CONTENTS

Focus on
The Constitutional Court
1996 Term
INTRODUCING THE DEVIL: AN INSTITUTIONAL ANALYSIS OF THE POWER OF CONSTITUTIONAL REVIEW

Heinz Klug*

Introducing a justiciable constitution has fundamentally changed the place of the judiciary in South Africa’s constitutional and political order. Analysis of the judicial role, and the Constitutional Court in particular, has in consequence focused on developing an understanding of how the Court will go about its task of applying and interpreting the Constitution and the Bill of Rights in particular. This approach relies, it has been argued, upon comparative constitutionalism to trace the history of “ideological and jurisprudential struggle on the part of the judiciary to develop a coherent set of constitutional values which emanate clearly from a Bill of Rights and which can act as reliable signposts en route to a decision”. While this analysis is central to understanding the practice of advocates before the courts and indeed for identifying the relevant issues to which the court will look in formulating its opinions in particular cases, I will argue that this approach provides only a part of the answer to the mighty problem of judicial review.  

Focusing on constitutional interpretation and the explication of particular constitutional rights by courts in different parts of the world, fails to question how courts achieve the power, often in direct contradiction to a legislative majority or a popularly elected executive, to decide on issues of fundamental social importance. The doctrinal response is of course to point to the sections of the Constitution which explicitly grant the court

---

* BA(Hons)(Natal) JD(University of California), Member of the California Bar, Advocate of the Supreme Court of South Africa, Assistant Professor, Law School, University of Wisconsin. I am grateful for, and have benefited from, comments on earlier drafts of this paper by Neil Komesar, Jonathan Klaaren and Stuart Woolman as well as the participants in the Michigan Legal Theory Workshop at the University of Michigan Law School.


2 See M Cappelletti The Judicial Process in Comparative Perspective (1989) at 150. Cappelletti argues that “the application of the Marbury doctrine raises exceedingly serious questions [which] turn on the problem of formidable role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or personal predilections into the relatively empty boxes of such vague concepts as liberty, equality, reasonableness, fairness, and due process”
the power of judicial review, or failing which, to refer to case law in which the power was assumed. This response however fails in the face of a history in which courts, even when explicitly granted powers of judicial review, have either been ‘executive-minded’ in their deference to the executive or just failed to exercise this authority. This trajectory is evidenced even in the Supreme Court of the United States which for long periods of its history failed to uphold the rights of citizens against government and private violations.

In the late twentieth century there has been a globalization of the notion that individual rights, inscribed in written constitutions, are an essential component of democratic governance. This third wave of constitutionalism has, in the political transitions following the collapse of state socialism, been accompanied by the introduction of new economic laws in accordance with the ‘conditionalities’ attached to financial aid programmes or loans granted by the international financial institutions. However, in neither of these processes has much attention been paid to the institutional requirements and consequences of placing greater reliance on the courts, or in introducing a justiciable bill of rights. The capacity of the courts and a constitutional court in particular is an essential prerequisite to the judiciary’s effective assertion of the power of constitutional review and thus becomes a central element in securing the future vibrancy of constitutional rights. I will argue that only an institutional analysis of how courts achieve, over time, the power to decide who decides, will enable us to develop a balanced understanding of the judicial role.

OUTLINING THE ARGUMENT

German constitutional scholar Brun-Otto Bryde uses the histories of the German, Hungarian and South African Constitutional Courts to demonstrate the important institutional roles these courts have played in stabilizing democracy in the context of constitutional transitions.\(^3\) His analysis describes the different Courts’ specific roles as educator,\(^4\) protector of acquired rights\(^5\) and past interests,\(^6\) or as arbitrator\(^7\) in the context of these particular democratic transitions. Bryde identifies ‘institutional interests and preferences’ as being of primary significance in explaining the court’s strategic behaviour to protect the constitution as ‘the basic

\(^3\) B Bryde ‘Constitutional Courts in Constitutional Transition’ to be presented at Conference of Constitutional Transitions, Hong Kong, June 1997 (Draft, March 1997)

\(^4\) The German Constitutional Court in the post-WWII period of democratic construction

\(^5\) The Hungarian Constitutional Court’s protection of social welfare benefits under the property clause of the post-socialist constitution

\(^6\) The role of the German Constitutional Court in protecting the reunification agreements made with a now disappeared German Democratic Republic

\(^7\) Describing the role of the South African Constitutional Court and in particular the first Constitutional Certification judgment
source of its own institutional power'. He however remains sceptical about the court's ability to play a major political role, concluding that this is dependent upon the acceptance of the court's role by the wider legal culture and political system. It is towards an understanding of the institutional dynamic of this 'acceptance' that my analysis will turn.

In order to understand how the court achieves the institutional prerogative to decide who decides it is necessary to focus on the judiciary's early exercise of the power of constitutional or judicial review, and particularly, on those first cases when the courts strike down the actions of the highest democratically-elected bodies. Understanding this process in comparative perspective will enable us to see how the successful emergence of the power of constitutional review in relation to other competing political institutions is a prerequisite and source of strength for the protection of constitutional rights.

In order to explore the institutional dynamics of the assumption by the courts of their role as final arbiter in struggles over the constitutional allocation of the power to decide who decides, I need to make a distinction between the decision that a particular institution – court, legislature or market – is best suited to handle a particular problem and the prior assertion of the constitution's determination of who has the final say in deciding to whom the constitution allocates this power. While Marshall CJ in Marbury v Madison implies that the courts must have the final word, as there is no one else to resolve malfunctions in the political process, in fact constitutional interpretation is continually engaged in by other organs of government under the doctrine of coordinate construction. It is in this context that this paper will focus on the question of how the courts achieve the institutional authority to decide who decides and do not reach the deeper questions of comparative institutional analysis which would consider both the differing capacities of competing institutions to make and implement particular decisions as a basis for deciding who should decide as well as making normative determinations as to which institutions would most appropriately be empowered to make a particular decision.

As a general proposition I wish to begin by proposing that we should understand judicial or constitutional review as the historical consequence of two interacting elements. First, an objective element. This element is

---

8 See L Fisher & N Devins Political Dynamics of Constitutional Law (1992)
9 See N K Komesar Imperfect Alternatives Choosing Institutions in Law, Economics, and Public Policy (1994)
10 In this analysis 'deciding who decides' has two distinct elements. The first is when the courts must decide which institution – judicial, legislative or market – is best suited to resolve a particular social problem. The second element involves the court's assumption of the role of the institution which is the ultimate and final source of constitutional understanding and decision-making, in which the court of last instance assumes the right to decide who decides on the correct understanding of the constitution and the constitution's allocation of decision-making powers. It is this latter aspect of the problem of institutional power on which my concern is focused.
produced by a complex interaction of two factors: one, the traditional judicial role, as the determiner of rights;\textsuperscript{11} and two, the emergence of systems of governance premised on the horizontal and vertical dispersion of governmental powers.\textsuperscript{12} While written constitutions have increasingly based the structure of government on the separation of powers and the distribution of powers between different spacial jurisdictions or levels of government, it is only more recently that explicit provision has been made for the judicial determination of conflicts over these allocations of power.\textsuperscript{13} Instead, judicial assumption of this power to decide on the allocation of constitutional powers flowed initially from the courts common-law role as determiner of rights in general and the laws claim, since the Magna Carta, to limit the powers of government. It is the implementation or introduction of this right to decide who decides that I would postulate is one of the most important moments prefiguring the emergence of a vibrant constitutional democracy. It is the outcome of this moment, often repeated, in which the exercise of constitutional review by the judiciary is institutionally accepted, which secures the role of judicial review despite the oft-cited counter-majoritarian dilemma.

A second, or subjective, element provides the space within which the court is able to develop increasing institutional legitimacy.\textsuperscript{14} This is

\textsuperscript{11} Judicial review in this sense is implicit in the judicial function and the adjudication of rights under the common law. Notions of natural rights and of the repugnancy of local laws to colonial statutes prefigure the assertion of the 'testing right'. Perhaps, as some have implied, these elements lead inevitably to the development of the wider power of judicial review. See Capelletti op cit note 2 at 126-31 The judicial function of determining the rights between parties is however, mainly an individually oriented handling of social conflict and does not directly shape the broader exercise of governmental powers. It is upon this second aspect of the judicial function, as the guarantor of individual rights and the concomitant issues of constitutional interpretation, that most constitutional law analysis focuses.

\textsuperscript{12} Less attention has been paid to this second, more threatening and wider power of judicial review, implied in the creation of a supreme constitution and its allocation of governmental powers. The power, to determine who decides, I would argue is implicit, but remains largely unspecified, in a written constitution's claim of legal supremacy. Structural reasoning in constitutional analysis – from Charles Black to Mark Tushnet – draws inferences from constitutional structure and relationships but has focused primarily on questions of federalism and the separation of powers. In my view the question of institutional choice is prior, and is implicit in the judiciary's assumption of the power to decide who decides. In determining the constitutional allocation of power, the court is claiming the right to make the institutional choices upon which the constitutional allocation of powers is premised.

\textsuperscript{13} See s 98(2)(e) of the interim Constitution. Note however, that the court's jurisdiction over conflicts between branches of government became an issue of debate in the Constitutional Assembly. And, while the power of constitutional review has been extended to the Supreme Court of Appeal (former Appellate Division) and the High Courts (former Divisions of the Supreme Court) which have been given the power to declare an Act of Parliament invalid upon confirmation of the order by the Constitutional Court, the power to decide constitutional disputes between organs of state has been explicitly limited to the Constitutional Court (s 167(4)(a)).

\textsuperscript{14} It is interesting to note that in constitutional democracies as culturally and historically different as the Federal Republic of Germany and India, it is the Constitutional Court and the Supreme Court respectively that have consistently enjoyed, as institutions of governance, the highest degree of public approval and confidence.
premised, particularly in the early exercise of judicial power, on what may be termed with no pun intended, judicious politics. Particular histories and contexts – both international and local – play a significant part in setting the stage upon which judicial review is introduced. While its ability to build legitimacy through its formal judicial role is a source of strength, the comparative institutional weakness of the judicial branch, by its very nature, requires the judiciary to be circumspect in its exercise of authority over the more resourced and powerful arms of government. In asserting its constitutional powers the judiciary constantly recognizes its ultimate reliance on both the executive and legislative branches to enforce its holdings on the one hand and to protect its independence on the other.

As a consequence of this weak institutional position the court must carefully negotiate its way through conflicts which could elicit direct attacks on the independence of the judiciary or the tenure of individual judges, and even attempts to restructure the courts jurisdiction so as to limit the institution’s power. Awareness of the pivotal role these institutional concerns and limitations may play in the assertion of the power of judicial review may also allow us to develop further insights into the classic strategies of judicial deference or restraint with respect to the courts’ own authority which underlie decisions on questions of justiciability – standing, mootness, ripeness and in some circumstances, the political question doctrine or similar differential strategies.

In adopting an historical comparative approach to the introduction of judicial review, I hope to demonstrate the role of these two elements – institutional logic and judicious politics – in the implementation or assertion of judicial review. I also hope to show how the emphasis may have shifted from the former to the latter through the explicit constitutional recognition, in more recent constitutions, of judicial jurisdiction over the intergovernmental distribution of power.

INTRODUCING JUDICIAL REVIEW

Despite continuing philosophical arguments and debates on the scope and application of the power of judicial review in the United States, it may be argued that today constitutional review is ‘a given in the structure of American government’, based on the doctrine of judicial review attributed to Marbury v Madison. It is this attribution which marks Marbury

---

15 This ties in with Alexander Bickel’s notion of judicial restraint as a deferential strategy. See A Bickel The Least Dangerous Branch The Supreme Court at the Bar of Politics (1962)

16 Here the notion of comparative institutional capacity is a reference to the application of comparative institutional analysis in which the allocation of decision-making powers is considered in the context of the judicial institutions capacities and limitations as compared to the imperfect alternatives of legislative action or the market. This analysis is not pursued here

17 5 US (1 Cranch) 137 (1803).
as the founding case, and therefore, for the purpose of understanding the
emergence of judicial review, the place to begin.

In *Marbury* the United States Supreme Court held that William Mar-
bury had a legal right to have his Commission as a federal circuit judge
delivered to him but that the Supreme Court could not provide a remedy.
The Supreme Court could not require the Executive to produce the
Commission as the court's jurisdiction over the case, based on s 13 of
the Judiciary Act of 1789, was unconstitutional. The factual context of
the case reveals a moment of high political drama following the defeat of
the federalists in the elections of 1800 and an attempt by President Adams
and the United States Congress to stack the federal judiciary with the
party's own appointees so as to retain control of one branch of govern-
ment. In this process William Marbury was appointed but in the confu-
sion of the last hours of the Adam's administration the Secretary of State,
John Marshall, failed to deliver the Commission because he was called
away in his new capacity as Chief Justice to inaugurate the new President.
In holding that Congress did not have the power to extend the Supreme
Court's jurisdiction beyond that specified in Article III s 2 of the US
Constitution, the court denied its own power to provide a remedy while
indicating on the one hand, that Marbury had a legal right and on the
other, that the court had the power to strike down an Act of Congress. It
was the assumption of this last power – to strike down an Act of Con-
gress – at best implied in the Constitution and only explicitly enumerated
by Hamilton18 during the ratification process, that introduced constitu-
tional review of federal legislation.19 However, within a century, the
court's power to review the decisions of the highest democratically
elected body in the land was recognized and *Marbury* has remained
unchallenged as the legal source of the doctrine of judicial review.

Most discussions of John Marshall's opinion in *Marbury* are concerned
with the present, to justify the power of judicial review or to determine
the scope of the court's role in constitutional interpretation. My concern,
however, is to address what I consider to be a prior issue, the manner in
which the court managed what was potentially a destructive political clash.20 Robert McCloskey's classic statement that Marshall's opinion

18 See The Federalist Vol II No 78 (New York, 1788)
19 Cf C L. Black Jr The People and The Court (1960) at 78. Black argues that the opinion (in
Marbury) 'implemented what appears to have been the general expectation of the
Constitutional Convention [and] is in large part based on one of The Federalist Papers'
Review 87 for an institutional analysis of Marbury and the emergence of judicial review using
the methodology of game theory to demonstrate that the emergence of the institution of
judicial review is based on the short-run strategic choices of political actors. The weakness of
this approach in my view is the failure to consider the structural resources – such as the
judiciary's power to adjudicate rights based on the historic institutional role of the courts –
which are a significant factor in determining what strategic options are available to the relevant
political actors.
was a 'masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another',\textsuperscript{21} needs as Gerald Gunther argues, 'to be taken with a grain of salt'.\textsuperscript{22} Yet it may say more about the institutional circumstances of \textit{Marbury} than many of the more recent commentaries which deride McCloskey for exaggerating Marshall's concern with judicial review in his desire to create a strong foundation for the doctrine of judicial review, or those that criticize Alexander Bickel for perpetuating the myth of \textit{Marbury} as the prime exemplar of aggressive judicial activism.\textsuperscript{23} While McCloskey's claim that Marshall consciously slipped judicial review in by the back door may ignore the historical complexities of the period,\textsuperscript{24} there is clear evidence that Marshall was keenly aware of the political dangers the case posed. Not only was Marshall deeply involved in the political transition that gave birth to the conflict, as the Secretary of State responsible for the distribution of the commissions that went undelivered, but the court was also engaged in a struggle for survival with the newly-elected Jeffersonians. These circumstances are alluded to in the opening paragraphs of Marshall's opinion when he refers to the 'peculiar delicacy of this case'. The threat of Congressional impeachment hanging over the judiciary during this period only confirms the extent of the institutional crisis.

The Court's need to assert the right to constitutional review in \textit{Marbury} despite the dangers inherent in the ongoing political conflict, are said to reside in the wish of the federalists to empower the only branch of government they remained in control of. Evidence for this is found in the clear scheme to pack the judiciary with federalist appointees, a scheme which went partly awry in the failure to deliver the commission's at issue in \textit{Marbury}. There is, however, strong evidence that Marshall was in no position to assert a new claim of power on behalf of the judiciary, but was rather seeking to assert the traditional role of the judiciary as determiner of legal right in a situation in which both Congress and the President had, in the face of compliant federalist judges, entered the field of protecting individual rights and deciding on constitutional issues.\textsuperscript{25} For example, in 1801 Jefferson had discharged all those convicted or under prosecution in terms of the Alien and Sedition Acts of 1798 on the grounds that he considered the law a nullity, while Congress 'passed

\textsuperscript{21} R G McCloskey \textit{The American Supreme Court} (1960) at 40
\textsuperscript{22} G Gunther \textit{Constitutional Law} 12 ed (1991) at 12.
\textsuperscript{23} R L Clinton 'Precedent as Mythology: A Reinterpretation of \textit{Marbury v Madison}' \textit{The American Journal of Jurisprudence} (1990) at 56-57. See also R L Clinton \textit{Marbury v Madison and Judicial Review} (1989)
\textsuperscript{25} L Fisher 'One of the Guardians Some of the Time' in R A Licht (ed) \textit{Is the Supreme Court the Guardian of the Constitution?} (1993) at 84-87
private bills to reimburse individuals who had been fined under the sedition act.\textsuperscript{26}

In his opinion in \textit{Marbury} Chief Justice Marshall himself alludes to an institutional justification for judicial review, arguing in effect that it is only the court that can decide when the political process cannot: The court’s authority is found according to Marshall in the oath taken by the judiciary to uphold the Constitution.\textsuperscript{27} The fact that other government officials are also sworn to uphold the Constitution and in effect interpret its provisions in their daily decisions makes this an extremely thin argument for the court’s institutional supremacy. It is in this context that we might use a comparative historical analysis to identify a broader institutional logic which drives courts to find a way, consistent with their traditional role as determiner of rights to claim a supreme constitutional role in determining the constitution’s allocation of the power to decide who decides.

The achievement of this status was however not a foregone conclusion. From the beginning and without much controversy the federal courts exercised powers of judicial review to strike down state legislation incompatible with the federal constitution.\textsuperscript{28} However, in the first seventy years of the Constitution’s life, the power of constitutional review was employed only twice\textsuperscript{29} to strike down Acts of Congress, provoking intense political controversy on both occasions. In other countries, and at other times, attempts to introduce constitutional review have either stagnated or been dramatically foreclosed. The Supreme Court in Chile, for example, has had the power of judicial review for over forty years, but has rarely used it.\textsuperscript{30} When the court has found a statute unconstitutional, it has usually been in cases of minor importance.\textsuperscript{31} Instead, the impact of legal education and career training created an extremely orthodox view of the judicial function, producing a tendency for judges to ‘recoil from the responsibilities and opportunities of constitutional adjudication’.\textsuperscript{32} In the

\textsuperscript{26} Ibid
\textsuperscript{27} Marshall is however very careful to circumscribe his claim by making a distinction between the law – which he argues ‘is emphatically the province and duty of the judicial department to say what the law is’ – and ‘[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, [and which he argues] can never be . . . [decided] in this court’.
In cases in which the ‘executive possesses a constitutional or legal discretion [Marshall argues] nothing can be more perfectly clear than that their acts are only politically examinable’ The judiciary’s power is in contrast traced by Marshall to the application of the law. When two laws conflict with one another and the court ‘must decide on the operation of each . . . If, then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply’.
\textsuperscript{28} For example \textit{Calder v Bull} 3 US (3 Dall) 386 1 L Ed 648 (1798)
\textsuperscript{29} \textit{Marbury v Madison} (1803) and \textit{Dred Scott v Sanford} (1857)
\textsuperscript{30} J H Merriman, D S Clark & J O Haley \textit{The Civil Law Tradition Europe, Latin America, and East Asia} (1994) at 739.
\textsuperscript{31} Ibid
\textsuperscript{32} Ibid
years following decolonialization in Africa, the imposition of post-colonial constitutions and the reaction of governing elites produced an instrumental view of the purposes of constitutions and the extensive derogation of justiciable rights in the name of a more socially relevant basic law.\textsuperscript{33} More recently, and more dramatic, was the suspension of the Russian Constitutional Court by President Boris Yeltsin after it raised questions about the constitutional power of the President.

While judicial review has failed to protect constitutional rights in many countries – despite the adoption of bills of rights and even the explicit recognition of the power of judicial review – one of the most stark rejections of judicial review occurred right here on South African soil. Prefiguring our present Constitution by almost a century the High Court of the South African Republic, with much reliance on \textit{Marbury v Madison}, asserted the ‘testing right’ but lost the ensuing conflict with the executive and legislature.

Drawing on the United States Constitution, Chief Justice J G Kotze of the High Court of the South African Republic declared invalid a legislative resolution indemnifying the government for any liability resulting from the withdrawal of its declaration of a public gold digging.\textsuperscript{34} With repeated references to Marshall’s reasoning in \textit{Marbury}, Kotze argued that as sovereignty vested in the people of the Republic and not the Volksraad it was the court’s duty to strike down legislation incompatible with the fundamental law of the Grondwet.\textsuperscript{35} Reaction from the executive was swift. President Kruger secured an emergency resolution of the legislature declaring that ‘the judges had not and never had had the testing right.’\textsuperscript{36} As the crisis deepened, Chief Justice Kotze refused to remain bound by a negotiated undertaking not to exercise the ‘testing right’, and President Kruger dismissed the Chief Justice asserting the supremacy of the legislature. Later President Kruger warned the judges not to follow the devil’s way, as Chief Justice Kotze had done, as ‘the testing right is a principle of the devil’, which the devil had introduced into paradise to test God’s word.\textsuperscript{37}

While Chief Justice Kotze may have relied on Marshall’s holding that the court must strike down legislation incompatible with the constitution, he does not seem to have taken care to observe the careful manner in which Chief Justice Marshall appropriated the power to decide. While


\textsuperscript{34} \textit{Brown v Leyds NO} (1897) 4 Off Rep 17 in which an American mining engineer claimed damages arising out of the government’s failure to issue licenses for gold claims he had ‘pegged out’ See H R Hahlo and E Kahn \textit{South Africa The Development of its Laws and Constitution} (1960) at 107-10

\textsuperscript{35} J Dugard \textit{Human Rights and the South African Legal Order} (1978) at 21

\textsuperscript{36} Hahlo and Kahn op cit note 34 at 108-9

\textsuperscript{37} Dugard op cit note 35 at 24
Kotze was dismissed and Marshall survived threats of impeachment, it is obvious that institutional risks, inherent in the appropriation of the power of institutional choice, seem always to accompany the act of introducing the devil.

**Reintroducing the Devil.**

Despite the vast differences in historical period and context there is a striking similarity in the manner in which the power to determine the question of institutional choice has been successfully introduced by the Constitutional Court in South Africa since 1995 and its much earlier introduction in the United States. This similarity, evidenced in both Court’s even-handed juxtaposition of contending powers and outcomes, was echoed most recently in the Constitutional Court’s management of the constitutional certification process. Again and again the justices of the Constitutional Court have, when faced with politically charged decisions, worked to create a common consensus, based on both a circumscribed assertion of the Court’s power and public deference to democratic values.

It is however the stark contrast between the bold assertion of constitutional rights and powers which characterized the decision to strike down the death penalty and the echoes of similarity between the Court’s *Western Cape* decision and *Marbury* which creates an intriguing puzzle of similarity and difference. This puzzle is further highlighted in the Certification judgments in which the Constitutional Court simultaneously asserted its role as decision-maker and deferred to the democratic will in its broad and final acceptance of the Constitutional Assembly’s product. The relevance of this puzzle becomes obvious when compared to the failure of courts, in a variety of circumstances, to successfully introduce judicial review as a necessary implication of constitutional supremacy or even in some circumstances, despite an explicit granting of the power of constitutional review, to enforce a bill of rights.

Similarity between the responses of two courts, a continent and nearly two centuries apart could, one supposes, be explained as simple coincidence. The evidence, however, suggests otherwise. The pattern of the decisions of the Constitutional Court in the two cases, decided within a few months of the Court’s establishment, and echoed in the certification judgments, presents an opportunity to explicate the Court’s implementation of its power of constitutional review. The first case, *S v Makwanyane* involved the interpretation of fundamental rights and the striking down of law and practice that was closely associated with the violations

---

38 *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC)
39 *1995 (3) SA 391 (CC)*
and inequalities of the apartheid era. The second case, Executive Council, Western Cape Legislature v President of the Republic of South Africa\textsuperscript{40} involved the allocation of powers between levels of government under an Act negotiated by all parties as part of the transition to democracy. While differences between cases involving the adjudication of rights and those involving the allocation of government powers may seem an obvious explanation for the differences in reasoning and decision, merely asserting the difference does not explain the Court's sudden shift and deference to the role of the coordinate branches of government in the implementation of the Constitution in Western Cape.

While legal context may explain a change in the Constitutional Court's analytical approach to the legal issues before the court, it does not, on its own, explain the dramatic shift in emphasis from the assertion of the Court's constitutional role in Makwanyane to the careful balancing the Court applies in Western Cape. This shift, within a period of three months, from what would be characterized as classic judicial activism in United States constitutional jurisprudence, to an equally classic example of judicial restraint, leads one to doubt the obviousness of an explanation based simply on the formal difference in the nature of the cases before the court.

In declaring capital punishment unconstitutional in Makwanyane the Court emphasized that the transitional Constitution established a new order in South Africa.\textsuperscript{41} One in which human rights and democracy are entrenched and in which the Constitution is supreme. The Court's declaration of a new order based on constitutional rights was forcefully carried through in the adoption of a generous and purposive approach to the interpretation of the fundamental rights enshrined in the Constitution.\textsuperscript{42}

The unanimous opinion of the court was however judiciously tailored. Finding that the death penalty amounts to cruel and unusual punishment under most circumstances, Chaskelson P declined to engage in a determinative interpretation of other sections of the Bill of Rights that might also have impacted upon the death penalty such as the right to life, dignity and equality. The individual concurring opinions of the remaining ten justices were not as restrained. Despite their concurrence with Chaskelson P's opinion, each of the remaining ten members of the court went much further in their interpretation of other rights and in their prescriptions on the future trajectory of the Court's jurisprudence. The South African Constitutional Court's judgment is a clear indication of the confidence with which they wielded their powers. It stands in stark contrast to Chief Justice Marshall's decision, made under the threat of

\textsuperscript{40} Western Cape supra note 38
\textsuperscript{41} Makwanyane supra note 39 at para 7, 402 (F-G)
\textsuperscript{42} Ibid at para 9, 403 (D)
ongoing Congressional impeachment proceedings against federal judges, in which only one member of the US Supreme Court would sign any particular opinion.

All ten justices joined Constitutional Court President Chaskalson in giving explicit and great weight to the introduction of constitutional review. They emphasized that the court ‘must not shrink from its task’ of review, otherwise South Africa would revert to parliamentary sovereignty and by implication, to the unrestrained violation of rights so common under previous parliaments. Even the recognition that public opinion seemed to favour the retention of the death penalty was met with a clear statement that the Court would ‘not allow itself to be diverted from its duty to act as an independent arbiter of the Constitution’, and that public opinion in itself is ‘no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour’. If public opinion were to be decisive, Chaskalson P argued, ‘there would be no need for constitutional adjudication’.

Confronted with evidence that capital punishment was subject to extensive debate in negotiations before and during the constitution-making process, the Court argued that ‘the clear failure to deal specifically in the Constitution with this issue was not accidental’. The failure of the founders to resolve this issue left the Constitutional Court with the duty to decide whether the ‘provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes’, was consistent with the fundamental rights enshrined in the Constitution.

This bold assertion of the Court’s constitutional powers in *Makwanya* stands in marked contrast to John Marshall’s carefully crafted claim of the right to exercise judicial review in *Marbury*. The contrast may at first seem obvious given the different historical period, the spread of judicial review since 1945 and the explicit constitutional grant of the power of judicial review in the South African Constitution. But the dramatic shift, just three months later, in the Constitutional Court’s approach to the use of its power in *Western Cape* leads one to doubt

43 Ibid at para 22, 408(C) quoting the South African Law Commission’s *Interim Report on Group and Human Rights Project 58* (August 1991) paragraph 7 31
44 Ibid at para 88, 431 (D)
45 Ibid at para 89
46 Ibid at para 88
47 Ibid at para 20, 407 (F-G)
48 Although the founders were present, any attempt to ascertain their intent or to base interpretation of the Constitution on their original intent would, according to the Court, be confounded by the multiplicity of persons who took part in the production of the Constitution. This seems to confirm empirically Neil Komesar’s argument that constitutional theories of original intent fail to take cognizance of the collective nature of constitution-making processes and the manner in which rules of aggregation provide an additional source of delegation to future generations of the need to decide on particular meanings or issues. See N K Komesar ‘Back to the Future – An Institutional View of Making and Interpreting Constitutions’ (1987) 81 Northwestern University Law Review 191.
the completeness of obvious explanations. Instead, explanations for this
dramatic shift from activism to restraint may be found in the distinction
between the Court's recognized role as the adjudicator of rights and the
Court's assumption of the role of final arbiter of the Constitution's
allocation of power over particular, politically-charged matters.

In deciding on the relative powers of the legislature and the executive
and of the national and the provincial, the Court faces the threat that any
of these sites of governmental power could ignore or publicly disregard
its decision. It is this implicit threat which evokes echoes of Marbury and
provides an explanation for the Court's shift from a bold assertion of its
role as interpreter of individual rights protected in the Constitution to a
careful balancing of the contending claims of power made by the coor-
dinate branches and different levels of government.\(^{49}\) As United States
Chief Justice Warren Burger noted with respect to Marbury: 'the Court
could stand hard blows but not ridicule, and the ale houses would [have
rocked] with hilarious laughter', had Marshall issued a mandamus that
the Jefferson administration ignored.\(^{50}\) Although it may be argued that
Chief Justice Marshall's careful application of judicial review in Marbury
was a consequence of circumstances in which he was required to justify
the courts exercise of the 'testing right', the similarity between his appli-
cation of the power of judicial review in relation to the executive and
legislative branches of government and the approach of the South Afri-
can Constitutional Court in Western Cape is striking.

The conflict adjudicated in Western Cape erupted when President
Mandela, acting in terms of the amendment powers granted the execu-
tive in s16A of the Local Government Transition Act (LGTA), amended
the Act: (1) transferring the power to appoint members of local demarca-
tion committees away from provincial government – where it had been
assigned when the administration of the LGTA had been assigned to
provincial governments; and (2) limiting the wide powers of local admin-
istrators of the Act to make rules relating to the demarcation of local
government structures and the division of such structures into wards.
Mandela's actions were motivated by, and effectively reversed, attempts

\(^{49}\) While it is self-evident that the political process could, as a matter of power, merely ignore the
Court's prohibition on the death penalty or its interpretation of any particular individual right
guaranteed in the Constitution, to do so would imply an explicit rejection of the Court's clearly
mandated role as the determiner of rights This situation may however be distinguished from
one involving the allocation of decision-making powers among branches and/or levels of
government In the latter case, the political institutions may argue that their powers are laid
out in the Constitution and although they may be ignoring a determination of the Court they
are in effect merely fulfilling their Constitutional mandate to act in a particular area – a notion
which comes close to the political question doctrine recognized by the United States Supreme
Court It is the Court's ability to assert its role as the final arbiter on the allocation of constitutional power in this context and in the initial period when constitutional review is first
being established, that both challenges the capacity of the Court and establishes the future
scope of the Court's acceptance by the more powerful institutions of governance

\(^{50}\) Louis Fisher op cit note 25 at 85
by the National Party provincial government in the Western Cape to demarcate the Cape Town metropolitan area so as to dilute the effect of ANC support in the historically poor African areas, thus limiting the impact of this vote on local government in Cape Town. While the ANC objected to this process of demarcation, the National Party in the Western Cape accused the national government of interfering in provincial matters. When the Provincial Government lost its first challenge to Mandela’s directives, the National Party vowed to take the fight for Western Cape independence into the streets if the courts could not defend what they believed to be a constitutional right to provincial autonomy.

In rejecting the Western Cape claim the Provincial Division of the Supreme Court said that Parliament’s amendment of the LGTA had effectively transferred Parliament’s highest legislative powers to President Mandela by ‘allowing the President to make laws in its place’. On appeal, the Constitutional Court was faced with resolving a crisis that by early September 1995 was threatening to prevent the holding of nationwide local government elections and to halt the process of democratic transition away from apartheid. Deflecting the potentially explosive issue of provincial autonomy and avoiding the politically sensitive issue of local government demarcation the Constitutional Court raised the constitutionality of the legislature’s delegation of amending powers to the executive, calling into question the constitutionality of s 16A of the Act which was the legal basis upon which President Mandela had acted.

In reversing the lower court’s deference to legislative authority, in striking down Mandela’s proclamations and Parliament’s amendment of the Local Government Transition Act, the Constitutional Court was hailed by opponents of the government as defenders of the Constitution. Despite earlier expressions of concern regarding the Court’s sympathies for the new government, the Court was now praised for standing up to the ANC-dominated executive and legislature, and for fulfilling the promise of judicial review. However, when President Mandela publicly praised the Constitutional Court’s decision, stating that ‘this judgment is not the first, nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance’, it became clear that the Court had effectively traversed the ‘fundamental questions of constitutional law’ and ‘matters of grave public concern’ which Justice Chaskalson, unintentionally echoing John Marshall in Marbury, had raised in the opening paragraph of the Court’s decision.51

While the sting of the ruling against the legislature was removed, in part, by the remedy granted – giving the legislature a period of time to correct the defect in the Act – executive concern was addressed by the Court’s tacit support for the powers of central government over the

51 Western Cape supra note 38 at para 1
provinces in controlling the restructuring and regulation of local government. In the end however, the Constitutional Court had for the first time struck down intensely-politicized legislation passed by a democratically-elected Parliament and a highly popular President. A closer examination of the Court’s handling of the division of powers, particularly the transitional powers granted to the President by the Constitution for the purpose of moving the society beyond apartheid, reveals a judicious style of intervention reminiscent of Marshall’s opinion in *Marbury*.

The Western Cape Provincial government’s argument was based on three elements: first, on the constitutional protection of provincial autonomy in the constitutional requirement that the majority of Senators of a Province must approve any legislation affecting the boundaries, powers or functions of the province; second, on similar protections of provincial autonomy in the amending sections of the Constitution; and third, on the argument that the national government’s action encroached upon the geographical, functional and institutional integrity of the province as guaranteed in Constitutional Principle XXII contained in Schedule 4 of the Constitution.

Instead of finding for the Western Cape on issues of provincial autonomy, which would have played directly into the continuing and growing conflict between the ANC dominated national government and the two provinces (Western Cape and KwaZulu/Natal controlled by non-ANC governments), the Court determined that there was a larger, prior question that in effect declared the President’s actions in the Western Cape unconstitutional. Simultaneously, however, the Court clarified that control over local government was constitutionally assigned to the national parliament. Although the Western Cape government won the case, it failed to receive the degree of provincial autonomy it was seeking.

While the case focused on the constitutionality of s 16A of the Local Government Transition Act and whether the President’s proclamations could nevertheless be saved from constitutional attack by reliance upon the President’s transitional powers, the case effectively introduced a constitutional scheme guiding the exercise of presidential authority under the transitional sections of the Constitution and determining the allocation of powers between national and provincial government. Rejecting the President’s argument that despite the unconstitutionality of his amending powers his actions were saved by the transitional powers granted the executive in the Constitution, the court carefully detailed the scope of Presidential power in terms of the transitional sections of the Constitution. Preserving the bulk of Presidential actions in the transition, the court carefully crafted a clearer basis upon which the President could continue to act to facilitate the democratic transition. The crafting of these powers illustrates how the Court asserted its power to decide who decides while creating the opportunity for the dominant institutional power to embrace its role.

The Court’s argument follows a number of steps. First, the Court
argued that in order to ensure constitutional continuity the interim Constitution contains specific mechanisms dealing with the continuation of laws and transitional arrangements for the allocation of executive authority. Second, the Court argued that the Constitution facilitates this process by empowering the President to assign the administration of particular categories of laws to ‘competent authorities’ and to amend or adapt such law to the extent that the President considers it necessary for the ‘efficient carrying out of the assignment’.

The Constitutional Court was however, divided four ways in its analysis of the extent of the President’s power to amend Acts of Parliament for transitional purposes. The outcome of the case was a bifurcated analysis of the President’s transitional powers. First was the issue of application and, second, the extent of the President’s amending powers. The basic outline of this scheme was that the President’s transitional powers were limited in their application to pre-constitutional laws:

i) which were continued in terms of the Constitution;

ii) which fall within the ambit of provincial competence as specified in the Constitution;

iii) which vested, for the purpose of exercising executive authority, in the President when he assumed office; and,

iv) which the President has subsequently assigned to either a province or to national government until such time as they may be assigned to the government of a province.

More controversial however was the definition of the President’s powers to amend such laws in terms of s 235(8). While there seems to have been agreement among the Justices of the Constitutional Court that the exercise of Presidential authority under s 235(8) is limited to the degree an amendment is necessary for the efficient carrying out of the assignment, there were differing opinions as to the extent of amendment allowed once this jurisdictional fact entitling the President to amend or adapt has been satisfied. There are three distinct positions taken by the justices in this regard. The most expansive declaration of Presidential authority is articulated by Justices Madala and Ngcoze who argued that the interim Constitution adopts ‘a robust attitude towards the plethora of laws which were in force at the commencement of the Constitution’, and therefore the President is granted fairly extensive powers to deal with ‘deficiencies which are already inherent in the law’. Although it would seem that this approach aimed to recognize fairly extensive Presidential powers of amendment, in effect it would have been limited by the requirement that these powers address deficiencies which are already inherent in the law’. This latter requirement raises doubts as to whether the President could amend in order to deal with deficiencies which arise in the post-

52 Ibid at para 9
53 Ibid at para 214
constitutional period and which were not ‘inherent in the law’.

The most restrictive analysis of the President’s power is that implicit in the judgments of Justices Chaskalson and Kriegler (joined by Justices Langa and Didcott) which would limit the President’s power to amendments that make the old laws ‘fit the new situation’, \(^{54}\) or which ‘tailor existing laws to suit the new provincial structures’ \(^{55}\) in order to ‘achieve the functional administration of the assigned laws’. \(^{56}\) A third analysis of the President’s authority to amend in terms of s 235(8) was offered by Mahomed D P who argued that the amendment would not be subject to challenge so long as it ‘is rationally capable of facilitating the efficient carrying out of the assignment and rationally capable of regulating the application or interpretation of the law’. \(^{57}\)

Despite the three-way analysis of the President’s transitional powers, the Court was careful to both protect Mandela’s past decisions and to provide clear guidelines for the President’s continued exercise of his constitutional powers. Faced with its most politically sensitive decision to date, the Court successfully traversed the dangers of conflicting powers and managed to insinuate itself as an honest broker by avoiding the claim for regional autonomy, while simultaneously disciplining and empowering the national institutions of democracy. Without any bold references to its right, duty or power to decide, the Court successfully asserted, in a moment of high political tension, its authority to decide who decides, and everyone applauded.

While the exercise of constitutional review in Western Cape may be viewed as an example of the Court mediating a conflict between different levels of government, not dissimilar to the largely uncontroversial adjudication of issues of federalism under the United States Constitution, its significance lies rather in the Court’s exercise of its role as final arbiter in a conflict over the Constitution’s allocation of the power to decide highly politicized questions of democratic participation. The certification process, in which the Constitutional Court was required to certify that the text produced by the Constitutional Assembly met the parameters of the Constitutional Principles contained in the 1993 Constitution provides a unique example, in the context of a democratic transition, of a situation in which a Constitutional Court is required to exercise its role as final arbiter on constitutional scope and meaning, and in doing so is required to skirt the outer reaches of its institutional powers. While unique in its specifics, the certification process reflects issues of constitutional review which may in the future arise in the context of challenges to duly enacted

\(^{54}\) Ibid at para 97
\(^{55}\) Ibid at para 169
\(^{56}\) Ibid at para 97
\(^{57}\) Ibid at para 145
constitutional amendments and have been reflected in the 'basic structure' jurisprudence of the Indian Supreme Court.

Declaring the new text of the final Constitution 'unconstitutional', despite its adoption after last minute political compromises by eighty-six percent of the democratically-elected Constitutional Assembly, was on its face a bold assertion of the power of judicial review. Yet the Constitutional Court's denial of certification was far more measured and subtly crafted than this bold assertion of 'unconstitutionality' implies. In fact the Constitutional Court was careful to point out in its unanimous, unattributed opinion, that 'in general and in respect of the overwhelming majority of its provisions', the Constitutional Assembly had met the predetermined requirements of the Constitutional Principles. In effect then, this was a very limited and circumscribed ruling. This analysis is confirmed with the benefit of hindsight, as the major political parties rejected any attempt to use the denial of certification as a tool to re-open debates, instead the Constitutional Assembly focused solely on the issues raised by the Constitutional Court.

This outcome was implicit in the Court's handling of its own role in the certification process. Instead of trumpeting its constitutional duty to review the work of the Constitutional Assembly, the Court was careful to point out that the Constitutional Assembly had a large degree of latitude in its interpretation of the principles and that the Constitutional Court's role was judicial and not political. While this may be dismissed as the posture of a Court merely hiding behind legalism, in fact this deference to the democratic constitution-making process shaped the Court's approach to its task. In defining its mode of review the Court specifically identified two separate questions. First, the court would examine whether the 'basic structures and premises of the N[ew] T[ext] ... accordance with those contemplated in the C[onstitutional] P[rinciples]'. Conducting this inquiry the Court established a minimum threshold which the Constitutional Assembly had to meet and found that in fact the New Text satisfied those standards. The significance of this approach is that despite arguments that the certification judgments are unique, in fact the Court is granted jurisdiction and called upon in the final Constitution to determine the constitutionality of any future Constitutional Amendment. Significantly, at least two Justices of the Constitutional Court have made reference to the notion of the basic structure of the Constitution used by the Indian Supreme Court in its jurisprudence striking down validly enacted Constitutional Amendments. To this extent the Constitutional Assembly and the Court have left open the future of the Court's role in the formal constitution-making or amending process under the final Constitution.

Second, the Court's methodology held that only once the Court decided that the New Text accorded with the basic structure and premises would the court turn to an analysis of whether the details of the New Text complied with the Constitutional Principles. In making this turn to a detailed analysis of the content of the New Text the Court both asserted its power and duty to ensure compliance by testing the text against the Constitutional Principles, but the Court was also very careful to limit the scope of this review. This limiting strategy was accomplished by asserting the formal legal distinction between politics and law. The Court noted that it 'has a judicial and not a political mandate' and that this 'judicial function, a legal exercise' meant that the Court had 'no power, no mandate and no right to express any view on the political choices made by the CA in drafting the New Text'. While the Court asserted that its interpretation of the Constitutional Principles was consistent with its jurisprudential commitment to a 'purposive and teleological application which gives expression to the commitment to “create a new order” based on a “sovereign and democratic constitutional state” in which “all citizens” are “able to enjoy and exercise their fundamental rights and freedoms”, it also asserted that the Court was not concerned with the merits of the choices made by the Constitutional Assembly. In fact, the Court emphasized the scope of the Constitutional Assembly's latitude by arguing that while the new text

'may not transgress the fundamental discipline of the CPs... within the space created by those CPs interpreted purposively, the issue as to which of several permissible models should be adopted is not an issue for adjudication by this Court. That is a matter for the political judgment of the CA, and therefore properly falling within its discretion...'

In contrast, however, the Court took a robust view of its judicial role of establishing legal precedent. Faced with the dilemma of alternative constructions in which one interpretation could be held to be in violation of the Constitutional Principles, the Court adopted the traditional judicial strategy of upholding that interpretation which would avoid a declaration of unconstitutionality. This raised the spectre of a future Court revisiting the issue and adopting an interpretation which would have been in violation of the Constitutional Principles. In this 'judicial' context the Court claimed the power to bind the future holding that a 'future court

59 This strategy of judicial deference is interesting in a context where the Constitutional Assembly had, in its drafting of the new text, gone so far as to incorporate the precise language of Constitutional Court opinions where the Court had expressly addressed a constitutional question. For example, in the Constitutional Assembly's reformulation of the limitations clause so as to exclude the notion of the essential content of the right. Furthermore, despite popular political pressure to rescind the Court's holding against the death penalty the Constitutional Assembly merely retained the previous formulation of the rights relied upon by the Court in that case.

60 Ex Parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the Republic of South Africa. 1996 1996 (4) SA 744 (CC) (Certification that para 27

61 Ibid at paras 34-35
should approach the meaning of the relevant provision of the New Text on the basis that the meaning assigned . . . in the certification process . . . should not be departed from save in the most compelling circumstances". 62

The Court took a similarly robust attitude to its judicial role in its second certification judgment when the Court finally certified the final Constitution. 63 In this case the Court was faced with attempts by political parties and other interested groups to reopen issues which had not been identified as the basis for the Court's refusal to certify in the first round of the certification process. While accepting these challenges the Court noted the 'sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are clearly wrong . . . [and that] having regard to the need for finality in the certification process and in view of the virtual identical composition of the Court that considered the questions barely three months ago, that policy is all the more desirable here'. 64 As a result the Court made it clear that a party wishing to extend the Court's review beyond those aspects identified in the first certification judgment would have a 'formidable task'. Through this reliance on a classic judicial strategy of deference to past decisions, the Court was able to significantly limit the scope of its role in the final Certification judgment. It was this change in posture towards the certification process and the fact that the Constitutional Assembly fully addressed all but one of the Court's concerns that ensured a swift certification on the second round. Significantly, the Court now relied less on the specifics of the Constitutional Principles and instead emphasized the fundamental elements of constitutionalism contained in the text – 'founding values which include human dignity, the achievement of equality, the recognition and advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law'. 65 While the Court still had to recognize that the powers and functions of the provinces – the most contentious issue in the whole constitution-making process – remained in dispute between the parties, the Court held in essence that the removal of the presumption of constitutional validity of bills passed by the NCOP had tipped the balance. 66 Thus despite the recognition that provincial powers and functions in the Amended Text remained less than or inferior to those accorded to the provinces in terms of the interim Constitution, this was not substantially so 67 and therefore no longer a basis for denying certification.

62 Ibid at para 43.
63 Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (1997 (1) BCLR 1 (CC) (Certification II)
64 Ibid at para 8
65 Ibid at para 25.
66 Ibid at paras 153-157
67 Ibid at para 204(e)
Thrust into this unique role of arbiter in the second and final phase of the constitution-making process, the Constitutional Court was faced with a number of distinct pressures. First, the democratically-elected Constitutional Assembly represented the pinnacle of the country’s new democratic institutions empowered with the task of producing the country’s final Constitution – the end product of the formal transition. Given a history of Parliamentary sovereignty and the failure of the courts to check the anti-democratic actions of the executive in the dark days of Apartheid and during the States of Emergency, how was a newly appointed Constitutional Court going to stand up against the first truly democratic constitution-making body in South African history?

Second, the credibility of the Constitutional Court was at stake. As the court heard argument on the Certification of the Constitution, numerous sectors, including important elements within the established legal profession, openly speculated whether the Court had sufficient independence to stand up to the Constitutional Assembly, particularly over the key issue of the entrenchment of the Bill of Rights. Failure to refuse certification on at least this ground would in this view amount to a failure of the certification function and proof that the Court lacked the necessary independence.

Third, the Constitutional Court’s certification powers were not only unique but were to be exercised on the basis of a set of Constitutional Principles negotiated in the pre-election transition. The Principles had, in the dying days of the multi-party negotiations and in the context of the CONSAG rebellion, become the focus of unresolved demands leading to the incorporation of a number of contradictory Principles designed more to keep the contending participants within the process than to establish a coherent set of Constitutional Principles by which a future draft Constitution could be judged. Significantly, however, the basic framework of Principles, tracing their heritage from the ANC’s Constitutional Principles of 1988, the Harare Declaration, the United Nations General Assembly Resolution on Apartheid and finally adopted by the major parties at CODESA remained at the core of the Constitutional Principles. It was this basic framework, guaranteeing broad democratic participation, a justifiable bill of rights and an independent judiciary, that provided the fundamental assumptions of the Constitutional Court’s analysis of both the content of the text and the Court’s role in the certification process.

Fourth, the Constitutional Court’s review of the text was permeated with the Court’s own inarticulated assumptions with respect to the institutional implications of the new constitutionalism. These assumptions are exposed in the Court’s response to those elements of the text which held implications for its own institutional role. In fact many of the grounds upon which the Court declined to certify the text had institutional implications for the Court. For example, the Court demanded a strengthening of the procedures and threshold for amending the Bill of Rights, it struck down attempts to insulate the labour clause from judicial
review, and its use of the presumption that a bill passed by the NCOP could be presumed to indicate a national interest overriding separate regional interest to tip the balance against the adequacy of the basket of regional powers. Thus without explicit acknowledgment nor even necessary awareness, the Court’s approach to the new text indicated a profound concern with guaranteeing the institutional prerogatives of the Court as the institutional repository of the power to decide who decides. It was the imperative to secure the role of the Court as guardian of a constitutional democracy based on the explicit foundations of constitutional supremacy that weighted the balance in the first Certification judgment.

CONCLUSION

The echoes of Marbury in the dramatic shifts in the approach of the Constitutional Court enable us to view the contemporary introduction of judicial review in South Africa and its institutional dynamics in a wider historical context. We are able also to reflect back on Marbury and forward to future and repeated constitutional moments, and to adopt a conscious concern for the institutional logic and political dynamics that shape the institutional capacities and constraints on the exercise of constitutional review in general. While I agree with the argument that constitutional law is about institutional choice, I hope I have demonstrated that a comparative understanding of the judiciary’s initial engagements in the allocation of the power to decide, constructs a new window through which we may view the introduction and exercise of constitutional review.

It is the Court’s ability to embrace and control the power of institutional choice, to allocate the right to decide as between the different coexisting jurisdictions without becoming the target of overwhelming political conflict, which creates the space in which the power of judicial review may be institutionally consolidated. In this analysis the judiciary’s source of institutional legitimacy and power lies as much in its ability to insinuate itself institutionally in conflicts over the separation and distribution of powers as it does in its defence of rights. According to this understanding, it is the institutions’ success in achieving a viable institutional role vis-a-vis the coordinate branches of government which enables it to insist upon its role as the interpreter of rights. Thus it escapes questions over its self-appointment as the institution of choice for deciding the meaning and scope of constitutional rights. In this way the judiciary is able to simultaneously draw upon its legacy as the determiner of rights between parties and to create a space, or node of power, from within which to continually assert its institutional right to be the final arbiter of the meaning of the Constitution.

68 Komesar op cit note 9.
The countermajoritarian dilemma thus remains an issue for democratic theorists but has little significance for the institution of judicial review. The legitimacy of judicial review is built instead on twin foundations. First, on a strategy of judicial deference in wielding the power of institutional choice between the more powerful sites of governmental power. Second, in the judicial seizing of a supreme role in the interpretation of constitutional rights which is both historically consistent with the judicial function and is premised upon the self-allocation of the interpretative power. It is only in times of heightened social conflict, whether based on a rights consciousness engendered by constitutionally endorsed yet frustrated aspirations,⁶⁹ or on social changes beyond the courts responsive capacities,⁷⁰ that the power of the court to make these determinant institutional choices is politically exposed and brought into question, and when the coordinate branches of government will successfully assert a greater role in deciding on the parameters of the constitution.

This analysis suggests that taking an institutional and comparative view of the work of the Constitutional Court in implementing constitutional review may provide one way of understanding the potential and possible pitfalls of our new constitutionalism. And, finally, it may hint at the appropriate etiquette when introducing the devil.

⁶⁹ See for example the history of struggles over civil rights or conflicts over abortion in the United States.
⁷⁰ When political conflicts become irrevocably un-negotiable and lead to dramatic political realignments (such as the New Deal in the United States) or even civil war, then the ability of even the most deferential court to provide acceptable alternatives or justice between the parties is lost.
STATISTICS

CONSTITUTIONAL COURT STATISTICS FOR THE 1996 TERM

INTRODUCTION

This section provides some descriptive statistics on the work of the Constitutional Court in the past year, organised into seven tables. This information should complement the analyses presented in this issue. The objectives and methods of this section are laid out more carefully in the 1995 edition of this section.¹ The method of constructing each table is given in the text following the table. The 1996 statistics are drawn from data on the World Wide Web site maintained by the Faculty of Law of the University of the Witwatersrand (http://www.law.wits.ac.za). This section covers only cases in which a full written judgment of the Court is produced. Thus matters disposed of without hearing or full judgment by a single judge – which would be important from the point of view of examining issues such as the control of the Court over its docket – are not included. The statistics presented here describe a small number of cases and should thus be interpreted with a high degree of caution.

The 1996 term exhibited an even higher degree of cohesiveness among the members of the Court than 1995. Amongst the regularly sitting judges, the agreement rates – for full judgment agreement between any two judges – ranged from a low figure of 81.5 per cent between Didcott J and Sachs J to a high figure of 100 per cent between Ackermann J and Chaskalson P and between Langa J and each of Ackermann J, Chaskalson P and Mahomed DP. Compared both with the Court’s performance last year and with other constitutional courts, the Court’s degree of agreement is significantly high. Of the decided cases (not including the Certification judgments), 79.2 per cent were unanimous and a further 16.7 per cent showed no dissent. In 1995, the comparable figures were 57.1 per cent and 21.4 per cent. Indeed, only one 1996 case showed any dissent: Du Plessis v De Klerk. The Court’s united front can also be seen in the number of dissenting votes cast. Of 287 votes, only three were dissenting.

The Court’s docket has broadened as the total number of cases decided has nearly doubled from 14 to 27. Criminal cases made up only 29.6 per cent of the total cases decided, declining from 64.3 per cent the year before. Perhaps as a result, the Court ruled against the prevailing government position in only 33.3 per cent of its cases, as compared to last year’s 64.3 per cent.

The Court delivered on its promise of making direct access an exceptional remedy, granting jurisdiction on this basis in only 14.8 per cent of

¹ See ‘Constitutional Court Statistics for the 1995 Term’ (1996) 12 SAJHR 39

208