PART I

INTRODUCTION

1

The Politics of Legal Interpretation

Shortly after South Africa's democratic transition, the country's newly created Constitutional Court issued two controversial judgments. In *City Council of Pretoria* v. *Walker* (1998), the Constitutional Court sided with a white defendant who invoked the Constitution's Equality Clause as a defense against not paying his utility bills.[1] The government had merged various utility districts that had previously serviced Pretoria's different racial neighborhoods during the country's apartheid era of racial segregation. But the government had not yet devised an appropriate rate plan under the unified department, in part because of the disparities in service delivery across the city. The city's indecisiveness left many white residents paying more for their utilities than some non-white residents. The Court ruled that the Constitution's antidiscrimination guarantees prohibited punishment in this case. By ruling on behalf of the white defendant, the Court seemingly indicated that the Constitution's Equality Clause could be invoked at least in some circumstances by white litigants to challenge government policies when they treated people differently according to their race or cultural group membership.

Some months later, in *Premier, Province of Mpumalanga* v. *Executive Committee of the Association of Governing Bodies of State Aided Schools* (1998), the Constitutional Court behaved similarly. The Court relied on statutory provisions in support of historically white schools, which challenged the unfairness of a governmental decision to withdraw busing subsidies that the apartheid government had previously provided.[2] In this instance, the Court's ruling had a direct impact on the budget of a local government, requiring it to pay for a benefit that preserved a racialized system of education. In both cases, the Constitutional Court seemed to favor the interests of the declining

[1] 1998 (2) SA 363 (CC).
[2] 1999 (2) SA 91 (CC).

apartheid-era regime led by the National Party (NP), which had governed South Africa between 1948 and 1994.

Although courts are often empowered to preserve the interests of declining political regimes against emerging competitors, South Africa's Constitutional Court should not have exhibited such behavior in these cases.[3] After the African National Congress (ANC) won its historic election in 1994, the party's president, Nelson Mandela, appointed a cohort of justices to the newly created Constitutional Court. And, as political scientist Robert Dahl once remarked, "Presidents are not famous for appointing justices hostile to their own views on public policy."[4] Mandela did not deviate from Dahl's expectation, appointing judges largely sympathetic to the ANC's agenda, if not ANC personnel. Standard accounts therefore would expect that Mandela's appointees would render judgments favorable to the ANC's governing agenda, which called for the end of racial discrimination against black South Africans and the destruction of apartheid's legacies.[5]

The Constitutional Court's anomalous judgments have not gained substantial attention, however, in part because the Court's subsequent rulings brought the law back into alignment with the ANC's preferred policy agenda. Many of the justices on the Constitutional Court abandoned their previous interpretations of the law and instead ruled in ways that made it more difficult for white litigants to use the Equality Clause or various statutes to preserve apartheid-era policies. In *Bel Porto School Governing Body* v. *Premier of the Western Cape Province* (2002), for example, many of the same justices dismissed a legal challenge initiated by white teachers who were adversely affected by governmental efforts to reorganize apartheid-era schools. Or, in cases like *Minister of Finance* v. *van Heerden* (2004), the Court made it more difficult for white litigants to initiate so-called reverse-discrimination lawsuits to challenge controversial government policies like affirmative action that deviated from uniform treatment of policy beneficiaries.[6] These latter decisions seemed to cure the previous and theoretically anomalous judgments issued in 1998.

But, upon closer examination, those latter decisions did not render the Court's behavior any less curious. In *van Heerden*, ANC officials did not ask the Constitutional Court's justices to bring the law back into alignment with a more favorable interpretation. On the contrary, the ANC was willing to abide

3 Finkel (2008); Ginsburg (2003); Hirschl (2004).
4 Dahl (1957, 284).
5 Dahl (1957); Graber (1993); Roux (2013).
6 2002 (3) SA 265 (CC); 2004 (6) SA 121 (CC).

by the Court's previous – though no doubt controversial – decision.[7] Instead, the justices themselves introduced a novel doctrinal position, offering a new understanding of the Equality Clause that went beyond their own previously established and innovative doctrinal decision. In *Bel Porto Schools*, however, the justices proved more reluctant and retreated to a more conventional interpretation requested by the ANC.[8] The variation in judges' interpretive decisions and subsequent responses across the four cases is difficult to reconcile with existing theories of judicial behavior, at least insofar as those theories apply to legal interpretation.

Existing theoretical accounts do not often expect judges to behave in these varying ways: sometimes deferring to the preferred positions of their aligned counterparts in the elected branches, sometimes overruling their counterparts to adopt novel doctrinal positions, and at other times adopting novel doctrinal positions only to reverse themselves later. Yet these interpretive shifts are not uncommon among judges in constitutional democracies. American justices on the Supreme Court of the United States have regularly demonstrated similar behavior, as Chief Justice Warren Burger had when interpreting the Fourteenth Amendment's requirements governing racial vote dilution. In 1980, Burger believed that the Fourteenth Amendment would only support such challenges if minority plaintiffs could demonstrate lawmakers' discriminatory intentions.[9] By 1982, however, Burger supported a new approach that would allow courts to infer lawmakers' discriminatory intentions from a plan's discriminatory effects.[10] Justices on the Supreme Court of India, who previously opposed affirmative action for India's so-called Other Backward Classes (OBCs), reinterpreted the Indian Constitution in support of these controversial policies and in ways that resembled the behavior of their counterparts in South Africa and the United States.[11] Many more examples exist, but they often escape analysis of judicial behavior because of an alternative emphasis on the outcomes of litigation and not on doctrinal positions.

Nonetheless, shifts in doctrinal positions matter. Although the evidence is mixed as to whether judges on appellate courts are themselves constrained by doctrinal positions, most legal decisions are not made by appellate-level

7 Heads of Argument of Appellants, *Minister of Finance* v. *van Heerden*, CCT 63/03, at para. 63.
8 Principle Submissions to be Advanced on Behalf of Respondents, *Bel Porto School Governing Body* v. *Premier of the Western Cape Province*, CCT 58/00.
9 *Mobile* v. *Bolden*, 446 US 55, 61–5 (1980).
10 *Rogers* v. *Lodge*, 458 US 613, 617 (1982).
11 *Indira Sawhney* v. *India*, AIR 1993 SC 477; *TMA Pai Foundation* v. *Karnataka*, AIR 2003 SC 355.

judges.[12] Rather, the vast majority of legal decisions shaped by doctrine are made outside of the courts, often to avoid or initiate litigation.[13] By altering legal doctrine, courts seem to exercise an important power that shields or exposes controversial policies to legal challenge.

Why, then, do judges sometimes change their minds about crucial doctrinal questions, and how does this behavior impact legal development over time? As the introductory examples indicate, legal interpretation is not solely the province and duty of the judiciary. In this book, I argue that legal development and shifting understandings of law are best understood as developing within a deliberative partnership between judges and their aligned political parties or elected coalitions as they work across governing institutions to elaborate evolving legal positions.[14]

THE JUDICIAL ROLE AND LEGAL INTERPRETATION

Legal interpretation refers to the task of expounding upon the meaning of a legal instrument to assess its implications for a set of legal relationships. Triers of law and fact almost always need to engage in some form of legal interpretation to reach a decisive conclusion to legal questions because the law's command is rarely straightforward and unambiguous. Accordingly, judges need to include some additional arguments about the law and how it ought to be applied to justify a specific outcome in a pending case.

The ambiguities of law and judges' capacity to apply it nonetheless in concrete cases make them powerful actors. Through legal interpretation, judges can refashion law's impact in ways that not only affect the lives of litigants but also favor elected officials' governing agendas by reinterpreting statutory and constitutional language to discourage legal challenges. Or, if judges oppose an elected coalition's agenda, they can reinterpret the law in ways that facilitate legal challenges that can jeopardize a controversial policy agenda.

Judges exercise their authority with substantial risk to democratic commitments because legal interpretation can transform judges into lawmakers. The most dramatic form of such interpretation involves the exercise of judicial review, allowing judges to set aside legislative acts or the action of

[12] Bailey and Maltzman (2008); Bartels (2009); Kornhauser (1992); Kritzer and Richards (2003); Landa and Lax (2009); Lax (2007); Richards and Kritzer (2002); Segal and Spaeth (2002).
[13] Shapiro (1968, 39).
[14] I include both party and political coalitions because, during some periods and in some countries, race- or caste-policy coalitions span across parties. During these periods, references to coalitions are more precise than references to parties.

TABLE 1.1. *The judicial role when interpreting law, by school*

		Legal interpretation is:	
		Exclusively judicial	Shared with the elected branches
Judges are:	Empowered	Guardians	Regime partners
	Constrained	Principled interpreters	Strategic interpreters or deliberators

government officials because, according to judges, elected lawmakers fail to comply with constitutional dictates. Such behavior is particularly problematic when conducted by unelected judges, resulting in what the American legal scholar Alexander Bickel termed the "countermajoritarian difficulty."[15] Judicial review, Bickel argued, potentially "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[16] And, to the extent that these judges are unaccountable, they substitute their own views for those who act with greater democratic authority.

Normative and empirical scholarship focused on legal interpretation has been first and foremost concerned with the countermajoritarian difficulty, but the findings of this scholarly enterprise have implications for the empirical study of legal interpretation more broadly. It therefore provides a useful starting point for contemplating the judicial role when judges engage in legal interpretation. This literature has converged on four distinct schools of thought about how unelected judges can escape – or at least minimize – the problems associated with the countermajoritarian difficulty (Table 1.1). When judges interpret the law, including constitutional law, the literature describes them as carrying out different roles, depending on (1) whether the school believes that the countermajoritarian difficulty can be "resolved" by empowering or constraining judicial authority; and (2) whether the task of interpretation is a matter reserved for legal actors alone or whether it is shared with political actors in the other branches.

One dominant approach resolves the countermajoritarian difficulty as a judicial matter and empowers courts to pronounce legal decisions based not on democratic authority but on a constitutional grant of authority.

[15] Bickel (1962, 16).
[16] *Id.* at 17.

"The institutional arrangement at the heart of our democracy," India's Chief Justice Rajendra Mal Lodha once claimed after striking down a constitutional amendment, "provides that the will of the people, as reflected in the decisions of their elected representatives, *is subject to* the will of the Constitution, as reflected in the decisions of an independent judiciary."[17] The countermajoritarian difficulty, on this view, is only problematic if one insists that democratic authority is the ultimate source of authority in a constitutional democracy. As Chief Justice Lodha's statement indicates, however, there may be other sources of authority, which can in some instances supersede democratic will. Some constitutions, like South Africa's, explicitly grant high courts exclusive authority to determine whether an act of parliament or a constitutional amendment complies with the country's constitution.[18] Such grants of authority portray justices on high courts as guardians or umpires of the constitutional and democratic orders, and they are empowered to act as custodians of the political system. Judges on this view are unconstrained by countermajoritarian objections, allowing them to have the final say over interpretative matters.

A second approach also retains an exclusive focus on the judiciary, but rather than empowering guardians, this school recommends important constraints on judges who engage in the task of legal interpretation. Ronald Dworkin provides a useful illustration of how judges ought to behave as principled interpreters. Judges, according to Dworkin, can avoid the countermajoritarian difficulty by discovering – not inventing – background legal principles to govern difficult cases where the law is ambiguous.[19] If courts adhere to certain established rules about how to interpret legal instruments, then they can confidently reach conclusions in pending cases without acting like mini-legislatures. Of course, legal positivists reject Dworkin's basic approach that judicial decision-making is anything other than law-making. But many legal positivists adopt a similar kind of approach, recommending that judges commit themselves to some principled school of statutory or constitutional interpretation when rendering judicial decisions and applying those principles irrespective of whether the judge favors the outcome.[20] Although such accounts are not always explicitly

[17] Lodha (2015) (emphasis added). The Chief Justice of the United States John Roberts expressed a similar sentiment when he acknowledged his "respect for our public officials; after all, they speak for the people, and that commands a certain degree of humility from those of us in the judicial branch, who do not. … We do not speak for the people, but we speak for the Constitution" (Barnes, 2018). For a useful collection of essays exploring this view, see Licht (1993).

[18] Constitution of South Africa, §167(4)(b),(d).

[19] Dworkin (1978, 81–6).

[20] Wechsler (1959). For a helpful discussion of various approaches, see Peretti (1999, ch. 1).

concerned with the countermajoritarian difficulty, they nonetheless imply that judges are – or should be – constrained by principled approaches to legal interpretation and not their own policy preferences.[21] Or, alternatively, if they are not disciples of a particular interpretative school, judges should interpret law in prodemocratic ways such that their decisions support democracy, even if such decisions thwart the actions of elected representatives who might favor antidemocratic policies.[22] Either way, judges act appropriately when they set aside their policy or ideological preferences and render decisions as principled interpreters by comitting to a set of rules about how to resolve cases.

A third approach departs from a conception of judges as guardians or principled interpreters and instead emphasizes the role of judges as partners in dominant political regimes. Robert Dahl, in his classic statement about judicial decision-making in democracies, advanced a version of this approach.[23] Elected officials, according to Dahl, gain advantages if courts support their governing agendas. Elected officials therefore use the appointment process to position like-minded personnel on the bench to protect controversial elements of their governing agendas from potentially adverse legal challenges.[24] Under these conditions, elected officials find strong, strategic incentives to defer to the judges who can preserve political coalitions faced with divisive issues and can shield elected officials from electoral reprisals.[25] And, if judicial turnover is sufficiently rapid, the risks of judicial empowerment are reduced substantially because courts, as Dahl concluded, are unlikely to oppose democratically elected majorities for any extended period of time.[26] The relationship between elected and judicial regime partners significantly downplays the importance of the countermajoritarian difficulty.[27] Or, as Mark Graber has argued, it is difficult to portray courts as behaving in countermajoritarian ways if dominant elected coalitions do not wish or cannot act to resolve controversial matters.[28] Rather, dominant sections of those coalitions might simply want to avoid the matter and hope that judges decide, irrespective of the outcome.

[21] For a useful overview of American interpretative debates, see Barber and Fleming (2007). The contributors to Goldsworthy's (2006) book assess the extent to which judges in various countries have remained true to such interpretive schools.
[22] Ely (1980); Issacharoff (2011); Landau (2014).
[23] Dahl (1957).
[24] See also Powe (2000).
[25] Graber (1993); Whittington (2005).
[26] Dahl (1957, 291).
[27] Some, like Casper (1976), suggest that the American Supreme Court plays a much larger role than Dahl's analysis indicates.
[28] Graber (1993).

A substantial portion of the empirical literature on judicial behavior and judicial power has converged on this consistent conclusion: political elites have discovered strategic benefits by deferring to and empowering their partners in the judicial branches in ways that seemingly diminish the salience of the countermajoritarian difficulty.[29] Political scientist Keith Whittington, for example, concludes that through "much of American history, presidents have found it in their interests to defer to the Court and encourage it to take an active role in defining the Constitution."[30] A similar story is consistent with judicial behavior in constitutional democracies around the world. A number of scholars have found that elected officials in constitutional democracies in Europe and Latin America also derive benefits or avoid costs by empowering courts.[31] Such behavior also takes place with respect to international bodies.[32] Though these analyses are not always about legal interpretation per se, they nonetheless explore the strategic benefits of judicial independence and authority in a variety of contexts and suggest that political actors obtain political advantages by deferring to their ideologically sympathetic partners in the judiciary to render controversial decisions.

A fourth strategy, and the one preferred by Bickel himself, argues that judicial decision-making and legal interpretation are or should be constrained by the other branches of government. According to Bickel, judicial review is only a deviant institution in a self-governing democracy if judges have the final say over constitutional matters.[33] If, however, their elected counterparts are not bound by the principles judges announce in their legal opinions, then the system still operates in accordance with the principles of a self-governing democracy.[34] On this view, judges are entitled to set aside the actions of elected officials or established precedent, according to Bickel, if they are able to persuade the other branches – or, indeed, citizens more generally – of novel constitutional commitments and principles.[35] Or, as Bickel put it:

[29] Hirschl (2004); Smith (2009); Whittington (2007). Other scholars have made broadly similar arguments about the strategic foundations of judicial supremacy; see Friedman (1998); Friedman and Delaney (2011); Knight and Epstein (1996). For an institutional argument, see Mate (2017). Others have worried that judicial supremacy is on the decline; see Schauer (2004).

[30] Whittington (2007, 5). Consider also Kleinerman's (2009, 236) observation that "members of Congress now implicitly and even … explicitly abdicate their constitutional responsibility, expecting as they do so that the Supreme Court will 'clean up' their mess."

[31] Finkel (2008); Helmke (2005); Hilbink (2007a; 2007b); Vanberg (2009; 2015).

[32] Carrubba and Gabel (2014); but see Alter (1996).

[33] Bickel (1962, 23–8, 200, 239).

[34] See also Lincoln (1861); Murphy (1986).

[35] As a normative matter, Bickel's argument has attracted some support; see, for example, Burt (1992); Obama (2006); Sunstein (1998). Others still have defended different and equally