

SOUTH AFRICAN CONSTITUTIONAL DOCTORS WITH LOW PUBLIC SUPPORT

THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005. Theunis Roux.¹ Cambridge: Cambridge University Press. 2013. Pp. xvi + 433. \$130.00 (cloth), \$59.00 (paper).

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INTRODUCTION

One current controlling paradigm of American constitutional theory is that in order to function properly, the Supreme Court must have enduring public support.³ Working within this paradigm, Theunis Roux in his new book offers an account of the South African Constitutional Court's (hereinafter: SACC) adjudication in the first decade of its existence. Yet Roux encountered a puzzle. The SACC functioned properly without possessing enduring public support. Rather than abandoning the American paradigm, Roux attempted to somehow reconcile the reality of the SACC's low public support with the logic of this controlling paradigm. In this review I argue that Roux's findings justify narrowing the scope of the paradigm and acknowledging that a national high court can function properly without public support so long as the executive branch views the Court as an expert. Moreover, I argue that this revisionist position has ancient

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3. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 221 (2002) (“[M]any commentators made the point that judicial power ultimately depended upon popular acceptance.”); Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1015 (2007) (“Like anyone who does not live on a desert island, the Court, in order to achieve its goals, has to be concerned with what other people think of it. . . . [T]he Court must take care to behave in a way that inspires or maintains public confidence . . .”).

roots in Alexander Hamilton's Federalist No. 78.⁴ I explain that only with the rise of public opinion polls did the notion that the United States Supreme Court needs public support to function properly ascend to the level of a controlling paradigm.

I begin by presenting Roux's thesis as an application of the controlling legitimacy paradigm. After exposing the roots of this paradigm in the peculiar history of the United States Supreme Court, I explore Roux's actual findings as verifying a different theory, the Hamiltonian one that explains courts' power and legitimacy as based on their expertise. According to this theory, the SACC could function properly even without public support since the executive believed that the Court held expertise, i.e., the governing elites believed that the judges are constitutional "doctors." Before concluding, I examine Roux's portrayal of the SACC's judges. According to Roux, the judges behaved as strategic players, i.e., they were cognizant of the basic idea of the legitimacy paradigm and acted strategically in order to recruit public support. Based on his description, I show that belief in legal expertise was prevalent among judges and the legal elites during the Chaskalson Court era.

I. THE CONTROLLING PARADIGM AND ROUX'S THESIS

Roux has written a magnificent book. Many texts that aim to explain the work of national high courts offer either an account of courts as strategic players or a thick description in which courts are part of larger political and cultural arenas.⁵ Each type of account is prone to a set of problems. Scholars who produce accounts according to the strategic line of thought reduce complex human beings to the figures of "players," who act solely according to their calculation of gains and losses.⁶ Under such a worldview, belief in ideas, such as truth, independent of its instrumental-

4. THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

5. See, for example, with regards to the Israeli Supreme Court, MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 54–180 (2011) (presenting a thick description of Israeli society and the Supreme Court as an important player in societal development); SHAI DOTHAN, *REPUTATION AND JUDICIAL TACTICS* 163–212 (2015) (presenting a strategic analysis of the Israeli Supreme Court's behavior).

6. See William H. Riker, *Political Science and Rational Choice*, in *PERSPECTIVES ON POSITIVE POLITICAL ECONOMY* 163, 172–74 (James E. Alt & Kenneth A. Shepsle eds., 1990).

strategic value does not exist.⁷ Scholars who produce thick descriptions attempt to avoid reductionism by purporting to capture reality in its fullness.⁸ Yet absent a narrative, without an organizing idea, the data they collected would be unmanageable. Thus, these types of accounts are prone to disregard data that do not fit their narrative or narrate the data in a manner that fits the organizing idea through which the scholar views reality.

Well aware of these limitations, Roux covers the SACC's work from both vantage points. He acknowledges that one cannot collapse one framework into the other without losing something substantial (p. 124). Thus, he adopts a "two-pronged approach" that explains the SACC's work in "rational choice terms" but also in terms of "ideas, personalities, traditions and broader social processes" (p. 124). This approach, coupled with his intellectual honesty, leads Roux to present data that discredit one vantage point but ensure a full presentation of the other.

Roux is writing under what he calls the "legitimacy theory" (p. 37) and what I dub the "legitimacy paradigm." The difference in titles is significant. A theory still needs to be tested. Roux never doubts the legitimacy "theory." He assumes its validity. He then applies it under more stringent conditions as if he was working within a scientific paradigm.⁹

According to the legitimacy paradigm, "a certain level of public support is a precondition for whatever else a constitutional court may hope to achieve" (p. 37). The method of assessing public support, under this paradigm, is public opinion polling. In other words, in order to function properly, the SACC must possess enduring public support as measured in opinion polls. Yet, Roux cannot deny that "the South African case appears to defy this rule" (p. 37). There were "certain brute facts about the Chaskalson Court's institutional legitimacy" (p. 34) that could not be squared with the legitimacy paradigm. Surveys conducted by James Gibson and Gregory Calderia in 1996-1997, 2001 and 2004

7. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 194 (2014) (arguing that within the rational choice "framework, 'rational' politicians are exclusively concerned with the pursuit of electoral advantage Anything else is 'irrational' — it happens sometimes but should be seen as aberrational.").

8. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 35 (1999) ("Scholars such as Clifford Geertz and Michel Foucault emphasize that social practices are historically specific and that each such practice must be approached through a process of thick description.").

9. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23 (2nd ed. 1970).

showed that the Court never cultivated enduring public support.¹⁰ No other opinion polls covering the first ten years of the SACC exist, as the Institute for Justice and Reconciliation (IJR) began measuring public confidence in the SACC only in 2006.¹¹ “[T]he Court,” writes Roux, “handed down a number of decisions in politically controversial cases, all of which were enforced, and none of which triggered a debilitating attack on the Court” (p. 3). However, as Roux acknowledges, “the Court never built much institutional legitimacy (in the sense of ‘diffuse support’)” (p. 4). He thus concludes that “the interesting thing about the Chaskalson Court is that it was able to play its constitutionally assigned veto role from the very outset, and that it continued to play this role without ever building much institutional legitimacy” (p. 4; see also pp. 15, 37-38). By examining the Chaskalson Court’s adjudication, Roux attempts to explain this puzzle. He endeavors to show how the Court’s adjudication during its first ten years of existence does not contradict the legitimacy paradigm.

Yet, Roux does not raise the possibility that his work disproves the controlling American paradigm and that in certain circumstances national high courts do not need public support to function properly. Instead, Roux in part capitulates to the controlling paradigm. He does not view the ten first years of the Court as a complete success since “the Court never built the kind of public support that is ordinarily taken to be the mark of a successful constitutional court” (p. 391). This partial capitulation is surprising since Roux acknowledges the uniqueness of the American case that triggered the rise of the legitimacy paradigm. He explains that

In most mature constitutional democracies, where the legal-professional culture is premised on a relatively strong attachment to the ideal of adjudication according to law, and where all major political actors support the need for judicial

10. James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POL. 1, 11 (2003) (“From a comparative perspective, the South African Constitutional Court has failed to develop a very deep reservoir of goodwill among the South African mass public.”); James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in *JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA* 229, 246–50 (François du Bois & Antje du Bois-Pedain eds., 2008) (arguing based on survey conducted in 2004 that the SACC enjoys “low to moderate level of support [S]upport for the Constitutional Court seemed to change little between 1997 and 2004 [T]he minimalist conclusion to be drawn is that the Court has not broadened its support in the seven years between the first and last surveys.”).

11. See THE INSTITUTE FOR JUSTICE AND RECONCILIATION, <http://www.ijr.org.za/political-analysis-SARB.php> (last visited Sept. 9, 2015).

independence, the tension between law and politics recedes to the background, arising only in isolated cases when a particularly controversial case brings it to the surface (p. 89).

In a footnote he notes that “[t]he major exception is the United States” (p. 89 n.30; see also p. 102). Indeed, in the American public discourse, belief that legal expertise resolves constitutional questions has eroded, making the partisan aspect of the Court’s adjudication much more salient.¹² But if the United States Supreme Court presents such a *sui generis* case, why assume that the paradigm through which it is studied will fit the SACC?

David Robertson provides a potential explanation in his comparative study of several national high courts. Robertson suggests that the approach to the study of courts worldwide was devised based on the very unique context of the United States Supreme Court as a result of American academic dominance in the field of social science.¹³ This American-based approach, so says Robertson, should not be exported so easily to other countries.¹⁴ Similarly, Gibson and Caldeira, two of the most prominent scholars of the “legitimacy paradigm,” admit in their article on the South African Constitutional Court that while “legitimacy theory is widely accepted by scholars . . . it is unclear that extant findings, mostly on the U.S., are generalizable to other political and legal systems.”¹⁵ While Roux acknowledges the influence of the American way of thinking on his work (p. 17), he cannot break free from this American paradigm. Since for Roux this paradigm is necessarily true, he writes that “the Court could not escape the fact that its institutional role and thereby also its institutional independence was premised on the Court’s capacity to sustain the public’s faith in the impartiality of its interpretive practices.” (pp. 206-207).

12. See Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239 (2011) (describing the decline of legal expertise in the American public mind).

13. DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST* 21 (2010) (“The first characteristic of most political science research on courts is that it is American. It is either written by Americans (about American courts – the largest single category by a long way – or about other courts) or, less common, written by non-Americans about other courts but in a way heavily influenced by American paradigms.”).

14. *Id.* at 25–26 (“[N]on-American courts are much less obviously political actors, and much more cautious ones. . . . Political science models may more effectively apply to American than to non-American courts simply because those models are assessing a different reality. Therefore, they should be exported with care.”).

15. Gibson & Caldeira, *supra* note 10, at 2–3.

II. ROUX'S REVOLUTIONARY FINDINGS

A. FLAWS IN THE LEGITIMACY PARADIGM

Many American scholars present the controlling legitimacy paradigm as a paraphrase of Hamilton's argument regarding the judiciary's limited power in Federalist No. 78.¹⁶ This lends the paradigm an aura of a timeless truth. For example, in their work "On the Legitimacy of National High Courts," Gibson, Caldeira, and Baird write that "[n]ot even the most powerful courts in the world have the power of the 'purse' or 'sword'; with limited institutional resources, courts are therefore uncommonly dependent upon the goodwill of their constituents for both support and compliance . . . courts, more than other political institutions, require a deep reservoir of goodwill."¹⁷ The authors then use public opinion polls to measure that "reservoir of goodwill." However, the Federalist No. 78 reads differently. Alexander Hamilton proclaimed there that "[t]he judiciary on the contrary has no influence over either the sword or the purse . . . It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."¹⁸ As I explain at length elsewhere,¹⁹ according to Hamilton, the government's support is the essential component for the efficacy of the Court's rulings. This support is acquired because the executive branch acknowledges the value of the Court's *judgment* and not because it is fearful of public reaction if it fails to comply with the Court's decisions. Even if the Court gives a judgment that is contrary to popular opinion or to the government's interests,

16. See, e.g., TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 67 (2011) ("Indeed, at least since Alexander Hamilton wrote in *Federalist* #78 that the Court is 'possessed of neither force nor will, but merely judgment,' students of American government have recognized that the Court is limited in its efficacy by the necessity of public and political will to give its decisions force."); Christopher D. Johnston & Brandon L. Bartels, *Sensationalism and Sobriety Differential Media Exposure and Attitudes Toward American Courts*, 74 *PUB. OPINION Q.* 260, 276 (2010) ("The support of the general public is essential to the American court system, as judges possess neither powers of appropriation nor of sanction."); Neal Devins, *The Majoritarian Rehnquist Court?*, 67 *L. & CONTEMP. PROBS.* 63, 75 (2004) ("Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance.").

17. James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92(2) *AM. POL. SCI. REV.* 343, 343 (1998).

18. *THE FEDERALIST* No. 78, at 523 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

19. See Or Bassok, *The Two Countermajoritarian Difficulties*, 32 *ST. LOUIS U. PUB. L. REV.* 333, 368-76 (2012).

the government may still enforce the judgment in the same way a patient may comply with a treatment that causes her pain. Thus, Hamilton based the Court's power "merely" on its judicial expertise; not on public support for the Court.²⁰ According to the legitimacy paradigm, the government's support is given because it makes a strategic calculation on public support for the Court,²¹ rather than because the executive believes in the Court's expertise. Public opinion is the drive wheel of American politics, and the government does not usually stand against a popular institution. Moreover, according to this paradigm, even if the Court is perceived to act politically, i.e., not as an expert, as long as it retains public confidence, political resistance to its decisions is unfeasible because the political costs of attacking the Court are too high (p. 161).²²

The invention of public opinion polls changed how the term legitimacy is understood, at least in the United States. This shift has had an especially important impact on courts. First, the term is now understood more and more in sociological terms (whether a court has legitimacy in the eyes of the public) rather than in normative terms (whether a court has legitimacy as a matter of normative justification).²³ Second, courts now have the ability, for the first time in their history, to base their legitimacy on public support rather than on expertise.²⁴ Those who hold political power have listened to public opinion well before the invention of public opinion polls, but the manner in which public opinion is voiced

20. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 54 (1999) (explaining that according to Alexander Hamilton, "the court's only claim to authority is the force of its reason and the clear accuracy of its decision.").

21. See MATTHEW E.K. HALL, *THE NATURE OF SUPREME COURT POWER* 15–18 (2011) ("[T]he Court, like most political authorities, must rely on other political actors to implement its decisions. . . . These other government actors may also be under strong political pressure from superiors or electoral constituents to ignore the Court. . . . [E]lected officials may be unwilling or unable to resist the Court when it is supported by strong public opinion.").

22. See generally JAMES A. STIMSON, *TIDES OF CONSENT*, at xvi (2004) ("Public opinion matters. . . . Its power is that it points always to the future, telling those whose careers and strategies depend on public support that success depends on being with the tide, not against it."); CLARK, *supra* note 16, at 81–82 ("[M]embers of Congress will generally have an interest in correctly position-taking in line with public opinion, which is a central activity in the pursuit of reelection.").

23. See Bassok, *supra* note 19, at 335–43 (explaining the change in the way scholars confront the counter-majoritarian difficulty: from a problem that requires a normative justification to a problem that requires showing that the Supreme Court does not contradict public opinion).

24. See Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 197 (2013) ("Public support as a basis of legitimacy is no longer the monopoly of the elected branches. The Court can now rely, even if only tacitly, on public support for the Court as a viable, independent basis of legitimacy.").

has changed. Until the invention of public opinion polls, Congress *was* public opinion.²⁵ Countering the will of Congress meant contravening the will of the majority of the public. But with the rise of public opinion culture things have changed. Public opinion polls are now the main mechanism through which the public will is represented and thus legitimacy has become in many ways synonymous with public support as expressed in opinion polls. As a result of these two developments, together with the measurement of public support for the United States Supreme Court since the 1960s, the Supreme Court now has the ability, for the first time in history, to base its legitimacy on public support rather than on expertise.

Imagine the era before the invention of opinion polls. During that period, Roux's idea of "a people's court, with its own constituency independent of the ANC" (p. 379) would seem problematic, to say the least. How can the Court, even tacitly, claim to have the people's "vote" in any conflict with the people's representatives? With no ability to reliably demonstrate this support to the political branches, the value of the Court's claim would be very low. No independent public indicator could back up this claim to public legitimacy in a clash with the elected branches. Of course, even before the invention of public opinion polls, the claim that unelected institutions require public support to function properly was raised.²⁶ Indeed, the United States Supreme Court did speak in the name of the people or rely on "public confidence" for the Court even before the invention of public opinion polls.²⁷ But, the understanding of what it means for the Court to hold public confidence was different. For example, the view that the government as a whole requires public support (rather than individual institutions) was the controlling view before the invention of public polling.²⁸

After the invention of public opinion polls, the claim that courts possess public support can hold its ground in public

25. Amy Fried & Douglas B. Harris, *Governing with the Polls*, 72 *THE HISTORIAN* 321, 323–24, 341 (2010).

26. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 135 (1972) ("In classical Whig thought all rulers, whether English kings or Venetian doges, supposedly derived their powers ultimately from the people; election only made explicit what was always implicit."); *id.* at 612 (discussing the eighteenth century view that all power was "derived from the public opinion.") (quoting Samuel Williams).

27. See, e.g., *Holmes v. Jennison*, 39 U.S. 614, 618 (1840) (Baldwin, J., concurring) (asserting that the Court's power "is moral, not physical; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts.")

28. See Bassok, *supra* note 24, at 160 (describing the position that the legitimacy of the system as a whole depends on public opinion).

discourse as long as polls demonstrate such support. But, while in the United States every salient issue is probed in polls by the media, including questions regarding Supreme Court cases,²⁹ Roux does not present any evidence of similar polling frenzy in South Africa. In his account of the SACC's first ten years, he relies on only three public opinion poll surveys that measured support for the Court and another poll measuring support for the Court's death penalty decision (p. 238). In view of the scarcity of public opinion polls, his claim that the SACC's ability to function properly between 1995 and 2005 was connected to public's support for the Court stands on a shaky ground, even if these four surveys had demonstrated broad support for the Court. Public support for courts, with the exception of rare occasions when it is manifested in elections that are focused on court-related issues, is not by itself an exercise of power. People with power listen to it.³⁰ Yet, in the current era, in order for public opinion to be listened to, it needs to be measured and made public or to be manifested through serious public mobilization. Thus, the Court does not need to state that it holds public support, but other institutions need to be aware of a reliable metric demonstrating such support. Otherwise, without a belief in the court's expertise, they may disregard the court's decisions if their only merit is the decider's unsupported claim to hold public support. After all, elected representatives view their voice as the best proxy for public support.

B. THE LEGITIMACY BASED ON EXPERTISE EXPLANATION

It is not only the use of public opinion polls, coupled with the shift in how legitimacy is understood (public opinion culture), that differentiates the American reality and the South African one. After all, under the same conditions, it is difficult to find anyone claiming that the American Federal Reserve Bank's proper function is dependent on it holding public support. The Federal Reserve Bank was designed as an expert institution, unaccountable to the public that offers judgments in its realm of expertise.³¹ At least until recently, it was almost undisputed for

29. THOMAS R. MARSHALL, *PUBLIC OPINION AND THE REHNQUIST COURT* 3-4 (2008) (presenting data on the high frequency of public polling with regard to the American Supreme Court).

30. CHARLES TAYLOR, *A SECULAR AGE* 190 (2007) (arguing that modern public-sphere "is supposed to be listened to by power, but it is not itself an exercise of power.").

31. JOHN T. WOOLLEY, *MONETARY POLITICS: THE FEDERAL RESERVE AND THE POLITICS OF MONETARY POLICY* 88 (1984) ("The Federal Reserve depends on expertise, and economists are the relevant experts.").

many decades that the executive complies with the Federal Reserve judgments because of its expertise, not because of its popular support.³² Why is the United States Supreme Court different? What comes to mind immediately is that non-compliance with the Federal Reserve judgment is like refusing to adhere to a doctor's medical advice.³³ But judges seem to be perceived differently than economists. At least with regards to salient constitutional cases, such as those dealing with the constitutionality of the death penalty, the American public's belief that the Justices possess any relevant expertise to decide these questions has weakened.³⁴ Without such expertise, all the judiciary has is indeed public support. The Federal Reserve Bank and its decisions to influence the interest rates are regarded differently. This difference in how Americans imagine these two institutions is a result of contingent historical developments. Since the clash between FDR and the Court over the New Deal legislation, the public's understanding that legal expertise does not provide the Court with determinate answers in constitutional cases, and that the law's malleability allows judges to decide cases based on their political preferences, began to spread and has been spreading ever since.³⁵

But it is evident from Roux's book, with regards to the SACC, that the way South African governing elites imagine the court is different than the way Americans imagine their Supreme Court. In other words, Roux depicts how South African elites,

32. *Id.* at 57 ("In contrast to incumbents in top posts in other agencies (including the Treasury), the Federal Reserve Board has had twice as many holders of doctoral degrees. This kind of distribution is exactly what one would expect to find in an agency that relies heavily on expertise in the conduct of policy and as a source of legitimacy."); *id.* at 88 ("The Federal Reserve may be the first instance of institutionalized application of economic expertise in the service of government.").

33. Frederick Schauer, *Foreword: The Court's Agenda — and the Nation's*, 120 HARV. L. REV. 4, 54-55 (2006) (claiming that there is almost no discussion of the counter-majoritarian difficulty with regard to the Federal Reserve Board partly because "many people believe, rightly or wrongly, that most agency decisions are based on technical knowledge which neither the people nor their directly elected representatives possess.").

34. Bassok, *supra* note 12, at 247-53 (describing the erosion in public perception of the Court's expertise); Suzanna Sherry, *Democracy's Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. F. 7, 11 (2011) ("[M]any people no longer see judges as possessing legal expertise.").

35. See, e.g., Friedman, *supra* note 3, at 171-72, 223-25 (2009) ("It would be difficult to overstate the extent to which the public and commentators had by mid-century become reconciled to Realist (or anti-formalist) conceptions."); Bassok, *supra* note 12, at 253 ("[C]onstitutional theorists generally agree that the rise in public saliency of the indeterminacy of legal norms and the decline of the Court's mythical image date back to the first half of the 20th century.").

consisting mostly of the African National Congress Party (ANC), still believe in judicial expertise even for salient constitutional questions. They still believe in constitutional doctors. The executive's compliance with the SACC better resembles compliance by the American executive branch with the Federal Reserve Bank's directives or Hamilton's vision of the United States Supreme Court's basis of legitimacy. Do not dismiss this opinion as a form of naiveté that cannot really exist or as something that could exist only when the world was young. Economics is still considered in the United States to be a form of expertise to which a different section is dedicated in newspapers (as opposed to legal issues that appear in the general "news" section). How can one argue otherwise? After all, there are a lot of numbers and large spreadsheets in the economics section. Obviously, only experts may really discern developments in the world of economics. However, after the economic crisis of 2008, one can easily see beyond this horizon and imagine a world in which the salient decisions of the Federal Bank are considered as political as the Court's decisions.³⁶ The Federal Reserve would be considered as a bunch of conservative, Republican economists trying, in a countermajoritarian manner, to hinder the Democratic President's progressive economic policy in the name of their false expertise. After all, it would be well known that the President's contradictory policy is supported by his own bunch of Democratic economic "experts." Such developments, in which a field of expertise is no longer imagined as such, do occur. As already noted, the fallout of the struggle over the New Deal between FDR and the United States Supreme Court is one example of this process.³⁷

Roux only partly capitulates to the "legitimacy paradigm." His analysis from the vantage point of culture and politics provides a recipe for how a national high court, such as the SACC, can properly function without public support. The first condition is the existence of a dominant political force that controls the executive. This condition ensures that the Court will not be used as a pawn in a struggle between political forces (pp. 125-126). The

36. RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* 169 (2007) (arguing that "disputes between economists over different approaches to monetary policy" are examples of disputes that involve "potentially contentious moral and ideological judgments at some level or another.").

37. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 *HARV. L. REV.* 1147, 1157 (1993) (noting that after the New Deal, the belief that constitutionalism is a special expression of reason or science was undermined, and that constitutionalism "appeared simply as another instance of rule by political interests.").

second condition is that the dominant political force consists of believers in judicial expertise.

Roux links the dominance of a single political party in South Africa (the ANC) to the SACC's ability to defy the legitimacy paradigm. He writes that "the Court was continually able to defy the ordinary assumptions of liberal constitutional theory by exploiting the ANC's dominance to carve out a role for itself as an independent check on the abuse of political power" (p. 363). He repeatedly states that "[t]he main determinant of the Chaskalson Court's insulation from political attack must have been the ANC's interest in its independence" (p. 144; see also pp. 125-26, 186-87). For example, he explains that in the salient decision to abolish the death penalty (*S. v. Makwanyane*) the Court's ability to reject "the content of public opinion as a determinant of constitutional meaning" was "crucially dependent on the ANC's capacity as a dominant political party to insulate the Court from political attacks" (p. 238; see also p. 390). At times the Court even forfeited opportunities to recruit public support in order to ensure the ANC's backing (p. 378).

To establish the existence of the second condition—the belief of the dominant political force in judicial expertise—Roux relies on historical scholarship other than his own. He presents the origins of the South African elites' belief in legal expertise as emerging from the process of colonial state formation and the rise of apartheid (pp. 191, 197). Based on Martin Chanock's work, Roux explains that "[i]n a country where law was so obviously deployed as an instrument of social control and oppression, lawyers' discourse on law played the role—common to most legal-professional cultures, but intensified in the particular circumstances of South Africa—of separating the realm of the legal from the political" (p. 195). This legacy was persevered after 1993, as "the positive memory of formally rational law played a crucial role in the transition to democracy, functioning as a shared 'mental model' that supplied the 'trust' required to drive the negotiation process forward" (p. 196). Thus, although according to the strategic model all politicians are merely strategic players who are not persuaded by arguments but only driven by their interest to be reelected, Roux cannot disregard the data from the cultural vantage point. The historical data reveals that given this legacy of judicial expertise, some of the ANC's leaders, and in particular Nelson Mandela, just believed in complying with the SACC's decisions, since they believed in its expertise even when the SACC ruled against their interest (pp. 127, 173, 189). Even

with rifts inside the ANC during the Mbeki presidency, and the decline of strategic reasons for part of the ANC leadership to support the Court, “very few attacks on the Court were in fact launched, and none that could be described as successful” (pp. 186-187). The belief in the SACC’s expertise was not necessarily a belief only in judicial expertise in legal doctrine (though that existed as well³⁸). Rather, as Roux explains, the ANC obeyed the Court during the Chaskalson era given its commitment to human rights, and because the Court was perceived as an expert in human rights (p. 388).³⁹

According to Roux, the separation of law and politics, as well as viewing the Court’s work as purely legal, is still the predominant way of thinking among South African elites (pp. 112, 213, 219, 382). Thus, the Court’s decisions have been understood by the elites as the decisions of an expert (pp. 3, 15). For this reason, diverting from a “legally compelled” approach implies heavy reputational losses to the SACC (p. 289). Similarly, since the elites comply with the Court’s decisions because of its expertise instead of its public support, it is not surprising that Roux distinguishes between the United States and South Africa in terms of the role of public opinion in determining the Court’s power. He explains that in *Makwanyane* the ANC’s support was able to “cushion” the Court from the adverse effects of public opinion, in comparison to the United States where public opinion has a more “powerful role” (p. 175 & n.101).

As long as the ANC is politically dominant and as long as belief in legal expertise is dominant among the elites, the SACC will function properly (pp. 175, 182). It might have decided contrary to public opinion as well as contrary to the ANC’s view, but as long as it was perceived to follow the directives of its expert knowledge, the ANC complied. The Court did not have the sword or the purse, only judgment, and that worked fine. In this spirit, Roux explains that its “light case load” allowed the Court

to concentrate on the careful wording of its decision. A strategy that was primarily focused, not on popular acceptance of the Court’s role, but on the political branches’ continued support

38. Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. CONST. L. 106, 138 (2009) (“[T]he CCSA’s reputation for legally credible decision making lending . . . the ANC government’s continued respect for, and obedience to, the CCSA’s decisions . . .”).

39. See also Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 76-78, 89 (1997) (detailing the ANC’s commitment to the language of human rights).

for the constitutional project, required the Court to invest a considerable amount of time and energy into crafting its decisions for maximum justificatory effect (p. 383).

In other words, the SACC tried to exhibit good judgment and thus to persuade the executive to enforce its judgments.

In an ironic twist, Roux juxtaposes the attitude of American scholars towards the Chaskalson Court's record on social rights with that of South African scholars. He explains American scholars' appreciation of the Court given their acceptance of "strategic compromises that constitutional courts may be required to make." Roux points out that since in South Africa, "political constraints under which constitutional courts operate are either not seen at all or, if seen, are considered to be irrelevant to legal-academic criticism," South African scholars are much more critical of the Court's record in this realm (p. 264). In essence, Roux argues that in South Africa the belief in legal expertise is such that scholars refuse to accept not following the correct result, according to expert knowledge, in the name of strategic considerations. One is thus left wondering why Roux adopts an American paradigm to explain how the SACC can function properly in the South African context.⁴⁰

Thus, in my view, the takeaway message from Roux's book is that, as opposed to the controlling legitimacy paradigm, national high courts do not need public support to function properly. As long as the controlling elites perceive their national high court as an expert in law and adopt its advice like a patient adopts her doctor's advice, the court will be able to function properly, even without public support. Exactly as the Federal Reserve Bank's judgment in the United States is adopted by the executive, even when it contradicts public opinion, since it is understood to be based on expertise in economics, national high courts' judgments can be adopted since they are understood to be based on judicial expertise. As long as the executive is persuaded by the Court's expertise and the system of governance as a whole possesses public confidence, public support of a national high court is not crucial for its proper function.⁴¹ The South African Constitutional

40. Cf. Gibson & Caldeira, *supra* note 10, at 5 (noting that "it is unclear to what degree findings" that establish the legitimacy paradigm in "long-established democratic politics can be generalized to the world's emerging democracies.").

41. Cf. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1979) ("Legitimacy does not depend on popular approval of the institution's performance It is the legitimacy of the political system as a whole that depends on the people's approval, and that is the source of its democratic character.").

Court's experience in its first ten years, as depicted by Roux, validates this argument.

III. THE SOUTH AFRICAN CONSTITUTIONAL COURT AS A STRATEGIC PLAYER

The question of whether the Court can function properly without public support is distinct from the question of whether judges believe that the Court requires such support and whether they take into account public opinion in their adjudication. The latter question concerns how judges decide cases. Roux is interested in all of these questions. So far I have discussed only the first question. Although the other questions are not at the center of my review, Roux's discussion of the judges' strategic behavior serves as a good indication of the judges' "legal consciousness" or shared beliefs.⁴² It reveals the prevalence of the belief in legal expertise among elites during the Chaskalson Court era.

In his discussion of how the SACC's judges decided cases, Roux adopts the strategic approach and assumes that judges believed that in order to fulfil their preferred policy the Court requires public support (the legitimacy paradigm).⁴³ However, since Roux shows that the SACC did not require public support to function properly, much of his analysis actually shows how the Court acted strategically to preserve the ANC's support (pp. 288-290, 388). This "managerialist strategy" (p. 392) relies on premises that are closer to Hamilton's manner of thinking than to the legitimacy paradigm.⁴⁴

42. Cf. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 *RESEARCH IN LAW AND SOCIOLOGY* 3, 6 (J. Spitzer ed., 1980) ("The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind.").

43. Cf. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 48-49 (1998) (explaining that justices protect the Court's institutional legitimacy "as a means to an end - a policy end."); HALL, *supra* note 21, at 7 ("I take as assumed, as is common in the judicial politics literature, that Supreme Court justices are political actors with policy preferences - that is, preferences regarding policy outcomes - and Court decisions are reflections of those preferences.").

44. But it does not contradict the strategic approach because this approach is not restricted to the idea that judges seek public support. See HALL, *supra* note 21, at 11 ("Typically, rational choice theorists assume that justices are 'single-minded seekers of legal policy,' but that not need be the case. It is up to the researcher to specify the content of actors' goals, and a few have explored objectives other than policy.").

Roux presents SACC Judge Laurie Ackermann as having “a profound sense of the determinacy of law as a professional discipline” (p. 225). While, according to Roux, other judges did not share this “sense” and viewed law also as a means to an end, “[a]ll of them had been socialized in a legal-professional culture in which the distinction between law and politics was highly valued” (p. 230; see also p. 120). Thus, the South African judges continued to view the “maintenance of the public’s faith in the ideal of adjudication according to the law as an essential component of their work,” not merely out of “strategic advantage” but also out of “sincere commitment” to this ideal (p. 383; see also pp. 7-8). They “chose to present their decisions as legally compelled” (p. 388). The idea of more openness to the political nature of adjudication was “never really on the cards” (p. 384). Roux concludes his book stating that “[w]hile the Court’s decision-making record may be criticized for maintaining an overly strict, and at times strained, conception of the law/politics distinction, the judges’ commitment to the liberal-legalist ideal underlying this conception was sincere and genuine” (p. 387).

In comparison, American Justices are quite explicit today in their belief in the need for public support for the Court.⁴⁵ For example, in his book, *Making Our Democracy Work—A Judge’s View*, Justice Stephen Breyer states that “[t]he Court itself must help maintain the public’s trust in the Court” in order to ensure its proper function.⁴⁶ The controversy between current justices is on how to acquire such support. Note that I do not claim that American Justices state that the Court must follow public opinion. Public support for an institution can be achieved by maintaining its image as an expert that sometimes decides against public opinion.⁴⁷ Roux does not present evidence about the SACC judges’ views as to whether the Court needs public support. Indeed, Roux’s description of the judicial mindset of the Chaskalson Court is consistent with a belief in expertise as the Court’s source of power rather than public support.

The question of whether judicial adherence to expertise as the Court’s source of legitimacy can be adequately depicted using

45. Bassok, *supra* note 12, at 258–63 (surveying examples from recent years of justices expressing their concern of public confidence for the Court which they view as vital for its proper function).

46. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK*, at xiii (2010).

47. For distinguishing between these two positions, see Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 37-38 (2014).

the strategic approach is beyond the scope of this review.⁴⁸ At one point Roux claimed that “[t]he more legally compelled” a certain approach to the interpretation of the Constitution, “the heavier the reputational losses attendant on rejecting it would have been. . . .” (p. 289). Following this argument, one can translate an expert’s adherence to her expertise out of a belief in its intrinsic value into a strategy for reputational gains. Thus, the Court’s tendency to adhere to the same doctrinal test in different fields, a tendency that fits well the consistency and coherency of a legal expert, “suggest[s],” according to Roux, “that more than a mere doctrinal preference was at work” (p. 323). The strategic prism leads Roux to conclude that the Court’s adoption of “similar tests from such different starting point suggests . . . that the Court was shaping the law to suit the long-term performance of its institutional role in two inherently controversial areas of its mandate” (p. 323). Consider the example of a doctor who consistently prescribes a certain kind of antibiotics for several similar illnesses out of a belief in the drug’s efficacy. How would you react to the suggestion that he does so out of strategic calculation for enhancing his reputation among the drug companies? What makes Roux conclude that the Court’s adherence to expertise is strategic rather than sincere?

Interestingly, Herman Pritchett, one of the fathers of the strategic approach, apparently thought that before the spike in American Justices’ dissents at the beginning of the 1930s, the strategic approach was not the most adequate one to explain the United States Supreme Court’s judgments.⁴⁹ Viewing judicial adherence to expertise as an instrument to recruit public support is not an adequate explanation during periods in which the culture of expertise reigns high. During these periods, the Court’s legitimacy was not understood in terms of public support.⁵⁰

48. For such an attempt, see, for example, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 54 (2013) (“Doctrines such as plain meaning . . . and *stare decisis* . . . enable judges . . . to minimize controversy with other branches of government by appearing to play a modest ‘professional’ role . . .”).

49. EPSTEIN & KNIGHT, *supra* note 43, at 24; C. HERMAN PRITCHETT, *CIVIL LIBERTIES AND THE VINSON COURT* 22 (1954) (“It is precisely because the Court’s institutional ethos has become so weak that we must examine the thinking of the individual justices . . .”); see also EPSTEIN, LANDES & POSNER, *supra* note 48, at 66–67 (noting that Pritchett “is rightly regarded as the founder of the quantitative social-scientific study of judicial behavior.”).

50. Determining the periods in which the culture of expertise reigned high is a complex affair. It should be noted, however, that in the U.S. the process was not linear in the sense of a continuous decline of the belief in expertise.

Many viable perspectives are available for describing phenomena.⁵¹ One can describe a person to her friend by giving the exact proportions of the chemical elements from which his body was composed at that moment. Such a description offers the most accurate scientific depiction of him currently available. Yet it would be difficult to recognize him on the street according to this description. One can analyze the question of whether a woman is allowed to discriminate against white people and date only black women according to legal analysis. After all, as Aharon Barak and Elena Kagan taught us, “law is everywhere”⁵² and “it is law all the way down.”⁵³ Yet, this would be a categorical mistake, at least according to our current understandings of choices in the realm of personal relationships. Viable perspectives of this kind can be deployed so as to encompass every human action under their wings.⁵⁴ This is surely true with regards to the strategic approach that can narrate any act as part of a strategy for achieving a certain goal.⁵⁵ For example, one can describe scholars who adhere to the legitimacy paradigm as strategic players rather than as scientists dedicated to finding the truth. According to this description scholars would prefer to follow the controlling scientific *Zeitgeist* that views courts as strategic players, rather than jeopardize their career by adhering only to the contrasting findings and encountering great opposition within their discipline.⁵⁶ As for judicial decisions, as Robertson noted, “[o]ne can frequently come up with a plausible post hoc account of why a decision could have been strategic, whatever the judges claimed as their reasoning.”⁵⁷ The only question is whether it is

51. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* (Keith Ansell-Pearson ed., Carol Diethe trans., 1994) (1887); FRIEDRICH NIETZSCHE, *THE WILL TO POWER* §§ 181, 530 (Walter Kaufmann & R.J. Hollingdale trans., 1967) (1901).

52. Owen Fiss, *Law Is Everywhere*, 117 *YALE L.J.* 256, 259 (2007) (explaining Barak’s ideas).

53. Bassok, *supra* note 47, at 40–41 (explaining the ideology behind Kagan’s quote).

54. *Cf.* Kahn, *supra* note 8, at 102 (noting that with regards to the political and legal perspectives that “[t]hese are systems of meaning, each of which can be deployed within and about all of our political institutions.”).

55. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 98 (2002) (explaining that rational choice theory “for the most part” cannot be falsified since “[i]f any goals are allowed, then there must always be goals that can explain the behavior in question.”).

56. *Cf.* LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* 211 (2001) (“[L]aw and economics advocates might be challenged to explain why their approach cannot itself be understood as a rational adaptation to the market forces that favored its development . . .”).

57. ROBERTSON, *supra* note 13, at 25; *see also* Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism*, 12 *INT’L J. CONST. L.* 626, 639 (2014) (“Nor should we confine ourselves to looking at constitutional

the most adequate perspective. From Roux's description it is unclear whether the most adequate perspective to describe the SACC's adjudication is the strategic one.

CONCLUSION

Gazing through his "constitutional microscope," Theunis Roux saw something he was not supposed to see. The SACC functioned properly without public support, contrary to the current controlling paradigm. As any scholar working within the framework of a controlling paradigm, this result puzzled him as it defied the entrenched legitimacy paradigm. While Roux recognizes that this anomaly challenges the current controlling paradigm, he attempts to subordinate it to the logic of the paradigm.⁵⁸ Yet his findings diverge from this framework. They demonstrate, contrary to the controlling legitimacy paradigm, that national high courts can function properly without public support as long as the Court is considered by the governing elite to be an expert. One may view Roux's discovery not as disproving the legitimacy paradigm but simply as narrowing its scope of applicability.⁵⁹

In any event, his discovery signals a major shift in the understanding of national high courts. This shift also affects the method of inquiry. Having a thick description of the local understanding of legal expertise, as Roux offered, is clearly a relevant factor for determining national high courts' ability to

courts merely as strategic actors seeking to carve out a maximum of power for themselves in a larger institutional context, thus isolating them from their legal tradition and their broader cultural context. Justices at constitutional courts have been first and foremost educated, worked, and socialized for decades in a legal system before their appointment to the court. Unsurprisingly, they will be influenced by their specific legal culture, and by the more general attitudes towards authority in society.").

58. Cf. KUHN, *supra* note 9, at 36–37 (explaining the scientist's puzzle-solving function during normal science); *id.* at 46–47, 57–59 ("[T]he perception of anomaly – of a phenomenon, that is, for which his paradigm had not readied the investigator – played an essential role in preparing the way for perception of novelty.").

59. One may argue that the legitimacy paradigm, in certain formulations, can incorporate this adjustment. For example, distinguishing between compliance and legitimacy allows one to argue that in order to achieve compliance (and thus to function properly), a court need not have public legitimacy but only expertise in the eyes of the elites. See also KUHN, *supra* note 9, at 98–100, 122 (discussing the idea of narrowing paradigms' range of application in order to salvage them); cf. Gibson & Caldeira, *supra* note 10, at 4 (distinguishing between compliance and legitimacy).

function properly. Mere measurements of public support fail to capture the entire picture.⁶⁰

60. See KUHN, *supra* note 9, at 58–61 (explaining that shifts in paradigms bring shifts in the standard tests we use to understand reality); *id.* at 126 (“[O]perations and measurements are paradigm-determined.”).