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*From parliamentary to judicial supremacy:
Reflections in honour of the
constitutionalism of Justice Moseneke**

PETER G DANCHIN[†]

Justice Moseneke has presciently identified two interrelated dilemmas at the heart of South Africa's project of transformative constitutionalism: one concerning constitutional authority following the historic rejection of parliamentary supremacy; and the other concerning constitutional normativity following the adoption in 1996 of a comprehensive Bill of Rights. This essay advances two key arguments: First, that the rejection of parliamentary supremacy has conventionally been understood in terms of a false opposition between 'parliamentary' and 'constitutional' supremacy. And second, that proponents of strong judicial review have paid insufficient attention to three core dangers of judicial supremacy: the displacement of self-government, the reproduction of the problem of sovereignty and the usurpation by the judiciary of the role of *pouvoir constituant*. This striking reversal in conceptions of normativity and authority rests on a distinctive constitutional account of popular sovereignty under which the will of the People is the source of normativity while the courts, as adjudicators of reason, are the highest legal authority. The paradox of this constitutional logic is that in order to justify the anti-democratic consequences of strong judicial review, rights-based reasoning will increasingly need to be justified in terms of the will of the People with attendant gravitational consequences for theories of adjudication. To achieve Justice Moseneke's call for an equitable balance between democratic will and constitutional supremacy – and thereby maintain a robust rights-based constitutionalism – South African judges and legal scholars will need to grapple more squarely with the twin dangers of judicial supremacy on the one hand, and the essentially contested nature of constitutional rights on the other.

'Every dawn seems to pose trenchant questions about our polity. The questions are about our society in transition; about the usefulness and relevance of our divided history. . . . These open, if not critical conversations suggest that there are no holy cows or orthodoxies beyond public

* This is a revised version of the paper presented at the symposium honouring Dikgang Moseneke held at the Faculty of Law, University of Cape Town on 7 December 2016. I wish to thank Penny Andrews, Hugh Corder, Danwood Chirwa and Mark Graber for helpful discussion and comments. I wish also to express my gratitude and admiration to Justice Moseneke for his remarkable contributions to South African constitutional law and jurisprudence.

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scrutiny. No boundaries are finite and no lines are incapable of being re-drawn or even crossed. In many ways, we live in a society of unimaginable freedom and infinite possibilities. The overarching constraint is whether our institutional arrangements and the cognate norms are well suited to realize the just society the preamble to the Constitution envisions.⁷

–Justice Dikgang Moseneke¹

I INTRODUCTION

In his extra-curial writings and public speeches, Justice Moseneke has often observed what he regards as a central tension lying at the heart of South Africa's democratic project of transformative constitutionalism. Noting the increase in criticisms concerning the legitimacy of the post-apartheid constitutional order, he has identified two recurring lines of argument: First, that the 'will of the people does not find full voice within constitutional arrangements . . . [and f]or this reason, legislative and executive power in the hands of the parliamentary majority is empty'.² This is at bottom an issue of *legal authority*: ie whether it is Parliament, or the courts, which ultimately decides what the law *is*. Second, that '[c]onstitutional constraints on the exercise of public power stand in the way of government to deliver on social equity . . . [such that] the constitution has shielded the historic economic inequality from change and in turn has obstructed the effective economic participation or freedom of the majority'.³ The question of constitutional limits on public power is at bottom an issue of *legal normativity*: ie what is the source and justification of the rights entrenched in the Constitution itself?

As Justice Moseneke has observed, the combined effect of these two lines of argument concerning constitutional authority and normativity is that 'the will of the people on the project of transforming society is frustrated by the supremacy of the Constitution and the role of courts in policing its compliance'.⁴ On this account, the core challenge moving forward is 'whether our constitutional arrangement permits an equitable balance between democratic will and constitutional supremacy?'⁵

This is a vital and increasingly embattled question in the post-apartheid legal landscape, and Justice Moseneke stands as a pivotal and deeply respected voice in the public debate. He has offered a robust but at the

¹ Dikgang Moseneke 'The balance between robust constitutionalism and the democratic process' Seabrook Chambers Public Lecture, University of Melbourne Law School, 16 June 2016.

² Ibid 3.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

same time nuanced defence of South Africa's constitutional order and, in particular, its core features of a comprehensive Bill of Rights accompanied by strong judicial review which, together, subject 'majoritarian primacy to the provisions of a Supreme Constitution'.⁶ In making this case, Justice Moseneke has argued that:

Our founding mothers and fathers were well aware of th[e] deleterious impact of parliamentary sovereignty and made a different choice. They sought to bring to life a democratic state under the sway of a supreme constitution that entrenches fundamental protections and a binding normative scheme.⁷

The question pursued in this essay is the persuasiveness of this case as a matter of constitutional jurisprudence, especially as a response to the twin dilemmas presciently identified by Justice Moseneke as surfacing in a constitutional project that is still 'young, tentative and just beyond adolescence'.⁸ From the dual vantage points of comparative constitutional law and legal philosophy, the essay critically explores the questions of constitutional authority and normativity and argues that a deep and perilous paradox arises in their interrelation in any constitutional order.

The primary claim is that extant narratives in South Africa justifying the need for a shift from 'parliamentary' to 'constitutional' supremacy have uncritically adopted and paid insufficient attention to certain distinct conceptions of and controversies concerning legal authority and normativity. Over time, these underlying assumptions will exert a gravitational pull towards a jurisprudence of strict legal textualism – the very species of legal thought most closely, and paradoxically, associated with the worst failings of the apartheid legal order. To achieve Justice Moseneke's call for an equitable balance between democratic will and constitutional supremacy – and thereby maintain a robust rights-based constitutionalism – South African judges and legal scholars will thus need to grapple more squarely with the twin dangers of judicial supremacy on the one hand, and the essentially contested nature of judicial review of constitutional rights on the other.

II PARLIAMENTARY SUPREMACY AND CONSTITUTIONAL AUTHORITY

As a matter of legal history, conventional wisdom holds that there were two primary evils of the apartheid legal order: parliamentary supremacy and strict legal positivism. This much-repeated narrative has its roots in the anti-apartheid legal literature of the 1960s and 1970s. Consider, for

⁶ Ibid 6.

⁷ Ibid 13.

⁸ Ibid 1.

example, the inaugural lecture of John Dugard at the University of the Witwatersrand in 1971.⁹ While noting the law-making function of the South African judiciary in developing the common law, Dugard suggested that judges in South Africa adhered to a ‘phonographic theory’ in the interpretation of statutes which rested on the creed of legal positivism. This creed was based on two core beliefs: first, the Austinian command theory of law as reflected in the principle of parliamentary supremacy; and second, the need for a strict separation of law and morality – between the law as *it is* and as it *ought to be*.¹⁰ Dugard noted that natural law theories were never received with as much enthusiasm in England and were finally destroyed by the advent of positivism and utilitarianism in the nineteenth century. This English legal influence had spread to South Africa, as well as Canada, Australia and New Zealand.¹¹

Interestingly, however, Dugard noted that the United States was colonised before the heyday of Sir Edward Coke, and thus before the advent of Austin and Bentham, and in America ‘Coke’s natural-law notion of a higher immutable law, which Parliament itself was obliged to obey, took root and thrives today in American legal institutions’.¹² Presciently, he raised the following query:

It is fascinating to speculate what would have happened had South Africa, like America, been colonized by Britain in the seventeenth century. Would we today have a rigid Constitution with a Bill of Rights and judicial review?¹³

Variations on this historical narrative are commonly heard today, not only to explain, but also to justify core features of the post-1996 constitutional order: constitutional supremacy, a Bill of Rights, and strong judicial review exercised by a supreme Constitutional Court. The legal theoretical battle lines, and progressive trajectory of history, are thus both clearly drawn. South Africa has rejected a sterile jurisprudence of strict legal positivism that existed in an unjust legal order based on English-style parliamentary supremacy in favour of a dynamic rights-based jurisprudence based on a higher or fundamental law of reason and justice guaranteed by strong US-style judicial review.

Justice Moseneke himself appears to have endorsed the essential ratio-

⁹ John Dugard ‘The judicial process, positivism and civil liberty’ (1971) 88 *SALJ* 181.

¹⁰ *Ibid* 3–4.

¹¹ *Ibid* 4–5.

¹² *Ibid* 5. Dugard cites *Dr. Bonham’s Case* (1610) 8 Co Rep 113b, 77 ER 646 as support for this proposition. For later discussion of the case and its legal implications in the American colonies, see John Dugard *Human Rights and the South African Legal Order* (1978) 14–15 (arguing that Coke’s statement in *Dr. Bonham’s case* later ‘formed the foundation for the Bill of Rights . . . and in 1803 Chief Justice Marshall took Coke’s *dictum* to its logical conclusion when he expounded the doctrine of judicial review in *Marbury v. Madison*’.)

¹³ *Ibid*.

nale and historical inevitability of this account. In order to achieve its substantive distributive and transformational aims, the Constitution—

had to be the supreme law beyond the whims and fancy of parliamentary sovereignty. We are not again going to submit to legislative majoritarianism. After all we had lived through parliamentary positivism. With meticulous formalism, apartheid legislation still oppressed. It made unconscionable inroads into fundamental rights and freedoms with impunity and yet it was valid law. Mere rule of law and its attendant positivism is not a sufficient condition to avert repression and bad government and injustice. Apartheid judges did not lack sound legal training and yet they were duty bound and did to enforce laws that wreaked inestimable harm.¹⁴

Viewed through a comparative and theoretical lens, however, this otherwise appealing narrative of a simultaneous shift in constitutional authority and normativity is open to critical question. To be clear, my concern is not to defend any particular legal theory or type of constitutional order, nor to deny the unremitting cruelty and injustice of the apartheid legal order. Rather, my concern is that a widely accepted narrative both misunderstands the constitutional theory of parliamentary supremacy (and its supposed association with legal positivism) while at the same time remaining inattentive to the dangers, limits and deeply contested foundations of a constitutionalism premised on judicial supremacy (and its supposed association with a rights-based jurisprudence).

The first confusion lies in a false opposition between ‘constitutional supremacy’ on the one hand and ‘parliamentary supremacy’ on the other. The implicit suggestion here is that in a system of parliamentary supremacy, there is no ‘comfort of a muscular and supreme Constitution’¹⁵ which can ensure that the ‘judiciary is vested with plenary powers of review of legislative and executive conduct’.¹⁶ The difficulty with this juxtaposition, however, is that parliamentary supremacy is *itself* a principle

¹⁴ Dikgang Moseneke ‘A jurisprudential journey from apartheid to democratic constitutionalism’ 62nd Annual Meeting of American College of Trial Lawyers, 19 October 2012. In his other writings, Justice Moseneke has re-emphasised the point:

Under apartheid, Parliament enjoyed supremacy and no constitution or bill of rights provided any fetter on its legislative powers. Oppressive laws passed by Parliament could, for the most part, not be challenged by the courts. The apartheid regime was sustained by [a] lack of accountability and the construct of parliamentary sovereignty. . . . [A]t this time when the South African Parliament enjoyed parliamentary sovereignty, the Appellate Division – and [the] judiciary more generally – was a weak check on Parliament’s powers. Parliament was able to make laws without substantive constraints; it essentially enjoyed a monopoly on power.

Dikgang Moseneke ‘Striking a balance between the will of the people and the supremacy of the Constitution’ (2012) 129 *SALJ* 9 at 14–15.

¹⁵ Dikgang Moseneke ‘Separation of powers, democratic *ethos* and judicial function’ Oliver Schreiner Memorial Lecture, 23 October 2008.

¹⁶ Moseneke ‘A jurisprudential journey’ (n 14) (noting that ‘[t]his remarkable constitutional architecture has afforded our senior judiciary unprecedented powers of judicial review’.)

in the constitutional law of various parliamentary democracies. The classic definition is provided by AV Dicey as—

neither more nor less than this, namely that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.¹⁷

This is a constitutional principle of legal authority, developed and recognised by the courts, which answers the question: Who finally decides what the law is? Under the Constitution of the United Kingdom, the answer is provided in three doctrinal points:

1. Parliament can make laws concerning anything.
2. No Parliament can bind a future parliament (i.e. it cannot pass a law that cannot be changed or reversed by a future Parliament).
3. A valid Act of Parliament cannot be questioned by the court: Parliament is the supreme lawmaker.

The doctrine says nothing about what the law is, or should be, or what substantive provisions (eg a Bill of Rights) a constitutional legal system should include. Rather, it provides that the *pouvoir constitué* recognised under the Constitution to settle legal questions is not the courts, nor the executive (nor, lest we forget in prior times, the monarch), but Parliament. If there is a contested social issue, division or conflict among the people, their representatives and indeed among the judges themselves concerning a basic question of constitutional rights, then it is Parliament that has the ultimate authority to decide and settle the question through voting in the legislature.

Consider the recent division in the courts in *Stranham-Ford v Minister of Justice and Correctional Services and Others*, a case concerning the right of an individual to physician-assisted suicide. Justice Fabricius in the High Court held that, in so far as they provide for an absolute prohibition in the context of assisted suicide by medical practitioners, the common law crimes of murder or culpable homicide unjustifiably limit the constitutional rights to human dignity and freedom to bodily and psychological integrity.¹⁸ On appeal, however, the Supreme Court of Appeal held that the High Court had been wrong to develop the common law on the grounds of an infringement of constitutional rights. Justice Wallis for the court reasoned inter alia as follows:

It is of course possible that Parliament will, as has occurred in other countries, intervene and pass legislation on the topic. That would be welcome if only

¹⁷ AV Dicey *Introduction to the Study of the Constitution* (1885), cited in AW Bradley and KD Ewing *Constitutional and Administrative Law* 14 ed (2007) 54.

¹⁸ *Stranham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP).

because it would give effect to the proper role of Parliament in a society where the doctrine of the separation of powers has application. Lobby groups could then make their voices heard and a proper debate and process of reflection could occur. In general, whilst recognising the role that the Constitution confers upon the courts, it is desirable in my opinion that issues engaging profound moral questions beyond the remit of judges to determine, should be decided by the representatives of the people of the country as a whole.¹⁹

This mode of reasoning goes to the heart of the matter and illustrates a second confusion. What is essentially in conflict is not parliamentary as opposed to constitutional supremacy, but rather parliamentary versus *judicial* supremacy (both being subject to the supremacy of the Constitution.) As noted above, Justice Moseneke rejects the doctrine of parliamentary supremacy for lacking not only the ‘comfort of a muscular and supreme Constitution’, but also a ‘judiciary . . . vested with plenary powers of review of legislative and executive conduct’. This criticism rests on two interrelated points: first, regarding the nature of a *written* (as opposed to *unwritten*) Constitution; and second, regarding the nature and scope of *judicial review*. Let us consider each point in turn.

(1) *Written versus unwritten Constitution*

In a comparison of the United Kingdom and United States Constitutions, John Gardner has explored the distinction between an ‘unwritten’ or ‘uncodified’ constitution on the one hand and a ‘canonical constitutional master-text’ on the other.²⁰ In the case of the former, what determines the status of rules as part of the constitution is not how they are *created* (their ‘special origin or process of enactment’) but rather how they are *received* (their ‘treatment in either the customs or the decisions of certain law-applying officials, principally the courts’.) Even though the UK Constitution is partly comprised of various ‘canonical’ Acts of Parliament understood to impose constitutional limits on political institutions (including the courts),

¹⁹ *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* 2017 (3) SA 152 (SCA) at 62–3. The judgment cites with approval the views of Lord Sumption in *Nicklinson* on the proper role of Parliament in cases of this type: ‘In my opinion, the legislature could rationally conclude that a blanket ban on assisted suicide was “necessary” in Convention terms, i.e. that it responded to a pressing social need. I express no final view of my own. I merely say that the social and moral dimensions of the issue, its inherent difficulty, and the fact that there is much to be said on both sides make Parliament the proper organ to deciding it.’ *R (on the application of Nicklinson and others) v Ministry of Justice* [2014] 3 All ER 843 (SC) para 233.

²⁰ John Garner ‘Can there be a written constitution?’ *Oxford Legal Studies Research Paper* No 17/2009 (8 May 2009) at 2–4.

they remain part of an unwritten constitution, for their constitutional status – their entry into the constitution – comes of the unwritten law of the law-applying officials who subsequently treat them as having that status.²¹

Such an unwritten Constitution notably includes customary, extra-legal rules – what Dicey termed ‘conventions of the constitution’ – that can become part of the law of the Constitution through the courts ‘treating them as law’.²²

The point here is that, unlike a written Constitution, the tradition of unwritten English constitutionalism locates its foundations not in a spontaneous act of autonomous sovereign will but in a living discursive tradition of historical legal thought and practice which *precedes* and *shapes* acts of sovereign will. This unwritten Constitution has no sole or unified author or moment of posited creation; rather, it *pre-exists* the sovereignty of the state and is recognised as controlling the exercise of public authority.

For a political theorist such as Edmund Burke, the virtue of such a constitutional theory is that it is rooted not in the rational egoism of the popular sovereign imagined to stand at the centre of Enlightenment political thought but in the ancient history and traditions of one’s ancestors and ultimately in human experience itself.²³ In this respect, the British constitutional tradition is a partnership among ‘those who are living, those who are dead, and those who will be born’.²⁴ As Talal Asad has noted, the notion of a normative discourse established through history is central to any conception of a discursive tradition:

These discourses relate conceptually to *a past* (when the practice was instituted, and from which the knowledge of its point and proper performance has been transmitted) and *a future* (how the point of that practice can best be secured in the short or long term, or why it should be modified or abandoned), through *a present* (how it is linked to other practices, institutions, and social conditions).²⁵

At the heart of English constitutional discourse is the doctrine of parliamentary supremacy, a constitutional rule developed primarily by the

²¹ Ibid 5.

²² Ibid 10 (citing AV Dicey *Introduction to the Study of the Law of the Constitution* (1885) 23–4 (defining ‘conventions of the constitution’ as ‘customary constitutional rules which the courts may note, rely upon, and accommodate in applying the law but of which the courts’ applications are not authoritative, even for the immediate purposes of the case before them’.)

²³ Edmund Burke *Reflections on the Revolution in France* (1790) in *The Works of the Right Honorable Edmund Burke* vol 3 (1899). See further Jeremy Waldron *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) 77.

²⁴ Burke (n 23) at 359.

²⁵ Talal Asad ‘The idea of an anthropology of Islam’ *Occasional Paper Series*, Center for Contemporary Arab Studies (1986) at 14.

courts themselves. While the courts act as the guardians of constitutional *normativity* by determining the legal effect of Acts of Parliament, Parliament retains its position as the ultimate legal *authority* by always being able to overrule the courts through re-legislation.

This arrangement rests on a distinctive jurisprudential logic. The will of the people – including in relation to conflicts of rights and liberties – is expressed ultimately through legislation enacted in Parliament. The meaning and legal effect of that expressed will, however, is determined through its reception and interpretation in the reason of law-applying officials, primarily in the judicial reasoning of the courts.

As we shall see in Part III below, this logic has important implications for theories of both judicial review and rights-based reasoning. For present purposes, it is sufficient to observe that this constitutional tradition departs markedly from the foundational premises of American-style constitutionalism which is based on a written constitution. In US jurisprudence, the Constitution is fundamentally understood to be the *result* of an exceptional act of popular self-determination. The canonical constitutional master-text is the expression of a super-majoritarian act of popular will and competing accounts of popular sovereignty both underlie and define the legitimacy of the constitution itself. As Paul Kahn explains:

Popular sovereignty in the United States is distinctly not a conception of self-government through elections that express the majority will as it emerges from constantly shifting coalitions. Political theory may give us such a process view of popular-sovereignty, but to pursue this path is like thinking that we can understand religious faith by examining church attendance statistics. The popular sovereign is a trans-temporal, omnipresent, and omniscient plural subject.²⁶

This notion runs throughout American constitutional history. It is perpetually rearticulated in landmark Supreme Court cases such as *New York Times Co v Sullivan* where Justice Brennan famously interpreted the ‘central meaning of the First Amendment’ as being intimately connected to Madisonian and Jeffersonian notions of popular sovereignty.²⁷

My point here is not to explore the complex and intricate terrain of theoretical treatments of popular sovereignty in modern constitutional thought. Rather, following Kahn, it is to observe that within this constitutional tradition the law acquires its authority and legitimacy not

²⁶ Paul Kahn ‘Sacrificial nation’ *The Utopian* 29 March 2010.

²⁷ 376 US 254 (1964). See further William J Brennan, Jr ‘The Supreme Court and the Meiklejohn interpretation of the First Amendment’ (1965) 79 *Harvard Law Review* 1; Harry Kalven, Jr ‘The New York Times Case: A note on “the central meaning of the First Amendment”’ (1964) *Supreme Court Review* 191; Alexander Meiklejohn *Political Freedom: The Constitutional Powers of the People* (1948).

primarily from its qualities of reason or the justice of its demands, but from its connection to the will of the sovereign. Again, as Kahn makes the point:

We have a sacred text – the Constitution – which we understand as the revelatory expression of the popular sovereign. We also have rituals of sovereign action – elections as well as judicial decisions. We believe that unless an assertion of governmental authority can be traced to an act of popular sovereignty, it is illegitimate. This is precisely the meaning of judicial review, which serves as a constant affirmation of our belief that we live under the rule of law, not men. Judicial review shows us explicitly the linkage of popular sovereignty and the rule of law.²⁸

On this view, the authority of the courts derives directly from their claim to articulate the meaning of the canonical constitutional master-text which is itself a ‘remnant’ of popular sovereignty. Such a logic is almost exactly opposite to that of the unwritten English Constitution. Constitutional normativity is now understood to lie not in the accumulated wisdom and discursive reason of historically constituted discourses but in an extraordinary act of popular self-determination as expressed in a canonical master-text. At the same time, ultimate legal authority is now understood to lie not in Parliament, but in the courts and their exercise of judicial review, including in the case of both the United States and South Africa in the power of judicial review over not only executive action, but also of legislation.

This significant reversal in conceptions of normativity and authority correlates to the two challenges identified by Justice Moseneke to the legitimacy of contemporary South African constitutionalism: the dual criticism that ‘the will of the people on the project of transforming society is frustrated by the supremacy of the Constitution and the role of courts in policing its compliance’.²⁹

Let us turn then to the second question of parliamentary versus judicial supremacy, before exploring in Part III the relationship between this question and the nature of judicial review in the context of a rights-based written Constitution.

(2) *Parliamentary versus judicial supremacy*

Recall Dugard’s primary indictment of parliamentary supremacy during the apartheid era being its association with a ‘phonographic theory’ of strict legal positivism and the corresponding absence of a ‘natural-law notion of a higher immutable law, which Parliament itself was obliged to obey, [as] took root and thrives today in American legal institutions’.³⁰

²⁸ Paul W Kahn ‘Speaking law to power: Popular sovereignty, human rights, and the new international order’ (2000) 1 *Chicago Journal of International Law* 1, 3.

²⁹ Moseneke (n 1).

³⁰ Dugard (n 9).

We can now see, however, that as a matter of *normativity* there is no inherent or necessary connection between the doctrine of parliamentary supremacy and a jurisprudential philosophy of legal positivism.

Whether developing the common law; interpreting and applying statutes; reviewing executive action; or indeed interpreting and recognising the unwritten rules of the Constitution, rights-based reasoning is a distinguishing feature of the common-law tradition and judges have historically developed an array of doctrines to ensure that considerations of fairness, equity and justice shape judicial reasoning and interpretation of legal norms. Indeed in the pre-apartheid era, equality before the law was a core premise in judicial reasoning of the courts in South Africa.³¹ In Australia, this is the main argument advanced against the adoption of a substantive Bill of Rights: ie the notion that fundamental rights are already adequately protected by the common law and freely elected legislatures.

On this view, the great evil of the apartheid legal system was not parliamentary supremacy per se, but rather the violation of its core premises: democratic self-government and cherished principles of representation and political equality. Through the complete denial of universal adult suffrage on grounds of race, the apartheid constitutional system accorded ultimate legal authority to an unjustly constituted political institution. Where the legislature is representative and elected on a basis of political equality, the case for parliamentary supremacy as a theory of legal *authority* is significantly more normatively attractive (even, as Jeremy Waldron has argued, in relation to minority groups with the state).³²

What then explains and, more importantly, justifies the shift in South Africa from parliamentary to judicial supremacy, paradoxically at the very moment apartheid was rejected and representative democracy and a freely elected legislature fully embraced? The most apparent answer is that the post-apartheid South African Constitution was deeply influenced by the immediate post-Cold War project and euphoria of liberal constitutionalism as promoted and inspired mainly by the example of the United States and other leading Western democracies.³³

The core features of this tradition are popular sovereignty, a substantive Bill of Rights and strong judicial review (often in the hands of a supreme

³¹ See eg *Williams and Adendorff v Johannesburg Municipality* 1915 TPD 106; *Minister of Posts and Telegraphs v Rasool* 1934 AD 167.

³² Jeremy Waldron 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346.

³³ For discussion of this phenomenon, see Samuel Issacharoff 'Comparative constitutional law as a window on democratic institutions' *Elgar Research Handbook on Comparative Judicial Review* (2018 forthcoming) 5 (noting that what unified the courts established in post-1989 democracies was the power of judicial review as part of a 'new democratic organization of political power').

constitutional court). In 1989, the Soviet scholar Vasily Vlasihin thus defined 'constitutionalism' as—

a written constitution *per se* surrounded by a cloak of unwritten principles, values, ideals, procedures, and practices. Without attempting to list the entire file of attributes of American constitutionalism, let me single out the key ones. Making up the core of constitutionalism are the ideas of 'popular sovereignty' and a social contract as the source of the government; the principles of republicanism, federalism, separation of powers, and government limited by law; respect for the rights and liberties of citizens and the protection of private property; the rule of law and the supremacy of the Constitution; the independence of the judiciary and judicial review.³⁴

Recall in this context that apart from South Africa, Dugard also mentioned Canada, Australia and New Zealand as countries similarly influenced by the English tradition of parliamentary supremacy. It is interesting to reflect that in the wake of the post-1990 tide of American-style constitutionalism, these countries have embraced entrenchment of constitutional rights but not the kind of strong judicial review of legislation under a Bill of Rights that defines the American constitutional tradition.

In Canada, courts may decline to apply a statute if it violates a provision of the Canadian Charter of Rights and Freedoms, but this power is subject to the 'notwithstanding clause' of the Constitution under which legislation may be declared by Parliament to be insulated from this scrutiny.³⁵ In New Zealand, an even weaker form of judicial review exists. Courts may not decline to apply legislation when it is found to violate the rights set out in the Bill of Rights Act of 1990, although they are directed to prefer an interpretation whenever possible that avoids such a violation.³⁶

³⁴ Vasily Vlasihin 'Political rights and freedoms in the context of American constitutionalism: A view of a concerned Soviet scholar' (1989) 84 *Northwestern University Law Review* 257, 258. See further Louis Henkin 'Elements of constitutionalism' *Occasional Paper Series*, Center for the Study of Human Rights, Columbia University (August 1994).

³⁵ Section 33 of the Canadian Charter of Rights and Freedoms provides:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

³⁶ Section 4 of the New Zealand Bill of Rights Act 1990 provides:

No court shall, in relation to any enactment . . . [h]old any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or [d]ecline to apply any provision of the enactment — by reason only that the provision is inconsistent with any provision of this Bill of Rights.

In Australia, judicial review is an axiomatic part of the legal system despite the fact that (like the United States) there is no provision in the Australian Constitution expressly conferring such a power on the courts.³⁷ But as noted earlier, the Australian Constitution does not have a Bill of Rights and its constitutional jurisprudence has focused principally on the relationship between federal and state legislative and executive power rather than on individual rights.

In Australian High Court practice, the post-Cold War era similarly heralded a period of rights-based activism from 1987 to 1995 under the leadership of Chief Justice Anthony Mason whereby the court sought to develop a jurisprudence based on ‘implied’ constitutional rights and freedoms.³⁸ The notion, however, that the High Court has the authority to imply a constitutional freedom and then employ such an implication as the basis to invalidate legislative or executive action (in addition to developing the common law) created strong controversy in the Australian legal system. Under the subsequent leadership of Chief Justice Murray Gleeson, this implied rights jurisprudence and conception of judicial review has steadily declined.³⁹

What then are the reasons for this reluctance of modern democracies (with their origins in the English tradition of parliamentary supremacy) to embrace ‘strong’ judicial review: that is, the ‘authority to decline to apply a statute in a particular case (even when the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage)?’⁴⁰ The answer lies in the perceived dangers and political implications of ‘judicial sovereignty’:

[T]he prospect of judicial sovereignty is no better than any other kind of sovereignty and considerably worse than forms of rule that are disciplined ultimately by accountability to the people. However inferior the judgments of the people seem to the judgments of a judge, we like the idea of self-governing

Section 6 further requires that ‘[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning’.

³⁷ Kathleen E Foley ‘Australian judicial review’ (2007) 6 *Washington University Global Studies Law Review* 281.

³⁸ *Nationwide News Proprietary Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Proprietary Ltd v Commonwealth* (1992) 177 CLR 106.

³⁹ Foley (n 37) at 316. Foley notes that the ‘Gleeson Court’s dominant approach to constitutional interpretation is textualism combined with a form of “soft” originalism’. See also Dan Meagher ‘Guided by voices? – Constitutional interpretation on the Gleeson Court’ (2002) 7 *Deakin Law Review* 261, 283.

⁴⁰ Jeremy Waldron ‘Judicial review and judicial supremacy’ *Public Law and Legal Theory Research Paper* No 14–57 (November 2014) at 8.

republic and we are not at all sure that that is compatible with the ultimate authority of courts in the Constitution.⁴¹

Not simply radical or conservative, but also leading liberal public law scholars such as Jeremy Waldron and Mark Tushnet have advanced sophisticated, sustained and trenchant critiques of strong judicial review. There is much to be learned from these counter-narratives as well as from the increasingly obvious pathologies and dysfunction of American constitutional law and judicial politics.

Waldron has identified three main 'evils' of judicial supremacy: First, as already noted, the displacement of self-government ('the tendency of any arrangement that allows . . . vital and divisive questions to be settled by the courts').⁴² Second, the reproduction of the Hobbesian problem of sovereignty that makes the judiciary into a 'new Sovereign' ('whether judicial power represents the rule of law or represents a sort of judicial super-sovereign that itself escapes the authority of the rule of law is a perennial problem in rule of law studies').⁴³ And third, the usurpation of the role of *pouvoir constituant* in so far as the constitution is concerned (the idea that 'no constituted power may be identified – or identify itself – directly or indirectly with the people or claim the credentials of the popular sovereign').⁴⁴

In each of these points lie different but related dangers: first of dominating government; second of institutional hegemony above the law; and third of the power to define and redefine the Constitution. What then finally is the relationship between these related dangers of judicial supremacy as a theory of legal authority and the *normative* sources and justification of the constitutional order itself? It is on this point that a deep paradox and ever-increasing legitimacy crisis arises for the courts, especially for present purposes the Constitutional Court of South Africa.

⁴¹ Ibid 2.

⁴² Waldron cites (at 12) Abraham Lincoln's First Inaugural Address: '[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.'

⁴³ Waldron notes (at 15) that 'Hobbes rejected the logic of constitutionalism. It is, he said a mistake to think that you can limit sovereignty with a constitution, because you have to do it with some other political entity – in this case a court.'

⁴⁴ The point is that the 'courts, even the highest court, is not *le pouvoir constituant*. It is a constituted power, set up by the constitution. It is *un pouvoir constitué*.' (ibid at 19). Waldron discusses (at 20) the 'negative Sieyès principle' which holds that 'a constitutional system must be ordered in such a way as to prohibit (and to reduce the prospect and plausibility of) any constituted power taking upon itself the mantle of *le pouvoir constituant*. The question then becomes 'to what extent are *the courts* claiming to speak for the people (and thus violating the negative Sieyès principle) in the way they exercise their powers of judicial review? To what extent are they taking on the mantle of the people, when they set up their own interpretations and repudiate interpretations of the constitution which emanate from the other branches?' Ibid at 24.

III CONSTITUTIONAL RIGHTS AND LEGAL NORMATIVITY

The Bill of Rights and newly created Constitutional Court are today two of the most widely admired features of the post-apartheid 1996 Constitution. Section 172(1)(a) of the Constitution entrenches strong judicial review requiring the courts to declare any law or conduct inconsistent with the Constitution to be invalid to the extent of its inconsistency. In *Pharmaceutical Manufacturers*, the Constitutional Court definitively held that *all* public power is controlled by and subject to the written Constitution, which is supreme law.⁴⁵

(1) *The justification of judicial review*

What theory or basis of legitimacy does the Constitutional Court's power of judicial review rest upon? This is a critical question as South African legal history itself has shown that the adjudication of constitutional rights can be as ideological and political as any act of the legislature. In his analysis of the apartheid legal order, John Dugard himself observed that in the mid-nineteenth century in both the Orange Free State and South African Republic, attempts were made – influenced strongly by the US Constitution – to revive natural law philosophy in rigid Constitutions with which the laws of the respective Volksrade were obliged to conform.⁴⁶

In the Orange Free State Constitution of 1854, the legislature (*Volksraad*) was 'non-sovereign' and certain fundamental rights were expressly guaranteed.⁴⁷ As illustrated by the case of *Cassim and Solomon v The State*,⁴⁸ however, the 'equality-before-the-law' provision was read in accordance with the *mores* of the Voortrekkers. Some people were accepted as more equal than others and race was not an irrelevant factor in making such a determination.⁴⁹

In the South African Republic (Transvaal), the status of the Constitution (*Grondwet*) of 1858 was less clear. But in the famous case of *Brown v Leyds NO* (1897) 4 OR 17, Chief Justice Kotzé of the High Court – citing *Marbury v Madison* (1803) – held that certain informal laws or *besluiten* were invalid on the grounds of incompatibility with the *Grond-*

⁴⁵ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

⁴⁶ John Dugard *Human Rights and the South African Legal Order* (1978) 18–19.

⁴⁷ In 1898, Judge JMB Hertog of the Orange Free State High Court expressly rejected the doctrine of legislative supremacy in *The State v Gibson* holding that the 'Volksraad is beyond doubt the highest legislative authority, but still not unqualifiedly the highest authority. Above the legislative authority stands the constitution-giving authority – that is, the sovereign people, to whom the majesty belongs.' (1898) 15 *Cape Law Journal* 1 at 4, cited in Dugard (n 46) at 19.

⁴⁸ (1892) 9 *Cape Law Journal* 58.

⁴⁹ Dugard (n 46) at 19. This line of reasoning was achieved by granting the franchise only to 'citizens' and defining eligibility for citizenship in terms of race.

wet. This reasoning was premised on the basis that (a) 'sovereignty vested in the people of the Republic and not in the *Volksraad*'; (b) 'the Constitution created fundamental law with which the *Volksraad* was obliged to conform'; and (c) it was the 'duty of the court to declare invalid measures which were not in conformity with the *Grondwet*'.⁵⁰

At a similar time in the United States during the *Lochner*-era, from the 1880s to the late-1930s, state and federal courts struck down up to 170 statutes that constituted a progressive programme of economic and social amelioration. A majority of the Supreme Court marked out a stance of broad opposition to the legislative program of the government establishing in effect a 'stand-off' and ultimately a constitutional crisis of power between the elective branches of government and the judiciary.

These historical examples vividly illustrate Waldron's second and third evils of judicial supremacy: the interrelated dangers of the judiciary becoming in effect a new sovereign, or 'super-sovereign', that itself escapes the authority of the rule of law, thereby allowing a constituted power to usurp the role of *pouvoir constituant* by identifying itself with the sovereignty of the people.

As argued in Part II, the analysis of this dilemma by proponents of strong judicial review is premised on the mistaken assumption that under the doctrine of parliamentary supremacy the legislature is somehow *superior* to the Constitution. In the case of the 1858 Transvaal constitution, Dugard thus states that it—

was not made clear whether the *Grondwet* created fundamental law and whether the Constitution was superior to the legislature, although there were several articles that seemed to point to the sovereignty of the people, not the *Volksraad*.⁵¹

This sentence conflates and confuses the issues of constitutional authority and normativity. There can be no doubt as a *normative* matter that the *Volksraad* was *subject to* the *Grondwet* as a matter of constitutional law. Rather, what was in doubt was a question of constitutional *authority*: whether it was the *Volksraad*, or the courts, which ultimately had the power under the *Grondwet* to determine what the law was on any particular issue.

This allows us to see the second mistaken assumption made by proponents of strong judicial review: the notion that, while the legislature

⁵⁰ Dugard (n 46) at 21. The decision precipitated a constitutional crisis and President Kruger declared the testing right – and thus the notion of higher law – to be a 'principle of the Devil' and proclaimed the supremacy of the *Volksraad*. Ultimately, Chief Justice Kotzé was dismissed by the President (ibid at 22–4).

⁵¹ Dugard (n 46) at 20.

is *superior* to the Constitution under the principle of parliamentary supremacy, in the case of judicial review under a written Constitution the courts are somehow *inferior* to and merely the ‘voice’ of the Constitution. Justice Moseneke is one of the few jurists clearly to have seen the emerging volatility of this contradiction:

[I]t must be conceded that, if there is a danger in parliamentary supremacy, there is also a danger in constitutional supremacy. Contemporary attacks on the Constitutional Court as undermining popular will have traction precisely because they are rooted in a legitimate fear. A tension clearly exists between democratic theory and constitutional supremacy.⁵²

It is vital to see once again, however, that the dilemma is not one of ‘constitutional supremacy’ or the need to impose entrenched ‘normative constraints on majoritarian politics’. All of this is consistent and compatible with parliamentary supremacy and its underling justification of expressed democratic will. Rather, the dilemma is one of privileging the *authority* of the courts over the legislature in possessing the ultimate power to decide the effect of those constraints through judicial review of legislation.

The dilemma raises instead the question of what is often referred to as the ‘counter-majoritarian difficulty’,⁵³ the need to justify judicial review – and therefore judicial as opposed to parliamentary supremacy – as a ‘necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing limits that the Constitution itself imposes on governmental power’.⁵⁴ This raises a deep paradox concerning the normative source and justification of rights-based constraints.

(2) *The source and justification of constitutional rights*

We have seen that some account of popular sovereignty underlies both the normativity and ultimately the legitimacy of the written Constitution itself.⁵⁵ The constitutional text is the link between the rule of law and the will of the popular sovereign. Again, as Paul Kahn explains:

The starting point for understanding the American rule of law is the idea that the law gains its authority not from the justice of its demands, but from the will of the sovereign. This is an old idea in jurisprudence, but it is experienced as a

⁵² Moseneke (n 1) at 15. The locus classicus of the tension between democratic theory and judicial review is John Hart Ely *Democracy and Distrust* (1980).

⁵³ The term was first used by Alexander Bickel *The Least Dangerous Branch* (1962) at 16 (describing the view that judicial review stands in tension with democratic theory by allowing unelected judges to overrule the law-making of elected representatives, thus undermining the will of the majority).

⁵⁴ Moseneke (n 1) at 16.

⁵⁵ See Kahn (n 28) and accompanying text.

literal truth in America: the authority of the judge derives directly from his or her claim to articulate the meaning of texts that are themselves 'remnants' of popular sovereignty.⁵⁶

This is categorically not, however, how the Bill of Rights in the South African Constitution (and other democratic states) is understood or interpreted by the courts and, in particular, by the Constitutional Court. Rather, an international legal and universal moral theory of human rights is more often invoked by judges seeking to justify the imposition of constitutional limits on democratically enacted legislation. The Bill of Rights is, in this sense, understood to be part of a wider global project of constitutionalism premised on the protection of fundamental human rights.

Despite significant differences in their time of composition, constitutional formulation and elaboration by courts, Waldron has argued that international and regional human rights charters as well as the 'bodies of law relating to fundamental rights of each major democracy' collectively represent 'attempts by their respective framers to get at roughly the same subject matter: what important rights do individuals have – what rights may they preemptorily assert – simply by virtue of being human?'⁵⁷ On this view, international human rights law and constitutional law on fundamental rights are each part of a common normative order standing in a relation of 'dual positivization'.⁵⁸

Justice Moseneke has endorsed a robustly global view of constitutionalism as underpinning the South African Bill of Rights:

The premium placed by many jurisdictions on both democracy and constitutional supremacy derives from the prioritization of human rights in the wake of the Second World War and in our case in the wake of apartheid and colonial repression. Constitutionalism, on this view, reflects contemporary democracies' commitment to 'entrenched, self-binding protection of basic rights and liberties' in an 'attempt to secure vulnerable groups, individuals, beliefs, and ideas vis-à-vis the potential tyranny of political majorities, especially in times of war, economic crisis, and other incidents of political mass hysteria'.⁵⁹

⁵⁶ Kahn (n 26) at 3.

⁵⁷ Jeremy Waldron 'Human rights: Universalism or the integrity of a common enterprise?' (1 September 2016). NYU School of Law, Public Law Research Paper No 16-48, available at SSRN: <https://ssrn.com/abstract=2848611> at 2-3. At the national level, Waldron mentions the UK Human Rights Act; the New Zealand Bill of Rights Act; Germany's Basic Law of 1948; the US Bill of Rights; the Canadian Charter of Rights and Freedoms; and the Bill of Rights of the Constitution of South Africa.

⁵⁸ Gerald L Neuman 'Human rights and constitutional rights: Harmony and dissonance' (2003) 55 *Stanford Law Review* 1863, 1864ff (discussing the 'institutional consequences of embodying the human rights ideology in two parallel regimes of positive law').

⁵⁹ Moseneke (n 1) at 23-4.

This view has two main implications: first, that democracy itself should be understood in terms of a new political theory of sovereignty, one that Justice Moseneke terms (mistakenly in my view) 'constitutional supremacy' which has now displaced the older, discredited principle of 'parliamentary sovereignty'; and second, that the fundamental rights in the Constitution should be 'robust enough to withstand even change by an elected parliament' by virtue of the exercise of the power of judicial review, which itself should be understood not as undemocratic but as 'reconcilable with majority rule'.⁶⁰

The central claim in this essay is that this double argument in fact constitutes a reversal in the conceptions of constitutional authority and normativity in South Africa – a reversal which over time will have paradoxical and unintended consequences for a robust and democratic rights-based constitutionalism. As discussed in Part II, the source of constitutional normativity on this view – including the Bill of Rights – is ultimately some account of popular sovereignty understood as a positive act of *creation* which expresses the super-majoritarian will of the people in a canonical constitutional master-text. The ultimate source of constitutional authority, however, is the judiciary and, in particular, the Constitutional Court vested with the power of strong judicial review.

As time progresses and the court is called upon to decide difficult and often momentous questions concerning the meaning and hierarchy of constitutional rights, the supremacy of judicial (as opposed to legislative) authority will increasingly be called into doubt. The perception of a legitimacy deficit is likely to be heightened by modes of judicial reasoning and interpretation which go beyond the text and seek to rely on the purported universality and binding nature of human rights. The underlying difficulty is that this conception of constitutional normativity and authority suggests not only that ultimate legal authority lies in the hands of unelected judges, but that legal normativity lies in some essential sense *external* and *superior* to the South African legal order itself as judges act to *recognise* or *receive* universal human rights norms into domestic constitutional law.⁶¹

Given the open-textured nature of rights provisions and the essentially interpretive nature of rights-based reasoning,⁶² critics will be quick to

⁶⁰ Ibid.

⁶¹ The most well-developed account of this view is that by Harold Hongju Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599 (advancing a theory of the relationship between domestic and international law in the international or 'transnational' legal process tradition involving the interaction, interpretation and internalisation of human rights norms). See also Harold Koh 'International law as part of our law' (2004) 98 *Am. J. Int'l Law* 43; Harold Koh 'The globalization of freedom' (2001) 26 *Yale J. Int'l L.* 305.

⁶² See Jeremy Waldron 'A rights-based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 19 (discussing the 'difficulty, complexity, and controversy attending

attribute both the source and justification of controversial judicial decisions not to the universal demands or claims to justice of human rights norms, but to the value judgments, political preferences and individual biases of the judges themselves.⁶³ This criticism will be especially acute in instances of landmark cases such as *S v Makwanyane and Another*⁶⁴ which involve persistent, substantial and good faith disagreements about rights, ie cases involving basic questions concerning what the commitment to fundamental rights means and what the legal implications are of such rights, especially where complex conflicts of rights arise.

One of the earliest commentators on the post-apartheid Constitution presciently observed that a sea change had occurred in South African law and argued that 'the explicit intrusion of constitutional values into the adjudicative process signals a transition from a 'formal vision of law' to a 'substantive vision of law.'⁶⁵ Having reviewed the docket of the Constitutional Court in its first year, however, Cockrell perceived instead the 'absence of a *rigorous* jurisprudence of substantive reasoning, for what we have been given is a quasi-theory so lacking in substance that I propose to call it "rainbow jurisprudence".⁶⁶ He proceeded to give three examples of such reasoning:

In interpreting the Bill of Fundamental Rights and Freedoms . . . an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence.⁶⁷

In broad terms, the function given to this Court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution.⁶⁸

This evaluation must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution and in other legislation, in the decisions of our Courts and, generally, against our own experiences as a people.⁶⁹

In each of these passages, we see the judges straining to reconcile two opposing accounts of constitutional normativity, one premised on popular sovereignty ('common values in South Africa' . . . 'shared by the whole nation as expressed in the text of the Constitution' . . . 'the values of South African society as articulated in the Constitution') and the other on human rights and a universal account of reason ('an all-inclusive value

the idea of basic rights' and suggesting caution about 'the enactment of any canonical list of rights, particularly if the aim is to put the canon beyond the scope of political debate and revision').

⁶³ See eg Alfred Cockrell 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1.

⁶⁴ 1995 (3) SA 391 (CC).

⁶⁵ Cockrell (n 63) at 3.

⁶⁶ *Ibid* at 11.

⁶⁷ *Makwanyane* (n 64) para 307, 500H (Mokgoro J).

⁶⁸ *Makwanyane* (n 64) para 362, 514C–D (Sachs J).

⁶⁹ *S v Williams* 1995 (3) SA 632 (CC) para 59, 650D (Langa J).

system’ . . . ‘the fundamental sense of justice and right’ . . . ‘the backdrop of . . . values’).

For Cockrell, this early attempt at normative reconciliation was a failure for two reasons: first, because ‘statements such as these flit before our eyes like rainbows, beguiling us with their lack of substance’; and second, because they seem ‘intent on denying the existence of deep conflict in the realm of substantive reasons, assuming as they do that constitutional adjudication is all about normative harmony rather than normative discord’.⁷⁰ As theorists of rights have long argued, the critical point is that ‘substantive reasons are difficult reasons; they require hard choices to be made between moral and political values which are inherently contestable and over which rational people will disagree’.⁷¹

(3) *The paradox of popular sovereignty and judicial review*

I do not intend to explore the complex legal and political philosophical relationship between popular sovereignty and human rights. Rather, I wish merely to observe the paradox that arises in all modern constitutional thought from this variation on the ancient question posed by Socrates to Euthyphro:

Euthyphro: I would say that what all the gods love is holy . . .

Socrates: The point which I want to resolve first is whether the holy is beloved of the gods because it is holy, or holy because it is beloved of the gods.⁷²

Recall John Gardner’s discussion of the distinction between a written and unwritten Constitution: are the rules of the Constitution valid because *posited* or posited because *valid*? In the case of a written Constitution, the validity of constitutional rules is determined ultimately by how they are *created* (their ‘special origin or process of enactment’). In the case of an unwritten Constitution, however, validity is determined ultimately by how certain norms are *received* (their ‘treatment in either the customs or the decisions of certain law-applying officials, principally the courts’).⁷³

⁷⁰ Cockrell (n 63) at 11.

⁷¹ Ibid. See generally Jeremy Waldron *The Dignity of Legislation* (1999) at 4 (developing a normative theory of legislation in response to the idea that ‘[p]eople have become convinced that there is something disreputable about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle’.)

⁷² Plato ‘Euthyphro’ in Benjamin Jowett’s edition of the *Dialogues* vol II (1871) 84, cited in John Gardner ‘Law as a leap of faith’ (2000), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397138 at 1.

⁷³ See n 20 and accompanying text in Part II (1). I say ‘ultimately’ because the dialectic between creation and recognition of rules operates in complex ways in each case. Many American judges, for example, adopt a Lockean ‘social contract’ view of the Bill of Rights in the US Constitution understood to reflect a pre-existing normative order of natural or fundamental

The paradox that arises is as follows: in order *politically* to justify the exercise of strong judicial review on the basis of entrenched constitutional rights – and thus strike down or modify laws enacted by democratic majorities – the courts will increasingly be drawn towards the gravitational pull of popular sovereignty. The adjudication of constitutional rights will be justified not in terms of the demands of reason or justice, but the expressed will of the sovereign people (a uniquely ‘South African human rights jurisprudence . . . shared by the whole nation as expressed in the text of the Constitution’).

The irony of this logic is that in order to avoid the charges of subjectivity and political bias in making complex value judgments, the courts will similarly be drawn over time towards a jurisprudential philosophy of formalism and textualist legal positivism – the very theory Dugard associated with the worst failings of the apartheid legal order. This has unquestionably been the experience of the United States Supreme Court over the last half century as the liberal rights ‘activism’ of the Warren and Burger courts has been overtaken by the textualism and originalism of the Rehnquist and Roberts courts.

The success of the legal philosophy of Justice Antonin Scalia is the clearest illustration (and warning) of this trajectory. Indeed, it was precisely because of the wide and seemingly unconstrained discretion of judges exercising strong judicial review under a written Constitution (unlike in the United Kingdom) that Justice Scalia argued so forcefully in favour of textualism and originalism:

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. . . . Central to [Marshall’s analysis in *Marbury v Madison*] . . . is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of ‘law’ that is the business of the courts – an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of ‘law,’ but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than the legislature? . . . Quite to the contrary, the legislature would seem a much more appropriate expositor of societal values, and its determination that a statute is compatible with the Constitution should, as in England, prevail.⁷⁴

rights. For the reasons advanced *infra*, such classical ‘liberal’ theories of constitutional rights have become increasingly difficult to justify in a culture dominated by American exceptionalism (in the form of popular sovereignty) and legal positivism (in the form of textualism and originalism).

⁷⁴ Antonin Scalia ‘Originalism: The lesser evil’ William Howard Taft Constitutional Law Lecture, 16 September 1988.

Today, it is broadly accepted by judges across the political spectrum on the US Supreme Court that textualism and originalism are at least the proper starting points for constitutional adjudication.⁷⁵ Similarly in the legal academy, various theories of a ‘new originalism’ have been advanced by prominent constitutional law scholars.⁷⁶

Consistent with Paul Kahn’s thesis of a constitutional theology grounded in popular sovereignty, judges are no longer viewed as continuing the ‘deliberative process of reason’ by working from ‘a specified list of human rights – those rights necessary for a free and democratic order – put forth in numerous, overlapping conventions’. Rather, the contextual exercise of reason itself has begun to look illegitimate:

What is it that American judges do, if they are not applying reason to discern the progressive path of rights in particular contexts? They are interpreting a text. Their authority comes not from the application of universal reason, and certainly not from the appeal to an “all things considered” judgment of reasonableness. All American debates over legal rights are hermeneutical: judges and lawyers argue over the appropriate interpretive attitude to bring to that text. . . . The authority of the American constitutional text comes neither from a claim of democratic legitimacy, nor from a claim of justice . . . [r]ather, the authority of the constitutional text derives from its appearance as an act of popular sovereignty. This text is the remnant, the evidence, of sovereign presence.⁷⁷

Popular sovereignty in the American constitutional imagination generates a distinctive conception of judicial authority as grounded essentially in discerning the *will* of the popular sovereign as expressed in the canonical master-text. The role of the judge is not to interpret, but to *read* the constitutional text, which is ‘a trace, a remainder, of the presence of the popular sovereign’. The judge’s ‘will is determined by his sight. Reading becomes an act of seeing.’ This form of spectral knowledge is coupled with ‘an appeal to original history: temporal proximity to sacred presence carries its own weight’. In this way, the judge can appear to ‘subordinate himself to a law outside himself’ while simultaneously ‘call[ing] the nation back to its sacred origin’. To the extent that the judge engages in reasoning that looks beyond the constitutional text and invokes other

⁷⁵ See eg Elena Kagan’s remarks while Dean of Harvard Law School in 2007 (Scalia’s ‘views on textualism and originalism, his views on the role of judges in our society, on the practice of judging, have really transformed the terms of legal debate in this country’).

⁷⁶ See eg Jack Balkin *Living Originalism* (2011); Jack Balkin ‘The new originalism and the uses of history’ (2013) 82 *Fordham Law Review* 641; Lawrence B Solum ‘What is originalism? The evolution of contemporary originalist theory’ (28 April 2011), available at: SSRN: <https://ssrn.com/abstract=1825543> or <http://dx.doi.org/10.2139/ssrn.1825543>; Randy E Barnett ‘The gravitational force of originalism’ (2013) 82 *Fordham Law Review* 411.

⁷⁷ Kahn (n 26) at 7.

sources of authority or the contextual demands of justice, criticisms immediately arise regarding the illegitimacy of judicial review.

Over time, this logic generates a remarkable paradox. The exceptional nature of the popular sovereign that is the normative source and legitimacy of the constitutional order is understood in increasingly universalistic terms: the idea of the rational, self-determining liberal subject. Conversely, the universal 'higher' law that reflects the will of the popular sovereign is understood in increasingly personal and exceptionalist terms: as 'our supreme law'. In this way, rightness is understood not in terms of a contextual, pluralistic tradition of reason but the true ascertainment of the unitary, rational will of 'the People'.

Precisely the opposite logic operates in the case of the discredited theory of parliamentary supremacy. As discussed in Part II, the ultimate source and legitimacy of the unwritten constitution lies not in a positive act of will of the popular sovereign, but in an historical discursive tradition of legal thought and practice. In this tradition, the courts have a wide and substantive scope of authority to engage in modes of reasoning that seek ways to realize and protect rights in particular contexts and to balance competing claims of right. This exerts a gravitational force away from or beyond a *particular* historically situated legal order and *towards* the claims of universal reason and justice.

This rich tradition of rights-based adjudication is legitimate *precisely because* it is understood to be subject to the doctrine of legislative supremacy. In instances of moral or political controversy surrounding rights, the decisions of the courts are always subject to the overarching authority of the democratically elected legislature to settle such questions through deliberation and ultimately majority vote. This ironically draws the legislature *towards*, rather than away from, the moral demands of reason, thereby offering the possibility of both a strong deliberative democracy coupled with a robust tradition of rights-based adjudication.

Recall that under the theory of popular sovereignty, normativity is understood to lie in the *will* of the popular sovereign while legal authority lies in the courts as the supreme interpreters of that will as reflected in the higher law of the text of the Constitution. Under parliamentary sovereignty, by contrast, normativity is understood to lie in a pluralistic and flexible tradition of discursive *reason* while ultimate legal authority lies in the democratic will of the people as exercised through their representatives in the legislature.

This view is not, of course, immune from criticism or without its own internal weaknesses. The idea of a largely unwritten discursive constitutional tradition may be unattractive, unavailable or unjust in certain respects, while the notion of final legal authority in the hands of democratic majorities – as widely noted in the literature – may itself pose

threats to the protection of minority and individual rights.⁷⁸ Similarly, there may well be powerful and original ways of understanding the theory and practice of popular sovereignty in the South African constitution that depart significantly from the eighteenth-century assumptions and path dependencies of the American tradition.

But as a resolution of the basic dilemma identified by Justice Moseneke as between constitutional supremacy and democratic will, the tradition of parliamentary supremacy offers much from which we can learn. Once the false opposition between constitutional and parliamentary supremacy is made visible and the various pathologies of judicial supremacy as a theory of constitutional authority squarely confronted, we can begin to see how competing configurations of normativity and authority generate different – and often paradoxical – forms of constitutional politics. Given that South Africa has opted for a model of strong judicial review, this should open the space for new conversations regarding the praxis and effective implementation of rights-based adjudication.

IV CONCLUSION

This essay has advanced two key arguments. First, that the rejection of parliamentary supremacy in South Africa has conventionally been understood in terms of a false opposition between parliamentary and constitutional supremacy. And second, that proponents of strong judicial review have paid insufficient attention to three core dangers of judicial supremacy: the displacement of self-government, the reproduction of the problem of sovereignty and the usurpation by the judiciary of the role of *pouvoir constituant*.

This striking reversal in conceptions of normativity and authority rests on a distinctive constitutional account of popular sovereignty under which the will of the People is the source of normativity while the courts, as adjudicators of reason, are the highest legal authority. The paradox of this constitutional logic is that in order to justify the anti-democratic consequences of strong judicial review, rights-based reasoning will increasingly need to be justified in terms of the will of the People. As a matter of jurisprudence, this will exert an increasing *inward* gravitational pull towards formalism, textualism and originalism.

The idea of a constitutional legal tradition not grounded in an express act of popular sovereignty may seem deeply anti-modern and conservative in the Burkean sense. But it allows us to see more clearly the merits of

⁷⁸ See eg Richard H Fallon 'The core of an uneasy case for judicial review' (2008) 121 *Harvard Law Review* 1693; Frederick Schauer 'Judicial Supremacy and the Modest Constitution' (2004) 92 *California Law Review* 1045. See also Ronald Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996) (arguing that judicial enforcement of entrenched rights is an essential institutional feature of a democratic society).

locating *will* not in a conception of metaphysical normativity, but in human authority – the decisions of a democratically elected legislature – while at the same time locating *reason* not in judicial authority, but in a conception of discursive normativity – an historically evolving, pluralistic and living legal tradition. As a matter of jurisprudence, this view paradoxically exerts an increasing *outward* gravitational pull towards substantive reason and conceptions of the universal.

Justice Moseneke has astutely identified and presciently sought ways to reconcile the indelible tensions between these two visions of constitutionalism lying at the heart of the post-apartheid legal order. He has argued that the Bill of Rights ‘enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’.⁷⁹ The future of this order and its widely admired recognition of the universality of human rights and claims to justice rests on a clear-eyed appraisal of both the revolution in constitutional normativity that has occurred and the increasing perceptions of illegitimacy that the exercise of judicial authority is likely to generate. By according critical attention to the dangers of judicial supremacy, normative space can remain open and receptive to the kind of robust rights-based reasoning that we treasure in the personal integrity and constitutional jurisprudence of Justice Moseneke.

⁷⁹ Moseneke (n 1) at 6–7.