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Understanding South Africa's Aspirational Constitution As Scaffolding

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Understanding South Africa's Aspirational Constitution As Scaffolding

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AUTHOR'S NOTE: First, I'd like to thank Steve Ellmann for setting me on my path, then lighting the way (as he might say) and constantly creating platforms and environments in which I could safely test out new ideas. Second, I wish to praise the entire *New York Law School Law Review* editorial team for putting together a fantastic conference and, in particular, Ben Eisenstein, Justin Offermann, Elizabeth Stevens, and Gerard Quinn for dramatically reworking my initial text and burnishing the citations that support its various propositions. I really like how it reads.

I. THE LAY OF THE LAND

Quite a large number of contributors to the literature on comparative constitutionalism have noted that over the past twenty years, many new one-party-dominant constitutional democracies have suffered from similar problems of clientelism, cronyism, and corruption.¹ This troika invariably stunts both development² and growth.³ The political-legal science literature thus provides an eminently reasonable (if partial) explanation for the many false starts experienced by post-authoritarian, one-party-dominant constitutional democracies.

The finest contributions to this discourse remind us that when we undertake such analysis, we must have (a) a firm handle on a particular country's extant legal doctrine (few systems arise *ex nihilo*); (b) a nuanced appreciation for the political, social, and economic environment in which a new constitutional order is situated (all substructures are not alike); and (c) the ability to recognize that established democratic republics suffer similar ills.⁴

On the other side of the South African constitutional jurisprudential literature are, for lack of a better locution, the transformative constitutionalists.⁵ The tendency here is to assume that an aspirational document can magically pull a bunny out of a hat. The bunny? A radically transformed society in which all members have both (a) the ability to appear in public without shame; and (b) those necessities of existence deemed necessary by all citizens to pursue a life worth valuing. A Constitutional Court that handles some thirty-five cases a year can neither alter dramatically the economic and social substructures of a highly stratified polity nor contribute

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1. See Sujit Choudhry, *'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 7–8, 22–24, 32–33 (2009); see also Heinz Klug, *Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision Making*, 3 CONST. CT. REV. 1, 2–4 (2010).
 2. On how deeply entrenched, and substantively unfair, cultural, social, economic, and political practices undermine the ability of individuals, and disadvantaged groups, to pursue lives worth valuing, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000).
 3. See GOLDMAN SACHS, *TWO DECADES OF FREEDOM: WHAT SOUTH AFRICA IS DOING WITH IT, AND WHAT NOW NEEDS TO BE DONE* (2013); WORLD BANK GROUP [WBG], *SOUTH AFRICA ECONOMIC UPDATE: FOCUS ON INEQUALITY OF OPPORTUNITY* 15–39 (2012).
 4. Theunis Roux's work best reflects this orientation. See Theunis Roux, *The South African Constitutional Court's Democratic Rights Jurisprudence*, 5 CONST. CT. REV. 33, 33–38, 48–54 (2014). See generally HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000); THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005* (2013). When comparative law scholars cherry pick, they generally lose sight of the country-specific dynamics that give rise to what appear to be similar judicial doctrines. On the evils of cherry-picking, see John Bell, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 235, 236–48 (Andrew Harding & Esin Örücü eds., 2002); Günter Frankenburg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 414–26 (1985).
 5. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146, 150 (1998). Klare's essay is the urtext for transformative constitutionalists. Transformative constitutionalism captures "a long-term project of constitutional enactment, interpretation, and enforcement [by the judiciary]." *Id.*

substantially to the creation of a functional democracy unless *three* basic requirements for a just social order are already largely in place.⁶

A constitution—that contains innovatively designed institutions and a justiciable Bill of Rights—can assist a nation in starting over. However, no matter how lovely a new constitution (or “basic law”)⁷ may look in print, it cannot provide (a) a *rule of law culture* reciprocally related to a robust civil society, (b) *political accountability* through regular elections that allow citizens to kick the bums out and break up patronage arrangements, or (c) *effective bureaucracies* that deliver basic services and coordinate daily life. Only once these three basic requirements are in place can a constitutional democracy realize the increasingly egalitarian economic and social arrangements needed to bring about genuine liberation.⁸ That seems rather obvious. Yet the dazzling array of promises made in South Africa’s Constitution can, understandably, distort one’s perception of what a new constitution in a post-authoritarian, putatively multi-party, democracy can do.

This essay begins where my last book, *The Selfless Constitution*, left off.⁹ That book’s coda—“The Crooked Timber of Democracy”—served as a reminder of what we could or could not expect from this new constitutional order within a span of a mere twenty years.

Let’s start with the primary purpose of constitutions. We forget that these documents begin as peace treaties of quite a unique kind: (a) highbrowed, often detailed, *social contracts*; and (b) *bargains*, hard struck, after military engagement, civil strife, or long, drawn out deliberations. As bargains, these efforts and outcomes tend to produce conservative documents. No one gets everything that they desire. As a result, a substantial portion of the status quo is preserved. That’s not always so bad. Most of that which gives meaning to our lives lies elsewhere, not in political demonstrations or rights-based constitutional litigation, but in the daily exchanges that pre-exist constitutional orders. If new constitutional orders do anything well, then they improve those daily exchanges. Despite the fact that life in South Africa still bears a remarkable resemblance to life on the plantation, this nation’s velvet revolution has *not* left the country where it began twenty years ago. The enhanced equality and dignity many South Africans enjoy today is a function of dramatic changes made to and through their basic law.

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6. See generally FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* (2014); HENRY KISSINGER, *WORLD ORDER* (2014).
 7. Basic law is another term used to refer to a constitution. *Constitution Definition*, DUHAIME’S LAW DICTIONARY, <http://www.duhaime.org/LegalDictionary/C/Constitution.aspx> (last visited Apr. 9, 2016). Germany refers to its Constitution as the basic law. *The Basic Law*, GERMANY.INFO, http://www.germany.info/Vertretung/usa/en/06__Foreign__Policy__State/04__Political__System/02__Basic__Law/__Basic__Law.html (last visited Apr. 9, 2016).
 8. See Sanele Sibanda, *Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty*, 22 STELLENBOSCH L. REV. 482, 485–94 (2011); see also Sanele Sibanda, *Not Quite a Rejoinder: Some Thoughts and Reflections on Michelman’s “Liberal Constitutionalism, Property Rights and the Assault on Property”*, 24 STELLENBOSCH L. REV. 329 (2013).
 9. STU WOOLMAN, *THE SELFLESS CONSTITUTION: EXPERIMENTALISM AND FLOURISHING AS FOUNDATIONS OF SOUTH AFRICA’S BASIC LAW* (2013).

UNDERSTANDING SOUTH AFRICA'S ASPIRATIONAL CONSTITUTION AS SCAFFOLDING

Political elites are held *partially* accountable. That limited political accountability occurs largely within African National Congress (ANC) party structures that feel some pressure from courts, Chapter 9 institutions, small oppositional parties, the media, international non-governmental organizations, 11,000 largely peaceful protests recorded per annum,¹⁰ and a growing student movement currently roiling the country.¹¹ That ain't nothing. After twenty years of such indirect political pressure, the state now delivers electricity to 84.7 per cent of the population, provides social welfare grants to 16.6 million of 51.8 million inhabitants (a jump from 5.9 *per cent* in 1996 to 32 *per cent* in 2014),¹² and has created over three million new housing units¹³ while increasing the national budget allocation for housing by 10.3 per cent.¹⁴

Of course, here the hands go up: "That's not the South Africa with which we should be content." That's true. However, we must admit that South Africa has yet to arrive at its first staging post, let alone its last. *That proposition will remain true for quite some time.*

How best then to understand the South African Constitution (or any other constitution)? The Constitution is a form of scaffolding. No recipe yet exists for an immortal republic. But if a constitutional democracy wishes to last more than a few decades, several pre-conditions must obtain. First, *the rule of law* in its most basic form: not only must governors and governed be subject to the same rules, but the citizens themselves also ought to be subject to the same rules vis-à-vis one another. Second, a constitutional democracy ought to ensure *political accountability*. The ability to "kick the bums out" now and again may or may not lead to better policies or outcomes in the short term, but it does help to prevent Tammany Hall patronage systems from taking root. Moreover, political accountability operates as the best guarantor that public servants will serve the public irrespective of who holds power at any given moment. Third, a functional constitutional democracy requires *the provision of basic goods and essential infrastructure by a competent, depoliticized civil service*. A country needs properly trained security services, an adequate system of public education, decent roads and ports for personal and commercial transport, proper document control, and an effective system of taxation by a state revenue service. In the absence of such public goods, things will either fall apart or muddle along to everyone's dissatisfaction. Fourth, *a truly civil, civil society*—married to an entrenched rule of law culture—means that the expectation of procedural fairness from the state and its public servants is inextricably linked to the development of a

10. See *Have Protests in South Africa Nearly Doubled Since 2010?*, AFR. CHECK (July 22, 2015), <https://africacheck.org/reports/have-protests-in-south-africa-nearly-doubled-since-2010/>.

11. See Ryan Lenora Brown, *The Student Protests Rocking South Africa are About More Than Tuition*, FOREIGN POLICY (Oct. 30, 2015), <http://foreignpolicy.com/2015/10/30/the-student-protests-rocking-south-africa-are-about-more-than-tuition/>.

12. GOLDMAN SACHS, *supra* note 3, at 4.

13. See Saskia Greyling & Sophie Oldfield, *Housing Waiting Game*, IOL NEWS (Sept. 11, 2015), <http://www.iol.co.za/dailynews/opinion/housing-waiting-game-1914515>.

14. GOLDMAN SACHS, *supra* note 3, at 28.

civil society in which individuals and groups treat other individuals and groups with dignity and mutual respect.¹⁵ The reciprocal relationship between the rule of law and a robust civil society cannot be ignored.¹⁶ However, this reciprocal relationship is particularly difficult to realize in an inegalitarian polity with severely limited amounts of mutual trust, loyalty, friendship, kinship, and cooperation.

Why has South Africa not done better in terms of the realization of its imagination? *It looks like a classic problem of collective action.*¹⁷ First, the large stores of social capital required to foment relatively radical change to apartheid-era economic, cultural, and legal structures do not yet exist.¹⁸ Second, the inability to form new bridging networks and bonding networks prevents the creation of new parties and social institutions that would challenge the still dominant parties and groups that brokered the Constitution.¹⁹ Both problems, however, are fundamentally political. Little can be done through the tenets of the basic law, and, in particular, the Bill of Rights, to alter the current, unstable, unsustainable terrain.²⁰

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15. See *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 41 (“[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership [in] particular groups.”).
 16. See Stu Woolman, *On the Reciprocal Relationship Between the Rule of Law and Civil Society*, 2015 ACTA JURIDICA 374, 384–90.
 17. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1–2 (1965) (“[I]t is *not* in fact true that the idea that groups will act in their self-interest follows logically from the premise of rational and self-interested behavior. . . . Indeed, unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational . . . individuals will not act to achieve their common or group interests.*”).
 18. See Stu Woolman, *Freedom of Association*, in 3 CONSTITUTIONAL LAW OF SOUTH AFRICA 44-1, 44-9–44-30 (Stu Woolman et al. eds., 2d ed. 2008).
 19. Tshepo Madlingozi has explained, in part, why the solidarity that held together the anti-apartheid movement quickly evaporated after 1994. See Tshepo Madlingozi, *Post-Apartheid Social Movements and the Quest for the Elusive ‘New’ South Africa*, 34 J.L. & Soc’y 77, 80–88 (2007). Madlingozi demonstrates that despite the solidarity and the victory of the ANC and other groups that had cooperated within the United Democratic Front, the ANC, once in power, moved away from mass participatory democracy. Indeed, the ANC’s politics serve a new elite and consciously strive to demobilize popular organizations that may oppose ANC policies. *Id.*
 20. What are some of the most prominent features of that rough terrain? South Africa, circa 2015, had: (i) a one-party-dominant democracy undermined by clientelism, cronyism, and corruption, see Choudhry, *supra* note 1, at 7–8, 22–24, 32–33 (2009); (ii) an official unemployment rate of 25.5% (this figure discounts persons who never sought or have stopped seeking employment, thus a real rate of 34.4%), see *South Africa Unemployment Rate*, TRADING ECON., <http://www.tradingeconomics.com/south-africa/unemployment-rate> (last visited Apr. 9, 2016); (iii) a meager growth rate that has fluctuated between 1.3%, negative 1.3%, and 0.7% over the first three quarters of 2015, see *Economic Growth*, STAT. S. AFR., http://www.statssa.gov.za/?page_id=735&id=1 (last visited Apr. 9, 2016); (iv) one of the highest Gini coefficients in the world, see *Income Inequality and Limitations of the Gini Index: The Case of South Africa*, HUM. SCI. RES. COUNCIL, <http://www.hsrc.ac.za/en/review/hsrc-review-november-2014/limitations-of-gini-index> (last visited Apr. 9, 2016); (v) a population in which one in three black women has HIV and up to 55% regularly experience intimate partner violence, see Stu Woolman et al., *Nowhere To Run, Nowhere to Hide: The Absence of Public Policy as to How Health Professionals Should Address Intimate Partner Violence Abrogates the Rights to Healthcare and Bodily Integrity Under the South African Constitution*,

II. THE BASIC LAW AS SCAFFOLDING

The Selfless Constitution engaged problems of change in a manner designed to realize the lofty goals to which the Constitution aspires. That work demonstrated that individuals, associations, and a constitutional democratic order are best placed to make constructive changes when (a) they are understood as radically heterogeneous, naturally and socially determined entities; and (b) they, so understood, can overcome extant constraints through trial and error, decent feedback, and the provision of the material conditions and the immaterial conditions necessary for individuals to pursue lives worth valuing.

This short intervention has a decidedly different aim. Consistent with Jürgen Habermas's prescient analysis of the difficulties of establishing successful constitutional democracies,²¹ this article suggests that we employ a more modest metric for the evaluation of new constitutional democracies: the basic law as scaffolding.

Almost all newly minted constitutional democracies suffer from (a) a thin civil society that makes a robust rule of law culture difficult to vouchsafe; (b) a lack of political accountability; and (c) weak administrative organs of state capable of delivering essential goods.²² The "scaffolding" thesis requires that those three pathologies be cured before an aspirational constitutional party gets started.

22 CARDOZO J.L. & GENDER 29 (2016); (vi) an educational system that ranks near the very bottom of developing countries, *see generally* BRAHM FLEISCH, PRIMARY EDUCATION IN CRISIS: WHY SOUTH AFRICAN SCHOOLCHILDREN UNDERACHIEVE IN READING AND MATHEMATICS; *South Africa's Education System vs the World*, BUSINESSTECH (May 14, 2015), <http://businesstech.co.za/news/lifestyle/87310/south-africas-education-system-vs-the-world/>, and in which only 15% of university students graduate, *see* Nontobeko Mtshali, *Only 15% of SA University Students Graduate*, IOL (June 13, 2013, 11:20 AM), <http://www.iol.co.za/lifestyle/family/kids/only-15-of-sa-university-students-graduate-1.1531809>. Compare South Africa to two European democracies. Spain only arose out of the shadows of Franco's dictatorship forty years ago. *See Francisco Franco*, HISTORY.COM, <http://www.history.com/topics/francisco-franco> (last visited Apr. 9, 2016). Greece, after toppling a military junta in 1974, actually held a referendum as to whether it should be governed as a monarchy or a democracy. *See* Nikos Chrysoloras & Paul Tugwell, *What Will Greeks Vote On? The Referendum Question*, BLOOMBERGBUSINESS (June 27, 2015, 10:52 AM), <http://www.bloomberg.com/news/articles/2015-06-27/what-will-greeks-vote-on-the-referendum-question-ibexrhf0>. The deep depressions in both of these European democracies are a function of the limited time available to create a civil society governed by the rule of law, political accountability, and strong bureaucracies capable of weathering such storms as the 2008 global meltdown. And what of the European Union? *See generally* EUROPE'S JUSTICE DEFICIT? (Dimitry Kochenov et al. eds., 2015). The draft European Constitution for a twenty-member federation flopped—after just two "No" referenda results. *See Dutch Say 'Devastating No' to EU Constitution*, THE GUARDIAN (June 2, 2005, 6:32 AM), <http://www.theguardian.com/world/2005/jun/02/eu.politics>.

21. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 2–3 (William Rehg trans., 1996).

The development of constitutional democracy along the celebrated "North Atlantic" path has certainly provided us with results worth preserving, but once those who do not have the good fortune to be the heirs of the Founding Fathers turn to their own traditions, they cannot find criteria and reasons that would allow them to distinguish what is worth preserving from what should be rejected.

Id. While academics the world over were having a democracy and human rights parade, Habermas predicted what actually transpired here, there, and everywhere over the next two decades. Few listened.

22. *See* Marc F. Plattner, *Is Democracy in Decline?*, 26 J. DEMOCRACY 1, 7–10 (2015).

A. Constitutions as Peace Treaties, Interim Social Contracts, and Scaffolding

The South African Constitution is best understood as a peace treaty and an initial stab at a social contract. It begs credulity to believe that a peace treaty and an initial stab at a social contract can deliver substantially more than a basic law as scaffolding.

“The real story” behind the Constitution provides a partial explanation. Super-elite “white” capital finally found South Africa ungovernable in the 1980s—as the United Democratic Front had successfully planned. The treaty-making talks between the super-elites who wished to have capital controls lifted and the ANC’s broad-based coalition who wished to see apartheid buried allowed those elites to take their capital elsewhere. In return, the ANC secured the levers of political power. Thirty years on, against the background of global events (the severe economic contraction of South Africa’s major trading partners) and domestic miscues and malfeasance (the adoption by the ANC of a patrimonial approach to governance), the old deal that delivered the Constitution has frayed considerably.

Yet the old deal delivered a number of important items. First, it gave South Africa a peaceful transition of political power. That’s no small thing when you consider the number of nation-states that have fallen apart in the last twenty years as they embarked upon the conversion from authoritarian rule to democratic regimes. Second, it provided the platform upon which to erect a still viable political order.

The most critical and creative piece of institutional design at the Multi-Party Negotiating Forum took the form of thirty-four Constitutional Principles (CPs) in the Interim Constitution.²³ The purpose of these principles was to place meaningful constraints on the ANC’s ability to draft the final Constitution entirely to its liking in return for equally meaningful constraints on the National Party’s (NP) ability to refuse to engage, or to hold out for better terms. In exchange for these constraints on the scaffolding, the ANC and the NP were placated by three distinct processes. First, the Interim Constitution would go into effect after the first multi-racial elections, and parties would be proportionally represented in Parliament.²⁴ Second, the newly elected representatives in both Houses of Parliament would sit as a Constitutional Assembly and be required to produce the text of a final Constitution within two years.²⁵ Third, an independent Constitutional Court would have the power to ensure that the final Constitution (“New Text”) satisfied the CPs.²⁶ This extraordinary piece of lawmaking helps us better understand South Africa’s peaceful transition on April 27, 1994.

The Constitutional Assembly discharged its responsibilities in May 1996. It remained for the Constitutional Court to assess the New Text’s compliance with the CPs. The Court held, in the *First Certification Judgment*, that the Constitutional

23. See S. Afr. (INTERIM) CONST., 1993, sched. 4.

24. *Id.* §§ 40, 48, 88.

25. *Id.* § 73.

26. *Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) at paras. 1–23, 31.

Assembly's New Text failed to comply with the CPs.²⁷ It did so on extremely limited grounds.²⁸

Several grounds for refusal fit snugly into the thesis that the primary purpose of South Africa's Constitution is scaffolding. The Court held that the CPs required special procedures (in addition to special majorities) for certain forms of constitutional amendments;²⁹ ensured that the process of removing (through special majorities) the Public Protector and the Auditor-General guaranteed genuine independence of these Chapter 9 institutions;³⁰ demanded that the new Constitution specify the measures by which the Public Service Commission (PSC) would remain independent and impartial,³¹ and declared that no act could be declared beyond judicial review (unless it was made part of the constitutional text itself).³²

The Constitutional Court, far from dictating the future political, social, and economic terrain in any meaningful sense, created the conditions for a robust form of self-governance heretofore unknown in South Africa. The Court's insistence on special procedures for (a) amendments to the Bill of Rights (with its clear commitment to subjecting private power as well as public power to its dictates) or (b) removal of the Public Protector and the Auditor-General meant that the new state would ensure that those who govern are subject to the same strictures as those who are governed and to a degree of accountability beyond the intermittent exercise of the franchise by the electorate. The *First Certification Judgment* concerns itself with the first two lineaments of the basic law as scaffolding. The third and most unheralded component, the creation of effective administrative organs of state that would serve all South Africans equally, lay beyond its immediate purview.

B. Scaffolding and Our Commitment to the Rule of Law

Michael Walzer conjures up what we *all* expect of any constitution meant to initiate the creation of a just and well-ordered legal regime:

I want to begin my argument by recalling a picture (. . . late in . . . 1989)
It is a picture of people marching in the streets of Prague; they carry signs, some of which say, simply, 'Truth' and others 'Justice.' When I saw the picture, I knew immediately what the signs meant – and so did everyone else who saw the same picture. . . . Is there any recent . . . post-modernist account, of . . . language that can explain this understanding and acknowledgement? How could I . . . join so unreservedly in the language game or the power play

27. *See id.* at paras. 482–84.

28. The Constitutional Court had no choice but to (a) reject the power of local government to impose excise taxes; (b) find that Chapter 7's provisions for local government powers were far too scanty; and (c) conclude that the collective bargaining rights in section 23 of the New Text failed under CP XXVIII to protect adequately the rights of individual employers. *See id.* at paras. 63–69, 299–330.

29. *Id.* at para. 156.

30. *Id.* at paras. 163, 165.

31. *Id.* at paras. 273–78.

32. *Id.* at para. 149.

of a distant demonstration? The marchers shared a culture with which I was largely unfamiliar; they were responding to an experience I had never had. And yet, I could have walked comfortably in their midst. . . .

. . . .

. . . . What they meant by the “justice” inscribed on their signs . . . was simple enough: an end to arbitrary arrests, equal and impartial law enforcement, the abolition of the privileges and prerogatives of the party elite—common, garden variety justice.³³

That’s exactly what motivated the Constitutional Court in *First Certification Judgment*. The Court ratified virtually all of the Constitutional Assembly’s manifold cracks at levelling a radically asymmetrical socioeconomic playing field. In addition, it strengthened, ever so slightly, institutions and procedures designed so that all denizens of South Africa might better cooperate with their compatriots and the persons elected to govern them.

South African courts have found large numbers of statutory provisions, regulations, and rules of common law and customary law unconstitutional.³⁴ Many of these laws hailed from the days of apartheid and colonial rule. Besides purging apartheid and colonial-era law from the books, the Court has spent significant energy in establishing a baseline for (coordinated) action to which everyone—public officials and private actors alike—could adhere: the rule of law (or legality) doctrine. This doctrine ensures that all state action (a) is authorized by law; (b) applies equally to the governors and to the governed; (c) is neither arbitrary nor irrational; and (d) draws its power from the Constitution itself.³⁵

While various commentators have explored the potential limitlessness of power the rule of law doctrine vests in South Africa’s courts,³⁶ what concerns us here is its connection to scaffolding. In short, the rule of law doctrine primarily concerns itself with that old familiar Lockean nostrum that without law there can be no freedom.

For example, the Constitutional Court, in *Democratic Alliance v. President of the Republic of South Africa*, further entrenched the rule of law doctrine when it concluded

33. MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 1–2 (1994).

34. See, e.g., *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at paras. 95, 136 (finding male primogeniture with respect to inheritance unconstitutional and inconsistent with the dignity and equality rights of women); *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 151 (finding capital punishment unconstitutional).

35. See *Pharm. Mfrs. Ass’n of S. Afr.* 2000 (2) SA 674 (CC) at para. 39 (quoting STANLEY A. DE SMITH ET AL., *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 14–15 (5th ed. 1995)).

36. See Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, in 1 *CONSTITUTIONAL LAW OF SOUTH AFRICA*, *supra* note 18, at 11–1; Alistair Price, *The Content and Justification of Rationality Review*, in *IS THIS SEAT TAKEN? CONVERSATIONS AT THE BAR, THE BENCH AND THE ACADEMY ABOUT THE SOUTH AFRICAN CONSTITUTION* 37 (Stu Woolman & David Bilchitz eds., 2012) [hereinafter *IS THIS SEAT TAKEN?*]. But see *Governing Body of the Juma Musjid Primary Sch. v. Essay* 2011 (8) BCLR 761 (CC) at paras. 57–60 (placing *negative* duties on private actors with regard to the right to a basic education, but distinguishing these duties from the more onerous *positive and negative* obligations of public officials).

that the President had acted *irrationally* in making a significant appointment required by the Constitution.³⁷ The *Democratic Alliance* Court placed substantial emphasis on the need for the National Director of Public Prosecutions to be *independent* and conduct her work—including assessments of the legality of actions taken by government officials—without fear, favor, or prejudice.³⁸

More recently, in *South African Broadcasting Corporation v. Democratic Alliance*, the Supreme Court of Appeal found that coordinate branches of government and various organs of state were obliged to take cognizance of adverse findings by the Public Protector.³⁹ The Public Protector had produced a detailed report that revealed fraud, deception, and gross misconduct on the part of the SABC Board, its Chief Operating Officer (COO), and the Minister of Communications.⁴⁰ The duplicity of the COO took place on such a grand scale that the Public Protector recommended his removal—along with a number of other remedies.⁴¹ The Minister and the SABC countered that such fraud had not occurred, proceeded to reinstate the COO, and ignored the remainder of the Public Protector's findings and recommendations.⁴² The Supreme Court of Appeal would have none of it. Indeed, it spent the better part of its judgment recounting the COO's duplicity and the blatant disregard for the law by the Minister and the SABC Board.⁴³ What truly galvanized the court was the refusal by the Minister and an organ of state to recognize that the Public Protector plays a critical role in maintaining the rule of law by standing guard over the guardians.⁴⁴ Sustained disregard for the findings of Chapter 9 institutions would render their constitutionally-mandated role superfluous.⁴⁵ An agitated Supreme Court of Appeal held that the rule of law required that the Public Protector's findings and remedies must be viewed as binding, unless they are subsequently set aside on review by a court of law.⁴⁶

These cases stand for a number of rather modest propositions. *First*, both appellate courts remain committed to the proposition that the Constitution represents a signal break from the apartheid state's culture of authority and the embrace of a culture of justification. *Second*, the aspirations set out in the Constitution are only as good as every citizen's commitment to making good on their promise. As the

37. 2013 (1) SA 248 (CC) at para. 86.

38. *See id.* at paras. 49, 56.

39. [2015] ZASCA 156 (SCA) at paras. 52–53.

40. *Id.* at para. 5.

41. *See id.* at para. 7.

42. *See id.* at paras. 9–11.

43. *See id.* at paras. 6–21.

44. *See id.* at paras. 55–60.

45. *Id.* at paras. 47, 56. Other Chapter 9 institutions of import created by the Constitution (in Chapter 9) are the Auditor-General, the Human Rights Commission, the Commission for Gender Equality, and the Independent Electoral Commission. *See S. AFR. CONST.*, 1996, §§ 181–94.

46. *S. African Broad. Corp.*, [2015] ZASCA 156 at para. 53.

Constitutional Court correctly noted in *Shilubana v. Nwamitwa*, the responsibility for the delivery of those material and immaterial goods necessary for flourishing rests most often with the citizens themselves and the associations, networks, and communities that fundamentally shape their lives.⁴⁷ However, since citizens rarely enact new law via direct democracy, the transformation of South African society lies almost entirely in the hands of elected officials and political appointees. To that end, these representatives must establish the most rudimentary of commitments to the rule of law. As it was in 1996, so it is in 2016.

Moreover, the courts' appreciation for where genuine lawmaking and law-changing occurs allows for an appreciable degree of self-correction by the parties themselves. The Constitutional Court, in *Residents of Joe Slovo Community v. Thubelisha Homes (Joe Slovo II)*, reflected its commitment to this modest manifestation of rule of law rulemaking when it agreed to discharge a previous order when the parties subsequently arrived at a more desirable arrangement: "[I]t seems illogical for this Court to have the power to vary an order issued on the basis that it was just and equitable when changing circumstances require, but not to have the power to discharge an order when the dictates of justice and equity require."⁴⁸

The Court does not abdicate its role in general norm-setting. Neither does it close down the space for political participation that meaningful engagement orders in cases like *Joe Slovo II* invite.⁴⁹ That's the basic law as scaffolding.

C. Scaffolding and Political Accountability

Do we possess evidence that the "basic law as scaffolding" thesis explains the Court's behavior in terms of political accountability? What if the *First Certification Judgment* Court had allowed simple legislative majorities to dismiss the Public Protector and the Auditor-General? The Public Protector and the Auditor-General could hardly watch the watchers if they knew that any threat that they might pose to members of the ruling party (or coalition) could result in their own ouster. The *First Certification Judgment* Court put paid to this counterfactual. As we saw above in *South African Broadcasting Company v. Democratic Alliance*, the Public Protector and the Auditor-General have, through naming and shaming, done exactly what the Constitutional Court had hoped that they would do.

D. Scaffolding and the Administration of the South African State

South Africa lacks, in palpable respects, the impersonal administrative state developed two centuries ago in France and two millennia back in China.⁵⁰ Yes, the South African Revenue Service is an appropriately aggressive entity that collects the necessary revenue for the discharge of the state's many responsibilities. The Reserve

47. See 2009 (2) SA 66 (CC) at paras. 54–55.

48. *Residents of Joe Slovo Cmty. v. Thubelisha Homes* 2011 (7) BCLR 723 (CC) at para. 24.

49. See *id.*

50. See FUKUYAMA, *supra* note 6, at 17.

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Bank and the Treasury have generally acted in a fiscally responsible manner. In addition, the Constitution has enabled the national government to intervene when provincial authorities have failed to discharge their duties.

Do we possess further evidence that the basic law provides scaffolding for the administration of the state? In *Glenister v. President of the Republic of South Africa*, the Constitutional Court concluded that without an independent, corruption-fighting unit, the executive branch of government could not fulfill its duties under section 7(2) of the Constitution.⁵¹ Section 7(2) requires the state to promote, to protect, and to respect the various substantive provisions found in the Bill of Rights.⁵² The *Glenister* Court did not say how this unit would accomplish this task, only that, as scaffolding, it would be well-placed to vouchsafe fundamental rights.

E. Constitutions Create the Space for Politics; They Do Not Replace Politics

Prior to the U.S. Supreme Court's initial review of the Patient Protection and Affordable Care Act,⁵³ Jack Balkin noted that a majority of American constitutional law academics expected an extremely conservative bench to begin the process of gutting it.⁵⁴ That did not occur. As Balkin explained:

In civics class we learn that federal courts decide whether laws passed by Congress and the state legislatures are constitutional. . . . That is certainly true, but it [is] not the whole story. In fact, the most important function of the federal courts is to legitimate state building by the political branches. That is the best way to understand what happened in the Health Care Case.⁵⁵

But Balkin wasn't just fishing about (in 2012) to find anecdotal evidence in the U.S. Supreme Court's recent jurisprudence to prop up his thesis. Just three years later, in *King v. Burwell, Secretary of Health and Human Services*, the U.S. Supreme Court was afforded another opportunity to demolish the Patient Protection and Affordable Care Act.⁵⁶ Again, the Supreme Court upheld the legislation.⁵⁷ The U.S. Supreme Court and the South African Constitutional Court recognize that they are primarily guardians of the basic law and that the basic law's scaffolding enables the other branches of government and the citizenry to go about creating what they deem to be a just and fair social order.

51. 2011 (3) SA 347 (CC) at paras. 190, 194, 214.

52. S. AFR. CONST., 1996, § 7(2).

53. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

54. See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

55. Jack M. Balkin, *The Court Affirms Our Social Contract*, THE ATLANTIC (June 29, 2012), <http://www.theatlantic.com/national/archive/2012/06/the-court-affirms-our-social-contract/259186/>.

56. 135 S. Ct. 2480 (2015).

57. *Id.*

Etienne Mureinik captured the essence of the basic law as scaffolding argument in his article “A Bridge to Where?”⁵⁸ He is bumper sticker famous for his assertion that South Africa’s Constitution reflects a commitment to supplanting a “culture of authority” with “a culture of justification.”⁵⁹ Twenty years later, we have a better idea of what Mureinik had in mind. When courts, legislatures, and executive entities are asked what lies behind their decisions, a rational justification will generally pass constitutional muster.⁶⁰ Because he consciously limited his conception of judicial review to a mere reasonableness threshold, Mureinik is likewise lauded for allaying fears associated with the potential of unelected justices, or those not carefully chosen, to wreak havoc with a Reconstruction and Development Programme (RDP) designed to realize such rights.⁶¹ How do these contributions support the notion of constitutions as “scaffolding”? First, by limiting their incursion into the political domain, Mureinik managed to secure the inclusion of socioeconomic rights in the Constitution.⁶² Second, Mureinik believed that the ultimate responsibility for realizing a just distribution of public goods lay with fifty million other South Africans and their representatives—not the bench.⁶³

III. POLITICS THROUGH SCAFFOLDING OR REVOLUTION

South Africans officially buried apartheid a mere twenty years ago. Yet apartheid was immensely successful on its own terms. South Africans live together, but apart. While most daily interpersonal interactions are carried out in a dignified manner, all such engagements carry an ethical charge: what one might call *the moral salience of everyday life*. To be ever conscious of the imperative to treat others with dignity, while remaining cognizant of living on a large plantation, is truly exhausting.

The next step requires even more of South Africans. The logic of collective action often hinders groups of different sizes and kinds from delivering the public goods that individuals and associations require in order to flourish.⁶⁴ Whether that occurs through the crooked timber of South Africa’s current democratic order, or by revolution, is a question beyond the scope of this article.

58. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR 31 (1994).

59. *See id.* at 32.

60. *See* Michael Bishop, *Rationality is Dead! Long Live Rationality! Saving Rational Basis Review*, in *IS THIS SEAT TAKEN?*, *supra* note 36, at 4–5. Only twice in twenty years has the Constitutional Court found that the state failed to meet the requirements of rationality review. *Id.* at 5 n.22 (citing *Van der Merwe v. Rd. Accident Fund* 2006 (4) SA 230 (CC) at para. 42; *S v. Ntuli* 1996 (1) SA 1207 (CC)).

61. *See* Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 SAJHR 464, 466–72 (1992).

62. *See* S. AFR. CONST., 1996, §§ 26–29 (including housing; health care, water, food, and social security; children’s rights; and education).

63. *See* Mureinik, *supra* note 61, at 465–66.

64. On that next step, see Stu Woolman, *South Africa’s Aspirational Constitution and Our Problems of Collective Action*, 32 SAJHR (forthcoming 2016).