CONSTITUTIONALIZING DEMOCRACY IN FRACTURED SOCIETIES

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Constitutionalizing Democracy in Fractured Societies

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Constitutionalism exists in inherent tension with the democratic commitment to majoritarian rule. At some level, any conception of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept preexisting restraints on the range of choices available to governing majorities. As well expressed by Laurence Tribe in addressing the paradox of American constitutional democracy, “the question . . . is why a nation that . . . associates legality with representative government would choose . . . to constitute its political life in terms of commitments to an originating agreement—made to be treated by the people as binding on their children, and deliberately structured to be difficult to change.”

In this article, I address the role of constitutionalism in stabilizing democratic governance in what I term fractured societies. The argument is that constitutionalism emerges as a central defining power in these societies precisely because of the limitations it imposes on democratic choice. For purposes of this discussion, I do not wish to explore the full dimensions of what is meant by democracy. Instead, I accept a rather spare definition of democracy as a system through which the majority, either directly or through representative bodies, exercises decision-making political power. Similarly, I want to avoid a theoretical inquiry into the full range of what is meant by constitutionalism. I use the term only to refer to the creation of a basic law that restricts the capacity of the majority to exercise its political will. For

1. Harold R. Medina Professor of Procedural Jurisprudence, Columbia Law School. Earlier versions of this paper were presented at faculty workshops at Columbia and Stanford Law Schools, and at the Law Review Symposium at the University of Texas School of Law. Michael Doyle, Tom Grey, and Frank Michelman provided especially valuable comments on drafts. I am also deeply indebted to the research assistance of Christopher Brummer, Philip Fortino, Camden Hutchison, Anna Morawiec Mansfield, and Joshua Willenfeld.


4. Frank Michelman well captures this tension in defining democracy as ultimately “popular political self-government” and constitutionalism as “[t]he containment of popular political decision-making by a basic law.” Frank I. Michelman, Brennan and Democracy 5–6 (1999). See also Richard H. Pildes, Constitutionalizing Democratic Politics, in A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy 155, 156 (Ronald
these purposes, it does not matter whether the restraint is an absolute, as with the non-amendable provisions of the German constitution, or simply the “obduracy” of Article V of the American constitution, or the temporal constraints requiring successive parliamentary action for constitutional reform, as in some European countries. Under any such system, the constitution serves as a limitation on what democratic majorities may do.

When the question is posed, as by Professor Tribe, of why there should be any restriction on majority rule, two rather traditional answers are typically given. The first concerns a species of rights guaranteed to individuals or minorities that must be secured against majoritarian will. As expressed by Ronald Dworkin, “The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.” The second concerns the structures of power, the limitations on the scope of office, and the forms of governmental change and accountability. Any system that entrusts power to the majority must ensure that majorities can change, that the rules of the game remain fair, and that those elected remain accountable to the electorate. This second category of restrictions may be thought of as the rules of democratic governance that guarantee that government truly represents the will of the majority of the people, while the first addresses the limitations on government conduct toward the citizenry, regardless of majoritarian preferences. There is considerable debate about how rigid these rules must be, about the need for limitations on parliamentary prerogatives, and the question of constitution-reinforcing judicial review. Indeed, there are those who challenge aggressively whether constitutional restriction is necessary for democratic legitimacy.

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5. See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY L.J. 837, 846 (1991) (discussing the “eternity clause” of German Basic Law which bars amendments tampering with German federalism or basic political principles).


8. See Introduction to CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, at xxi (Douglas Greenberg et al. eds., 1993) (describing modern constitutionalism as a “commitment to limitations on ordinary political power”).


10. The leading exposition of this view is found in Stephen Holmes, Precommitment and the Paradox of Democracy, in CONSTITUTIONALISM AND DEMOCRACY, supra note 3, at 195, 195–98 (noting that all working democracies operate within boundaries set by stabilizing constraints). For my own views on this, see Issacharoff, supra note 7, at 1988–91.

11. See GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 9 (1984) (highlighting one such source of democratic legitimacy that is not constitutionally based: the British convention that
I do not wish to engage these well-established, though ongoing, debates. I note simply that all the newly emerging democracies of the late twentieth century have opted for some form of written constitution and adopted some form of constitutionally-based judicial review. I turn my attention instead to a third feature that constitutionalism serves that is not as widely noted: the role of securing legitimacy for the exercise of political power in fractured societies. I have in mind societies that are characterized by deep racial, ethnic, or religious animosities in which cross-racial, ethnic, and religious political institutions do not exist. Under such conditions, the emergence of stable democratic rule requires dampening such animosities so that the population as a whole views the exercise of state authority as being politically legitimate, or perhaps more modestly, does not rise in armed rebellion against the state. This ability of legal restriction to provide the basis for reconstituting society has begun to attract attention as a distinct form of ordering the transition to democratic rule: Ruti Teitel, for example, dubs this phenomenon a species of transitional constitutionalism in which law itself plays “an extraordinary constituting role” in the stabilization of democratic governance.

Despite the attention given to the creation of a constitution in the emerging democracies of the former Soviet bloc and South Africa, the focus on law as mediating deep social divisions is actually of relatively recent vintage. There is a rich political science literature addressing the problem of nation-building in complex, divided societies. For John Stuart Mill, democratic governance in fractured societies was a non-starter:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.

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“Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way.”). For further elaboration of this discussion, see ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 124–36 (arguing that democratic politics is merely a “surface manifestation” of the underlying agreement on values that is essential to the operation of any democratic polity); but see M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 323–45 (cataloguing attacks on theories of constitutionalism, including those which downplay the importance of the mechanics of government and focus on preexisting values).

12. Indeed, Ran Hirschl argues that the empowerment of the judiciary is an integral component of contemporary liberal constitutionalism—a process he dubs the emergence of a “juristocracy.” RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 2 (2004) (describing a sweeping trend in favor of constitutionalism, stemming from the notion that judiciaries are the most effective bodies for the protection of minority rights).


Subsequent work, however, looked to the national experiences in European countries such as Austria, Belgium, the Netherlands, and Switzerland to claim that “consociational structures” could forge a national integration of rival elites and yield a politically stable democracy. In his classic study, Arend Lijphart identified the critical elements of the consociational experiment:

(1) government by a grand coalition of all significant segments; (2) a mutual veto or concurrent-majority voting rule for some or all issues; (3) proportionality as the principle for allocating political representation, public funds, and civil service positions; (4) considerable autonomy for various segments of the society to govern their internal affairs.

The key to the consociational model is that power will be allocated across competing interests in the society independent of the political process. Thus, elections in consociational democracies can decide which among the candidates of a particular ethnic or racial group will hold an office that was predetermined to be assigned to that particular group; whether a particular group or interest should hold office is decided outside the electoral process through the formation of what Lijphart terms the “grand coalition.”

Whether such consociational governmental structures can be transported out of the Western European context and whether they can deliver the promised political stability have been subjects of intense debate. Both in and out of Europe, recent developments shed increasing light on the use of constitutions in the aid of nation-building. The first is a recognition of a broader range of nation-reinforcing tools beyond some kind of pro rata formal power sharing. The second is the dramatic expansion, and apparent acceptance, of judicial review of the structures of governance. The role of judicially enforced constitutionalism offers a different avenue of nation-building than that assumed in the consociational models. Rather than securing national unity through formal power sharing along the major axes of social division, constitutionalism tends to impose limits on the range of

15. See AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 1 (1977) (discussing how consociational democracy explains the “political stability” of Austria, Belgium, the Netherlands, and Switzerland).

16. Id. at 25.

17. Id.


decisions that democratically elected governments may take. In many cases, as will be seen in the central discussions in this paper, constitutionalism emerges as a rejection of the formal political arrangements that characterized consociational experiments in nation-building. Rather than forecast the division of power that must hold in a fractured society, as does consociationalism, robust constitutionalism substitutes the “struggle to regulate political competition” so that the victors do not devour the process.

In what follows I examine some of the different forms of constitutional restraint on democracy that have been employed in fractured societies from the vantage point of constitutional review of the resulting institutional structures. Examined from this perspective, it is possible to ask, “What features of constitutionalism serve best to address the problems of fractured societies?” Or, put another way, “What constitutional restrictions on majoritarian power appear conducive to the emergence of stable democratic governance?” I approach this issue tentatively because I am moving away from any claim of expertise I may have in the constitutional law governing the political process in this country. But I do so in part in order to reexamine the claim that the U.S. constitutional confrontation with ethnic power-sharing, which emerges as the Shaw v. Reno line of cases, is somehow merely an expression of American equal protection law. The Shaw cases, which occupied the Court through the 1990s, sought to find a defensible limitation to race-conscious drawing of electoral district lines. Accompanying the difficult jurisprudence of these cases were high-voltage claims that the creation of majority-minority legislative districts was an American form of “political apartheid” or an invitation to “balkanization.”

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21. Shaw v. Reno, 509 U.S. 630, 656 (1993) (reversing the District Court’s holding that the challenge to the North Carolina General Assembly’s redistricting plan had not stated a claim under the Equal Protection Clause of the Fourteenth Amendment); Shaw v. Hunt, 517 U.S. 899, 918 (1996) (overruling the District Court’s decision on remand from Shaw v. Reno that North Carolina’s District 12 was narrowly tailored to the State’s asserted interest in complying with the Voting Rights Act); Hunt v. Cromartie, 526 U.S. 541, 555 (1999) (holding that the District Court’s finding that the North Carolina General Assembly had been motivated by racial considerations in setting out legislative districts was improper at summary judgment); Easley v. Cromartie, 532 U.S. 234, 237 (2001) (reviewing the District Court’s determination that the North Carolina General Assembly impermissibly used race in drawing District 12 and holding that the District Court’s finding was clearly erroneous).

22. See, e.g., Guy-Urnel E. Charles, Racial Identity, Electoral Structures, and the First Amendment Right of Association, 91 CAL. L. REV. 1209, 1216 (describing Shaw and subsequent voting rights cases as implicating equality concerns under the Fourteenth Amendment).

23. See Easley v. Cromartie, 532 U.S. at 236 (contending that those who attack race-conscious electoral district lines “must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles and that those alternatives would have brought about significantly greater racial balance.”).

24. See Shaw v. Reno, 509 U.S. at 657 (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a
Perhaps as well, a comparison to actual balkanization and apartheid may bring into sharper relief the difficult problem of ensuring representational legitimacy across racial divides. And, perhaps, this international comparison will illuminate in the \textit{Shaw} cases a richer set of issues than the shifting of familiar equal protection categories of strict scrutiny over time from schools to job to politics. To the extent that Justice O’Connor saw the contorted North Carolina election districts at issue in \textit{Shaw} as an invitation to the balkanization of American politics, the real Balkans reflect that there is still, fortunately, a wide cushion separating our politics from theirs. On the other hand, to the extent that the issue in the Shaw line of cases is seen as judicial discomfort with the formal state assignment of representation along communal lines, the Court finds allies in many parts.

I employ a method of my own devising, one that is most accessible to the constitutional lawyer at a relative loss for a deep understanding of the national issues I address. In this paper I examine the constitutional arrangements designed to secure rights and limit power in fractured societies. The focus is on constitutional courts in those countries that have had to decide whether the resulting arrangements could claim some form of transcendent legitimacy.\footnote{Some have argued that the increased role of the judiciary is an inevitable byproduct of the focus on constitutionalism in post-Cold War creation of democratic states. \textit{See}, e.g., \textit{KLUG}, \textit{supra} note 20, at 29 (“A standard explanation for the shift to democratic constitutionalism, and the empowerment of courts it implies, in states emerging from dictatorships and social conflict is that the shift is a reaction to that society’s particular past.”). While I agree that this is a foreseeable development, and certainly one that has occurred in all countries establishing democratic governance in the late twentieth century, I do not wish to engage the argument whether this development is inevitable. I propose instead to observe courts that have undertaken this project without weighing in on either the legitimacy or inevitability of courts playing this role.} The aim is not to devise a one-size-fits-all model of proper constitutionalism. I find this a dispiriting and more than mildly chauvinistic enterprise. I much prefer the Aristotlean recognition that \textit{...}\footnote{\textit{ARISTOTLE, THE POLITICS} 181 (Ernest Barker trans., Oxford University Press 2d ed. 1948).}

Instead, I look at structured forms of power in divided societies in the terms by which the constitutional courts of those societies analyze the difficulties they present. In part, this is a recognition of how much more sophisticated the world has become since the simple consociational models that were supposed to yield stability through formal power-sharing, as in
Lebanon\textsuperscript{27} or Sri Lanka\textsuperscript{28} or Cyprus\textsuperscript{29} or the Ivory Coast\textsuperscript{30}—before those countries descended into fratricidal war. In part as well, this is a recognition of the stakes in truly fractured societies. The unfortunate lesson of history is that stable civilian governance is most likely to emerge from post-conflict societies when one ethnic group has accomplished clear dominance or destruction of the other.\textsuperscript{31} Even with the introduction of more aggressive international peacekeeping, the key issue in nation-building remains the creation of an integrated political authority claiming legitimacy beyond an ethnic or racial base.\textsuperscript{32}

What distinguishes the countries I have examined is the use of constitutional authority as a means of diffusing ethnic or racial antagonisms. In each case, national or international courts have been forced to rule on the bounds of majoritarian politics in order to consolidate a constitutional order. For the most part, they have avoided what Ronald Dworkin would term a “moral reading of the constitution,”\textsuperscript{33} and its attendant invitation to the judiciary to import values that the judges would assign to the highest realm of that society’s governing principles. Rather, these courts have more closely approximated the “pragmatic” values advocated by Richard Posner\textsuperscript{34} by

\textsuperscript{27} See, e.g., Richard H. Dekmejian, Consociational Democracy in Crisis: The Case of Lebanon, 10 COMP. POL. 251, 254 (1978) (describing how the 1926 constitution and National Pact of 1945 provided for a six to five ratio of Christians to Muslims in the Chamber and an even division in the cabinet); ANTOINE N. MESELLA, THÉORIE GÉNÉRAL DU SYSTÈME POLITIQUE LIBANNAIS (Paris, 1994).\textsuperscript{[paren]}[CU Pending]


\textsuperscript{29} LIJPHART, supra note 15, at 158–61 (discussing the failure of consociationalism in Cyprus); AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 184 (1984) (noting that the 1960 constitution of Cyprus provided for separately elected communal chambers for the Greek majority and Turkish minority).

\textsuperscript{30} See, e.g., Connie de la Vega, The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?, 11 HARV. BLACKLETTER L.J. 37, 49 (1994) (discussing Ivory Coast’s equal protection guarantees).

\textsuperscript{31} See Roy Licklider, The Consequences of Negotiated Settlements in Civil Wars, 1945–1993, 89 AM. POL. SCI. REV. 681 (1995) (finding that in so-called identity civil wars “negotiated settlements are less likely to be stable than military victories”).


\textsuperscript{34} For a general discussion of Posner’s “pragmatic” values, see RICHARD A. POSNER, LAW, PRAGMATISM & DEMOCRACY 57–96 (2003). Posner states that “the core of pragmatic adjudication [is] . . . ‘a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.’” Id. at 59 (quoting RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227 (1999)).
asking what constitutional values best enhance the prospects for stable democratic governance.\textsuperscript{35}

Although this inquiry is informed by a broader number of national studies,\textsuperscript{36} for purposes of this article, I focus on only two: South Africa and Bosnia. The two are unique, as far as I know, in that each represents a constitutional court required to, in effect, adjudicate the constitutionality of a constitution itself. More centrally, the two represent markedly distinct positions in the attempt to create stable democratic rule in the context of extreme social polarization, along lines of ethnicity and religion in Bosnia and race in South Africa.

As will be developed below, the Bosnian arrangement stemming from the Dayton accords hewed more closely to the consociational model described above. The Dayton accords created a formal power sharing arrangement along clear ethnic lines, cemented by a tripartite executive that would be assigned geographically to an area predetermined to represent one of the warring peoples. The litigation discussed emerged primarily from the designation of a geographic entity as the Serbian Republic within Bosnia Herzegovina and from the requirement that the member of the executive triumvirate from that region be the representative of Bosnian Serb interests. The effect was to compel the Bosniak (Bosnian Muslim) population of that region to restrict their voting choices to Serb representatives. There was more than a touch of historic cruelty to this arrangement given that the region that emerged as the Bosnian Serb Republic (not to be confused with Serbia or the remnants of the former Yugoslavia) was the site of massive communal violence during the Bosnian civil war, which resulted in the displacement and ethnic cleansing of the vast majority of the Bosniak population in that region. The Bosniak minority living in the Bosnian Serb Republic, therefore, could only choose for its representation in the executive triumvirate from among the population that had committed the worst communal atrocities seen in Europe since WWII.

In some sense, South Africa confronted the same dilemma as Bosnia with two critical differences. First, the minority threatened by the exercise of untrammeled majoritarian rule was the militarily dominant white population. Second, the looming presence of apartheid made any attempt at formal


\textsuperscript{36} The major comparable constitutional decisions come from Canada (the Canadian Supreme Court’s ruling on a referendum on Quebec secession); India (the Indian Supreme Court upholding the decision of the Electoral Commission disqualifying a victorious Hindu nationalist politician for inciting ethnic animosity during his campaign); Turkey (the decision of the Turkish Constitutional Court, upheld by the European Court of Human Rights, disbanding the largest party in Parliament, removing several members of that party from office, and seizing the party’s assets); and Belgium (the division of the country into Flemish and French resulting in the dominant French speakers of Brussels being effectively shut out of all representation on matters of local governance).
assignment of power along racial lines an impermissible hearkening to the past. Whatever allure consociational models may have held for Dayton, they could not be directly invoked in the critical Johannesburg negotiations leading to the transfer of power from the apartheid rulers. Therefore, South Africa had to confront how to permit the creation of democratic political structures, and the inevitable emergence of black majority rule, while allaying the fears of the white minority that this “democracy” would simply be the code for racial revanchism. Let me be clear that this is not intended as a normative statement about the proper historical rendering of accounts for the brutality of apartheid. I intend this only as a characterization of the political realities facing the negotiators. Without assurances to the apartheid rulers that there would be limits to demands for revenge and redistribution, power would only have been ceded at the conclusion of a civil war—if at all. The task therefore was to create limitations on majoritarian power without formal power sharing of the Bosnian sort.

Taken together, Bosnia and South Africa represent divergent efforts to placate minority concerns in the transition to majoritarian power. Lost in this streamlined account are the nuances of ruling under circumstances in which constitutional constraints on democratic majorities come to be perceived for what they in fact are: antidemocratic devices. This phenomenon is posed most acutely in countries such as India and Turkey, where fundamentally authoritarian religious political movements (Hindu nationalism in India and Islamic fundamentalism in Turkey) increasingly turn to the rhetoric of democracy to challenge the power of constitutional constraints and to challenge the authority of constitutional courts to thwart the will of political forces with national and regional followings.37

Finally, let me forecast where this inquiry is headed. The demise of the Soviet Union and the fall of apartheid opened up the largest minting of new democracies since the end of the colonial period. Many, if not all, of these societies face the problems of religious and ethnic fracture. Comparative analyses shed light on the problems of religious and ethnic fracture. Comparative analyses shed light on the successes and failures in trying to stabilize democratic rule and flesh out the intuition that stable democracy requires more than just rushing to hold an election. Too often the holding of an election becomes the forum for the attempt to cement power in the hands of a dominant majority followed by a demoralizing descent into one-party rule.

37. See Brenda Cossman & Ratna Kapur, Secularism’s Last Sigh?: The Hindu Right, the Courts, and India’s Struggle for Democracy, 38 Harv. Int’l L.J.113, 115 (1997) (arguing that, in India, “the Hindu Right has hijacked the dominant understanding of secularism as the equal respect of all religions in order to promote its vision of Hindutva and its agenda of establishing a Hindu State.”).
and show elections. In the words of the cynical and oftentimes culpable ex-colonialists, this was one-man, one-vote, one-time.

With claims for democratic governance in countries like Iraq, the questions presented here take on greater urgency. Perhaps these questions of constitutional governance should have commanded the attention of comparative constitutionalism for some time. Unfortunately, the field of comparative constitutional law seems not to have embraced the challenge of transitional mechanisms and societal stabilization as a central inquiry. In so doing, it has missed the distinct structural role of democratic governance and the contribution that constitutionalism might provide to that elusive goal.

I. Antimajoritarian Constitutional Constraints: South Africa

Prior to the dismantlement of the apartheid state, South Africa operated under a Westminster-style parliamentary system in which the legislature served as the highest adjudicative body, and in which there was no independent judicial body capable of imposing constitutional hegemony. This arrangement was thought unsatisfactory in the transitional period for two distinct reasons. First, given the numerical vulnerability of the still-entrenched white minority, unbridled parliamentarism was unlikely to offer sufficient guarantees of the security of person and property in a transition to majoritarian-based democracy. Second, the struggle against apartheid had long been waged in the universal language of human rights and the role of law. Almost inescapably, that too pushed toward the creation of an independent judiciary.

Although some argued that formal parliamentary power sharing could allow minority vetoes and other legislative devices to stabilize minority protections, this view did not prevail for a variety of reasons. First off, critics

38. See DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 97 (1991) (providing examples of “polarizing elections” leading to authoritarian regimes).

39. The phrase “one man, one vote, one time” is often attributed to former Assistant Secretary of State and U.S. Ambassador to Syria and Egypt, Edward Djerjian. See, e.g., Ali Kahn, A Theory of Universal Democracy, 16 WIS. INT’L L.J. 61, 106 n.130 (1997). Djerjian’s cynicism was founded in fact: between 1967 and 1991, for example, no country in Africa experienced power passing from one elected government to another. HOROWITZ, supra note 38, at 239.

40. A more caustic characterization is provided by Philip Bobbitt:

An alternative to finding the common basis for legitimacy in contemporary constitutional orders is to compare the constitutions of various states. Comparative constitutional law courses are usually paralyzingly boring; they typically consist of arid comparisons of the provisions of different written constitutions—which ones protect trial by jury, which ones have a bicameral legislature, and so forth... Such comparative constitutional law courses... are lifeless because they lack the animating aspect of the subject being studied. With respect to constitutionalism, they lack its link between the common method of legitimation (unique to that era) and the different values that characterize different states.

of the application of consociationalism to South Africa responded that the basic black-white divide and the small size of the white minority (estimated at roughly 14 percent a decade ago and now nearing 10 percent) would inevitably yield an overwhelming pressure to simple majoritarianism.\footnote{The most prominent of these criticisms is found in Horowitz, supra note 38, at 137–45. Horowitz focused instead on different electoral arrangements to destabilize simple majoritarian lumping and provide incentives for cross-party compromises. \textit{Id.} at 154–55.}

Thus, although the apartheid rulers of the National Party (“NP”) sought some form of express minority veto over any future governmental action, they did not focus their negotiation demands on formalized power sharing of the sort envisioned through consociationalism. On the other side of the table, the insurrectionary African National Congress (“ANC”) had little sentimental or political attachment to the inherited political arrangements of the apartheid state and did not seek to build a new formal coalition within the confines of preexisting governmental structures. Indeed, it was the ANC that proposed both the creation of a Constitutional Court as part of the Interim Constitution and the formal abolition of Westminster-style parliamentarism.\footnote{See Makau wa Mutua, \textit{Hope and Despair for a New South Africa: The Limits of Rights Discourse}, 10 Harv. Hum. Rts. J. 63, 80 (1997) (“The Constitutional Court, which was proposed by the ANC . . . can exercise judicial review, a power that the previous Supreme Court lacked under the parliamentary supremacy model of apartheid . . . .”).} The role of the Constitutional Court was an integral part of the negotiations leading to the end of apartheid and marked one of the most significant alterations to the inherited South African political institutions.\footnote{See Richard Spitz & Matthew Chaskalson, \textit{The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement} 191–209 (2000) (detailing the negotiations over the structure and functions of the Constitutional Court). While the proposal for the Constitutional Court came from the ANC, the National Party agreed, and even pushed hard to make all court appointments the exclusive authority of the executive—a move that took the ANC by surprise. See Sri Gloppe, \textit{South Africa: The Battle over the Constitution} 230 (1997) (suggesting the failure of the NP to win a share in the executive power, its “primary objective,” debilitated its ability to achieve its agenda through the courts).}

South Africa is a particularly salient example of the turn to constitutionalism as an alternative to consociational power sharing. The fall of apartheid came with the inauguration of an interim government that used formalized power sharing to ensure all groups a mutual veto over contested governmental action—precisely the formula for consociationalism identified by Lijphart and other proponents of this approach. The Interim Constitution provided detailed power arrangements, along with its critical list of thirty-four Constitutional Principles of democratic governance—to which I shall return.\footnote{See Klug, supra note 20, at 108 (noting that the development of a set of constitutional values while at the interim Negotiating Forum provided a means to avoid irreconcilable conflict during the later making of the final constitution).} The primary mechanism was the election of a parliament by proportional representation and the assignment of the position of deputy president to the representatives of each party holding at least 80 of the 400
seats in the National Assembly.\textsuperscript{45} Among the powers conferred as a result of this representation in the executive was the ability to participate in the selection of some of the justices of the Constitutional Court, a power reserved to the executive branch.\textsuperscript{46} This provision alone, however, was hardly sufficient to protect the interests of the white minority. Whatever the participatory mechanisms formally adopted, there was no escaping the fact that the ANC would control the parliament and that Nelson Mandela would serve as head of state. Just as critical to the success of the interim constitutional arrangement as the power sharing was the fact that this was an interim arrangement designed to last no more than five years and required to cede power to a more formal constitution that could only be implemented if deemed faithful to the original 34 Principles.\textsuperscript{47} Moreover, the National Assembly,\textsuperscript{48} required by Principle VIII of the interim constitution to be selected through proportional representation, would also serve as the formal drafting body for the final constitution.\textsuperscript{49} As a result, the final constitution would have two critical features. First, it would bear a democratic legitimacy that could not be claimed by a negotiated compromise among political leaders, no matter how much de facto authority they could claim. Second, the interim principles of the Constitution, rather than the formalities of power sharing, could serve to assuage minority concerns over the limits of majoritarianism.\textsuperscript{50}

The interim arrangements were therefore critical to the transition and were in turn the product of intense and largely secret negotiations among the major political groups in South Africa, primarily the governing National Party and the ANC.\textsuperscript{51} All participants in what are known as the Kempton Park negotiations over the end of apartheid understood that there could be no room for express racial or ethnic guarantees of power or rights; such racialist policies would hearken too closely to the despised regime of apartheid. At the same time, the ANC initially resisted a formal and judicially-enforceable Bill of Rights, which was seen as inevitably entrenching the privileged position of the white minority.\textsuperscript{52} Some members of the ANC, most notably

\begin{itemize}
\item \textsuperscript{45} S. Afr. Const. of 1993 (IC) § 84(1).
\item \textsuperscript{46} S. Afr. Const. of 1993 (IC) § 97.
\item \textsuperscript{47} S. Afr. Const. of 1993 (IC) § 71.
\item \textsuperscript{48} S. Afr. Const. of 1993 (IC) sched. 4, Principle VIII.
\item \textsuperscript{49} S. Afr. Const. of 1993 (IC) § 68.
\item \textsuperscript{50} Albie Sachs well noted the irony that South African apartheid was purely majoritarian among the enfranchised white minority, but that “[n]ow that the majority is going to be black, South African whites suddenly believe majority rule is a terrible thing . . . . Now that the majority stands to change color, you no longer hear people talking about majority rule but about ‘majoritarianism,’ which sounds worse than Marxism-Leninism.” Horowitz, supra note 38, at 98.
\item \textsuperscript{51} The Inkatha Freedom Party participated in the negotiations and in the government of national unity that emerged, but then boycotted the final process of constitutional ratification. The negotiations are described in detail in Spitz & Chaskalson, supra note 43, at 191–209.
\item \textsuperscript{52} See Klug, supra note 20, at 76 (acknowledging Albie Sachs’ view that “a bill of rights in South Africa had . . . ‘usually been projected . . . as serving as a mechanism to ensure that if one
Albie Sachs, argued on this basis that if there were to be a Bill of Rights, there must also be parliamentary control over its interpretation and implementation. This objection failed. At the same time, the NP was surprisingly wary of embracing any sort of formal guarantees of rights. While this is easy to understand in the context of apartheid rule, it is more difficult to comprehend the initial negotiating resistance to enforceable constitutionalism. It was only after what NP chief negotiator Roelf Meyer has termed a “paradigm shift” that the white minority began to see constitutionalism not as the end of racial prerogatives, but as a minority-protection device going forward.

As a result, not only did the rights guarantees become incorporated in both the interim and final constitutions, but both constitutions vested enormous authority in an independent judiciary. It was, as Heinz Klug aptly summarizes, a revolution “represented by the triumph of constitutionalism over parliamentary sovereignty and, while its impact was yet to work its way fully through the labyrinth of South African law, its basic premise—a justiciable constitution—was fully guaranteed in the Constitutional Principles which guided the democratically elected Constitutional Assembly.”

The debates over the limits of majoritarianism played out along a series of institutional design questions. Here one cannot escape the tremendous intellectual influence of Albie Sachs over the constitutional debates in South Africa, at least on the ANC side. Not only did Sachs actively reject any possible formal racial assignment of political power, but it was Sachs who staked out the contours of constitutionalism as the arena for post-apartheid political struggle. As he wrote in 1986, “the struggle for self-determination takes the form of a struggle within the frontiers of South Africa to create a new constitutional order.”

While rejecting any form of racial power sharing, Sachs’s view of the constitution served primarily as a way of organizing majority political power while providing a limited terrain of rights...
guarantees. One example that would later emerge as key to the judicial assessment of the first proposed permanent constitution was Sachs’s rather categorical rejection of federalist constraints on centralized power. For Sachs, federalism

is a way of depriving majority rule in South Africa of any meaning . . . . This would prevent the emergence of national government, keep the black population divided, prevent any economic restructuring of the country and free the economically prosperous areas of the country of any responsibility for helping develop the vast poverty stricken areas.  

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As one commentator notes, the focus on the ability of a majority to rule effectively was, for Sachs, “not only the crux of the idea of democracy, but absolutely essential if South Africa is to become a more just society.”  

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Despite the strong advocacy of majoritarian prerogatives, Sachs was attentive to the risk of governmental oppression, though perhaps more in terms of the risk of political despotism than majoritarian tyranny. Thus, Sachs hearkens to Montesquieu and a formal division of power between parliament, the executive, and an independent judiciary, together with a liberty enshrining declaration of rights.  

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Beyond the familiar powers of judicial review over the constitutionality of proposed legislation, the South African Constitutional Court had a power that, to the best of my knowledge, had never before been imparted on any court. As part of the negotiated transfer of power from apartheid rule, the South African negotiators had created not only an interim constitution, but thirty-four Principles that would form the basis for a final constitution. Under the negotiated provisions of the interim constitution, the final constitution could not be adopted unless it faithfully adhered in its implementation to the negotiated general Principles set out in the interim constitution.  

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And, it was the Constitutional Court that was entrusted with the power to ensure that the final constitution conformed to the thirty-four Principles.

Despite the breadth of material covered in the thirty-four Principles, it is worth focusing on what may be subsumed under the category of antimajoritarian protections. As a general matter, these take three forms. First, there is an elaborate set of rights guarantees that extends to the confiscation of property. Although the new government would be devoted to the amelioration of disparities in wealth across racial lines, Principle V provides that “[e]quality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour

60. SACHS, supra note 58, at 159.
61. GLOPPEN, supra note 59, at 199.
or gender.\textsuperscript{62} In essence, this Principle extends legal protection to the white minority to prevent simple expropriation resulting from the exercise of majority power. Second, there are limitations on the exercise of government power through a balancing of powers within the national government and principles of federalism. These limitations include the requirements of formal lawmaking (Principle X)\textsuperscript{63} through a multi-party legislature (Principle VIII),\textsuperscript{64} separation of powers (Principle VI),\textsuperscript{65} an independent judiciary (Principle VII),\textsuperscript{66} and a multi-party representative government based on proportional representation (Principle VIII).\textsuperscript{67} More unique are the constitutional guarantees to the provinces and local governments to be able to claim an “equitable share” of national resources (Principle XXVI),\textsuperscript{68} and the creation of a Public Service Commission and Reserve Bank independent of legislative control (Principle XXIX).\textsuperscript{69} Third, there are protections provided by the supermajority processes needed to amend the Constitution that require not only a two-thirds vote in the upper house of the national parliament but approval by a majority of provincial legislatures (Principle XVIII).\textsuperscript{70}

The thirty-four Principles sought to facilitate the transition to democratic rule by assuring the white minority that democratic rule would not simply be an invitation to majoritarian retribution.\textsuperscript{71} Whatever the historical merits of retribution, and whatever the grave injustices of apartheid rule, the fact remained that without some formal guarantee of security, power would never be ceded except on the closing end of a bloody civil war. The mechanism for enforcing security would be the newly crafted constitution, but its drafting and implementation presented two key problems, which are best set out in the words of the Constitutional Court of South Africa:

The first arose from the fact that they [the architects of the constitutional compromise] were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the

\textsuperscript{62} S. AFR. CONST. OF 1993 (IC), schedule 4, Principle V.
\textsuperscript{63} Id. Principle X.
\textsuperscript{64} Id. Principle VIII.
\textsuperscript{65} Id. Principle VI.
\textsuperscript{66} Id. Principle VII.
\textsuperscript{67} Id. Principle VIII.
\textsuperscript{68} Id. Principle XXVI.
\textsuperscript{69} Id. Principle XXIX.
\textsuperscript{70} Id. Principle XVIII.
\textsuperscript{71} See id. Principle XIV (“ Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.”).
insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.

The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black majority and those who were determined to eradicate apartheid once and for all. In essence the settlement was quite simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But—and herein lies the key to the resolution of the deadlock—that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.\footnote{In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 799 ¶¶ 12–13 (CC).}

The task of ensuring compliance was given in its entirety to the constitutional court. In effect, once South Africa emerged as a full constitutional democracy, the constitutional court would stand as the ultimate arbiter of the constitution, holding full powers of judicial review. Ironically, however, the constitutional court would predate the constitution and would serve as the final body approving the adoption of the constitution itself. Hardly customary yet innovative, this arrangement seemed to satisfy the security interests of all parties and was integral to the peaceful transition to constitutional democracy.

It is of course possible to assail any political arrangement with the remnants of apartheid. As one critic has noted:

For the NP, the principles constituted a shield for the protection of the white minority and its privilege from the possible redistributive inclinations of a black-led government. In other words, the principles

\footnote{In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 799 ¶¶ 12–13 (CC).}
were the essential link between the past and the present; through them the old order would ensure its survival. For the ANC, which ascended to power through persuasion as opposed to the defeat of its adversary, rejection of the principles would likely have delayed the transition or compounded the crisis of governance then destabilizing South Africa. The establishment was willing to transfer some powers to an ANC government so long as the resulting state would have substantially inferior powers compared with those of its predecessors. 73

The comparison to the past is entirely apt. The former government was dedicated to racialist domination. To the extent there would be a peaceful transition, and some prospect of democratic, multi-racial rule, the criticism that the incoming government would have less power than its predecessor misses the mark. Of course it would. Absent such constitutional constraints, a racial civil war was inevitable. As all parties to the negotiations realized, the ANC could not govern without the inherited administrative bureaucracy of the defeated apartheid regime. Nor could the ANC overcome the apartheid rules militarily. At the same time, the NP could not very well continue to hold off majority rule and believed that international sanctions would have prevented a bloody war of attrition against the majority population. 74 What emerged was precisely the product of a contested negotiation.

In July 1996, the proposed permanent constitution was submitted for review to the constitutional court, which rendered its decision two months later. 75 Of greatest significance for present purposes are the provisions that reaffirmed limitations on government and those that were struck down for what may be termed an excess of majoritarianism. These primarily concerned the attempt to preclude constitutional review from certain categories of statutes, the absence of federalist safeguards on centralized power, and the lack of supermajoritarian protection for certain components of the constitution itself, including the liberty protections of the Bill of Rights. 76 With regard to the latter, the court found a violation of the principles of the interim constitution in the failure to “entrench” the rights in question. 77 In summary form, the court’s majestic ruling turns on the following key understandings of permissible constitutional law:

1. Bicameralism and divided government.— Invoking Montesquieu, the court reaffirmed the importance of checks and balances across the branches

73. Mutua, supra note 42, at 81.
74. This is a dramatically condensed version of a long process of realization through negotiations, told forcefully in SPARKS, supra note 54, at 120–225.
75. Certification, 1996 (4) SALR at 744.
76. This is referred to as the requirement that there be “special procedures involving special majorities” for constitutional amendment and for any alteration of the constitutional guarantees of individual rights. Id. at 821 ¶ 152.
77. Id. at 822 ¶ 156.
of government.\textsuperscript{78} The court pointed specifically to the creation of an upper house (the National Council of Provinces) that would not be based on equipopulational voting, but on the election of ten representatives from each of the nine provinces.\textsuperscript{75} This has great practical significance because one of the provinces is majority Zulu (hence outside the political orbit of the ANC) and two others have large concentrations of white and coloured voters.\textsuperscript{80}

2. \textit{Federalism}.—The court strictly enforced Principle XXII ensuring that the national government would not encroach on the powers of the provinces.\textsuperscript{81} Thus the court found unconstitutional those provisions that failed to provide the required “framework for LG [local government] structures,” as well as the failure to ensure the fiscal integrity of political subdivisions.\textsuperscript{82} For the court, the South African constitution should provide only those powers to the national government “where national uniformity is required,” and only economic matters and issues of foreign policy met this restrictive definition.\textsuperscript{84}

3. \textit{Supermajoritarianism}.—The court also strictly construed Principle XV, which required “special procedures involving special majorities” for constitutional amendments.\textsuperscript{85} According to the court, the purpose of this provision was to secure the constitution “against political agendas of ordinary majorities in the national Parliament.”\textsuperscript{86} Various provisions of the proposed constitution requiring supermajoritarian action were nevertheless struck down for failing to create special procedures outside the framework of

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} at 766 ¶ 6, 788 ¶ 45.
\item \textsuperscript{79} \textit{Id.} at 865–66 ¶¶ 152.
\item \textsuperscript{80} The commitment to a territorially based upper chamber was of particular significance in keeping the IFP a participant in the process of negotiations and in the Interim Government, although that party did walk out on the final accords. \textit{See Gloppen, supra} note 59, at 204, 222–23. For general background on powers of the bicameral parliament, see \textit{The Central Intelligence Agency, \textit{The World Factbook: South Africa}}, (internet ed.) http://www.cia.gov/cia/publications/factbook/geos/sf.html (last modified Dec. 18, 2003) (describing responsibilities of South African legislative organs).
\item \textsuperscript{81} \textit{S. Afr. Const. of 1993 (IC)}, schedule 4, Principle XXII.
\item \textsuperscript{82} \textit{Certification}, 1996 (4) SALR at 861 ¶¶ 301–02, 911 ¶ 482.
\item \textsuperscript{83} \textit{See id.} at 845 ¶ 240 (explaining that the constitution mandates that legislative powers should be allocated predominantly, if not wholly, to the national government where national uniformity is required).
\item \textsuperscript{84} \textit{See id.} at 846 ¶ 241 (noting that the constitution expressly “requires that the determination of national economic policies, the promotion of inter-provincial commerce and related matters should be allocated to the national government”). \textit{See also id.} at 849 ¶ 254 (quoting Principle XIX’s requirement that “the Constitution shall empower the national government to intervene through legislation” wherever such intervention is necessary for “the maintenance of economic unity . . . [and] the maintenance of national security”).
\item \textsuperscript{85} \textit{S. Afr. Const. of 1993 (IC)}, schedule 4, Principle XV.
\item \textsuperscript{86} \textit{Certification}, 1996 (4) SALR at 821 ¶ 153.
\end{itemize}
ordinary legislation. Thus, for example, a provision allowing a two-thirds majority of the lower house to amend parts of the constitution failed because “no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required.” Similarly, the court found that allowing the Bill of Rights to be amended by a two-thirds majority of the lower House failed the “entrenchment” requirement of Principle II, which, the court ruled, required “some ‘entrenching’ mechanism . . . [to give] the Bill of Rights greater protection than the ordinary provisions of the [constitution].”

4. Judicial review.—The rejection of judicial review for certain categories of statutes was found to violate the commitment to constitutional supremacy in Principle IV and the jurisdictional guarantees for judicial power contained in Principle VII.

5. International law.—Although not a central issue in the ultimate approval of the constitution by the court, Article 39 of the final constitution provides that, in construing the Bill of Rights, a court “must consider international law.” Most observers will note only the valorization of international human rights norms. But the incorporation of a source of law beyond the control of the parliamentary majority again serves to constrain majoritarian prerogatives by providing an independent, non-parliamentary source of authority for courts to enforce. Thus, in construing the obligations of the Constitution, the court found an obligation to protect those rights recognized in open and democratic societies as being “inalienable entitlements of human beings.” While the court recognized that no consensus exists as to what entitlements are inalienable, the court required the Constitution, at a minimum, to guarantee those rights which have achieved a wide measure of international acceptance. Thus, according to the court, in aggregating the fundamental rights of other societies, South

87. See, e.g., id. at 822 ¶ 156 (striking down a provision which required approval of a two-thirds majority of the lower house for any constitutional amendment for failing to dictate “special procedures” for ratification in addition to supermajoritarian assent).
88. Id. at 822 ¶ 156.
89. S. Afr. Const. of 1993 (IC), schedule 4, Principle II.
90. Certification, 1996 (4) SALR at 822–23 ¶ 159.
91. Id. at 820 ¶ 149.
93. For example, Section 35 of South Africa’s interim constitution provides: “In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.” S. Afr. Const. of 1993 (IC) § 35(1).
95. Id. at 790–91 ¶ 52.
Africa’s proposed Constitution established a set of rights “as extensive as any to be found in any national constitution.”  

6. Minority party security.—Beyond the protections of proportional representation, the Constitution contained an “anti-defection” principle in which a Member of Parliament would have to resign if he or she attempted to switch parties. Although such provisions may restrict expression of beliefs by legislators, there is an overriding concern that minority legislators could be induced to sway from their constituents’ interests to support majoritarian policies. Since by definition there are fewer minority than majority representatives, any single minority defection would have a more severe impact on the representation of the minority population than the defection of a majority legislator would have on the representation of the majority. Such defection to the majority is not only more costly, but also more likely. Minority caucuses are unlikely to be able to offer the same personal opportunities or chances for local blandishments as is the majority. In rejecting the civil liberties challenge to the anti-defection clause, the court noted that anti-defection clauses were found in the constitutions of Namibia and India and were therefore entirely consistent with democratic governance.

The Constitutional Assembly then revised the constitutional draft to meet the court’s concerns in October of 1996 and, following a second round of judicial scrutiny, the new constitution was signed and implemented by President Nelson Mandela in December of 1996. The new constitution drew much fanfare, particularly among those taken with its ample guarantees of not just political rights, but also the sort of economic rights that had frustrated American courts even in the most expansionist Warren Court era. The new constitution even assures South Africa citizens the right to “an

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96. Id.
97. See id. at 829 ¶ 181 n.136 and accompanying text (considering whether the anti-defection principle was unconstitutional).
98. Id. at 790–91 ¶ 52. The minority party protections through the anti-defection mechanism was subsequently repealed by constitutional amendment. The repeal is troubling for three reasons. First, the anti-defection principle was a significant subject of debate and compromise in the creation of the overall constitutional framework. See SPITZ & CHASKALSON, supra note 43, at 110–12 (discussing the origins of the anti-defection clause). Second, the proponent of the repeal was the ANC, clearly the majority party least at risk to suffer defection. Third, on my reading of the Certification decision, the structural minority protections provided the central analytic framework for compliance with the interim principles. Although troubled, the constitutional court held the repeal to apply only to the procedural requirements of constitutional amendment. The court did not attempt to impose a doctrine of structural integrity of minority protections to prevent the amendment, which perhaps signifies a retreat from the role the court assumed in the Certification decision. United Democratic Movement v. The President of the Republic of South Africa, 2003 (1) SALR 495 (cc).
environment that is not harmful to their health and well-being.”\textsuperscript{100} Cass Sunstein seized upon this feature of the South African constitution to declare it “the most admirable constitution in the history of the world.”\textsuperscript{101} For many champions of activist courts, the broad recognition of judicial authority in implementing constitutional principles combined with the sweeping rights guarantees sparked expectations that post-enactment cases would usher in an era of active judicial engagement with the process of dismantling the legacy of apartheid.\textsuperscript{102}

Consistent with its origins as the handmaiden to constitutional democracy, however, the court has played a circumspect, pragmatic role, refusing to develop a broad mandate of rights jurisprudence.\textsuperscript{103} Thus, much criticism was directed at decisions such as Republic of South Africa v. Grootboom,\textsuperscript{104} in which the court distinguished between the rights guarantees of the constitution and the deference that should be accorded the government in crafting policies to achieve those objectives.\textsuperscript{105} To my mind, critics of the court largely fail to appreciate the true significance of the South African constitutional process and of the role played by the court in that process. Although many will be taken by the ample rights domain in the South African constitution, and no doubt its constitutionalization of environmental and labor organizing protections will feature prominently in future comparative law treatises, the constitutional processes in South Africa served primarily as a success story in constituting democratic rule. The use of an interim constitution defused the pressure to resolve deeply contested governance questions on a once-and-for-all basis while providing a sense of security to minority constituencies. The interim constitution, and the authority entrusted to the constitutional court, allowed for transitional democratic organization of parties and constituencies and also for a participatory legitimacy to the drafting and ratification of the final constitution. Having helped create a fledgling democracy in a deeply divided and still violent society, the court’s reluctance to substitute decrees for

\textsuperscript{100} S. AFR. CONST. § 24(a).
\textsuperscript{101} CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 261 (2001).
\textsuperscript{102} See, e.g., id. at 236–37 (the Constitutional Court of South Africa “has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socioeconomic rights could not possibly be a good idea.”).
\textsuperscript{103} For a summary of the criticisms of the South African Constitutional Court and a defense of institutional pragmatism, see Mark S. Kende, The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism, 26 VT. L. REV. 753 (2002).
\textsuperscript{104} Republic of South Africa v. Grootboom, 2001 (1) SALR 46 (CC).
\textsuperscript{105} See id. at 68 ¶ 41 (indicating that the constitution’s guarantee of a right of access to adequate housing did not prevent the court from deferring to “reasonable” measures taken by the State to provide such housing). For a thoughtful account of this tension, see Heinz Klug, Five Years On: How Relevant is the Constitution to the New South Africa, 26 VT. L. REV. 803 (2002) (analyzing the conflict over the extent of the constitution’s mandate on specific policies in the context of litigation over efforts to require the government to provide Nevirapine to prevent mother-to-child HIV transmission).
democratic deliberation and compromise seems well in keeping with the ambitious mandates of the transitional process. This leads to some final observations on the generalizability of the South African experience. South Africa entered the constitutional period with a developed industrial base, a well-functioning market economy, and strong institutions of civil society both inside and outside the market arena.\textsuperscript{106} Throughout the transitional period, state power remained intact and the interim constitution could be implemented by the outgoing regime as ordinary legislation.\textsuperscript{107} Both the NP and the ANC were western-oriented and secular. Even so, the democratic experiment in South Africa remains fragile. What nonetheless emerges is the use of limitations on majority power as a mechanism for stabilizing democratic governance without the reinforcement of ethnic and racial divides created by formal power sharing.

II. Ethnic Power-Sharing: Bosnia under the Dayton Accords

\textit{A. The Dayton Formula.}

The 1995 Dayton Peace Agreement—the celebratory signing for some reason being staged in Paris rather than Dayton\textsuperscript{108}—marked the end of the three-year civil war in the territory of Bosnia and Herzegovina.\textsuperscript{109} The Dayton accords sought to establish peace and stability through the classic form of consociational power-sharing among the dominant ethnic groups in the country: the Bosniaks, the Croats, and the Serbs.\textsuperscript{110} The key governance elements were the creation of a weak central government and the reservation of significant authority to ethnically-distinct regional bodies denominated the...
“Entities.\textsuperscript{111} The latter bodies were the key to consociational governance and Article III of Dayton confirms that “[t]he parties welcome and endorse the arrangements that have been made concerning the boundary demarcation between the two Entities, the Federation of Bosnia and Herzegovina and Republika Srpska.”\textsuperscript{112}

The post-war constitution of Bosnia and Herzegovina, enshrined at Dayton as Annex 4, elaborates further the composition of the country, its governing structures, and the power sharing arrangements between the ethnic groups. Although the constitution of Bosnia and Herzegovina designates a sovereign state incorporating “Bosnia[k]s, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina,”\textsuperscript{113} it also provides for “a citizenship of each Entity, to be regulated by each Entity.”\textsuperscript{114} Both Entities, in turn, regulate citizenship, as well as all other internal affairs through their respective constitutions.\textsuperscript{115} According to their constitutions, the Federation of Bosnia and Herzegovina is an Entity of “Bosnia[k]s and Croats as constituent peoples,”\textsuperscript{116} while the Republika Srpska is the “State of Serb people and all of its citizens.”\textsuperscript{117} It is the definition of citizenship according to Entity, and by extension, ethnic lines, that has served to enshrine ethnically based political power at the critical level of Entity governance. Perhaps the provenance of the Accords sheds light on these strong ethnic features of post-Dayton Bosnia. From the beginning of the negotiations, the interests of the Bosnian Serbs were represented by a “joint Yugoslav-Republika Srpska delegation” under the leadership of Serbian strongman Slobodan Milosevic,\textsuperscript{118} who presently is on trial for crimes against humanity.

In addition to vesting power primarily in the ethnically defined Entities, the same pattern of reinforcing ethnic control over political authority is reflected in the “common institutions” of the national state of Bosnia and Herzegovina.\textsuperscript{119} The Constitution of Bosnia and Herzegovina guarantees that

\begin{itemize}
  \item \textsuperscript{111} Mansfield, \textit{supra} note 110, at 2057.
  \item \textsuperscript{112} Dayton Peace Agreement, art. III.
  \item \textsuperscript{113} \textit{BOSN. \\& HERZ. CONST.} pmbl.
  \item \textsuperscript{114} \textit{Id.} art. I, § 7.
  \item \textsuperscript{115} See Aolain, \textit{supra} note 110, at 974 (noting that each entity was given wide authority to regulate “defense, police, citizenship, the issuing of passports, criminal matters, property law, finance, and even external relations and cooperation with other states”).
  \item \textsuperscript{116} \textit{FED’N OF BOSN. \\& HERZ. CONST.} art. I, § 1, \textit{available at} http://www.ohr.int/const/bih-fed (last visited Mar. 16, 2004).
  \item \textsuperscript{117} \textit{REPUBLICA SRPSKA CONST.} art. I, § 1 (amended 2003), \textit{available at} http://www.ohr.int/const/rs (last visited Mar. 16, 2004).
  \item \textsuperscript{118} \textit{HOLBROOKE, supra} note 111, at 105–06.
  \item \textsuperscript{119} According to its constitution, Bosnia and Herzegovina remains responsible for the development of trade, customs, monetary, immigration, asylum and foreign policy, the financing of the state institutions and their international obligations, international and inter-Entity criminal law enforcement, operation of common and international communications facilities, regulation of inter-Entity transportation, and air traffic control. \textit{BOSN. \\& HERZ. CONST.} art. III, § 1. All other governmental functions and powers are delegated to the Entities. \textit{Id.} art. III, § 3.
\end{itemize}
all common institutions are governed through tripartite executives, consisting of one part Serb, one part Bosniak, and one part Croat. The Presidency of Bosnia and Herzegovina, for example, consists of three members, one from each of the three ethnic groups. The provision for their election is based squarely on Entity, and therefore ethnic, affiliation: “The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosnia[k] and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.”

Although the three-member presidency “shall endeavor” to act by consensus, the reality is otherwise. While the constitution provides a mechanism allowing for a decision to be adopted by two members absent agreement among all three, more significant is the ability of any dissenting member of the presidency to block any decision deemed to be “destructive of a vital interest of the Entity from the territory from which he was elected.” The challenged decision must then “be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory,” or “to the Bosnia[k] Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosnia[k] member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member.” The challenged decision does not take effect if a two-thirds vote of the member’s “home” parliament confirms that it violates a national interest within ten days of its referral.

Legislative power is similarly doled out on an ethnic basis. The fifteen-member upper chamber, the House of Peoples, has five delegates from each ethnic group, each selected by representatives of the delegate’s ethnic group currently serving in their respective Entity parliament. Each ethnic group is given the power to shut down the chamber since a quorum of nine must, per the Constitution, include three members from each of the ethnic groups. Following the tripartite convention, the lower House of Representatives consists of forty-two members, “two-thirds elected from the territory of the Federation, one-third elected from the territory of the Republika Srpska.” While legislation requires a majority vote, “[t]he

120. Id. art. V.
121. Id. art. V, § 2(c).
122. Id. art. V, § 2(d).
123. Id.
124. Id.
125. Id.
126. Id. art. IV.
127. Id. art. IV, § 1. The constitution makes clear that “[t]he designated Croat and Bosnia[k] Delegates from the Federation shall be selected, respectively, by the Croat and Bosnia[k] Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska.” Id. art. IV, § 1(a).
128. Id. art. IV, § 1(b).
129. Id. art. IV, § 2.
Delegates . . . shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates . . . from the territory of each Entity. \(^{130}\) This is coupled with a “vital interest” provision analogous to the one that stalls executive decisionmaking: \(^{131}\) Any member of the House of Peoples may declare a proposed legislative initiative “to be destructive of a vital interest of the Bosnia[k], Croat, or Serb people by a majority of . . . the Bosnia[k], Croat, or Serb Delegates.” \(^{132}\) The matter, if not resolved by an \textit{ad hoc} joint commission, “comprising three delegates, one each selected by the Bosnia[k], by the Croat, and by the Serb Delegates,” is referred to the Constitutional Court. \(^{133}\)

Not surprisingly, the Entities of Bosnia and Herzegovina seized upon the ethnic/religious basis for power distribution to entrench themselves by directly linking ethnicity with citizenship and political rights in the Entities. The constitution of the Republika Srpska, for example, begins with an unequivocal invocation of its ethnic entitlement: “Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development," \(^{134}\) the Republika Srpska proudly declares itself a “[s]tate of Serb people and of all its citizens.” \(^{135}\) Its constitution also ensures that the “Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in official use in the Republic." \(^{136}\)

Further, while Article 28 declares that “[f]reedom of religion shall be guaranteed,” it nonetheless specifies that “[t]he Serbian Orthodox Church shall be the church of the Serb people and other people of Orthodox religion.” \(^{137}\) More importantly, it declares that the “State shall materially support the Orthodox church and it shall co-operate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values,” \(^{138}\) conspicuously omitting any reference to the religions of Islam or Catholicism—those of the Bosniaks and Croats, respectively.

Meanwhile, the Federation’s constitution preserves its status as an Entity of Bosniaks and Croats through its own decentralized system of government. The territory of the Federation is subdivided into cantons. \(^{139}\)

\(^{130}\) \textit{Id.} art. IV, § 3(d).
\(^{131}\) \textit{Id.} art. IV, § 3(e).
\(^{132}\) \textit{Id.} art. IV, § 3(e).
\(^{133}\) \textit{Id.} art. IV, § 3(f).
\(^{134}\) \textit{REPUBLIKA SRPSKA CONST.} pmbl.
\(^{135}\) \textit{Id.} art. I, § 1.
\(^{136}\) \textit{Id.} art. I, § 7.
\(^{137}\) \textit{Id.} art II, § 28.
\(^{138}\) \textit{Id.}
\(^{139}\) \textit{See FED’N OF BOSN. \\& HERZ. CONST.} art. I, § 2 (declaring that “[t]he Federation consists of federal units (Cantons)”).
All but two of the ten cantons, which are based on ethnic predominance, are deemed either a “Bosniak canton” or “Croat canton,” and, accordingly, are governed by the majority ethnic group.140 While the Dayton agreements held out against the demands of the Serbs for full cantonization (and the prospect, perhaps inevitable, of the integration of the Serbian-dominated areas into Serbia proper), an idea that had already been floated by European Community officials and that had underlaid the earlier Vance-Owen peace proposals, the cantonization of the Entities portended the same recognition of the ethnic land grab.141

Perhaps most damning to the consociational project are the incentives to validate and reinforce the ethnic cleansing of the Civil War period created by this ethnic assignment of power. For example, since Serb (and only Serb) members of the state common institutions are directly elected from the territory of the Republika Srpska, it is impossible for a non-Serb to represent the people of the Republika Srpska. Consequently, there is no meaningful manner in which Bosniaks or Croats may participate in, and be represented through, the electoral or democratic processes in that Entity. For any non-Serbs to return to a pre-war home in the Republika Srpska means to accept permanent subordinate status in the Serb-dominated and -controlled Entity. The same holds true for Serbs in the Federation of Bosnia and Herzegovina. Such provisions, whether by design or effect, perpetuate the ethnically entrenched division of power and territoriality among the Entities emerging from the Civil War—a period in which the Serb population in Republika Srpska went from 54.3% to 96.8% of the total population, and the Bosniak population fell from 28.8% to 2.2%.142 They also provide a natural mechanism for the historically subjugated Serbs—the majority of the population of the former Yugoslavia, yet citizens of the poorer southern part of the country—to seek redress for perceived centuries of domination, first by the Turks and then by the more economically advanced Croatian and Slovenian populations in the northern parts of the country.143 Again, this is not to exculpate the slaughter visited on the Bosniak population, but simply to reinforce the point that ethnic assignments of power seem particularly susceptible to the settling of historic scores on the basis of sheer power.144

As the Bosnian Constitutional Court would later find,

140. In the two so-called “special regime” cantons, neither Bosniaks nor Croats dominate. They are thus controlled by a proportional multi-ethnic regime. Id. art. V, § 12.
141. See BOBBITT, supra note 40, at 447, 465 (discussing the “cantonization” of Bosnia and Herzegovina).
143. For a fuller discussion of this point, see AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 170–75 (2003).
144. The designation of Republika Srpska as a Serbian political entity did not quell nationalist sentiments among the Serbs. Ambassador Holbrooke recounts that even during the Dayton
After the Dayton-Agreement came into force, there was and is systematic, long-lasting, purposeful discriminatory practice of the public authorities of RS [Republika Srpska] in order to prevent so-called “minority” returns either through direct participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation or violent attacks solely on the ground of ethnic origin . . . .

B. Judicial Review of Dayton’s Legacy.

The one (partial) exception to complete ethnically based paralysis of post-Dayton Bosnia and Herzegovina comes with the constitutional court, which as the primary federal judicial body in the country is entrusted with jurisdiction to “uphold [the] Constitution [of Bosnia and Herzegovina]” and “to decide any dispute that arises under [the] Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities.” In part the court reflects the same ethnic assignment of roles. The ethnic composition of the nine-member court includes four members who are selected by the Federation House of Representatives and two members selected by the Republika Srpska National Assembly. To prevent ethnic deadlock in adjudication, however, the remaining three members of the court must be non-citizens, are selected by the President of the European Court of Human Rights “after consultation with the Presidency,” and cannot be citizens of any neighboring country. Precisely for this reason, the court became the forum for revisiting the democratic viability of compelled ethnic power assignments inherited from Dayton, with the predictable limitations of having Dayton as the baseline constitutional principles, rather than the Interim Principles that were relied upon in South Africa.

The challenge to the constitutionality of many aspects of the Dayton accords was brought to the Bosnian Constitutional Court at the instigation of Alija Izetbegovic, the then-Chairman of the Presidency of Bosnia and Herzegovina, and himself a Bosniak. The Court issued four distinct partial opinions, although my focus will be on the decision of July 1, 2000, because negotiations the Serb delegation made it clear that it would not accept Muslims as potential swing voters in intra-Serb elections. Holbrooke, supra note 111, at 290.

146. Bosn. & Herz. Const. art. VI, § 3.
147. Id. art. VI, § 3(a).
148. Id. art. VI, § 1(a).
149. Id. art VI, § 1(a) & (b).
150. Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Partial Decision of July 1, 2000, at ¶ 1. Further complicating the picture is the fact that Izetbegovic objected strenuously to the final form of the Dayton accords as hammered out by Serbian President Milosevic and Croatian President Tudjman. Ultimately, however, Izetbegovic was forced under pressure from the U.S. to accede to the ethnic assignment of power through the territories. Holbrooke, supra note 111, at 308–09.
it provides the broadest discussion of the tension between ethnic power assignments and the viability of democratic governance.\textsuperscript{151} While the other three decisions addressed related themes, such as the ability of the Serb area to, in effect, conduct its own foreign policy and make its own international treaty obligations,\textsuperscript{152} the July 1, 2000 decision addressed forthrightly the chief inheritance of Dayton: the dedication of the Entities to be the governmental embodiment of ethnic power.

The provisions challenged focused on the declarations in the preambles of the sovereign power of ethnic groups.\textsuperscript{153} The Constitution of Republika Srpska declares itself the “State of the Serb people” and adds:

Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;

Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

... Taking the natural and democratic right, will and determination of the Serb people from Republika Srpska into account to link its State completely and tightly with other States of the Serb people . . . .\textsuperscript{154}

In striking down the provisions of the preambles of the Entities, the court held:

\begin{quote}
151. \textit{See Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Partial Decision of July 1, 2000, at \$ 1(A)(b) (chronicling Izetbegovic’s challenge to a provision of the constitution that stated “Republika Srpska is a State of the Serb people and of all its citizens”).}


154. \textit{Id. \$ 9(A)(a) (quoting the Constitution of Republika Srpska). The Constitution of the Federation of Bosnia and Herzegovina similarly provides that “Bosniacs and Croats as constituent peoples . . . [act] in the exercise of their sovereign rights.” \textit{Id. \$ 10}.}
\end{quote}
Segregation is, in principle, not a legitimate aim in a democratic society. It is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as determined by Article I.2 of the Constitution of BiH in conjunction with paragraph three of the Preamble. Territorial delimitation thus must not serve as an instrument of ethnic segregation, but—quite contrary—must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.\textsuperscript{155}

While perhaps an apt statement of democratic aspirations, the court was forced into a direct confrontation with the legacy of Dayton:

It is beyond doubt that the Federation of Bosnia and Herzegovina and Republika Srpska were—in the words of the Dayton Agreement on Implementing the Federation, signed in Dayton 10 November 1995—recognized as “constituent Entities” of Bosnia and Herzegovina by the GFAP, in particular through Article I.3 of the Constitution. But this recognition does not give them a carte blanche! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimation for ethnic domination, national homogenisation or a right to uphold the effects of ethnic cleansing.\textsuperscript{156}

The original expediency of the Dayton compromise infected every aspect of the democratic aspirations of Bosnia and Herzegovina. For example, the court notes, “the Serb member of the Presidency . . . is not only elected by voters of Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation.”\textsuperscript{157} In its opinion, the Bosnian Constitutional Court makes many deft analytic moves to avoid some of the investiture of the Dayton accords, as with the reliance on international law to find that only the federal signatory to the treaty and not the subordinate Entities was entitled to claim a reliance interest on the actual treaty language. But the key analytic work is done by the court’s crafting of a “functional interpretation” of the national Constitution that allows it to proclaim that the “overall objective of the Dayton Peace Agreement” is to facilitate the “re-establish[ment of] the multi-ethnic society which had existed before the war.”\textsuperscript{158} This functional interpretation would require an analysis of the “totality of these circumstances” to unwind the institutional provisions of the Dayton Accords in favor of stronger constitutional safeguards on governance.\textsuperscript{159} Toward this aim, the key section of the opinion

\textsuperscript{155} Id. ¶ 57.
\textsuperscript{156} Id. ¶ 61.
\textsuperscript{157} Id. ¶ 65.
\textsuperscript{158} Id. ¶ 73.
\textsuperscript{159} Id. ¶ 97.
relies on international law and the aspirational provisions of Dayton to repudiate ethnic power claims:

[ETHnic segregation can never be a “legitimate aim” with regard to the principles of “democratic societies” as required by the European Human Rights Convention and the Constitution of BiH. Nor can ethnic segregation or, the other way round, ethnic homogeneity based on territorial separation serve as a means to “uphold peace on these territories”—as asserted by the representative of the National Assembly—in light of the express wording of the text of the Constitution that “democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society.”160

The court’s actual holding, by contrast, was quite narrow. This may have been the result of having to work within the limitations of Dayton, or the recognition of the frailty of the social peace in Bosnia and Herzegovina, or the frank realization that the court could do little more than pronounce when it was itself badly divided. The opinion striking down the claims of ethnic hegemony in the Entities was a five-to-four vote with the majority comprising the two Bosniak judges and the three international judges, while the Serb and Croat judges dissented.161 In the end, the court struck down the declarations of ethnic sovereignty in the constitutions of the Entities, while leaving the development of integrative norms and repatriation of ethnic refugees to subsequent development. While the situation remains flammable, there is some small evidence of increased political accommodation and an increase in the number of refugees returning to their native villages and towns in the aftermath of the court’s ruling.162

III. Conclusion

Let me return to the passing mention made in the opening regarding the relation between the issues of ensuring representation and the difficulty in using the state to lock in the divides of a fractured society. One of the tensions in the Shaw line of cases is between the U.S. Supreme Court’s evident discomfort with formal state assignment of representation based on race, and its intuitive recognition that there would be a dramatic lack of legitimacy if the halls of legislative power were bereft of minority representation.163 While the cases appear frustratingly difficult to decipher in

160. Id. ¶ 96.
161. Id. ¶ 142.
162. See Mansfield, supra note 110, at 2089–90 (stating that since the court’s decision, there has been increased ethnic cooperation, new legislation, and an increase in the return of refugees).
163. This theme is explored more fully in T. Alexander Aleinikoff and Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno, 92 MICH. L. REV. 588 (1993); Samuel Issacharoff, The Constitutional Contours of Race and Politics, 1995 S. CT. REV. 45. See also Charles, supra note 22, at 1211–12. Articulating the dilemma faced by the Supreme Court, Charles observes:
the particular, the general pattern of trying to mediate a permissible level of race consciousness is apparent. Viewed with a wider, more international lens, the Shaw cases reflect a less urgent version of a recognizable tension in divided societies. The allure of consociationalism was its understanding that state authority could not achieve legitimacy without inclusiveness. At the same time, formal state entrenchment of racial or ethnic political power appeared historically to perpetrate—and in some instances exacerbate—the underlying societal division.

Whatever the difficulties in crafting a constitutional line that mediates these divides in the United States, the stakes simply cannot compare to those in truly fractured societies. South Africa avoided a massive bloodletting only through a combination of good fortune in finding a negotiated pathway and a level of inspired political leadership that only rarely graces the world stage. Bosnia and Herzegovina live under the perpetual threat of a sudden descent into renewed ethnic slaughter. In these countries, a lack of legitimacy in representation would trigger either the collapse of the central government or a last stand by an excluded group. Governmental structures had to be devised that could assure participation for all, temper the threat of majoritarian tyranny, and guarantee the sanctity of the individual. Where the U.S. Supreme Court took a full decade to find some level of stability in its Shaw jurisprudence, it was unlikely that a ten-year trip through the courts was possible in South Africa or Bosnia.

I am more certain of my praise for South Africa than of my discomfort for the Dayton approach. South Africa used a modern yet innovative approach to constitutionalism to hold a workable peace in a deeply fractured society. By reducing what the governing majority in power may do, the South Africa Constitution served to lower the stakes for playing the political game and to provide encouragement for a peaceful transition. Even without giving formal expression to the racial and ethnic divide, however, South Africa assured each group significant political power through federalism, territorial representation, proportional representation, and ample checks on the executive. My sense is that the Bosnian Constitutional Court attempted to do the same by leaving untouched the mechanism of representation inherited from Dayton and then using the constitutional framework to undermine the hard edges of consociationalism.

This then is the point of convergence between the South African and Bosnian courts. Each saw in its constitutional authority a responsibility to mediate the inherent conflict between democratic self-governance and the...
risk of majoritarian oppression. Each helped its society move away from the risk of locking in social fractures that would have been present had the immediate majorities held unfettered power. At the same time, each showed itself to be quite sensitive to the need to assure meaningful minority participation in the structures of governance. Perhaps because the stakes do not appear so high, American case law appears to follow a more meandering path around the inherent conflicts in constitutional democracy. Where the stakes are higher and the courts are seen as indispensable actors in holding together a delicate social peace, the Bosnian and South African courts have shown a fuller appreciation of their role in mediating the inescapable tension between constitutionalism and democracy.