

A Tactical Separation of Powers Doctrine

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ABSTRACT: This essay explores the possibility that courts can play a role in arresting damage to constitutional democracy and in hindering processes of democratic backsliding. To that end, it examines closely four decisions in which the Constitutional Court has responded to state capture as a threat to ‘constitutional democracy’. Each case reflects an effort either to stymie President Zuma’s determination to entrench his hold on high office or to buttress the attempts by opposition parties to oust him from power. This coterie of cases are rightly perceived as component parts of an ongoing accountability process in which the Court employs tactical strategies that rely upon the use of structural constitutional commitments rather than clearly enunciated principles or provisions in the basic law.

KEYWORDS: comparative constitutional law; separation of powers; democratic decline

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I THE PROBLEM OF STATE CAPTURE IN SOUTH AFRICA

In *Democratic Alliance v Speaker of the National Assembly and Others*, the Constitutional Court of South Africa began its analysis of the free-speech rights of parliamentarians by declaring simply that ‘South Africa is a constitutional democracy.’¹ Madlanga J did not define the term. Nevertheless, his opinion took it as an axiomatic basis of South African constitutional adjudication. The following year, Mogoeng CJ began his opinion in *United Democratic Movement v Speaker of the National Assembly and Others* by using very similar language.² This time, however, the Court added some words of definition. As relevant here, its guiding gloss echoed Abraham Lincoln’s famous Gettysburg Address: A ‘constitutional democracy,’ wrote Mogoeng CJ, is a ‘government of the people, by the people and for the people through the instrumentality of the Constitution.’³ This is rather good as rousing rhetoric. It is perhaps less satisfying as a measure for legal interpretation. After all, it is not at all clear how the definition picks out a discrete class of cases in which constitutional democracy is imperiled. So long as there is a government in power with some sort of claim to democratic legitimacy derived in some fashion from the 1996 Constitution, it might be argued that ‘constitutional democracy’ of some kind obtains. It is also not clear how this touchstone of ‘constitutional democracy’ could usefully illuminate constitutional adjudication. In cases concerning the allocation of powers and privileges between different constitutional institutions, a domain sometimes known as the ‘separation of powers,’ for example, the definition provides essentially no real help in understanding ambiguous constitutional provisions without more analytic work. Yet Mogoeng CJ and Madlanga J would not have conjured a concern with constitutional democracy had not that value been imperiled in some sense. They also would not have offered it as a lodestar in their opinions had they not believed that the term in some meaningful way could explain and guide their legal analysis. I believe they were correct on both counts. As a result, their opinions invite an inquiry into how a constitutional court can defend or protect constitutional democracy – even if the bare invocation of principle provides little by way of an answer.

The nature of the then-relevant threat to the integrity of constitutional democracy in South Africa is widely known. A perceptive commentator, writing roughly contemporaneously to the *United Democratic Movement* judgment, summarized the South African political situation at the time in the following terms:

[Jacob] Zuma’s presidency has been disastrous. Corruption has run riot, led by the example of the President’s own family and their friends and benefactors, the Gupta family, an immigrant Indian family whose tentacles are everywhere in government departments and state-owned industries.... In effect, the state has been criminalized. Officials who refuse to allocate contracts in the right direction will receive death threats, and as there were more than two dozen political murders last year, no one believes that this is only bluffing. Confidence and trust in government have never been lower, not even under apartheid.⁴

The origin of the crisis that has thrown ‘constitutional democracy’ into such parlous conditions, Samuel Issacharoff has argued in these pages, is political rather than legal or constitutional in genealogy. In recent years in South Africa, Issacharoff contended, ‘the dominant party [the African National Congress, or ANC, became] the center for all political

¹ [2016] ZACC 8, 2016 (3) SA 487 (CC) at para 11.

² *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21, 2017 (5) SA 300 (CC).

³ *Ibid* at para 1.

⁴ RW Johnson ‘The Fall of Jacob Zuma and the Crisis of South Africa’ (2017) 61 *Quadrant* 39.

and economic dealings with the government.⁵ The effects of a dominant party take several forms. The most important was a profusion of graft and systematic corruption. During the tenure of Thabo Mbeki, an ‘ANC party state’ developed in which party loyalists were assigned to high posts in public office, parastatals came under party control rather than state control, and ANC elites increasingly dominated the ‘commanding heights’ of the private economy.⁶ In the Zuma presidency that followed, the merger of the state with private interests accelerated. The state was captured by a group of businesses owned and operated by three brothers sharing the Gupta name, who manipulated state business to their personal advantage.⁷ This often involved the steering of public contracts to preferred businesses owned by the Guptas at exorbitant rates in exchange for kickbacks to ministers and other officials making allocative decisions.⁸ Ministers who declined to cooperate with the Guptas were quickly relieved of their duties and office.⁹ As a result of ineffectual or corrupt presidential leadership, a raft of structural, macroeconomic problems accumulated. State-owned enterprises such as Eskom, Denel, and the South African Broadcasting Corporation, for example, fell into dysfunction and courted bankruptcy.¹⁰ As RW Johnson has argued, the compromising of large state enterprises imperilled the state’s access to international credit markets. Eskom’s debt contracts include cross-default clauses. Under these clauses, Eskom’s bankruptcy automatically results in all loans to South African State-owned enterprises (SOEs) being called in. Looting one SOE is thus linked by law to the prospect of a generalised financial crisis that the ANC is not well positioned to parry.¹¹

Such endemic corruption and graft preclude the delivery of some basic government services. The macroeconomic strains generated by these inefficiencies are likely to generate even sharper cuts in public services in the future. Relatedly, a generalized failure of law-and-order has led to a sharp spike in crime and vigilantism.¹² This violence often had a political cast. Deadly violence against critics of the ANC, as well as civil-society figures who had the temerity to complain of corruption, spread rapidly. Surveying the resulting lawlessness and impunity, some commentators have proposed a new concept of ‘violent democracy’ to capture South Africa’s predicament.¹³ The ordinary processes of political feedback, which might curb some of these

⁵ S Issacharoff ‘The Democratic Risk to Democratic Transitions’ (2015) 5 *Constitutional Court Review* 1, 3. The importance of ANC dominance as a factor in the decline of democratic institutions is critically examined in T Roux ‘The South African Constitutional Court’s Democratic Rights Jurisprudence: A Response to Samuel Issacharoff’ (2015) 5 *Constitutional Court Review* 33, 42–43.

⁶ R Southall ‘The Coming Crisis of Zuma’s ANC: The Party State Confronts Fiscal Crisis’ (2016) 43 *Review of African Political Economy* 73, 80.

⁷ ‘South Africa’s Public Protector Finds “State Capture” by the President’s Pals’ *The Economist* (5 November 2016); L Chutel & L Kuo ‘What the “State Capture” Report Tells Us about Zuma, the Guptas, and Corruption in South Africa’ *QZ Africa* (3 November 2016).

⁸ S Bracking ‘Corruption & State Capture: What Can Citizens Do?’ (2018) 147 *Daedalus* 169, 171.

⁹ ME Martin & H Solomon ‘Understanding the Phenomenon of “State Capture” in South Africa’ (2016) 5 *Southern African Peace and Security Studies* 21, 22–23.

¹⁰ On corruption and the SOEs, see the insightful analysis in RW Johnson ‘Cyril Ramaphosa’s Poisoned Chalice’ *Standpoint Magazine* (March 3, 2018), available at <https://standpointmag.co.uk/dispatches-april-2018-rw-johnson-cyril-ramaphosa-jacob-zuma-south-africa>.

¹¹ *Ibid.*

¹² On the failure of policing, see B Bradford, A Huq, J Jackson, & B Roberts, ‘What Price Fairness when Security is at Stake? Police Legitimacy in South Africa’ (2014) 8 *Regulation & Governance* 246.

¹³ K von Holdt ‘South Africa: The Transition to Violent Democracy’ (2013) 40 *Review of African Political Economy* 590.

trends, have too often been partly stymied as a result of party loyalty or corruption. The ANC rank-and-file, for example, has at some pivotal moments protected corrupt leaders such as Zuma from censure or punishment, using complaints about ‘white monopoly capitalism’ to draw attention away from their malfeasance.¹⁴

The net result of these trends, according to a pivotal report by Thuli Madonsela, the former Public Protector of South Africa,¹⁵ was a phase shift from diffuse, pervasive graft into a more systematic phenomenon of ‘state capture’, in which the state effectively operated as a vehicle for a narrow, unrepresentative set of private interests acting without democratic authorization.¹⁶ While the evidence of state capture documented by Madonsela was particularly vivid, South Africa is hardly alone in facing this cluster of problems. Even before Zuma came to power, political scientists had identified a relationship in African democracies between the concentration of political power (particularly in the office of a president) and pathological forms of clientelism.¹⁷

At first blush, the problem of state capture exemplified by the Zuma presidency might seem intractable. It is not at all clear how the tools of constitutional law and institutional design might remedy it at all for three reasons. First, the problem of state capture does not arise simply because one office (the presidency) wielded too much control over fiscal and procurement decisions (although that may make it worse).¹⁸ Rather, as depicted by Madonsela’s ‘State of Capture’ report, and as theorized in Issacharoff’s work, state capture arises in part because of the brute electoral dominance of one party. The latter, suggests Issacharoff, is a necessary if not sufficient condition for state capture. In the case of the ANC, that dominance reflects the pivotal role that the party played in the independence movement, as well as the axial role of its former leader, Nelson Mandela, in the transition from Apartheid. In the absence of the ANC, the 1996 South African Constitution would not exist in its current form. However powerful the party’s claim to democratic legitimacy in the aftermath of independence, the very magnitude of its political dominance has opened a pathway toward state capture.¹⁹

Second, one analysis of endemic corruption suggests that the latter arises in the context of accelerated capitalist development, in which government officials inevitably have the power to

¹⁴ Bracking (note 8 above) at 170–171.

¹⁵ President Zuma initially applied to block the publication of the report, apparently in the hope that it would be revised or edited by Madonsela’s successor. He withdrew his application, however, and in November 2016, the Pretoria High Court ordered the report’s release. See L Wolf ‘The Remedial Action of the “State of Capture” Report in Perspective’ (2017) 20 *Potchefstroomse Elektroniese Regsblad* 1, 4.

¹⁶ Bracking (note 8 above) at 170. Hannah Arendt, in contrast, defined corruption as ‘when private interests invade the public domain.’ H Arendt *On Revolution* (1963) 267, available at https://monoskop.org/images/b/bf/Arendt_Hannah_On_Revolution_1990.pdf.

¹⁷ For a qualitative and a quantitative analysis of the pathological tendencies of presidentialism in the African context, which differ in emphasis, although not in pessimism, see N Van de Walle ‘Presidentialism and Clientelism in Africa’s emerging party systems’ (2003) 41 *Journal of Modern African Studies* 297, and KC Moghalu ‘Africa’s Leadership Conundrum’ (2017) 41 *Fletcher Forum on World Affairs* 171.

¹⁸ For an argument to that effect, see M Mkhabela, ‘Zuma May Be Gone, But How Do We Avoid a Repeat of the Disaster?’ *News24* (6 September 2018). RW Johnson also blames the specific leadership failures of various ANC presidents. Johnson (note 10 above). The growth of presidential authority may also impede development of a public culture of democratic expectations and participation. YL Morse ‘Presidential Power and Democratization by Elections in Africa’ (2018) 25 *Democratization* 709.

¹⁹ For an insightful, and early, argument that the ANC would present a threat to the persistence of constitutional democracy by dint of its dominance, see H Giliomee, J Myburgh, & L Schlemmer ‘Dominant Party Rule, Opposition Parties and Minorities in South Africa’ (2001) 40 *Democratization* 161, 162.

marshal and channel resources, and hence defalcate state funds.²⁰ But if widespread corruption is associated with a particular phase of economic development, it may not be avoidable through legal means; and ceasing to develop economically is simply not on the cards.

Third, state capture involves a pervasive failure of integrity on the part of high-level officials. This is not so much an institutional design problem as a problem of culture. If a sufficiently anomic attitude suffuses the whole ANC party structure (which has been in power at the national level and in many subnational jurisdictions since 1994), it seems quite unlikely that any institutional fix will prevent state capture. If a sufficient proportion of officials wielding state power are indifferent to the risk to constitutional democracy, if they become sufficiently inured to the public's legitimate demands for effective state functioning for all, and if they are willing to engage in self-serving conduct without regard to the cost to the nation's economic and political stability, then it is hard to see how any rule of constitutional law or institutional device could make a difference. This is not a novel point: theorists from Max Weber onward have recognized that a measure of official acceptance and internalization of legal rules is necessary for the law to have effective force.²¹ More recently, theorists of constitutional law have derived from the English legal philosopher H.L.A. Hart the powerful hypothesis that the legitimacy and stability of a constitutional system depends on the attitudes and investments of some combination of elites and ordinary citizens.²² Absent these orientations toward legality and law, no legal system gets off the ground or stays in motion.

But if law rests on the sociological fact of internalization, particularly by state officials, and upon a positive attitude toward legality, it is circular to call upon law as a solution when that internalization, and the corresponding official attitudes, fail. Rather, a Weberian (or Hartian) lens suggests that it may be wiser to cultivate the appropriate sociological conditions in which internalization occurs than to chisel precisely the corners and edges of government institutions.²³ Consider in this regard, the effort of the American constitution's drafters to elicit certain 'institutional' dispositions on the part of national office holders, as a means of deracinating them from the fiery passions of factional passion. The Madisonian project of generating institutional loyalties as a predicate for restraining intragovernmental competition, however, is today considered a failure by most constitutional theorists.²⁴ There is no contemporary successor to this Madisonian theory that promises to reinfuse government with integrity and legality through clever constitutional design. Constitutions, we now think, cannot make people good.

So there are ample reasons for doubting the efficacy of law or constitutionalism as a complete remedy for state capture. Yet this perhaps moves too fast. The conclusion that laws

²⁰ A Beresford 'Power, Patronage, and Gatekeeper Politics in South Africa' (2015) *African Affairs* 226, 229–230.

²¹ M Weber *From Max Weber: Essays in Sociology* (2013).

²² For a recent recapitulation of this argument, see R Fallon *Law and Legitimacy in the Supreme Court* (2018). For Hart's canonical description of law as resting upon the 'customary rule of judges and other officials', see HLA Hart *The Concept of Law* (2012), 317.

²³ But the idea of cultivating certain dispositions to promote constitutionalism is not entirely alien to constitutional law. Consider, for example, Philip Bobbitt's idea of an 'ethical' form of constitutional argument, which 'relies on a characterization of [national] institutions and the role within them of the [national] people.' P Bobbitt *Constitutional Fate: Theory of the Constitution* (1982), 95. For a South African take on this proposition, see S Woolman 'On the Reciprocal Relationship between the Rule of Law and Civil Society' (2015) *Acta Juridica* 374.

²⁴ For a reconsideration of this project, largely associated with James Madison, as well as suggestions as to how it might be partially redeemed, see D Fontana & A Huq 'Institutional Loyalties in Constitutional Law' (2018) 85 *University of Chicago Law Review* 1.

and institutions are *alone* insufficient to prevent state capture does not also mean that laws and institutions cannot *ever* make a difference. Perhaps they cannot guarantee absolutely that state capture, or some other threat to constitutional democracy, will not arise. Law, after all, cannot always prevent the emergence of a dominant party. Nor can it wholly control the forces unleashed by a sudden exposure to global markets.

Nevertheless, law and constitutions might play a role in managing the resulting threats to democracy. Savvy institutional design might change the rate at which state capture takes hold, allowing countervailing political forces time to marshal. It might also mitigate the risk of state capture's worst-case scenarios. Indeed, the possibility of successful judicial interventions in respect to social pathologies of a different sort was posited by Theunis Roux in 2003. Roux's core claim was that the Court had quickly become 'adept' in the role of 'legitimator of the post-apartheid social transformation project'.²⁵ In 2009, Roux identified the Court's separation-of-powers jurisprudence as an instrument to 'minimize the impact' of controversial cases on the tribunal's 'institutional security'.²⁶ Roux's aim was to illustrate how separation-of-powers ideas could be deployed strategically to facilitate the Court's role in the constitutional architecture. The function played by that doctrine in the decisions under review here is rather different, insofar as it relates to the stability of democracy as a going concern. Nevertheless, my analysis is consistent with that earlier claim, and might profitably be read as an extension of Roux's pathmarking work.

Another domain in which the role of courts in protecting constitutional democracy is the recent literature on 'democratic backsliding'.²⁷ This literature crisscrosses law, political science, and sociology. It aims to understand, and craft effectual responses to, the electoral victories of populist leaders in Poland, Hungary, Venezuela, Bolivia, Russia, Turkey, and the United States (among other countries). Many of these leaders have either attempted to dismantle, or succeeded in dismantling, the likelihood of subsequent democratic rotation. They have neutered checking institutions such as courts and ombudsmen, and silenced dissenting voices in the media and academia. Their legalistic toolkit is novel. In the twentieth century, antidemocratic behaviour generally took the form of coups or abuses of emergency powers. Today, democratic backsliding typically takes place within a framework of laws and constitutional continuity.²⁸ The process of backsliding, moreover, has typically been incremental, rather than immediate. Decline is a process and not an event. Recent studies suggest that it would be foolish to expect constitutional courts to provide a comprehensive prophylactic against backsliding risk: there are many instances in which elected branches can outflank such tribunals by moving first or by simply stacking the bench.²⁹ My aim in this article is not to develop a general account of

²⁵ T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92, 93.

²⁶ T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106, 126.

²⁷ The following paragraph draws upon A Huq & T Ginsburg 'How to Lose a Constitutional Democracy' (2018) 65 *University of California at Los Angeles Law Review* 78; T Ginsburg & A Huq *How to Save a Constitutional Democracy* (2018); and T Ginsburg & A Huq 'Defining and Tracking the Trajectory of Liberal Constitutional Democracy' in M Graber, M Tushnet & S Levinson (eds) *Constitutional Democracy in Crisis?* (2018) 29.

²⁸ K Scheppele 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

²⁹ For a comprehensive account, see Ginsburg & Huq, *How to Save a Constitutional Democracy* (note 27 above). For an analysis of the particular perils of the first-period of constitutional growth, see S Gardbaum. 'Are Strong Constitutional Courts Always A Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285.

when courts will succeed or fail in this enterprise. More modestly, I hope to explore one case study where judicial action has contributed, at least temporarily, to democracy's defence.³⁰

There are many similarities between the problem of state capture and the prospect of populist degradation of constitutional norms. Studies of the latter process suggest that legal and institutional arrangements can be important, if not always decisive, frictions. Legal rules matter because the processes of institutional decomposition extends over time through the manipulation of legal and constitutional rules; and the details of those rules turn out to be consequential. Constitutional design can create protective redoubts for political factions committed to democracy and a strong form of the rule of law. These institutional shelters enable resistance to democratic backsliding that would otherwise be impossible. Such resistance might not succeed – but without clever constitutional design, it is simply impossible. This dynamic is most clearly illustrated in several cases of democratic 'near misses' in countries such as Sri Lanka, Colombia, and Finland. In all those countries, a stable democratic order has come under sudden attack, but has subsequently recovered (at least in the medium-term). In each of these three cases, the Constitution or laws created institutional shelter for resistance to backsliding. Specifically, unelected actors empowered by law to act as election administrators, as judges, or as military commanders took advantage of their structural independence from direct political control to oppose backsliding.³¹ To be sure, the operation of those institutions could not alone have saved democracy. Rather, their intervention created political space for other, democratic forces to organize successfully, and ultimately prevail in a subsequent election. It is possible that what works to curb populist backsliding also works to constrain the threat to constitutional democracy from state capture.

This essay explores the possibility that courts can play a role in arresting damage to constitutional democracy, much as courts have hindered processes of democratic backsliding in other contexts. To that end, it examines closely four decisions in which the Constitutional Court of South Africa has responded to state capture as a threat to 'constitutional democracy.' Each of these cases concerns an effort either to stymie one of President Zuma's efforts to entrench himself, or else an oppositional effort to oust him from power. One of the four cases was decided after Zuma resigned in February 2018. I include it here because it concerns Zuma's prosecutorial appointments, which were part of his entrenching strategy. These cases are perceived as component parts of an accountability process. Stu Woolman has argued in these pages that the Constitutional Court was a key player in a larger political dynamic by which Zuma was 'ignominiously' forced from the presidency.³² That it was a process rather than an event, notwithstanding the early and ample evidence of Zuma's improprieties, reflects

³⁰ Of course the possibility exists that the kind of malleable, tactical jurisprudential instruments described here can be used for anti-democratic ends. But whereas I am skeptical that more formalist approaches can ever be effective means of democracy preservation, at least tactical approaches can be used for salutary ends.

³¹ T Ginsburg & AZ Huq 'Democracy's Near Misses' (2018) 29 *Journal of Democracy* 15.

³² S Woolman 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalyzed Effect that Brought Down a President' (2018) 8 *Constitutional Court Review* 158, 159. Woolman notes that the Court's ruling 'rattled' the ANC's hegemony and had 'discernible knock-on effects' such as the setbacks of the ANC during 2016 municipal elections and internal ANC political processes that brought Ramaphosa to power. Ibid at 185.

the ANC's frequent resistance to accountability, and at times its resistance to the Constitutional Court itself.³³

I consider these four decisions to analyse how they employed the Constitution against state capture: Did the Court apply a consistent theoretical touchstone in analysing legal questions? Did it consistently favour one branch (or one institution within a branch) over others? Was its aim to elicit solely long-term dynamics? The answer to these questions is no: the Court's interventions were methodologically varied; they helped different entities; and they tacked between short-term and long-term effects. Indeed, an overarching lesson to be drawn from these cases is that democracy's defence is a tactical, rather than a strategic, challenge. Rather than articulating a singular theory or jurisprudential decisions, the Court's decisions are better understood as fluid and contingent responses to specific political risks. Threats to constitutional democracy are fluid and themselves the results of strategic action. Hence, it is not surprising that a court seeking to defend democracy pursuant to the rule of law would be ill-served by a single, fixed theoretical framework. Nor is that goal best served by a singular effort to defang one 'most dangerous' branch.³⁴ Indeed, at certain moments the appropriate object of reformist attention is not the state at all, but the dominant party's internal dynamics. When a single party is sufficiently dominant, its character and trajectory shape the state's character and trajectory. Moreover, the kind of needful remedies will vary from one occasion to the next. At times, the most needful interventions are local and immediate in effect; at times, they will have little or no direct effect, but will profoundly alter the strategic options for both the defenders and the foes of constitutional democracy. The Constitutional Court's jurisprudence in this field, in short, illustrates both the possibility and the virtues of a *tactical* approach to the separation of powers as a safeguard of constitutional democracy. It shows the virtue of setting deep structural principles to one side, and simply doing what works.³⁵

To be clear, I do not claim that these judgments are the *only* decisions of the Constitutional Court that, in some fashion, have been responsive to the problem of state capture. At other times, the Court has also struck down legislation that diminished the ability to create and to maintain a genuinely independent anti-corruption agency;³⁶ has limited parliamentary delegations to the presidency to extend the Chief Justice's term of office;³⁷ and has overturned a presidential decision appointing a new National Director of Public Prosecutions.³⁸ The decisions analysed here are simply the rulings most closely tied to the specific threat to constitutional democracy posed by President Zuma. Nor do I claim that the 'strategic' quality of the Court's decisions, which I emphasize here, is somehow unprincipled or unjudicial. To the contrary, I emphasize that methodological pluralism and doctrinal flexibility are directly tied to the higher-level

³³ On the ANC reaction to the *Economic Freedom Fighters* decision discussed below, see L Hartwell, 'Protecting Zuma versus Protecting the Constitution' (2016) 5 *Southern African Peace and Security Studies* 35.

³⁴ For a genealogy and useful repurposing of this concept, see MS Flaherty 'The Most Dangerous Branch' (1995) 105 *Yale Law Journal* 1725.

³⁵ D Kapiszewski 'Tactical Balancing: High Court Decision-Making on Politically Crucial Cases' (2011) 45 *Law & Society Review* 471.

³⁶ *Glenister v President of the Republic of South Africa & Others* [2001] ZACC 6, 2011 (3) SA 347 (CC).

³⁷ *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Center for Applied Legal Studies & Another v President of the of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

³⁸ *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

pursuit of democracy-preservation – akin to ‘neutral principles’³⁹ – at a doctrinal level. This methodological pluralism and doctrinal flexibility is, of course, neither necessary nor sufficient for the more general structural task of defending a constitution’s core moral commitments.

I begin by offering a parsimonious definition of ‘constitutional democracy’ drawn from my earlier work with Tom Ginsburg on the cognate idea of ‘liberal constitutional democracy’. This definition supplies a more secure point of reference for analysis. It is broadly consistent with the concerns raised by Mogoeng CJ and Madlanga J, and helps explain the relationship between constitutional democracy and corruption. After a brief account of separation-of-powers jurisprudence from the 1990s and early 2000s, I turn to the four recent Constitutional Court decisions touching on state capture and the Zuma presidency, focusing in particular on the way in which the Court’s interventions relate to the project of maintaining constitutional democracy. These decisions illustrate the virtue of a *tactical* separation of powers. I conclude by stepping back briefly and reflecting on the implications of the (at least temporary) success of the Constitutional Court’s intervention for the ongoing efforts to theorize the separation of powers as a general constitutional concept.

Before offering any further analysis, I feel it important to offer an important caveat: I am not a South African lawyer, and have no particular feel for the fabric of its jurisprudence. Nor (to my dismay and chagrin) have I had the chance to spend sufficient time in South Africa to be able to claim any familiarity with the felt political dynamics and patterns of national political life. The analysis that follows, accordingly, should be understood as reflecting the written products of the Constitutional Court, as well as the available secondary literature, evaluated from a comparative and theoretical perspective. I make no pretence at an evaluation of the nation’s constitutionalism from an internal perspective.

II A WORKING DEFINITION OF CONSTITUTIONAL DEMOCRACY

It is useful to begin by offering a thick account of ‘constitutional democracy.’ By using the term ‘constitutional democracy’, I believe that Mogoeng CJ and Madlanga J had something in mind akin to what Tom Ginsburg and I in a recent book discuss under the rubric of ‘liberal constitutional democracy.’ Mogoeng CJ and Madlanga J are fairly read as implying the broadly ‘liberal’ character of the Constitution, at least in the sense Ginsburg and I use that term. Its omission from their opinions, therefore, is not a strike against this definitional alignment. The idea of liberal constitutional democracy, moreover, illuminates the relationship of state capture to the prospect of democracy backsliding.

In a book and a number of scholarly articles, Ginsburg and I have characterized ‘liberal constitutional democracy’ as comprising three distinct, but interlocking system-level elements.⁴⁰ The first of these is a democratic electoral system. Most importantly, this involves periodic free-and-fair elections in which the modal adult can vote, and after which a losing side concedes power to the winning side. The second prong of the definition comprises the particular liberal rights to speech and association that are closely linked to democracy in practice. Without free speech and association, it is hard to see how opposition parties can coordinate and persuade voters to remove

³⁹ H Wechsler ‘Toward Neutral Principles of Constitutional Law’ (1959) 73 *Harvard Law Review* 1.

⁴⁰ This definition draws on various works previously cited (note 27 above). Our definition was parsimonious because we aimed to provide a working basis for analyzing the processes of democratic backsliding, and believed that a thicker description courted the risk of becoming mired in the extended, and perhaps interminable, debates over what should count as a democracy.

incumbents from office. Finally, and most unusually, the definition looks for a level of integrity of law and legal institutions sufficient to allow democratic engagement without fear or coercion. Democracy, we have argued, requires institutional mechanisms to maintain regularity and legality in elections and media regulation. It needs a robust, relatively autonomous and professional, bureaucracy to prevent incumbent self-dealing or entrenchment. This need is particularly acute in respect to institutions that manage the democratic process and the criminal justice system. These are the parts of the state most apt to be used unfairly against electoral competitors. Liberal constitutional democracy is thus a system-level quality that requires all three of these more precise institutional predicates before getting off the ground.

As a system-level quality, it is not easy to precisely quantify. Part of the difficulty of quantification flows from the fact that none of the three institutional predicates that we describe are ever likely to be perfectly achieved. All democracies, however well-functioning, likely fall short in one way or another in respect to these three institutional building blocks. None, however, can work without a measure of all three of the values we describe. And we think it is plausible to make judgments about the existence and direction of liberal constitutional democracy, even if the latter cannot be precisely measured.

Once constitutional democracy is defined in this fashion, the link to state capture intimated by Mogoeng CJ and Madlanga J becomes easier to see. Endemic corruption is causally related to systemic and disabling dysfunctions in the basic democratic mechanisms that link the public to the state.⁴¹ State capture's evisceration of the administrative rule of law in turn undermines both liberal rights and the possibility of fair elections by fostering a violent democracy in which the law-enforcement institutions cannot be trusted.

Consider a number of ways in which this can happen. First, state capture undermines the efficacy of channels linking public preferences to political choices. Most generally, a government that is unable to satisfy the basic demands of its citizens for public goods such as safety, macroeconomic stability, and services such as power and water is not a government that can sustain confidence in democracy as a system. Catastrophic economic mismanagement creates conditions for democratic backsliding. Economic crises since the Great Depression have been linked to the rise of anti-democratic populist movements.⁴² On gaining power, populist parties tend to dismantle many of democracy's necessary institutional supports by removing checks on executive power, hobbling courts and oversight bodies, and capturing the free press and the academy.⁴³ Indeed, as discussed above, this dynamic is precisely what has recurred, and become entrenched, in many nations since the recession of 2008–2009.

Both populist governance and state capture can inflict a blizzard of small, but cumulatively crippling, harms to democracy. The result is democratic death by a thousand cuts. A political landscape of endemic corruption is thus incompatible with the motivational basis of democratic participation because it yields an 'unjustified disempowerment' of citizens who are not direct

⁴¹ S Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (2001); D della Porta & A Vannucci *Corrupt Exchanges: Actors, Resources, and Mechanisms* (1999).

⁴² Barry Eichengreen, *The Populist Temptation: Grievance and Political Reaction in the Modern Era* (2018). If liberal democracy tends to founder under conditions of macroeconomic strain, and economic crisis is sufficiently predictable, then liberal democracy necessarily has an expiration date – even though it is not to blame for macroeconomic crisis. A less pessimistic view is that liberal democracies need to be shored up in anticipation of inevitable economic crisis.

⁴³ A Huq 'The People Versus the Constitution' (2018) 116 *Michigan Law Review* 1123.

beneficiaries of ongoing graft.⁴⁴ Where people cease to believe that public decisions are based on public-regarding reasons, as opposed to private gain, they become disillusioned with the process of democratic debate and persuasion.⁴⁵ The public sphere is also robbed of its function when its participants come to believe that their arguments no longer have any connection to the actual exercise of state power. In addition, there is a bilateral relationship between state capture and democratic decay. On the one hand, a dominant party engages in state capture as an alternative to competition in the democratic sphere. On the other hand, state capture motivates a dominant party to adopt rhetorical tactics that degrade further the relationship between the public and its elected representation. For example, the ANC has employed rhetorical tropes that demonize whites to sustain public support in the absence of any concrete policy achievements, and against the backdrop of collapsing public services.⁴⁶ In Zimbabwe, such tactics have led to violence and dispossession. While the risk of overt violence against whites as a consequence of this sort of political rhetoric is hard to quantify, the illiberal distortion of public debate makes it more difficult for the polity to focus upon matters of real public importance. Indeed, the whole point of ginning up anger at foreign elites is to distract the public from deep failures of governance. Such ‘democratic pollution’ presents arguably as a great a risk to the possibility of democratic rotation as formal, legal censorship. Just as much as a prior restraint, it impedes the effective operation of public debate and political association.⁴⁷

In sum, different threats to liberal constitutional democracy target distinct elements of its tripartite institutional foundation. State capture, understood as an acutely endemic species of corruption, undermines directly the administrative rule of law and corrodes the quality of the public sphere. In so doing, it directly and indirectly saps the efficacy of both fair elections and also liberal rights of speech and association. As Mogoeng CJ and Madlanga J suggested, the South African example is an important reminder of a pluralism of democracy’s institutional foundations. Such pluralism reduces the chances of systemic failure, even if it remains possible that a default in one local domain can have concatenating, systemic consequences for democracy as a whole.

III THE CONSTITUTIONAL COURT CONFRONTS STATE CAPTURE: FOUR PERSPECTIVES

This part examines the ways in which the Court interpreted the South African Constitution’s division of powers between branches and other institutions in order to promote constitutional democracy. I focus in particular on the crucial two years prior to Zuma’s resignation in February 2018. I discuss four cases below. Three of them precede Zuma’s fall. The fourth followed that event, but was deeply implicated in Zuma’s fate, and reflects an effort to unravel the pernicious elements of his legacy. How in these cases, I ask, did the Court further the cause of constitutional democracy? What kind of vision of the institutional relations of constitutional

⁴⁴ Ibid 329.

⁴⁵ M Warren, ‘What does Corruption Mean in a Democracy?’ (2004) 48 *American Journal of Political Science* 328, 328–329.

⁴⁶ For examples, see Bracking (note 8 above) at 171.

⁴⁷ Tim Wu has argued that effective political control is achieved more effectively through polluting the public sphere than by formal censorship legible as such. T Wu ‘Is the First Amendment Obsolete?’ in D Pozen (ed) *Knight Institute Emerging Threats Series* (2017). Wu focuses on the ability of internet content providers to manipulate users’ attention. The form of democratic pollution with which I am concerned here is somewhat different in form and vector.

bodies underwrote its decisions? By examining decisions that were part of a successful defence against democratic backsliding, I hope to offer insight into the role that courts can play in shoring up constitutional democracy.

As a threshold matter, it is worth underscoring that the opinions discussed in this part are consistent with a longer jurisprudential trajectory in which the Constitutional Court has approached the separation of powers in a purposive manner that combines doctrinal and methodological suppleness with an eye to larger, systemic ends. In the First Certification Judgment, for example, the Court refused to endorse a static, rigid, and textualist approach, and instead embraced an approach that emphasized functional principles that could emerge through specific applications and the workings of institutional life.⁴⁸ The separation of powers in South African law, it explained, ‘evidence[s] a concern for both the over-concentration of power and the requirement of energetic and effective, yet answerable, executive’⁴⁹ It was, the Court later elaborated, ‘a delicate balancing, informed both by South Africa’s history and its new dispensation’ between restraining and enabling impulses.⁵⁰ The same idea was endorsed again in 2001 and then in 2002.⁵¹ Anticipating some of the themes in the cases discussed below, the Court has also vigorously endorsed the functional independence of Chapter 9 institutions from ‘national executive control’ such that ‘they should be and should manifestly be seen to be outside government.’⁵² In short, there is a precedential foundation for the approach followed in these four cases. What is of interest is therefore not the fact of doctrinal novation, but how this ‘distinctively’ South African approach has been adapted to the question of state capture.

In the four cases examined here, the Constitutional Court has addressed questions about the allocation of institutional power between and within the branches of the national government.⁵³ These cases have arisen in the context of contestation over how (and for whom) state power is exercised. In particular, they all concern President Zuma’s efforts to remain in office despite allegations of misconduct. The decisions were all steps in a larger process that led to President Zuma’s departure from office in February 2018. Other elements of the process had nothing to do with the courts. For example, Zuma’s March 2017 effort to install ‘a tame Gupta protégé’ as finance minister was taken as a ‘clear sign that even the national Treasury was about to be looted,’ and led to an overnight collapse in the value of the Rand. It brought businesses, trade unions, and the Communist Party into accord that Zuma had to be dispatched.⁵⁴ The subsequent publication of the ‘State of Capture’ report also catalysed street protests with ‘huge crowds of trade unionists and workers ... chanting anti-Zuma slogans in the street and demanding his resignation.’⁵⁵ Still, informed commentators underscore the important role that the Constitutional Court’s decisions played in the lead-up to Zuma’s fall. Johnson, for

⁴⁸ *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26, 1996 (4) SA 744 at para 111. The Court also said that ‘the separation of powers doctrine is ... given expression in many different forms and made subject to checks and balances of different kinds.’ *Ibid.*

⁴⁹ *Ibid.* at 112.

⁵⁰ *De Lange v Smuts NO and Others* [1998] ZACC 6, 1998 (3) SA 785.

⁵¹ *S v Dodo* [2001] ZACC 16, 2001 (3) SA 382 (CC) at para 17; *S and Others v Van Rooyen and Others* [2002] ZACC 8, 2002 (5) SA 246 at para 34.

⁵² *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23, 2001 (3) SA 925 at para 31.

⁵³ I do not address questions concerning the role of the provinces under the Constitution. Cf J Wehner ‘Fiscal Federalism in South Africa’ (2000) 30 *Publius* 47.

⁵⁴ Johnson (note 4 above) at 39.

⁵⁵ Bracking (note 8 above) at 172.

example, explicitly links the Court's ruling on the Public Protector – discussed in greater detail below—with the ANC's subsequent defeats in local elections in Port Elizabeth, Johannesburg, and Pretoria.⁵⁶ Given that commentators have sometimes described the Court as otherwise aligned with many of the ANC's policy preferences,⁵⁷ its role here is all the more noteworthy.

A *Democratic Alliance v Speaker of the National Assembly*

The first case, *Democratic Alliance v Speaker of the National Assembly*, arose from the removal of members of the Economic Freedom Fighters party from the National Assembly's chamber during President Zuma's State of the Nation address on 12 February 2015.⁵⁸ The issue before the Court was the validity of Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004. This section provided the statutory authority pursuant to which the Speaker of the National Assembly had ordered the parliamentarians' removal. The petitioner in the case, a parliamentary party opposed to the ANC, argued that section 11 was a violation of the separation of powers.⁵⁹ Refusing to rely upon the *Hyundai* Court's preference for reading legislation as in a manner consistent with constitutional dictates,⁶⁰ Madlanga J held for a majority of the Court that Section 11 had been correctly read to allow the removal of members of the legislature. This broad reach, however, had a 'chilling effect' upon parliamentary free speech, and also 'directly infringe[d] the immunities from criminal proceedings, arrest and imprisonment enjoyed by members' pursuant to ss 58(1)(b) and 71(1)(b) of the Constitution.⁶¹ Complementing this rights-based line of reasoning, the Court also offered a structural argument that took up the petitioner's invitation to consider the separation of powers.⁶² The aforementioned sections of the Constitution setting forth the privileges of parliamentarians, the Court explained, need not be read to allow for unlimited disruption by members intent on derailing legislative proceedings. But they did imply that the regulation of cameral speech had to be done by the relevant House itself, and not by an Act of Parliament.⁶³ This reading, on my understanding, rested heavily on textual evidence rather than any functional analysis of allocating power at the cameral rather than the parliamentary level. On these grounds, the Court found that the February 2015 removal had been unlawful.

The Court could have taken a number of paths. Not only could it have reached a different result, but it could also have avoided the separation of powers issues raised and decided in Madlanga J's majority opinion. For example, it might have accepted the *Hyundai*-based argument for construing s 11 narrowly. Jafta and Nkabinde JJ took this view in their

⁵⁶ Johnson (note 4 above) at 39.

⁵⁷ Roux (note 26 above) at 138.

⁵⁸ 'South African Parliament Chaos as Malema MPs Heckle Zuma' *BBC News* (12 February 2015).

⁵⁹ *Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 8, 2016 2016 (3) SA 487 at para 7 ('*Democratic Alliance*').

⁶⁰ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd & Others In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12, 2000, 2001 (1) SA 545 (CC) at para 23.

⁶¹ *Democratic Alliance* (note 59 above) at paras 41 and 42.

⁶² The Court, however, declined to consider or decide whether the challenged provision was 'at variance with the separation of powers doctrine.' *Democratic Alliance* (note 59 above) at para 53. Nevertheless, the structural implications of the decisions are sufficiently clear to be appropriately included here.

⁶³ *Democratic Alliance* (note 59 above) at para 47.

concurrence.⁶⁴ This construction would have yielded a similar bottom line. It might even have left open the possibility of new legislation. (However, Jafta J's opinion intimates that substitute legislation of greater clarity would be deemed 'unconstitutional'.) Perhaps, as importantly, this narrow construction would also have vitiated the Court's opportunity to make a broad statement on parliamentary free speech as well as the separation of powers. The opinion's effects on elite and public opinion might, as a result, have been quite different.

On the merits, one can also easily imagine a different result. In respect to the separation of powers element of the case, indeed, it is noteworthy that American constitutional law has taken a different tack.⁶⁵ The US Congress has enacted statutes that contain rules of cameral procedure since the 1790s, for instance to provide expedited consideration of trade treaties and otherwise to fashion frameworks for rapid legislative consideration of time-sensitive policy considerations.⁶⁶ One legal scholar has developed a powerful argument for the position that Article I, Section 7 of the US Constitution, which endows each branch with power to set its own rules, renders such statute-based imposition of cameral rules unconstitutional, rather in the spirit of *Democratic Alliance*.⁶⁷ Yet his position remains a minority one. The argument for permitting statutory rules of cameral procedure, moreover, is arguably stronger in South Africa than in the US. Under the American Constitution, both Houses and also the President normally play a role in the legislative process. Under Article 75 and related provisions of the South African Constitution, the president must generally assent, and has only a limited power to return laws.⁶⁸ Hence, no argument can be proffered in terms of the South African Constitution (as is available under US Constitution) that the executive has shaped cameral rules. (That said, the effective fusion of the executive and the legislature in South Africa's parliamentary system does allow the executive to influence the legislature's agenda.)

Note also the distinctive way in which *Democratic Alliance* was a separation-of-powers decision. The decision allocates authority between different institutions created by the Constitution, but it does not move power between the branches. Rather, it shifts authority largely held by the parliament (with the exception of certain constraints in Article 79) to the level of the single chamber.⁶⁹ The effects of this alternation of institutional relationships is ambiguous and complex. In the short term (ie, the context of the particular decision), it benefited the plaintiffs – the Economic Freedom Fighters and the Democratic Alliance – who could not be sanctioned for past protests within the ANC-dominated legislature. In the longer term, however, the separation-of-powers element of the decision created no more than a temporary speed bump to the imposition of such punishments: the judgment did not make it more difficult to regulate parliamentary speech. To the contrary, all else being equal, it ought to be easier for a

⁶⁴ Ibid at para 82.

⁶⁵ I offer the US experience merely as a point of comparison; I do not mean to suggest that merely because the US courts have decided a question one way, that is the correct way to decide the issue.

⁶⁶ For a careful study of the uses of such framework legislation, see E Garrett 'The Purposes of Framework Legislation' (2004) 14 *Journal of Contemporary Legal Issues* 717.

⁶⁷ A Bruhl 'Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of the Proceedings Clause' (2003) 19 *Journal of Law and Politics* 345, 345–349.

⁶⁸ Under Article 79, the President may refer a bill back to the National Assembly for reconsideration. If the reconsidered bill accommodates the President's reservations, the President must assent to and sign the bill. If a reconsidered measure does not fully accommodate the President's reservations, the President must either assent to and sign the Bill or refer it to the Constitutional Court for a decision on its constitutionality. If the Constitutional Court decides the bill is constitutional, the President must sign it.

⁶⁹ The National Assembly's power to promulgate internal rules, for examples, is described in Article 59(1)(b).

single chamber to enact (and also to repeal) rules limiting or punishing such speech than for the two chambers acting together to do so. In particular, where one party dominates a particular chamber, it seems likely that it will not be constrained in silencing the minority's protests. The free speech component of *Democratic Alliance*, moreover, does not appear to impose much of a constraint on a cameral majority. The majority opinion here suggests that a chamber cannot 'denude the privilege of its essential content'.⁷⁰ The precise effect of this ambiguous limiting language is hard to predict. Accordingly, it seems reasonable to infer that the short-term effect of *Democratic Alliance* – which was to affirm as lawful (and hence subtly to legitimate) a protest against President Zuma – may well be more important than its uncertain long-term implications.

B *Economic Freedom Fighters v Speaker of the National Assembly and Others*

The second important decision of this period concerning corruption and state capture, *Economic Freedom Fighter v Speaker of the National Assembly and Others*,⁷¹ pertains to the Public Protector's report on President Zuma's spending on a private residence in Nkandla. In particular, it turns on the question of whether the Public Protector's recommendations to the president and the National Assembly pursuant to s 182(1)(c) of the Constitution were binding or precatory. Stu Woolman has argued that *Economic Freedom Fighters* constitutes a critical 'part of the Constitutional Court's ongoing efforts to keep the train on the tracks – by ensuring that the state, specific state actors, and 'well-connected' private actors abide by the rule of law and are held accountable both to the Constitution and the people they serve.'⁷² The question addressed here is precisely *how* the Court pursued these goals. After all, it is not entirely clear how 'rule of law' values inform a judicial decision as to which of a number of plausible readings of the law to adopt.⁷³ Nor is it self-evident how accountability should be defined. Mechanisms of accountability come in both legalistic and democratic forms.⁷⁴ A surfeit of such mechanisms in a constitution can generate perverse and even undesirable outcomes.⁷⁵ Both the vector and the appropriate quantum of accountability appropriate to preserve constitutional democracy must therefore be analysed with some precision.

The Nkandla residence of Jacob Zuma is located in KwaZulu Natal. It became an epicentre of public controversy as a result of a publicly-funded security upgrade ultimately costing some R246 million. The improvements to the property included a helipad, underground bunkers, facilities for security and their accommodation, a fire pool, a chicken-run, and fencing around

⁷⁰ *Democratic Alliance* (note 59 above) at para 39. In the previous paragraph, the majority states that the privilege 'can never go so far as to give members a licence so [as] to disrupt the proceedings of Parliament.' Ibid at para 38. Hence, it appears that the Court envisages some constraint on parliamentary free speech as well as cameral power. Precisely how one would delineate the constraints in these two domains remains unclear.

⁷¹ [2016] ZACC 11, (3) SA 580 (CC).

⁷² S Woolman (note 32 above) at 174–175; S Woolman (note 32 above) at 159 (Woolman offers further reflection on that topic.)

⁷³ The 'rule of law' can be defined in terms of constitutional law in a number of different ways; some are thin in the sense of providing little or no guidance as to the substantive content of the law. R Fallon Jr 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1.

⁷⁴ See A Huq 'Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design' (2018) 65 *University of California at Los Angeles Law Review* 4.

⁷⁵ Democratic accountability can conduce to undesirable failures to account for minority interests. E Maskin & J Tirole 'The Politician and the Judge: Accountability in Government' (2004) 94 *American Economic Review* 1034. See also JE Gersen & MC Stephenson 'Over-Accountability' (2014) 6 *Journal of Legal Analysis* 185.

the entire complex. In 2013, Public Protector Thuli Madonsela released a report on the Nkandla spending entitled ‘Secure in Comfort’ – the provisional, perhaps more telling, title had been ‘Opulence on a Grand Scale’. The report concluded that the improvements went well beyond the security-related alterations permitted by law; that Zuma had substantially benefited from the improvements; and that he was obligated to repay the state a reasonable amount of the resulting costs.⁷⁶ Prior to the release of the Public Protector’s final report, the parliamentary ANC had also initiated its own investigation of the Nkandla spending. Rather unsurprisingly, this cleared Zuma of any impropriety.⁷⁷ For a year after the Public Protector’s report had been submitted, a stalemate ensued. Neither the president nor Parliament took any steps to implement it. This stalling ultimately triggered applications by the Economic Freedom Fighters and Democratic Alliance parties seeking orders compelling those branches to take remedial actions, including determining the reasonable cost of the non-security measures and paying back to the state a reasonable percentage of that cost.⁷⁸

The Constitutional Court held first that it had jurisdiction over the complaints lodged by those two parties because they had alleged that both the President and the National Assembly had ‘breached their respective constitutional obligations’ in a matter of ‘high political importance.’⁷⁹ The allegation that the President had personally failed to meet a constitutional obligation was pivotal to the Court’s analysis. In the course of this analysis, the Court again recognized that it was wading into ‘sensitive areas of separation of powers’.⁸⁰ Indeed, the sensitivity of the underlying questions was in part a justification for its exercise of jurisdiction.

On the merits, the Court began by adumbrating the justifications for Chapter 9 institutions such as the Public Protector office. It described that office in particular as ‘invaluable’.⁸¹ To fulfil its role in combating corruption, graft, and other forms of impropriety, the Court explained, the Public Protector (like other Chapter 9 institutions) had constitutional guarantees of ‘independence, impartiality, dignity and effectiveness’.⁸² Mogoeng CJ then offered the simple yet devastating observation that unless the Public Protector possessed the power to

⁷⁶ ‘Nkandla: It’s Still Opulence on A Grand Scale’ *Mail & Guardian* (20 March 2014).

⁷⁷ ‘Nkandla: Nxesi Explains Why Security Upgrade Was Essential’ *Mail & Guardian* (19 December 2013).

⁷⁸ A prior, but roughly contemporaneous, decision by the Supreme Court of Appeal held that the legislature, the executive and all organs of state were not merely under an obligation to respect the Public Protector’s rulings, but that they must view adverse findings, as well as recommendations and remedies, in reports by the Public Protector as having binding legal effect. *South African Broadcasting Corporation v Democratic Alliance* [2015] ZASCA 156, 2016 (2) SA 522 (SCA) at paras 47 and 54. The Supreme Court of Appeal’s conclusion flowed, in part, from its recognition that the Public Protector exists in order to ensure that the governors are held accountable to the same set of rules as the governed.

⁷⁹ *Economic Freedom Fighters* (note 71 above) at para 24.

⁸⁰ *Ibid* at para 19. The idea that the sensitivity of the issue and the personal involvement of the President created jurisdiction is almost the inverse of the standard view of jurisdictional constraints in American constitutional law. In US jurisprudence, the closer a question is to the apex of political power, and the more neuralgic it is, the less likely the US Supreme Court is to address the matter (or to evince a form of deference that is functionally indistinguishable from the eschewal of jurisdiction). The US position is usually justified on grounds of expertise and democratic legitimacy. But neither reason is persuasive. There is no real difference between the questions of law and policy that arise when the Court declines jurisdiction and that arise in regulatory disputes which the Court routinely adjudicates. And it is implausible to think that democratic accountability will be effective when the executive controls the information available to the public about the success, and the costs, of a policy. A Huq ‘Structural Constitutionalism as Counter-Terrorism’ (2012) 100 *California Law Review* 887.

⁸¹ *Economic Freedom Fighters* (note 71 above) at para 52.

⁸² *Ibid* at para 50.

determine conclusively the appropriate remedies for official misconduct, ‘very few’ of the apex legislative and executive officials subject to her jurisdiction would ever comply with those recommendations.⁸³ The mandatory force of her remedial conclusions, therefore, followed from the functional necessity of binding remedies in a context where compliance was typically incentive incompatible.⁸⁴

Turning to the *legal* force of the Public Protector’s proposed remedies, the Court categorically rejected the notion that, in the absence of judicial review and constraint, they were advisory. A functional logic again played a key role here. As Mogoeng CJ explained: ‘One cannot talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.’⁸⁵ In rejecting the reasoning of an earlier High Court decision, Mogoeng CJ underscored the ‘irrationality’ of allowing alleged malefactors to decide on whether they should comply with the Public Protector’s recommendation. Such a posture, the Court explained, would be ‘at odds with the rule of law’.⁸⁶ Its explanation for this last point, however, rested on the arguably circular assumption that the Public Protector’s recommendations constituted ‘law’ of the relevant kind.⁸⁷

The ensuing opinion did not endorse legislative (cameral) or executive authority. To the contrary, it affirmed the authority of a pivotal Chapter 9 Institution against the interests of both the legislative and the executive branch. This affirmation also came after the Public

⁸³ Ibid at paras 56 and 64. In subsequent sections of the opinion, Mogoeng CJ addressed and rejected the argument that ss 182(1) and 182(2) of the Constitution allowed the National Assembly to impose legislative restraints on the Public Protector’s actions. This is, however, in essence a response to a counter argument, rather than a positive justification for the Chapter 9 power at issue in the case.

⁸⁴ A potential counterargument is that the Public Protector’s reports would be followed because of public pressure on the President. See E Posner & A Vermeule ‘The Credible Executive’ (2007) 74 *University of Chicago Law Review* 865. This is not, so to speak, a credible argument, even if it were not belied by the facts. Chief executives can often mitigate public pressure from accountability institutions by attacking those institutions as corrupt, or by ginning up political distractions.

⁸⁵ *Economic Freedom Fighters* (note 71 above) at paras 64, 65, and 68 (‘Remedial action must ... be suitable and effective.’). Again, the disjunct between South African and American constitutional law is as striking as it is stark. In recent American constitutional jurisprudence, the supply of remedies for individual rights’ violations has gradually been constrained to the point where only the most gross and intentional transgressions of long-established law generate any kind of a judicial response. For an analysis of the relevant cases, and an exploration of the sociocultural context of these cases, see A Huq & G Lakier ‘Apparent Fault’ (2018) 131 *Harvard Law Review* 1525, and A Huq ‘Judicial Independence and the Rationing of Constitutional Remedies’ (2015) 65 *Duke Law Journal* 1. The US Supreme Court, however, has been far more willing to permit the litigants to invoke structural principles, even when doing so has no clear causal relationship to the values the Court purportedly wishes to vindicate. A Huq ‘Removal as a Political Question’ (2013) 65 *Stanford Law Review* 1. The net result of these postures is a highly regressive doctrinal structure.

⁸⁶ *Economic Freedom Fighters* (note 71 above) at para 72. Woolman notes that the Court was in fact arrogating to itself the power to determine what remedies pressed by Chapter 9 institutions are valid. Woolman (note 32 above) at 190. The decision hence might be read as an endorsement and enlargement of judicial power as opposed to a constraint on corruption.

⁸⁷ The circularity arises because the Court assumes that the Public Protector’s recommended remedies are a ‘decision or step sanctioned as law’ that cannot be ‘ignored based purely on a contrary view’. *Economic Freedom Fighters* (note 71 above) at para 75. This assertion assumes the legal force of those recommendations – which is precisely the legal question upon which the matter pivots. That said, the Court reasoning tracks the precedent and the structural analysis of the Constitution articulated by the Supreme Court of Appeal in *South African Broadcasting Corporation v Democratic Alliance* [2015] ZASCA 156, 2016 (2) SA 522 (SCA): namely, that the Public Protector exists in order to ensure that the governors play by the same set of rules as the governed.

Protector had published her bombshell ‘State of Capture’ report. It would be very surprising if the decision did not also influence both public and official perceptions of the latter document. Hence, like *Democratic Alliance*, the opinion in *Economic Freedom Fighters* likely had the immediate practical effect of advancing the political agenda of those who sought to constrain a hegemonic presidency. But unlike *Democratic Alliance*, the *Economic Freedom Fighters* decision rested more on a functional analysis of institutional powers than on a close reading of a specific constitutional text. (The contrast, to be sure, is one of degree and not absolute, since both opinions range over a variety of interpretive modes). The key term in Mogoeng CJ’s logic, as I read the case, concerned the (correct) recognition that officials fingered for graft by the public protector are likely to resist, or at least slow-walk in the face of those allegations. Nothing in the text of the Constitution conveys this assumption. Indeed, the textual recognition of broad legislative authority to regulate the Public Protector at least in some ways in sections 182(1) and 182(2) of the Constitution arguably cut in the other direction. Hence, *Economic Freedom Fighters* reflects a subtly different strategy of constitutional interpretation than *Democratic Alliance*. Had the latter’s textualism been applied exclusively, perhaps a different outcome would have ensued.

The opinions’ practical effect, moreover, diverge in an interesting way. In the Nkandla controversy, President Zuma had already agreed to the measures suggested by the Public Protector (to be sure under the shadow of constitutional litigation).⁸⁸ Had the opinion come out the other way, it is at least possible that he would still have carried out these steps. Perhaps it would have been too embarrassing for him not to do so. Hence, it is at least possible to gloss the Court’s conclusion as merely confirming an existing political equilibrium. Even if one concludes that Zuma would have reneged on his earlier promise, though, the immediate effect of the opinion was relatively limited. The Nkandla graft, while not trivial, is hardly significant in comparison with the pattern of wholesale state capture associated with the Gupta family, a pattern that still imperils the nation’s fiscal standing. Rather, it seems more plausible to gloss its opinion in dynamic terms: elected actors, and in particular ANC officials, would know on a going-forward basis that they had a legal obligation of compliance with the Public Protector’s recommendations. That this ruling occurred in the context of the state capture controversy is a fact that should not be forgotten.

Consistent with this understanding, Ros Dixon and Theunis Roux argue that *Economic Freedom Fighters* embodied a precise, almost surgical, intervention that mitigated temporarily the systemic threat to democracy posed by state capture. They emphasize rightly that the Court alone would have insufficient authority to stem that threat completely. Rather, they describe the Court’s continued, if incremental, efficacy as a friction on democratic backsliding.⁸⁹ Dixon and Roux underscore the long-term nature of the conflict between the ANC and the Court, praising the latter for its strategic foresight in placing out of bounds a strategy of noncompliance with Chapter 9 institutions. Dixon and Roux might have added that this insurance against lawlessness was not without its own flaws. If Public Protector reports cannot be ignored safely any more, the premium upon appointing captured loyalists to a leadership position in that

⁸⁸ *Economic Freedom Fighters* (note 71 above) at para 100.

⁸⁹ R Dixon & T Roux ‘Making Constitutional Transitions: The Law and Politics of Constitutional Transitions in South Africa’ in T Ginsburg & A Huq (eds) *From Parchment to Practice: Challenges of Implementing New Constitutions* (forthcoming 2019).

office rises.⁹⁰ That is, even if the Court's intervention limited state control, its effect probably had a shelf-life: its efficacy would evaporate when the hegemonic party captured the Public Protector itself.

C *United Democratic Movement v Speaker of the National Assembly*

The third case of interest here arises out of parliamentary manoeuvring in response to President Zuma's March 2017 decision to fire five cabinet members, including finance minister Pravin Gordhan and his deputy Mcebisi Jonas.⁹¹ The United Democratic Movement requested that the Speaker of the National Assembly permit a secret ballot on a motion of no confidence in Zuma. Its leader Bantu Holomisa argued that a secret ballot was appropriately used by the National Assembly to appoint the President. He also argued that ANC members would be subject to discipline and even expulsion if they did not support their President.⁹² In response, the Speaker concluded that she had no authority under the Constitution and the Rules of the National Assembly to permit a secret ballot. The United Democratic Movement, along with the Economic Freedom Fighters, the Inkatha Freedom Party and the Congress of the People, filed an application with the Constitutional Court seeking a declaration that the Speaker had erred, and that secret ballots were allowed under the Constitution in no-confidence motions.⁹³

The Court rejected the Speaker's judgement that she lacked authority to conduct a secret ballot. It returned the matter to the Speaker to determine how to proceed in the light of that authority. Mogoeng CJ's opinion begins with a strikingly long introductory essay on the separation of powers, and in particular on the role of Parliament as an institutional site for 'accountability-ensuring mechanisms'.⁹⁴ This introduction signalled the Court's cognizance of the broader political context of its decision. The Court in particular honed in on the question of the efficacy of accountability mechanisms.⁹⁵ Although it did not say that judgments of efficacy must account for contemporaneous political context, this assessment

⁹⁰ Stu Woolman notes that the Court likely had in mind the demise of the Directorate of Special Operations, or Scorpions, which the government had eliminated in order to protect itself from an independent authority charged with investigating corruption both within the state and in society at large. S Woolman (note 32 above) at 175. See, especially, *Glenister v President of the Republic of South Africa & Others* [2001] ZACC 6, 2011 (3) SA 347 (CC) (Court holds that the government violated various provisions of the Constitution, read with international law, by eradicating an independent investigatory unit designed to combat fraud and bribery and replacing it with a body subject to direct executive oversight.)

⁹¹ N Onisha & S Chan 'Firing of South Africa's Finance Minister Widens a Political Rift' *The New York Times* (31 March 2017). This decision – following prior attempts to manipulate the Finance Ministry by the firing of Nhlanhla Nene in December 2015 – played some role in the ultimate downgrading of South African sovereign debt by two rating agencies.

⁹² M Gallens 'Secret Ballot in Vote of No Confidence Will Protect ANC MPs – Says UDM' *News24* (April 10, 2017). Many ANC senior figures, including Ramaphosa, had criticized the firings. Onisha & Chan (note 91 above). It is difficult to know, however, whether rank-and-file members do vote freely in a more consequential no-confidence motion.

⁹³ *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21, 2017, 2017 (5) SA 300 (CC) at paras 18 and 19.

⁹⁴ *Ibid* at paras 1 to 10. In para 33, the Court reiterated the theme of accountability and the 'reality that constitutional office-bearers occupy their positions of authority on behalf of and for the common good of people.' The very repetition of this (by then plainly) counterfactual 'reality' works to underscore the Court's cognizance of the contemporary political conjunction.

⁹⁵ *Ibid* at para 12. The theme is repeated later in the judgment: it suggests a constitutional obligation to have 'effective mechanisms in place' to hold 'Members of the Executive accountable'. *Ibid* at para 40.

seems implicit in its discussion. A contextual approach to efficacy was also implicit in its extended discussion of no-confidence motions under s 102 of the Constitution. It characterized these motions as a ‘crucial consequence-management or good-governance’ issue necessary to ensure the effectiveness of existing mechanisms, in-between the general elections to articulate ‘dissatisfaction’ with executive conduct.⁹⁶ The Court, in short, organized its analysis around the pragmatic question of efficacy in a way that invites, and perhaps even compels, a contextual and situated judgment of contemporaneous political circumstances.

All this threshold analysis, however, had strikingly little to do with the actual holding. The decision turned, as in *Democratic Alliance*, on a relatively simple point of textual analysis. Section 57(1) gives the National Assembly power to ‘make rules and orders concerning its business’ and does not mention either secret or open balloting, the Court observed. Therefore, the Constitution permitted both secret and open balloting, hence the Speaker’s assumption of no authority.⁹⁷ Although the Court offered some comments on the benefits of a secret ballot in the context of a no-confidence motion, it is hard to read these stray thoughts as anything more than supplementing its central, textual ground of decision.⁹⁸ This textual reading, it should be underscored, could have been reached without any of the anticipatory paraphernalia of the decision. The result is an opinion with a slightly bathetic note.

The principal effect of *United Democratic Movement*, like that of *Democratic Alliance*, quickly materialized. A vote of no-confidence using a secret ballot, which Zuma survived, was ultimately held in August 2017.⁹⁹ Even if that vote was not decisive, Zuma and his allies had struggled mightily to avoid it. The narrowness of the vote margin, moreover, demonstrated the extent to which Zuma and his allies had lost support within and control over the ANC. That information, aired publicly by the vote, likely weakened Zuma further because it increased the likelihood that wavering ANC members might later ‘defect’ from his caucus, and openly resist his presidency. Paradoxically, therefore, the secrecy of the no-confidence vote allowed legislators to generate a credible public signal of the extent of dissatisfaction with the Zuma presidency in a way that lowered the anticipated costs of defecting from that regime subsequently. It thus anticipated, and rendered more likely, Zuma’s ultimate February 2018 ouster.

The decision will also have some enduring consequences. In the longer term, the decision means that a dominant majority party such as the ANC cannot use the veil of parliamentary secrecy to shield, and so ignore, fissures within its own coalition as a way to prevent the ouster of incumbent ministers or presidents. The effect of the decision, therefore, is not so much to shift power from one branch to another. It is instead to reallocate authority from the party in government to the more diffuse parliamentary party. In the context of a ‘dominant party’ system of a kind that has become prevalent across sub-Saharan Africa,¹⁰⁰ this shuffling of intraparty

⁹⁶ Ibid at para 47.

⁹⁷ Ibid at paras 58 to 61. The Court further held in para 67 that the Speaker had erred in reading the relevant National Assembly rules not to allow for secret balloting.

⁹⁸ Ibid at paras 73 to 76.

⁹⁹ S Allison ‘Jacob Zuma Narrowly Survives No-Confidence Motion in South African Parliament’ *The Guardian* (9 August 2017). However, had Zuma been truly concerned about his immediate survival, he would have likely applied some pressure on the Speaker.

¹⁰⁰ There are a number of different definitions of ‘dominant party’ system that have been applied in the Sub-Saharan African context, although the ANC fits all of them. For a survey of the relevant work, see M Bogaards ‘Counting Parties and Identifying Dominant Party Systems in Africa’ (2004) 43 *European Journal of Political Research* 173.

power – with its concomitant implication of a less concentrated form of parastatal political power – is perhaps a more deeply significant institutional change than is readily apparent.¹⁰¹

One way to theorize *United Democratic Movement* is in light of the ‘focal point’ account of constitutional enforcement developed by the political scientist Barry Weingast and others.¹⁰² On Weingast’s account, constitutional rules provide crisp and readily available focal points that act as a signal to diffuse, uncoordinated social and political actors that democratic norms are imperiled. The absence of a focal point will render popular and oppositional resistance to the antidemocratic consolidation of political power more costly to organize and hence less effective. Weingast’s theory concerns the content of constitutional rules themselves, rather than their implications for parliamentary voting rules. But it can be extended to cover the logic of *United Democratic Movement*: By facilitating a motion of no-confidence, that is, the Court enabled opponents of an entrenched presidential clique to discover their own numerosity. By facilitating the disclosure of this information, the decision lowered epistemic barriers to increased coordination among political opponents of an incumbent president to check his or her power.

D *Corruption Watch NPC v President of the Republic of South Africa*

One final decision is worth mentioning even though it was heard some two weeks after Zuma had resigned and was not handed down for another six months. *Corruption Watch* concerned Zuma’s efforts while in office to remove former National Director of Public Prosecutions Mxolisi Nxasana by offering him a large financial settlement conditional on his departure from the position, and to install in his place Shaun Abrahams.¹⁰³ Because the case arose out of Zuma’s effort to obtain greater control over accountability mechanisms, it is related to the ongoing process of state capture. The decision also raises the same question of how to craft institutional rules to respond to the prospect of state capture. Hence, it makes sense to treat the case as part of the same jurisprudence.

The language and result of the case also betray a concern with state capture. The Court held that s 179(4) of the Constitution guarantees the independence of the prosecuting authority as a safeguard against the risk of political capture by ‘criminals ... holding positions of influence.’¹⁰⁴ Concluding that Zuma had sought to ‘get rid of Mr. Nxasana at all costs’, Madlanga J explained for the Court that ‘effectively buying out’ the Director of Public Prosecutions constituted an improper infringement on that office’s independence.¹⁰⁵ He further held that Abrahams’s appointment was as a result ‘constitutionally invalid’.¹⁰⁶

Corruption Watch is the only one of these four decisions that deals directly with the authority of the President under the Constitution. It sharply narrows that authority in the cause of democracy. Its reasoning sounds in the same functionalist and consequentialist register as *United Democratic Movement*. Indeed, it is not impossible to imagine judges reasoning that Nxasana’s

¹⁰¹ The relationship between formal constitutional structures and political party systems is usefully explored in S Gardbaum ‘Political Parties, Voting Systems, and the Separation of Powers’ (2017) 65 *American Journal of Comparative Law* 229.

¹⁰² B Weingast ‘The Political Foundations of Democracy and The Rule of The Law’ (1997) 91 *American Political Science Review* 245.

¹⁰³ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC).

¹⁰⁴ *Corruption Watch NPC* (note 103 above) at para 19.

¹⁰⁵ *Corruption Watch NPC* (note 103 above) at paras 26 to 29.

¹⁰⁶ *Corruption Watch NPC* (note 103 above) at para 35.

decision to accept the financial offer from Zuma meant that his departure could not be construed as a termination, but rather as a voluntary action. The Court (correctly, in my view) recognized that the course of dealing between Zuma and Nxasana was salient to an understanding of the latter's final decision, and declined to analyse their deal formalistically. But this tactical and fruitful form of analysis cannot be taken for granted. Again, the US courts' tendency to view the question of removal authority in formalist terms stands in telling contrast.¹⁰⁷

Given the timing of the hearing and ultimate resolution of the case, the decision could have had no direct impact on Zuma's continued ability to hold and to wield power. Indeed, it is reasonable to speculate that Zuma's fall provided a formative backdrop to the Court's deliberations. Rather, the effect of *Corruption Watch* will be felt during later presidencies. Subsequent holders of the office will lack an important tool for controlling the progress of criminal investigations of their own conduct, or that of close allies.

E The tactical challenge of preserving constitutional democracy

The four decisions discussed in this part all concerned the Constitutional Court's response to the problem of state capture. The cases respond in part to the pressure imposed on the value of 'legality'; the latter can be understood as simple compliance with constraints on the behaviour of senior executive branch officials. In addition, they can be glossed in terms of a background worry about the sound operation of 'democracy'; the latter can be understood as the ability of various democratically chosen actors, including members of the legislative minority, to air complaints about government malfeasance and wrong-doing as a necessary epistemic backdrop to renewed democratic contestation. In their different ways, therefore, all four cases concern the problem of how a court can protect constitutional democracy, or what Ginsburg and I have called liberal constitutional democracy, from the potentially disabling shadow of state capture.

If the opinions are united by their cognizance of that shadow, and their awareness of the political realities in which the Court operated, they are also marked by a diversity of analytic methods and theoretical commitments. One way of understanding this diversity – and of linking it to the underlying theme of judicial responsibility for constitutional democracy in the teeth of state capture – is to see that judicial task in the face of democratic backsliding is not a matter of defending abstract principles. It is as a matter of tactics. The Court in these four cases was not following the unfolding logic of a single structural principle or textual command. It was, rather, engaged in a highly contextual, situationally dependent exercise by responding to the many and various ways in which an antidemocratic movement or faction was seeking to stymie institutional levers of legality or democracy. The ways in which democracy can be undermined are plural and unpredictable in their forms and sequencing.¹⁰⁸ As a result, a court trying to maintain constitutional democracy cannot be theoretically rigid, or attend only to one element of institutional design. It must rather be tactical, responding in a pragmatic fashion to the particulars of the situation, and not bound to an *a priori* constitutional theory. Of course, the tolerance for such tactical thinking may vary between different national and socioeconomic contexts. As a pragmatic matter, courts inclined to perform a systemically supportive role may be well advised to cultivate a tolerance for such action.

¹⁰⁷ Huq 'Removal as a Political Question' (note 85 above).

¹⁰⁸ I explore this theme at greater length in Ginsburg & Huq *How to Save a Constitutional Democracy* (note 27 above).

To appreciate the extent to which these decisions are internally heterogeneous, consider three different margins of comparison: the Court's choice of interpretive methodologies; the decisions' effect on the distribution of governmental power across institutions; and the time-frame (long-term versus short-term) of their main effect. First, a range of different methodological approaches are visible across the four decisions discussed in this part. For example, *Democratic Alliance* and *United Democratic Movement* are, at their core, relatively simple glosses upon the constitutional text. Consequentialist analysis is largely absent in *Democratic Alliance*, while it is present but apparently superfluous in *United Democratic Movement*. In contrast, *Corruption Watch* starts from a highly purposive understanding of the Constitution's protection of prosecutorial independence. It generated from that more holistic understanding an inference about the scope of presidential authority to reach side-deals with senior officials. That inference, however, is hard to extract directly from the relevant constitutional text without a dose of contextualizing, pragmatic reasoning. Similarly, the result in *Economic Freedom Fighters* flowed from an understanding of the likely incentives of institutional actors faced with corruption and graft investigations, rather than following narrowly from the constitutional text. Accordingly, the decisions evince a mixture of methodological commitments. Indeed, they sometimes tacked between those commitments in the context of a single decision. It is thus hard to see any singular 'theory' of the separation of powers at work across these cases. The Constitutional Court was not, in other words, reasoning from *a priori*, abstract grounds of constitutional theory to specific outcome in these cases.

Second, the decisions did not have parallel effects on institutional power in the sense of uniformly decreasing executive power or increasing legislative authority. Rather, they had dispersed and distinct institutional logics. At the same time, it is likely that their logics all proved conducive in either the immediate or the long term to limitations on state capture. *Economic Freedom Fighters* and *Corruption Watch* hence strengthened the hand of accountability institutions. The former concerned a Chapter 9 body, while the latter concerned an entity within the executive. In contrast, *Democratic Alliance* and *United Democratic Movement* did not concern directly the distribution of authority between branches. Rather, they both altered the distribution of effectual authority *within* the National Assembly. Moreover, in my view, *United Democratic Movement* is best understood as a case concerning the distribution of power within a dominant *party* (which often operated as an adjunct to the constitutional state) rather than a decision about legislative authority *per se*. It thus demonstrates the Court's awareness of the interaction between constitutional structures and political-party processes.¹⁰⁹ It also evinces a measure of sophistication in understanding how best to shape the latter. It is striking to note that only one decision (*Corruption Watch*) directly concerned the scope of presidential power even though all these decisions are plainly preoccupied with the problem of restraining a seemingly lawless presidency.

These decisions, finally, operated in different timeframes. The immediate effect of *Economic Freedom Fighters*, for example, may have been dampened by the fact that President Zuma had ostensibly agreed to follow the remedies identified by the Public Protector – though the decision clearly reverberated through the general public and ANC rank and file members. Its effect was also long-term, insofar as it insulated and strengthened the hand of Chapter 9

¹⁰⁹ The insight is all the more striking insofar as most post-1945 constitutions contain only 'a brief and general article (or articles) acknowledging the role of political parties in contributing to the formation of the public will in a democracy.' Gardbaum (note 101 above) at 241.

institutions in future fights with the president. In contrast, the effect of *Democratic Alliance* was likely limited to the short-term because it made it easier (rather than more difficult) for a dominant party to punish or to exclude protesting minority or opposition party members from the National Assembly. In the long term, this effect would fade or even reverse. Similarly, in *United Democratic Movement*, there was a quite clear immediate effect in the form of the August 2017 secret ballot on a no-confidence motion lodged against President Zuma. But that decision will likely also continue to shape the ability of a dominant party to exercise control over the legislative process so as to protect an incumbent president from various forms of accountability. Like *Economic Freedom Fighters*, therefore, its effects are temporally plural and complex.

In my view, the best way to read these opinions is in terms of the Constitutional Court's conscious assumption of a role defending what Mogoeng CJ and Madlanga J called 'constitutional democracy.' On the ground, this defence turns out to be not a matter of applying some *a priori* theory of institutional relations under a constitution. Nor is it a matter of defending one particular institution's prerogatives from the threat of another. Rather, it is a pragmatic, context-sensitive exercise in responding to the particular threats presented to legality and democracy as systemic values. Fifteen years ago, Theunis Roux demonstrated that the Court was 'adept' at a 'kind of strategic behaviour.'¹¹⁰ Albeit in relation to quite distinct issues, this form of pragmatism still seems to be alive today. While it would be premature to suggest that the Court has 'succeeded' *tout court*, the evidence certainly suggests that this tactical approach to the separation of powers can play an important, if partial, role in preventing a gradual process of erosion in the quality of constitutional democracy in the context of pervasive, and pernicious, state capture.

IV CONCLUSION: IMPLICATIONS FOR SEPARATION OF POWERS THEORY

The Constitution, as glossed by the Constitutional Court, reflects a commitment to the separation of powers that works cunningly to protect the Founding Provision's guarantee of a government designed 'to ensure accountability, responsiveness and openness'.¹¹¹ These goals of constitutional design map closely onto the purposes of the separation of powers in other constitutional systems.¹¹² It is therefore reasonable to consider the South African case law as a lens to consider the way in which different articulations (or conceptions) of the separation of powers can be implemented. The latter question has special resonance for American constitutionalism, where profound disagreements on fundamentals still characterize scholarly and jurisprudential conversations on the separation of powers.¹¹³ In concluding, therefore, I draw upon the South African jurisprudence mapped in Part III to critique American theories of the separation of powers.

In the American context, the dominant approach to the separation of powers (particularly among the Justices of the US Supreme Court) is a formalist one. This approach understands each branch as a distinctive and stand-alone entity with a lexically defined set of powers, usually

¹¹⁰ Roux (note 25 above) at 93.

¹¹¹ Constitution, s 1(d). See also Constitutional Principle VI in Schedule 4 to the Interim Constitution; *Certificate of the Constitution of Republic of South Africa* [1996] ZACC 26, 1996 (10) BCLR 1253 (CC) at para 45.

¹¹² A Huq & J Michaels 'The Cycles of Separation of Powers Jurisprudence' (2016) 126 *Yale Law Journal* 346, 382. For a treatment of the separation of powers under UK law, see NW Barber, *The Principles of Constitutionalism* (2018).

¹¹³ The debates are canvassed and dissected in A Huq 'Separation of Powers Metatheory' (2018) 118 *Columbia Law Review* 1517, from which the following descriptions are drawn.

derived from textual exegesis or inference of the original meaning of the first three Articles of the Constitution.¹¹⁴ The result is a judicial effort to discern answers to unexpected institutional design questions in the inchoate and murky waters of late eighteenth-century constitutional debates. Perhaps the leading (or at least the most sophisticated) scholarly criticism points out that it is often not possible to identify *ex ante* a specific government action as legislative, executive, or judicial because there is commonly an observational equivalence between those forms of state action. Scholars working in this vein are sceptical of any approach that treats the ‘relevant constitutional language ... as a set of descriptive labels, a set of terms like “executive”, “state”, or “judicial” (terms that seem ripe for definition or drawing boundaries), [such that] texts are then matched against the challenged practice under review’.¹¹⁵ They are sceptical that the ‘branch’ is the truly relevant unit of analysis if one wishes to understand and predict the actions of official actors.

The South African experience suggests that both formalism as a separation-of-powers strategy, and the highly sceptical response to formalism, are both flawed. The Constitutional Court has worked with reasonable success to preserve constitutional democracy as a going concern by tacking between different methodological registers rather than allowing the text or some sort of ‘original understanding’ to dominate its reasoning.¹¹⁶ The success of this judicial enterprise has two implications for the American debate. First, it suggests that formalism’s rigid focus on the three constitutional branches defined *a priori* in relation to original understanding may well have perversely destabilizing consequences. It is hard to see how formalist reasoning could conduce to the kind of thoughtfully tactical, and hence effective, interventions as those mapped in Part III. In addition, the Constitutional Court’s willingness to account for the rule of intra-branch and external actors, such as political parties, starkly contrasts with the myopic assumption of American formalism that analysis must proceed in a rigidly atomistic manner, in which branches provide the basic and indissoluble blocks of constitutional theory. Separation-of-powers formalism, in short, would fail the task taken on by the Constitutional Court.

At the same time, the Constitutional Court’s response to the Zuma presidency suggests that it would be premature to lapse into unmitigated scepticism about the separation of powers as a framework for analysing the production of systemic public goods such as the rule of law and democracy. Such scepticism is belied by the ability of the Constitutional Court to identify legal interventions that serve a useful purpose, and then to craft decisions that select for immediate and long-term effects in ways that are plausibly responsive to the project of protecting constitutional democracy.

The cases canvassed above underscore a different, more useful way of thinking about the purposes of governmental design decisions. They suggest that to the extent that the separation of powers is looked to as safeguard of constitutional democracy, it might be best comprehended as a pool of institutional resources to be leveraged in the face of mutative challenges to that order. That pool is institutionally diverse. It encompasses not just the three branches but also Chapter 9 institutions, the Director of Public Prosecutions and organizations that cut across all branches and organs of state, such as political parties. Institutional pluralism of this sort gives the Court a

¹¹⁴ The standard citation for an academic defence of this theory is S Calabresi & S Prakash ‘The President’s Power to Execute the Laws’ (1994) 104 *Yale Law Journal* 541.

¹¹⁵ V Nourse ‘Toward a New Constitutional Anatomy’ (2004) 56 *Stanford Law Review* 835, 841; ME Magill ‘Beyond Powers and Branches in Separation of Powers Law; (2001) 150 *University of Pennsylvania Law Review* 603.

¹¹⁶ Originalism, in any case, has not made inroads as an interpretive methodology beyond the United States. D Fontana ‘Comparative Originalism’ (2009) 88 *Texas Law Review* 189.

range of options for responding to diverse forms of democratic backsliding: different redoubts of resistance to democratic backsliding can be protected. This matters because modern challenges to constitutional democracy tend to be opportunistic and unpredictable in their approaches. Attacks on democracy, that is, require no robust theory to be effective. Instead, these challenges take advantage of whatever weaknesses exist in a given constitutional structure.

Accordingly, the judicial enforcement of the separation of powers to promote constitutional democracy must also be agile, responsive, and provisional, rather than a matter of static relations calibrated by *a priori* theory, therefore, the separation of powers doctrine should be comprehended as a fluid (even open) set of concepts and potential judicial moves. Contra the sceptics, this project can bear fruit by enlarging the space for democracy's allies (often in the parliamentary opposition, and frequently mobilized by a fear of being excluded permanently from power). Even if courts cannot save democracy on their own, that is, they can create political space in which others can do so. The greater the ensuing flexibility, the greater the chance that a court sympathetic to democratic norms might find ways to delay and defer state capture long enough for popular mobilization to neutralize more directly that threat.¹¹⁷ If there is no guarantee of success, recent South African experience nonetheless suggests the project is hardly one that is doomed to failure.

¹¹⁷ To be clear, I do not think that a High Court will necessarily be committed to democracy, or will be willing to take risks to defend democracy. A Huq 'Democratic Erosion and the Courts: Comparative Perspectives' (2018) 93 *New York University Law Review Online* 21. In the United States, for example, the Supreme Court as currently constituted is probably more hostile than friendly to democratic norms, specifically through its willingness to enable and even accelerate concentrations of executive and corporate power; its unwillingness to tolerate campaign finance reform; its openness to restrictions on the franchise and self-dealing by political elites in the form of partisan gerrymandering; its willingness to allow aligned political elites to transform policy disputes into novel constitutional problems (eg, the challenges to the Affordable Care Act); and its reluctance to rein in police and security services who overstep their public safety mission, and instead curb free speech or assembly rights. One of the open questions in American constitutionalism is the extent to which democratic majorities – if allowed to gain power – will tolerate such an antidemocratic and even unjust institutions.