

# RIGHT AFTER ALL: RECONSIDERING *NEW NATIONAL PARTY* IN THE SOUTH AFRICAN CANON

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No scholar currently defends the majority's decision on voting rights in *New National Party v Government of the Republic of South Africa*. Its place in the South African canon is one of rejection: a classic mistake, or at least an illustration of the problems of excessive deference, technicality, and/or nervous political calculation. Against this, I argue that the decision is in fact eminently defensible. Its universal rejection is therefore very intriguing: why have so many scholars treated the decision as clearly wrong, and the dissent of O'Regan J as clearly right? One of the reasons is that the majority judgment of Yacoob J is standardly misread, in part because he, confronting issues that were brand new in 1999, uses terms other than those that would soon thereafter become settled in South African constitutional talk. But the deeper and more interesting reason is that currently dominant ways of understanding constitutionalism in South Africa – interlocking ideas about apartheid, about the ANC, about the Constitutional Court and about rights – prime us to view *New National Party* as a clear error. That it is not, in fact, a clear error, therefore, should lead us to reverse course and reconsider the canonical ideas that label it as such.

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## I INTRODUCTION: CANONS AND ANTI-CANONS

A constitutional canon is a limited set of sources that we as lawyers use to understand our constitutional system. It is limited in order to be manageable; it is canonical because it consists of the sources no lawyer in the system, no theory, no legal argument, can afford to disregard.<sup>1</sup> We use a canon whenever we frame arguments in terms of great cases or other landmark legal sources. We also use a canon when we refer to cases taken to stand for classic mistakes or failures. This includes the historical outrages, sometimes referred to as the anti-canon; in post-apartheid South Africa, these are the ideas on whose rejection the new system is understood to be founded. Thus the South African canon surely includes cases like *S v Makwanyane*; it also includes symbols

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1 On canons, see JM Balkin & S Levinson 'The Canons of Constitutional Law' (1997/1998) 111 *Harvard LR* 963; JM Balkin & S Levinson (eds) *Legal Canons* (2000).

of the apartheid past like the Group Areas Act and the notorious security decisions of the apartheid Appellate Division.

The canonical status of a particular source depends above all on what it is understood to symbolise, and we wrestle with the rest of it from there. ('We accept *Makwanyane*, therefore we must accept ...'; '*Makwanyane* implies that we adopt this approach to this point ...', and so on). What we put into canons and why says a great deal about our professional self-understandings. Accordingly, while we usually start, implicitly or explicitly, with the canon and then move to debate its meaning and implications for some or other new situation, it can be very revealing to reverse course and re-examine the canon itself. What might we be misfiling, or leaving out? What does this say about how we understand our own constitutional practice?<sup>2</sup>

I believe the South African canon needs re-examination. We have left out some sources that deserve to be central – our canon is top-heavy with Constitutional Court decisions, whereas actual constitutional practice is a good deal less court-centric, and less highest court-centric, than this would imply – and we have misfiled some cases because we have misunderstood them.<sup>3</sup> But that re-examination is a very large project.<sup>4</sup> My aims in this article are much narrower, and principally concern just one case which I believe we have, instructively, misfiled.

No legal scholar currently defends *New National Party v Government of the Republic of South Africa*.<sup>5</sup> Most treat the lone dissent of O'Regan J in the case as obviously preferable. This universal repudiation follows because *NNP* is understood to embody several things of deeply suspect status in South African constitutional law. The majority confronts a plausible threat to rights and chooses to do nothing (and in the context, no less, of a case asking a court to protect voting rights, among the most classical of judicial responsibilities). The majority is technical. It is deferent. It is – observers darkly suspect – politically strategic. Its approach has led Dennis Davis to draw comparisons to the restraint of the apartheid judiciary, technicality and formalism and legislative deference being hallmarks of the prevailing understanding of what led apartheid's judges to be complicit in the evils of the era.<sup>6</sup> Nervous, formalist, un-judicial in its politics, regrettable in its principle, seemingly reminiscent of apartheid judging and distinctly *unreminiscent* of the

2 For a project understanding itself explicitly in this way, see B Ackerman *We the People: The Civil Rights Revolution* (2014) 7, 32–6.

3 The concern with court-centricity is a regular complaint of canon discussions in the US context: see for example Balkin & Levinson (note 1 above) 970; B Ackerman *We the People: Transformations* (1998) 17.

4 One I make a start on in J Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-apartheid South Africa* (forthcoming).

5 1999 (3) SA 191 (CC) (*NNP*). Its sister case, *Democratic Party v Government of the Republic of South Africa* 1999 (3) SA 254 (CC) is also repudiated, but *NNP* is the main judgment and I focus on it here; see further Fowkes (ibid) chapter 3.

6 Davis identified a 'similarity in approach between [the *NNP*] judgment and those in the rather darker days when the [judiciary's] trust of the executive constrained review activity': D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 174.

standard view of *Makwanyane* – it is not hard to see why *NNP* is so uniformly repudiated. I do not know whether its critics would go as far as placing it in the anti-canon with the apartheid symbols, or whether they would prefer to class it with the politicised compromises on principle, or simply file it with the other instructive missteps that go into a useful canon. But those details are here a side-issue: on every view, *NNP*'s canonical status in South African law is one of rejection.

And yet it should not be. The correctness of the majority is at least eminently debatable, and in my view, the majority is right. The decision is tightly consistent with deep themes in the court's jurisprudence on voting rights and more generally, and it is symbolic not only of how South African constitutionalism has often worked since 1994 but of how it has often worked *successfully*. In short, although we may (as ever) reasonably debate its details, we should not include *NNP* in our canon as a clear mistake, and indeed we might do well to include it as a more positive exhibit.

This claim will take some defending, and especially in relation to its broader aspects, I must refer the reader elsewhere for my full defence of it.<sup>7</sup> Here, I am concerned with what turns out to be not an entirely straightforward task: recovering the meaning of *NNP* and the considerations that led Yacoob J to write it and all except O'Regan J to sign on to it. *NNP* is often misread, to a significant extent because of how it can *seem* to resonate so strongly with canonically suspect ideas, but also because it is in one key respect ambiguous and because historical coincidence has greatly exacerbated the ability of that ambiguity to mislead us. The decision was written at a time when the basic South African constitutional language was still being formed, and we have ended up retaining the substance of Yacoob J's approach much more than the particular terms in which he expressed it. We risk anachronism if we understand him in our terms rather than his, and so our first step must be to correct this problem of historical interpretation – perhaps a surprising necessity in so young a system (anachronism *already?*), but a necessity all the same.

## II THE STANDARD VIEW

Fifteen years on, a brief recap of the case will assist.<sup>8</sup> In 1998, Parliament passed new electoral legislation which introduced a requirement that voters had to hold an identification document with a bar code in it in order to vote. Although the Electoral Commission was initially in favour of the change, it was concerned about possible exclusion of voters who lacked the proper documentation, and commissioned a study by the Human Sciences Research Council (HSRC) to examine the question. The study revealed that, as of June

<sup>7</sup> See Fowkes (note 4 above).

<sup>8</sup> For the factual background, see *NNP* and *DP*, and the sources discussed in Fowkes (note 4 above) chapter 3, esp. HSRC *Opinion 1999: Voter Participation in the 1999 Elections* (1999) and the helpful collection of sources and chronology in Electoral Institute of South Africa *South Africa's Second Democratic Election 1999: An Annotated Bibliography* (B Strachan, compiler) (2001).

1998 with nine months to go until the election, fully 20 per cent of voting age citizens could not meet the requirement. The Electoral Commission therefore proposed that the requirement be dropped, but did not persuade Parliament. The New National Party (NNP) and the Democratic Party (DP) – whose likely voters, according to the HRSC study, were among the least likely to have bar-coded IDs – opposed the policy through political channels. Initially, outgoing President Mandela suggested that a compromise might be possible, but after this offer was withdrawn (possibly at the behest of his anointed successor), the two opposition parties decided to litigate. The government, meanwhile, had launched two public awareness campaigns and a contingency plan at the Department of Home Affairs in order to ensure voters got their new bar-coded IDs in time. There was no decisive evidence at the time of the case about how these initiatives were working: they were not clearly failing but nor was it clear that they would succeed. No doubt for this reason, the challenges brought by the NNP and the DP attacked the underlying statutory requirement of a bar-coded ID itself. The NNP also sought to intervene in a long-running dispute between the government and the Electoral Commission about funding and staffing, which it alleged showed the government was not respecting the Commission's independence. In response, the majority in *NNP* decided to make no order of any kind, while O'Regan J would have struck down the bar-coded ID requirement.

The standard disparaging view of *NNP* understands it as a case that turns on the interpretation of voting rights. The standard view is that the majority decides that voting rights challenges are to be assessed according to an unacceptably weak and deferent standard, while the O'Regan J dissent uses a more rigorous reasonableness standard.<sup>9</sup> This neatly explains the result: the reason the majority does not intervene when it should is because its understanding of voting rights is weaker than it should be, while O'Regan J's test is appropriately strong, and therefore led her to favour action against the threat of disenfranchisement.

Given the centrality to my argument of claims about this standard reading, it is as well to quote specific views at this point and offer a survey of scholarly views of *NNP*. Readers who are willing to take my word for it can skip to the next heading.

The repudiation of *NNP* is ubiquitous. Iain Currie and Johan de Waal in *The Bill of Rights Handbook* describe *NNP* as 'unfortunate' and state that the approach taken there 'cannot be accepted'.<sup>10</sup> Jason Brickhill and Ryan Babuich, in the chapter in *Constitutional Law of South Africa* on voting rights, call the judgment 'far too deferential' and are concerned that 'it does not sufficiently protect the right to vote'.<sup>11</sup> Theunis Roux, in the chapter on democracy, calls the judgment 'hard to fathom', and writes elsewhere that

9 For sources, see notes 15 & 16 below.

10 I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 438–39.

11 J Brickhill & R Babuich 'Political Rights' in S Woolman & M Bishop *Constitutional Law of South Africa* 2 ed (2005) 45-19 – 45-20; see also 45-40 & 45-51.

on reading the O'Regan J dissent 'it is difficult to come to any conclusion other than that the majority failed to give a principled reading of the Constitution'. He accordingly classifies *NNP* as one of his cases in which the court 'compromised on principle'.<sup>12</sup> (I should note that Roux, a gracious subject of criticism, has modified his views in response to the arguments I present here and elsewhere).<sup>13</sup> Davis, as already noted, sees in *NNP* the weak and deferent capitulation of an apartheid-era security decision. O'Regan J's dissent is standardly preferred: to my knowledge, just one piece of scholarship expresses anything less than clear rejection of the majority – and that piece, a largely descriptive treatment as part of a broader comparative analysis, nevertheless notes the limitations of the decision and cites Roux's verdict on its excessive caution.<sup>14</sup>

These fingers of blame all point to the majority's test for the voting right as the culprit, but there is disagreement about what they are pointing at. Many scholars understand Yacoob J to favour a rationality test for assessing possible limitations of the right to vote, as opposed to O'Regan J's reasonableness test.<sup>15</sup> Others hold that when Yacoob J talks of rationality he is in fact talking

- 12 T Roux 'Democracy' in Woolman & Bishop (ibid) 10-56 – 10-57; T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' 7 *I.CON* 106 (2009) 125–28; T Roux *The Politics of Principle: The First South African Constitutional Court 1995–2005* (2013) 363.
- 13 In his new book, Roux has revised his description of the legal test used by the majority (see note 16 below), but still refers to it as a 'fairly low standard of review': Roux *Politics of Principle* (note 12 above) 346. He continues to prefer O'Regan J's approach as 'pointing to the way to the path of principle not followed' 335, 344–50; the quoted text appears at 350 – and to classify *NNP* as a case where the court compromised on principle 363. In a paper presented at the UCT *Acta Juridica* Conference in Honour of Former Chief Justice Pius Langa (16 January 2014), Roux indicates that he has revised his views of *NNP* but does not elaborate: T Roux 'The Langa Court: Legacies and Leitmotifs' (forthcoming, 2015) *Acta Juridica*; also in M Bishop & A Price (eds) *A Transformative Justice: Essays in Honour of Chief Justice Pius Langa* (forthcoming, 2015).
- 14 CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *American J of Comp L* 1, 31–2 & 34–6.
- 15 In chronological order: Davis writes that: '[In *NNP*] reasonableness is ... relegated to the limitation inquiry ... When a court deals with a right as foundational to the entire constitutional state as the right to vote, it is entitled to demand more of Parliament as the custodian of arrangements for the exercise of the vote than that it should not be arbitrary in its decision to pass the legislative arrangements': Davis (note 6 above) 174–75. Patrick Lenta explains that 'O'Regan J's dissenting judgment was less restrained [than Yacoob J's]. She argued that since the right to vote is foundational ... it demands that government should act "in reasonable pursuance of an appropriate government purpose" rather than simply rationally in Yacoob J's (and Thayer's) sense': P Lenta 'Judicial Restraint and Overreach' (2004) 20 *SAJHR* 544, 557. George Devenish writes that 'In [*NNP*] O'Regan J delivered a dissenting judgment in which she adopted and applied the criterion of reasonableness' whereas '[i]n the majority judgment Yacoob J took the view that the court should determine whether [the new ID policy] is "rationally connected to a legitimate government purpose". He concludes that "[t]he vital issue on which they differed was whether reasonableness is required for the constitutionality of the legislation concerned': GE Devenish '*African Christian Democratic Party v Electoral Commission: The New Methodology and Theory of Statutory Interpretation in South Africa*' (2006) 123 *SALJ* 399, 405–06. Geo Quinot states that: 'In contrast [to the reasonableness approach adopted in another case], in the harder s 19 [voting right] cases, such as the challenge to the bar-coded identity document requirement ... the Court adopted a fairly weak rationality approach': G Quinot 'Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right' (2009) 25 *SAJHR* 392, 395. Alistair Price writes that '... Yacoob J drew a distinction between rationality

about the general legality principle, but still prefer O'Regan J's test for the voting right.<sup>16</sup> These scholars, as we will see, are closer to the truth of what Yacoob J is really up to.

### III RE-READING THE *NEW NATIONAL PARTY* MAJORITY

The most common explanation, that Yacoob J is using a rationality test, is a neat one – a too-weak test results in a too-weak response. But it is not correct. Yacoob J never once mentions 'rationality' or 'rational' in his paragraphs about the voting right, and his s 19 test is plainly one based on reasonableness. In his words: 'Parliament is obliged to provide for the machinery, mechanism or process that is *reasonably* capable' of 'ensuring that all persons who want to vote, and take reasonable steps in pursuit of the right, are able to do so'. 'Any scheme which is not sufficiently flexible to be *reasonably* capable of achieving [it] ... has the potential of infringing the right ... The appellant bears the onus

and reasonableness as standards of review for legislative schemes, holding that the former was the appropriate standard under the separation of powers' while 'the latter was relevant only to whether a violation of the right to vote under s 19 of the Constitution was justified in terms of s 36 [ie at the limitations stage]': A Price 'The Content and Justification of Rationality Review' (2010) 25 *SAPL* 345, 349. IM Rautenbach writes that '[t]he mistake the court made in [NPP] ... in respect of the effect regulatory measures might have on the conduct and interests protected by a right would now imply that all laws "that give effect to a right" must only be rationally related to the "purpose to regulate the right". This is an unsatisfactory state of affairs ... to require only the existence of a rational relationship would be insufficient': IM Rautenbach 'Means-end Rationality in Constitutional Court Judgments' (2010) 4 *TSAR* 768, 776. Charles Fombad, too, adopts the prevailing rationality reading: Fombad (note 14 above) 31–2 & 35.

- 16 Currie & De Waal (note 10 above) 438–39: 'In order to determine whether the legislature could insist on the use of the bar-coded identity document, the court formulated a two-step test. The first part of the test involves determining whether there is a rational relationship between the scheme the legislature adopts and the achievement of a legitimate government purpose ... [this] first step is not derived from the Bill of Rights, but from the rule of law ... The second part of the test is that the electoral system must not infringe any of the fundamental rights ...'. Roux initially described the majority as supporting 'a rationality-based standard', but he also noted that there might be a further step to the majority's test though 'it is not clear': Roux 'Principle and Pragmatism' (note 12 above) 126–27. In his recent book, Roux now explicitly notes the two identifiable stages and recognises that the *NNP* majority uses a standard based on reasonableness for the right to vote – see Roux *Politics of Principle* (note 12 above) 341, 346–47; and see also Roux 'Democracy' (note 12 above) 10–57 – but continues there to support O'Regan J's approach, although his views may have changed (see note 13 above). George Devenish (in a different article to the one cited above) recognises that Yacoob J's rationality test is separate to his voting rights test: 'First, the [NPP] court held that an objector who impugns the scheme must prove either that the purpose is illegitimate or that the means are not rational. Secondly, the electoral scheme must not violate any of the fundamental rights enshrined in the bill of rights set out in the constitution.' G Devenish 'The Rule of Law Revisited with Special Reference to South Africa and Zimbabwe' (2004) 4 *TSAR* 675, 684. Rautenbach's main target is the court's (unanimous) finding that a registration requirement is not itself a limitation of the right to vote (see note 37 below). He too recognises the true source of Yacoob J's rationality test, but seems nevertheless to understand the court to do no more than rationality review: '[NPP] held that legislation that gives effect to the constitutional right to vote does not factually limit the right ... [b]ut in order not to abandon judicial review completely the court ... followed the decision in the *Fedsure* case by stating that even when legislation does not limit rights [it must comply with a rationality test] ...': Rautenbach 'Means-end Rationality' (note 15 above) 776; see also IM Rautenbach 'Die Beperking van Stemreg' (2000) 3 *TSAR* 552, 560–61; IM Rautenbach 'Policy and Judicial Review – Political Questions, Margins of Appreciation and the South African Constitution' (2012) 20 *TSAR* 26.

of establishing that the machinery or process provided for is not *reasonably* capable of achieving that purpose' (all my emphasis).<sup>17</sup> It simply is not true that O'Regan J is the only one in *NNP* using a test based on reasonableness. Indeed, it is this passage from *NNP* that she herself quoted in the unanimous voting rights decision in *Richter* she wrote ten years later.<sup>18</sup>

How is it that, notwithstanding the language just quoted, so many scholars have read the *NNP* majority to support a rationality standard? As noted, not all scholars read the decision this way, but a careful re-reading of Yacoob J's judgment on this point is important in engaging with their arguments as well.

In October 1998, five months before *NNP* was handed down, the court delivered the seminal decision in *Fedsure Life Assurance*. That decision articulated a doctrine, now based on s 1(c) of the Constitution of the Republic of South Africa, 1996 under which all exercises of public power are subject to the principle of legality.<sup>19</sup> When Yacoob J conducts a rationality analysis, he is doing so in terms of this s 1(c)-based legality doctrine. He conducts this analysis as a preliminary step, in no way replacing the subsequent s 19 analysis to follow. But this can confuse because, as it has turned out, South African constitutional law did not end up taking this approach to the legality doctrine. We do not begin each and every review of public power with a rationality enquiry: if a right is involved, we tend to move straight to that. But *Fedsure's* rationality test was brand new in April 1999. *NNP* was in fact the very first time the court had to consider the relationship between the general legality principle and the Bill of Rights. Yacoob J is effectively arguing for a three-stage review: first, the general rationality standard introduced by *Fedsure*; then, if the policy is deemed rational, rights analysis; and then, if a right is deemed to be violated, s 36 limitations analysis. He begins with rationality presumably for reasons of subsidiarity: at any rate, this is why he conducts a rationality enquiry in *NNP*, and also explains why one might mistake this enquiry for the rights review that is *our* natural first step.

But this is in fact only the beginning of the problem. The most important reason *NNP* is misread lies after the rationality analysis, in its 24th paragraph, the standard citation for the standard interpretation of the case. Given its importance and its apparently damning evidence against the argument I am presenting here, I quote at length from its rejection, over and over again, of a reasonableness standard:

O'Regan J ... asks the question whether the electoral scheme is reasonable ... In my view this is not the correct approach to the problem. Decisions as to the reasonableness of statutory

17 *NNP* (note 5 above) para 23.

18 *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) para 56; see also Currie & De Waal (note 10 above) 432, noting that *Richter* confirms *NNP's* test. O'Regan J's *Richter* re-statement is not identical to the test as stated in *NNP*, but those details can be left aside for the purposes of the present argument.

19 *Fedsure Life Assurance Ltd v Greater Johannesburg Municipality* 1999 (1) SA 374 (CC) paras 53–9. The case, decided under the 1993 text, treated legality as an implicit principle of the Constitution as a whole, but it noted the presence of s 1(c) in the 1996 text as supporting evidence. For more on the relationship between s 1(c) and the legality principle, see J Fowkes 'Founding Values' in Woolman & Bishop (note 11 above).

provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution. It was within the power of Parliament to determine what scheme should be adopted for the election. If the legislation defining the scheme is rational, the Act of Parliament cannot be challenged on grounds of ‘unreasonableness’. Reasonableness will only become relevant if it established that a scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution, and it is only as part of this section 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of enquiry that the question of reasonableness has to be considered.

It is here that Yacoob J is partly the author of his own misfortune, but also here that the danger of anachronistic misreading is greatest. If *Fedsure* was new in April 1999, it is vital to remember that at that point *Grootboom* over a year away – and it was only after *Grootboom* that South African constitutional law would get used to talking about a general reasonableness standard in the context of determining whether a right is infringed.<sup>20</sup> To understand Yacoob J, we need to put this now-standard idea on one side for a moment, and ask this question: supposing you had not yet read *Grootboom* and all its heirs, where is the most natural place in the constitutional text to talk about a general reasonableness standard?

You might indeed zero in on the reference to ‘reasonable’ in a right like the s 26 right to housing. And you might then extend the reasonableness standard into the interpretation of provisions that do not, like s 26, actually contain the word, and if so you will end up more or less where South African constitutional law has ended up.

But this is not the only option. If we return to the text, we will read in s 36 the requirement that a limitation be ‘reasonable and justifiable in an open and democratic society ...’. This is the language Yacoob J read, and *this* language is what he means to refer to when he talks about ‘reasonableness analysis’. He means his third stage and our second one, the stage we today usually call limitations analysis.

That is why he says that ‘[r]easonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote’. He means the limitations stage, which becomes relevant ‘only ... if it is established that the scheme ... has the effect of infringing the right ...’. It is easy to see how one might read this sentence as a rejection of the reasonableness standard at the stage of rights interpretation.

20 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (4 October 2000). Roux acknowledges that most of the decisions talking of a general reasonableness test at the stage of rights interpretation were written after *NNP* – ‘Democracy’ (note 12 above) 10-56 – but in fact they all were. The only pre-*NNP* case Roux cites is *Harksen v Lane NO* 1998 (1) SA 300 (CC) which, as he notes, arises in the different context of the equality right and does not directly concern reasonableness. No case before *NNP* used reasonableness in the way familiar in the post-*Grootboom* world.

But note – crucially – that the sentence *also* says that rationality is not relevant to the stage of rights interpretation *either* – it specifically refers to the situation where a scheme ‘though rational’ *nevertheless* ‘has the effect of infringing the right of citizens to vote’. The sentence, in other words, distinguishes *both* the general rationality standard *and* the general reasonableness standard from the stage of rights review. This is further proof that Yacoob J does not favour a rationality threshold for the right to vote – but it also makes sense only if we understand him to be favouring a three-stage review process. He must be referring to the *Fedsure* s 1(c)-based doctrine when he talks about ‘rationality’<sup>21</sup> and to the s 36 limitations enquiry when he talks about ‘reasonableness’, and he must therefore have something else again in mind for the s 19 right to vote.<sup>22</sup>

Unfortunately, the something else that Yacoob J has in mind is the s 19-specific test I quoted earlier, and as we saw that test uses reasonableness language: government is expected to implement a scheme that is ‘reasonably capable of ... ensuring that all persons who want to vote, and take reasonable steps in pursuit of the right, are able to do so’. So Yacoob J is proposing a test that uses the word ‘reasonably’ on the one hand while apparently repudiating ‘reasonableness’ in general on the other. At this point, one feels, his (mis)readers are entitled to feel a little aggrieved – and we can see why even those of his critics who understand the real place of rationality in his judgment are a little at a loss to know how to refer to his s 19 test, with ‘rationality’ assigned to the legality principle and ‘reasonableness’ to O’Regan J’s approach.

That said, however, this ambiguity is by no means confined to the pen of Yacoob J in *NNP*. The line between rights interpretation and limitations analysis is often a messy one in South Africa.<sup>23</sup> We should in particular note *August*, handed down by the unanimous court just 12 days before *NNP*, which displays the same ambiguity.<sup>24</sup> At one point, Sachs J refers to s 1(d) and s 19 of the Constitution, and language from the Electoral Commission Act, and concludes that ‘[t]his clearly imposes an affirmative obligation on the Commission to take *reasonable* steps to ensure that eligible voters are registered’ (my emphasis).<sup>25</sup> But he also says in the same case that ‘if

21 Note that Yacoob J cites *Fedsure* in connection with this part of para 24.

22 This also explains the otherwise puzzling sight of Yacoob J, the future author of *Grootboom*, objecting to a reasonableness standard at the stage of rights interpretation (Roux *Politics of Principle* (note 12 above) 348 notes this puzzle). Once we recognise that the ‘reasonableness’ Yacoob J is objecting to is s 36 analysis at the stage of rights interpretation, we can see that the puzzle is a linguistic one.

23 See, for example, S Woolman & D Brand ‘Limitations’ in Woolman & Bishop (note 11 above) 34-18 – 34-29, 34-68 – 34-70 & 34-103 – 34-104 and further sources there cited. The use of reasonableness in socio-economic rights cases is also a source of confusion, since the line between the reasonableness enquiry under the right, and the enquiry under s 36, is not always clear: see, for example, K Iles ‘Limiting Socio-economic Rights: Beyond the Internal Limitations Clause’ (2004) 20 *SAJHR* 448.

24 *August v Electoral Commission* 1999 (3) SA 1 (CC) was heard on 19 March 1999 and judgment was handed down 1 April; *NNP* was heard on 15–16 March and judgment was handed down 13 April.

25 *August* (ibid) paras 14–16; see also para 22 & the order in para 42.

Parliament seeks to limit the unqualified right of adult suffrage entrenched in the Constitution', it will be required to comply with s 36 by doing so 'in terms of a law of general application which meets the requirements of *reasonableness* and justifiability as set out in s 36' (my emphasis).<sup>26</sup> One can be forgiven for thinking 'reasonable' and 'reasonableness' refer to the same thing, but at least to that court then they did not. *August* shows the terminological problem to be a general one, rather than the result of an isolated lapse in *NNP* or a product of the special political circumstances of that case. It also shows that the approach in the universally repudiated *NNP* is much closer to the approach in the universally welcomed *August* than the sharp distinction in scholarly verdicts about them would imply. And it shows how Sachs J and every other judge who joined the *NNP* majority were signing on to a 'reasonable steps' test under the s 19 right in *August* at the same time they were signing on to *NNP*. Adherents to the standard view must therefore accuse these judges of puzzling inconsistency – or accept that we should read the ambiguous language of *NNP*, notwithstanding its apparently deferent, anti-enfranchisement result, just as we read that language in the generally applauded, pro-enfranchisement *August*.<sup>27</sup>

This, however, leaves us with a critical question. If Yacoob J is not supporting a mere rationality test for s 19, what is he rejecting when he rejects 'reasonableness' in relation to the interpretation of the right to vote? The key to the real answer lies in another version of the same question: if Yacoob J and O'Regan J are in fact *both* using reasonableness-based tests in *NNP*, what is the difference between them? Adherents to the standard view are as quick to ratify O'Regan J's dissent as they are to reject the majority, but her judgment too requires careful reading.

#### IV RE-READING O'REGAN J'S DISSENT

One important part of the explanation for the internal terminological difficulties in *NNP* is surely that they are a product of the back-and-forth of writing and re-writing judgments in response to the disagreements among the justices, all done, in *NNP*, under time pressure. While we do not know what was said or changed in response to what, it is clear that both O'Regan J and Yacoob J understand 'reasonableness' to mean her dissenting approach.<sup>28</sup> It is this approach that Yacoob J and the majority are rejecting, and we need to see something about it that is universally missed by *NNP*'s critics. Instead of it being the majority who is surprisingly weak and O'Regan J who is solidly mainstream, her dissent is highly, even unprecedentedly, expansive.

26 Ibid para 3; see also para 31.

27 Brickhill & Babuich (note 11 above) 45-21 – 45-22 note that *August* used a reasonableness test but explain the discrepancy away because its statements were obiter. They also note, without explanation, that the court used a reasonableness test in *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) and the public participation cases; Brickhill & Babuich (ibid) 45-22 – 45-23.

28 *NNP* (note 5 above) paras 24, 123 & 127.

Start by recalling that the framing of the applicant's challenge in *NNP* was not without its difficulties. The applicant was objecting to the new ID scheme on the grounds that it would not be implemented properly in time, and so would exclude voters. But the available evidence about its implementation was not conclusive: it showed that millions of applications were being received and documents processed, but it also showed a significant and growing backlog at the Department of Home Affairs.<sup>29</sup> It could not be concluded that the implementation effort was doomed; it could also not be concluded that it was going to work in time. Thus the applicant had directed its constitutional challenge to the underlying statute imposing the requirement – and, for the same reason, the only way for O'Regan J to invalidate the new ID book requirement was to directly second-guess Parliament's decision to impose it. She could only invalidate it by deciding that Parliament had been wrong to weigh the benefits of the new requirement above the risks of voter exclusion:

In sum, the legislative purposes identified [by the government] as the goal of the provisions ... relate to a relatively small increase in administrative convenience, some increase in security features ... as well as the rendering obsolete of identity documents bearing a racist taint. If the legislative provisions enacted were to have little or no effect on the ability of eligible voters to participate in the election, the question of whether they were reasonable would end here. However, this is not the case ... [t]he purposes for which Parliament chose to insist on the bar-coded ID ... given the obligation upon Parliament to seek to facilitate that right to vote ... are inadequate to render Parliament's insistence on the bar-coded ID reasonable.<sup>30</sup>

This is what is sometimes called proportionality analysis in the narrow sense: not asking whether the measures were rationally related to the goals identified (they clearly were), or whether less restrictive means existed (either one introduced a new uniform document requirement or one did not), but directly weighing the costs against the benefits.<sup>31</sup> And O'Regan J conducts this analysis, not in order to decide whether a rights limitation is justified, but to decide whether the s 19 right to vote is being limited in the first place.<sup>32</sup> She engages, in other words, in the most intrusive form of judicial review right up front at

29 Ibid paras 8–9, 23, 37–47 & 139–40.

30 Ibid paras 124 & 126.

31 Which is not to claim that the South African practice is always to distinguish these separate steps, which I use here merely for convenience: see for example A Stone Sweet & J Mathews 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia J of Transnational L* 74, 127 & 130; S Gardbaum 'Limiting Constitutional Rights' (2007) 54 *UCLA LR* 789, 840–42; Woolman & Brand (note 23 above) 34-15, 34-92 – 34-93 & 34-102 – 34-104.

32 In their general discussion of the limitations clause, Stu Woolman & Danie Brand note that O'Regan J's approach amounts to a limitations enquiry: Woolman & Brand (note 23 above) 34-27 – 34-28. They note that while the majority in *NNP* 'were still able to maintain the basic integrity of Chapter 2's two-stage analysis,' O'Regan J 'charts a rather different and undesirable course' in this regard and 'engages in no rights analysis at all, but instead begins and ends with limitation analysis'. If this is meant to mean that she skips s 19, it is incorrect: as is clear from her statements quoted later in this paragraph, she understands herself to be engaging with the right and renders s 36 vestigial. It does indicate, however, the substance of what O'Regan J's analysis amounts to. Roux also now notes that O'Regan J's enquiry blurs with s 36, but argues that this stronger standard is preferable and so it would have been better to treat all regulation of the right to vote as a limitation of s 19 so as to be able to apply that standard. He thus recognises that O'Regan J's s 19 test is effectively the limitations enquiry – Roux *Politics of Principle* (note 12 above) 348–49.

the stage of rights interpretation. It is *this* that Yacoob J is rejecting when he rejects a ‘general reasonableness’ test at the stage of rights analysis – as would be immediately clear to us if he had used the phrase ‘limitations analysis’ or ‘proportionality analysis’ in the sentences of para 24 quoted above, instead of deciding, in those pre-*Grootboom* days, to refer to this approach by picking out the word ‘reasonable’ in the s 36 text.

Witness in this regard that O’Regan J concedes that her approach to s 19 amounts to the limitation enquiry: ‘[g]iven the definition of the right I propose and have applied, the exercise under s 36 in this case is similar to the exercise carried out to determine whether the challenged provisions are reasonable’. ‘The effect,’ she accepts, ‘is that it is not necessary to undertake a full and separate limitations analysis.’<sup>33</sup> She also enquires into whether and when ‘the concept of reasonableness’ can enter at the stage of rights interpretation given that ‘the structure of our Constitution generally reserves questions of reasonableness and justifiability for circumstances where a litigant has shown that a right has been infringed’ – a question whose framing reflects how O’Regan J too is operating in a pre-*Grootboom* world and still associates ‘reasonableness’ primarily with the s 36 enquiry.<sup>34</sup>

Conducting proportionality analysis in the narrow sense at the stage of rights interpretation is undoubtedly expansive, and probably unprecedentedly so.<sup>35</sup> A number of writers have suggested that proportionality analysis is inherent in the reasonableness test that has emerged from *Grootboom* and its heirs, but they all agree that the court has never actually used it that way.<sup>36</sup> O’Regan J’s dissent in *NNP* should be recognised as the closest the court has yet come to doing so. I cannot think of another case in which a Constitutional Court judge has used proportionality this way – and considering that two-stage review is there to strike the proper balance between legislative authority and judicial review of it, this is no mere technical quibble. What O’Regan J’s dissent in *NNP* does with reasonableness analysis was and remains an outlier in South African jurisprudence. It is not clear how one would rank such things, but it is not implausible to suspect that her dissent is a candidate for the most expansive exercise in judicial review ever to appear in a South African Constitutional Court judgment. Whatever else we think of it, the caution of the other ten judges in the case should not surprise us in the least.

33 *NNP* (note 5 above) para 160.

34 *Ibid* para 123.

35 Opposition to *this*, the conducting of balancing exercises at the interpretation stages, is hardly an unknown position in South African law: see for example Woolman & Brand (note 23 above) 34-21; Iles (note 23 above) 453, 454; K Iles ‘A Fresh Look at Limitations: Unpacking Section 36’ (2007) 23 *SAJHR* 68, 72-3; and further sources there discussed.

36 S Liebenberg ‘Interpretation of Socio-economic Rights’ in Woolman & Bishop (note 11 above) 33-39 – 33-40; T Roux ‘Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court’ (2003) 10 *Democratization* 92, 96-7; A Price ‘The Content and Justification of Rationality Review’ (2010) 25 *SAPL* 345, 356-59, 361 fn 71; G Quinot & S Liebenberg ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-economic Rights Jurisprudence in South Africa’ (2011) 22 *Stellenbosch LR* 639, 646-47, 650-51, 654-55 & 659-61.

And yet everyone *is* surprised. Given how expansive it is, the most striking thing is not O'Regan J's stance but the fact that it is has been so easily and universally welcomed by scholars. Most do not even note what her approach amounts to, presumably taking their cue from the 'reasonableness' label, as read through post-*Grootboom* eyes, to conclude that O'Regan is just doing fairly standard South African rights review. But even those who do see beyond the rationality vs reasonableness view of the case still welcome the substance of her approach, as we saw.

Some among this latter group may argue at this point that I am indeed making too much of what really *is* quite a technical quibble. Several scholars have argued that O'Regan J would have done better simply to treat the government's introduction of the new bar-coded ID requirement as a limitation of the right to vote.<sup>37</sup> If that is the first step, then we could thereafter leave s 19 behind, and O'Regan J could conduct her proportionality analysis under s 36, where everyone accepts it is appropriate.

Moving straight to treating the ID scheme as a limitation of the right is hardly far-fetched, and if O'Regan J's analysis were conducted at the limitations stage it would look far less radical. Even if we confine ourselves to voting rights cases, the court has often engaged in analysis that at least resembles her cost-benefit analysis.<sup>38</sup> In *Liberal Party*, it weighed the costs and benefits of making changes to the electoral timetable to accommodate a party's failure to comply with statutory requirements for participation in the election.<sup>39</sup> In *ACDP*, the majority considered two readings of a legal requirement for the payment of deposits for municipal elections and weighed the effect of each on electoral purposes.<sup>40</sup> In *Richter* and *AParty*, similarly to *Liberal Party*, it weighed the general threat to the integrity of election against the benefits of trying to include categories of overseas voters in various parts of the process.<sup>41</sup> And in *IFP*, similarly to *ACDP*, it balanced the costs and benefits of a strict interpretation of the electoral statute in terms of democratic values and electoral integrity.<sup>42</sup> The difference between these cases and O'Regan J's *NNP* judgment as she wrote it is, of course, that in each of these other cases it was accepted by all sides that a right would be limited absent judicial action. But if we follow the suggestion to treat the mere imposition of the requirement as a limitation, then O'Regan J's analysis could be filed alongside these other cases.

37 See for example Currie & De Waal (note 10 above) 439–40; Roux *Politics of Principle* (note 12 above) 345–46 & 349; Rautenbach (note 15 above) 776 and his other articles cited therein.

38 It should be noted that the court in these cases is not always clear about whether it understands itself to be conducting this analysis in terms of s 36, although in each of them it is conducted in the context of a factually clear limitation of the s 19 right.

39 *Liberal Party v The Election Commission* 2004 (8) BCLR 810 (CC) paras 27–9 (*Liberal Party*).

40 *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) paras 17–18, 27–8 & 33 (*ACDP*).

41 *Richter* (note 18 above) paras 89–91; *AParty v Minister of Home Affairs* 2009 (3) SA 649 (CC) paras 52, 56, 65 & 69 (*AParty*).

42 *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* 2011 (9) BCLR 943 (CC) paras 45–52 (*IFP*).

Now even with this finesse, O'Regan J's judgment would still be expansive among the voting rights cases. Most of them do not represent the court second-guessing *legislative policy choices*. In *Liberal Party, ACDP and IFP*, the court was engaged in legislative interpretation, seeking to identify the intended purpose of certain statutory requirements in order to see whether they could be interpreted to permit certain sorts of doubtful compliance.<sup>43</sup> If it was overturning anything, it was an interpretative choice of the Electoral Commission or a ruling of another court, not the decision of an elected body. Other cases do involve the review of more serious policy choices, the two prisoner voting rights decisions in *August* and *NICRO* foremost among them. But these were also much clearer-cut cases than *NNP*. The rights limitation in *August* and *NICRO* was absolutely clear, because the policy in question had *set out* to limit voting rights (albeit only *de facto* in *August*), whereas in *NNP* the scheme had been adopted in the belief that it would improve electoral security and efficiency (and no one objected to the scheme in principle). The precise constitutional errors – the failure to pass a law of general application in *August*, the failure to defend the policy choice on much beyond implausible logistical grounds in *NICRO* – was also much more obvious than in *NNP*, where one had to actually go as far as proportionality in the narrow sense and second-guess the legislature's decisions directly, on a limited record, in order to invalidate the policy choice.

But for my purposes here this issue is secondary. Recognising that O'Regan J is unusually expansive, however one looks at her judgment, does not of course make her wrong. As it happens, I do think the majority's approach in *NNP* is better, both judged at the time and as a matter of hindsight, but I present that argument elsewhere. My argument here is addressed not to O'Regan J's judgment, but to *NNP*'s place in scholarship and in South Africa's canon.

For surely, if my analysis is even roughly correct, *NNP* should be at least an eminently debatable case. The most interesting thing about the case, especially 15 years on, is not who was right, but why it is that the Yacoob judgment is so universally condemned and the O'Regan judgment so universally celebrated – without the true nature of the two judgments even really being noticed by critics. Even if we follow the suggestion just considered and finesse the problem by treating the bar-coded ID requirement itself as a violation, hers is still an unusually intrusive exercise in review – and note that while this technical move would smooth away the spike of O'Regan J's status as a doctrinal outlier, it would set an expansive precedent of its own. After all, the only reason to resist this approach – as all the judges in *NNP* did and as the whole court did again ten years later in *Richter*<sup>44</sup> – is that it subjects every regulation of voting directly to the test of s 36, with the onus on the government

43 See esp *ACDP* (note 40 above) para 23: '... when interpreting provisions in electoral statutes [courts should] seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion. The exercise, however, remains one of interpretation'; and *IFP* (note 42 above) para 36: 'The issue is one of statutory construction'.

44 *NNP* (note 5 above) paras 15 & 123; *Richter* (note 18 above) paras 55–6.

to justify the policy whether or not the applicant can produce credible grounds for thinking it unjustified. What I am interested in, above all, is that I suspect few if any of my South African readers or of *NNP*'s critics will find this an especially worrying possibility. The more protection the better, they will say, especially in relation to something as important as voting rights.

It is *this* deep instinct that really underpins the standard view of *NNP*. Misreading happens, especially when judges write a bit ambiguously under time pressure and when coincidental evolutions in terminology greatly exacerbate the original potential for confusion. But the deeper reasons underlying *NNP*'s status are much more interesting. They are about the relationship between the case and certain core ideas in South African constitutionalism, and they explain why *NNP* has seemed so naturally to so many to belong among the regretted parts of South Africa's canon.

#### V FOUR CANONICAL ASSUMPTIONS

Consider how the following four ideas will incline one to the standard reading of *NNP* and to the standard tendency to view the majority decision as patently wrong and really rather puzzling unless explained, non-legally, as a strategic decision to duck legal principle rather than appear to side with the *NNP* against the ANC.<sup>45</sup>

One, *the African National Congress (ANC) is a threat against which the court and the Constitution stand as guardians*. This point is amplified by *NNP*'s voting rights context, a classical site of arguments for why judicial policing of elected bodies is appropriate, but it is a general idea explicit and implicit in much work on South African constitutionalism.

Two, *judicial deference in a rights case is always suspicious*. This, too, is a common idea that is amplified in the South African context by standard diagnoses of what went wrong with the apartheid judiciary. If judicial engagement in a rights case is not bold and value-driven, if it seems to pay too much attention to formal and technical questions, if, above all, the court does not *act*, then apartheid's ghost will be invoked – as Davis invoked it in relation to *NNP*.

Three, *judicial action is the only action that matters*. This is closely linked to the previous points. Court-centrism is pervasive in scholarship on South African constitutionalism, and it is encouraged by the first two ideas. If the judiciary is the Guardian, and if the apartheid judiciary stands as a warning that history will come to judge harshly the failure to guard, then it is to the court that we will look when there is a danger of injustice or harm, and we will view a decision by the court not to respond vigorously as an abdication. But other bodies have constitutional responsibilities too. If they are not acting,

45 I engage in much more detail with these ideas and with political accounts of the court's behaviour in Fowkes (note 4 above); some of those arguments are also summarised in J Fowkes 'The People, the Court, and Langa Constitutionalism' (forthcoming, 2015) *Acta Juridica*; also in M Bishop & A Price (eds) *A Transformative Justice: Essays in Honour of Chief Justice Pius Langa* (forthcoming, 2015).

judicial obligations get weighty, to be sure. But if other bodies *are* acting, then judicial inaction can take on a very different complexion – and also a very different complexion to apartheid judicial inaction. Then, it was generally true that no other state organ could be expected to act, but that general assumption simply does not hold in post-1994 South Africa.<sup>46</sup>

Four, *the most important thing in a rights case is the meaning attached to the right*. The standard view looks to the rights test of the *NNP* majority and is easily satisfied by the explanation it offers: the majority has too weak an understanding of the right to vote, which is why it does not intervene. The solution, of course, is a stronger right to vote, a bill which O'Regan J's judgment is easily understood to fit. This view is also regularly on display, it should be noted, in scholarship on socio-economic rights. If the court's socio-economic rights cases are often seen to do too little, the court's reasonableness test is generally seen as the culprit, and stronger understandings of the rights are generally offered as the solution – often accompanied by an expression of puzzlement about how the court can persist with its weaker test.<sup>47</sup> This puzzlement, which is often perfectly sincere, is the same as the puzzlement about *NNP*. ('Surely the court did not *really* believe such a restrained approach was adequate to something as important as voting rights?')

If one departs from some combination of roughly these four ideas, then *NNP*'s standard scholarly fate is not surprising. The court confronts a threat to voting rights, apparently adopts a weak understanding of the right, and chooses to do nothing while expressing deference to, *inter alia*, the ANC legislature in a highly politicised case. This is close to the very definition, the essence, of the South African understanding of judicial abdication. And of course standard understandings of *NNP* as a worrisome case only serve to reinforce the view that these are the proper areas of concern: the ideas ratify the view that the case is problematic, and the perceived problems of the case ratify the significance of the ideas. That is how canons work.

But suppose, to reverse course, we departed from something like the rejection of these four ideas. Suppose that we thought that, since 1994, the ANC government has often played roles other than constitutional threat, including constitutional partner. Suppose we thought that judicial deference to an actor with a genuine sense of its own constitutional responsibilities is not always suspicious, and indeed is often more respectful of a constitutional design that certainly distributes constitutional responsibilities widely. Suppose we thought, as a result, that the most critical thing in rights cases would often be the institutional question about what blend of judicial and other action would best advance the right. If other actors are also acting, at least some of the time, then the key judicial question would be about whether and when

46 For a much more detailed elaboration of this argument, see J Fowkes *Apartheid Judging and Dugard's Question: Re-examining the Legend* (forthcoming).

47 For recent examples, see S Wilson & J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights' (2011) *Stellenbosch LR* 644, 669–70; C McConnachie & C McConnachie 'Concretising the Right to a Basic Education' (2012) 129 *SALJ* 554, 580–81.

to act – and if other actors are also responsibly engaged in giving content to the right to vote, then the key judicial question might well be about whether and when it is necessary for the judiciary to take over the task of articulating constitutional content.<sup>48</sup> Of course one cannot separate the judgment about whether other institutions are acting properly from the question of what the right requires – the claim is hardly that the content of rights is *unimportant* in rights cases. The point is that if other constitutional actors are also doing their jobs, at least some of the time, then the place to start is not invariably with the judiciary setting out a strong understanding of the right. Court-centrism will often give us the wrong answer, and questions about institutional relationships will properly loom largest.

If we departed from ideas somewhat like *these*, then *NNP* would look different. When we see the majority's decision not to act, our first reaction would not be to condemn this as a failure and look for an explanation and a fix. We would want to know what the other branches were doing. We would take seriously the possibility that the court's inaction might reflect a genuine judgment that it did not need to act (yet), because other institutions genuinely could be left to work on the problem, at least for a while longer, and because there was still time for the court to make an order liberalising the documentary requirements if necessary, a possibility the *NNP* majority explicitly raised.<sup>49</sup> We would take more seriously the role of the Electoral Commission, which had adopted precisely this wait-and-see approach in *NNP* and to whose judgments about electoral integrity the court uniformly defers (though the court does not uniformly defer to its judgments on other matters less at the core of the Commission's role).<sup>50</sup> We would take seriously the possibility that what drove the ANC's actions was policy-(over)ambition, rather than something more sinister, and we would take seriously the possibility that the government might respond to the concerns about its policy once the Commission had

48 See also A Sachs 'Book Review: Cass R. Sunstein, *One Case at a Time: Minimalism on the Supreme Court* and Ian Loveland, *Racial Discrimination and the Right to Vote in South Africa 1855–1960*' (2001) 51 *U of Toronto LJ* 87–90, who comments, after arguing that Sunstein's theory of judicial minimalism makes good sense, but would be more persuasive at some times than at others, that the 'question becomes not one of whether but of when: I would love to see a theory of when ...'.

49 *NNP* (note 5 above) para 46. For a rebuttal of the natural concern that this was an empty promise, see Fowkes (note 4 above) chapter 3.

50 The court has never ordered anything over an objection by the Commission that doing so would threaten the integrity of the elections. See *AParty* (note 41 above) paras 21–4, 56 & 59; see also *Richter*, where the court declined to make an order the Commission said would create significant logistical difficulties in a case where '[t]he practical implications of granting urgent relief now in relation to the 2009 elections are not clear from the record before us' *Richter* (note 18 above) paras 14 & 85–91; the quoted text appears at para 91. These decisions not to make certain orders can be compared for example to *NNP*, where the court placed reliance on the fact that the Commission had not (yet) made a finding that the integrity of the elections would be compromised by the bar-coded requirement; to *August*, where the court pushed back against some of the Commission's logistical claims but nevertheless relied on Commission undertakings that it would strive to give effect to the order; to *NICRO*, where the court relied on the Commission's statement that the order contemplated would not threaten the elections; and to *ACDP*, where the court relied on the Commission's assurance that including the ACDP would create difficulties but would not render the elections impossible: see *NNP* (note 5 above) para 43; *August* (above note 24) paras 7, 30, 33

drawn attention to them. We would take seriously the paragraphs in *NNP* about institutional relationships and burdens of proof for triggering judicial action which are the legal manifestation of a court fleshing out the multi-actor constitutional mechanism, and not just zero in on the paragraphs speaking explicitly about the right to vote.

For what it's worth, these departure points look good in hindsight. The *NNP* and *DP* did not return to court on the issue. The Department of Home Affairs ultimately succeeded in issuing somewhere between 3,4 and 4 million new IDs between July 1998 and the final registration weekend in March 1999. The *HSRC*, whose report had been at the heart of *NNP*, ultimately concluded that 'possession or not of a bar-coded ID was not a significant factor' in whether people registered for the elections. The Electoral Commission did not feel the need even to mention the bar-coded ID issue in its post-election report.<sup>51</sup> No one now thinks that the *ANC* was trying to steal the 1999 elections, or that the Electoral Commission's independence was subverted; the basic integrity of South African elections is taken for granted. None of these recognitions in hindsight rebuts O'Regan J. Caution that turns out to be excessive is not, of course, necessarily unwise for all that. But it should be enough to show why it is not flatly naïve to adopt a more open-minded perspective on the constitutional performance and reliability of institutions other than the court. (Also, while the relevance of this knowledge in hindsight for assessing the *NNP* judgments themselves is of course debatable, it is striking that scholarly criticism of *NNP* never even engages with it: the focus of attention ends when the court case does.) But let us set this epilogue to *NNP* aside, and imagine ourselves as the judges confronting the case at the time. If we departed from something like the rejection of the four ideas above, instead of their acceptance, we would not start the case on the assumption that the problem was important and the right was important and the larger constitutional stakes were important and *so judicial action was imperative*. We would start with a different question: given the facts and institutional responses before the court, and given the importance of the problem and the right and the larger constitutional stakes, *was judicial action the best way to respond?* Only if the answer was 'yes' would it make sense to think about bold judicial action.

& 40; *Minister of Home Affairs v National Institute for Crime Prevention and Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) paras 49, 68, 76 & 78; *ACDP* (above note 40) para 2. They can also be compared to cases where the court has not followed the Commission's opinion on matters other than electoral integrity, such as in interpreting the electoral statute where electoral integrity is not at stake – see for example *ACDP* (above note 40) paras 29–33 – or in other related matters, such as the introduction of floor-crossing, which the court upheld in *UDM (2)* (note 27 above) over the opposition of, inter alia, the Commission: see *Fowkes* (note 4 above) chapter 7.

51 With one exception. The only context in which the Commission's Report mentions the bar-coded ID requirement is in connection with prisoners – entirely ignored by the challenges of the *DP* and the *NNP*, and the one group where it *had* been established, in *August*, that the government's enfranchisement efforts were inadequate. See Independent Election Commission *Election Report 1999* <<http://www.elections.org.za/content/Documents/Annual-reports,-reports-and-strategic-documents/Annual-reports---IEC/1999-IEC-Annual-Report/>> 36; and *Fowkes* (note 4 above) chapter 3.

This is the real question that all the judges in the case are confronting, including O'Regan J. She is intervening simply because she thinks it better to play it very safe and intervene immediately to liberalise documentary requirements. Note that, contrary to simple understandings of the court acting to guard against violations of the right to vote, O'Regan J's judgment is really mainly about *promoting* the right to vote – about a duty to try and make it easier for people to vote so as to encourage democratic participation, as opposed to about *protecting* the right to vote against a more sinister threat. The *NNP* majority, on the other hand, is choosing not to intervene because it is content, at least for now, to rely on Parliament and the Department of Home Affairs and the Electoral Commission, all of whom were of the view that it was not yet necessary to liberalise documentation requirements because the ID rollout might be successful. As noted, the majority emphasises the possibility that the parties could return to the court, presumably to get such a liberalisation order, should subsequent evidence show the rollout would not suffice.

This question of *whether* judicial action was the best response is also, we should not forget, the question of the third, unanimous, judgment in *NNP*. Langa DP wrote on the allegations that the independence of the Electoral Commission had been infringed. Analysis of *NNP* is often focused on the Yacoob/O'Regan disagreement and leaves the Langa judgment to one side, but this is a mistake. The Langa judgment shares the deep institutional concerns of the majority's judgment on the bar-coded ID question. It is heavily about the relationships between the Electoral Commission and other institutions, and significantly for the present argument, it is not just about the proper relationship of independence between the Electoral Commission and the executive. The court does unanimously state that government proposals had not sufficiently respected the independence of the Commission, since they had acted as if it were a kind of sub-entity of the Department of Home Affairs rather than a constitutionally independent body answerable only to Parliament.<sup>52</sup> But the whole court chooses not to actually take any action in this regard, just as the majority did on the ID question. The court does not even make a declaratory order about the Commission's status. The reason for this lies in its answer to the question, not whether there was a constitutional problem, but whether *judicial intervention was necessary to fix* that constitutional problem. The Langa judgment is quite clear that the executive was not acting in relation to the Commission in the way required by the Constitution. But it also holds that the Commission had been able to defend its own independence, that the constitutional mechanism was therefore working as it should, that judicial intervention was not therefore necessary to uphold the Constitution, and that accordingly it was not necessary for a political party to move the court. This is why the precise basis for rejecting this part of the *NNP*'s challenge was to reject the party's *standing* to raise it.<sup>53</sup> Their contentions, in other words, had

52 *NNP* (note 5 above) paras 83–5, 88–9, 95 & 98–100.

53 *Ibid* paras 97 & 101–07.

constitutional merit, but they should not be permitted to raise them in the circumstances of the case because it was not (yet) necessary for the court to intervene in the constitutional dispute being worked out by other institutions.

This institutional concern also appears in O'Regan J's judgment. As noted, the only reason for not treating the bar-coded ID requirement straightaway as a limitation of the right to vote is to avoid setting the precedent that every regulation of the right to vote must be justified in terms of s 36. The reason to avoid setting such a precedent is not about doctrinal protection of the right to vote – since, obviously, bringing s 36 into play sooner will increase judicial scrutiny of matters affecting the right. Instead, it is about the proper relationship between the judiciary and other branches.

This question of whether to intervene can also be found elsewhere in the court's voting rights jurisprudence. Most significant here is the court's 2009 decision in *Richter*. The decision, unlike *NNP*, seems to have been generally accepted, but why? One part of the answer, of course, is that those who read *NNP* to impose a rationality test will see *Richter* as redemption, because it imposes a reasonableness test. (In fact, *Richter*'s test is almost identical to the majority's test in *NNP*, as noted.) But it is nevertheless interesting that the result in *Richter* has been so quietly received.

*Richter* (and *AParty*) successfully vindicated the right of registered citizens overseas to vote in national elections. But when it came to the right of registered citizens overseas to vote in *provincial* elections, the court in *Richter* was caught between two equality problems. The electoral legislation made special provision for government officials overseas to vote in provincial elections, but both other citizens overseas (such as the applicants) and citizens inside South Africa but outside their province of residence on voting day were not permitted to vote in provincial elections. Thus if the court issued no relief, the applicants would be treated unequally in relation to government officials overseas; if it granted them relief, then citizens inside South Africa but outside their home provinces would be treated unequally in relation to citizens outside South Africa. (The Chief Electoral Officer had stated that, at the late stage at which the case was brought, extending the right to vote in provincial elections to *all* citizens outside their province of residence on voting day would 'create very real logistical difficulties'.<sup>54</sup> The court's response was to acknowledge the equality problem but not do anything about it.<sup>55</sup> It did not even issue a declaratory order, in order to leave the matter open for another court to take up after the election – notwithstanding the apparently preemptory requirement of s 172(1)(a) that a court encountering unconstitutional law or conduct 'must' make a declaration of invalidity accordingly.

*Richter*, therefore, represents a judgment call by the court: that it would be better to leave what is very probably an unconstitutional situation un-remedied, lest judicial intervention threaten the elections. The court is not simply laying rights down next to conduct and making declarations accordingly. As in both

54 *Richter* (note 18 above) para 90.

55 *Ibid* paras 85–91.

issues in *NNP*, it is making a more holistic decision about whether and when judicial intervention is a constitutionally good idea. It is deciding in relation to part of the question before it (overseas voting in national elections) that judicial intervention is appropriate, and in relation to another part (overseas voting in provincial elections) that the best course is to do nothing. *Richter* has been folded into precedent without much fuss, and has certainly never been considered for canonical repudiation, but it is much more similar to *NNP* than standard accounts acknowledge. Its result, after all, is blunter: it represents a final denial of the desire by citizens overseas to vote in the 2009 provincial elections, whereas *NNP* was a final denial of no one's voting rights and left open the prospect of further judicial action. And the constitutional basis for the blunter *Richter* result, given the wording of s 172(1)(a), is arguably murkier. Yet *Richter*, careful of electoral arrangements and the views of other institutions and representing quite a collaborative exercise in responding to a problem, is widely accepted. *NNP* deserves consideration from a similar perspective.<sup>56</sup>

Finally, the question of when to intervene is also at the heart of the theoretical account underpinning much of the criticism of *NNP* and understandings of voting rights cases in general. Proponents of bolder action in *NNP* have pointed explicitly to the account of John Hart Ely, and his name is the standard citation for the idea that courts in democracies should police voting rights and electoral processes.<sup>57</sup> But Ely's theory is at least as much a theory of restraint as it is of intervention. He thinks courts should leave *functioning* processes alone, and so he is distinctly ambiguous authority in *NNP*, a case all about whether or not it was necessary for a court to step in and take a decision about electoral processes out of the hands of the other branches. The court, unlike its critics, is taking both sides of Ely's theory seriously.

## VI CONCLUSION

I began this article with the claim that our choices about canons can be extraordinarily revealing about our self-understandings as participants in a legal system. *NNP*'s unquestioned pariah status illustrates, I believe, the extent

<sup>56</sup> An anonymous reviewer suggests that it may be significant that the particular *site* of the institutional question differs in these cases. In Yacoob J's judgment in *NNP*, it is manifested in how the test for voting rights is applied, whereas in *Richter* it looks more remedial, and in the Langa judgment in *NNP* it manifests as a threshold decision about standing. The suggestion is therefore that scholars may be more sensitive to these types of considerations within the sphere of rights interpretation and less concerned about their presence in decisions about jurisdiction and remedies, explaining the particular criticism directed at the Yacoob judgment. I think there is considerable merit in this suggestion – and that it reflects an important and questionable broader pattern in the way in which legal scholars in South Africa and more generally think about issues of interpretation and law when rights are being interpreted as opposed to when other legal questions are at issue: see Fowkes (note 4 above) chapters 3 & 5 esp.

<sup>57</sup> JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980). For explicit reliance, see Roux 'Democracy' (note 12 above) 10-56 – 10-57; Lenta (note 15 above) 558–60; Ely's work doubtless underlies other thinking as well. For further analysis of Ely's argument here, see Fowkes (note 4 above).

to which scholars of South African constitutionalism depart from (roughly) the four premises I discussed – for if we do not depart from them, *NNP* is the arguable case that we can now see it was, rather than the obvious breach of principled judging it has long been thought to be. Of course, *NNP*'s special interpretative challenges do not help, but the extent to which a misreading has gone so universally unquestioned is proof, to my mind, that the problem is not just that *NNP* is easy to misread. It goes to the lenses through which the reading is being done. This is how canonical thinking works, and if we are to address it, it must be by regrinding the lenses, and then looking out anew on the constitutional landscape and re-evaluating the canon in light of what now comes into focus. I do not necessarily claim that, if we do, *NNP* will be universally acknowledged as a great case – although as an exercise in careful judicial review in a difficult, hurried and pressurised case it deserves far more canonical respect than it currently receives. But I do claim that if we critically re-examine deep ideas like the four considered in this article, we will find the South African canon looking very different. The apparently sharp divides between the cases thought great and those thought regrettable will often start melting away – and we will be that much closer to the questions and debates that have really mattered in South African constitutional practice since the demise of apartheid.