

TRANSFORMATIVE CONSTITUTIONALISM AND THE BEST INTERPRETATION OF THE SOUTH AFRICAN CONSTITUTION: DISTINCTION WITHOUT A DIFFERENCE?

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1 Introduction

The journal articles that refer to Karl Klare's 1998 essay on "Legal Culture and Transformative Constitutionalism"¹ ("LC&TC") are legion.² Very few of these articles, however, respond in detail to his argument. Some are clearly sympathetic to it, and cite LC&TC as a prelude to analysing a particular area of law or taking up a particular line of theoretical inquiry.³ Others simply cite LC&TC in support of the proposition that the Constitution of the Republic of South Africa, 1996 ("the Constitution") should be read as a transformative constitution, which is of course only part of what Klare argued.⁴ In celebration of LC&TC's tenth anniversary, I want to respond in this article to Klare's argument in detail: first, to see whether it stands up to critical scrutiny, and then, if not, to suggest ways in which the project of transformative constitutionalism may be reconceptualised in a more defensible way. Although my analysis of LC&TC is quite critical at times, I hope that by closely reading

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¹ 1998 *SAJHR* 146.

² See, for example, De Vos "Substantive Equality after *Grootboom*: the Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence" 2001 *AJ* 52 58 n 23; Moseneke "Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" 2002 *SAJHR* 309 317; Botha "Metaphoric Reasoning and Transformative Constitutionalism (Part 1)" 2002 *TSAR* 612 613 n 9; Froneman "Legal Reasoning and Legal Culture: our 'Vision' of Law" 2005 *Stell LR* 3 4 n 10; Pieterse "What do we mean when we talk about Transformative Constitutionalism?" 2005 *SAPL* 155; Van der Walt "Transformative Constitutionalism and the Development of South African Property Law (Part 2)" 2006 *TSAR* 1 22 n 236; Wesson & du Plessis "Hart, Dworkin and the Nature of (South African) Legal Theory" 2006 *SALJ* 700 722 n 75; Liebenberg "Needs, Rights and Transformation: adjudicating Social Rights" 2006 *Stell LR* 5 6 n 2; Albertyn "Substantive Equality and Transformation in South Africa" 2007 *SAJHR* 253 257 n 18; Dyzenhaus "The Past and Future of the Rule of Law in South Africa" 2007 *SALJ* 734 740 n 18.

³ See, for example, De Vos 2001 *AJ* 52 and Van der Walt 2006 *TSAR* 1.

⁴ See, for example, Froneman 2005 *Stell LR* 4 n 10 (citing Klare as "influential" in persuading South African lawyers that the Constitution requires engagement with "substantive reasoning" but apparently seeing no real difference between Klare's argument in this respect and the very different argument in Cockrell "Rainbow Jurisprudence" 1996 *SAJHR* 1); Wesson & du Plessis 2006 *SALJ* 722 n 75 (citing Klare in support of the proposition that the Constitution is a transformative constitution that "endeavours to establish a society very different to that created by apartheid"); Dyzenhaus 2007 *SALJ* 740 n 18 (advising readers to refer to Klare "for an illuminating discussion of transformation in the South African context").

and responding to Klare's argument this article will be understood as paying LC&TC the homage that it deserves. LC&TC is a provocative article, and the numerous citations to it are justified. Nevertheless, I think that its argument is flawed, for reasons this article is devoted to explaining.

If the argument of LC&TC can be reduced to a single sentence, it is that a particular interpretive method, one typically associated with the methodology and political commitments of the Critical Legal Studies movement ("CLS") in the United States, is required in order to realise the full transformative potential of the Constitution. In this article I shall counter this argument by showing that it is possible to read the Constitution as a transformative constitution, and to engage in the project of transformative constitutionalism, through an interpretive method made famous by Ronald Dworkin. In contrast to the method of CLS, Dworkin's method is premised on the view that claims about the political morality informing a constitution should, and in practice often are, presented as claims about the objective correctness of a particular interpretation. I make no argument about which interpretive method is better under all conditions, or that these are the only two methods that may be used to interpret the Constitution. In the particular circumstances of South Africa, however, I think that Dworkin's interpretive method offers a more easily defensible way of giving effect to the progressive values underlying the Constitution than the method Klare advocates. It is therefore a method that he was unwise to dismiss.

This article proceeds in three further parts. I begin by reconstructing and assessing the argument of LC&TC. I do this to make absolutely clear what I understand to be the argument of the piece, and its shortcomings. The next part is devoted to exploring two of the major themes underlying Klare's argument, namely what it means to offer a best interpretation of the Constitution, and the idea of strategy in constitutional adjudication. In the final section, I briefly assess the current state of the constitutional project and make some speculative remarks about its future trajectory. From these remarks, and the essay as a whole, it should be clear that I do not think that the constitutional project is moribund. I do, however, think that it needs to be reconceived in order to withstand current attempts to undermine it.⁵

⁵ I am referring here to developments such as the publication of the Constitution Fourteenth Amendment Bill (GN 2023 in GG 28334 of 2005-12-14), which contemplated extending the executive's control over the administration of the Constitutional Court, including the setting of its budget, and removing the court's power to suspend Acts of Parliament or provincial Acts before their commencement. Although the bill was withdrawn after protests from the General Council of the Bar and others, the ANC resolved to reintroduce it at its party congress in Polokwane in December 2007. There have also been several well-publicised attacks on the judiciary and the Constitutional Court in particular, mostly associated with the attempted prosecution of ANC president, Jacob Zuma, on a series of corruption-related charges. The best-known of these attacks was a statement allegedly made by ANC Secretary-General, Gwede Mantashe, that the Constitutional Court judges were part of "counter-revolutionary forces" threatening to undermine South Africa's democratic transformation process. The making of this statement, at least in these precise terms, was subsequently denied by the ANC (see *ANC Today* (11-17 July 2008) 8(27) available at <http://www.anc.org.za/ancdocs/anctoday/2008/at27.htm> (accessed 20-05-2009)).

2 Reconstructing and assessing the argument of LC&TC

The aim of this section is to give a fair reconstruction and assessment of Klare's argument in LC&TC. This task is complicated by the fact that LC&TC does not so much consist of a series of logically connected propositions as a set of suggestions and invitations, intended to provoke discussion, but studiously disavowing anything so hopelessly old-fashioned as a claim to truth. I have to confess that I find this strategy of arguing a point by not arguing it, or at least by *saying* that one is not arguing it, a little trying. At the risk of sounding like a "mainstream, traditionalist" liberal⁶ – which risk I happily run – I want to try to reconstruct Klare's argument in this section as a series of logically connected propositions, if only for purposes of responding to it. If I am not fair in my reconstruction, if I attribute to Klare arguments that he did not make, then this response is so much the weaker. But if the sole complaint about my attempt to reconstruct LC&TC as a set of logically connected propositions is that Klare did not intend his article to be read in this way, then my retort would be that no author can foreclose in advance the way he is read. If this were true – if foreclosing particular kinds of readings were something authors were legitimately allowed to do – then there could be no such thing as intellectual debate. Indeed, I do not understand Klare to be foreclosing discussion of his article. Quite the contrary: he expressly invites "dialogue about what it might mean to say that a given interpretation of a text is 'legally correct'"⁷. I take this invitation to be an invitation to respond to his article from my own theoretical perspective, subject only to the duty of fair comment.

Reconstructing the argument of LC&TC in this way, it emerges as a series of normative claims about the sort of society that the Constitution envisages, and the methods of legal reasoning conscientious lawyers (judges, advocates and legal academics) should adopt if they want to contribute to the creation of such a society. It is this collective project of legally-driven social change that Klare calls "transformative constitutionalism"⁸. The starting point for his argument is a particular reading of the Constitution, which he calls "a postliberal reading"⁹. Klare is at pains to say that, at least for purposes of his argument in LC&TC, he is offering the postliberal reading simply as one plausible reading, rather than the "legally correct" reading of the Constitution.¹⁰ He does so, he says, because what it means to offer a "legally correct" meaning is subject to debate, and he does not want to pre-empt that debate in his article. Indeed, he wants to trigger it. Somewhat coyly, however, Klare at the same time says that

"[i]n another context, I would be quite prepared to contend that the postliberal reading is the *best* interpretation and therefore the one that should guide South African judges and lawyers."¹¹

⁶ 1998 *SAJHR* 152.

⁷ 152.

⁸ 150.

⁹ 151.

¹⁰ 152.

¹¹ 152.

This is a crucial sentence in LC&TC to which I shall return later.¹² For the moment, however, it is sufficient to note that Klare does not offer his postliberal reading as the best interpretation of the Constitution, even though he thinks that there may well be criteria by which one could have a rational argument about whether his postliberal reading is “legally correct”. Instead, Klare says that the postliberal reading is at least plausible. The first two propositions in Klare’s reconstructed argument are therefore that: (i) it is possible to interpret the Constitution in a number of different ways, each of which is plausible according to accepted conventions of legal reasoning; and (ii) the postliberal reading is one such plausible interpretation.

Significantly, Klare does not give any examples of what these other plausible readings might be. At one point he mentions “mainstream, traditionalist interpretations”¹³ but he does not tell us what the nature of these competing interpretations is, or how they would differ from his postliberal reading. We are simply asked to accept that there *are* mainstream, traditional liberals out there who would likely disagree with the postliberal reading.

A large part of the difficulty I have with LC&TC is that I think that the postliberal reading, at the level of generality Klare offers it, is entirely non-contentious, and would be to any South African lawyer of whatever political persuasion and jurisprudential perspective. This is not to say that there are not South Africans out there who might disagree with it. Rather, no particular interpretive method is required to accept it and any suggestion that a particular interpretive method *is* required only weakens the project of transformative constitutionalism properly understood.¹⁴

What is the postliberal reading and why do I say that it is non-contentious? Klare offers several different iterations, starting with the comment that

“[the] essential features of the South African experiment ... [include] multiculturalism, close attention to gender and sexual identity, emphasis on participation and governmental transparency, environmentalism and the extension of democratic credentials into the ‘private sphere’”.¹⁵

On the next page he says that

“[t]he South African Constitution intends a not fully defined but nonetheless unmistakable departure from liberalism ... toward an ‘empowered’ model of democracy.”¹⁶

In support of this statement he cites a passage from Mahomed DP’s judgment in *S v Makwanyane*¹⁷ that characterises the Constitution of the Republic of South Africa Act 200 of 1993 (“the interim Constitution”) as signalling a

“decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos”.¹⁸

¹² See 3 below.

¹³ 152.

¹⁴ I concede that I am making the phrase “properly understood” do a lot of work in this sentence, but I do go on to explain what I mean in 4 below.

¹⁵ 151.

¹⁶ 152.

¹⁷ 1995 3 SA 391 (CC).

¹⁸ Para 262.

While tending to confirm that one (relatively influential) judge of the Constitutional Court supported a reading of the interim Constitution that accords with something like Klare's notion of an "empowered model of democracy", this quote hardly supports the full weight of his proposition, ie that a constitution that instantiates an "empowered model' of democracy" breaks decisively with the liberal tradition in a way that justifies calling it a postliberal constitution. But that is neither here nor there for purposes of my argument because it is not the label "postliberal" that I think is uncontroversial, it is the reading of the Constitution as providing for, among other things, an "empowered model' of democracy". No South African lawyer, reading the Constitution conscientiously according to accepted conventions of legal reasoning, could come to any other conclusion. The same is true of the six detailed themes that Klare goes on to explore in the rest of Part II of his article. The contentiousness of these themes does not lie in their content, which is stated at a high level of generality, but in Klare's use of the term "postliberal" to describe them, as though liberalism were an ideological project that has clear conceptual boundaries. If that were true, there would be no less reason to call liberalism, after it accepted the principle of universal adult suffrage at the end of the nineteenth century, "postliberalism" than there would be to call the Constitution's particular instantiation of the liberal tradition "postliberal". Rawls would not have been much of a liberal either, and so on. But labels are not my target here. My target is Klare's presentation of the postliberal reading of the Constitution as a plausible reading different from other plausible readings that he assures us are out there.

It would be tedious and unnecessary at this point to go through the six themes Klare associates with the postliberal reading, or even to list them. I analyse them in detail in the next part of this article. For the moment, it is sufficient to say that the persuasiveness of my argument will ultimately depend on the force of my contention that the normative content Klare attributes to these six themes is uncontroversial. That these themes are not characteristic of the United States Constitution or other "classic" liberal constitutions is equally uncontroversial. But that is not the point. The point is that a liberal legalist would have no difficulty in reading the Constitution as containing these themes. In fact, as I will argue below, a Dworkinian interpretation of the Constitution would attribute much the same normative content to these themes as Klare does.

In this section, however, I am still trying to reconstruct Klare's argument. For that purpose the proposition he makes at this stage of his article may be restated as follows (following on the numbering used earlier): (iii) what makes the postliberal reading different from other readings is that it does *better* interpretive justice to certain essential features of the Constitution, such as its concern for multiculturalism, socio-economic rights and the potential abuse of private power, and its provision for an empowered model of democracy.

I am conscious that Klare might object at this point and say that this unfairly misstates his argument because he does not expressly say that the postliberal reading does better interpretive justice to the essential features he identifies. What he says is that the postliberal reading finds "support" in these

features.¹⁹ But this proposition makes no logical sense unless it is understood to mean that the postliberal reading is somehow able to do better interpretive justice to these features than the other plausible readings that Klare tells us are out there. If the proposition is simply that the postliberal reading is supported by these essential features, but that these same features also support other readings, or that other readings are supported by features not identified in LC&TC, then what is the point of identifying them? What Klare would then be saying is that the Constitution supports a number of different plausible readings (as indeed he does say), *and that there is no particular reason to prefer the postliberal reading to any other* (which he decidedly does not say). If that is Klare's point, ie if he wants us to accept that the postliberal reading is a plausible reading *and* that there is no reason to prefer it to any other reading (which is, note, still short of arguing for the postliberal reading as the *best* interpretation), then why should we read any further? Surely our interest in reading his article lies in the possibility of our being persuaded that there are good reasons to prefer the postliberal reading to other plausible readings of the Constitution? If not, all that we could hope to take away from LC&TC would be the sense that there is such a thing as a postliberal reading of the Constitution, but that we need not bother about it too much because there are no reasons to prefer it to any other reading. Klare *must* mean, cannot *avoid* meaning, that the postliberal reading has something going for it, namely that it does better interpretive justice to the Constitution according to whatever criteria we eventually agree (for we must eventually agree) should be used to distinguish a good interpretation from a bad one.

That is all I would like to say about the postliberal reading for the moment. My argument up to this point may be summarised as follows: Klare's assertion that he does not have to defend the postliberal reading as the best interpretation of the Constitution for purposes of LC&TC, even though he would be prepared to do so for other purposes, is unconvincing. To maintain our interest as readers he needs at least to tell us why that interpretation is more persuasive than others. He also needs to make this claim as a logical building block in his argument because, if the postliberal reading is not to be preferred for reasons that we can all agree on, then his call to join in the project of transformative constitutionalism, which depends on that reading, falls flat.

In preparing the ground for the next substantive section of his article, in which he explains his preferred theory of constitutional adjudication, Klare adds an important proposition which is worth identifying separately. It is the proposition that "[t]he Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals".²⁰ Unlike the other propositions thus far identified, this one is so clearly stated that we can simply call it proposition (iv). It is the idea that the Constitution, whether or not you think that the postliberal reading is the correct reading, requires a particular form of interpretive method consistent with its commitment to social transformation through law.

¹⁹ 1998 *SAJHR* 153.

²⁰ 156.

The difficulty facing Klare at this point in his argument is that he cannot support this very clearly stated proposition by appealing to his earlier, more tentatively offered proposition that the postliberal reading is just one plausible reading among many. If we have not yet agreed on how we might decide whether the postliberal reading is legally correct, how can we use that reading as a basis for the proposition that the postliberal reading entails a particular, legally correct understanding of the way conscientious lawyers should interpret the Constitution? Klare must find an alternative basis for it. The alternative basis he offers is that “the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods”.²¹ This is an amazing statement. Not only does it suggest that there is a necessary connection between the substantive content of a constitution and the method of its interpretation, but it also seeks to support this proposition by relying on the very kind of interpretive strategy (“classical legalist methods”) that the proposition condemns.²² Unless I missed something, part of the Crits’ stock-in-trade when CLS was still a happening thing in the United States was to make fun of intentionalist arguments about the meaning of the American Constitution, as though anyone could seriously believe that a diverse group of relatively opinionated people could form a single intention on anything. And yet here we are in 1998, being asked to accept that the South African Constitution is not just capable of being plausibly read as postliberal, but actually invites an accompanying postliberal interpretive method because that is what the Constitutional Assembly must have intended. “On my reading,” Klare says, “the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method.”²³

To be clear, my objection at this point is not to the cogency of this proposition, but to the irony behind the reason Klare offers us in order to accept it. A liberal legalist interpretive device – an appeal to the intention of the legislature – is used to persuade us that the Constitution means for us not to use liberal legalist interpretive devices when interpreting it. If such interpretive devices are useful to a legal academic when trying to suggest how the Constitution *might plausibly be read*, why are they not useful to a legal academic (or a judge or an advocate) when arguing how the Constitution *should* be read? Is it because in the former instance such devices are used to make take-it-or-leave-it suggestions, whereas in the latter they are used to bolster

²¹ 156.

²² This is not the only point in his argument where Klare uses the language of intention. When first articulating his postliberal reading, as we have seen, he says:

“The South African Constitution intends a not a fully defined but nevertheless unmistakable departure from liberalism ...” (152).

If anything, saying that a document intends something is even worse than saying that a diverse group of opinionated people intends something. But perhaps Klare does not mean to refer to the constitutional text here, but to the social process of constitutionalism launched at Kempton Park and given new impetus by the Constitutional Assembly and other social actors after 1994. If so, he doesn’t expressly say so, and his postliberal reading does not seem to depend on such an understanding of the word “Constitution”.

²³ 156.

claims about the best interpretation of the Constitution? If so, this is just too clever by half. What is really happening in this part of the argument is an undeclared conversion of the tentatively offered propositions (i) and (ii) into a strong argument that the postliberal reading is the best interpretation of the Constitution. The sentence quoted at the end of the previous paragraph cannot be understood in any other way. To say that one's reading of the Constitution "suggests not only the desirability, but the *legal necessity*, of a transformative conception of adjudicative process and method"²⁴ is to make a claim about the meaning of the Constitution that assumes law's capacity to generate the experience of constraint. This is not the weak form of constraint Klare elsewhere says is the sort of constraint that ideological projects like the project of transformative constitutionalism can be driven through,²⁵ but the strong form of constraint that is capable of legitimating a legal interpretation as apolitical in some significant sense.²⁶

Part II of LC&TC gives a long explanation of the approach to constitutional interpretation that Klare says is necessitated by his postliberal reading. It would be unfair to suggest that Klare's argument in this respect is wrong just because the method of legal analysis and reasoning he says the Constitution invites is the method of legal analysis and reasoning to which he has devoted his scholarly life. But we should nevertheless be on our guard. The South African constitutional experiment has been idealised too often for us not to feel suspicious about this kind of argument. It is one thing to identify certain general features of the Constitution as characterising it as postliberal. It is quite another to read the Constitution as mandating a particular interpretive method. The second argument, if not the first, certainly requires some sort of agreement about what it means to offer a "legally correct" interpretation of the Constitution. A mere appeal to intentionalism – especially when it contradicts one's preferred interpretive method – is not enough.

Reconstructing it, the proposition Klare makes in this section of LC&TC is as follows: (v) as soon as one accepts that the postliberal reading of the Constitution is plausible, there is only one correct method of constitutional interpretation in South Africa, namely a politically engaged, transparent method that is similar in ethos to the essential features of the Constitution identified in the postliberal reading. It is possible to understand Klare not as making this proposition, but as making the weaker proposition that as soon as one accepts the postliberal reading of the Constitution as plausible, then one must also accept the associated postliberal interpretive method as plausible, ie as one possible interpretive method among many. But this does not seem to be what Klare is arguing. I say this because much of Part II of LC&TC is devoted to rejecting other possible interpretive methods in a way that would

²⁴ 156 (emphasis added).

²⁵ 149.

²⁶ If Klare's response to this criticism is to say that he is again just offering his interpretation as a plausible reading of the Constitution, then my response would be to say that, until he tries to convince us that he is right, we have no reason to engage with him. For, if he is not right, then the Constitution also invites other plausible reading strategies, and the project of transformative constitutionalism in the way he defines it is just one possible project among many.

not have been necessary had Klare merely been presenting his preferred interpretive method as one plausible method among many. If the legal correctness of the postliberal reading is not something Klare wants to push too strongly in LC&TC, the superiority of his preferred interpretive method certainly is.

Klare's assault on other interpretive methods begins with the assertion that "the very idea of transformative adjudication seems out-of-place within liberal legalism."²⁷ The term "transformative adjudication" here means the politically engaged and politically transparent method of constitutional interpretation that Klare says is necessarily entailed by his postliberal reading of the Constitution. Judges, according to this approach, must treat the postliberal reading not just as a legally plausible reading, but as an ideological project that they have a duty to promote through the process of adjudication. Liberal legalists cannot do transformative adjudication thus understood, because it offends one of their central tenets, namely the strict law/politics distinction. That distinction prohibits liberal legalists from pursuing ideological projects like transformative constitutionalism because maintaining the fiction that law can be separated from politics requires them to offer interpretations of the Constitution that they believe are legally compelled. Since the postliberal reading is not legally compelled, but merely plausible, liberal legalists cannot pursue the project of transformative constitutionalism that seeks to write that reading into law.

Quite so. This entire argument, however, depends on understanding the project of transformative constitutionalism as an ideological project in the manner of the CLS conception of liberalism and conservatism in the United States. If, however, the postliberal reading is not an ideological project in that sense – if instead it is an uncontroversial reading of the Constitution that can be accepted by people of different political viewpoints and jurisprudential persuasions – then everything changes. For then liberal legalists would be able to pursue the postliberal reading not as a forbidden ideological project, but as a legally compelled reading that they are perfectly within their rights, as strict legalists, to give. The "politicality" of reading the Constitution as a transformative Constitution, in other words, depends on how politically loaded you think the postliberal reading is. If you think the postliberal reading (as opposed to the label "postliberal") is uncontroversial, because it is obviously mandated by the text of the Constitution, then reading the Constitution in this way does not necessarily require you, as a judge, advocate or legal academic, to bring to your professional work the kind of political engagement Klare says is indispensable to reading the Constitution as a transformative Constitution. As I argue below,²⁸ a mainstream liberal could read the Constitution as a transformative Constitution using a Dworkinian best-interpretation approach. A Hartian legal positivist could do the same thing. There is nothing particularly penumbral, after all, about the "essential features" Klare identifies. That being so, both of these mainstream liberal interpretive methods (and probably others besides) could be used to read the Constitution in a transformative way.

²⁷ 157.

²⁸ See 3 below.

Why, for example, should the invalidation of the crime of sodomy depend on reading the Constitution in the way Klare suggests in Part II of LC&TC, as opposed to reading it as a Dworkinian interpretivist or a Hartian legal positivist? Or the abolition of the death penalty or the recognition of same-sex marriage or the development of the common-law definition of rape? Klare, as the case discussion in Part IV of LC&TC indicates, wants this kind of case to be decided in a particular way, but he cannot use his postliberal reading of the Constitution to cast aspersions on judges who arrive at these legally compelled outcomes by their own preferred methods.

The South African Constitution, I am in effect saying, cannot be used to settle old scores in Anglo-American legal theory. That this is indeed part of the motivating force behind LC&TC is apparent where Klare, with breathtaking brevity, dismisses H L A Hart, Hart & Sacks, Ely, Wechsler and Dworkin as just so many liberal legalists who could not get over the fact that legal interpretation, and constitutional adjudication in particular, is inescapably political.²⁹ From a purely strategic point of view, this part of LC&TC seems unwise because it makes the project of transformative constitutionalism unnecessarily dependent on our preparedness to dismiss all of these legal theorists as being fundamentally misguided. As I shall argue in conclusion, there *is* something valuable about the project of transformative constitutionalism, and suitably reconceptualised, this project is something to which all South African lawyers should contribute. But the project needs all the help it can get, and making the abandonment of liberal legalist commitments a precondition for participation is unnecessary and therefore unwise.

It is not just liberal legalists' attachment to the law/politics distinction that irks Klare, it is also their penchant for treating "professional practices and strategic pursuits ... as mutually exclusive".³⁰ I shall interrogate Klare's sense of strategy in the next section. For the moment, it is sufficient to say that what he means by "strategy" here is the strategic pursuit of the project of transformative constitutionalism, ie reading the Constitution in a particular, ideologically loaded way. This sense of strategy is drawn from Duncan Kennedy's work,³¹ where judges are conceived as political actors, strategising how best to write their liberal or conservative ideological projects into law. In the same way, Klare argues, the postliberal reading of the Constitution must be understood as an ideological project that progressive South African lawyers need to pursue through law. But this is once again to suggest that the postliberal reading of the Constitution is more controversial than it really is. Unlike the ideological projects of liberalism and conservatism, neither of which has been successful in the United States in monopolising the meaning of that country's Constitution, the postliberal reading in South Africa has every chance of enjoying support from a wide spectrum of judges, lawyers and legal academics. To suggest, therefore, that it needs to be strategically pursued in a process of politicised adjudication is wrong. In South Africa,

²⁹ 158.

³⁰ 159.

³¹ *A Critique of Adjudication [Fin de Siècle]* (1997).

there is no contradiction between professional legal practices that keep law separate from politics, and reading the Constitution in a transformative way.

Because Klare sees transformative adjudication as an inevitably political practice, he must find some way of legitimating it, other than the claim that his postliberal reading is the legally correct one. His answer is candour: “there is nothing legal practitioners can do but acknowledge their political and moral responsibility in adjudication and share the secret with their publics in the interests of transparency”.³² What legitimates the project of transformative constitutionalism, in other words, is not the fact that the postliberal reading is the best interpretation of the Constitution, which in turn might make the interpretive method associated with it the best method of constitutional interpretation. It is that the prescribed method for implementing the project of transformative constitutionalism – candour about the inevitable politicality of judicial value choice – is self-legitimizing. In the absence of an appeal to the authority of a right answer, legitimacy stems from being open and honest about the reasoning processes and value choices involved in the assertion of judicial power.

This conception of legitimacy has its limits. No amount of candour, after all, can legitimate a bad argument. Klare’s implication that liberal legalists favour opaque forms of legal reasoning is also questionable. Neither Hart nor Dworkin, for example, counsels judges to be secretive about their reasoning processes or value choices.³³ Dworkin’s theory of constructive interpretation is all about defending one’s interpretation of the Constitution on the basis of the “political theory that justifies the constitution as a whole”.³⁴ Hart likewise does not say that judges must pretend that there are no gaps in the legal system that they are required to fill through a process of judicial law-making.³⁵ The difference between the two conceptions of transparency is that, for Klare, transparency is a way of legitimating the inescapably political nature of constitutional adjudication. For Dworkin and Hart, on the other hand, transparency is a requirement of good legal arguments.

At the very end of the section on transformative adjudication, Klare pauses to consider the view that judicial denial of the politics of adjudication may not be such a bad thing. “Several distinguished South African lawyers”,³⁶ he says, have put it to him that “the fictions of politically and morally neutral adjudication and of the impersonal rule of law may be essential ideological underpinnings of forward progress towards democratic transition”.³⁷ From the perspective of 2008, this view sounds quite prophetic, but it would be

³² 1998 *SAJHR* 164.

³³ See, for example, Dworkin *Freedom’s Law: the Moral Reading of the American Constitution* (1996) 37: “The moral reading offers different counsel. It explains why fidelity to the Constitution and to law demands that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment, in the hope that judges will construct franker arguments of principle that allow the public to join in the argument.”

³⁴ Dworkin *Taking Rights Seriously* (1977) 106.

³⁵ Hart *The Concept of Law* 2 ed (1994) 273 (“there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers”).

³⁶ 1998 *SAJHR* 166 n 44.

³⁷ 166 (footnote omitted).

unfair to use the wisdom of hindsight against Klare here. If his analysis of the early case law is right in saying that the judges of the Constitutional Court have been less candid about their value choices than they might have been, as I think it is, then it would be reasonable for him to respond that, had the judges been more candid about the politicality of judicial value-choice from the outset, they might have been in a better position to withstand the current constitutional crisis.³⁸ It is a counterfactual, and we cannot therefore be certain. What we can say, however, is that Klare does not give the view put to him by the distinguished lawyers much of a hearing. He simply acknowledges it, and then uses it as a rhetorical device to segue to his next section – on legal culture. His argument, to the extent that it can be discerned, is that the view that denying the politics of adjudication might be a viable legitimation strategy resonates with the formalist nature of South African legal culture, and therefore is only likely to entrench it.

If that is the correct way of reconstructing Klare's argument, I agree with it as far as it goes. Conscious denial of the politics of adjudication as a judicial legitimation strategy *does* run the risk of further entrenching South Africa's formalist legal culture. But this is no argument against more sophisticated liberal legalist approaches to the politics of adjudication. As noted earlier, neither Hart nor Dworkin denies the need for judicial value choice.³⁹ Rather, they both attempt to explain why the recognition of judicial value choice is not necessarily incompatible with the view that legal reasoning is a distinctive mode of reasoning that is different from political reasoning – at least distinctive enough to legitimate the exercise of judicial power. Whatever one thinks of them, Hart's and Dworkin's arguments cannot simply be lumped together with legal formalism and dismissed as so much liberal mythology. Both present sophisticated theories of adjudication which are not obviously inapplicable to the South African context. Hart's theory, for one, purported to be a general theory of law, and Dworkin's theory was largely directed at a Constitution (the American) which, though not as politically progressive as South Africa's, shares many of the same institutional features. Something more than a few select quotes from the constitutional text is required to convince the reader that these theories have no bearing on debates about how to interpret the Constitution.⁴⁰

The final theoretical section of LC&TC, before Klare gets down to reading the cases, is his discussion of legal culture. "By *legal culture*", Klare says, "I mean professional sensibilities, habits of mind, and intellectual reflexes."⁴¹ Through a series of indicative questions he then adds to this list: "rhetorical

³⁸ I am referring here to the controversy over the CC's decision to lodge a formal complaint with the Judicial Service Commission against the conduct of Cape High Court Judge President, John Hlophe. See further n 4 above and 4 below.

³⁹ See, for example, Dworkin *Freedom's Law* 37:

"I not only concede but emphasize that constitutional opinion is sensitive to political conviction ... The question is rather whether the influence is disreputable."

See also Hart *Concept of Law* 272-276.

⁴⁰ For an argument about the continuing relevance of Dworkin's work to the interpretation of the South African Constitution, see Wesson & du Plessis 2006 *SALJ* 721.

⁴¹ 1998 *SAJHR* 166.

strategies”, “argumentative moves”, “[w]hat counts as a persuasive legal argument”, “understandings of and assumptions about politics”, and a few more characteristics besides.⁴² “A defining property of legal cultures”, he continues, “is that its participants tend to accept its intellectual sensibilities as normal”.⁴³ Participants in a legal culture are often unaware of the contingency of their judgments about what constitutes a good or a bad legal argument.⁴⁴ Legal culture in this way imposes a limit on legal development – by circumscribing what counts as a good legal answer. In South Africa, Klare argues, this aspect of legal culture may work as a drag on constitutional interpretation, by limiting the transformative potential of the Constitution.⁴⁵

Klare then typifies South African legal culture as conservative – not in the sense of political conservatism, but in the sense that it is based on “cautious traditions of analysis common to South African lawyers of all political outlooks”.⁴⁶ It is clear from this statement that Klare means that South African legal culture is “formalist” – he is just too polite to say so. Instead he says:

“Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound than in the States, whereas U.S. legal culture is much more policy-oriented and consequentialist”.⁴⁷

Although the substantive content of the American Constitution is conservative, Klare says, the “discursive practices”⁴⁸ of American lawyers are progressive. From this he concludes that a legal culture can be “jurisprudentially progressive” without being politically progressive.⁴⁹ There is also “no *necessary* correlation between judicial style and interpretive method, on the one hand, and political ideology on the other”.⁵⁰

I am in complete agreement with all these observations. Where I disagree is in relation to the conclusion Klare draws, which we may think of as his final proposition (vi):

“While not sufficient, ... a progressive legal culture is a necessary condition for [the] long-term success of transformative constitutionalism”.⁵¹

For Klare’s own strategic purposes, this proposition seems to me to be unwise because it is highly unlikely that South African legal culture is going to become “jurisprudentially progressive” any time soon, and therefore to make this change a necessary condition for the success of the project of transformative constitutionalism is to condemn that project to probable failure. I am also, as must now be clear, not in agreement with the normative claim underlying this proposition. I think that there are other methods of interpreting the Constitution that can give effect to its progressive values and in this

⁴² 166-167.

⁴³ 167.

⁴⁴ 167.

⁴⁵ 168.

⁴⁶ 168.

⁴⁷ 168.

⁴⁸ 169.

⁴⁹ 169.

⁵⁰ 170.

⁵¹ 170.

way contribute to the transformation of the South African legal order and the social and political institutions that it regulates. In particular, I can see no difficulty for a Dworkinian interpretivist or a Hartian legal positivist in giving effect to the progressive values in the Constitution. As Alfred Cockrell pointed out at the very beginning of the South African constitutional project, the new constitutional order requires a change from a formal to a substantive vision of law.⁵² There are, however, many interpretive methods compatible with this required change other than the one Klare advocates.⁵³

When stripped bare in this way, the change to South African legal culture that Klare suggests is legally compelled by the Constitution is really just a change that he thinks would be desirable. He cannot appeal to what the Constitutional Assembly must have intended or to what the postliberal reading of the Constitution necessarily requires in order to make his case for this change. Instead, he must make his case in the same way that his jurisprudential predecessors, the Legal Realists, challenged the dominant formalist legal culture in the United States in the early part of the last century, ie by a sustained process of intellectual engagement and critique. Despite its conceptual flaws, LC&TC has been a very provocative intervention in this respect, persuading many South African academic lawyers to reconsider their assumptions about the nature of law and legal method. I, however, and I imagine many other liberal legalists, remain unconvinced. For us it seems unnecessary to understand the project of transformative constitutionalism as an ideological project in the manner of liberalism and conservatism in the United States. That the Constitution has normative commitments we do not doubt, but we believe that we can draw out the implications of these normative commitments by a range of different interpretive methods, none of which has any special claim to constitutional endorsement.

The flaw in Klare's argument in this respect would not really matter if the project of transformative constitutionalism were not under threat. But it is,⁵⁴ and therefore everyone who holds this project dear should redouble their efforts to find mutually compatible ways of pursuing it. The next section of this essay explores two of the main themes underlying Klare's argument with a view to reconceiving the project of transformative constitutionalism in a less exclusionary way.

3 The underlying themes

3.1 The best interpretation of the Constitution

In the preceding section I noted Klare's insistence that he was not offering his postliberal reading of the Constitution as the "best interpretation" of that

⁵² 1996 SAJHR 5.

⁵³ Klare's only objection to this last statement can be that, because they are premised on a strict conception of the law/politics distinction, these other interpretive methods are *per se* disabled from giving effect to the Constitution's progressive values. If pressed, this objection would be both offensive to the many judges, legal professionals and legal academics who want to participate in the constitutional project while respecting the law/politics distinction, and non-demonstrable without agreement on the question of how best to give effect to the Constitution's progressive values.

⁵⁴ See n 4 above.

document but only as a plausible reading. The reason he gave for this was that he wanted first to clear away some “conceptual underbrush” about the “criteria” for assessing whether a particular interpretation of the Constitution is best.⁵⁵ My response to this argument was to say that the postliberal reading – at the level of generality that Klare offers it – is entirely non-contentious. What I meant by this was that, whatever one’s political ideology and whatever one’s preferred interpretive method, it is impossible to deny, within the parameters of acceptable legal argument, that the Constitution indeed contains the features Klare says it contains, and that those features are accurately depicted in his postliberal reading.

In this section I want to take a slightly different tack, and demonstrate positively that the “essential features” that Klare says “support” his postliberal reading of the Constitution are also features that the best interpretation of that document would identify as being cardinal to it. In a sense, therefore, I am undertaking the interpretive project that Klare said in *LC&TC* he was prepared to undertake, but which could not be undertaken until he had clarified certain conceptual issues in the course of writing that piece. For purposes of my argument, I assume that the task of clarifying these conceptual issues was the task Klare sought to accomplish in Part II of *LC&TC*, which is the section of his article in which he sets out his preferred interpretive method. I make this assumption with some caution however, because Part II of *LC&TC* does not in fact expressly address the criteria by which we could agree on “what it might mean to say that a given interpretation of a text is ‘legally correct’”.⁵⁶ In fact, much of this part of Klare’s argument is aimed at denying that there could ever be objective criteria according to which the correctness of a particular interpretation of the Constitution could be established. This, after all, is the thrust of his critique of liberal legalism, the central tenet of which is that there *are* objective interpretive methods through which judges can do law and not politics.

The other issue that troubles me in trying to undertake the task that Klare said he would be prepared to undertake is that the phrase that Klare chooses to describe it—giving the “best interpretation”—is a term intimately associated, to the point of being virtually synonymous, with the work of one of the traditional legal theorists he later dismisses. I am talking, of course, of Ronald Dworkin and his theory of constructive interpretation.⁵⁷ Klare includes Dworkin in a list of contributors to “contemporary jurisprudence” whose “strategies” for “maintain[ing] the law/politics boundary” he finds unsatisfactory.⁵⁸ Klare subsequently softens his position on Dworkin somewhat when he describes

⁵⁵ 1998 *SAJHR* 152.

⁵⁶ 152.

⁵⁷ See *Law’s Empire* where Dworkin states:

“Constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.” (52)

and

“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.” (225).

⁵⁸ 1998 *SAJHR* 158.

Dworkin's work as "[t]he best of contemporary theory" in going "farthest along the path of blurring the law/politics distinction".⁵⁹ But the impression is still that Dworkin is just the best of a bad lot, and that ultimately Klare's aim is to persuade us that Duncan Kennedy's theory of adjudication,⁶⁰ which was developed partly in response to Dworkin's theory, is to be preferred.

One can only assume, therefore, that when undertaking to defend at some later date his postliberal reading as the "best interpretation" of the Constitution Klare did not mean to use this term in the Dworkinian sense, but in some other, yet-to-be defined sense. Quite why Klare chose to confuse the issue by using the term "best interpretation", however, is not clear. It is also a little surprising that Klare does not refer to Dworkin's express use of this term.⁶¹

At any rate, what I would like to do in this section is to show that the postliberal reading can be presented as the best interpretation of the Constitution using Dworkin's method. I said at the beginning that this was only "in a sense" like undertaking Klare's task because I am uncertain exactly how he would have gone about that task. Given his dismissal of Dworkin's views it seems unlikely that Klare would have tried to undertake it by giving a Dworkinian interpretation to the Constitution. But this need not concern me because my purpose in giving this Dworkinian interpretation is not to make the case for the postliberal reading as the best interpretation in the way Klare would likely have made it, but to make good on my own promise to show that the postliberal reading of the Constitution can be presented as the best interpretation of that document in a Dworkinian sense. If I can show that, then I can show that the "frankly political" approach to interpretation that Klare advocates in Part III of LC&TC is not, in fact, required to read the Constitution as a postliberal constitution, whatever one might think of that particular label.

Recall now the "essential features" that Klare says characterise the Constitution:

"multiculturalism, close attention to gender and sexual identity, emphasis on participation and governmental transparency, environmentalism and the extension of democratic ideals into the 'private sphere'".⁶²

At this level of generality, the response of just about everyone reading these words would be "Yes, OK." There is, in other words, absolutely nothing controversial in the identification of these features as being "essential". They are essential features of the constitutional text whether you like it or not. A conservative judge, for example, could hardly deny that the Constitution paid "close attention to gender and sexual identity". Indeed, the arch-conservative, formalist, everything-we-love-to-hate-about-Republican-appointed-judges Justice Antonin Scalia of the United States Supreme Court, if asked whether he agrees with this reading, would say, "yes, of course – that is what the text says."

⁵⁹ 159 n 30.

⁶⁰ *Critique* 119-130.

⁶¹ See, for example, Dworkin "Law's Ambitions for Itself" 1985 *Virginia LR* 173 176; Dworkin *A Matter of Principle* 162.

⁶² 1998 *SAJHR* 151.

So we are not even in the territory yet where some kind of best interpretation might be required to resolve disagreement between competing interpretations. How much more contentious does the postliberal reading get as Klare delves deeper into the meaning of each of his essential features? Take his first example: “social rights and substantive conception of equality”.⁶³ Klare says that

“the Constitution comprehends that political freedom and socio-economic justice are inextricably intertwined and therefore draws a close connection between political and socio-economic rights”.⁶⁴

He develops this theme for a bit and then says

“[T]he Constitution contains a pervasive and overriding commitment to equality, specifically comprehending a substantive (redistributive), not just formal, conception of equality”.⁶⁵

His conclusion is that, in South Africa,

“foundational law is not and cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization”.⁶⁶

Certainly there is some interpretive work required here. Nothing in the Constitution automatically suggests, for example, that “political freedom and socio-economic justice are inextricably intertwined”. You have to bring something to the interpretive table, in order, first, to want to relate those two values to each other and, secondly, to suggest that they are “inextricably intertwined”. But is that something necessarily a political ideology that lies outside the “structural design of the Constitution as a whole”?⁶⁷ I contend not. To see why, let us imagine Dworkin’s putative judge Hercules, reading the Constitution in a case that at least remotely puts in issue the relationship between political rights and socio-economic rights.⁶⁸ Hercules, unless he were illiterate (in which case he wouldn’t be very Herculean), would find in the Constitution a textual commitment to political rights and socio-economic rights. He would also know that the Constitution was enacted after a long struggle for political freedom that included strong calls for democratic control of South Africa’s social and economic resources. After much meditation on the rest of the constitutional text and South Africa’s political and legal traditions, he would conclude that the Constitution had been enacted so as to confer on all South Africans, for the first time, justiciable rights to participate in the democratic process and to hold government to account when its policies failed to deliver at least the minimum “social resources”, as Klare puts it, “meaningfully to exercise their [democratic political] rights”.⁶⁹ The fact that “classical bills of rights”⁷⁰ did not understand the relationship between political rights and socio-economic rights in this way would not bother Hercules in the slight-

⁶³ 153.

⁶⁴ 153.

⁶⁵ 153-154.

⁶⁶ 154.

⁶⁷ Dworkin *Freedom’s Law* 10.

⁶⁸ I say “at least remotely puts in issue” to avoid tilting the example too far in the direction I would like Hercules to go, but not so far as to make the example irrelevant to the issue at hand. Part of what Klare is arguing is that the very issues that judges decide to make relevant to a case, are part of their ideologically-driven legal work – see, for example, 1998 *SAJHR* 163.

⁶⁹ 153.

⁷⁰ 153.

est, because he would know that he was not interpreting a classical bill of rights. Instead, he would devise a more progressive political theory, more or less along Rawlsian lines, to put the Constitution in its best light. After doing all of this interpretive work, Hercules would come to the conclusion that, in South Africa, “foundational law is not and cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization”.⁷¹ In fact, the only difference between the conclusion drawn by Hercules and that of Klare’s ideological-project-pursuing judge is that Hercules would say he was offering the best interpretation of the Constitution, whereas Klare’s judge would say that he was implementing the transformative constitutional project. The outcome, however, as a matter of constitutional principle, would be identical.

The same argument could be applied to the second, third and fourth essential features Klare identifies: “affirmative state duties”,⁷² “horizontality”,⁷³ and “participatory governance”.⁷⁴ Indeed, the problem with these features is that Klare mostly just lists the constitutional provisions in question,⁷⁵ making it hard to see whether he is interpreting the Constitution or simply restating it. What Klare must mean, I think, is that there is some interpretive work required in order to identify these provisions as “essential”. They are certainly provisions that one would not find in a classic liberal constitution. But once again it is hard to see why this would prevent a mainstream liberal judge from identifying and giving effect to them. Here, the difference between Klare’s judge and Hercules would be that Hercules would single out these provisions as essential components of the political theory that best interprets the Constitution, whereas Klare’s judge would refer to these features as “supporting” the postliberal reading. But the two interpretive strategies would produce the same legal outcome.

The fifth essential feature – “multiculturalism”⁷⁶ – reads as follows:

“The Constitution espouses an advanced cultural politics. It celebrates multiculturalism and diversity within a framework of national reconciliation and ubuntu, and it expressly promotes gender justice and rights for vulnerable and victimized groups and identities, explicitly including protections for, e.g., gay people and the disabled. It protects language diversity and respect for cultural tradition.”⁷⁷

The first sentence of this passage is meaningless without a definition of “cultural politics” and some indication of how “cultural politics” can be understood to be more or less “advanced”. In the next sentence, “celebrates” carries some normative weight, conveying as it does the impression that

⁷¹ 154.

⁷² 154.

⁷³ 155.

⁷⁴ 155.

⁷⁵ 155. The section on participatory governance, for example, reads:

“The Constitution envisages inclusive, accountable, participatory, decentralized and transparent institutions of governance and contemplates that government will actively promote and deepen a culture of democracy (s 234).”

A footnote after the word “governance” in this passage invites us to “[s]ee generally s 40(2) and s 41(1)” before referring by section number and title to ss 32 (access to information), 33 (right to fair and just administrative action), 34 and 38 (access to courts).

⁷⁶ 155.

⁷⁷ 155 (footnote omitted).

the Constitution's commitment to multiculturalism is unequivocal. Once again, however, a Dworkinian best interpretation would produce the same conclusion. The Constitution, after all, lists "culture" as a ground of unfair discrimination in section 9(3) and protects the right to language and culture in section 30 and the rights of cultural, religious and linguistic minorities in section 31. Any interpretation of the Constitution that ignored or downplayed these provisions would fail to put it in its best light. The same could be said of Klare's singling out of the Constitution's concern for "gender justice and rights for vulnerable and victimized groups and identities", all of which are uncontroversial extrapolations of the listed grounds of unfair discrimination in section 9(3). In interpreting these provisions, Hercules would not, of course, use words like "celebrates", because he doesn't think that anthropomorphising the Constitution really helps to explain what its normative commitments are. But otherwise he would be in complete agreement.

The sixth and final essential feature of the Constitution that supports the postliberal reading is its "historical self-consciousness".⁷⁸ All that Klare really means by this phrase is that the Constitution is expressly "committed to social transformation and reconstruction".⁷⁹ He adds some other things besides, and speaks approvingly of the Constitution's rejection of "the fiction that the political community is founded on a single moment of 'social contract', thereby ratifying the pre-existing hierarchy and distribution of social and economic power".⁸⁰ But none of this depends on bringing a particular political ideology to his reading of the text. A liberal legalist, confronted by the land reform provisions in section 25, or the comprehensive list of socio-economic rights in sections 26-29, or the express protection in section 9(2) of positive measures to assist those affected by past discrimination, would have little difficulty in agreeing with these propositions.

All of the essential features Klare identifies are thus either textually uncontroversial or features that Dworkin's Hercules would readily identify as components of the political theory that best interprets the Constitution. Why then was Klare so reluctant to offer his postliberal reading as the best interpretation of that document? It cannot really be because he wanted to clear away "conceptual underbrush that makes it difficult to have an open-ended conversation about whether a postliberal, or neoliberal, or conservative, or any other reading of the text is best".⁸¹ Part II of LC&TC seeks to end that conversation rather than start it. Could it simply be that Klare realized that offering the postliberal reading as the best interpretation of the Constitution would have undermined his later dismissal of Dworkin's work? We cannot be sure. All that we know is that Klare deemed it unnecessary to offer his postliberal reading as the best interpretation of the Constitution, even though he thought it was.

⁷⁸ 155.

⁷⁹ 155.

⁸⁰ 155.

⁸¹ 152.

3.2 Strategic adjudication

The word “strategy”, and its cognates “strategic” and “strategically”, appear at several points in the argument of LC&TC. The first appearance occurs during a discussion of Etienne Mureinik’s conception of adjudication under apartheid. In this context, Klare (summarising Mureinik’s position) says that “a conscientious judge operates within and to some degree authentically accepts legal constraint, yet acts strategically to accomplish freedom and social justice”.⁸² This sense of the word “strategy” implies a judge pursuing a particular goal – freedom and justice – through a process of adjudication in which the judge does not so much impose her own political views on the legal materials as “work” with the legal materials to find professionally acceptable ways of deciding the case in accordance with her personal conception of freedom and justice.

Although this sense of strategic adjudication is offered first in relation to Mureinik’s work, it is clear from the rest of LC&TC that it is a conception that Klare himself shares, and also that it is the mode of adjudication that he thinks is required in order to implement the project of transformative constitutionalism. For example, Klare says

“My argument is that the strategic pursuit of transformative projects through adjudicative practices is not, in principle, inconsistent with duties of interpretive fidelity”.⁸³

This sentence repeats the point made in the summary of Mureinik’s work about the compatibility of strategic adjudication with observance of professional codes of conscientious adjudication, and ties the notion of strategic adjudication to the project of transformative constitutionalism.

Given the centrality of the strategic approach to Klare’s argument, it is worth examining exactly what he means by this term and also whether it is appropriate for the purposes for which he wishes to use it. Klare says that the theory of adjudication on which he relies is “drawn largely from Duncan Kennedy’s *Critique of Adjudication*”.⁸⁴ He also refers us to Kennedy’s article “Strategizing Strategic Behavior in Legal Interpretation”,⁸⁵ as “an accessible introduction”.⁸⁶ In this article Kennedy defines “strategic behavior in interpretation” as “the externally motivated choice to work to develop one rather than another of the possible solutions to the legal problem at hand”.⁸⁷ This conception of strategy is linked to Kennedy’s notion of judges as political actors who pursue ideological projects – such as conservatism or liberalism – through the process of adjudication.⁸⁸ According to Kennedy,

⁸² 148.

⁸³ 151.

⁸⁴ 159 n 31.

⁸⁵ 1996 *Utah LR* 785

⁸⁶ 1998 *SAJHR* 159 n 31.

⁸⁷ 1996 *Utah LR* 785.

⁸⁸ 786. Kennedy defines “ideology” as “a universalization project of an intelligentsia that sees itself acting ‘for’ a group with interests in conflict with those of other groups”.

appellate judges in the United States (to whom he restricts his argument), pursue either a liberal or a conservative agenda by “working” with the legal materials to produce legal outcomes consistent with one or the other of these two ideologies. They are able to do this, Kennedy argues, because there are sufficient authoritative sources in the legal materials to allow them to justify their ideologically preferred outcome by legally acceptable methods.⁸⁹

The issue that I would like to take up in this section is whether Kennedy’s theory of adjudication, thus understood, provides an appropriate conceptual framework for understanding the role of judges in relation to the interpretation of the South African Constitution. If not, is there any other way of thinking about strategy in constitutional adjudication that might be more appropriate to South Africa?

The obvious starting point in answering these questions is the observation that there are several important differences between the American context from which Kennedy’s notion of strategic behaviour is drawn and the context in which the South African Constitution is being interpreted. Kennedy himself, as already noted, does not offer his theory of adjudication as a general *normative* theory of adjudication for all judges everywhere, but only as a *descriptive* theory of United States appellate court practice. The accuracy of that descriptive theory is very much tied to the peculiar nature of American politics, which has for a long time been dominated by two major political parties (Republicans and Democrats) representing two main contending ideologies (conservatism and liberalism). It is also tied to the overtly political nature of the judicial appointments process in the United States, which makes it relatively easy to identify a particular appellate court judge as a Democrat or a Republican, and therefore relatively easy to understand judges as strategically pursuing ideological projects through law. Finally, Kennedy’s theory is applied against the background of a constitution that is generally agreed to be so open-textured as to admit of competing conservative and liberal readings.⁹⁰

The South Africa context is, of course, vastly different. South Africa’s electoral politics have been dominated by a single political party that contains neo-liberal, welfare liberal, social-democratic, communist, moral conservative and traditionalist groupings within its ranks. The fact that such an ideologically diverse political party controls judicial appointments means that it is not necessary for a judge to declare her private political views as a condition

⁸⁹ *Critique* 157-179.

⁹⁰ The essential difference between Kennedy’s theory of adjudication and Dworkin’s theory of constructive interpretation, from this perspective, is that Kennedy denies, because it is so open-textured, that either a liberal or a conservative reading of the US Constitution can ever be termed “best”, whereas Dworkin maintains that, despite this, there are objective grounds on which the liberal reading can be asserted as the best interpretation of the US Constitution.

for appointment.⁹¹ Finally, although open-textured, the Constitution is undeniably committed to certain values, such as gay and lesbian equality or the institution of private property, that are very clearly at odds with the political ideology of certain groupings within the African National Congress.

Because of these contextual differences, Kennedy's descriptive theory of adjudication cannot easily be translated into a descriptive theory of adjudication in South Africa. In any case, a descriptive theory by its very nature cannot be used to explain adjudication in another context without additional empirical work to establish the accuracy of the theory in that context. Klare does not even attempt such work. Instead, he seeks to avoid this problem by offering Kennedy's theory of adjudication, not as descriptive theory, but as a normative theory of adjudication for South African lawyers to follow.

There are certain obvious problems with transforming a descriptive theory into a normative theory, but it is not a conceptually impossible thing to do. The basic argumentative move is for the theorist to say that this is how and why things happen *and it is a good thing too*. Kennedy himself does not make this move in developing his descriptive theory of appellate court adjudication in the United States. His argument is rather: this is how and why things happen *and it is inevitable given certain structural features of the American political system*. For Klare to transform this argument into a normative argument about the preferred theory of adjudication in South Africa he has to say that, since supreme-law constitutional adjudication is an inevitably political practice everywhere it occurs, there is one thing and one thing only that conscientious judges should do, and that is openly to declare the politicality of their decision-making practices. That is really the extent of the normative justification Klare gives for his theory, as far as I can see, apart from his circular argument about the theory being somehow legally compelled by the constitutional text.

Dworkin, as we know, has a different take on the inevitable politicality of the judicial role under a supreme-law constitution. He agrees that constitutional adjudication is political.⁹² A large part of his argument is in fact directed against the very same formalists that Klare attacks for denying this. Where Dworkin differs from CLS, however, is in arguing that political decisions can be defended as objectively right, ie as providing the best interpretation

⁹¹ Of course, South African judges' political sympathies may be well known. Unlike in the US, however, Parliament has only a very minor role in the making of senior judicial appointments in South Africa, which are generally left to the President, acting either after consultation with, or on the advice of, the Judicial Service Commission (see s 174 of the Constitution). Because of its overwhelming majority in Parliament, the ANC dominates the Judicial Service Commission and thus effectively controls judicial appointments. In this sense, the judicial appointments process in South Africa is *less* openly political than it is in the US. Judicial nominees are not seen first and foremost as representing the views of one of the main political parties. Rather, they are seen as people whose political views are at least acceptable to the ANC, without its being clear exactly where they stand in relation to the different ideological currents within the ANC. On the other hand, given the imperative that the South African judiciary be transformed along race and gender lines, the judicial appointments process in South Africa is *more* politicised than the US in the sense that the achievement of a broader policy objective (proportionate race and gender representation on the bench) is a factor that is given considerable weight in the judicial appointments process. This form of politicisation, however, does not undermine the point being made here, viz that it is less easy to identify South African judges with the pursuit of a particular ideological project than it is in the US.

⁹² See Dworkin *A Matter of Principle* chs 1 and 2.

of the Constitution. The essential difference between Kennedy's theory and Dworkin's theory, in other words, is that Kennedy denies that either a liberal or a conservative reading of the open-textured United States Constitution can ever be termed "best", whereas Dworkin maintains that, despite the open-textured nature of that Constitution, there are objective grounds on which the liberal reading can be asserted as the best interpretation of that document.

Without taking a position on which of these two theorists is more persuasive in the American setting, it is reasonable to assume that the less open-textured a constitution, the more persuasive Dworkin's theory becomes. If the nub of the disagreement between Dworkin and Kennedy is about the constraining capacity of law – with Dworkin and other mainstream liberals believing that law is capable of sufficiently fettering judicial discretion so as to legitimate the exercise of judicial power, and Kennedy and other CLS scholars believing that it is not – then the clearer a Constitution is about its political commitments, the more likely it is that a political interpretation of that Constitution can be objectively justified.

It should by now be obvious where this argument is headed: as the previous section showed, the postliberal reading of the Constitution requires very little interpretive work. All of the features Klare identifies, except perhaps the last, have an indisputable basis in the text. This is what makes it possible to attribute a particular political ideology to the Constitution in the first place. Klare himself is not a "postliberal", as though that was a political ideology you could espouse in the abstract. He is a radical democrat who finds many of his political commitments textually present in the Constitution. I, for my part, would resist putting a label on the political ideology manifest in the Constitution, since I think that this would inevitably make it less than the sum of its parts. I would also, as I have said, certainly avoid the label "postliberal" because of its implication that liberalism has a conceptual termination point. If pressed, I would say that the Constitution is a liberal constitution of a particular type – certainly not a classic liberal constitution, but one that reflects the more statist and communitarian tradition within liberalism, and connects it with the indigenous African philosophy of *ubuntu*.

That understanding of the Constitution is not enough to be dispositive of every case – it does not explain the text of the Constitution in a way that would allow a formalist judge to decide every interpretive dispute mechanically, without recourse to substantive moral reasoning. But it does give the Constitution a certain normative valence that is hard to interpret away while remaining within the confines of acceptable legal reasoning. That being so, a judge pursuing a Dworkinian method of interpretation is more likely to be able to defend a progressive, "caring", communitarian interpretation of the Constitution than she would be able to defend a mainstream liberal interpretation of the United States Constitution.⁹³ Such an interpretation would be a political interpretation in the sense that it would have to attribute to the

⁹³ See Roederer "Race Cards, Academic Debate and Progressive Liberal Scholarship: what is a Liberal anyway?" 2001 *SALJ* 708 716-17 (making a similar point in an exchange with Dennis Davis over the relevance of Ronald Dworkin's work to the interpretation of the Constitution).

Constitution certain political commitments. But it would not be a political interpretation in Klare's sense, because there would be no requirement that the judge actually shares these commitments or conceive of herself as participating in an ideological project aimed at giving effect to them. Indeed, a conservative judge could, and would have to, interpret the Constitution in this way.

All of which brings us back to that part of Klare's argument where he touches on the view that judicial denial of the politics of adjudication might not be such a bad thing. As I have already noted,⁹⁴ Klare raises this argument after setting out his own preferred interpretive method. In his preceding dismissal of liberal legalism, however, he fails properly to distinguish Dworkin's theory from its liberal legalist rivals, saying only that it "goes farthest along the path of blurring the law/politics distinction".⁹⁵ Had Klare been less committed to finding his own preferred theory of adjudication in the text of the Constitution, he might have given a more even-handed account of the potential of Dworkin's theory to legitimate the exercise of judicial power in South Africa. South African legal culture *is* formalist, and therefore an approach to adjudication that masks the politics of adjudication would both entrench that culture and fail to do interpretive justice to the Constitution. But Dworkin's theory, as noted already, does not mask the politics of adjudication. Rather, it attempts to show how deciding cases according to the political theory that best interprets the Constitution is sufficiently constraining of judges' discretion to legitimate the exercise of their power. In the United States, the problem with this theory is that there are rival liberal and conservative interpretations of the American Constitution and it is therefore not clear how Dworkin could claim that the one is objectively better than the other. In South Africa, by contrast, the Constitution, although open-textured, contains many clear normative commitments that make it much easier to interpret in a Dworkinian way. Indeed, as I have tried to show, this is exactly how Klare's postliberal reading could be presented.

The only real difference, then, between a Dworkinian best interpretation of the Constitution and the kind of interpretation that Klare prefers is the spirit in which the interpretation is offered. Whereas Hercules would defend his interpretation as the best interpretation, justified by objective legal reasoning methods, Klare's judge would justify his interpretation as a frankly political reading of the Constitution that relied as much on the judge's private political commitments as it did on the legal materials. Because the two judges would be vindicating the same set of constitutional principles, the decisions they reached would likely be the same. The text of the judgments, however, would be different, with Hercules relying more on claims to objective legal reasoning, and Klare's judge more on candid admissions of political preference.

Importantly, this difference would not necessarily mean that Klare's judge would have a monopoly on strategic thinking about how to implement the

⁹⁴ See 2 above.

⁹⁵ 1998 *SAJHR* 159 n 30.

constitutional project. As I have argued elsewhere,⁹⁶ Dworkin's theory of adjudication allows space for judges to make strategic decisions about when to push arguments of constitutional principle and when to compromise on principle so as to keep the ideal of a community of principle alive. As Dworkin puts it:

“An actual justice must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices *and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.*”⁹⁷

As I understand this passage, what Dworkin means is that deciding cases as his hypothetical judge Hercules would decide them is an ideal that cannot always be realised in practice – not because it is conceptually impossible always to offer one's interpretation of the Constitution as the best interpretation, but because there are certain practical constraints on constitutional adjudication. The first constraint is the requirement that decisions must enjoy majority support. If faced with a choice, Dworkin says, Hercules would prefer to “adjust” his decision as a matter of principle in order to win the votes of his fellow judges, rather than hand down a fully principled but minority judgment. The second constraint is that, even with majority support, a judge may strategically adjust his decision as a matter of principle in order to make that decision “sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level”.

If that last notion seems obscure, think of the difference between O'Regan J's dissenting judgment in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*⁹⁸ and Sachs J's majority judgment in the same case. The two judges agreed on the constitutional principle, ie that the right to equality means that same-sex couples should be allowed to marry. Where they differed was in respect of Sachs J's preparedness to design a special procedure for the enforcement of that principle in order to make it more “secure”.⁹⁹ Given the controversy over same-sex marriage, Sachs J argued, it was strategically better to allow Parliament to make the required change to the marriage laws than for the Court to enforce this change by itself. In Dworkinian terms, what Sachs J was saying was that the principled decision in *Fourie* needed to be adjusted so as to be “sufficiently acceptable to the [South African] community”. The way to do that was to relax the ordinary rule that a successful constitutional claimant is entitled to full and immediate vindication of her rights by giving Parliament a year within which to make the required change to the marriage laws. By so doing, Sachs J implied, South Africans would have an opportunity to think through the broader issue of constitutional principle at stake, and in this way to act “in the spirit of a community of principle at the constitutional level”.

⁹⁶ Roux “Principle and Pragmatism on the Constitutional Court of South Africa” 2009 *ICON* 106.

⁹⁷ Dworkin *Law's Empire* 380-381 (emphasis added).

⁹⁸ 2006 1 SA 524 (CC).

⁹⁹ Para 136.

This broader notion of acting “in the spirit of a community of principle” provides, I think, a viable way of reconceiving the project of transformative constitutionalism. It is not an ideologically neutral project, because it is decidedly a liberal project of a particular type. But it is also not an ideological project in Kennedy’s sense of that term. Rather, it is an open-ended project of constitutional imagining, experimentation and debate to which all South Africans committed to the ideal of constitutional democracy should be allowed to contribute.

4 Concluding reflections

Writing this essay as I am in the second half of 2008, the South African constitutional project seems under threat as never before. The Constitutional Court’s decision to publicise its complaint to the Judicial Service Commission against the conduct of the Judge President of the Cape High Court, Justice John Hlophe, has been found by the Witwatersrand Local Division of the High Court to have violated his constitutional rights.¹⁰⁰ The Constitutional Court’s complaint related to an allegation that the Judge President had improperly sought to influence two of its judges in their consideration of one of a number of interrelated cases in the on-again, off-again prosecution of ANC President Jacob Zuma.¹⁰¹ Before the Witwatersrand Local Division’s decision, the Constitutional Court had found it necessary, in *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*,¹⁰² to state that its judgment in that matter had not been affected by the events leading up to its decision to lodge a complaint against Justice Hlophe.¹⁰³

For the Court’s critics, its decision to lodge a complaint against Justice Hlophe apparently indicated that it had prejudged Mr Zuma’s guilt on the charges then pending against him. There is no logic in this inference.¹⁰⁴ Unlike previous attacks on the Constitutional Court,¹⁰⁵ however, there is an aggressive confidence on the part of the Court’s current critics that suggests that they would be prepared, if they had their way, to abolish the Court or at least to curtail its powers so as to fundamentally change its role in the South African political system.

¹⁰⁰ *Hlophe v Constitutional Court of South Africa & Others* [2009] 2 All SA 72 (W).

¹⁰¹ At the time of writing, the prosecution of Jacob Zuma had been halted by the decision of Nicholson J in *Zuma v National Director of Public Prosecutions* 2009 1 All SA 54 (N). This judgment had in turn been taken on appeal to the SCA [and was subsequently overturned in *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) (eds)].

¹⁰² 2009 1 SA 1 (CC).

¹⁰³ See paras 4-6 per Langa CJ.

¹⁰⁴ The thrust of the charge against the CC, though nowhere made explicit, is that the CC, by lodging a complaint against Justice Hlophe for allegedly attempting to influence it in its decision in *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 1 SA 1 (CC) had somehow attempted to ensure that Jacob Zuma would not be given a fair trial. The fact that the lodging of the complaint had nothing to do with the merits of the corruption charges then still being pursued against Mr Zuma, and could not be understood procedurally to have made that case any more or less likely to succeed, seems to have been lost on the CC’s critics.

¹⁰⁵ For example, in the controversy surrounding *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC).

In such a volatile context, I am in agreement with Klare that blunt denials of the Constitutional Court's political function are only likely to entrench South Africa's formalist legal culture, with adverse consequences for the Court. By the same token, however, I do not think that the alternative strategy Klare proposes, of frank admission of the Court's political function, is wise. In my view, frank admission by the Court of its political function would leave it even more exposed than it currently is to the charge that it is an unelected body opposing "the people's revolution". Such an admission would in any case be inaccurate. The Court is not an ordinary political actor exercising a purely political function in Klare's sense. The better, certainly more defensible, view is that it is a court of law that has been given the task, through distinctly legal methods, of expounding the Constitution's vision for a just society in relation to the concrete disputes that come before it.

What does this understanding of the Court's function tell us about how it should respond to the current crisis? First, the Court should redouble its efforts to develop a substantive "moral reading" of the Constitution. It can do this in a number of ways, for example by giving discernible content to rights, as it did in *Doctors for Life International v Speaker of the National Assembly*.¹⁰⁶ Secondly, the Court should return to the foundational distinction between the elaboration of the content of rights and the permissible grounds for their limitation, and develop a more coherent theorisation of the values underlying an "open and democratic society based on human dignity, equality and freedom". It is that theorisation, after all, that stands between South Africans and government by political faction. Thirdly, I think the Court should continue to be strategic, in the Dworkinian sense, about the cases in which it decides to give theoretically deeper accounts of constitutional values and the cases in which it adjusts principle in order to keep alive the ideal of a community of principle.

It should be clear from this that I do not think that minimalism or "judicious avoidance" – whatever its merits in the first ten years of the Court's institutional life¹⁰⁷ – is a viable strategy for the Constitutional Court to pursue any longer. When given the opportunity, the Court must take the chance to flesh out the political theory that best interprets the Constitution. Such an interpretation inevitably will be along the lines of the essential features that Klare offers in his postliberal reading, but should (a) provide more detail, and (b) not be presented as stemming from some or other political project independent of the constitutional project that it is the Court's duty, through conventionally accepted legal methods, to expound.

In this way the current Court will be able to set its political theory of the Constitution as a high-water mark against which any later attempt to empty out the Constitution's progressive values may be measured. Unlike the situation in the United States, where liberals had every reason, after the heady days of the Warren Court, to be concerned about the precedent that legally dubious interpretive methods might have set for later, more conservative judges to follow, in South Africa the transformative reading of the Constitution has a solid

¹⁰⁶ 2006 6 SA 416 (CC).

¹⁰⁷ See Currie "Judicious Avoidance" 1999 *SAJHR* 138.

basis in the constitutional text, and can be justified by a theory of interpretation that will make it harder for conservative judges to reverse progressive gains once made.

At the very beginning of his article, Klare cites Etienne Mureinik's views on the connection between conscientious adjudication, professional legal practice and scholarship.¹⁰⁸ These roles are indeed connected, but each component of the legal profession has a slightly different function to perform. The Court, as I have argued, needs to give value-laden readings of the Constitution and to elaborate the political theory that best interprets it. In so doing, however, it may occasionally have to "adjust" a constitutional principle, in Dworkin's sense, so as to keep the ideal of a community of principle alive. Legal practitioners and academics are not so constrained. It is legal practitioners' duty to interpret constitutional principles from their clients' perspective – to make the best case for an interpretation that favours their clients' interests. This can only assist the Court. Academics, equally unconstrained by strategic concerns, can afford to elaborate the Constitution in a more Herculean way. In fact, this is probably where the interpretive methods of Dworkin's ideal judge are most realisable. In the interests of fair criticism, however, academics should keep in mind that the Court is an institutionally constrained actor. Academic criticism of the Court should always be qualified by concessions to these constraints.

In this way, judges, legal professionals and academics committed to the ideal of constitutional democracy may together contribute to the fashioning of a theoretically rich understanding of the South African constitutional project that welcomes participants from any critical or ideological perspective, provided only that they respect the fundamental tenets of non-violent, democratic, law-driven social change.

SUMMARY

Written for a conference in celebration of the tenth anniversary of the publication of Karl Klare's article on "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146, this paper argues that Klare's article, while justly celebrated, defines the project of transformative constitutionalism in too exclusive a fashion. In particular, it unnecessarily requires, as a condition for participation in that project, the rejection of the liberal legalist distinction between law and politics in favour of a candid recognition of the politics of adjudication. Whatever the outcome of the decades-old dispute in Anglo-American legal theory over this question, the Constitution of the Republic of South Africa, 1996 clearly commits itself to a number of progressive political values. It is therefore not obvious why an interpretive method based on Ronald Dworkin's notion of putting the Constitution "in its best light" would not produce the progressive legal outcomes Klare advocates, while at the same time insulating the South African judiciary from the potentially legitimacy-threatening charge of political adjudication.

To the extent that Klare's article makes successful implementation of the project of transformative constitutionalism conditional on changing South Africa's traditionally formalist legal culture, the imposition of this condition, given that it is unlikely to be fulfilled in the short term, was (a) strategically unwise; and (b) wrongly premised on a circular argument about the preferred method of interpretation that the Constitution supposedly invites. Rather than being made to depend on a particular interpretive method, the project of transformative constitutionalism should be open to all participants, subject only to respect for the fundamental tenets of non-violent, democratic, law-driven social change.

¹⁰⁸ 1998 *SAJHR* 148.