



James Fowkes

BUILDING THE CONSTITUTION

THE PRACTICE OF CONSTITUTIONAL
INTERPRETATION IN POST-APARTHEID
SOUTH AFRICA

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The Practice of Constitutional Interpretation
in Post-Apartheid South Africa

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BUILDING THE CONSTITUTION

This revisionary perspective on South Africa's celebrated Constitutional Court draws on historical and empirical sources alongside conventional legal analysis to show how support from the African National Congress government and other political actors has underpinned the Court's landmark cases. Standard accounts see the Court as overseer of a negotiated constitutional compromise and as the looked-to guardian of that constitution against the rising threat of the ANC. In reality, South African successes have been built on broader and more admirable constitutional politics to a degree no previous account has described or acknowledged. The Court has responded to this context with a substantially consistent but widely misunderstood pattern of deference and intervention. Although a work in progress, this institutional self-understanding represents a powerful effort by an emerging court, as one constitutionally serious actor among others, to build a constitution.

JAMES FOWKES is a former clerk of the South African Constitutional Court and studied law at the University of the Witwatersrand, Johannesburg, and Yale Law School. He is currently a senior researcher at the Institute for International and Comparative Law in Africa, University of Pretoria, South Africa.

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For Michaela

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Books, it seems, are like rolls of sticky tape: their owners often find themselves surprisingly attached to them, but until finished they are mostly an exercise in trying to find the end. And once finished, it takes a special kind of forensically archeological mind to have much interest in going back to identify the precise point where they began. This book may have begun in Marius Pieterse's course on Human Rights at Wits Law School in 2006, or while writing for Thaddeus Metz in the Wits philosophy department the following year, or during my time as a law clerk to Justice Johann van der Westhuizen at South Africa's Constitutional Court the year after that, or indeed after my arrival at Yale Law School a year later still. I'm not sure: I am, however, deeply grateful to all four.

It was, at least, at YLS that it took shape, and this book is owed above all to that institution and its generosity, of academic spirit and other things. It may be increasingly customary to be indebted to US law schools, but my debts are of the nicest kind. I owe them to the graduate programs office, to its mother, Maria Dino, its deans Toni Davis and her successor Gordon Silverstein, and to Steph D'Ambrose and Caroline Curtis; to Dean Robert Post; and to Yale's extraordinary librarians, not least for permitting me to check out portions of their South African collections sufficiently large to require returning by incredulous taxi. I owe them to teachers at YLS, including Akhil Amar, the late Robert Burt, Daniel Bonilla, Dieter Grimm, Frank Iacobucci, John Langbein, Jerry Mashaw, Nick Parrillo, Susan Rose-Ackerman, and Jim Silk, who although not directly involved in this book offered encouragement and afforded me, in various ways, the invaluable opportunity to watch them at work. I owe them to Ian Shapiro of Yale's Political Science department, who served on my doctoral committee and offered generous support and incisive criticism, and to my friends and colleagues in the Yale graduate community who had the misfortune to have parts of this book and, worse still, parts since deleted from this book, bounced off them, occasionally

with their consent. And I owe them to Bruce Ackerman, whose scholarly interest in the breadth and richness of constitutional real life first made me want to go to Yale, who I was to discover possessed kindness to match as supervisor to the thesis on which this book is based, and who taught me too to disagree, although it is possible that there at least he was casting for type.

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