

*The Selfless Constitution:*  
Experimentation & Flourishing as the  
Foundations of South Africa's Basic Law

by

Stuart Craig Woolman

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## ABSTRACT

The way the vast majority of us think about the self, consciousness and free will is incorrect – dramatically out of step with what the majority of neuroscientists, cognitive psychologists scientists and analytic philosophers have to say about those subjects. One consequence of these erroneous views is that the manner in which the majority of us understand ‘freedom’ – as a metaphysical term and as a political concept -- is sharply at odds with how things actually are. We replicate similar kinds of errors when we think about how various forms of human association are constructed and how change actually occurs within such associations. Once again, epistemological fallacies with regard to social theory have the consequence of leading us to attribute far greater ‘freedom’ to groups than they actually possess. This second misattribution of autonomy results in institutional political arrangements and constitutional doctrines at odds with what we know about the human condition.

As things stand, the various models of political theory with which the South African Constitutional Court operates rest upon a belief that the rights and freedoms enshrined in the Final Constitution should enable individuals to exercise relatively unfettered control over decisions about the intimate relationships and the various practices deemed critical to their self-understanding. However, individual autonomy as a foundation for constitutional theory overemphasizes dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self-consciousness, is a function of a complex set of narratives over which we exercise little in the way of (self) control. The involuntary and *arational* nature of identity formation – at the level of both the individual and the social -- requires a constitutional theory that supplants the model of a rational individual moral agent which undergirds much of our current jurisprudence with a vision of the self that is more appropriately located within and determined by the associations to which we all belong.

Despite the involuntary and *arational* nature of identity formation, we can live within communities that determine the greater part of the meaning we make, and still remain committed to the possibility of significant change (for the better) within those communities. This thesis then goes on to explain how a commitment to experimentalism in the political domain, when married to a robust conception of basic entitlements and citizenship, services human flourishing. (To expand the conditions for flourishing, however, is not to make us metaphysically ‘free’ to ‘will’ our actions: a commitment to flourishing reflects an attempt to create an environment in which all inhabitants of South Africa have the opportunity to live lives worth valuing.) Experimental constitutionalism dovetails with a very modest, naturalized account of flourishing because both accounts (1) take the radical givenness of existing constitutive attachments seriously; (2) recognize the boundedness of individual and collective rationality; and (3) describe various kinds of feedback mechanisms that allow for error correction and the enhancement of the conditions of being.

Experimental constitutionalism, in particular, enables more citizens to see what ‘works’ and what doesn’t – both with respect to the means and the ends of our existence. Experimental constitutionalism offers the promise of improving the conditions for being by suggesting a range of alterations in constitutional doctrine and a host of changes in the manner in which many political institutions operate. In South Africa, the innovations associated with experimental constitutional design embrace: (1) a doctrine of constitutional supremacy that maintains a meaningful equilibrium with a doctrine of separation of powers, and thus sets relatively clear guidelines for how authority for constitutional interpretation might best be shared by the judiciary, the legislature, the executive and non-state-actors; (2) the use of various standard judicial mechanisms – such as cost orders, court procedures, amici and intervenors, expanded constitutional jurisdiction and structural injunctions – to create bubbles of participatory democracy better able (than courts or legislatures) to resolve various kinds of polycentric conflict; (3) an approach to limitations analysis that provides a better process than ‘balancing’ for experimentalist adjudication; and (4) greater roles for Chapter 9 Institutions with respect to investigation, information-sharing and norm-setting; and (5) a principle of democracy that invites public participation in law-making that will both elicit better information about which government policies work best and effect widespread reflection about the meaning of those constitutional norms that govern our lives. The thesis then (a) mines the brief historical record of two important policy areas – Housing and Education – to show how the principles of experimental constitutionalism have already been put to work and (b) re-examines six Constitutional Court cases to demonstrate how the dual commitment to experimental constitutionalism and flourishing might generate more optimal outcomes.

## **Key Words and Phrases**

Self

Consciousness

Free Will

Experimental Constitutionalism

Flourishing

Feedback Mechanisms

Centre of Narrative Gravity

Global Neuronal Workspace Theory

Spontaneous Orders

Universal Selection Theory

Participatory Bubbles

Shared Constitutional Interpretation

**Stu Woolman** holds degrees in philosophy from Wesleyan University (BA, with Honours) and Columbia University (MA, President's Fellow) and law from Columbia Law School (JD, Harlan Fiske Stone Scholar). He is the editor-in-chief and primary author of *Constitutional Law of South Africa*, the most widely cited authority on the subject. He is also the author of some 50 articles, book chapters, working papers and the editor of a number of collections. Mr Woolman is a member of the New York State bar, and has practised anti-trust law with Crowell & Moring in Washington, DC, corporate finance with Brock Silverstein in NYC, and constitutional law with Edward Nathan & Friedland in Johannesburg. He is currently a consultant in public law with Ashira (Pty) Ltd in Johannesburg. Prior to joining the University of Pretoria faculty as a senior lecturer, in 2002, Mr Woolman taught from 1993 to 1998 at the University of the Witwatersrand and from 1999 through 2001 at Columbia Law School. He has served as an editor for the *Columbia Human Rights Law Review*, the *South African Journal on Human Rights* and *SA Public Law* and has worked on the United Nations Human Rights Committee and the Commission of Public Inquiry into the Prevention of Public Violence and Intimidation. He is currently a Research Associate at the Centre for Human Rights and at the South African Institute for Advanced Constitutional, Public, Human Rights & International Law.

# TABLE OF CONTENTS

## I. INTRODUCTION

- A. Basic Thesis
- B. Structure of the Text: The Self; The Social; The Constitutional
- C. Epistemic Commitments: Self, Society and State as Natural Phenomena
- D. Methodological Commitments: Intuition Pumps
- E. The Problem and the Argument in Short
  - 1. Why Rethinking Constitutional Law is Necessary in South Africa
  - 2. How Rethinking Our Understanding of the Self Services a Better Constitutional Theory
    - a. A Theory of the Self: Flourishing, Not Freedom
    - b. A Theory of the Social: Constraint, Criticism and Change
    - c. A Theory of the Constitutional: Experimentalism and Flourishing
- F. Connections
  - 1. Connections: Global Workspaces, Spontaneous Orders and Participatory Bubbles
  - 2. Connections: Neuronal Network Competition, Universal Selection Theory and Shared Constitutional Interpretation
  - 3. Connections: The Determined Self, the Conditioned Self, the Multiple Self, the Divided Self and Levels of Generality

## II. A THEORY OF THE SELF, CONSCIOUSNESS & FREEDOM

- A. Self and Consciousness
  - 1. Traditional Views of the Self and Their Problems
    - a. My Cartesian Self
    - b. My Cartesian Theatre
  - 2. Explaining (Away) the Self
    - a. Bundle Theory
    - b. Plausible Theories of Consciousness and the Self
      - i. The Proto-Self, the Core Self and the Autobiographical Self
      - ii. Global Neuronal Workspace Theory
        - aa. Baars' Global Workspace Theory
        - bb. Dehaene's Global Neuronal Workspace Theory
      - iii. Dennett's Self as a Centre of Narrative Gravity
        - aa. Consciousness
        - bb. Selves
- B. Freedom
  - 1. Consciousness, Self, Error Correction and Free Will
    - a. The Illusion of Volition
      - i. Libet's and Walter's Timing Experiments
      - ii. Wegner and Wheatley's Experiments
    - b. A Modest Account of Freedom
  - 2. Awareness, the Intentional Stance and Freedom
- C. Consciousness, Self, Freedom and Constitutional Doctrine
- D. Consciousness as a Feedback Mechanism: Video Games; Driving; Spelling

## III. A THEORY OF THE SOCIAL: CONSTRAINT, CRITICISM & CHANGE

- A. Introduction
  - 1. Unchosen Conditions of Flourishing
  - 2. Social Feedback Systems
- B. Descriptions of Social Feedback Systems
  - 1. Spontaneous Orders
  - 2. Experiments in Living
    - a. Mill and the Limits of Private Ordering
    - b. From Private Ordering to Experimentalism
  - 3. Blind Variation and Selection Retention in Social Processes
- C. Prescriptions for the Social: Experimentalism in State Policy
- D. Shared Consciousness as a Feedback Mechanism: Psychotherapy; Golf; Constitu



# TABLE OF CONTENTS

## IV. A THEORY OF THE CONSTITUTIONAL: EXPERIMENTAL CONSTITUTIONALISM & FLOURISHING

- A. Introduction
  - 1. Basic Theses
  - 2. Some Riders on Experimental Constitutionalism in South Africa
    - a. Experimentalism and Optimality
    - b. Tradition and Transformation
    - c. Constitutionalism and Experimentalism
    - d. Institutional (Under) Capacity and Experimentalism
- B. Experimental Constitutionalism under South Africa's Final Constitution
  - 1. An Initial Description of Experimental Constitutionalism
    - a. On Reflexivity
    - b. On Deliberation
    - c. On Destabilization
    - d. On Experimentalism
  - 2. Experimentalism and Institutional Design
  - 3. Experimental Institutional Design
    - a. The Promise of Experimental Institutional Design
      - i. Three Principles
      - ii. The Role of the Judiciary in Structuring Institutional Reforms
      - iii. Theoretical Underpinnings of Experimental Constitutionalism: Shared Constitutional Interpretation & Participatory Bubbles
    - b. Shared Constitutional Interpretation: Institutional Design & Constitutional Doctrine
      - i. Provincial Constitutions
      - ii. Rights Interpretation and Limitations Analysis
        - aa. Theory
        - bb. Practice
      - iii. Democracy and its Relationship to Rights Interpretation
      - iv. Socio-Economic Rights
      - v. Chapter 9 Institutions
        - aa. Auditor-General
        - bb. Public Protector
        - cc. South African Human Rights Commission
      - vi. Public Participation in the Process of Norm-Setting
    - c. Participatory Bubbles: Institutional Design & Constitutional Doctrine
      - i. Remedies
      - ii. Rules and Procedures in Constitutional Matters
      - iii. Costs
      - iv. Constitutional Jurisdiction
      - v. Public Participation in the Process of Law-Making
      - vi. Chapter 9 Institutions
- C. Participatory Bubbles & Shared Constitutional Interpretation as Feedback Mechanisms
  - 1. Experimentalism in American Education Law and Policy
  - 2. Experimentalism in South African Housing Law and Policy
    - a. An Immediate Critique of *Grootboom*
    - b. The Reformation of Housing Policy in Light of *Grootboom*
  - 3. Experimentalism in South African Education Law and Policy
    - a. Extant Constitutional Norms regarding Religious, Linguistic & Cultural Autonomy in Public Schools
    - b. State Efforts to Control Private Power in Public Schools

# TABLE OF CONTENTS

## **D. Flourishing, Dignity and the Politics of Transformation in South Africa**

1. The Situated Self
2. The Reflective Self
3. Dignity & Flourishing
  - a. Flourishing Defined
  - b. Dignity Defined
    - i. Dignity as a Condition for Flourishing
      - aa. Individual as an end-in-herself
      - bb. Equal Concern and Equal Respect
    - ii. Dignity as Constitutive of Flourishing
      - aa. Self-actualization
      - bb. Self-governance
    - iii. Dignity and the Material Conditions for Flourishing
  - c. Widening Gyres of Dignity and Flourishing

## **E. Revisiting Some Recent Cases in Light of Experimentation and Flourishing**

1. *Prince*
2. *Jordan*
  - a. Flourishing, not Freedom
  - b. Experimentation, not Deference
3. *Grootboom*
  - a. Structural Injunctions and Participatory Bubbles
  - b. Experimentalism, Feedback Effects & Transformation
  - c. Shared Constitutional Interpretation
4. *Fourie*
5. *TAC*
  - a. Failure to Flourish
  - b. Not Tough Enough
6. *Port Elizabeth Municipality*

## **V. EPILOGUE: THE LIMITS OF REASON IN SOUTH AFRICA & ITS CONSEQUENCES FOR EXPERIMENTAL CONSTITUTIONALISM AND FLOURISHING**

- A. Folk-Psychology of Freedom
- B. Irrationality
- C. Political Undercapacity
- D. Avoidance

# THE SELFLESS CONSTITUTION

## Chapter One

### Introduction

*Table of Contents*

- A. Basic Thesis
- B. Structure of the Text: The Self; the Social; the Constitutional
- C. Epistemic Commitments: Self, Society and State as Natural Phenomena
- D. Methodological Commitments: Intuition Pumps
- E. The Problem and the Argument in Short
  - 1. Why Rethinking Constitutional Law is Necessary in South Africa
  - 2. How Rethinking Our Understanding of the Self and Consciousness Services a Better Constitutional Theory
    - a. A Theory of the Self: Flourishing, Not Freedom
    - b. A Theory of the Social: Constraint, Criticism & Change
    - c. A Theory of the Constitutional: Experimentalism & Flourishing
- F. Connections
  - 1. Connections: Global Workspaces, Spontaneous Orders & Participatory Bubbles
  - 2. Connections: Neuronal Network Competition, Universal Selection Theory and Shared Constitutional Interpretation
  - 3. Connections: The Determined Self, the Conditioned Self, the Multiple Self, the Divided Self and Levels of Generality

## I. INTRODUCTION

### A. The Basic Thesis

The first basic thesis of this text is disarmingly simple. It goes something like this.

The way the vast majority of us think about the self, consciousness and free will is incorrect – dramatically out of step with what the majority of neuroscientists, cognitive psychologists scientists and analytic philosophers have to say about those subjects. One consequence of these erroneous views is that the manner in which the majority of us understand ‘freedom’ – as a metaphysical term and as a political concept -- is sharply at odds with how things actually are. We replicate similar kinds of errors when we think about how various forms of human association are constructed and how change actually occurs within such associations. Once again, epistemological fallacies with regard to social theory have the consequence of leading us to attribute far greater ‘freedom’ to groups than they actually possess. This second misattribution of autonomy results in institutional political arrangements and constitutional doctrines at odds with what we know about the human condition.

This thesis does not, however, attempt to describe the self and the social correctly in order to establish basic truths about the world. My descriptive efforts have a primarily instrumental end. This project is motivated by the ‘intuition’ that an accurate understanding of the self and the social will assist us in putting our constitutional politics on more solid footing. My dual desire to reconceptualize ‘freedom’ in terms of ‘flourishing’ and to redescribe the commitment to ‘deliberation’ in politics in terms of ‘experimentation’ is not animated by a more basic attempt to reinterpret, radically, how we see the world. My aim is, instead, prescriptive. What I hope to offer, if successful, is an argument for shifting, ever so slightly, a number of constitutional doctrines so that they better fit with what we know about ourselves as individuals and as social beings. While the sweep of subject matter covered in this thesis may seem rather ambitious, I hope to justify the range of topics traversed by making claims that are, in the end, quite modest.

That's the project in broad strokes. In the rest of the introduction, I lay out in somewhat greater detail the structure of the thesis and its methodology, its use of intuition pumps to make controversial claims easier to swallow, the concerns about our constitutional politics that drove me to write this work, and the theories of the self, the social and the constitutional that better fit our basic law.

## B. Structure of the Text: The Self; the Social; the Constitutional

In some ways, this text begins at the end. Later on in the introduction, I discuss the limitations of several of the dominant political theories on display in our constitutional discourse, and how they can be traced, to one extent or another, to errant understandings of 'freedom' in the context of the self and the social. These limitations in our existing metaphysics and politics leads to the search for better explanations of the self in Chapter 2, a description of the structure of and the mechanics of change in social formations in Chapter 3, and an account of experimental constitutionalism and flourishing in Chapter 4.

To make clear the cash value of the conclusions reached in each part of this thought project, I provide examples of the kind of phenomena which engage the often abstract arguments proffered in the preceding pages. In Chapter 2, I use driving, video games, and spelling to explain the purpose of consciousness in terms of self-correcting sets of feedback mechanisms. In Chapter 3, I use psychotherapy, golf instruction and constitutional jurisprudence to explain how critical engagement with participants in a given form of life, and measurement of successful responses within in a social practice, operate as social feedback mechanisms and increase the potential for individual and group flourishing. In Chapter 4, I use examples from recent South African constitutional litigation and policy formation in housing and education to explain how institutions that foster experimentation are absolutely indispensable feedback mechanisms for modern democratic societies committed to flourishing.

### C. Epistemic Commitments: Self, Society and State as Natural Phenomena

The method of this thesis is distinct in two important ways from many similar kinds of synthetic projects in the law, the social sciences or the humanities.

First. I offer a description of human nature that results in a set of prescriptions for South African politics. Depending upon the reader's perspective, that could be a strength or weakness of this project.

Second. I do not set this humanistic project in false opposition to the natural sciences. This project does not treat the human phenomena that it engages as radically different in kind from natural phenomena. Quite often when a scholar in the social sciences and the humanities makes a claim about treating theories about natural phenomena and theories about human phenomena in the same manner, it is based upon the assumption that theories in the natural sciences, like theories in the human sciences, are reducible in some way to claims about power or ideology.<sup>1</sup> I take the opposite position. I do not deny that power or ideology may influence what we come to study or what we claim to know: I only deny that truth claims are somehow reducible to such influences. Like all natural phenomena, human beings are subject to the same causal laws that govern other physical objects in the world. I therefore see no reason why explanations of human phenomena require special pleading that we would not otherwise accept for any other kind of phenomena.<sup>2</sup> Moreover, the claims made on behalf of the model of the self and the social sketched herein accord with recent and not-so-recent learning in fields as diverse as neuroscience, evolutionary biology,

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<sup>1</sup> Post-structuralist accounts of science tend to conflate the propositions (1) that some, if not all, scientists may be motivated by interests not intrinsic to the matter under study with proposition (2) that the scientific method, as practiced by a community of scholars, generates verifiable truth propositions about the world. For these post-structuralists, proposition (1) taints proposition (2) in a manner that invariably relativizes the manner in which truth propositions in terms of proposition (2) are produced. P Feyerabend *Against Method* (1975); P Feyerabend *A Farewell to Reason* (1987). As I note in Chapter 3, this account of how science operates is simply wrong, and the truth of proposition (1) and the truth of proposition (2) have no bearing on the truth of the other.

<sup>2</sup> See G Ryle *The Concept of Mind* (1949). Ryle describes the persistence of such distinctions as category mistakes. We would be rightly perplexed if a visitor to the University of Pretoria, after having been shown all the lecture halls, playing fields, offices, laboratories, academics, students and staff, still asked 'But where is the University?' The mistake is in thinking the University represents something over and above its constituent parts. Something similar occurs in discussions of the self, consciousness and free-will. The mistake is in thinking that there is something -- the mind -- over and above the physical constituent parts that make up human action.

cognitive psychology, artificial intelligence and mathematical modelling.<sup>3</sup> Indeed, it is fair to say that some of the intuitions that govern this thesis are parasitic upon learning in the natural sciences. That said, it is important at the outset to make clear that I am not claiming that the laws which govern human phenomena are reducible to qualities of and laws which govern natural phenomena.<sup>4</sup> Just as few people claim that the description of biological properties are captured entirely by chemistry, or that chemistry is captured entirely by physics, I hew to the party line which holds that human phenomena can never, ever, be entirely reducible to the laws of biology, chemistry or physics.

#### D. Methodological Commitments: Intuition Pumps

The audience for this thesis is the lawyer, jurist and legal academic working in South Africa. It is not aimed at a sophisticated philosophical or scientific readership. Members of the academy drawn from these philosophical or scientific quarters may object to the conclusions I reach or, more importantly, to what may appear to them to be the superficial manner in which I engage complicated bodies of scholarship across a range of domains.

The justification for what must be a rather cursory approach to complex phenomena is not that I believe that the truth or the strength of the philosophical claims that I make do not matter. Quite the opposite. I believe that they do. However, I cannot offer extended defences of these positions for two quite obvious reasons: (1) I am neither a professional philosopher, nor a cognitive psychologist, nor a neuroscientist; (2) this thesis is not primarily about the virtues of theories of determinism as opposed to the vices of theories supporting free will, nor is it generally about the grounds for preferring blind variation and selective

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<sup>3</sup> For example, the same set of criteria that would enable us to ascribe intentionality to a human being potentially allow us to ascribe intentionality to animals and computers. Such a claim links up biology with philosophy, and philosophy with artificial intelligence. The kind of adaptation exhibited by animals can describe the social history or cultural reproduction of thought processes and various computer generated entities. Such a claim links up evolutionary biology with social psychology, and social psychology with mathematical modeling.

<sup>4</sup> It would be easy to reduce an explanation of why we hold individual persons (and groups) morally and legally culpable for their actions to Darwinian and utilitarian accounts of how a commitment to individual responsibility results, generally, in the increasingly successful life chances of individuals and those societies committed to individual responsibility. However, our account of the self is sufficiently rich to explain why individuals and societies that come to accept deontological, non-instrumental and non-reductive explanations of moral, political and legal responsibility are justified in doing so.

retention theories in the social sciences to other theories about how social phenomena evolve. That this thesis is ultimately about *South African constitutional politics* – because that is my area of expertise and interest – raises other questions about the contents of this work.

Legal academics, lawyers and judges who have read this work in various forms over the past couple of years have often asked a single question: are the descriptive accounts of the self and the social really necessary for a thesis that has as its primary aim a minor re-conceptualization of the way in which we think about constitutional law in South Africa? Put another way, many of my fellow academics have asked whether the ‘is’ with respect to the self and the social entails an ‘ought’ with respect to the constitutional.<sup>5</sup>

My answer to these questions about both content and method is ‘yes’. But that ‘yes’ itself requires some explanation. I do not doubt for a minute that someone could write about the subject matter traversed in Chapter 4 of this thesis without engaging the subject matter covered in Chapters 2 and 3. Several academics have done so. But they have not done so this way -- my way -- and they have not done so with my particular concerns in mind. Because I argue that a re-conceptualization of South African constitutional politics turns, to some degree, on a better understanding of the self and a better understanding of social phenomena, I am obliged to describe what those better understandings are. I have the good fortune to live in a time when my understandings of the self and the social have already been canvassed at great length in a broad array of disciplines by a large number of scholars. However, the argument of this thesis takes the shape it does because the ideal account of South African constitutional politics that I offer in these pages is not one that I expect all readers will necessarily share. By first laying out my ‘uncontroversial’ views about

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<sup>5</sup> I am fortunate to have worked with, as an author and as an editor of *Constitutional Law of South Africa*, some of South Africa’s best public law academics: Karin Van Marle, David Bilchitz, Theunis Roux, Jon Klaaren, Kirsty McLean, Adrian Friedman, Danie Brand, Henk Botha, Michael Bishop, Kate Hofmeyr, Drucilla Cornell, Cathi Albertyn, Dennis Davis and Steven Budlender have all deepened my understanding of the doctrines, the rules and the institutions this thesis engages. Participants at the Research Unit for Constitutional and Legal Interpretation Conference (‘RULCI’) at the University of the Western Cape and Stellenbosch University in 2004 – and, in particular, Francis Olson – asked penetrating questions that advanced this project. Michael Dorf, William Simon, Archun Fung, Barry Friedman, Susan Sturm and other members of the Columbia/Harvard/Yale Constitutional Experimentalism Workshop proposed several new lines of inquiry – at a seminar in 2006 -- that have added to the richness of this work. Andre Van Der Walt and Marius Pieterse offered additional critiques – and possible responses to their own – during my oral defense. Most importantly of all, Li Yu, a former student of mine at Columbia Law School helped me to begin work out many of the ideas in these pages and introduced me to bodies of literature most congenial to theses developed in this work.

the self and the social, I hope to convince at least some of my readers that the constitutional politics that I later prescribe provides the best fit for the individuals and the groups that make up South African society.

Let me put the matter slightly differently, and perhaps more candidly. The accounts of the self and the social, in Chapter 2 and Chapter 3, are -- in addition to being stand alone theories -- intuition pumps. Intuition pumps are rhetorical devices – commonly used in philosophy, but not unknown in other disciplines – that are designed by their creators to draw the readers attention to certain features of a philosophical problem. By emphasizing these ‘critical’ features of a problem – often isolating them from other features – the writer hopes to make it easier for the reader to agree with the writers’ own solutions to a problem. My views on the self and the social are intuition pumps in the sense that my characterizations of the self and the social emphasize certain views about ‘freedom’, ‘trial and error’ and ‘feedback mechanisms’ that I believe to hold true not only for the self and the social, but for the political and the constitutional.

‘Intuition pumps’ serve as a more felicitous, and accurate, description of my efforts than does a term like ‘proof’. While I might think that the self and the social are as I describe them, I am loathe to say that my ‘theories’ lead ineluctably to the conclusion that the political and the constitutional must take a particular, univocal form. No matter how accurate my philosophical and sociological arguments may be, there are simply too many states and too many constitutions that do not permit a theoretical fit between my accounts of the self and the social, on the one hand, and my account of constitutional politics. on the other. Neither the predominantly Islamic Republic of Iran nor the predominantly Jewish State of Israel can be proved ‘wrong’ by my account of the self and the social.

However, for those readers already inclined towards the model of a largely secular, relatively heterogeneous, socially democratic, constitutional state – such as we have here in South Africa – my accounts of the self and the social may do some work. These accounts cannot ‘prove’ my preferred model of constitutional politics: but they do serve as *evidence* of a certain kind. This evidence, of which I am quite confident, suggests that if this is who we really are in largely secular, relatively heterogeneous, socially democratic, constitutional

states, then these are the constitutional doctrines and political institutions that will serve us best.

## E: The Problem and the Argument in Short

### 1. Why Rethinking Constitutional Law is Necessary in South Africa

As the reader might already be aware, there are other intuition pumps out there, working away in support of different models of constitutional politics. The Constitutional Court has handed down a range of decisions over the past decade that suggest that it is working with at least three (and now perhaps four) competing models of constitutional politics.<sup>6</sup>

The first is a classically liberal model<sup>7</sup>: explicitly on display in *Ferreira*,<sup>8</sup> and *Du Plessis*,<sup>9</sup> influential in the early development of the equality and dignity jurisprudence of the Court,<sup>10</sup>

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<sup>6</sup> See *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) (Rastafarian use of cannabis in religious ritual justifiably impaired by criminal sanctions because the legislature has power and duty to enact legislation prohibiting conduct considered by it to be anti-social – whether court agrees with this assessment or not) (*Prince*); *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC) (Women's right to engage in commercial transactions involving sex, though private and often involving economically marginalized classes, insufficient to outweigh state's interest in proscription through criminal sanction) (*Jordan*); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (Court assumes, that for the purposes of analysing the constitutionality the use of corporal punishment by teachers, that FC ss 15 and 31 have been infringed; however upon proceeding to limitations analysis, the Court explains why the state is justified in barring corporal punishment and why the court is justified in not crafting an order creating an exemption for such punishment) (*Christian Education*)

<sup>7</sup> Classical liberalism stresses the capacity of separate, independent selves to choose the aims and attachments by which they will define themselves. As a chooser, 'the [liberal] self', as John Rawls has written, 'is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.' *A Theory of Justice* (1971) 3-4. In fairness to Rawls, the quote from *Theory* may be misleading. He has never been a classical liberal as that position is described in these pages. See J Rawls *Political Liberalism* (1993); J Rawls 'The Domain of the Political and Overlapping Consensus' (1989) 64 *New York University L. Rev.* 233.

<sup>8</sup> *Ferreira v Levin* 1996 (1) SA 984 (CC) (*Ferreira*).

<sup>9</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) (*Du Plessis*).

<sup>10</sup> That this body of learning occupies such a central place in the Court's jurisprudence is poetically just. The majority of the *Ferreira* Court rejected Justice Ackermann's understanding of what 'freedom' in the right to 'freedom and security of the person' meant.<sup>10</sup> It rejected his libertarian take on the relationship between citizen and state – or at the very least it rejected this analysis with respect to the text of the Interim Constitution. However, it is hard to read the Court's judgments on the meaning of equality and dignity and not come away feeling that the Court has ultimately vindicated Justice Ackermann's notion of individual liberty by simply recasting it in terms of dignity. It is the individual qua individual who may not have his or her dignity impaired. Much as Justice Ackermann argued in *Ferreira*, when it comes to liberal democracy, it is the negative liberty of liberalism that matters most and not the positive liberty of democracy. In finding the common law criminalization of sodomy a violation of the right to dignity, the *NCGLE I* Court wrote, '[I]t is clear that the

and arguably decisive in the majority opinions in *Prince, Jordan* and *Robinson*.<sup>11</sup> The second is

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constitutional protection of dignity requires us to acknowledge the value and the worth of all *individuals* as members of society.’ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at paras 28. Moreover, the Court argued, ‘the rights of equality and dignity are closely related, as are the rights of dignity and privacy.’ *Ibid* at para 30. Individual freedom – negative liberty – thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality. As the Court writes in *Prinsloo*: ‘In our view unfair discrimination [the linchpin of equality analysis]... principally means treating people differently in a way which impairs their fundamental *dignity* as human beings, who are inherently equal in *dignity*.’ *Prinsloo v Van der Linde* 1997 (3) SA 1012. If the link between individual freedom, and dignity and then equality is still not clear, the *Hugo* Court writes: ‘[D]ignity is at the heart of individual rights in a free and democratic society. . . [E]quality . . . means nothing if it does not represent a commitment to each person’s equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens.’ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). For further analysis of the relationship between equality and dignity see C Albertyn and B Goldblatt ‘Equality’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2007) Chapter 35; S Cowan ‘Can Dignity Guide Our Equality Jurisprudence?’ (2001) 17 *SAJHR* 34; S Woolman ‘Dignity’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

<sup>11</sup> Critics of the commitment to negative liberty evident in the early jurisprudence of the Constitutional Court argue that when it comes to understanding individual flourishing, a commitment to negative liberty is *too* negative. See D Davis ‘Equality: The Majesty of Legoland Jurisprudence’ (1999) 116 *SALJ* 398, 412 – 413 (‘The court has given dignity both the content and scope that make for a piece of jurisprudential Lego-Land to be used in whatever form and shape is required by the demands of the judicial designer.’ Even if I disagree with that indictment of the Court’s current dignity jurisprudence, Davis had good grounds – at the time of writing – for critiquing the Court’s nascent dignity and equality jurisprudence for being grounded in a predominantly ‘individualistic framework’.) See also S Cowan ‘Can Dignity Guide Our Equality Jurisprudence?’ (2001) 17 *SAJHR* 34, 39. For the articulation of similar concerns with respect to German jurisprudence, see D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 300-301, 312-313 (The anteriority of the right – to dignity – to the state complicates judicial control of the concept.); S Wermiel ‘Law and Human Dignity: The Judicial Soul of Justice Brennan’ (1998) 7 *William and Mary Bill of Rights J* 223. See, further, C Taylor ‘What’s Wrong with Negative Liberty’ *Philosophy and the Human Sciences: Philosophical Papers* 2 (1985) 211, 213. The classical liberal account, evinced in the Constitutional Court’s early jurisprudence, defines individual autonomy primarily in terms of individuals not having their lives interfered with by other individuals or the government. This view wrongly identifies *flourishing* as ‘a matter of what we can do, of what is open to us to do’ without external restraints. Taylor (*supra*) at 213. If we instead identify individual flourishing with self-realization - with control (loosely understood) over the form our life takes - then we may be forced to realize that such control is not solely a function of the absence of external constraints, but also involves overcoming internal barriers as well. (The discussion about and examples of feedback mechanisms and error correction in Chapters 2 and 3 explain why this is so.)

As Taylor convincingly argues, even a classical liberal view of autonomy requires us to discriminate between, and make judgments about, those restrictions which serve significant or important goals, and those which do not. For example, we do not see traffic lights and laws as significant obstacles to self-realization, but we will likely view restrictions on religion as significant obstacles to flourishing. That is, we would be unlikely to describe ourselves as having flourished if we eliminated traffic lights. On the other hand, we would be likely to identify ourselves as having flourished if we eliminated restrictions on religious practice. The point is that even a system of negative liberty forces us to identify some purposes as important for flourishing, and others as unimportant or unrelated to individual self-realization. We make similar discriminations between important and unimportant purposes when we talk about overcoming internal barriers. That is, we are able to identify some of our purposes and desires as essential for flourishing, and others as unimportant and even inimical to such ends.

The upshot of this thesis that we discriminate between our own significant and insignificant purposes is that a person’s claim that she is doing what she says she wants to do doesn’t mean that she should be read as having flourished. Other people may have a better idea of what my own interests are and what will truly make me flourish. Thus, contrary to Berlin and other classical liberals, ‘we cannot maintain the incorrigibility of the subject’s judgments about his freedom, or rule out second-guessing.’ *Ibid* at 228. (Again my recasting of

liberal democratic model underpinned by a strong theory of individual agency<sup>12</sup>: such a position appears on display in the majority judgments in *NCGLE I* and *NCGLE II*<sup>13</sup> and in the minority opinions in *Prince* and *Jordan*. The third is a social democratic model married to a strong theory of individual agency.<sup>14</sup> All three models are predicated upon a *metaphysical* set

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freedom discourse in terms of error correction and social feedback mechanisms reinforces this controversial thesis.) As Taylor points out, all individual actions are in some way addressed towards other individuals and groups with whom they are involved. And since the meaning of any action is assigned within socially constructed horizons of meaning, other individuals to whom the actions are addressed can have something meaningful to say about the rightness or the wrongness of those actions. *The Ethics of Authenticity* (1992).

A similar constellation of arguments may be arrayed against the classically liberal position that politics is not the most suitable arena for individual and group value construction. The critique of this political position is that the classical liberal view of autonomy - that people live their lives in accordance with personal ideals - simply becomes a justification and an excuse for doing what one likes without the need for rational explanation for one's acts to others. The response of a modest naturalised account of freedom is that while there is an undeniably justifiable attachment to the belief that the ability of each person to live as she likes and to author her own law is a necessary condition of a 'free' society, it does not follow that every individual choice is morally or politically justifiable. See J Nedelsky 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in A Hutchinson & L Green (eds) *Law and the Community: The End of Individualism?* (1994) 219, 220-1, 223. Again the problem with a political culture committed to negative liberty (and value relativism) is that it tends to silence debate about values and real experiments in living. What all persons committed to flourishing ought to be saying is that while value 'choice' is a precondition of flourishing, not every choice is worthy of praise or is politically desirable. Put slightly differently, what this means for politics is that a belief in the correctness of a way of life does not end public debate about such choices.

These conclusions regarding the flaws of classical liberalism and other forms of liberalism support the following propositions for experimental constitutionalism, and the modest, naturalised account of flourishing upon which it rests. First, individual and group flourishing - and the pluralist society that inevitably follows - is a valid ideal. Second, given the socially constructed and shared nature of meaning, members of a given polity can have rational arguments about political ideals and the extent to which particular practices conform to the ideals to which a polity has committed itself in public documents like a constitution. Third, such arguments can sometimes make a difference in the way others see us, the way we see others, and the way we live together. Fourth, arguments alone may convince us to see the world differently. More often, however, it is action, and seeing how others construct their world, that makes for the most compelling of arguments. See H Arendt *The Human Condition* (1961). My understanding of action, however, is not one which requires mobilization of the entire citizenry around noble goals. It has the more modest aim of enabling all members of society to (a) have their basic needs met so that (b) they might engage in meaningful action that (c) would count as evidence for or against a way of living in the world and (d) at a minimum expand the range of conditioned choices available in a polity.

<sup>12</sup> For a jurisprudential account of a strong agency model consistent with a weak social democratic theory, see D Meyerson *Rights Limited* (1996); J Rawls *Political Liberalism* (1993).

<sup>13</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) ('*NCGLE I*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 (2) SA 1, 41 (CC) ('*NCGLE II*').

<sup>14</sup> For defenses of a social democratic state tied to ideal speech conditions and strong accounts of individual agency, see D Davis *Democracy and Deliberation* (2000); J Habermas *Between Facts and Norms: A Discourse Theory of Law and Democracy* (1997). The Court's dignity and socio-economic rights jurisprudence evinces a strong social democratic political theory - but one still unnecessarily pinned, in many places, to the metaphysical commitments of freedom and the unencumbered self that comes under attack in these pages. For a discussion of cases emphasizing self-actualization and self-governance, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

The preferred political theory sketched in these pages is largely on all fours with the theory of the self, society and polity adumbrated elsewhere in my work. See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson &

of commitments to individual freedom that we should make every effort to eschew. In *Ferreira*, that ‘freedom’ talk takes a form that may appear hard to gainsay:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.<sup>15</sup>

But ‘freedom’ talk by the Court can also possess a stern, rather moralizing tone that more readily reveals the flaws in the Court’s thinking. In *S v Jordan & Others*, the majority reasoned as follows:

If the public sees the recipient of reward as being ‘more to blame’ than the ‘client’, and a conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.<sup>16</sup>

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M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. The chief difference between the earlier account of ‘creole liberalism’ that Dennis Davis and I proposed, and the kind of liberalism articulated in these pages is the commitment to experimental constitutionalism and an embrace of flourishing that eschews freedom-talk.

<sup>15</sup> *Ferreira* (supra) at 1013-1014.

<sup>16</sup> *Jordan* (supra) at paras 16 - 17.

The majority's commitment to a very strong form of metaphysical autonomy – a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances -- fails dramatically those prostitutes who happen to be, in quite significant numbers, the victims of sexual trafficking. Sexual trafficking is about the sale and exploitation of women – of people who have little chance, and no choice, in life's wheel of fortune. The prostitution (coerced sex) that they are forced to engage in for fear of their lives cannot be charitably described as chosen.

One may think this characterisation of *Jordan's weltanschauung* – and its freedom talk -- unfair. I think the majority judgment speaks for itself:

It was accepted that they have a *choice*, but it was contended that the *choice* is limited or 'constrained'. Once it is accepted that [the criminalisation of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.<sup>17</sup>

How 'knowing' that stigma attaches to an event that takes place under conditions of compulsion makes a prostitute culpable remains unclear.<sup>18</sup> The minority, although sympathetic to the plight of sex-workers, offers more of the same freedom-talk:

Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes *knowingly* accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.<sup>19</sup>

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<sup>17</sup> Ibid at para 16.

<sup>18</sup> As Marius Pieterse notes, the same analysis could be pressed with respect to sex-workers generally. I emphasize the plight of sex-slaves here because it makes the Court's commitment to metaphysical autonomy that much more implausible. See also N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex?' (2004) 20 *SAJHR* 230.

<sup>19</sup> Ibid at paras 16 - 17.

The freedom-talk on display in *Ferreira* and *Jordan* reflect the basic metaphysical commitments of but three of the primary models for contemporary political theory.<sup>20</sup> It strikes me that none of the three theories do adequate justice to the nature of the decision-

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<sup>20</sup> A fifth position could be described as communitarian. Communitarian theory is not taken particularly seriously here because it no longer has much to say about the political pre-commitments of a liberal constitutional democracy. See, eg, M Sandel *Liberalism and the Limits of Justice* (1982); A MacIntyre *After Virtue* (1984); M Walzer *Spheres of Justice* (1983); C Taylor 'Atomism' *Philosophical Papers II* (1991); IM Young 'The Ideal of Community and the Politics of Difference' *Throwing Like a Girl and Other Essays* (1991). Communitarianism has receded as a significant critique of liberalism because, for the most part, liberal theory has absorbed the original Sandelian critique that liberalism – read Rawls – relies upon the fiction of (Economic Man) the person always capable of rationally ordering his or her preferences in a manner that maximizes utility. How liberalism, in the work of theorists such as Charles Larmore, John Rawls, Amy Gutmann, or Joshua Cohen, has absorbed the Sandelian critique, is described below. See C Larmore *Patterns of Moral Complexity* (1987); J Rawls *Political Liberalism* (1993); J Cohen *Rules of the Game* (1986); J Cohen & J Rogers *Associations and Democracy* (1995); J Cohen, A Fung and E Elgar (eds) *Constitutionalism, Democracy, and State Power: Promise and Performance* (1996); A Gutmann *Freedom of Association* (ed) (1998). It goes without saying then, that this thesis falls squarely within the liberal tradition, and especially a liberalism that has absorbed the contributions of communitarians such as Walzer, MacIntyre and Taylor. For more on how liberalism has absorbed the critiques levelled against it by communitarianism and postmodernism, see S Benhabib *Situating the Self* (1992) (Benhabib does not argue from within the liberal tradition, but, rather, as a feminist who grounds her ethical theory in universal principles of judgment.)

Against the classical liberal, the welfare state liberal, the social democratic liberal, communitarians pit an encumbered theory of the self. In this fifth account, individuals are born into existing political communities, and have their identities or selves created or conditioned by a vast network of social, historical, political, religious, educational and linguistic practices. The primary, and most important, difference between the liberal politics of flourishing and experimental constitutionalism defended here and the communitarian account is how and where they locate the self in relation to the community or communities out of which the self's primary understandings are constructed. My liberal account recognizes the sources of the self as heterogeneous - that the self and its sources are made up of linguistic, religious, social, class, racial, ethnic, gender, national and political groupings which may overlap, but which are never identical, and which often conflict with one another. Communitarians, on the other hand, tend to privilege the political community over other communities, underplay existing and historical conflicts between the various communities that source the self, or entirely elide the difference between the polity and other communities that make-up a society. For example, George Fletcher writes:

In a patriotic *society*, where all individuals share a common past and purpose, each can identify with others and find in them an equal partner in a common cause. The rooting of the *self* in a *culture* of loyalty enables individuals to grasp the humanity of their fellow *citizens* and to treat them as bearers of equal rights.'

*Loyalty* (1993) 21. Fletcher's prose is a perfect example of what might be called the communitarian shuffle: the easy move back and forth between discussions about society and polity that obscures the fact that the two are not coextensive - that polities contain multiple societies and cultures, and that cultures and societies are often rooted in a variety of different states.

The difference between the two positions is important. The communitarian privileging of the state over other communities within the state - or in some cases conflating the state and those communities - has significant repercussions for individual and group flourishing, as well as the construction of the self. Once shared pasts, shared purposes and common causes are assumed, the state is further free to assume that important differences between its citizens and the smaller communities of which they are a part do not exist. Once pluralism is no longer a concern, there is no reason for individual and group flourishing to be - and the state is truly free to impose a more and more homogenous and standardized way of life. Our strong democratic experimentalist, on the other hand, retains her commitment to pluralism. The role of the state remains the mediation of disputes between different communities and different visions of the good life, where possible, the resolution through rational discourse of disputes between communities with different visions of the good life, and at all times, the roughly equal support for different communities with different visions of the good life.

making processes of citizens in a constitutional democracy.<sup>21</sup> In short, citizens do not act in light of any of the models of agency or freedom upon which the Court's three dominant theories are predicated.

The three models of political theory ascribed to the Court rest upon a belief that the various rights and freedoms enshrined in the Final Constitution should enable individuals to exercise relatively unfettered control over decisions about the intimate relationships and the various practices deemed critical to their self-understanding. However, individual autonomy as a foundation for constitutional theory overemphasizes dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self-consciousness, is a function of a complex set of narratives over which we exercise little in the way of (self) control. As I shall suggest below, the involuntary and *arational* nature of identity formation – at the level of both the individual and the social -- requires a constitutional theory that supplants the model of a rational individual moral agent which undergirds much of our current jurisprudence with a vision of the self that is more appropriately located within and determined by the associations to which we all belong.

In Chapter 4, I show how a fourth model of political theory – nascent in our Court's dignity jurisprudence – better fits both our conception of the self and a more generally accepted goal of flourishing. Flourishing recognizes simultaneously the socially constructed and contingent nature of the individual, the limited utility of freedom as a description of individual behaviour, and the highly circumscribed nature of collective rationality.<sup>22</sup>

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<sup>21</sup> The constitutional theories adumbrated by Davis and Habermas are perhaps closest to the mark. See D Davis *Democracy and Deliberation* (2000); J Habermas *Between Facts and Norms: A Discourse Theory of Law and Democracy* (1997). In terms of outcomes there may be precious little to choose between this last set of constitutional theories and a constitutional theory which takes the absence of freedom and the presence of arationality seriously. That said, the kind of limits on individual autonomy described herein must place some meaningful limits on reasoned political discourse – deliberation – and ground a more modest set of suggestions as to how to supplant a commitment to rationality with a cautious experimentalism in constitutional adjudication.

<sup>22</sup> See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For a similar set of views, offered from a very different philosophical paradigm, see K van Marle 'Law's Time, Particularity and Slowness' (2003) 19 *SAJHR* 239 (Though she locates herself in continental schools of philosophy, Van Marle advocates a view of law that emphasizes its evolutionary qualities in a manner not entirely dissimilar from the views defended here. She

Dignity, as both constitutive of and the condition for flourishing, is not simply a constellation of negative duties owed by the state to each human subject, or a set of positive entitlements that can be claimed by each member of the polity. Dignity is that which binds us together as a community, and it occurs only under conditions of mutual recognition. Moreover, such mutual recognition is not merely formal. The Court in *Khosa* notes that the Final Constitution commits us to an understanding of dignity in which

wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.<sup>23</sup>

How then to comprehend dignity as a collective concern? What the Court wishes us to understand is that for dignity to be meaningful in South Africa, the political community *as a whole* must provide that basket of goods – including such primary goods as civil and political rights – which each member of the community requires in order to flourish. This conception of dignity and of flourishing possesses striking similarities to Amartya Sen's politics of capability. Moreover, the virtue of capabilities theory – so far as my argument is concerned – is that one can accept the Constitutional Court's link between dignity and the need for individual freedom from state intervention without accepting the proposition that the conditions for dignity and flourishing *only* demand individual freedom from state intervention. For example, Amartya Sen ties his notion of 'development as freedom' to the provision of a basic basket of goods that enable human beings to develop those 'capabilities' necessary for each individual to achieve those ends that each has reason to value.<sup>24</sup> Sen

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shows how greater attentiveness to the objects and the subjects of the law promotes a deeper understanding of the requirements of justice.)

<sup>23</sup> *Khosa* (supra) at para 74. The Court's language echoes Rawls' description of a Kantian 'realm of ends' in which

everyone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized.

J Rawls *Lectures on the History of Moral Philosophy* (2001) 209. See also S Doctor 'Dignity, Criminal Law and the Bill of Rights' (2004) 121 *SALJ* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')

<sup>24</sup> See A Sen *Development as Freedom* (1999) ('*Development*'); A Sen *Inequality Re-examined* (1992).

contends that dignity and freedom and equality, rightly understood, are meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good.<sup>25</sup> What these covalent values do require is a level of *material* support (eg, food, water, health, housing) and *immaterial* support (eg, civil liberties such as rights to fair trials, equality before the law, expression, association) that enable individuals to pursue a meaningful and comprehensive vision of the good life – as those individuals understand it.<sup>26</sup> Put another way, these covalent values should (describe and) promote the political institutions and the material conditions required for individual flourishing.

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<sup>25</sup> Sen's relationship to classical schools of political philosophy is far too subtle and complicated to be explicated meaningfully here. However, a précis of his positions may suggest why Sen, of all contemporary theorists, offers an account of dignity, equality and freedom that provides the best fit with my own take on these 'three conjoined, reciprocal and covalent values' and my ultimate commitment to flourishing. *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41. Sen rejects Rawls' (Kantian and deontological) contention in *A Theory of Justice* (1972) – and to a lesser degree in *Political Liberalism* (1993) – that there are certain primary goods – civil liberties such as expression, assembly, the franchise – that cannot be compromised in any way.' Sen *Development* (supra) at 64. Sen has even less time for utilitarian frameworks that make the greatest good for the greatest number the measure of justice. In addition to offering the standard criticisms of utilitarianism – its inability to arrive at an acceptable metric for interpersonal comparisons of happiness, its general indifference to radical inequality in the distribution of happiness, and its neglect of rights, freedoms and other non-utility concerns – Sen inveighs against the general inclination – especially amongst economists – to measure utility or happiness in terms of wealth (eg, GNP) and wealth in terms of income (per capita). Neither wealth nor income provide adequate information about the well-being and the substantive freedom of individuals. Both liberals and utilitarians – as we have just described them – fail to take account of how individual differences – in physical ability or disability, in environment, in social practices, in family structure – create significant asymmetries in the manner in which primary goods and incomes can be exploited. Ibid at 73.

Sen's theory of distributive justice accounts for how the heterogeneity amongst individuals (both within societies and across societies) shapes the meaning of primary goods *and* incomes. For example, the meaning of a primary political good like freedom of assembly will have demonstrably different meanings for a person who is ambulatory and for a person who is not ambulatory, but housebound. Similarly, the utility of an income of R200 000 will have demonstrably different value for a person who is ambulatory and for a person who is not ambulatory, but housebound. At a minimum, says Sen, quoting Adam Smith, our primary concern ought to be providing individuals with those necessities of life that will, in fact, give them "the ability to appear in public without shame". Ibid at 73 quoting A Smith *The Wealth of Nations* (1776)(ed RH Campbell and AS Skinner 1976) 469 – 471 (By "necessities", Smith means 'not only the commodities which are indispensably necessary for the support of life, but what ever the customs of the country renders it indecent for creditable people, even the lowest order, to be without.') That, in just a few well-chosen words, sounds very much like South African discourse on dignity.

Sen thus shifts our focus to the actual 'freedom generated by commodities', and away from 'commodities seen on their own,' to the actual freedom generated by civil liberties, and away from formal constitutional rights viewed in the abstract. Ibid at 74. Sen argues that the best measure of equality or freedom or dignity is the ability of individuals to *convert* such primary goods as *income* or *civil liberties* into the capability 'to choose a life one has reason to value' – or in simpler terms, the ability to pursue one's own ends. Ibid at 75. That is, in sum, how I understand flourishing. The virtue of Sen's approach is that it recognizes (a) the heterogeneity of capacity that people possess by virtue of biology, custom, or class; (b) the heterogeneity of critical functions – from nourishment to civic participation – that may be required to live a life one has reason to value; and (c) the heterogeneity of capabilities that people will possess – different combinations of more basic functions – which will, in turn, enable them to pursue different 'lifestyles' or different visions of the good

<sup>26</sup> Sen *Development* (supra) at 75. See also D Cornell *Defending Ideals: War, Democracy, and Political Struggle* (2004).

## 2. How Rethinking Our Understanding of the Self and Consciousness Services a Better Constitutional Theory

In this section, I want to suggest, briefly, why the metaphysical commitments of the Constitutional Court in cases such as *Ferreira* and *Jordan* are incorrect, and to adumbrate an account of ‘freedom’ that better squares with what we know about the self and consciousness.

### a. A Theory of the Self: Flourishing, Not Freedom

Let me begin with four short stories.

On my way to 23 Forbes Street, Fellside, Johannesburg, in May 2006, I had cause to reflect upon various strands of the argument made in this work. The fact that I had an opportunity to engage in some form of reflective activity with regard to this project is hardly remarkable in itself. What is remarkable is that all this reflective activity occurred while I drove my car from 82 Homestead Road, Glen Atholl, Johannesburg to the address above – and that as I pulled up to the house in Fellside, I realized that I had no recollection of actually driving the 6 km between the two residences. I was too busy thinking. If I was too busy thinking to be aware of the drive, then who, you might well wonder, was driving the car?

Later that same day, as I drove home from the movies, I turned off of Glenhove Road in Houghton and on to the M1 heading north towards Glen Atholl and Pretoria. There was only one problem with this chain of events. I had not wanted to take this turn on to the highway. I had wanted to go to my home in Fellside. And yet, there I was, headed to my old flat in Glen Atholl or perhaps my office north of the Juskei. Perhaps I was thinking about the movie I’d just seen. I don’t recall. My partner, driving in the car behind me, was startled to see me peel off in an entirely unexpected direction. If we are certain that I was driving the car – and let’s assume that we are -- then how did this error occur?

For if we are certain that that I was driving the car, then I am equally certain that the ‘decision’ to turn on to the highway was not a decision of which I was consciously aware.

Perhaps we have all had similar experiences while driving a car. Take a more startling account of my ‘self’ in action. Approximately 10 years ago, I telephoned a friend in New York from my office in Johannesburg. The call had been on my list of things to do all week. A normal event in the life of an émigré. Approximately 20 minutes into the call, I had the sense that my friend Adam was preoccupied – his responses seemed both canned and uneasy. I had not been well recently, and I soon suspected that problem lay, not with Adam, but with me. And so I asked Adam, ‘Have we had this conversation before?’ As it turns out, we had. Adam said that I had called him the day before and that we had covered very similar terrain in 45 minutes of conversation.

Let’s end this set of stories with something more mundane. Equipped with my full set of faculties, and quite conscious of the orators before me in the Moot Court room at the University of Pretoria, I banged my gavel down to signal the end of oral argument in the matter before me. Nothing strange here. Or so it seems. In addition to my role as moot court judge, however, I was also participating in a psychology experiment designed to explore the relationship between conscious awareness, neuronal impulses and physical action. As it turns out, approximately 0.6 seconds prior to my conscious awareness that I was about to bang the gavel to signal the end of oral argument – and 0.8 seconds before the event itself -- a set of neuronal impulses in my brain registered my decision to bring argument to a close.

With the exception, perhaps, of the phone call to my friend Adam in New York, the experiences described above all fall within the domain of the normal. In the first two instances, we share an experience of our ‘mind’ being somewhere else – or more accurately, in the first case, of our mind being, at a minimum, devoted to discrete tasks, and in the second case, of being so devoted to one task, that we make an error with respect to another. Even the third experience can be made to seem more commonplace if we add a condition: the caller suffered from parasomnia (asleep yet capable of habitual physical responses), had been under anesthesia or had been inebriated. Although the fourth experience is not really

an experience we would normally share unless we were all participants in various psychology experiments, those of us who have played sports that require quick responses are familiar with being aware of our 'reaction' only after we have already initiated – if not completed -- the response. This delay, between the neuronal impulses, conscious awareness and, ultimately, physical action, reflects a partial inversion of how we think traditionally of the relationship between consciousness and freedom.<sup>27</sup> Indeed, the purpose of all four 'stories' is prepare the ground for a theory of self, consciousness and free will that runs counter to traditional accounts of these same three phenomena.

The *traditional* view of the self, consciousness and free will is one in which the individual actor surveys her options, makes a choice and then wills that choice into being. The four stories that introduce this section are designed to shift our understanding of these three phenomena. They are meant to challenge an array of beliefs associated with a traditional conceptions of the self, consciousness and free will.

The story of the gavel – retold from the perspective of neuroscience – is that non-conscious brain events that result in a particular physical response proceed (and determine) conscious awareness of the 'decision' to respond in a particular manner. If consciousness of our action matters – that is, if it rises to the level of requiring attention -- then we become

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<sup>27</sup> As I discuss below in Chapter 2, the work of empirical psychologists Benjamin Libet and W Grey Walters has provided a well-established framework for understanding delayed conscious awareness of 'unconsciously' initiated action. See, eg, B Libet 'The Experimental Evidence for Subjective Referral of Evidence Backward in Time: Reply to PS Churchland' (1981) 48 *Philosophy of Science* 182; B Libet et al 'Time of Conscious Intention to Act in Relation to the Onset of Other Cerebral Activities (Readiness Potential): The Unconscious Initiation of a Freely Voluntary Act' (1983) 106 *Brain* 623; WG Walters' *Presentation to the Osler Society* (1963) as reported in D Dennett *Consciousness Explained* (1991) 167 – 171. I am indebted to John Ostrovick of the University of the Witwatersrand for sharing his work on this subject with me and for his explanation of the findings. See J Ostrovick 'The Timing Experiments of Libet and Walters' (2004)(Unpublished manuscript on file with author). Libet's experiments demonstrate that a readiness potential – 'a change in the voltage in the brain' -- occurs 0.6 seconds before what we describe commonly as a conscious awareness and 0.8 seconds before action. Only conscious awareness prior to readiness potential would demonstrate consciously willed action. Again, no empirical evidence exists for such awareness. WG Walters' experiments bolster conclusions about non-conscious determination of action and the importance of maintaining an apparent causal connection between awareness and action. Walter's subjects were brain surgery patients asked to press a button to change a viewing-slide at any time. The button, however, was not connected to the slide projector. Instead, the slide-projector was rotated by an amplification of the readiness potential signal from the patient's brain. Walters' subjects reported the experience an unsettling form of precognition – on the part of the projector. That is, they found that the slide projector had rotated the slides prior to their conscious intention to press the button. Indeed, the significant time gap between non-conscious readiness potential, slide change and intent-consciousness was sufficiently large to cause the subjects to report that they were concerned that 'they might, accidentally, advance the slide twice.' See Ostrovick (supra) at 8. See also WG Walters (supra) at 171.

dimly aware of the content of the unwilling intention and then – wham! – hot on the heels of consciousness – assuming we have it -- comes the action itself.<sup>28</sup>

The story of the unconscious driver – an instance in which awareness seems unnecessary -- is meant to draw our attention to the multiple narratives or selves that make up the individual – or, more precisely, the multiple processes that we ‘individuals’ engage in co-temporaneously, only a few of which command our awareness or rise to the level of consciousness. And yet, despite our lack of consciousness (awareness), or perhaps, more precisely, *because of this lack of awareness*, we are able to act all the same.<sup>29</sup> I drove that car though I had no awareness of my actions and possess no memory of the experience.

The story of the errant driver also draws our attention to multiple selves engaged in multiple processes co-temporaneously – but it also signals a purpose for consciousness: error-correction. My consciousness or awareness may have initially been focussed on the movie I had just seen. But confronted with a situation that demanded attention – namely my turning on to the highway and driving in the wrong direction – that which we call ‘consciousness’ shifted ‘its’ object of attention to the road before me. Consciousness – so described -- forms part of a complex set of feedback mechanisms that enable us to navigate through the world in relative safety. The sensation of singularity, as we shall see, emerges, quite incredibly, from a neurological system that is (1) primarily unconscious, (2) distributed throughout the brain (and body), (3) engaged in multiple parallel processes, and, (4) of enormous, highly under-utilized capacity.<sup>30</sup> The purpose of consciousness on this account is

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<sup>28</sup> Some readers might want to know how would one explain the fact that while a baseball travels the 60 feet and 6 inches from pitcher to hitter in 0.45 seconds, Libet’s experiments seem to reflect a much more generous period of 0.8 seconds between readiness potential and action. The explanation is agent-priming. Constant habituation enables actors to shorten dramatically the period between non-conscious intention and action.

<sup>29</sup> S Dehaene & L Naccache ‘Towards a Cognitive Neuroscience of Consciousness: Basic Evidence and a Workspace Framework’ in S Dehaene (ed) *Cognitive Neuroscience of Consciousness* (2001) 1, 13:

High level processes may operate unconsciously, as long as they are associated with functional neural pathways either established by evolution, laid down during development or automatized by learning. Hence there is no systematic relationship between the objective complexity of a computation and the possibility of it proceeding unconsciously. For instance, face processing, word reading, and postural control all require complex computations, yet there is considerable evidence that they can proceed without attention based upon specialized neural subsystems. Conversely, computationally trivial but non-automatized operations, such as solving 21 -8, require conscious effort.

<sup>30</sup> See BJ Baars ‘How Does a Serial, Integrated and Very Limited Stream of Consciousness Emerge from a Nervous System that is Mostly Unconscious, Distributed, Parallel and of Enormous Capacity’ in GR Bock and J Marsh (eds) *Experimental and Theoretical Studies of Consciousness* (1993) 282. See also BJ Baars *In the Theatre of*

three-fold: (a) 'durable and explicit information maintenance' (b) 'novel combinations of operations' and (c) 'intentional behavior'.<sup>31</sup>

The story of the repeated phone call is meant to challenge our construction of a self that is unitary, integrated and continuous over time. The gap in consciousness or self that 'I' experienced with respect to the two phone calls is meant to emphasize the more daily and commonplace place 'gappiness' of consciousness and the self. Indeed, the self is really no more than the subject of experiences that are single mental things (sesmets). And if you prefer metaphor, these sesmets that constitute the self are like pearls on a string.<sup>32</sup>

I prefer a somewhat different metaphor: What holds these selves together are a densely woven set of narratives. For me, the dominant narratives cover a diverse domain of roles: as a male, as an academic, as an English speaker, as an eater, as a sexual being, as a white permanent resident of South Africa, as an American citizen, as a golfer, a sleeper, as a person with a permanent disability, as a Jew, as a friend of Theunis, as a son of Lenore, as a listener, as a speaker, as a New Yorker, as bald, as a life-partner of Courtenay, as a writer, as the Editor-in-Chief of *Constitutional Law of South Africa*. The list of narratives is not infinite – but it is almost as long and as varied as those found in any life. Indeed, you could say that 'I' am made up of lots of narratives selves. What we call 'the self', the 'I', or the 'ego' then is perhaps better described by Daniel Dennett as a centre of narrative gravity.<sup>33</sup> A centre of narrative gravity is simply a self-representation which holds together and organizes information, various storylines and dispositional states that make up a sense of 'me'. This centre of narrative gravity is unique – the variety of narratives that make up 'me' is different in a sufficiently large number of respects to allow a person to differentiate my 'self' from any other 'self'. It is relatively stable – though my narratives and dispositional states are always changing, my self-representations enable me to see my 'self' as remaining relatively

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*Consciousness: The Workspace of the Mind* (1997) 142; JB Newman, BJ Baars and SB Cho 'A Neural Global Workspace Model for Conscious Attention' (1997) 10 *Neural Networks* 1195.

<sup>31</sup> S Dehaene & L Naccache 'Towards a Cognitive Neuroscience of Consciousness: Basic Evidence and a Workspace Framework' in S Dehaene (eds) *Cognitive Neuroscience of Consciousness* (2001) 1, 9-12.

<sup>32</sup> See G Strawson 'The Self' (1997) 4 *Journal of Consciousness Studies* 405.

<sup>33</sup> See D Dennett *Consciousness Explained* (1991).

consistent over time.<sup>34</sup> It is socially and physically determined – the self, and its various narratives, is thoroughly a function of physical capacities and social practices over which I have little control or choice.<sup>35</sup> But remember, like a necklace of pearls, this self is delicate. The connection between the self that places a phone call on Monday can be severed from the self that places a phone call on Tuesday.<sup>36</sup>

This work, as the title suggests, is not an exercise in the analytic philosophy of mind or a scientific study of consciousness. The purpose of the account of consciousness and the self that follows in these pages is to shed light upon – and change the way we understand -- such basic concepts in our constitutional lexicon as ‘free will’, ‘individual moral agent’ and ‘political freedom’.<sup>37</sup> As we shall see, the real upshot of view of the self propounded here is that while we may possess far less ‘freedom’ – of all kinds -- than we commonly suppose,<sup>38</sup> *we are still capable of ‘flourishing’ in all the ways that genuinely matter to us.*<sup>39</sup>

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<sup>34</sup> Individuals who have suffered through accidents or illnesses often experience a radical break in terms the self. A sense of self ‘before’ and a sense of self ‘after’. Such is the difference between these different self-representations that an individual will often say ‘I am not the same person’. Of course, they are correct. The different set of dispositions makes them a different person. Many of us will have a similar, if somewhat less stark, sense of otherness when we think back upon our childhood.

<sup>35</sup> See R Dawkins *The Selfish Gene* (1976); R Dawkins *The Extended Phenotype* (1982). Dawkins provides useful accounts of how patterns of learned behaviour – memes -- replicate themselves over time through individuals, groups and societies.

<sup>36</sup> The theory of self developed in these pages does not assume a unitary supervisory ‘self’ over time. See D Parfit *Reasons and Persons* (1984); D Parfit ‘Divided Minds and the Nature of Persons’ in C Blackmore and S Greenfield (eds) *Mindwaves* (1987) 19 – 26. For the classic statement of such a disaggregated view of self, see D Hume *A Treatise of Human Nature* (1739) (‘[W]hen I enter most intimately into what I call *myself*, I always stumble upon some particular perception or other, of heat or cold, light or shade, love or hatred, pain or pleasure. I can never catch myself at any time without a perception and can never observe anything but the perception.’)

<sup>37</sup> At least part of the reason most of us continue to adhere to a conception of free will is that we view human behaviour in terms of ‘agents’ and other phenomena in terms of ‘causation’. The former concept is a fundamentally ethical precept. It enables us to attach responsibility for actions to particular individuals and groups. The latter concept is a physical precept. It enables us to discuss and analyze regularities. The refusal to see human behaviour in terms of determined cause and determined effect is the only way in which a full-blown theory of free-will gains any purchase. See JCC Smart ‘Free Will, Praise and Blame’ (1961) 70 *Mind* 291. These basic errors do not mean that the notions of praise and blame that attach to human action serve no purpose. It is simply not the purpose that we most readily suppose. They are primarily mechanisms for social control. Reward reinforces the inclination towards certain behaviour. Punishment creates disincentives. The efficacy of reward and punishment is not contingent upon the existence of free will.

<sup>38</sup> Indeed, the argument, as it is developed in Chapter 2, is not just about the meaning of ‘freedom’ and the meaning of ‘consciousness’. Rather the argument is that the mistakes we make about the notion of ‘consciousness’ share a strong family resemblance to the mistakes we make about ‘freedom’. See D Dennett *Sweet Dreams: Philosophical Obstacles to a Science of Consciousness* (2005). To correct a misunderstanding of the one may lead to a correction in the misunderstanding of the other.

<sup>39</sup> Flourishing has, to my mind, always been at the heart of contemporary liberal thought. It probably owes its current revival in the philosophical literature to the neo-Aristotelian turn of Martha Nussbaum’s writings. See, eg, M Nussbaum *Women and Human Development* (1999). The notion of flourishing I shall defend in these pages

## b. A Theory of the Social: Constraint, Criticism and Change

It should be evident – by now – that this project is animated by two apparently disparate lines of thought. The first set of thoughts address questions about what it is to be a person, why we have consciousness, how a self is constructed, and the extent to which that self, so constructed, exercises agency. The second set of thoughts address the kind of constitutional politics that I believe to be consistent with the view of the self adumbrated in these pages and the basic law to which we have committed ourselves in the Final Constitution.

What links the two lines of thought is a reconceptualization of ‘freedom’. The modest, naturalized account of freedom offered here first takes cognisance of the extent of the limits of individual agency. It then recasts freedom-talk in terms of the less metaphysically problematic concept of flourishing. (The reason for this move is simple: the standard account of freedom is either wrong or, in its crassest form, tends to obscure more than it enlightens.) Having supplanted freedom-talk with flourishing, this thesis then explains how individual flourishing and group flourishing occur. More importantly, it explains how individuals and groups so thoroughly conditioned and determined by the world can alter the ends they pursue – as well as the means for pursuing them -- through different kinds of feedback mechanisms.<sup>40</sup>

However, there is a second reason to recast ‘freedom’ in terms of ‘flourishing’: the mediating role that social formations play in the construction of all meaning. It is trite to note that outside society and without language, individual flourishing is a largely meaningless

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is, perhaps, closest in form to the politics of capability expounded by Amartya Sen. Sen ties his notion of ‘development as freedom’ to the provision of a basic basket of goods – both real and figurative -- that enable human beings to develop those ‘capabilities’ necessary for each individual to achieve those ends that each has reason to value. See A Sen *Development as Freedom* (1999) A Sen *Inequality Re-examined* (1992). Sen contends that the conditions for flourishing – an open and democratic society based upon dignity equality and freedom (in the language of the Final Constitution -- are, rightly understood, meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good. What these covalent values do require – as conditions for flourishing -- is a level of material support (eg, food) and immaterial support (eg, civil liberties) that enable individuals to pursue a meaningful and comprehensive vision of the good life – as they understand it. Sen *Development* (supra) at 75.

<sup>40</sup> See D Dennett *Freedom Evolves* (2003).

notion. It is only in light of the various practices, forms of life, or language games that social groups provide that we become anything that remotely approximates what we understand to be human.

The constitutive nature of our attachments and practices forces us to attend to another overlooked feature of social life. We often speak of the social practices, endowments and associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of social life generally. As Michael Walzer has convincingly argued, there is a 'radical givenness' to our social world and the practices that make it up.<sup>41</sup> What he means, in short, is that most of the practices that make up our social life are involuntary. We don't choose our family. We generally don't choose our race or religion or ethnicity or nationality or class or citizenship. Moreover, even when we appear to have the space to exercise choice, we rarely create the practices available to us. The vast majority of our practices and forms of life are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create some new practice (and let us not be understood to underestimate the value of such overcoming and creativity), the very structure and style of the practice is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. So gay marriages may be truly new – but marriage itself is a publicly recognized and sanctioned institution for carrying on intimate or familial relationships. Even in times of radical transformation, reiteration and mimicry of existing social practices is the norm.<sup>42</sup>

These 'constraints' on our ways of being in the world – I prefer the word 'endowments' -- does not mean that genuine change within small associations or large social formations is impossible or undesirable. It does mean, however, that we must take some

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<sup>41</sup> M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67.

<sup>42</sup> A revolution of the nature of the French Revolution ostensibly returns to the direct democracy of Athens. A revolution along the lines of the Cambodian revolution may look to traditional forms of communal or agricultural organization. Less radical revolutions, like the South African revolution, reiterate the modern idiom of a constitutional democracy committed to universal human rights.

care in offering an account of how change occurs and in even greater circumspection before we proffer prescriptions for the mechanisms that would facilitate 'optimal' forms of change.

I have suggested – in the theory of the self – that individual behaviour, conscious and unconscious, is best understood in terms of 'trial and error'. From simple to complex actions, individuals use their cognitive modalities to test their environment, and to come up with the best possible solutions to the problem with which they are confronted. Because I also argue that much of what we do as individuals is not conscious, I am inclined to contend, as do Donald Campbell, David Hull, Jean Russo and others, that 'a blind-variation-and selection-retention process is fundamental to all inductive achievements, to all genuine increases in fit of system to environment.'<sup>43</sup>

This account of how trial and error in both cognitive and non-cognitive processes may lead to greater adaptive fit may sound a great deal like a form of evolutionary epistemology. It is. The attraction of this account is that it simultaneously explains the importance (ineluctability) of constraint and the mechanisms of change.<sup>44</sup> Moreover, by attending to the mechanisms of change in blind-variation-and selection-retention processes, it makes it possible to suggest how 'experiments' (trials with their successes and their failures) ought to take place in the formation of social policy by political actors. (That prescriptive endeavor will be reflected in my account of experimental constitutionalism.) Blind-variation-and selection-retention processes – or universal selection theory – fits my previous account of the constitutive nature of the self and the social, because it does not require – indeed it eschews – undetermined (or overtly 'free') accounts of how change occurs both at the level of the individual and the social.<sup>45</sup> My account relies instead on descriptions of social institutions that are, in the main, the result of 'human action, but not human design.'<sup>46</sup>

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<sup>43</sup> See D Campbell 'Blind Variation and Selection Retention in Creative Thought as in Other Knowledge Processes' (1960) 67 *Psychological Review* 380.

<sup>44</sup> See KM Kim 'DT Campbell's Social Epistemology of Science: Vicarious Selection, Epistemological Fallibilism, and Sociology of Scientific Validity' (1997) 3 *Evolution and Cognition* 75; KM Kim 'Nested Hierarchies of Vicarious Selectors' in C Heyes and D Hull (eds) *Selection Theory and Social Construction* (2001) 101.

<sup>45</sup> G Cziko 'Universal Selection Theory and the Complementarity of Different Types of Blind Variation and Selective Retention' in C Heyes and D Hull (eds) *Selection Theory and Social Construction* (2001) 15, 18. See also D Campbell 'Evolutionary Epistemology' in PA Schlipp (ed) *The Philosophy of Karl Popper* (1974) 421.

<sup>46</sup> FA Hayek 'The Use of Knowledge in Society' (1945) 35 (4) *American Economic Review* 519, 520. See also FA Hayek 'The Results of Human Action, but not of Human Design' *Studies in Philosophy, Politics and Economics* (1967) 96, 97.

Moreover, the explanatory power of theories of blind-variation-and selection-retention processes are not limited to biology and the explanatory power of theories of spontaneous order are not limited to markets. Were they so limited, then we might have reason to be skeptical about their application to individual cognitive processes, social processes and political processes. But these explanation fit what we know from immunology about the production of effective antibodies,<sup>47</sup> from neuroscience about how the brain ‘selects’ some neuronal-synaptic connections over others,<sup>48</sup> and from psychology about how creative persons are able to produce novel, diverse and often more fruitful ideas.<sup>49</sup>

How does this social epistemology fit with our previous account of the involuntariness of associations and the constraints that they impose on individual and group identity? First, our social practices provide stores of collective wisdom about what works and what doesn’t work. They often constitute large playing fields against which experiments in life are played out – often unconsciously, quite often without central planning. Moreover, they offer systems of feedback that provide significant amounts of information about forms of behaviour that no longer work or new forms of behaviour that work ‘better’. Second, even if the capacity for critique of our practices imminent in our practices is limited, it does exist. The space for critique in our social practices – in science, in religion, in law – expands our individual and collective capacity for critical engagement with our actions and our ends. Third, the grander the collective exercise in experimentation is – that is, the larger and more varied our critical community is – the more varied our individual lives are likely to be. The more varied our individual lives are, the more likely we are to find successful models for what it is to be fully human.

Suppressing for the moment how we go about achieving and measuring such success,<sup>50</sup> what I hope to have shown in this brief introduction to a theory of the social is

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<sup>47</sup> See G Cziko *Without Miracles: Universal Selection Theory and the Second Darwinian Revolution* (1995).

<sup>48</sup> WH Calvin ‘The Brain as Darwin Machine’ (1987) 330 *Nature* 33.

<sup>49</sup> HJ Eysenck ‘Creativity and Personality: Suggestions for a Theory’ (1993) 4 *Psychological Inquiry* 147.

<sup>50</sup> The notion of an experimenting society and the social science that supports such a notion is developed at length in Chapter 3. It is largely parasitic on Donald Campbell’s efforts to describe the role of the social scientist in constructing assessment criteria that would make the various experiments in an ‘experimenting society’ meaningful. See D Campbell & MJ Russo *Social Experimentation* (1999). These principles are also

that we can live within communities that determine the greater part of the meaning we make, and still remain – as a descriptive matter -- committed to the possibility of change (for the better) within those communities. The next step in my argument is this: if it is true (a) that the more successful models of being in the world that exist, the more likely it is that we will possess a greater range of possibilities for our lived existence, then (b) in many states, and contemporary South Africa is one, only with the intervention of the state will most individuals will come to possess the enhanced material conditions necessary for living out those possibilities.

c. A Theory of the Constitutional: Experimentalism & Flourishing

In Chapter 4, this thesis then goes on to explain how a commitment to experimentalism in the political domain, when married to a robust conception of basic entitlements and citizenship, services human flourishing. But let me make clear – again -- why human flourishing is the goal of the state – not freedom. The self -- as I have depicted it – is a ‘centre of narrative gravity’. It is a place which multiple narratives, not primarily spun by the individual, call home. Not only is the individual not free to choose these narratives, she is generally not ‘free’ – in the common-sense usage of the term -- to discard old storylines and to create, out of whole cloth, new storylines. The physical and the social determination of individual action occurs both at the level of individual responses to immediate stimuli and at the level at which we tend to attribute meaning to an individual life. The social – practices, forms of life, associations – operates within the same set of constraints. However, as we have also seen, neither the self nor the social is – despite the absence of freedom – incapable of change that enhances the meaning of life.

The ability of individuals and groups to give life meaning – in a variety of different ways – is what I mean by flourishing. (‘Flourishing’ in these pages possesses a decidedly liberal – as opposed to neo-Aristotelian – denotation.) In Chapter 4 of this work, I defend the thesis that entitlements and institutions must be set up in such a way as to enhance

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consistent with the notions of legal and political institutional design expounded by Michael Dorf in his work on experimental constitutionalism. See, eg, M Dorf ‘Legal Indeterminism and Institutional Design’ (2004) 78 *New York University L Rev* 875; M Dorf and C Sabel ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Columbia LR* 267.

human flourishing. That will generally mean allowing people to continue to be what they already are -- along with provision of the material resources necessary to sustain such ways of being in the world. The South African Constitution is designed to do just that. However, flourishing must also require the creation of an array of institutions that enable individuals and groups to undertake 'experiments in life' -- along with the provision of the material resources necessary to sustain such experiments. These then are the two poles of our account of the self, the social and the constitutional: the conservative and the transformative. On the one hand, this project recognizes how deeply entrenched are our individual sub-routines, our social practices and our political commitments. The meaning of these routines, practices and commitments *makes* us. At the same time, selves, practices and politics are capable of change. We are capable of error correction. We can change our ways of being to meet, instrumentally, changed circumstances in the world. We can, though not without great difficulty, change errant ways of being in the world.

Experimental constitutionalism dovetails with a very modest, naturalized account of the freedom (read flourishing) because both accounts (1) take the radical givenness of existing constitutive attachments seriously; (2) recognize the boundedness of individual and collective rationality; and (3) describe various kinds of feedback mechanisms that allow for error correction. At the level of the state, experimental constitutionalism enables more citizens to see what 'works' and what doesn't. It goes without saying that experimentalism is no cure for systemic failures. Aggregate individual behaviour – and a failure of political will – can lead to outcomes that we all know to be disastrous: for example, increasing levels of fossil fuel consumption may lead to the destruction of the very environment in which most individuals live. It also goes without saying that experimental constitutionalism may not yield ways of being in the world that meaningfully enhance human flourishing.

And yet, what choice do we have but to give experimental constitutionalism a shot. Its opposite numbers are on ready display throughout the world: dictatorships continue to plague Africa and Asia; crony capitalist states have begun to proliferate in both the developed world and the developing world; theocracies have an unhealthy hold on societies across the globe. In Chapter 4, I describe the rudiments of a social democratic state committed to experimental constitutionalism both because I believe it to be the best political

model available to South Africa and because I believe the philosophical commitments that underlie experimental constitutionalism are consistent with the most fundamental principles of our basic law.

After laying out the principles of experimental constitutionalism, I then look at how this model of constitutional politics might alter a range of constitutional doctrines and the manner in which a number of institutions operate. For those who cannot wait to see how this story ends, Chapter 4, after setting out principles for experimental institutional design, offers a number of doctrinal and institutional examples of such design. These South African innovations embrace: (1) a doctrine of constitutional supremacy that maintains a meaningful equilibrium with a doctrine of separation of powers, and thus sets relatively clear guidelines for how authority for constitutional interpretation might best be shared by the judiciary, the legislature, the executive and non-state-actors;<sup>51</sup> (2) the use of various standard judicial mechanisms – such as cost orders, court procedures, amici and intervenors, expanded constitutional jurisdiction and structural injunctions – to create bubbles of participatory democracy better able (than courts or legislatures) to resolve various kinds of polycentric conflict;<sup>52</sup> (3) an approach to limitations analysis that provides a better process than ‘balancing’ for experimentalist adjudication;<sup>53</sup> and (4) greater roles for Chapter 9 Institutions with respect to investigation, information-sharing and norm-setting.<sup>54</sup> Chapter 4 then mines the brief historical record of two important policy areas – Housing<sup>55</sup> and Education<sup>56</sup> – to

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<sup>51</sup> See M Dorf and B Friedman ‘Shared Constitutional Interpretation’ (2000) 2000 *Supreme Court Review* 61; S Woolman ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31; S Woolman and H Botha ‘Limitations’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

<sup>52</sup> See A Fung and EO Wright ‘Deepening Democracy: Innovations in Empowered Participatory Governance’ (1998) 29 (1) *Science & Society* 5; O Fiss ‘The Supreme Court 1978 Term Foreword: Forms of Justice’ (1979) 93 *Harvard Law Review* 1.

<sup>53</sup> See S Woolman and H Botha ‘Limitations’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34

<sup>54</sup> See J Klaaren ‘South African Human Rights Commission’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn ‘Commission for Gender Equality’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D

<sup>55</sup> See K McLean ‘Housing’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55; K Rust ‘No Shortcuts: South Africa’s Progress in Implementing its Housing Policy, 1994 – 2002’ (Institute for Housing of South Africa, 2003)(Manuscript on file with author).

<sup>56</sup> See B Fleisch and S Woolman ‘On the Constitutionality of School Fees: A Reply to Roithmayr’ (2004) 22 (1) *Perspectives in Education* 111; S Woolman and B Fleisch ‘South Africa’s Education Legislation, Quasi-Markets and

show how the principles of experimental constitutionalism have, albeit unwittingly, already been put to work and how we might witness even greater improvement in those two policy areas were the principles of experimental constitutionalism employed on a more consistent basis.

#### F. Connections:

##### a. Global Workspace Theory, Spontaneous Orders & Participatory Bubbles

In some sense, what global workspace theories of consciousness, spontaneous order theories of social formations, and participatory bubble approaches to polycentric political problems all share in common is a belief that the information required for problem-solving is rather diffuse and that processes that solicit participation from multiple-stakeholders (neuronal networks, firms, NGOs) will offer more optimal solutions to problems with which the self, the social or the state is confronted. All three theories resist models -- of consciousness, social theory or constitutionalism -- based upon central planning or command and control.

As we shall see, consciousness in global workspace theory occupies transient locations (in the brain). These locations or neuronal networks are designed to solve the immediate problem that has 'captured' our attention. Various sensory inputs and a host of potential experts -- neural networks -- assist (and sometimes compete to assist) in the 'solution' of the problem that has captured an individual's attention.<sup>57</sup> These teams of

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School Choice' (2006) 24 (2) *Perspectives in Education* 1; S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive, Vision of the Good Life' (2007) -- *Stellenbosch LR* -- (forthcoming); B Fleisch and S Woolman 'The Constitutionality of Single Medium Public Schools' (2007) 23 (1) *SAJHR* -- (forthcoming).

<sup>57</sup> Indeed, Baars recognizes that the notion of a 'theatre audience' is far too passive to capture the engagement various parts of the brain and neural processes will have with the conscious contents of the global workspace:

[T]he global workspace resembles more a deliberative body than a theater audience. Each expert has a certain degree of 'influence', and by forming coalitions with other experts can contribute to deciding which issues receive immediate attention and which are 'sent back to the committee'. Most of the work of the deliberative body is done 'off-stage' (ie, non-consciously). Only matters of greatest relevance in the moment gain access to consciousness.

See Newman, Baars and Cho (supra) at 1132 -- 1133 (Consciousness is not a particular thing or a even particular kind of feeling, but rather the architecture that enables discrete and disparate neurological processes to solve a host of pressing (but also important medium term and long term) problems.

'experts' could encompass neural networks with particular linguistic skills, relevant memories, or trained responses. As Blackmore puts it, the global neuronal workspace 'recruits processors for ongoing tasks, facilitates executive decisions and enables voluntary control over automatic action routines.'<sup>58</sup> However, after the problem has been 'solved', the neural networks responsible for the solution will – unless a virtually identical problem arises – go silent until they are needed once more.

Spontaneous orders offer a similar characterization of knowledge-sharing and problem-solving. Markets, for example, require no central planner, no Hercules making optimal judgments, in order to arrive at efficient outcomes. Indeed, limited amounts of information – often captured by price – is sufficient to enable large numbers of participants in a market to assist (and sometimes to compete) in the solution of a social problem. However, as soon as the problem is solved, the components of the market – individuals and firms alike – turn their attention to other problems and new solutions.

Talk of participatory bubbles offers more of the same. The physical metaphor of bubbles is meant to convey three qualities of such small-scale institutional processes. First, processes of political deliberation are a natural part of ongoing social interactions. They originate when challenges to a given political authority accumulate and finally come to a boil: just as bubbles form after pressure builds up in a liquid and escapes to the surface. Second, bubbles are meant to suggest limits on the scope of deliberation. Bubbles only enclose a small amount of space -- both in terms of the issues debated and the number of participants. Third, bubbles are ephemeral. After satisfactory resolutions emerge from processes of participatory deliberation, the *raison d'être* for such political (or judicial) processes ceases to exist. The bubbles burst. Participants can return to their more routine lives.

This comparison of global neuronal workspace theory, spontaneous orders and participatory bubbles suggests that at least one tentative conclusion can be drawn at this juncture. And that is this: perhaps the gap between *is* and *ought* is not so great as some of my early readers had suggested. To the extent that the descriptions of the self, the social and the constitutional are accurate, they are all meant to depict what 'is'. Ultimately, it is the 'fit'

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<sup>58</sup> Blackmore *Consciousness* (supra) at 72.

of these various descriptions with one another that counts as one of the strengths of the theory of South African constitutionalism put forward in these pages.

b. Neuronal Network Competition, Blind Variation and Selective Retention Theory, and Shared Constitutional Interpretation

A similar set of family resemblances are on display in my discussion of neuronal network competition, universal selection theory and shared constitutional interpretation. What links all three 'theoretical' constructs at a meta-theoretical level are the mechanisms for selection of best practices, and the rolling nature of the selection process.

With respect to the self, neuronal network competition describes the actual competition between different neuronal networks for primacy of place in response to environmental stimuli. As we shall see below in Chapter 2, what we, as individuals, become 'aware' or 'conscious' of turns on the neuronal network that best 'fits' the current environment. That does not mean, of course, that such a neuronal network will remain dominant or always provide the best 'fit'. Indeed, it may not provide for the appropriate response to the next environment: and a new neuronal network will, one hopes, supplant it.

With respect to the social, universal selection theory offers a similar account of cognitive and non-cognitive processes. Some theories and practices better 'fit' the social environment within which they operate. That does not mean, of course, that such a theory or practice will remain dominant or always provide the best 'fit'. A better theory or practice – for the environment in question – may come along and offer the possibility of greater success.

With respect to the constitutional, shared constitutional interpretation offers a comparable account of the development of constitutional doctrines and political policies. What we want from both courts – that set constitutional doctrine – and coordinate branches of government -- that set various policies – is the best possible 'fit' in the political environment within which they operate. That does not mean, of course, that a court's gloss on a constitutional norm or the policies pursued by a particular government will remain dominant or always provide the best 'fit'. That would assume an unchanging environment.

What we hope for from a politics of experimental constitutionalism is the ability of all branches of government – aided by an informed and engaged citizenry – to remain open to understanding our basic law differently and to devising policies most likely to realize our preferred ends.

What links neuronal network competition, universal selection theory and shared constitutional interpretation is a commitment to the notion that ‘choices’ at the level of the individual, the social, and the constitutional are largely about ‘fit’, at the same time as that notion of ‘fit’ remains open-ended, partial and perhaps, sub-optimal. At each level, there is – or ought to be -- a constant interrogation of means and ends, and thus, at least metaphorically, a commitment to rolling best practices that offer the greatest likelihood that we might flourish.

c. Connections: The Determined Self, the Conditioned Self, the Multiple Self, the Divided Self and Levels of Generality

The theory of the self offered in these pages takes a number of different forms. Each form or theory has as its goal the displacement of the dominant Cartesian notion of the self as a fully integrated, rational, freely-willed chooser of its ends. However, as several readers have noted, each of these theoretical displacements of the Cartesian notion of the self (with its folk-psychology of freedom) takes place at a different level of generality.

The account of the determined self takes two forms in the pages that follow. The first account of the determined self is a standard materialist argument. It holds that the individual, as a physical corporeal entity, is subject to the same laws of physics as all other corporeal entities. The ‘determined self’ is, therefore, subject to the same laws of cause and effect as all other entities. According to this incompatibilist position on free will, it is impossible to be both a physical entity subject to the same deterministic framework as all other physical entities and an incorporeal entity that freely-wills its actions in an otherwise determined physical universe. The second account of the determined self concentrates its energies on providing an explanation for how consciousness, the experience of an integrated choosing self and a subjective experience of ‘free will’ arise out of a thoroughly determined

physical entity. A significant amount of space in Chapter 2 is devoted to the current neuroscience of consciousness because this new science provides the best explanation of what consciousness is and how 'it' operates. It is this empirical account of consciousness – the account of the workings of the brain that underlie it that offers the best hope of breaking the tenacious hold that the folk psychology of freedom has on us.

The account of the conditioned self also takes two forms. At the level of the individual, the account of the conditioned self – described in Daniel Dennett's terms as a centre of narrative gravity – explains how our physical and social endowments create a variety of roles or dispositional states that cohere – or overlap -- in a manner that enables (some of) us to experience a sense of integrity or singularity. The point again is too narrow dramatically the space for 'freely-willed' action by calling attention to the extent to which our actions are determined by the social endowments with which (or into which) we are born and the physical endowments with which we are graced. This account places particular emphasis on the extent to which pre-existing forms of 'meaning makes us'. At the level of the social, the account of the conditioned self – described by Michael Walzer in terms of involuntary association and the 'radical givenness' of the self -- explains how the meaning of an individual life is determined by the variety of communities into which the individual is born and the extent to which what gives meaning to our lives is determined and not freely-willed. Walzer's account of the conditioned self serves as a bridge from the discussion in Chapter 2 of the constraints that exist with respect to the self to the discussion in Chapter 3 regarding the constraints that exist with respect to the social.

The discussion of the multiple self or the divided self serves the general assault on the folk-psychology of free-will in a number of different ways. Dennett's characterization of the self as a centre of narrative gravity with its emphasis on how different selves co-exist within a single individual and Baars' global workspace theory and its description of the actual architecture of the brain and how it makes consciousness and our multiple selves possible displaces the Cartesian view of the self an integrated, rational, freely-willed chooser of its ends. However, the multiple self or the divided self does not simply offer a materialist account of consciousness and an argument against the folk-psychology of freedom. It also offers, as Amartya Sen and Michael Walzer contend, a means for understanding how change

(and thus the subjective experience of freedom) is possible in a determined and conditioned self. As Walzer notes, the 'self divides itself among its interests and roles . . . among its identities and among its ideals, principles and values.'<sup>59</sup> Walzer writes that there is, amongst these roles, identities and ideals

no linearity, . . . and no hierarchy. The order of the self is better imagined as a thickly populated circle, with *me* in the center surrounded by my self-critics who stand at different temporal and spatial removes (but don't necessarily stand still). Insofar as I am receptive to criticism, ready for (a little) castigation, I try to draw some of the critics closer, so that I am more immediately aware of their criticism; or I simply incorporate them, so that I become a worried self. I am like a newly elected president, summoning advisors, forming a cabinet. Though he is commander-in-chief, his choices are quite limited, his freedom qualified; the political world is full of givens; it has a history that pre-dates his electoral triumph. My inner world is full of givens, too, culturally bestowed or socially imposed – I maneuver among them insofar as their plurality allows for maneuvering. My larger self, my worried self, is constituted and self-constituted by the sum of them all. I am the whole circle and also its embattled centre.<sup>60</sup>

Walzer's 'me' sounds much like Dennett's centre of narrative gravity – or in Walzer's words, 'a thickly populated circle'. Change occurs – perhaps even improvement occurs – as a result of the friction, the conversation, between the various selves that make up the 'thickly populated circle'. So here we have an account of change – and of choice – that is not contingent upon the existence of rational, freely-willed choosers of its ends. On this account, change but that flows from a divided self in which different roles, identities and ideals serve as critics that offer different and sometimes inconsistent ways of being in the world.<sup>61</sup> These

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<sup>59</sup> M Walzer *Thick and Thin: Moral Argument at Home and Abroad* (2002) 85.

<sup>60</sup> *Ibid* at 98 – 99.

<sup>61</sup> Walzer interestingly juxtaposes his thickly populated, divided self with what he calls the 'thin self' or the 'dominated self'. He writes:

The religious or political fanatic is the obvious example: god-possessed or ideologically driven. . . . We must imagine it dominating other self-critics, repressing alternative possibilities within the self. No one growing up in the modern world is, as it were, linear before the fact. Only repression will make us so. I am not going to try to describe here the psychological mechanisms of repression. (I argued [elsewhere about] . . . the role of fear in shaping a singular national identity.) I only want to insist that such mechanisms must be at work in every person whose 'true character' or 'normal condition' is

(self)critics not only offer us different ways of pursuing the same ends – they offer us different ends. The divided self makes sense of this thesis' commitment to the centrality of trial and error: success stories remain dominant for so long as they bring the thickly populated circle success. Errors or failures in the divided self elicit criticism from within the thickly populated circle. And with such (self)criticism, perhaps, comes change.

I hope to show, in the pages that follow, how each account of the self -- the determined self, the conditioned self, the multiple self, the divided self – undermines the Cartesian view of the self and supplants it with an account that, on the whole, possesses greater explanatory power. However, it is important to note that while these various accounts of the self work in concert with on another, they also work at different levels of generality. That is, they reinforce one another, but are not reducible to one another. No attempt is made, therefore, to capture the social theory of the self that Walzer offers in terms of the neuroscientific theory of the self that Baars or Naccache offer. So, just as we do not expect the laws of biology to be reducible to the laws of chemistry – even when they have the same objects under scrutiny, so too is it wrong to expect that the language of contemporary social theory is reducible to the ostensibly more basic language of contemporary neuroscience. It is enough, for my purposes, that they do not contradict one another.

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singular and absolute. Within every thin self, there is a thick self yearning for elaboration, largeness, freedom.

Ibid at 99 – 100. What is particularly interesting, for the purposes of this thesis, is Walzer's connection of the divided critical self with kind of roughly egalitarian, pluralist democracy defended in these pages. Walzer writes that 'divided selves are best accommodated by complex equality in domestic society and different versions of self-determination in domestic and international society. . . . Even in my normal condition, however, I hear voices, I play parts, I identify myself in different ways – and so I must aim at a society that makes room for this divided self'. Ibid at 103 – 104.

# THE SELFLESS CONSTITUTION

## Chapter Two

### A Theory of Self, Consciousness and Freedom

#### *Table of Contents*

#### A. Self and Consciousness

1. Traditional Views of the Self and Their Problems
  - a. My Cartesian Self
  - b. My Cartesian Theatre
2. Explaining (Away) the Self
  - a. Bundle Theory
  - b. Three Plausible, Related Theories of Consciousness and the Self
    - i. The Proto-Self, the Core Self and the Autobiographical Self
    - ii. Global Neuronal Workspace Theory
      - aa. Baars' Global Workspace Theory
      - bb. Dehaene's Global Neuronal Workspace Theory
    - iii. Dennett's Self as a Centre of Narrative Gravity
      - aa. Consciousness
      - bb. Selves

#### B. Freedom

1. Consciousness, Self, Error Correction and Free Will
  - a. The Illusion of Volition
    - i. Libet's and Walter's Timing Experiments
    - ii. Wegner and Wheatley's Experiments
  - b. A Modest Account of Freedom
2. Awareness, the Intentional Stance and Freedom

C. Consciousness, Self, Freedom and Constitutional Doctrine

D. Consciousness as a Feedback Mechanism

1. Video Games
2. Driving
3. Spelling

## A Theory of Consciousness, Self and Freedom

As I noted in the introduction, three of the models of political theory articulated by our Constitutional Court rest upon views of personhood, consciousness and free will that lead, in turn, to various constitutional doctrines designed to enable individuals (and groups) to exercise relatively unfettered control over decisions about the intimate relationships and the various practices deemed critical to their self-understanding. I have also suggested that these views regarding individual autonomy and collective rationality overemphasize dramatically the actual space for self-defining or group-defining choices. But the Constitutional Court is hardly the only guilty party in this regard. Indeed, the Court's autonomy doctrines simply reflect the fact that the manner in which the vast majority of us think about the self, consciousness and free will is incorrect. The majority of us find ourselves in the tenacious hold of a folk psychology of free will, self and consciousness that is dramatically out of step with what a growing majority of neuroscientists, cognitive psychologists and philosophers have to say about those subjects. In sum, erroneous views shared by the majority of South Africans about the actual content of human 'freedom' – as a metaphysical term – are sharply at odds with how things actually are. In the pages that follow I will argue that our experience of personhood, of consciousness, and of free will are functions of a complex set of neurological structures, learned, habitual physical dispositions, social constructs and complex individual narratives over which we exercise little control.

The theories of the self offered in these pages takes a number of different forms: the determined self, the conditioned self, the multiple self and the divided self. As I noted in the introduction, each form or theory has as its goal the displacement of the dominant Cartesian notion of the self as a fully integrated, rational, freely-willed chooser of its ends. But each displaces the folk-psychological or Cartesian notion of the self in different ways and at different levels of generality. I spend a significant amount of space on Baars and Dehaene's neuropsychological explanations of global neuronal workspace theory and Dennett's use of these explanations to reconstruct a plausible account of the self. I do so because it is simply not enough to trash folk-psychological accounts of the self. Not only must something with greater explanatory power must be offered in its place, my preferred theory of the self must, ultimately, make more plausible my theory of constitutional politics.

## A. Self and Consciousness

### 1 Traditional Views of the Self and Their Problems

#### a. My Cartesian Self

After dropping my partner Courtenay off at the Johannesburg International Airport at approximately 10:15 pm, I drove back to our house in Fellside, Johannesburg. The trip back took me the entire running time of two Bruce Springsteen songs – ‘She’s the One’ and ‘Jungleland’. Every light was green. Once home, I turned off the alarm, flipped on the lights, cranked up the heat and poured myself a weak cup of coffee. I settled down in bed to finish editing a chapter in *Constitutional Law of South Africa* – ‘Social Security’ – and to unwind by catching up on the exploits of my favourite baseball team – The New York Mets – in *The New York Times*. I had planned an early night so that I could join my friend Brahm early Sunday morning on the mashy-nibblick course we play in Roosevelt Park. Morpheus, however, did not arrive until 1:30 am, making an early tee time unlikely.

I awoke the next morning having slept the sleep of the dead – not a good sign for an early tee time. Not surprisingly, my phone recorded the fact that Brahm had been leaving a steady stream of messages since approximately 8:30 – persistent but not obnoxious. I called him and promised that after my morning ablutions, I would pick him up at his house. I ran a hot bath, flipped on the coffee maker and settled back into bed to read *The New York Times* and inhale enough pure oxygen from my tank to clear my head and ready my body for the day ahead. (I suffer from a condition that leaves me chronically tired and mentally befuddled unless I hew to a well-managed routine of rest, medication, oxygen and therapy (both physical and psychological).) Having successfully negotiated my morning rituals, I jumped in the car, picked up Brahm and headed west toward Roosevelt Park. The golf was a pleasure – though my score left much to be desired. Lunch afterwards was surprisingly good. But best of all was the fact that with both of our partners in planes headed towards North America, Brahm and I had a chance to talk without any external limits being placed upon the length or the content of our conversation. Our golf and lunch complete, I

stopped off at Brahm's house in Parkwood. I caught 5 minutes of a World Cup Match between the Netherlands and Serbia (actually Serbia and Montenegro to be exact) and then proceeded to Brahm's mother's cottage to check in on the French Open – split a set a piece between Federer and Nadal. Having indulged my various pleasures, I returned home to begin work on this chapter.

On the standard or traditional account of the self, 'I' am the author of the story just told. I drove the car. I kissed Courtenay goodbye. I turned on the stereo. I turned off the house alarm. I edited the book chapter and read the newspaper. I slept and then I awoke in the morning. I made coffee. I ran a bath. I turned on the computer and the oxygen tank. I picked up my friend. I played golf. I had an extended conversation about the nature of love. I ate lunch. I watched television. I drove home – where all my stories begin and end.

But did I really do all these things? I have no doubt – mind you – that all these events occurred. Rather the doubt expressed is about the 'agent' – I – who engaged in this range of activities. As Susan Blackmore writes:

In everyday language, we talk unproblematically about our 'self' . . . It seems that we not only think of this self as a single thing, but we accord it all sorts of attributes and capabilities. In ordinary language, the self is the subject of experiences, an inner agent who carries out actions and makes decisions, a unique personality, and the source of desires, opinions, hopes and fears. This self is 'me'; it is the reason why anything matters in my life.<sup>1</sup>

Few people deny that this is how things appear or feel. (Indeed, there may even be a physiological reason that we experience this unified sense of self.<sup>2</sup>) And even I will not deny that the 'I' or the 'self' that undertook all the actions above, and the actions themselves, matter to me. Why else would I do them? And yet it is fair to say that fewer and fewer

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<sup>1</sup> S Blackmore *Consciousness* (2004) 94.

<sup>2</sup> Dehaene and Naccache suggest, as I discuss below, that a number of modular, non-conscious processes and structures distributed throughout the brain, can account, when they enter the global neuronal workspace, for a 'sense' of individual identity. S Dehaene & L Naccache 'Towards a Cognitive Neuroscience of Consciousness: Basic Evidence and a Workspace Framework' in S Dehaene (ed) *Cognitive Neuroscience of Consciousness* (2001) 1, 31.

contemporary philosophers, cognitive psychologists or neuroscientists defend the philosophical premises – or conclusions -- upon which the unproblematic account of the self adumbrated by Blackmore above rests.

The ‘unproblematic’ account has a venerable pedigree. Its most famous exponent, Rene Descartes, captured its essence in his *Meditations*.<sup>3</sup> His attempt to work out first principles from which all ‘true’ propositions could be deduced led him to the conclusion that constitutes philosophy’s best-known sound-bite ‘Cogito, ergo sum’ – ‘I think therefore I am.’ This one incontrovertible maxim was grounded in the incorrigible evidence of Descartes’ extended, critical and openly sceptical process of introspection. The only thing that was not subject to doubt was his ‘thinking’ self.

The problem left over from Descartes’ achievement in the *Meditations* was how this thinking self made anything happen in the physical world, starting with the actions undertaken by the body itself. Descartes posited a theory of substance dualism in which the mind is constituted by one kind of substance, the body by another. When pressed to explain how physical events in the world – and the brain itself – gave rise to perceptions, images, ideas, emotions, decisions – those mental events we associate with the mind, and when further pushed to explain how the mind – and these mental events gave rise to a welter of physical events – as manifest in the brain, the body and world about us, Descartes pointed to the pineal gland. That is, the immaterial soul, our thinking self, was connected to the brain and thus the body in a tiny gland found at a midpoint in the brain. What occurred in the pineal gland that enabled the non-physical soul to work its magic on the physical brain, and the brain on the soul, Descartes could not say.

Nor can any substance dualist for that matter. Substance dualism relies upon linguistic alchemy – and not empirical proof. The *only* philosophical defense of dualism of recent vintage was offered in the late 1970s by Karl Popper and John Eccles.<sup>4</sup> Despite Popper’s extraordinary stature in 20<sup>th</sup> century philosophy and Eccles’ recognition as a Nobel Laureate in biology, it is fair to say that their theory of dualist interactionism met with near

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<sup>3</sup> R Descartes *Meditations on First Philosophy* (1641).

<sup>4</sup> K Popper & JC Eccles *The Self and Its Brain* (1977).

universal derision in professional philosophical and scientific circles. The theory held, in short, that the chemical processes that occur in the synaptic connections between neurons are so subtle that they could be subject to non-physical processes such as ‘thinking’ or ‘feeling’. How such non-physical processes as ‘thinking’ or ‘feeling’ could effect even the most subtle changes in brain chemistry, neither Popper nor Eccles could quite explain.<sup>5</sup> As a result, how the non-physical ‘self’ controls the physical brain (and other neurological or biological processes) remains – on the Eccles/Popper account – something of a mystery. The tenets of dualist interactionism have the qualities of articles of faith – mysterious, untestable and, ultimately, unverifiable. The only significant difference between Descartes and Eccles/Popper is that the bridging properties of the pineal gland (whose actual purpose is now properly understood) have been moved to the domain of the synapse.

The problem of dualist accounts of the self, or consciousness or free will, as I noted in Chapter 1, is that they are all plagued, in one way or another, by what Gilbert Ryle described as ‘the dogma of the Ghost in the Machine.’<sup>6</sup> Ryle describes such distinctions between mind/brain, consciousness/experience or free will/determined physical events as category mistakes. Take an unproblematic example of a category mistake. We would be rightly perplexed if a visitor to the University of Pretoria, after having been shown all the lecture halls, playing fields, offices, laboratories, academics, students and staff, still asked ‘But where is the University?’ The mistake is in thinking that the University represents something over and above its constituent parts. Something similar occurs in discussions of the self and the mind. The mistake is in thinking that there is something -- the mind or the self -- over and above the physical constituent parts that make up human action. Mental activities are physical processes, and the mind is a set of properties and dispositions that belong to all human beings.<sup>7</sup>

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<sup>5</sup> JC Eccles *How the Self Controls Its Brain* (1994); JC Eccles *The Brain and the Unity of Conscious Experience* (1965).

<sup>6</sup> See G Ryle *The Concept of Mind* (1949) iv.

<sup>7</sup> T Metzinger *Being No-One: The Self Model Theory of Subjectivity* (2004) 1 (‘No such things as selves exist in the world: Nobody ever was or had a self. All that ever existed were conscious self-models that could not be recognized as models. The phenomenal self is not a thing, but a process – and the subjective experience of *being someone* emerges if a conscious information processing system operates under a transparent self-model. You are such a system right now. Because you cannot recognize your self-model as a model, it is transparent: you look right through it. You don’t see it. But you see *with it*’); M Minsky *Society of Mind* (1986) 287 (‘Minds are simply what brains do’); G Claxton (1994) *Noises from the Darkroom* 37 (‘Mind is designer language for the functions the brain carries out.’) S Greenfield *Brain Story* (2000) 14 (Mind is ‘the personification of the brain.’)

b. My Cartesian Theatre

And yet the features of Cartesian dualism retain a tenacious hold over our imagination. Even amongst philosophers who reject substance dualism – or dualism in any form – there remains a sense that, as David Hume put it,

The mind is a kind of theatre, where several perceptions successively make their appearance; pass, re-pass, glide away and mingle in an infinite variety of postures and situations.<sup>8</sup>

But Hume, unlike many contemporary theorists, was unwilling to be bewitched:

The comparison of the theatre must not mislead us. . . . They are successive perceptions only that constitute the mind; nor have we the distant notion of the place where scenes are represented, nor the material of which it is composed.<sup>9</sup>

What Hume warned against 250 years ago, and what Daniel Dennett has inveighed against more recently, is the notion that there is a place where ‘it all comes together’ – our ideas, images, perceptions and feelings – and ‘consciousness happens’.<sup>10</sup> But there is, in fact, no such place – no screen in the brain -- where ‘it’ all comes together so that ‘I’ can watch the events of my own mind and the world before ‘me’ unfold.

We may experience the relationship between ‘consciousness’ and our ‘self’ in this theatrical manner. That does not make it correct. Indeed, the distinction between the ‘perceptual screen’ and the ‘self’ that views that screen constitutes a form of dualism that led Dennett to describe this phenomenon as the ‘Cartesian theatre’ and its proponents as

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See also G Claxton ‘The Light’s On, But There’s Nobody Home: The Psychology of No-Self’ in G Claxton (ed) *Beyond Therapy: The Influence of Eastern Religions on Psychological Theory and Practice* (1986).

<sup>8</sup> D Hume *A Treatise of Human Nature* (1739) xx.

<sup>9</sup> Ibid.

<sup>10</sup> Dennett *Consciousness* (supra) at 39.

'Cartesian materialists'. How do we know that this new form of dualism is incorrect? After all, each of us has this 'experience' of watching her or his world.

To understand why this metaphor is inapt, Blackmore asks her readers to undertake a simple exercise:

Right now, please – consciously and deliberately – take a thumb, raise it to your face and press it against the end of your nose. Feel the thumb-on-nose sensations and then let go.<sup>11</sup>

Where, she asks them, did consciousness happen? The Cartesian theatre – or some variant thereof – seems like an appropriate response. However, everything we now know about how our brain works tells us that such a theatre does not exist.

First, the reading of the instructions for the experiment engages the visual cortex (V1) and Wernicke's area (where much of the neural activity associated with linguistic tasks occurs). Second, as to the movement of the eyes and the thumb required to bring the thumb into contact with our nose, the neural activity associated with these actions occur in the motor cortex. Finally, when my thumb touched my nose, it activated my sensory cortex. There is, as it turns out, no central headquarters where all the information is directed, processed, arranged and then projected up on to the screen of our Cartesian theatre. What is happening – and I shall return to this notion in the section on consciousness – is largely unconscious, regionally distributed, massive amounts of parallel processing which ultimately meet up in a *transient* global neuronal workspace that spans large, but ever changing, portions of the brain.<sup>12</sup> If this initial description of largely unconscious, regionally distributed, massive parallel processing as the basis for consciousness does not convince you to give up on the Cartesian theatre model of consciousness, then consider this further example.

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<sup>11</sup> Blackmore *Consciousness* (supra) at 66.

<sup>12</sup> See A Damasio 'Time-Locked Multi-Regional Retro-activation: A Systems Proposal for the Neural Substrates of Recall and Recognition' (1989) 33 *Cognition* 25; W Singer and C Gray 'Visual Feature Integration and Temporal Correlation Hypothesis' (1995) 18 *Annual Review of Neuroscience* 555; G Tononi and G Edelman 'Consciousness and Complexity' (1998) 282 *Science* 1846; BJ Baars 'How Does a Serial, Integrated and Very Limited Stream of Consciousness Emerge from a Nervous System that is Mostly Unconscious, Distributed, Parallel and of Enormous Capacity' in GR Bock & J Marsh (eds) *Experimental and Theoretical Studies of Consciousness* (1993) 282.

It was common practice, in cases of severe epilepsy that could not be controlled through medication alone, for surgical procedures to be carried out that limited the damage done during epileptic fits to a single hemisphere of the brain. The procedure involved the division of the entire corpus callosum, the division of the anterior and hippocampal commissures and, on occasion, the division of the massa intermedia. In short, the left hemisphere and the right hemisphere of the brain were disconnected. RW Sperry reported the following results of 'hemisphere deconnection':

One of the more general and also more interesting and striking features of this syndrome may be summarized as an apparent doubling in most of the realms of conscious awareness. Instead of the normally unified single stream of consciousness, these patients behave in many ways as if they have two independent streams of conscious awareness, one in each hemisphere, each which is cut off from and out of contact with the mental experiences of the other. In other words, each hemisphere seems to have its own separate and private sensations, its own perceptions, its own concepts, and its own impulses to act, with related volitional, cognitive and learning experiences. Following the surgery, each hemisphere also has thereafter its own separate chain of memories that are rendered inaccessible to the recall processes of the other.<sup>13</sup>

Sperry's interpretation of the consequences of this radical surgery suggests that one self and one brain has been carefully carved up into two selves and two brains. Without, for the moment, accepting all of Sperry's conclusions, it does appear from the responses of patients that this surgery had the consequences of creating two different physical 'realms' of consciousness. What this means – at a minimum – is that the Cartesian theatre is now a duplex. All kidding aside, the results indicate that there is no single theatre of consciousness. To the contrary, each hemisphere demonstrates the capacity – after disconnection – to form conscious thoughts, to experience conscious perceptions, and to perform conscious actions: all features that we attribute to a human self. These features of

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<sup>13</sup> RW Sperry 'Hemisphere Deconnection and Unity in Conscious Awareness' (1968) 23 *American Psychologist* 723.

selves – now located in two distinct hemispheres of one brain – support the previous contention that the self is not located in a single ‘place’ in the brain where it then takes stock of the action presented to it and responds accordingly.

Subsequent assessments of split-brain subjects were less emphatic than Sperry with respect to the contention that the split brain led to the cleaving of one self into two. Gazzaniga located what he described as ‘the interpreter’ in the left hemisphere that appeared to retain the capacity for ‘high-level consciousness’.<sup>14</sup> But neither this finding, nor MacKay’s conclusion that the ‘two selves’ playing one another, as distinct entities, in a game of 20 questions did not possess a genuine ‘duality of will’,<sup>15</sup> displace the more general contention that the self – or consciousness – is a function of largely unconscious, regionally distributed, massive parallel processing. We may not yet know with certainty how the self coheres or how consciousness emerges, but we should be clear that the Cartesian theatre is an inapt and inaccurate theoretical construct.

Sperry, Gazzaniga and MacKay’s findings all undermine the central metaphor of the Cartesian theatre – a ‘little me’ watching and responding to the ‘bigger me’ and the world about me from the comfort of a seat somewhere in the middle of the brain. However, underlying all three attempts at explaining the data is the belief that one can ‘count’ the number of ‘selves’ in a split-brain patient. But can we? I want, in the following section, to suggest instead, in William James’ words, that ‘the same brain may subserve many conscious selves’.<sup>16</sup>

## 2. Explaining (Away) the Self

### a. Bundle Theory

We have seen that ego theorists – such as Descartes, or even Sperry, Mackay and Gazzaniga – have problems explaining how the unitary conception of the self actually

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<sup>14</sup> MS Gazzaniga *Nature's Mind* (1992) 122 (Higher level functions: language use, belief construction and attribution of intentionality.)

<sup>15</sup> D MacKay ‘Divided Brains – Divided Minds?’ in C Blackmore and S Greenfield (eds) *Mindwaves* (1987) 5.

<sup>16</sup> W James *The Principles of Psychology: Volume I* (1890) 401.

operates both mechanically and phenomenologically. Descartes cannot explain how an immaterial 'mind' or 'soul' interacts with the body and the rest of the material world. Sperry, Mackay and Gazzaniga cannot agree amongst themselves on whether a disconnected brain contains one self, two selves, or an upper self and a lower self.

Bundle theorists, such as Derek Parfit, view the consternation of ego theorists attempting to parse selves with a certain degree of *sang quoi faire*. Parfit contends that these experiments make little sense if our goal is to arrive at a clear conclusion about the numbers of selves located within an individual body or the brain. Given what we know about the responses of split-brain patients, Parfit asks us to imagine the following experiment. A split brain patient is shown two cards – one red, one blue. The left hemisphere registers red; the right hemisphere registers blue. When asked to write down the colour of the card, the hand controlled by the left hemisphere writes 'red'. The hand controlled by the right hemisphere writes 'blue'. The questions Parfit's thought experiment is designed to get us to ask are: (1) How many selves are there? (2) How many streams of consciousness are there? The answer to the last question is two. But the answer to the first question is not, on Parfit's account, two as well. Parfit argues that our multiple experiences, thoughts, emotions, actions are related to one another as a 'bundle of sensations'. They are not, as it generally seems to us, the property of a single unified self. As a result, Parfit contends that the answer to question number 1 is not 'two', but 'none'.<sup>17</sup>

Even if Parfit's reductionist account of the self as simply a 'bundle' of percepts is true, nothing about the data derived from the split-brain experiments proves the truth of the bundle theorists account. What seems to interest Parfit most in the split-brain account is that ego theorists – who posit the existence of integrated continuous selves – cannot agree on whether the data supports the presence of one, two or more selves. Moreover, what seems evident, on Sperry, Mackay and Gazzaniga's own accounts, is that different parts of the brain carry out different functions contemporaneously, and that different constellations of these parallel processes can produce the phenomenon of consciousness. For a bundle theorist like Parfit, some succour can be derived from the brain's ability to 'produce'

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<sup>17</sup> D Parfit 'Divided Minds and the Nature of Persons' in C Blackmore and S Greenfield (eds) *Mindwaves* (1987) 19, 20.

consciousness in a number of different ways, using a number of different parts of the brain, and even producing two apparently different conscious responses simultaneously. For a bundle theorist, the data appears to support the hypothesis that at least two different forms of conscious awareness can be produced by the same brain that have no immediate awareness of the other conscious response and no subsequent mnemonic capacity to recall the content of the other stream of consciousness. The split-brain experiments seem to support the thesis that the unity of consciousness – and of the self – is not a necessary consequence of a functioning brain.

And yet, even the father of bundle theory, David Hume, knows that positing a stream of thought as all there is to selfhood runs counter to common sense and everyday experience. Most of us have the experience – the sensation, at any rate -- of a self that holds all of its thoughts, feelings and emotions ‘together’. What then, assuming the truth of bundle theory, accounts for this sense of a unified continuous ‘self’ and what, ultimately, is the truth about how our brain creates consciousness and a sense of self.

#### b. Plausible Theories of the Consciousness and the Self

Over the past decade, neuroscientists, cognitive psychologists and philosophers have proffered theories of the self that do not rely on any form of Cartesian dualism, but, consistent with the available data, explain how a unitary ‘sense’ of self can emerge from an enormous, normally disaggregated system of neurological processes that are distributed throughout the brain, occur in parallel and may or may not be the subject of conscious awareness. The leading theories of the self -- and consciousness -- share this aforementioned empirical understanding of how the brain operates. And so it will come as no surprise that these accounts will sound very similar themes. The purpose of this section is not to interrogate these offerings in order to arrive at a preferred theory, but to proffer some reasonably solid conclusions about how the majority of neuroscientists, cognitive scientists and philosophers understand the self and consciousness in order that we might better explain why a proper conception of the self matters for constitutional theory.

#### i. The Proto-Self, the Core Self and the Autobiographical Self

One way to understand consciousness and selfhood – from a neurophysiological perspective – is to think of it as having layers, or levels, or sophistication that depend upon the neurological complexity of the creature and the integrity of the brain and the neurological system. Antonio Damasio – a clinician and a neuroscientist – claims that even the simplest organisms have a proto-self.<sup>18</sup> This proto-self is no more than a set of neural patterns that enable the organism to monitor both its state and its environment on a moment-to-moment basis. However, the proto-self is not conscious – is not aware – of either its internal state or its relationship to the environment about it.<sup>19</sup>

A smaller, but still significant, number of organisms possess core consciousness, and thus core self. This level of consciousness enables the organism to have a sense of self in the here and now. However, the core self is ‘a transient entity, ceaselessly recreated for each and every object with which the brain interacts’.<sup>20</sup> Severe amnesiacs, such as those who present with Korsakoff’s syndrome (alcoholism, and the thiamine deficiency associated with it, leads to the destruction of the miliary bodies and the dorso-medial nucleus of the thalamus, as well as more diffuse damage to the frontal lobes), suffer from anterograde amnesia (the inability to form new long-term memories) and retrograde amnesia (the loss of long-term memory that often stretches far into the past). Such persons – though they retain the capacity to engage in some tasks that can be done relatively quickly (dialling a telephone) – remain stuck in a very brief perpetual present. Oliver Sacks wrote of one such patient that his amnesia was ‘a pit into which everything, every experience, every event, would fathomously drop, a bottomless memory-hole that would engulf the whole world.’<sup>21</sup> Such persons are incapable of creating memories of a unitary continuous self – or as some bundle theorists would argue, the comforting illusion of such a self.<sup>22</sup> Although somewhat more

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<sup>18</sup> A Damasio *The Feeling of What Happens: Body, Emotion and the Making of Consciousness* (1999) (‘Feeling’). See also A Damasio *Descartes’ Error: Emotion, Reason and the Human Brain* (1994).

<sup>19</sup> Dennett would say that the proto-self is exhibiting intentionality – the ability to act on information and regulate its responses to the world in light of such information. Of course, Dennett is not concerned with whether such a simple organism can describe the quality of the internal state – only that from a third-person perspective the proto-self will share the capacity for intentionality that we would attribute to beings with core selves and autobiographical selves.

<sup>20</sup> Damasio *Feeling* (supra) at 17.

<sup>21</sup> O Sachs *The Man Who Mistook His Wife for His Hat* (1985) (‘Hat’) 34.

<sup>22</sup> See Sachs *Hat* (supra) at 34 (‘If a man has lost a leg or an eye, he knows he has lost a leg or an eye; but if he has lost a self – himself – he cannot know it, because he is no longer there to know it.’)

complex than many core selves found in other organisms, the person who suffers from a severe case of Korsokoff's syndrome is recreated for each and every object with which he interacts.<sup>23</sup>

The third form of self – and of course this oversimplifies Damasio's rubric of consciousness – is the autobiographical self. The autobiographical self features complex forms of cognitive and neurological organization and takes shape over the period of an organism's life. Unlike the person who suffers from Korsokoff's syndrome, a normal human being is able to form and to retain short, medium and long-term memories. As a result, she is able to learn and to retain a broad array of simple and complex tasks. This self, as Damasio is careful to note, is not a separate entity above and beyond the corporeal self. (That would make him guilty, of course, of the kind of category mistake Ryle warns against and that neuroscientists generally do not make.) The autobiographical self is the story, or rather stories, we tell of our life for as long as we have the capacity to tell stories (until, that is, we experience some form of Alzheimer's, senile dementia or, of course, death.) Damasio's metaphor for the autobiographical self that retains its integrity runs as follows: 'You are the music while the music lasts.'<sup>24</sup>

As a physiological matter, Damasio remains committed to the proposition that all conscious experience is the result of transient connections between neural modules distributed throughout the brain – from places as diverse in function as 'the brain stem, thalamus and cerebral cortex'.<sup>25</sup> Like Baars, Dehaene and Dennett, and most of the other neuroscientists whose work I will canvass, Damasio also has no need for a viewing self – a homoculus – who passively, or not so passively, experiences the world and herself in the comfort of a Cartesian theatre. Although Damasio does not demonstrate a clear link between the complex, parallel, massive, distributed neural processes that gives rise to consciousness and the autobiographical self, his writing suggests that it is our capacity for

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<sup>23</sup> The picture of memory and its relationship to self is more complicated than can be described in these pages. For example, persons with severe auto-noetic amnesia – and no auto-noetic consciousness – may still possess kinds of memory and kinds of recall, but absolutely no sense of subjective or personal time (past or future), and no capacity to form a sense of self over time. They lack an autobiographical self. See E Tulving 'Memory and Consciousness' (1985) 26 *Canadian Psychology* 1.

<sup>24</sup> Damasio *Feeling* (supra) at 191.

<sup>25</sup> Ibid at 73.

remembering – and ordering -- the many events, skills and relationships that make up our lives that enables us to experience (feel) that ‘unity of consciousness’ that provides that subjective experience of being ‘me’.<sup>26</sup>

Dehaene and Naccache offer, as I discuss in greater detail below, a physiological explanation for Damasio’s subjective experience of a ‘unity of self’. On their account, a number of modular, non-conscious processes and structures distributed throughout the brain, can create, when they enter the global neuronal workspace, a ‘sense’ of individual identity: Modular processors governing ‘the face and person-processing circuits of the interior and anterior temporal lobes’, other processors that govern episodic memory and modules that enable us ‘to interpret and to predict other people’s actions’, when brought together in the ‘conscious workspace, may suffice to account for the subjective sense of self.’<sup>27</sup> This speculation is supported by the absence of self experienced by persons who have Capgras syndrome, Fregoli syndrome and certain forms of autism and thus do not possess the healthy functional neuronal module processors that Dehaene and Naccache believe are required for a subjective sense of self.

## ii. Global Neuronal Workspace Theory

### a. Baars’ Global Workspace Theory

One distinguishing feature of Bernard Baars’ Global Workspace Theory is that it embraces the metaphor of ‘a theatre of consciousness’ without endorsing any of the fundamental misconceptions about the self that plague Cartesian dualism.<sup>28</sup> But for Baar,

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<sup>26</sup> This autobiographical self is similar then, in some important respects, to the notion of the ‘centre of narrative gravity’ that Daniel Dennett employs to describe how ‘self-hood’ takes shape. Dennett, unlike Damasio, remains a skeptic as to whether there is anything to ‘consciousness’ above and beyond this densely woven tapestry of narratives. Damasio accepts the evidence of first person reports of those of his patients and subjects who report ‘feeling’ that they possess a unitary consciousness and compares such reports with the first person reports of patients who lack such a ‘feeling’ of unitary experience. Moreover, Damasio’s evidentiary record supports a third person account that suggests that there is a difference. What makes it hard for many to accept Dennett’s thesis is the contention that the data found in all first person accounts could, ultimately, be accounted for in third person accounts.

<sup>27</sup> S Dehaene & L Naccache ‘Towards a Cognitive Neuroscience of Consciousness: Basic Evidence and a Workspace Framework’ in S Dehaene (ed) *Cognitive Neuroscience of Consciousness* (2001) 1, 31.

<sup>28</sup> The metaphor places Baars somewhat at odds with theorists – eg, Dennett – who eschew any description of consciousness that relies upon theatres or movies in the brain.

the theatre is more than just a metaphor, it accords with verifiable and replicable data generated by single cell recording,<sup>29</sup> EEGs,<sup>30</sup> computer tomography,<sup>31</sup> PETs,<sup>32</sup> MRIs,<sup>33</sup> TMS<sup>34</sup> and other methods of recording brain activity.<sup>35</sup>

For Baars, the metaphor of the theatre is first employed to distinguish the tiny amount of 'spotlighted' data available to consciousness (awareness) with the enormous amount of data being generated by unconscious neural processes. Baar extends this metaphorical contrast between 'focal consciousness' – what is, for the moment, 'on stage' – and the unconscious neural processes that are, sometimes for the moment, and sometimes forever, 'off-stage'. Around the 'bright spot' on stage are fringe 'players' of whom we are only vaguely aware. Finally, in the audience for the 'theatre of consciousness' are unconscious neuronal processes that receive the information being delivered from the 'stage' and other unconscious neuronal processes that respond to the information delivered and serve to shape what happens 'on-stage'.<sup>36</sup> It goes without saying that the vast majority of neuronal processes are not really interested in the theatre, will go on doing what they are doing without any meaningful interaction with the events on stage and never put a foot on stage.

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<sup>29</sup> Single cell recording employs the use of electrodes inserted directed into living cells to measure electrical activity.

<sup>30</sup> Electroencephalograms (EEGs) track changes in electrical potential in the brain, and though a rather old technology, it remains a useful tool to measure such events as the readiness potentials that proceed both physical action and conscious awareness.

<sup>31</sup> Computer tomography (CT) scans generate images of different tissue densities, and are useful for determining the deterioration of various parts of the brain and, thus, any concomitant loss of cognitive capacity.

<sup>32</sup> Positron emission tomography (PET) scan tracks radioactive substances introduced into the body in a manner that enables us to measure brain metabolism and blood flow, and to develop pictures of what and where brain activity occurs during certain forms of stimulation.

<sup>33</sup> Nuclear magnetic resonance imaging (MRI) provides vivid displays from all imaginable angles. Its limitations are that it reflects metabolic or hemodynamic responses to neural activity, and thus only indirectly measures neuronal activity.

<sup>34</sup> Transcranial magnetic stimulation (TMS) creates a magnetic field that stimulates neural activity in motor areas that, in turn, cause certain kinds of involuntary movement to occur. Used in conjunction with scanning, this technique enables investigators to map, with great precision, those areas of the brain responsible for motor coordination.

<sup>35</sup> See, generally, BJBaars *In the Theatre of Consciousness: The Workspace of the Mind* (1997); JB Newman, BJ Baars and SB Cho 'A Neural Global Workspace Model for Conscious Attention' (1997) 10 *Neural Networks* 1195 as reprinted in BJ Baars, W Banks and JB Newman *Essential Sources in the Scientific Study of Consciousness* (2003) 1131. BJ Baars 'In the Theatre of Consciousness: Global Workspace Theory, A Rigorous Scientific Theory of Consciousness' (1997) 4(4) *Journal of Consciousness Studies* 292; Bernard J Baars *A Cognitive Theory of Consciousness* (1988).

<sup>36</sup> See AD Baddeley 'Short-term and Working Memory' in E Tulving and FIM Craik (eds) *The Oxford Handbook of Memory* (2000) 77.

In Baars terminology, the theatre of consciousness is better known as the ‘global workspace’. And while ‘the theatre’ may be a nice metaphor – as an introduction – to Baars’ thinking about consciousness and the self, the use of the terms ‘global workspace’ is more illuminating, both with respect to explaining how the brain works and why it produces consciousness.

Baars ‘global workspace’ deploys analytical tropes successfully developed in other fields of study – speech understanding<sup>37</sup> and distributed artificial intelligence.<sup>38</sup> In these fields of study, the ‘global workspace’ focuses on a small number of ‘problems’ at a given moment. The ‘global workspace’ – a transient location designed to solve the immediate problem that has ‘captured’ our attention – is simultaneously connected to various sensory inputs and a host of potential experts – neural networks – that might assist in the ‘solution’ of the problem.<sup>39</sup> These teams of ‘experts’ could encompass neural networks with

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<sup>37</sup> See Newman, Baars and Cho (supra) at 1131 citing DR Reddy, LD Erman, RD Fennell and RB Neely ‘The Hearsay Speech Understanding System: An Example of the Recognition Process’ (1973) *Proceedings of the International Conference on Artificial Intelligence* 185:

The Hearsay model was one of the earliest attempts to simulate a massively parallel interactive computing system. The notion of a global workspace was initially inspired by this architecture, consisting of a large number of knowledge modules, or ‘local experts’, all connected to a single blackboard, or problem-solving space. Activated experts could post ‘messages’ (or hypotheses) on the blackboard for all other experts to read. Incompatible messages would tend to inhibit each other, while the output of cooperating messages would gain increasing access to the blackboard until a global solution emerged. Blackboard architectures are relatively slow, cumbersome and error-prone, but are capable of producing solutions to problems too novel or too complex to be solved by any extant modular knowledge source. Once such ‘global solutions’ are attained, however, the original problems can be allocated to modular processors for ‘nonconscious’ solution.

<sup>38</sup> See Newman, Baars and Cho (supra) at 1131 – 1132 quoting EH Durfee ‘Cooperative Distributed Problem Solving between (and within) Intelligent Agents’ in P Rudomin et al (eds) *Neuroscience: From Neural Networks to Artificial Intelligence* (1993) 84, 84:

[D]istributed artificial intelligence [DAI] [is] the study of ‘how intelligent agents coordinate their activities to collectively solve problems that are beyond the individual capabilities.’ . . . DAI models would appear to balance competitive self-interest and co-operative problem solving that is essential to optimizing outcomes in complex ‘social’ organizations.

<sup>39</sup> Indeed, Baars recognizes that the notion of a ‘theatre audience’ is far too passive to capture the engagement various parts of the brain and neural processes will have with the conscious contents of the global workspace:

[T]he global workspace resembles more a deliberative body than a theater audience. Each expert has a certain degree of ‘influence’, and by forming coalitions with other experts can contribute to deciding which issues receive immediate attention and which are ‘sent back to the committee’. Most of the work of the deliberative body is done ‘off-stage’ (ie, non-consciously). Only matters of greatest relevance in the moment gain access to consciousness.

See Newman, Baars and Cho (supra) at 1132 – 1133 (Consciousness is not a particular thing or a even particular kind of feeling, but rather the architecture that enables discrete and disparate neurological processes to solve a host of pressing problems (but also important medium term and long term problems.)

particular linguistic skills, relevant memories, or trained responses. As Blackmore puts it, the global workspace ‘recruits processors for ongoing tasks, facilitates executive decisions and enables voluntary control over automatic action routines.’<sup>40</sup>

If we return for a moment to the sketches in the introduction, Chapter 1, of the unconscious driver and the errant driver, then we might get a better idea of how the workspace operates. In the story of the unconscious driver, consciousness is taken up with all sorts of ruminations about the nature of the self and its relationship to experimental constitutionalism. At best, the various objects that ought to concentrate the mind – other cars, traffic robots, layouts of streets – are pushed to the periphery of the stage. At worst, say we add a cell-phone to the mix, these objects of attention may appear to be pushed off the stage entirely. (But that is too strong a statement – for the routine nature of driving is such that we are also trained to remain aware of objects that might cause us harm (other cars, red lights, sharp turns in the road.) Indeed, the story of the errant driver serves to show how the global workspace – its attention or focus drawn primarily to the plot devices of that night’s film – can be shifted to another problem: the layout of roads. Whereas the unconscious driver had no apparent need of the neural network required to solve driving problems and could rely on an array of unconscious, distributed, parallel processes to carry him from Glen Atholl to Fellside, the errant driver – having pushed his many driving sub-routines to the periphery of consciousness – suddenly became aware of a problem with ‘driving’ and returned ‘driving’ to its place of prominence in the global workspace in order to right the ship and redirect the car to Fellside.<sup>41</sup> The events depicted in the errant driver story fit Baar’s and Newman’s contention that ‘consciousness generally comes in play when stimuli are assessed to be novel, threatening or momentarily relevant to active schemas or intentions’<sup>42</sup>:

The defining features of stimuli which engage conscious attention (ie, the global allocation of processing resources) are that they: (1) vary in some significant degree

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<sup>40</sup> Blackmore *Consciousness* (supra) at 72.

<sup>41</sup> For more on the relationship between consciousness and error-correction, see JL McClelland ‘The Programmable Blackboard of Reading’ in JL McClelland and DE Rummelhart (eds) *Parallel Distributed Processing* (1986) 121, 151 -152.

<sup>42</sup> See Newman, Baars and Cho (supra) at 1131.

from current expectations; or (2) are congruent with the current predominant intent/goal of the organism. In contrast, the processing of stimuli which are predictable, routine or over-learned is automatically allocated to non-conscious, highly-modulized cognitive systems.<sup>43</sup>

As Baars' analysis and Newman's explanation of the hallmarks of conscious attention suggest, the examples of the unconscious driver and the errant driver paint too Manichean a picture of consciousness. It is safer to say that in both instances, we were more conscious and less conscious of certain events. Indeed, brain scans reveal the consciousness has this very graded character – moving from highly conscious, to very conscious, to somewhat conscious, to barely conscious, to not conscious at all.<sup>44</sup> Such scans – which show the variability and motility of consciousness – also reveal a feature of consciousness to which we have already attended in previous sections: that it has no fixed location and, apparently, no fixed content.<sup>45</sup>

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<sup>43</sup> JB Newman 'Reticular-Thalamic Activation of the Cortex Generates Conscious Contents' (1995) 18 (4) *Behavioral and Brain Sciences* 691.

<sup>44</sup> Baars and his colleagues rely on a wide ranging body of evidence to support their claim that global attention – and thus its shifting location and variable levels of intensity – is reflected in measurements (and models) of changes in the thalamus-NRT-cortex complex. See Newman, Baars and Cho (supra) at 1134 citing JG Taylor and FN Alavi 'Mathematical Analysis of a Competitive Network for Attention' in JG Taylor (ed) *Mathematical Approaches to Neural Networks* (1993) 34182; C Koch and T Poggio 'Multiplying with Synapses and Neurons' in T McKenna, J Davis and SF Zornetzer (eds) *Single Neuron Computation* (1992) 315; AB Schiebel 'Anatomical and Physiological Substrates of Arousal: A View from the Bridge' in JA Hobson and MAB Brazier (eds) *The Reticular Formation Revisited* (1980) 55. Although their findings are not based upon analysis of dendro-dendritic connections, Llinas and Pare used high frequency EEG oscillation to produce a model – like Baars -- in which loops of 'non-specific' nuclei 'operate in parallel with specific loops' in a manner that appears to 'provide the basis for "perceptual unity . . . by which different sensory components are gathered into one global image".' Newman, Baars and Cho (supra) at 1137 quoting RR Llinas, U Ribary, M Joliot & XJ Wang 'Content and Context in Temporal Thalamocortical Binding' in G Busaki et al (eds) *Temporal Coding in the Brain* (1994) 251. Llinas, Ribary, Joliot and Wang then go on to describe their neurological evidence for the kind of multi-centered, parallel processing that undergirds both his and Baars' account of how conscious emerges:

When the interconnectivity of these nuclei is combined with the intrinsic properties of the individual neurons, a network for resonant neuronal oscillations emerges in which specific corticothalamic circuits would tend to resonate at 40 Hz. According to this hypothesis, neurons at the different levels, and particularly those in the reticular nucleus, would be responsible for the synchronization of 40 Hz oscillations in distant thalamic and cortical sites . . . [and] these oscillations may be organized globally over the CNS [central nervous system], especially as it has been shown that neighboring reticular cells are linked by dendrite-dendritic and intra-nuclear axon collaterals.

Llinas (supra) at 253 – 254 citing M Deschenes A Madariage-Domich & M Steriade 'Dendrodendritic Synapses in the Cat Reticularis Thalami Nucleus: A Structural Basis for Thalamic Spindle Synchronization' (1985) 334 *Brain Research* 165. See also RR Llinas & D Pare 'Commentary: Of Dreaming and Wakefulness' 44 (3) *Neuroscience* 521.

<sup>45</sup> However, Baars does not discount data that suggests that the neural correlates of consciousness tend to suggest that there are preferred convergence zones for 'consciousness' and that there may be particular areas of the brain that facilitate the construction of a global workspace. Such hypotheses, as Koch and Crick observe,

b. Dehaene and Naccache's Global Neuronal Workspace Theory

Over the past two decades, Dehaene, Naccache and others have extended Baars hypotheses regarding global workspace theory in a manner that connects the theory more directly to empirical findings in neuroscience. This fleshing out of Baars' theses with hard data about the manner in which the brain operates explains the subtle shift in description from a global workspace theory to a global neuronal workspace theory.

Dehaene and Naccache begin by noting that any theory of consciousness must accommodate three critical empirical observations:

- (1) a considerable amount of processing is possible without consciousness, (2) attention is a prerequisite of consciousness, and (3) consciousness is required for some specific cognitive tasks, including those that require durable information maintenance, novel combinations of operations, or the spontaneous generation of intentional behaviour.<sup>46</sup>

They then offer a hypothesis which synthesizes these three findings: the theory of a global neuronal workspace. According to this hypothesis

[A]t any given time, cerebral networks are active in parallel and process information in an unconscious manner . . . [Global neuronal workspace theory operates on the assumption that] information becomes conscious . . . if the neural population that represents it is mobilized by top-down attention amplification into a brain state of coherent activity that involves many neurons distributed throughout the brain. The long-distance connectivity of these 'workspace neurons' can . . . make the information available to a variety of processes including perceptual categorization,

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are testable: though we may not, as yet, possess an adequate map of what occurs in each part of the brain, a sufficiently sophisticated account of how neural networks form and reform over vast spaces within the brain and brain imaging technology adequate to the task of capturing convergence zones. See C Koch *The Quest for Consciousness: A Neurobiological Approach* (2004).

<sup>46</sup> S Dehaene & L Naccache 'Towards a Cognitive Neuroscience of Consciousness: Basic Evidence and a Workspace Framework' in S Dehaene (ed) *Cognitive Neuroscience of Consciousness* (2001) 1.

long-term memorization, evaluation and intentional action. We postulate that this global availability of information through the workspace is what we subjectively experience as a conscious state. A complete theory of consciousness should explain why some cognitive and cerebral representations can be permanently or temporarily inaccessible to consciousness, what is the range of possible conscious contents, how they map on to particular cerebral circuits and whether a generic neuronal mechanism underlies all of them . . . Neurophysiological, anatomical, and brain-imaging data strongly argue for a major role of prefrontal cortex, anterior cingulate, and the areas that connect to them, in creating the postulated brain-scale workspace.<sup>47</sup>

That a considerable amount of processing is possible without consciousness is evinced by studies of brain-lesioned patients,<sup>48</sup> prosopagnosic patients<sup>49</sup> and normal subjects in which the relevant stimuli is masked by surrounding stimuli.<sup>50</sup> The question then arises as to why, if so much information can be processed without consciousness, we require or experience consciousness at all.

The answer, as one might expect, is that ‘consciousness is required for specific mental operations’.<sup>51</sup> One such task is durable memory. In the absence of conscious amplification of a visual field, the contents of that visual field quickly decay. A second task is the ability to perform a novel or an unusual computation. A series of studies of the Stroop effect support the proposition that the ‘ability to inhibit an automatic [and generally unconscious] stream of processes and to deploy a novel strategy depended crucially on the conscious availability of information.’<sup>52</sup> From this set of experiments – and the concomitant

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<sup>47</sup> Ibid at 1 – 2.

<sup>48</sup> See E Poppel, R Held & D Frost ‘Residual Visual Function after Brain Wounds Involving the Central Visual Pathways in Man’ (1973) 243 *Nature* 295 (Patients with partial blindness were able to detect visual stimuli without having any conscious awareness of the stimuli.)

<sup>49</sup> B Renault, JL Signoret, B Debouille, F Breton & F Bolgert ‘Brain Potentials Reveal Covert Facial Recognition in Prosopagnosia’ (1989) 27 *Neuropsychologia* 905 (Although patients failed to register consciously, and thus to report recognition of familiar faces, ‘an electrical waveform indexing process, the P300’, reflected the greater intensity associated with recognition of familiar faces.)

<sup>50</sup> PJ Whalen, SL Rauch, NL Etcoff, SC McInerney, MB Lee, MA Jenike ‘Masked Presentations of Emotional Facial Expressions Modulate Amygdala Activity Without Explicit Knowledge’ (1998) 18 *Journal of Neuroscience* 411 (Subjects demonstrated response – in the amygdala -- to masked expressive faces.)

<sup>51</sup> Dehaene & Naccache (supra) at 8.

<sup>52</sup> Dehaene & Naccache (supra) at 9

hypotheses regarding their meaning -- Dehaene and Naccache draw the following conclusion:

[A]s a generalization, the strategic operations . . . associated with planning a novel strategy, evaluating it, controlling its execution, and *correcting possible errors* cannot be accomplished unconsciously. It is noteworthy that such processes are always associated with a subjective feeling of 'mental effort', which is absent during automatized or unconscious processing and may therefore serve as a selective marker of conscious processing.<sup>53</sup>

A third kind of task associated with consciousness involves intentional behaviour. Dehaene and Naccache, following Dennett and Weiskrantz, note the difference in responses of normal subjects and blind-sighted subjects to visual stimuli.<sup>54</sup> Normal subjects can respond consciously and of their own accord to visual stimuli. Blind-sighted subjects cannot. Their absence of conscious awareness of the stimuli means that they must be guided by another – that is, by the intentional behaviour of another – in order to engage in a purposive response to the stimuli.

That we can distinguish tasks that require conscious attention from tasks that do not returns us once again to the question of how the brain accomplishes these tasks. The hypothesis stated above by both Baars and Dehaene and Naccache is that

[B]esides specialized processors, the architecture of the human brain . . . comprises a distributed neural system or 'workspace' with long-distance connectivity that can potentially interconnect multiple specialized brain areas in a coordinated though variable manner. Through the workspace, modular systems that do not directly exchange information in an automatic mode can nevertheless gain access to each other's content. The global workspace thus provides a common 'communication

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<sup>53</sup> Ibid at 11. See also S Dehaene, M Kerzberg & JP Changeux 'A Neuronal Model of a Global Workspace in Effortful Cognitive Tasks' (1998) 95 *Proceedings of the National Academy of Sciences USA* 14529.

<sup>54</sup> L Weiskrantz *Consciousness Lost & Found: A Neuropsychological Exploration* (1997).

protocol' through which a particularly large potential for the combination of multiple input, output, and internal systems becomes available.<sup>55</sup>

Dehaene and Naccache then go on to identify five main categories of neural systems that must participate for the workspace to function: (1) 'perceptual circuits that inform about the present state of the environment'; (2) 'motor circuits that allow the preparation and controlled execution of actions'; (3) 'long-term memory-circuits that can reinstate past workspace states'; (4) 'evaluation circuits that attribute [percepts] a valence in relation to previous experience'; and (5) 'attentional or top-down circuits that selectively gate the focus of interest'.<sup>56</sup> The interaction of these five kinds of neural systems requires no central coordination. Instead, neural networks are established for the purpose of conscious action by virtue of their adequacy with respect to the demands of the environment and the task at hand. The neural systems ultimately selected are, not surprisingly, those networks that have worked previously, or based upon past experience, those novel networks that can be expected to realize the person's goals and achieve the desired reward. Again Dehaene and Naccache take great care to emphasize that 'the resulting . . . transient self-sustained workspace states follow one another in a constant stream, without requiring any external supervision.'<sup>57</sup> (That should sound more like Parfit's bundle theory than it does a Cartesian ego.) The process governing these transient self-sustained workspace states appears, from current computer simulations, to be one of 'neuronal Darwinism'.<sup>58</sup>

Another important 'how' question is how does the workspace actually function anatomically in order to produce these conscious states? That is, what parts of the brain are responsible for conscious states?

Some theorists prefer not to employ the term 'consciousness' much. They spend their time explaining the physiological basis, the neural correlates, of consciousness because they tend to believe that the term, as it currently stands, evokes deeply embedded, and

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<sup>55</sup> Dehaene and Naccache (supra) at 13.

<sup>56</sup> Ibid at 14

<sup>57</sup> Ibid at 15.

<sup>58</sup> S Dehaene & JP Changeux 'A Hierarchical Neuronal Network for Planned Behaviour' (1997) 94 *Proceedings of the National Academy of Sciences USA* 13293 – 13298.

wrong-headed, metaphysical beliefs that obscure more than they enlighten. They believe that with enough empirical investigation, and a better understanding of how the brain actually works, people will stop using dualist language and learn to speak of consciousness as they would any other physical phenomenon.<sup>59</sup> Indeed, their strong materialist orientation leads neural correlates of consciousness proponents, such as Christopher Koch and Francis Crick, to assert that 'you', their reader and their audience, 'your joys and sorrows, your memories and your ambitions, your sense of personal identity and free will, are in fact no more than the behaviour of a vast assemblage of nerve cells and their associated molecules.'<sup>60</sup> Consciousness, on Koch and Crick's account, 'is the behaviour of neurons'<sup>61</sup> Consciousness is not to be understood as either the (epi)phenomenological product of neuronal activity, nor is it to be understood as an entity that causes the neurons themselves to act.<sup>62</sup>

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<sup>59</sup> See, generally, C Koch *The Quest for Consciousness: A Neurobiological Approach* (2004); C Koch and G Laurent 'Complexity and the Nervous System' (1999) 284 *Science* 96; C Koch and RB Tootell 'Stimulating Brain, But No Mind' (1996) 383 *Nature* 301; F Crick and C Koch 'Consciousness and Neuroscience' (1998) 8 *Cerebral Cortex* 97; F Crick and C Koch 'A Framework for Consciousness' (2003) 6 *Nature Neuroscience* 119; F Crick and C Koch 'Why Neuroscience May Be Able to Explain Consciousness' (1995) 273 *Scientific American* 84.

<sup>60</sup> F Crick *The Astonishing Hypothesis* (1994) ('*Hypothesis*').

<sup>61</sup> Blackmore *Consciousness* (supra) at 72.

<sup>62</sup> At some level, this stance absolves Koch and Crick of the obligation to explain to students gathered round a vivisection table how a lump of gray matter gives rise to notions of self, consciousness and free will, or to tie the electrical readouts of an EEG to the actual texture of a lived experience. Their response is, in fact, not to ignore the problem entirely, but rather to state, with some modesty, that the neuroscience that will yield a full account of physical basis for consciousness is still in its incipient stages. However, as things stand, they argue that grand hypotheses about how consciousness actually arises outstrip the conclusions that can be reasonably drawn from the limited amount of data we possess. As Koch writes:

For now, science should rise to the occasion and explore the basis of consciousness in the brain. Like the partially occluded view of a snow covered mountain summit during a first ascent, the lure of understanding the puzzle is irresistible.

Koch *Quest* (supra) at 20. As a result, Crick and Koch concentrate their much more modest efforts on identifying the neural correlates of consciousness, and, in particular, the neural correlates of consciousness associated with vision. What are neural correlates of consciousness (NCCs)? The basic premise is that we can study – and measure -- various forms of neural functioning and determine how they correlate with first person accounts of conscious experience. See T Metzinger (ed) *Neural Correlates of Consciousness* (2003).

In their early work, Crick and Koch make three important and illuminating admissions. First, they have concentrated their efforts on the NCCs of visual experience because it enables them 'to avoid the more difficult aspects of consciousness, such as self-consciousness and emotion'. F Crick 'Forward' in Koch *Quest* (supra) at xiv. Second, they have narrowed their focus to NCCs of visual experience – as opposed to NCCs of other experiences – because there is both a vast amount of largely undisputed evidence regarding visual perception from available from 'visual psychology, brain scans, neuro-physiology and neuroanatomy' that extends all the way down to the simplest of components 'neurons, synapses and molecules'. Ibid. Third, as yet, they can locate 'no single region in which the neural activity corresponds exactly to the vivid picture of the world we see in front of our eyes', but that, instead, 'at any moment in time, consciousness will correspond to a particular type of activity in a transient set of neurons that are a fraction of a much larger set of potential candidates.' Crick *Hypothesis* (supra) at 159, 207.

Dehaene and Naccache recognize the tight correlation between the activation of particular neural circuits and a subject's reports of consciousness. However, they refuse to draw the conclusion that correlation implies causation.<sup>63</sup> 'Causality', they write, 'can only be established by demonstrating that alterations of . . . brain state[s] systematically alter[] subjects' consciousness.'<sup>64</sup>

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This third admission tells us two very important things – even if they come as something of a disappointment for Koch and Crick. NCCs are distributed throughout various parts of the brain, even when the scope of analysis for NCCs is limited to the NCCs of visual percepts. The general physical architecture of consciousness has begun to distinguish itself from the architecture in the brain responsible for other kinds of neuronal processes and bodily functions; though once again the architecture is a formal set of structures – kinds of cells in particular kinds of relationships – rather than specific cells engaged, continuously, in neuronal processes that correlates with each and every moment of consciousness. Both of these observations accord with the evidence Baars and Dehaene have marshalled in support global workspace theory's two primary propositions:

First, the vast majority of cognitive functions are carried out, non-consciously, via changing arrays of specialized modular processors. [Second,] GW theory also reminds us that conscious functions operate on an information load about the size of working memory. Thus, we are talking about a highly coarse-grained level of processing. In this context, global attention is . . . a second order operation, acting upon a highly selective stream of information. All this is to say that a relatively low density of widely distributed, yet highly convergent, circuits could be all that are required to create a conscious system; and these are the very characteristics of the neural model we have described.

Newman, Baars and Cho (supra) at 1140. Not all working neuroscientists sign on to Crick and Koch's project of identifying the smallest units that could, reliably, be responsible for conscious experience. For example, Edelman and Tononi reject Crick and Koch's central contention – that a limited number of neuronal circuits or cortical regions could play a privileged role with respect to consciousness. See GM Edelman and G Tononi *A Universe of Consciousness* (2000); G Tononi and GM Edelman 'Consciousness and Complexity' (1998) 282 *Science* 1846 – 1851. Instead, they prefer to explain the neuronal basis for conscious experience in terms of a 'dynamic core'. This dynamic core consists of a large cluster of thalamo-cortical neurons – a large coalition, if you will. The dynamic core – when viewed as a dominant coalition of neurons whose constituent parts are spread throughout the brain – does not look all that different than those theories offered by Baars, Dennett, Dehaene and Changeux in which the NCC is made up of a 'dominant coalition of neurons stretching halfway across the cortex.' Koch *Quest* (supra) at 311. So although these neuroscientists share a general view about how apparently unified serial consciousness emerges from massive, distributed, parallel and primarily nonconscious neuronal process, they have smaller and larger disagreements about how and where these processes occur. Indeed, Crick and Koch's later work generates conclusions that remain consistent with global workspace theory. Koch himself summarizes their conclusions as follows: '1. Consciousness deals with broader, less commonplace, and more taxing aspects of the world or a reflection of these in imagery. Consciousness is necessary for planning and choice among multiple courses of action. . . The function of consciousness is to summarize the current state of the world in a compact representation and make this 'executive summary' available to the planning stages of the brain. . . The content of this summary is the content of consciousness.' Koch *Quest* (supra) at 305. 2. 'The slower, conscious system may interfere with simultaneously active zombie agents. By means of sufficient repetition, specific sensory-motor behaviours that initially require consciousness, such as hitting a backhand in tennis, can be carried out effortlessly by an automatic zombie agent.' Ibid. 3. 'Any one percept, real or imagined, corresponds to a coalition of neurons. . . . The dynamics of coalitions will not be easy to understand, though it is clear that a winner take all competition plays a key role.' Ibid at 305 - 306. 4. 'At any one moment, the winning coalition, expressing the actual content of consciousness, is somewhat sustained. A very short-lived coalition corresponds to a fleeting moment of consciousness. A useful metaphor is the hustle and bustle underlying the electoral process in a democracy.' Ibid at 315.

<sup>63</sup> Dehaene and Naccache (supra) at 23.

<sup>64</sup> Ibid.

That said, Dehaene and Naccache are not entirely agnostic on the subject of causation and consciousness. They contend that experiments carried out by MacIntosh, Rajah and Lobaugh demonstrate the centrality of the prefrontal cortex ('PFC') for consciousness.<sup>65</sup> In their work, MacIntosh, Rajah and Lobaugh separated out, after the experiment, those subjects who became consciously aware of the stimuli from those subjects that did not. The subjects who became consciously aware of the systematic relations between auditory and visual stimuli

showed an increased activation of the PFC (and, to a lesser degree, in bilateral occipital cortices and left thalamus) . . . Importantly, this activation was accompanied by a major increase in the functional correlation of the left PFC with other distant brain regions including the contralateral PFC, sensory association cortices, and cerebellum. This long distance coherence pattern appeared precisely when subjects became conscious and started to use their conscious knowledge to guide behaviour.<sup>66</sup>

These findings regarding the PFC have been repeated in other experiments.<sup>67</sup> Additional experiments carried out over the past decade enable Dehaene and Naccache to refine their hypotheses about the neurological architecture responsible for most conscious activity: the PFC, the anterior cingulate ('AC'), along with interconnected areas must, in turn, 'be tightly interconnected through long axons' with the five kinds of neural networks identified above ('high level perceptual, motor, long-term memory, evaluative and attentional').<sup>68</sup>

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<sup>65</sup> AR McIntosh, MN Rajah & NJ Lobaugh 'Interactions of the Prefrontal Cortex in Relation to Awareness in Sensory Learning' (1999) 284 *Science* 1531.

<sup>66</sup> *Ibid* at 25.

<sup>67</sup> See E Rodriguez, N George, JP Lachaux, J Martinerie, B Renault & FJ Varela 'Perception's Shadow: Long-Distance Synchronization of Human Brain Activity' (1999) 397 *Nature* 430; C Tallon-Baudry & O Bertrand 'Oscillatory Gamma Activity in Humans and Its Role in Object Representation' (1999) 3 *Trends in Cognitive Science* 151.

<sup>68</sup> *Ibid* at 26. Dehaene and Naccache, following the work of Goldman-Rakic on monkeys, postulate a global neuronal workspace that has something like the following physical structure:

A dense network of long-distance reciprocal connections linking the dorsolateral PFC with premotor, superior temporal, inferior parietal, anterior and posterior cingulate cortices as well as deeper structures including the neocortex, parahippocampal formation and thalamus. This connectivity pattern . . . provides a plausible substrate for fast communication amongst the five categories of processors that we postulated contribute primarily to the conscious workspace. Temporal and parietal circuits provide a variety of high level perceptual categorizations of the outside world. Premotor, supplementary motor and posterior parietal cortices, together with the basal ganglia (notably the

As interesting as these findings regarding the physical anatomy of the global neuronal workspace are, Dehaene and Naccache hypotheses about the purpose of consciousness are that much more so for this thesis's immediate purposes. In the last full quotation, Dehaene and Naccache write that '[t]his long distance coherence pattern appeared precisely when subjects became conscious and started to use their conscious knowledge to guide behaviour.' *The purpose then of consciousness is to guide behaviour.*

But how exactly does consciousness accomplish this feat? Dehaene and Naccache suggest that conscious attention enables us to modify or to withhold automatic or learned behavioural responses when confronted with novel circumstances. Consciousness, it would appear, allows an individual 'to represent a goal and to estimate the outcomes of [her] . . . actions before initiating them'.<sup>69</sup> The ability to undertake 'trials and errors' within the simulated framework of mental activity is an enormous advance on having to undertake 'trials and errors' in one's actual physical environment. It enables us to weed out outcomes less likely to be successful in the physical world and enhances our capacity to survive and to flourish.<sup>70</sup>

And that then is the explanation of the genesis of conscious. Dehaene and Naccache conclude:

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candidate nucleus), the cerebellum and the speech production circuits of the left interior lobe, allow for the intentional guidance of actions, including verbal reports, from workspace contents. The hippocampal region provides an ability to store and retrieve information over the long term. Direct or indirect connections with the orbitofrontal cortex, AC, hypothalamus, amygdala, striatum, and mesencephalic neuro-modulatory nuclei may be involved in computing the value or the relevance of current experiences in relation to previous experience. Finally, parietal and cingulate areas contribute to the attentional gating and shifting of focus of interest. Although each of these systems, in isolation, can probably be activated without consciousness, we postulate that their coherent activity, supported by their interconnectivity, coincides with the mobilization of a conscious content into the workspace.

Ibid at 26 – 28 citing PS Goldman-Radic 'Topography of Cognition: Parallel Distributed Networks in Primate Association Cortex' (1988) 11 *Annual Review of Neuroscience* 137.

<sup>69</sup> Ibid at 30.

<sup>70</sup> However, Dehaene and Naccache are quick to point out that this ability to check one's immediate responses and to come up with what one believes to be an optimal response should not be confused with being able to 'freely will' a response in the standard compatibilist sense of the term. Instead, they adopt Spinoza's position on the prevailing confusion between consciousness and causality. Spinoza wrote: 'Men are mistaken in thinking themselves free; their opinion is made up of consciousness of their own actions, and ignorance of the causes by which they are conditioned. Their idea of freedom, therefore, is simply their ignorance of any cause of their actions.' *Ethics*, II, 35.

The evolutionary advantages that this system confers to the organism may be related to the increased independence it affords. The more an organism can rely on mental simulation and internal evaluation to select a course of action, instead of acting out in the open world, the lower are risks and the expenditure of energy. By allowing more sources of knowledge to bear on this internal decision process, the neural workspace may represent an additional step in a general trend towards increasing internalization of representations in the course of evolution, whose main advantage is the freeing of the organism from its immediate environment.<sup>71</sup>

In keeping with the general thesis of this work, what Dehaene and Naccache have shown is that consciousness enables the individual – by herself or in concert with others – to undertake multiple thought experiments that maximize the chances of successful real *experiments* in the outside world. Consciousness – as reflected in global neuronal workspace – accomplishes this feat by allowing different combinations of neural networks to compete with one another until a winner is selected – a winner that reflects a representation of the action most likely to succeed in the outside world.

### iii. The Self as a Centre of Narrative Gravity

#### aa. Consciousness

Daniel Dennett has, for quite some time, been the most influential philosopher in contemporary empirical and conceptual debates about consciousness. Much of Dennett's energy has been devoted to 'correcting' long-standing errors in the philosophical canon (especially various species of mind/body dualism such as the hard problem of consciousness,<sup>72</sup> the nature of qualia,<sup>73</sup> as well as related arguments about the irreducibility

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<sup>71</sup> Dehaene & Naccache (*supra*) at 31.

<sup>72</sup> According to David Chalmers, the 'hard problem' in consciousness studies is why we have the 'experience' of subjectivity, that a set of percepts belong to me, that no one else has access to these subjective experiences, and that a set brain processes give rise to subjective experiences of blueness or love. Chalmers explains the hard problem as follows:

Even when we have explained all the cognitive and behavioural functions in the vicinity of experience – perceptual discrimination, categorization, internal access, verbal report – there may still be a further unanswered question: Why is the performance of all these functions accompanied by experience? Why doesn't all this information-processing go on 'in the dark' free of any inner feel?

and incorrigibility of first person reports and the possibility of heterophenomenology.<sup>74</sup>)  
However, his contributions have not been limited to the demolition of the Cartesian theatre

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D Chalmers 'Facing Up to the Problem of Consciousness' (1995) 3(1) *Journal of Consciousness Studies* 200, 203. See also D Chalmers *The Conscious Mind* (1996). The answer, to the extent that I can offer one, is found in global workspace theory itself. 'Consciousness' is simply the winner in a neuronal competition for attention that serves as a broadcast to the rest of the apposite neuronal processes in the brain about a problem that needs a solution. Others claim that such a solution is not a solution at all. See C McGinn *The Mysterious Flame: Conscious Minds in a Material World* (1999). McGinn describes the gap between the objective world, subject to scientific inquiry, and the subjective world, which we as individuals inhabit, as separated by a 'yawning conceptual divide.' Ibid at 51. That chasm is unbridgeable because, he says, '[y]ou can look into your mind until you burst, and you will not discover neurons and synapses and all the rest; and you can stare at someone's brain from dusk til dawn and you will not perceive the consciousness that is so apparent to the person whose brain you are so rudely eye-balling.' Ibid at 47.

<sup>73</sup> Qualia are such things as my experience of the blueness of the ocean, the sting of the salt-water against my cheek while on the deck of a boat, or the thrill I get from finally seeing land after weeks at sea. Ostensibly, these experiences are mine and mine alone, and there is no way of confirming or denying the quality of my experience. (That is why some describe qualia as being a species with the larger genus of what are known as problems of other minds.) John Locke thought this proposition so incontrovertible that he made it a linchpin of his epistemology. See J Locke *An Essay Concerning Human Understanding* (1690). For example, Locke claimed that our perceptions were so incorrigible that my color spectrum could be completely inverted with respect to yours and we would have no way of knowing that your blue is my blue, or more disturbing still, that your blue is actually my orange. This claim regarding the inverted colour spectrum was thought to be immune to scientific contestation. However, over 50 years worth of investigation into colour experience has, in fact, yielded data that suggests that we do – for the most part – experience the same colours when we see the colour blue. See S Palmer 'Can the Color Spectrum Really be Inverted?' (1999) as reprinted in BJ Baars, W Banks and JB Newman (eds) *Essential Sources in the Scientific Study of Consciousness* (2003) 185. Palmer lays out an evidentiary record that demonstrates that, in fact, all human beings experience 4 pure colours – red, yellow, blue and green – and that other colours could not – without contradicting the 'purity' quality of those four colours – be mapped on to them in an inverted colour scheme. The only candidates for inversion are – for clear physiological and logical reasons – red and green. Logically, they are both pure. Physiologically, the cones for red and green are close in size and in proximity on the retina. Moreover, the work done on colour-blindness (and the inversion of reds and greens or their absence) supports this hypothesis.

<sup>74</sup> Those who believe in the hard problem of consciousness are going to be inclined to believe that first-person reports are essential to any science of consciousness. For some, like John Searle, 'consciousness has a first person or subjective ontology and so cannot be reduced to anything that has third-person or objective ontology.' J Searle (ed) *The Mystery of Consciousness* (1997) 212. They would be apt to say that even when we discover a way to collect effectively first-person reports about consciousness ('I feel pain when my skin is pinched') and connect them directly to third person reports (the skin is red and the somatosensory cortex registered a measurable response during an MRI), something real, if ineffable, will be left out of our account. Likewise, David Chalmers, whose agenda for a future science of consciousness rests on the ability to make such connections, insists that because 'it's a manifest fact that there is something it is like to be us – that we have subjective experiences – and [that] [o]ur direct knowledge of subjective experiences stems from our first person access to them', the content of conscious experience cannot be capture entirely in terms of third-person explanations.' D Chalmers 'First-Person Methods in the Science of Consciousness' (1999) *Consciousness Bulletin*, available at <http://www.u.arizona.edu/chalmers/papers/firstperson.html> as cited in Blackmore *Consciousness* (supra) at 372 - 373. Another way of articulating the 'hard problem' of conscious is to compare, invidiously, human consciousness with what either qualifies as bat consciousness or simply batness. See T Nagel 'What Is It Like to be a Bat?' *Mortal Questions* (1979) 165. Our lack of access to 'bat experience' and the clear differences in their sensory structure leads Nagel to draw two conclusions. First, we cannot say, meaningfully, what it is like to be a bat. Second, we can say, subjectively, what it is like to be human. That we can offer this subjective account serves as an argument in favour of the 'hard problem': namely, the inability to capture in an objective, third person account the subjective sense of what it is like to be me or a bat. Others demur and argue that a sufficiently sophisticated objective physical science which adopts the science's standard third person stance could, potentially, arrive at a phenomenological account that does justice to my 'most private and ineffable subjective experiences'. D Dennett *Consciousness* (supra) at 72.

and all vestiges of dualism.<sup>75</sup> Indeed, as a cognitive scientist, Dennett was one of the first theorists to conceive of an empirical framework for consciousness that used the available data from fields as disparate as ‘quantum physics and chemistry, through neuroscience and psychology, to philosophy and literature’.<sup>76</sup> By drawing heavily on contemporary scholarship in neuroscience, experimental psychology and artificial intelligence, Dennett was able to offer an account of consciousness and the self in the early 1990s that has, in fact, largely been verified by subsequent investigations in the natural sciences as to the nature of and physiological rudiments of consciousness and the self.<sup>77</sup> That account, offered in various forms in the previous pages of this chapter, runs as follows:

At any given time, many modular (1) cerebral networks are active in parallel and process information in an unconscious manner. Information (2) becomes conscious, however, if the neural population that represents it is mobilized by top-down amplification of into a brain-state of coherent activity that involves many neurons

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<sup>75</sup> See Dennett *Consciousness* (supra) at 134: ‘When you discard Cartesian dualism, you really must discard the show that would have gone on in the Cartesian theatre, and the audience as well, for neither the show nor the audience is to be found in the brain, and the brain is only real place to look for them.’ The crucial move, on this account, is the elimination of ‘a master discriminator’, a single homunculus sitting comfortably in the cortex of the brain, who *has* the experiences. (There is no mini-me inside the larger-me.) As Susan Blackmore explains, on Dennett’s account – and this holds true for the global workspace theory worked out by Baars, Newman, Dehaene, Naccache and others – ‘all kinds of mental activity, including perceptions, emotions, thoughts, are accomplished in the brain by parallel, multitrack processes of interpretation and elaboration of sensory inputs, and they are all under continuous revision. . . . [C]ontents arise, get revised, affect behaviour and leave traces in memory, which then get overlaid by other traces, and so on.’ Blackmore *Consciousness* (supra) at 74 -- 75. These multiple drafts, as Dennett calls them, do, in fact, produce various narratives. However, it would be a mistake to conclude from the existence of such narratives ‘that there are facts – unrecoverable but actual facts – about just which contents were conscious and which were not at the time.’ Dennett *Consciousness* (supra) at 407.

<sup>76</sup> Dennett *Sweet Dreams* (supra) at 131.

<sup>77</sup> See S Dehaene & L Naccache *The Cognitive Neuroscience of Consciousness* (2001). Dennett notes that the authors marshal a powerful body of evidence to support the contention that the previous decade has witnessed convergence – from various quarters – on a global neuronal workspace model. Dennett *Sweet Dreams* (supra) at 131. Dennett does not, in fact, claim credit for the dominance of global workspace theory. Baars’ first major work on global workspace theory – *A Cognitive Theory of Consciousness* (1988) – preceded Dennett’s *Consciousness Explained* (1991) by a few years. Indeed, he traces the current dominant neuroscientific theory of consciousness to work in artificial intelligence by J McCarthy in the late 1950s. See J McCarthy ‘Pandemonium: A Paradigm for Learning’ *Symposium on the Mechanization of Thought Processes* (1959). McCarthy wrote:

I would like to speak briefly about some of the advantages of the pandemonium model as an actual model of conscious behaviour. In observing a brain, one should make a distinction between that aspect of the behaviour which is available consciously, and those behaviours, no doubt equally important, but which proceed unconsciously. If one conceives of the brain as a pandemonium – a collection of demons – perhaps what is going on within the demons can be regarded as the unconscious part of thought, and what the demons are publicly shouting for each other to hear, as the conscious part of thought.

McCarthy (supra) at 147.

distributed throughout the brain. The long distance connectivity of these ‘workplace neurons’ can, when they are active for a minimal duration (4), make the information available to a variety of processes including perceptual categorization, long term memorization, evaluation and intention action. We postulate that this global availability of information through the workplace is (5) what we subjectively experience as a conscious state.<sup>78</sup>

Dennett draws attention to three additional hallmarks of the global workspace theory that are not only important for understanding this theory of the self, but will, I think, become important to understanding the fundamental principles of flourishing and experimental constitutionalism developed later on in this work. First, it is important to remember that this post-competition ‘consensus’ amongst neural networks does not cause ‘consciousness’. It *is* consciousness. Second, the accessibility of Baars’ discrete experts – and McCarthy’s demons – to one another (horizontally), and not vertically to ‘some imagined higher executive or central ego’) may ‘explain the dramatic increases in cognitive competence that we associate with consciousness: the availability to deliberate reflection, the non-automaticity, in short, the open-mindedness that permits a conscious agent to consider anything in its purview in any way it chooses.’<sup>79</sup> Third, he suggests that we should try to understand consciousness, or the conscious moment, in terms of

political influence – a good slang term is clout. When processes compete for ongoing control of the body, the one with the greatest clout dominates the scene until a process with even greater clout displaces it. . . . Our brains are . . . democratic, indeed somewhat anarchic. In the brain there is no King, no official viewer of the

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<sup>78</sup> S Dehaene & L Naccache *The Cognitive Neuroscience of Consciousness* (2001) 1 - 31. Dennett warns against taking the top-down imagery invoked by Dehaene and Naccache too seriously, since there is not an organizational summit in the brain. What they mean by ‘top-down’, says Dennett, is simply the result of ‘competitive, cooperative, collateral activities whose emergent net result is what we may lump together and call top-down influence.’ Dennett *Sweet Dreams* (supra) at 133. Indeed, ‘in an arena of opponent processes (as in a democracy) the ‘top’ is distributed, not localized.’ Ibid. The comparison to ‘democracy’ is important not only for understanding how conscious states occur, the competition and the coalitions that form in the brain – and whose winner *is* the conscious state – has important repercussions for how we come to understand why experimental constitutionalism in a democratic state ‘fits’ who we are as conscious selves.

<sup>79</sup> Dennett *Sweet Dreams* (supra) at 136.

State Television Program, no Cartesian Theatre, but there are plenty of sharp differences in political clout exercised by contents over time.<sup>80</sup>

What Dennett contends is that consciousness, like political success or fame, is ‘not an intrinsic property, not even just a dispositional property; it is a phenomenon that requires some actualization of potential.’<sup>81</sup> Dennett explains how competition and cooperation amongst neuronal networks in a global workspace results in consciousness by offering us a metaphor for what it means for neuronal activity *not* to achieve ‘consciousness’:

Consider the following tale. Jim has written a remarkable first novel that has been enthusiastically read by some of the cognoscenti. His picture is all set to go on the cover of *Time Magazine*, and Oprah has line him up for her television show. A national book tour is planned and Hollywood has already expressed in his book. That’s all true on Tuesday. Wednesday morning San Francisco is destroyed in an earthquake, and the world’s attention can hold nothing else for a month. Is Jim famous? He would have been, if it weren’t for that darn earthquake. Maybe next month, if things return to normal, he’ll become famous for deeds done earlier. But fame eluded him this week, in spite of the fact that the *Time Magazine* cover story had been typeset and sent to the printer, to be yanked at the last moment, and in spite of the fact that his name was already in *TV Guide* as Oprah’s guest, and in spite of the fact that stacks of his novels could be found in the windows of most bookstores. All the dispositional properties normally sufficient for fame were in place, but their normal effects didn’t get triggered, so no fame resulted. . . Real fame is not the *cause* of all the normal aftermath; it *is* the normal aftermath.<sup>82</sup>

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<sup>80</sup> Ibid at 137. Although there is a tendency in current neuroscientific writing to discuss consciousness in political parlance as a winner-take-all phenomenon, Baars’ earlier description of fringe players in the ‘theatre of consciousness’ and recent work by Parvizi and Damasio suggests that the competition for consciousness ‘leaves not only single winners, but lots of quite powerful semi-finalists or also-rans, whose influences can be traced even when they don’t achieve the canonical . . . badge of fame: subsequent reportability.’ Ibid at 139 – 141 citing J Parvizi and A Damasio ‘Consciousness and the Brain Stem’ (2001) 79 *Cognition* 135. The persistence and continued existence of semi-finalists or also-rans makes sense when one considers that such a network created by the brain does not simply disappear, even if it never rises to the level of consciousness. The basis for another run at the top-spot may have, in fact, already been laid. See J Driver and P Vuilleumer ‘Perceptual Awareness and Its Loss in Unilateral Neglect and Extinction’ in S Dehaene & L Naccache (eds) *The Cognitive Neuroscience of Consciousness* (2001) 39.

<sup>81</sup> Dennett *Sweet Dreams* (supra) at 141.

<sup>82</sup> Ibid at 141 – 142.

The same is true of consciousness. It is not the *cause* of the neuronal processes that give rise to a broad array of percepts, emotions, thoughts, actions. It simply *is* the set of neuronal processes that, for the moment, has achieved victory in our brain's regular competition amongst neural networks for 'attention'.

bb. Selves

On my account, the various theories on offer by Baars, Damasio, Dehaene, Koch and Dennett converge on a conception of consciousness in which various cerebral networks distributed throughout the brain (a) act in parallel, (b) process substantial amounts of information in an unconscious manner, (c) compete for the 'awareness' that constitutes the content of consciousness, and (d) then amplify that information to the rest of the brain in a manner that enables us to solve an immediate problem or continue to carry out a critical task. But what sense then are we to make of the 'self', given that consciousness itself is not fixed in a given place, that the contents of consciousness itself are the product of competition (and co-operation) between parallel, mostly nonconscious and widely distributed neural networks, that the winners of such competitions – like politicians in a democracy – will have tenures of varying length, and that there is no single entity, no executive programme, no master discriminator that brings all the winners to heel in the service of a single master narrative?

The preceding account(s) of consciousness supports the claim that our notion of 'selfness' is a function, a very useful by-product, of a complex array of semi-independent neural networks that control the body's journey through life. This complex set of dispositional states are a function of both the deep grammar of our brains and the social endowments that have evolved over time to determine various patterns of behaviour. Once again, it should be apparent from this brief account that the self is a valuable abstraction and *not* an entity – neither an internal observer nor a boss -- that stands back from experience and then dictates to the body what it does in response to various stimuli.<sup>83</sup>

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<sup>83</sup> See, especially, D Dennett *Elbow Room: The Varieties of Free Will Worth Wanting* (1986), D Dennett *Consciousness Explained* (1991), D Dennett *Kinds of Minds* (1996), D Dennett *Freedom Evolves* (2003), D Dennett *Sweet Dreams*:

Each self then is, in Dennett's felicitous phrase, *just* 'a centre of narrative gravity'. Each centre of narrative gravity – each self -- is a set of different, but overlapping narratives. Each narrative, or storyline, reflects a complex set of experiences and dispositional states organized around a particular form of behaviour. As I noted in the Introduction, the "I" that goes by the name of Stu Woolman consists of such diverse narratives as male, academic, English speaker, American, golfer, orphan, Jew, friend of Anthony, permanent resident of South Africa, New Yorker, disabled person and so on. The list of narratives is not infinite – but it is almost as long and as varied as any life. The self then is that centre of narrative gravity, that self-representation, which holds together and organizes information, various storylines and dispositional states that make up a sense of 'me'. It is unique – the variety of narratives that make up 'me' is different in a sufficiently large number of respects to allow a person to differentiate his 'self' from any other 'self'. It is relatively stable – though a person's narratives and dispositional states are always changing, a person's self-representations enable him to view his 'self' as remaining relatively consistent over time. It is socially and physically determined – the self, and its various narratives, is thoroughly a function of physical capacities and social practices of which we have little control or choice.

## B. Freedom

The preceding account of consciousness and the self will have several important consequences for the theories of the social and the constitutional that shall follow. The preceding account emphasized (a) that consciousness is not 'a thing', but rather what emerges – in different parts of the brain – from competition and cooperation among

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*Philosophical Obstacles to a Science of Consciousness* (2005). See also D Parfit, *Reasons and Persons* (1984). This account obviously elides the extensive debate around identity. A literature review of that debate clearly does not belong here. Cf A Bilgrami 'Notes toward a Definition' (2006) 135 (4) *Daedulus: Journal of the American Academy of Arts & Sciences* 5; C Rovane 'Why Do Individuals Matter?' (2006) 135 (4) *Daedulus: Journal of the American Academy of Arts & Sciences* 49; T Feiberg 'Our Brains, Our Selves' (2006) 135 (4) *Daedulus: Journal of the American Academy of Arts & Sciences* 72. This 'de-centered' characterization of the self also features in many contemporary psychoanalytic, poststructuralist and post-modern theories of personhood. However, my naturalized account of the self does not share many of the epistemic commitments — and the anxieties of doubt — of much of what counts as post-modern. For useful accounts of the 'de-centered self' as it features in post-modern thought, see F Meredith *Experiencing the Post-metaphysical Self: Between Hermeneutics and Deconstruction* (2005); RM Strozier *Foucault, Subjectivity, and Identity: Historical Constructions of Subject and Self* (2002); S Benhabib *Situating the Self* (1992); LH Martin, H Gutman, and PH Hutton *Technologies of the Self: A Seminar With Michel Foucault* (1988); C Mouffe *Deconstruction and Pragmatism* (1996).

parallel, mostly nonconscious and widely distributed neural networks; and (b) that the self is best understood as a 'centre of narrative gravity' in which the various contents of consciousness are held together by a broad array of socially and physically-determined narratives that remain – if we remain in reasonably good health – relatively stable over time. One immediate consequence is that anyone who grants the validity of either (a) or (b) or both (a) and (b) will be in a position that will require him or her to accept certain further conclusions about what it means to exercise 'agency' and whether or not such 'agents' exercise what we commonly refer to as 'free will'.

The above variations on the thesis that consciousness (the content) and the self (the context) are physiological entities, and that the reflexive attribution of unity to both consciousness and self constitutes are category mistakes for which no physiological basis exists, should have softened the reader up for the big punch. That punch – if you haven't seen it coming – looks something like this:

1. Consciousness is not located in a single place in the brain, nor is there ever a time when everything comes together as 'consciousness'. As a result, there cannot be a master discriminator or a homunculus viewing the display of percepts, thoughts, actions or emotions – the unfolding movie of our lives – from the passive comfortable seat in the middle of our brain.
2. Selfhood is, similarly, not located in a single place in the brain, and like consciousness lacks the unitary character that would support an 'I' that somehow stands over and above the particular experiences we have in the world and then decides how 'I' should respond to each and every phenomenological state. The widely distributed, primarily nonconscious, parallel neuronal processing that underlies consciousness supports a view of the self in which a massive number of selves (if you feel the need to count) play an equally massive number of roles in our lives. While these selves will, quite naturally, overlap and cohere – at various points in time – there is no self that stands above the fray directing these lower selves in the appropriate direction. To think that the self is anything more than a centre of narrative gravity – where all my storylines and my dispositional states reside and create my 'autobiographical self' – is just a comfortable illusion.

3. If consciousness emerges – in no specific location (within the brain) – from widely distributed, primarily nonconscious, parallel neuronal processes, and if the self is no more than an array of diverse, often nonconscious, parallel narratives, then it makes little sense to speak of an individual moral agent that exercises free will in the physical universe.

The extended version of argument number 3 above follows in the section below.

1. Consciousness, Self, Error Correction and Free Will

It makes sense to talk about consciousness as the result of competing, and yet cooperative, feedback loops meant to address and to solve various problems with which we are confronted at any given moment. It makes sense to speak of the self as a set of narratives – made up different dispositional states and socially constructed purposes – meant to achieve a variety of objectives in the world and to address, and to overcome, a variety of problems that the world will throw up along the way.

However, while we are error-correcting and problem-solving organisms, it would be incorrect to assume that the conscious processes and narrative selves that address these problems commits us to the proposition that we ‘freely will’ a solution to any given problem. In important respects, this observation returns us to the problem of Cartesian dualism with which I opened up this chapter. Recall that one of the insuperable challenges for Cartesian dualism was to explain how an immaterial soul could interact with and direct the material body. It could not – and still cannot.

Those who claim that we can will freely an action must explain how, in a world of physically determined events, individual human beings can exercise volition in a manner that is free of the same physical laws that we believe all other events in the world. Compatibilists must offer a theory of freely-willed human agency consistent with a deterministic theory of the physical world. Like Descartes, compatibilists must explain how an ‘immaterial’ act of

human agency is free from the set of physical laws that determine the movement of rocks, rivers, rhinos and the rest of the universe.<sup>84</sup>

To say that the literature on free will is large and ancient does not, of course, release me of the burden of saying why I believe only an incompatibilist position is consistent with what we know of the physical world. However, the argument against dualism and the construction of a materialist account of consciousness goes some distance toward demonstrating that we do not need some ‘additional’ immaterial agent to explain what ‘causes’ us to think and to act.

In the next few pages, I review several recent studies in neuroscience and cognitive psychology that provide support for the proposition that the near universal experience of ‘free will’ is a *useful illusion*. But a useful illusion remains an illusion. After recounting these findings, I offer a more modest account of ‘free will’ which dispenses with the problems that plague the compatibilist account and yet retains some meaningful practical space for individual moral agency. This space for individual moral agency is, in turn, critical for my account of flourishing.

a. The Illusion of Volition

i. Libet’s and Walter’s Timing Experiments

The work of empirical psychologist Benjamin Libet has provided a well-established framework for understanding delayed conscious awareness of ‘unconsciously’ initiated action.<sup>85</sup> Libet’s experiments demonstrate that a readiness potential – ‘a change in the

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<sup>84</sup> For contemporary accounts of the compatibilist positions on free will, see R Chisholm ‘Human Freedom and the Self’ in G Watson (ed) *Free Will* (2003) 27; R Taylor *Action and Purpose* (1966). Defenses of pure compatibilism are difficult to find in the philosophical academy. Libertarian accounts often rely upon the unique capacity of human beings to reason and to order their ends in a manner that differs, importantly, from that of an inanimate object such as a rock. See, eg, T O’Conner (ed) *Agents, Causes and Events* (1995); R Clarke ‘Toward a Credible Agent-Causal Account of Free Will’ (1993) 27 *Nous* 191.

<sup>85</sup> See, eg, B Libet *Mind Time: The Temporal Factor in Consciousness* (2004); B Libet ‘The Experimental Evidence for Subjective Referral of Evidence Backward in Time: Reply to PS Churchland’ (1981) 48 *Philosophy of Science* 182; B Libet ‘Time of Conscious Intention to Act in Relation to the Onset of Other Cerebral Activities (Readiness Potential): The Unconscious Initiation of a Freely Voluntary Act’ (1983) 106 *Brain* 623. I am indebted to John Ostrovick of the University of the Witwatersrand for sharing his work on this subject with me and for his

voltage in the brain' -- occurs 0.6 seconds before' what we describe commonly as a conscious awareness and 0.8 seconds before action.<sup>86</sup> One might be inclined to think that if the conscious intention were really the cause of the action, then it would antedate the action by at least 0.8 seconds. But even this intuition – unsupported by the evidence – is insufficient grounds for establishing consciously willed action.<sup>87</sup> Even if conscious intention were simultaneous with readiness potential, it could not be a cause of the action. It would remain epiphenomenal. Only conscious awareness prior to readiness potential would demonstrate consciously willed action. Again, no empirical evidence exists for such awareness. Moreover, as Daniel Dennett argues, there may be good reasons to believe that the 'conscious awareness' of the intention cannot be accurately determined even within the parameters of the 0.8 seconds afforded us. In his challenging and not uncontroversial account of mental events, Dennett suggests that the brain produces multiple – and often partial -- drafts of phenomena and that the 'memory' or 'awareness' of intention is simply one report that facilitates future use of the information and the fixing of conscious time another kind of report that serves to maintain the connection between cause and action. In sum, Dennett's theory of multiple drafts -- which play an important role in demolishing the Cartesian theatre and explaining our experience of consciousness – explains why there is no master discriminator to organize consciousness and that without such a master discriminator it is difficult, if not impossible, to fix an exact time for when 'consciousness' of a mental event occurred. Remember: all we have are the mental events themselves. We do not possess a separate consciousness of the mental event – what we might possess is a separate and distinct 'conscious awareness' of a previous mental event. But that is another mental event – fixed, if it can be fixed, at another moment in time.

W. Grey Walters' experiments bolster conclusions about non-conscious determination of action and the importance of maintaining an apparent causal connection between awareness and action. Walter's subjects were brain surgery patients. The props were a slide-projector, a screen upon which the patient viewed the slides and electrodes

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explanation of Libet's findings. See J Ostrovick 'The Timing Experiments of Libet and Walters' (2004)(Unpublished manuscript on file with author).

<sup>86</sup> See B Libet 'Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action' (1985) 8 *Behavioural and Brain Sciences* 529; Ostrovick (supra) at 1.

<sup>87</sup> See Ostrovick (supra) at 5.

attached to the cerebral cortex. The patients were asked to press a button to change a viewing-slide at any time. The button, however, was not connected to the slide projector. Instead, the slide-projector was rotated by an amplification of the readiness potential signal from the patient's brain. Walters' subjects reported the experience of an unsettling form of precognition – on the part of the projector. That is, they found that the projector had rotated the slides prior to their intention to press the button. Indeed, the gap in non-conscious readiness potential, slide change and consciousness of both the volition and the fact of the slide change was sufficiently large to cause the subjects to report that they were concerned that 'they might, accidentally, advance the slide twice.'<sup>88</sup>

More recent sophisticated brain mapping bears out Walters' findings. New technology appears to enable researchers to determine whether a subject has seen previously a particular object. If she has, the researchers witness a readiness potential for an affirmative response 0.3 seconds before the subject forms any conscious awareness of the object on view and before she can form an express opinion about her recognition of the object. If she has not seen the object before, then no readiness potential exhibited for a neuronal process that proceeds a neural correlate of consciousness occurs. The benefits for law enforcement are obvious.<sup>89</sup>

Libet attempted to extend his analysis of conscious awareness, nonconscious neuronal activity and physical responses in a subsequent set of experiments. Libet himself had not been convinced that his previous experiments had demonstrated that 'conscious awareness' followed nonconscious formation of a decision to act. In these subsequent experiments, Libet believed that he had demonstrated that his subjects possessed a capacity to 'veto' their actions at about 0.15 seconds prior to the initiation of the original intention of which they were conscious. Libet writes that he is inclined to view this capacity as creating some elbow room for freely-willed conscious intention.<sup>90</sup> But given that all other actions demonstrate some readiness potential prior to conscious awareness, it does not seem

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<sup>88</sup> Ibid at 8. See also WG Walters' Presentation to the Osler Society (1963) as reported in D Dennett *Consciousness Explained* (1993) 167 – 171

<sup>89</sup> S Silberman 'Don't Even Think About Lying: How Brain Scans are Re-inventing the Science of Lie Detection' (2006) 14 (01) *Wired* 1, available at [www.wired.com/wired/archive/14.01/lying.html](http://www.wired.com/wired/archive/14.01/lying.html) (accessed on June 18 2006).

<sup>90</sup> See Ostrovick (supra) at 10.

plausible to have conscious 'veto' powers that somehow intervene in an otherwise non-consciously determined course of action. Such 'veto' actions are still a function of prior non-conscious readiness potential. Moreover, the difficulty of fixing time becomes apparent when one asks how a subject and an experimenter come to know that the veto occurs 0.15 seconds before an action that never occurs.

The conclusions drawn from all three sets of experiments should cause us to modify our account of free will – and what we mean by 'freedom'. First, we should now be inclined to attribute causation to non-conscious brain events. Second, we should be inclined to view the conscious awareness of the impending action as serving a purpose other than that of immediate cause. As we have already seen, the purpose of consciousness, generally, is to play the role of a feedback mechanism that enables the actor to analyze the consequences of a particular set of the actions – before they occur -- and to form a better response to the problem that the world has set for her.

## ii. Wegner and Wheatley's Experiments

That nonconscious brain events precede conscious awareness of intention, and that 'free conscious will' is not the 'cause' of the actions that follow both the nonconscious brain events and the conscious awareness of intention, seems manifestly clear from Libet's experiments – even if Libet himself refused to draw exactly those conclusions. In light of Libet's own reluctance to draw the appropriate conclusions from his experimental data, Daniel Wegner set about constructing an experiment that might prove his hypothesis that 'the experience of willing an act arises from interpreting one's thought as the cause of the act'.<sup>91</sup> Susan Blackmore captures the crucial features of the experiment in the following account:

[A] 20 cm square board [was] mounted on a computer mouse. Movements of the mouse moved a cursor over a screen showing a picture of about 50 small objects.

The experiment involved two participants: a subject and a confederate. To make the

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<sup>91</sup> D Wegner & T Wheatley 'Apparent Mental Causation: Sources of the Experience of Will' (1999) 54 *American Psychologist* 480.

explanation easier we . . . call[ed] them Dan and Jane. . . . Dan and Jane were seated facing each other across a small table. Dan . . . had no idea that Jane was a confederate. They were asked to place to place their fingers on the little board and to circle the cursor over the objects. They were asked to stop every 30 seconds or so and then rate how strongly they had intended to make that particular stop. Each trial consisted of 30 seconds of movement, during which they might hear words through a headphone, and 10 seconds of music, during which they were to make a stop. Dan was led to believe that Jane was receiving different words from his, but actually she had heard instructions to make particular movements. . . . On four trials, she was asked to stop on a particular object (eg, swan) in the middle of Dan's music. Meanwhile Dan heard the word 'swan' 30 seconds before, 5 seconds before, 1 second before or 1 second after Jane stopped on the swan. In all other trials, the stops were not forced and Dan heard various words 2 seconds into the music; 51 undergraduates were tested.

During the four forced stops, subjects like Dan gave the highest rating for the proposition 'I intended to make the stop' when the word came prior to the stop by 1 or 5 seconds. The subjects gave much lower ratings when the word in question occurred 30 seconds prior to the stop, and far lower ratings still when the word occurred 1 second after the stop. Wegner and Wheatley claim that the results support what they call the 'priority principle'. According to the priority principle, the 'effects' or the 'events' are described as intended – as freely willed – when the relevant thought – in this case stimulus – occurs just 'prior' to the 'effect' or the 'event'. The priority principle – in the context of this experiment – supports their contention that '[b]elieving that our conscious thoughts cause our action is an error based on the illusory experience of will.'<sup>92</sup>

Having concluded from his experiments that free will is an illusion, Wegner went on to explain that the illusion of free will can be explained in following fashion.<sup>93</sup> First, our brain – nonconsciously and consciously – identifies a problem and initiates a sequence of events to solve that problem and to achieve our objective. Second, we are, as we have seen,

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<sup>92</sup> Wegner & Wheatley (supra) at 490.

<sup>93</sup> D Wegner *The Illusion of Conscious Will* (2002).

almost entirely unaware of the massive amount of nonconscious neuronal activity responsible for carrying out both internal bodily functions and external physical actions. However, where the problem to be solved is novel and requires our extant neuronal networks to respond in an equally novel fashion, then we tend to become aware of both a problem and an intention to respond to the problem in a particular fashion. We call this subsequent awareness of the non-consciously preferred solution an ‘intention’. Finally, as we have seen from the Libet experiments, because the action occurs after we become conscious of our ‘intention’, we jump to the erroneous conclusion that our ‘conscious’ intention was the cause of the action.

Wegner further concludes, as I do throughout this chapter, that this particular illusion is consistent with a related series of illusions:

The fact is, it seems to us that we have conscious will. It seems we have selves. It seems we have minds. It seems we are agents. It seems we cause what we do. Although it is sobering and ultimately accurate to call all of this an illusion, it is a mistake to conclude that the illusory is trivial.<sup>94</sup>

I offer an explanation, in the following section, as to why these various illusions are not, in fact, trivial and why a proper understanding of these illusions ‘may’ help us to understand better the self, the social and the constitutional.

#### b. A Modest Account of Freedom

Given that we cannot explain how a human being can be free of the chain of physical events in the world, it might now come as something of a surprise to hear Daniel Dennett claim that ‘free will is indeed quite real, but just not quite what you probably thought it was’.<sup>95</sup>

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<sup>94</sup> Ibid at 342.

<sup>95</sup> D Dennett *Freedom Evolves* (2003) 223.

That consciousness is a physical state subject to the same laws of nature as other physical states means that when we discuss whether I ‘could have done otherwise in a given set of circumstances’ we do not really mean that I could have done otherwise. This position signals a clear break from those who believe that a physically determined world is compatible with a human will that stands outside the chain of physical events in the world.<sup>96</sup> However, this does not make our discussion of whether I could have done otherwise meaningless. The point of our discussion is to analyze a problem – even one that has already occurred – and ask whether a different ‘choice’ would have led to a preferable result.

Freedom, on this more modest, naturalized account, does not refer to actions (choices) that occurred in the past. Rather it is forward looking and recognizes that human beings have the capacity to alter their behaviour in light of error. Recall from our discussion of Dehaene and Naccache that the purpose of consciousness is that it allows an individual ‘to represent a goal and to estimate the outcomes of [her] . . . actions before initiating them’.<sup>97</sup> The ability to undertake ‘trials and errors’ within the simulated framework of mental activity is an enormous advance on having to undertake ‘trials and errors’ in one’s actual physical environment. Freedom, then, rightly understood means an expansion of conditioned choice and an expansion of the possibilities for action in life.

To get a sense of what this means consider the difference in the contours of ‘freedom’ for a human being 20,000 years ago – a being that had the choice of hunting, gathering or both and that lived a maximum of 30 years -- and a human being with a certain level of material wealth and education today – a being that has a variety of different vocations and avocations available to her and an average life-span at least twice as long in which to experience those different ways of being in the world. Moreover, a human being today is a participant in a large number of critical and discursive practices which enable her as an individual and as a member of various groups to reflect upon what has happened in the past and alter her practices – her pre-determined routines – in the future.

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<sup>96</sup> For a clear account of the incompatibilist position, see P Van Inwagen ‘An Argument for Incompatibilism’ *An Essay on Free Will* (1983). For other powerful variations on the incompatibilist position on free will, see the collection of essays in G Watson (ed) *Free Will* (2003).

<sup>97</sup> *Ibid* at 30.

Freedom so understood changes the rationales for attribution of responsibility to individual human agents. If individuals and their actions are as much a part of the great chain of physical events in the world as any other physical phenomena, then it must follow that their actions are as fundamentally determined as any other physical phenomena. Why then attribute culpability to any individual if that individual's actions were caused in the same way that an ant is caused to move away from a torrent of water from a tap or a flower is caused to bend towards the sun? First, because as self-correcting entities – shaped to be such by biological evolution and by cultural evolution – we have the capacity to alter our behaviour in response to both negative and positive reinforcement from the environment. Holding individual agents responsible for their actions creates incentives for 'positive' responses by the individual in the future and maximizes the likelihood for success of the system of reinforcement as a whole. Moreover, if the system of reinforcement exacts penalties that outweigh any potential positive benefit, individuals will begin to resist existing patterns of reinforcement. Though the benefits of such resistance may or may not accrue to individual mavericks, such individuals will test the general success of the system of which they are a part. Thus, the first rationale for moral and legal culpability is the utility of forcing individuals to make use of their own capacity for self-correction and the utility of forcing individuals or groups of individuals to make use of self-correction mechanisms within the society as a whole. Second, the utility of a form of behaviour – in very Darwinian terms – need not exhaust the reasons for holding individuals accountable. We are beings bathed in language, and in concepts that place a value on goods that have little or nothing to do with our survival. Goods such as truth, beauty and justice have come to be regarded as goods equal in value to more utilitarian ends of sex, food or money. As Matthew Elton suggests:

Could it be through language, the constant trading of ideas, that we come to be creatures that see the commitment to the existence of genuine responsibility, of genuine praise and blame, genuine right and wrong, as a condition without which we would not be fully human.<sup>98</sup>

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<sup>98</sup> M Elton *Daniel Dennett: Reconciling Science and Our Self-Conception* (2003) 265.

Such reasoning does not break the chain of determined events, it only provides grounds potentially independent of pure utility for holding ourselves and others to be responsible moral agents.

### c. Awareness, the Intentional Stance and Freedom

We humans possess at least two basic kinds of awareness: behavioural awareness and narrative awareness. Only narrative awareness – the ability to report on what one's experience of the world is like -- is an exciting form of awareness. Behavioural awareness – and thus intentionality -- can be attributed to one-cell organisms. Narrative awareness requires the capacity to give some kind of verbal report (and that includes any kind of sign or written language) of what an experience is actually like. As far as we can tell only humans possess definitively this kind of language.

That said, the ability of apes to make use of symbols not of their own making to communicate apparent 'interior' states seems to push the envelope. (I use the term 'interior' in scare quotes because there is nothing more on the inside than the verbal report itself – the same event as is apparent on the exterior.) If we adopt an intentional stance toward other beings – and rely on descriptions and analysis of what happens, as opposed to verbal reports from the creature under observation -- then it would seem that individual dolphins appear to have the ability to distinguish themselves from other dolphins and from previous 'narrative' awareness of their own appearance.<sup>99</sup> This narrative awareness is evinced through actions that reflect their recognition that a recently painted fin on their own body is their own fin and that this newly painted fin constitutes a signal difference in their own appearance over time. Dolphins may possess what Damasio describes as an autobiographical self. (Most animals lack the capacity to recognize themselves in a mirror and tend to behave as if the

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<sup>99</sup> See D Reiss & L Marino 'Self-recognition in the Bottlenose-Dolphin: A Case of Cognitive Convergence' (2001) 98 (10) *Proceedings of the National Academy of Sciences* 5937. See also M Hauser *Wild Minds: What Animals Really Think* (2000) (Hauser found that cotton-top tamarins responded to seeing in a mirror that the tufts of hair on their head had been dyed by touching their own tufts and altering the angle of the mirror to get a posterior view. Both actions suggest self-awareness and the ability to differentiate the physical state of the self at Time 1 from the physical state of the self at Time 2.)

animal in the mirror were another creature.) Of course, while we readily adopt the intentional stance with respect to other humans because we can have our attribution of thoughts, hopes, fears and desires to them confirmed by both verbal accounts and observations of their actions, our current reliance on description and analysis alone -- without corroborating verbal reports -- currently limits the confidence we have in attributing narrative awareness to dolphins. But our present inability to translate dolphin signals fully does not, of course, rule out the possibility that one day we shall be able to translate dolphin communication in a manner that confirms -- or disproves -- our attribution of narrative awareness.<sup>100</sup>

Using the intentional stance can also have interesting consequences when we are asked to compare the actions of robots and the actions humans so as to decide whether or not robots possess consciousness and freedom in a manner comparable to the consciousness and freedom we attribute to humans. Soda machines are like one-celled organisms. Even if we adopt an intentional stance towards the soda machine and note that its purpose seems to be able to collect 5 rand coins and to produce soda, we are unlikely to attribute consciousness or freedom to it. But what of a sophisticated computer -- say like HAL in the movie *2001* -- that can undertake cognitive tasks that dwarf the capacity of human beings and direct physical actions of complex machinery that human beings could not, on their own, operate? If, adopting the intentional stance, we say that HAL's purpose was to guide the space ship from Earth to Jupiter, to take decisions that made the likelihood of success greater, to learn from mistakes made on route and to communicate with the astronauts about the mission, then what else would we require before we would attribute consciousness and freedom to HAL? Assume HAL had been programmed to speak about its mission and its ongoing success -- and to express pride in that success. If HAL engages in error-correction, can distinguish itself from other computers and, of course, human beings, and offers verbal reports about its own internal states -- Drive D is failing -- then

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<sup>100</sup> That said, it is possible that our possession of language and other sophisticated symbolic systems makes the kind of consciousness and freedom that we possess uniquely human. Even an enthusiastic user of the intentional stance like Daniel Dennett admits that it is possible that 'the kind of mind you get when you add language to it is so different from the kind of mind you can have without language, that calling them both minds is a mistake.' See D Dennett *Kinds of Minds* (1996) 17.

what, save for our inability to say what an internal state of a computer feels like, would cause us to withhold the attribution of consciousness to HAL?

At the moment, the evidentiary record suggests that we ought to remain agnostic as to whether animals and computers possess self, consciousness and freedom even in the modest form described in these pages.<sup>101</sup> However, the purpose of adopting the intentional stance with respect to dolphins or highly sophisticated robots – and the fact that questions remain about the level of consciousness and the degree of freedom they possess – serves as a challenge to our conception of what ‘consciousness’ is and closes the gap between humans, animals and robots when it comes to discussions of freedom.<sup>102</sup>

### C. Consciousness, Self, Freedom and Constitutional Doctrine

The conclusions I draw from the foregoing account of consciousness, self and freedom for understanding constitutional theory are fairly straightforward. These accounts of consciousness, self and freedom are meant to bracket, if not dispel, the notion that individuals are best understood as ‘rational choosers’ of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogenous set of practices -- of ways of responding to or acting in the world. The centrality of inherited practices or social

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<sup>101</sup> But see BJ Baars ‘There are No Known Differences in Fundamental Brain Mechanisms of Sensory Consciousness Between Humans and Other Animals’ (2001) 10 *Animal Welfare* 31 (Given that there is no significant difference between the basic architecture of the human brain and that of many animal brains, Baars believes the onus is on those who object to the attribution of consciousness to animals to demonstrate that their near identical architecture is incapable of producing consciousness.)

<sup>102</sup> Are there conscious machines? John Searle’s response is yes – but his affirmative response is not what you might expect. He writes:

We have known this answer for a century. The brain is a machine. *Its is a conscious machine.* The brain is a biological machine just as much as the heart and the liver. So of course some machines can think and be conscious. Your brain and mine for example.

J Searle *The Mystery of Consciousness* (1997) 202. But that is where Searle draws the line. Alan Turing originally set a test for whether a machine could think. His Turing machine, as it came to be called, satisfied this test and served as the precursor to modern computers. Turing was also asked to set a test for whether a machine could be conscious. He asked, suggesting that the answer would be in the negative, whether a machine could ‘be kind, resourceful, beautiful, friendly, have initiative, have a sense of humour, tell right from wrong, make mistakes . . . fall in love, enjoy strawberries and cream, learn from experience . . . use words properly, be the subject of its own thought . . . do something really new. See A Turing ‘Computing Machinery and Intelligence’ (1950) 59 *Mind* 433 as reprinted in DR Hofstadter and D Dennett (eds) *The Mind’s I: Fantasies and Reflections on Self and Soul* 53, 61. As it stands now, 50 years later, machines can, in fact, do many of the things on that list that Turing suggested that they could not. Would we deny a machine consciousness if the only thing it could not do was taste strawberries and cream? Would we then deny consciousness to a man that had no tongue?

endowments for both the creation and the maintenance of identity introduces an ineradicable element of *arationality* into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*: they are not reflective; they are not critical; they are not chosen; they just are. It is this heterogeneous variety of associations and practices into which we are born and in which we continue to reside that determine substantially our responses to various events or phenomena. If this is so, then as a constitutional matter, the model of a rational individual moral agent which undergirds much of our current jurisprudence ought to be supplanted with a vision of the self that is more appropriately located within the relationships and associations to which we all belong.

Take for example the way in which the Court has dealt with Rastafarians in *Prince*, sex workers in *Jordan* and pornography in *De Reuck*. What links all of the Court's judgments is the model of the self as an autonomous, rational, integrated moral agent that freely-wills its actions. The result of this dominant mode of analysis is that it overestimates the capacity of the individual to choose his or her own ends. Conversely, it underestimates the centrality of relationships, associations, endowments and practices for the formation of individual identity. If we were to frame our constitutional analysis in terms of the relationships and the associations that are constitutive of the self, and if we were to be somewhat more modest about the extent and the nature of the freedom we human's exercise, then we might be willing to treat those individuals who participate in non-dominant forms of behaviour with greater respect. Eliminate the notion that individual Rastafarians 'choose' to smoke an illicit substance and supplant it with the assessment that Rastafarians simply engage in a marginal, but not especially dangerous, form of life. The result should be that we are willing to take more seriously the need to create a space for what many in our society view as aberrant practices. Exemptions for other ways of being in the world supplant the desire to sanction non-conformist or non-dominant forms of behaviour. Judicial solicitude for rational individual choice – a stance that often inclines toward the belief in a single justifiable form of behaviour -- is displaced by judicial solicitude for the arational, constitutive attachments that form the better part of our identity.

A similar move could be made that would rectify the wrong done to many sex workers in *Jordan*. As I noted in Chapter 1, the Constitutional Court in *S v Jordan & Others* falls into ‘an autonomy trap’. In rejecting equality, dignity, privacy and freedom of profession challenges to those sections of the Sexual Offences Act that criminalise prostitution,<sup>103</sup> the majority reasoned as follows:

If the public sees the recipient of reward as being ‘more to blame’ than the ‘client’, and a conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.<sup>104</sup>

The Court’s commitment to a very strong form of metaphysical autonomy – a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances -- fails dramatically the large number of prostitutes who are victims of sexual trafficking or who are otherwise coerced into prostitution. (It also fails those prostitutes for whom the alternatives are unemployment (or very low remuneration) or prostitution.)

A relatively recent Constitutional Court judgment hints at a way out of the kind of autonomy trap on display in *Jordan*. In *Khosa v Minister of Social Development; Mablaule v Minister of Social Development*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27 (1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants: old age, disability, veterans, child-support and foster care. Mokgoro J writes:

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<sup>103</sup> See s 20(1)(aA) of the Sexual Offences Act 23 of 1957.

<sup>104</sup> *Jordan* (supra) at para 16 -17.

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa . . . Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.<sup>105</sup>

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy. *Kbosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Kbosa* court rightly recognises, legal regimes that offer incentives to inhabitants to become members of the political community but then punish those inhabitants who cannot act on such incentives -- by withholding benefits or through incarceration -- are perverse. These disincentives deny the affected person exactly that which the state is obliged to provide. The *Kbosa* court indicates that where meaningful choice is severely curtailed, the state bears a much greater responsibility with respect to creating the material conditions for genuine agency. For children, the aged and the disabled, the inability to work underwrites their claim for state support. *Kbosa*, as I shall argue at greater length in Chapter 4, recognizes that freedom, properly understood, refers to the conditions of existence in which individuals and groups can actually learn from their errors and genuinely possess meaningful opportunities to pursue alternative ways of being in the world.<sup>106</sup>

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<sup>105</sup> *Kbosa* (supra) at para 76.

<sup>106</sup> Another version of the autonomy trap – or should I say the flip side of the autonomy trap – is reflected in *Case & Curtis. Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) In finding that Section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 violated the right to privacy by prohibiting the possession of ‘indecent’ or ‘obscene’ materials in one’s own home, Didcott J, for a majority in *Case & Curtis*, wrote:

What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody’s business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the interim Constitution guarantees that I shall enjoy.<sup>106</sup>

*Case & Curtis* (supra) at para 91 citing with approval *Bernstein* (supra) at paras 67 – 69 (Right to privacy protects ‘the inner sanctum of a person’ that lies within ‘the truly personal realm.’) See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 18 (Right to privacy protects intimate space because such a space is a prerequisite for human dignity.) The problem, so far as my account of freedom is concerned, is not the result, but how the Court arrived at it. The Court appears to suggest that there exists – physically and

Let me not be misunderstood. The recognition of the self as a function of arational, constitutive attachments does not mean that we must give each of these attachments our imprimatur of constitutional approval. Within the constraints of these social endowments, we still possess the capacity to make critical assessments. Within the constraints of these social endowments, we still possess the capacity to make reasoned judgments about right and wrong, good and evil.<sup>107</sup> Indeed, it is the varied forms of attachments and dispositions

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metaphysically – a space in which the individual self has no exchange, no intercourse, with other members of society. Somehow, however, within the hermetically-sealed domain of his castle, the individual citizen is ‘free’ to receive and to enjoy pornographic material. But how, one might ask, did the pornographic material appear in the home in the first-place? Once again, the Court, by sealing off the individual from the society in which he is fundamentally conditioned, accords him a metaphysically implausible degree of ‘freedom’. In her concurrence in *Case & Curtis*, Mokgoro J once again, in her own modest way, suggests a way out of the Court’s autonomy trap:

I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the state to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a ‘South African’s home is his (or her) castle.’ But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials.

*Case & Curtis* (supra) at para 65. See also *S v Dube* 2000 (2) SA 583 (N)(High Court holds that the right to privacy does not embrace the right not to be secretly photographed while engaging in criminal activity. Such an extravagant notion of privacy even if constitutionally protected would have to yield before the overwhelmingly more important interests of the polity as a whole). Justice Mokgoro recognizes the self as fundamentally conditioned by, and inextricably connected to, the community of which he is a member. The Robinson Crusoe account of the self on offer from the majority, detached as he is from the larger world, would only be entitled to the pornography that washed up on to the island with him. That seems, upon reflection, like a cramped conception freedom indeed.

<sup>107</sup> The emphasis in this section on the arational sources of the self invariably brackets the place of reason in ethical, political and legal thought (or most fields of human inquiry for that matter). However, bracketing reason and diminishing its efficacy to the vanishing point are two entirely different things. First, the place of instrumental reason and the ability of human beings to recognize regularities in the world means, at the very least, that we are able to discriminate between better and worse ways of realizing our preferred ends. Second, the more de-centered the self, the more varied forms of life the self draws upon, the more tools the self will have when deciding upon the preferred vision of the good life. Third, this account is not averse or opposed to the existence of some deep grammar of human reason — married to long-standing social conventions — that commits us to such varied ends as the family, the collective and the individual. Some may think it convenient that such a species of naturalism results in a commitment to such imperfectly reconcilable goods as freedom, equality, dignity and democracy. However, putting aside the current dominance of liberal and social democracy, these values or ends have competed with one another for primacy of place for several millennia. How one settles, in a rational manner, the differences between these ultimate ends is the very meat of ethical and political thought. Fourth, though there may be plenty of instances in which the evidence for our beliefs about the world leaves room for a certain amount of theoretical indeterminacy, I take it as given that most of our beliefs about the world are true and that we, humans, share most of those beliefs. Only under such general conditions of shared understanding does it even begin to make sense to talk about disagreement. Thus, though Ptolemy and I may not share certain theories about the solar system, we certainly would share most other beliefs about things in this world. This identity of belief sets between Ptolemy and ourselves would be obvious if you were able to watch — and to interrogate — both what we do and say. Moreover, the near identity of belief sets would enable us to settle many an apparent dispute. See, for example, D Davidson *Inquiries into Truth and Interpretation* (1985), ‘On the Very Idea of a Conceptual Scheme’ (1974) 47 *Proceedings and Addresses of the American Philosophical Association* 1; WVO Quine *Word and Object* (1960); D Dennett *The Intentional Stance* (1987).

that make up the self which provide each of us, and our society collectively, with at least some of the critical leverage necessary for discriminating between more and less valuable forms of behaviour.

The recognition of the extent to which social practices and deep neurological structures determine the contours of the self does not mean that we eschew hard constitutional choices. It means, rather, that we ought to think twice before we differentiate invidiously between our preferred way of being in the world and that way of being preferred by others. This more modest account of freedom should force us to attend to the arationality of our most basic attachments and choices and to think twice before we accord our arational attachments and choices preferred status to the arational attachments and choices of others.<sup>108</sup>

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The use of the term arational may likewise strike some as deeply counterintuitive. It may seem to sweep into the ambit of the arational, various processes most people are apt to describe as falling within the domain of the rational. The point is not to argue about terms. I would be happy to concede various natural and social processes as counting as amongst the many kinds of rational operations in which we engage. The point is the authorship of the processes themselves. We employ many natural and social processes in a fashion clearly intended to secure various ends. The fit between our means and ends, as well as the choice of the ends themselves, is often just what we mean by rational. We did not, as individuals, and often as groups, consciously create many of these processes. They are not the product of any one person's capacity to reason (though various individuals will have contributed to this vast array of processes). In this respect, they are arational. So when I say these responses 'just are', I am not denying that there might not be good reasons for them being so. I only deny that the ultimate source of the reasons, evolutionary adaptation or social adaptation, lies within the individual alone. Cf Edmund Burke 'Speech on Conciliation with America' (22 March 1775). Burke wrote that 'it is a great mistake to imagine that mankind follows up practically any speculative principle, either of government or freedom, as far as it will go in argument or logical illation.' Like this author, Burke is sceptical of reasoning from the bottom up. Unlike this author, Burke is deeply cynical about our collective capacity for rational discourse.

<sup>108</sup> That this conclusion may share some attributes of contemporary liberal theories -- those predicated upon finding neutral grounds for political institutions -- is coincidental. Such contemporary liberal theories have actually shied away from any meta-theoretical commitments because of the fear of making some new epistemological error that might leave them open to the kinds of attack leveled by Michael Sandel against John Rawls' original theory of justice. The irony of such twice-shy liberalism is that it may have left them with far less worth defending. The level of deference accorded non-dominant choices -- the freedom accorded non-dominant ways of being -- also echoes the political liberalism of Ronald Dworkin. The difference between Dworkin's epistemological commitments and my own is three-fold. To some extent, Ronald Dworkin is a methodological individualist. He is also committed to a moral cognitivism that ostensibly generates uniquely specifiable right answers in the political domain. The basis for equal concern and respect on Dworkin's account has to do with the capacity of each person to reason. As my account of the self, social choice and politics suggests, I do not assume reason as the basis for meaningful choice; I certainly do not assume uniquely specifiable answers -- in advance -- in the political realm; the self described here is fundamentally conditioned by memes and genes and has his or her choices circumscribed by an array of constitutive attachments. Only by working through those attachments does the individual arrive at reasoned choices.

## D. Consciousness as a Feedback Mechanism for Error Correction that Enhances Freedom

### 1. Video Games

Initially, the mis-en-scene of your average video game is a miasma of moving objects, whose actions appear unpredictable, their purposes opaque. Over time and with greater experience, the player begins to note certain regularities in the movement of other objects and is able to predict how those objects respond to her engagement with them. As time goes on, certain kinds of responses – how to move the controls to effect desired movement and action – become ‘second nature’. That is, they become dispositional states with regard to the game that require absolutely no conscious awareness of those states and their attendant consequences. In empirical psychology, this first simpler kind of awareness is often described as behavioural awareness. (One recognizes and reacts to stimuli without any conscious awareness of the stimuli or the reaction.) Consciousness enables us to attend to those novel details of the game playing that require attention: in other words, narrative awareness attends to problems in the game that need to be solved. (It should be clear that narrative awareness can, over time, become behavioural awareness. Indeed, civilization advances, to paraphrase Alfred North Whitehead, to the extent that we can turn tasks that require narrative awareness into tasks that require only behavioural awareness.)

As I have shown above, though behavioural awareness and narrative awareness will necessarily overlap, it also the case that behavioural awareness will often not generate any narrative awareness at all. Where the demands of one’s environment will be satisfied by a routinized response, behavioural awareness is all we need. That is, ‘narrative awareness is . . . not required for control of action. Behavioural awareness will often suffice on its own.’<sup>109</sup> Conscious or narrative awareness enables us to focus on aspects of our environment – and hold them up for scrutiny – in order to form better behaviour responses to the environment. Consciousness is a kind of feedback mechanism. The conscious report constitutes a record of our response, and perhaps the nature of our error. A record of such errors enables us to respond differently – assuming we survive the error – the next time we

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<sup>109</sup> M Elton *Daniel Dennett: Reconciling Science and Our Self-Conception* (2003) 145.

are faced with the appropriate set of circumstances. Video games provide lots of easy, uncontroversial evidence of these two different but entirely compatible kinds of awareness. The more we play the game, the more our actions take the form of behavioural awareness. Indeed, once appropriately primed for all the variations a simple video provides, it is often possible to play a game with only the slightest narrative awareness of the action. In sum, once the possibility for error is largely contained – and almost extinguished – it is possible to play as if one were on remote control.

## 2. Driving

Learning how to drive a car reflects a similar set of experiences and offers a largely identical account of the relationship between behavioural awareness and conscious awareness. Initially, many driving activities -- hitting the gas, clutching, parallel parking – require conscious awareness. All the relevant experts in our global neuronal workshop – portions of the brain responsible for motor control, visual concentration, memory – receive the information that constitute our conscious state. As we learn to drive, new neuronal pathways and processes are established. Over time, these new neuronal pathways and processes become routine nonconscious pathways and processes. Indeed, so many of the routines associated with driving become routine that one can drive a car without conscious awareness. That, of course, was the point of the story of the unconscious driver. I am not endorsing nonconscious driving practices. Retaining conscious awareness remains necessary in order to account for unpredictable changes in the driving environment caused by other drivers, traffic robots, small children playing in the street and even falling trees.

## 3. Spelling

At this point in our respective lives, spelling as we write is a largely nonconscious activity. But, as anyone who can recall spelling bees can attest, spelling a word correctly was often a contest.

Moreover, as anyone who writes for a living will tell you, spelling as an adult is not always a nonconscious activity. Questions often arise when the word being written is

arcane, technical or rarely used. But it is also possible to move spelling from a nonconscious to a conscious activity by pausing to stare at the word. The attention itself may well raise doubts about the spelling – or it may, on another occasion, create some disquiet about the relation of the written symbol to the word that was ‘in’ our head.

Sometimes questions arise with phonemes like ‘where’ and ‘wear’, or closely related words, in form, such as ‘were’. And sometimes we only become aware – conscious -- that we are spelling words as we write when we make an obvious error, or when the computer tells us that we have either erred or used a word with which it is unfamiliar. Spelling, it seems to me, is a good activity by which to measure the usefulness of the description of consciousness in terms of a global neuronal workspace in which consciousness emerges from massive array of parallel, widely distributed nonconscious neuronal processes. For the most part, the adult author need not use the global workspace for spelling and can attend to more complex and novel tasks associated with writing – sentence construction, the rhythm of the language, the fit between the concept one wishes to express and the words being used to express them. Not much writing would occur were we forced to attend to the spelling of each and every word that appeared on a printed page or a computer screen. Indeed, computer programmers are sufficiently aware of this need to turn spelling into an almost entirely nonconscious neuronal process that most contemporary computer programmes correct our spelling mistakes without our even noticing our error or the computer’s correction.

# THE SELFLESS CONSTITUTION

## Chapter Three

### A Theory of the Social: Constraint, Criticism & Change

*Table of Contents*

- A. Introduction
  - 1. The Unchosen Conditions of Flourishing
  - 2. Social Feedback Systems
- B. Descriptions of Social Feedback Systems
  - 1. Spontaneous Orders
  - 2. Experiments in Living
    - a. Mill and the Limits of Private Ordering
    - b. From Private Ordering to Experimentalism
  - 3. Blind Variation and Selective Retention in Social Processes
- C. Prescriptions for the Social: Experimentalism in State Policy
- D. Social Practices as Feedback Mechanisms: Psychotherapy; Legal Academia; Golf Constitutional Law

### III. The Social: Constraint, Criticism and Change

#### A. Introduction

##### 1. The Unchosen Conditions of Flourishing

An initial caveat is in order. This section, on how groups can increase the possibility of expanding conditions of individual flourishing through experimentation, will be the most schematic of the three substantive chapters. The reason for this is simple enough. The real action lies elsewhere: (a) in the modest, naturalised, descriptive account of consciousness, self and freedom delineated in the previous chapter and (b) in the more speculative, prescriptive account of the appropriate constitutional politics for advancing flourishing through experimentation.

Here is this chapter's move, in short. It is trite to note that outside society, and without language, individual flourishing is a meaningless notion. It is only in light of the various practices, forms of life, or language games that social groups provide that we become anything that remotely approximates what we understand to be human. And yet these social practices and forms of life from which we derive meaning in our lives also constrain our actions and often limit our ability to act in manner that we believe will promote our own well-being, in particular, and human flourishing, generally. How, this chapter asks, can we recognize both the value of the radical givenness of social life and still attempt to alter social structures in a manner that changes things for the better?

Here is a less abbreviated account. The constitutive nature of our attachments and practices forces us to attend to another often overlooked feature of social life. We often speak of the social practices, endowments and associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individuals. It is also largely not true of social life generally. As Michael Walzer has convincingly argued, there is a 'radical givenness' to our

social world and the practices that make it up.<sup>1</sup> What he means, in short, is that most of the practices that make up our social life are involuntary. We don't choose our family. We generally don't choose our race or religion or ethnicity or nationality or class or citizenship. Moreover, even when we appear to have the space to exercise choice, we rarely create the practices available to us. The vast majority of our practices and forms of life are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create some new practice (and let us not be understood to underestimate the value of such overcoming and creativity), the very structure and style of the practice is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. So gay marriages may be truly new – but marriage itself is a publicly recognized and sanctioned institution for carrying on intimate relationships. Even in times of radical transformation, reiteration and mimicry of existing social practices is the norm.

Perhaps Walzer's most interesting challenge flows from his invitation to think of what it might mean for individuals to lack involuntary associational ties, to be 'unbound, utterly free?'<sup>2</sup> One image, he suggests, might be that of wild horses. But this very image is the antithesis of what makes us human. We are human, and not feral, because of the involuntary practices into which we are born and which have been sustained and developed over time. Even schools designed to enable us to make the most of our 'freedom' do not let us do whatever we so wish. We have to learn to be free. Again, it is more accurate to say that we must learn how to flourish. Even assuming that we could learn all that which might make us fully human, we would never cross over into the domain of the undetermined and unconditioned. Flourishing would remain predicated upon practices that were and continue to be involuntary in important respects.

As with the above account of the self, this account of the involuntariness of social life is not meant to undermine the importance of equity or transformation for flourishing in any truly complex democratic society. Issues of access, of coercion, of choice, of voice, of exit in

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<sup>1</sup> M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. On the radical givenness of everyday life, see M Heidegger *Being and Time* (1953).

<sup>2</sup> Walzer 'On Involuntary Association' (supra) at 70.

various communities of which we are a part must be constantly negotiated. The emphasis on involuntariness in social life is, however, meant to bracket the standard account of freedom – on the standard account, any impediment to free association is a denial of that which is most fundamentally human. On my account, however, those so-called impediments are the preconditions for freedom – or better put, the preconditions for flourishing. A reasonably equal and democratic society must, it would seem, mediate the givenness of our social life and the aspirations all of us have to discriminate between those social forms of life which still fit and those which do not. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom.<sup>3</sup> And again: this conditioned outcome explains why little or no explanatory power is lost when we substitute flourishing for freedom. Indeed, as Walzer suggests, we ought to call such decisions to reaffirm our conditioned commitments ‘freedom simply, without qualification.’<sup>4</sup> It is, for the most part, he concludes, ‘the only “freedom” that free men and women can ever have.’<sup>5</sup>

The sociological, political, legal and constitutional insights to be drawn from this account of involuntary association are much the same as those drawn from the naturalized account of the self in Chapter 2 above. To understand what flourishing actually means requires us to pay particular attention to the unchosen conditions of flourishing; and to the real space in which conditioned choice obtains. This understanding in no way diminishes our responsibility to engage in case-by-case analysis of rights claims made on behalf of those who

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<sup>3</sup> We commit and recommit to marriages, friendships, religions, countries, employers. We stay with people or institutions out of loyalty: because this is just who we are. Sometimes we fight for our country. At other times, we carry on the fight, we resist, generally peaceably, within our own country.

<sup>4</sup> Walzer ‘On Involuntary Association’ (supra) at 73.

<sup>5</sup> Ibid at 73. See also M Oakeshott ‘Political Education’ *Inaugural Lecture at the London School of Economics* (1961) (‘Our determination to improve our conduct does not prevent us from recognizing that the greater part of what we have is not an incubus to be thrown off, but an inheritance to be enjoyed. And a degree of shabbiness is joined with every real convenience.’) Hume, like Walzer and Oakeshott, argued that freedom – properly understood – only becomes meaningful as a descriptive and a prescriptive term when we appreciate fully its contingency on tradition or custom. Hume writes:

Custom is the great guide of human life. It is the principle alone which renders our experience useful to us, and makes us expect for the future a similar train of events with those that have appeared in the past. Without the influence of custom, we should be entirely ignorant of every matter of fact . . . We should never know how to adjust means to ends or to employ natural powers in the production of any effect. There would be an end at once of all action, as well as the chief part of speculation.

D Hume *An Enquiry Concerning Human Understanding* (1739) 29. It is interesting to note that radical social democrats such as Walzer and political conservatives such as Oakeshott share, along with Hume, a commitment to the premise that our beliefs, generally, ‘are neither natural in the sense of innate . . . nor a deliberate invention of human reason, but an artifact, . . . a product of cultural evolution.’ FA Hayek ‘The Legal and Political Philosophy of David Hume’ *Studies in Philosophy, Politics and Economics* (1967) 111.

inhabit such 'unchosen' worlds. It does, however, sound a cautionary note that ought to be heeded by those who trumpet freedom – and not flourishing -- as the ultimate trump and for those who would treat all such 'unchosen' social institutions as suspect and therefore as instruments to advance egalitarian ends.

## 2. Social Feedback Systems

This section attempts to answer two distinct, but related questions. First, how does the aforementioned account of the relationship between the individual and the social fit this thesis' more general account of flourishing and feedback mechanisms? Secondly, how does one best describe the possibilities for change against a background of 'involuntary' constraint?

The account offered in Chapter 1 and Chapter 2 suggests that social practices, endowments, language games and associations provide a variety of tools for being in the world. Our social practices provide stores of collective wisdom about what works and what doesn't work. They constitute large playing fields against which experiments in life can be played out. Moreover, they offer systems of feedback far superior to those available to the lone individual.

At the outset of this section, I will place particular emphasis on particular kinds of social formations – what FA Hayek called 'spontaneous orders' – so that we might better understand how some social systems can simultaneously provide individuals with information about their world at the same time as they extract information from them and circulate that information throughout the system. Such feedback mechanisms create an environment that enables all participating individuals to make better and better decisions about how to respond to their environment.

Of course, no guarantee exists that a society will advance flourishing by providing the individual with a sufficiently heterogeneous array of social practices and feedback mechanisms. Large societies, as well as small, can stifle the individual and the group experimentation required to advance flourishing. Because individual flourishing is parasitic upon the continued existence of social practices, and social life is often repressive, the individual often

faces great difficulty in changing the means and the ends of life. Social practices create experiential bottlenecks. They restrict both the ends to be pursued and the means of achieving them. Mill and other theorists who rely heavily on individual experiments in living to drive social change often fail to appreciate the extent to which social forces are often arrayed against such change. That is why, in Chapter 4, I argue that a politics committed to both flourishing *and* experimentalism is necessary to liberate the self and the social from the tyranny of custom.

The capacity for critique of our practices that is imminent in our practices -- and which may expand the possibilities of existence -- may well exist in a notoriously small number of communities. Indeed, in some rather closed and insular societies, the capacity for critique may well be a function *only* of the manner in which different selves (roles, dispositional states, identities or ideals) create friction between one another and thus force conflicts that must be resolved in favour of one way of being rather than another.<sup>6</sup> Although such 'choice' may seem a rather impoverished notion of choice, it remains choice nevertheless. More importantly, it is 'choice' or 'conflict' from which we can learn, and it is 'choice' and 'conflict' whose lessons can be applied, profitably, to similar choices in the future. The ultimate point is that there are always social practices -- in science, in religion, in law -- that expand our individual and collective capacity for critical engagement with our actions and our ends.

For the experimentalist, the grander the exercise in experimentation -- the larger and more varied our critical community -- the more varied our individual lives are likely to be. The more varied our individual lives, the experimentalist believes, the more likely we are to find successful models. The more successful models of being in the world there are, on the experimentalist account, the more likely it is that a member of a community will be able to identify at least one of a range of possible lives that will enable her to flourish.

That said, in contemporary South Africa, it is only with the intervention of the state that many individuals will come to possess the enhanced material conditions necessary for living out those possibilities. Moreover, such a state, to be successful, must undertake a range

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<sup>6</sup> See M Walzer *Thick and Thin: Moral Arguments at Home and Abroad* (2002) 103 – 104.

of social policy ‘experiments’ designed to provide its citizens with the means and the goods required to flourish.

## B. Descriptions of Social Feedback Systems

### 1. The Theory of Spontaneous Orders

Spontaneous orders possess two notable features. They do not rely upon a centralized form of command and control to achieve optimal outcomes. They provide, in the form of abstract rules, constraints on individual behaviour that by their very abstraction enable individuals to respond constructively -- singularly and collectively -- to changes in the environment. The archetypal example of a spontaneous order is the market. The real purpose of markets, as Hayek argues, is not the making of money: it is the coordination of knowledge, information and goods – in an intelligent manner -- without the direction of any one person or groups of persons. Hayek demonstrated that markets – by drawing down on the tacit knowledge and the local intelligence of individuals and groups – could outperform the best informed central planner. More importantly, markets provide individuals with information about their world (at the same time as they extract information from them) that enables individuals to make better and better decisions about how to respond to the environment within which they live.

Hayek’s theory of spontaneous orders is not limited to markets. It applies with equal force to all other cultural institutions that are ‘the result of human action but not of human design’.<sup>7</sup> Spontaneous orders embrace cultural institutions such as language, the common law, open-code software and markets that ‘serve the common welfare without a common will aiming at their creation.’<sup>8</sup>

Before moving on to a discussion of other examples of spontaneous orders – such as language, open-code software and the common law -- it is, perhaps, worth pausing for a

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<sup>7</sup> FA Hayek ‘The Use of Knowledge in Society’ (1945) 35 (4) *American Economic Review* 519, 520. See also FA Hayek ‘The Results of Human Action, but not of Human Design’ *Studies in Philosophy, Politics and Economics* (1967) 96, 97.

<sup>8</sup> FA Hayek *Counter-Revolution in Science* (1952) 49.

moment, to consider how such cultural structures form and how they evolve over time. As Hayek points out

Culture is neither natural nor artificial, neither genetically transmitted nor rationally designed. It is a tradition of learnt rules of conduct which have never been 'invented' and whose function individuals usually do not understand. . . . It is here that the . . . Cartesian approach has made thinkers accept as good for a long time only what were either innate or deliberately chosen rules, and to regard all merely grown formations as mere products of accident or caprice. Indeed, 'merely cultural' has now to many the connotation of changeable at will, arbitrary, superficial or dispensable. Actually, however, civilization has largely been made possible by subjugating the innate animal instincts to the non-rational customs which made possible the formation of larger orderly groups of gradually increasing size. . . . That cultural evolution is not the result of human reason consciously building institutions, but of a process in which culture and reason developed concurrently is . . . beginning to be more widely understood. *It is probably no more justified to claim that thinking man has created his culture than that culture created his reason.* . . . The structures formed by traditional human practices are neither natural in the sense of being genetically determined nor artificial in the sense of being the product of intelligent design, but the result of a process of winnowing or sifting, directed by the differential advantages gained by groups from practices adopted for some unknown and perhaps purely accidental reasons. . . . The evolution of society and of language and the evolution of the mind raise in this respect the same difficulty: the most important part of cultural history, the taming of the savage, was completed long before recorded history begins. It is this cultural revolution which man alone has undergone that distinguishes him from other animals. . . . To understand this development we must completely discard the conception that man was able to develop culture because he was endowed with reason. What apparently distinguished him was the capacity to imitate and to pass on what he had learned. And much if not most of what he learnt about what to do he probably learnt by learning the meaning of words. Rules for his conduct which made him adapt what he did to his environment were certainly more important to him than knowledge about how other things behaved.<sup>9</sup>

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<sup>9</sup> FA Hayek *Law Legislation & Liberty (Volume 3): The Political Order of a Free People* (1979) 155 -- 158.

Three cultural institutions – language, computer programmes and the common law -- may further elucidate Hayek's primary themes. Hard-wired as we might be for language, languages themselves are social systems that are the result of collective action, but not collective design. Put another way, complex social systems such as language persist not because of unilateral, or mono-directional, commands, but by virtue of a complex interaction of patterns that Donald Campbell calls 'downward causation'.<sup>10</sup> Henry Plotkin writes that '[d]ownward causation refers to the dynamic nature of control hierarchies, where information and causal power flow in all directions.'<sup>11</sup>

Languages are archetypal examples of systems that reflect downward causation. Languages are rule-driven and require, for competency, the ability to master those rules. However, no modern language has its rules set by a single authority and no modern language possesses a central authority that determines the competency of its individual users. Instead, each competent user of a language employs a system of signs that millions if not billions of individuals have made use of and contributed to over time in order to convey billions of ideas, desires or demands. In using a language, each individual further contributes to the language's growth – for each use of a word entails an extension of the word's extension to include a new set of phenomenon, even if the 'newness' of that set of phenomenon turns on events that seem as trivial as the date, or the position of the sun. Of course, other institutions exist that mediate the use of the language and reinforce, or alter, the denotation of particular words: schools, parents, books, newspapers, television, the internet, the Oxford English Dictionary, movies all play important roles in information flow within the linguistic community. But once again, the causal flow is inordinately complex – each conversation constitutes a new piece of information that subtly alters the linguistic landscape, and each conversation lies beyond the control of any single authority.

To understand the power of Hayek and Campbell's description of social formations as the result of the twin forces of spontaneous ordering and evolution one need only look at the brief and ignominious history of the only modern language that was entirely the result of

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<sup>10</sup> D Campbell 'Downward Causation in Hierarchically Organized Biological Systems' in FJ Ayala and T Dobzhansky (eds) (1974) *Studies in the Philosophy of Biology*.

<sup>11</sup> H Plotkin 'Social Constructions and Evolution' in C Heyes and D Hull (eds) *Selection Theory and Social Construction* (2001) 119, 132.

collective human design: Esperanto. The linguists who created Esperanto offered us a logical and coherent system that was easy to learn and universal in application. However, for the language to work, it required static and immutable rules to which all speakers were required to adhere. The failure of Esperanto stems, as least in part, from the failure of its creators to appreciate that languages work not (primarily) because their users have command of ostensive definitions or grammatical rules, but because the languages meet the ever changing needs, purposes and ends of their users. Esperanto left no room for the inevitable evolution of language that occurs with every spoken use or written iteration of a word or phrase. Esperanto failed because it left no room for the change to the entire language that follows, inexorably, from changes to the meaning to its constituent parts. Esperanto failed because its creators failed to recognize that language is ‘the product of slow evolution in the course of which more knowledge and experience has been precipitated in it than any one person can know.’<sup>12</sup>

A good counter-example of a modern language that works is Linux. The success of this free operating software code lies in its ability to accommodate novel contributions from users

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<sup>12</sup> FA Hayek *Law Legislation & Liberty (Volume 1): Rules and Order* (1973) 16. How language itself arose – as opposed to particular languages -- remains the subject of much debate. However, one of the dominant theories of language development as a natural phenomenon reinforces this chapter’s thesis that blind variation and selective retention theories offer useful ways of understanding the growth of most knowledge processes. Henry Plotkin argues that:

What is contentious is how language is to be viewed in evolutionary terms, and when it first appeared. All possible positions have been taken on both issues, which is a fair measure of how little we know about the evolution of language. . . . For biologists, I believe without exception, anything that is both innate and complex in design is a consequence of evolution by selection. This applies to language as it does to all other complex psychological traits. As for first appearance, views range from that of Tobias arguing for language in *Homo habilis* as long ago as two million years . . . to others who place its appearance some time in the last 200,000 to 100,000 years. . . The current untestable truth is likely somewhere between these extremes since . . . it is probable that language did not appear suddenly. Getting the anatomy of the mouth and throat right, as well as their innervation and control with hemispheric asymmetry and by appropriately sculpted neural networks that will generate rule-governed language required modification to a suite of genes, not some single mutation, and would have required a long period of time. How long is not known, but long enough for other features of human cognition and communication to have evolved alongside language. Mimesis . . . and imitation are obvious candidates whose requirements for reference and the control of sequential, concatenated motor skills would have involved psychological mechanisms that might have been incorporated into an evolving language capacity. . . . Another cognitive module that might have evolved concurrently, or interleaving, with language is what is known as Theory of Mind, that is, the capacity to attribute intentional mental states to others. Indeed, it is possible that language . . . in some form, no matter how limited, [was] essential for the emergence of Theory of Mind . . . The reverse position can also be argued. That is, language carries with it the intention to alter the mental states of others, and for this to be so, Theory of Mind is a necessary precursor to language.

H Plotkin ‘Social Constructions and Evolution’ in C Heyes and D Hull (eds) *Selection Theory and Social Construction* (2001) 119, 126 -127.

without any single authority determining the benefits or the costs of any novel contribution. The users of Linux themselves determine the success of any novel development.

The common law shares many of these same features of languages, open-code software and markets. The general norms of the common law provide abstract rules that guide – and delimit – the behavior of an entire society of individuals without specifying the actions that those individuals undertake. At the same time, the rules themselves are – like words – altered, sometimes subtly, sometimes significantly, each time they are invoked between individuals, or by a court asked to dispose of a dispute based upon an extant common law rule. In mediating the conflicts between the expectations of the litigating parties as to the actual extension of the rule, the judge is obliged to decide which set of expectations ‘is to be treated as legitimate’ and ‘in so doing . . . ‘provides the basis for future expectations.’<sup>13</sup> Although one party will have had his trial and have been deemed to have erred, the result of the judgment is that all parties to the case – and all members of society – become aware of a shift – however small -- in the standard by which their future actions will, very likely, be assessed. Without pressing the point too much further, the common law, like language and like markets, relies upon individual judges and individual litigants operating within a larger system of law (and meaning) and the ability of judges and litigants to understand the system of signals being sent throughout the system by other judges and litigants. A general commitment on the part of judges, lawyers and litigants to a coherent system of law allows the common law system to evolve in response to individual cases without any person or group of persons dictating the content of the entire system of rules. Indeed, as Richard Adelstein notes, ‘the dynamic which energizes the entire [common law] process of structural adaptation is the postulated search for mutually beneficial exchange.’<sup>14</sup> It requires no Leviathan and no legislator for the system of rules to work and to change as individuals go about their lives and seek out Adelstein’s postulated mutually beneficial exchange.

The theory of spontaneous orders offers a way in which to understand how we – as fully conditioned (and constrained) as we are – are capable of making decisions that alter both ourselves and the world around us. Spontaneous orders also offer us another window onto

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<sup>13</sup> Ibid at 156.

<sup>14</sup> R Adelstein ‘Institutional Function and Evolution in the Criminal Process (1981) 76 *Northwestern University Law Review* 1.

the theory of consciousness developed in Chapters 1 and 2. As we have already seen, consciousness is not the product of a central planner, or a homunculus, who audits data and issues commands. Consciousness is, rather, the product of mostly unconscious, multiple, parallel, distributed neural networks. These networks often compete with one another -- for both attention and for the ability to determine action. The tacit knowledge or dispersed knowledge of individuals upon which markets, languages, and the common law rely is not unlike the unconscious, multiple, parallel, distributed neural networks upon which the brain relies.<sup>15</sup>

However, while the theory of spontaneous orders might provide a useful heuristic device for demonstrating striking similarities in consciousness, language, markets, software and law as feedback mechanisms, it does not follow that this descriptive account entails a particular set of political commitments. Indeed, it should be clear that the quietism and the commitment to classical liberal principles closely associated with Hayek's theory of spontaneous orders is incompatible with the politics of human flourishing and experimental constitutionalism adumbrated above in Chapter 1 and below in Chapter 4. Donald Campbell puts his critique of classical liberalism, from the perspective of the 'experimenting society', thus:

Within western democratic Capitalism, there are a number of favorable features. These include the legal tradition, the successful achievement of changes in government through elections, and the genuine pluralism of decision-making units. The so-called 'market mechanisms' of capitalist economic theory can be regarded in ideal form as self-regulatory cybernetic feedback systems implementing the collective aspects of the

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<sup>15</sup> Hayek develops the connection between consciousness and spontaneous orders in an early work -- *The Sensory Order* (1952). Hayek's theory of mind relies upon the twin concepts of classification and evolution. Classification consists of the innate, as well as the nurtured, propensity of a mind to impose regularities upon the world that enable us to act with some expectation that other entities in the world will respond in accordance with our predictions. Hayek's concept of classification largely coheres with the view that neural networks are created, reinforced and distinguished by our experiences of action in the world. Indeed, Hayek's view that synaptic connections between neurons, and larger sets of neuronal networks, are not 'invariable features of the nervous system but are subject to modification in the course of the system's operation' has been borne out by the findings of contemporary scientific studies of consciousness. Ibid at 57. Our conceptual framework evolves, on Hayek's understanding, through a process of evolution: new inputs, new experiences, challenge our existing belief set. Neural networks and belief sets that continue to 'work' are reinforced. Neural networks and belief sets that fail to offer adequate responses to the world are supplanted by neural networks and belief sets that possess a higher degree of success. The change in neural networks that occurs within the individual and the change in belief sets that occur within the individual and the broader society are both 'explained' by reference to the kinds of selection theory associated with evolutionary theory and naturalistic epistemology. See, eg, D Campbell 'Blind Variation and Selection Retention in Creative Thought as in Other Knowledge Processes' (1960) 67 *Psychological Review* 380.

preferences of individual decision-makers. But the ideological justification and effective practice of the accumulation of great inequalities in individual and corporate wealth, and the role of wealth in providing uneven weightings of some persons' preferences over those of others, provide great obstacles that may effectively sabotage program decision genuinely based upon the public good.<sup>16</sup>

In sum, while primarily market driven economies and polities offer some capacity for human flourishing and for feedback on 'best practices' over a wide range of social institutions, the benefits flow to too small a portion of the overall population to contribute, meaningfully, to individual flourishing and to effective social experimentation.<sup>17</sup>

In the next section, I look at the commitment to flourishing and experimentation from the view of the individual and through the writings of John Stuart Mill. As we shall see, Mill's theoretical commitment to flourishing and experimentation is undermined by his refusal, like Hayek, to accord a sufficiently important role to the polity to ensure desirable outcomes at both the level of the individual and the collective.

## 2. Mill's Experiments in Living

John Stuart Mill's notion of 'experiments in living' unearths the potential of experimentation within private ordering. That is, instead of assuming that leaving people to their own devices will only maintain the *status quo*, Mill believed that people, once freed from the yoke of rigid legal constraints, will undertake 'experiments in living.' These 'experiments' should, according to Mill, enable individuals to explore their ideals in a manner that produces practices that better fit their identities.<sup>18</sup> As a good utilitarian, the promise of such voyages of

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<sup>16</sup> D Campbell & J Russo *Social Experimentation* (1999) 19.

<sup>17</sup> In addition, while spontaneous order theories make much of the unintended collective benefits that flow from the actions of individual agents pursuing their own interests, these theories often ignore the unintended negative consequences that may follow from individual agents pursuing their own interests without regard for the collective outcome. As both Hull and Hardin have pointed out, 'the tragedy of the commons' is that 'although none of the farmers using the commons intend to destroy it, that is what they do.' DL Hull *Science and Selection: Essays on Biological Evolution and the Philosophy of Science* (2001) 140. See also G Hardin *The Limits of Altruism: An Ecologist's View of Survival* (1977). 'Invisible-hand' explanations offer plausible accounts of both unintended good consequences and unintended bad consequences of individual agents pursuing their own interests without regard for the ultimate outcome.

<sup>18</sup> See JS Mill *On Liberty* (1861) 57 ('[A]s it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties

self-discovery for Mill lay not just with individual changes in behaviour. He quite naturally believed that individual change, in the aggregate, would produce a more progressive polity.<sup>19</sup>

The potential for experimentation and social dynamism that Mill identified provides an intuitively plausible, if incomplete, method for reconciling the conflicting demands of progressive social transformation and liberal private ordering. Mill's emphasis on negative liberty, and the guarantee of some individual and group independence from state coercion with respect to value formation and re-inscription, is a necessary condition for human flourishing and social dynamism. But it is not sufficient. Once we recognize the significant natural (and social) limitations on our capacity for reflection and autonomy, we come to understand that fostering novel forms of private ordering requires sustained structural, public intervention aimed at creating social institutions that promote collective experimentation and error correction.<sup>20</sup>

#### a. Mill and the Limits of Private Ordering

While *On Liberty* is typically identified with Mill's advocacy of individual rights, what often goes unnoticed is his powerful account of ethical empiricism. Drawing on his own

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of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them.”)

<sup>19</sup> Ibid at 70 ([D]espotism of custom is everywhere the standing hindrance of human advancement, being in unceasing antagonism to that disposition to aim at something better than customary, which is called . . . the spirit of liberty, or . . . progress or improvement.)

<sup>20</sup> I claim no originality with respect to many of the ideas that inform this account of a better constitutional theory for South Africa. The notion that democratic theories should emphasize detailed analysis of extant social processes rather than dictating substantive outcomes born of pure theory flows from a variety of thinkers in the American pragmatist tradition. See, eg, J Dewey *Reconstruction in Philosophy* (1926); R Rorty *Consequences of Pragmatism* (1981); B Fay *Contemporary Philosophy of Social Science* (1997). Brian Fay draws heavily on Dewey's insights to argue that the philosophy of social inquiry should refrain from relying on categories and focus on processes. Fay (supra) at 223-242. I, in turn, rely heavily on pragmatic principles of institutional design articulated, most compellingly, in Michael Dorf's oeuvre. See, eg, M Dorf 'Legal Indeterminism and Institutional Design' (2004) 78 *NYU L Rev* 875. American pragmatists invariably emphasize the extent to which 'progress' flows from a better understanding of the relationship between means and ends and the extent to which evolutionary improvements in means often have a reciprocal or knock-on effect on the ends that individuals, groups and the state seek to realize.

experience of personal crisis, exploration and recovery,<sup>21</sup> Mill's second line of argument ties the grounds for protecting individual freedom to more general 'experiments in living'.<sup>22</sup>

For Mill, his personal experience of exploration and adjustment marked a prototype for the process of 'experiments in living.' He believed that this process could be replicated throughout a society with the appropriate political arrangements, namely, maximum individual liberty. Such experiments, according to Mill, promote human flourishing because they help us to narrow the distance between our ideals, our characters, and our circumstances.<sup>23</sup>

However, Mill did not believe that this potential for change based on reflection, self-critique, and adjustment was limited to individuals. A similar potential for dynamism -- based on reflection, critique, and adjustment -- also existed for social formations. Allowing individual greater freedom for experimentation was, for Mill, a way of overthrowing the bondage of 'irrational' customs and social conformity. Although Mill did not indicate clearly the link between individual experimentation and progressive social change, the details can be gleaned from his writings. The process would take the shape of the following ever-expanding cycle. Personal crises prompt individuals to reflect upon their ideals and circumstances. Personal reflection produces shifts in personal ethical ideals. Upsurges of new personal ethical ideals challenge and transform existing customs. Regular transformation of customs and norms encourages the process of personal experimentation and reflection.

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<sup>21</sup> Mill undertook a personal journey from being a young man living under the intellectual shadow of his father to becoming a more self-possessed thinker. This journey had both a theoretical and a practical dimension. Theoretically, Mill accepted a form of ethical incompatibilism. He recognized the existence of higher and lower pleasures, *i.e.*, a diversity of goods. See C Taylor 'The Diversity of Goods' *Philosophical Papers II: Philosophy and the Human Sciences* (1985) 230. Mill rejected the strict ethical reductionism of his father, James Mill. See E Anderson 'John Stuart Mill and Experiments in Living' 102 (1) *Ethics* (1991) 4. Consistent with the change in his theoretical views, Mill also undertook a process of personal exploration and experimentation. *Ibid* at 17-19.

<sup>22</sup> Mill borrowed a metaphor from Sydney Smith to illustrate his vision of experimentation and greater 'fit'. If we represent lives 'by holes upon a table, of different shapes -- some circular, some triangular, some square, some oblong,' and persons represented 'by [pegs] of similar shapes', Smith thought that 'we shall generally find that the triangular person has got into the square hole, the oblong into the triangular ... [T]he officer and the office, the doer and the deeds, seldom fit so exactly that we can say that they were almost made for each other.' Anderson (*supra*) at 19. Mill's notion of encouraging individual 'experiments in living' aims to create a system where the shape of pegs and holes can be ever more perfectly matched with each other. Mill's ideas present us with a dynamic, rather than static, vision of private ordering.

<sup>23</sup> See Mill (*supra*) at 60 ('[H]uman nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.')

A crucial part of Mill's belief in the possibility of progressive social change was his theory of ethical empiricism. This theory provides a bridge between individual experimentation and the transformation of social norms. Despite his commitment to the existence of a hierarchy of values and the intrinsic worth of existing social norms, Mill nonetheless held that such norms must be evaluated in light of their capacity for promoting individual flourishing under reasonably hospitable conditions. Accordingly, Mill deemed all ethical ideals and social norms open to assessment, critique, and adjustment on the basis of our lived experience. Two questionable assumptions about individual potential lay beneath his ethical empiricism. First, his version of ethical empiricism requires that we be creatures with the capacity for sustained, rational reflection upon our beliefs and experiences. Second, it requires the ability to change our beliefs and practices on the basis of our reflection.<sup>24</sup>

Given the earlier reversal of the traditional relationship between consciousness, freedom and action, it seems that Mill dramatically overestimated the extent of our capacity for rational reflection on our experience.<sup>25</sup> In times of crisis that are supposed to trigger personal reflection, we are more than likely to fall back on strategies that attempt to soften the pain of the problem at hand rather than search for those that might yield more fundamental flaws in our self-understanding.<sup>26</sup> Moreover, as I have repeatedly observed, each life is often a composite of many, often competing, narratives over which we have little control as authors. A person's ethical orientation is inevitably dictated by such pre-determined roles. Given the radical givenness of our existence, we can never take the synoptic view of own lives and our ethical commitments. This is not to deny the possibility of self-analysis that initiates change. It simply points up the significant limits of that capacity. We are constrained by forms of external regulation – social mores and legal norms -- and our own personal entropy.<sup>27</sup> Even those of us who have successfully re-evaluated their beliefs through reflection may find their

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<sup>24</sup> See C Taylor 'Agency and the Self' *Philosophical Papers I: Human Agency and Language* (1985) 113.

<sup>25</sup> See Anderson (supra) at 25-26 (Points out that Mill's theory poses daunting requirements for our capacity for self-transparency and for holding systematic views as to our visions of the good life.) See also Fay (supra) at 166-174 (Argues that the dynamic relationship between the present and our past experiences precludes absolute transparency in our self-interpretations.)

<sup>26</sup> See Dennett *Consciousness Explained* (supra) at 85-87 (Acknowledges that while deliberation and reflection may be beneficial in the long-run, we tend to focus first on immediate concerns.)

<sup>27</sup> Put another way, we are emotional beings enmeshed in dense lattice-works of narratives, traditions, identities and social mores, and corporeal beings constrained by our physical dispositions.

capacity for self-initiated changes in behaviour or beliefs limited by natural or social constraints.<sup>28</sup> Like Ulysses, who could not refuse the sirens' calls, we cannot simply will ourselves into adopting a belief or a disposition.<sup>29</sup> The cost associated with trying to alter fundamentally, upon reflection, one's beliefs can be much greater than the discomfort of lashing oneself to the mast for a day. Why? Because it often involves severing entire aspects of one's identity.<sup>30</sup>

Mill also failed to appreciate fully the tenacity of social norms in resisting conscious change due to the extent to which social norms, legal rules and individual identities are linked in contemporary societies. The connection between norms and individual identities invariably entrenches social authority in a manner that dampens effective individual reflection and adjustment.<sup>31</sup> The presence of entrenched private power undermines Mill's political vision because such obstacles to experimentation do not depend on direct government sanctions.

Entrenched private power creates a two-fold barrier to experimentalism. First, it aligns existing custom and practices with one's individual identity. It thereby makes critical self-reflection difficult and redefinition painful. It thwarts attempts at reflection and adjustment by increasing its costs. That is, entrenched private power forces individuals to choose *between* preserving their membership in a community by muting their demands *or* alienation if they

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<sup>28</sup> See J Elster *Ulysses and the Sirens* (1992). See, generally, Fay (supra) at 152-154, 171-178.

<sup>29</sup> See Fay (supra) at 146-164, 191-197 (Illustrates the limits of a purely cognitivist model of human behavior in light of our embodiment and embeddedness in social relationships.)

<sup>30</sup> Imagine, for example, that your reflections on the cruelty perpetrated on people of color by discriminatory laws have led you to subscribe to principles of racial equality. Yet, adopting those beliefs, even if secretly, would clash with your previous identity as a member of a community that accepts its privileged position as a deserved entitlement. Accepting the new belief requires you not only to give up previously-held racist notions, but also to reject a host of other intertwined beliefs and relationships. The difficulty of changing one's beliefs is compounded when one seeks to change one's behavior on account of a change in beliefs. Recent social psychology scholarship illustrates that because our modes of behavior in relating to others are mediated through sub-conscious stereotypes, simply changing our conscious, overt beliefs about racism or class-based discrimination is often insufficient to eliminate patterns of behavior that result in racially or class-based discriminatory outcomes, such as avoiding areas with large number of poor residents. See, generally, S Plous (ed) *Understanding Prejudice and Discrimination* (2003). To successfully combat the effects of existing patterns of discrimination requires both individual reflection, changes in belief and gradual alterations in the patterns of social practices.

<sup>31</sup> For instance, the leader of a religious fellowship or congregation often wields a great deal of implicit authority over her or his congregants both over core religious issues as well as over questions less central to religious doctrines, such as questions of social policy. Here, the congregants may view the act of submitting to the spiritual and political authority of their religious leader as constitutive of their identities as members of that faith. Such disparities have, it seems plain, the potential to diminish demands for change.

choose to speak up. Second, it enables individuals or institutional practices supported by entrenched authority to suppress new ideas and alternative points of views on the basis of authority instead of merit.<sup>32</sup> Entrenched private power creates a 'bottleneck' and prevents individual experimentation from leading to corresponding changes in social norms. Mill's insistence on the private order as the engine for social transformation fails to account for this inevitable brake on change.

Accordingly, one should refine Mill's political theory in several respects while retaining the essential spirit of his experimentalist vision. Chapter 2 and Chapter 3's initial recognition of the natural constraints and social limits on the individual capacity for reflection and adjustment calls for the creation of alternative set of political mechanisms designed to realize Mill's vision of a dynamic, virtuous cycle of progressive change. To this end, I add the following corollary to Mill's vision: experimentalism requires public intervention, not government abstention. Such public intervention entails (a) historical redress for marginalized communities; and (b) both public and private institutions that promote reflexivity and increase our individual and collective capacity to challenge the tyranny of custom.

#### b. From Private Ordering to Experimentalism

Private ordering, conceived as permitting individual interaction with minimal official intrusion, can never truly be free from public ordering. Rules of contract, of delict, and of property – that often determine private ordering -- can only be enforced with the backing of state authority. The distinction, then, between different levels of public intervention is a matter of degree, rather than kind.<sup>33</sup>

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<sup>32</sup> Let's extend the example in the previous footnote and assume that several members of the fellowship in question have been working on a public health campaign with a group of volunteers from a gay community organization. Based on those interactions, the members of the fellowship have come to re-examine their beliefs about the sinfulness of homosexuality. Through reflection, they may now view those beliefs as a political position propounded by the leadership of the fellowship, but without any actual basis in the faith's core religious teachings. Accordingly, they raise objections to the principles within the fellowship. In the absence of entrenched authority, this conflict would not have occurred. Yet, the inevitable presence of entrenched authority within most institutions often permits the preservation of existing norms without justification.

<sup>33</sup> See C Sunstein 'Lochner's Legacy' (1987) 87 *Columbia LR* 873, 876-883 (Sunstein notes that the flaws of the United States Supreme Court's jurisprudence in the early 20<sup>th</sup> century did not flow from its alleged activism – i.e.,

Given that private ordering inevitably entails the use of state power, then questions of (conservation and) transformation of existing social formations ultimately reduce to issues of political institutional design. Generally, public intervention can either be imposed from above, via direct state action, or originate from below, through the initiative of individual stakeholders.<sup>34</sup> Direct state action offers the virtue of speed. It suffers, however, from two important drawbacks: information deficiency and lack of participation. First, reconfiguring social institutions requires a certain amount of inside information. If trained anthropologists find understanding the cultures they study exceedingly difficult, how much greater is the challenge for an untrained bureaucratic administrative staff paid to solve pressing polycentric social problems. Second, by relying on a bureaucratic process, a top-down approach faces the peril of excluding the participation of the people most directly affected. Not only does such exclusion fuel the information deficit already discussed, it can also undermine an essential part of the political project of transformation — to change the mindset of those who govern. Finally, the silence of those affected undermines the legitimacy of the decisions taken.

As I shall argue in more detail in Chapter 4, one way of increasing participation, deliberation, information-generation and legitimation is through what Robert Mangabeira Unger describes as ‘destabilization rights.’<sup>35</sup> Destabilization rights – in their thinnest form – provide remedies for stakeholders who seek accountability from a government agency that influences private ordering or a social institution that exercises significant private power. Such destabilization rights offer two distinct forms of relief to the stakeholders. First, they require those in power to account for their decisions on the basis of evidence and reasonable arguments. Second, they bestow upon stakeholders rights of participation in the processes meant to address the problems that concern them. As we shall see in Chapter 4,

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a commitment to vigorous enforcement of rights -- but rather from its choice of existing common law arrangements as *the* baseline for social relations and its assumption that such a baseline was more ‘natural’ than alternative legal arrangements -- i.e. progressive social welfare laws.) See also S Woolman ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31.

<sup>34</sup> Of course, neither program operates in absolute terms. To contrast them as top-down vs bottom-up merely illustrates some key differences. In reality, a top-down approach inevitably requires a measure of individual participation, just as the bottom-up approach described more fully below will demand political cooperation and administrative oversight.

<sup>35</sup> See R Mangabeira Unger *False Necessities: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (1987).

destabilization rights are novel but not untested. Successful constitutional challenges to existing government policy in both South Africa<sup>36</sup> and the United States<sup>37</sup> demonstrate their potential.

### 3. Blind Variation and Selective Retention in Social Processes

I have suggested – in Chapter 2's theory of the self – that individual behaviour, conscious and unconscious, is best understood in terms of 'trial and error'. From simple to complex actions, individuals use their cognitive modalities to sample or to test their environment, and to come up with the best possible solutions to the problem with which they are confronted. Because I also argue that much of what we do as individuals is not conscious (that is, behaviour of which we are largely unaware), I am in a position to contend, in the words of Donald Campbell, that 'a blind-variation-and selective-retention process is fundamental to all inductive achievements, to all genuine increases in fit of system to environment.'<sup>38</sup>

This account of how trial and error in both cognitive and non-cognitive processes may lead to greater adaptive fit may sound a great deal like a form of evolutionary epistemology. It is. The attraction of this account is that it simultaneously explains the importance (ineluctability) of constraint and the mechanisms of change.<sup>39</sup> Moreover, by attending to the mechanisms of change in blind-variation-and selective-retention processes, we can then suggest how 'experiments' (trials and errors) ought to take place in the formation of social policy by political actors. (That prescriptive endeavor will be reflected in my account of experimental constitutionalism in Chapter 4.)

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<sup>36</sup> See *Minister of Health & Others v Treatment Action Campaign & Others No 2* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('TAC'). See also J Klaaren 'A Remedial Interpretation of the *Treatment Action Campaign* Decision' (2003) 19 *SAJHR* 539.

<sup>37</sup> See C Sabel and W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015 (Offers a theoretical perspective as to how litigation over the adequacy of school funding, prison conditions and housing fit within the framework of destabilization rights.) See also M Heise 'State Constitutions, School Finance Litigation and the "Third Wave": From Equity to Adequacy' (1995) 68 *Temple LR* 1151 (1995) (Traces the history of state constitutional challenges to school funding in the United States and describing the success of the current wave of litigation.)

<sup>38</sup> See D Campbell 'Blind Variation and Selective Retention in Creative Thought as in Other Knowledge Processes' (1960) 67 *Psychological Review* 380.

<sup>39</sup> See KM Kim 'DT Campbell's Social Epistemology of Science: Vicarious Selection, Epistemological Fallibilism, and Sociology of Scientific Validity' (1997) 3 *Evolution and Cognition* 75; KM Kim 'Nested Hierarchies of Vicarious Selectors' in C Heyes and D Hull (eds) *Selection Theory and Social Construction* (2001) 101.

Blind-variation-and selective-retention processes – or universal selection theory – fits my previous account of the constitutive nature of the self and the social, because it does not require – indeed it eschews – undetermined (or overtly ‘free’) accounts of how change occurs both at the level of the individual and the social. Blind-variation-and selective-retention processes or universal selection theory consists, note Czikó and Campbell, of four basic claims.

First, a blind-variation-and selective-retention process is fundamental to all inductive achievements, to all general increases in knowledge, to all increases of fit of system to environment. Second, in such a system there are three basic essentials: mechanisms for introducing variation; consistent selection processes; and mechanisms for preserving and/or propagating the selected variations. Note that, in general, the preservation mechanisms and the variation generation mechanisms are inherently at odds, and each must be compromised. Third, the many processes which short-cut a fuller blind-variation-and selective-retention process are themselves inductive achievements, containing wisdom about the environment achieved originally by blind variation and selective retention. Fourth, in addition, such short-cut processes contain in their own operation a blind-variation-and selective-retention process that substitutes for overt loco-motor exploration or the life and death winnowing of organic evolution.<sup>40</sup>

Were these four claims about blind-variation-and selective-retention processes limited to the discoveries in biology of the mechanisms which explain the emergence and the evolution of species and their adaptive characteristics, then we might have reason to be skeptical about their application to individual cognitive processes, social processes and political processes. But this explanation fits what we know from immunology about the production of effective antibodies,<sup>41</sup> from neuroscience about how the brain ‘selects’ some

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<sup>40</sup> G Czikó ‘Universal Selection Theory and the Complementarity of Different Types of Blind Variation and Selective Retention’ in C Heyes and D Hull (eds) *Selection Theory and Social Construction* (2001) 15, 18. See also D Campbell ‘Evolutionary Epistemology’ in PA Schlipp (ed) *The Philosophy of Karl Popper* (1974) 421.

<sup>41</sup> See G Czikó *Without Miracles: Universal Selection Theory and the Second Darwinian Revolution* (1995).

neuronal-synaptic connections over others,<sup>42</sup> and from psychology about how creative persons are able to produce novel, diverse and often more fruitful ideas.<sup>43</sup>

One complaint aimed at evolutionary epistemology or ‘invisible hand’ explanations of knowledge processes – say, that which occurs in the natural sciences – is that they ostensibly treat each actor -- in this case, the scientist -- as if he or she is a wholly autonomous individuals without the need, the desire or the experience of relationships with other scientists. Mirowski argues – correctly – that scientists operate in communities that reflect varying degrees of integration and cooperation.<sup>44</sup> However, as Hull points out, all that is necessary for ‘invisible hand’ explanations of knowledge processes (in the natural sciences) to work is that

sometimes these individuals act in relative autonomy from each other with respect to the general good at issue and that within the groups that they form, an important concern is looking out for themselves.<sup>45</sup>

They do not require that self-interest be the only motivation, nor that all the mechanisms by which the knowledge system produces truth or useful conclusions be ‘invisible’ to the participants.<sup>46</sup> While there is little sense in comparing, on aggregate, the virtue of scientists, with the virtue of politicians, priests or philosophers, it seems worth noting that scientists are, by and large, motivated by a desire to produce knowledge for knowledge’s sake. This motivation is a necessary feature of a system in which the ‘truth’ – the product of a scientific experiment – is contingent upon the recognition and the acceptance of the truths established by a whole community of scholars. They are contingent in two distinct ways: first, the truth of the hypothesis is dependent upon a body of knowledge that the scientist did not create;

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<sup>42</sup> WH Calvin ‘The Brain as Darwin Machine’ (1987) 330 *Nature* 33-34; WH Calvin *How Brains Think: Evolving Intelligence, Then and Now* (1996).

<sup>43</sup> HJ Eysenck ‘Creativity and Personality: Suggestions for a Theory’ (1993) 4 *Psychological Inquiry* 147; HJ Eysenck *Genius: The Natural History of Creativity* (1995).

<sup>44</sup> P Mirowski ‘A Visible Hand in the Marketplace of Ideas: Precision-Measurement as Arbitrage’ (1994) 7 *Science in Context* 563, 566.

<sup>45</sup> DL Hull *Science and Selection: Essays on Biological Evolution and the Philosophy of Science* (2001) 141. See also E Ullmann-Margalit ‘Invisible-Hand Explanations’ (1978) 39 *Synthese* 263, 267-268 (Contentends that the explanatory value of spontaneous order or invisible-hand explanations for social phenomena depend upon the ‘the process, or mechanism, that aggregates the dispersed individual actions into the patterned outcome: it is the degree to which the mechanism is explicit, complex and sophisticated -- and, indeed, in a sense unexpected -- that determines the success and interest of the invisible-hand explanation.’)

<sup>46</sup> See A Sen ‘The Profit Motive’ (1983) 147 *Lloyds Bank Review* 1, 13.

second, the truth of the hypothesis – its value in the broader scientific community and beyond – is dependent upon the willingness of the scientist to rely upon the findings of others (and thus give them the credit they deserve), with the expectation that they will return that respect if the experiment's result turns out to be true.

Having at once established the virtue of scientists, I have also drawn attention to the manner in which natural science knowledge processes fits the general model of 'invisible-hand' or 'spontaneous order' explanations. First, the scientists are still motivated by the desire to produce valuable work for which they receive express – or at least implicit – credit. Indeed, this motivation underlies the many races – and consequent disputes – about who really arrived at the truth first – Darwin or Wallace, with respect to natural selection, Gallo or Montagnier, with respect to the virus that causes AIDS.<sup>47</sup> Second, although scientists rarely bother to replicate the experiments of others in order to prove the actual findings of others – *no glory there* – they do attempt to discover error in the work of others and do receive credit for demonstrating that previous work contained falsehoods of one sort or another. Thus, with respect to error, science operates 'as a self-policing system of mutual exploitation, or, if you prefer, cooperation'.<sup>48</sup> But like all invisible hand processes, no one person determines the validity or the invalidity of truth statements, and no one person organizes a regime that determines which hypotheses are tested and how. Because the commitment to truth, and the rewards and the punishments that attach to genuine discoveries and to the failure to produce reliable results, constitute the core values of the scientific community, no central authority is required for policing its individual members.<sup>49</sup>

How then does this epistemology of blind-variation-and selective-retention in knowledge processes fit with my previous account of the involuntariness of social associations

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<sup>47</sup> A Rawling 'The AIDS Virus Dispute: Awarding Priority for the Discovery of the Human Immunodeficiency Virus' (1994) 19 *Science, Technology & Human Values* 342.

<sup>48</sup> Hull (supra) at 144.

<sup>49</sup> As David Hull points out, however, scientists need not be saints to do what they do well:

Scientists may well be as motivated to produce knowledge for its own sake as they say they are, and perhaps these admirable motivations are sufficient to bring about the production of reliable knowledge, but the really neat thing about the reward system in science is that it is so organized that, by and large, more self-serving motivations tend to have the same effect as more altruistic motivations. Virtue and benefit go hand in hand . . . To the extent that scientists are motivated by the high opinion of others as evidenced by the use of each other's work, they will be pressured to behave themselves.

Hull (supra) at 146.

and the constraints that they impose on individual and group identity? First, our social practices – including the blind-variation-and selective-retention knowledge processes in science -- provide stores of collective wisdom about what works and what doesn't work. Moreover, they offer systems of feedback that provide significant amounts of information about forms of behaviour that no longer work or new forms of behaviour that work 'better'. Second, individuals and groups – individual scientists and their teams -- do not need to 'know' all there is to 'know' about how a particular social practice (or natural phenomenon) functions in order to make use of it and in order to undertake experiments within it. Third, the capacity for critique of our practices is imminent in all our practices, and in the blind-variation-and selective-retention in knowledge processes of science quite open. The space for critique in our social practices --- large in science, somewhat smaller in religion – expands our individual and collective capacity for critical engagement with our beliefs. Fourth, the stronger our collective commitment to experimentation is – that is, the larger and more varied our critical community is – the more varied our individual lives are likely to be. The blind-variation-and selective-retention in knowledge processes such as science provide a good example of how experimentation creates more and more successful models of the world and a far greater range of options when it comes to choosing what it means to be a scientist.<sup>50</sup>

### C. Prescriptions for the Social: Experimentalism in State Policy

Although I shall devote a significant amount of space in Chapter 4 to demonstrating how constitutional doctrines and political institutions can be better understood in terms of experimental constitutionalism and how a commitment to experimental constitutionalism better serves human flourishing, it is worth noting here that there is a large and varied literature in the social sciences devoted to the promotion of experimentation in statecraft. The epistemic and political foundations of this literature are very much of a piece with the

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<sup>50</sup> The history of science itself is evidence for this claim. For almost 2,000 years of western history, science and philosophy were largely synonymous – or, at the very least, the same thinkers did both and did not differentiate between the two. However, the last 300 years has witnessed a steady winnowing of the domain of philosophy. Three hundred and fifty years ago, philosophers from Descartes to Locke to Leibniz all retained a hand in, and made contributions to, physics, mathematics, chemistry, and biology. But as the scientific revolution increased in speed, and as the thinkers within the scientific community began to specialize, domain of knowledge after domain of knowledge left its original home in philosophy. Physics, mathematics, chemistry, biology, psychology, sociology, political science, computer science, artificial intelligence, critical theory, jurisprudence all got their start in philosophy. Today, philosophy's success can be measured by how little of its original content remains distinctly philosophical.

core epistemic and political foundations of experimental constitutionalism. In short, both bodies of work recognize the constraints that the social places on change and both bodies of work concur that the state – as things currently stand – is in the best position to break the bottlenecks in the social that prevent individuals and groups from undertaking genuine experiments in living. Both bodies of work endorse the proposition that the state – if properly organized – is in the best position both to support and to monitor these experiments in living and, ultimately, to ratify, even if it is in only the most provisional way, the best practices that arise out of these various experiments in living.

However, the two bodies of literature have distinct objectives. Experimental constitutionalism concerns itself primarily with constitutional doctrines and political arrangements that will facilitate experimentation across a broad array of policy domains. Social experimentalism concerns itself primarily with how social scientists, as part of and partner to the state apparatus, can construct policy experiments in a manner most likely to yield best practices that can be replicated – if successful – on a broader scale.

In the first place, social scientists who press for an ‘experimenting society’ ought not to be misread as proposing that social scientists set the political agenda.<sup>51</sup> Social experimentalism accepts that ‘preponderantly unscientific political processes’ will determine ‘ameliorative program initiatives’.<sup>52</sup> The role of the social scientist in a social experimentalist program is to help decision-makers and citizens alike assess the success of an initiative in achieving its goals and in avoiding deleterious consequences.

Somewhat ironically, advocates of social experimentalism tend to be rather modest about the contributions that social science can offer politics. Where non-experimentalists tend to fall into the over-advocacy trap – offering advice, but little subsequent analysis – experimentalists generally tend to eschew advocacy. Part of this reserve flows from the recognition that many areas of social policy are notoriously resistant to experimental assessment.

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<sup>51</sup> See D Campbell ‘The Experimenting Society’ in ES Overman (ed) *Methodology and Epistemology for Social Science: Selected Papers* (1988) 290.

<sup>52</sup> D Campbell & J Russo *Social Experimentation* (1999) 19.

Given their relative agnosticism as to what the ‘best practices’ in a given area of social policy ought to be, how do proponents of social experimentalism expect to advance the goals of an experimental society? At least two general answers are offered.

First, the assessment of the experiments themselves ought to be undertaken by as large a number of independent social scientists as possible. As David Hull and Donald Campbell both note, science works best under conditions of ‘competitive cross-validation’. That is, as Roger Merton showed, the ‘organized scepticism’ of a scientific community – in which a systemic level of distrust is married to personal ambition – leads scientists, individually and as members of research teams, to monitor one another for theoretical advances that actually improve the ability to carry out their own programs. Genuine theoretical advances need not be replicated – and indeed rarely are. They need only prove useful to others. Should the alleged theoretical advance prove unreliable – and ultimately erroneous – the scientist or the scientists responsible will be subject to communal opprobrium. The ‘organized distrust’ that produces ‘trustworthy reports’ is enhanced when our independent social scientists bring their respective critical skills to bare on a data set that is apt to be analyzed by other evaluators.<sup>53</sup>

Second, social experimentalists tend to advocate funding numerous local programs to address chronic problems. Only once a local program announces success would it be subject to scientific evaluation. While social scientists tend to emphasize the evaluation process, what is interesting, from the perspective of experimental constitutionalism, is their advocacy of multiple local programs. Though social experimentalists and the experimental constitutionalists advocate numerous local programs for slightly different reasons, both kinds of experimentalists believe that best practices are only likely to reveal themselves if one can demonstrate that some practices are, in fact, better than others.

Experimental constitutionalism has been criticized by scholars such as Mark Tushnet on the grounds that it takes the present set of political arrangements as the ‘best can be hoped for’ and that it therefore abjures radical solutions to chronic social problems.<sup>54</sup> And there is some merit to this charge. But rather than take the criticism as mark against their theory,

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<sup>53</sup> Ibid at 26.

<sup>54</sup> M Tushnet *After Bureaucracy: The New Constitutional Order* (2004).

experimental constitutionalists such as Michael Dorf, William Simon, Susan Sturm and Charles Sabel accept that their theoretical orientation requires them to make the best of the political system that we currently have.<sup>55</sup> Social experimentalists such as Donald Campbell take a similar view of what social science can do. As Campbell notes:

Evaluation research is clearly something done by, or at least tolerated by, a government in power. It presumes a stable social system generating social indicators that remain relatively constant in meaning so that they can be used to measure the program's impact. The programs that are implemented must be small enough not to seriously disturb the encompassing social measurement system. Thus the technology I have been discussing is not available to measure the social impact of a revolution.<sup>56</sup>

Unlike Mark Tushnet or Thomas Kuhn, however, neither Campbell nor Dorf believe that the existing framework – whatever it is – necessarily blocks meaningful and fundamental reform.<sup>57</sup> Though individual improvements may only incrementally alter an experimentalist society, the cumulative effect of a myriad of experiments can be fundamental and transformative.<sup>58</sup>

#### D. Shared Consciousness as a Feedback Mechanism

##### 1. Psychotherapy

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<sup>55</sup> M Dorf 'Review of Mark Tushnet's *After Bureaucracy: The New Constitutional Order*' (2004) 71 *University of Chicago LR* 363.

<sup>56</sup> Campbell & Russo (supra) at 43 – 44.

<sup>57</sup> See T Kuhn *The Structure of Scientific Revolutions* (1970) (Claims that the existing framework in any science sets the limits on possible change and that systematic change can only be brought about by a revolution in the existing theoretical framework.)

<sup>58</sup> Remember too that the experimentalist – social and constitutional – is primarily concerned with the conditions and the processes under which experiments take place. Experimentalists can be – and often are – egalitarian in their orientation and quite progressive in their politics if for no other reason than that inegalitarian arrangements often skew experimental results in favor of those persons who possess greater power or wealth (because their preferences are given undue weight.) However, the experimentalist is, by orientation, committed to the proposition that better political arrangements in the world are possible for the same reason that better scientific explanations of the world are possible. The experimenting method, the scientific method, has demonstrated that better and better explanations of the world are possible. Of course, with respect to political arrangements, the question necessarily arises as to what and for whom a particular arrangement will be better. Experimentalists need not be wedded to any given outcome – and almost by nature must view any positive outcome as provisionally desirable. But the notion of 'better' must, in this age, mean 'better for all to a meaningful degree'. Otherwise, we would be entitled to ask why bother with the experimentation process at all?

One initiates therapy because one believes that the manner in which one engages the world is flawed and leads to less-than-optimal outcomes. One might even borrow the language of our initial encounter with a video game: our life might appear to us as a miasma of moving objects, whose actions, including our own, appear unpredictable, their purpose opaque. The goals of therapy then are three-fold: to enable us to see, more clearly, what we do; to understand why we do it; and, where necessary, to change our orientation towards the world. We could engage in this reflective process by ourselves. Quite often, for many matters, we can engage in the kind of sustained self-reflection and critique that would otherwise count as therapy. But even if it were possible for us to engage in that sort of endeavour, there are benefits to therapy that outstrip self-reflection.

The therapist provides two goods that the individual alone cannot provide. First, she presents a relationship – a context – in which the patient can act out general patterns of behaviour in the world. Second, she can provide a critical voice that sets out the individual's maladaptive behaviour in sharp relief. While there is no substitute for the internalisation of this critical voice, we must be able to see the errors first before we can respond constructively to them.

Again, the parallels to playing a video game jump out. Over time and with greater experience of the therapeutic process, the patient begins to note certain regularities in her behaviour and how she and the world respond to her various modes of engagement. As time goes on in therapy, certain kinds of responses to the world should become unlearned and preferred ways of being should become 'second nature'. That is, in therapy, and over time, we replace existing maladaptive dispositional states with beneficial dispositional states in such a manner that – if all goes to plan -- we ultimately require absolutely no conscious awareness of those states.

## 2. Legal Academia

Therapy is simply one of many conscious critical practices that enable us to focus on aspects of our environment – and hold them up for scrutiny – in order to form better behavioural responses to the environment. Legal academic life is another such practice.

This thesis is a product of such a practice. It relies to a significant degree on the legal, philosophical and scientific contributions of others. (Indeed, the originality of the thesis lies primarily in the application and the synthesis of these other contributions to constitutional law in South Africa.) More importantly for the argument in this section, legal academia functions as a social feedback mechanism. While I experience some urgency in completing this argument for public consumption – because I desire the recognition assigned to novel contributions – I am equally concerned that the legal community will recognize and endorse this contribution. Thus, in 2004, I offered the first draft of the paper upon which this thesis is based at the Research Unit in Legal and Constitutional Interpretation Conference. The academic discussion there pointed up concerns about the necessity of foregrounding normative arguments regarding constitutional doctrine with a descriptive account of consciousness. The same process was repeated at the Columbia Law School Experimentalism Workshop of in 2006. Concerns were raised about whether the work spoke to views of the self, the society and the state beyond those found in the liberal tradition (broadly construed) and the extent to which South Africa – despite all of its capacity problems – might, in fact, be a desirable environment within which to establish experimental political structures. My supervisor, and external readers, all offered useful appraisals of the arguments offered: they offered new examples that strengthened existing arguments; they raised important questions about the relationships between the various kinds of self – determined, conditioned, multiple, divided -- described in these pages. I have managed, as a result of these various trials and interventions, to correct some of the limitations in both the individual arguments and the overall structure of the thesis. In my experience, legal academic discourse constitutes a sustained set of feedback mechanisms for error correction and truth propagation. At a minimum, the system points up logical or empirical flaws. At its best, this knowledge system provides both the grounds for understanding the world and the conditions for offering new and better ways of understanding the world. Whether such a novel understanding leads to new and improved legal arrangements, or just convinces some of its audience of its truth, is another matter entirely.

### 3. Golf Instruction

Therapy and legal theory – forms of shared consciousness -- are just two examples of social feedback mechanisms. In our highly differentiated, extraordinarily heterogeneous society, innumerable other individuals enable us to reflect more effectively upon our actions and, where necessary, to come up with better solutions to the way in which we engage the world.

Golf offers an example of participation in what many might take to be a non-cognitive, non-reflective, social practice: golf instruction. Golf is not just about walking up to the ball and letting it rip. Indeed, just about everything about golf at a fundamental level is counterintuitive – or at least non-intuitive: the manner in which the hands grip the club; the exaggerated extension of one's backside (so that one's back remains straight); the rotating of the body so that one's back faces the target; the weight shift to the right side, and then the left; the initiation of the swing down through the ball with a slight turn of the hips toward the target; finishing with one's hands high and one's belt buckle pointed at the target. None of these components of the golf swing were obvious to me. They had to be taught. Moreover, none of the components of the golf swing were obvious my instructor when he started playing. Golf is a practice that dates back several hundred years: it is now a practice that has generated significant amounts of study as to what the body does during the swing and how the body's movements can be orchestrated in a manner that produces the greatest and the most consistent amount of accuracy, power and control.

Watch yourself swing a golf club on film: then bring the insights and collective wisdom of millions of golfers to bear on what you are doing right and what you going wrong. All of a sudden you are part of a social practice in which centuries of trial and error put us in a position to correct mistakes – at the individual level. Go down to the pro shop and look at the new range of clubs designed to improve play. All of a sudden you are part of a social practice in which centuries of trial and error have put manufacturers of equipment in a position to make improvements to ball and club design – at the collective level. Golf, so understood, reveals itself to be a social practice in which the '*downward causation*' of multiple participants enables all boats to rise – at least a little – without any one person or any one authority responsible for such a rise.

# THE SELFLESS CONSTITUTION

## Chapter Four

### A Theory of the Constitutional: Experimental Constitutionalism & Human Flourishing

*Table of Contents*

A. Introduction

1. Basic Theses
2. Some Riders on Experimental Constitutionalism in South Africa
  - (a) *Experimentalism and Optimality*
  - (b) *Tradition and Transformation*
  - (c) *Constitutionalism and Experimentalism*
  - (d) *Institutional (Under)Capacity and Experimentalism*

B. Experimental Constitutionalism under South Africa's Final Constitution

1. Philosophical Assumptions behind Experimental Constitutionalism
  - (a) *On Reflexivity*
  - (b) *On Deliberation*
  - (c) *On Destabilization*
  - (d) *On Experimentalism*
2. Experimentalism and Institutional Design
3. Experimental Institutional Design
  - (a) *The Promise of Experimental Institutional Design*
    - (i) Three Principles

- (ii) Role of the Judiciary in Structuring Institutional Reforms
  - (iii) Theoretical Underpinnings of Experimental Constitutionalism: Shared Constitutional Interpretation & Participatory Bubbles
  - (b) *Shared Constitutional Interpretation: Institutional Design & Constitutional Doctrine*
    - (i) Provincial Constitutions
    - (ii) Rights Interpretation and Limitations Analysis
      - (aa) Theory
      - (bb) Practice
    - (iii) Democracy and its Relationship to Rights Interpretation
    - (iv) Socio-Economic Rights
    - (v) Chapter 9 Institutions
      - (aa) Auditor-General
      - (bb) Public Protector
      - (cc) South African Human Rights Commission
  - (c) *Participatory Bubbles: Institutional Design & Constitutional Doctrine*
    - (i) Remedies
    - (ii) Rules and Procedures in Constitutional Matters
    - (iii) Costs
    - (iv) Constitutional Jurisdiction
    - (v) Public Participation in the Process of Law-Making
    - (vi) Chapter 9 Institutions
  - (d) *Participatory Bubbles & Shared Constitutional Interpretation as Feedback Mechanisms*
    - (i) Experimentalism in American Education Law and Policy
    - (ii) Experimentalism in South African Housing Law and Policy
      - (aa) An Immediate Critique of *Grootboom*
      - (bb) The Reformation of Housing Policy in Light of *Grootboom*
    - (iii) Experimentalism in South African Education Law and Policy
      - (aa) Extant Constitutional Norms regarding Religious, Linguistic & Cultural Autonomy in Public Schools
      - (bb) State's Efforts to Control Private Power in Public Schools
- C. Flourishing, Dignity and the Politics of Transformation in South Africa
1. The Situated Self
  2. The Reflective Self
  3. Flourishing and Dignity

*(a) Flourishing Defined*

*(b) Dignity Defined*

(i) Dignity as a Condition for Flourishing

(aa) Individual as an end-in-herself

(bb) Equal Concern and Equal Respect

(ii) Dignity as Constitutive of Flourishing

(aa) Self-actualization

(bb) Self-governance

(iii) Dignity and the Material Conditions for Human Flourishing

*(c) Widening Gyres of Dignity and Flourishing*

#### D. Revisiting Some Recent Cases in Light of Experimentation and Flourishing

1. *Prince*

2. *Jordan*

*(a) Flourishing, not Freedom*

*(b) Experimentation, not Deference*

3. *Grootboom*

*(a) Structural Injunctions and Participatory Bubbles*

*(b) Experimentalism, Systemic Feedback Effects & Transformation*

*(c) Shared Constitutional Interpretation*

4. *Fourie*

5. *TAC*

*(a) Failure to Flourish*

*(b) Not Tough Enough*

6. *PE Municipality*

## A. Introduction

### 1. Basic Theses

In Chapters 1, 2 and 3, we have seen how the individual, though fundamentally conditioned by the world, can use the various critical tools at her disposal to engage in more optimal forms of behaviour. We have seen that the expansion of such tools of critical discourse through participation within different knowledge domains *may* lead to a greater array of ways of being in the world. It is the extension of the range of ways of being in the world – and the material conditions that make their exercise possible – that constitute what I really mean by flourishing.<sup>1</sup>

My commitment to recasting freedom in terms of the more modest concept of flourishing requires an equally modest conception of politics. To that end, this work offers a theory of politics that should be described as experimental constitutionalism.<sup>2</sup>

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<sup>1</sup> The contemporary literature on flourishing is vast. Reintroduced into the philosophical canon by the neo-Aristotelian writings of Alisdair MacIntyre, it has been readily, and quite naturally absorbed, into the liberal canon. See A MacIntyre *After Virtue* (1984). The philosopher most responsible for that absorption is Martha Nussbaum. See, eg, M Nussbaum *Love's Knowledge* (1991); M Nussbaum and A Sen (eds) *The Quality of Life* (1993); M Nussbaum *Women and Human Development: The Capabilities Approach* (2000); M Nussbaum 'The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality' (1985) 1 *Proceedings of the Boston Areas Colloquium in Ancient Philosophy* 151; M Nussbaum 'Aristotelian Social Democracy' in R Bruce Douglass (ed) *Liberalism and the Good* (1990); M Nussbaum 'The Good as Discipline, the Good as Freedom' in D Crocker and T Linden (eds) *The Ethics of Consumption: The Good Life, Justice and Global Stewardship* (1998) 320. Nussbaum's capabilities approach constitutes a normative liberal political theory aimed at securing the political environment necessary for flourishing. Only two points need be made here. First, Nussbaum's notion of 'flourishing' – from the Greek 'eudemonia' – can be defined as living a life worth living or living life in all its fullness. Indeed, '[t]he failure to flourish' she has said, 'is a kind of death.' See J Cowley 'Twelve Great Thinkers of Our Time' (2003) 132 *New Statesman* 1. However, the form that flourishing takes will vary across societies, across cultures and across individuals. What ought not to vary across societies, across cultures and across individuals is the capacity to flourish. That leads Nussbaum to assert a second axiom for her liberal political project. Her political commitment to a capabilities approach – developed, at least in part, with Amartya Sen – rests on the assumption that 'a human life lacking the identified capabilities would be guaranteed less than a fully human life.' B Butler 'Nussbaum's Capabilities Approach: Political Criticism and the Burden of Proof' (2001) (1) *Journal of Politics and Ethics* 1 The consequences of flourishing, and capabilities theory, for South African constitutional jurisprudence are explored at greater length below. Suffice it to say that Nussbaum's list of capabilities required for flourishing, and Sen's general theory of capabilities are consistent with the jurisprudence of experimental constitutionalism adumbrated in this chapter.

<sup>2</sup> Michael Dorf, Charles Sabel, William Simon, Susan Sturm, Barry Friedman and Archon Fung have been the primary exponents of this school of legal thought. See, eg, M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia LR* 267; M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015; M Dorf '1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard LR* 4 (1998); See S Sturm 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia LR* 452. S Sturm 'The Promise of Participation' (1993) 78 *Iowa LR* 981, 987-991, 1002-1010; S Sturm 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown LJ* 1357; A Fung & EO Wright 'Deepening Democracy: Innovations in Empowered Participatory Governance' (1998) 29(1) *Science & Society* 5. This school's approach to both constitutional doctrine and institutional design work equally well with respect to South African jurisprudence. See, eg, S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson

Unlike the notion of formal autonomy that animates classical liberalism, or even the notion of substantive autonomy that underwrites much of the existing South African literature on how to create a transformative legal culture, experimental constitutionalism eschews freedom talk in favour of flourishing. Flourishing recognizes simultaneously the socially constructed and contingent nature of the individual, the limited utility of freedom as a both a description of and a prescription for individual behaviour and the highly circumscribed nature of individual and collective rationality.<sup>3</sup> In short, this account begins with the premise that individual flourishing occurs primarily within the many, and often, competing associations into which an individual is born and of which she remains a part. Experimental constitutionalism envisages a state that does not exhaust the possibilities of individual lives. To the contrary, experimental constitutionalism aims at creating the conditions under which individuals and groups can fully realize extant sources of the self.

Put another way, at a minimum, an experimental constitutional state bears the dual responsibility of ruling out ways of being which threaten the core values of our polity - tolerance, dignity, rough equality, democratic participation - and of providing a framework within which competing notions of the good life can coexist - if inevitably uncomfortably. To meet these minimal requirements, such a state must ensure that each individual inhabitant possesses the most basic entitlements necessary to be human and that the general conditions for both individual and group flourishing obtain. Such roles for the state are entirely consistent with the both the conservative and the progressive qualities of the Final Constitution.<sup>4</sup>

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& M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. For a critique of experimental constitutionalism, see M Tushnet *After Bureaucracy: The New Constitutional Order* (2004).

<sup>3</sup> See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

<sup>4</sup> S Woolman & D Davis 'The Last Laugh: Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361, 363 ('[T]he state has an essential role to play in determining the contours of those 'private' relationships which so fundamentally shape individual identity and in making possible a variety of life choices through support for those associations and organizations which make up society writ large. Creole liberalism envisages a state which does not exhaust the possibilities of individual lives, but helps to make real those possibilities. In addition, creole liberalism requires that the state occupy a crucial, if not always central place in the debate about and construction of values at the same time as it supports a variety of different ways of being in the world.') See also A Sen *Development as Freedom* (1999) 24 (Describes these normative commitments as 'substantive freedom').

While I think that the minimalist account may be necessary to discharge various obligations under the Final Constitution, it is not sufficient given the account of flourishing adumbrated in Chapters 1 through 3 of this work. First, on my maximalist account, the experimental constitutional state must commit itself to fairly robust forms of intervention. These experimental institutional arrangements should enable the state to rotate social, economic and political capital in a manner that allows the citizenry to engage in various ‘experiments in living.’ Such experiments should, in turn, yield more and better visions of the good life. Second, on the maximal account, the state must create institutions that ensure the active deliberation by its citizens about the contours of the state’s political framework and in the decisions about the basic settings for individual and collective action. Third, only under conditions of rough equality – and other such minimal requirements such as tolerance and dignity – can the kind of participation that leads to the legitimation of the entire political enterprise take place. Finally, do not forget the ends of this project: the maximization of human flourishing. Only by creating conditions of rough equality, of access to rotating funds of (various forms of) capital, can individuals and groups either reaffirm their vision of the good life or experiment with alternative visions. The experimental constitutional state, in particular, can create optimal conditions for flourishing in two notionally distinct ways. The feedback mechanisms associated with experimental constitutional doctrines and institutions can help to weed out deleterious ways of being in the world, and at the same time, create a range of options for being in the world that enhance our understanding of what it means to be human. This slowly evolving enhancement and expansion of the conditions of being constitutes the only genuinely meaningful account of political freedom.

## 2. Some Riders on Experimental Constitutionalism in South Africa

Before I get started, it is worth offering several riders on the relationships between (1) experimentalism and optimality; (2) tradition and transformation; (3) constitutionalism and experimentalism; and (4) institutional (under)capacity and experimentalism.

### (a) Experimentalism and Optimality

The notion of achieving optimality with respect to individual behaviour must be used with great circumspection.<sup>5</sup> Given that most of our ends are chosen for us, optimality primarily means maximizing our utility within a highly circumscribed value domain. That is, what most of us can, and do, hope for is the capacity to achieve the goals that matter to us – and not to select new ones. However, as my discussion (in Chapters 2 and 3) of error correction at both the individual and social levels reflects, regular experience of error – or failure – in terms of the achievement of dominant existing ends can lead to reorientation toward other ends. Experimentalism is both the justification for the selection of alternative ends and the method for achieving them.

#### (b) Tradition and Transformation

This work attempts to steer a path between conservative and transformative politics.

The conservative dimension of this work's politics reflects an initial understanding of the self and the social that acknowledges that human flourishing largely consists in doing that which we are already doing – only better. It means the reinforcement or the creation of social space that enables the group practices upon which individual meaning is contingent to continue. A conservative politics recognizes the extent to which 'meaning makes us'.

The transformative dimension of this work's politics recognizes the vast inequalities in existing stocks of social and economic capital that sustain various stores of meaning. We cannot commit ourselves to flourishing without acknowledging that all citizens must have roughly equal access to the kinds of capital needed to support practices that have been historically marginalized. The nation state is, as things stand, the preferred engine for the redistribution of those resources that will support such practices. Of course, if we tie transformation too closely to conservation, then the danger exists that state will not be able to prevent individuals and groups from using existing practices and associational forms to reinforce domination. Transformation must hold out to individuals the promise of moving away from a way of being that diminishes the self to one that holds out the promise of enriching it.

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<sup>5</sup> See SH Orzack and E Sober 'Introduction' in SH Orzack and E Sober (eds) *Adaptationism and Optimality* (2001) 1, 5 (Orzack and Sober warn that even in the biological sciences, where natural selection is viewed by most practitioners as having some role in the evolution of all traits, the thesis that the evolution of individual traits inevitably tends toward optimality – that is, greater and greater adaptive fit with the environment – is articulated with caution and often viewed with skepticism.)

(c) Constitutionalism and Experimentalism

As the last set of caveats suggest, constitutionalism invariably entails the protection of various forms of private ordering. Civil and political rights protect – and re-inscribe – extant ways of being. It cannot, and should not, be otherwise. Experimentalism recognizes that private ordering often reinforces social hierarchies that diminish individual flourishing. Experimentalism, as I understand it, is committed to forms of state intervention that shake up such hierarchies and, potentially, create the space for new ways of being to flourish.

(d) Institutional (Under)capacity and Experimentalism.

Experimental constitutionalism, as we shall see, requires institutions – courts, legislatures and executives – capable of understanding constitutional doctrine and acting upon that understanding. Closely reasoned judgments coupled with the political branches understanding of the Court's pronouncements should – theoretically – both constrain judicial decision-making in subsequent cases and enable state actors to anticipate whether the laws they wish to promulgate will pass constitutional muster.<sup>6</sup> Of course, for this last proposition to be meaningful, state actors would have to be able to follow Constitutional Court judgments and Constitutional Court judgments would have to be sufficiently well and deeply reasoned to constrain judicial and non-judicial actors.<sup>7</sup>

However, a Constitutional Court that takes some pride in its ability to avoid constitutional issues, and saying no more than is necessary about those issues, is unlikely to produce a corpus of judgments that constrain judicial and non-judicial actors.<sup>8</sup> As to whether

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<sup>6</sup> See H Botha 'Freedom and Constraint in Constitutional Adjudication' (2004) 20 *SAJHR* 249.

<sup>7</sup> See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 129 (Constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.') See also P Hogg & A Bushell 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall LJ* 75; H Botha 'Rights, Limitations, and the (Im)possibility of Self-government' in H Botha, A Van der Walt & J Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13, 24-25.

<sup>8</sup> See J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (2001) 37 quoting *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59:

It must be stated at the outset, however, that in practice the indirect application of the Bill of Rights must always be considered before its direct application to law or conduct. The reason for this is the principle, laid down by the Constitutional Court in an early decision, that 'where it is possible to decide a case without reaching a constitutional issue, that is the course that should be followed.' Where a legal dispute

state actors are reading Constitutional Court judgments, Roach and Budlender's careful analysis of the state's implementation of court ordered remedies suggests that many are either incapable of understanding them or are wilfully ignoring them.<sup>9</sup> If Roach and Budlender are correct – and I have no reason to doubt that they are – then the *actual* political environment in South Africa must make more modest our expectations for the court-based centralized standard-setting and rolling implementation of best-practices that Dorf and Sabel identify as the *sine qua non* of successful experimental constitutionalism.

## B. Experimental Constitutionalism in South Africa

This second section consists of two parts. First, I set out in slightly more detail the theoretical framework for experimental constitutionalism. Second, following the lead of Michael Dorf, Charles Sabel, William Simon, Barry Friedman, Susan Strum, Archon Fung and other experimentalists, I offer (a) a set of principles for experimental institutional design; and (b) some practical South African examples of such design. As we shall see, the principles require: (1) the articulation of a doctrine of constitutional supremacy that leaves ample room for shared constitutional interpretation; (2) the use of various judicial, legislative and executive fora to create bubbles of participatory democracy.

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cannot be resolved without reference to the Constitution, the principle clearly prefers indirect application . . . over direct application.<sup>7</sup>

The logical incoherence of Currie and De Waal's first proposition – that indirect application must precede direct application – is discussed elsewhere in this work. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. In any event, it does not follow from the Court's doctrine of avoidance as articulated in *Mhlungu*. Of greater concern, however, is the lack of analytical precision and an almost casuistic approach to constitutional interpretation that flows from this doctrine. The jurisprudence of avoidance is most dangerous when it becomes, as it has, not just an approach to constitutional adjudication, but a preferred form of constructing judgments. The thinness associated with such judgments makes it more difficult to anticipate the kinds of arguments — reasons — that would lead the Court to conclude that a right has been infringed or that the limitation of a right is (or is not) reasonable and justifiable. The absence of rules of law to which political actors must align their behaviour undermines the ability of other branches of government to comply with the Bill of Rights — and places the Court in the unnecessarily uncomfortable position of having to reject or to accept government's positions in any given case as if they were ruling *ab initio*. Such considerations constitute some of the strongest arguments against Sunstein's theory of 'one case at a time' or Currie's full-blown jurisprudence of avoidance. See C Sunstein *One Case at a Time* (1996); I Currie 'Judicious Avoidance' (1999) 15 *SALJHR* 138. In addition, the absence of clearly articulated rules undermines rational political discourse. Reasoned disagreement can only take place when the parties agree on the terms of the debate. The Constitutional Court abdicates its institutional responsibility to model rational political discourse by refusing to state, in a comprehensive manner, the reasons that led to its conclusions. Finally, avoidance undermines the 'integrity' of the legal system. It is impossible to create a more coherent jurisprudence without identifying the rules — and the reasons — that ground decisions. This critique is explored in greater detail in Chapter 5 – The Epilogue.

<sup>9</sup> K Roach & G Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdiction' (2005) 122 *SALJ* 325.

The adjustments to (existing) doctrine required by experimental constitutionalism in South Africa embrace: (1) an approach to rights interpretation and limitations analysis that better mediates the tension between separation of powers doctrines and constitutional supremacy doctrines; (2) provincial constitutions that offer protections not afforded by the Final Constitution and legislative and executive structures that challenge standard arrangements between the political branches; (3) a deeper understanding of the principle of democracy and its relationship to rights interpretation; (4) a meaningful acceptance by the executive and the legislature of the Constitutional Court's invitation to assist the Court in shaping the contours of socio-economic rights; and (5) an appreciation for the role Chapter 9 Institutions have to play in giving various constitutional norms greater content.

The adjustments to (existing) institutional design required by experimental constitutionalism in South Africa encompass: (1) an understanding of constitutional jurisdiction that facilitates more challenges to common law doctrines that inhibit transformation; (2) rules of procedure that promote greater access to court for those who wish to pursue fundamental rights challenges; (3) the creative use of remedies such as structural injunctions and cost orders to promote broader participation in constitutional litigation; (4) an enhanced role for public participation in legislative processes; and (5) greater roles for Chapter 9 Institutions with respect to investigation, information-sharing and norm-setting.

The pay-off of these various commitments to experimental constitutionalism can be viewed both in terms of the resolution of specific disputes (by all interested stakeholders) and the long-term 'improvements' in law and policy that arise from extended engagement between the judiciary (through its general constitutional norm-setting) and the coordinate branches of government (through policies that respond both to the court's general norms and the exigencies of the moment.) With respect to the long-term 'improvements' that can be traced to this sustained engagement between the courts, the political branches and other social actors, I pay particular attention to developments in South Africa's housing and education sectors.

#### 1. Philosophical Assumptions behind Experimental Constitutionalism

Experimentalism integrates four primary concepts. The first is ethical empiricism. We should evaluate social norms and institutional arrangements against our practical experience

instead of *a priori* norms or mere intuition.<sup>10</sup> The second is reciprocal effect. Social norms and institutional arrangements are both constitutive of and dependent upon the legal framework. The third is reflexivity. We should examine, critically, the process of social change and our own self-understanding. The fourth is destabilization. Destabilization recognizes that social formations invariably create structures intended to promote their own continued existence and that such structures may block meaningful individual efforts at change. Destabilization therefore places a premium on shaking up existing hierarchies in a manner that might enable members of a political community to pursue new ways of being in the world. Through combining those four concepts, experimentalism seeks to achieve two goals: (1) social norms and institutional arrangements made more flexible and open to revision; and (2) the revision of those norms and institutions in light of the 'best-practices' revealed by well-designed studies of various policy initiatives.

#### (a) On Reflexivity

Experimentalism is made more coherent with a concomitant commitment to reflexivity. Operationally, reflexivity describes a political system that systematically evaluates the record of past performance and adjusts accordingly. Michael Dorf and Charles Sabel, for example, see reflexivity embodied in the idea of centralized standard-setting, localized experimentation, and rolling implementation of best-practices.<sup>11</sup> As a matter of principle, political reflexivity demands that we be willing to examine and to put to the test, individually and collectively, our preferred values and forms of life. This dimension of experimentalism corresponds with the notion that,

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<sup>10</sup> As I have already noted in Chapter 3, this account of experimentalism draws upon J S. Mill's pragmatic theory of ethical empiricism. See also J Dewey *Reconstruction in Philosophy* (1921)(Another account of the consequences of pragmatism for politics). However this account conceptualizes the process of experimentation somewhat more diffusely. Instead of viewing experimentation as the product of individual reflection, I view it as a set of reciprocal social processes that creates the conditions for individuals, communities and the state to engage critically both the ends pursued and the means employed to pursue those ends. In *On Liberty*, Mill argued that only way for individuals and groups within a given polity to come to know that in which the 'good life' consists is for as many individuals and groups as is possible – given the limits of resources and the inevitable potential for conflict – to be given the space to engage in 'experiments in living' See E Anderson 'John Stuart Mill and Experiments in Living' (1991) 101 *Ethics* 4. For Mill, the optimal conditions for fostering experimentalism was through a through-going commitment to the protection of individual liberty. In a very basic sense, Mill's experimentalist model was premised on a direct, relatively unmediated relationship between individual citizens and government. Given my recasting of freedom in terms of flourishing in Chapter 2, and Chapter 3's recognition of the inevitable bottlenecks in social formations that block change, we can identify three obvious shortcomings in Mill's model. First, while cognizant of the conformist pressures that customs are capable of exerting, Mill did not fully appreciate the mutually reinforcing and restrictive roles that social norms and legal institutions play in determining individual identity. Second, Mill failed to recognize the extent to which highly conditioned individual action – further constrained by inflexible social norms and rigid legal arrangements -- make any significant shift in value formation extremely difficult. Third, Mill overestimated the capacity of individual rational reflection in yielding optimal or novel results.

<sup>11</sup> See M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia L Rev* 267.

in a deliberative democracy, no ideas, policies or principles should be regarded as above criticism.<sup>12</sup>

### (b) On Deliberation

A commitment to deliberation ensures the accountability and the legitimacy of public decisions. It also seeks to have such choices derived, if possible, from shared understandings and insights. Deliberation requires that public choices are arrived at through processes that allow for the active participation of all meaningful stakeholders and are free, to the maximum extent possible, from coercion.<sup>13</sup> In sum, deliberation promises three goods consistent with our commitment to flourishing and experimentation: flexibility, accountability and learning by doing and by error. The last part of this section of the chapter describes in detail some of the forums for deliberation that create feedback mechanisms without necessarily destroying existing stores of social capital or the political institutions through which experiment and change are negotiated.

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<sup>12</sup> The Constitutional Court has recently warmed to the idea that an effective democracy is contingent upon the participation of an engaged and critical citizenry in the actual process of law-making. As Justice Sachs writes in *Doctors for Life v The Speaker of the National Assembly*:

This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness. The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions.

It should be emphasised that respect for these three inter-related notions in no way undermines the centrality to our democratic order of universal suffrage and majority rule, both of which were achieved in this country with immense sacrifice over generations. Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. . . . Yet the Constitution envisages something more.

True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. *They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making.* Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.

Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.

CT 12/05 (Decided 14 August 2006) at paras 228 – 232 (footnotes omitted). Reflexivity and its relationship to the principle of democracy and to public participation in the processes of law-making is discussed at greater length below.

<sup>13</sup> See W Rehg *Insight & Solidarity: The Discourse Ethics of Jurgen Habermas* (2000) 62. See also J Habermas *Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1998).

(c) On Destabilization

Destabilization rights are designed to make good the South African Constitution's challenge to the status quo and the concentration of social and economic power in the hands of the white minority under apartheid. Perhaps the best known example of an intuition pump designed to get us to take destabilization seriously is Roberto Unger's idea of a rotating capital fund.<sup>14</sup> The rotating capital fund ensures that various members of society have access to a substantial portion of a polity's available economic capital at some point in time. The fund's period of rotation – for instance every five years – guarantees that people have (1) an incentive to use the existing capital to maximise immediate return and (2) an incentive to ensure that existing capital is put to long term employment that will benefit all members of society (including those currently at the helm of the fund).

We can contrive a similar set of incentives for political institutions. In order to ensure that elites do not capture state institutions, we might attempt to make provision for political arrangements that ensure that various groups and persons have a turn at the helm. Or, at a minimum, we can create bubbles of participatory democracy. The end of such institutional arrangements is not change for change's sake. Like the rotating capital fund, these political arrangements are best characterised as super-liberal.<sup>15</sup> The destabilisation rights that any such super-liberal community might devise are designed to ensure that dominant beliefs do not remain dominant simply because they serve the interests of elites. For political or legal beliefs to remain dominant they must – as a prescriptive matter -- offer solace for those who did not contrive them in the first place.<sup>16</sup> Even in more modest incarnations, destabilization rights allow individuals and groups to participate in the political processes that shape their lives.<sup>17</sup>

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<sup>14</sup>See, eg, RM Unger *Politics: A Work in Constructive Social Theory* (1987): *Social Theory: Its Situation and Its Task (Volume I)*; *False Necessity: Anti-Necessitarian Social Theory in the Service of Social Democracy (Volume II)*; and *Plasticity into Power: Comparative Historical Studies on the Institutional Conditions of Economic and Military Societies*. A rotating capital fund bears a passing resemblance to a South African *stokvel*.

<sup>15</sup>These super-liberal political institutions take cognizance of the extent to which political power invariably shapes and reinforces the formation of group and individual identity. Thus, at the same time that these institutions recognise that 'freedom' is essential for genuine individual and associational flourishing, they also recognise that the state plays an essential role in mediating between conflicting associations and promoting rational discourse about the ends of individuals and groups.

<sup>16</sup> The argument from immanence is one of the attractive features of Unger's work. It suggests the kinds of institutional transformations that might be realized through tweaking the system. See R Rorty 'Unger, Castoriadis and a National Future' *Philosophical Papers II: Essays on Heidegger & Others* (1991) 177.

<sup>17</sup> C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015. )

Destabilisation rights are profitably contrasted with negative conceptions of liberty. Negative liberty takes stability as a good even where such stability works manifest injustice and takes certainty as a good even where it creates no efficiencies.<sup>18</sup> Destabilisation rights make no such assumptions about stability, certainty or efficiency.<sup>19</sup> As I have just suggested, a political system based upon destabilisation rights assumes that the legitimacy of any legal doctrine depends upon its ability to serve the interests of most sectors of society (and not merely the elites that have historically controlled the various organs of state.)

'Destabilization rights' can take a number of different forms: a rotating capital fund is but one. In another incarnation, destabilization rights provide a judicial remedy for stakeholders who seek accountability from a government agency that influences private ordering or a social institution that exercises significant private power. Assertion of destabilization rights provides two forms of relief to the stakeholders. First, they require those in power to account for their decisions on the basis of evidence and reasonable arguments. Second, they bestow upon stakeholders rights of participation in the processes meant to address the problems that concern them.<sup>20</sup>

(d) On Experimentalism<sup>21</sup>

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<sup>18</sup> Many traditional legal doctrines, eg, stare decisis, privilege certainty or formal equality (as in the case of contractual freedom), even where such doctrines work manifest injustice. See S Woolman & D Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38.

<sup>19</sup> This account of flourishing forces us to take existing ways of being in the world seriously. But there is no assumption that any given way of being must survive or that the state is obliged to avoid intervention with respect to the internal affairs of non-state associations. For an analysis of the legitimate and the illegitimate grounds for such intervention, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

<sup>20</sup> The Constitutional Court has recently accepted destabilization rights in the legislative arena. FC s 59(1)(a), FC s 72(1) and FC s 118(1) promise citizens – within reason – the right to participate in and to be consulted with regard to decisions that effect their communities. *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) (*Matatiele IP*).

<sup>21</sup> As I have intimated above, an adequate theory of South African constitutionalism must satisfy a number of conflicting demands. First, it cannot ignore the ineradicable textual tension between a commitment to constitutionalism and private ordering on the one hand and a commitment to social transformation through direct public action on the other. Second, such a constitutional theory cannot be committed to any specific comprehensive vision of the good life. Within the bounds dictated by commitments to tolerance, dignity and rough equality, it must set out to promote a broad array of forms of human flourishing. One would think that the commitment to individual flourishing is so ingrained a feature of constitutionalism that it hardly bears mentioning. Yet many powerful traditions of humanistic thought committed to the idea of rational autonomy tend to overlook the value of human happiness. See B Fay *Critical Social Science* (1986) (Fay argues that an important drawback of many 20<sup>th</sup>-century critical theories, such as Herbert Marcuse's, is their failure to appreciate the value of happiness or to subsume happiness under the idea of autonomy.) Third, for reasons that I have already made clear, although such a constitutional theory will not provide an interpretation of rights contingent upon individual freedom, it still needs to provide an account as to why rights need to be taken seriously. Flourishing and experimentalism do just that. Fourth, it must present an account of how a strong system of rights can assist in social transformation and not hinder it.

In Chapter 3, I noted that while John Stuart Mill's notion of 'experiments in living' unearths the potential for experimentation within private ordering, Mill himself dramatically overestimates the extent of our capacity for rational reflection on our experience and fails to appreciate fully the tenacity of social norms in resisting conscious change because of the manner in which social norms, legal rules, political power and individual identities are linked in contemporary societies. As I also noted in Chapter 3, entrenched private power creates a two-fold barrier to experimentalism. First, it aligns existing custom and practices with one's individual identity. It thereby makes critical self-reflection difficult and redefinition painful. It thwarts attempts at reflection and adjustment by increasing its costs. That is, entrenched private power forces individuals to choose *between* preserving their membership in a community by muting their demands *or* alienation if they choose to speak up. Second, it enables individuals or institutional practices supported by entrenched authority to suppress new ideas and alternative points of views on the basis of authority instead of merit. Entrenched private power creates a 'bottleneck' and prevents individual experimentation from leading to corresponding changes in social norms. Mill's insistence on the private order as the engine for social transformation fails to account for this inevitable brake on change.

One can, however, reject Mill's classically liberal politics while retaining the essential spirit of his experimentalist vision. An experimental constitutional regime committed to human flourishing requires public intervention, not government abstention. Such intervention entails (a) historical redress for marginalized communities; and (b) institutions that promote reflexivity and increase our individual, and collective, capacity to challenge the tyranny of custom.

State intervention can take two forms – neither of which excludes the other. It can either be imposed from above, via direct state action, or originate from below, through the initiative of individual stakeholders. Direct state action offers the virtue of speed. It suffers, however, from two important drawbacks: information deficiency and lack of participation. First, reconfiguring social institutions requires a certain amount of inside information. If trained anthropologists find such an understanding of other cultures exceedingly difficult, how much greater is the challenge for an untrained bureaucratic administrative staff paid to solve pressing polycentric problems. Second, by relying on a bureaucratic process, a top-down approach faces the peril of excluding the participation of the people most directly affected. Not only does such

exclusion fuel the information deficit already discussed, it can also undermine an essential part of the political project of transformation — to change the mindset of those who govern. Finally, the silence of those affected undermines the legitimacy of the decisions taken.

### 3. Experimentalism and Institutional Design

#### (a) Experimental Institutional Design

Having briefly adumbrated the philosophical foundations for experimental constitutionalism above, I devote this section of this paper to a more detailed discussion of the theory of experimental constitutionalism and to practical illustrations of experimental institutional mechanisms in South Africa. The aim of this section is to demonstrate the existence of experimental institutions already been made available to us by the South African Constitution and to show how these experimental arrangements can be better exploited by government and private actors seeking novel solutions for seemingly intractable social problems.

#### (b) The Promise of Experimental Institutional Design

Experimental institutional design offers a number of important promises for South African constitutional doctrine.

The most immediate benefit is for fundamental rights protection. Experimental institutional design can invigorate limitations analysis by opening up the manner in which facts are placed before the court – moving from a model in which facts are arrayed in a binary opposition between applicant and respondent to model in which additional, if not all, parties that have an interest in the outcome of a case may place evidence before the court. Similarly, experimental institutional design reinforces existing doctrines of costs, amici and intervenors intended to expand the number of voices – and to increase the amount of useful information – that a court hears in a given matter.

Other mechanisms can generate additional information for the process of adjudication. A temporary interdict might be issued while the court awaits the collection of apposite data. A structural injunction might provide even more meaningful information. A court that retains jurisdiction can determine, over time and as conditions change, whether the government has finally discharged its burden and, thereby, justified its initial prima facie infringement of a right. Experimentalist adjudication ought to reduce judicial deference to official policy and to private norms that arise out of information deficit and untested solutions.

By requiring that all parties provide more meaningful data, a court can demand greater accountability of government actors and greater participation by affected individuals and groups. Moreover, an interdict or an injunction may create incentives for the parties before the court to hammer out a solution that fits the specific needs of the parties' concerned – needs of which a court may have only the vaguest awareness. Such incentives cultivate individual reflexivity and actuate penetration of participatory democratic politics into civil society.

The demand for greater accountability of government actors and greater participation by affected individuals and groups need not be limited to constitutional litigation. The Constitutional Court has handed down judgments that make it plain that legislatures must invite greater public participation in the normal course of law-making processes. Once again, the motivation behind this expansion of the public's right to participate is the belief that legislatures will make better decisions when they consult affected constituents and that affected constituents will make better citizens if allowed to participate in their own self-governance.

The South African constitutional order contains a number of unique institutions — Chapter 9 bodies -- that can service experimental adjudication. The Human Rights Commission, the Public Protector, the Commission for Gender Equality and the Auditor-General, to name but a few, can assist citizens in the investigation and the development of their complaints. They can play a supervisory role with respect to court-ordered remedies. They can gather and disseminate information to the public. They can, through public hearings, assist both legislatures and courts in constitutional norm-setting. Each of these roles flows from the greater proximity of the Chapter 9 Institutions to the public and from the greater specificity, in terms of subject

matter competence, that such bodies (ought to) possess. Each of these roles creates, potentially, the space for experimentation and innovation in other constitutional institutions.

As these initial observations suggest, South African constitutional jurisprudence need not be wedded to a rather arid doctrine of separation of powers that blocks experimentation. Courts can use their position to set norms for public and private behaviour at the same time as they invite various public and private actors to cast their own light on how constitutional principle ought to manifest itself in policy. Such shared constitutional competence extends the responsibility for upholding the basic law to all public actors without giving rise to either an enervating form of judicial deference or an overweening exercise of executive power.<sup>22</sup>

The remaining arguments regarding experimental constitutionalism are presented in three stages.

I describe three principles that underpin experimental constitutional design proposals. Those ideas not only illustrate the plausibility of experimentalist adjudication. They demonstrate the need for such experiments in South Africa. Those three principles are, I hope to show later on in this chapter, closely linked to an account of flourishing, first articulated in Chapters 1 and 2, that eschews freedom talk.

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<sup>22</sup> My account addresses serious concerns about institutional comity in a constitutional democracy by fleshing out – in South African terms -- what Michael Dorf, Barry Friedman, Charles Sabel, Susan Sturm and others have described as ‘shared constitutional interpretation’. After suggesting that the Final Constitution itself demands a doctrine that would enable the courts to share ‘constitutional competence’ with other political actors – and thus mediate competing claims of constitutional supremacy and judicial deference – one must ask whether the Constitutional Courts’ extant jurisprudence provides sufficient normative content to guide lower courts and other actors interested in participating in this shared interpretive endeavor. What we see is, on the one hand, a rather cursory attempt to reconcile the primary values that underlie fundamental rights analysis and limitations analysis – openness, democracy, human dignity, equality and freedom – and a more deeply entrenched privileging of the value of human dignity, on the other. I do not deny the centrality of dignity to our constitutional project – our dignity jurisprudence may even be, with the rule of law doctrine, one of our two most important contributions to the larger world of constitutional doctrine. I do, below, take issue with Court’s tendency to reduce the other four constitutional grundnorms to manifestations of dignity, and its record of having little to say about the meaning of ‘democracy’ in our basic law -- something of a surprise given the success of South Africa’s transition from fascism to democracy. Following Theunis Roux, I suggest that, in addition to the grundnorm of dignity, a proper reading of the Final Constitution requires a ‘principle of democracy’. See Stu Woolman and Henk Botha ‘Limitations’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 31; Theunis Roux ‘Democracy’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10. As I have already noted, and discuss further below, *Matatiele II* and *Doctors for Life* suggest that the Court may be on its way towards developing such a principle.

I sketch a number of institutional mechanisms for experimentalist adjudication and show how existing constitutional doctrines and tools can encourage collaboration between courts, legislatures, various organs of state, Chapter 9 Institutions and civil society. I then undertake the somewhat more speculative task of showing how ‘shared constitutional interpretation’ works in practice. That requires an analysis of both housing law and policy from 1994 through 2006 and a similar exercise regarding the vicissitudes of education law and policy.

I review several recent Constitutional Court judgments – *Prince, Jordan, Grootboom, Fourie, TAC* and *PE Municipality*. Here I suggest how institutions designed with shared constitutional interpretation and participatory bubble-making in mind might better accommodate conflicts between rights and extant law, and simultaneously increase the space for experimentation and human flourishing.

i. Three Principles

Three principles undergird experimental constitutionalism: (1) the judiciary, as well as the legislature and the executive, can act as an agent of social change; (2) difficult cases, especially those cases requiring involving limitations analysis of prima facie abridgements of constitutional rights, become somewhat easier to resolve when courts move away from traditional models of adjudication and adopt an experimentalist, problem-solving perspective; and (3) for experimental constitutionalism to succeed, courts must facilitate dialogue between stakeholders and provide fora for information-gathering, information-sharing, collective action and collective norm-setting. By providing such fora, courts can expand our ‘experiments in living’ and shake-up existing social hierarchies in a manner that *may* enhance individual and group flourishing.

ii. The Role of the Judiciary in Structuring Institutional Reforms

We do not ordinarily think of the judiciary as an institution responsible for initiating social change. Others players — legislatures, administrative agencies and interest groups — spring more quickly to mind. However, it becomes clear why the judiciary must play a meaningful role in the process of social change in South Africa when we consider the following

set of circumstances described in Chapters 2 and 3 of this work. Because human flourishing is contingent upon – and constrained by – both natural and social endowments, and because no meaningful individual change can occur without concomitant social and political change, public intervention is required, often on a systematic rather than an individual scale, to address a lack of political accountability or an abuse of private power. Moreover, given the inherent respect of South African constitutionalism for private ordering – respect that I believe is largely desirable -- legislatures, administrative agencies and other government actors will often lack the resources to uncover and to provide redress for the kinds of abuses of power that stunt human flourishing.

The limits of traditional legislative or administrative solutions to social ills manifest in two ways.

First, a given legislature or an administrative agency will lack a panoptic view of all relevant information about particular form of abuse. The procedural requirements of the legislative process place inherent limits on the range of issues that can be addressed within a given session. Moreover, a good deal of legislative time must be devoted to more pressing political issues: foreign policy, economic development and budget allocation. Accordingly, legislatures will rarely meet the informational threshold necessary for optimal solutions to rights-based issues. Administrative agencies, in developed countries, often have greater expertise than other branches of government with respect to the enforcement of a specific set of rights. They therefore should possess a significantly lower informational threshold for action. That said, considerations of procedural fairness, on the one hand, and interest group capture, on the other, often constrain their capacity for engaging in pro-active, rights-vindicating, fact-finding processes. In South Africa, the often dramatic under-capacity of the fourth branch of government limits the ability of various organs of state to discharge their constitutional obligations.<sup>23</sup>

Second, limited resources constrain effective legislative and administrative solutions. The twin forces of budgetary pressures and conflicting priorities – say between large-scale delivery of such basic goods as housing, health and education and new investments in military

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<sup>23</sup> For example, several provincial government departments in Gauteng lack the internal capacity to do their own commercial legal work or to represent themselves effectively within government structures. As a result, they hire private counsel, at significant expense, to represent their interests and to discharge their constitutional duties.

hardware – means that while the legislature may be committed to human rights generally, it will experience little meaningful pressure to address rights violations experienced by marginal or vulnerable groups.<sup>24</sup> Moreover, limits on the fiscus – even without conflicts in priority – would constrain the legislature’s capacity to make good the promise of various constitutional rights.

In contrast to legislative and administrative solutions, the judiciary has a fairly low informational threshold. Under the liberal standing rules of the Final Constitution, many types of parties are eligible to initiate suit. Moreover, because courts have extensive powers for structuring the scope of discovery, their capacity for information-gathering, once a suit has begun, may be substantially greater than legislature and administrative agencies.<sup>25</sup> Assuming adequate resources – a potentially tendentious assumption in South Africa -- a larger range of rights-based conflicts may be brought to the attention of the judiciary than to the legislature or administrative agencies.

More importantly, as Unger recognized, the law has an inherently ‘disentrenching power.’ Because legal norms are intrinsically linked to people’s self-conceptions and social practices, judicial decisions tend to have a greater impact than administrative decisions. Consider the following hypothetical case. A medical student who suffers from a disability is denied a medical license. The denial stems in part from the substantial public opprobrium that attaches to his disability and in part from the difficulty the disability presents in performing certain procedures. The aggrieved medical student challenges the denial of his medical license in court. The court grants an interdict requiring the medical professional boards to work with that student and others similarly situated, in good faith, to find a meaningful accommodation.

The court’s ‘disentrenching power’ influences the behaviour of relevant actors in two respects. The primary effect of that judicial decision is to initiate a process of negotiation and, hopefully, accommodation within the medical profession of practitioners with a particular

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<sup>24</sup> The Rastafarians, whose religious freedom to use cannabis was denied in *Prince*, represent as good an example as any of the type of out-group whose interests and rights require judicial solicitude. As Chaskalson CJ observed: ‘[T]he Rastafari community is not a powerful one. It is a vulnerable group.’ *Prince* (supra) at para 26.

<sup>25</sup> See A Chayes ‘The Role of the Judge in Public Law Litigation’ (1976) 89 *Harvard LR* 1281, 1308 (Chayes notes that adversarial structure of litigation ‘furnishes strong incentives for the parties to produce information [and] that ‘the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies’ of the legislative or administrative process.)

disability. In addition, the impact of that decision and the new legal doctrines contained therein will have a cascading effect in the broader sphere of private conduct. Many other licensing organizations -- such as those for nurses, attorneys, and accountants -- will seek to negotiate with disabled professionals, *ex ante*, to reach mutually agreeable accommodations that avoid the costs of litigation and that create formal or informal affirmative defenses in the event of litigation.

As Abraham Chayes and Owen Fiss have suggested, courts enjoy other institutional advantages relative to administrative agencies. They possess greater independence and are less likely to be subject to interest-group capture.<sup>26</sup> They possess greater institutional legitimacy and often benefit from a public perception of neutrality. Those qualities make it possible for courts to structure experimental institutional solutions for protecting fundamental rights.<sup>27</sup>

### (iii) Theoretical Underpinnings of Experimental Constitutionalism: Shared Constitutional Interpretation & Participatory Bubbles

Talk of ‘participatory bubbles’ and ‘shared constitutional interpretation’ is meant to draw our attention to the kinds of institutional arrangements that are most likely to realize the five basic ends of the South African state. Those ends, again, are as follows.

Given the radical givenness of the ends of individuals and groups, the South African state is under a constitutional obligation to protect those ways of being in the world that do not vitiate its concomitant core commitments to such goods as rough equality, tolerance, dignity and democratic participation. Civil and political rights protect extant ways of being in the world.

South Africa’s history of radical inequality in resource allocation requires a particular form of redress. The South African state is under a constitutional obligation to ensure that

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<sup>26</sup> Chayes (supra) at 1307-08 (A judge’s ‘professional tradition insulates him from narrow political pressures, but ... he is likely to have some experience of the political process and acquaintance with a fairly broad range of public policy problems.’)

<sup>27</sup> That statement may possess even greater purchase within South Africa. Government officials can sometimes seem to be at a loss as to how the Final Constitution and fundamental rights ought to shape both law and policy.

historically marginalized groups have access – at least initially – to the requisite stocks of political, economic and social capital necessary to sustain extant sources of the self.

Consistent with the Final Constitution's core commitments, the South African state must ensure that its citizens are not held hostage by ways of being in the world that diminish individual flourishing. This concern is more about the ability of individuals to exit repressive communities than it is about creating novel conditions for flourishing. But that does not mean that state intervention on behalf of coerced individuals will not have such a secondary or knock-on effect.

State intervention on behalf of such persons may just shake up existing social hierarchies in a manner that creates new ways of being in the world. This commitment to experimentalism is predicated upon the notion that existing ways of being in the world – extant cultural formations – will, for many individuals, fail to recognize those ends upon which happiness of those individuals truly rests.

Experimental constitutionalism is ultimately pragmatic about the means and the ends of life. It holds no end to be beyond criticism or immune to reform. Consistent with its pragmatic roots, it recognizes the reciprocal relationship between means and ends. That is, experimental constitutionalism understands that a change in the way one goes about pursuing the ends of life may ultimately change the ends that one pursues.

aa. Shared Constitutional Interpretation: Institutional Design &  
Constitutional Doctrine

Shared constitutional interpretation stands for four basic propositions.

It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content.

It draws attention to shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text is not meant to exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text.

Shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization.

A commitment to shared interpretations ratchets down the conflict between co-ordinate branches and levels of government. Instead of an arid commitment to separation of powers – and empty rhetorical flourishes about courts engaging in legal interpretation not politics -- courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the basic text can co-exist. Indeed, the courts and all other actors have more to gain from seeing how variations on a given constitutional norm work themselves out in practice.

The relationship between shared constitutional interpretation and experimentalism should be clear. Shared constitutional interpretation creates the space for different actors in different places or with different briefs to try doing things differently but constitutionally. The different means may show us which ways of doing things that are more successful. Or the different means may shed new light on – or change our understanding of – the very constitutional ends the varying strategies seek to promote.

This depiction of ‘shared constitutional interpretation’ is neither new nor merely theoretical. As Michael Dorf and Barry Friedman describe it, the ‘invitations’ by the US Supreme Court to Congress and state legislatures to share responsibility for giving various constitutional provisions content have been going out for some time. As we shall see, both the South African Constitutional Court and the Final Constitution have issued similar ‘invitations’.

Dorf and Friedman use the cases of *Miranda*<sup>28</sup> and *Dickerson*<sup>29</sup> to great effect in explaining how shared constitutional interpretation works. As any viewer of US police dramas knows, *Miranda* articulated the warnings to persons arrested by the police custody that must precede any custodial interrogation. What few viewers appreciate is the extent to which most of those warnings were intended as judicial guidelines and not excavations of constitutional bedrock. The *Miranda* Court, as Dorf and Friedman point out,

explains that it granted certiorari ‘to explore some facets of the problems ... of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.’ The Court sets out its ‘holding’ at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation ‘unless it demonstrates the use of procedural safeguards effective to secure’ the privilege. And ‘[a]s for the procedural safeguards to be employed, unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it’ the specific *Miranda* guidelines are required. The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right. At least twice more, the Court repeats the holding and re-extends the invitation.<sup>30</sup>

Congress accepted the invitation. But as the judgment in *Dickerson* reflects, it wilfully misconstrued the nature of the invitation. Congress did not, as the Supreme Court suggested, come up with equally effective ways of safeguarding the right to remain silent and not to have statements made in custodial interrogation used by the prosecution unless adequate safeguards

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<sup>28</sup> *Miranda v Arizona* 384 US 436 (1966) (‘*Miranda*’).

<sup>29</sup> *US v Dickerson* 530 US 428 (2000) (‘*Dickerson*’)

<sup>30</sup> M Dorf & B Friedman ‘Shared Constitutional Interpretation’ (2000) 2000 Sup Ct Rev 61, 81-83 citing *Miranda* (supra) at 441 – 490.

have been put in place. Instead, Congress simply enacted as legislation the pre-*Miranda* test that the voluntariness of a confession would be assessed in terms of a totality of the circumstances. The *Miranda*-specific warnings were merely included as factors to be taken into account when determining voluntariness. Not surprisingly, the *Dickerson* Court rejected Congress' 'new' take on the voluntariness of custodial confessions. It did so, as Dorf and Friedman argue, because Congress had failed to take seriously the Court's concern with the 'compulsion inherent in custodial interrogation' and had failed to offer an alternative that could be deemed "equally effective" in ameliorating this compulsion.<sup>31</sup>

While the 34 years between *Miranda* and *Dickerson* might have witnessed confusing dicta from the Court regarding the status and the reach of the holding in *Miranda*, Dorf and Friedman convincingly show that Congress and other government actors did indeed possess significant space to place their own gloss on the Fifth Amendment's protections. What they were not free to do was ignore entirely even the most limited construction of the Court's holding.

The Final Constitution and recent South African case law sets up a similar field of play for non-judicial actors. The text of the Final Constitution contains several invitations to other political branches to alter the meaning of the Constitutional Court's explication of the basic law. The Constitutional Court's case law itself demonstrates that the Court speaks to the parameters of the 'constitutional' and that the Court is *not* as an oracle of the 'optimal'. As we shall see, these invitations are of a piece with a commitment to experimental constitutionalism.

#### (i) Provincial Constitutions

The first constitutional invitation takes the form of the power of the provinces to draft constitutions of their own.<sup>32</sup> Now while a provincial constitution may not contradict the Final Constitution, it can offer protections that the Final Constitution does not.<sup>33</sup> In addition, provinces may alter some of the provincial legislative and executive structures and procedures established by the Final Constitution.<sup>34</sup> These constitutional invitations may seem relatively trivial. But they still afford the provinces space to experiment with fundamental rights and

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<sup>31</sup> Dorf & Friedman (*supra*) at 71.

<sup>32</sup> FC s 142.

<sup>33</sup> FC s 143.

<sup>34</sup> *Ibid.*

political structures. Such experiments could well influence decisions taken in other provinces or by the national government.<sup>35</sup>

(ii) Rights Interpretation & Limitations Analysis

(aa) Theory

A more important invitation is to be found in both the interpretation clause and the limitation clause of the Bill of Rights. However, the emphasis of this work on the resolution of polycentric social conflicts narrows my interpretative focus to the phrasing, structure and meaning of the limitation clause.

The limitation clause directs a court to ask whether a given law of general application constitutes a reasonable or justifiable infringement of a fundamental right. As I have argued elsewhere, the clause is something more than an effort to soften the counter-majoritarian dilemma created by a justiciable Bill of Rights.<sup>36</sup> On the one hand, it is an invitation by the Final Constitution to the legislature or to the executive to try again if previous efforts to solve a particular social problem are found to be constitutionally infirm. On the other hand, it is a reminder to the courts that they are obliged to take the law-making efforts of the co-ordinate branches seriously.

The holdings in *Miranda* and *Dickerson* suggest how we are to understand the relationship between these two propositions. First, the mere re-assertion by Parliament or the Executive of the exact legal position found to be unconstitutional by the Constitutional Court warrants little or no judicial solicitude. Second, the law-making efforts by Parliament or the Executive to address the same issue in a different way, and in a manner not obviously at odds with the previous findings of the Court, warrants judicial solicitude. In sum, a statute or subordinate

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<sup>35</sup> For more on the actual space for innovation afforded by the Final Constitution with respect to provincial constitutions, as well as the significant constraints the Final Constitution imposes upon provincial constitutions, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2<sup>nd</sup> Edition, OS, March 2005) Chapter 21.

<sup>36</sup> See S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2<sup>nd</sup> Edition, OS, July 2006) Chapter 34.

legislation that revisits an issue already addressed by the courts, but which contains a new solution, is entitled to a certain amount of latitude.

Perhaps the clearest articulation of a standing invitation to share power with respect to constitutional interpretation occurs in the *First Certification Judgment*.<sup>37</sup> While the Constitutional Court states that its mandate with respect to the certification of the Final Constitution is legal and not political, the role it carves out for itself is not dissimilar from that articulated by the US Supreme Court in *Miranda*. Its job was to say, in quite general terms, what the Interim Constitution – specifically the 34 Constitutional Principles – allowed. Within those very general parameters, the Constitutional Assembly was said to be free to craft any constitution it liked. To put it differently, the Constitutional Court recognized that the Constitutional Assembly could draft an infinite number of constitutions that complied with the 34 Constitutional Principles. It was not the job of the Constitutional Court to say which of the well-nigh infinite number of possible Final Constitutions was to be preferred.<sup>38</sup>

#### (bb) Practice

In a typical piece of commercial or private law litigation, a court will decide preliminary issues of evidence, interpret the applicable law and render a decision based on its reading of the admissible evidence. Despite the fact that the scope of judicial discretion is often extensive as to factual determinations, and only constrained by the (quite expansive) bounds of analogical reasoning, it rarely occasions major complaints. Most judicial decisions in private litigation are accepted for two reasons that are relevant for this argument. First, commercial actors accept the possibility of an adverse outcome. Second, courts are credited with a degree of generalized knowledge that legitimates their factual conclusions.

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<sup>37</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)*.

<sup>38</sup> What is true of the certification process must certainly be true of the normal process of law-making and judicial review. The role of the Constitutional Court is not to find optimal solutions but to stake out a range of constitutional solutions. One way in which the courts recognize their 'role' and their obligation to share responsibility for constitutional interpretation is in terms of a remedy of temporary validity. While the Parliament or another branch of government goes about redrafting an infirm piece of legislation, the courts may, in the interest of good governance, suspend a declaration of invalidity. See M Bishop, J Klaaren, M Chaskalson & S Budlender 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, June 2007) Chapter 9.

A similar degree of deference attaches to judicial opinions that are able to tie well-entrenched social mores to constitutional rights. As a result, traditional constitutional adjudication bears sufficient resemblance to ordinary conceptions of the judicial function to escape excessive criticism.<sup>39</sup> But not all constitutional cases present straightforward application of principle to problem.

For example, a piece of super-ordinate legislation -- The Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') -- is designed to give content to FC s 9 (the equality clause) in a manner that enables the state and private actors to challenge existing structures of authority within private institutions. PEPUDA's Equality Courts will have to assess the extent to which they must defer to the transformative intent of the legislature or continue acquiesce to existing social practices. Progressive readings of PEPUDA -- and concomitant critiques of private ordering of relationships -- will raise, quite crisply, questions about the possibility for judicially-initiated social change.<sup>40</sup> Similarly, cases such as *Prince* and *Jordan* pose dilemmas for traditional models of adjudication because judicial intervention is linked to the analysis of a complex set of facts and an assessment of whether an effective remedy exists. As I suggested above, a willingness to seek out important facts not initially before the court is essential for judicially-initiated social change. If a court doesn't have all the relevant facts available, then it cannot possibly fashion an adequate remedy.

The two-part structure of Bill of Rights analysis provides the courts with a measure of relief. By explicitly separating out the process of defining the ambit of a right and the process of determining the appropriateness of any limitation, the Bill of Rights avoids creating a binary

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<sup>39</sup> I suspect that the *Makwanyane* Court -- despite the popular support for capital punishment -- continued to enjoy public support for this very reason. 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) ('*Makwanyane*').

<sup>40</sup> In such circumstances, the illegitimacy of the conduct challenged is less than clear. The problem of putting private institutional norms to the PEPUDA test bears a good deal of similarity to what Professor Susan Sturm has identified as the "second-generation" problems of protecting workers' civil rights from discrimination in the workplace in the United States. See S Sturm 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia LR* 452. In the context of employment discrimination, Sturm observes, the most pressing problem has evolved from obvious, intentional discrimination of yester-years: 'first-generation' problems exemplified by 'smoking guns' such as 'the sign on the door [declaring] that 'Irish need not apply' or the rejection [of an applicant] explained by the comment that 'this is no job for a woman.' Ibid at 459-60. Instead, ethnic minorities and women in America today encounter discrimination that 'involve social practices and patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups,' which are reinforced by 'structures of decision-making, opportunity, and power.' Ibid at 460. My account owes much Susan Sturm's insights on the differences between traditional models of adjudication concerned with findings of liability and adjudication geared towards the creative structuring of remedies to systemic problems. See S Sturm 'The Promise of Participation' (1993) 78 *Iowa LR* 981, 987-991, 1002-1010.

world where the outcome of the dispute is tied entirely to rights definition. For example, in American constitutional law, once a particular type of conduct is deemed to fall within the protected ambit of a fundamental right, any law limiting the exercise of the conduct concerned is more than likely to be invalidated under a strict scrutiny standard.<sup>41</sup> The two-part structure of Bill of Rights analysis has enabled the Constitutional Court to avoid such rigid categories. As I have argued elsewhere, a relatively precise, if nuanced, approach to limitations analysis creates the space for a fairly fastidious treatment of rights analysis.<sup>42</sup>

A more emphatic embrace an experimentalist approach would enable a South African court to use the open-ended, fact-driven framework of limitations analysis to invite litigants – and other stakeholders -- to participate more directly in the vetting of possible solutions to the legal problem confronting the court. Such an invitation to the parties to get their hands dirty enables the courts to overcome both their own limited administrative capacity and their often enervating reliance on the good faith of the various parties. More importantly, the invitation to the parties to expand the basis of their competing claims from zero-sum outcomes to solutions in which all parties believe they may benefit would enable the courts to reap the problem-solving benefits inherent in collective deliberation.

An experimentalist perspective on limitations analysis proceeds from the recognition that the determination of the ‘reasonableness’ of a limitation and the identification of the best of all possible remedies are interdependent processes. This experimentalist perspective also recognizes how exceedingly difficult it is to discover the ‘right’ answer – or remedy -- from an outsider’s perspective.<sup>43</sup> Indeed, the notion of a single ‘right’ answer in such a complex context – in advance of any attempt to mediate the competing positions -- is itself suspect.<sup>44</sup> As Susan Sturm has observed in connection with workplace discrimination, changes in legal doctrines shape people’s expectations. The new legal doctrine thereby reconstructs identities, beliefs and

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<sup>41</sup> For a compelling account of the dilemmas posed by one-stage fundamental rights analysis, see L Tribe & M Dorf ‘Levels of Generality in the Definition of Rights’ 57 *University of Chicago LR* 1057 (1990).

<sup>42</sup> See S Woolman & H Botha ‘Limitations’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 34.

<sup>43</sup> See M Dorf ‘1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation’ (1998) 112 *Harvard LR* 4 (1998).

<sup>44</sup> This recognition is one of the hallmarks of the sociological concepts of complexity and emergence. To observe that social systems are complex is not tantamount to rejecting the possibility of systematic, scientific understanding. Rather, as Lee McIntyre notes, complexity relates to our knowledge of the world at a particular level of description. It does not rebut the possibility of (social) scientific explanations at another level. See L McIntyre ‘Complexity and Social Scientific Laws’ (1993) 97 *Synthese* 209-227.

behaviour. Such an evolutionary process – a function of the law as an experimental feedback mechanism -- can gradually transform the nature of the problem as originally perceived.<sup>45</sup>

Confronted with such complexity, the task for the courts is not to undertake Herculean quests for perfect theoretical answers or to retreat into the political quietism of deference to administrative decisions and private ordering. An experimentalist perspective possesses two important advantages. First, by acknowledging the difficulty of finding the ‘right’ answer, *ex ante*, courts with a problem-solving perspective must create mechanisms (including legal doctrines) that gather relevant information, generate proposed reforms and relay feedback quickly. Second, given the potential for unintended consequences that flow from adaptive processes triggered by shifting legal principles, a problem-solving perspective implements each set of solutions tentatively and is ready to modify its solutions on the basis of new empirical evidence.<sup>46</sup>

### iii. The Principle of Democracy and its Relationship to Rights Interpretation

I have described in the preceding pages an approach to fundamental rights and limitations analysis that simultaneously answers ‘deep’ questions about institutional comity in a constitutional democracy and adumbrates an analytical framework that responds to concerns about judicial usurpation of legislative prerogatives and the alleged inability of courts to resolve polycentric social problems. What I have not described, in even the most superficial way, is how the courts go about determining the ‘normative’ content necessary for fundamental rights interpretation and limitations analysis.

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<sup>45</sup> See Dorf ‘The Domain of Reflexive Law’ at 399-400 (Observes the dynamic character of social change resulting from new legal protections.) As the partial success of ‘rational expectations’ theory in macroeconomics demonstrates, some adaptive processes can be modeled very effectively (some of the time). See S Sheffrin *Rational Expectations* (1996). However, there are good reasons for doubting whether models of similar precision can be designed for contexts as diverse and unpredictable as personal intimacy (*Jordan*) or religious worship (*Prince*). The experimentalist approach, however, does demand mechanisms that allow one to compare the information generated by different proposals and different policies. That, as I discussed in Chapter 3, is the appropriate role of a social scientist in an experimentalist society.

<sup>46</sup> See Dorf ‘Legal Indeterminism and Institutional Design’ (*supra*) at 960-970. See also J Klaaren, ‘A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights’ (2005) 27 *Human Rights Quarterly* 539 (Drawing on experimentalist principles in EU regulatory regimes, Klaaren suggests that the SAHRC be responsible for gathering and disbursing information regarding the government’s progress in fulfilling the promise of socio-economic rights.)

The normative content for fundamental rights interpretation and limitations analysis turns on the phrase ‘an *open and democratic* society based on *human dignity, equality and freedom*’. Determining the meaning of this phrase is fraught with interpretive difficulties as old as political theory itself. There are, for starters, the tensions between democracy and rights, between equality and freedom, and the deeply contested nature of each of these terms.

The Court has, as yet, refused to give distinctive content to each of the five values enshrined in FC s 36 and FC s 39. As I have noted elsewhere, the Court has viewed the four other values largely through the lens of human dignity.<sup>47</sup> According to the Court, dignity provides a common measure of value which can help bridge the division between equality and freedom, or between negative and positive rights, or between the individual and collective aspects of our autonomy. However, a close examination of the Court’s jurisprudence reveals that dignity does not adequately address all conflicts of right, value and interest nor does a reliance on dignity appear to do justice to those out-groups whose participation in our social and political life remains marginal at best.

It is particularly surprising that the Constitutional Court has not done more to develop the meaning of ‘openness’ and ‘democracy’ — two features of our society that clearly demarcate the boundary between apartheid South Africa and post-apartheid South Africa. In my view, a greater elaboration of the meaning of ‘an open and democratic society’, and a closer connection of these values to dignity (especially dignity qua self-governance), may result in a jurisprudence more inclined to accommodate plurality and difference. Similarly, an engagement with ‘democracy’ may strengthen our commitment to securing spaces in which ‘counter-publics’ can challenge dominant ideas and engage in alternative discourses.<sup>48</sup>

In this section, I consider the possibility of a complementary understanding of the ‘big five’ values underlying the Bill of Rights that flows from a greater appreciation for the kind of ‘democratic’ society to which the Final Constitution commits us. It is an understanding of

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<sup>47</sup> S Woolman & H Botha ‘Limitations’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 34.

<sup>48</sup> As I have already noted, and discuss in greater detail below, the Constitutional Court has, in *Matatiele II* and *Doctors for Life*, given greater content to the principle of democracy – though they have as yet not tied that understanding to their analysis of fundamental rights or limitations analysis. See J Brickhill & R Biabuch ‘Political Rights’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2007) Chapter 45.

‘democracy’ that, consistent with a commitment to ‘shared constitutional interpretation’, loosens the Gordian knot of most facile characterizations of the counter-majoritarian dilemma.

In *United Democratic Movement v President of the Republic of South Africa*, the Constitutional Court issued a challenge of sorts to the academic community: tell us what ‘democracy’ means, and more importantly, tell us how it ought to inform, in a principled manner, our understanding of various provisions in the text of the Final Constitution.<sup>49</sup> Some South African academics, and in particular, Theunis Roux, have begun to do just that.<sup>50</sup> In his monograph on ‘Democracy’, Roux pulls together the political theory out of which our particular South African conception of democracy arises, the textual provisions of the Final Constitution that shape that conception, and the extant case law of our courts to generate a ‘principle of democracy’.<sup>51</sup> I will not rehearse

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<sup>49</sup> See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) (‘UDM’).

<sup>50</sup> See T Roux ‘Democracy’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

<sup>51</sup> This principle stated in its clearest form holds:

Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained. (2) The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of a law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.

See Roux ‘Democracy’ (supra) at § 10.5(b) (Italics removed.) The Court has begun to provide an answer of its own to the question posed in *UDM*. Within the last several years, a number of justices have articulated accounts of ‘democracy’ that suggest that Roux’s principle is nascent in our Court’s jurisprudence. Roux notes that in her powerful dissent in *New National Party v Government of the Republic of South Africa*, ‘O’Regan J stressed the centrality of the right to vote in the consolidation of South African democracy, remarking that: “The right to vote is foundational to a democratic system. Without it, there can be no democracy at all.” 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 122. O’Regan J’s dissent, Roux continues, ‘also supports the second element of the principle of democracy . . . [I]t is integral to the Final Constitution’s conception of democracy that rights be capable of trumping the will of the majority where such a result better serves “the democratic values of human dignity, equality and freedom”’. Roux (supra) at § 10.5(c). Roux acknowledges that Sachs J’s remarks in *Masondo* ‘articulate many of the elements of the principle of democracy that [this chapter has] argued [are] immanent in the constitutional text.’ Roux (supra) at § 10.5(c) citing *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) at paras 42–43. More recently, the Constitutional Court has, in *Doctors for Life*, articulated an account of democracy that more closely approximates Roux’s reading of the Final Constitution. In *Doctors for Life*, Sachs J writes:

True to the manner in which it itself was sired, the Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the sidelines while it is being adopted. *They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making.* Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would

Roux's arguments in support of that principle here. I will, however, draw down on several of his arguments, especially those that serve part (2) of his 'principle of democracy'.

The argument that lends the greatest force to a theory of shared constitutional interpretation is Roux's contention that, read together, FC ss 7(1), 36(1), and 39(1) 'structure the way in which the tension between rights and democracy is to be managed in South African constitutional law'.<sup>52</sup> As I have argued elsewhere, FC ss 36(1) and 39(1) require a value-based approach to fundamental rights analysis and limitations analysis in part because they invoke the same set of values, the same linguistic trope, 'an open and democratic society based upon human dignity, equality and freedom'. However, Roux's connection of the oft-ignored FC s 7(1) to both fundamental rights interpretation (FC s 39) and limitations analysis (FC s 36) enables me to make four new critical points.

First, FC s 7(1) reads: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Notice that democracy is treated as an independent value. Notice that the values of human dignity, equality and freedom are 'democratic' values. At a minimum, the language of FC s 7(1) should give pause to those interpreters of the basic law who privilege, reflexively, the value of human dignity. One can press this point further and argue that FC s 7(1), in fact, reverses the spin placed by the Constitutional Court on the phrase 'an open and democratic society based upon human dignity, equality and freedom'. It makes a democratic society, and not dignity, foundational.

Second, it is unnecessary to read the language of FC s 7(1) in a manner that privileges democracy over dignity. Indeed, Roux suggests that we should be just as wary of such overly simplistic reductions (rights service democracy) as we are chary of claims that rights and democracy stand in irreconcilable tension with one another (the counter-majoritarian dilemma). I think that it is enough to suggest, as Roux does, that FC s 7(1) delinks the phrase 'an open and democratic society' from 'human dignity, equality and freedom'. That is, whereas the phrase 'open and democratic society based upon human dignity, equality and freedom' suggests a miasma of 'big' ideas that, if read jointly and severally, could exhaust the entire universe of

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be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years.

*Doctors for Life* (supra) at para 231.

<sup>52</sup> Roux (supra) at § 10.3(c).

modern political theory, delinking the two phrases forces the reader of FC ss 36(1) and 39(1) to stop and attend to the meaning, as well as the desiderata, of an 'open and democratic society'. Even if it does nothing else, by reading FC s 7(1) together with FC s 36(1), we are forced to concede that the principle of democracy is, at least, of equal weight as the value of dignity when it comes to the justification of a limitation of a fundamental right.

Third, Roux's arguments support my contention that balancing is an inapt metaphor for limitations analysis. Such metaphors block one from drawing the conclusion to which FC s 7(1) has already alerted us: namely, that rights stand not in opposition to democracy, but that they are, instead, constitutive of it. That is to say, without the rights to equality, dignity, life, belief, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts, and just administrative action, we would not have a meaningful democracy. These rights are themselves the preconditions for an 'open and democratic society'.

Fourth, the principle of democracy, when taken seriously, gets read back into these rights. And by that I mean that the virtues of belonging, deliberating and participating -- identified first and foremost with democracy -- attach not just to the political realm, but to an array of associational forms — religious, traditional, linguistic, commercial, labour, intimate, cultural — that are part of, but not identical to the political. So, although Roux might not make this fourth claim, I do. Indeed, it is an appreciation for these 'democratic' values of membership, deliberation and participation that underwrites my defence of pluralism, marginal social groups and 'oppositional counterpublics'.<sup>53</sup> And we should value pluralism, and thus marginal social groups and 'oppositional counterpublics', not simply because they serve as reminders of the emancipatory potential of robust democratic discourse, but because these groups, and others like them, are where democracy takes place everyday for the vast majority of us.<sup>54</sup>

Finally, no one can gainsay Roux's contention that 'no South African political system claiming to be democratic would be worthy of that name unless it respected the democratic

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<sup>53</sup> See K Thomas 'Racial Justice' in A Sarat, G Bryant & R Kagan (eds) *Looking Back at Law's Century* (2002) 78, 87. See also H Botha 'Rights, Limitations, and the (Im)possibility of Self-Government' in H Botha, A Van der Walt and J Van der Walt *Rights and Democracy in a Transformative Constitution* (2003) 13; H Botha 'Freedom and Constraint in Constitutional Adjudication' (2004) 20 *SAJHR* 249.

<sup>54</sup> The Constitutional Court itself may be slowly coming round to this very position. In its recent judgment in *Fourie*, the Court remarked that '[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner.' *Fourie* (supra) at para 95.

values which the Bill of Rights affirms.<sup>55</sup> This view firmly reinforces my own view about the relationship between courts and legislatures in a regime of shared constitutional interpretation. In such a regime, as in the political system contemplated by FC ss 7(1), 36(1) and 39(1), neither the courts nor the political branches of government have a privileged position with regard to the making and re-making of our basic law.

#### iv. Socio-Economic Rights

The Final Constitution contains a sizeable portion of the world's remarkably small number of genuinely justiciable socio-economic rights. These rights run from housing to health care, from water and food to social security, from children's rights to the specific material entitlements of prisoners.<sup>56</sup> The content of these rights has been fleshed out by the courts in a number of important cases.<sup>57</sup> For my immediate purposes, we can extract the following principles from this complex body of jurisprudence:

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<sup>55</sup> Roux (*supra*) at § 10.3(c).

<sup>56</sup> See FC s 26, FC s 27(1) and FC s 27(3), FC s 28 and FC s 35. On the right to housing, see K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 55. On the right to healthcare, see D Bilchitz 'Health' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, December 2005) Chapter 56A. On the right to water, see A Kok and M Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, December 2004) Chapter 56B. On the right to food, see D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2005) Chapter 56C. On the right to social security, see M Swart 'Social Security' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 56D. On children's rights, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, June 2004) Chapter 57. On prisoners' rights, see F Snyckers & J Le Roux 'Criminal Procedure: Rights of Detained, Arrested and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 51.

<sup>57</sup> The leading Constitutional Court cases are: *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) ('*Soobramoney*'); *Government of the Republic of South Africa v Grootboom* ('*Grootboom*') 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* ('*TAC*') 2002 (5) SA 721 (CC); *Kbosa v Minister of Social Development* 2004 (6) SA 505 (CC) ('*Kbosa*'). For a comprehensive analysis and critique of this body of jurisprudence, see D Bilchitz (2001) 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' 119 *SALJ* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; (2003); T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 4 *Democratization* 10 (Discusses the different standards of review adopted by the Court in socio-economic rights cases); M Pieterse 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services' (2006) 22 *SAJHR* 473. See also S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, December 2003) Chapter 33; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 22; M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383; D Moellendorf (1998) 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327; M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284. For accounts that generally approve of the court's deferential

- Socio-economic rights do not, generally speaking, embrace an entitlement to the immediate award of a remedy in the event of a breach;<sup>58</sup>
- Most socio-economic rights simply requires the state to progressively realise the access to a particular good for individual members of the polity and to do so within ‘available resources’;<sup>59</sup>
- Whether the state has discharged its duty to progressively realise a right will be evaluated by the courts in terms of the ‘reasonableness’ of the plan;<sup>60</sup>
- To be found reasonable, a comprehensive and coordinated programme to realise access to a particular socio-economic right: (1) must ensure that “the appropriate financial and human resources are available”; (2) ‘must be capable of facilitating the realisation of the right’; (3) must be reasonable ‘both in their conception and their implementation’; (4) must attend to ‘crises’; (5) must not exclude ‘a significant segment’ of the affected population; and (6) must ‘respond to the urgent needs of those in desperate situations.’<sup>61</sup>

One cannot find a better ‘express’ example in South African jurisprudence of shared constitutional interpretation regarding the meaning of fundamental rights. The Constitutional Court has refused, as a general matter, to identify a minimum core (content) for each socio-economic right. (In this respect our socio-economic rights jurisprudence reflects a marked departure from the jurisprudence of the UN Committee on Social, Economic and Cultural Rights.) Instead, the Court has set out – as indicated above – general norms that govern the progressive realization of socio-economic right and that leave the political branches ample room to experiment with policies intended to realize those rights.<sup>62</sup>

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approach, see C Sunstein ‘Social and Economic Rights? Lessons from South Africa’ (2001) 11 *Constitutional Forum* 123 (Defending the Court’s administrative law model of socio-economic rights); D Davis Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite’? (2006) 22 *S.AJHR* 301 (From a realist’s perspective of the Constitutional Court’s socio-economic jurisprudence, reasonableness review is likely to be the best model of review for which one could hope.)

<sup>58</sup> See *Soobramoney* (supra); *Grootboom* (supra); *TAC* (supra).

<sup>59</sup> See *Soobramoney* (supra).

<sup>60</sup> See *Khosa* (supra) at para 43 (‘In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis.’)

<sup>61</sup> See *Grootboom* (supra) at paras 39-46, 52, 53, 63-69, 74, 83.

<sup>62</sup> Pace Pieterse, this invitation is not simply a function of the Court’s gloss on FC s 26 and FC s 27. The text of both rights are crafted in a manner that gives the government ample space to decide what policies meet the

The invitation by the Court to the political branches to assist it in shaping the contours of socio-economic rights has been accepted by the legislature and the executive in a number of different domains. (It has been resisted in others.) Perhaps the best example of the principled dialogue between the courts and the political branches – as I will discuss at greater length below – can be found in housing policy. After the Constitutional Court handed down its decision in *Grootboom* in 2001, the government was obliged to revisit its housing policy. The most important consequence of this review – for my theoretical purposes – is that the National Department of Housing generated a new policy document – *Breaking New Ground* – that quite consciously echoes the language of *Grootboom* and reorients government imperatives in light of the general norms articulated by the Court.

The relative open-endedness of many of the *Grootboom* norms ensures that the Court will likely accept good faith government efforts to execute the policies enunciated in *Breaking New Ground*. That said, the Constitutional Court will not accept policy pronouncements alone as evidence of such good faith. Where, as in *Modderklip*, the state makes no meaningful effort to accommodate the housing rights, property rights and procedural rights of citizens, the Court will not only find the government conduct unconstitutional, it may take, as it did in *Modderklip*, the highly unusual step of imposing constitutional damages.<sup>63</sup> As I, and others, have been at pains

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constitutional desiderata of ‘progressive realization’. The Court’s gloss on FC s 26(2) and FC s 27(2) might be said to narrow the space within which government can determine the content of the rights to housing, health food, water and social security. See M Pieterse ‘Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services (2006) 22 *S.AJHR* 473; E-Mail Correspondence with Marius Pieterse (14 March 2007).

<sup>63</sup> In *Modderklip*, the Supreme Court of Appeal had found that the state’s failure to act on the occupation of private land by an informal settlement amounted to an expropriation under FC s 25(1) read with FC s 7(2) and ordered the state to compensate Modderklip Boerdery for the violation. *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA). See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W). The Constitutional Court declined to decide the case on the same basis. The *Modderklip* Court relies instead, for reasons that cannot be interrogated here, on FC s 1(c) and FC s 34. No longer simply a stand-alone principle, FC s 1(c) and the rule of law doctrine, when read with the right of access to courts, FC s 34, generates the proposition that the rule of law, properly conceived, imposes an ‘obligation [on] . . . the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them.’ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC). The *Chief Lesapo* Court hints at some of the concerns raised in *Modderklip*. Mokgoro J writes that FC s 34 and the rule of law doctrine are ‘foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help.’ *Ibid* at para 22. However, it is one thing to inveigh against individualized acts of self-help, and quite another to find the State culpable for the social disintegration that flows from a generalized failure of the state’s legal dispute mechanisms to resolve conflict effectively.) But the sting in *Modderklip* is not that FC s 34 secures for the citizenry the legal institutions required to mediate conflict. Now read in concert with FC s 1(c), FC s 34 requires more than ‘the mere provision of the mechanisms’ for dispute resolution. *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (‘*Modderklip*’) at para 42 (emphasis added).

to point out: shared constitutional competence has its limits. A refusal by the political branches to take seriously the Final Constitution – and the Court’s gloss on the Final Constitution – will result in a revocation of the initial invitation.

## v. Chapter 9 Institutions

In *Grootboom*, the Constitutional Court made a modest contribution towards the design of experimental institutional arrangements. It did so by charging the Human Rights Commission with the dual responsibilities of monitoring compliance with the Court’s order and of facilitating information-gathering about housing policy. There is absolutely no reason why other Chapter 9 Institutions Supporting Constitutional Democracy -- the Commission on Gender Equality, the

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It demands that the state take ‘reasonable steps . . . to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.’ If such language alone is not striking enough – the spectre of a Zimbabwe-like constitutional crisis looms large – then three subtle shifts in language are. The access to courts is no longer primarily concerned with the existence of formal legal structures. It is now concerned with ‘effective remedies’. It is concerned with *substantive* outcomes and thus outcomes whose constitutionality are to be measured by the courts for compliance with some rather murky, but no less meaningful, sense of what ‘reasonable steps’ are required to turn back the forces of entropy. It also seems clear that this new reasonableness test is not derived from FC s 34. It flows from FC s 1(c) and our commitment to the rule of law. As Justice Langa writes: ‘The precise nature of the state’s obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.’ Ibid at para 43. FC s 1(c) will tell us, in the context of various rights, what reasonable, *substantive* steps the state – and the courts – must take to maintain order.

The challenges of meeting such a reasonableness requirement in similar kinds of cases are not to be underestimated. Although the Court describes these circumstances as extraordinary, they are, indeed, the circumstances in which many South Africans find themselves now. See *Modderklip* (supra) at paras 46-49 (‘[C]ourt orders must be executed in a manner that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it. . . . The circumstances of this case are extraordinary in that it is not possible to rely on mechanisms normally employed to execute eviction orders. This should have been obvious to the state. It was not a case of one or two or even ten evictions where a routine eviction order would have sufficed. To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law. The question that needs to be answered is whether the state was, in the circumstances, obliged to do more than it has done to satisfy the requirements of the rule of law and fulfil the [FC s] . . . 34 rights of Modderklip. I find that it was unreasonable of the state to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers.’) In the space of several paragraphs, the *Modderklip* Court has moved from an apparently procedural gloss on the rule of law – consistent with the legality principle enunciated in *Fedsure* and *Pharmaceutical Manufacturers* – to something far more robust. The state – in order to comply with the dictates of the rule of law doctrine – must create and maintain courts that provide ‘effective remedies’. Again, the rule of law requires not just any remedy, but an effective remedy. What is an effective remedy? An effective remedy must reflect a serious attempt to prevent ‘large-scale disruptions in the social fabric’ and their attendant ‘chaos and misery’. Failure of the state to plan adequately for such contingencies risks censure by the courts. Moreover, such censure is no longer limited to a terse statement at the end of a judgment castigating the responsible Minister for a failure to discharge constitutional responsibilities. A failure to take those reasonable steps necessary to safeguard the rule of law may result in an award of *constitutional damages* against the state. In South Africa, we are concerned, not with ‘mere’ violations of freedom of contract – as was the US Supreme Court in *Lochner* -- but with state action that risks ‘large-scale disruptions in the social fabric’. The Constitutional Court has retained, for itself, the right to intervene when it believes such disruptions pose a reasonably real danger to the general welfare of the commonweal.

Public Protector, the Auditor-General, the Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities, or the Independent Electoral Commission -- cannot play similar roles with regard to their areas of competence. Indeed, Chapter 9 Institutions do, without prompting by the Constitutional Court, undertake institutional roles commensurate with a commitment to experimental constitutionalism.<sup>64</sup>

(aa) Auditor-General

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<sup>64</sup> However, Parliament's consistent under-funding of Chapter 9 Institutions and an executive policy of malign neglect make effective operation of these institutions difficult, if not impossible. See Hugh Corder, Sara Jagwanth & Fred Soltau 'Report on Parliamentary Oversight and Accountability' Report to the Speaker of the National Assembly (1999), available at [www.pmg.org.za/docs/2001/viewminute.php?id=811](http://www.pmg.org.za/docs/2001/viewminute.php?id=811) (accessed 10 January 2005) ('Corder Report'). Corder, Jagwanth and Soltau write that

In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices. . . . In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.

'Corder Report' (supra) at paras 7.2 and 7.2.1. The Corder Report suggests that, at a minimum, the budget of each Chapter 9 Institution be subject to a separate vote -- a vote distinct from that for the budget for the department with line authority, and a vote distinct from that for the budget of other Chapter 9 Institutions. Ibid at para 7.3. To meet other constitutional imperatives, the Corder Report advocates the passage of legislation -- an Accountability and Independence of Constitutional Institutions Act -- and the creation of a parliamentary oversight committee -- a Standing Committee on Constitutional Institutions. Ibid at paras 1.1, 7.3, 7.4, 8. Parliament has not acted on any of the Corder Report recommendations. Other Chapter 9 Institutions have noted this failure to act with dismay. See N Barney Pitso 'South African Human Rights Commission Presentation to the Justice Portfolio Committee -- Budget Review and Programmes 2001/2002' (8 June 2001), available at [www.sahrc.gov.za](http://www.sahrc.gov.za) (accessed on 11 January 2005). Chairperson Pitso writes:

After five years of operations, it is very discouraging to have to report that questions about the independence of the Commission have not been resolved. . . . National Treasury continues to relate to the Commission through the Justice Department. This means that we have no direct means of having queries and problems resolved. . . . Since inception, the Commission has constantly raised concerns about the manner in which its budget was set. We pointed out ad nauseum that at no stage was there a proper assessment of the mandate of the Commission and the appropriate level of resources necessary to execute the mandate.

Ibid at 4-5. For more on the under-funding of Chapter 9 Institutions, generally, and the under-funding of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, in particular, see S Woolman & J Soweto-Aullo 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24F. Such under-funding is one of the rate-limiting factors with respect to experimental constitutionalism in South Africa.

By virtue of its position as ‘the supreme audit institution of the Republic’,<sup>65</sup> the Auditor-General must produce financial audits and compliance audits with respect to all national and provincial departments, all municipalities, all public entities and a host of other institutions.<sup>66</sup> The filing of these audits with Parliament and the National Treasury is meant to ensure the proper use of public funds.<sup>67</sup>

These audits -- some 1400 annually -- provide critical information about how various arms of government are managing their budgets, enable the legislature (and the judiciary) to exercise

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<sup>65</sup> PAA s 1 defines ‘the supreme audit institution of the Republic’ as ‘the institution which, however designated, constituted or organized, exercises by virtue of the law of a country, the highest public auditing function of that country’. Whereas the Auditor-General Act (‘AGA’) served as the enabling legislation for the Auditor-General under the Interim Constitution, the Public Audit Act (‘PAA’) gives proper expression to the Final Constitution’s conception of the Office of the Auditor-General. Auditor-General Act 12 of 1995; Public Audit Act 25 of 2004. Perhaps, the two most significant differences between the PAA and its predecessors are the new Act’s grant of sweeping powers of search and seizure and the express expansion of the Auditor-General’s authority to cover institutions in the public sector. See PAA s 16 and PAA s 4. The PAA, s 53 read with Schedule 1, repeals the Auditor-General Act and the Audit Arrangement Act in their entirety and the Public Finance Management Act 1 of 1999 (‘PFMA’) ss 58 - 62.

<sup>66</sup> See FC s 188. The Public Audit Act extends these constitutionally-mandated audit functions to all constitutional institutions and to any public entity listed in the Public Finance Management Act and the Local Government: Municipal Systems Act that may require the Auditor-General’s services. The Auditor-General demonstrates its even-handedness through the oversight process itself: on the one hand, it provides advice to legislatures and their committees assessing the performance of an agency or department; on the other hand, it assists auditees with their replies to inquiries launched by legislatures subsequent to the legislatures’ review of an audit report. PAA s 5 (1)(c). The PAA and PFMA place a number of substantive constraints on the auditing activities of the Auditor-General designed to ensure its independence and impartiality. First, it may not undertake audits or offer services -- for fees -- that compromise its constitutional and statutory obligations. Second, the Auditor-General may not provide advice or services that have a direct bearing on the formulation of policy. PAA s 5(1)(a)(iii).

Unlike most of the other Chapter 9 Institutions, the unique legislative environment within which the Auditor-General operates makes this institution the most likely to retain its independence and to discharge its responsibility to ensure that our government fulfils its mandate to operate in an accountable, transparent and equitable manner. Whilst the breadth of its investigatory powers may distinguish the Auditor-General from other Chapter 9 Institutions, the most unique feature of the Auditor-General is its fiscal independence. The Auditor-General’s ability to generate significant revenue streams from fees charged for audit services ensures that it has the money necessary to discharge its constitutional duties. These financial resources immunize the Auditor-General from some of the budgetary pressures that have undermined the independence of other Chapter 9 Institutions. See PAA s 36; Office of the Auditor-General *Activity Report for 2003-- 2004* RP 211/2004 (2005) (‘*Activity Report*’) 11. However, the fiscal independence promised by these fees is only as good as the ability or the willingness of the audited entities to make good. Local government has been notorious for its failure to pay its statutorily required fees. See L Loxton ‘Fakie Seeks R100m from Municipalities’ *Business Report* (12 March 2003).

<sup>67</sup> See, eg, *Lebona Mineral Trust v Lebona Granite (Pty) Ltd* 2002 (3) SA 30 (I) (Enabling legislation for Trust requires annual audit by Auditor-General and tabling of report before the legislature); *Esack No & Another v Commission on Gender Equality* 2001 (1) SA 1299 (W), 2000 (7) BCLR 737 (W) (Commission transactions subject to audit by Auditor-General); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 77 (Court notes that the Independent Electoral ‘Commission’s necessary expenditure is to be defrayed out of money appropriated by Parliament . . . and its records are to be audited by the Auditor-General. Comprehensive reporting duties are imposed on the Commission and in particular it is required annually to submit to Parliament . . . an audited statement on income and expenditure and a report in regard to its functions, activities and affairs in respect of such financial year.’) See also I Rautenbach & E Malherbe *Constitutional Law* (2002) 212.

meaningful oversight over the executive,<sup>68</sup> and offer the promise of a government that operates in an accountable, transparent and equitable manner.<sup>69</sup> As the Constitutional Court noted in *President of the Republic of South Africa v South African Rugby Football Union*, the Final Constitution is

committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The constitutional goal [of ensuring that the administration observes fundamental rights and acts both ethically and accountably] is supported by a range of provisions in the [Final] Constitution . . . [including the establishment of] the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial State departments and administrations as well as municipalities.<sup>70</sup>

The Auditor-General's powers extend beyond the coercive power of shame and embrace the threat of forensic audits.<sup>71</sup> Its reports and its forensic audits expose malfeasance, corruption, and incompetence in the discharge of public office that enable other law enforcement agencies

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<sup>68</sup> The lack of a meaningful distinction between legislative authority and executive authority in our parliamentary democracy places severe constraints on Parliament's oversight capacity.

<sup>69</sup> See *Rail Commuter Action Group & Others v Transet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 72 ('Accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution.' The Court cites FC ss 1, 41(1) and 195(1)(f) in support of this proposition.) See also *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4 ('Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution . . . If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.')

<sup>70</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 133.

<sup>71</sup> See Office of the Auditor-General *Activity Report for 2003-- 2004* RP 211/2004 (2005) 23 ('*Activity Report*') ('Forensic auditing is an independent process aimed at preventing or detecting economic crime in the public sector. The process mainly comprises an objective assessment of the measures instituted by accounting officers and other relevant role players to prevent and detect economic crime, but it can also include economic crime investigations when this is appropriate and seems necessary . . . [T]he term "economic crime" is used to describe various crime categories, including fraud, forgery, theft and other contraventions of applicable statutes (e.g. corruption).') See also *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 164.

to launch criminal investigations.<sup>72</sup> Existing case law suggests that the Auditor-General may even possess standing to seek rescission of decisions or contracts that manifest fraud.<sup>73</sup>

As a general rule, the Auditor-General carries out audits, but does not opine on the merits of particular government programmes. However, while the Auditor-General will not 'question policy laid down by the legislative and executive authority, the arrangements for the implementation thereof, the controls applied, the cost incurred and the results achieved are all legitimate subjects for auditing.'<sup>74</sup> In other words, although the government's 'objectives' fall beyond the purview of the Auditor-General, the Auditor-General can interrogate the means the government employs to realize its objectives. When it comes to the expenditure of public monies, the Auditor-General has an obligation to state whether the financial audits and the compliance audits reflect a problem with the implementation of a policy or the delivery of services.<sup>75</sup>

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<sup>72</sup> The term 'corruption' here is to be broadly construed. As Sole notes, '[c]orruption may vary from the clearly illegal -- such as fraud -- to more subtle forms of unethical rent-seeking, patronage and abuses of power that may be just as damaging to the social fabric of a nation.' S Sole 'The State of Corruption and Accountability' in J Daniel, R Southall & J Lutchman (eds) *State of the Nation: South Africa 2004 - 2005* (2005) 86. Sole suggests the following definition -- one that fits the broad brief of the Auditor-General's Office: 'Corruption is the wilful subversion (or attempted subversion) of a due decision-making process with regard to the allocation of any benefit.' Ibid at 87. For example, an Auditor-General's report on Transnet led the National Prosecuting Authority to launch a probe into the inappropriate manner in which medical scheme benefits were handled by officials in the Department of Correctional Services. See S Adams 'Scorpions Probe Medical Aid Fraud' *The Mercury* (5 October 2004). The corruption uncovered by the Auditor-General and the Scorpions in this matter fits a general pattern of political malfeasance. See, generally, J Hyslop 'Political Corruption: Before and After Apartheid' *Conference on State and Society in South Africa* (University of the Witwatersrand 2004) 17 ('[G]overnment policy [has] encouraged rent-seeking behaviour by black entrepreneurs through the economic preferences they were given through a whole gamut of policies, especially those relating to the awarding of state contracting and corporate ownership. The tendency of such policies [is] to create a climate in which the line between legal forms of rent-seeking and outright corruption and cronyism [is] . . . blurred.)

<sup>73</sup> See *Minister of Local Government and Land Tenure & Another v Sizwe Development & Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677, 678 - 679 (Tk).

<sup>74</sup> *Office of the Auditor-General Report on the Financial Statements of the Provincial Administration of the Northern Cape* (31 March 1998) 7.

<sup>75</sup> For example, the Auditor-General in its *Report on the Financial Statements of the Provincial Administration of the Northern Cape* found that only 1 of 17 provincial departments warranted an unqualified financial audit report-- 7 were qualified and 9 had disclaimers -- and only 5 out of 17 departments deserved unqualified compliance reports -- 11 were qualified and 1 had a disclaimer. These findings stand as a scathing indictment of the provincial administration and raises serious doubts about the capacity of current personnel asked to carry out policy. Ibid at 9. If the capacity does not exist to execute the policy, then the policy itself must be called into question. *Activity Report* (supra) at 19.

Such reports are not unusual. The general reports, the special reports and the individual audits made publicly available by the Auditor-General over the course of the last five years offer a detailed account of both the achievements of, and the maladministration in, South African government. In 2000, some 38% of financial audits for national departments received qualified reports. The reasons for the qualifications ranged from 'limited or no audit performed, resulting in a disclaimer of opinion or adverse opinion; liabilities and creditors that could not be verified; loans, debtors and investments that were either misstated, or of which the recovery was doubtful; assets, including stock, stores and inventory, that could not be verified; misstatement of income; irregularities in disclosing expenditure; unacceptable financial statements for trading accounts.' Office of the Auditor-General *General Report for 1999 -- 2000* RP 75/2000 (2001) 15 ('*General Report 2000*') 3, 15 -- 21. The national departments fared even more

In my ideal world of shared constitutional interpretation, the Auditor-General is a gigantic feedback mechanism. It tells us what works in government and what doesn't. In addition, the Auditor-General's power to shed light on the efficacy of policy and policy implementation plays a significant role on the future formation of policy and the discharge of constitutional duties. These Auditor-General's reports -- and the problems the reports identify -- have a critical role to play in the creation of a polity committed to the rule of law and for the restoration of society's faith in a government of, by and for the people.<sup>76</sup> The power of these reports to shame some government officials into taking appropriate action is reflected in a brace of cases that have arisen out of normal audits and forensic investigations.<sup>77</sup> It is also echoed in constructive

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poorly with respect to compliance audits: over 57% of national departments received qualified reports because of 'serious shortcomings in internal checking and control; non-compliance with other prescripts, including legislation and Treasury regulations; unauthorised expenditure that was incurred; insufficient control over personnel expenditure; and serious deficiencies in provisioning administration.' Ibid at 4, 22-30. The financial state of provincial government and local government was abysmal. So few adequate controls existed at the provincial level that the Auditor-General could not issue a report on the 1999 - 2000 fiscal year. He was obliged to limit his assessments to completed audits from the previous financial year. Even with respect to these audits, the majority had to be qualified because internal departmental audits were largely unreliable and asset registers were either non-existent or incomplete. Given the parlous state of local government at the time -- the report noted the 'short-term deteriorating financial position of many municipalities'-- some solace could be taken in the fact that 31% of the municipalities audited received unqualified reports. *General Report 2000* (supra) at 6, 36-45. See also Office of the Auditor-General *General Report on Local Government* (2003) 12. That said, the most recent general report illustrates both an improvement in the administration of government and the increased vigilance of the Auditor-General. Office of the Auditor-General *General Report for 2003-2004 RP 210/2004* (2005) ('*General Report 2005*'). See also T Keenan 'Auditor-General: Fighting Fraud with the Best of Them' *Finance Week* (12 July 2002) 16. Not only are the numbers better, the high numbers of qualified audits identified in previous reports have had the intended consequence of forcing improved internal departmental compliance with PAA, PFMA and other statutory reporting requirements.

<sup>76</sup> Experts ranked the Auditor-General second, after the Special Investigating Unit, with respect to their perceived success in combating official corruption. See L Camerer *Corruption in South Africa: Results of an Expert Panel Survey Institute for Security Studies* Monograph 65 (2001) Chapter 6 ('A significant proportion (48%) of the respondents saw the office of the Auditor-General as effective in fighting corruption.')

<sup>77</sup> See *Mthembu-Mahanyele v Mail & Guardian Ltd & Another* 2004 (6) SA 329 (SCA), 2004 (11) BCLR 1182 (SCA) (Auditor-General's report of irregularities in tender for housing contract and a call for a commission of inquiry into improper benefits bestowed upon friends of the Minister supported Court's finding that published criticism of the appellant was reasonable under the circumstance and thus not defamatory); *Young v Shaik* 2004 (3) SA 46 (C) (Arms deal report by the Auditor-General, the Public Protector, and the Director of Public Prosecutions led to accusations, in the media, of corruption. Court finds accusations -- made by the defendant -- based in part on the report, but otherwise not fully corroborated, to be defamatory.) See also *Kruger v Johnnic Publishing (Pty) Ltd & Another* 2004 (4) SA 306 (T) (Findings by Auditor-General of mismanagement and irregularities at a school led to allegations of corruption that prompted an ultimately unsuccessful suit for defamation.)

responses to criticism from the Auditor-General<sup>78</sup> and promises to root out sources of corruption and inefficiency.<sup>79</sup>

The courts have reinforced this power to shame – and to reconstruct policy -- by expressly recognizing that the Auditor-General is the most appropriate arbiter of disputes over the use or the misuse of public funds.<sup>80</sup> Whether the directly accountable branches of government -- Parliament and the provincial legislatures -- will heed the Auditor-General's words or reduce it to the role of Cassandra remains to be seen.<sup>81</sup>

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<sup>78</sup> Yearly criticism of the South African Revenue Service ('SARS') by the Auditor-General in annual reports tabled before SCOPA ultimately led SARS to overhaul its internal auditing systems and to procure the technology necessary to manage its assets. The tabling of an unqualified financial audit of SARS before SCOPA was hailed by a SARS commissioner, Pravin Gordhan, as a clear indication that SARS is a 'service organization that handles taxpayers' money efficiently.' L Loxton 'Gordhan Delighted with SARS Clean Bill of Health' *Business Report* (24 September 2004).

<sup>79</sup> After receiving two consecutive years worth of disclaimers by the Auditor-General in reports to Parliament, and in the face of mounting evidence that the Unemployment Insurance Fund had failed to comply with the PFMA, the Minister of Labour committed himself to the appointment of managers who would ensure future compliance with the PFMA. See C Terrblanche 'Minister under Pressure over UIF' *The Mercury* (20 September 2004). Similarly, a forensic audit by the Auditor-General that revealed millions of rands in losses at Transnet due to an irregular scrap metal contract that had by-passed normal procurement procedures was hailed by SCOPA -- which had called for the investigation -- as evidence that corruption could be effectively rooted out of government. See 'Audit Finds Transnet Lost Millions through Irregular Scrap Metal Deal' *Business Report* (18 July 2003).

<sup>80</sup> See *Ritchie & Another v Government, Northern Cape, & Others* 2004 (2) SA 584 (NC) at paras 21- 23 (State's decision to fund the private defamation actions of public officials was an internal provincial government matter not susceptible of review by the courts, and that the matter fell within the domain of the Auditor-General for a determination as to whether the expenditure had been authorized.)

<sup>81</sup> The Office of the Auditor-General has, in the recent past, been quite critical of the government's lassitude with respect to the Office's reports of egregious, and often wilful, maladministration by national and provincial departments, municipalities and public entities:

The extent to which audit information effectively contributes toward accountability and transparency not only depends on the quality of the information provided in the various audit reports. It is also critically dependent on the success with which such information is further processed and the response it evokes in the concluding phase of the accountability process. In this respect the role of the public accounts committee is vital. . . . The Standing Committee on Public Accounts (SCOPA) is the mechanism through which the National Assembly exercises oversight over the receipt and expenditure of public money. The extent to which the committee appreciates the issues raised in the respective audit reports and pursues them through effective oversight practices will determine whether appropriate and sufficient pressure will be brought to bear on the various accountable authorities. . . . The committee also did not always succeed in following up unresolved matters. Given the reconsideration of roles and processes, to a large extent brought about by the Public Finance Management Act, it may be prudent to examine the weaknesses of SCOPA's post-review processes in order to ensure that its recommendations have the desired impact on financial management in the public sector at national level. As it will be in the interests of accountability and useful for the committee and the public, and given the lack of resources of the committee, I shall in future report periodically on the status of implementation of the committee's recommendations. This is in line with international practice.

Office of the Auditor-General *General Report of the Auditor-General: Year Ended 31 March 2000* (2001) 10. Recent reports in the media suggest that that SCOPA's post-review process is improving as a result of the pressure applied by the Auditor-General. See L Loxton 'Gordhan Delighted with SARS Clean Bill of Health' *Business Report* (24 September 2004)(After years of qualified reports, and criticism from SCOPA, SARS received an unqualified financial audit.) However, the ANC's decision to 'break with tradition and permanently take over the chair' of SCOPA -- thus departing from Commonwealth practice of having the chair come from the ranks of an opposition party -- have led to inevitable questions over whether SCOPA possesses sufficient independence to operate as a meaningful check on executive power. See C Terrblanche & M Hlangani 'Opposition Dismay as ANC Takes Over

## bb. Public Protector

Like most ombudsman around the globe, the Public Protector monitors the conduct of state officials and agencies with the aim of ensuring an effective and ethical public service.<sup>82</sup> The office reflects, in both conception and execution, a profound improvement upon its precursor: the Advocate-General. The Advocate-General's brief was limited to investigations into the unlawful or the improper use of public money.<sup>83</sup> The Public Protector's brief, as initially adumbrated in the Interim Constitution, and as now determined by the Final Constitution and the Public Protector Act ('PPA'), is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.<sup>84</sup>

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Control of SCOPA' Cape Times (10 May 1994); S Sole 'The State of Corruption and Accountability' in J Daniel, R Southall & J Lutchman (eds) *State of the Nation: South Africa 2004 - 2005* (2005) 107 ('Party heavies were deployed to lay down the party line in SCOPA, thus destroying the tradition of non-partisanship the committee had built up.') A recent report by the United Nations Report on Drugs and Crime underwrites the Auditor-General's scepticism about the capacity of Parliament to rein in errant members of the executive and officials in the state apparatus. See United Nations *Drugs and Crime: Country Corruption Assessment Report on South Africa* (2003) ('UN Corruption Report'), available at <http://www.info.gov.za/reports/2003/corruption.pdf> (accessed on 5 November 2005) ('Members of Parliament, who are aware of corruption within the ranks, feel they are supposed to act but, all too often, when a corrupt official is exposed, party discipline is imposed.')

<sup>82</sup> The Public Protector was originally established in terms of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') ss 100 -- 114. FC ss 182 reads:

- (1) The Public Protector has the power as regulated by national legislation
  - (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
  - (b) to report on that conduct; and
  - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.
- (3) The Public Protector may not investigate court decisions.
- (4) The Public Protector must be accessible to all persons and communities.
- (5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

See *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('First Certification Judgment') at para 161 ('The Public Protector is an office modelled on the institution of the ombudsman.') The drafters of the Interim Constitution did not favour the term ombudsman. They objected to both 'man', for its possible sexist connotations, and 'ombud', for an unknown reason. See D Basson *South Africa's Interim Constitution: Text and Notes* (Revised Edition, 1995) 173; G Devenish *The South African Constitution* (2005). 'Public Protector' and 'Defensor del Pueblo' have similar connotations. The later term, employed in Spain and some Latin American countries, emphasises the protection of 'the people' and the public good, as opposed to the 'private' or narrow interests manifest in individual complaints. See M Oosting 'The Ombudsman and His Environment: A Global View' in L Reif (ed) *The International Ombudsman Anthology* (1999) ('Reif Anthology') 5.

<sup>83</sup> Ombudsman Act 118 of 1979. For a comprehensive history of the Advocate-General, see JP Fegbeutel *An Ombudsman for South Africa* (Unpublished LLD thesis, University of South Africa, 1990); DJ Brynard *Die Advokaat-Generaal in Publieke Administrasie: 'n Vergeelykende Evaluering* (Unpublished DLitt thesis, University of Pretoria, 1987). Although it constituted an important step towards greater public accountability, the Advocate-General could not investigate maladministration. *Ibid* at 230. See also L Baxter *Administrative Law* (1984) 290.

<sup>84</sup> Act 23 of 1994. The Act has been amended four times. See Public Service Laws Amendment Act 47 of 1997; Public Protector Amendment Act 113 of 1998; Promotion of Access to Information Act 2 of 2000; Public Protector Amendment Act 22 of 2003. The PPA repeals the Ombudsman Act. See PPA s 14.

The Public Protector's role in a scheme of shared constitutional interpretation can be profitably compared with the duties discharged by the judiciary. Courts handle discrete disputes about law and conduct – even as they craft general norms designed to govern the behaviour of the state and private actors. They rely on correct procedure and solid, sometimes intricate, legal argument. Courts are not, however, designed to handle the large number of complaints that arise from simple misunderstandings or bureaucratic red-tape, nor do they lend themselves to the resolution of injustices that turn more on undercapacity than illegality.<sup>85</sup>

The Public Protector occupies a middle space in the politico-constitutional landscape. It assists the courts by addressing those complaints about the administration of justice that fall beyond the court's purview. It assists the legislature by monitoring the performance of the executive and answering those complaints that elected representatives are unable to address.<sup>86</sup>

The Public Protector performs these functions, in theory at least, free from political pressure. It is not, however, entirely independent. For while the Public Protector enjoys priority over other institutions in the exercise of its functions,<sup>87</sup> it must still often act together with the courts and other Chapter 9 Institutions to fulfil its mandate.

One of the most common criticisms levelled against the Public Protector, and ombudsmen, generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively -- without making binding decisions -- is the real measure of its strength.<sup>88</sup> Stephen Owen explains this apparent paradox as follows:

Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a

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<sup>85</sup> See S Owen 'The Ombudsman: Essential Elements and Common Challenges' in *Reif Anthology* (supra) at 51, 54 - 55. See also M Zacks 'Administrative Fairness in the Ombudsman Process' (1967 to 18987) 7 *The Ombudsman Journal* 55, 55 ('Complainants come to Ombudsmen for help to cut through red tape and to deal expeditiously with their concerns. If they wanted technical, legal arguments and approaches, one can say with some justification that they should hire a lawyer and go to court.')

<sup>86</sup> See Owen (supra) at 53 (Ombudsmen enable politicians to address failures in the state bureaucracy.)

<sup>87</sup> *Special Investigating Unit v Ngcinvana & Another* 2001 (4) BCLR 411, 413B (E) (When interpreting the competence of tribunals under the Special Investigating Units and Special Tribunals Act 74 of 1996 with respect to the investigation of maladministration and corruption, the court held that '[c]onstitutional priority would thus seem to lie with the institution of the Public Protector. Any interpretation of the Act's purposes must pay heed to that reality.')

<sup>88</sup> See Owen (supra) at 52; Oosting (supra) at 10.

single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future.<sup>89</sup>

The publication of the Public Protector's findings can shame a body into accepting the validity of its recommendations.<sup>90</sup> Its reports to Parliament should enable the national legislature to exercise effectively its oversight function and shape important debates on policy and budgetary matters.<sup>91</sup> Whether our Public Protector has sufficient funds to maintain the high standards of investigation and reporting required in order to be the 'voice of reason' is matter assayed above. However, the Public Protector does fulfil its role in a scheme of shared constitutional interpretation by ensuring that the members of the executive 'understand' their constitutional responsibilities and that the other branches of government – the courts and the legislature – 'understand' when those norms are not being fulfilled in practice.

cc. South African Human Rights Commission

Jon Klaaren offers astute observations regarding the status of the SAHRC and other Chapter 9 Institution that resonate strongly with my more general theses about shared constitutional interpretation and participatory bubbles.<sup>92</sup> He notes that

the six institutions listed and established in terms of FC s 181(1), are not mere creatures of statute. As creatures of the Final Constitution, the SAHRC and the other Chapter 9 Institutions enjoy a status and an authority that can potentially override unconstitutional legislative provisions.<sup>93</sup>

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<sup>89</sup> Owen (supra) at 52.

<sup>90</sup> See Oosting (supra) at 12 ('[T]he mobilisation of shame can constitute a powerful weapon in his arsenal.')

<sup>91</sup> Ibid ('In this world the sweet voice of reason -- a well formulated argument, based on meticulous research -- does not always fall on attentive ears. Political support for the ombudsman is therefore essential.')

<sup>92</sup> J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; J Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-Economic Rights' (2005) 27 *Human Rights Quarterly* 539 ('A Second Look').

<sup>93</sup> FC s 181, read together with FC ss 193 and 194, provide the general constitutional framework for (almost) all Chapter 9 Institutions. Although these provisions do not establish ICASA, Chapter Nine does govern the Independent Authority to Regulate Broadcasting. See J White 'Independent Communications Authority of South Africa' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 24E (Noting that the independent authority to regulate broadcasting is not listed in FC s 181(1)).

In sum, Chapter 9 Institutions have the power to find legislation ‘inconsistent’ with the terms of the Final Constitution. (Though it does not, of course, follow that these institutions have the power to declare, in terms of the supremacy clause in FC s 2, law or conduct to be constitutionally infirm.)

Klaaren then contends that the establishment of this unique constellation of independent non-judicial institutions -- as a basic structure of our South African constitutional democracy -- has at least one obvious implication. He writes that

While constitutional amendments to Chapter Nine may (and arguably at times should) change the internal arrangements of these institutions, any amendment that detracted from the capacity of this set of independent human rights institutions to discharge its responsibilities would need, at the very least, to acknowledge its intention to alter the constitutional structuring and separation of powers doctrine of the Final Constitution. And any constitutional amendment that did away with this complex of independent institutions entirely would eliminate this basic structure. Although the separation of powers doctrine is not identified as a founding value in FC s 1, the case can be, and has been, made that the doctrine is a basic structure of the Final Constitution.<sup>94</sup>

Klaaren finally observes that, since both ‘the SAHRC and the Constitutional Court are designed to protect and to promote respect for human rights’, a principle of *complementarity* governs the relationship between the Chapter 9 Institutions, the courts and other branches of government.<sup>95</sup> According to Karthy Govender, complementarity should be understood as follows:

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<sup>94</sup> J Klaaren ‘South African Human Rights Commission’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C citing C Roederer ‘Founding Provisions’ in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 13. The Constitutional Court itself has noted that amendments to the Final Constitution that alter the basic structure of our constitutionality could be challenged on substantive and not merely procedural grounds. See *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC). See also M Pieterse ‘Coming to Terms with Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *SAJHR* 383; J Klaaren ‘Structures of Government and the 1996 Constitution: Putting Democracy Back into Human Rights’ (1997) 13 *SAJHR* 3.

<sup>95</sup> The Chapter 9 Institutions, much like the three primary branches of government, undertake investigations into matters of public interest and issue reports on their findings. The investigations undertaken by the Commission reflect proactive enforcement of human rights. The Commission has produced, at the end of its investigations, reports on a wide range of topics: from the effect of road closures on the right to movement, to the conflict between the right to equality and the freedom to associate. See SAHRC ‘Report on the Public Hearings into the Use of Boom Gates and Road Closures’ available at [http://www.sahrc.org.za/sahrc\\_cms/publish/article\\_132.shtml](http://www.sahrc.org.za/sahrc_cms/publish/article_132.shtml)

[I]nternational standards require that the [national human rights] institutions do more than simply function as a surrogate court of law. Their role is to actively protect and promote human rights and not to exist simply as an investigative mechanism which reacts to human rights violations. The institutions must work systematically and holistically towards the attainment of internationally recognized human rights.<sup>96</sup>

The Constitutional Court, in *New National Party*, acknowledged this role of Chapter 9 Institutions in determining the contours of South Africa's new constitutional order. Deputy President Langa wrote, on behalf of the Court, that that '[t]he Constitution places a constitutional obligation on [all] . . . organs of state to assist and protect the [Independent Electoral] Commission in order to ensure its independence, impartiality, dignity and effectiveness.'<sup>97</sup>

In sum, FC s 181 through FC s 194 identify a fourth (or fifth), indispensable branch of government that has responsibility for determining the meaning of the Final Constitution.<sup>98</sup>

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(accessed on 8 February 2006); SAHRC 'Report on the Public Hearings into Equality and Voluntary Associations' (July 2006) available at [http://www.sahrc.org.za/sahrc\\_cms/publis](http://www.sahrc.org.za/sahrc_cms/publis). These investigations, and the subsequent reports, have occasionally provoked intense controversy. The Investigation of Racism in the Media led to the issuance of subpoenas by the SAHRC and equally unusual litigation-like responses from members of the media. K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571, 584-86. Perhaps the most surprising outcome of all is the extent to which other branches of government and private parties treat these findings as binding.

Of equal import is the SAHRC's capacity for adjudication and litigation. With respect to its powers of adjudication, a three member panel chaired by an SAHRC Commissioner held that a the chanting of a slogan 'kill the farmer, kill the boer' did, indeed, amount to hate speech. *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC). With respect to its powers of litigation, the SAHRC has been an amicus or party in numerous cases. See eg, *Bekeker & Another v Jika* 2002 (4) SA 508 (E), [2002] 1 All SA 156 (E); *S v Twala (South African Human Rights Commission intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC), 1999 (2) SACR 622 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* 1998 (12) BCLR 1517 (CC), [1998] 3 ALL SA 26 (W); *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*'). The SAHRC has even acted against a vacation resort that evicted a family accompanied by two black children. See 'Settlement of the Equality Court case against the Broederstroom Holiday Resort' available at <http://www.sahrc.org.za/media> (accessed 3 February 2006). In the magistrate's court, the SAHRC won a case on behalf of a learner who was assaulted and subject to racist remarks. See 'Landmark Victory: Edgemead Race Case' available at <http://www.sahrc.org.za/media> (accessed 3 February 2006).

<sup>96</sup> Govender 'SAHRC' (supra) at 572.

<sup>97</sup> *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*New National Party*') at para 78.

<sup>98</sup> The commitment to complementarity – of shared constitution interpretation and shared constitutional competence – has moved beyond mere rhetoric. In *Grootboom*, the Constitutional Court's remedy required the SAHRC adopt a supervisory role to ensure the government compliance with the Court's order to provide alternative accommodation for those persons most desperately in need. *Grootboom* (supra) at para 97. As I have noted elsewhere, Roach and Budlender's study of government responses to judicial remedies – or the lack thereof – should underwrite a more significant role for the SAHRC with respect to actual rights enforcement. K Roach & G

The other branches of government have an obligation not only to take heed of the activity of the Chapter 9 Institutions, but a duty to take their interpretations of the basic law seriously.<sup>99</sup>

## vi. Public Participation in Law-Making

As a general matter, the constitutional structures for ‘public participation in the process of law-making’ seem to me to belong, more properly, under the discussion of participatory bubbles below. A case has been made, however, that public participation in the process of law-making forms a part of a regime of shared constitutional interpretation.

In the discussion of *Matatiele II* and *Doctors for Life*, below, I emphasize the extent to which the Court was concerned with deepening democracy and creating space for citizens to address specific problems that have a direct bearing on their lives. In participatory bubble-speak, once a specific conflict has been resolved, the bubble bursts and legislators and citizens alike return to other matters that occupy them.

But, as Marius Pieterse has made clear to me, there need not be such a neat cleavage between the immediate outcomes of participatory bubbles and the long term effects of shared constitutional interpretation. Immediate outcomes of participatory bubbles can have at least two roles to play in the domain of shared constitutional interpretation. First, to the extent that our courts have created the space for meaningful participation by the citizenry in the law-making process, then citizens have a role to play in shaping the meaning of constitutional norms through the legislative (as opposed to the judicial) process. That is, citizens, through the drafting of some kinds of legislation, will play a direct role in giving the basic law content. Second, even where the law fails to reflect the interventions of the citizenry, the ‘burst’ participatory bubble leaves behind a residue of active political engagement. The failure to influence the setting of norms (constitutional and statutory) in one set of circumstances need not, indeed cannot, prevent any future influence of civil society on norm setting. Just as neuronal networks that fail to rise to the level of consciousness may yet form a winning coalition in cognitive battles over

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Budlender ‘Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?’ (2005) 122 *SALJ* 325.

<sup>99</sup> Of the Chapter 9 Institution’s ‘shared’ powers of constitutional interpretation, the Constitutional Court, in *S v Jordan*, wrote:

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is there constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission’s views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that [the legal provision at issue] is unfairly discriminatory on grounds of gender reinforces our conclusion.

2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 70.

‘awareness’, citizen networks that fail to carry one vote in Parliament may yet build upon their current strength and win a future battle in the legislature. Pieterse’s point, fleshed out thus, is that the space created by participatory bubbles in legislatures holds out the promise that citizens have an ongoing role to play in the formation of constitutional norms and that such an ongoing role has the capacity to create community based organizations that ultimately share responsibility for constitutional interpretation with the branches of government.

### i. Participatory Bubbles

A scheme of shared constitutional interpretation introduces experimentalist element into the upper tiers of government institutions. The notion of bubbles of participatory deliberation directs our attention to experimentation in smaller units: at the level of the individual or the local community.

Because my naturalized account of the self takes seriously the limits on our capacity for rational reflection and collective deliberation, I believe it is inaccurate and obscurantist to ground our politics in an alleged capacity of individuals and groups to engage in profound reflection over critical existential questions. (Politics as reasoned discourse remains an ideal even as we recognize – doctrinally and institutionally – that it is not the common practice.) That said, my naturalized account of the self does not deny our capacity to engage in meaningful deliberation.

In acknowledging our significant limitations with regard to rational deliberation, Bruce Ackerman has offered an understanding of error-correction and political change that is restricted to a few key constitutional moments.<sup>100</sup> However, rather than limiting deliberation to a few earth-shaking moments of universal participation, the institutional design proposals in this chapter seek to create small-scale ‘bubbles’ of limited participatory deliberation over the content of individual constitutional norms and their application to subject matter specific, and often time-sensitive, institutional contexts.

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<sup>100</sup> See B Ackerman *We The People: Foundations* (1991)(Ackermann identifies two periods of intense political mobilization and public deliberation -- triggered by the Civil War and the Great Depression — that created radical paradigm-shifts in the United States’ fundamental constitutional commitments.)

The physical metaphor of bubbles is meant to convey three qualities of such small-scale institutional processes. First, processes of deliberation are a natural part of ongoing social interactions. They originate when challenges to a given institutional authority accumulate and finally come to a boil: just as bubbles form after pressure builds up and escape to the surface of a liquid. Second, bubbles are meant to suggest limits on the scope of deliberation. Bubbles only enclose a small amount of space -- both in terms of the issues debated and the number of participants. Third, bubbles are ephemeral. After satisfactory resolutions emerge from processes of participatory deliberation, the *raison d'état* for such process ceases to exist. Participants can return to their more routine lives.

How do bubbles relate to constitutional interpretation? As Robert Cover observed, interpretations of constitutional values are not confined to the courts. Instead, each community continually struggles to harmonize its internal values with the constitutional norms of the society at large.<sup>101</sup> Such interpretative struggles are not mere word games. They can pose serious questions of individual and group survival.<sup>102</sup> Does the constitutional right to shelter enable one to seek accountability from housing agencies?<sup>103</sup> Does the constitutional right to religious freedom allow a small and ostracized religious group to obligate law enforcement agencies to accommodate their deviant practices?<sup>104</sup> Does the foundational value of equality permit one to challenge public mores – and the laws that flow from them -- that discriminate on the basis of gender or sexuality or sexual orientation?<sup>105</sup>

Two important caveats are in order.

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<sup>101</sup> See R Cover '1982 Term Foreword: Nomos and Narrative' 97 *Harvard LR* 4, 28 (1983)(Commenting on the American Mennonites' *amicus curiae* brief in *Bob Jones University v. United States*, Cover characterizes the 'Mennonite understanding of the first amendment as not simply the 'position' of an advocate – though it is that [as well].' According to Cover, 'the Mennonites inhabit an ongoing nomos that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy.')

<sup>102</sup> See R Cover 'Violence and the Word' (1986) 95 *Yale LJ* 1601 (Cover reminds us of the inevitably coercive dimension of constitutional interpretation: 'legal interpretation takes place in a field of pain and death. ... A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.') See also J Van Der Walt *Law and Sacrifice* (2006).

<sup>103</sup> See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(*'Grootboom'*).

<sup>104</sup> See *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)(*'Prince'*).

<sup>105</sup> See *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)(*'Jordan'*); *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

Deliberation does not, necessarily, lead to better outcomes. As Susan Sturm and Cass Sunstein have pointed out, it can lead to greater polarization of positions. However, deliberation is less about consensus, and more about provisional agreement upon 'best practices'. The 'failure' of a practice – the negative feedback from our social environment – should lead us back to the drawing board to reflect further upon the nature of our failure and the options that remain. But even here, a further caveat is in order. As I have noted above, it seems relatively clear that many discussions between different branches of government in South Africa about 'best practices' never occur. And they do not occur because the political branches of government often appear incapable of making sense of the general norms articulated by the courts and of implementing the general norms – in the form of law and policy – that they do understand.

The mere fact of participatory bubbles does not ensure 'better' outcomes. Any court making use of various kinds of participatory bubbles must be alive to the possibility that the power imbalances reflected in adversarial legal processes will simply be replicated in a court-sanctioned participatory bubble. Courts must, in a Habermasian manner, attempt to craft bubbles that approximate 'ideal speech' conditions and that enable less powerful voices to be heard. In short, courts must be willing to articulate constitutional norms – as a departure point – that enable less powerful stakeholders to have a meaningful role to play in the polycentric decision-making process initiated by the court.

aa. Remedies

x. Theory

Conflicting interpretations of the application of constitutional principles to the practices or norms of a given institution leads to litigation. Those challenging existing norms seek to make the institutional practices consonant with their interpretations. One solution in such circumstances, as Owen Fiss has argued, is for the courts to initiate a process of structural reform. In these court initiated processes, 'the judge tries to give meaning to our constitutional

values in the operation of those organizations.<sup>106</sup> The preferred tool for such judicial intervention is, as Fiss suggests, a structural injunction (or interdict). Structural injunctions permit courts to engage in a

long, continuous relationship between the judge and the institution: it is concerned not with the enforcement of a remedy already given, but with the giving or shaping the remedy itself.<sup>107</sup>

A number of South African scholars have argued in favour of greater use of structural injunctions.<sup>108</sup> They recognize that one of a structural injunction's virtues is that it does not assign the task of constitutional interpretation exclusively to the courts. Structural injunctions should, preferably, create the space for deliberation over the meaning of constitutional principles between the accountable members of a given political – or private -- institution and the citizen-stakeholders challenging the institution's authority. Within such a bubble of deliberation, all those whose interests are at stake (within reasonable limits) are offered a chance to participate -- through their representatives – in the process of norm-setting and problem-solving. Furthermore, an injunction so fashioned maximizes the legitimacy of the deliberative process by ensuring openness to all view points and the relative equality of the parties within the process.

The promise of such a process is *genuine* deliberation. Each participant adopts a reflexive stance toward their own views and attempts 'to make the interests of others their own, [and to recognize] the circumstances in which they should give moral priority to what is good for others or for the polity as a whole.'<sup>109</sup> Thus, participatory bubbles facilitate processes of institutional reform that proceed within the vocabulary and the norms of the relevant institutions and communities, instead of via imposition by judicial authority. The reflexive stance of the bubbles'

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<sup>106</sup> See O Fiss 'The Supreme Court 1978 Term Foreword: Forms of Justice' 93 *Harvard LR* 1, 2 (1979).

<sup>107</sup> Ibid at 28. See also C Diver 'The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions' (1979) 65 *Virginia LR* 43, 82. For more skeptical views of court supervision, see DL Horowitz 'Decreeing Organizational Change: Judicial Supervision of Public Institutions' (1983) *Duke LJ* 1265, 1267; M Schlanger 'Beyond the Hero Judge: Institution Reform Litigation as Litigation' (1999) 97 *Michigan LR* 1994.

<sup>108</sup> See K Roach and G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 *SALJ* 325; S Budlender 'Making Socio-Economic Rights Effective: Judicial Remedies for Breaches of the State's Duty to Respect, Protect, Promote and Fulfil Socio-Economic Rights' (2002)(LLB dissertation, manuscript on file with author).

<sup>109</sup> See J Mansbridge 'A Deliberative Theory of Interest Representation' in MP Petracca (ed) (1992) *The Politics of Interests: Interest Groups Transformed* 37, 46.

participants should both foster a deeper commitment to public deliberation and enhance individual and group aptitudes for experimentation and error-correction.<sup>110</sup>

The foregoing discussion should make clear that participatory bubbles are important experimental feedback mechanisms. First, they enable state actors responsible for the creation of policy to benefit from insider information about the problem the parties aim to solve. Second, state actors and citizens who are not participants in a given bubble at a given moment have an opportunity to benefit – down the line – from the deliberation and the experimentation of their predecessors. Third, both the process and the outcome of deliberation in such bubbles should have a knock on effect. That is, it should create incentives for political institutions to pro-actively open up their decision-making processes to affected stakeholders in advance of conflict so as to seek out non-adversarial solutions.

Of course, courts called upon to perform limitations analysis and to fashion remedies cannot avoid adjudicating conflicts that are not susceptible to deliberative solutions. Here again experimental constitutionalism offers the additional idea of provisional adjudication. Provisional adjudication puts alternative possible remedies to the test of experience without necessarily elevating such remedies to the level of established doctrine. Provisional adjudication promises two additional benefits. It may facilitate compromise: affected parties may learn from practical experience and adjust their beliefs and conduct accordingly. It gives parties that may have been aggrieved with a final non-provisional outcome the opportunity to experiment with a remedy of their own making.

#### y. Practice

The South African experience with remedies such as structural injunctions is decidedly mixed. While the Constitutional Court has stated that a structural interdict may be an appropriate and valid remedy for some constitutionally infirm law or conduct,<sup>111</sup> it has repeatedly

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<sup>110</sup> See A Fung and EO Wright 'Deepening Democracy: Innovations in Empowered Participatory Governance' (1998) 29(1) *Science & Society* 5, 32 (Suggests that people may become more reasonable and reflexive after 'seeing that cooperation mediated through reasonable deliberation yields benefits not accessible through adversarial methods.')

<sup>111</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('August').

stressed that such an order must be only be made where it is 'necessary'. The Court has demonstrated great reluctance to employ this remedy.<sup>112</sup>

Again, reluctance is not refusal. The Constitutional Court employed a fairly stringent structural interdict in *August v Electoral Commission*. After finding that both the Department of Correctional Services and the Independent Electoral Commission had failed to take the requisite steps to ensure that prisoners could exercise their constitutionally enshrined entitlement to the franchise, the *August* Court turned its attention to the appropriate remedy for this constitutional infirmity. It wrote:

The Commission must therefore make the necessary arrangements to enable them to vote. This Court does not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected. During the hearing of this matter, counsel for the Commission was invited to indicate what arrangements for registration and voting would best suit the Commission in order to assist the Court in making a precise order. The Commission did not provide the information. The determination of what arrangements should be made remains a matter pre-eminently for the Commission. It is important that there should be certainty as to what these arrangements will be. In the light of the fact that this Court is not in a position in the circumstances of the present case to give specific direction as to what is to be done, it is appropriate that the Commission be required to indicate how it will comply with the order that has been made.<sup>113</sup>

The Court then ordered the Commission to deliver an affidavit that stated the manner in which the Commission would comply with its edict.<sup>114</sup>

Other courts have followed suit. In *Kiliko and Others v Minister of Home Affairs and Others*, the Cape High Court heard an application by asylum seekers from the Democratic Republic of

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<sup>112</sup> Cf *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at paras 96 – 114; *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2003 (5) SA 518, 590 (C).

<sup>113</sup> *August* (supra) at paras 38 – 39.

<sup>114</sup> As Steven Budlender notes, the *August* Court was motivated by the fact that 'just two months remained from the time of judgment to the time of the election, and was concerned that if there were any further dispute or uncertainty, the only way to allow prisoners to vote would be to delay the election. The court therefore very sensibly took matters into its own hands, demanding a timetable of arrangements from the Electoral Commission.' Budlender (supra) at 64.

the Congo.<sup>115</sup> The application contended that the procedures adopted by the Western Cape refugee reception office were unlawful and unconstitutional.<sup>116</sup> Van Reenen J concluded that the policy of limiting the number of asylum applicants to twenty per day constituted an unjustifiable infringement of the FC s 10 and the FC s 12 rights to dignity and to freedom and security of the person. As to the remedy, Van Reenen J held that the present case was an appropriate one for the granting of a structural interdict. The interdict required the respondents to provide the Court with a report on improvements to the reception of asylum-seekers in the Western Cape. According to Van Reenen J, the purpose of the order was to 'ensure that the manner in which the respondents receive and process applications for asylum in the future does not offend against any of the State's obligations under international law, the Constitution and statutes.'<sup>117</sup>

More recently, in *Child Law Centre v MEC for Education, Gauteng*, a High Court in the Transvaal Provincial Division handed down on an 'invitation' that goes significantly beyond the standard form of a structural interdict.<sup>118</sup> Having found that the school of industry and the MEC in question had failed to provide the most basic living conditions for its charges – and having found that they had thus violated FC s 28, FC s 10 and FC s 12 -- Judge Murphy put the school and the MEC on the strictest of terms. His order begins by requiring that the state

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<sup>115</sup> 2006 (4) SA 114 (C) ('*Kiliko*').

<sup>116</sup> Section 21 of the Refugees Act 130 of 1998 provides that an application for asylum must be made to a refugee reception officer at any refugee reception office. Five such offices exist throughout the country. The applicants contended in their own interest and in the public interest that the Western Cape refugee reception office was not providing them with a proper opportunity to apply for asylum. It permitted no more than 20 applicants to enter the office to apply for asylum on any given day. Vast numbers of asylum-seekers were effectively barred from applying for asylum.

<sup>117</sup> *Kiliko* (supra) at para 32. Van Reenen J relied heavily on the Cape High Court judgment in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others (No 1)*. But as Steven Budlender has pointed out, Van Reenen J appears to have overlooked the fact that the structural interdict granted by the Cape High Court in *Metrorail* was overturned by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*. 2005 (2) SA 359 (CC), 2005 – BCLR – (CC) at para 109. Moreover, Budlender questions whether the structural interdict was, in fact, 'necessary': the threshold imposed by the Constitutional Court. He writes:

Van Reenen J's judgment never assesses what makes the order necessary save to state that the manner in which the Department discharges its duties and obligations deleteriously affects the freedom and dignity of disadvantaged human beings and fails to adhere to the values of the Constitution. This, however, applies to many breaches of the Constitution and in our view, without more, is insufficient to justify the granting of a structural interdict. This is particularly so where the applicants did not seek a structural interdict in their notice of motion – leading Van Reenen J to accommodate his order under the general prayer for 'further and/or alternative relief'. While any number of factors could justify the granting of a structural interdict -such as a concern on the part of the Court that government will not effectively implement its order, a long history of rights' violations in the manner at issue in the case concerned, or the fact that a failure by government (even in good faith) effectively to implement the court order might have life and death consequences – and may well have justified the granting of such an order in the *Kiliko* case, it is necessary for courts to enunciate these factors when determining whether such an order is indeed 'necessary'.

Budlender (supra) at 75.

<sup>118</sup> *Child Law Centre v MEC for Education, Gauteng Case No 19559/06* (Unreported Judgment, Transvaal Provincial Division, 30 June 2006) ('*Child Law Centre*').

arrange the immediate provision of sleeping bags that would ensure sleeping temperatures of no lower than 5 degrees Celsius. The order then requires that:

- a. The MEC provide, within a month of the decision, a plan to ensure perimeter and access control to the school;
- b. The MEC and the school create, within a month of the decision, a quality assurance programme, in concert with relevant government bodies and non-governmental organizations, designed to ensure appropriate residential care and treatment;
- c. The MEC, the school and a multi-disciplinary task team (made up of child care experts) produce, within a month of the decision, a report on their initial findings and the progress made in the intervening period;
- d. The MEC and the school put in immediate place psychological and therapeutic support structures to ensure the well-being of the students;
- e. The MEC would appear in court, five weeks after the judgment, to describe the aforementioned plans and how it intends to go about their implementation;
- f. The applicants participate in the construction of the aforementioned plans and that they retain the ability to return to court seeking appropriate relief for any failure to carry out the court's order.

While legitimate doubts have been raised as to whether a structural interdict was the appropriate remedy in *Kiliko*, the facts of *Child Law Centre* – the dire circumstances of the children in question -- did not afford the High Court much by way of meaningful latitude. However, the *Child Law Centre* court is also quite clear that the order handed down has as much to do with its great displeasure with, and distrust of, the state in the instant matter. Judge Murphy writes:

While I am minded to commend the first respondent for its concessions about the poor state of affairs, I express the concern, I am sure shared by many, about the bureaucratic prevarication intrinsic to the department's litigation strategy. Section 195(1) of the Constitution requires the public administration to respond to public needs quickly and effectively. Increasingly one is witness to public statements made by politicians and community activists about the slow pace of the delivery of social services to the

vulnerable and marginalized sectors of our society. There is a growing sense arising in the general public that bureaucrats are failing us. I therefore venture the tentative suggestion that in many cases government departments defend litigation against them unnecessarily, and in doing that, use resources that might be better applied elsewhere.<sup>119</sup>

After detailing the parlous state of affairs at the school, and noting that the state had abdicated its responsibility to provide even marginally better care for these children than their parents currently could, Judge Murphy proceeded to announce the need for a structural interdict:

The need for a developmental quality assurance process is patently obvious. Matters appear to have come adrift at the school. They need to be remedied immediately. The process is a useful, investigative, diagnostic and remedial tool which will identify organizational weaknesses and a way forward. Given the dilatory and lackadaisical approach taken so far, it is a good idea that this court retains a supervisory role to ensure progress. Violations of constitutional rights invite innovative remedies and the present case calls for such.<sup>120</sup>

The court's order creates the conditions for a paradigmatic participatory bubble. For although the High Court finds that the general norms set out in FC s 10, FC s 12 and FC s 28 have been violated, the judge has left it up to the parties – under his supervision – to work out a plan that will leave all parties better off. Should this initial plan fail to provide the requisite levels of redress, the court retains the jurisdiction to ensure that the requirements of FC s 10, FC s 12 and FC s 28 are met. Thus, though the judgment stands as a scathing indictment of government lassitude, it also invites the state and the school to meet their respective obligations. Moreover, by requiring the state to engage non-state actors in the construction of its plans, the court's invitation enables it to draw upon expertise it simply does not possess and allows it to avoid the articulation of principles that might look pretty on paper but wind up being rather empty in practice.

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<sup>119</sup> *Child Law Centre* (supra) at 3-4.

<sup>120</sup> Ibid at 11. In a theme to which I shall return in the epilogue, Chapter 5, the undercapacity of the current public administration in South Africa practically begs for greater court intervention. Competent courts can create organizational structures that elicit information and proffer solutions beyond the ken of many departments. The common critique that courts cannot handle polycentric social disputes does little work under conditions that we might describe as polity (as opposed to market) failure.

## bb. Rules and Procedures in Constitutional Matters

The rules and procedures of the Constitutional Court reflect another, perhaps less obvious, set of court-created participatory bubbles. Rules and procedures regarding direct access, legal aid referrals, intervenors and amici all enhance deliberation and experimentation.

As Kate Hofmeyr notes, 'direct access applications are increasingly being used by parties where the relief they seek is substantially similar the relief sought by other parties in a matter already before the Constitutional Court.'<sup>121</sup> The Constitutional Court is inclined to grant many of these applications where the applicants' submissions relate to substantive issues that are already before the Court and where the insights offered by the applicants may help to resolve difficult issues before the Court. The Court is especially interested in submissions that help it to fashion more appropriate remedies<sup>122</sup> or enable it to fill in doctrinal 'gaps' in matters already before the Court.<sup>123</sup>

Legal aid referrals also possess the capacity to enhance the quality of the Court's deliberations by increasing the amount of litigation.<sup>124</sup> In two recent decisions, *De Kock v Minister*

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<sup>121</sup> K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2007) Chapter 5. The above discussion relies heavily upon Hofmeyr's superb analysis. See, eg, *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of The Republic of South Africa and Another* 2005 (1) SA 580 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC); *Minister of Home Affairs & Another v Fourie & Another*; *Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

<sup>122</sup> See *Bhe* (supra) at para 33.

<sup>123</sup> See *Minister of Home Affairs & Another v Fourie & Another*; *Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 42. However, where the issues raised in the application for direct access are quite complex, the Court will tend to regard privilege the value of another courts' views on the topic over the interests of the applicant in securing direct access. In *Mkontwana*, the Court granted the WLD applicants direct access in relation to the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000. *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) ('*Mkontwana*'). That issue was already before the Court in a confirmation proceeding. However, it declined to grant the applicants direct access in relation to other aspects of their challenge. With respect to the applicant's challenge to section 118(3) of the Local Government: Municipal Systems Act 32 of 2000, the Court found that the 'reasoned judgment of another court on how the section is to be interpreted is likely to be helpful'. Ibid at para 13. The Court also declined to grant direct access in relation to the WLD applicants' challenge to section 49 of Gauteng Local Government Ordinance 17 of 1939 and certain by-laws of the City of Johannesburg. Ibid at para 14.

<sup>124</sup> In terms of Rule 4(11), the Constitutional Court's Registrar refers an unrepresented party to the nearest office or officer of the Human Rights Commission, the Legal Aid board, a law clinic or such other appropriate body or institution that may be willing and in a position to assist such party.

of *Water Affairs and Forestry* and *Mnguni v Minister of Correctional Services*, the Constitutional Court, despite refusing to grant direct access to the unrepresented applicants in both cases, directed the Registrar to bring the judgments to the attention of the Law Society of the Northern Provinces.<sup>125</sup> The purpose of this procedure is to ensure that unrepresented applicants have the capacity to raise 'important yet difficult issues which may well require adjudication' by the Court.<sup>126</sup>

Intervenors represent -- in terms of Constitutional Court Rule 8 -- a second class of party that may enhance the Court's participatory and critical capacity.<sup>127</sup> In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwebho Intervening)*, an application was made by an Alexandra flood victim -- who was offered temporary accommodation at Leeuwkop -- for leave to intervene as a party.<sup>128</sup> The Court noted the applicant's 'direct and substantial interest in the proceedings' -- the test articulated in the case law surrounding rule 12 of the Uniform Rules of Court -- and determined that it entitled him to be joined in his own right to the proceedings.<sup>129</sup> On its face, Rule 8 envisages leave being sought from the Court by a party wishing to intervene in proceedings before it. By adding the requirement that leave be sought, the Court would appear to retain the discretion to determine the right of a party to intervene. However, the Court's own doctrine of objective unconstitutionality may limit that discretion dramatically. Despite the apparent desuetude of this doctrine, the Court reaffirmed its existence in *National Director of Public Prosecutions v Mohamed NO*<sup>130</sup> and recommitted itself to its original articulation in *Ferreira v Levin NO and Others*:

a statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court,

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<sup>125</sup> See *De Kock v Minister of Water Affairs and Forestry* 2005 (12) BCLR 1183 (CC) ('*De Kock*'); *Mnguni v Minister of Correctional Services* 2005 (12) BCLR 1187 (CC) ('*Mnguni*').

<sup>126</sup> *De Kock* (supra) at para 5; *Mnguni* (supra) at para 7.

<sup>127</sup> The 2003 Rules' inclusion of a specific provision relating to the procedure to be adopted by parties seeking leave to intervene in proceedings before the Court marks a change from the position under the 1998 Rules. Although the Court has yet to interpret Rule 8 itself, the Court's previous case law on intervention, as well as the case law surrounding Rule 12 of the Uniform Rules of Court, provide a rough and ready guide about what to expect from the Court under Rule 8. See K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, February 2007) Chapter 5.

<sup>128</sup> 2001 (3) SA 1151 (CC), 2001 (--) BCLR --- (CC) ('*Kyalami Ridge*').

<sup>129</sup> Ibid at para 30. In *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Ltd*, Corbett J highlighted the fact that the test of a direct and substantial interest in the subject-matter of the action had been regarded as the decisive criterion in applications for intervention. 1972 (4) SA 409, 416 (C).

<sup>130</sup> 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 58.

or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.<sup>131</sup>

The class of applicants with a direct and substantial interest in a declaration of invalidity that reaches the Constitutional Court for confirmation is potentially vast. (Indeed, the Court often speaks, quite rightly, of all South Africans as having an interest in the outcome of every constitutional matter because all constitutional matters engage the basic principles of a just and fair political order) As I have argued elsewhere, while the specific circumstances of the original applicants – or those seeking to intervene -- may shed further light on some of the implications of the impugned law or conduct, the doctrine of objective unconstitutionality, logically, makes the position of the applicants and interveners immaterial to the Court's ultimate determination.<sup>132</sup> While such a logical consequence of the doctrine may trouble a Court concerned with the manner in which it controls its docket, the doctrine takes the demands for increased participation demanded by experimental constitutionalism seriously.<sup>133</sup>

Amici constitute -- in terms of Constitutional Court Rule 10 -- a third class of party that may enhance the Court's deliberative capacity and participatory outcomes. While the Constitutional Court's regularly warns amici that they incur unique responsibilities,<sup>134</sup> this

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<sup>131</sup> 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC) at para 26. For more on the doctrine of objective unconstitutionality, see C Loots 'Standing, Ripeness & Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2005) Chapter 7; S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2005) Chapter 31.

<sup>132</sup> For more on the relationship between the doctrine of objective unconstitutionality and rights interpretation, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 34.

<sup>133</sup> The Court exercises enormous amounts of discretion with respect to direct access, legal aid referrals, intervenors and amici and uses that discretion to control the kinds of cases it hears. Such discretion, readily employed, invariably undercuts its commitment to objective unconstitutionality. The absence of a written record of this exercise of discretion, as both Marius Pieterse and Michael Bishop have pointed out, makes it difficult to assess the seriousness of the Court's invitation to non-state actors to approach it for relief. The real sting in Pieterse's critique is that a Court genuinely interested in adjudicating socio-economic rights would have heard more than four cases in twelve years. Email correspondence with Michael Bishop (5 February 2006); Email correspondence with Marius Pieterse (15 February 2006).

<sup>134</sup> In *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*, the Constitutional Court discussed the particular duty which amici owe to the Court:

In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus

warning is generally softened by the Court's express recognition of the invaluable role the amicus curiae often play in broadening – and thereby reshaping -- the Court's analysis.<sup>135</sup>

#### cc. Costs

In ordinary civil litigation, the general rule is that costs orders should indemnify a party against expenses that were incurred as a result of litigation that he should not have been required to initiate or defend. As Adrian Friedman notes, 'the rationale behind the rule in civil litigation is that, if a private person is brought to court to defend a claim with insufficient merit, it would hardly be fair to expect him to pay legal costs simply to defend an action that, objectively, ought not to have been brought in the first place.'<sup>136</sup>

The Constitutional Court has departed from that approach in one extremely significant way: it often does not award costs to a successful respondent. This practice holds especially if the respondent is a government entity.<sup>137</sup> Why? Because a sphere of government or an organ of state that successfully defends law or conduct alleged to be unconstitutional has not, in fact, incurred unnecessary expenses. The Court has made it clear that all parties – especially the most impecunious South Africans -- ought to be able to bring challenges designed to vindicate

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must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court.

2002 (5) SA 713 (CC) at para 5. For more on the rules governing amici, see G Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, July 2006) Chapter 8; K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, February 2006) Chapter 5.

<sup>135</sup> See, eg, *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at para 3; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 4; *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC), 2001 (11) BCLR 1137 (CC) at para 9.

<sup>136</sup> For an excellent discussion of costs upon which my views are almost entirely parasitic, see A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (2<sup>nd</sup> Edition, OS, February 2007) Chapter 6B.

<sup>137</sup> See *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole en 'n Ander v Premier Provinsie Vrystaat en Andere* 1998 – SA – (CC), 1998 (6) BCLR 653 (CC) at para 4; *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) ('*Motsepe*') at para 30; *In re: The Gauteng School Education Bill* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) ('*Gauteng School Education Bill*') at para 36; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) ('*Bel Porto School Governing Body*') at para 132. See also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 98. However, where the successful respondent is a private individual, the Court will often order the applicant to pay the respondent's costs. For example, in *Omar v Government, RSA and Others*, the Constitutional Court found that although the applicant's challenge to the Domestic Violence Act was 'to a considerable extent ill-conceived', no costs order should be made in favour of the governmental entities defending the Act. 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC) ('*Omar*'). At the same time, however, the *Omar* Court ordered the applicant to pay the costs of the third respondent – the applicant's ex-wife under Islamic law who had been obliged had to acquire various protection orders against the applicant in terms of the Domestic Violence Act. *Omar* (supra) at para 64.

fundamental rights.<sup>138</sup> As Friedman notes, the rationale for this significant departure from the rule for civil litigation is two-fold:

First, all constitutional matters – even when initiated to serve the immediate needs of individuals -- always reflect a public interest in the creation and the maintenance of a legal order that conforms to the requirements of the basic law. Second, the capacity to vindicate one's common-law rights has, unfortunately, long been dependent in commonwealth jurisdictions on one's available resources. The Constitutional Court's approach to costs mitigates the very real, and sometimes insuperable, fiscal barriers to effective vindication of constitutional rights by and for all South Africans.<sup>139</sup>

For the purposes of this chapter, the departure from the ordinary rule in civil litigation is important for two additional reasons. First, though some might think the proposition a bit tendentious, the relaxation of costs orders enhances the chances for experimental constitutionalism to gain some traction in South Africa because it enables poor applicants, who might not otherwise get to court, to launch challenges that force the judiciary and the state to make an assessment of whether law or policy reflects 'best practices' and conforms to basic dictates of justice. A negative finding should force both the judiciary and the state to consider alternative and, one hopes, better means of pursuing constitutional imperatives. Second, human flourishing is, in the South African legal order, inextricably bound up with the vindication of fundamental rights. Individuals and communities incapable of asserting their constitutional rights because of the costs and the risks that attach to litigation are individuals and communities less likely to flourish. The Constitutional Court's relaxed position on cost orders with respect to successful respondents (ie, the state) and unsuccessful applicants (ie, the citizens) ensures that more of the poor are likely to have their fundamental rights challenges heard.

#### dd. Constitutional Jurisdiction

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<sup>138</sup> See *Motsepe* (supra) at para 30; *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) ('*SACCAWU*') at para 51; *Gauteng Education Bill* (supra) at para 36.

<sup>139</sup> A Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2007) Chapter 6. Unsuccessful applicants who raise important constitutional issues will generally not be mulcted in costs. However, the Constitutional Court routinely awards costs to applicants who have successfully pressed constitutional challenges. See, eg, *Jaftha v Schoeman and Others; Van Rooyen v Stolitz and Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 66; *Bannatyne v Bannatyne and Another* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at para 41; *Larbi-Odam v Member of the Executive Council for Education, North-West Province* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 48; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at para 68.

In a number of recent cases, the Constitutional Court and the Supreme Court of Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, generally, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. In short, the courts' doctrines make it difficult for lower courts to revisit incorrect decisions and to revise them accordingly. The existing doctrine on constitutional precedent undermines efforts to make the basic law part of a more effective legal/political feedback mechanism.

The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) 'constitutional era'.<sup>140</sup> The Supreme Court of Appeal in *Afrox* extended binding precedent -- backwards -- past the very beginning of even the most controversial understanding of the 'constitution era'.<sup>141</sup> The *Afrox* Court recognized that High Courts could retain constitutional jurisdiction for any direct attack on a rule of law grounded in a pre-constitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed, through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true indirect application), its hands are tied.<sup>142</sup> The High Court is bound to follow the pre-constitutional decisions of the Appellate Division.

As Danie Brand and I have argued at great length elsewhere, the problems with *Walters* and *Afrox* on the issue of *stare decisis* and the constitutional jurisdiction of the High Courts are legion.<sup>143</sup> What is particularly troublesome for the purposes of a theory of experimental constitutionalism is that the Constitutional Court and the Supreme Court of Appeal have said that FC s 39(2) is the appropriate vehicle for development of the common law -- both directly and indirectly -- but that the High Courts may not disturb settled precedent through FC s

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<sup>140</sup> 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('*Walters*') at para 61.

<sup>141</sup> 2002 (6) SA 21 (SCA) ('*Afrox*').

<sup>142</sup> For more on the difference between direct application and indirect application, and why the former must, as a logical matter, precede the latter, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. The Court's refusal to recognize this basic principle of constitutional logic explains, in part, this particular failure in constitutional doctrine.

<sup>143</sup> See S Woolman & D Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38.

39(2).<sup>144</sup> This result effectively bars our trial courts from offering litigants new opportunities to explore the meaning of our basic law and the most effective ways of realizing its ends. The most obvious solution – and one consistent with the commitment to shared constitutional interpretation – is to relax the rule on precedent grounded in FC s 39(2) and permit High Courts to hear, at a minimum, direct (as opposed to indirect) constitutional challenges to precedent established under apartheid.

ee. Public Participation in Law-Making

As one might expect, and as Theunis Roux has discussed at great length elsewhere,<sup>145</sup> the Final Constitution's most obvious commitment to democracy is to be found in the provisions dealing with the powers and functions of Parliament, the provincial legislatures and the municipal councils.<sup>146</sup> Of particular import for any discussion of participatory bubbles is the extent to which the Final Constitution creates space for participation by minority parties and the

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<sup>144</sup> At least one space remains within which to contest existing precedent. The *Afrox* Court states that High Courts will be able to deviate from SCA, AD and CC precedent with respect to how they understand such open-ended notions as *boni mores* and public interest. *Afrox* (supra) at para 28. A second line of attack may be open to the High Courts. Where the Supreme Court of Appeal has assiduously avoided the constitutionalization of an issue of law, then the Constitutional Court's doctrines of legality, the unity of the law, constitutional supremacy and an objective normative value system suggests that the High Courts should have an opportunity to test such a rule of law against the basic law's dictates. See *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) SACR 1 (CC), 2001 (1) BCLR 36 (CC) at para 15 ('The development of, or the failure to develop, a common-law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.') See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31; F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

<sup>145</sup> T Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

<sup>146</sup> As Sachs J remarked in *Matatiele I*, '[d]emocratically elected by the nation, Parliament is the engine-house of our democracy.' *Matatiele I* (supra) at para 109. FC s 42(3) confirms that the primary form of democracy in South Africa is representative democracy. It reads:

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.

See *King & Others v Attorneys Fidelity Fund Board of Control & Another* 2006 (1) SA 474 (SCA), 2006 (4) BCLR 442 (SCA) at para 20 (Court concludes that '[t]hose are all facets of a National Assembly that belongs to the people, although its formal business is conducted through their representatives, and it is to an Assembly functioning in this way that the Constitution entrusts the power to legislate'.) The main function of the National Council of Provinces, in turn, is to represent provincial interests. FC s 42(4). Provincial legislatures and local governments fulfill similar functions. See S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17; T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 19.

general public and the extent to which the need for direct participation has been emphasized by the Court.

For starters, FC s 57(1)(b) provides that the National Assembly may ‘make rules and orders concerning its business, with due regard to representative and *participatory democracy*, accountability, transparency and *public involvement*.’<sup>147</sup> In *De Lille & Another v Speaker of the National Assembly*, the Cape High Court held that the ‘suspension of a Member of the Assembly from Parliament for contempt is not consistent with the requirements of representative democracy [in FC s 57(1)(b), read with FC s 57(1)(a) and FC s 57(2)(b)].’<sup>148</sup> The primary grounds for the High Court’s conclusion was that such a sanction not only hurt the Member of Parliament in question, ‘but also his or her party and those [members] of the electorate who voted for that party who are entitled to be represented in the Assembly by their proportionate number of representatives.’<sup>149</sup> As Roux rightly recognizes, *De Lille*’s gloss on FC s 57(1)(b) ‘is a classic instance of what John Hart Ely has called the ‘democracy-reinforcing’ function of judicial review.’<sup>150</sup>

FC s 57(2)(b) states that the National Assembly’s rules and orders must allow for ‘participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy’. This language is rehearsed with respect to the procedures of the National Council of Provinces, provincial legislatures, and municipal councils.<sup>151</sup> Two important decisions have been handed down on minority party participation in the proceedings of a municipal council and its committees (in terms of FC s 160(8).) In *Democratic Alliance v ANC & Others*, the reconstitution of three committees of the City of Cape Town was challenged under FC s 160(8).<sup>152</sup> The applicant, a minority political party, alleged that its representation on the City’s reconstituted executive

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<sup>147</sup> Emphasis added. This formulation is reiterated, in virtually identical terms, with respect to the National Council of Provinces and the provincial legislatures in FC s 70(1)(b) and FC s 116(1)(b). The latter provision was cited but not judicially considered in *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000*. 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) at para 17. The equivalent provision in respect of municipal councils, FC s 160(6) makes no reference to democracy. FC s 160(6) was considered in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others*. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at paras 96-112.

<sup>148</sup> 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) at para 27.

<sup>149</sup> *Ibid*.

<sup>150</sup> Roux (supra) at § 10.3 citing JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

<sup>151</sup> See FC s 70(2)(c), FC s 116(2)(b), FC s 160(8). See also FC s 61(3)(Providing that national legislation determining how provincial legislatures’ delegates to the National Council of Provinces are to be selected must ensure minority party participation); FC s 70(2)(b) (Rules and orders governing participation of provinces in proceedings of National Council of Provinces must be ‘consistent with democracy’.)

<sup>152</sup> 2003 (1) BCLR 25 (C).

committee and two other committees was adversely disproportional to the number of seats it held in the municipal council. In argument, counsel for the applicant conceded that FC 160(8)(b) participation requirement would be satisfied by a first-past-the-post system in which the majority party took all the seats on the executive committee.<sup>153</sup> The decision turned on the court's interpretation of FC s 160(8)(a). FC s 160(8)(a) provides that parties must be 'fairly represented' on committees of the Municipal Council.<sup>154</sup> On this issue, the Cape High Court held that FC s 160(8)(a) confers a right to participate in such committees, rather than a right to demand that the composition of each committee be proportional to the parties' representation in the municipal council.<sup>155</sup>

The Constitutional Court had an opportunity to consider FC s 160(8) in *Democratic Alliance & Another v Masondo NO & Another*.<sup>156</sup> In *Masondo*, the issue was whether a mayoral committee established under s 60 of the Local Government: Municipal Structures Act<sup>157</sup> was a committee as contemplated in FC s 160(8). Langa DCJ, writing for the majority, held that it was not. The Court found that the functions of mayoral committees under the Structures Act were 'executive' not 'deliberative',<sup>158</sup> and that since a mayoral committee was not elected by the municipal council, but appointed by the executive mayor, it was not a committee contemplated by FC s 160(8).<sup>159</sup> The real action, however, lies not in the majority opinion but in Justice O'Regan's dissent. O'Regan J agreed that FC s 160(8)(b) connotes simple majority rule. However, she felt obliged to dissent because, on her reading of FC s 160(8)(a), the Final Constitution requires a procedure in which the views of minority parties should at least be taken into account. In O'Regan J's view, 'the obligation of fair representation means that [majority] decisions [under

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<sup>153</sup> *Democratic Alliance v ANC & Others* 2003 (1) BCLR 25, 31D-F (C) (*Democratic Alliance v ANC*).

<sup>154</sup> *Ibid* at 31D-G.

<sup>155</sup> *Ibid* at 37F. Roux draws 'two provisional conclusions' from *Democratic Alliance v ANC*:

First, it is clear that, where the Final Constitution refers to democracy *tout court*, rather than any particular form of democracy, there is a danger that the term 'democracy' will be understood as a reference to the majority-rule principle, rather than the deeper principle of democracy that appears to underlie the constitutional text as a whole. Secondly, the Court's reluctance to super-impose its own conception of democracy on FC s 160(8) illustrates the inherent difficulty in all cases where the principle of democracy is implicated. As the Court notes, cases of this type are by definition 'political', and therefore subject, if not to a formal political question doctrine, at least to more than the ordinary degree of deference. When this deferential approach is coupled with the contested nature of democracy itself, it may be expected that non-specific or unqualified references to democracy in the Final Constitution will rarely give rise to determinate rules, other than the requirement that the dispute should be resolved according to the wishes of the majority. On the other hand, where references to democracy *are* qualified, there may be a basis for more robust judicial intervention.

Roux (*supra*) at § 10.3.

<sup>156</sup> 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) (*Masondo*).

<sup>157</sup> Act 117 of 1998.

<sup>158</sup> *Masondo* (*supra*) at para 19.

<sup>159</sup> *Ibid* at para 20.

FC s 160(8)(b)] are made only once the interests of non-majority parties have been aired.<sup>160</sup> O'Regan J summarized her position as follows:

[S]ection 160(8)(b) is clear that the principle of fair representation is always subject to democracy and the will of the majority. Members of the mayoral committee must therefore submit to that principle, as must all councillors. The principle established by section 160(8) is a principle which requires inclusive deliberation prior to decision-making to enrich the quality of our democracy. It does not subvert the principle of democracy itself.<sup>161</sup>

As Roux rightly notes, O'Regan J dissent echoes the theoretical literature's accepted view on the value of participation in political decision-making: While deliberation ought not to override the commitment to majority-rule – and no democratic regime 'should be beholden to the impossible ideal of decision-making by consensus' – 'deliberation and participation in decision-making are stressed for the contribution these processes can make to better informed and more legitimate decisions.'<sup>162</sup> Justice O'Regan's dissent emphasizes the value of participation and deliberation at the same time as it recognizes that such virtues can, when a decision must be taken, become counterproductive.

Although a minority in *Masondo*, O'Regan J's view ultimately carried the day in *Matatiele II* and *Doctors for Life*.<sup>163</sup> *Matatiele II* and *Doctors for Life* provide a much more expansive and nuanced understanding of FC s 59(1)(a), FC s 72(1) and FC s 118(1). The *Matatiele II* Court was asked, amongst other questions, whether the Twelfth Amendment to the Final Constitution was

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<sup>160</sup> Ibid at para 63.

<sup>161</sup> Ibid at para 78.

<sup>162</sup> Roux (supra) at § 10.3.

<sup>163</sup> In *Matatiele I*, the Constitutional Court remarked, as obiter, that FC s 118(1)(a) may impose a duty on provincial legislatures, when considering a constitutional amendment under FC s 74(8), to entertain oral or written representations by the public. *Matatiele I* (supra) at para 65. Because the issue was not properly argued, the *Matatiele I* Court declined to decide it. It ordered that the issue be properly interrogated at a subsequent hearing. Ibid at para 86. For the same reason, the Constitutional Court declined to comment on the correctness of the view expressed by the Supreme Court of Appeal in *King & Others v Attorneys' Fidelity Fund Board of Control & Another* that '[t]he public may become "involved" in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes'. 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA) (*King*) at para 22 as quoted in *Matatiele I* (supra) at paras 64 - 65.

To understand FC ss 59(1), 72(1) and 118(1), as Theunis Roux notes, one must first understand FC ss 59(2), 72(2) and 118(2). FC s 59(2) states that the National Assembly 'may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society'. This provision is repeated, virtually verbatim, with respect to the National Council of Provinces, in FC s 72(2), and provincial legislatures, in FC s 118(2). Roux contends that 'these provisions . . . acknowledge the value not so much of public participation in legislative decision-making as access to information about the inner workings of the democratic process.' Roux (supra) at § 10.3.

unconstitutional because it re-demarcated the boundary of the municipality of Matatiele – and removed it from KwaZulu-Natal and into the Eastern Cape – without sufficient public consultation.<sup>164</sup>

Justice Ngcobo, writing for a majority of the *Matatiele II* Court, held that a provincial legislature, whose provincial boundary is being altered, is required by the Final Constitution to approve such an alteration. Moreover, when a provincial legislature takes a decision of this nature, it clearly invokes its law-making powers. As such, the provincial legislature is required to facilitate public participation in making its decision-making process. The Court's test for sufficient facilitation is that of reasonableness.

When determining whether a provincial legislature has acted reasonably, the Constitutional Court will have regard to factors such as the intensity of the impact of the legislation on the public. As Ngcobo J wrote:

The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to ensure that the potentially affected section of the population is given a proper opportunity to have a say.<sup>165</sup>

Ngcobo J found that *Matatiele II* satisfied the factual predicate required by test: the proposed amendment would have moved an entire, identifiable community from one province to another province. Moreover, the consequences of the proposed amendment were more than symbolic. The move of the municipality from KwaZulu-Natal to the Eastern Cape would have significant effects on the provision – to the constituents of Matatiele – of welfare payments, health services and education. (No one would argue that KwaZulu-Natal benefited from a more professional civil service.) Given the test to be applied, and the salient facts, the Court concluded that KwaZulu-Natal, in not holding any public hearings or inviting any written submissions, had acted unreasonably. As a result, that part of the Twelfth Amendment that altered the boundary of KwaZulu-Natal was declared unconstitutional.

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<sup>164</sup> *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) (*Matatiele I*).

<sup>165</sup> *Ibid* at para 68

In *Doctors for Life*, the Constitutional Court was asked to address a comparable question: whether the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were unconstitutional because they had been passed without the requisite levels of public participation. Ngobo J, again writing for a majority of the Court, began by noting that the National Council of Provinces (‘NCOP’) enabled the provinces to have a say in the national law-making process. NCOP delegations are generally obliged to secure voting mandates from their respective provincial legislatures. This direct influence of the provincial legislatures on their NCOP delegations meant that both Parliament and the provincial legislatures had a constitutional obligation to facilitate public involvement. Once again, the Court in *Doctors for Life* employed a reasonableness test for determining whether citizens possessed a meaningful opportunity to be heard in the making of laws.

The papers and oral argument made it abundantly clear that although the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act had – as Bills -- generated great public interest and that the NCOP had decided that public hearings would be held in the provinces, the majority of the provinces did not, in fact, hold hearings on these Bills. Given that the majority of provinces, and the NCOP itself, had failed to hold public hearings, and thus abdicated their respective responsibilities to provide the opportunity for public participation contemplated by FC 72(1)(a), the *Doctors for Life* Court held that both pieces of legislation had failed the test for reasonableness and were, consequently, constitutionally infirm.

For my purposes, *Matatiele II* and *Doctors for Life* stand for the proposition that public participation is not a good because it enhances deliberation or moral agency, but rather that public participation – depending upon the issued concerned – will elicit information that is deemed critical for decision-making in a robust constitutional democracy. Moreover, the kind of participation contemplated by the *Matatiele II* and *Doctors for Life* resonates quite profoundly with previous discussions about the nature and the purpose of participatory bubbles. Public participation in South Africa – after *Matatiele II* and *Doctors for Life* – is meant to address specific problems that have a direct bearing on the lives of the would-be participants. Once the contested matter has been resolved, the bubble bursts and legislators and citizens alike return to other matters that occupy them.<sup>166</sup>

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<sup>166</sup> These two decisions have shaken up political practices in all 9 provincial legislatures. None of the legislatures know how much participation is ‘reasonable’ for any given decision. But they do know that they are obliged to

ff. Chapter 9 Institutions

I have discussed above the manner in which Chapter 9 Institutions share constitutional competence for interpreting the Final Constitution. However, it may well be that, in a nation with as thin a civil society as South Africa, the most important role of the Chapter 9 Institutions is to create space for public discourse. What I mean is that these organizations play a critical role in mediating disputes both between the state and citizens and between private parties. Moreover, for the purposes of this work, the disputes are often of limited duration and easy disposition. The participatory bubbles provided are ephemera: voices are heard and claims are made. Resolutions – even nonbinding resolutions -- allow the participants to return their attention to other facets of their existence.

Take the Public Protector. The Public Protector must take those steps necessary to make its ombudsman services ‘accessible to all persons and communities.’<sup>167</sup> While meaningful access dictates that the services provided be free -- which the Public Protector’s services are -- they must also be geographically accessible and expeditiously dispatched. The Public Protector now has offices in every province and a national office in Pretoria.<sup>168</sup>

More importantly, although aggregate numbers of complaints and resolutions can suggest an overwhelmed and understaffed Public Protector’s office, the public appears to be getting good value for money.<sup>169</sup> In 2002, 10% of finalised cases found in favour of the complainant.<sup>170</sup>

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consider public participation when reaching decisions that will have some demonstrable effect on a discrete and identifiable portion of the community. Panel Discussion on *Mataliele II* and *Doctors for Life*, South African Human Rights Commission and the South African Institute for Advanced Constitutional, Public and International Law (11 October 2006).

<sup>167</sup> FC s 182(4) and PPA s 6(1)(b).

<sup>168</sup> See *2004 -- 2005 Annual Report* (supra) at 128 -- 129. The Public Protector has also instituted an outreach programme to improve access for people in remote areas. Ibid at 14 - 15. Forty-three visiting points across South Africa provide service at least once per week. More regional offices are planned.

<sup>169</sup> With regard to the speedy handling of claims, in 2004 -- 2005 the Public Protector carried over 9 292 complaints from the previous year and received 22 350 new complaints. *2004 -- 2005 Annual Report* (supra) at 19 and 20. Of the 31, 642 complaints in its docket for 2004-2005, only 17 539 were finalised. Thus, 14 103 complaints will be carried over into 2005 -- 2006. Ibid at 21 and 22. Although a special team of investigators has been created to respond to all complaints older than two years, given that most complaints reach their sell-by date after 24 months, this particular strategy might bear far less fruit than anticipated. Ibid at 13. The real crisis in the Public Protector’s office flows from its limited manpower. The office itself claims that the optimal number of active complaints per investigator is between 20 and 100. In 2003, the average was 111. In some provinces, active complaints per investigator average 157. *2003 -- 2004 Annual Report* (supra) at 11. These numbers reflect inadequate levels of funding and threaten both the public perception of and the actual effectiveness of the Public Protector.

In 99% of these cases, the state rectified the wrong.<sup>171</sup> When a well-founded and properly registered claim is made, the Public Protector appears to be a very accessible and a highly effective alternative to the courts.<sup>172</sup>

The SAHRC<sup>173</sup> and the CGE<sup>174</sup> hold regular hearings about legal issues of moment. Together, these institutions create participatory bubbles in which various constituencies can

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<sup>170</sup> 2001 -- 2002 *Annual Report* (supra) at 16. The complainant lost 9% of all cases; 50% of complaints were determined to be either premature or outside the Public Protector's jurisdiction; 4% of complaints were referred to another body to finalise; 1% of complainants were instructed to first exhaust alternative legal remedies; 26% of complaints required no further action due to a deficiency in the claim or the complaint being resolved without the Public Protector's aid. Ibid.

<sup>171</sup> Ibid. 98% were finalised before the case closed and a further 1% after the case closed. In only one case did the state refuse to follow the recommendation: it chose to take an alternative route to address the problem.

<sup>172</sup> The Office of the Public Protector increases access through its acceptance of complaints in numerous formats. Personal interviews ensure that persons who are illiterate or who lack sufficient education to draft a document stating the alleged wrong can lay a complaint. Complaints registered by telephone interview ensure that those persons who lack the resources (time or money) needed to travel to a Public Protector's office are still able to file a complaint. Complaints can also be initiated by letter. See *Office of the Public Protector Public Protector: South Africa* (2003), available at [http://www.publicprotector.org/brochure\\_faq/11\\_lang/english.pdf](http://www.publicprotector.org/brochure_faq/11_lang/english.pdf) (accessed on 1 November 2005). The brochure is available in all 11 official languages. A toll free number -- 0800 11 20 40 -- enables members of the public to speak directly with a member of the Public Protector's office. The office will assess both the merits of the claim and the likelihood of success should the complainant pursue it further. Ibid.

The Public Protector's relatively high rate of success in securing adequate redress for complainants raises the question of when, and whether, the Public Protector ought to be treated as the preferred forum for ventilation of disputes between a citizen and the state. As it stands, the law provides only limited disincentives with respect to forum shopping. On the one hand, the PPA permits the Public Protector to refuse to investigate any matter in which the complainant has not exhausted his legal remedies. PPA s 6(3)(b). This power has been exercised in less than 1% of all complaints. 2001 -- 2002 *Annual Report* (supra) at 16. On the other hand, the complainant has no obligation to approach the Public Protector for assistance prior to filing suit in a court of law. See *Ngxuzo v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609, 625 (E), 2000 (12) BCLR 1322, 1333 (E) ('[The Public Protector and the Auditor-General] are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the Courts are precluded from coming to the assistance of the applicants.') See also *Daboloribhuma Patriotic Front & Another v Government, RSA & Others* [2004] JOL 12911 (I) ('*Daboloribhuma*') at para 30.2. If anything, the current case law suggests that a complainant might be well advised to adopt a two-pronged approach to the resolution of a dispute with a public entity. In *Mothibeli*, the court held that the lodging of a complaint with the Public Protector does not count as sufficient reason for the late lodging of an application. *Mothibeli v Western Vaal Metropolitan Substructure* [1999] JOL 5678 (LC) at para 18 ('While the applicant may well have been entitled to approach the Public Protector for assistance, that clearly would have been a parallel exercise to the course of legal proceedings . . . In any event, he could not reasonably have understood that his referral of the dispute to the Public Protector could excuse him from pursuing the matter under the Labour Relations Act, including the filing of the necessary statement of claim in this Court.') See also *Prinsloo v Development Bank of Southern Africa Pension Fund & Another* [1999] 12 BPLR 439, 443 (PFA) (Condonation of late application denied despite earlier application to Public Protector.) *Mothibeli* makes the Public Protector a somewhat less attractive substitute for litigation. However, the Public Protector remains a free and an effective mechanism for dispute resolution. Those complainants who believe that their best chance at securing the required relief is to be found in the courts are not barred from filing in both forums simultaneously. The contemporaneous pursuit of litigation and alternative dispute resolution can only be said to defeat the purpose of creating the Public Protector if, in fact, the vast majority of complainants are obliged to adopt such a tactic. The evidence does not support such a conclusion.

<sup>173</sup> See J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24C; K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571; See J Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-Economic Rights' (2005) 27 *Human Rights Quarterly* 539.

engage one another in public debate regarding current crises and deeper fissures in South African society.

As Cathi Albertyn notes, the CGE's range of monitoring activities – and its invitations to a broad range of state and social actors – go beyond mere report writing and enter the realm of law and policy-making:<sup>175</sup>

Although the scope of the Commission's monitoring function extends across the entire spectrum of the state and civil society, much of its work has been aimed at the state. It has been especially engaged in the development of the government's legal and policy framework. In 1998, it commissioned an audit of discriminatory legislation to identify gaps in laws.<sup>176</sup> It has also made regular submissions to the South African Law Commission and to Parliament on laws affecting gender equality, including customary laws. More recently, it has addressed the issue of implementing law through the idea of an Annual Report Card of progress by various government departments.<sup>177</sup> The Commission has evaluated the participation of women in politics,<sup>178</sup> and the gender policies of political parties. It has monitored national and local elections to assess the participation of women in political parties and in voting.<sup>179</sup> . . . [T]he CGE's oversight

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<sup>174</sup> Cathi Albertyn writes:

The CGE's most important function is to act as a watchdog for gender equality, and hence of democracy. This watchdog role extends beyond the state to the private sector and civil society. Section 11(1)(a) of the Act explicitly authorises the CGE to monitor and to evaluate the policies and practices of all organs of state, statutory bodies or functionaries, public bodies and authorities and private business, enterprises and institutions. Section 11(1)(c) requires the CGE to evaluate any Act of Parliament or aspect of the common law, with particular emphasis on systems of personal, family and customary law. In terms of s 11(1)(h), the CGE is expected to monitor compliance with relevant international instruments, especially the Convention on the Elimination of All Forms of Discrimination Against Women.

C Albertyn 'Commission for Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 24D.

<sup>175</sup> Indeed, it may be that the CGE's investigative functions – as opposed to its monitoring mandate – better fits the model of participatory bubbles:

The CGE is mandated to investigate any gender-related complaint and resolve it through mediation, conciliation or negotiation.<sup>7</sup> Section 11 makes provision for two types of investigations: (1) those related to individual complaints brought to the Commission; and (2) those initiated by the Commission. This flexibility enables the CGE to identify and act upon significant areas of gender inequality in society. The complaints function sets up a tension between expending resources on addressing the needs of those who bring their problems to the CGE and ensuring that interventions are strategic and have the maximum transformative impact.<sup>8</sup> In order to diminish this institutional and budgetary strain, the Commission has sought to refer complaints to other institutions where possible, and to address the systemic problems that prevent women from using such institutions effectively.

Ibid (footnotes omitted).

<sup>176</sup> Centre for Applied Legal Studies *Audit of Legislation that Discriminates on the Basis of Sex/Gender* (1998). See also *CGE 1999* (supra) at 28.

<sup>177</sup> Commission on Gender Equality *Annual Report 2000* (2000) at 21-22 ('CGE 2000').

<sup>178</sup> Commission on Gender Equality 'Redefining Politics—Women and Democracy in South Africa' (1999).

<sup>179</sup> Commission on Gender Equality 'Report on the 1999 General Elections: A Gender Perspective' (1999).

responsibilities capture relationships within civil society. The CGE monitors traditional practices that are harmful to women: it has conducted research and engaged in dialogue with communities and traditional leaders on issues such as witchcraft and virginity testing.<sup>180</sup> The CGE has also developed a particular focus on gender equality in the private sector. It has recently undertaken a survey of the sector and produced a report entitled 'Best Practice Guidelines for Creating a Culture of Gender Equality in the Private Sector'.<sup>181</sup>

The CGE's activities enable it to undertake a broad array of short-term and long term problem-solving activities that require some form of polycentric decision-making. The independence of the CGE enables it to attract participants from multiple sectors of society. Finally, the absence of the need for a final resolution of a conflict enables the CGE to assist the courts and the legislature in general norm-setting without being beset by the zero-sum outcomes of constitutional litigation.

The SAHRC's range of activities is equally broad. Indeed, its subject matter competence, human rights, knows (virtually) no limits. With respect to its monitoring activities, Jon Klaaren writes:

The investigations undertaken by the Commission reflect proactive enforcement of human rights. The Commission has produced, at the end of its investigations, reports on a wide range of topics: from the effect of road closures on the right to movement<sup>182</sup> to the conflict between the right to equality and the freedom to associate.<sup>183</sup> These investigations, and the subsequent reports, have occasionally provoked intense controversy. The Investigation of Racism in the Media led to the issuance of subpoenas by the SAHRC and equally unusual litigation-like responses from members of the media. The Commission's early reports on the lack of respect for the rights of non-nationals in post-apartheid South Africa and on the conditions of detention at an official repatriation

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<sup>180</sup> Commission on Gender Equality *Annual Report 2000/2001* (2001) 9 ('CGE 2001').

<sup>181</sup> Commission on Gender Equality 'Gender and the Private Sector' (1999).

<sup>182</sup> SAHRC 'Report on the Public Hearings into the Use of Boom Gates and Road Closures' available at [http://www.sahrc.org.za/sahrc\\_cms/publish/article\\_132.shtml](http://www.sahrc.org.za/sahrc_cms/publish/article_132.shtml) (accessed on 8 February 2006).

<sup>183</sup> SAHRC 'Report on the Public Hearings into Equality and Voluntary Associations' available at [http://www.sahrc.org.za/sahrc\\_cms/publish](http://www.sahrc.org.za/sahrc_cms/publish) (accessed on 8 June 2006).

facility, Lindela, were greeted with harsh words by government and department officials (especially the Department of Home Affairs).<sup>184</sup>

But report writing constitutes the least provocative and the least innovative of the SAHRC's constitutionally-mandated activities. The SAHRC's brief embraces the protection of human rights through mediation,<sup>185</sup> adjudication,<sup>186</sup> litigation,<sup>187</sup> and interpretation<sup>188</sup> and enforcement.<sup>189</sup> It is, moreover, empowered to undertake these activities through a 'variety of dispute resolution mechanisms'.<sup>190</sup> Each power and each of these dispute resolution mechanisms enables the SAHRC to tailor its responses to the kind of dispute and the nature of the constituencies engaged by a particular matter. Finally, given the mediating role that the SAHRC plays between state and civil society and between groups within civil society, its emphasis has been on finding solutions to problems that leave all parties better off and able to return the rest of the lives heard, if not entirely happy.

#### (d) Participatory Bubbles & Shared Constitutional Interpretation as Feedback Mechanisms

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<sup>184</sup> J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24C.

<sup>185</sup> Human Rights Commission Act, s 8, grants the SAHRC the power to resolve by mediation, conciliation or negotiation any dispute or to rectify any act or omission in relation to a fundamental right. Section 20(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') -- Act 4 of 2000 -- empowers an equality court to refer disputes to an alternative forum. As Jon Klaaren notes, the preferred forum for such referrals is the SAHRC. Klaaren (supra) at Chapter 24C.

<sup>186</sup> The SAHRC has been loath to exercise its power of adjudication. But see *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) (Commission finds slogan 'Kill the farmer, kill the Boer' -- articulated at an ANC rally -- to constitute hate speech.) Perhaps one reason for this reluctance is that its decisions are often understood not to be binding on the parties to the dispute.

<sup>187</sup> While loathe to exercise its power of adjudication, the SAHRC has initiated litigation or participated as an amicus on numerous occasions. The virtue of its appearance as an amicus -- as I noted above -- is that it gives the courts, and especially the Constitutional Court, an additional perspective on a dispute. See, eg, *Bekker & Another v Jika* 2002 (4) SA 508 (E), [2002] 1 All SA 156 (E); *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC), 1999 (2) SACR 622 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W), [1998] 3 All SA 26 (W); *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others*; *Shibi v Sithole & Others*; *South African Human Rights Commission & Another v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

<sup>188</sup> See *Jordan* (supra) at para 70 (Recognizes role of Chapter 9 Institutions in shaping the Court's understanding of the content of a constitutional norm: 'This Court is of course not bound by the Commission [of Gender Equality]'s views but it should acknowledge its special constitutional role and its expertise.')

<sup>189</sup> As Jon Klaaren observes, the *Grootboom* Court endorsed a significant monitoring role for the SAHRC. Its remedy requested that the SAHRC adopt a supervisory role to ensure the state's compliance with the Court's order. See Klaaren (supra) at Chapter 24C.

<sup>190</sup> Klaaren (supra) at Chapter 24C.

The experience of many attorneys and scholars both in the United States and South Africa is that remedial intervention modelled on command-and-control of state bureaucracy is fraught with difficulty and largely a failure. The reasons have as much to do with the broad remedial sweep of the desired intervention as with the ability of lawyers to control the courts and other political agencies that must enforce court-sanctioned social change. The *apparent* initial failure of South African public interest lawyers to alter state policy on housing through litigation is but one local example.<sup>191</sup> In the United States, the past fifty years have witnessed ‘a move away from remedial intervention modelled on command-and-control bureaucracy toward a kind of intervention that can be called “experimentalist.”’<sup>192</sup> Sabel and Simon write that ‘instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency.’<sup>193</sup> They further view ‘public law [litigation] as core instances of “destabilization rights” - rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction.’<sup>194</sup>

(i) Experimentalism in American Education Law and Policy

The United States has almost 80 years worth of experience with litigation designed to determine the shape of public school education.

In the first wave of such litigation, the aim was desegregation. Though initially successful as a legal intervention with regard to the racial stratification of society and political blockages in the democratically accountable branches of government, ultimately public litigation lawyers and courts found themselves unable to address the kinds of social movements – read white flight – that re-inscribed patterns of segregation.<sup>195</sup>

The next wave of litigation revolved around issues of fiscal equity. Ironically, although some of these constitutional cases have been successful of securing equal funding, the ultimate result has often been diminished funding overall of school education and movement out of the

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<sup>191</sup> See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (Court refuses to retain jurisdiction over case and does not specify a particular remedy: meaning that Government is on notice but no citations of contempt can force the Government to undertake a given course of action.)

<sup>192</sup> C Sabel & W Simon ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117 *Harvard LR* 1015.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid* at 1023.

public school system into the private school system (through private funding and vouchers). Moreover, there was no discernable improvement in the performance of schools in historically poorer districts.

These two experiments in social change have been followed by a third. This last wave of education litigation has been marked by an emphasis on adequacy. Unlike the first two waves of education litigation, the new legal regimes do not contemplate judicial micromanagement or administrative centralization. In writing about attempts at establishing adequacy baselines in Alabama, Helen Hershkoff has argued that new kinds of judicial decrees ‘establish[] a structure for institutional reform, [but do not] not fix[] the precise content of [the] reform.’<sup>196</sup> The third wave of education litigation has been influenced, note Sabel and Simon

by the ‘new accountability’ movement in educational reform. That movement results from the interaction of both centralizing and decentralizing developments. The centralizing theme emphasizes the importance of comparative performance measurement and material incentives. The decentralizing theme prescribes devolution of authority . . . [to] districts, principals, and teachers (and sometimes parents).<sup>197</sup>

The point about this last wave of education litigation for the purposes of this work’s more general arguments about ‘flourishing’, ‘feedback mechanisms’ and ‘trial and error’ is two-fold. First, it recognizes systemic failures of previous legal experiments to effect the desired change. Second, it offers the opportunity for trying a variety of different solutions to the same problem: namely, how to improve the performance of all students while simultaneously acknowledging, addressing and redressing the deficits of the worst off. The new model of legal and political intervention in education may or may not prove fruitful. But it certainly does reflect the notion, emphasized throughout this work, that we expand the conditions of freedom – not simply by allowing people to do as they wish – but through state-sponsored experiments in living that enable us to see for ourselves what kinds of institutions expand *materially* our conditions of possibility. Public interest litigation – and state responses to it – is an important political feedback mechanism. By moving back and forth between courts and legislatures, experts and

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<sup>196</sup> ‘Positive Rights and State Constitutions: The Limits of Federal Rationality Review’ (1999) 112 *Harvard LR* 1131, 1190 (Describing *Harper v Hunt*, No. CV-91-0117-R (Ala Cir Ct Montgomery County, Apr. 1, 1993)).

<sup>197</sup> *Ibid.* See also M Rebell & R Hughes ‘Schools, Communities, and the Courts: A Dialogic Approach to Education Reform’ (1996) 14 *Yale Law & Policy Rev* 99, 114 - 136.

parents, the wave after wave after wave of litigation achieves the kind of experimental success that ought to be the hallmark of a politics committed to individual and group flourishing.

(ii) Experimentalism in South African Housing Law and Policy

Can South African public interest litigation re-make itself and follow a similar experimentalist pattern? One way to interrogate this possibility is to review the surrounding circumstances of, the Court's opinion in, and the political response to *Republic of South Africa v Grootboom*. Kirsty McLean offers the following account:

*Grootboom* began with an informal community's occupation of private land. The community named their new settlement 'New Rust' — and it was, all things being equal, an improvement upon the deplorable conditions of their previous settlement. The owner of the land, however, sought and obtained an order for the community's eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.<sup>198</sup> The community then sought shelter on a municipal sports field. After requesting assistance, but receiving none, from the relevant local government authorities, the community sued the local municipality in the Cape High Court for an order granting temporary shelter. In so doing, they relied on FC s 26 and FC s 28. Davis J granted an order in terms of FC s 28(1)(c), instructing the State to provide shelter for the children in the community, as well as their parents. The State appealed against this order to the Constitutional Court. After the intervention of an *amicus curiae*, the original claim based on FC s 26(1) and (2) was also reargued.<sup>199</sup> The Constitutional Court held that the rights in FC s 26 and FC s 28 did not entitle 'the respondents to claim shelter or housing immediately upon demand'.<sup>200</sup> At the same time, the Court emphasized that socio-economic rights are justiciable and that the right to housing is enforceable.<sup>201</sup> That enforcement, as a general matter, takes the form of direct regulation of State policy. Proper enforcement, according to the *Grootboom* Court, required the State to have in place a reasonable plan to realize the right to housing over time and within its budgetary constraints, including a plan to provide relief to those in desperate need. The declaratory order of the *Grootboom* Court reads as follows:

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<sup>198</sup> Act 19 of 1998.

<sup>199</sup> *Grootboom* (supra) at paras 3–16.

<sup>200</sup> *Ibid* at para 95.

<sup>201</sup> *Ibid* at para 94.

(a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.<sup>202</sup>

(aa) An Immediate Critique of *Grootboom*

On one view, *Grootboom* represents a classic instance of judicial deference in the face of extraordinarily difficult institutional reform.<sup>203</sup> As the Constitutional Court made clear, it could not, in good faith, have credited the government response to the housing situation as adequate under the circumstances. At the same time, the Court was concerned with its ability to intercede effectively in the legislative or administrative process for housing delivery. It therefore left the structure of the remedy almost entirely up to the government's discretion.

As Sturm points out, while a courts' concern regarding its institutional competence is entirely legitimate, that concern does not dictate deference.<sup>204</sup> Instead, the difficulty of the task of structural reform can be addressed through institutional mechanisms such as court-guided, deliberative negotiation between stakeholders: that is, the creation of a participatory bubble.

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<sup>202</sup> K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55. McLean's excellent monograph provides the factual substratum for the analysis that follows.

<sup>203</sup> See S Sturm 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown LJ* 1357, 1367-68 (Describes the approach embraced in *Holt v Sarver* 309 FSupp 362, 383 (ED Ark 1970). In *Holt*, a finding of grave constitutional violations in an Arkansas prison system was followed by a remedial order requiring a 'prompt and reasonable start toward eliminating the conditions that have caused the court to condemn the system and to prosecute their efforts with all reasonable diligence to completion as soon as possible.')

<sup>204</sup> *Ibid* at 1407-1408.

The immediate criticism of *Grootboom* is really two-fold. In addition to the Government's failure to address the desperate plight of the homeless, the case raises serious questions about the accountability of those government institutions responsible for housing to those most in need.<sup>205</sup> By deferring to the government, by accepting its 'good faith' commitment to put a plan in place, the Court sidestepped the issue of accountability.<sup>206</sup>

Instead of deferring entirely to the Government, the Constitutional Court could have taken a more forceful stance. It could have vindicated the destabilization rights of the community represented by *Grootboom*. Had the Court retained jurisdiction, it could have appointed representatives for affected citizens in the *Grootboom* community and enjoined government agencies, both national and local, to engage in earnest deliberation towards an effective solution. Using a structural injunction to create such a participatory bubble would have had several beneficial consequences.

Government agencies would have had to come up with a remedy particularly tailored to the needs of the *Grootboom* community.

This participatory bubble could have become the model for other similarly situated groups around the country. By multiplying such bubbles, the public and private actors charged with responsibility for housing policy would be required to take into account the saliency and the variance of the housing needs of different groups. The information gathered would allow government to allocate, more efficiently, scarce available resources and to fulfil the FC s 26 rights violated in *Grootboom*.

Such a polycentric process of deliberation would generate experimentalist responses to the resource constraints confronted by both government agencies and those in need of adequate housing. A structural injunction coupled with the replication of participatory bubbles throughout the country would give the Court, the government and the public the ability to share information about the kinds of strategies that work to alleviate homelessness.

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<sup>205</sup> See Sabel & Simon (supra) at 1062-63 (Note that political blockage, i.e., lack of accountability from the public bodies in question to certain stakeholders, is often an implicit element of the *prima facie* case for vindication of destabilization rights.)

<sup>206</sup> Sturm (supra) at 1411 (Argues that remedial orders must provide effective remedies 'reasonably calculated to produce compliance with the underlying substantive norm?')

The Constitutional Court did make a modest contribution toward developing an experimentalist model of fundamental rights adjudication. It charged the South African Human Rights Commission with the responsibility of monitoring compliance and facilitating information-gathering.<sup>207</sup> The SAHRC's enhanced 'supervisory' role would permit flexibility in the implementation processes in various locales, ensure participation by stakeholders in such processes, guarantee compliance with the basic norms articulated by the *Grootboom* Court and allow for constant comparison in housing policy outcomes around the country.<sup>208</sup> In other words, as an information-gathering body in this nation-wide experiment, the South African Human Rights Commission would report on local housing initiatives and publicize best practices.<sup>209</sup>

As the aforementioned benefits should make clear, the most compelling consequence of an experimentalist revision of *Grootboom* would be its systemic effect. *Grootboom* would come to represent a classic example of citizens exercising their destabilization rights and securing government accountability. We would see a *Grootboom* effect. That effect would flow from its trend-setting use of innovative injunctive relief to create participatory bubbles that facilitate wide-spread experimentation. The *Grootboom* effect would place other government agencies responsible for delivering basic necessities or transforming social institutions on notice. The revised *Grootboom* would tell government agencies that they are best served by finding stakeholder representatives to secure the necessary feedback on the community's needs before the government agencies design new and better forms of service delivery.<sup>210</sup>

(bb) The Reformation of Housing Policy in Light of *Grootboom*

*Grootboom*, despite these critiques, and the failure of many a municipality to effect coordinated and comprehensive programmes to address severe housing crises, housing policy in

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<sup>207</sup> See *Grootboom* (supra) at para 97 ('Commission indicated during argument that the Commission had the duty and was prepared to monitor and report on the compliance by the State of its section 26 obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the State to comply with its section 26 obligations in accordance with this judgment.')

<sup>208</sup> See Sabel & Simon (supra) at 1069 - 1071 (Authors note the experimentalist tendency in public law remedies in the United States. The remedies, which take 'the form of a rolling-rule regime', are provisional rules that are evaluated according to their success in achieving the desired outcomes and can be supplanted with more successful rules.)

<sup>209</sup> See Klaaren (supra) at Chapter 24C (Klaaren argues that the Human Rights Commission has the capacity to play an 'important independent role to play in interpreting, influencing and critiquing the state's obligations with respect to socio-economic rights.')

<sup>210</sup> See Sabel & Simon (supra) at 1080-82 (Argue that vindication of destabilization rights tend to spin a 'web' of social networks that extend far beyond the litigants effected by the positive outcome of the litigation.)

South Africa, has not been an unmitigated disaster. As Kirsty McLean notes, '[f]rom 1 April 1994 until December 2005, the South African government subsidized the construction of 1 916 918 houses and in so doing, at an average of 4.1 people per household, provided housing to approximately 7 859 363 people in South Africa.'<sup>211</sup> Such an accomplishment could only be achieved, as Kecia Rust points out, because:

South Africa has tackled issues of housing finance, social housing, and consumer protection. It has institutionalised the concept of 'people's housing', made space for women in the construction industry, and supported the role of emerging builders. It has built a single, non-racial department of housing out of a previously fragmented and inefficient system. And, perhaps most importantly, it has entrenched the right to adequate housing in its constitution. Each of these developments is a significant achievement. Their combination, especially given South Africa's history, is unparalleled.<sup>212</sup>

However, for my immediate purposes, *Grootboom* ultimately signals the capacity of the South African state to meet (some of) the doctrinal demands of shared constitutional interpretation. For while the state and the Constitutional Court may have appeared, immediately after the judgment, to have failed to engage one another in a sustained conversation about housing law and policy, that conversation has, in fact, taken place.

Recall that the *Grootboom* Court held that to be found reasonable, a comprehensive and coordinated programme to realise access to housing (and the other socio-economic rights found in FC s 26 and FC s 27): (1) must ensure that 'the appropriate financial and human resources are available'; (2) 'must be capable of facilitating the realisation of the right'; (3) must be reasonable 'both in their conception and their implementation'; (4) must attend to 'crises'; (5) must not exclude 'a significant segment' of the affected population; and (6) must 'respond to the urgent needs of those in desperate situations.'<sup>213</sup> Evidence for the claim that the National Housing

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<sup>211</sup> K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55 citing National Department of Housing *Ten Year Review* (2003).

<sup>212</sup> K Rust 'No Shortcuts: South Africa's Progress in Implementing its Housing Policy, 1994–2002' (Unpublished paper, Institute for Housing of South Africa, 2003, on file with the author) 7.

<sup>213</sup> See *Grootboom* (supra) at paras 39–46, 52, 53, 63–69, 74, 83.

Department has responded to *Grootboom's* call can be found in its new policy document, *Breaking New Ground*, and an array of amendments to the national *Housing Code*. McLean writes:<sup>214</sup>

Since 2000, and the decision in *Grootboom*, several shifts have occurred in housing policy. First, 'sustainability' has emerged as a key concept . . . and within the national Department of Housing.<sup>215</sup> Second, as the Medium Density Housing Programme reflects, *Grootboom* has been the catalyst for two significant policy developments: the recognition that the State must cater for 'all' housing needs (which resulted in the addition of Chapter 12 of the Housing Code 'Housing Assistance in Emergency Housing Circumstances' and Chapter 13 of the Housing Code 'Upgrading of Informal Settlements'); and the State's commitment to use both market-driven and non-market-driven mechanisms to diversify housing delivery.<sup>216</sup>

Additional evidence for the revolution of housing policy in response to *Grootboom* can be found in a 2004 amendment to the Housing Code that aims to 'provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need'.<sup>217</sup> And finally, the *Grootboom*

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<sup>214</sup> K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

<sup>215</sup> See S Charlton, M Silverman & S Berrisford Taking Stock: Review of the Department of Housing's Programme, Policies and Practice (1994–2003)(Unpublished paper, Department of Housing, 2003) 31.

<sup>216</sup> Ibid.

<sup>217</sup> See National Housing Code, Part 3: National Housing Programmes: Chapter 12 Housing Assistance in Emergency Housing Situations, 12.2.1., available at [http://www.housing.gov.za/Content/legislation\\_policies/Emergency%20%20Housing%20Policy.pdf](http://www.housing.gov.za/Content/legislation_policies/Emergency%20%20Housing%20Policy.pdf) (accessed on 25 January 2006). That said, many municipalities have failed to put the policy into practice. According to McLean, *City of Cape Town v Rudolph* reflects the ongoing gap between rhetoric and reality. *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C), 2003 (11) BCLR 1236 (C), [2003] 3 All SA 517, 547 (C)(In *Rudolph I*, the primary application was for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 by the Cape Town Metropolitan Municipality. The respondents brought a counter-application for an order by the Court that the applicants were in breach of their constitutional and statutory duties.) She draws particular attention to the remarkable similarity between the factual circumstances in *Grootboom* and *Rudolph*:

Both involved an attempt to evict a group of illegal occupiers from State-owned land by the Cape Town municipality. Both groups were living with 'no access to land, no roof over their heads . . . in intolerable conditions' or crisis situations. *Rudolph*, however, was decided almost three years after *Grootboom* and Selikowitz J took great care to apply the holding of the *Grootboom* Court to the facts of *Rudolph*. The *Rudolph* Court found that 'despite the clear statement by the Constitutional Court, applicant has still not implemented the AMLSP [Accelerated Managed Land Settlement Programme] or any equivalent programme' and that 'applicant has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court — and therefore the Constitution itself.'

McLean (supra) at 55-22 quoting *Rudolph I* (supra) at 553, 554. Of greater import, for my immediate theoretical purposes however, is the *Rudolph I* Court's order:

The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents as also its failure to have heeded the order in *Grootboom* . . . makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is 'necessary', 'appropriate' and 'just and equitable'.

Court's nostrum that a 'reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available' is reflected in the 2006 document 'Accreditation Framework for Municipalities to Administer National Housing Programmes'. The programme is designed to enable local government to carry out their housing responsibilities by providing the requisite accreditation and the necessary long-term financial support.<sup>218</sup>

(iii) Experimentalism in South African Education Law and Policy

Education law and policy, unlike housing, constitutes a somewhat less transparent context in which to test hypotheses regarding experimental constitutionalism. It is less transparent both because the courts have had less opportunity to engage in general norm setting and because governmental responses to the limited amount of judicial norm setting have been rather oblique. Perhaps the best example of this more nuanced engagement between state and society over the meaning of constitutional norms has occurred in a recent line of cases that have engaged linguistic and cultural autonomy in our public schools.<sup>219</sup> As we shall see, although the changes

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*Rudolph I* (supra) at 553. As McLean notes, the *Rudolph I* Court was obliged to hand down such a far-reaching order -- requiring the City of Cape Town to deliver a report within four months which outlined the 'steps it has taken to comply with its constitutional and statutory obligations' -- because the City had been afforded numerous opportunities to craft an appropriate response to the housing crisis and had failed to do so. McLean (supra) at 55-22 quoting *Rudolph I* (supra) at 560. The City of Cape Town has, subsequently, just managed to avoid being cited for contempt by making some effort to discharge their constitutional duties. *City of Cape Town v Rudolph & Others* (Unreported decision of the Cape High Court, 5 December 2005) ('*Rudolph II*') 2.

<sup>218</sup> K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55. McLean notes that it is too early to determine whether this programme will have its intended effect.

<sup>219</sup> For a close reading of the constitutional provisions and the statutes governing equity requirements at independent schools, see S Woolman 'Defending Discrimination: On The Constitutionality Of Independent Schools That Promote A Particular, If Not Comprehensive, Vision Of The Good Life' (2007) -- *Stellenbosch Law Review* -- (forthcoming). For a close reading of the constitutional provisions and the statutes governing equity requirements at public schools, see B Fleisch and S Woolman 'On The Constitutionality of Single Medium Public Schools' (2007) -- *SAJHR* --.

. The regulatory framework for admissions policies at non-state-aided independent schools appears to afford learners, parents, educators and school governing bodies (SGBs) a substantial degree of autonomy. See B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22 (1) *Perspectives in Education* 111; S Woolman & B Fleisch 'South Africa's Unintended Experiment in School Choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools' (2006) 18(1) *Education and the Law* 31; S Woolman & B Fleisch 'South Africa's Education Legislation, Quasi-Markets and School Choice' (2006) 24 (2) *Perspectives in Education* 1. In *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, Justice Kriegler claimed that IC s 32 (c), FC s 29(3) and then extant national and provincial education legislation and subordinate legislation collectively constitute

a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion . . . . There are, however, two important qualifications. Firstly, . . . there must be no discrimination on the ground of race . . . . A common culture, language or religion having racism as an essential element has no constitutional claim to

in law and policy are somewhat more diffuse than they might have been in the housing sector, they still reflect the kind of trial-and-error responses consistent with an experimentalist approach to statecraft.

The Department of Education's second white paper supports the proposition that the state has quite expressly adopted an experimentalist approach to education policy. In 1995, then Minister of Education Bengu wrote:

Policies are stated in general terms and cannot provide for all situations. Our legacy of injustice and mistrust continuously throws up problems which need the wisdom of Solomon to settle. In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected. The possibility of damage will be reduced if new policies are based on knowledge of our charter of fundamental rights and on sufficient consultation with those who are affected by them, if conflicts are negotiated, and if principled compromises are sought.<sup>220</sup>

The Minister acknowledges that the Department's various policy imperatives pulled in numerous directions and that no amount of analysis could anticipate the manner in which a complex set of policy initiatives would interact with a dynamic social environment. More importantly, he makes it clear that the state would revisit its experiments in education at some later date and revise them as circumstances required.

(aa) Extant Constitutional and Statutory Norms regarding Linguistic and Cultural Autonomy in Public Schools

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the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, . . . [the Constitution] . . . keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.

*Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Kriegler J)(*Gauteng Education Bill*) at paras 39—42.

<sup>220</sup> Department of Education *White Paper 2: The Organisation, Governance and Funding of Schools* (General Notice 1229, 1995) 7.

Before the velvet revolution of 1994, most political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility.<sup>221</sup> From the passive resistance of Ghandi, through worker movements of the early 20<sup>th</sup> century to the Freedom Charter, the preferred language of liberation was that of human rights discourse. The liberation movement's utilization of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner supremacy.

The liberation movement's universalist turn provides a partial explanation for the failure of group-based claims during CODESA and the MPNF. The African National Congress ('ANC') rejected every attempt to entrench what it termed 'racial group rights'.<sup>222</sup> Political power would have to be traded for peace. That peace, and the retention of economic power by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.<sup>223</sup>

But all was not lost. The Interim Constitution's and Final Constitution's rejection of group political rights<sup>224</sup> was at least partially compensated by the 'notable levels of constitutional significance' to which cultural, linguistic and religious matters were elevated.<sup>225</sup> The Final Constitution contains six different provisions concerned with culture, eight with language and four with religion.<sup>226</sup> The Final Constitution, as a liberal political document, carves out both 'public' and 'private' space within which cultural, linguistic and religious formations might flourish.

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<sup>221</sup> A Sachs 'Opening Remarks' Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 9 available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/SACHS1.pdf>, (accessed on 1 April 2005); H Giliomee 'The Majority, Minorities and Ex-Nationalities in South Africa and the Proposed Cultural Commission' KAS Seminar on Multiculturalism (1999) 37, available at [www.kas.org.za/Publications/SeminarReports/Multiculturalism/GILIOMEI](http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/GILIOMEI), (accessed on 6 January 2005).

<sup>222</sup> See S Woolman 'Community Rights: Religion, Language and Culture' in S Woolman T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.

<sup>223</sup> See Giliomee (supra) at 40. The ANC insisted that minority rights *qua* static, non-demographically representative levels of political representation were unacceptable. The ANC proposed a compromise between two political positions: the demand for unfettered majority rule on the one hand, and the insistence of some whites for structural guarantees that 'majority rule will not mean domination by blacks' on the other. The Bill of Rights is, in large part, the content of that compromise.

<sup>224</sup> See Sachs (supra) at 13 ('The instruments and institutions of government are not based on cultural groups, cultural communities or representation in terms of membership of a particular community.')

<sup>225</sup> See F Venter 'The Protection of Cultural, Linguistic and Religious Rights: The Framework Provided by the Constitution of the Republic of South Africa, 1996' KAS Seminar on Multiculturalism (1999) 19, available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/VENTER.pdf>, (accessed on 1 April 2005).

<sup>226</sup> Ibid. Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: (a) ss 9, 30, 31, 235 (culture); (b) ss 6, 29, 30, 31, 35, 235 (language); and (c) ss 9, 15, 30, 31 (religion).

The 'public' space and 'private' space within which cultural, linguistic and religious formations might flourish was -- in terms of FC s 29(2) and FC s 29(3), respectively -- reflected in the constitutional recognition of single medium public schools and culturally, linguistically, and religiously based independent schools. However, whereas public schools can, under FC s 29(2) maintain their linguistic homogeneity only when they met strict constitutional criteria for equity, practicability and historical redress, private or independent schools,<sup>227</sup> FC s 29(3) permits linguistically and culturally restrictive admissions policies at independent schools so long as these policies do not discriminate, intentionally, upon the basis of race. The Constitutional Court, in *Gauteng Education Bill*, has made it quite clear that particular comprehensive visions of the good life are more appropriately accommodated in private schools and not public schools.<sup>228</sup> As Kriegler J notes in *Gauteng School Education Bill*, IC s 32 (c), soon to be FC s 29(3), and then

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<sup>227</sup> IC s 32 read quite generously. It states that 'educational institutions based on a common culture, language or religion' can be established, 'provided that there shall be no discrimination on the ground of race.' FC s 29(2) reads: 'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.' FC s 29 (3) reads 'Everyone has the right to establish and maintain, at their own expense, independent educational institutions that a. do not discriminate on the basis of race; b. are registered with the state; and c. maintain standards that are not inferior to standards at comparable public educational institutions.' Rassie Malherbe contends that FC s 29(2) provides a strong guarantee -- a rebuttal presumption -- that linguistic communities can create and maintain publicly funded single medium public schools. See R Malherbe 'The Constitutional Framework for Pursuing Equal Opportunities in Education' (2004) 22(3) *Perspectives in Education* 9. With respect, Malherbe misreads FC s 29(2). He collapses, repeatedly, the distinction between the right to instruction in a mother tongue or preferred language (where practicable) with the obligation imposed upon the state to consider a range of options as to how to offer such instruction. Malherbe privileges single medium schools. FC s 29(2) does not. *Ibid* at 21. It only mentions them as only one in a range of alternatives that the state has an obligation to consider. Moreover, any option considered by the state for delivering mother-tongue instruction -- one of which is single medium schooling -- must satisfy the three criteria of equity, practicability and historical redress. Malherbe claims that because the Final Constitution specifically refers to 'single medium institutions' that 'whenever they [single medium institutions] are found to be the most effective way to fulfill the right to education in one's preferred language, single medium institutions should be the first option'. *Ibid* at 22. This analysis places the cart before the horse: because Malherbe collapses the distinction between mother-tongue instruction and single medium schools, he fails to recognize that the right to the preferred language instruction is subject to 'practicability', and the privilege of maintaining a single medium public school can only be retained if the school's continued existence satisfies the three-fold criteria of equity, practicality and redress. Finally, Malherbe asserts that 'right to education in one's preferred language is guaranteed unequivocally in the South African Bill of Rights.' *Ibid*. This statement is clearly false. As the above language of FC s 29(2) indicates, the right to receive education in the official language or languages of [one's] choice in public educational institutions' is subject to a powerful internal modifier -- namely, the right exists only where the provision of 'that education is reasonably practicable.' See also R Malherbe 'Submission to President Nelson Mandela on behalf of a group of Afrikaans Organizations' (15 May 1996); R Malherbe 'A Fresh Start: Education Rights in South Africa' (2000) 4 *European Journal for Education Law and Policy* 49.

<sup>228</sup> See *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) (Justice Sachs argues that the religious, linguistic and cultural rights found in the Interim Constitution are best understood as efforts to 'concretis[e] . . . a certain measure of cultural/linguistic autonomy in the private sphere. . . . Section 32(c) appears, . . . to be an explicit, if limited, acknowledgement of the need in certain circumstances to allow for a departure from the general principles of [non-discrimination. . . What appears to be provided for . . . is not a duty on the State to support discrimination, but a right of people . . . to further their own distinctive interests.]

extant national and provincial education legislation and subordinate legislation collectively constitute

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a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion . . . . There are, however, two important qualifications. Firstly, . . . there must be no discrimination on the ground of race . . . . A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, . . . [the Constitution] . . . keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.<sup>229</sup>

Justice Kriegler offers no comment on, and certainly no support for, the contention that communities bound by common culture, language or religion have some entitlement to state support. Quite the opposite. While sympathetic to the belief that communities bound by common culture, language or religion are an important source of meaning for many South Africans, Justice Kriegler makes it clear that the post-apartheid state can no longer support public institutions that privilege one way of being in the world over another. Indeed, here, at least, is one place where the Constitutional Court's jurisprudence is not so radically under-theorized that it leaves us with no useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make the state up and how those communities ought to engage one another. Public schools *are* public, not private entities and the state has an overriding obligation to ensure equal treatment of *all* of its citizens by *all* of its state officials (including teachers and principals.) The Final Constitution's answer to those parents who wish to school their children in the language, culture or religion of their choice is pretty straightforward: you may 'dig into your own pocket' and build the 'independent school' on your own time.

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<sup>229</sup> Ibid at paras 39 – 42.

Of course, the historical and legal record regarding community rights and public schools is somewhat more complex. And it is through this historical and legal record of the last decade that we can see how experimental constitutionalism does some explanatory work with respect to the explication of constitutional norms and the articulation of state policy.<sup>230</sup>

(bb) State Efforts to Control Private Power in Public Schools

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Over the past several years, the South African government, emboldened by 10 years of democracy and ANC majority rule, has started to flex its muscle. Concerns about consolidating power through reconciliation have receded. The current ANC administration is now in a better position to consolidate its power through policy initiatives closer to its heart – say those that pursue redress -- and to challenge existing patterns of privilege. The open textured character of the law in this area (of admissions policies and equity requirements) creates the necessary terrain for political contestation.<sup>231</sup>

As I have already argued elsewhere with respect to school fees and school choice, the lacuna in the law must, at some level, be viewed as intentional. The fragile state that drafted the Final Constitution, SASA, NEPA and EEA could never have withheld the authority that it had granted. At best, the state could hedge its bets. Whether the issue was school choice, school fees or admissions policies, a fragile state crafted legislation and regulation that divided management, governance and policy-making responsibilities between national government, provincial government, provincial Heads of Department, teachers, principals, unions, SGBs, parents and learners without establishing clear hierarchies of authority. The result was that local and private actors in the mid-1990s were able to assert their interests through legal channels without having to worry about being rebuffed by the state. The price the state paid for such assertions of private power was small by comparison to the compensatory legitimation that it secured through *de jure* and *de facto* decentralization.<sup>232</sup>

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<sup>230</sup> This legal space, as I have argued elsewhere, is a variable space, and one that can expand and contract in response to the political exigencies of a given historical moment. S Woolman & B Fleisch 'South Africa's Unintended Experiment in School Choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act Create the Enabling Conditions for Quasi-Markets in Schools' (2006) 16 *Education and the Law* 37.

<sup>231</sup> Cf J Beckmann 'The Emergence of Self-Managing Schools: Devolution of Authority or Disguised Centralism?' (2002) 14 *Education and the Law* 153, 161.

<sup>232</sup> H Weiler 'Comparative Perspectives on Educational Decentralization: An Exercise in Contradiction?' (1990) 12 *Education Evaluation and Policy Analysis* 433.

By the fin de siècle, the state's concerns had shifted from anxiety about its quiescence, to apprehension about the speed of transformation. The subtle change in the state's objectives did not, so it seemed, require dramatic alterations to the law. Rather, the state sought to achieve its more egalitarian ends through the very same legal structures that it had created to promote reconciliation: new policy experiments were undertaken without a significant change in the legal equipment.<sup>233</sup> And when there was change in the legal equipment, that change went largely unannounced.<sup>234</sup>

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<sup>233</sup> A good example of this shift in goals is on display in the state's efforts to bring independent schools to heel by attempting to control the age of admittance for learners at independent schools. The state seemed to assume that it could go after independent schools in this manner without having to worry about alienating a particular constituency – a constituency that would mobilize around ascriptive identifiers such as language, religion or culture. What the state failed to take sufficiently seriously was the ability of individual parents to mobilize around the interests of their own children. In *Harris v Minister of Education*, the High Court found that the state's age restrictions on admission to Grade 1 constituted an unjustifiable impairment of Tayla Harris' right to equality. 2001 8 BCLR 796 (I) (*Harris HC*) (The King David Schools refused to admit Talya to Grade 1 in 2001 -- even though her parents believed she was ready. The refusal to admit Tayla was based upon a notice issued by the Minister of Education stating that independent schools could only admit learners to Grade 1 at the age of 7. Unwilling to take the risk that Tayla might experience a developmental deficit after being held back a year, Talya's parents decided to challenge the constitutionality of the notice so that their daughter could be admitted to Grade 1 in 2001.) The *Harris* High Court found that the state had failed to tender any adequate justification for its policy. The Minister was naturally afforded an opportunity to rebut the presumption of unfair discrimination. First, the Minister argued that six-year old children were more likely to fail than seven-year old children and such failure rates had serious financial consequences for the state. Second, the Minister argued that the diversity of cultures and languages within South Africa produced insuperable difficulties for the creation of a school readiness test. Third, the Minister argued that there are sound pedagogical reasons for starting formal education at age 7. The *Harris* High Court rejected all three arguments tendered by the Minister because the state had failed to adduce any evidence in support of its claims. As a result, the state failed to rebut the presumption that unfair discrimination on the grounds of age had taken place. More importantly, the result thwarted state efforts, on apparently neutral grounds, to control private power as exercised through private institutions. *Harris* stands for the proposition that the associational rights of the parents who send their children to independent schools trump alleged state interests in equality where the equality interest asserted cannot be backed up by any compelling pedagogical reason. The Constitutional Court did not confirm the rationale for the High Court ruling, but found instead that found that the Minister lacked the requisite authority under NEPA s 3(4) to create such a rule. *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC) (*Harris CC*) at paras 11 – 13.

<sup>234</sup> The biggest legal challenge to the exercise of private power in private institutions has been the promulgation of the Promotion of Equality and Prevention of Unfair Equality Act 4 of 2000. PEPUDA constrains private power in ways the courts, and those who run public schools and non-state-aided independent schools, have yet to fully appreciate. Indeed, it seems fair to say that the government itself – in the form of national and provincial departments of education – remains largely unaware of the power this particular tool has to reshape admissions policies – along more egalitarian lines -- at both public schools and non-state-aided independent schools. PEPUDA makes it clear that its provisions prevail over all other law -- save where an Act expressly amends PEPUDA or the Employment Equity Act applies. A second canon of statutory interpretation tells us that more recent legislation ought to prevail. PEPUDA postdates SASA. Finally, although canons of statutory interpretation state that, *ceteris paribus*, more specific sectoral legislation or subordinate legislation ought to trump more general legislation, SASA does not contain any language that would suggest that in the event of a conflict between SASA and another piece of legislation, SASA ought to prevail. PEPUDA, both as a piece of ordinary legislation, and as a piece of super-ordinate legislation giving effect to the equality provision of the Final Constitution (FC s 9(4)), would appear to prevail over all other pieces of legislation that engage equality considerations in independent schools. Accepted canons of statutory interpretation supporting this reading, see L du Plessis *The Re-Interpretation of Statutes* (5<sup>th</sup> Edition, 2002). See also C Botha *Statutory Interpretation* (4<sup>th</sup> Edition, 2005). For more on the current ability of the state to control admissions policies and expulsion procedures in independent schools, see S Woolman 'Defending

The body of case law built up over the past ten years evinces the state's desire to advance transformation efforts more quickly and to control the exercise of private power in public spaces. At the same time, the decisions acknowledge that certain kinds of associational interests merit continued solicitude even in the face of the state's pursuit of more egalitarian educational arrangements.

Although the attempts by the state to control private power in public schools engages such diverse subject matter as religion, culture, SGB authority, age and freedom of expression, the most revealing exercise of state power with respect to admissions requirements in public schools occurs with respect to language rights. The four cases discussed below reflect the state's attempts to experiment with public school admissions requirements designed to protect linguistic rights.

Stated at a relatively high level of generality, the state has stepped into the breach created by those who assert a constitutional entitlement to single-medium public schools and those who assert the constitutional right to be educated in the official language of one's choice. Not surprisingly, the state has weighed in on the side of black students who wish to receive instruction in English, but who have found themselves excluded from predominantly Afrikaans-speaking public schools.

At issue in *Matukane & Others v Laerskool Potgietersrus* was the attempt by the parent of three learners, Mr Matukane, to enroll his three children (13, 13 and 8) at the Laerskool Potgietersrus.<sup>235</sup> The Laerskool Potgietersrus was then, and remains still, a state-aided dual-medium primary school.

In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans students and 89 English students. The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans nature of the school. The school contended that IC Section 32(c) – the precursor to FC s 29(3) -- vouchsafes the right

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Discrimination: On The Constitutionality Of Independent Schools That Promote A Particular, If Not Comprehensive, Vision Of The Good Life' (2007) – *Stellenbosch Law Review* – (forthcoming).

<sup>235</sup> *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

‘to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race’ and entitled the school to adopt admissions requirements designed to maintain the existing ‘culture’ and ‘ethos’ of the school. The Laerskool Potgietersrus also asserted that a DoE directive gave the school governing body the sole power to determine its criteria for admission.

Our law uniformly prohibits discrimination on grounds of race. Despite the school’s assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. Room existed to accommodate more English-speaking children. Little danger existed of the school’s Afrikaans culture and ethos being destroyed even if every black applicant were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. The *Matukane* court held that it could draw no other inference as to actual intent of the school’s admissions policy other than that it discriminated directly on the basis of race, ethnic and social origin, culture and language. Given that the discrimination took place on one or more of IC s 8’s listed grounds, unfairness was presumed. The burden shifted to the school to show that the discrimination was fair.

So while the Laerskool Potgietersrus might have been justified in its desire to privilege Afrikaans over English, the school failed to demonstrate why a modest increase in black English-speaking students would deleteriously effect the school’s promotion of Afrikaans language and culture. The *Matukane* court was driven by the facts to conclude that the ostensible promotion of language and culture were operating as surrogates for racial discrimination and that the respondent had failed to discharge its burden of proving the fairness of its admissions policies.

*Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere*, litigated in 2003, extends the holding in *Matukane* from dual-medium to single-medium schools.<sup>236</sup> However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of one’s choice.

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<sup>236</sup> 2003 (4) SA 160 (T).

Having notified the state that it had failed to take cognizance of FC s 29's commitment to linguistic diversity, the *Laerskool Middelburg* court conceded that the right to a single-medium public educational institution was subordinate to the right of every South African to a basic education and the proven need to share education facilities with other linguistic and cultural communities. The *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking – and largely black – learners to be prejudiced by the state's failure to play by the rules and the school's intransigence on the issue of dual-medium education. FC s 28(2)'s guarantee that the best interest of the child are always of paramount importance was held by *Laerskool Middelburg* court to trump the language and cultural rights of the school's Afrikaans-speaking learners.<sup>237</sup> So while the state's actions had, in fact, been mal fide, it was still able to secure a victory for educational equity by getting the proper parties – namely the children – before the court.

At issue in *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* was the refusal of an Afrikaans medium public school to accede to a request by the Western Cape Department of Education ('WCDoe') to change the language policy of the school so as to convert it into a parallel medium school.<sup>238</sup> Acting on behalf of 21 learners, the WCDoe had directed the primary school to offer instruction in their preferred medium: English. The WCDoe had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning and teaching to offer instruction in that language.

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<sup>237</sup> In deciding that the 'minority' students must be accommodated, the *Laerskool Middelburg* court correctly concluded that the right to a single-medium public educational institution was clearly subordinate to the right which every South African had to education in a similar institution and to a clearly proven need to share education facilities with other cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggested that it was an open question as to whether the exercise of own language and culture was better furthered where provision was made in a school for the exclusion of other cultural societies or not. Moreover, it quite wrongly argued that a claim to a single-medium institution was probably best defined as a claim to emotional, cultural, religious and social-psychological security. This trivializes the desire to maintain basic, constitutive attachments. It seems clear that the desire to sustain a given culture – especially a minority culture, as Afrikaaner culture now is -- is best served by single medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. As a result, the *Laerskool Middelburg* court must be wrong when it claims that the conversion of a single-medium public institution to a dual-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic communities' claim to a school organized around its language and culture. Ibid at 173. That is exactly what the conversion does.

<sup>238</sup> *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA) ('*Mikro*'). See also *Governing Body of Mikro Primary School v Western Cape Minister of Education* [2005] 2 All SA 37 (C).

The Supreme Court of Appeal summarily rejected both the WCDoE's reading of the Norms and Standards and the WCDoE's gloss on FC s 29(2).<sup>239</sup>

The decision is notable in two important respects. First, it diminishes – under current law – the ability of the state to determine admissions policy with regard to language. Such power continues to vest in the SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that individual schools retain the privilege – if FC s 29(2) conditions are met -- of offering instruction in a single medium. The effect of the Supreme Court of Appeal's decision in *Mikro* is to reverse, ever so slightly, the spin of *Laerskool Middelburg*. Not only is parallel-medium instruction an automatic default position, the current language preferences of a single medium school can still trump the policy preferences of national and provincial DoEs. It is impossible to read *Mikro* and not come away with the impression that linguistic associational interests may – on rare occasion -- trump equity concerns, and that they may do so even in public schools.

While *Mikro* might have brought some relief to the SGBs of single-medium Afrikaans-speaking schools, there is every reason to believe that such a respite will be brief. *Seodin*, a recent judgment in the Northern Cape, reinforces the holdings *Matukane* and *Laerskool Middelburg*.<sup>240</sup>

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<sup>239</sup> It did so on three primary grounds. First, the Supreme Court of Appeal overturned Bertelsmann J's finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the 'language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so.' The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicant's contention that FC s 29(2) could be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable.' *Mikro* (supra) at para 30. Such a reading, the *Mikro* Court held, would mean that any significant cohort of learners could demand instruction in their preferred language if it was conceivably possible to do so. The *Mikro* Court noted that such a reading would lead to the absurd consequence that 'a group of Afrikaans learners would be entitled to claim [a right] to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school.' Ibid. The Supreme Court of Appeal held that the correct reading of FC s 29(2) affords the state significant latitude in deciding how best to implement this right and that FC s 29(2) grants everyone a right to be educated in an official language of his or her choice at a public educational institution if, in the totality of circumstances, it is reasonably practicable to do so. That means, of course, that the right is only to language instruction, generally, and, thus to instruction at some school within an accessible geographical domain, and not, as the applicants had claimed, to language instruction at each and every public educational institution and thus to any school the applicants wished to attend.

<sup>240</sup> *Seodin Primary School v MEC Education, Northern Cape* 2006 (1) All SA 154 (NC).

In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the three SGBs of three primarily Afrikaans speaking public schools could not use language preference to exclude black, primarily English speaking schools from admittance. Moreover, public pronouncements by the MEC for Education on the need for greater integration in the public schools system could not be interpreted as an *ultra vires* act aimed at the elimination of single-medium – read Afrikaans – public schools. Where public schools are concerned, *Seodin's* reading of the Final Constitution make it clear that considerations of equality and transformation will, more often than not, trump considerations of associational freedom.<sup>241</sup>

From an experimental constitutional perspective, it is important that we read the Final Constitution and the subsequent litigation around language policy in public schools as part of an ongoing dialogue between the state and various actors in civil society about the meaning of the apposite constitutional norms – in particular the meaning of FC s 29(2) -- and how best to put that reading into practice. It is also important -- from an experimental constitutional perspective – to recall then Minister Bengu's words in the second white paper on public school governance:

Policies are stated in general terms and cannot provide for all situations. . . . In this protracted transitional period, in which new policies for a democratic society are being developed and implemented, the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognised and corrected.<sup>242</sup>

The position that the state has taken in the aforementioned cases and a raft of amendments to SASA and the regulations issued under SASA indicate, quite clearly, that the state is clearly no longer enamoured with its experiment with single medium public schools. So while in 1994, it may have been obvious to Afrikaans-speaking parents that their children were entitled, as a constitutional matter, to education in single medium public schools, the evolution of the law over the last 13 years has signalled that single medium public schools are a privilege and not a right. *Gauteng Education Bill* certainly narrowed the Interim Constitution's commitments. It assured learners of no more than that right to education in their preferred

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<sup>241</sup> More recently, in *Hoërskool Ermelo v Masilela*, a full bench of the Pretoria High Court ruled that the provincial Department of Education had good cause to force the school to change its language policy and start teaching pupils in both English and Afrikaans. The decision turns less on the merits of single medium education and more on the overt and appalling racist discrimination that black learners admitted to *Hoërskool Ermelo* had experienced: From being taught separately in a converted laundry, to being refused access to ablution facilities and the tuck shop, to being barred from participation in school sports activities, to being subject to regular racist taunts.

<sup>242</sup> *White Paper 2* (supra) at 7

language if their parents were willing to pick up the tab. The deadlock between the ANC and the NP in the May 1996 negotiations over the appropriate language for the education clause in the Final Constitution ultimately led to clause that reflects the ANC's refusal to allow privileged communities to use their historical advantage to exclude learners from historically disadvantaged communities on the basis of race. While the language of the Final Constitution 'appears' to reflect a compromise between the two parties, FC s 29(2) clearly eliminates any 'right' to single medium public schools and makes any demand for single medium schools subject to threshold tests for equity, practicability and historical redress.<sup>243</sup> The case law and various statutory

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<sup>243</sup> Brahm Fleisch and I believe that the extant jurisprudence now supports the following reading of FC s 29(2): 1. FC s 29(2) grants all learners 'the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.' First note that the right to receive education in the official language or languages of one's choice is not, as the Supreme Court of Appeal in *Mikro* noted, an unqualified right. The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read? We suggest that where sufficient numbers of learners request instruction in a preferred language – and, as we shall see below, we do possess regulations, as well as standards and norms, that make clear what those numbers are – and no *adequate alternative* school exists to provide such instruction, then a public school is under an obligation – with assistance from the state -- to provide instruction in the language of choice. 2. However, we proceed to the second sentence in FC s 29(2), it is worth taking another look at the meaning of 'reasonably practicable'. As an evidentiary matter, the learner or the learners or the state must be able to show that instruction in the language of choice is 'reasonably practicable' at the institution where the learner or the learners has applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single medium Zulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her at a single medium Zulu school. An inability to establish reasonable practicability would be even more pronounced where the learner who preferred instruction in Sepedi had access to an adequate school that offered Sepedi instruction. Finally, a failure to demonstrate that a request for instruction is reasonably practicable ends, as the *Mikro* Court found, the FC s 29(2) inquiry. 3. Assume, however, that the learner has shown that instruction in the language of choice is reasonably practicable at the institution where she has applied for admission. Only then do we consider the import of the second sentence of FC s 29(2). 4. The second sentence of FC s 29(2) states that '[i]n order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account: a. equity; b. practicability; and c. the need to redress the results of past racially discriminatory laws and practices.' 5. The second sentence of FC s 29(2) makes it patently clear that single medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single medium schools in no way privileges such institutions over dual medium schools, parallel medium schools, or schools that accommodate the multilingualism of the student body in some other way. All that this section of FC s 29(2) requires is that the state consider 'all reasonable educational alternatives' that would make mother tongue or preferred language instruction possible. 6. However, even if single medium schools are found to be one of the reasonable alternatives for preferred language instruction, the single school medium school must be able to satisfy a three factor test. That is, for a single medium school to be preferred to another reasonably practicable institutional arrangement – say dual medium instruction or parallel medium instruction -- it must demonstrate that it is more likely to advance or to satisfy the three listed criteria of equity, practicability and historical redress. 7. This constitutional concession to single medium schools is a very weak right indeed. (It is, perhaps, best described as right to have reasons or an entitlement to justification.) That said, it is not without value for proponents of single medium schools. What the second sentence of FC s 29(2) ultimately requires is that the state be able to justify its preference for one form of school over another. Given the Final Constitution's recognition of single medium schools as a legitimate means of providing preferred language education, the state will find itself under an obligation to demonstrate why another form of instruction – dual medium, parallel medium, special tutoring -- will better served the learners in question. Moreover, the Final Constitution's recognition of community rights, associational rights, religious rights, cultural rights and linguistic rights creates a set of background conditions against which claims for single medium schools must be taken seriously. For where preferred language instruction is reasonably practicable, and where single medium schools satisfy the desiderata of equity, practicability and historical redress, the state cannot simply invoke an overriding commitment to 'equality' or 'transformation' in order to dismantle single medium institutions. The Final Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against

amendments further narrow the space within which particularist claims can be made regarding the linguistic and cultural ethos of public schools. They do not, however, shut the window entirely. After a decade of experimentation with single medium public schools and parallel medium public schools, South African case law, education statutes and sector specific regulations now support the proposition that although linguistic associational interests may occasionally trump equity concerns where there is no sign of overt discrimination and where learners who wish to receive instruction in English – as opposed to Afrikaans – have access to English-speaking schools that provide an equal and an adequate education, Afrikaans-speaking learners and their parents have *no* constitutional right to single medium public schools.<sup>244</sup> What they have, for as long as FC s 29(2) remains in place, is a constitutional privilege to maintain single medium public schools where concerns of equity and historical redress can be adequately and practically met by other public schools.

### C. Flourishing, Dignity and the Politics of Transformation in South Africa

My original commitment to recasting freedom in terms of the more modest concept of flourishing required an equally modest conception of politics. To that end, this chapter has offered a constitutional theory best described as experimental constitutionalism.

In this section, I want to return to the notion that the individual, though fundamentally conditioned by the world, can use the various critical tools at her disposal to engage in more optimal forms of behaviour. I hope to have shown, in the preceding pages, that experimental constitutionalism provides a set of tools designed to expand both our capacity for critical discourse and our ability to participate in a greater array of ways of being in the world. And as I noted at the outset of this chapter, it is this extension of the range of ways of being in the world

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exclusion and discrimination, it rejects the kind of totalizing view of the state that marked and marred apartheid. Space remains – within both the private realm and the public realm – for the accommodation of multiple ways of being in the world. That public space, as we have seen, is extremely narrow for single medium public schools. But however narrow it may be, it cannot be entirely wished away. See B Fleisch & S Woolman ‘On the Constitutionality of Single Medium Public Schools’ (2007) – *SAJHR* –. For an alternative, but ultimately flawed, reading of FC s 29(2), see R Malherbe ‘The Constitutional Framework for Pursuing Equal Opportunities in Education’ (2004) 22(3) *Perspectives in Education* 9; R Malherbe ‘A Fresh Start I: Education Rights in South Africa’ (2002) 4(1) *European Journal for Education Law and Policy* 49.

<sup>244</sup> One thing seems certain. This experiment will continue. The white Afrikaans-speaking community will press for continued recognition of single medium public schools. The state, while publicly supporting the notional right of single medium Afrikaans schools to exist, will attempt to use the basic law and various statutes to force Afrikaans-speaking communities to accept parallel-medium instruction in public schools or to create single medium independent schools committed to the furtherance of Afrikaans language and culture.

– and the material conditions that make their exercise possible – that constitute what I really mean by flourishing.

But have we any reason to think that South Africa's Final Constitution is similarly committed to human flourishing? I think that we do. This belief is grounded in the Constitutional Court's express recognition that dignity – not freedom, and not equality – is the Bill of Rights' primary grundnorm.

My goal in this section then is to tie the Court's jurisprudence on dignity more tightly to my account of flourishing. If I can succeed in this part of my endeavor, then I will have gone some distance in demonstrating that flourishing – like experimental constitutionalism – ought to be recognized as an implicit, if not an explicit, feature of our basic law.

To make this connection requires one brief detour. I need to return briefly to the arguments, made in Chapters 1 and 2, that the self, as a theoretical construct, is best understood in terms of flourishing. Only then does it make sense to tie the concept of flourishing to the Constitutional Court's understanding of dignity.

### 1. The Situated Self

As I suggested in Chapters 1 and 2, the self with which I am concerned is neither the rational chooser of classical economics nor the autonomous moral agent of classical liberalism. Each self is best understood, in Dennett's terms, as a centre of narrative gravity. Each such centre unifies a set of dispositional states (and a physical body) that draw down on the practices of the various communities – religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) -- into which that centre is born. This view of the self supports a number of pretty straightforward conclusions about the individual in South African constitutional politics.<sup>245</sup>

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<sup>245</sup> At the same time this account of the self demonstrates the extent to which associations are constitutive of the self, it dispels the notion that individuals are best understood as 'rational choosers' of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogeneous set of practices – of ways of responding to or acting in the world. The centrality of inherited practices or social endowments for both the creation and the maintenance of identity introduces an ineradicable element of *arationality* into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*. They are not reflective. They are not critical. They are not chosen. They just are. It is this heterogeneous variety of associations and practices into which we are

My account of self, consciousness and freedom, rightly understood, forces us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*.<sup>246</sup> Moreover, these theses regarding the self and the nature of conscious buttress my general contention that our constitutive attachments to particular ways of being in the world possess a rebuttable presumption of legitimacy in our liberal constitutional order.

## 2. The Experimental Self

The recognition of the self as a function of arational, constitutive attachments does not mean that we must give each of these attachments our imprimatur of constitutional approval. Within the constraints of these social endowments, we still possess the capacity to make critical assessments. Within the constraints of these social endowments, we still possess the capacity to make reasoned judgments about right and wrong, good and evil.<sup>247</sup> Indeed, it is the varied forms

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born and in which we continue to reside that determine substantially our responses to various events or phenomena.

<sup>246</sup> As I noted in Chapter 3, the constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. In Chapter 3, recall that I placed significant emphasis on Michael Walzer's contention that there is a 'radical givenness to our associational life.' M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67. What he meant, in short, is that most of the associations that make up our associational life are *involuntary* associations. The emphasis on *involuntariness* in associational life is meant to bracket any conception of freedom that suggests that *any* impediment to free association is a denial of that which is most fundamentally human. Those impediments are, in many respects, the precondition for such freedom. A reasonably equal and democratic society must mediate the givenness of our associational life and the aspirations of all of us to have the ability to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom. Ibid at 73.

<sup>247</sup> The emphasis in this section on the arational sources of the self invariably brackets the place of reason in ethical, political and legal thought (or most fields of human inquiry for that matter). However, bracketing reason and diminishing its efficacy to the vanishing point are two entirely different things. First, the place of instrumental reason and the ability of human beings to recognize regularities in the world means, at the very least, that we are able to discriminate between better and worse ways of realizing our preferred ends. Second, the more de-centered the self, the more varied forms of life the self draws upon, the more tools the self will have when deciding upon the preferred vision of the good life. Third, this account is not averse or opposed to the existence of some deep grammar of human reason — married to long-standing social conventions — that commits us to such varied ends as the family, the nation, a religion, a marriage and individual happiness. Some may think it convenient that such a species of naturalism results in a commitment to such imperfectly reconcilable goods as freedom, equality, dignity and democracy. However, putting aside the current dominance of social democratic thought in the academy, these values have competed with one another for primacy of place for several millennia. How one settles, in a rational manner, the differences between these values is the very meat of ethical and political thought. Fourth, though there may be plenty of instances in which the evidence for our beliefs about the world leaves room for a certain amount of theoretical indeterminacy, I take it as given that most of our beliefs about the world are true and that we, humans, share most of those beliefs. Only under such general conditions of shared understanding does it even begin to make sense to talk about disagreement. See R Rorty 'Solidarity or Objectivity' *Objectivity, Relativity & Truth*:

of attachments and dispositions that make up the self which provide each of us, and our society collectively, with at least some of the critical leverage necessary for discriminating between more and less valuable forms of behaviour. Amartya Sen has recently put the matter thus:

In some versions of communitarian thinking, it is presumed . . . that one's identity with one's community must be the principal or dominant (perhaps even the only significant) identity a person has. This conclusion can be linked to two alternative – related but distinct – lines of reasoning. One line argues that a person does not have access to other community-independent conceptions of identity and to other ways of thinking about identity. Her social background, firmly based in 'community and culture', determines the feasible patterns of reasoning and ethics available to her. The second line of argument does not anchor the conclusion to perceptual constraints, but to the claim that . . . communitarian identity will invariably be recognized to be of paramount importance.<sup>248</sup>

Sen rightly rejects the acritical, homogenizing communitarian account of the self on two grounds:

First, even though certain cultural attitudes and beliefs may influence the nature of our reasoning, they cannot invariably determine it fully. There are various influences on our reasoning, and we need not lose our ability to consider other ways of reasoning just because we identify with, and have been influenced by membership in, a particular group. . . .

Second, the so-called cultures need not provide any uniquely defined set of attitudes or beliefs that can shape our reasoning. Indeed, many of these 'cultures' contain considerable internal variations, and different attitudes and beliefs may be entertained within the same broadly defined culture.<sup>249</sup>

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*Philosophical Papers I* (1991) 21, 31.

My use of the term arational may likewise strike some as deeply counterintuitive. It may seem to sweep into the ambit of the arational, various processes most people are apt to describe as falling within the domain of the rational. I would be happy to concede that various natural and social processes count amongst the many kinds of rational operations in which we engage. The point is the authorship of the processes themselves. We did not, as individuals, or as groups, consciously create many of these processes. As I argued in Chapter 3, they are not the product of any one person's capacity to reason. In this respect, they are arational. So when I say these ends we pursue 'just are' the ends we pursue, I am not denying that there might not be good reasons for them being so. I only deny that the ultimate source of these ends is a function of rational, freely-willed individual choice.

<sup>248</sup> A Sen *Identity and Violence: The Illusion of Destiny* (2006) 33.

<sup>249</sup> *Ibid* at 34 - 35. For further argument along these same lines, see my discussion of Michael Walzer's account of the ineradicability and the virtues of the divided self in Chapter 5. See M Walzer *Thick and Thin: Moral Arguments at Home and Abroad* (2002) 85, 99 - 104.

And so, if what Sen contends holds true about the capacity of the self for critical reflection within *individual* cultures, then the self who lives, contemporaneously, amidst *multiple* communities will almost certainly possess (at least formally) somewhat greater capacity for critical reflection.

It is this second kind of person, made up of multiple selves with their varying narratives and dispositions, that requires the political space created by experimental constitutionalism. For just as experimental constitutionalism is predicated upon the belief that best practices are more likely to surface within institutions designed to promote social experimentation, so too is our experimental self grounded in a belief that an individual is more likely to alight on a preferred way of being in the world if provided the conditions – political and material – under which to compare, contrast and critique different ways of being in the world.

### 3. Flourishing and Dignity

If we are not fully autonomous rational choosers or fully determined arational non-choosers, then what are we? We are creatures with the capacity to flourish. And that is to say, we are creatures endowed with worlds of meaning who possess the capacity for self-actualization and self-governance within those worlds of meaning.

Notice that freedom – strong metaphysical freedom -- does not feature in the aforementioned account. And that is because my account of what it means to flourish does not require it.

As fate would have it, freedom -- strong metaphysical freedom – is also not what the Final Constitution requires in order for human beings to flourish. What it requires, the text of the basic law and the Constitutional Court tell us, is a commitment to human dignity. Indeed, I wish to argue that the Court has spent the first decade of its operation spinning out a jurisprudence of dignity that begins with very modest premises, but ultimately blooms into a doctrine substantially richer and more robust.

One question worth keeping in mind is whether dignity and flourishing are best treated as synonyms, or whether dignity is, in fact, a condition for flourishing. I suspect that the answer

tends toward the latter: that is, one cannot flourish without first being accorded some minimal level of dignity. However, more demanding requirements of our dignity jurisprudence – say, dignity *qua* self-actualization and dignity *qua* self-governance – reflect two of the most important features of flourishing. It is, in the end, the Court's commitment to these more maximal accounts of dignity that has convinced me that a robust constitutional defence of dignity is a precondition for flourishing in an experimental constitutional state.

*(a) Flourishing Defined*

My rather modest account of flourishing flows from both conservative strains and transformative features found in our Final Constitution and from my account of the self, the social and the constitutional. These various sources commit me to the following propositions:

- The conservative strain in this account emphasizes the fact that only in light of the various practices, forms of life, or language games that social groups provide that we become anything that remotely approximates what we understand to be human. We often, incorrectly, speak of the social practices, endowments and associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves and is equally true of social formations. To acknowledge that there is 'radical givenness' to our social world and that 'meaning makes us' explains why the commitment conditioned choice results in little or no explanatory power being lost when we substitute flourishing for freedom. Indeed, as Walzer suggests, we ought to call such decisions to reaffirm our conditioned commitments 'freedom simply, without qualification'. And should follow him when he concludes that such 'freedom' is 'the only "freedom" that free men and women can ever have.'<sup>250</sup>
- The transformative strain in this account of flourishing simultaneously recognizing that these same social practices and forms of life from which we derive meaning in our lives also constrain our actions and often limit our ability to act in manner that we believe enhances our own well-being and human flourishing generally. The transformative dimension of flourishing requires that issues of access, of coercion, of choice, of voice, of exit must be constantly negotiated in order to ensure that all members of our society have a meaningful opportunity to flourishing. A reasonably equal and democratic society must

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<sup>250</sup> Walzer 'On Involuntary Association' (supra) at 73.

mediate the radical givenness of our social life, on the one hand, and the aspirations of all of us to discriminate between those social forms of life which still fit and those which no longer reflect our (self)conception of flourishing.

- The constitutional insights to be drawn from the conservative and the transformative account of flourishing are much the same as those drawn from the naturalized account of the self in Chapter 2 and the naturalized account of the social in Chapter 3. To understand what flourishing actually means requires us to pay particular attention to the unchosen conditions of flourishing; and to the real space in which conditioned choice obtains. This understanding in no way diminishes our responsibility to engage in case-by-case analysis of rights claims made on behalf of those who inhabit such 'unchosen' worlds. It does, however, sound a cautionary note that ought to be heeded by those who identify freedom – and not flourishing -- as the ultimate trump and by those who would treat all such 'unchosen' social institutions as suspect and therefore as instruments to advance radical egalitarian ends.

- Experimental constitutionalism serves both strains of flourishing. First, all constitutional orders recognize the ineradicable 'private ordering' of social affairs. To such an extent, constitutions are inherently conservative documents. Second, while this account begins with the premise that individual flourishing occurs primarily within the many communities into which an individual is born and within which she remains a member, experimental constitutionalism envisages a heterogeneous society made up innumerable ways of being in the world and a state that does not aim to exhaust the possibilities of individual lives. At a minimum, the experiment state enables individuals and groups to fully realize extant sources of the self. For just as experimental constitutionalism is predicated upon the belief that best practices are more likely to surface within institutions designed to promote social experimentation, so too is our experimental self grounded in a belief that an individual is more likely to alight on a preferred way of being in the world if provided the conditions – political and material – under which to compare, contrast and critique different ways of being in the world. Put another way, at a minimum, an experimental constitutional state bears the dual responsibility of ruling out ways of being which threaten the core values of our polity - tolerance, dignity, rough equality, democratic participation - and of providing a framework within which competing notions of the good life can coexist - if inevitably uncomfortably. To meet these minimal requirements, such a state must ensure that each individual citizen possesses both the most basic material

entitlements necessary to be human and the most basic material entitlements that would that person to flourish.

Does the above amount to a plausible account of flourishing? One way to judge its plausibility is compare it with the dominant view of flourishing offered in the academy: that of capabilities. While Sen's account shall dominate my discussion of dignity and flourishing, Nussbaum's take on capabilities provides a more fully worked out list of those institutional arrangements that a community committed to flourishing must provide. Nussbaum identifies 10 such features:

1. Life: Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living;
2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter;
3. Bodily Integrity. Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction;
4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason--and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training.
5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve in their absence.
6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life: liberty of conscience.
7. Affiliation. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship; protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, freedom of association, freedom of assembly and political speech.
8. Non-Discrimination. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, religion, caste, ethnicity, or national origin.
9. Play. Being able to laugh, to play, to enjoy recreational activities.
10. Control over one's Environment. Political Control: Being able to participate effectively in choices that govern one's life; having the right of political

participation, protections of free speech and association. Material Control: Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others.<sup>251</sup>

While my account of flourishing lacks the precision of Nussbaum's account of capabilities, it shares a strong family resemblance. In the first place, I have recognized, in the course of these pages, that the Final Constitution – and the Bill of Rights in particular – create – even if they do not actually supply -- the 'conceptual' predicates for flourishing. It is impossible to read Nussbaum's list and not see the constitutional rights to: Life – FC s 11; Freedom & Security of the Person – FC s 12; Housing -- FC s 26; Health -- FC s 27; Land – FC s 25; Property – FC s 25; Freedom of Trade, Occupation and Profession -- FC s 26; Freedom of Association -- FC s 18; Freedom of Religion, Conscience, Thought & Belief – FC s 16; Freedom of Assembly – FC s 18; Freedom of Expression; Socio-Economic Rights to Food & Water – FC s 27. In the second place, if we South Africans have committed ourselves to the justiciability and progressive realization of all these rights, then one can hardly charge Nussbaum – or myself for that matter – with expecting too much of any given polity. In the third place, Nussbaum's account captures the Final Constitution's commitment to the conservative conditions required for flourishing: Property; Freedom of Trade, Occupation and Profession; Freedom of Association; Freedom of Religion, Conscience, Thought & Belief; Freedom of Assembly; and Freedom of Expression. In the fourth place, Nussbaum's account captures the Final Constitution's commitment to the transformative conditions required for flourishing: Life; Freedom & Security of the Person; Housing; Health; Land; Property; Food; Water; Social Security; Assembly; Association; and Expression. This confluence between the capabilities approach to flourishing and on our own Constitution's approach to flourishing sets the stage for an argument that I believe ties

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<sup>251</sup> This list is drawn from a longer list provided by Brian Butler. See B Butler 'Nussbaum's Capabilities Approach: Political Criticism and the Burden of Proof' (2001) (1) *Journal of Politics and Ethics* 1 (In addition, Butler offers broad overview of the relationship between capabilities and flourishing, and argues that burden of proof with respect to cultural critiques of capabilities lies with those persons who do *not* think capabilities or flourishing – as Nussbaum understands them – have intercultural purchase.) For the urtext on capabilities, see M Nussbaum *Women and Human Development: The Capabilities Approach* (2000). For recent reflections on the capabilities approach, see B Giovanola 'Personhood and Human Richness: Good and Well-Being in the Capability Approach and Beyond' (2005) 63 *Review of Social Economy* 1 (Offers a defense of flourishing and the Aristotelian concept of *eudaimonia*, and engages the question of whether capabilities theory offers a partial, and thus liberal, account of the good life or something closer to a comprehensive Aristotelian account); A Kaufman 'Capabilities and Freedom' (2006) 14 (3) *The Journal of Political Philosophy* 289; AM Jaggar 'Reasoning about Well-Being: Nussbaum's Methods of Justifying Capabilities' (2006) 14 (3) *The Journal of Political Philosophy* 301; K Dowling 'Can Capabilities Reconcile Freedom and Equality?' (2006) 14 (3) *The Journal of Political Philosophy* 323.

flourishing and the capabilities approach ever more tightly to our constitutional project: that is an extended account of how FC s 10's right to dignity – as well as the more general value of dignity (found in FC ss 1, 7, 36, 39, for starters) – is constitutive of, and provides the conditions for, flourishing.

*(b) Dignity Defined*

As I have noted elsewhere, the Constitutional Court has proffered five related, but distinct definitions of dignity.<sup>252</sup> These five definitions draw down on the same basic insight: that all individuals are to be recognized as and to be treated as ends-in-themselves.

(i) Dignity as a Condition for Flourishing

The first two definitions of dignity are primarily negative. That is, they concern the conditions that prevent individuals from flourishing.

(aa) Individual as an end-in-herself<sup>253</sup>

For Kant, as for Constitutional Court, the recognition of every human being's inherent dignity takes the form of a variation on the golden rule,<sup>254</sup> the categorical imperative: 'Act in

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<sup>252</sup> See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2006) Chapter 36.

<sup>253</sup> Justice Ackermann, the Court's original exponent of dignity, grounds the first definition of dignity in two sources: the history of apartheid and the work of Immanuel Kant:

[I]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean ... What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination ... Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state ... That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.

Ackermann (supra) at 540. See also *Danwood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Danwood*') at para 35 (O'Regan J writes: 'The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.')

<sup>254</sup> As a technical matter, Kant actually rejects the golden rule as a maxim for ethical action. See I Kant *Groundwork of the Metaphysics of Morals* (trans and ed AW Wood, 2002) ('*Groundwork*') 46 – 47. He does so because the golden rule permits our individual inclinations to determine outcomes ('as you would have them do onto you') and does not require the attempt at moral perfection (through reason) demanded by the procedures associated with the categorical imperative. See TW Pogge 'The Categorical Imperative' in P Guyer (ed) *Critical Essays on Kant's*

such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end.<sup>255</sup> Stated in Kant's uncompromising terms, such an ethical algorithm might seem impossible to enact.<sup>256</sup> We all know that, even with the best of intentions, many of the myriad interactions we have with our fellow human beings will be almost entirely instrumental. We know that whether we are taking decisions for a family, a classroom of students, a neighbourhood, a town, a province or a nation, some form of a utilitarian calculus – the greatest good for the greatest number – will enter into our considerations. And we know that the relational or communitarian quality of ethics is such that we will often privilege the claims of family, kin, neighbourhood or nation over more general or universal claims.<sup>257</sup>

How then to understand Kant in a way that is neither sentimental nor woolly? Consider Oscar Schachter's gloss on the categorical imperative: 'Respect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated *merely* as instruments or

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*Groundwork of the Metaphysics of Morals* (1998) 189, 191 (For Kant, 'the categorical imperative is not a version of the Golden Rule.') See also J Rawls *Lectures on the History of Moral Philosophy* (2000) ('Lectures') 199.

<sup>255</sup> Kant *Groundwork* (supra) at 45 – 46. See also D Meyerson *Rights Limited* (1997) 12 (Refers to this formulation of the categorical imperative as a heuristic device through which we might better understand our own basic law.) That Kant should be identified as a source for constitutional doctrine in South Africa is not as outlandish a proposition as it may initially sound. In his commentary on German constitutional law and its dignity jurisprudence, Donald Kommers identifies three 'politically significant sources of ethical theory': Christian natural law, Kantian thought and social democratic thought. D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 304. The above variation of the categorical imperative is, in fact, Kant's second formulation. See Rawls *Lectures* (supra) at 181. The second formulation makes, what is for Kant and for us moderns, a crucial distinction: between things which have a price – and are therefore fungible – and things which have no price – and thus have no replacement. Most of us think of our selves and those we care about as priceless. Kant asks us to extend that recognition to all human beings: for they, like us, view themselves and their significant others as irreplaceable. See AW Wood 'Humanity as an End in Itself' in P Guyer (ed) *Critical Essays on Kant's Groundwork of the Metaphysics of Morals* (1998) 165, 170 (Wood 'Humanity as an End') (Defines the term 'individual as an end-in-itself' as 'an end with absolute worth or (as Kant also says) dignity, something whose value cannot be compared to, traded off against, or compensated for or replaced by any other value.')

<sup>256</sup> Kant did not view this principle as impossible to enact. Indeed, as Rawls notes, Kant found moral pietism offensive and conceived of the categorical imperative as a 'mode of reflection that could order and moderate the scrutiny of our motives in a reasonable way.' Rawls *Lectures* (supra) at 149. Perhaps the best way to characterize Kant's categorical imperative is as a reflective check – albeit a demanding one – on our moral intuitions. A contemporary example of such a reflective check – and one that continues to do a great deal of heavy lifting – is Rawls' own 'veil of ignorance'. See J Rawls *A Theory of Justice* (1972). Like the categorical imperative, the veil of ignorance serves as an intuition pump for claims about distributive justice by forcing us to forsake any knowledge of our current position in society before we begin debate on how various social goods are to be allocated. Both intuition pumps are designed to eliminate illicit information that might otherwise skew (or justify) the criteria for the distribution of various goods in favour of those who already possess the current criteria for the distribution of various goods: power, wealth, beauty. See, eg, Pogge (supra) at 206 ('The categorical imperative is . . . a general procedure for constructing morally relevant thought experiments. . . [T]he categorical imperative amplifies my conscience by transforming the decision from one of marginal significance into one concerning the world at large, and also isolates my conscience by screening out personal considerations that might affect my choice of maxims but are irrelevant to my decisions about how through legislation to specify a realm of ends.')

<sup>257</sup> See C Lamore *Patterns of Moral Complexity* (1986) (Deontological, utilitarian and communitarian claims describe different dimensions of moral obligation, and no one dimension can be made wholly subordinate to another.)

objects of the will of others.<sup>258</sup> Dignity, on this account, sets a floor below which ethical – and legal -- behaviour may not fall. Although some relationships will be purely instrumental, no individual person can be treated as a mere instrument over the *entire* domain of her social interactions. This floor supports – as the *Dawood* Court suggests – Chapter 2's express prohibitions on slavery, servitude and forced labour.<sup>259</sup> This definition of dignity also bars punishments that either extinguish the humanity of another entirely – say, the death penalty – or through their disproportionality reduce a human being to a mere signal – a warning, a disincentive – within a large and impersonal system of social control.<sup>260</sup>

(bb) Equal concern and equal respect

Another version of Kant's moral law – more accurately described as a principle of justice – yields another dimension of dignity: 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'<sup>261</sup> This primarily negative obligation not to treat another merely as a means and to recognize in that other the freedom to act as an end in itself – the ability to act as an autonomous moral agent – underwrites a conception of dignity as a formal entitlement to equal concern and to equal respect.<sup>262</sup> From this conception of dignity as an entitlement to equal concern and to equal respect, the Constitutional Court has constructed two different, though not entirely distinct, tests in terms of FC s 9 (the right to equality): (1) a right to equal treatment which ensures (a) that the law does not irrationally differentiate between classes of person and (b) that the law does not reflect the 'naked preferences' of government; and (2) a right to equal treatment that guarantees that individuals

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<sup>258</sup> O Schachter 'Human Dignity as a Normative Concept' (1983) 77 *American J of Int L* 848, 849.

<sup>259</sup> For more on the relationship between dignity and the prohibitions of slavery, servitude and forced labour, see S Woolman 'Dignity' (supra) at § 36.4(e). See also S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64.

<sup>260</sup> For more on the relationship between dignity and sentencing, see S Woolman 'Dignity' (supra) at § 36.4(c)(iii) infra, and D Van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

<sup>261</sup> See I Kant *Metaphysics of Morals* (trans M Gregor 1991) 56.

<sup>262</sup> Kant offers a more accessible, and less rarefied, account of dignity as equal concern and equal respect in the *Metaphysics of Morals*, when he writes:

[A] human being regarded as a person . . . is exalted above any price; for as a person . . . he is not merely to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of *equality* with them.

Ibid at 557 (emphasis added).

are not subject to unfair discrimination on the basis of largely ascriptive characteristics.<sup>263</sup> Of this demand for equal concern and equal, Justice Ackermann writes:

[A]t the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.<sup>264</sup>

(ii) Dignity as Constitutive of Flourishing

While the third and the fourth dimensions of dignity provide ‘political’ conditions for flourishing, I would also contend that they are constitutive of flourishing itself.

(aa) Self-actualization

Another formulation of the categorical imperative shapes a third strand of the Court’s dignity jurisprudence. Kant writes: ‘Act only on the maxim through which you can at the same time will that it should become a universal law.’<sup>265</sup> Here, the term that warrants the closest scrutiny is ‘will’. For Kant, the hallmark of humanity is its ability to ‘will’ or to shape its ends through ‘reason’. But when Kant writes that our humanity consists, at least in part, in our power to rationally set and will an end, he is not speaking solely of an individual’s capacity to adopt an end for purely moral reasons. While Kant certainly contends that the defining feature of humanity is our capacity to overcome our instincts and that we are only truly free when we are moral, he maintains that we define ourselves – and our humanity – through the rational choice of *all* of our ends and not just those that are explicitly moral. This broader capacity to create meaning – to ‘will’ value into the world – gives rise to the modern political and ethical pre-occupation with ‘self-actualization’. An individual’s capacity to create meaning generates an

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<sup>263</sup> See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) (‘*Hugo*’) at para 41 (‘[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal respect* regardless of their membership in particular groups.’)

<sup>264</sup> LWH Ackermann ‘Equality under the 1996 South African Constitution’ in R Wolfrem (ed) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Menschenrechtsschutz* (2003) 547. See also *Law v Canada (Minister of Employment and Immigration)* [1999] 170 DLR 4th 1 (SCC).

<sup>265</sup> Kant *Groundwork* (supra) at 38 (‘Act as if the maxim of your action were to become through your will a universal law of nature.’)

entitlement to respect for the unique set of ends that the individual pursues. In *Ferreira v Levin*, Justice Ackermann writes:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.<sup>266</sup>

Dignity, properly understood, secures the space for self-actualisation.<sup>267</sup> That said, dignity qua self-actualisation – and consistent with my view of self and consciousness -- describes *only* a political, and not a metaphysical, state.<sup>268</sup>

(bb) Self-governance

A third formulation of the categorical imperative helps us to identify a fourth dimension of dignity.<sup>269</sup> An essential feature of the constitutional politics that issues from the categorical

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<sup>266</sup> *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC) at para 49.

<sup>267</sup> The majority in *Ferreira v Levin* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a robust, self-standing freedom right. Ibid at paras 170 – 185 The Constitutional Court accepted, subsequently, Justice Ackermann's thesis that dignity is meant to secure the space for self-actualisation (autonomy). However, this early characterization of self-actualisation turns not on a commitment to political participation or to social entitlements – also known as 'positive liberty' or 'freedom to' – but primarily on a commitment to limiting state power – also known as negative liberty or 'freedom from'. The Court's conception of dignity qua freedom (autonomy) is later elaborated in a series of equality cases. See, eg, *Hugo* (supra) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society.') See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 131-132.

<sup>268</sup> As I have already argued at length, self-actualization is not contingent upon the ability to will freely or to choose freely one's ends. Such a conception of freedom is a form of folk psychology. Rather, freedom consists primarily of having the capacity to participate in ways of being in the world that already give one's life the better part of its meaning. See Wood 'Ethics' (supra) at 176 ('I doubt that Kant's extravagant metaphysics is the best we can do with this problem. The basic point, however, is that Kantian ethics is no more hostage to the free will problem than any other ethical theory would be that regards us as reasonable and self-governing beings.') But see D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity and Reconciliation' (2004) 19 *SA Public Law* 666, 667 ('[I]f we give Kantian dignity its broadest meaning, it is not associated with our actual freedom but with the postulation of ourselves as beings who not only can, but must, confront . . . ethical decisions, and in making those decisions . . . give value to our world.') For Kant, freedom does describe a metaphysical state. See I Kant *Religion within the Limits of Reason Alone* (trans TM Greene & HH Hudson, 1960) 24.

imperative is the recognition of the ability of (almost) all human beings – through their capacity to reason – to legislate for themselves. Indeed, as I have just noted, it is our capacity for self-governance, and the fact that we are not simply slaves to our passions, that distinguishes man from beast. (Whether Kant is correct to make reason the sine qua non of humanity is another matter.<sup>270</sup>) Our capacity for self-governance – the capacity of (almost) all human beings to reason their way to the ends that give their lives meaning – is largely what makes democracy the only acceptable secular form of political organization in modernity. For if we are capable of shaping our own ends as individuals, equal treatment demands that we be able to shape them as citizens. At a minimum, it means that we must be able to participate in the collective-decision making processes that determine the ends of our community. As Justice Sachs notes in *August v Electoral Commission*:

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of *dignity* and of personhood. Quite literally, it says that everybody counts.<sup>271</sup>

This commitment to dignity qua self-governance is rather straightforward in the franchise cases.<sup>272</sup> However, dignity qua self-governance is, in fact, where the Constitutional Court falters most conspicuously. Dignity qua self-governance ought to promote the Court's commitment to

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<sup>269</sup> See Rawls *Lectures* (supra) at 183 ('In the third formulation (that of autonomy) we come back again to the agent's point of view, but this time not as someone subject to moral requirements, but as someone who is, as it were, legislating universal law: here the [categorical imperative] procedure is seen as that procedure the adherence to which with a full grasp of its meaning enables us to regard ourselves as making law for a possible realm of ends.')

<sup>270</sup> See B Williams 'The Idea of Equality' in P Laslett & WG Runciman (eds) *Philosophy, Politics and Society* (1962) 111. Williams argues that the entitlement to equal treatment flows not, as in Kant, from the ability to reason. It flows instead from the recognition that others have narratives (like our own) that shape their lives and that the pursuit of the ends of such narratives gives life its meaning. Equal treatment requires that each person possess the material means necessary to make the pursuit of such ends genuinely possible. Kant was, however, uncompromising in his views of both reason and freedom as the pre-conditions of a meaningful existence. On Kant's account:

[I]n this world of ours there is only one kind of being with a causality that is teleological, that is, directed to purposes, but is yet so constituted that the law in terms of which these beings must determine their purposes is presented as unconditioned and independent of conditions in nature . . . That being is man . . . considered as a noumenon. Man is the only natural being in whom we . . . recognize, as part of his constitution, a supersensible ability (freedom). . . . [The principle of morality – the categorical imperative] is the only possible thing in the order of purposes that is absolutely unconditioned as concerns nature, and hence alone qualifies man, the subject of morality, to be the final purpose of creation.

See I Kant *The Critique of Judgment* (trans JC Meredith, 1952) § 84. See also Rawls *Lectures* (supra) at 159. In sum, only man has the capacity to determine the laws of nature, to legislate them for himself (and others) and thus to be free in a way (of mere causality and desire) that no other entity (that we know of) is. One can subscribe to this vision of things without endorsing its religious dimensions.

<sup>271</sup> See *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (emphasis added).

<sup>272</sup> See *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC); *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (4) BCLR 457 (CC).

representation reinforcing processes – most notably where our democratic institutions cannot be profitably exploited by vulnerable minorities and out-groups. But *Prince, Jordan, Robinson* and *De Reuck* sound cautionary notes about the extent to which the Court will extend itself on behalf of non-traditional associations, vocations or professions.<sup>273</sup> In these cases, the Court appears to reinforce a traditional morality, supported by a majority of South Africans. It thereby undermines the efforts of these out-groups to determine the ends of their own lives. In short, it denies them the space and the capacity to flourish.<sup>274</sup>

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<sup>273</sup> *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*'); *S v Jordan & Others (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*'); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC); *Volks v Robinson* 2005 (5) BCLR 466 (CC) ('*Volks*'). Cf *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*'). Sachs J, in dissent in both *Prince* and *Volks*, and as the author of *Fourie*, has begun to adumbrate a jurisprudence that values the meaning of non-dominant associations to their participants, but does not threaten the general principles to which the Final Constitution commits us. See *Prince* (supra) at para 149 ('[W]here there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile' and to find adequate means – perhaps a carefully constructed exemption – of accommodating the practice at issue.) See also *Volks* (supra) at paras 154 and 156 (Sachs J rejects the majority's finding that the appellant, 'having chosen cohabitation rather than marriage, . . . must bear the consequences' and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act. He contends that: 'Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not . . . penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.')

<sup>274</sup> To be clear, this Constitutional Court does not ever dismiss cavalierly the interests of a vulnerable class of persons. The point is, rather, that traditional mores inform – sometimes more and sometimes less – explicitly the reasoning of the Court. So, for example, the Court in *Jordan* concludes that the criminalization of prostitution could not be said to impair the dignity of the prostitute because 'the diminution arose from the character of prostitution itself.' *Jordan* (supra) at para 74. And since prostitutes choose this ignominious fate, the Court continues, they have no one to blame for the stigma that attaches to their profession but themselves. *Ibid* at paras 16–17 ('If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in.') Not only does the Court decline to take responsibility for the manner in which they reinforce such prejudice by upholding the law, they adamantly refuse to acknowledge the conditions of duress under which many sex workers operate. *Ibid* at para 16. ('It was accepted that they have a choice . . . that is limited or 'constrained'. Once it is accepted that . . . by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.') Justice Sachs provides the putative grounds for upholding the legal sanctions for traditional taboos in *NCGLE I*: 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm.' *NCGLE I* (supra) at para 118. Aside from the fact that most societies, historically, have not only permitted but promoted inter-generational sex, neither the invocation of tradition nor the pressure of the status quo counts as an argument. With respect, it is just this sort of non-argument about 'perceived harm' that makes it so difficult to secure judicial solicitude for aberrant practices. Justice Sachs uses 'democratic societies' as a rhetorical strategy to suggest that the Court shares the same set of values as the majority of South Africans. But it is an odd form of justification for a judge and a Court that tends to pride itself on the protection it affords vulnerable groups and non-traditional associations – groups and associations that would otherwise be subject to legal sanctions animated by the trivial 'perceived harms' experienced by transient majorities. *Fourie* better expresses such sentiments. See *Fourie* (supra) at paras 60–61 (Sachs J) ('Equality . . . does not presuppose . . . suppression of difference . . . Equality . . . does not imply . . . homogenisation of behaviour . . . . [T]here are a number of constitutional provisions that underline the

(iii) Dignity and the Material Conditions for Human Flourishing

This failure to accord out-groups the requisite level of equal respect is thrown into sharper relief by the fifth and final strand of the Court's dignity jurisprudence. Here the emphasis is not *solely* on the individual ends in our realm of ends. The Court also contemplates a connotation of dignity that attaches to the realm *as a whole*.<sup>275</sup>

In a series of unfair discrimination and socio-economic rights cases, the Constitutional Court has made it clear that our commitment to dignity does not flow entirely from the inalienable rights of individuals. Whether it has engaged the stigma associated with HIV/AIDS, the urgent need for shelter, the entitlement of all to adequate food and water, or the desperation associated with summary evictions, the Constitutional Court has, over the past several years, repeatedly emphasized the fact that

It is not only the *dignity* of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society *as a whole* is demeaned when state action intensifies rather than mitigates their marginalisation.<sup>276</sup>

Dignity, on this account, is not simply a constellation of negative duties owed by the state to each human subject, or a set of positive entitlements that can be claimed by each member of the polity. Dignity is that which binds us together as a community. And it occurs only under conditions of mutual recognition. Moreover, such mutual recognition is not merely formal. The Court in *Kbosa* notes that the Final Constitution commits us to an understanding of dignity in which

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constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.)

<sup>275</sup> See Kant *Groundwork* (supra) at 51:

I understand by a 'kingdom' a systematic union of different rational beings under common laws. Now since laws determine ends as regards their universal validity, we shall be able – if we abstract from the personal differences between rational beings, and also from the content of their private ends – to conceive of a whole of ends in systematic conjunction.

<sup>276</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 18 (emphasis added).

wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.<sup>277</sup>

The Court's account of dignity, which has, heretofore, offered various desiderata for individual moral agency, now appears to describe dignity as a collective good. The case law even features a small number of disputes in which the dignity interests of the collective are said to trump the dignity interests of an individual.<sup>278</sup>

But with the exception of a few aperçu in the socio-economic rights cases, and an aside or two in a handful of other disputes, the Court rarely refers to our collective dignity.<sup>279</sup> The Court's circumspection, in this regard, suggests that it does not have in mind some romantic conception of the political community.<sup>280</sup>

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<sup>277</sup> *Khosa* (supra) at para 74. The Court's language echoes Rawls' description of a Kantian 'realm of ends' in which everyone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized.

Rawls *Lectures* (supra) at 209. See also S Doctor 'Dignity, Criminal Law and the Bill of Rights' (2004) 121 *SALJ* 265, 315 ('Dignity has a communitarian aspect: by requiring respect for others' claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.')

<sup>278</sup> In two High Court judgment, the general public's right to receive information trumped rather attenuated claims by individuals to withhold that information. See *S v Dube* 2000 (2) SA 583 (N); *MEC for Health, Mpumalanga v M-Net* 2002 (6) SA 714 (T).

<sup>279</sup> One such rare exception is *S v Makwanyane*, where Justice Langa connects ubuntu with the dignity of individuals and the solidarity of the community:

[Ubuntu exists in] a culture which places some emphasis on *communality* and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to *unconditional respect, dignity, value and acceptance* from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding *duty* to give the same respect, *dignity, value and acceptance* to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and *co-responsibility* and the mutual enjoyment of rights by all.

*Makwanyane* (supra) at paras 224-225 (emphasis added). See also D Cornell & K van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* – (forthcoming); Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 15; M Pieterse 'Traditional African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 441; IG Kroeze 'Doing Things with Values (Part 2): The Case of Ubuntu' (2002) 13 *Stellenbosch LR* 252; R English 'Ubuntu: The Quest for an Indigenous Jurisprudence' (1996) 12 *SAJHR* 641.

<sup>280</sup> The purpose of the kingdom or realm of ends has nothing to do with the romantic conception of a volk who would use the institutions and the laws of the state to give effect to their preferred, comprehensive and ultimately exclusive way of being in the world. 'For the Kantian', says Wood, 'a community of rational beings must be conceived from the ground up as the rational agreement of a plurality of distinct and equal persons who freely choose to unite their ends on terms that respect each one's autonomy. The crucial thing . . . is *not* to determine a single given collective end.' Wood 'Ethics' (supra) at 162 – 163 (emphasis added). According to Wood: 'For Kant the clearest model of a realm of ends in ordinary human life is friendship, in which . . . friends unite their ends in a collective end in which their individual happinesses are swallowed up.' Ibid at 167. This reading does not mean that individuals subordinate their individual goals and aspirations to the goals and aspirations of the collective. Individual narratives still matter. Friends are a model for the realm of ends because genuine friends act out of a disinterested desire to see their friends flourish, and for no immediate benefit to themselves. Friends are always ends.

How then to comprehend dignity as a collective concern? What the Court wishes us to understand is that for dignity to be meaningful in South Africa, the political community *as a whole* must provide that basket of goods – including such primary goods as civil and political rights – which each member of the community requires in order to exercise some basic level of agency. This conception of dignity possesses striking similarities to Amartya Sen's politics of capability.

For Sen, as for our Constitutional Court, the primary concern of the polity is not with wealth maximization. 'Wealth' as Aristotle wrote, 'is evidently not the good we are seeking; for it is merely useful and for the sake of something else.'<sup>281</sup> That something else, as Sen writes, is

[t]he expansion of the 'capabilities' of persons to lead the kinds of lives they value – and have reason to value. . . . Having freedom to do the things one has reason to value is (1) significant in itself for the person's overall freedom, and (2) important in fostering the person's opportunity to have valuable outcomes.<sup>282</sup>

However, Sen's aims are not limited to fostering the agency of the individual. Individual agents should be understood both as ends-in-themselves and as the 'basic building blocks' of [aggregate social] development. The 'greater freedom' of individuals not only 'enhances the ability of people to help themselves and . . . to influence the world,' it is essential to the development of society as a whole.<sup>283</sup> For Sen, the link between individual capabilities and development is part of a virtuous circle. Enhancement of individual flourishing – by both political and material means – leads to greater social development, which, in turn, further enhances the possibilities for individual capabilities and the ability to lead the kinds of lives we have reason to value.<sup>284</sup>

This virtuous circle would appear to be what the Constitutional Court in *Khosa* has in mind when it ties the well-being of the worst off to the well-being of the wealthy. The enhancement of individual capabilities of the poorest members of our political community enhances the development of South Africa as a whole. Or put slightly differently, the greater the 'agency' of

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<sup>281</sup> See Aristotle *Nicomachean Ethics* (trans D Ross 1980) Bk I, § 5, 7.

<sup>282</sup> A Sen *Development as Freedom* (1999) 18.

<sup>283</sup> *Ibid.*

<sup>284</sup> For a more detailed discussion of the relationship between our dignity jurisprudence and Sen's views on capabilities and development, see Woolman 'Dignity' (*supra*) at § 36.5(a)(ii).

the least well-off members of our society, the greater the 'agency' of 'all' the members of our society. This gloss on *Khosa* emphasizes not the subjective sense of well-being that the well-off might experience by tying their well-being to that of the poor. Rather it emphasizes an increase in the objective sense of well-being that flows from the enhancement of the agency of each individual member of our society.

(c) *Widening Gyres of Dignity and Flourishing*

We may be able to see, now, how dignity builds upon a simple premise, the refusal to turn away from suffering, and yields, ultimately, a realm of ends. The refusal to turn away marks the very beginning of our moral awareness – the first time we come to understand that others are not mere instruments for the realization of our desires, but beings who are ends in themselves. This moral awakening leads, almost ineluctably, to two further insights: (a) that others are entitled to the same degree of concern and respect that we would demand for ourselves; and (b) that others are entitled to that equal respect and equal concern because they, like us, are possessed of faculties and talents that enable them to pursue ends which give their lives meaning.<sup>285</sup> The ability to give our lives meaning, and to determine the course by which we give our lives meaning, leads to the recognition that we are able to govern our selves. At a minimum, this mutual recognition of our ability to govern our selves supports the more formal political recognition that just as each one of us is capable of and entitled to govern our individual self, so too are we equally capable of legislating on behalf of the broader community of which we are a member. This mutual recognition of one another as rational beings capable of ordering the ends both of our own lives and of the larger community underwrites the final insight: that we not only live in a realm of ends, but that if such a realm is to have real meaning, we must be willing to order our community in a manner that enables each individual to realize her status as an end. It is simply not enough to (a) not turn away from suffering, (b) end discrimination and (c) grant all citizens the franchise. Once we recognize others as ends we must be committed – at some level -- to the provision of those material means necessary to live as ends. To refuse them such means might render meaningless the more formal guarantees found in the Final Constitution. As the Court itself notes in *Grootboom*:

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<sup>285</sup> See Laurie WH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(Manuscript on file with author) § 4 quoting T Dürig 'Der Grundrechtssatz von der Menschenwürde' (1956) 81 *Archiv für öffentliches Recht* 117, 125 ('All humans are human by virtue of their intellectual capacity ("kraft seine Geistes") which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature.' (Ackermann's translation).)

The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of *human dignity*. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to *human dignity*. In short, I emphasise that human beings are required to be treated as human beings.<sup>286</sup>

The transformation of the Court's dignity jurisprudence -- from an initial, basic concern with the manner in which the law denied the majority of South Africans their dignity to a more robust set of doctrines designed to foster the flourishing of each and every person -- is, perhaps, nowhere more evident than in the Court's sexual orientation case law. Our courts begin slowly, dispatching laws proscribing sodomy as a violation of intimate or private space. The courts go on to reject laws that impair the ability of same-sex partners to live -- private lives -- within South Africa. They then abolish laws that refuse to extend 'public' benefits to the surviving same-sex life partner of a judicial officer. Until finally, the dignity of same-sex partners is understood to be as important a public matter as it is private, and the public institution of marriage sanctions heterosexual and homosexual unions alike.<sup>287</sup>

The public recognition of same-sex life partnerships as marriages takes dignity beyond the merely restitutive, and articulates an understanding of dignity that is fundamentally transformative of our politics. That the holding in *Fourie* is fundamentally transformative, and not merely reactive, can be understood through the prism of the state's response to the various challenges mounted against anti-gay and anti-lesbian enactments. The early challenges to sodomy laws and immigration laws met with little resistance. However, as the challenges to the law required public recognition of the equality of gays and lesbians -- as opposed to mere sufferance of the homosexuals in our midst -- the state's resistance stiffened. In both *Satchwell I and II*, Parliament balked with respect to providing spousal benefits to the survivors of same-sex life partnerships. In *Satchwell II*, the Constitutional Court had to take the unusual and uncomfortable step of invalidating a piece of legislation virtually identical to the legislation that it had found unconstitutional in *Satchwell I*. It is hard to read Parliament's response to *Satchwell I* as

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<sup>286</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*') at para 83 (Emphasis added).

<sup>287</sup> See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

anything but a refusal to recognize that same-sex partnerships are entitled to equal concern and equal respect. In *Fourie*, the state actively sought to block the recognition of same-sex unions as marriages. Again, it is hard to read the state's response as anything other than a refusal to accord same-sex life partnerships the same public recognition as opposite-sex life partnerships. The Constitutional Court and the Supreme Court of Appeal have reached beyond mere restitutionary forms of justice to a vision of dignity that forces *all* South Africans to reconsider their previous understandings of marriage. This new vision of dignity forces *all* South Africans to acknowledge publicly the variety of legitimate and valuable life partnerships within our society.

It seems reasonable to ask, at this juncture, whether the Court's jurisprudence on sexual orientation reflects a genuine commitment to flourishing or the mere logical extension of Court's liberal commitment to state non-intervention (and the actual pressures of the text.) The question arises because some critics of the Court's early dignity jurisprudence have, correctly, suggested that the Constitutional Court permitted a Berlinian understanding of negative liberty to slip into the Court's equality jurisprudence through the backdoor of dignity. The *Ferreira* Court rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) required that 'freedom' and 'security of the person' should be read disjunctively and that IC s 11(1) and FC s 12(1) contained a robust freedom right. However, in a number of cases decided shortly after *Ferreira*, the Court appeared to accept Justice Ackermann's contention that there exists an inextricable link between dignity and the need for individual freedom from state intervention. In *Hugo*, the Court places 'dignity . . . at the heart of individual rights in a free and democratic society.'<sup>288</sup> In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court states that 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.'<sup>289</sup> Thus, over the course of several cases and the space of a couple of years, individual freedom qua negative liberty becomes the foundation for dignity, and dignity, in turn, becomes the basis for equality.

One can accept the truth of the proposition that the Constitutional Court accepted the link between dignity and the need for individual liberty from state intervention without accepting the proposition that dignity is *only* about the need for individual liberty from state intervention. For example, Amartya Sen ties his notion of 'development as freedom' to the provision of a basic basket of goods – both real and figurative -- that enable human beings to develop those

<sup>288</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41.

<sup>289</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (3) SA 173 (CC), 1998 (12) BCLR 1517 (CC) at para 28.

'capabilities' necessary for each individual to achieve those ends that each has reason to value.<sup>290</sup> Sen contends that dignity and freedom and equality, rightly understood, are meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good.<sup>291</sup> What these covalent values do require is a level of *material* support (eg, food) and *immaterial* support (eg, civil liberties) that enable individuals to pursue a meaningful and comprehensive vision of the good life – as they understand it.<sup>292</sup> Put another way, these covalent values describe the political and material conditions for individual flourishing – as well as some of its general features.<sup>293</sup>

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<sup>290</sup> See A Sen *Development as Freedom* (1999); A Sen *Inequality Re-examined* (1992).

<sup>291</sup> Sen's relationship to classical schools of political philosophy is far too subtle and complicated to be explicated meaningfully here. However, a précis of his positions may suggest why Sen, of all contemporary theorists, offers an account of dignity, equality and freedom that provides the best fit with my own take on these 'three conjoined, reciprocal and covalent values' and my ultimate commitment to flourishing. *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41. Sen rejects Rawls' (Kantian and deontological) contention in *A Theory of Justice* (1972) – and to a lesser degree in *Political Liberalism* (1993) – that 'there are certain primary goods – civil liberties such as expression, assembly, the franchise – that cannot be compromised in any way.' Sen *Development* (supra) at 64. Sen has even less time for utilitarian frameworks that make the greatest good for the greatest number the measure of justice. In addition to offering the standard criticisms of utilitarians – their inability to arrive at an acceptable metric for interpersonal comparisons of happiness, their general indifference to radical inequality in the distribution of happiness, and their neglect of rights, freedoms and other non-utility concerns – Sen inveighs against the general inclination – especially amongst economists – to measure utility or happiness in terms of wealth (eg, GNP) and wealth in terms of income (per capita). Neither wealth nor income provide adequate information about the well-being and the substantive freedom of individuals. Both liberals and utilitarians – as we have just described them – fail to take account of how individual differences – in physical ability or disability, in environment, in social practices, in family structure – create significant asymmetries in the manner in which primary goods and incomes can be exploited. *Ibid* at 73.

Sen asks us to take account, in any theory of distributive justice, of how the heterogeneity amongst individuals (both within societies and across societies) shapes the meaning of primary goods *and* incomes. For example, the meaning of a primary political good like freedom of assembly will have demonstrably different meanings for a person who is ambulatory and for a person who is not ambulatory, but housebound. Similarly, the utility of an income of R200 000 will have demonstrably different value for a person who is ambulatory and for a person who is not ambulatory, but housebound. At a minimum, says Sen, quoting Adam Smith, our primary concern ought to be providing individuals with those necessities of life that will, in fact, give them "the ability to appear in public without shame". *Ibid* at 73 quoting Adam Smith *The Wealth of Nations* (1776)(ed RH Campbell and AS Skinner 1976) 469 – 471 (By "necessities", Smith means 'not only the commodities which are indispensably necessary for the support of life, but what ever the customs of the country renders it indecent for creditable people, even the lowest order, to be without.'). That, in just a few well-chosen words, sounds very much like South African discourse on dignity.

Sen thus shifts our focus to the actual 'freedom generated by commodities', and away from 'commodities seen on their own,' to the actual freedom generated by civil liberties, and away from formal constitutional rights viewed in the abstract. *Ibid* at 74. Sen argues that the best measure of equality or freedom or dignity is the ability of individuals to *convert* such primary goods as *income* or *civil liberties* into the capability 'to choose a life one has reason to value' – or in simpler terms, the ability to pursue one's own ends. *Ibid* at 75. That is, in sum, how I understand flourishing. The virtue of Sen's approach is that it recognizes (a) the heterogeneity of capacity that people possess by virtue of biology, custom, or class; (b) the heterogeneity of critical functions – from nourishment to civic participation – that may be required to live a life one has reason to value; and (c) the heterogeneity of capabilities that people will possess – different combinations of more basic functions – which will, in turn, enable them to pursue different 'lifestyles' or different visions of the good. Because Sen refuses to reduce human flourishing to a single basic unit – a utility or a liberty – he is, inevitably, quite pluralistic about the kinds of goods which individuals ought to be free to pursue.

<sup>292</sup> Sen *Development* (supra) at 75.

<sup>293</sup> That is to say that one of the defining features of the South African state – as would be the case with any liberal constitutional state – is that the very conditions for individual flourishing – self-governance and self-actualization –

I have suggested – in the pages above -- that the Court has moved beyond a minimalist understanding of dignity, and a negative conception of liberty, to something richer and more substantial: flourishing. In *Grootboom* the Constitutional Court announced: ‘A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on dignity, equality, and freedom.’<sup>294</sup> In *Khosa v Minister of Social Development*, the Court commits the state to the provision of actual resources, social assistance, to an identifiable class of persons – permanent residents. In so doing, the Court moves well beyond dignity as negative liberty to a vision of dignity in which ‘wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.’<sup>295</sup>

Dignity qua collective responsibility for material agency moves us towards a Sen-like and Nussbaum-like capabilities model. Moreover, it does so without being susceptible to the critique of dignity qua negative liberty leveled by exponents of substantive equality. The capabilities model defines equal treatment in terms of the provision of differently situated persons with the material and immaterial means that they, in particular, require to pursue some specific vision of the good.<sup>296</sup> So, for example, Sen argues that pregnant women need more nutrition than men and that any basic food program is obliged to recognize this difference in a basic nutritional package.<sup>297</sup>

Dignity qua collective responsibility modeled on a Sen-like capabilities model also appears to answer the charge that a commitment to rough equality re-inscribes the disadvantage of those who find themselves in a state of injury. A capabilities model does not underscore the lack of freedom of our fellow citizens, nor call undue attention to their injury, so much as it demands that we recognize that all of us require a relatively ‘unique’ basket of goods in order to pursue our preferred way of being in the world.

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are also two of the goods which individuals seek. Indeed, I would argue that one of the goods we seek in a liberal state is to create autonomous individual moral agents – persons who can think critically and act responsibly – both as citizens and as members of other forms of association.

<sup>294</sup> K van Marle ‘No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth’ (2002) 13 *Stellenbosch LR* 299, 306.

<sup>295</sup> *Khosa* (supra) at para 74.

<sup>296</sup> See D Cornell *Defending Ideals: War, Democracy, and Political Struggles* (2004).

<sup>297</sup> See Sen *Development* (supra) at 189 – 203.

Dignity qua collective responsibility modeled on a Sen-like capabilities model also meets the challenge of those theorists such as Steven Feldman who contend that if we give 'dignity' too much content, then we ultimately put 'freedom' itself at risk. Feldman writes:

[W]e must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices, which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole... The quest for human dignity may subvert rather than enhance choice, and in some circumstances may limit rather than extend the scope of the traditional 'first generation' human rights and fundamental freedoms. Once it becomes a tool in the hands of law-makers and judges, the concept of human dignity is a two-edged sword.<sup>298</sup>

Feldman, however, conflates 'dignity' with 'dignified'. Dignity, on my account, rests on objective characteristics of a person. Material goods flow to an individual – or a group – because of these objective characteristics. (So, for example, pregnant women would receive a better nutritional package because they require better nutrition than non-pregnant women.) The term 'dignified', on the other hand, concerns itself instead with a subjective judgment about the 'value' of the lives being led. So, for example, feminists often conflate 'dignity' and 'dignified' when they attribute false consciousness to women in traditional communities who have chosen lives which seem undignified because these communities embrace practices that appear to deny women their agency. As Drucilla Cornell notes, while we must recognize that material circumstances and legal conditions exist that impair the ability of women to shape their preferred way of being in the world, and that such obstacles to flourishing ought to be removed,<sup>299</sup> we should be quite chary of the argument that to live life within the frame of a traditional community makes a woman's life undignified.<sup>300</sup>

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<sup>298</sup> See Cowan (supra) at 52 – 53.

<sup>299</sup> See D Cornell *Just Cause: Freedom, Identity and Rights* (2000) (*Just Cause*). See also A Sen 'More Than 100 Million Women Are Missing' *The New York Review of Books* (20 December 1990) (Analysis of obstacles to women's agency – infanticide, denial of property rights, limited education, lack of access to health care, malnutrition – that lead to substantially higher rates of mortality in Asia, Africa and South America.)

<sup>300</sup> For a more detailed discussion of the relationship between women's agency, customary law and the dictates of dignity, see S Woolman 'Dignity' (supra) at § 36.5(c) infra; S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 64; *Bhe v Magistrate, Khayalitscha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

## D. Revisiting Recent Cases in Light of Experimental Constitutionalism & Flourishing

At the outset of this work, I claimed that the Constitutional Court's initial emphasis on freedom-talk, rather than flourishing, and on the deference demanded by separation of powers, rather than experimentalism, has had several untoward consequences for our constitutional jurisprudence. In this section, I revisit and recast six relatively recent Constitutional Court judgments in light of these new doctrines of flourishing and experimental constitutionalism.

### 1. *Prince v President, Cape Law Society and Others*<sup>301</sup>

There is, perhaps, no better example of the limits of the Constitutional Court's basic approach to rights analysis than its judgment in *Prince*. A narrowly divided Court found itself doctrinally incapable of extending the protections of religious freedom to the kind of vulnerable minority most in need of judicial solicitude. How would the judgment have differed if the Court had followed the outlines for a slightly altered jurisprudence described in these pages?

The most significant outcome-determinative difference would have been to supplant 'freedom-talk' with 'flourishing'. The *Prince* Court ought to have been disposed towards viewing the actions of the members of Rastafarian community in terms of social endowments that largely determine the meaning of individual lives – and not through the lens of rational, autonomous moral agents that freely-will their ends. Had it been so inclined, the Court might have taken more time to explore legal structures that would take the Rastafarian way of being in the world seriously.

A shared constitutional interpretation approach to limitation's analysis might have also altered the outcome. The *Prince* Court did ask for the government's assistance in making a difficult instance of limitations analysis easier. The Court asked the government to furnish facts regarding (1) practical difficulties with granting an exemption for the sacramental use of cannabis and (2) the differential impact on law enforcement posed by a religious ritual exemption as compared with medical and scientific exemptions. But the information provided,

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<sup>301</sup> See *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC), 2001 (2) BCLR 133 (CC).

to the extent it was provided, did little to shape the Court's approach either to its limitations analysis or to its remedies construction. The majority of the Court accepted the state's contention that a feasible exemption could not be crafted.

But what if the Court had adopted an experimentalist perspective on limitations analysis – a perspective that proceeds from the recognition that the determination of the 'reasonableness' of a limitation and the identification of the best of all possible remedies are interdependent processes. The experimentalist perspective might have led the Court to recognize how difficult it is to discover the 'right' answer – or remedy -- from an outsider's perspective: a difficulty with respect to which the Court was already partially aware. Had they acted on this awareness, instead of simply relying on the 'good faith' of the government, it could have used a number of mechanisms to mediate the competing positions.

The experimentalist approach to limitations analysis – with its explicit commitment to eliciting better information from all the relevant parties – might have led the Court to issue a structural injunction. A structural injunction that brought law enforcement officials and Rastafarian leaders together might have (a) elicited the relevant information for more precise limitations analysis and (b) generated proposals for remedies that might diminish – to the vanishing point – the constitutional conflict. At a minimum, the participatory bubble created by the injunction might have led the Rastafarian stakeholders and the state to find at least a short-term answer to the problem of the ritual use of cannabis. The Court would *not* then have been in the uncomfortable position of imposing its will by fiat. Moreover, retention of jurisdiction through a structural injunction would have allowed the *Prince* Court to track any unintended consequences that might flow from adaptive processes triggered by shifting legal principles and allow it to modify the remedy – say, some form of exemption for the use of cannabis -- on the basis of new empirical evidence.

As the last several paragraphs suggest, a doctrine of shared constitutional interpretation need not be limited to colloquies between the legislature and the courts. Shared constitutional interpretation – especially in a constitutional order that places constitutional duties on both private actors and public actors – would require both law enforcement officials and citizen-stakeholders to offer their respective gloss on constitutional norms. Such shared competence

enables parties at the coal-face to assist the Court in developing constitutional norms and to facilitate experiments in the application of such norms to novel sets of circumstances.

The post-experimentalist *Prince* suggests how the original *Prince* Court, with the assistance of others, could have gone Justice Sachs' 'extra mile' in order to safeguard the constitutive attachments of a vulnerable minority. It also shows how experimental constitutionalism steers a path between a conservative constitutional politics committed to extant understandings of individual and group flourishing and a transformative politics committed to error-correction through novel institutional arrangements.

## 2. *S v Jordan*<sup>302</sup>

*Jordan* warrants recasting for two distinct reasons.

### (a) *Flourishing, not Freedom*

As I have already noted, the *Jordan* Court rejected equality, dignity, privacy and freedom of profession challenges to those sections of the Sexual Offences Act that criminalise prostitution.<sup>303</sup> The majority reasoned as follows:

If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be

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<sup>302</sup> *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC).

<sup>303</sup> See s 20(1)(aA) of the Sexual Offences Act 23 of 1957.

advanced by males accused of certain crimes, the great majority of which are committed by men.<sup>304</sup>

The majority's commitment to a very strong form of metaphysical autonomy – a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances -- fails dramatically many sex workers. It seems particularly inapt for the many sex workers who ply this trade only because they are victims of sexual trafficking. The majority approaches the circumstances of such prostitutes – to use classic metaphysical parlance -- as if they 'could have done otherwise.' That is the kind of 'freedom talk' that does no meaningful work.

Sexual trafficking is about the sale and the exploitation of women – of people who have little chance, and no choice, in life's wheel of fortune. The *Jordan* majority and minority's approach may hold in the context of some sex workers who are attracted to this profession. (Though I have suggested above, and would still maintain, that the attribution of culpability to those who act under circumstances of severe economic duress is equally suspect.)<sup>305</sup> The *Jordan* majority and minority's approach cannot be applied, without real violence being done to the word 'voluntary', to the victims of sexual slavery.

I have little doubt that the *Jordan* Court, if now asked to opine on the status of sexual slaves, might come to a somewhat different conclusion about the autonomy of at least some prostitutes. However, even if the *Jordan* Court did not actually speak to the constitutional protection afforded prostitutes forced into the sex trade, it has left us with the impression that this most vulnerable and marginalised class of individuals is not especially deserving of our solicitude and that they have, somehow, brought this fate upon themselves. This errant belief constitutes a cultural – and not just a legal – practice that makes the manumission of sexual slaves – and other prostitutes who work under some form of duress -- that much more difficult.

A recent judgment hints at a way out of the kind of autonomy bind on display in *Jordan*. In *Khosa v Minister of Social Development; Mablaule v Minister of Social Development*, the Constitutional

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<sup>304</sup> *Jordan* (supra) at para 16 – 17.

<sup>305</sup> This critique of *Jordan* cannot be read as an implicit denial of women's agency. While we must recognise that material and legal conditions exist that impair the ability of women to shape their preferred way of being in the world, and that such obstacles to agency ought to be removed, as I have argued above, we should be leery of the argument that to live life within the transgressive frame of a brothel makes a woman's life undignified or demonstrates a lack of agency. See Woolman 'Dignity' (supra) at § 36.5.

Court found unconstitutional, as a violation of both FC s 9 and FC s 27 (1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants: old age, disability, veterans, child-support and foster care. Mokgoro J writes:

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa . . . Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.<sup>306</sup>

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy.

Sex slaves would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many sex slaves do not speak the language, do not know the lay of the land, do not have the resources to engage corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own families.

The point is not that sex slaves are excluded from some particular benefit to which another class of persons is entitled. *Khosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Khosa* Court rightly recognises, legal regimes that offer incentives to become members of the political community but that punish inhabitants who cannot act on such incentives -- by withholding benefits or through incarceration -- are perverse. These disincentives deny the affected person exactly that which the state is obliged to provide. *Khosa* indicates that where meaningful opportunities for flourishing are curtailed, the state bears significant responsibility for bringing the material conditions for flourishing into being.<sup>307</sup>

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<sup>306</sup> *Khosa* (supra) at para 76.

<sup>307</sup> Moreover, to the extent that the *Jordan* Court does operate with an appreciation for flourishing, it distinguishes invidiously between the ways of being in the world of sex workers and the ways of being in the world of other human beings who have ostensibly non-commercial sex. The manifold motivations for sex – and the bewilderingly complex forms of exchange that underlie so much of it – makes the Court's distinctions between protected forms of intercourse and unprotected forms of intercourse unpersuasive. See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34; S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A

*(b) Experimentation, not Deference*

Could we also use a structural injunction, and its consequent participatory bubble, to recast the outcome in *Jordan*? Perhaps. Law enforcement officials and streetwalkers might yet be able to reach some consensus on the kind of framework necessary for the de-criminalization of prostitution. If concerns about coercion, disease transmission and child trafficking lie at the heart of criminalization of the sex trade, then one can easily imagine setting up structures that would permit the state to supervise it. The affected parties might well agree that the requirement that commercial sex take place at brothels in a set area of a city would enable the state to conduct regular inspections. Such regulation of the profession would enable the state to track the health, age and autonomy of many sex workers.

The *Jordan* Court, in the end, could have moved beyond deference – with its rather unfortunate consequences for the Court's dignity jurisprudence – to norm setting that recognized the intrinsic worth of prostitutes as human beings. That does not, of course, mean that the Court would be obliged to craft a remedy other than it did. It only means that the participatory bubble in question might have offered the Court a broader range of institutional arrangements with which to work.

3. *Government of the Republic of South Africa v Grootboom & Others*<sup>308</sup>

I have, above, already suggested how *Grootboom* has led to a minor revolution in South African housing law and policy. I will rehearse that discussion here only to demonstrate in a rather step-by-step fashion how I think the analytical tools provided by experimental constitutionalism can be used to re-think similar sorts of socio-economic rights cases.

*(a) Structural Injunctions and Participatory Bubbles*

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Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. See also N Fritz 'Crossing *Jordan*: Constitutional Space for (Un)Civil Sex?' (2004) 20 *SAJHR* 230.  
<sup>308</sup> 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

The *Grootboom* Court could have issued a structural injunction that required representatives for affected citizens in the Cape Flats and parties responsible for housing in national, provincial and local government to engage in talks aim at an effective solution. Using a structural injunction to create such a participatory bubble would have had several beneficial consequences. First, government agencies would have had to come up with a remedy particularly tailored to the needs of the *Grootboom* community. Second, this participatory bubble could become the model for other similarly situated groups around the country. Third, such a polycentric process of deliberation would generate experimentalist responses to the resource constraints confronted by both government agencies and those persons and communities in need of adequate housing. A structural injunction, coupled with the replication of participatory bubbles throughout the country, would give the court, the government and the public the ability to share information about the kinds of strategies that work to alleviate homelessness.

That such an approach is possible is reflected in the subsequent Cape High Court cases in *Rudolph I* and *Rudolph II*.<sup>309</sup> The High Court in *Rudolph I* and *Rudolph II* noted the lack of responsiveness on the part of government. The structural injunction forced the state to come up with a housing plan that – if implemented – would meet its constitutional obligations.

*(b) Experimentalism, Systemic Feedback Effects and Transformation*

Perhaps, the most compelling consequence of an experimentalist revision of *Grootboom* would be its systemic effect. *Grootboom* would come to represent a classic example of citizens exercising their destabilization rights and securing accountability from government. We would see a *Grootboom* effect. That effect would flow from its trend-setting use of innovative injunctive relief to create participatory bubbles that facilitate widespread experimentation. The *Grootboom* effect would place other government agencies responsible for delivering basic necessities or transforming social institutions on notice. The revised *Grootboom* would tell those government agencies that they are best served by finding stakeholder representatives who can provide the necessary feedback on new and better forms of service delivery. The decisions of the High

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<sup>309</sup> For more on *Rudolph I* and *Rudolph II*, see *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C), 2003 (11) BCLR 1236 (C), [2003] 3 All SA 517, 547 (C) ('*Rudolph I*'); *City of Cape Town v Rudolph & Others* (Unreported decision of the Cape High Court, 5 December 2005) ('*Rudolph II*'). See also K Mclean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

Court in *Rudolph I* and *Rudolph II* suggest that putting such feedback loops in place is both possible and desirable.

*(c) Shared Constitutional Interpretation*

The Constitutional Court's current approach to socio-economic rights suggests a deep-seated fear of ordering relief that would either require sustained judicial oversight of a complex remedial apparatus or relief that would seem to displace the policy-making prerogatives of the political branches of government. By retaining jurisdiction through a structural injunction, but allowing responsible government officials and citizen stakeholders the opportunity to craft an appropriate remedy, the Court would obviate the need to allocate scarce administrative resources to remedial management or to wade into complex terrain through which it feels ill-equipped to move.

Instead, the Court can go about setting out general norms to guide the various government actors and stakeholders. It can invite, a la the *Miranda* Court, other government actors to provide effective means of realizing the right in question. General norm-setting married to such an open-ended invitation services experimental constitutionalism by creating a body of doctrine and experience that is flexible enough to address new challenges. The flexibility of shared constitutional competence frees the Court from its ever-present anxiety that it will say too much and thus bind its hands in the future. Likewise, it frees the Court from the doctrinal dead-end of one-case-at-a-time land, where the future is always now and no guiding principles can ever be affirmed. As I noted above, the National Department of Housing's new policy document – *Breaking New Ground* – and various amendments to the *Housing Code* suggest that the Court's general norm setting has had the intended effect of motivating those parties with greater expertise to generate legal responses consistent with newly articulated constitutional norms.

However, as the judgments in both *Modderklip* and in *Rudolph I* and *Rudolph II* suggest, the state may not always respond with alacrity to the Court's invitation to create new policy. (And it may well be, as often seems the case in South Africa, that a government department lacks the requisite capacity to formulate a meaningful response.) Where the state does fail to respond to the Court's invitation then constitutional damages – as in *Modderklip* – or threats of citation for contempt – as in *Rudolph* – become necessary and appropriate responses.

4. *Minister of Home Affairs & Another v Fourie & Another*<sup>310</sup>

As I noted above, *Fourie* engaged the question of whether same-sex couples were constitutionally entitled to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples. The *Fourie* Court found that granting such status to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to the tenets of their religion. The Court then concluded that the common law and section 30(1) of the Marriage Act were inconsistent with FC s 9(1) and FC s 9(3) and FC s 10 to the extent that they made no provision for same-sex couples to enjoy the status, entitlements and responsibilities that they accord to heterosexual couples.

Of immediate moment for this work is the remedy crafted by a majority of the Court. It has been summarized by the *Fourie* Court as follows:

- The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.
- The omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.
- These declarations of invalidity are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.
- Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words “or spouse” after the words “or husband” as they appear in the marriage formula.
- The Minister and Director-General of Home Affairs and the Minister of Justice and Constitutional Development must pay the applicants’ costs.<sup>311</sup>

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<sup>310</sup> *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

<sup>311</sup> For the actual order of the Court, see *Fourie* (supra) at para 162. The order, as it appears in the text above, was crafted by the Court for public consumption in its media summary. The entire media summary is available at <http://www.constitutionalcourt.org.za/fourie/summary>.

From the perspective of the doctrine of shared constitutional interpretation, it might be argued that the Court's refusal to follow the simple proposal found in the papers of the Equality Project – or in Justice O'Regan's partial dissent -- to 'read in' the words 'or spouse' after the words 'or husband' in the Marriage Act was correct. Parliament, if one takes the Court seriously, was invited to craft a remedy of its own device that will ensure that legal unions of same-sex life partners are accorded the same respect by the state as opposite-sex life partners.<sup>312</sup>

##### 5. *TAC*<sup>313</sup>

*Treatment Action Campaign* is often considered both a significant victory for advocates of a more robust approach to socio-economic rights and an easy case for those commentators who view the Court as rather reluctant to put the government on specific terms in the event of an adverse ruling. After the passage of five years, *Treatment Action Campaign* may warrant a re-appraisal. From the perspective of flourishing, *Treatment Action Campaign* promised an easy solution to the problem of intra-partum transmission of HIV. Moreover, the Court's order that government 'make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV [and] take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV looked like it would go some distance towards solving the problem of sero-conversion that takes place if HIV-positive mothers breastfeed their children after birth.<sup>314</sup> From the perspective of experimental constitutionalism, the order looked tough enough to guarantee the desired result – provision of Nevirapine to HIV-positive pregnant women in order to prevent intra-partum transmission of HIV from mother to child (MTCT) – while flexible enough to allow government to shift its policies should a more efficacious, safer and cheaper solution to the problem of MTCT be found.

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<sup>312</sup> Justice O'Regan, in a partial dissent, found that the Court's clear commitment to ensuring that same-sex couples and opposite-sex couples receive the same treatment by the State required the Court to 'read in words to section 30 of the Act that would . . . permit gays and lesbians to be married by civil marriage officers' and to develop the common law to realize the same ends. *Fourie* (supra) at paras 169 – 170. Unfortunately, the Civil Union Act passed by Parliament retains a commitment to 'separate but equal' treatment of same-sex life partners that the Court held, quite clearly, to be manifestly inconsistent with FC s 9 and FC s 10. (While same sex partners may now have the same duties and responsibilities as opposite sex couples that enter civil unions, the status of the new institution – civil union – does not seem on par with that of marriage.) Parliament does not appear to have taken Court's invitation to revisit the marriage laws in light of the demands of the basic law seriously.

<sup>313</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) ('*TAC*').

<sup>314</sup> *TAC* (supra) at para 135.

a. *Failure to Flourish*

There can be little doubt that the Constitutional Court believed that its order requiring Nevirapine to be provided at all public hospitals would be carried out and that the result of its order being carried out would be a significant diminution in MTCT and a concomitant decrease in infant mortality as a result of AIDS. The statistics tell another story.<sup>315</sup>

94,900 HIV-infected children are born each year: a 40% increase since the *TAC* Court's order was handed down almost 5 years ago. Moreover, only 13,134 of these 94,900 children will receive any antiretroviral treatment (ART)<sup>316</sup>. In sum, over the past five year period, 400,000 children who urgently required access to ARVs have not received them. The majority of these children will not reach the age of two.<sup>317</sup> Yet, as the *TAC* Court was aware at the time of its judgment, and as the World Health Organization continues to emphasize:

Paediatric HIV is almost entirely preventable. It has been virtually eliminated in high-income countries.<sup>318</sup>

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<sup>315</sup> As Courtenay Sprague notes: 'Although ARV medicines became freely available through the public health system in April 2004, pregnant women and children for whom treatment is indicated face significant barriers to accessing antiretroviral medicines (ARVs).' C Sprague 'Cui Bono: Barriers to Access for HIV-Infected Women and Children' (PhD Proposal, November 2006, manuscript on file with author.) Only 10% of infected children and 14.6% of pregnant women have access to life-saving Anti-retroviral Treatment. See WHO *Summary Country Profile for HIV/AIDS Treatment Scale-Up* (June 2005), available at <http://www.who.int/3by5/countryprofiles/en>. Sprague argues that 'the most visible manifestation of this complex problem is the high mortality rates exhibited in children under age five in South Africa' and that 'these death rates are preventable'. Sprague (supra) at 6 citing World Health Organization *The World Health Report 2006* (Estimates from 2004 data); World Health Organization *National Guide to Monitoring and Evaluating Programmes for the Prevention of HIV in Infants and Young Children* (2006); World Health Organization *Antiretroviral Therapy of HIV Infection in Infants and Children in Resource-Limited Settings: Towards Universal Access: Recommendations for a Public Health Approach*. World Health Organization *Antiretroviral Drugs for Treating Pregnant Women and Preventing HIV* (2006); World Health Organization *Infection in Infants in Resource-Limited Settings Towards Universal Access: Recommendations for a Public Health Approach* (2006); Médecins sans Frontières *New MSF Data Shows Treatment of Children Works in Resource Poor Settings but Scale Up is Hampered by Ill-Adapted Tools and Exorbitant Costs* (August 2006), available at <http://www.msf.org>.

<sup>316</sup> According to Courtenay Sprague, these numbers must be used, and viewed, with caution. Email correspondence with Courtenay Sprague (27 February 2007). For the source of these numbers, see F Hassan et al AIDS Law Project Monitoring Unit, Joint Civil Society Monitoring Forum (September 2006), available at <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=318>.

<sup>317</sup> UNICEF South Africa *Impact on Children: Paediatric Testing and Treatment* (2006), available at <http://www.unicef.org/southafrica>; G Gray Global AIDS: HIV Prevention and Care in Children, Treatment Access and Challenges Among Children in Resource-Limited Settings. *Management of Pediatric HIV Infection, and Prevention of Mother-to-Child HIV Transmission* (2006) available at <http://www.medscape.com/viewarticle/544610>.

<sup>318</sup> World Health Organization *Infection in Infants in Resource-Limited Settings Towards Universal Access: Recommendations for a Public Health Approach* (2006); UNICEF *The State of the World's Children: 2002* (2002).

One doesn't require a particularly sophisticated account of flourishing or capabilities to conclude that the South African government has failed to take the Constitutional Court's order seriously.<sup>319</sup>

*b. Not Tough Enough*

Part of the responsibility for this failure surely lies with the Court itself. After surveying the foreign literature on structural interdicts, the Court concluded that no good jurisprudential reason existed for abstaining – as a general matter – from deploying them as required.<sup>320</sup> Indeed, the Court found that it could employ a structural interdict that permitted the government to alter its policies as the exigencies of the moment dictated:

A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.<sup>321</sup>

However, despite incontrovertible evidence that the government's reasons for refusing to supply Nevirapine were internally incoherent and factually incorrect, the Court decided that the

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<sup>319</sup> Even if I don't offer, in these pages, a particularly full account of flourishing or capabilities, it seems clear that if health is impaired, then 'most other human capabilities will remain out of reach.' Sprague (supra) at 6. Ruger, who argues concludes that the state's obligation to improve health 'rests on the ethical principle of human flourishing – or human capability', contends that:

Policies that deny antiretroviral drugs to patients with HIV/AIDS, as happens in sub-Saharan Africa and other parts of the world, are morally troubling not only because they constitute subminimal healthcare, reduce individuals' opportunity for employment and require cosmopolitan duty.... The moral concern is the reduced capability for physical and mental functioning or even for being alive. Deprivations in the capability to function rob individuals of the freedom to be what they want to be

JP Ruger 'Ethics and Governance of Global Health Inequalities' (2006) 60 *Journal of Epidemiological and Community Health* 998, 999.

<sup>320</sup> See *TAC* (supra) at paras 112 – 113 ('What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies particularly when the state's obligations are not performed diligently and without delay. South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may and if need be must use their wide powers to make orders that affect policy as well as legislation.')

<sup>321</sup> *Ibid* at para 114.

government deserved the benefit of the doubt. Had it retained the jurisdiction that normally attaches to a structural injunction, it might have found itself in a position to address what appears to be a persistent pattern of malign neglect around MTCT of HIV/AIDS.

#### 6. *Port Elizabeth Municipality*<sup>322</sup>

The Port Elizabeth Municipality sought an eviction order against 68 persons living in shacks on privately owned land. The occupants agreed to move to 'suitable alternative land'. However, the land offered by the Council – in Walmer Township – provided no security of occupation and was wracked by crime. The municipality contended that no other alternative existed and that making a special exception for the occupiers would be tantamount to 'queue-jumping' with respect to the municipality's comprehensive and coordinated housing scheme.

After having won in the High Court and lost in the Supreme Court of Appeal, the municipality sought a ruling from the Constitutional Court that would confirm that it was not constitutionally obliged to find alternative accommodation or land when seeking an order evicting unlawful occupiers. The Court denied the appeal. It held that although a municipality was not generally under an obligation to provide alternative accommodation or land, the municipality's failure to take any steps – let alone all reasonable steps – to solve this social problem meant that the municipality had failed to discharge its constitutional obligations. Given this abdication of responsibility, the Court held that it was neither just nor equitable for the eviction order to be granted.

The Constitutional Court noted, relatively early in its judgment, that the polycentric nature of the problem – homeless persons in need of shelter, private land owners who wish to use the occupied land, municipalities charged with creating a coherent housing scheme for all its inhabitants, sheriffs charged with executing an eviction, inhabitants of other communities to which the homeless persons might be moved – posed significant challenges for the Court:

The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the

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<sup>322</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) ('*Port Elizabeth Municipality*').

procedures it may adopt, the way in which it exercises its powers and orders it might make.<sup>323</sup>

But the Court appeared that it might rise to the challenge. It first noted that cases that affected the lives of so many parties might be best resolved through face-to-face discussions – what it describes as ‘mediation’. On the virtues of these participatory bubbles, the Court writes:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.<sup>324</sup>

The Court elucidates two further benefits of participatory bubbles: the internalization of constitutional norms by the participants in the negotiations; and the ability of such bubbles to make up for the information deficits that top-down statecraft or adversarial legal proceedings tend to generate:

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.<sup>325</sup>

Despite these largely unassailable observations, the Court balks when it comes down to ordering mediation and retaining jurisdiction to ensure that a just and equitable outcome occurs. Its

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<sup>323</sup> Ibid at para 35.

<sup>324</sup> Ibid at para 39.

<sup>325</sup> Ibid at para 42.

reasons for *not* putting mediation and a structural injunction in place range from the intransigence of the parties, the small likelihood of success given the failure to reach any agreement earlier in the process, the failure of lower courts to employ this dispute resolution mechanism and the idiosyncratic nature of the community effected. With respect, these justifications for refusing to issue a structural injunction are, in fact, very good reasons for doing so. A structural injunction that sets out the general norms that will shape the outcome the dispute, but leaves the parties to ‘discover’ the best possible remedy, is exactly the kind of remedy that might overcome existing intransigence, idiosyncracies of circumstance and previous failures to generate an outcome that both sides might prefer (to the zero-sum outcome of a court order.) Indeed, as it turns out, the parties are left pretty much where they started: the Municipality has ‘illegal’ occupants that it cannot move, as yet, and the occupiers remain, for the moment, on private land to which they can stake no meaningful claim. Thus, despite its high minded rhetoric about novel judicial interventions, the *Port Elizabeth Municipality* Court looks, ultimately, to be more concerned with saving its political capital than with creating the conditions that might present a lasting solution to a particularly pressing social problem.<sup>326</sup>

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<sup>326</sup> See T Roux ‘Tactical Adjudication’ *Kwa-Zulu Natal School of Law Conference on Democracy and Judicial Review* (Draft copy, 9 February 2007, manuscript on file with author). For more sanguine views on the transformative potential of the South African Constitution, see AJ Van der Walt ‘A South African Reading of Frank Michelman’s Theory of Social Justice in H Botha, AJ Van der Walt & J Van der Walt *Rights & Democracy in a Transformative Constitution* (2004) Stellenbosch: Sun Press; Klare K ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146.

# THE SELFLESS CONSTITUTION

## Chapter 5

### Epilogue

#### The Limits of Reason in South Africa & Its Consequences for Experimental Constitutionalism and Flourishing

*Table of Contents*

- A. Folk-Psychology
- B. Irrationality
- C. Political Undercapacity
- D. Avoidance

In chapters 1 through chapters 4, this thesis puts forward a fairly thick conception of the self and of the social in order to support a reasonably thick account of the kinds of political institutions and judicial doctrines that South Africa requires to make good the promise of our basic law. This final chapter is intended not to draw the reader's attention back to arguments already stated at greater length.<sup>1</sup> The point of this chapter is to identify a number of difficulties in psychological, political and legal thought that may block a reader's understanding of or predisposition to credit the arguments made in this thesis. What these 'problems' have in common is a failure to provide an accurate account of the nature of reason or an inability to account for breakdowns in collective rationality. These problems take four distinct forms: the folk-psychology of free will, the ineradicability of irrationality in politics, the undercapacity of the South African state, and constitutional doctrines that underestimate the necessity of principled norm setting.

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<sup>1</sup> To understand these shortcomings, a brief recapitulation of the primary arguments of this thesis is in order. In chapter 2, I described consciousness as the product of a neurological system that is primarily unconscious, distributed throughout the brain (and body), engaged in multiple parallel processes, and, of enormous, highly under-utilized capacity. Consciousness functions as a complex feedback mechanism that enables us to undertake both idealized and fully realized thought experiments in the world around us. The self happens to be both the beneficiary of these (successful and unsuccessful) thought experiments and that centre of narrative gravity that holds together the various storylines (dispositional states) hard-wired in our brain and enhanced by our social endowments. The self, so understood, supports *individual flourishing* without any dependence upon the metaphysical baggage of Cartesian dualism or freedom of the will. In chapter 3, the thesis moves beyond the biological into the social. In chapter 3, the naturalized account of the self and consciousness (developed in chapter 2) suggests that – hard wiring aside -- who we are as individuals is largely a function of the various communities, and social practices, into which we are born. Most importantly for my account both of the social and of individual flourishing, chapter 3 recognizes that these communities are what make us truly human. And they make us truly human by providing us with the better part of the meaning that we derive from life. But we are, as I have repeatedly pointed out, more than that which has made us. For although 'meaning makes us' to a significant degree, the scripts of our lives remain 'open' to change. The multiple roles, identities, and ideals that make us remain open to change because one role, one identity, one ideal, one script invariably provides a *critical* window on to the other roles, identities, ideals and scripts that make us who we are. This friction, married to our innate capacity to engage in reasoned discourse, creates the necessary, but not sufficient conditions for change in the social. How much change our 'scripts' and our 'roles' permit turns on the openness of our social formations to 'experiments in living'. As we saw in chapter 3 and in chapter 4, many social formations stifle 'change' in order to prevent any undesirable challenge to the established hierarchy. They look instead to re-inscribe existing patterns of belief and behaviour – and thus the arrangements of power, wealth or influence that flow from such patterns. To make meaningful change possible, we require social space within which genuine experimentation with alternative ways of being in the world is possible. Chapter 4 argues that the state must take on some of the responsibility for creating conditions under which individuals and groups possess both the material conditions (social goods such as food, health and housing) and the non-material conditions (civil rights and political freedoms such as dignity, equality, expression and association) that make both flourishing and experimentation possible. Only flourishing married to experimentation makes genuine change – through the imitation and the re-inscription – possible. The political arrangements and judicial doctrines described in chapter 4 – like the self of chapter 2 and social formations in chapter 3 – function as feedback mechanisms that provide state actors and non-state actors alike with information on best practices and failed experiments. These best practices and failed experiments constitute the informed basis upon which we can continually alter our ends and the means we employ to pursue them.

## A. The Problem of Folk Psychology

Folk psychology ('FP') is a network of principles which constitutes a sort of common-sense theory about how to explain human behavior. . . . Folk psychology . . . is deeply ingrained in our commonsense conception of ourselves as persons. Whatever else a person is, he is supposed to be a rational (at least largely rational) *agent* -- that is, a creature whose behavior is systematically caused by, and explainable in terms of, his beliefs, desires, and related propositional attitudes. The wholesale rejection of FP, therefore, would entail a drastic revision of our conceptual scheme. This fact seems to us to constitute a good *prima facie* reason for not discarding FP too quickly in the face of apparent difficulties.<sup>2</sup>

As one might have gathered from Chapters 1, 2, 3 and 4, this thesis constitutes a large scale assault on principles of folk-psychology that continue to dominate our explanations of the self, the social and the political. The hope, of course, is that, by undermining these common-sense, but incorrect, explanations of the self, the social and the political, we might arrive at a better understanding of who we are and what we need to do.

One line of criticism of this thesis, has been, that it seeks to connect descriptive claims about the self and the social to prescriptive claims about the political, and that one need not establish the truth regarding claims about the self and the social in order to make the more speculative claims about the political. That, of course, is true. Trivially true. One could make all the normative claims about South African constitutional law found in chapter 4 without any of the preceding descriptive claims about the self or the social. However, the very point of this thesis is to demonstrate the tenacious hold that folk-psychological explanations of the self and the social have over us, to show how that folk-psychology blocks better understandings of who we are as human beings and that folk-psychology of freedom inhibits the formation of a fair and just political order.

When it comes to such explanations, the folk psychology of freedom suffers from flaws of epic proportions.<sup>3</sup> As I noted in the introduction, the standard folk psychology of freedom

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<sup>2</sup> RN McCauley 'Folk Psychology is Here to Stay' (1985) 94 *The Philosophical Review* 197, 198.

<sup>3</sup> See P Churchland 'Eliminative Materialism and Propositional Attitudes' in SM Christensen & DR Turner (eds) *Folk Psychology and the Philosophy of Mind* (1993) 42; P Feyerabend 'Materialism and the Mind-Body Problem' in SM Christensen & DR Turner (eds) *Folk Psychology and the Philosophy of Mind* (1993) 3, 15 ('Is it then possible to reject

suggests – in a having your cake and eating it sort of way -- that human beings are not subject to the laws of cause and effect to which every other object in the physical universe are subject. In a manner that goes entirely unexplained, an ostensibly immaterial entity – the soul or the mind – causes a material entity – the body -- to undertake action in the world. Only by positing the presence of such an immaterial entity does the folk psychology of freedom liberate human beings from the yoke of determinism that attaches to all other material entities. But this strategy begs several other questions for which proponents of the folk psychology of freedom have no answers.

First, where is the ‘mind’ or the ‘soul’ located? It certainly is not, as Descartes suggested, located in the pineal gland. No other *scientific* answer is proffered. The scientific answer is that what we call self or consciousness is actually the product of a neurological system that is (1) primarily unconscious, (2) distributed throughout the brain (and body), (3) engaged in multiple parallel processes, and, (4) of enormous, highly under-utilized capacity.<sup>4</sup> The purpose of consciousness on this generally accepted account is three-fold: (a) ‘durable and explicit information maintenance’ (b) ‘novel combinations of operations’ and (c) ‘intentional behavior’. That is, as Daniel Dennett argues, our conscious beliefs function as ‘idealized fictions’ that enable us to engage – in advance – in sophisticated ‘action-predicting, action-explaining calculus.’<sup>5</sup>

Second, how does an immaterial entity – the self – cause a material entity – the body to act? Once again, those who speak of the ‘mind’ or the ‘soul’ do not offer a physical explanation for this utterly unique form of causality. Contemporary neuroscience, cognitive psychology and materialist theories of consciousness as we have seen in Chapters 1 and 2, offer such an account: but it is one that does away entirely with the need – as an explanation for human action – for an independent, immaterial entity like the soul.

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materialism by reference to the success of a nonmaterialistic language? The answer is NO and the reason . . . is as follows: in order to discuss the weaknesses of an all-pervasive system of thought such as is expressed by the ‘common’ idiom, it is not sufficient to compare it with ‘the facts.’ Many such facts are formulated in terms of the idiom and therefore already prejudiced in its favor. Also there are many facts which are inaccessible, for empirical reasons, to a person speaking a certain idiom and which become accessible only if a different idiom is introduced. More concretely: if you want to find out whether there are pains, thoughts, feelings in the sense indicated by the common usage of these words, then you must become (among other things) a materialist. Trying to eliminate materialism by reference to the common idiom, therefore, means putting the cart before the horse.)

<sup>4</sup> See BJ Baars ‘How Does a Serial, Integrated and Very Limited Stream of Consciousness Emerge from a Nervous System that is Mostly Unconscious, Distributed, Parallel and of Enormous Capacity’ in GR Bock and J Marsh (eds) *Experimental and Theoretical Studies of Consciousness* (1993) 282.

<sup>5</sup> D Dennett *Brainstorms* (1978) 30. See also D Dennett *Freedom Evolves* (2003).

Why then is the folk psychology of freedom so deeply embedded in our multiple of being and thinking in the world? Could it be, as Nietzsche so bluntly puts it, that:

It was in *this* sphere then, the sphere of legal obligations, that the moral conceptual world of 'conscience', 'duty', 'sacredness of duty' had its origins; it's the beginnings were, like the beginnings of everything great on earth, soaked in blood thoroughly for a very long time. [Before long] . . . the creditor could inflict every kind of indignity and torture upon the body of the debtor.<sup>6</sup>

These debts, the creditors themselves began to realize, had started to accumulate on their own books. The debts were especially high with respect to their ancestors, to which they, as creditors, realized that they owed almost everything meaningful that they possessed. And so says Nietzsche, in his 'just so' story, mankind invented the guilty conscience:

Suddenly we stand before the paradoxical and horrifying experience that afforded temporary relief for tormented humanity, that stroke of genius on the part of Christianity: God himself sacrifices himself for the guilt of mankind, God himself makes payment to himself, God as the only being who can redeem man from what has become unredeemable for man himself – the creditor sacrifices himself for his debtor, out of love (can one credit that?), out of love for his debtor!<sup>7</sup>

Nietzsche's explanation works at a particular level – that of critical theory, the language of the literary, the political and even the ethical. But a somewhat more mundane explanation of political or legal 'free will' avails itself as well. 'Free will' is, as Nietzsche and Dennett would agree, essential for any system of social control. We inculcate a belief in free will – and thus in individual responsibility -- in order to ensure greater compliance with the rules that the group, the society or the polity has set up to perpetuate itself:

Instead of investigating, endlessly, in an attempt to discover whether or not a particular trait is of someone's making – instead of trying to assay exactly to what degree a particular self is self-made – we simply hold people responsible for their conduct (within limits we

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<sup>6</sup> *On the Genealogy of Morals* (1887) 64 – 67, 92.

<sup>7</sup> *Ibid* at 92.

care not to examine too closely.) And we are rewarded for adopting this strategy by the higher proportion of 'responsible' behaviour we thereby inculcate.<sup>8</sup>

This Darwinian benefit of the continuous self enables the single self to perform 'action-predicting, action-explaining calculus'. A community of such selves increases exponentially – through collective efforts, both planned and unplanned -- the accuracy of this 'action-predicting, action-explaining calculus'. We, collectively, generate more optimal outcomes -- the most optimal of which is the set of practices that maximizes the overall chance of the survival of the herd. (It goes without saying that this account oversimplifies, dramatically, the neurological, the physiological and the anthropological developments that made memory, language, speech, writing and science possible.)

No account of our genealogy could be more repugnant to advocates of the folk psychology of free will. But the advocates of free will are utterly wrong to think that this Nietzschean/Dennettian account eliminates freedom, choice or reason entirely. As Dennett notes:

At every level of organization, from the presumably hard-wired level of memory organization to the level of design of social institutions, the best possible designs, given the constraints of finitude and time pressure, would have to include some arbitrariness and wise risk taking. The (entirely unconscious) organization of memory guarantees that only some approximately appropriate subset of relevant points will occur to one in the time available.<sup>9</sup>

And, it is in this rather capacious space, in which risk and novel problem-solving take on sometimes life and death significance, that all the varieties of free will worth wanting reside. The human brain – the self, the mind– is an extraordinarily powerful problem solving mechanism; its uniqueness adheres in its ability to address and to overcome apparently insurmountable obstacles through complex neurological feedback mechanisms that enhance our ability to engage in abstract, future-oriented, action-predictive behaviour. Our problem-solving capacity – our regular inquiries about the nature of our environment, our ability to penetrate the future – is where our free will

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<sup>8</sup> D Dennett *Elbow Room: The Varieties of Freedom Worth Wanting* (1984).

<sup>9</sup> *Ibid* at 164. See also C Cherniak 'Rationality and the Structure of Human Memory' (1983) 57 *Synthese* 163.

ultimately resides. As a result, Dennett is able to claim that his conclusions about 'free will', though radically different than those on offer from folk psychology, 'is optimistic'.<sup>10</sup> He writes:

Free will is not an illusion, not even an irrepressible or life-enhancing illusion. When we look closely at the sources of our suspicion and dread, we find again and again that they are not indisputable axioms or overwhelmingly well-supported empirical discoveries, but unfocused images, hastily glanced at – like shadows on the bedroom wall that take on an apparent robustness and menace because we do not look at them closely.

What we want when we want free will is the power to decide our courses of action, and to decide them wisely, in light of our expectations and desires. We want to be in control of ourselves, and not under the control of others. We want to agents, capable of initiating, and taking responsibility for, projects and deeds. All this is ours, I have tried to show, as a natural product of our biological endowment, extended and enhanced by our initiation into society.

We want, moreover, to have enough elbow room in the world so that when we exercise these powers, it is not always a matter of settling for the only desperate course of action that has a chance of fulfilling our desires. We can have this elbow room as well, and it is worth striving for, but not guaranteed. *There are real threats to human freedom, but they are not metaphysical.* There is political bondage, coercion, the manipulation inducible by the dissemination of misinformation, and the 'forced move' desperation of hunger and poverty. No doubt we could do a lot more to combat these impositions on our freedom, were it not for another sort of straightjacket we often find ourselves wearing: the curious sort of self-imposed bondage that we create by the very exercise of our freedom, and in the acknowledgement of our responsibility for the chains, ropes, strings and threads of commitment (explicit and tacit) that tie us to family and friends, that tie us to life projects, and that make us increasingly immovable by appeals for radical action.<sup>11</sup>

In these three paragraphs, Dennett explains the power that the self does, indeed, possess: the power, again and again revealed to us, to build better mousetraps. Moreover, in the above paragraph, Dennett ties freedom to what really matters to us – the ability to flourish. Our efforts

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<sup>10</sup> Dennett *Elbow Room* (supra) at 169.

<sup>11</sup> Ibid.

to eliminate poverty, hunger, coercion, manipulation and bondage are not aimed at freedom for freedom's sake: they are aimed at ensuring that all of us are able to pursue lives worth living. That, of course, is the essence of flourishing. There is a sting to this tale – and one this thesis has not shied away from. Flourishing, in the main, is derived from the associations of which we are a part and the meaning with which these associations imbue our lives. We do not so much choose such meaning as embrace it. So understood, flourishing forces us – inevitably -- to steer a path between the Scylla of the conservation (of our practices that give our lives meaning) and the Charybdis of transformation (of our practices so that others might be free). Zarathustra most of us are not.

This account of free will may not satisfy those who prefer folk psychology. But it is the only account that coheres with what we know about the physical world, the brain, the self, consciousness, social phenomena and the law. It is, ultimately, the only account of freedom or free will worth having.

#### B. The Problem of Irrationality

Assume for the sake of argument, that all the descriptive claims made in Chapters 1 through 4 of this thesis were true. One problem that remains for a speculative project such as mine is the problem of irrationality.

One form of 'irrationality' – really 'arationality' -- has already been identified: the extent to which various ways of being in the world (including comprehensive visions of the good life) determine (a) who we are as individuals and (b) the necessary conditions for flourishing. I am only concerned with this form of arationality to the extent that it prevents – through various forms of coercion – individuals from creating ways of being in the world that enable them to flourish. What we want from a politics of flourishing, ultimately, are institutional arrangements that enable individuals who are square to live in square holes and individuals who are round to inhabit round holes. No more than that.<sup>12</sup>

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<sup>12</sup> Indeed, it would be impolitic not to recognize that the politics of flourishing and experimental constitutionalism are only possible against a background of common cultures that ensure the general stability of a society. Or, as John Gray argues, the institutions of the modern social democratic state on offer in these pages 'depends far more on their political and cultural acceptability than upon the legal framework which supposedly defines and protects them.' J Gray *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (1997) 102.

There is a second form of irrationality, however, that is more pernicious. It is a concern with this second form of irrationality that drives the distinction Plato offers in *The Republic* between philosophy and politics. Politics, on Plato's view, is largely the domain of the messy and the venal: it concerns itself with competitive advantages between individuals, with the distribution of the goods in life among various groups in society, and with 'the instabilities engendered by changing social and economic relationships.'<sup>13</sup> Politics is the enemy of stability and truth, and thus philosophy.<sup>14</sup>

Even if we agree with Arendt,<sup>15</sup> Dahl,<sup>16</sup> Pitkin,<sup>17</sup> and Young,<sup>18</sup> that politics is messy, and in the nature of all things human, unavoidable, we need not adopt the authoritarian stance and the benevolent tyranny of *The Republic* to have some sympathy for Plato's concerns about irrationality. Gadamer's reconstruction of Plato reconnects the capacity to recognize Plato's Ideal Forms with more general forms of human reasonableness and moral consciousness.<sup>19</sup> It should be clear that

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<sup>13</sup> LJ Biskowski 'Reason in Politics: Arendt and Gadamer on the Role of the *Eide*' (1998) 31 *Polity* 1.

<sup>14</sup> See WE Connolly *Political Theory and Modernity* (1988). Connolly, following Nietzsche, contends that Plato discounts the sensuous world of change, growth, decay and finitude to attain the true world of ideas . . . . The sphere of ideas brings the pious and virtuous man to truth and it establishes a set of standards by which the mundane world must be evaluated. This is the first and most confident expression of the western will to truth, of the will to interpret the world in human terms and then to pretend that the interpretation reflects the world as it is in itself.

Ibid at 141 -142. See also Sheldon Wolin *Politics and Vision: Continuity and Innovation in Western Political Thought* (1960) 42 (Plato treat these phenomena – of competition, disagreement and instability – 'as the symptoms of an unhealthy society, as the art against which political philosophy and the political art had to contend. Political philosophy and ruling alike had as their objectives the creation of the good society, 'politics' was evil, and hence the task of philosophy and of ruling was to rid the community of politics. Thus the Platonic conception of political philosophy and ruling was founded on a paradox: the science as well as the art of creating order was sworn to an eternal hostility towards politics, towards those phenomena, in other words, that made such a science meaningful and necessary.')

<sup>15</sup> H Arendt *The Human Condition* (1960).

<sup>16</sup> RA Dahl *Democracy and Its Critics* (1989) 52.

<sup>17</sup> HF Pitkin *Wittgenstein and Justice* (1972) 326.

<sup>18</sup> Iris Young puts her critique of Platonism thus:

Critical theoretical accounts of instrumental reason, postmodernist critiques of humanism and of the Cartesian subject, and feminist critiques of the disembodied coldness of modern reason all converge on a similar project of puncturing the authority of modern scientific reason. Modern science and philosophy construct a specific account of the subject as knower, as a self-evident origin standing outside of and opposed to objects of knowledge--autonomous, neutral, abstract, and purified of particularity. They construct this modern subjectivity by fleeing from material reality, from the body's sensuous continuity with flowing, living things, to create a purified, abstract idea of formal reason, disembodied and transcendent... The gaze of modern scientific reason, moreover, is a normalizing gaze. It is a gaze that assesses its object according to some hierarchical standard... Forced to line up on calibrations that measure degrees of some general attribute, some of the particulars are devalued, defined as deviant in relation to the norm.

IM Young *Justice and the Politics of Difference* (1990) 126-127.

<sup>19</sup> HG Gadamer *Truth & Method* (1968).

the capacity to be able to form reasoned judgments is critical both to flourishing – which involves a pre-commitment to tolerating some, but not all, ways of being in the world – and to constitutional experimentalism – which involves a pre-commitment to making assessments regarding the kinds of ‘experiments in living’ worth reinforcing and those kinds of experiments not worth maintaining.

The concern with irrationality, then, is not a concern with a failure to recognize ‘the one true way’. It is, first, a concern with forms of politics that would, in fact, impose a single comprehensive vision of the good life of all the members of a polity. A theocracy run according to a particularly conservative variation of shariah, or a dictatorship run according to a cult of personality are simply the most pernicious forms of the irrational in politics. Neither flourishing nor experimentalism are genuinely possible under such regimes.

But eliminating the extreme examples are easy. Irrationality adheres more prominently in the desire to maintain the status quo. I want to suggest that my theory of human flourishing and experimental constitutionalism constitute persistent challenges to the status quo (defined as the commitment to leaving things as they are) and requires a thicker conception of reasonableness than even our current constitutional politics admits. To disentrench established interests, to challenge things as they are, demands both a more thorough-going commitment to creating the material conditions for flourishing and a revision of our political arrangements in light of the dictates of experimental constitutionalism. To accept anything less is to admit that our current political commitments are simply the product of the irrational – both in the Platonic idiom and in the modern sense. Both flourishing and experimentalism connects us to intercultural attempts to extend our shared understanding of the good without reifying the good in a manner that takes it outside the realm of the political.

### C. Undercapacity

One apparent threat to constitutional experimentalism – and to flourishing as well – are current problems with the undercapacity of the South African state and of South African civil

society. Rarely a day passes when qualified financial reports on municipalities, provincial governments or national departments are not issued by the Auditor-General. The reports generally don't identify malfeasance or outright corruption: though they may well be present. What the reports tend to identify is the absence of adequate internal auditing systems, dramatic shortages in skilled personnel, and a general lack of capacity that leads, ineluctably, to a failure to deliver necessary services.

The nature of such a threat to the project of experimental constitutionalism should be obvious. The political arrangements and judicially-crafted doctrines that flow from this theoretical construct require that we overcome significant information deficits when we ask government actors to contrive best practices consistent with constitutional norms. If, however, government actors lack the capacity to supply information necessary for the solution of a polycentric social problem, or, worse, if they lack the institutional capacity to make adequate use of that information in the creation of new and better policies, then the increased informational benefits to be derived from experimental institutions will simply not exist.

Or so it may seem at first blush. William Simon and Charles Sabel's analysis of education reform efforts in the United States suggest that experimental constitutional institutions and doctrines may actually have the most profoundly positive effects in political systems which are apparently 'the most broken'. The reason for this perhaps counterintuitive result is that those states which had the worst educational systems initially had the most to gain from the participation by and the information elicited from non-state actors. As it turns out, in poor states like Alabama, educational outcomes improved dramatically because participation by other state actors and non-state actors in the educational system enabled state institutions to overcome logistical and informational deficits created by undercapacity. William Simon has suggested that we may see similar benefits here in South Africa – depending upon the level of institutional decay. A High Court issuing a structural interdict – as it did in *Child Law Centre* – may find that its remedy overcomes the intransigence or the incompetence of state officials by enabling non-state actors to determine the appropriate outcome for the children at risk. On the other hand, cases such as *Rudolph I* and *Rudolph II* suggest that creative institutional arrangements that elicit the requisite amount of information about the needs of communities in urgent need of housing may still fail to achieve the desired goal when the necessary modicum of political will remains absent. But this last

state of affairs has less to do with the efficacy of experimental constitutional arrangements and far more to do with the absence of an accountable municipal government. Only the voters, during elections, can turn the unaccountable and irresponsible politicians out and break the bottleneck that prevents novel 'experiments in living' from being tested in society.<sup>20</sup>

#### D The Principle of Avoidance

Experimental constitutionalism relies heavily on co-operation between the co-ordinate branches of government. The general norm-setting practiced by the courts is supplemented by various attempts by other state actors and non-state actors at crafting laws and policies designed to fulfil those constitutional norms. Over time courts, state actors and non-state actors will have the opportunity to determine whether various 'political experiments' have achieved the ends set for us by our basic law (as interpreted by the courts, the legislature, the executive and non-state actors). We will, in instances of policy failure, also have an opportunity to decide whether the norms or the ends set by the courts, the legislature, the executive and non-state actors constitute the best possible gloss on our basic law.

The embrace of the principle of avoidance by our courts and by a number of constitutional commentators poses a unique set of threats to the project of experimental constitutionalism. In its least pernicious form, the principle of avoidance has been articulated by the Constitutional Court in *Mhlungu* as follows:

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<sup>20</sup> Martin Clough offers something of a dissenting opinion on this view of undercapacity in the modern nation state. He writes:

A final barrier to imagining the possibility of an alternative to the national state is the failure to recognize that the current crisis of global governance is as much a consequence of overcapacity as of undercapacity. National governments have not grown weaker; civil society has grown stronger. Now, more than ever before, other actors--regional, state and local governments; national and international NGOs; affinity and solidarity groups; transnational corporations; business, labor and professional associations; international agencies and organizations; and others--have the resources and leverage to promote or frustrate the ability of national governments to achieve particular objectives both within and beyond their borders. As a consequence, once an issue has gotten onto the international public agenda, the problem often is not inaction but incoherence. In Bosnia, Somalia and Rwanda, for example, there was not a shortage of individuals, organizations and governments willing to act; the problem was that they often acted at cross-purposes. The challenge is not so much to increase the capacity of the state but to find ways to manage and mobilize the capacity of civil society.<sup>7</sup>

M Clough 'Reflections on Civil Society' (1999) 268 *The Nation* 1. Policy churn or competing interests may well undermine political solutions in some countries. The dominance of the ANC in South Africa and the relative thinness of civil society suggests that our problems have less to do with incoherence of policy initiatives, and more to do with a lack of viable initiatives and a weakness of political will.

[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.<sup>21</sup>

On its face, this salutary rule seems unobjectionable. What is, objectionable, even on the Court's own terms, is turning this salutary rule into a full-blown jurisprudence in which a court must never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'<sup>22</sup>

The *first objection* is that this early statement in *Mhlungu* flatly contradicts the Court's later statement in *Mhlungu* as to the nature of constitutional interpretation. The Constitutional Court in *Mhlungu* avers that constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.'<sup>23</sup> However, if a court refuses to say more than is necessary to decide a case on its facts, then one can hardly expect any meaningfully predictive principle to be drawn from the judgment. That, of course, leads to the *second objection*. The lack of precision and almost casuistic approach to constitutional norm setting means that it is difficult for any actor – another lower court, a government official or a private actor – to anticipate future forms of law or conduct that would or would not satisfy the basic law's general norms. If there is no rule of law to which a state actor or private actor knows that she must conform her behaviour, then it would be surprising to find her attempting to conform her behaviour to some unarticulated and inchoate sense of a 'rule' that is consistent with the Constitutional Court's understanding of what the Final Constitution permits. Thus, the *third objection*: the absence of rules of law undermines the ability of other branches of government to comply with the Bill of Rights – and places the court in the unnecessarily uncomfortable position of having to reject or to accept government's positions in any it were ruling *ab initio*. Such considerations constitute some of the strongest arguments against Sunstein's 'one case at a time' theories or Currie's jurisprudence of 'judicious avoidance'.<sup>24</sup> A *fourth objection* is that the absence of clearly articulated rules undermines rational political discourse. Reasoned disagreement can only

<sup>21</sup> *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

<sup>22</sup> *Zantzi v Council of State, Ciskei* 1995 (4) SA 615 (CC) at para 8.

<sup>23</sup> See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 129

<sup>24</sup> See C Sunstein *One Case at a Time* (1996); I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138.

take place when parties agree on the general terms of the debate. The Constitutional Court must, in terms of its institutional role, establish the meaning of constitutional norms and thus the general framework for contestation. The Constitutional Court abdicates this institutional responsibility to model rational political discourse by refusing to state, in a comprehensive manner, the reasons that ground its conclusions. A *fifth objection* is that avoidance undermines the ‘integrity’ of the legal system. It is impossible to create a more coherent jurisprudence without identifying the rules – and the reasons – that ground decisions.

It should be obvious then why experimental constitutionalism – with its commitment to shared constitutional interpretation and participatory bubbles – abhors a jurisprudence of avoidance. Shared constitutional interpretation relies, fundamentally, upon a principled dialogue between the courts, the co-ordinate branches of government, and the public. The process of general norm-setting by the courts that initiates a process of rolling best practices by other parts of the state never gains sufficient traction when constitutional norms remain radically under-theorized. Participatory bubbles rely, on the other hand, on a court-initiated structure to ensure that meaningful conversation about optimal outcomes takes place. These bubbles lose their cohesion – and the pressure to produce better than zero-sum outcomes -- if the court’s fail to articulate the norms within which a preferred solution is meant to occur. If experimental constitutionalism is judged to be an attractive set of principles by which to establish constitutional norms (by widespread public agreement) and to assess best practices (by inviting as many stakeholders as possible to design an optimal remedy for a specific social problem) then the jurisprudence of avoidance must be one of the first judicial doctrines to go.<sup>25</sup>

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<sup>25</sup> For a critique of ‘avoidance’ that demonstrates its incoherence when elevated to a rule of adjudication, see S Woolman ‘Application’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, OS, March 2005) Chapter 31.

# THE SELFLESS CONSTITUTION

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## **9. Legislation**

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Public Protector Amendment Act 113 of 1998

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