensions Act, in terms of that Act's exclusions. The inconsistency and the delay in fixing it bespeak hesitance and presumably some degree of discomfort with the issue. The same pattern is on display, to varying extents, throughout the LGBT equality cases. The second *National Coalition* case, on spousal visas for same-sex couples, arose after the government backed away from its initially generous stance on the issue. The case would even see the government advancing the argument that LGBT persons did not suffer discrimination because they were free to marry members of the opposite sex. The next three decisions after that – *Satchwell, J* and *Du Toit* – saw much less resistance from the government, but still rather less than full-throated support. And as is well known, the ANC government was less than enthusiastic about same-sex marriage.

This is the story that tends to be told, or assumed, in relation to LGBT equality in South Africa: a principled court (just not enough in *Fourie*), prompted and assisted by the National Coalition and other litigants, against a reluctant and sometimes homophobic government. But it is incomplete. The second *National Coalition* decision may have provoked non-trivial resistance from the government, but the same government had by that point passed no less than eight statutes bringing same-sex couples into various legal regimes. The government was clearly uneasy about same-sex marriage, and it is quite true that Cabinet initially favoured the creation of a separate civil union for same-sex couples rather than a 'marriage' regime. But quite apart from the fact that even this in itself represents a very progressive view in Africa today, we should recognize what the government choose to do once it became clear that this strategy was not compatible with *Fourie (2)*. It did not repudiate the decision, or attack the Court, or pursue a constitutional amendment. It did not even just run out the clock on the Court's suspended order, thus ensuring that the Court would be the actor creating same-sex marriage. Instead, it passed the Civil Union Act under a three-line whip, compelling ANC members to support marriage equality in a way no other party did, with the Speaker, Frene Ginwala, reminding ANC members of the values of dignity and equality for which they had fought the struggle. The Civil Union Act undoubtedly has its flaws. But South Africa's recognition of same-sex marriage is extraordinary in African and indeed still in global terms, and when the crunch came, the ANC chose to put its power behind it. This is a special moment – and one that has gone entirely unheralded by legal scholars.[16] The ANC deserves credit for this – indeed, all the more so since the issue was plainly a difficult one for many of its members.

This political story is a continuation of the political trajectory that led to the groundbreaking inclusion of 'sexual orientation' among the list of prohibited

[16] The vote on the Act is noted by David Bilchitz and Melanie Judge 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' 23 *SAJHR* 466 (2007) 482 n91, who relegate the information to a footnote and do not treat it as significant.

grounds of discrimination in the first place. That trajectory extends back into the 1980s, and includes actors other than the ANC: both the DP and the IFP took importantly supportive stances on the issue in the early 1990s. It would be surprising if that trajectory had disappeared or ceased to matter just because the drafting was complete. If we exclude it, we will miss the statutory developments occurring alongside, or ahead of, the judicial ones; we will not give sufficient credit to the ANC government; and we will not even understand all the cases properly. *Fourie (2)* is explicit in choosing not to decide the issue entirely itself because a multi-institutional response, vindicated by the elected parliament, would provide a more ringing vindication of the rights of same sex couples. Instead of concluding that the presence of 'sexual orientation' in the text settled the issue, the judges were adopting a more politically aware approach. And in doing so, they were relying on the legislature to respond in kind. After all, *Fourie (2)*'s approach created a large headache for a reluctant ANC, since it transferred responsibility to parliament while giving parliament only the narrowest of choices – essentially, between including same-sex couples in the existing marriage statute or passing a new statute open to both same-sex and opposite-sex couples. To write *Fourie (2)*, one must not only be thinking partly politically, but one must have some faith in the ANC. It is perhaps not coincidental that the author was Albie Sachs, once a very prominent promoter of LGBT equality within the ANC who had witnessed its evolution on the issue.

To appreciate the full importance of this sort of underlying constitutional politics, however, we need to reach for a different example. The politics in LGBT equality produced an explicit and comparatively clear textual foundation for what followed, to which the textualist can point in arguing that it is the wording of the Constitution that matters. But now consider *Hoffman*. The decision in *Hoffman* bears a striking resemblance to the LGBT equality cases, especially *National Coalition (2)*. It too cites the growing body of statutes and other legal instruments passed by the ANC government as reflecting South African law's concern to protect HIV-positive people against discrimination – a body of work that, we should note, precedes *Hoffman* and *TAC* and grows out of political activity dating back to the early 1990s. Yet *Hoffman*

does not benefit from the obvious textual foundation that the LGBT equality cases did. HIV/AIDS is not mentioned in s 9(2). The political foundations, in other words, are the same, but the textualist foundations are not, and yet the cases are very similar. This shows us how important the constitutional politics is. We have only to imagine how powerless the 'sexual orientation' text might have turned out to be if the political environment had been more hostile to see the same point. This is why the actions of the ANC, post-drafting, matter much more than is usually admitted.

Doctors for Life, the last member of the standard list of canonical success stories, is another case in point here. The textual basis for the judgment is even more flimsy than the basis for *Hoffman*. There are, at least, no real textual pointers *against* the idea that discrimination on the basis of HIV/AIDS is unacceptable at least absent a solid scientific, medical rationale, and the broader ideas of equality throughout the text are strong indicators *for* this idea. But the balance of textual arguments is arguably against the view of the *Doctors for Life* majority, which creates a specific requirement for the passage of legislation, subject to a reasonableness standard and unprecedented anywhere in the world, out of an apparently much more modest and general provision that is not included with the legislative process requirements and makes no mention of the word 'reasonable.' (Justice Yacoob's dissent in *Doctors for Life* is a textualist master class.) What *Doctors for Life* is really built on are ideas of democratic participation and listening. Textual hooks for these ideas can be found, but *Doctors for Life* is really based on a rather free-wheeling values argument.

Lest it appear that this, finally, is an example of the bold judicial creativity the Court's critics call for, however, it is important to remember something usually not noted about *Doctors for Life.* Considering how unprecedented and intrusive its exercise of jurisdiction is, why was the ruling accepted by the legislatures involved in that case and in its sister of *Matatiele (2)*? In fact, why did they not even *challenge* this extraordinary, creative and intrusive exercise in jurisdiction? The Court in *Doctors for Life* itself had to ask for argument on whether it could exercise jurisdiction over the legislative process in this manner. The stance of the legislatures

concerned – all of them ANC-controlled – was that they had met their obligations, not it would be inappropriate for the Court to check whether they had in this way. And if *this* stance may seem surprising at first glance, perhaps it should not. Democratic inclusion and participatory democracy are major ANC ideas, with a deep public resonance. This is the party, after all, that introduced local government throughout South Africa in order to bring government closer to the people; a party with strong commitments to participatory modes of democracy (sometimes described as particular features of African democracy). Parliament was already taking a whole range of steps to facilitate public participation before *Doctors for Life*, and indeed one reason that the case was so conducive a set of facts was that the provincial legislatures concerned had taken the position that they should facilitate public participation and then had simply failed to do so.[17] That the ANC government has also shown significant centralizing tendencies does not change the fact that there is more than one side to its approach to democratic structures. *Doctors for Life* is like *Makwanyane* in that the Court was pushing on something of an open door. It is enforcing ideas with a significant pre-existing political foundation, and the image of a court of principle checking politics offers only a superficial view of the case.

Revisiting the underlying pattern

These are hasty sketches, but they suffice to offer a different explanation for the inconsistency charge raised against the court: its boldest judgments come when it is vindicating ideas of strong pre-existing public status. It does not always respond this boldly, simply enough, because not everything is of this sort of public status.

This line looks plausible enough to explain the difference between the cases just considered and those on issues like Sunday closings, Rastafarianism or prostitution that do not have the same political history and backing in South Africa. But it does

[17] See further Susan Rose-Ackerman, Stefanie Egidy and James Fowkes *Due Process of Lawmaking: The United States, South Africa, Germany and the European Union* (forthcoming 2014, Cambridge University Press), 114-20

not seem to offer a complete explanation of the inconsistencies. After all, if ideas of participation and inclusion underwrite powerful boldness in *Doctors for Life*, why is the Court deferent in at least fairly similar democracy cases like *UDM (2)* or *NNP*? To understand cases like these, too, we need to consider how the foregoing discussion should affect our understanding of things beyond the famous cases.

On their own, the re-told stories of these cases might fit quite snugly with the political explanation of Roux's account. If the Court tries to avoid clashes with the ANC's stance, then the contention that its boldest cases are underpinned by more admirable ANC stances may seem in the same spirit. By that token, they would also seem open to the same objections I suggested applied to Roux's account: this is only a political account, offering a legally unsatisfying explanation of the Court's actions, and it does not revise our view of the canon much (beyond slipping some historical credit the way of the ANC.) But I believe these stories prompt deeper revision, chiefly because they recognize the ANC's stances as admirable, as opposed to precariously politically convenient for the admirable Constitution and Court.

These stories are rather sharply at odds with the idea that the ANC is the hero up until the drafting and then either a looming threat or an actual villain thereafter. Of course, they might just be aberrations, but that is not actually a very plausible view. Once we remind ourselves that constitutional politics doesn't stop when the drafting does, we will see that it would be rather odd if the political movements that produced such a widely-admired constitution had suddenly disappeared or ceased to matter after 1996. It would also be rather odd if a constitutional system as admired and successful as South Africa's had been built in the teeth of the most powerful political forces in the country. That is not to deny for a moment that the ANC has sometimes opposed constitutional developments and has sometimes not lived up to the ideals that informed the constitution drafting. Political concerns almost inevitably get narrower and sometimes less noble as the constitutional moment passes and ordinary politics returns. Implications of vague constitutional terms are concretized in ways that political actors might find unwelcome. Liberation

leaders pass on, and earlier concerns are displaced somewhat by the politics of patronage and efforts to control the state and the party. All of this is to be expected, and it has all come to pass in South Africa to some extent. But just as all this is to be expected, so it is *also* to be expected that the earlier spirit does not evaporate overnight, that broader aims to uplift South Africans and build a better country continue to have weight, and that many dedicated people work in government.

The prevailing view of the ANC as a threat and a villain can make this point hard to remember, as does a certain newspaper tendencies to focus on individual stories and neglect the larger picture. For consider: abstracting for a moment from particular outrages and episodes, try to come up with an example of a government in an emerging constitutional system with a more respectful attitude towards constitutional authority than the ANC. If you are like me, you will struggle to think of one. The comparative judgment is important, because it is easy to see the problems and the dangers in the ANC's self-understanding and easy to forget that such things are present everywhere and that other systems have often had a more difficult time with them than South Africa has. Of course, there have been rather more problems in recent years, but especially if we consider the crucial first dozen or years of the life of the Constitution and the Court, the ANC has been remarkably respectful of constitutional authority.[18] In similar vein, one may raise criticisms about most aspects of substantive government policy over this period, but the ANC can no more be described as a generally apathetic failure in government than it can be seen as a general constitutional opponent and threat. Both demand more nuanced judgment.

Thus, the re-told stories matter for more than giving the ANC some credit for the canonical success of South African constitutional law. They are emblematic of the broader need to recognize the more varied picture of the quality of South African constitutional politics and constitutional government. And *that* matters a great deal to our assessment of the Constitutional Court. After all, whether judicial deference is

[18] A point also recognized by Roux, *Politics of Principle*, 160, 182, 187-90; and Klug *Constitution of South Africa*, 295

a good or defensible idea has a great deal to do with what the court is deferring *to*. If the ANC is mostly a threat or a villain or an incompetent, then deference will mostly seem irresponsible or unwise. If it seen as at best as a temporarily virtuous but deteriorating constitutional supporter, then deference is possibly a poor long-term strategy or at least offers no comforting assurance that the Court is aware of the stronger role it may need to play and is ready and willing to do so. This point is important to put argument from Apartheid into perspective. Since Apartheid-era judges are today condemned for being overly deferent, today it is easy to fall into the trap of concluding that Apartheid shows that judicial deference is a mistake, as noted earlier. But of course Apartheid history only really shows that judicial deference towards a wicked regime leads to unchecked wickedness, a point that is almost logically true. Everything depends on what is being deferred to.[19] This is why an accurate view of the ANC's constitutional record after 1996 matters.

The other side of the prevailing bold standard in commentary on South African constitutionalism is an often very limited account of deference. It is seldom denied that there *are* limits: that the separation of powers matters and that issues of legitimacy and institutional capacity have some bite. But these limits seldom have much weight in the actual arguments that are made. The usual view is either that the Court is currently quite far from pushing up against the limits and so can do more, or that the present situation is so dire or the government action so unacceptable that ordinary separation of powers bets are off and the Court should simply do as much as it can to combat injustice. Thus when a Court decision is criticized as deferent, the particular form of the criticism is often an attempt to show how real and urgent the injustice is or was, and/or an attempt to show that the Court *could* have done something more, either in interpretation or remedies or something else. This is of the first importance in understanding the current canonical view, and its limits because - without denying the value of both sorts of contention – note how

[19] This being the crucial objection to existing comparisons between Apartheid-era judges and today's Justices: see esp. Jackie Dugard 'Judging the Judges: Towards an appropriate role for the judiciary in South Africa's transformation' 20 *Leiden J of International Law* 965 (2007)

both can be entirely beside the point. If the Court thinks it must defer because it is not institutionally capable of acting, or if it thinks it can put off potentially controversial bold action because it does not think the problem is that pressing, then these criticisms will be entirely apt. But if the Court thinks it should defer because another institution can currently better handle the problem, then showing that the problem is serious and that the Court could act is irrelevant. The judge could agree with both arguments entirely and still be deferent on this basis.

Put another way, criticism often seems to think of South African constitutional problems in terms of a drowning person in the sea. In response to a person who is drowning, one should not deliberate long about swimming abilities: if one can swim, one should jump in and try and save the life. This moral urgency is impatient with the institutional details of separation of powers arguments, and since it tends to be accompanied by skepticism of the ANC government, it is doubtful about the other possible swimmers anyway. The paradigm of apartheid judging therefore appears to fit. The Court really is the only hope, and if it does not jump in and do all it can, one is left asking how it could be that the judges can leave people to drown.

What this critical perspective seems often to take for granted is that judicial intervention would have good consequences for the underlying problem. The true enquiry is not whether the court *can* intervene but about what course of action will best advance constitutional goals, and the dominant paradigm can be guilty of glossing over its burden of proof here. The question is often a good one. Not only does the ANC's government often demand nuanced assessment, but many systems outside South Africa have seen bolder judicial activity, and the results are mixed. It cannot be assumed that bolder judicial action is ultimately good for the court, or for other constitutional institutions, or for the underlying problems the court is asked to confront. Because that cannot be assumed, the canonical critic's true burden of proof is not to show that greater judicial action is possible or that injustice exists or that there are problems with the South African government's responses – all of

which is usually definitely true. It is to show that bolder judicial action is or will be better than other possible responses, or (at least) that it will not make things worse.

Attempts to respond to this burden of proof are rare. Roux's argument offers at least a partial response, since it addresses the problem that bold action might have serious institutional consequences for the court. But this is the part of the argument least likely to convince the critic seeking boldness, since the court that lives to fight another day always risks charges of excessive caution or cowardice, unfairly or not, and always faces legal criticism if that retreat represents a 'compromise on principle'. In fact, the point goes beyond institutional self-preservation.

Bold judicial action has potentially significant costs for other institutions as well. The familiar charge that judicial review is democracy-stunting is partially met by arguments that courts can operate in more democracy-promoting ways. But the more serious point is that we do not *want*, ideally, a system in which the Court does a great deal and ends up running lots of things that would, as a matter of default positions, be done by other branches with greater legitimacy, resources and/or technical expertise. We *want* the legislature and the executive and all the other constitutional institutions to do their jobs. That is the complex, multi-institutional machine the constitutional text envisages. Of course, that is an ideal result that might be only imperfectly realized in an imperfect world, and if other institutions are flatly failing their responsibilities than the arguments for expansive judicial action to compensate become much simpler to make. But at least a lot of the time, the issue is far less clear-cut. There will be a government actor that indicates an intention to act, after some prior prevarication and delay, and it will not be clear how reliable the undertaking is. Or there will have been a government response, with some admitted flaws and some more contested ones, and a proposed plan to fix them, which may or may not happen or work if it does. In this sort of situation, there will often be a general prima facie reason to favour judicial action on better-safe-than-sorry grounds. But there will *also* often be general prima facie reasons to favour judicial deference, and it is these that get too little attention currently.

The most important of these neglected arguments, in the South African context, is an argument about the value of trust. We are entirely accustomed to arguments that the ANC government should trust the courts, and that expressions of that trust by ANC officials are very valuable things. Thus the (deserved) lionization of Mandela's pointed acceptances of judicial authority during his Presidency. But the logic works the other way as well. Why should the court not express trust in the government, and why should *that* not be valuable from an institution-building perspective too? The reply will naturally come that the ANC is much more powerful and so it is much more important for it to express trust in the fragile court than vice versa. But what we are really talking about is the building up of the many parts of the government machine. These are often new mechanisms, or ones staffed by new people, or ones facing new and difficult tasks, and so they are often fragile or troubled institutions themselves. Indeed, the power of the ANC and its blurring of the party/state lines mean that those who see the party and its power as a threat should be the most sympathetic to the argument about the fragility of government institutions. Expansive judicial action, which involves taking decisions out of the hands of these institutions or subjecting their actions to judicial constraints and monitoring, is often a bad way to build their institutional status or contribute to their institutional functioning. Of course, we might sometimes have to swallow that cost. But we should be aware that it is a cost, and that the decision to intervene, or to intervene expansively rather than modestly, has costs beyond abstract separation of powers concerns. Furthermore, the logic of trust is often that trust repays trust, and distrust, distrust. Observers of South African constitutionalism frequently want the government to respect the Court and trust the Court, but seldom engage with what it takes to bring about that state of affairs. A Court that departs from the premise that the government is to be treated with suspicion, and that it is better for the Court to direct and monitor and otherwise involve itself, is a Court expressing little trust in government – and is therefore liable to be repaid in kind.

Nothing about this argument is necessarily decisive – it is all a matter of reasonable debate and a certain amount of speculation – but that is not the point. A reflex to trust and defer is potentially naïve and potentially under-informed about the extent of what courts are capable of doing if they try. But a reflex to *dis*trust is curiously politically naïve and under-informed in its own way because of its disregard for what it really takes to build relationships with other institutions and powerful politicians. Both sorts of consideration need to be in the mix, and the current canonical understandings omit one of them far more often than they should. Recalibrating the current view of the post-1996 ANC is the first step to seeing that, and to seeing the degree to which much current criticism of the court rests on un-interrogated assumptions about the effects of expansive judicial action.

Revisiting some canonical failures

To see the implications of these arguments, it is once again useful to return to the canonical cases, and to see what perspective it affords us on cases that are not neatly explained by the presence or absence of ANC support for a particular issue or, more broadly, of a pre-existing political, social consensus for the Court to appeal to.

UDM (2), which declined to find that the introduction of floor crossing was unconstitutional, is a widely vilified case. If one adopts the two general assumptions that the ANC is a threat to South African democracy or that there is a good chance of this, and that one should be optimistic about the abilities of courts and the consequences of judicial intervention in this sort of case, then one will naturally look to the Court in *UDM (2)* to play a democracy-protecting role against the ANC. One will therefore expect the Court to police a floor-crossing policy the ANC supported for narrow political reasons, and one will regret the Court's decision not to do so. And indeed this is the standard scholarly view of the case.

As an aside on the power of canonical ways of thinking, it is also striking how *UDM (2)* seems increasingly to be seen as a case about the proper judicial response to the

dominant ANC. This is interesting, because the main concern that emerges from the political science literature is the risk to the smallest parties, not the risk of every party except the ANC. (We should recall here that both the DA and the NNP voted for floor crossing in 2002 for narrow political reasons essentially identical to the ANC's, and that it was one of the smaller parties, the United Democratic Movement, that brought the challenge.) This reflects the way that the gloss placed on the legal canon pervasively affects our interpretation, and re-interpretation, of the case law.

Now suppose that we relax the assumptions about the ANC and about the merits and effects of judicial intervention that inform the standard view of *UDM (2)*. Suppose we do not depart from the premise that the ANC was a dominant party trying to *subvert* democracy. Assume instead that the ANC was a party playing the admittedly sometimes grubby games of ordinary politics, just like the DA and the NNP, with the aim, shared by every other party in democratic history, of staying in power. Suppose, further, that we take more seriously the possibility that institutional mechanisms other than the court might be able to respond to the situation. The proximate cause of the introduction of floor crossing was the collapse of the NNP, the concluding act in the political realignment following the end of Apartheid, prompting other parties to fight over the remains. We might think that the mechanisms of ordinary politics – the parties, the legislatures and municipal councils, elections, the press – were the better institutions to work out this situation. We might also be suspicious of a court taking it upon itself to rule that floor-crossing is incompatible with democracy when lots of democracies have floor-crossing, or a court ruling that floor-crossing would be bad for South African democracy when there was plenty of expert disagreement about this. (A number of political scientists argued that floor crossing would be valuable to weaken the very strong party discipline that was and is a general feature of South African democracy).

If these arguments seem suspicious or far-fetched, it is worth recalling how floor crossing actually played out in South Africa. The ANC did ultimately gain the most from floor crossing, especially at the local level, but there was a great deal of

movement in many directions. The ANC's gains never reached the level of subverting democracy. It is important here that there is actually very little support in the historical record for the argument that floor crossing would allow larger parties to amass support contrary to the wishes of the electorate. In fact, voters tended to endorse floor-crossing trends – the parties that gained seats during the floor crossing windows between elections usually gained *still more* seats in the subsequent election. It is also important that despite the ANC being the party that was gaining the most from floor crossing, it joined the other parties in abolishing the practice again in 2008. The story is not a simple one, and one may reasonably adopt interpretations of it that are more and less charitable to the ANC. But it should at least be clear why it is not implausible to depart from the assumptions that the ANC was playing self-servingly and uninspiring ordinary politics rather than democracy-subverting politics, and why it might not be foolish to think that the collapse of the NNP could be left to play itself out in the political realm.

The point is not, of course, that these assumptions are obviously the right ones to depart from and those that currently inform the canonical view of *UDM (2)* are not. Much of this is a matter of reasonable disagreement, especially since we are often left to speculate about counterfactuals about judicial intervention and its consequences. The point is only to see that the canonical assumptions are far from the only plausible ones, and that it we depart from different assumptions *UDM (2)* may look different too. It may look astute, or at least it should no longer look like an obvious abdication of responsibility in the face of a clear and serious threat.

NNP, another widely criticized case, is even more susceptible to such analysis. It involved the government introducing new barcoded ID requirement for voting ahead of the 1999 elections, in circumstances where its voters were among the most likely to hold the new IDs. The situation in which the government manipulates voting rules to benefit itself is an old one, and a classic site for judicial intervention. If one makes the same canonical assumptions – if one is suspicious of the ANC and sanguine about the abilities of courts and the effects of judicial intervention – then

NNP can appear just such a classic case. The majority decision not to intervene is accordingly universally criticized. Again, however, the case looks very different as soon as we reconsider those assumptions. During the 1994 elections, an array of documents was accepted for voting purposes, raising serious delay problems and concerns about fraud. It was hardly unreasonable in these circumstances for the ANC government to seek a safer, standardized system for 1999 (though they may be rightly criticized for only getting around to doing so in 1998). Conversely, there is some evidence that the ANC initially adopted the policy despite concerns from its strategists that the policy might actually *hurt* the party in the 1999 elections.

The effect of canonical thinking on the way we interpret cases is again on display here, since there is again a certain tendency to parse the case in terms of the ANC seeking to subvert democracy by excluding white opposition voters. In fact, the most serious concern in the case, the one that preoccupied the *NNP* judges (and presumably the ANC election strategists as well), was the risk of excluding the young, poor, rural black voters who were least likely to learn of the new documentary requirement or to take the steps to acquire barcoded documents. The likeliest explanation for the true forces at work is a combination of the over-worked post-1994 legislature being too slow to get to the issue of electoral reform, and the policy over-ambition to which the ANC was no foreigner during those years. The documentary scheme in *NNP* was purportedly part of a general ID reform policy that is, in fact, only now just being rolled out, a little under 15 years later than planned.

There are, therefore, good grounds for wondering about the assumption that the ANC in *NNP* should be treated as a manipulator of elections. As it turned out, the Department of Home Affairs issued millions of documents in time and there was little evidence of disenfranchisement. Neither the HSRC, whose survey on how many voters held barcoded IDs had prompted the *NNP* litigation, nor the Electoral Commission which had commissioned the HSRC survey, took the view that the 1999 elections had been compromised by the new documentary requirement. There are also grounds to suspect that judicial intervention would have produced a worse

outcome. Justice O'Regan, in dissent in *NNP*, would have overturned the barcoded ID requirement and liberalized the documents that could have been used for voting, as in 1994. But in circumstances where the disenfranchising effect of the new requirement turned out to not be very serious, the balance of the evidence suggests that her order might well have had worse electoral consequences than trusting the government and leaving its policy in place. O'Regan J's view, on the facts before her, is of course debatable rather than clearly wrong – the point instead is simply that we cannot take it for granted that bolder judicial action would have been better. *NNP* is another case whose vilification turns out to rest on creaky assumptions.

It is quite easy, therefore, to square these cases with the explanation I have offered for the boldness of *Doctors for Life*. It may well be that a richly democratic argument *could* have been made in *UDM (2)* or *NNP,* just as it had been for participation in legislative law-making processes. But the point is not that the Court *must* intervene whenever the ANC is supportive of a particular position or where there is an idea of pre-existing public status, only that this makes it much easier for the Court to do so. The key difference between the cases, then, lies in the Court's view about whether or not there was a need for it to intervene. (This is an instance where arguments about what the Court *can* do, and about the seriousness of the problem, therefore risk being entirely beside the point). *Doctors for Life* involved government actors failing to meet their own expressed standards, both as a matter of general principle and on the specific facts. *UDM (2)* and *NNP*, whatever else one can say about them, are far less obviously breaches on the part of the government. Furthermore, if the Court did not intervene in *Doctors for Life* nothing further would be done about the situation that had occurred there, whereas in both *UDM (2)* and especially *NNP* the results depended on what happened in other institutions and mechanisms. These differences come to light only if we are willing to take seriously institutions other than the Court as reliable constitutional actors, and as subjects of research.

The point has application well beyond issues of democracy; I offer *UDM (2)* and *NNP* as illustrative examples of a wider trend. The socio-economic rights cases are

particularly important examples for this line of analysis. For all the scholarship attempting to show that it is *possible* for courts to enforce socio-economic rights in a variety of robust ways, there is very little evidence offered that it would be *better* for the achievement of a particular socio-economic good for the courts to play a larger role, in general or in particular cases. A comparative perspective that draws on the experiences of socio-economic rights enforcements in Latin American and South Asian systems will reveal the problems of stronger-form judicial enforcement of socio-economic rights.[20] That is naturally not to claim that those problems are necessarily a bar to judicial action, and of course the seriousness and intractability of the problems varies from case to case. Judicial action has sometimes produced good results in those systems and reforms might improve that record still further. The point is only that the problems do exist, and so unless one is faced with a government far from generally apathetic or incapable than the ANC has been since 1994, the question of whether judicial intervention is better than leaving the issue in the hands of the government is often one that demands serious analysis.

A recent case illustrates the point. Some observers seem to have been unable to fathom *Mazibuko v City of Johannesburg*, the Court's first water rights case in which it declined to order any intervention with City's contentious use of prepaid water meters in townships. Critics have concluded that *Mazibuko* symbolizes the Court's indefensible skepticism about socio-economic rights and/or its blindness to the plight of the poor. In my view, *Mazibuko* is nothing of the kind. It rests, above all, on a judgment that it would be better to leave the admitted complexities of water policy to an apparently sincere and active government body – a judgment that is not disturbed by recognition that there were some real problems with the government's policy and efforts. To show that there were some problems is not a good reason for judicial intervention if judicial intervention would not be better at solving those

[20] I discuss some of the problems of the Indian Supreme Court's expansive approach, and the associated scholarship, in James Fowkes 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' 27 *SAJHR* 434 (2011), and refer to some of the emerging Latin American concerns in James Fowkes 'Civil Procedure in Public Interest Litigation: Tradition, collaboration and the managerial judge' 1 *Cambridge J of International and Comparative Law* 235 (2012).

problems, or if it would create new problems – and that is a question that, to my knowledge, no critical scholarship on *Mazibuko* has even tried to engage.

The controversial litigation in *Joe Slovo* has related lessons. After all, during that case the Court did what many of its critics have called for and designed a very detailed structural interdict providing for the details of a housing resettlement and the precise details of what new houses those who were resettled would be entitled to. Criticism tends to focus on whether the Court should have been stricter in objecting to defects in some of the processes surrounding the resettlement, or more decisive in insisting on an in situ upgrade that avoided the dislocations of moving people to new houses while their old neighbourhoods were upgraded. These debates are not unimportant, but lost amidst them is an important insight about processes other than judicial ones. While the Court was imposing its interdict, the City and the community continued to engage and ultimately agreed that an in situ upgrade would happen after all. One may reasonably wonder whether this result would have been reached without the Court's earlier order, but it is nevertheless interesting to see how a positive political result was reached, and how the expansive judicial order ultimately ended up being an obstacle the Court was obliged to rescind.[21] Where critics focus on *Joe Slovo*'s failures to be bold, there is an important lesson about how political processes can produce good constitutional outcomes, and indeed potentially better ones than those produced by court orders who find it harder to second-guess policy choices and end up working within their constraints.

Contrary to the prevailing tendency to analyze socio-economic rights cases as a separate category, I suggest this line of analysis is also instructively applied to traditional rights cases too. Each member of the canonically vilified quartet of *Lawrence*, *Prince, Jordan* and *Volks* tends to be attacked equally as a shameful failure to defend rights. What this criticism never explores are the relative merits of judicial intervention and other possible responses in each of the four situations.

[21] See further Woolman, *Selfless Constitution*, 460-66

In fact, there are important potentially differences in this regard. Unlike the other three cases, for example, the Court in *Volks* was reacting to the government's explicit submissions, made for the first time in the Constitutional Court, that Parliament was intending to act on the issue. Subscribers to the bold standard will demand judicial action to protect rights on the facts before it, but given the potential advantages of legislative action on a complex problem, the Court's decision to defer is at least debatable. Of course, the gamble did not pay off because Parliament has yet to legislate on the issue, but that is the hazard of judgment calls – and the need to make that call is an important feature that separates *Volks* from the other three cases.

Or consider how judicial inaction in *Lawrence* preserved room for the diverse political engagement that has since taken place over the issue of Sunday closings. The issue has been delegated to the provinces, and a rich exercise in federalist experimentalism has been taking place. Only the Northern Cape has retained the old arrangements that were at issue in *Lawrence*; other provinces have permitted Sunday liquor sales, and others, like the Western Cape, have delegated the issue further down to local government level. On a sensitive issue that also does not necessarily produce serious immediate harms, there is certainly a prima facie reason to like this exercise in constitutional politics and to consider it preferable to a sudden Court-ordered abolition of Sunday trading rules. This argument looks much less applicable to the other cases where this sort of political response to the problem was rather less likely and/or where the harm was more serious.

Prince, in its turn, saw a much more serious and institutionally creative effort by the Court to engage with the problem. Unlike the other three cases, the Court postponed *Prince* in order to get more information about the feasibility of creating and policing a Rastafarian exception to the rules criminalizing use and possession of marijuana. *Prince* is not a judicial refusal to engage with a difficult problem, but rather a symptom of the difficulties of that engagement. Notwithstanding the Court's efforts, half the bench still did not feel sufficiently sure of the facts to rule decisively (and

some worryingly large assumptions are present in some of the judgments). One may criticize the decision not to act – although one has to have quite an optimistic view about judicial intervention on limited facts in order to do so – and one may wonder about if the Court's institutional creativity went far enough. But *Prince* is much less open to being criticized as a product of judicial apathy than, say, *Jordan* is.

Jordan is the true villain of the quartet, in my view. Even here, there is a meaningful debate to be had about whether the result of the Court's inaction may have been better for sex workers than forcing a governmental confrontation with the issue. (The result, as it has turned out, has been a de facto decriminalization robust enough that a court has subsequently felt able to rule that arrests of prostitutes in the Western Cape were for illegitimate extortionary purposes, not genuine law enforcement, and to interdict them.) But *Jordan* defers where no other institution was plausibly going to take up the issue, where the reasons to doubt the political process were particularly strong, and where the Court made little or no attempt even to investigate the issue for possible avenues of judicial action. This separates *Jordan*, in my view, from *Prince, Volks* and *Lawrence*, especially since the statute in *Jordan* is the most obviously constitutional objectionable of the lot. You may or may not agree – these are difficult, troubling cases – but my point here is only that the canon treats equally four cases that in fact display crucial, relevant differences.

Towards a new constitutional canon

For scholars, deference has been the most contentious judicial activity in post-1994 South Africa. Since the assessment of deference depends above all on what one is deferring to, one's view of the ANC and the actions of the government it heads therefore has a pervasive influence on one's assessment of the Court's activity. This is why the revisionary argument about the ANC presented in this paper has such far-reaching consequences for the shape of the South African canon.

As a paper concerned with reconsidering the old canon, however, the paper has had some of the limitations of its target. Its focus has remained heavily on the Court, whereas a more accurate canon would have to take account of the extraordinary legislative output of the ANC government in the years since 1994. A number of rights, including the socio-economic rights and the environmental right, have been principally cashed out by legislation and government policy documents, not judgments. Similarly, while the Court has made some institutional structural rulings, the shaping of the South African constitutional state mostly occurs elsewhere. Scholarship on the Court's limited findings on presidential powers, for example, far outstrips research on the fundamental changes in the office of the presidency (and the vice presidency) that occurred under Mbeki and now again under Zuma.[22] An adequate canon must take into account landmark statutes and government actions at least as much as cases, especially considering that the Court's output has been small and often cautious, while the government's has been comparatively extensive.

A second limitation of the paper is that it offers variables that explain the Court's actions but does not argue for why these might be legally defensible things for the Court to take into account. Is it legitimate for a Court to treat two cases differently if the only difference between them is the public status of the constitutional principle at stake? Is it legitimate for a Court to judge whether a political process might play out favourably on an issue and to decide whether or not to act itself on that basis? I have engaged this question elsewhere, but it will remain central to the debate over the canon. Current scholarship frequently glosses over questions like these, simply arguing that the Court should uphold the text and declining to consider issues raised by its status as a strategic or multi-institutional actor. The more South African constitutional law is engaged, realistically, as a political exercise, the less it will be possible to marginalize these theoretical questions about the nature of law.

[22] Richard Calland's work is an exception here, and even it does not aim to offer close constitutional analysis of the changes it records: see his *Anatomy of South Africa: Who holds the power?* (2007) and *The Zuma Years: South Africa's changing face of power* (2013)

Recognizing the more constitutionally positive aspects of political activity is crucial to seeing why that enquiry is not necessarily a foolish one to embark upon.

The issue of what a court can do legitimately will also go beyond these theoretical issues. If one is working with a bold standard, then thinking about the institutional role of the Court will inevitably focus on issues such as direct access and expansive remedial devices that permit the Court to do more, and this is indeed often the case in existing scholarship on these issues. Once we adopt a more nuanced perspective, however, we will see that a much broader array of institutional questions become relevant – ideas of dialogue, institutional subsidiarity and collaboration – and relevant not just as ways to facilitate expansive judicial action, as is often the case currently. In fact, the Court is sometimes ahead of the scholarly community here. It does not depart from the same bold premises as its critics, and so it has often found itself compelled to act in novel ways – ways that, partly due to the absence of scholarly support, often remain to be worked out in procedural detail.[23]

Looking to the future, however, this paper's most crucial contention concerns the real workings of the South African constitutional system to date. The conventional view sees its successes as signs of what a court can do if it tries, and so calls for more of the same. If those successes are actually built on political foundations, then so might future successes need to be – and if so, constitutional lawyers might need to pay much more attention to political activity and less to articulating bold interpretations and calling on the Court to announce them. Alternatively, it means that future successes might need to be constructed in different ways to which the past record is only an uncertain guide. If South Africa's constitutional success has been built on ANC stances to a greater degree than it currently appreciated, a less virtuous ANC *or* a less powerful one may imply changes in kind, rather than merely in degree, to the logic of South African constitutionalism. On this strength of this

[23] See further James Fowkes 'Civil Procedure in Public Interest Litigation'; James Fowkes 'Constitutional Civil Procedure and the limits of party autonomy in private cases: *Maphango v Aengus Lifestyle Properties (Pty) Ltd.* 5 *CCR* (forthcoming)

paper, for instance, this Court has engaged in a good deal less genuinely unilateral, bold, counter-majoritarian activity than is standardly thought, and so if constitutionally unfavourable political changes challenge it to do so, we will confront a new sort of constitutional dynamic different from the post-1994 one in kind rather than degree. Or, to take another example, the South African political landscape might splinter in years to come if the ANC's broad tent tears apart. Conventional wisdom would tell us to welcome this result as the end of dominant party democracy. But recognizing the way that the ANC has been able to marshal power behind counter-majoritarian results and insulate the court from politics somewhat should make us view this outcome more ambiguously.[24] We may in time come to be nostalgic about these first years of the system where the presence of consolidated power, whatever its dangers, also meant that things could get done.

In these ways and more, the canon we choose matters a great deal to how we understand the constitutional past and attempt to prepare for the future. If this paper is right, scholars of South Africa constitutional law have considerable work to do if we are not to confront a likely more difficult next twenty years of constitutionalism with a defective understanding of what has underwritten the early successes of a constitutionalism heard around the world.

[24] Several political analysts have argued that having a strong party at the centre may have been good for transformation, and Roux suggests this logic extends to the Court, though as should by this point be clear he takes a rather dimmer view of its quality as a constitutional partner than I do – Roux, *Politics of Principle*, 182; see also e.g. 178, 186-87