FROM ASPIRATION TO REALISM: CONSTITUTIONALISM, JUDICIAL REVIEW AND THE DEMOCRATIC PROCESS IN SOUTH AFRICA

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‘People in African Countries may have begun to transform themselves from the ‘subjects’ of the past… into active ‘voters’ under the present dispensation. But at the same time, they do not appear to fully grasp their ‘political rights as citizens’, notably to regularly demand accountability from leaders. As such, most African political regimes still have to meet the minimum requirements of a representative democracy. ’ Nuran Davids and Yusef Waghid[[1]](#footnote-1)

I.INTODUCTION: RETURN OF THE POLITICAL

South Africa had its founding ‘constitutional moment’ just more than two decades ago, putting an end to the political and legal institutions of the Apartheid system, and heralding a new political and legal order based on democracy, human rights and the rule of law. This transition appeared to be part of a global and irreversible trend towords a democratic system which combined elective institutions and constitutional government.

Political transition to a ‘nonracial’ constitutional order through deliberative acts of bargaining and political choice, was a significant political achievement in a society with a history of colonial conquest and despoliation.The Judiciary acted to support and legitimise this transition.[[2]](#footnote-2) Over the next two decades it articulated an aspirational jurisprudence which set standards for state conduct in relation to individuals[[3]](#footnote-3) and for parliamentary politics.[[4]](#footnote-4) The latter received comparatively little attention in the legal academy,which has been concerned mainly with articulating a conception of the South African constitution as a blue print for transformation, including socio economic transformation.[[5]](#footnote-5)

But more than two decades later, entrenched patterns of economic inequality, spatial apartheid and persistent patterns of undeserved privilege, have proved intractable.This is how Verne Harris and Sello Hatang of the Nelson Mandela Foundation characterize South Africa’s current ‘post Apartheid’ reality:’Our society remains severely damaged.Old fissures remain resilient. New ones are emerging. The social fabric is being unraveled further by growing disparities… *by rampant corruption*, by creeping service delivery infrastructures, a failure of leadership… *alienation from political processes*, xenophobia, the re-racialization of discourse, infant mortality, HIV infection, illiteracy and so on.’[[6]](#footnote-6)[*My emphasis*]

‘State capture’,a form of political corruption has become a particular concern after the publication of two reports by the Public Protector, the first finding that public funds had been spent on the President’s private homested for non security purposes[[7]](#footnote-7) and the second, that he had effectively handed over his constitutional authority to appoint cabinet Ministers to private individuals who are in business with his son[[8]](#footnote-8). A subsequent report by a group of academics[[9]](#footnote-9) came to the conclusion that under the Zuma administration, public power was effectively being exercised by a ‘shadow state’, a well organized clientelistic and patronage network, behind the façade of the ‘constitutional state with clear rules and laws.’[[10]](#footnote-10)’State capture’ raised a question not only of constitutional and institutional integrity but of democratic legitimacy, since this evidence suggested that the political process was not under the control of voters and their elected representatives.

This is the context in which the legitimacy of the institutional arrangements envisaged by the constitution is being contested. We are experiencing a ‘return of the political’ which seeks to reopen questions thought to have been resolved once and for all more than two and a half decades ago through a set of constitutional precommitments[[11]](#footnote-11). This second ‘constitutional moment’ is experienced as a moment of peril but is also potentially one of renewal, since the the constitutional project, properly understood is designed to facilitate the political activity of ‘the people’ within a constitutional framework.

And the institutions of legal constraint on ‘bad politics’ provided for in Chapters 8 and 9 of the constitution have also demonstrated their efficacy and purpose by setting constitutional standards for political activity in political parties[[12]](#footnote-12) and for those who hold public office in legislatures [[13]](#footnote-13)and the Executive Branch[[14]](#footnote-14) in order to protect the institutions of popular self- rule from plutocratic capture.Thus,the ‘return of the political’ makes its appearance as part a double paradox: on the one hand , it appears at a time of greater distrust of the democratic politics of ‘the people’ as its frailties have become more evident; and on the other, at a time which has seen the emergence in the academy of a mood more sceptical of liberal constitutionalism and legal reasoning[[15]](#footnote-15), but also of a reaffirmation of constitutionalism in the political domain, as political actors, acting in their own interests, have turned increasingly and productively to the courts to vindicate the constitutional value of accountability.[[16]](#footnote-16)

Some constitutional democracies in the global north appear to mirror similar pathologies of institutional fragility and decay. ~~[[17]](#footnote-17)~~ It is hardly an exaggeration to say that liberal democracy is in a crises everywhere and that its afflictions are both familiar and common: unjust inequalities which affects the fairness of the political process[[18]](#footnote-18) and plutocratic capture which erodes its democratic legitimacy have become systemic. This has led Michael Ignatieff to observe after a recent visit to South Africa:’It is a comforting illusion to divide the world into secure liberal democracies that have a mutually enabling relation between institutions and virtue, and those that are still struggling to create this virtuous upward spiral.’[[19]](#footnote-19)Liberal democracies, he says, ‘face their own forms of institutional entropy:elite capture, corruption, and inequality.’[[20]](#footnote-20) Protecting and restoring trust in the political process and democratic politics has therefore become an imperative in countries with very different histories, social conditions, and locations in the global economy.[[21]](#footnote-21)

How should constitutional theory and law respond to questions concerning the health and efficacy of ‘the politics’ of democratic communities? What is the role of Judicial review in our jurisdiction in setting standards for ‘politics’ and remedying ‘political process disfunction’? How do we define and conceive ‘political disfunction’ and which forms of disfunction are susceptible to remedy through judicial review?These are questions which may have have different answers in different jurisdictions, since the sources and character of ‘political disfunction’ are context dependent.They are currently under theorized in South African constitutional jurisprudence.I[[22]](#footnote-22)t is the argument of this paper that these issues can be engaged by restoring as a proper focus of constitutional law and theory the idea of democracy as requiring that ‘the terms of social life be subject to collective self determination’ by ‘the people’, through their elected representatives. A *system* of self government, requires in addition, non elected institutions, like courts to establish legal parameters for democratic politics, and efficient bureaucracies to deliver collective public goods.[[23]](#footnote-24)

This idea of ‘self government’ has long been present as the core commitment of the idea of democracy, perhaps from its inception in antiquity, but has lost its centrality under the weight of the ‘new constitutionalisms’ singular preoccupation with the judicialenforcement of individual rights. We can then return to a question that preoccupied the late Frank Michelman-perhaps South Africa’s most brilliant constitutional interlocutor-and ask: how do we as participants in South African constitutional and legal argument-whether implicitly or explicitly-envisage the character and point of political activity in the conditions of south African democracy today.[[24]](#footnote-25)

This is not an important question for constitutional law from the point of view of rights orientated constitutional theory.This genre of constitutional theory is preoccupied with the regulation of the relationship between the democratic state and the individual, or as Thomas Nagel might say, the reconciliation of the standpoint of the collectivity and the standpoint of the individual. In Part 11 below, I argue that the rights oriented framework, does not adequately address questions that arise in a constitutional democracy about how the political process of ‘will formation’ should be structured,and what kinds of political disfunction should be remedied through constitutionalization.[[25]](#footnote-26) Rights remain important in this context, but they loose their raison’edet as constitutional concepts that are required to protect fundamental individual interests at risk in the political process. Rather, in this context, they have structural or ‘scaffolding’ purposes to undergird and protect the process of democratic decision making.

In Part 111, I show why constitutional thinking about how the political process itself should be structured requires additional normative framings and different starting points.The normative grounding for this kind of analysis, I suggest is provided by the idea of self government, popular consent and political equality. These ideals appear to have lost their centrality in defining the constitutional idea of democracy, although there is textual [[26]](#footnote-27) and historical evidence[[27]](#footnote-28) supporting this reading. This is certainly how Anti colonial liberation movements understood the democratic project.I show why this ideal itself requires ‘rule of law’ constraints which are not the ones which have developed to control administrative discretions.

What legal constraints is it appropriate for the judiciary, having regard to its institutional competencies and constitutional role to impose on the political process. Answers to this question will depend on how the process of ‘will formation’ is understood under our constitution- on a spectrum from ‘realist’ to more ‘idealised’ conceptions. Such constitutional understandings are informed by different versions of ‘process theory’ in constitutional law. ‘Process theory’ in its various forms has lost much of its interest because it was thought to provide an inadequate account of the case for judicial protection of rights. But I argue that a return to process theory is necessary today because it is the process itself and how it should be structured which needs constitutional analysis apart from outcomes which might be considerd unjust because they violate the fundamental rights of individuals. So I consider the relationship between judicial review and the political process on different versions of ‘constitutional process theory’ in Parts 1V and Part V.

In Part V1, I discuss the Constitutional court’s process jurisprudence.In the more optimistic period of the South African project, the Court intervened as ‘nation builder’ and ‘constitutional architect’ promoting inclusion of minority parties in the legislative process and public participation of marginalized groups.I suggest that the court sought to preserve consensual methods of decision making that had characterized the constitution-making period, and that this ‘aspirational process jurisprudence’ reflects a pronounced scepticism towords aggregative and majoritarian conceptions of the political process, ‘Westminister Parliamentariasm’ and ‘ democracy as representation and electoral participation’ in pursuing this integrative vision of the constitutional project.

In more recent cases, corresponding to the the current period of constitutional criticism and ‘state capture’, the court has directly targeted sources of political disfunction, like the lack of transparency in party funding as a cause of political corruption,the failure of the majority party operating on the basis of party discipline and therefore of parliament, to hold the President to account for the abuse of public funds for private purposes,and the failure of Parliament to put proper rules in place governing impeachment, the remedy of last resort in the most extreme cases of threat to the constitutional order.I argue that this jurisprudence is best understood as the application of an anti corruption constitutional principle developed by the court to remedy constitutionally cognizable harms to the democratic process as such.

II The LIMITS OF RIGHTS ORIENTATED CONSTITUTIONAL THEORY

The contemporary ubiquity of the idea of universal human rights grew out of the experience of Nazi Germany. Governments elected by democratic procedures could conceive and enact a genocide.After the Second World War, it appeared to be the case that the lesson to be learnt from at least some northern jurisdictions was that democratic procedures could not always be relied upon to end discrimination on the basis of race and gender.This was also the main lesson drawn by the legal community from the experience of Apartheid.

The central preoccupation of much of contemporary constitutional theory became the explanation of the reasons for the judicial enforcement of individual rights to countermand the outcomes of majoritarian politics.Even when the concept of ‘democracy’ enters constitutional analysis, it is to demonstrate why the idea of rights is required by the idea of democracy itself.[[28]](#footnote-29) But otherwise, the idea of ‘self government’ [[29]](#footnote-30) as a democratic value lost its place in the constitutional theory of democracy.

This rights orientated tradition of constitutional theorizing has consequently not engaged critically with the political process itself,[[30]](#footnote-31) as a distinct focus of constitutional analysis.The ‘political process’ is merely a background category the inadequacies of which demonstrate why judicial enforcement of individual rights is required to secure justice.

It thus lacks the conceptual resources to respond to emerging threats to the project of ‘democracy as self-government’ which cannot be properly framed within the discourse of individual rights. Various forms of political corruption, for instance are best understood not as threats to the fundamental interest of individuals but as threats to the structure of democratic representation[[31]](#footnote-32). The Benthamite alternative and the school of ‘political constitutionalism’[[32]](#footnote-33) which aims at showing that well functioning legislatures can be relied upon to protect rights in the ‘presence of politics’ also does not have much to contribute to the analysis of the pathologies that can impair the functioning of the democratic process such as we are currently experiencing.

It is the thesis of this paper that in order to establish non rights constitutional standards which the democratic process must comply with and to delineate an appropriate role for the judiciary in setting standards and containing threats to democratic politics consistent with its institutional capabilities and constitutional role, a different paradigm is required. Such an enterprise of theory building can start by excervating earlier traditions which ground political and legal authority in popular consent.

III:SELF GOVERNMENT, POLITICS AND THE RULE OF LAW

I begin by going back to Hannah Arendt’s discussion in her essay, ‘The Great Tradition’[[33]](#footnote-34) of types of government which, she says, always rests on two conceptual pillars: law and power. These conceptual pillars must also frame our discussion of the idea of self government and the democratic political process.

The first theme, is the platonic one recognizable in contemporary ideas of constitutionalism and the rule of law:’lawful government was good and lawless bad.’[[34]](#footnote-35) But she points out immediately:’ the criterion of law, however, as the yardstick of good or bad government, was very early replaced, already in Aristotle’s philosophy, by the altogether different notion of interest, with the result that bad government became the exercise of power in the interests of rulers, and good government the use of power in the interests of the ruled.’[[35]](#footnote-36)Aristotle then goes on to say, she says ,that in each polis composed of ruler and ruled, ‘it is necessary that all share equally in ruling and being ruled.’[[36]](#footnote-37)Here we have an early expression of the idea which in contempory democracies has come to mean ‘free and equal participation in political will formation, ’[[37]](#footnote-38)which I take to mean the idea of self government, and which Benjamin Constants termed the ‘Liberty of the Moderns.’[[38]](#footnote-39)Many of the political process pathologies which are the subject of this paper are best understood as affronts to this core democratic value, or in Arendt’s terms as problems of accountability that arise in the relationship between rulers and the ruled in representative democracies.These are not problems that can be understood as ones that arise in the relationship between the individual and the state.

The democratic value of self government requires -that the people are self- governing and sovereign.‘Constitutionally speaking’ Frank Michelman has observed:‘Democracy in our times… names a standard by which a country is not free, its inhabitants not free men and women, unless political arrangements are such as to place the people under their own joint rule.’Self-government’it is often called.’[[39]](#footnote-40) For the people to be ‘self-governing’, it must in some sense be able to be said that they are the authors of the laws to which they are subject. It is a requirement that is satisfied collectively not individually through membership of the political community and guaranteed *rights of participation in the institutions* that are set up for collective decision-making. Actualization of the political good of ‘self-rule’requires a system *of rules, procedures and institutions*.[[40]](#footnote-41)

At this point, we begin to confront the familiar paradox of self-rule. Self-rule or ‘Active liberty’[[41]](#footnote-42)requires a system of *legally binding normative constraints*. We can understand these as enabling constraints, by retrieving another old idea associated with Montesquieu:the idea of a legal structure only as a ‘framework within which people move and act’,[[42]](#footnote-43) or in other words, as constitutive of ‘the whole realm of politics.’[my emphasis]

We can see the influence on this idea in the Woolman’s recent suggestion that the South African constitution should be understood as a framework or scaffolding for collective action, as well as in Hans Lindahl’s[[43]](#footnote-44) ‘first person plural’ perpective that begins with the opening words of the constitution, ‘We The People’ so that the constitution is then understood as providing the ‘master rule that structures how a legal collective goes about responding authoritatively to the practical question, ‘what is joint action for?’ thereby determining what counts as legal behavior for for the collective.’ More precisely’ he says ‘there is a form of joint action in which *the monitoring and enforcement* of collective action is entrusted to certain officials and authorities: legal order. By the monitoring of joint action I mean that in the course of joint action certain authorities establish in a binding fashion what is its point, and how it can be best achieved, whether in the light of the changing context in which the joint action unfolds or because conflict about these issues may arise between participant agents. In such circumstances, it is up to the authorities to articulate the point of joint action by establishing what will count in the default setting of collective action, and to establish whether an act counts as a *participant act*…’[[44]](#footnote-45)

Lindahl’s Authoritative Collective Action Model(ACA) model makes it clear that harms to the collective process of democratic decision-making, as distinct from harms to individual interests should also be considered to be constitutionally cognizable. He entrusts responsibility for the determination of what constitutes ‘legally rational’ and prohibited illegal behavior from the point of view of the collective to ‘certain officials or authorities’. In South Africa, that responsibility is assigned to the constitutional court and other independent bodies, like the Public Protector.[[45]](#footnote-46)

In Woolman’s terms, we can say that the court and the Public Protector form part of the ‘scaffolding’ of democratic politics and that the court has the constitutional authority to establish and protect the legal framework of collective action, or which I prefer to call ‘democratic politics.’ In this sense, the institutions that make up a system self government can include both elected and unelected institutions which have the constitutional function of establishing legal boundaries to ‘the political.’[[46]](#footnote-47)

Rule of law constraints are thus required to enable a project of democratic self- government.But in this constitutional context, the rule of law should not be confused with the principle of legality we encounter in that branch of the law which has developed to control administrative discretions, since this characterization will often obscure what from a constitutional law point of view is really at stake.

IV. JUDICIAL REVIEW AND THE DEMOCRATIC PROCESS

Judicial review to protect the institutions of self government and to undergird the political process of collective decision-making raises as many questions as arise in other areas of judicial supervision: questions of normative framing and relative institutional competence[[47]](#footnote-48) of interpretive method, of functional delineation and the proper standards of review usually considered under a version of the ‘separation of powers principle.’

How should the line between constitutionally prescribed intervention and usurpation be drawn? Certainly the elitist temptation to try to achieve through constitutional prescription what should properly be struggled for in the cut and thrust of the democratic politics, should be avoided.Answers to this line drawing question will depend on different theorizations of the democratic process and the assumptions we make about the character and point of democratic politics.[[48]](#footnote-49)

Do we conceive of democratic politics as deliberative and consensus seeking or as strategic and competitive?Do we think that the institutions of self government- require both representation and popular participation? And what forms of political conduct do we think are beyond the pale because they distort the relationship envisaged by the constitution between ruler and ruled? Process theory then, helps us to become aware to quote Frank Michelman of ‘the moments in our arguments and explanations when we make or omit to make justificatory references to popular determinations respecting the laws.’[[49]](#footnote-50)And to ask:’ How are we at those moments conceiving of the people and their politics, both empirically and normatively? In these conceptions, or our argumentative deployments of them, are there inconsistencies or irregularities that need trouble us? Are there divisions among us, patterns of difference in conception and deployment, that if brought to light, would clarify basic issues of constitutionalism, or enable advocates to argue more persuasively?’[[50]](#footnote-51)

V.THE DEMOCRATIC PROCESS IN CONSTITUTIONAL THEORY

In constitutional law, process theory is concerned with the what kind of participation in decision-making is required by the constitutional principle of democratic self-government. Below I discuss two broad paradigms of democratic process theorization that have entered the fabric of constitutional theory and law: ‘thick’ and idealized versions and ‘thin’ and ‘realist’/pragmatic conceptions of the democratic process.The conception that is adopted will determine which normative standards like deliberation, popular participation,equality, fairness and minority rights protection the process of collective decision making will be required to adhere to, and which ‘pathologies’ are considered to require judicial supervision.

A.Realist Process Theory

Rights-based liberalism[[51]](#footnote-52) conceptualizes the purpose of the democratic process to be the aggregation of pre-existing individual preferences.[[52]](#footnote-53) Since the outcomes of such processes may be unjust, individual rights are required which themselves are not subject to a utilitarian calculus and which can override majoritarian preferences. Their purpose is to set limits to democratic outcomes which are unjust [[53]](#footnote-54)since the process of aggregation counts preferences based on prejudice or naked expressions of power.So the main preoccupation in constitutional theory of conceptualizations of the democratic process in the liberal tradition is to justify the Judicial protection of rights.

However, the inherent tension produced by attempts to produce a coherent synthesis between the two apparently opposed ideas of open-ended popular decision-making and platonic guardianship by a body of legal experts independent of the process has always generated controversy.John Hart Ely thought that Ronald Dworkin’s suggestion that the conundrum could be resolved by fusing moral theory and constitutional law effectively enabled a professional elite to impose their own values on the people and thereby accentuated the counter majoritarian difficulty.

He proposed alternatively, that courts should be cast in the role of guardians of the democratic process itself instead of being placed in the invidious position of second-guessing the decisions of the peoples elected representatives on important moral questions.Herein lies Ely’s importance. Although he was also preoccupied with the legitimacy of the judicial enforcement of of rights, he was the first to see the salience of the actual functioning of the democratic process for constitutional theory and law. Therein lies the contemporary relevance of Dean Ely whose theory has continuing relevance both in rights, but particularly in ‘non rights’ political process cases.

He built his theory on suggestions in two paragraphs of the famous *Carolene Products* footnote.[[54]](#footnote-55)Justice Stone said obiter that a standard of mere rationality in judging the constitutionality of statutes will generally be sufficient. Ordinarily, the outcomes of pluralist bargaining should be respected by the judiciary. But not where the process itself malfunctions:

‘[I]t is unnecessary now to consider … whether *legislation which restricts those political processes* which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exacting judicial scrutiny* under the general prohibitions of the 14th Amendment than are most other types of legislation….Nor need we enquire whether similar considerations into review of statutes directed at a particularly religious… or national … racial minorities…; whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to *curtail the operation of those political processes* ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial enquiry.’[[55]](#footnote-56)(my emphasis)

Ely assumed that the political process envisaged by the US Constitution was ordinarily majoritarian and based on efficient pluralist bargaining. But where these assumptions breakdown and the process is therefore defective, the judiciary could justifiably intervene in order to protect the democratic process itself and those minorities effectively unable to protect themselves by participating in the democratic process.

The usual assumptions about the accountability between representatives and citizen/voters can also breakdown in practice when representatives act in ways which are self-serving, and may be incentivized to curtail the democratic process in order to protect their incumbency(the ‘agency’ problem).The judiciary should therefore protect the democratic process in order to ensure accountability.[[56]](#footnote-57)

Ordinary democratic theory assumes a homogeneous society. Where this is not the case, according to Ely, certain the minorities that are ‘discrete and insular’ may be vulnerable to prejudice and as a result to routine loses in the political process. The court should therefore according to Ely, protect such vulnerable minorities which cnnot protect themselves through the ordinary process of pluralist bargaining.[[57]](#footnote-58) Ely argued that both of these themes are concerned with participation:’they ask us to focus not on whether this substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political process by which values are appropriately identified and accommodated… has been unduly restricted.’[[58]](#footnote-59)

Ely’s attempt to construct a theory of judicial review consistent with majoritarian democracy based upon a rigid distinction between review of democratic processes and the outcomes of such processes, and the distinction between process values and substantive values attracted justified criticism. Several constitutional scholars, showed how these distinctions could not bear close scrutiny and moreover that this unduly restrictive view could not persuasively account for the US Supreme Court’s role.[[59]](#footnote-60)

Ely’s ‘representation – reinforcement’ theory of constitutional review has also found little traction in South Africa since, it may be argued, the text of the South African Constitution preempts this enquiry into the legitimacy of judicial review. I think this view is mistaken. First, because a concern with process values can strengthen rights protection- those rights, that may be considered to be part of the constitutional framework or scaffolding of the democratic process, like rights to vote [[60]](#footnote-61), assemble[[61]](#footnote-62) and to speak[[62]](#footnote-63). This may well prove to be especially important in a country with still many still unresolved social problems and a tradition of often violent protest action. I do not think that these ‘first generation’ rights can be regarded as established and secure because they form part of the constitutional settlement enacted in 1996.

But most crucially, it could provide at least a theoretical starting point for identifying a class of constitutionally cognizable process harms, which are harms to the structure of democratic decision making, as distinct from harms to individual interests currently thought to be the only ones deserving of legal protection through a system of constitutional constraints.I can see no reason why a lack of accountability, various forms of plutocratic capture, and the impact of social inequality on the fairness and actual functioning of the political process should not be recognized as requiring legal regulation, including constitutional review.

In the United states, the overwhelming preoccupation of constitutional scholarship has also remained the vindication of rights,even though Judicial supervision of the political process stretches back to the 1960s.[[63]](#footnote-64) Professor Pildes has described this ‘largely unappreciated transformation in constitutional law’[[64]](#footnote-65) as the ‘constitutionalization of democratic politics’,[[65]](#footnote-66) which he argues requires a new doctrinal paradigm because the the dominant mode of constitutional theorizing with individual rights at the center does not provide an adequate analytical and normative framework.Pildes and Issacharoff[[66]](#footnote-67), paying proper deference to Dean Ely have proposed a new doctrinal framework, of distinctly ‘Schumpetarian’ [[67]](#footnote-68)inspiration which analogises ‘political markets’ to ‘markets for corporate control’ in competition law.

The theory targets abuses of dominance by ‘insiders’ and aims at protecting the competiveness of the structure of political competition as the central mechanism of ensuring political accountability.It seems to me that the theory successfully makes the case that problems of self dealing that arise in electoral systems in which political incumbants exercise political control over the demarcation of electoral constituencies and can therefore entrench themselves in power by illicit means, should be constitutionally cognizable.” But ‘on the other hand’ Pildes writes, sounding a word of caution, ‘…..where threats to competition are not present ,court’s left free to impose their view of ‘rights’ on politics run the risk of Lochnerizing the democratic system by making it more difficult for legislators or voters to experiment with changes to the democratic processes which respond to ever shifting disaffections with democracy.’[[68]](#footnote-69)

While such problems cannot arise in jurisdictions with electoral systems based on proportional representation and in which elections are administered by Constitutionally Independent Institutions, the idea that the competitiveness of the structure of electoral competition should be constitutionally protected and that self dealing by incumbents should be subject to constitutional control is applicable across jurisdictions with representative institutions.

The theory has the merit of identifying and targeting actual political pathologies, which will also differ from one political system to the next.It might be objected that the proposed doctrinal framework offers an unattractive, truncated conception of democracy.But this misses the point.The question is not what political theory offers the best account of democratic ideals.But what aspects of the democracy idea should be constitutionalized, and therefore be subject to judicial supervision.However, I do think this inquiry should also be grounded in a normative account of familiar democratic ideals like political equality, fairness and accountability, rather than a perspective which compares democratic politics to private markets.

B. Normative process theory

Those dissatisfied with the ‘preference aggregation’ and ‘interest group competition’ or ‘pluralist’ conceptions of democratic politics and the political process, have sometimes turned to the tradition of Republican political thought that can be traced back to ancient Athens and philosophy of Aristotle.[[69]](#footnote-70) It is possible to read some of the decisions of the South African Constitutional Court, to be discussed in the next section, as being inspired by Republican ideas.

In the tradition of Republican political theory, the political process does not merely mirror the exogenously generated preferences of atomized private individuals. It is potentially a creative process in which pre-existing references are shaped communicatively and from which the common good can be identified. Habermas explains the Republican view as follows:

‘On the Republican view… Politics is conceived as the reflexsive form of substantial ethical life. It constitutes the medium… through which members of… communities become aware of their dependence on one another and, acting with full deliberation as citizens, further shape and develop existing relations of reciprocal recognition into an association of consociates under law.’[[70]](#footnote-71)

This positive assessment in republican political theory of the political process has important consequences for the architecture and normative content of constitutional democracies since at specific normative weight is attributed to the intrinsic value of citizenship and political participation: That right to democratic participation is a right to participate on equal terms in social decisions on issues of high principle and not just interstitial matters of social and economic policy.’[[71]](#footnote-72)

‘According to the Republic view, the status of citizens is not determined by the model of negative liberties which these citizens can only claim as private persons. Rather, political rights- preeminently rights of political participation and communication- are positive liberties. They do not guarantee freedom from external compulsion, but guarantee instead the possibility of participating in a common practice, through which the citizens can make themselves into what they want to be- politically responsible subjects of a community of free and equal citizens.’[[72]](#footnote-73)

This kind of political theory can work in at least three different ways when incorporated into constitutional theory and law.First, in the direction of judicial passivity, since the political process itself can be trusted to resolve deep moral conundrums.But this kind of theory can also explain why the rights framework of democratic politics as well as the rights to individual automy require enhanced judicial protection,where the political process has not measured up to the high minded standards of republican citizenship.

Two constitutional scholars, Frank Michelman and Cass Sunstein who have experimented with incorporating Republican ideals into a constitutional law, examine the implications of Republican versions of the democratic process and politics for judicial review. Michelman has argued, that Republican thought creates a synthesis of the ideals of democracy and constitutionalism and a new articulation of both legislative politics and adjudication in the form of a ‘dialogue’which potentially strengthens the enforcement of rights.[[73]](#footnote-74)Sunstein’s [[74]](#footnote-75)analysis shows how the preoccupation of ‘Madisonian Republicanism’ with controlling the deleterious effects of ‘faction’ [[75]](#footnote-76) or interest groups on the political process shaped both the drafting of the Constitution’s structural provisions as well as the Supreme Court’s rights jurisprudence.’ Constitutional doctrine’, he remarks’ has not responded with equanimity to the prevalence of pluralist politics. Indeed it is possible to trace much of judge -made public law to a concern that the Madisonian ideal has been too sharply compromised in practice.’[[76]](#footnote-77)Many of the US Constitution’s rights provisions and the courts imposition of standards of review ranging from rationality to strict review can be understood he says ‘as a repudiation of pluralist politics.’[[77]](#footnote-78)

In recent decades, the aggregative / pluralist conception of the political process has also been challenged by ‘new generation’ democratic theory, emphasising public participation and deliberation to which the ‘new constitutionalism’ has been quite receptive. The value of direct political participation has republican roots. But deliberative theory has a more contemporary lineage. What is of particular interest is that this kind of theory has also informed judicial reasoning in South African constitutional court’s political process jurisprudence, as will be seen in the section to follow.

Deliberative theory, or what Habermas calls discourse theory, is critical of liberal and pluralist conceptions of the political process. Once again, mere preference aggregation, and strategic bargaining is considered insufficient to produce outcomes which are rationally acceptable to all. The legitimacy of outcomes depends not on a simple counting of preferences but on a process of ‘will formation’ which satisfies criteria of impartiality.[[78]](#footnote-79) The emphasis on the potential self-sufficiency of the process is what deliberative theory shares with Republicanism.

Habermas’s discourse theory– a version of process theory-which is set out in *Between Facts and Norms* can be counted as among the most significant theories of deliberative democracy. It sets out to explain why the ‘production of legitimate law requires the communicative freedom of citizens mobilised’[[79]](#footnote-80) and how this is discursively produced. Valid norms are those norms to which all possible affected person could agree as participants in a rational discourse.[[80]](#footnote-81) So the political process concerns itself not only with the mundane, but also with questions of justice- what sort of society the people want to live in.[[81]](#footnote-82)He distinguishes his conception both from mere interest group bargaining between competing private interests which characterizes the liberal view, and the classical republican view which is too solidaristic because it effectively leaves out basic rights:

‘Discourse theory invests the democratic process with normative connotations stronger than those of the liberal model but weaker than those of the Republican model…. It takes elements from both sides and fits them together in a new way. In agreement with republicanism, it gives centre stage to the process of political opinion and will formation, but without understanding the Constitution as something secondary; on the contrary, it conceives the basic principles of the constitutional state as a consistent answer to the question of how the demanding communicative presuppositions of a democratic opinion- and will formation can be institutionalized. Discourse theory does not make the success of deliberative politics depend on a collectively acting citizenry but on the institutionalization of corresponding procedures.’[[82]](#footnote-83)

Three critical questions, in the context of this discussion can be raised with respect to Habermas’s version of the deliberative theory of the democratic process, as well as deliberative theory generally. The first concerns the tension between empirical and normative conceptualizations of the process of democratic politics. Amy Guttman and Dennis Thompson, also deliberative democrats,question Habermas’s reliance on an idealized conception of the democratic process which abstracts from existing social and power relations to legitimize legislation.[[83]](#footnote-84)What is needed instead they say is an account of deliberation under ‘non-ideal conditions.’[[84]](#footnote-85) This leads them to reject a purely procedural conception of deliberative democracy. Outcomes must also be assessed in terms of substantive norms like the non-discrimination principle. Here again, the tension that was evident in the discussion of liberal conceptions of the democratic process between process and substance reappears. And as with Ely, the concern is with protecting groups disadvantaged in a majoritarian process. But which groups are identified for special constitutional concern depends on one’s substantive theory of justice.

Secondly,Habermas does not adequately confront the reasons for the gap between facts and norms in contemporary liberal democracies or explain the factors which prevent citizens from developing the capacities for communicative power and collective action envisaged by his theory.As Deborah Cook observes:’… states are… failing for the most part, to operate in accordance with the official, constitutionally prescribed circulation of power, they also effectively prevent citizens from gaining the competencies they need to generate communicative power, by undermining the forms of communication in which opinion and will formation can develop…. the talking cure for what ails liberal democracies will remain a placebo.’[[85]](#footnote-86)

Thirdly, agonistic democrats are sharply critical of Habermas’s discourse theory and other rationalist theories for attempting to ground the legitimacy of liberal democracies on the possibility of achieving agreement on the requirements of justice through reasoning. While recognizing the limitations of the aggregative model of democratic politics~~,~~ Chantal Mouffe[[86]](#footnote-87) for instance, argues that us/them relations of conflict and antagonism are constitutive of ‘the political’ and that conflict and value pluralism are ineradicable. But in modern constitutional democracies which combine Constants two principles in ways that are always subject to conflicting interpretations, political *antagonism* can potentially be transformed into *agonism* since political adversaries share ‘adhesion to the ethico-political principles of liberal democracy,’[[87]](#footnote-88)which includes political pluralism and are therefore not Carl Schmidt’s permanent enemies. Agonistic democrats accept Constants two principles of democratic legitimation, but wish to open up the very terms of democratic cooperation to ongoing contestation.This conception of democratic politics as occurring between adversaries within a shared ethico legal framework which itself is open to political disagreement, seems to me to capture the logic of constitutional politics in South Africa today better than those which assume concensus and constitutional closure, since it emphasises the importance and legitimacy of ongoing ‘political activity’.

Fourthly, Habermas does not pay much attention to the question,what institutions are envisaged by his theory since he is preoccupied with the question how a just procedure can produce just outcomes. But he does make some cryptic observations about judicial review in a deliberative democracy which should be of interest. The question of judicial activism or self restraint should not be discussed, he says, ‘in abstracto.’[[88]](#footnote-89) He then then says arguendo that if one understands the Constitution to integrate private and public autonomy ‘a rather bold constitutional adjudication of democratic procedure and the deliberative form of political opinion will formation’[[89]](#footnote-90) is required. But he immediately cautions:’ To be sure, we have to free the concept of deliberative politics from overly strenuous connotations that would put the Constitutional Court under permanent pressure to act. The court may not assume the role of regent who takes the place of an underage successor to thone…. The constitutional court can best play the role of tutor. There is no need to idealise this role, as self assured constitutional scholars have done, unless one is seeking a trustee for an idealistically depicted political process.’[[90]](#footnote-91)

V1.THE SOUTH AFRICAN CONSTITUTIONAL COURT AND THE DEMOCRATIC PROCESS: COURTS AND LEGISLATURES

The South african judiciary has intervened increasingly over a period of time in the political process, particularly in the internal processes and functioning of legislatures, a class of cases which is my particular focus because they raise such novel questions. Courts have intervened to set constitutional standards for parliamentary rule making[[91]](#footnote-92), the scheduling of parliamentary business[[92]](#footnote-93),parliaments legislative agenda[[93]](#footnote-94), the composition of parliamentary committees[[94]](#footnote-95),the functioning of parliamentary caucases[[95]](#footnote-96), and the rulings of the Speaker.[[96]](#footnote-97) These decisions depart significantly from constitutional understandings of the constitutional norms and principles governing the relationship between courts and legislatures in more established constitutional democracies,[[97]](#footnote-98)whether of the ‘Westminister’[[98]](#footnote-99) type, systems of ‘constrained parliamentarism’ like Canada[[99]](#footnote-100) and Namibia, and those with a US style system of ‘separation of powers’ and ‘checks and balances.’[[100]](#footnote-101)

So these cases require critical engagement with the court’s reasoning in the light of constitutional norms like ‘separation of powers’ and ‘ political equality.’ We can think of these ideas as ‘interpretive concepts’ and examine how the courts have understood them, and how they ought to be understood and used in constitutional reasoning.

Firstly, take the ‘separation of powers’, a constitutional principle of apparently unimpeachable pedigree.It is indisputable that the relationship between courts and legislatures is governed by this principle.[[101]](#footnote-102)But what is meant thereby in this context? [[102]](#footnote-103)The South African Constitutional Court has rightly rejected formalism.But its resort to the language and imagery of the functionalist alternative which originated in the field of administrative law[[103]](#footnote-104), also seems inadequate as a way of explaining decisions to intervene or not to in the internal functioning of legislatures. Plainly, the legislature’s ‘non legislative functions’ are now subject to routine judicial supervision, so that the legislature cannot be regarded as functionally or institutionally autonomous under the court’s’separation of powers’ jurisprudence. Is not surprising therefore that many of the significant disagreements that have arisen on the court in this kind of case, have concerned the ‘separation of powers.’ It does not follow that because a particular decision does not easily fit some version of an established understanding of this interpretive concept, that the decision is ‘wrong.’Habermas is quite right to have observed that questions of judicial intervention and nonintervention, or activism or restraint should not be assessed in abstracto. But it seems to me that we have yet to develop a convincing explanatory and normative framework which accounts in some coherent way for the court’s decisions. And that requires engagement with constitutional theory.

Similar interpretive questions arise with respect to the norm of equality, a norm widely considered to be a fundamental constitutional principle structuring democratic political processes. Uncontroversially, democratic electoral processes are based on the egalitarian political principle of ‘one person one vote.’And we elect governments by majority decision. This was the central political demand which framed the political struggle against colonialism and Apartheid.When Justice Moseneke observed in his Melbourne lecture, instructively entitled,’The balance between robust constitutionalism and the democratic process’, that he could not recall ‘a demand of the struggle that resonated with my revolutionary zeal more than ‘one person, one vote’, he was reflecting the basic *leitmotive* of this political struggle[ as well as the constitution that was adopted in 1996].Fundamental commitment to this principle is what explains the rejection by the ANC of any constitutional compromise based on the idea of consociation.[[104]](#footnote-105)

But what principle of constitutional equality[ inequality/fairness, parliamentary processes] governs or should govern collective decision-making in legislatures? This is a norm that is not explicitly engaged in any of the judicial decisions under consideration. But this is a question that cannot and should not be avoided in constitutional reasoning.[[105]](#footnote-106) Most legislatures make legislative and nonlegislative decisions by majority vote, subject to the rights of minorities to participate in the process of decision-making.Jeremy Waldron[[106]](#footnote-107), who is among a small group of constitutional scholars to take legislative decision making and legislative democracy seriously, argues that majoritarian decision making[[107]](#footnote-108) in legislatures-that is to say, in *the circumstances of politics,* is not merely a technical devise, [[108]](#footnote-109)or crude statistical view of democracy[[109]](#footnote-110), but rather a fundamental egalitarian principle of political morality which treats each participant as an equal.[[110]](#footnote-111)

Charles Beitz[[111]](#footnote-112) and the late Ronald Dworkin[[112]](#footnote-113) contest this understanding of what of what the the egalitarian principle of political equality requires as a decision-making procedure. The principle of ‘equal concern in respect’ version of the political equality idea is considered to require not only an equal opportunity to participate in the decision-making process, but also that each individuals interests is shown equal consideration. This version of the egalitarian principle controls both procedures and substantive outcomes. The principal of ‘equal concern in respect’ therefore places constitutional limits on majoritarian decisions which are inconsistent with a substantive interest of individuals that the constitution protects through the ‘rights as trumps’ idea.[ party political decision making in legislatures]

But we are concerned here with a different question: how should the process of decision-making in legislatures be structured and what constitutional norms should apply to such decision-making. We require criteria for evaluation of judicial decisions to intervene or not to in the processes of decision making in a legislature. The dominant individual rights perspective, as well as the ‘administrative law paradigm’[[113]](#footnote-114) are not fit for purpose. What is required instead is the articulation of a set constitutional principles, or structural goals[[114]](#footnote-115) [derived from the text and structure of the constitution itself,] which could include, in addition to equality- fairness, accountability, competitiveness, stability, free speech, popular participation and minority rights.The weight to be attached to these structural principles or goals, which may also conflict will depend on the context. The court’s ‘process jurisprudence’ will, I suggest benefit from a recognition that reliance on familiar and established patterns of justification will not always persuasively account for what it seeking to accomplish through judicial oversight of the democratic process or to enable it to effectively target real threats to the principle of democratic self government.

It is perhaps in recognition of the limitations of traditional constitutional theory’ that the court has been prepared to innovate on occasion by drawing on contemporary theories of democracy. This is evident in body of the courts jurisprudence which I have characterized as ‘aspirational.’In these cases, the question is whether the courts reasoning is persuasive on its own terms and from a realist point of view.

A.The Constitutional Court’s Aspirational political process jurisprudence[ rejection of conventional thinking]

The courts aspirational process jurisprudence manifests a marked skepticism towords to the outcomes of majoritarian decision making in legislatures and a receptiveness to ‘thick’ anti-pluralist republican and deliberative versions of process theory.[ equality] This has been evident both in cases concerning the substantive outcomes of of decisions and the protection of individual rights, which is to be expected, as well as in cases concerning the processes of decision making. The constitutional values that have informed the court’s reasoning in the latter kind of case include ‘deliberation’ which is concerned with kinds of reasons that inform decision making , and ‘participation’ , which postulates the inadequacy of mere voting and representation as conditions of constitutionally legitimate decision making. [popular or interest group?]

Deliberative democracy

This norm of ‘deliberative rationality’ renders the outcomes of political processes based simply on numerical preponderance and pluralist bargaining may potentially constitutionally suspect, although its not clear when and to what extent this ideal standard is also a legally cognizable one. Consider the following obiter statement by Justice Albie Sachs:

‘The requirementof fair representation… emphasizes that *the Constitution does not envisage a mathematical form of democracy where the winner takes all* until the next vote counting occurs. Rather, it contemplates a pluralistic democracy where *continuous respect is given to the rights of all to be heard and have their views considered*. The *dialogic nature of deliberative democracy* has its roots both in international democratic practice and indigenous African tradition. *It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimized the importance of the very inclusive process that led to its adoption, and sustains its legitimacy*…. The open and deliberative nature of the process providing a dignified and meaningful role to all participants. *It is calculated to produce better outcomes, through subjecting laws in governmental action to the test of critical debate, rather than basing them on unilateral decision-making*. It should be underlined get the responsibility for serious in meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, *the endeavours of both majority and minority parties should be directed not* towards *exercising(or blocking the exercise) of power for its own sake, back at achieving a just society*… majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, *an appropriate balance has to be established between deliberation and decision.’[[115]](#footnote-116)*(my emphasis)

In this obiter statement, Justice Sachs, assuming a role as educator, sets out an aspirational standard for legitimate decision making. The Constitution envisages a continuation in the democratic era of competitive party politics of the methodology of inclusive decision-making which first emerged in the period of multi-party negotiations and constitution making.The achievement of South Africa’s ‘higher law making’ founding moment provides the model for ‘ordinary’ democratic politics.

The ‘deliberative rationality’ standard is not however always a justiciable one and so that it remains unclear what this standard requires. In this case, Justice Sachs joined the majority in coming to the conclusion that s 160(8) of the Constitution did not require multi-party representation on the Executive Committee in Metropolitan local authorities.[[116]](#footnote-117) In two subsequent cases however, the Constitutional Court relied explicitly on the idea of deliberative democracy in coming to a conclusion on a question of constitutional adequacy.

In *Ambrosini* the question was whether a private member had a constitutional right to ‘initiate or prepare legislation’ at Parliament’s expense, on behalf of the National Assembly in terms of section 55 of the Constitution, and to introduce legislation in the National Assembly in terms of section 73(2).This was the first case in which the Constitutional Court was requested to review parliamentary rule-making, a core function of Parliament plainly lying at its heartland, and therefore raising a fundamental separation of powers question.

The Chief Justice for the court, answered both these questions in the affirmative.[[117]](#footnote-118)He concluded that Parliamentary rules restricting the individual right of members to ‘initiate and prepare legislation’ [[118]](#footnote-119)as well as those requiring that a member of the Assembly secure ‘permission’[[119]](#footnote-120) from the Assembly before she may introduces a Bill, inconsistent with the constitution and therefore invalid.

The court reached this far-reaching conclusion in the face of considerable textual evidence to the contrary. Section 57 of the Constitution empowers the National Assembly as a collective body to ‘determine and control its internal arrangements, proceedings and procedures.’ Section 55 regulates the exercise by the National Assembly of ‘*its* legislative powers’ and so could reasonably be interpreted as regulating the legislative powers of the National Assembly as a collective body. Section 53 entrenches majoritarian decision-making with respect to *all questions* without qualification before the National Assembly.[[120]](#footnote-121)Read together, these provisions confer control over parliamentary processes regulating all aspects of the legislative process on the parliamentary majority, subject only to minority rights of participation, which unusually are also specifically constitutionally entrenched in section 57(2)(b) [ how is the court using the idea of deliberation here/ court does not adop grand theories/critique from a realist point of view]

So effectively it is the substantive conception of deliberative democracy introduced through a purportedly ‘purposive’ construction which does all the work in reaching this conclusion: ‘Ours is a constitutional democracy that is designed to ensure what the *voiceless* are heard and even those of us who would, given a choice, have been happy not to entertain the views of the *marginalized or the powerless minorities*, listen’.[[121]](#footnote-122)The concept of democracy includes, deliberation,[[122]](#footnote-123) ‘multi-party democracy’, ‘representative and participatory democracy, responsiveness, accountability, and openness’.[[123]](#footnote-124)In support of this reasoning, Chief Justice Moegeng cited Justice Sachs’s dicta in *Masondo* quoted above and the following interesting passage from one of the court’s earlier decisions: ‘One of *the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny* in number and whose beliefs are considered bizarre… in constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be…’[[124]](#footnote-125)

These are sentiments many will not find disagreeable. But there are several important points about the way the court utilizes the concept of democracy in this case that are worth reflecting on critically. For this purpose, I will compare the Courts concept with Ely’s. Firstly, the characterization of minority *political parties* that have achieved representation in a representative body as marginalized, powerless and voiceless. Minority political parties are certainly not the kind of discrete and insular groups Ely identifies as requiring special judicial protection, nor for that matter the kind of group that would require special judicial consideration under Michelman or Sunstein’s Republican- inspired theories of the political process.[ is the court implicitly working with with a dominant party theory, assuming that under SA conditions the competitive mechanism does not work]

Secondly, Ely assumes that the outcomes of majoritarian political processes are generally legitimate. Minority political parties are therefore legitimate loses in parliamentary processes where agreement has not been reached. The only protections they are entitled to are rights to *participate in the process* of decision making and to record disagreement with the outcome. The Constitutional Court’s reasoning on the other hand about the proper functioning of the political process i*tself* is strongly counter majoritarian, even if it cannot be said that the process has malfunctioned on Ely’s theory or indeed, even if the outcome cannot be impeached as a violation of a right contained in the Bill of Rights or the rule of law.

The court’s assumptions about the norm of accountability is also different from that of Ely’s. Ely’s notion of accountability is based on a notion of a nexus between elected representatives and citizen/voters. We can call this ‘public policy and accountability.’ Political parties compete in elections for a mandate to implement their policy ideas through a legislative agenda. The party or coalition which wins the election also wins the right to govern and to control the legislative agenda subject to the participation rights of majority political parties.This is the most familiar theory of the way the political process is conceived to work in practice in parliamentary jurisdictions. The Court’s reasoning on the other hand effectively gives parties that failed to persuade voters that their policy ideas should be supported control of significant blocks of parliamentary time and resources. Plainly, the court is working with very different notions of accountability and properly functioning political and legislative processes from that of Ely.

The second case in which the idea of democracy as deliberative was invoked in the courts reasoning is *Mazibuko*[[125]](#footnote-126)which was written by Justice Moseneke. The decision in this case turned on and interpretation of the quite specific language of section 102(2) of the Constitution which reads:’If the National Assembly, by a vote is supported by a majority of its members, passes a motion of no confidence in the President, the President and other members of the cabinet and any Deputy Ministers must resign.’ The court, once again interpreting this language ‘purposively’ and in the light of the idea of deliberative democracy,came to the conclusion that the Constitution created a constitutional right to be exercised by individual members and minority parties to table and schedule such motions. It followed from this reasoning that the specific procedural rules that had been adopted by Parliament to regulate the scheduling of such motions and effectively enabled the majority or its Chief Whip to control the timing of the scheduling, were not constitutionally valid. I commented on this case critically elsewhere[[126]](#footnote-127), pointing out that it was difficult to reconcile this decision to intervene in the rule making process, a core function of parliament, if conceived as an autonomous and constitutionally coequal body under the ‘the separation of powers’ principle.

The point I want to make here is not that Mazibuko was wrong, since constitutions are open to different reasonable interpretations. Rather it is to point out what difference different conceptions of the political process make in constitutional reasoning. At the core of my critique were different assumptions I made about how parliamentary processes work in practice and therefore when judicial intervention is appropriate and when not. I wrote: ‘The efficient functioning of Parliament depends not only on rules, but on implicit agreements- a set of unstated commitments that enable adversaries to cooperate in order to compete. Such agreements are the result of politically efficient balances shaped overtime. In other words, they depend on bargaining and negotiation between political adversaries, not platonic external supervision.’[[127]](#footnote-128)[ remain skeptical that this can be manufactured from outside/ but absence of conventions. Ministerial accountability, freedom of speech]

What should be clear is that my conception of parliamentary processes, conceived more pragmatically and more agonistically, strategic bargaining and the resolution of conflict and disagreement through majoritarian decision making, is not constitutionally suspect in the absence of clear violations of specific constitutional provisions.But on the court’s aspirational reasoning, majoritarian resolution of inter-pary conflicts may well be be insufficient to pass constitutional muster in some circumstances.This amounts to a significant departure from what is considered to be the proper constitutional theory governing the relationship between courts and legislatures in most ‘established’ democracies.

So the key question that emerges, both from the perspective of constituonal theory and of law, is how courts, when exercising its review powers, conceive or ought to conceive democratic political processes: aspirationally or ‘realistically’[[128]](#footnote-129) or in some combination of these two perspectives.This is precisely the question raised by Posner’s ‘pragmatic’[[129]](#footnote-130)critique of the incorporation of the idea of deliberation into the constitutional conception of democracy.

Participation[ stake holder/popular/representation reinforcement]

In *Merafong[[130]](#footnote-131)* Justice Moseneke made it plain that that in our constitutional democracy all exercises of public power, including legislative power which ‘manifest naked preferences’[[131]](#footnote-132)are unlawful.[[132]](#footnote-133)

What conception of the norm of participation is presupposed by the idea of democracy? In the theoretical literature, there are two conceptions which stand in an uneasy relationship to each other. In the first is the more familiar idea that political participation in modern democracies and complex societies occurs through the institutions of representative democracy: votes, political parties, and Parliaments with law making authority representing the people. In this conception, the central value is political equality given expression in the idea of ‘one person one vote’. Both *Carolene Products* themes (the protection of the process itself and of discreetand insular minorities inadequately protected in a system pluralist bargaining) are concerned with the opportunity to participate in this sense. A Second conception of participation, which simultaneously reflects a contemporary trend and harks back to the City State of Greek antiquity, considers this form participation inadequate. Michael Waltzer for instance writes:’ The election process has gradually taken on the character of an outer limit, a form of ultimate popular defence rather than of popular self-government.’[[133]](#footnote-134)

It Is this ‘Republican’ formulation of Constants first principle of democracy- the liberty of the Ancients and its requirement of popular participation that the South African Constitutional Court has adopted.[[134]](#footnote-135)What animates the court’s vision is the idea of permanently engaged citizenry and a rejection of the Schumpetarian reduction of the democratic ideal of participation to the periodic selection of competitive elites through elections. In the seminal *Doctors For Life* case, Chief justice Ncobo held that the provisions of the Constitution regulating ‘public involvement in legislative and other processes’ createdjudicially enforceable constitutional obligations which legislative bodies provided for in the Constitution were required to comply with in passing legislation[[135]](#footnote-136). The test for determining compliance, the court said, is reasonableness[[136]](#footnote-137), and the obligation arises in each case of legislative enactment. The court proceeded on this reasoning to invalidate two important items of legislation[[137]](#footnote-138)whose substance was not impeached.[[138]](#footnote-139)Justice Moseneke, who joined the majority would presumably contend that this test, strikes a proper balance between ‘a robust constitutionalism and the political process’ in this context just as it does in socio-economics rights cases, since its leaves to the legislature a margin of appreciation in determining the degree of participation appropriating each case.

Justices Van Westhuizen and Yacoob wrote a texturally rigorous, though not literalist dissents. But the fundamental disagreement on the court, rare in South Africa, arose as a result of underlying conceptual disagreement about the idea of democratic participation embodied in the constitutional text or which should be adopted in our constitutional culture. Justice Yacoob pointed to the fundamental tension between the court’s conception of public participation and ideals of representative government:’ The failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy. In the circumstances, it would require the clearest language to justify the construction of the ‘public involvement’ provision to mean that these elected representatives exercising the power of the people consequent of their vote cannot pass a law unless they have public hearings or give the public an opportunity to make written and oral submissions before the law can be validly passed.’[[139]](#footnote-140)

The three subsequent constitutional court cases[[140]](#footnote-141) which considered the ambit of the obligation to facilitate public involvement in the legislative process all concerned the sensitive questions of the application of the norm when constitutional amendments involving a change in provincial boundaries are under consideration in the national legislative process. In these cases, the Constitutional Court clarifiedtwo aspects of the application of the standard of reasonableness. In doing so, the court curtailed the ambit of the obligation to facilitate public involvement enunciated in the *Doctors for Life* case.

Firstly,in *Matatielle* Chief Justice Ngcobo, once again writing for the court, clarified that the standard is a variable one dependent on the consideration of a number of factors, including the *nature of the group* impacted upon:’… the nature and degree of participation that is reasonable in a given case would depend on a number of factors. These include the nature and importance of the legislation and the intensity of its impact on the public. The more *discreet and identifiable* the potentially affected section of the population, the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.’[[141]](#footnote-142) The second, is that it is not a requirement of the reasonableness enquiry that the opportunity to participate has an impact on the outcome legislative deliberations.[[142]](#footnote-143)So the citizen right to direct participation in the legislative process is a process right. This conclusion can only makes sense if the courts theory of democracyprioritizes representation through elections over direct participation by citizens.

The first requirement of an impact on a *discrete group* has an unmistakable echo of Ely with this important difference: whereas Ely’s process theory was aimed at explaining why judicial protection of rights was justified in an otherwise majoritarian democracy, the South African Constitutional Court uses the concept to identify the groups entitled to *direct participation* in the legislative process. However, the concept of discreteness raises many of the same difficulties that have been identified with Ely’s theory.[[143]](#footnote-144) Which groups are discreet? In the Constitutional Court’s reasoning, there are two potentially conflicting themes. The first suggests that the court is concerned with compensating disadvantaged groups who also lack the resources for political participation in an unequal society:’ The Constitutional Assembly was acutely aware that our legacy of racial discrimination… could undermine the national effort to reconstruct “a Democratic an open society in which government is based on the will of the people.” A majority of the people had, for many years, being denied the right to influence those ruled them…. The result was gross inequality in education, Financial resources, access to knowledge in other areas that are crucial for effective participation in the lawmaking process.’[[144]](#footnote-145) A second theme- I will call it a nation building theme- most clearly associated with Justice Sachs, is concerned with limiting the influence of numerically dominant majorities[[145]](#footnote-146) in the legislative process and facilitating the participation of political minorities: ‘The need to prioritize mainstream concerns in a country that still cries out for major transformation, in no way implies that only the most numerous and politically influential voices in our diverse society are entitled to a hearing[[146]](#footnote-147)…. Public involvement may be of special importance for those whose strongly held views have to cede to the majority opinion in the legislature.’[[147]](#footnote-148) This second theme potentially contradicts the first which is concerned with the problem of weak majorities, and leaves out of the assessment the problem of powerful minorities.[[148]](#footnote-149)

It also has to be asked whether the right to participate is limited to groups that are discreet, in the sense of concentrated or identifiable. What about groups that are dispersed or experience acute collective action problems,[[149]](#footnote-150) like consumers, and so I have difficulties organizing themselves but whose interests may nevertheless be significantly impacted. These questions are important since it should be recalled that the court constitutionalized an obligation to facilitate ‘public involvement’ and failure to comply by the legislature can have the serious consequence of invalidation of otherwise constitutionally valid legislation.

B. The Constitutional Court’s Realist jurisprudence: Towords an Anti corruption Principle

Conclusion

In constitutional democracies, constitutions constrain and unable a project of self-government. How they combine legal constraints on the one hand and popular agency (the liberties of the Ancients), is always a contingent matter. The line of cases analyzed above in which the South African Constitutional Court has developed its understanding on the ideal of democratic self-government,show that the South African constitutional court perceives itself as the custodian not only of the negative liberties of the individual, but also of the positive liberties of the people.[[150]](#footnote-151)

In articulating it’s unique conception of its role, the constitutional Court has not hesitated to draw freely on older Republican theories of the democratic process,as well as contemporary theories of deliberative, and participatory democracy. The effect is to depart from accepted conceptions of the role of court’s in democracies, the idea of the separation of powers between courts and autonomous legislative bodies,and to refashion constitutionalism as a thicker more substantively laden concept. It is not surprising therefore that in dissenting in the *Doctors for Life* case, Justice Yacoob would point out:’ it will be this court and not the Constitution which will effectively determine an element of the national legislative process. This in my view, *is inconsistent with the very spirit of constitutionalism.’[[151]](#footnote-152)*(my emphasis)

The court, acting as the custodian of the people’s higher law achievement, has not hesitated to constrain contemporary majorities, not only by controlling the outcomes of pluralist bargaining-the more usual role of courts, but by intervening to shape the legislative process itself. In short it has cast itself in the role not as Ely envisaged, as pluralisms perfectors but as its confident critic, re casting the principle of self-government not as the autonomous realm of action by elected public representatives,but as one necessarily subject to careful judicial supervision.Paradoxically, it is has sought to defend the Constitution and empower the people by constraining its elected representatives, or a majority of them, even when no rights or rule of law question has presented itself. Whether in adopting a theory of what Justice Moseneke calls ‘robust constitutionalism’ it has struck a ‘balance’ between the democratic process and judicial review is perhaps a question that cannot be answered in the abstract but only in the light of the court’s theory of the democratic process and its interpretive practices.

~~It is not only the court’s adoption of a value laden conception of the idea of democracy which affects the ‘balance’. It is also the pronounced’ normativist style[[152]](#footnote-153)of legal reasoning-the~~ ~~tendency to fuse constitutional law and moral reasoning- that the court has adopted which tends to emphasize the autonomy of law, it’s adjudicative and control functions and to treat the status of representation ambivalently.[[153]](#footnote-154) This interpretive style also tends to increase the scope of review. The result is that attempts in what might be called traditional liberal legal theory (and the court’s own jurisprudence),to draw boundaries between courts and legislatures by relying on familiar conceptions of separation powers doctrine no longer adequately describe judicial practice regulating the relationship between courts and legislatures in South African constitutional law.[[154]](#footnote-155)What revisions may be required must be left to future work~~.

~~Constitutional theory and practice obviously matters to the balances that are struck between Constants two principles of democratic legitimacy- constitutionalism and self-government- and between Courts and the political process in particular constitutional cultures. So does context. It might well be that what Justice Moseneke calls ‘robust constitutionalism’ is a response to the challenge of stabilizing democratic governance in deeply fractured societies:’.. constitutionalism emergences as the central defining power in these societies precisely because of the limitations it imposes on democratic choice.’[[155]](#footnote-156) This suggests that the ‘balances’ that are struck are contingent and open to revision through democratic contestation over time~~.

1. *Mail and Guardian* 1-7 June 2018 [↑](#footnote-ref-1)
2. *Ex parte Chairman of the Constitutional Assembly:in re Certification of the Constitution of the republic of South Africa 1996( First Certification* Judgement)1996(4)SA 744(CC)[13];*Certification of the Amended Text of the Constitution of the Republic of South Africa. 1996(Second Certification Judgement)*1997(2) SA 97 (CC) [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. Karl klare’ legal Culture and Tranformative Constitutionalism’14 *South African Journal Of Human Rights*  (1998)146. This seminal article could be read as making a more limited claim about what a ‘post liberal’ reading of the text and purpose of the constitution could make to legal reasoning, and in this way to contribute to a project of social change.For a more skeptical view of the concept of transformative constitutionalism, see Sibanda ‘Not purpose made!Tranformative Constitutionalism , Post Independence Constitutionalism and the Struggle to Eradicate Poverty*’Stellenbosch Law Review* (2011) 482 [↑](#footnote-ref-5)
6. Verne Harris and Sello Hatang ‘ Coming to Terms with the Past, building the Present:The Case of South Africa’[on file with the Author] [↑](#footnote-ref-6)
7. *Secure in Comfort; Public Protector Report on Nkandla;Reportby the Public Protector on an Investigation into Allegations of Impropriety relating to the Implementation of Security Measures by the Department of Public Worksin respect of the Private Residence of President Jacob Zuma at Nkandlain the KwazuluNatal Province* (Report no 25 of2013/2014, 19 march) [↑](#footnote-ref-7)
8. *State of Capture Report on an Investigationinto Alleged improper and unethical Conduct by the President and Other State Functionaries relating to the alleged Improper Relationships and Involvement of the Gupta family in the Removal and Appointmentof Ministers and Directors of State Owned Enterprizes resulting in Improper and Possibily Corrupt award of State contractsand benefits tio the Gupta family business*(Report No.6 of 2016/2017) [↑](#footnote-ref-8)
9. *Betrayal of the Promise: How South Africa Is Being Stolen*(May 2017)The analysis in this report bears a striking resemblance to Mike Lofgrens analysis of elite capture and institutional decay in the United States in his recent book *The Deep State*:*The Fall of the Constitution And The Rise of the Shadow Government*(2016) [↑](#footnote-ref-9)
10. Ibid p.5 [↑](#footnote-ref-10)
11. See Tembeka Ngcukaitobi *The Land Is Ours: South Africa’s First Black Lawyers and The Birth Of Constitutionalism*(2018)The public debate and political mobilization has focused on the question of postcolonial justice and whether this requires an amendment of section 25 of the constitution.I only make the point here that the constitution itself , as a prescription for a system of self Government, specifically envisages a political process of revision. But it requires, appropriately, a more considered, deliberative process that weighs up competing interests and consequences in a more considered way than than for ordinary legislation. [↑](#footnote-ref-11)
12. [↑](#footnote-ref-12)
13. [↑](#footnote-ref-13)
14. [↑](#footnote-ref-14)
15. Joel Modiri ’The Colour Of Law, Power and knowledge:Introducing Critical Race Theory In (Post -Apartheid) South Africa’(2012) 28 *SAJHR* [↑](#footnote-ref-15)
16. [↑](#footnote-ref-16)
17. Francis Fukujama *Political Order and Political Dacay*(2014) Fukujama has had to revise the provocative thesis he proposed after the collapse of the Soviet Union, that ‘History’ had culminated in the adoption of liberal capitalism as a universally valid form of political and economic ordering. In his latest book he investigates the origins, evolution and decay of political institutions.His analysis includes the impact of corruption and inequality. [↑](#footnote-ref-17)
18. I M Scanlon *Why Inequality Matters*(2018)Chapter 6: Political Fairness. There is no shortage of reflection on the current crises of liberal Capitalism. See for instance:A. C. Greyling *Democracy and its Crises*(2017)Yasha MounkT*he People vs Democracy: Why our freedomIs In Danger And How to Save It*(2018);Robert Reich *Supercapitalism*(2008).A common theme runs through this recent literature. All trace the erosion of the legitimacy of liberal democratic institutions to the extant model of liberal capitalism , the inequalities it generates, and its impact on democratic values of self government and political equality.This question of the negative impact of economic structures on the of constitutional democracies is one I think, that arises across jurisdictions of the ‘Global North’ and ‘Global South.’ This a raises a question of the limits of constitutional law since capital is global and constitutional law is local,and of judicial review since structural inequalities which are generated through the immanent logic of economic processes of asset and income accumulation may be beyond the institutional competence of judiciaries.Courts can quite properly take account of the enervating impact of economic inequality on the functioning of the democratic process in a matter that properly arises to be adjudicated. The constitutionality of campaign financing laws is an example of such a matter that has come before the US courts for adjudication. A recent example in South Africa concerned the question whether the constitution required disclosure of the sources of private funding of political parties. [↑](#footnote-ref-18)
19. Michael Ignatieff *The Ordinary Virtues: Moral Order in a Divided World*(2017) p219 [↑](#footnote-ref-19)
20. Ibid p220 [↑](#footnote-ref-20)
21. The assumption in much of the ‘consolidating democracy’ transition literature that problems of institutional entropy are unique to countries in the global south therefore requires revision.So does an analytical framework which traces all political disfunction to a single factor in countries like South Africa: the ‘dominance’ of electoral majorities.This framework delegitimizes electoral majorities in countries with a history of colonialism which disenfranchised the colonized majority, but accepts the democratic pedigree of this principle in the Global North.This analysis also overlooks the impact of economic inequality and the the problem of economically dominant minorities.See Isaacharoff’The Democratic Risks to Democratic Transitions’*New York University Law And Legal Theory.* Working Papers [↑](#footnote-ref-21)
22. A notable exception is the work by Sujit Choundry. See,’He had a Mandate;The South African Constitutional court and the AfrIcan National Congress In a Dominant Party Democracy’.(2009)2 *Constitutional Court review*. As will become clear as my argument developes ,I have rather fundamental disagreements with Choudhry’s analysis of the kinds of ‘political disfuction’which it is appropriate for the judiciary to seek to remedy.He draws his thesis substantially from the work of a group of conservative political scientists who had argued that ‘ one person one vote ‘ democracy would lead to ‘ dominance’ and therefore that South Africa needed a ‘consociational’ version based on race base group political rights. This analysis was explicitly rejected in the constitution making process.The constitutional text that emerged from this process combines a fundamental commitment to the political equality of persons( ‘one person one vote’)with a system of abtract constitutional contraints that protects minorities without conscripting individuals to groups. Choudhrys suggestion that the court should consider ‘ dominance’ simpliciter without any evidence of interference in the competitive electoral process or abuse of incumbency, is inconsistent with the structural and normative premises of the South African constitution,and invites the judiciary to reason on the basis of its views on the electoral outcomes to be preferred.Theunis Roux ( ()is certainly correct , in criticizing Professor Issacaroff’s( ) to point out that constitutionalizing this doctrine would have placed the court in a position of confrontation with an electorally legitimate majority and therefore undermined the court’s systemic legimacy. But the suggestion fails in my view as a basis for the development of constitutional doctrine on normative grounds, not merely pragmatic ones. I think the court has been correct to resist Choudhry’s suggestion.There is the additional issue of the extent to which and the way in which constitutional theory and law draws upon political science.The dominant Party literature has been subjected to critique which I think persuasive[ see Raymond Suttner]So I think, the dominant party thesis fails both as political science and constitutional doctrine.This is an important methodological and interpretive issue to resolve, if we are to develop a workable theory of judicial supervision of the political process as a matter of constitutional doctrine and law. [↑](#footnote-ref-22)
23. See Christina Lafont ’Philosophical Foundations of judicial Review’ Chapter 13 in David Dyzenhaus and Malcolm Thorburn, *Philosophical Foundations of Constitutional Law*(2016); and Aileen Kavanagh,’Participation And Judicial Review: A Reply to Jeremy Waldron’ *Law and Philosophy,* vol.22 no 5(seprember.2003) pp451-486In *The China Model: Political Meritocracy and the limits of Democracy*(2015) Daniel Bell makes the important point that while electoral democracy is a universal political good , it is vulnerable to various forms of disfunction and requires other institutions, like meritocratic selection of administrators, to secure socially productive outcomes. [↑](#footnote-ref-24)
24. Frank I Michelman ’Conceptions of Democracy in American Constitutional Argument: Voting Right’s,*41Fla.L Rev. 443*(1989) p443 [↑](#footnote-ref-25)
25. Richard H.Pildes’The Supreme Court Term:Forward:The Constitutionalization of Democratic Politics’118 *Harv L. Rev*.29 2004-2005 [↑](#footnote-ref-26)
26. The Preamble begins:’We the People of South Africa’ On this reading of the constitution, the ‘South African People’ are continuously present in the the constitutional project of self government, not restricted to the ‘founding moment’ and subsequently to occasional moments of flourishing.Voting rights are extended by section19 to every adult South African citizen without qualification. [↑](#footnote-ref-27)
27. See Pallo Jordan’s observations in his Ruth First Memorial lecture. The founders African nationalism he writes ’proposed democracy, non- racism, non- sexism and equality as the alternative to white-minority rule. Democracy in South Africa required that it used two basic conditions be met: adult suffrage and the repeal of all racist laws that institutionalized inequality. Both early Nationalists and the successes hoped to forge a single South African nation from the diverse elements that make up South Africa.’[University of The Witwatersrand,28 August 2000] [↑](#footnote-ref-28)
28. Ahon Barak Proportionality: *Constitutional Rights and Their Limitations* (2012) [↑](#footnote-ref-29)
29. Denis Davis [↑](#footnote-ref-30)
30. Dominant party theory an exception [↑](#footnote-ref-31)
31. Michael Waltzer.p140-141 [↑](#footnote-ref-32)
32. Klaarman [↑](#footnote-ref-33)
33. [↑](#footnote-ref-34)
34. P 43 [↑](#footnote-ref-35)
35. P.43 [↑](#footnote-ref-36)
36. P.58 [↑](#footnote-ref-37)
37. Axel Honneth. P 92 [↑](#footnote-ref-38)
38. [↑](#footnote-ref-39)
39. FI Michelman ’Democracy and Positive liberty’ <<http://bostonreview.mit.edu/BR21.5/>>, 2. [↑](#footnote-ref-40)
40. J Tulley ’The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy’ (March,2002) 65 *Modern LR* 204, 205. [↑](#footnote-ref-41)
41. S Breyer *Active Liberty: Interpreting a Democratic Constitution* (2008). [↑](#footnote-ref-42)
42. P.53 [↑](#footnote-ref-43)
43. P.145 [↑](#footnote-ref-44)
44. P144 [↑](#footnote-ref-45)
45. EFF [↑](#footnote-ref-46)
46. [↑](#footnote-ref-47)
47. Kavanagh and Jeff King [↑](#footnote-ref-48)
48. Michelman [↑](#footnote-ref-49)
49. FI Michelman ‘Conceptions of Democracy in American Constitutional Argument’ (1989) 41 *Florida LR* 433. [↑](#footnote-ref-50)
50. Ibid 444. [↑](#footnote-ref-51)
51. Distinguished from earlier Benthamite liberalism based on utilitarianism as a criterion of justice. [↑](#footnote-ref-52)
52. The aggregative model is has its origins in Joseph Schumpeter’s seminal work, *Capitalism, Socialism and Democracy* (1947) in which he analogized competitive politics and private markets.He defined democracy as a process by which voters have the opportunity in regular elections to choose between elites. [↑](#footnote-ref-53)
53. Ibid.Chapter7.Different versions of liberalism are preoccupied with protecting different kinds of rights. Nozick was almost exclusively concerned with immunizing property rights from democratic politics. Egalitarian liberalism has a significantly different focus on protecting the personal freedoms of individuals and disadvantaged groups.But these differences within the liberal tradition on the interests that should be protected through judicially enforceable rights do not necessarily translate into different conceptualisations of the democratic process. [↑](#footnote-ref-54)
54. *United States v Carolene Products Co*mpany 304 US 144, 152-53 (1938). [↑](#footnote-ref-55)
55. Ibid. [↑](#footnote-ref-56)
56. Ely (note 10 above) 78. [↑](#footnote-ref-57)
57. Ibid 79. [↑](#footnote-ref-58)
58. Ibid 77. [↑](#footnote-ref-59)
59. M Tushnet *Red White and Blue: A Critical Analysis of Constitutional* law (1998) Chapter 2; FI Michelman ‘Process and Property in Constitutional Theory’ (1981) 30 *Cleveland State LR* 577; for a defence, see MJ Klarman ‘The Puzzling Resistance to Political Process Theory’ (1991) 77 *Virginia LR* 747. [↑](#footnote-ref-60)
60. [↑](#footnote-ref-61)
61. [↑](#footnote-ref-62)
62. Structural rights/ Pildes [↑](#footnote-ref-63)
63. Nondiscrimination,voting rights, districting, financing …cases [↑](#footnote-ref-64)
64. Pildes. P31[ Constitutionalizing democratic politics] [↑](#footnote-ref-65)
65. Pildes p 31 [↑](#footnote-ref-66)
66. Pildes/ Isscharoff[Politics as Markets] [↑](#footnote-ref-67)
67. Schumpeter [↑](#footnote-ref-68)
68. Pildes{[paper on file with author] critique of dominant party theory [↑](#footnote-ref-69)
69. D Held *Models of Democracy* (2006) Chapter 2. [↑](#footnote-ref-70)
70. Habermas (note 24 above) 151. [↑](#footnote-ref-71)
71. Ibid 213. [↑](#footnote-ref-72)
72. Habermas (note 24 above) 142. [↑](#footnote-ref-73)
73. FI Michelman ‘Laws Republic’(1988) 97 *Yale LJ* 1493, 1494. [↑](#footnote-ref-74)
74. C Sunstein ’Interest Groups in American Public Law’ (1985) 38 *Stanford LR* 29. [↑](#footnote-ref-75)
75. In Federalist 10, Madison proposed the idea of a complex constitutional structure as a solution to the problem of ‘faction’ which includes self -interested majorities and minorities. The South African Constitution also has a complex’Madisonian’ structure of representation (nine Provincial legislatures represented in the National legislative process through the National Council Of Provinces). So the constitution guards against the ‘tyranny of faction’ through structural as well as rights protections. [↑](#footnote-ref-76)
76. Ibid 49. [↑](#footnote-ref-77)
77. Ibid 50. [↑](#footnote-ref-78)
78. Held (note 37 above) 233. [↑](#footnote-ref-79)
79. J Habermas Be*tween Facts and Norms (*1998) 146. [↑](#footnote-ref-80)
80. Ibid 107. [↑](#footnote-ref-81)
81. J Habermas ’Three Normative Models of Democracy’ in D Ingram (ed) T*he* P*olitica*l (2002) 155. [↑](#footnote-ref-82)
82. Ibid 157. [↑](#footnote-ref-83)
83. A Guttman & D Thompson *Democracy and Disagreement* (1996). [↑](#footnote-ref-84)
84. Held (note 37 above) 242. [↑](#footnote-ref-85)
85. D Cook ’The Talking Cure in Habermas’s Republic’ (2001) 12 *New Left Review* 145. [↑](#footnote-ref-86)
86. C Mouffe *The Democratic Paradox* (2000). [↑](#footnote-ref-87)
87. Ibid 102. [↑](#footnote-ref-88)
88. Habermas *Between Facts and Norms*.p. 280 [↑](#footnote-ref-89)
89. [↑](#footnote-ref-90)
90. [↑](#footnote-ref-91)
91. [↑](#footnote-ref-92)
92. [↑](#footnote-ref-93)
93. [↑](#footnote-ref-94)
94. [↑](#footnote-ref-95)
95. [↑](#footnote-ref-96)
96. [↑](#footnote-ref-97)
97. Issacharoffs criticism ….not justified [↑](#footnote-ref-98)
98. [↑](#footnote-ref-99)
99. So cannot be explained as a consequence of the introduction of a system of constitutional constraints in parliamentary systems [↑](#footnote-ref-100)
100. Dissing Congress [↑](#footnote-ref-101)
101. [↑](#footnote-ref-102)
102. Kavanagh [↑](#footnote-ref-103)
103. Critique of reliance on admin concepts [↑](#footnote-ref-104)
104. See Pallo Jordan Letters to My Comrades [↑](#footnote-ref-105)
105. [↑](#footnote-ref-106)
106. WaldronLaw And Disagreement [↑](#footnote-ref-107)
107. Kenneth *Arrow Social Choice and Individual Values*(1963) His ‘impossibility theorem’ first noticed by Condorcet,showing why no decisional rule , including decision by majority vote can be said to accurately reflect individual preferences where the choice is not binary.But see Kenneth May[*Econometrica]* who demonstated that simple majority is the only method of making decisions where there is a binary choice which satisfies the conditions of decisiveness, neutrality, equality and responsiveness. In legislatures, the effect of party discipline, a principle of collective action, is that most decisions come down to a binary choice.This might explain why this is the method chosen for most kinds of decisions in most legislatures.It is also a principle explicitly written into text of the South African constitution. [↑](#footnote-ref-108)
108. P.107 Waldron p.107 [↑](#footnote-ref-109)
109. P117 [↑](#footnote-ref-110)
110. P.109 [↑](#footnote-ref-111)
111. Equality in voting rights,campaign financing decisions… [↑](#footnote-ref-112)
112. [↑](#footnote-ref-113)
113. [↑](#footnote-ref-114)
114. PildesDeliberative democracy [on file with author] [↑](#footnote-ref-115)
115. *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC). [↑](#footnote-ref-116)
116. *Merafong Demarcation Forum* v *President of the Republic of South Africa* 2008 (5) SA 171 (CC). [↑](#footnote-ref-117)
117. Justice Moseneke DE concurred. Justices Jafta C and Justice Yacoob Z dissented. [↑](#footnote-ref-118)
118. Merafong (note 68 above) 68. [↑](#footnote-ref-119)
119. Ibid 71. [↑](#footnote-ref-120)
120. Ibid 31. Look what effectively conceded is much at paragraph 31. [↑](#footnote-ref-121)
121. Ibid 41. [↑](#footnote-ref-122)
122. Ibid 47. [↑](#footnote-ref-123)
123. Ibid 46. [↑](#footnote-ref-124)
124. S v Lawrence, S v Negal, S v Solberg [1997] ZACC 11; 1997 (10) BCLR 1348; (CC) 1997 (4) SA 1176 (CC), 160. [↑](#footnote-ref-125)
125. *Mazibuko v Sisulu* 2013 (6) SA 249 (CC). Strangely, the Chief Justice who wrote *Ambrosini* dissented. [↑](#footnote-ref-126)
126. F Cachalia ‘Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint’ (2015-2016) 60 *New York Law School LR* 379. [↑](#footnote-ref-127)
127. Ibid 404. [↑](#footnote-ref-128)
128. These two cases may be open to a different framing as examples of ‘constitutional realism’ rather than ‘constitutional aspiration.’*Ambrosini* could be read as dealing realistically with the problem of what T. M. Scanlon calls ‘entrenched minorities’(Why does Inequality Matter.p.83)As an empirical matter, it could easily be established that ‘race’ and political preference still coincide in South Africa, and that therefore political parties whose electoral support is drawn primarily from this group, are therefore an ‘entrenched minority.’ But this realist consideration, which certainly seems to support the court’s characterization of minority parties as ‘marginalized and powerless’ finds no support in the constitutional theory that informed the drafting of the constitution, which rejected the idea that political minorities should be afforded legal protections beyond the usual ones in a ‘multi party’ democracy.*Mazibuko* could also be read through a ‘realist’ lens, as an attempt to reinforce political accountability, having regard to the negative impact of ‘dominance’or rigid party discipline on the accountability of the President to Parliament and the electorate.Certainly, these negative consequences, have subsequently become clearer.But from a realist point of view,‘accountability’ is not the only structural goal to be considered.The value of stability may also be important when the electoral process produces weak and fragmented coalitions.In those circumtances, a constitutional system will be better served by affording parties more latitude to negotiate the creation of a stable governing coalition, before precipitating a confidence motion that might result in the demise of an elected but temporarily vulnerable government. So the risks of ‘overconstitutionalization’ based on the political characteristics of a constitutional moment in time are real.In any event, if these realist considerations are the ones that could explain the outcome in these cases, they were not the ones that that explicitly informed the court’s reasoning. [↑](#footnote-ref-129)
129. Posner [↑](#footnote-ref-130)
130. *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC), 167. [↑](#footnote-ref-131)
131. The idea that decisions based on ‘naked preferences’ should be constitutionally suspect, is borrowed from CR Sunstein (note 27 above) 29-87. [↑](#footnote-ref-132)
132. Merafong (note 63 above) 167. [↑](#footnote-ref-133)
133. M Walzer *Radical Principles: Reflections of an Unrecontructed Democrat* 37 (1980). [↑](#footnote-ref-134)
134. The court also relied on a reading of the ‘take part’ clause of Article 5 of the International Covenant of Civil and Political Rights (1966). [↑](#footnote-ref-135)
135. Section 72 (1) (a) and section 118 (1) (a) of the Constitution. [↑](#footnote-ref-136)
136. *Doctors for Life* (note 67 above) 126,127 and 128. [↑](#footnote-ref-137)
137. Ibid 212. The Traditional Health Practitioners Act 22 of 2007, and the Choice on Termination of Pregnancy Act 92 of 1996 was amended by the Choice on Termination Pregnancy Amendment Act 1 of 2008. [↑](#footnote-ref-138)
138. Ibid 199 and 200. Once again, this decision to invalidate otherwise procedurally and substantively constitutionally unimpeachable legislation raised an important separation of powers question. The court acknowledged as much in paragraphs 199 and 200. However, having come to the conclusion that the requirement of public participation was a judicially enforceable constitutional obligation, this hurdle was easily surmountable. The question has to be posed whether the separation of powers is a constitutional prescript which has any meaningful residual role in regulating the relationship between the judiciary and legislatures in South Africa. Certainly, on the constitutional courts rather flexible theory of the separation of powers, legislatures are not autonomous or co-equal bodies. [↑](#footnote-ref-139)
139. Ibid 294. [↑](#footnote-ref-140)
140. *Matatiele v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC); *Merafong Demarcation Forum* v *President of the Republic of South Africa* 2008 (5) SA 171 (CC); *Poverty Alleviation Network* and Others v *President of the Republic of South Africa* 2010 (6) BCLR 520. [↑](#footnote-ref-141)
141. *Matatielle* (note 88 above) 63. [↑](#footnote-ref-142)
142. *Poverty Alleviation Network* (note 88 above) 62. [↑](#footnote-ref-143)
143. B Ackerman ’Beyond Carolene Products’ (1985) 98 *Harvard LR* 713. [↑](#footnote-ref-144)
144. *Doctors For life (note 67 above)* 130, and *Merafong* (note 88 above) 45. [↑](#footnote-ref-145)
145. The problematization of electoral ‘party dominance’ which originated in the political science literature on ‘deeply divided societies’ has made its way into constitutional theory and law in South Africa. This literature does not in my view adequately address the impact of unequal power relations on the political process in a society with a history of Colonialism. [↑](#footnote-ref-146)
146. *Doctors for Life* (note 67above) 233. [↑](#footnote-ref-147)
147. Ibid 234. [↑](#footnote-ref-148)
148. It is important to point out however that all four ‘cross-border cases’ concerned the participation in the legislative process of historically disadvantaged communities whose sense of identity and concerns about the delivery of services was potentially seriously impacted by the proposed border changes and constitutional amendments. As a matter of sound legislative and political practice, these were all compelling cases for active facilitation of public involvement. What is of interest here however are the implications in constitutional theory and law of the Constitutional Court’s decision to treat such matters as appropriate ones for judicial determination. [↑](#footnote-ref-149)
149. M Olsen Jr *The logic of Collective Action: Public Goods and The Theory of Groups* (1965). [↑](#footnote-ref-150)
150. Judge Sach’s A, most recent book is instructively entitled *We The People*: *Insights of An Activist Judge* (2016). [↑](#footnote-ref-151)
151. *Doctors For Life* (note 67 above) 184. [↑](#footnote-ref-152)
152. What I mean to stress here, is simply to examine the courts interpretive method and some of its consequences. In particular, its implications for key conceptual building blocks – like the separation of powers- of what is often presented as a coherent theory of liberal constitutionalism. This does not mean that the court is it wrong to treat the text in this way. As Cass Sunstein has observed, many different interpretive methods are available to courts. Each one finally must be assessed in the light of its consequences:’ the argument for any particular approach must depend… on a set of judgements about institutional capacities- above all, about the strengths and weaknesses of legislatures and courts. If judges are superb and error-free, their excellence bears on the choice of theory of interpretation. If judges are likely to blunder, their fallibility bears on the choice of interpretation.’ Cass*Sunstein A Constitution of Many Minds* (2009) 19. It might well be the case that in a society with still fragile democratic institutions, strong and bold courts willing to experiment are required to create stable background rules and institutions which form the indispensable ramparts for the exercise of self-government. The costs and implications should also be understood and weighed. [↑](#footnote-ref-153)
153. M Loughlin *Public Law and Political Theory* (2003) 60. He distinguishes between normativist and functionalist styles of legal reasoning. [↑](#footnote-ref-154)
154. See A Kavanagh ’Participation and Judicial Review: A Reply to Waldron’ (2003) 22 *Law and Philosophy* 451-486. Her defence of judicial review in response to Waldron’s criticism is based on the idea the judicial authority relates to a more limited range of decisions. Under her theory ‘most political decisions, including

     important policy-making issues, are left to the democratic process, accountable to the citizen body.’ [↑](#footnote-ref-155)
155. S Issacaroff ‘Constitutionalising Democracy in Fractured Societies’ (2003) 82 Texas LR 1861. [↑](#footnote-ref-156)