Chapter Four

A Theory of the Constitutional: Experimental Constitutionalism

All life is an experiment. The more experiments you make, the better.

Ralph Waldo Emerson
A. Philosophical Foundations

Given the theory of the self and the theory of the social put forward in Chapters 2 and 3, it should come as little surprise that my theory of the constitutional is disposed towards experimentalism. Recall that the purpose of consciousness is problem solving (for the various selves and dispositional states that constitute an individual) and that an individual’s brain/neuro-muscular system as a whole (often unconsciously/non-consciously) identifies a problem and initiates a sequence of events to solve that problem. Where the problem to be solved is novel and requires extant neuronal networks to respond in an equally novel fashion, then we tend to become aware of both a problem and the need to form an intention to respond to the problem.1 The global neuronal workspace – a transient location (generally dispersed throughout the brain) designed to solve the problem that has captured our attention – is simultaneously connected to various sensory inputs (from a broad array of organs in the body) and a host of neuronal network experts that might assist in the solution of the problem. These experts possess particular linguistic skills, relevant memories, and trained responses. These long distance neuronal patterns are consciousness and we become aware of them when we must use their expertise to direct behaviour.

The first purpose of consciousness then is to guide behaviour. However, consciousness pilots our behaviour in a particular way. Consciousness allows an individual (and the heterogeneous array of selves that make it up) to represent a goal and to estimate the outcomes of her actions before initiating them. The ability to undertake multiple trials within the simulated framework of mental activity is an enormous advance on having to undertake individual trials with real errors (and successes) in one’s actual physical environment. We can thereby weed out, in advance, outcomes less likely to be successful in the physical world and thereby enhance our capacity to survive and to flourish. As Dehaene and Naccache put it:

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.2

Consciousness enables the individual, by herself or in concert with others, to undertake multiple thought experiments and concrete enquiries that maximize the chances of successful outcomes in the world. The brain (or our entire neuro-muscular system) accomplishes this feat by allowing different combinations of neural networks to compete with one another until a winner is selected. Remember: only the winners of this competition rise to the level of consciousness. Of course, if we have time, we may run through the problem again and again.

For example, we may have the luxury of taking our time to ensure that our sentences scan. So, upon reflection, and many drafts of this book, I may choose one locution over another. Or, on the golf course, we might have the time to decide that a 100-metre shot to a slightly raised green and into a light breeze requires that we take an extra club – and not the club we might ordinarily use to target the green from that distance. In both cases, note that only certain sentence arrangements or club choices attract sufficient attention (because of their
novelty or complexity) for conscious awareness to emerge. A winner in these problem-solving competitions thus reflects a representation of the action most likely to succeed in the world. Put slightly differently, competitions enable us to create a constellation of idealized fictions that function as a sophisticated ‘action-predicting, action-explaining calculus’. Again: consciousness enables our densely populated me’s to undertake forward-looking thought experiments and real-world experiments that increase the likelihood that an individual will successfully navigate her way through the world.

The theory of the social replicates the theory of the self in a number of striking ways. Recall that the social is populated by a large, heterogeneous array of endowments that form the environment in which individuals and groups operate. Our innumerable interactions and conflicts with other members of our highly differentiated, extraordinarily heterogeneous society should, at least notionally, enable us to reflect more effectively upon our actions and, where necessary, to come up with better solutions to the problems we and other members of our society invariably confront every day. The solutions at which we arrive are not purely instrumental. They are reflexive in two distinct ways. First, we may find better means to achieve our ends. That’s instrumental. Second, we may find, say, that treating persons with a drug addiction as persons in need of medical assistance, as opposed to persons who deserve incarceration, alters our ends (as manifest in law) in more or less radical ways. That’s decidedly normative.

Thaler and Sunstein’s notion of choice architecture neatly captures this arrangement. Choice architects cannot arrive with an entirely preconceived answer to a problem in mind. Of course, they must operate within some prescriptive framework that seeks to elicit best practices that will achieve that framework’s ends. (I see no reason why these norms should not reflect the same core of shared understandings that Sunstein identified in One Case at a Time.) To identify those best practices, recall that a choice architect sets up a variety of environments in which different cohorts of individuals are permitted to act as they like. By reviewing the choices made by different cohorts, the choice architect can identify the environment that works best in terms of the overall welfare of the community that she serves. In so doing, the choice architect nudges individuals toward making optimal decisions as determined by the individuals themselves. Again: the choice architects must have some ex ante goal in mind. A normative departure point is necessary in any decision making setting. However, the whole point of these various experiments is to discover – ex post – both the kinds of ends people wish to pursue and the best way of ensuring that they achieve those ends.

It should come then as no surprise that the experimentalist cast of the constitutional theory explicated in these pages resonates profoundly with the problem-solving approach to the theories of consciousness and social policy construction adumbrated above. In his provocatively entitled work, ‘Toyota Jurisprudence’, William Simon describes this Deweyan approach to the political realm as one that:

(1) emphasizes the goals of learning and innovation (rather than of [binary] dispute resolution and the vindication of accepted norms), (2) combines the normative explicitness associated with formal rules with the continuous adjustment to particularity associated with informal norms (no
dialectic of rules and standards), (3) treats normative decision making in hard cases as presumptively collective and interdisciplinary (rather than the heroic labour of a solitary professional), (4) fosters a style of reasoning that is intentionally destabilizing of settled practices (rather than harmonizing or optimizing), and (5) attempts to bracket or sublimate issues of individual and retrospective fairness or blame.5

Joshua Cohen and Charles Sabel ask us to reimagine the polity – again in classically Deweyan terms – as an entity:

… in which sovereignty – legitimate political authorship – is neither unitary nor personified, and politics is about addressing practical problems … In this world, a public is simply an open group of actors … which constitutes itself as such in coming to address a common problem, and reconstitutes itself as efforts at problem solving redefine the task at hand. The polity is the public formed of these publics: this encompassing public is not limited to a list of functional tasks … enumerated in advance, but understands its role as empowering members to address such issues as need their combined attention.6

The democratic character we saw as emblematic of consciousness, self-hood, bridging networks and choice architecture, emerges again in experimental constitutionalism, as it moves away from the top-down, command and control character of most contemporary forms of constitutional jurisprudence (say of a Dworkinian maximalist ilk). Rather than putting the heroic judge or judges at the centre of all things that matter,7 experimental constitutionalists self-consciously take advantage of the heterogeneity of our society by emphasizing trial and error, reflexivity, polycentricity, and feedback enhanced decision making in a host of institutions designed to answer mundane and critical questions about the norms that govern our polity, various sub-publics within the polity, and publics that extend well beyond the generally arbitrary borders that determine national sovereignty (ie arenas that fly under the flag of 143 UN organizations, BRICS, NATO, the Red Cross, the Catholic Church). Put slightly differently, what differentiates the functionalism of experimental constitutionalism is the extraordinary amount of information various structures make available to all concerned parties (with the maintenance of a given practice or the resolution of a particular dispute), the capacity such structures have to enable all participants to alter their behaviour based upon the available information, and the ability to pool information across various state and social structures. As we shall see in Chapter 5, the South African institutions that adopt this functional approach range from Chapter 9 Institutions to provincial legislatures to courts to the Competition Commission. South African constitutional doctrines regarding rights interpretation, limitations analysis, remedies and public participation in law making, and expansive approaches to amici, costs and jurisdiction, can, similarly, be read as functional, pragmatic and experimental. As we shall see in Chapter 6, this approach has made modest, but still discernible, contributions to sectors of our society as broken as (a) primary and secondary school education, and (b) municipal, provincial and national agencies charged with providing adequate housing. (Before we get there, we’ll see how such experimentalist approaches work in the United States at the level of constitutional doctrines involving search and seizure, institutional settings such as family courts and drug treatment courts and national, state and local efforts to realize measurable improvements in basic education.8)
Before I proceed any further with this South African inflected account of experimental constitutionalism, I want to answer an unwarranted charge that experimental constitutionalism is largely instrumental, without discernible content, and minimalist in a manner that would undermine rather than service our constitutional democracy. That charge has been generously characterized by Michael Wilkinson as follows:

It is the [alleged] prioritizing of means over ends that sometimes gives experimentalism a technocratic flavour, suggesting that we are merely looking for more efficient solutions to common and uncontroversial problems (for example, of co-ordination) and that issues of morality, justice, or democratic legitimacy therefore do not arise. Sabel [and others] are careful to avoid this charge of celebrating technocracy, but it is impossible to ignore, particularly when levelled by those who claim that an obsession with ‘means’ exposes new governance to a ‘gap’ in terms of our traditional understanding of the rule of law, which is valuable not merely as a means but as an end in itself. For those who advance the ‘gap thesis’, law has an intrinsic value that is neglected by the new governance [experimental constitutionalist] paradigm.9

Several readily available responses take the initial sting out of claims that experimental constitutionalism does little to challenge or to change the status quo.

First, having articulated this criticism, Wilkinson simultaneously acknowledges that Irrespective of our views on the Constitutional (with a capital ‘C’) question, one of the advantages of experimentalism is the clear recognition that there is no simple one-way street between establishing the goals of integration and identifying the most appropriate means to achieve them. There is, rather, a complex interplay between means and ends because, for instance, new governance demands constant revisability of ends as these are rethought and adjusted or altered in the course of experimentation and mutual learning. In this way, the various fora of new governance act as a type of public laboratory of experimentalism, in a way that Dewey could hardly have foreseen. This is not to say that experimentalism guarantees democracy, it merely provides a more realistic democratic framework than the alternatives, such as Habermasian discourse theory.10

Given the wholesale failure of member states in the European Union to conceive of themselves as constituent parts of a constitutional order (while the current Euro crisis and potential state defaults force actions designed to maintain economic integration), Wilkinson’s acknowledgement of experimentalism’s strengths should draw the attention of those constitutional scholars who continue to reify talk over action.11 Reverse the spin.

Second, the experimentalist critique of modern democratic orders reflects dissatisfaction with a modern legal tradition stuck with legitimation, rule of law and separation of powers doctrines that take insufficient cognizance of what is required to protect individual (and collective) rights in a world of rapid technological and organisational change, and cross-border transactions, migration and externalities.12 The standard modern democratic legal tradition has a rather blinkered view of how norms are formed, and an antiquated view as to how norms can be revised in a manner that better fits most heterogeneous democratic communities. That account runs as follows:

The sovereign is a democratically elected government; its enactments are legitimate because of its representational status. The law-applying judgements of the government’s unelected agents are legitimate only to the extent they can be traced to the enactments of the legislative principal.
Accountability is thus a matter of pedigree … ideally … tested by an independent judiciary in proceedings that can be initiated by individual citizens. Accountability in this view is upward-and backward-looking; the court looks upward towards the sovereign and backward toward some prior authorisation.\textsuperscript{13}

Experimental constitutionalism does not reject the tradition in its entirety, but recasts it in a manner consistent with how we currently understand how optimal social systems work. Instead of ‘looking backward to a prior enactment and upward to a central sovereign’, Sabel and Simon claim that one of an experimentalist system’s virtues is its ability to look ‘forward and sideways: forward to the on-going efforts at implementation, sideways to the efforts and views of peer institutions’.\textsuperscript{14} In short, it spreads its bets out on a variety of different efforts to improve the system, and enables different participants within the system to learn from the successful trials and fatal errors of others similarly intent on improving the system. Wilkinson identifies the primary benefits of the experimentalist’s functional approach – as compared with a command and control or an institutional approach to governance – in terms of its predisposition to (a) set ‘framework goals and measures for assessing their attainment’; (b) bestow ‘lower-level actors the autonomy to decide on the appropriate means for their attainment’; (c) oblige ‘lower-level actors to report back on their progress and participate in peer review’, and (d) engage in periodic ‘revision of the framework goals by those who initially established them and the inclusion of additional participants whose views are seen to be indispensable to full and fair participation’.\textsuperscript{15} Whatever works. But ‘whatever works’ is now determined not, first and foremost, by legal authorities by virtue of their authority, but by a broad array of social actors who have an interest in and a willingness to participate in the creation of the norms that govern their existence. The return to ‘the social’ as a site of exploration, innovation, critique and reconceptualization of norms and practices is given a powerful twist in Simon’s ‘Toyota Jurisprudence’. Simon captures the dissatisfaction with standard centrally planned business operations in a manner consistent with the critique of the dominant top-down, command and control of modern liberal-legal governance described above:

TPS [Toyota Performance System] arises from dissatisfaction with a traditional mass manufacturing model that combines central planning with ad hoc shop floor adjustment. In the traditional model, a central corps of managers and engineers promulgates rules that dictate practice to a workforce that is narrowly skilled and divided among functional departments … Central management forecasts sales and then prescribes production targets for specific products, orders materials, and schedules each phase of the production process. Typically, the plan calls for the parts of a product to be processed separately in different departments in large batches with specialized machinery. Invariably, adjustments are required as events depart from the plan. The pattern of orders is different from the forecast. Supplies fail to arrive on time, or they are defective. In the plant, machines break down, or parts are improperly machined. … TPS proponents complain that such a system is slow in responding to unanticipated changes in the volume of customer demand or in its capacity to modify or change products. It takes a long time for centralized management to absorb information indicating that changes are needed, and a long time for it to develop and implement needed changes. The traditional system tends to be quite wasteful of labour and materials, in part, because it is slow to discover defects and, when they are discovered, slow to remedy them. In addition, the system does
not effectively capitalize on the knowledge and potential creative effort of most of its workers. And by encouraging tolerance for errors and the expectation that they will be remedied downstream, the system fails to cultivate in workers a sense of responsibility or ‘ownership’.

The model of social organization and decision making looks somewhat different under a TPS regime:

The phrase ‘kaizen’, or continuous improvement, connotes that process be revised in the course of its execution. TPS diffuses responsibility for the organization of production broadly. Shop-floor teams write and revise the descriptions for their jobs, schedule their members, and arrange for maintenance and repair of their equipment. All workers are encouraged to make suggestions for improvements in the process, and such suggestions often result in changes. Inspection and quality control cease to be the exclusive preoccupation of an elite corps and become the responsibility of the entire workforce.

The virtues of the Toyota Performance System as a model for experimental governance have been adumbrated by Wilkerson above. Another virtue, imminent in this model, but not expressly mentioned by Simon, is a form of ‘democratic solidarity’. Distinctions between ‘the bosses’ and ‘well-trained, flexible employees’ diminish. Employees receive an education, are trained to undertake multiple tasks and become part of the decision making process. Moreover, both management and workers on the shop floor take on responsibility for the final outcome. The notion of a shared endeavour in which all members have greater rights and responsibilities and duties sounds not unlike the kind of mobilized and engaged citizenry contemplated by s 3 of our own South African Constitution. Not only are citizens ‘(a) equally entitled to the rights, privileges and benefits of citizenship’, but they are ‘(b) equally subject to the duties and responsibilities of citizenship’. Such reciprocity drives Toyota Jurisprudence (and experimental constitutionalism).

Third, a return to the social need not mean political agnosticism. Experimental constitutionalism in South Africa operates within an aspirational normative framework provided by the text of the Constitution. The job of courts, legislatures, executives and citizens is to seek out those laws, policies and social practices that will achieve the basic law’s ends. To identify those best practices, experimental constitutionalists enjoin state and non-state actors to create a variety of environments in which individuals and institutions make choices that are better ‘as judged by themselves’ and better as determined by the judiciary, the legislature and the executive in terms of the overall welfare of South Africa. In all instances, experimental constitutionalists must have some ex ante goal in mind. That normative departure point is determined by the text of the Constitution and various publics, networks or associations that operate within our ‘objective, normative value order’. Even as we ‘fill in’ their content, many of the norms in the Constitution will still operate at a fairly high level of generality.

Why should the gloss placed upon most norms by the Constitutional Court also remain rather rarefied? The whole point of the experimental constitutionalism is to find out – ex post – both the best way of arriving at those rarefied ends (through legislation, policy and social arrangement that are both forward looking and lateral looking) and revising those ends.
(within the framework established by the Constitution) as people determine, over time and space, the ends they truly wish to pursue.

Fourth, the norms found within the South African Constitution – primarily those norms found within the Bill of Rights – are best understood in terms of a contemporary understanding of flourishing. This account of flourishing – whether described in terms of development theory or the capabilities approach – is decidedly not instrumental. Not only does it provide a relatively concrete view as to how individuals can pursue ‘lives worth valuing’ when they possess a reasonably full basket of the material and immaterial means (the capabilities) required for such pursuit, it identifies a constellation of rights (and a hierarchy within that constellation of rights) necessary to realize the invariably heterogeneous notions of flourishing that individuals and communities will pursue in our radically heterogeneous constitutional order.

This fourth feature of my South Africa twist on experimental constitutionalism possesses something of a challenge for the founders of this new school of thought. The reason: most of my experimental constitutionalist friends have a John Dewey problem. Overly concerned with intractable debates about foundationalism or essentialism, Dewey and his acolytes, such as Richard Rorty, deny the need for first principles, and apparently any principled departure point. This refusal leads to a problem repeatedly slammed happily home by America’s own Diogenes, Stanley Fish: ‘No politics follows from [pragmatism] or is blocked by it; no morality attaches to it or is enjoined by it.’ I should say, however, that while it’s no problem for Fish, it is a sticking point for experimental constitutionalists such as Dorf, Freidman, Sabel, Simon and Sturm. You simply cannot approach constitutional theory in a meaningful fashion without having an identifiable set of normative pre-commitments. Larry Tribe’s rather acerbic riposte to the structured silences of various constitutional theories a quarter century ago (eg, Ely’s process theory) applies with equal force to today’s experimental constitutionalists: ‘My reply is to question all formulas as concealing the constitutional choices that we must make – and that we cannot responsibly pretend to derive from any neutral method.’ Ira Struber suggests, constructively, that pragmatists, and therefore experimental constitutionalists, can respond in three ways: (1) they can make their ideals and aspirations explicit (and no more or less subject to scrutiny and to critique); (2) they can confess that the epistemological critique has teeth (for what that’s worth), while subjecting the political consequences of their ideals to external appraisal; and (3) they can set about acknowledging that they are committed to a general normative structure, but concentrate their efforts on the creation of institutions that allow members of any given community both to test the best means of achieving those ends and to alter the very norms with which they began. Neither pragmatists nor experimental constitutionalists need be embarrassed by their social democratic (or egalitarian pluralist) politics. For while social democracy may not appear to be written into the fabric of supernovas at the distant outskirts of our universe, we have good reason to believe that social democracy is written into the fabric of humanity. I take up this claim again in Chapter 7’s discussion of flourishing, development theory and the capabilities approach and assert that we may actually be hard-wired for something akin to social democracy. (It’s a point to which I have already strongly alluded in Chapter 2’s discussion of radically heterogeneous, naturally and socially determined selves.)
B. Basic Facets of Experimental Constitutionalism

The ur-text for experimental constitutionalism is Michael Dorf and Charles Sabel’s monograph-length article ‘A Constitution of Democratic Experimentalism’. The authors summarize their theoretical framework as follows:

Democratic experimentalism … attempts to decentralize power (in particular domains) to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems. This information pooling, informed by the example of novel kinds of coordination within and among private firms, both increases the efficiency of public administration by encouraging mutual learning among its parts and heightens its accountability through participation of citizens in the decisions that affect them. In democratic experimentalism, subnational units of government are broadly free to set goals and to choose the means to attain them. Regulatory agencies set and ensure compliance with national objectives by means of best practice performance standards based on information that regulated entities provide in return for the freedom to experiment with solutions they prefer. … This type of self-government is, in the United States, currently emerging in settings as diverse as the regulation of nuclear power plants, community policing, procurement of sophisticated military hardware, environmental regulation, and child-protective services. … [The] combination of decentralization and mutual monitoring intrinsic to democratic experimentalism better protects the constitutional ideal than do doctrines [say] of the separation of powers, [doctrines that are] so at odds with current circumstances, that courts recognize the futility of applying them consistently in practice by limiting themselves to fitful declarations of their validity in principle. … [D]emocratic experimentalism requires … social actors, separately and in exchange with each other, to take constitutional considerations into account in their decision making. [State structures] assist the actors even while monitoring their performance by scrutinizing the reactions of each to relevant proposals by … others. The courts then determine whether the [state] has met its obligations to foster and generalize the results of this information pooling. Agencies and courts alike use the rich record of the parties’ intentions, as interpreted by their acts contained in the continuing, comparative evaluation of experimentation itself. … [T]he aim of democratic experimentalism is to democratize public decision making from within, and so lessen the burdens on a judiciary that … awkwardly superintends the every-day workings of democracy. … [Democratic experimentalism] reconceptualizes constitutional rights. Relying … on ideas associated with early-twentieth-century American pragmatism, [democratic experimentalism] treats disagreements over rights as principally about how to implement widely shared general principles. … [T]he United States Supreme Court has recognized that there are often a variety of acceptable remedies for a violation of rights or a variety of acceptable means of achieving a constitutionally mandated end. … [Democratic experimentalism so reconceives] rights, [and]. … other constitutionally entrenched principles, [so that] means and ends cannot be neatly separated … [E]xperimentation at the periphery also redefines the core, ultimately challenging the very distinction between core and periphery.24

The remainder of this section spins out the meaning of some of the more important facets of experimental constitutionalism. The first dominant feature of experimental constitutionalism is a commitment to shared constitutional interpretation – an invitation to the co-ordinate branches of government to engage in an ongoing empirically-inflected dialogue about the meaning of the provisions found in our basic law. It directly challenges
the arid doctrine of separation of powers that often substitutes for reasoned discourse about the political norms that govern our lives. The second feature, participatory bubbles, draws our attention to less rarefied but no less important constitutional conversations. While a scheme of shared constitutional interpretation introduces experimentalist elements into the upper tiers of government institutions, the notion of bubbles of participatory polyarchy directs our attention to experimentation in smaller units: at the level of the individual or the local community. (Consider again Simon’s description of TPS.) Other central features of experimental constitutionalism – the nature of truth propositions in radically heterogeneous constitutional orders, a chastened commitment to deliberation, destabilization rights, remedial equilibration that effects the disentrenchment of discriminatory forms of private ordering, reflexivity and flattened hierarchies – are discussed in turn.

1. Shared Constitutional Interpretation

What is ‘shared constitutional interpretation’? In short, it stands for four basic propositions. First. 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. Second. It draws attention to a 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 does not 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 or to non-state actors to come up with their own alternative, but ultimately consistent, gloss on the text. Third. 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 to 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. Fourth. A commitment to shared interpretation ratchets down the conflict between co-ordinate branches of government and between the state and its citizens. Instead of an arid commitment to separation of powers – and the rhetorical flourishes about courts appropriately engaging in legal interpretation, not politics25 – 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. The courts and all other actors have more to gain from seeing how variations on a given constitutional norm work in practice.

The Constitutional Court has already endorsed this shared endeavour. In National Education Health and Allied Workers Union v University of Cape Town, the Constitutional Court recognized that the process of interpreting the Labour Relations Act in light of the demands of both FC s 39(2) and FC s 23(1) requires an appreciation of the legislature’s and the courts’ shared responsibility for interpreting the Final Constitution. The NEHAWU Court writes:
The LRA was enacted ‘to give effect to and regulate the fundamental rights conferred by s 23 of the [Final] Constitution’. In doing so the LRA gives content to s 23 of the [Final] Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted ‘in compliance with the Constitution’. Therefore the proper interpretation and application of the LRA will raise a constitutional issue. This is because the Legislature is under an obligation to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. In many cases, constitutional rights can be honoured effectively only if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the Legislature act in partnership to give life to constitutional rights.

The creation of remedies for rights violations requires a similar sort of institutional comity. The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs Court writes:

It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, ‘finetuning’ them or abolishing them.

Shared responsibility for interpreting the Final Constitution has its limits. The legislature – or the executive – must make a good faith attempt to revisit an issue in a new and constitutionally permissible way. In Satchwell v President of the Republic of South Africa II, the Constitutional Court was asked to assess the constitutionality of a statutory and regulatory framework almost identical to one that it had pronounced unconstitutional only a year earlier in Satchwell v President of the Republic of South Africa I. In Satchwell I, the Constitutional Court had declared ss 8 and 9 of the Judges’ Remuneration and Conditions of Employment Act unconstitutional because the sections discriminated against homosexual judges’ same-sex life partners. The Satchwell I Court ordered that the words ‘or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’ be read into the provisions after the word ‘spouse’. Subsequent to the judgment in Satchwell I, Parliament promulgated a new Act, the Judges’ Remuneration and Conditions of Employment Act. This Act took virtually no notice of the Satchwell I Court’s order. In Satchwell II, the Constitutional Court refused to accord Parliament any deference, declared the new provisions discriminatory, and read into the new legislation the words ‘or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’. Michael Dorf and Barry Friedman use the cases of Miranda and Dickerson to great effect in explaining how shared constitutional interpretation actually works. As any viewer of US police dramas knows, Miranda rights take, in part, the form of warnings that law enforcement officers must give detained persons prior to any custodial interrogation. What few viewers appreciate is the extent to which most of those warnings were intended as judicial guidelines and not as excavations of constitutional bedrock. The Miranda Court 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’.34 The US Supreme Court adumbrates 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.35 It then notes: ‘As 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,’ then the specific Miranda guidelines must be followed. At the very same time, the Miranda Court devotes the better part of a paragraph to prodding other governmental and law enforcement bodies into devising their own ways of safeguarding the right: ‘We encourage Congress and the States to continue their laudable search for increasing more and more effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.’36 Twice more in the course of the judgment, the Supreme Court repeats the holding and re-extends the invitation. Congress accepted the invitation. But as the judgment in Dickerson reflects, it wilfully misconstrued the nature of the invitation. The US Congress did not, as the US 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 have been put in place. 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 whether a confession was truly voluntary. 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 concerns about the ‘compulsion inherent in custodial interrogation’ and had failed to offer an alternative that could be deemed ‘equally effective in ameliorating this compulsion’.37 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 Fourth Amendment’s protections.38 What they were not free to do was ignore entirely even the narrowest possible construction of the Miranda Court’s holding.

What shared constitutional interpretation demonstrates is that it is possible to overcome problems of information deficit, lack of cross-cultural understanding and limited institutional competence through a subtle recasting of existing constitutional doctrines, judicial remedies, and special court structures that extract better information and increase normative legitimacy through the use of more mindful interventions. Over time, courts, state actors and non-state actors will have the opportunity to determine whether various socio-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. Shared constitutional interpretation relies upon principled negotiation and, perhaps
more importantly, rough-and-tumble engagement about norm setting between the courts, the co-ordinate branches of government and the public.

2. Participatory Bubbles

In acknowledging the significant limitations of rational deliberation in bringing about radical reformation, Bruce Ackerman has offered an understanding of error correction and political change that is restricted to a few key constitutional moments. However, rather than limiting reconstruction of our basic law to a few earth-shaking moments of universal participation, the institutional design proposals contemplated by experimental constitutionalists seek to create small-scale bubbles of limited participatory democracy regarding the content of individual constitutional norms and their application to subject-matter specific, and often time-sensitive, institutional contexts.

The physical metaphor of bubbles is meant to convey three qualities of such small-scale institutional processes. First, processes of participation and negotiation 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 participation. Bubbles only enclose a small amount of space – both in terms of the issues raised and the number of actors involved. Third, bubbles are ephemeral. After satisfactory resolutions emerge from processes of participatory engagement, the raison d’être for the bubble may cease to exist. The bubble bursts. Participants can, generally speaking, return to their more routine lives. Still, various supervisory structures must often remain in place. We want to ensure that the experimental resolutions are, in fact, carried out. We want to learn as much as possible from the experiments – whether they work, and whether they alter our understanding of the norms that frame them.

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. Such interpretative struggles are not mere word games. They can pose serious questions of individual and group survival. Does the constitutional right to shelter enable one to seek accountability from housing agencies? Does the constitutional right to religious freedom allow a small and ostracized religious group to compel law enforcement agencies to accommodate their ostensibly deviant practices? Does the foundational value of and right to equality permit one to challenge well-entrenched social mores – and the laws and traditional practices that flow from them – that discriminate on the basis of gender or sexuality or sexual orientation?

Two important caveats.

As we saw in Chapter 3, deliberation – even when restricted to participatory bubbles – 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, the negotiation that occurs within participatory bubbles is less about reaching long term binding 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. Even here, a further caveat is in order. It seems relatively clear that many discussions between different branches of government in South Africa about ‘best practices’ never occur. 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 problem is somewhat more complicated. A lack of mutual understanding is to a large degree a function of hollow state structures (not unique to South Africa) that exist, not surprisingly, alongside an extremely thin and rather fractured civil society. A weak state and a weak civil society are the natural legacies of a racist authoritarian apartheid state that served a white minority. Our one-party dominant democracy, with all its attendant problems, a largely supine business community, unions that now represent but a narrow band of class interests and the withdrawal of direct support from the international community have not helped matters. These observations are neither new nor controversial. To the extent that they have a bearing on the primary theses of this book, these claims are interrogated immediately below and again in Chapters 5, 6, 8 and 9.

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 should, 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 ought to articulate constitutional norms that enable less powerful stakeholders to have a meaningful role to play in a polycentric decision making process.

Before we throw up our hands regarding the ability of our fellow denizens of South African polity to create such useful artefacts, we ought to consider the jurisprudence flowing out of the Constitutional Court and lower courts over the past few years. The Constitutional Court has, on numerous occasions now, set out a very general normative framework within which ‘meaningful engagement’ between conflicting parties can take place. The Court’s commitment to this meaningful engagement possesses three features that deserve closer attention.

First, they may not (necessarily) be limited to the initial parties to the litigation. Other interested stakeholders – amici et al – may participate in the problem-solving process. The aim, again, is two-fold: greater elicitation of information; greater normative legitimacy of any decision ultimately taken.

Second, the other salient feature of these participatory bubbles is that they may not remain within the domain of the courts. We can easily imagine – and have witnessed in South Africa – greater community participation in hearings called by the South African Human Rights Commission, other Chapter 9 institutions, national or provincial legislatures, school governing bodies, and other social and political fora. The Constitutional Court has shown itself alive to the need for participatory bubbles when provincial legislatures take decisions
that affect the lives of the denizens within their boundaries. South Africa, despite the limits imposed by what remains a largely one-party dominant state, has the tools available to make participatory bubbles the norm in norm-setting environments.

Third, participatory bubbles lose their cohesion – and the pressure to produce better than zero-sum outcomes – if the courts 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 in the South African vernacular must be one of the first judicial doctrines to go. Several of the Constitutional Court’s recent judgments must leave one concerned about the ability of the Court to articulate such norms. Put somewhat differently, 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. Then again, the 2010/2011 judgments in Glenister and Blue Moonlight demonstrate the potential of a Constitutional Court that sets its horizons beyond a largely process-driven jurisprudence and alights upon something more substantial and substantive, decisions that model rational discourse (in a country sorely in need of it) by offering a thicker vision of the basic law that initiates discussion, engagement and action in other quarters of the republic.

However, let us assume that the courts and other political institutions adopted an experimentalist approach – replete with participatory bubbles and a commitment to shared constitutional interpretation. One must remember that one of the virtues of the experimentalist approach is that it is not static. New challenges to the general norms set by the courts, the legislative and the executive will arise. These new challenges will likely attract a host of new stakeholders – and thus new participatory bubbles. Experimentalism – especially in law and the social sciences – is a compelling answer to minimalism and absolutism because it recognizes (a) the ability to extract information to create norms that reflect the lived existence of people affected by the basic law; (b) that the circumstances governed by the basic law may change in ways unanticipated by the previous norms set by political institutions (and their stakeholders); and (c) the solutions upon which we alight may have unintended negative consequences that outstrip the apparent benefits. For example, the grand compromise struck by the ANC, big business and the unions – which led to a peaceful transition in 1994 – has outlived its usefulness. A more capacious participatory bubble revisiting and reconstituting the content of our basic law may be in order. Here’s a less troubling takeaway: the norms created by the courts or some other political body are understood to be rolling best practices that will be subject to change where and when the exigencies of the moment require such change.

This kind of language is not new to South African politics and the basic law that both amplifies and constrains that politics. In one of the first white papers on primary and secondary education in post-apartheid South Africa, then Minister 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 are being developed and implemented,
the chances are that we shall collectively make many mistakes, either in conception or execution. They must be recognized 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 compromises are negotiated, and if principled compromises are sought.57

Minister Bengu’s approach to the problems of South African primary and secondary education in a post-apartheid dispensation fits my notion of experimental governance perfectly. The minister understood the basic norms that governed South Africa’s new constitutional order. He had consulted with all of the relevant stakeholders – simply too numerous to mention here. He, and his national Department of Education, in turn, generated a white paper that would become the South African Schools Act. At the same time, Minister Bengu recognized that the law and the policies reflected in SASA were always going to be provisional. They represented a good faith effort to solve the problems that faced primary and secondary schools in South Africa. But he could not say, in advance, which policies would best serve the general commonweal and whether the provisions of our social contract might not change over time.

In the intervening 15 years, South Africa has witnessed two kinds of participatory bubbles in education: the first court initiated, the second driven by NGOs attempting to revise government policy. A largely grass-roots social movement, Equal Education (EE) claims, on its own behalf, that

In just under two years, Equal Education’s campaign has forced government to acknowledge a major gap in policy [the absence of adequate school libraries], achieved the publication of the overarching policy on the equitable provision of school infrastructure, forced publishers to acknowledge their prohibitively high prices, cultivated a reading consciousness in thousands of young people … and built a new generation of activist leaders.58

While EE deserves credit for initiating a new social movement, along with Section 27, the Legal Resources Centre, the Socio-Economic Rights Institute and the Centre for Child Law, those claims must be viewed with a pinch of salt – and against the background of the pre-existing dismal performance of our primary and secondary public school system. Libraries are great when teachers are capable of or interested in teaching learners to read.

In Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another, a case of racial exclusion masquerading as cultural autonomy, the Constitutional Court catechised two different policy initiatives.59 Since s 29(2) does not guarantee single-medium education to any public school, the first initiative, and the central holding of the case, requires that the Mpumalanga Head of Department, the Ermelo School Governing Body, principal, teaching staff, parents and learners accept that the school is now open to speakers of both Afrikaans and English, and orders the parties to find a way to satisfy the rights of all learners to a basic education. Although the Court establishes the framework – in terms of 29(2) of the Constitution and the South African Schools Act – for the resolution of this matter and subsequent similar matters, it does not dictate how the aim of equal access is to be achieved. While the Court found that good reasons may well exist for the withdrawal of the SGB’s restrictive language policies, it required both the HoD and the SGB to revisit the existing language policy of Hoërskool Ermelo in light of the needs of learners in the Ermelo
circuit and then report back to the Court with regard to their findings. Secondly, the Deputy Chief Justice, in what he describes as a ‘collateral irony of this case’ writes that:

Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education. Ample literature indicates that in Africa the former colonial languages have become the dominant medium of teaching. However, I need say no more about this irony because the matter does not arise for adjudication.60

Deputy Chief Justice Moseneke has tapped a growing consensus that the de facto default position of English as the primary language of instruction from primary school onwards has not served South African learners well and that school language policy ought to take on a far more multilingual cast.

One experiment in education appears to reach its denouement in Ermelo (the autonomy of single-medium Afrikaans public schools). At the same time, the Ermelo Court suggests that the Court might welcome results of a new experiment: an attempt by educators to determine whether multilingualism in schools is essential for the success of most South African learners (because they will only learn effectively if mother tongue instruction is offered) and whether multilingualism (that embraces an African language) amongst existing white elites will lead to the kind of mutual respect and integration required for the South African democratic project to succeed.

These two examples demonstrate two other features of participatory bubbles. First, they are not only created by courts. Second, they constitute a form of shared constitutional interpretation.

Robert Post and Riva Siegal, writing in a slightly different vein, likewise demonstrate that the current understanding of fundamental norms of a constitution can be tested and rejected by members of the polis, when popular movements arise to contest the norms as currently read.61 Such popular movements may not result in progressive outcomes. As Riva Siegal has recently shown, the assault on the original intent of the United States’ 2nd Amendment’s ‘right to bear arms’ succeeded in bringing about a conservative outcome because a 40-year-old popular movement (spurred on by the National Rifle Association) altered the accepted (200-year-old) discourse within the legal system.62 (However, a recent murderous attack at a Connecticut public school has prompted several new political initiatives by states to ban assault weapons entirely. Thus, a conservative US Supreme Court may see some of its work undone by individual states over time.)

3. Truth Propositions in Radically Heterogeneous Constitutional Orders63

Recall that our account of the self and the social in chapters 2 and 3 relied heavily on the heterogeneity of the self and the social as an opportunity for experimentation and an engine for change. A question naturally exists about whether this heterogeneity of the self and the social – contingent as they are upon a broad, heterogeneous array of endowments – undercuts the veracity of the truth statements at which we arrive through our participation in common political processes or impedes the acceptance of moral, political and judicial pronouncements by various political institutions. My position: heterogeneity does not entail incommensurable conceptual schemes that preclude translation and general agreement about most truth
propositions (whether scientific or ethical or constitutional). Moreover, the kind of pragmatism adopted in these pages need not be held hostage by a Fishian anti-foundationalism.

To understand why this is so, it is necessary to take a step back and consider the theory of interpretation and truth upon which this book is grounded. By this account, ‘snow is white’ because snow is white in the world – in English, in Sepedi, in German or in Zulu – and not because snow is ‘white’ relative to a particular linguistic set of conventions. That does not mean that our statements about the world cannot be false. As Donald Davidson powerfully puts the point:

But of course it cannot be assumed that speakers never have false beliefs. Error is what gives belief its point. We can, however, take it as given that most beliefs are correct. The reason for this is that a belief is identified by its location in a pattern of beliefs: it is this pattern that determines the subject matter of the belief, what the belief is about. Before some object in, or aspect of, the world can become part of the subject matter of a belief (true or false) there must be endless true beliefs about the subject matter.64

‘Endless true beliefs’. It is this notion of ‘endless true beliefs’ that allows us – today – to engage texts several millennia old, or a variety of 21st-century South African texts in Zulu, Sepedi, Afrikaans, Xhosa and English, or bodies of constitutional law in a variety of polities, say Germany, India and Canada. Put somewhat differently, Davidson writes:

It isn’t that any one belief necessarily destroys our ability to identify further beliefs, but the intelligibility of such identifications must depend on a background of largely unmentioned and unquestioned true beliefs … What makes interpretation possible then is the fact that we can dismiss a priori the chance of massive error. A theory of interpretation cannot be correct that makes a man assent to very many false propositions: it must generally be the case that a sentence is true when a speaker holds it to be true. But of course the speaker may be wrong; and so may the interpreter.65

On this account of knowledge, interpretation and truth, we must recognize that most of our fellow human beings are generally correct about most of the statements that they make about the world. This working assumption actually allows us to sharpen areas of disagreement – so that ‘we might later arrive at more precise propositions about the truth’.66 Problems arise – in constitutional law, as in any other domain of thought – primarily when we refuse to state our presuppositions or our conclusions clearly (when ‘language goes on holiday’) and when those who make the law or control various avenues of expression abuse their positions of power (the ‘big lie’).67

Recall that Wittgenstein offers a similar account of truth propositions in his Philosophical Investigations.68 For Wittgenstein, it is essential that we get our order of priority straight. Once a practice is established (through successful, regular action69), only then might we wish, upon reflection, to test its assumptions and results through experiments that do or do not confirm aspects of the practice’s usefulness, or our ability to extend its usefulness. Wittgenstein clearly demonstrates that: (a) regular successful action comes first; (b) we already have the material at hand to share, verifiable truth propositions about most of what we know about the world; (c) only at the very margins of belief, once we have aggressively learned all there is to be learned from one another, do our differences have any meaningful bite. (I introduced this thesis in
Chapter 1, and develop this thesis, and its application to South African constitutional law, at
greater length below.70)

The ramifications for our constitutional theory should be obvious. Seventeen years into our
constitutional project in South Africa, the basic law still functions both as a social contract
and as a contract about whose terms we largely agree. (Whether we have discharged the
terms of that contract are another matter.71 Many, if not a majority of South Africans, believe
that we have not.) Were it otherwise, the machinery of the state would grind to a complete
halt and the body of constitutional jurisprudence our courts have generated would lack the
coherence that it does, in fact, possess. That does not mean all cases have been correctly
decided, or that all of the constitutional doctrines developed thus far are internally coherent.
As Davidson pointed out above – errors exist, and will persist. However, these errors are only
intelligible against a background of endless true beliefs regarding the world about us and the
Constitution that governs us.

4. Chastened Deliberation

This possession of endlessly true beliefs about the world does not mean that disagreements –
and significant disagreements – will not arise. Indeed, South African constitutional law as a
domain of study seems especially bedevilled by disagreement. But in a highly heterogeneous
society such as our own, undergoing a difficult and slow transition from a fascist racist order
to a more egalitarian pluralist order, what might count as ‘on the margin’ of belief sets in
more established democracies often forms the heart of political debate in contemporary South
Africa. The question, then, is whether, and to what extent, these heated disagreements (on
the nationalization of mineral wealth, expedited land reform, universal health care, and the
requisite conditions for job creation) can be resolved simply by rational discourse. Given my
predisposition with regard to matters of truth claims, I tend to believe that our significant
disagreements flow from ongoing, radical inequalities of power and an inability to form the
substratum of trust necessary to have the open, honest conversations that would enable us
to act, successfully and regularly, in a manner that reflects rather obvious truths about the
world we inhabit.

Given its commitment to empiricism, experimental constitutionalism is not inclined toward
deep Habermasian conceptions of deliberative democracy. (How far are we today from an ideal
speech situation? Perhaps our first goal in South Africa should be to move away from having
the highest Gini coefficient in the world.) We have already seen the extent to which our ways
of being in the world are radically given. Moreover, given my theory of the social, we must also
recognize the broad array of cognitive biases that appear in our deliberative processes.

A thus-chastened commitment to deliberation means that public choices should be arrived
at through processes that allow for the active participation of all meaningful stakeholders and
are free, to the maximum extent possible, from coercion.72 This chastened form of deliberation
promises four goods: flexibility, accountability, learning by doing and the inculcation of trial
and error as part of those practices that admit of error. The last part of this chapter, as well
as Chapters 5 and 6, describes in detail some of the multi-stakeholder engagement fora that
create feedback mechanisms without necessarily destroying existing stores of social capital or the political institutions through which experiment and change are negotiated.

5. Destabilization Rights

In a country such as ours, with deep divisions in class (as well as race and gender and a host of other ascriptive characteristics), the notion of destabilization rights that lie at the heart of experimental constitutional thought resonates quite strongly with the goals of our own aspirational constitution. Destabilization rights function as an extended metaphor. You won’t find them expressly articulated in the Bill of Rights, nor anywhere else in the Constitution. What this term of art depicts is how actual rights and other structures can be used to challenge the status quo.

Roberto Unger’s idea of a rotating capital fund is the best available intuition pump if one’s aim is to enable others to come to grips rather quickly with the purpose of destabilization rights. In response to the tendency of virtually all capitalist systems to lock-in access to capital, and to pass on wealth from one familial or caste generation to the next, Unger’s rotating capital fund ensures that all members of and groups within a state would have access to and control over a substantial portion of a polity’s available economic capital at some point in time. The fund’s period of rotation – Unger suggests five years – would guarantee 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 persons or groups at the helm of the fund at any given moment). Given that Brazil had, during the 1970s, the world’s highest Gini coefficient, Unger’s idea of a rotating capital fund was meant to challenge the country’s radical inequality of wealth and power.

We can contrive a similar set of incentives for other political, social and economic 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 each 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. 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 interests to remain dominant they must – as a prescriptive matter – offer solace for those who did not contrive them in the first place. Even in more modest incarnations, destabilization rights allow individuals and groups to participate in the political processes that shape their lives.

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. Destabilisation rights make no such assumptions about stability, certainty or efficiency. A political system that relies 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 might result in a judicial remedy for stakeholders who seek accountability from a government agency that influences private ordering, or a social institution that exercises significant public power. Assertion of destabilization rights in these contexts 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 processes meant to address problems that concern them.79

The courts have an important role to play in establishing destabilization 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 a legislature or administrative agencies.80 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 judiciary81 than to the legislature or administrative agencies.82

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 more narrowly confined administrative decisions. Consider the following hypothetical case. A medical student who suffers from a disability is denied a medical licence. 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 licence in court. The court grants an interdict requiring medical professional boards to work with that student and others similarly situated, in good faith, in order to find a meaningful accommodation.83

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 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 defences in the event of litigation.

As Abraham Chayes has 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.84 They possess greater institutional legitimacy and often benefit
from a public perception of neutrality. Those qualities make it possible for courts to structure solutions intended to protect fundamental rights.85

6. The Disentrenchment of Private Ordering through Remedial Equilibration

The disentrenchment of private ordering, consistent with such destabilization rights, raises thorny questions about how and where we want such disentrenchment to occur. 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. Many traditional ways of being in the world are only now experiencing a collective sense of political freedom long repressed under apartheid.

And yet what are we to do when these traditional ways of being in the world re-inscribe patriarchy, racism, homophobia or capitalist inequality?86 Experimental constitutionalism recognizes that private ordering often reinforces social hierarchies that diminish individual flourishing. Experimental constitutionalism, at least in so far as it is to have meaningful application in South Africa, must be committed to various forms of state intervention: (a) that shake up existing restrictive, discriminatory hierarchies and (b) that create the space for new ways of being to emerge.87 As I shall argue below, the commitment to flourishing means, at a minimum, that individuals in traditional communities or conservative religious communities must be afforded the material and immaterial means to exit those communities when those communities fail to offer them what they deem to be ‘lives worth valuing’.

I briefly suggested above how a commitment to remedial equilibration might shake up extant hierarchies in a manner that increases the chances that individuals will possess the opportunity to pursue a life worth valuing, or, at a minimum, enable them to enter the public square without experiencing shame. Walzer describes the lineaments of this kind of egalitarian pluralist order as follows:

No more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more master, no more slaves. It is not a hope for the elimination of differences. We don’t all have to be the same or have the same amounts of the same things. Men and women are one another’s equals (for all important moral and political purposes) when no one possesses or controls the means of domination. But the means of domination are differently constituted in different societies, [publics, communities and associations].88

At the same time, he reminds us that this deep, profound and widely shared yearning does not conduce to the distribution of goods necessary for flourishing by a central, benign entity:

[There] has never been either a single criterion, or a single set of interconnected criteria, for all distributions. Desert, qualification, birth and blood, friendship, need, free exchange, political loyalty, democratic decisions: each has had its place, along with many others, uneasily coexisting, invoked by competing groups, confused with one another.89

Social goods that give meaning to life, as well as those social goods that make a meaningful life possible to pursue, are produced by and maintained by a panoply of different associational forms of life (over which we have little control).90 Since, according to Walzer, we possess...
no single matrix for distribution of goods and entitlements (material and immaterial), our primary concern should be to prevent monopoly power with respect to the distribution of one set of goods from determining the distribution of another set of goods. Given the rather egalitarian nature of his project, it may come as a surprise to find that Walzer is not adamantly opposed to the distribution of personal property through the market. Well-regulated markets, through price and other forms of information dissemination, are generally more efficient than central planners in determining an optimal distribution of existing material goods and the creation of new technologies. The problem with market distributions is not with their efficient distribution of material goods, but with the ability of natural persons and juristic persons to use their monopoly power in various segments of market economies to determine the distribution of goods in other spheres of human activity. (The widespread abuse of economic monopoly power Walzer rightly argues is but one form of tyranny. Think, for example, of the underlying philosophy of the 1% movement.) As Walzer writes:

Dominance describes a way of using social goods that isn’t limited by their intrinsic meanings … Monopoly describes a way of owning or controlling social goods in order to exploit their dominance. When goods are scarce and widely needed, like water in a desert, monopoly will make them dominant. Mostly, however, dominance is a more elaborate form of social creation, the work of many hands, mixing reality and symbol. Physical strength, familial reputation, religious or political office, landed wealth, capital, technical knowledge: each of these, in different historical periods, has been dominant; and each of them monopolized by some group of men and women. And then all good things come to those who have the one best thing. Possess the one, and the others come in train. Or, to change the metaphor, a dominant good is converted into another good, into many others, in accordance with what appears to be a natural process but is in fact magical, a kind of social alchemy.

Leaving aside the insuperable problem of overlap between spheres and competing criteria for the distribution of the same good, perhaps the most interesting outcome of the Walzerian approach to these quasi-private/quasi-public exchanges has been the recognition that constitutional litigation around sensitive issues of individual dignity and collective identity need not be a zero-sum game. As the Constitutional Court recognised in Sanderson, rights and remedies under the South African Constitution are both linked and flexible. Justice Kriegler, on behalf of the Sanderson Court writes: ‘Our flexibility in providing remedies may affect our understanding of the right.’ Such a flexible relationship between rights and remedies has not generally been the norm.

Oliver Wendell Holmes – a realist through and through – thought the law nothing more than a set of legitimate expectations about the order a court would grant: ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.’ In addition to this rather raw outcome-based assessment of the law, as Michael Bishop notes, stand two other traditional views of the relationship between rights and remedies – automatic remedialism and rights essentialism. In terms of automatic remedialism, ‘a finding that law or conduct is unconstitutional results automatically in a finding of invalidity’. In the lexicon of rights essentialism, writes Lawrence Sager, ‘there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement that attempts to translate such an ideal into a workable standard for the decision of concrete
issues’. Daryl Levison describes the distinction in starker terms: rights are ‘ideals, ultimate value judgments that are derived from some privileged source of legitimacy’; remedies ‘exist not in the realm of the ideal but … in the domain of contingent facts’.

A third relationship between rights and remedies that more closely resembles Kriegler J’s intuition in Sanderson goes by the moniker of ‘remedial equilibration’. Remedial equilibration – much like Martha Nussbaum’s notion of ‘perceptive equilibration’ – acknowledges that rights and remedies (ideal and real) are ‘interdependent and inextricably intertwined’. The two-sidedness of the real and the ideal, contends Paul Gewirtz, ‘pervades the judicial function’. The two-sidedness, continues Gewirtz, means that:

Practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely ideal. There is a permeable wall between rights and remedies: the prospect of actualizing rights through a remedy – the recognition that rights are for actual people in an actual world – makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.

What might this permeability of rights and remedies, this flexibility in determining the normative content of rights and the particularity of related remedies, mean for the issues surrounding findings of discrimination in a host of hierarchical ways of being in the world that preclude so many of us from flourishing? Well, for starters, those forms of life that distribute unequivocally public goods – say, our universities – are clearly subject to a no-holds-barred attack on discriminatory practices and equally intrusive remedies that would rectify the wrong. However, as we move away from public or quasi-public institutions toward associational forms that have a discernibly private cast, the need to distinguish between differentiation and domination, and between monopoly power and tyranny, becomes more pronounced, the likelihood of a finding of unfair discrimination less likely, and the need to consider remedies less invasive of the association, the community or the sub-public in question of greater necessity.

It’s rather easy to dispatch with the conceit that an individual might have an entitlement – a right – to become a member of a pre-existing intimate relationship between Joan and John, or Peter and Paul. But what might we say about religious communities that discriminate, in terms of membership, or the distribution of other goods, on the basis of sex or sexual orientation? Here, at least, potential findings of a rights violation and remedial action are on the cards. One possibility is that one might find that unfair discrimination has occurred in terms of s 9(4) of the Constitution or relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). Such a finding need not dictate an ‘automatic remedy’. We might find an Orthodox Jewish Shul’s partition of male members and female members of the community to constitute unfair discrimination. (The very nature of the upstairs/downstairs arrangement consigns women to second-class citizenship within that community.) However, it may be that such a finding alone is remedy enough. The finding recognises the impairment of the dignity of female members of the orthodox Jewish shul without interfering with the well-established distribution of goods within that community. Put differently, the political public may articulate dismay with respect to the ongoing subordination of women in a religious sub-public, but refrain from dictating the rules that a particular religious community continues
to hold sacred. Similarly, the discharge of a gay pianist from musical instruction at a religious private school solely on the grounds of sexual orientation might warrant a finding of unfair discrimination under s 9(4) of the Constitution or the applicable provisions of PEPUDA. Given the host of creative remedies available under PEPUDA and the Constitution, one can imagine that a court would rightly hold that neither the state nor natural or juristic persons may treat a natural person as a second-class citizen and then order (a) an apology; or (b) damages commensurate with the harm and the dislocation caused; and/or (c) assistance, provided by the culpable association and the state, in finding the pianist new and comparable employment. All such remedies are within the power of the court to grant. The religious private school, having been remonstrated, may continue to operate in a rather restrictive manner. (It would, of course, be foolish to repeat the same error again. Such behaviour might meet with less judicial solicitude the second time around.) Over time, all South African citizens come to learn that the basic law and super-ordinate legislation does not tolerate second-class citizenship.

A remedial equilibration approach in these circumstances possesses a number of virtues. First, it recognises constitutionally mandated tolerance for the multiple forms of private ordering of different communities within the political borders of our radically heterogeneous South Africa. Second, the notion that one might ‘seek justice elsewhere’ recognizes the agency of ordinary South Africans with respect to exploring new homes or the construction of new communities. Two provisos attach here: (1) communities found to diminish the life opportunities of some members have an obligation to leverage existing stores of real and figurative capital to make such exit viable; (2) the state, having found the traditional community wanting, must provide the material means necessary to ensure that the citizens subject to unfair discrimination have a genuine ‘opportunity’ to flourish elsewhere. Third, it averts the potential for politicisation of the affairs of various minority and traditional communities that might lead to a bench or reformation of the basic law that actually works against the very discrimination one seeks to undo. This third virtue is not a grim fairy tale. Witness recent calls for judicial reform within South Africa (bracketing for the moment the unprincipled political expediency that lies beneath them). Take as established writ that the modern religious-conservative political movement that would roll back a woman’s reproductive autonomy entirely in the US was born hot on the heels of the US Supreme Court decision – *Roe v Wade* – that still constitutes the apogee of women’s equal rights jurisprudence in the US.105 (That the Catholic Church had long blocked the reproductive autonomy of women at the statehouse steps is another, not inconsequential matter.) We must recognize that the rise of right-wing parties in Europe that oppose the grant of entitlements to minority groups, or the success in the United States of an extremely conservative movement that would withhold benefits to undocumented persons and their children born in the United States, has gained traction through the legalization, of what one might call, a negative politics of difference. In South Africa, our current president, Jacob Zuma, regularly plays to traditional and revanchist communities by making rather demeaning remarks with respect to particular historically disadvantaged minority groups. Remedial equilibration offers one window on to a broadly shared commitment to a more egalitarian pluralist society, through various forms of disentrenchment of power within highly stratified private orders, without incurring the backlash associated with automatic remedies and rights essentialism.
7. **Reflexivity and Optimality**

Ethical, political and constitutional empiricism requires that we evaluate social norms and institutional arrangements against our practical experience instead of a priori norms or mere intuition. In keeping with the leitmotif of this work, it follows that social norms and associational arrangements ought to be altered in light of the success or the failure of various experiments in living undertaken by the state.

Experimentalism is made more coherent by 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 Sable, for example, see reflexivity embodied in the idea of very general, centralized standard setting, wedded to localized experimentation; after the data on successful experiments is pooled and disseminated, all boats should rise with the recognition and rolling implementation of best practices. As a matter of principle, reflexivity demands that we be willing to examine and to put to the test, individually and collectively, our preferred ends and the means for achieving them. This dimension of experimentalism corresponds with the notion that, in a representative and participatory democracy, no ideas or policies should be regarded as above criticism or immune to change. (At the same time, this work’s commitment to flourishing means that in a constitutional democracy such as our own, one cannot speak of a constitutional project without pre-commitments to a range of capabilities and entitlements and principles: universal suffrage, the absence of slavery or servitude, access to a panoply of basic goods and a commitment to the rule of law.)

As Simon notes above, achieving optimality with respect to individual and collective behaviour requires great circumspection in an experimentalist order. First, given that most of our ends are chosen for us, optimality primarily means maximizing utility within a highly circumscribed value domain. The best most of us can hope for is the capacity to achieve the goals that matter to us – and not to select new ones. Second, as my discussion (in Chapters 2 and 3) of error correction with respect to the individual and the social reflects, regular experience of failure in terms of the achievement of dominant existing ends can, however, lead to reorientation toward other ends. Third, as the discussion of Sunstein’s recent work revealed, our preferences are relatively adaptive: alter the environment and one can modify goals and change behaviour. Experimentalism is both the justification for the selection of alternative ends and the method for achieving them.

8. **Flattened Hierarchies Rather than Top-Down Command and Control**

State intervention can take two forms. Neither excludes the other. It can either be imposed from above, via direct state action, or originate from below, through the initiative of informed and trained individual stakeholders. Direct state action offers the virtue of speed. It suffers 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 a bureaucratic staff, already underpaid, under-trained and under-resourced, when it comes to solving problems already on its plate. 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 South Africa’s political project of liberation – to change the mind-set of those who govern. Finally, the silence of those affected undermines the legitimacy of the decisions taken.

As we saw from Simon’s analysis of Toyota’s Performance System, a flattened hierarchy within most social systems possesses the benefits of ‘emphasizing the goals of learning and innovation’, ‘treats normative decision making in hard cases as presumptively collective and interdisciplinary (rather than the heroic labour of solitary professionals)’, and ‘attempts to bracket or sublimate issues of individual and retrospective fairness or blame’. Individual citizens and communities within an experimental constitutional democracy are viewed as sources of solutions, are made part of decision making processes that concern them and become part of a political community that is forward and lateral looking, rather than backward and punitive.

C. Potential Limits of Experimental Constitutionalism in South Africa

It would be pollyannaish, at best, to assume that the experimental constitutionalism literature of the United States or the new governance literature in Europe could be transplanted to South Africa without limitation. These limitations warrant serious consideration, though they are by no means insurmountable.

1. Institutional Undercapacity

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 a 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.

South Africa’s legislatures, administrative agencies and courts face even greater challenges. First, as Sujit Choudhry, Heinz Klug and Theunis Roux have demonstrated, they operate within and are subject to the pathologies of a one-party dominant democracy. The dominance of the African National Congress over the first 18 years of democracy cabins contestation of its preferences – whether it be in law or policy. Second, the often dramatic under-capacity of local government and the fourth branch of government (bureaucracies) limits the ability of the state to discharge its constitutional obligations. Third, 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, healthcare, water and education – 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. Finally, limits on the fiscus – even without conflicts in priority – will continue to constrain the legislature’s capacity to make good the promise of various constitutional rights.

In addition, experimental constitutionalism requires institutions – courts, legislatures, bureaucracies and the various executive branches of national, provincial and local government – 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. 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.

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. As to whether most state actors are actually attempting to make sense of and enforce Constitutional Court judgments, Roach and Budlender’s careful analysis of the state’s implementation of court-ordered remedies suggests that many wilfully ignore them. If Roach and Budlender are correct, then the actual political environment in South Africa may force upon us more modest expectations for the court-based, or issue-specific forum-based, standard setting and rolling implementation of best practices that Dorf, Friedman, Simon, Sturm and Sabel identify as the \textit{sine qua non} of successful experimental constitutionalism. On the other hand, Dorf, Friedman, Simon, Sturm and Sabel give us reason to believe that by returning responsibility for decision making to the actors most immediately affected by political, administrative or judicial edicts, we stand a better chance of fixing what is broken. (It may mean, \textit{hold your breath}, returning responsibility for various public functions to the citizens who legitimately expect delivery of basic public or common goods.) Experimental constitutionalism relies upon (a) a relatively high degree of participatory politics, and (b) a commitment to fairly flexible, standard-based judicial and non-judicial adjudication. Roach and Budlender’s apprehensions and recent studies conducted by Ivor Chipkin loom large. They remain, however, descriptive. We retain the capacity to do and to be otherwise.

2. \textit{Traditional Forms of Life and Radical Reformation}

This work attempts to steer a path between the conservation of traditional social orders and the commitment to radical change (in widespread areas of social life) required by our basic law. Commitments to religious freedom, cultural and linguistic community rights, property rights, associational freedom and even freedom of trade, occupation and profession ensure a relatively high degree of private ordering beyond the reach of the state, and the pluralism to which these rights are committed, does not generally lead to greater heterogeneity, new experiments in living and more egalitarian outcomes. Socio-economic rights – to education,
to housing, to a healthy environment, to food, to water, to healthcare and to social security – have the potential to bring about radical change (even as one must acknowledge that they have only been partially vindicated).

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 of doing that which we are already doing – only better. It requires 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 radical dimension of this work’s politics recognizes the vast inequalities in existing stocks of social and economic capital that sustain various stores of meaning in South Africa. 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. If we tie our constitutional project too closely to tradition and conservation, then the danger exists that the state will not be able to prevent individuals and groups from using existing practices and associational forms to reinforce domination and tyranny. Radical reformation must hold out to individuals the promise of moving away from a way of being in the world that diminishes the self, to a way of being in the world that holds out the potential for the enrichment of the self.

D. Normative Content of Experimental Constitutionalism

As I noted earlier, many pragmatist projects are often subject to a single, but harsh, indictment. They are viewed as largely instrumental and without the capacity for establishing the ends by which (any degree of) success might be measured. The proper rejoinder – crucial to the success of experimental constitutionalism in South Africa – is to lay out the contours of a commitment to flourishing. My riff on flourishing is most congenial to two of the most important advances in recent political theory: development studies and the capabilities approach.

1. On Flourishing

In Chapters 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 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 desirable and valuable ways of being in the world – and the material conditions that make their exercise possible – that constitute what I mean by flourishing. I discuss this modern notion of flourishing and its partial, unstated acceptance as a foundation for constitutional law in South Africa at length in Chapter 7. For now, we need only delineate a politics of flourishing in a manner that makes it a plausible match for a theory of experimental constitutionalism.

At a relatively trivial level, an image best captures the essence of this commitment to flourishing. In Raphael’s famous painting ‘The Academy of Athens’, two figures occupy
centre stage: Plato and Aristotle. Plato’s right hand and his right index finger point skywards. Aristotle’s right arm is outstretched, the palm of his hand face down, about waist high, inclined ever so slightly toward the ground.

Plato’s hand gesture vividly captures an entire weltanschauung. As most readers know, the argument developed in *The Republic* and other works (*The Meno*) suggests that the world of human perception and experience is shadow play. Recall the metaphor of ‘The Cave’. Lights and silhouettes dance on the wall. These apparitions, on Plato’s account, reflect the barest outlines of objects (and propositions about those objects). The things themselves remain inaccessible to limited powers of human perception. Accurate truth propositions about the world – and what makes human lives worth living – are accessible (directly) only to those philosophers who have the capacity to go beyond mere apparitions and who possess the requisite acumen to separate the wheat from the chaff of human thought. Through the identification of ‘the forms’ and ‘the good’ by these philosopher-kings, other members of Plato’s hypothetical, highly stratified community are able to partake of the benefits of the well-ordered and just society whose lineaments have been identified by their more gifted kin.

Aristotle’s gesture rejects both Plato’s method of divining the good (through pure reason) and the kind of well-ordered society that Plato derives from his mobile army of metaphors. My account of flourishing is not meant to revive an Aristotelian ethic of virtue. That communitarian ethic, collapsing as it does the right and the good, has no place in a theory about (some of) the optimal features of a modern democratic constitutional order that frames our own radically heterogeneous society.

Aristotle’s account of practical wisdom (*phronesis*), eudeimonia (*flourishing*) and *arête* (*virtue*) does, however, strike a decidedly contemporary cord, convivial to constitutional theory. These features of Aristotle’s work have been regularly invoked by modern political philosophers working within the existing frameworks of development theory, the capabilities approach, constitutional law and universal human rights discourse.

What could Aristotle possibly have to offer us moderns in our radically heterogeneous, sprawling, raw and riven nation state (South Africa) committed, by its basic law, to such divergent (yet ostensibly covalent) foundational values as freedom, equality and dignity? Aristotle opens Book II of the *Nicomachean Ethics* with the following statement:

Moral virtue … is formed by habit … [and] none of the moral virtues is implanted in us by nature [alone] … [T]he virtues are implanted in us neither by nature nor contrary to nature; we are by nature [unlike a stone] equipped to receive them, and habit brings this ability to completion and fulfilment.126

One thesis that I have reiterated again and again is the extent to which a broad array of involuntary social practices (*habits*) make us who we are and give our life meaning. We are born into these practices. They are ‘the habits of our heart’.127 They are also the habits of which Aristotle speaks. The second thesis – confirmed by the neuroscience and the experimental philosophy described in Chapter 2 – is that we are innately inclined to receive and to reiterate cultural habits and naturally ingrained dispositional states.

Some habits (endowments) may be beyond scrutiny. Indeed, they maybe required in order to satisfy the baseline desiderata for appearing in public without shame. Other facts
and norms, consistent with a commitment to experimentalism, must be open to review. However, I have made it patently clear: (1) that most of our perceptions of the world ought to be viewed as stable (and largely verifiable and true); (2) that our reflections upon them form an essential and desirable feature of our existence (even when, as Frank Michelman says, we still attempt to learn aggressively from alternative beliefs held by others); and (3) that these perceptions, beliefs and values, when woven together, and acted upon, define flourishing. Aristotle propounded this very three-part thesis. In Book II of the *Nicomachean Ethics*, Aristotle begins by defending the quintessentially Davidsonian principle ‘that our perceptual and cognitive faculties are basically dependable, that they for the most part put us into direct contact with the features and divisions of our world, and that we need not dally with sceptical postures before engaging in substantive philosophy’.

In Book VI of the *Nicomachean Ethics*, he puts this complex proposition as follows: ‘We are all convinced that what we know scientifically cannot be otherwise than it is … Therefore, the object of scientific enquiry exists of necessity and is, consequently, external.’ Our opinions about matters scientific may or may not be entirely true. (Even statements like ‘snow is white’ are subject to revision; we all now know about the black snow in the Arctic that contributes to global warming.) They remain subject to examination and to experimentation undertaken by a community of like-minded philosophers and scientists. The marriage of a world with which we are in unmediated contact to our cognitive capacity to put our beliefs about the world to the test means that Aristotle shares much in common with contemporary neuroscientists, social scientists and experimental philosophers. We can view empirical and experimental philosophers such as Appiah, Knoble and Aristotle as primarily concerned with how reason relates to action and subjecting our moral, political and legal beliefs to thorough analysis and proof (of a particular kind).

This emphasis on action intimates why it is important not to collapse ethics and science. Ethics as a *practice* requires *action*. These actions remain, through *phronesis* (practical wisdom), subject to a particular form of critical inquiry. We learn from our betters – say Pericles or Mandela – how one should behave when confronted with certain kinds of ethical dilemmas. Yet Pericles and Mandela – and statesmen of a similar ilk – do not provide us with rules or decision procedures that we can simply apply (sans reflection) to the moral universe or a given ethical dilemma laid out before us. Our betters may be our teachers in important respects. However, it is through our own actions that we develop practical wisdom and an ethical orientation toward the world.

The emphasis Aristotle places on the views of persons such as Pericles (or Mandela), *endoxa* (‘reputable judgments’, ‘credible opinions’, ‘entrenched beliefs’), constitutes a starting point – from which we may have no reason to depart. Again, however, Aristotle’s emphasis on *action* as a critical component of practical wisdom, flourishing and virtue means putting both received wisdom and our own forms of ethical and political thought consistently to the test. (Here we can discern 2500-year-old glints of experimental governance.) Action – putting reason to the test – demands working back and forth between means and ends. This reflexivity with respect to the ends that we pursue and the means that we employ gives Aristotle’s thought a distinctly modern, experimentalist cast. His working back and forth between means and
ends shares important features with the work of Nussbaum, Sen and Sunstein. Nussbaum, in her neo-Aristotelian phase, placed particular emphasis on the construction of ethical action through relationships and the reflexive relationship between means and ends through what she described as a process of ‘perceptive equilibrium’. She writes:

The effort really to see and really to represent is ‘no idle business in the face of the constant force that makes for muddlement.’ So wrote Henry James on the task of moral imagination. We live amid bewildering complexities. Obtuseness and refusal of vision are our besetting vices. Responsible lucidity can be wrested from that darkness only by painful, vigilant effort, the intense scrutiny of particulars. Our highest and hardest task is to make ourselves people ‘upon whom nothing is lost.’ A person armed only with standing rules … would, even if she managed to apply them to the concrete case be insufficiently equipped to act rightly in it. It is not just that all by themselves they might get it all wrong; they do not suffice to make the difference between right and wrong. … Obtuseness is a moral failing; its opposite can be cultivated. By themselves, trusted in and of themselves, the standing terms are a recipe for obtuseness. To respond ‘at the right times, with reference to the right objects, towards the right people, with the right aim, and in the right way, is what is appropriate and best … [James’ writings] allows us to see more deeply into the relationship between the finely tuned perceptions of particulars and a rule governed by concern for general obligations; how each, taken by itself, is insufficient for moral accuracy; how [and why] the particular, if insufficient, is nonetheless prior; and how a dialogue between the two [characters], prepared by love, can find a common basis for moral judgment. … James’ talk … of ‘getting the tip’ shows us what moral exchange and moral learning can be, inside a morality based upon perception. Progress comes not from the teaching of an abstract law but by leading the friend, or child, or loved one – by a word, by a story, by an image – to see some new aspect of the case at hand, to see it as this or that. Giving a ‘tip’ is a give a gentle hint about how one might see.131 The ‘tip’ here is given not in words, but in a sudden show of feeling. It is concrete, and it prompts the recognition of the concrete. … [T]his ideal of [perceptive equilibrium] makes room … for norms or norms of rightness and a substantial account of ethical objectivity. … Jamesian moral perception is like this: (without denying the existence of norms), [it requires] a fine development of our human capabilities to see, to feel, to judge; an ability to miss less, to be responsible for more.132

We may begin with certain ethical norms as our guides. But it is, ultimately, the attempt to find a fit between the moral facts with which we are confronted and the generally accepted norms that guide our behaviour that distinguishes Nussbaum’s (neo-Aristotelian) approach to ethics from neo-Kantian approaches – say Rawls’ notion of ‘reflective equilibrium’.133 The facts with which we are confronted are at least as important as the norms that we bring to the table. The fundamental flaw in Rawls’ account of ethical reasoning flows from his decision to relegate facts and relationships to opaque background conditions – states of the world of which we are dimly aware as we construct a perfectly just society behind a ‘veil of ignorance’.134

To sharpen this point, an example may help. I have yet to have a student in a South African law school elect to give up the particularities of their existence, step behind the ‘putative’ veil of ignorance and agree to a start afresh (as any one of fifty million South Africans) with only the difference principle as an insurance policy that would ensure that every economic decision would benefit (to some degree) the worst off. Everyone knows the difference between life in Alexandra Township, on one side of the M1, and life in Sandton, directly on the other...
side of the highway. The thought of making that ‘thought experiment’ a reality quickly ends discussions about reverse discrimination.

The commitment to reflexivity shares a family resemblance to the contemporary notion that we do not possess, in many matters of import, locked-in preferences. Our preferences in various arenas, as both Sen and Sunstein have demonstrated, are adaptive. While we must be committed to general norms that guide our behaviour towards more virtuous or optimal ends, otherwise no ethical inquiry can get off the ground, we may find that our initial preferences, to the extent that we possess them, may not be in accord with that which we discover is best for us and others. We need only recall how Thaler and Sunstein’s nudges – or the new and improved ways of understanding the world that may impose themselves upon us on the golf course, the analyst’s couch, in the academy or within the corporate boardroom – result in changes in belief and practice that we now hold to be preferable to those beliefs that we previously entertained.

Aristotle, Nussbaum, Sen and Sunstein, of course, believe that the fields of ethics and politics are grounded in a substantially large number of well-justified beliefs that remain true over time. However, what these thinkers recognize, in addition, is that a politics of flourishing requires of individual citizens, and those that govern them, a well-developed attention to, and even a willingness to experiment upon, the particular circumstances from which a practically wise judgment must issue.

2. **On the Relationship Between Flourishing and Experimentalism**

How does flourishing relate to the grander project of experimental constitutionalism?

First, for Aristotle, flourishing reflects the highest order of human activity. Second, flourishing is not a static state. Third, flourishing entails the actualization, to the highest possible degree, of all of our various competences, powers, faculties or gifts. As we shall see in Chapter 7’s discussion of development and capabilities, the demands of flourishing require that we (as members of a given community) must provide individuals and communities with the material means necessary to realize these core competences, powers, faculties or gifts.

A fourth feature of flourishing, on Aristotle’s account, is that individuals and groups will differ about the nature of ‘flourishing’ or ‘happiness’. They may agree on core competences, powers, faculties or gifts, but disagree on the import and the contours of those competences, powers, faculties or gifts, and the visions of ‘the good’ that they produce.

One can therefore translate Aristotle’s account of flourishing into modalities more felicitous to strains of modern philosophical thought without doing violence to the original text. Flourishing is a function not only of rational deliberation (which only takes one so far), but of experience, applied wisdom and experimentation. This practical engagement with the world and other human beings enables us to discern the correct course of action for ourselves and others. That capacity is especially important given the novel ethical situations that our world throws up daily.

For many, this discussion of Aristotle may seem far afield from our current set of enquiries – pressing up as they do against the most recent revelations in neuroscience, social theory or empirical philosophy discussed in Chapters 1, 2 and 3. But I want to push two propositions
(1) the kind of ‘experimental’ or ‘practical’ wisdom that guides contemporary theories of the self, the social and the constitutional has a long history in western thought and are united by considerations Aristotle identified some 2500 years ago; and (2) experimentalism in the related fields of epistemology, ethics and politics are connected, by a shared method, to this account of flourishing. I will try to make each part of the extended argument somewhat clearer below. For now, the connection between experimentalism and flourishing runs roughly as follows.

Both approaches to politics get off the ground through an initial acceptance of the shared practices and belief sets of the various communities into which we are born and within which we live. We recognize that these habits of the heart are what allow us to be wise (and foolish). At the same time that both experimentalism and flourishing accept the ‘endless true beliefs’ upon which our thoughts and actions are predicated, they emphasize the circumstances under which errant beliefs or non-optimal practices can be sifted out through action. Both experimentalism and flourishing are committed to reflexivity – a working back and forth between means and ends. In addition, having chosen the correct means to realize an end, we may find over time that the means reshape our view of our ends (or the good). For example, by approaching drug offences as opportunities for treatment rather than incarceration, we may come to see drug use as less of a crime against society requiring retribution and more a function of genetic or environmental factors beyond an individual’s control and with which she must fight a life-long battle. Finally, Aristotle and moderns such as Nussbaum, Sen and Sunstein, recognize the heterogeneity of goods that human beings pursue. While Aristotle may have viewed many of these pursuits as misguided, they remain facts of human existence nevertheless. Moderns committed to flourishing and experimentalism are more willing to incorporate that difference into their theories – and to make the local community, the state or the international community aware that they have obligations to ensure that individuals and various sub-publics have the ability and the capability to realize varying ends. Aristotle and the moderns whose theories I have deployed also recognize an additional truth – one that may have been lost in the empirical accounts of the self and the social that drove the first few chapters: ethics and science have different aims. As Nussbaum puts it:

But there is a mistake made, or at least a carelessness, when one takes a method and style that have proven fruitful for the investigation and description of certain truths – say those of natural science – and applies them without further reflection or argument to a very different sphere of human life that may have a different geography and demand a different form of precision, a different form of rationality. Most of the moral philosophy that I have encountered lacked these further reflections and arguments. And frequently stylistic choices appear[ ] … dictated … by habit and the pressure of convention … [and] above all by the academization and professionalization of philosophy, which leads everyone to write like everyone else, in order to be published in the usual journals. Most professional philosophers [do] not … share the ancient conception of philosophy as discourse addressed to non-expert readers of many kinds who would bring [to their engagement with a text] their urgent concerns, questions, and needs, … and whose souls might in that interaction [with the text] be changed. Having lost that conception they [have] lost, too, that sense of the philosophical text as an expressive creation whose form should be part and parcel
of its conception, revealing in the shape of the sentences the lineaments of a human personality with a particular conception of life.\footnote{137}

It’s human beings and what matters to them that occupies these pages, not an engineer’s analysis of widgets and sprockets. The sentences in this work should scan, and paragraphs should challenge the preconceptions of the reader, all without losing precision or reflecting an unwarranted worry that a ‘literary style would evoke\text{} criticism or even ridicule.\footnote{138} One’s training as a philosopher and a lawyer need not bind one to an arid, formalistic representation of the basic law – even as one appreciates the rigour behind more precise forms of presentation. The trick is to maintain the commitment to rigour at the same time as the writer sustains her connection with her reader.

Armed with Aristotle’s original position and Nussbaum’s reconceptualization of flourishing, we should see why a commitment to recasting freedom in terms of the more modest (less comprehensive) conception of flourishing (as propounded by Nussbaum) requires a relatively modest conception of constitutional politics. Though bracketed in its reach (the book does not claim to offer a full-blown constitutional theory), this work should demonstrate how one modest account of politics – flourishing – compliments another equally modest account of politics – experimental constitutionalism.\footnote{139}

This work 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.\footnote{140} 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 can fully realize extant sources of the self and nudge them (and their adaptive preferences) toward more optimal ways of being (as they come to understand them).

Put another way, 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 comprehensive (and non-comprehensive) notions of the good can co-exist – if inevitably uncomfortably. To meet these minimal requirements, such a state must ensure that each individual inhabitant possesses the most basic entitlements necessary to appear in public without shame and that the general conditions for both individual and group flourishing obtain.\footnote{141} Such roles for the state are entirely consistent with both the conservative and the progressive features of the Final Constitution.\footnote{142}

Three further pre-commitments are required for this model of constitutional politics to work. First, 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 Millian ‘experiments in living’. Such experiments should, in turn, yield more and better versions and visions of the good. Second, the state must create institutions that ensure the active participation of its citizens in decision making 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 and the rule of law – can
the kind of participation that leads to the legitimation of the entire political enterprise take place. Again, the purpose of this project: the maximization of 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 or experiment with alternative visions. The experimental constitutional state 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. A commitment to rolling best practices should create a range of options for being in the world that enhance our understanding of what it means to be fully human. This slowly evolving enhancement and expansion of the conditions of being constitutes the only genuinely meaningful account of political freedom.143

E. Emergent Experimentalist Government, Information Pooling and Rolling Best Practices in the United States

The experience of many lawyers and scholars both in the United States and South Africa is that remedial intervention contingent upon a command-and-control state bureaucracy is fraught with difficulty and is 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. 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”.144 Sabel and Simon write that “instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes on-going stakeholder negotiation, continuously revised performance measures, and transparency”.145 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”.146

Because my naturalized account of the self and the social takes seriously the limits on our capacity for rational reflection and collective deliberation, it is inaccurate and obscurantist to ground our politics in an alleged capacity of individuals and groups to engage regularly (let alone daily) 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. My naturalized account of the self and the social does not deny our capacity to engage in meaningful deliberation. Like much of experimental discourse, it primarily questions the level at which such deliberation should take place and the degree to which we should be bound by the outcome of any single set of deliberations of, say, a Constitutional Court.

1. Educational Reform

The United States has eighty years 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 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. As Gerald Rosenberg contends, matters only changed dramatically when extra-curial structures — the executive and individual school boards — decided to take up the cause.

The next wave of litigation revolved around issues of fiscal equity. Ironically, while some of these constitutional cases secured equal funding, the ultimate result has often been diminished funding overall and the movement of many privileged learners out of the public school system into the private school system (through private funding and public vouchers). More importantly, there has been no discernible improvement in the performance of schools in historically poorer districts. (Unless current projections change by 2014, the No Child Left Behind Act — with its mix of funding incentives and achievement benchmarks — will find that roughly two-thirds of learners and schools have failed to improve in the manner lawmakers expected. The only alternative, now, consistent with an experimentalist approach, is to alter the mix of incentives, benchmarks and funding to achieve more optimal outcomes.)

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 fix[,] the precise content of [the] reform.’ 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).

This last wave of education litigation fits more general arguments about ‘feedback mechanisms’ and ‘trial and error’ in a two-fold manner. 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 will expand the conditions of freedom, not simply by allowing people to do as they wish, but through state-sponsored and privately 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 parents, the wave after wave after wave of litigation may achieve the kind of experimental success that ought to be the hallmark of a politics committed to individual and group flourishing.
The proof of such feedback mechanisms is in the pudding. When Sabel and Simon began their investigations of experimental constitutionalism in the context of education reform, Alabama ranked near the bottom of the fifty states in terms of literacy and numeracy. It was, perhaps, the most broken of the systems that they surveyed.

One might expect that those states whose judicial systems, legislatures, teacher unions, parent associations and students which would gain the most from experimentalist institutions would already have the necessary feedback systems and the ability to pool information in place. That is, the best would be better off under this new regime. It ain’t necessarily so. As it turned out, the most broken of systems – such as that found in Alabama – benefitted the most from the reflexivity of experimentalist feedback mechanisms. The reasons seem clear enough. Instead of formulating rules regarding education policy and goals from the top down, new institutional designs allowed for greater participation from those groups and individuals who knew the most about what needed fixing. In most educational systems, those players are likely to be the people with the greatest day-to-day experience of what works and what doesn’t: principals, teachers, parents and learners. By extracting more information from those groups at the coalface and reversing the flow of information upwards – from principals, teachers, parents and learners to agencies, courts and legislatures – Alabama found itself in a position to benefit more from experiences of what works and what doesn’t than states whose educational systems already possessed greater reflexivity in their systems.

In describing public law litigation more generally, Sabel and Simon offer assessments consistent with the more speculative ‘Toyota Jurisprudence’ approach to experimental governance adumbrated above. They write that public law litigation has moved away from remedial intervention modelled on command-and-control bureaucracy toward a kind of intervention that can be called ‘experimentalist’. Instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes on-going stakeholder negotiation, continuously revised performance measures, and transparency. Experimentalism is evident in all the principal areas of public law intervention – schools, mental health institutions, prisons, police, and public housing. This development has been substantially unanticipated and unnoticed by both advocates and critics of public law litigation. … The evolution of structural remedies in recent decades can be usefully stylized as a shift away from command-and-control injunctive regulation toward experimentalist intervention. Command-and-control regulation is the stereotypical activity of bureaucracies. It takes the form of comprehensive regimes of fixed and specific rules set by a central authority. These rules prescribe the inputs and operating procedures of the institutions they regulate. By contrast, experimentalist regulation combines more flexible and provisional norms with procedures for on-going stakeholder participation and measured accountability. In the most distinctive cases, the governing norms are general standards that express the goals the parties are expected to achieve – that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these goals. At the same time, it specifies both standards and procedures for the measurement of the institution’s performance. Performance is measured both in relation to parties’ initial commitments and in relation to the performance of comparable institutions. This process of disciplined comparison is designed to facilitate learning by directing attention to the practices of the most successful peer institutions. Both declarations...
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of goals and performance norms are treated as provisional and subject to continuous revision with stakeholder participation. In effect, the remedy institutionalizes a process of on-going learning and reconstruction. Experimentalist regulation is characteristic of the ‘networked’ and ‘multilevel’ governance proliferating in the United States and the European Union – decision making processes that are neither hierarchical nor closed and that permit persons of different ranks, units, and even organizations to collaborate as circumstances demand. In cases that take the experimentalist approach, the courts are both more and less involved in reconstituting public institutions than they were when Chayes wrote. They are more involved because experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria. But the courts are less involved because the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them. At least in prospect, the demands on the managerial capacities of the court, and the risk to its political legitimacy, are smaller in this continuous collaborative process than in top down reform under court direction.153

2. Family Courts and Child Welfare Agencies

Family Courts are the kind of institution that would make Lon Fuller’s head spin.154 Representatives of the child, parent(s) or guardian, a foster parent or institutional representative, a social worker and an attorney acting on behalf of the state will often appear in a horseshoe-like arrangement around a specialist Family Court judge. Moreover, the rules of family court are such – so relaxed – that not only are these seven official voices heard, but the individual parties themselves may sound off. The law may be a blunt cudgel. Family courts can often soften the blow.155

The virtues of such an institutional approach for experimental constitutionalism are difficult to overstate. First, virtually every stakeholder that wishes to be heard can be heard. This fact increases the normative legitimacy of the process. Second, the plurality of voices increases the amount of information that the court can secure regarding a given family’s travails (and successes) once it has been found necessary to place a child under some form of protective care. Third, the expertise of the judge and the various practitioners – who are often solely involved in family law matters – increases the court’s appreciation of the kinds of problems that families and the children in the child welfare system face. That increased understanding has three virtues: (1) it enables courts to tailor their findings to the particular circumstances of the parties before them, with a better idea of what works and what doesn’t in such circumstances; (2) the flexibility of the court’s orders – and the relative ease with which a child and his or her family can re-enter the court – means that the judge can alter an arrangement that doesn’t work, in the hope that some other measure known to the court might; and (3) the court can take cognizance of improved circumstances and alter its orders accordingly. Without gilding the lily, the family court process sometimes succeeds in reuniting families.

How did this polycentric process come to pass – especially given the preference in many jurisdictions for binary, adversarial processes with zero-sum outcomes? Of child welfare agencies, Kathleen Noonan, Charles Sabel and William Simon write:
Programs that once focused on financial redistribution increasingly link transfer payments to services, and services are increasingly customized to the needs of individual recipients. The move to services is driven by the perception that transfer payments alone do not induce (and may inhibit) the development of skills that permit self-sufficiency. The move to individuation is driven in part by a conception of fairness that mandates response to ‘difference’ in people’s values and circumstances and by the perception that these circumstances are more fluid than they have been in the past. As the welfare state becomes more individuating and more adaptive, it threatens to undermine the awkward compromise between rule-of-law values and welfare state practices worked out in the Warren Court years and their aftermath. Two key features of that compromise were (1) the idea of a balance between relatively rigid rules to govern the conduct of low-status frontline workers and relatively flexible standards to govern the conduct of professionals, and (2) the idea of co-ordination between a bureaucratic accountability system for routine cases and a quasi-judicial accountability system for cases in which beneficiaries protest their treatment. In addition, the compromise distinguished two modes of court intervention into the administrative system—routine discrete intervention focused on particular practices or narrow norms and extraordinary systemic intervention designed to restructure entire programs. The core tendencies of the new programs put these arrangements under pressure. The need to customize and adapt makes rules an ineffective means of controlling discretion. Effective review of frontline efforts routinely requires the type of beneficiary participation that the old regime reserved for cases in which beneficiaries complained. Because the emerging system involves more complex co-ordination and more frequent adjustment, judicial review of discrete judgments and practices seems less practicable.156

That such an outcome has occurred in the child welfare system—a legal regime chronically identified with abject failure—is of even greater surprise. As of 2005, some thirty (of the fifty) states had been determined to be in such ‘systemic noncompliance with constitutional or statutory requirements’ as to warrant structural intervention.157 Despite these systemic failures, Noonan, Sabel and Simon note recent progress, and, in an echo of what Sabel and Simon found in the reform of educational systems, they discovered that the greatest progress has occurred in two of the states previously identified as having the worst child welfare systems. Both Utah and Alabama adopted self-reflexive programs that required the social workers to critique each other’s work. Social workers not only learned from their mistakes, but adopted the best practices of their peers. With respect to these two states, the authors surmise that ‘it may be because these systems have been so deeply broken that they have lent themselves to relatively radical experimentation’ and success.158 The other possibility, Noonan, Sabel and Simon suggest, is that child welfare systems were always relatively individuated and adaptable in approach, and that this specific system was simply waiting for the individuation and adaptability reflected in experimentalist models to begin to permeate the welfare state as a whole.159 But whether it was the chicken or the egg that came first is of little consequence. What matters, Noonan, Sabel and Simon contend, is that the Alabama and Utah models have implications for the debate over the proper scope of judicial intervention into chronically underperforming public institutions. Reform in these states emerged from judicial decrees mandating broad institutional form; yet, in each case the court and the parties avoided the rigidification and arbitrariness associated with ‘command-and-control’ type judicial intervention.160
The Alabama and Utah models seem to marry the benefits of shared interpretation of norms to participatory bubble-like structures at the coalface. In something of an ironic, throwaway line of argument, Noonan, Sabel and Simon identify this kind of rights discourse and remedies delivery with the socio-economic rights regime developed by our own South African Constitutional Court in *Grootboom*: namely, claimants are not entitled to specific entitlements ‘but to a process in which the relation between the claimant’s interests and the values underpinning the relevant public programs can be fairly and effectively considered’. Similarities certainly exist. But can even recent South African socio-economic rights jurisprudence – with its commitments to meaningful engagement and a few thin substantive entitlements that the state must grant successful claimants – be genuinely said to offer a model for US states that can draw down on the significantly greater resources available in what remains the world’s largest economy? Perhaps the answer is a qualified ‘yes’: the qualification is that the resources in the two domains differ by an order of magnitude.

3. **Drug Treatment Courts**

Could any aspect of the US public law regime be more broken than the family courts and the educational system described above? Yes. The federal and state penal systems are, by far, the harshest in the developed democratic world. Approximately 1,000 of every 100,000 citizens are behind bars. Compare that figure with only 59 of 100,000 citizens in jail in Japan or 152 of 100,000 citizens in jail in the United Kingdom. And forget the Netherlands. It is committed to drug use decriminalization generally and crafts policies ‘aimed primarily at limiting the harm that long term addicts do to themselves and those around them’.

At the turn of the century, illegal drug users constituted roughly half of the US prison population. Given that illegal drug users are largely non-violent, and that incarceration does little to alleviate the addiction (or its underlying causes), this degree of retribution is difficult to justify – in terms of rather intuitive notions of justice or success, or the amount of public money spent.

There must be a better way. As Michael Dorf and Charles Sabel go to great lengths to show, there is. Even better, it already exists. It is called a drug treatment court (or sometimes a drug court, or in other places a treatment court). About such courts, Dorf and Sabel write:

Variations in nomenclature and the precise details of their operation aside, treatment courts around the country share the same basic pattern. Persons charged with relatively low level, non-violent criminal conduct may opt out of the criminal trial court if the prosecuting attorney consents to the filing of charges in the treatment court. In treatment court, the defendant pleads guilty or otherwise accepts responsibility for a charged offense and accepts placement in a court-mandated program of treatment. In some model programs, offenders may initially choose among different courses of treatment – residential or outpatient – according to their needs and possibilities. The judges and court personnel closely monitor the defendant’s performance in the programme and the programme’s capacity to serve the mandated client. If progress in the treatment regime is unsatisfactory, courts offering various programmes may require the offender to choose another, more intensive one. Upon successful completion of the programme, the conviction is typically expunged. The drug court, moreover, will cease directing defendants to programs that show signs...
of incompetence and increase referrals to others that show greater promise. Treatment courts thus provide defendants with alternatives to incarceration without decriminalizing drug use.\(^{164}\)

Whilst holding no illusions about the difficulties associated with drug addiction, including the relatively high rates of recidivism even after successful treatment, Dorf and Sabel trumpet the importance of such fora in changing not only the lives of users, but in altering what Americans regard as criminal behaviour and how such behaviour should be handled. In short, Dorf and Sabel quickly illustrate – in quintessential experimentalist fashion – how a change in effective means to realizing existing ends can ultimately alter our view of the norms in play. Dorf and Sabel are a long way from claiming that the ‘war on drugs’ is over or that Dutch-style space brownies will soon become available at a bodega near you. However, they initiate their discussion of drug treatment courts by suggesting how the fact of non-incarceration for drug offences can ultimately lead to social perceptions and legal norms that no longer stigmatize drug users as criminals. That, again, is a perfect example of how the reflexivity, empiricism and pragmatism at the heart of experimentalism helps us revise both the ends we pursue and the means by which we go about pursuing them.

What makes these drug treatment courts even more extraordinary is (a) the amount of information that they make available to all parties, (b) the ability they give all participants to alter the available treatment based upon the available information, and (c) the capacity to pool information across courts, drug centres and even different jurisdictions. The system – for all its horrors (and incarceration for drug use is one) – looks very much like we would expect a Sunsteinian choice architect to create if she were trying to build the best drug treatment scheme. As with the theory of the social developed in chapter 3: (1) individual drug users are encouraged to make those choices from which they believe that they will benefit; (2) choice architects – judges, system personnel and treatment centres – provide both feedback and assessment that nudges the individual into making better choices; and (3) the information that flows from all parties to all parties enables officials and participants in the system to see which drug treatment rehabilitation practices work best, and which drug treatment rehabilitation practices do not work especially well.

Why does this emergent experimental institution operate effectively? If we return to the beginning of this chapter, we find that it meets virtually all of the desiderata for successful experimental governance:

- **Flourishing**: Drug treatment courts enhance flourishing by offering individuals batting on a sticky wicket options that may actually improve their lives. Drug rehabilitation programmes extend that chance. Incarceration does not.
- **Truth Propositions in Radically Determined Forms of Life**: No one kids themselves about drug addiction being easy to kick, or that various truths about rehabilitation hold across the board. At the same time, judges, treatment centres, doctors and drug users are all encouraged to challenge accepted norms by discovering better ways of beating recidivism.
- **Optimality**: Recall that optimality has no known ending. Life constantly disrupts our understanding of what we can expect. Optimality in an experimentalist regime...
means that the regular experience of failure, given an array of choices, ought to lead to reorientation toward alternative means.

- **Reflexivity**: Have we discussed an organizational system with greater (potential) reflexivity within the state? The information about a given offender flows into the system (and is disseminated throughout the system); decisions are taken based upon the offender's history; the results of the treatment are recorded (and disseminated throughout the system); new choices about both the appropriate treatment and the appropriate treatment centre are made (or incarceration may yet await); these choices are also fed back into the system; constructive arrangements, and disappointing therapies, are reflected as best practices and worst practices; as the system discovers more and more successful arrangements and therapies — which all parties have an interest in discovering — the notion that drug use is a dangerous, morally reprehensible offense has begun to diminish. Drug treatment courts — not criminal courts — are slowly becoming the norm.

- **Tradition and Radical Reformation**: Drug use remains a criminal offense. That is unlikely to change any time soon in the US or in the South African legal system. Yet the success of the system — with its lateral pooling of information on best and worst practices — holds out the promise of substantial alteration of the manner in which most drug users enter the justice system. Dorf and Sabel predicted that if drug treatment courts proved successful, then their achievements might change the justice system itself. In the decade since Dorf and Sabel published their article, their hypotheses regarding reflexivity and reformation appear to have been confirmed. Most drug use offenders now enter the justice system through drug treatment courts.

- **Chastened Deliberation**: This system is information intensive. Many actors participate in the choices made regarding an individual's therapy. However, when we take the synoptic view, the information is not the source of a large, collective discussion. To be sure, data must be analysed, and disagreements will exist over its meaning. However, it is the ability to pool information, and see what works under certain circumstances and what does not, that matters. The drug treatment centre system does not require large amounts of deliberation about means and ends to work effectively.

- **Destabilization Rights**: Dorf and Sabel might be hard pressed to find a better example of destabilization rights, with their disentrenching power. Drug treatment courts do not call for top-down, fixed-rule, command-and-control forms of remediation. They are shot through with experimentation. They employ ongoing stakeholder negotiation, continuously revised performance measures and transparency. The treatment courts are likewise notable for their flexibility and the provisional nature of their norms. In many instances, the parties to drug treatment court procedures not only enjoy the ability to determine the goals that the parties are expected to achieve, the drug treatment court 'regime leaves the parties with a substantial range of discretion as to how to achieve these goals'. Finally, information pooling 'is designed to facilitate learning by directing attention to the practices of the most successful peer institutions'. In the drug treatment system, the range of remedies, and information pooling about best (and
worst) practices ‘institutionalizes a process of ongoing learning and reconstruction’. Trial and error – found to do so much work at the level of the self and the social – does similar heavy lifting here in a public law regime.

- **Bottom Up instead of Top Down**: Although subject to discernable standards – and with the sword of Damocles of incarceration hanging over offenders – drug treatment courts send their information up and out. To be sure, systemic failures will be recorded and may be subject to top-down remediation. But the dynamic described by Dorf and Sabel is one of broad bottom-level participation that percolates upwards and realizes new norm construction – at the same time as it flows laterally to other similarly situated participants.

- **Possibilities of Polyarchy**: Drug treatment courts would seem to prove the proposition that judges – especially in specialized courts – are capable of handling polycentric problems that engage a broad array of parties. Moreover, we have seen how these ‘judge-led’ institutions can identify rolling best practices and effect change across the entire legal regime.

- **Novel Challenges Induce Change**: To be sure, one feature of experimentalist institutions is that they are often responses to novel and unexpected problems. Novelty and surprise often require radical experimentation. Those experiments that work, stick. In the United States, a crack epidemic led to an unstable, unsustainable penal system. Drug treatment courts have turned out to be a radical, but largely successful, response.

Dorf and Sabel describe the many virtues of these experimentalist regimes somewhat more crisply:

Treatment courts … point one way beyond the conventional limits of courts and other oversight institutions. By pooling information on good and bad performances, the courts enable and oblige improvement by the actors both individually and as members of a complex ensemble. Judicial involvement in reform is permanent and continuous in this model. Yet it is, paradoxically, less imperious than traditional forms of court-directed reform for two reasons. First, the court in effect compels the actors to learn continuously and incrementally from each other rather by instructing them to implement a comprehensive remedial plan devised by the court alone or even in consultation with the parties. Second, the court is itself compelled to change in response to the changes it facilitates. This occurs in part through the exchanges with the treatment providers and in part in response to comparisons with experience in other jurisdictions as revealed by national pooling.168

The takeaway: experimentalism can work in the manner the original theory hypothesized. Over a decade after Dorf and Sabel’s prescient work, most drug users now have their initial engagement with the justice system in drug treatment courts.

Without anticipating the arguments made in Chapter 6, we can see the possibilities for emergent experimental institutions in South African public law regimes such as housing and education.169 The information about these regimes is widely available and accessible; parties are often obliged to engage in meaningful engagement during litigation or simple participatory democracy outside the courthouse; and courts and tribunals, though aware of what other courts or other tribunals are doing in other areas of the country, are relatively free to experiment with collectively generated solutions to polycentric problems. Moreover, policy makers in South
Africa, just as they are in the United States, are often surprised by the positive responses to, as well as the unintended (negative) consequences of, their policies. One cannot plan for successful emergent experimental institutions. But one can leave space for them.

Endnotes

1. Recall both Baars’ 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’. 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.

2. Dehaene & Naccache (supra) at 31.


4. NB: Here we might wish to acknowledge how very much Sen and Sunstein have in common: both theorists recognize that different individuals and groups will still make different choices even under conditions of marginally diverse satisfaction constraints; both theorists acknowledge that a significant, shared normative understanding of the optimal choice environment is a necessary precondition for a just political order.


8. Experimental constitutionalism is simply the North American neologism for a body of thought that now goes elsewhere, in Europe, by the name of ‘new governance’. See, eg, G de Búrca & J Scott (eds) Late and New Governance in the EU and the US (2006); J Scott & S Sturm ‘Courts as Catalysts: Re-Thinking the Judicial Role in New Governance’ (2007) 13 Columbia Journal of European Law 565; G de Búrca & J Scott ‘Introduction to Narrowing the Gap! Law and New Approaches to Governance in the European Union (2007) 13 Columbia Journal of European Law 513, 514; D Trubek & L Trubek ‘New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation’ (2007) 13 Columbia Journal of European Law 539. Other works straddle the two converging bodies of thought, see, eg, E Szyszczak ‘Experimental Governance: The Open Method of Coordination’ (2006) 12 European Law Journal 486; C Sabel & J Zeitlin ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’ (2008) 14 European Law Journal 271, 274. It should be easy to see why experimental constitutionalism qua new governance has caught on in Europe. The constitutional project as a federal project has failed. So while the European Union has a Parliament, a Court that enforces the European Convention of Human Rights, and even a Central Bank, power and decision making is rather diffuse, and left primarily to the individual nation-states that make up the Union. Comparisons across borders are both useful and common. Indeed, at the time of writing, one might want to compare how German economic policies enabled it not only to survive the financial crisis of 2008 – while Iceland, Ireland, Greece and Spain imploded – but actually come out politically and economically stronger than virtually all other advanced western democracies. At the time of writing, only small, progressive, social democratic Iceland is witnessing a comeback. The future of the once-vaunted Euro still hangs precariously in the balance. A form of currency, without a sovereign state to back it should always have been viewed as vulnerable. This decades-old experiment has now revealed its flaws. That’s good in so far as the European jurisprudence of ‘new governance’ is concerned. We now have a clearer understanding of the institutions and regulatory regimes that must be in place for the Euro to work effectively and efficiently, and for the European Union to survive over the long run.
9. M Wilkinson ‘Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism’ (2010) 2 University Of Wisconsin Law Review 673, 691. A more stinging appraisal of pragmatist politics is summed up by Marion Smiley as follows: ‘The presence of ‘aspirations’ or ‘ideals’ in pragmatic analysis has always been a sticking point for pragmatists since ideals have almost always been construed as antithetical to pragmatism unless they can be shown to be pragmatically useful in which case, it is argued, they can no longer be ideals of the aspirational sort.’ Pragmatic Inquiry and Democratic Politics (1999) 43 American Journal of Political Science 639, 640.

10. Ibid at 679 (emphasis added).

11. See, eg, D Bilchitz & J Tuovinen ‘Theory, Practice and the Legal Enterprise: A Reply to Stu Woolman’ (2010) 25 Southern African Public Law 544. Talk, talk and more talk has such a vice-like grip on legal imagination that many scholars cannot imagine normative orders in which a grand idea is not the dominant mode of engagement. (The ‘talking cure’ in psychotherapy would appear, on the surface, to be about ‘conscious thought’. It is manifestly about the action in the room, the relationship between analyst and analysand, and the laying down of new neuronal tracks that reflect the creation of new patterns of behaviour that may, over time, out-compete old, dysfunctional, deeply ingrained dispositional states.) The miasma of Cartesian legal thought in South Africa makes it largely impossible to discuss the constitutional order in terms other than first principles. (Everyone is on the side of the angels.) The exceptions are to be found in the turn towards subsidiarity (apparently conservative in bent if not intent with its emphasis on private law) and the legal institutional (and constitutional order neutral) analysis inspired by comparative constitutionalism and political science. On subsidiarity, see A Van Der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2008) 1 Constitutional Court Review 77 (Professor van der Walt might rightly contend that his desire to reconceive property rights within the existing domain of common law/Roman Dutch property law has the potential to transform individual property relations in a manner that top-down constitutional property law simply cannot. Professor Van Der Walt seeks to return decision making on the proper construction of property laws to those persons most affected by them – certainly a feature in common with experimental constitutionalists.) See also L du Plessis ‘Interpretation’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2008) Chapter 32. For a critique of the conservative elements embedded in subsidiarity, see K Klare ‘Legal Subsidiarity and Constitutional Rights: A Reply to AJ Van Der Walt’ (2008) 1 Constitutional Court Review 129 (Can subsidiarity be given primacy of place where property relations are so radically unequal, the market alone is unlikely to level the playing field and the reconstruction of the deeply ingrained common-law property regime is resisted by the courts themselves?) See also F Michelmann ‘Expropriation, Eviction and the Gravity of the Common Law’ (2013) 25 (2) Stellenbosch Law Review (forthcoming).


13. Ibid at 398.

14. Ibid at 400.

15. Wilkinson (supra) at 689.

16. Simon (supra) at 10–11.

17. Ibid at 12.

18. The problem to which I address myself on pragmatism and first principles appears early on in Dorf and Sabel’s (otherwise) magisterial work A Constitution of Democratic Experimentalism: ‘The backdrop of our design is the pragmatist account of thought and action as problem solving in a world, familiar to our time, that is bereft of first principles and beset by unintended consequences, ambiguity, and difference. Thus, a central theme of the pragmatism of Peirce, Dewey, and Mead is the reciprocal determination of means and ends. Pragmatists argue that in science, no less than in industry and the collective choices of politics, the objectives presumed in the guiding understandings of theories, strategies, or ideals of justice are transformed in the light of the experience of their pursuit, and these transformations in turn redefine what counts as a means to a guiding end. Art epitomized for Dewey
the essentials of pragmatist investigation, because in art means become ends, and the relation between them commands attention because of this immediacy: The picture is constantly reconceptualized in the painting. Pragmatism thus takes the pervasiveness of unintended consequences, understood most generally as the impossibility of defining first principles that survive the effort to realize them, as a constitutive feature of thought and action, and not as an unfortunate incident of modern political life.’ M. Dorf & C. Sabel ‘A Constitution of Democratic Experimentalism’ (1998) 98 Columbia Law Review 267, 284–285 citing, in part, C. Peirce How To Make Ideas Clear (1878), J. Dewey Democracy and Education: An Introduction to the Philosophy of Education (1916), G. Mead Mind, Self, and Society: From the Standpoint of a Social Behavioralist (1934). It’s exactly this refusal to make the necessary commitments required for a normative project to get off the ground that cause latter-day curmudgeons such as Stanley Fish (see below) such glee, and experimental constitutionalists such as me, much distress.

19. See R. Rorty Contingency, Irony and Solidarity (1989). Rorty tries to have it both ways, claiming like Donald Davidson, that grass is green because grass is green; and then claiming that the claim grass is green is only contingently true, its truth conditional upon the meaning and grammar of a particular language. While Davidson would agree with the first proposition, the second notion, that truth propositions are contingent upon conceptual schemes or language games, is not something to which he would adhere. Davidson has rejected the second proposition outright. See, eg, ‘On the Very Idea of a Conceptual Scheme’ Inquiries into Truth and Interpretation (1984) 219; D. Davidson ‘Thought and Talk’ Inquiries into Truth and Interpretation (1984) 155. Rorty further argues his case in two collections of essays. See R. Rorty ‘Pragmatism without Method’ in Objectivity, Relativism and Truth: Philosophical Papers 1 (1991) 63 and R. Rorty ‘Heidegger, Contingency and Pragmatism’ in Essays on Heidegger and Others: Philosophical Papers 2 (1991) 27.


21. In fairness to Professor Sturm, whose work on experimental constitutionalism dovetails with her commitment to the eradication of gender-based discrimination in a variety of settings, it may be unfair to attribute the failure to work out a clear normative base-line to her body of work. See, eg, S. Sturm ‘Second Generation Employment Discrimination: A Structural Approach’ (2001) 101 Columbia Law Review 452.


26. 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (emphasis added). See also Institute for Democracy in SA & Others v ANC & Others [2005] JOL 14201 (C) (‘IDASA’) at paras 16–18. In IDASA, Griesel J reinforces this understanding of the shared responsibility for constitutional interpretation, especially with regard to constitutionally mandated super-ordinate legislation such as PAIA. The legal institutional/comparative constitutional approach generally accepts the constitutional order as a good, and asks, in an experimental mode, what has worked in different, but similar constitutional orders, and what we can learn from such comparisons.

27. NCGLE II (supra) at para 76.

28. 2004 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC) (‘Satchwell II’).

29. 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) (‘Satchwell I’).


32. Satchwell II (supra) at para 26.
34. Dorf & Friedman (supra) at 81–83.
35. Miranda (supra) at 467.
36. Ibid.
37. Dorf & Friedman (supra) at 71.
38. Dorf & Sabel also note that the states did not take up the offer made in Miranda. M Dorf & C Sabel ‘Democratic Experimentalism’ (supra) at 459.
39. See B Ackerman We The People: Foundations (1991)(Ackermann identifies two periods of intense political mobilization – triggered by the Civil War and the Great Depression – that created radical paradigm shifts in the United States’ fundamental constitutional commitments.)
40. See R Cover ‘1982 Term Foreword: Nomos and Narrative’ 97 Harvard Law Review 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.’)
41. See R Cover ‘Violence and the Word’ (1986) 95 Yale Law Journal 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).
42. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(Grootboom’).
43. See *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC).
44. 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); *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).
47. See *Shibulana v Nwamitwa* 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC).
50. See M Bishop ‘Vampire or Prince? The Listening Constitution’ and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* (2009) 2 Constitutional Court Review 313.
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52. See Merafong Demarcation Forum & Others v President of South Africa [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR (CC).


54. Glenister v President of the Republic of South Africa & Others 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC).


56. Recall that Dorf and Friedman showed that the Miranda Court openly invited the US Congress to address those concerns afresh. Congress did not (genuinely) do so. When the government, in US v Dickerson, sought to uphold its post-Miranda legislation, the Dickerson Court noted that too much time had passed (34 years), and that the Court’s normative position in Miranda had become accepted by law enforcement officials and citizens alike as legitimate. Dorf and Sabel’s engagement with drug treatment courts does not deny the normative content of the law those courts enforce. Rather, they demonstrate that a court designed to engage particular kinds of problems and provided with information from (and the experience of) multiple stakeholders (counsellors, doctors, treatment facility personnel, lawyers for all concerned parties, police and the judge herself) have a greater likelihood to overcome various cognitive deficits and arrive at a solution better for the addict (an opportunity for rehabilitation) as well as the commonweal (less recidivism and a less expensive resolution). Experimental constitutionalism recognizes that the norms themselves may change over time as participants in a form of life – say drug treatment courts – recognize the kind of interventions that work and the kinds of interventions that don’t. The alteration of norms (more or less incarceration, more or less rehabilitation) will flow from the experience of various actors who have worked in this domain over time. Finally, experimental constitutionalism need not eschew a normative framework – nor even a deep, normative framework. The very word ‘constitutionalism’ places experimental constitutionalists within a very explicit, specific, and constraining, western value order – one that South Africa explicitly shares (in terms of its basic law).


59. 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) (‘Ermelo’).

60. Ibid at para 58.


But the meaning of that ‘letter’ is not altogether clear. Locke’s primary concern – on my reading – was to identify a political-philosophical basis for a negotiated settlement that would prevent England from being continually riven by religious strife. The primary reason the 1st Amendment (1791) is the first amendment to the US Constitution is freedom of religion and not, as might be commonly thought, freedom of expression. Most Americans of European dissent had fled their native lands in order to escape religious persecution, and not the practice of their faith. Alighting on American soil, many of the denizens of the thirteen colonies set about producing powerful local and colonial governments committed to advancing their particular comprehensive vision of the good (as reflected by the tenets of
their particular Christian faith). The genius of the 1st Amendment of the US Constitution lies not in some desiccated negative liberal theory of the polity that many attribute to it. Its radical break with any previous founding political document is reflected in a uniquely American solution to the problem of how communities with vastly different conceptions of the good could live peaceably amongst each other via a document that provided a ‘theory’ of a just political order that satisfied all thirteen states. A social democratic constitutional order – as we have in South Africa – is primarily committed to enabling communities with vastly different conceptions of the good to live peaceably amongst one another. Here we have, on full display, in both the South African Constitution and the US Constitution, the genius of a pluralist order: the ability to negotiate between the right and the good (and a related ability to keep reasonably stable democracies from engaging in war with one another or disintegrating into civil wars themselves).

64. D Davidson ‘Thought and Talk’ in Inquiries into Truth and Interpretation (1984) 155, 168 (emphasis added).
65. Ibid at 168–169 (emphasis added). Here is the takeaway: in isolated cases a speaker might be mistaken about the truth of a particular proposition, but it does not follow that the entire body of knowledge possessed by the speaker is thereby undermined.
67. As Constitutional Court Justice Edwin Cameron has noted (when then a judge on the Supreme Court of Appeal): ‘At this tender stage of our legal development, the doctrine of precedent has special importance. The CC has been accused of disregarding its own decisions without convincing reason (without, indeed, acknowledging that it has done so). That is a grave charge … [And] this means that other courts, including the SCA, must follow the binding basis of its decisions in all cases in which it has assumed jurisdiction. True Mhadi 2009 (4) SA 153 (SCA), 2009 (7) BCLR 712 (CC) at para 102 fn 52 and 53, Cameron J cites, in support of his claim, ‘Constitution Chapter 1, Founding Provisions, s 1 – “the Republic of South Africa is founded on values that include … (c) Supremacy of the Constitution and the Rule of Law” … and Stu Woolman “The Amazing, Vanishing Bill of Rights” (2007) 124 South African Law Journal 762–794’. Cameron J then identifies a broad array of contradictory administrative law judgments in the lower courts as evidence of the deleterious consequences of Constitutional Court judgments so thinly reasoned that they lead to contradictory outcomes in the lower courts. True Mhadi (supra) at para 102, fn 53.
69. Ibid at § 243.
74. Such super-liberal political institutions take cognizance of the extent to which political power invariably shapes and reinforces the formation of group and individual identity. They also reflect the extent to which the state plays an essential role in mediating between conflicting associations and promoting rational discourse about the ends of individuals and groups.
75. The argument from immanence is one of the most attractive features of Unger's work. It suggests that rearrangement of extant institutions for the purpose of disentrenchment can occur through tweaking the existing system. See R Rorty 'Unger, Castoriadis and a National Future' Philosophical Papers II: Essays on Heidegger & Others (1991) 177.


77. Many traditional legal doctrines, such as *stare decisis*, privilege certainty over equity, 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.

78. This account of flourishing forces us to take existing ways of being in the world seriously. It does not, however, assume 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 & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz on the Distinction between Differentiation and Domination' (2012) 28 South African Journal of Human Rights 247.

79. The Constitutional Court has 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 affect their communities. See, eg, *Matatiele Municipality & Others v President of the RSA & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC)(*Matatiele II*).

80. See A Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1281, 1308 (Chayes notes that the 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.)


82. I'm not at all certain that the South African case law bears this contention out. The Constitutional Court hears but thirty cases a year. Although South Africa remains a one-party dominant democracy, lots of rights-based claims play themselves out in the political arena and non-political fora such as Chapter 9 Institutions. There's more political contestation than the new ‘one-party dominant democracy’ literature bears out. In part, that contestation over the content of rights comes from businesses, civil society, NGOs, unions, various forms of litigation and, yes, occasionally from within the ANC itself.

83. The Constitutional Court's commitment to a theory of meaningful engagement for both rights analysis and remedies construction, though limited in many respects, hints at the possibility of a more robust form of judicial structuring of basic norms on a rolling basis. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*; [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC)(*51 Olivia*); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*; [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC) (*Joe Slovo I*); *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others*; [2009] ZACC 31, 2010 (2) BCLR 99 (CC)(*Abahlali Basemjondolo*); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*; [2011] ZACC 8 (*Joe Slovo II*). The possibilities and limits of the Court's 'meaningful engagement' doctrine will be discussed in Chapters 6 and 8. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010).

84. Chayes (supra) at 1307–1308 (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.’)
That statement may possess even greater purchase within South Africa. Government officials often seem to be at a loss as to how the Final Constitution and fundamental rights ought to shape both law and policy. At the same time, South African judges are fairly conservative – in terms of their self-conception of their avocation. They resolutely resist acknowledgement of even the slightest political dimension to their role (even if they are right to maintain a distinction between law and politics). On the distinction between law and politics, see S Woolman ‘Humility, Michelmann’s Method and the Constitutional Court: Re-reading the First Certification Judgement’ and ‘Reaffirming a Disfunction between Law and Politics’ (2013) 24 (2) Stellenbosch Law Review – (forthcoming). South African judges are not unique in this regard. As Eric Segall and Richard Posner note regarding constitutional discourse on the bench and in the academy of the United States: ‘[M]ost law professors [and judges] are unwilling to say the Supreme Court is a political court. Why do you think that is and how can we change it?’ (Eric Segall). ‘[A] couple of reasons … [J]udicial opinions are public documents and public officials can’t be as candid as private persons. There is an accepted rhetoric of judicial expression, and judges have to write that way … Law professors don’t labour under that constraint. Their problem is they are comfortable with legal doctrine and not … psychology or political science’ (Richard Posner). For an entertaining account as to why judges are not up to these complex tasks, see E Segall ‘The Court: A Conversation with Judge Richard Posner’ (2011) 58 (4) The New York Review of Books 47. See also R Posner How Judges Think (2008). But 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 and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the [New Text] comply with the C[onstitutional] P[rinciple]. That is a judicial function, a legal exercise.)


Ibid at 4.


Walzer (supra) at 10–11.

See J Cohen ‘Michael Walzer’s Spheres of Justice’ (1986) 59 The Journal of Philosophy 464. The compartmentalisation of plural spheres of human endeavour, and the concomitant limitation of the distribution of goods by criteria intrinsic to these spheres is a lofty and noble goal, but a well-nigh impossible task. In the first place, as Joshua Cohen has remarked, spheres of human endeavour and the criteria for distribution of goods within those spheres are spontaneously ordered over time. Rarely are these spheres a discrete product of conscious, intentional and comprehensive human design at a given moment in time. Rarer still are the forms of life whose desiderata for success are mapped out once and for all. In the second place, spheres of human endeavour, as well as the criteria for distribution of goods, often overlap. Is it genuinely possible to separate out the bonds of love that join individuals in a life-long partnership from the ties that bind a family together to create a home or the efforts of a clan to ensure the health, well-being and success – educational and economic – of fellow kin over time? Marriage. Family. House and home. Learning and education. The purchase of an arable piece of land adjacent to the old homestead that might extend a family farm – or perhaps thirty head of Nguni cattle to solidify the relationship between two families. Nightly readings. Trips to the Planetarium. Can one really claim that the charm that first elicited love must be limited
to an initial tryst and should play no role in the formal education of the progeny that a consequent marriage may produce? Just as densely populated selves and radically heterogenous social roles overlap, so do spheres of justice. It follows then that such strict boundaries would make little sense of the lives we lead, nor could they hope to garner support from but the tiniest segment of humanity.

94. Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC).
95. OW Holmes 'The Path of the Law' in Collected Papers (1920) 173.
96. This section owes a significant debt to Michael Bishop's magisterial treatment of constitutional remedies under South African constitutional law as well as other well-established bodies of constitutional jurisprudence, see M Bishop 'Remedies' in Woolman & Bishop Constitutional Law of South Africa (supra) at Chapter 9.
100. Michael Bishop surveys the Court's body of remedial orders and concludes: 'It seems very likely that the Court would have reached a different conclusion at the rights stage if the option of limiting retrospectivity or suspending the order had not been available.' Bishop 'Remedies' (supra) at Chapter 9, 9–26 citing, amongst other cases, Mashavha v President of the Republic of South Africa 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) (Order of invalidity would have left government no legal authority to make social security grants); Matatiele Municipality v President of the Republic of South Africa 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (Order of invalidity would have invalidated election that had taken place five months earlier.)
101. M Nussbaum 'Finely Aware and Richly Responsible: Moral Attention and the Moral Task of Literature' (1985) 57 The Journal of Philosophy 516. Nussbaum demonstrates how justice is truly served when we work back and forth between standards and the actual contours of the relationships that demand our ethical engagement. Standards and principles are to be preferred to rules that dictate outcomes without reflection or perception.
102. Levison (supra) at 884.
104. Ibid at 678–679.
106. As I have already noted in Chapter 3, this account of experimentalism draws upon John Stuart Mill's pragmatic theory of ethical empiricism. See JS Mill On Liberty (1851). See also J Dewey Reconstruction in Philosophy (1921)(On the consequences of pragmatism for politics.) My account of experimentalism is somewhat more diffuse. 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 the 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 condition for fostering experimentalism was through a through-going commitment to the protection of individual liberty. Mill's experimentalist model was premised on a direct, relatively unmediated vertical 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, legal institutions and political power play in determining individual identity. Second, Mill failed to recognize the extent to which highly conditioned individual action, constrained by inflexible social norms and rigid legal arrangements, make significant shifts in value formation extremely difficult. Third, Mill overestimated the ability of individual reflection to yield optimal or novel results.

107. 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 radical social reconstruction through direct public action on the other. Second, such a constitutional theory cannot be committed to any specific comprehensive vision of the good. (The Constitution's vision of the good is thick enough.) Within the bounds dictated by commitments to tolerance, dignity, rough equality, and the rule of law, 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 many 20th-century critical theorists, such as Herbert Marcuse, fail 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 may not provide an interpretation of rights contingent upon individual freedom, it still must provide some justification for taking rights 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 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. I explore methods of breaking such bottlenecks through a doctrinal commitment to remedial equilibration. See S Woolman 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz on the Distinction between Differentiation and Domination' (2012) 28 South African Journal of Human Rights 243.


109. The Constitutional Court has warmed to the idea that an effective democracy is contingent upon the participation of a citizenry actively engaged in the 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 criticize 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.’ 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at paras 228–232 (footnotes omitted).

110. See SH Orzack & E Sober ‘Introduction’ in SH Orzack & E Sober (eds) Adaptionism 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 scepticism.)

111. A friend in the Office of the President of South Africa, who must remain anonymous, calls this state of affairs, ‘the 15% problem’. By this clever locution, he means that the 15% of the bureaucracy that does work effectively is so overwhelmed with its current responsibilities that it lacks the time and the energy to respond creatively to new problems or to implement well-conceived policies designed (by others) to address new and pressing problems.


114. 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.

115. 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.

116. See S Woolman ‘Is Xenophobia the Right Legal Term of Art? A Freudian and Kleinian Response to Loren Landau on Township Violence in South Africa’ (2011) 22 Stellenbosch Law Review 285. I do not rule out the possibility of actual large-scale political rebellion in South Africa that might bring about dramatic shifts in policy. Hints of such a possibility have been part of the political landscape.
since 2007. Tunisia toppled an autocratic leader because of high unemployment. Egypt has tossed out Hosni Mubarak, largely in response to broad disenchantment with state-sanctioned police violence and military rule, amounting to torture, against large portions of civil society. Moammar Gaddafi, Libya's former tyrant, is still dead. Large scale demonstrations and rebellions have unsettled Jordan and led to a severe, deadly military crackdown in Syria. With the support of both Iran and Russia, the crackdown in Syria shows no sign of abating after almost two years. The Maghreb Spring has turned from fall into winter in a number of states. Seventy per cent of Mali was controlled by AQIM out of power another rebel group replaced them: Mali remains a failed state split in two. South Africa's revolution, were one to occur, might trace the Rwandan model of large-scale unemployment, a political vacuum, dire prospects giving rise to violence amongst the most volatile segment of our society, 18–24-year-old men without jobs and easily overheated. The cultural and political revolutions of the 1960s in industrialized western states and the decolonized nations in Asia and Africa suggest how easily ideological shifts can occur – for different reasons – when the general population sees such shifts occurring elsewhere. Let's hope that this analysis does not extend to South Africa after the time of writing. However, unless the state, big business and the unions prove more responsive to the large numbers of the truly disenfranchised and dispossessed in South Africa, it's possible that we shall see similar claims that the Constitution's social contract has been breached and that rebellion is justified. See S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in Garvis v SATAWU (Minister for Safety & Security, Third Party) 2010 (6) SA 280 (WCC) (2011) 27 South African Journal on Human Rights 469. One difference, as Heinz Klug has pointed out, is that South Africa remains a democracy. Unlike the states experiencing the Maghreb revolution, our fellow citizens are not primarily concerned with throwing off the strictures of authoritarian rule. We simply expected the kind of liberation long promised and the delivery of those basic goods necessary for all South Africans to flourish. However, as the aftermath of the Marikana Massacre reflects, the citizenry, emboldened by more and more militant miners and farm workers, has largely decided that the deal struck between ANC elites, big business and once powerful unions no longer serves their interests. For more on how the deal that resulted in our constitutional democracy blocks genuine liberation for the majority of South Africans, see S Sibanda 'Not Yet Uhuru: How Constitutional Democracy has Blocked the Promise of South Africa's Liberation Movements' (PhD thesis, in process, University of the Witwatersrand, 2012.)
in S Woolman & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2005) Chapter 31 (Appendix). 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 – and 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 and non-political actors must align their behaviour ‘could’ undermine 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. So I originally argued in 2007. See S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 South African Law Journal 762. Frank Michelman’s reply led me to reconsider whether the problem was best described as a ‘flight from substance’ – which he denied – or ‘thinness’. See F Michelman ‘On the Uses of Interpretive Charity: Some Notes on Application, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa’ (2008) 1 Constitutional Court Review 165. See, then, the subsequent colloquy, S Woolman ‘Between Charity and Clarity: Kibitzing with Frank Michelman on How to Best Read the Constitutional Court’ (2010) 25 Southern Africa Public Law 491; F Michelman ‘Old Kibitzes Never Die: A Rejoinder to Stu Woolman’ (2010) 25 Southern Africa Public Law 514. I accept Professor Michelman’s claim that my original charge was too strong, based upon too limited a sample, and that my argument supported a less controversial charge of ‘thinness’, here and there. While a sufficiently large number of cases handed down since 2007 suggest that the first assault on the citadel possessed at least some merit, the Court has handed down too many important, thick and substantive decisions for a pure ‘flight from substance’ argument to stick. Professor Michelman himself seems to have recently arrived at a more cautious, but not entirely dissimilar, conclusion. His most recent argument, in short, is that South African courts, including the Constitutional Court, still remain in the thrall of common-law regimes that do not take sufficient cognizance of the changes brought about to the entire legal system by the Interim Constitution and the Final Constitution. See F Michelman ‘Expropriation, Eviction and the Gravity of the Common Law’ (2013) 24 Stellenbosch Law Review – (forthcoming)manuscript available from myself, the author, and on the SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116643). In fairness to Professor Michelman, a critical bite of difference between us remains, even as my position on the matter has shifted dramatically as a result of his sustained engagement with my texts and the case law.


121. It might be contended that what I have written elsewhere about the need for rule-governed decisions emanating from our Constitutional Court is inconsistent with the standard-based approach articulated here. They are not inconsistent positions. Even if we accept the priority of well-informed perception by persons ‘upon whom nothing is lost’ a la Nussbaum – we can still acknowledge that somewhat thickly described norms are necessary to get a constitutional project off the ground. See M Nussbaum ‘Constitutions and Capabilities: “Perception” against Lofty Formalism’ (2007) 121 Harvard Law Review 4.


125. 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: A Study in Moral Theory (1984); A McIntyre Whose Justice, Which Rationality (1987). The philosopher most responsible for that renewed interest is Martha Nussbaum. See, eg, M Nussbaum Love’s Knowledge (1991); 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 & T Linden (eds) The Ethics of Consumption: The Good Life, Justice and Global Stewardship (1998) 320. Nussbaum’s capabilities approach aims 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 valuing 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 project. Her political commitment to the capabilities approach – developed 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 (1) International Journal of Politics and Ethics 71. The consequences of flourishing, and capabilities theory, for South African constitutional jurisprudence are explored at greater length in Chapter 7. Suffice it to say that Nussbaum’s Decalogue of capabilities required for flourishing, and Sen’s general theory of development, are consistent with the jurisprudence of experimental constitutionalism.


128. Stanford Encyclopedia of Philosophy (2010)(SEP) Much of what Aristotle has to say about the world about us, and our beliefs about that world, accords with what I have already claimed, and will reassert, about truth propositions when discussing Donald Davidson’s work: most of our beliefs are true, that our way of understanding the world is parasitic on ‘endless true beliefs’ and that error, where it occurs, is, as Davidson says: what gives truth its point. As the SEP notes: Aristotle’s ‘attitude towards phainomena does betray a preference to conserve as many appearances as is practicable in a given domain – not because the appearances are unassailably accurate, but rather because, as he supposes, appearances tend to track the truth. We are outfitted with sense organs and powers of mind so structured as to put us into contact with the world and thus to provide us with data regarding its basic constituents and divisions. While our faculties are not infallible, neither are they systematically deceptive or misdirecting. Since philosophy’s aim is truth and much of what appears to us proves upon analysis to be correct, phainomena provide both an impetus to philosophize and a check on some of its more extravagant impulses’.

129. Aristotle Ethics (supra) at Book VI, 150.

130. I would be misrepresenting Aristotle entirely if I did not acknowledge the teleological nature of his thought. Each thing has its purpose, its end, its perfection. Though we moderns may tend to put certain moral beliefs beyond contested, we do not, generally, share Aristotle’s teleological view of nature and of human action. However, contemporary socio-biology and neuroscience have staked a claim on the degree to which many ostensibly ‘constructed’ norms can be traced to the hard-wiring of our brains. This book makes such claims. In Braintrust: What Neuroscience Tells Us About Morality (2011), Patricia Churchland outlines a compelling hypothesis for how ‘ethics or morality’ is ‘a four dimensional scheme
for social behaviour that is shaped by interlocking brain processes: '1) caring (rooted in attachment to kith and kin and care for their well-being); (2) recognition of others’ psychological states (rooted in the benefits of predicting the behaviour of others); (3) problem-solving in a social context (eg how we should distribute scarce resources ...); (4) learning social practices (by positive and negative reinforcement, by trial and error, by various kinds of conditioning, and by analogy).’ Ibid at 9 (emphasis added).

131. Nussbaum alludes to the following observation by Wittgenstein: ‘Is there such a thing as “expert judgment” about the genuineness of expressions of feeling? Even here, there are those whose judgment is “better” and those whose judgment is “worse”. Corrector prognoses will generally issue from the judgments of those with better knowledge of mankind. Can one learn this knowledge? Yes; some can. Not, however, by taking a course in it, but through experience. Can someone else be a man’s teacher in this? Certainly. From time to time, he gives him the right tip. This is what “learning” and “teaching” are like here. What one learns here is not a technique; one learns correct judgments. There are also rules, but they do not form a system, and only experienced people can apply them right.’ L Wittgenstein Philosophical Investigations, (1953) Book II, xi.


133. See J Rawls A Theory of Justice (1973). Interestingly enough, Rawls traces ‘reflective equilibrium’ back to Aristotle, but not without making several significant adjustments inconsistent with Aristotle’s and Nussbaum’s notion of perceptive equilibrium. Nussbaum identifies three primary qualities of Rawl’s notion: ‘balance, an absence of inconsistency or tension, and the dominance of intellectual judgment.’ Nussbaum ‘Perceptive Equilibrium’ (supra) at 174. These three features alone put Rawls’ theory at odds with other schools of contemporary ethical thought that are (a) non-reductive; (b) allow space for contestation between standards; and (c) acknowledge the place of relationships and emotion in our moral transactions. He further demands that his principles be ‘general in form’, ‘universal in application’, ‘public’, ‘impose a general ordering on conflicting claims’ and ‘be taken as final and conclusive’. Rawls (supra) at 47 and 135.

134. See A Sen The Idea of Justice (2009): ‘One question that can be asked about John Rawls’ formulation of justice is this: if behavioural patterns vary between different societies ... how can Rawls use the same principles of justice, in what he calls the constitutional phase, to establish basic institutions in different societies? In answering this question, it must be noted that Rawls’ principles for just institutions do not, in general, specify particular, physical institutions, but identify rules that should govern the choice of actual institutions. The choice of actual institutions can take as much notice as may be needed of the actual parameters of standard social behaviour. Consider, for example, Rawls' second principle of justice: ‘Social and economic inequalities must satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit for the least advantaged members of the society.’ Even though the first part may suggest a straightforward demand for non-discriminatory institutions, which need not be behavioural norms, it is plausible to think that the requirement of “fair equality of opportunity” could give a much greater role to behavioural features ... in determining the appropriate choice of institutions. When we turn to the second part of this principle for institutional choice (“the Difference Principle”), we have to examine how the different potential institutional arrangements would mesh with, and interact with, behavioural norms standard in a society. Indeed, even the language of the difference principle reflects the involvement of this criterion with what would actually happen in the society ... Again this gives Rawls much more room to build in sensitivity to behavioural differences.’ Ibid at 77. Sen's charge is that Rawls – in pursuit of perfectly just institutions – is tone-deaf to how his rules would work themselves out in practice. This failure to take practice and perceptive equilibrium seriously may lie exactly at the root of why theorists rebel when it comes down to swallowing Rawls’ two principles whole hog. They simply fail to take heterogeneous behavioural states, standards of development and variable individual capabilities seriously. Sen later rounds on Rawls as follows: ‘Understanding the demands of justice is no more a soloist exercise...
than any other human discipline. When we should try to assess how we should behave, and what kinds of societies should be patently unjust, we have reason to listen and pay attention to the views and suggestions of others, which might or might not lead us to revise some of our own conclusions. We also attempt … to make others … pay attention to our priorities … and in this advocacy we sometimes succeed, while at other times we fail altogether. … A theory of justice that rules out the possibility that our best efforts could still leave us locked into one mistake or other, however hidden it might be, makes a pretension that would be hard to vindicate. Indeed, it is not defeatist for an approach to allow incompleteness of judgments, and also to accept the absence of once and for all finality. It is particularly important for a theory of practical reason (phronesis) to accommodate a framework for reasoning within the body of a capacious theory – that … is the approach to the theory of justice this work pursues.’ Ibid 88–89. Sen gives us some very good reasons to prefer his robust, highly socially differentiated account of practical reason and of ‘perceptive equilibrium’ – following Aristotle and Nussbaum – to Rawls’ somewhat desiccated commitment to ‘perfect’ principles of justice and ‘reflective equilibrium’. Rawls, he contends, ‘ignore[s] the discipline of answering comparative questions about justice; … [ignore]s the broader perspective of social relationships; [ignore]s potential for adverse effects on people beyond the borders of each country from the actions and choices of this country; … [fail]s to have any systematic procedure for correcting the influence of parochial values to which any individual country may be vulnerable; … [do not allow] that even in the original position that different persons could continue to take, even after much public discussion, some very different principles as appropriate for justice because of the plurality of their reasoned political norms and values (rather than because of their differences in vested interests). Ibid at 90. On the fifth point, Rawls does appear somewhat at a loss as to explain how Condorcet, then Arrow, and then Sen himself could identify the fundamental problem of social choice theory – how A could defeat B; B defeat C; and C defeat A. See KJ Arrow Social Choice and Individual Values (1951); A Sen ‘The Possibility of Social Choice’ (Nobel Prize Lecture)(1999) 89 American Economic Review 1.

135. Again, Aristotle did view the life of the mind as the highest form of human activity. It is not my intention to mischaracterize his intentions.

136. However, while Aristotle’s commitment to the heterogeneity of goods might make him more palatable to moderns, he did not quite believe that virtue could be attained in a multiplicity of different ways. Ancient in outcome, if modern in method, Aristotle viewed the combination of theoretical wisdom and practical wisdom – two essential parts of a single whole – as the core drivers of virtue, excellence and flourishing. At the end of Book VI, Aristotle writes: ‘Virtue or excellence is not only a characteristic which is guided by [theoretical reason], but also a characteristic of right reason; and right reason in moral matters is practical wisdom. So while, Socrates [and Plato] believed that the virtues are rational principles – [they] said that all of them are forms of knowledge – we, on the other hand, think that [virtues] are united with a rational principle. Our discussion, then, has made it clear that it is impossible to be good in the full sense of the word without practical wisdom, or to be a person of practical wisdom without moral excellence or virtue.’ Ethica (supra) at 170–171.

137. M Nussbaum ‘Form and Content, Philosophy and Literature’ Love’s Knowledge (supra) at 19–20.

138. Ibid at 20–21.


141. Experimental constitutionalism is meant to draw our attention to the kinds of functional arrangements that are most likely to realize three basic ends of the South African state. Those ends, to the extent they are not made expressly clear above or in Chapter 7 below, are as follows. 1. If
one accepts 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 the rule of law 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.

2. The South African state is under a constitutional obligation to ensure that historically marginalized groups have access 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 turns primarily on the ability of individuals to exit repressive communities than it does on creating novel conditions for flourishing. But that does not mean that state intervention, and remedies that require support from traditional associations found to have engaged in unfair discrimination, will not have such a secondary or knock-on effect. 3. State intervention, along with remedies the ensure that private parties have some obligation to members compelled to exit, may just shake up existing social hierarchies in a manner that creates new ways of being in the world. This commitment to experimentalism and remedial equilibration is predicated upon the notion that a large number of existing ways of being in the world – extant cultural formations – will, for many individuals, fail to recognize those ends upon which the happiness of those individuals truly rests.

142. 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 South African Journal on Human Rights 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 at 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.’)

143. This slowly evolving enhancement and expansion of the conditions of being is fundamentally pragmatic, as opposed to deontological, in spirit. See M Dorf & C Sabel ‘Democratic Constitutionalism’ (supra) at 284 (‘The backdrop of our design is the pragmatic account of thought and action as problem-solving in a world.’) Chapter 7 shows that this shift of ideals in light of experience is rooted in the kinds of ‘trial and error’ mechanisms that have been revealed in recent studies of consciousness and contemporary theories about the social order (discussed in Chapters 1, 2 and 3). Moreover, ideals are not discovered through the revelation of forms, but, as Martha Nussbaum would have it in her Aristotelian phase, through practices in which individuals achieve virtue and come to understand the truth, by active engagement. M Nussbaum ‘Finely Aware and Richly Responsible: Moral Attention and the Moral Task of Literature’ (1985) 82 The Journal of Philosophy 516. Amartya Sen makes this point even more powerfully in development theory. Justice and injustice can even be measured – quantitatively – by what happens on the ground. One hundred million women (from the world’s population) were missing in 1992 – as Sen famously wrote in 1992 – because of some readily identifiable problems on the ground: infanticide (with respect to girls) and a general lack of access of women to adequate education, food and health care. A Sen ‘More Than 100 Million Women are Missing’ (1990) 37 New York Review of Books 61; A Sen ‘More Than 100 Million Women are Missing’ 367 The Lancet 185. Such a shift away from Rawlsian first and second principles developed behind a veil of ignorance has profound consequences for advocates, say, of the disabled, who would argue that the disabled would readily forsake many basic liberties in return for the kind of healthcare that would enable them to live lives worth pursuing. Another aspect of experimental constitutionalism’s commitment to pragmatism is worth emphasizing here. Dorf and Sabel write: ‘Pragmatism guides
us in coming to grips with that which we have come to anticipate: That experience will again and again disrupt our habits and the understandings that rest upon them.’ M Dorf & C Sabel ‘Democratic Constitutionalism’ (supra) at 285. That constant disruption, and our ability to respond to novel circumstances with novel practices, is exactly what underwrites this book’s description of consciousness, the radically heterogeneous (densely populated) self, and various social and political systems as ‘problem solving’ constructs (in Chapters 1, 2, 3, 4 and 5).


145. Ibid.

146. Ibid.

147. Ibid at 1023.


151. I do not want to be accused of gilding the lily. As Michael Bishop notes, not all adequacy litigation has taken this sort of approach. Many state courts still address reform as a purely financial issue. These courts attempt to determine how much additional money will be required to realize ‘adequate’ outcomes, then order the state to make such funds available. In some instances, the court order comes down with no oversight structures in place. The result, in many instances, is that court allocated funds go to waste. Funds allocated to New York City schools as a result of adequacy litigation reflect a quintessential example of the limits of current school reform litigation. For a conservative take on the limits of the adequacy movement and court-directed spending, see E Hanushek & A Lindseth Schoolhouses, Courthouses, and Statehouses: Solving the Funding-Achievement Puzzle in America’s Public Schools (2009). Hanushek and Lindseth contend that court rulings requiring states to increase public-school funding has done little to improve student achievement. They propose a performance-based system that directly links funding to success in raising student achievement. Not all commentators are so quick to dismiss the importance of both the financial equity and adequacy litigation. Michael Rebell defends the courts’ authority and responsibility to pursue the goal of educational equity. See M Rebell Courts and Kids: Pursuing Educational Equity through the State Courts (2009). As Rebell notes, litigants, since 1973, have challenged the constitutionality of the education finance systems in 45 of 50 states on the grounds that they deprive many poor and minority students of adequate access to a sound education. Those efforts cannot be blithely dismissed – even if the long-term benefits to historically disadvantaged students in successful litigation have not been exactly what its advocates had envisaged. Consistent with Michael Bishop’s point above, Rebell finds that the absence of court supervision ultimately led to disappointing results. Consistent with Sabel and Simon’s call for ‘new governance’, Rebell prescribes a system in which courts collaborate with the executive and the legislature, as well as local school systems, parents and learners, in a forward- and lateral-looking manner designed to realize educational equity. So – despite conservative critiques – it would appear that lawyers and educators have learned some valuable lessons from the previous waves of reform.


153. Sabel & Simon (supra) at 1019 and 1020.


155. I must thank Columbia Law School Professor Jane Spinak and Professor Philip Gentry for giving me the opportunity to work as a children’s advocate for two years at Morningside Heights Legal Services.


158. K Noonan, C Sabel & W Simon (supra) at 525.

159. Ibid.

160. Ibid.

161. Ibid at 526.


163. Ibid at 832.

164. Ibid.

165. See Prince (supra).

166. Dorf & Simon ‘Drug Treatment Courts’ (supra) at 837.

167. Ibid.

168. Ibid.

169. We have our own specialized courts and fora in South Africa: the Competition Commission, the Competition Tribunal, the Commission for Conciliation, Mediation and Arbitration, the Land Claims Court, and various Labour Courts (to name but a few of the most prominent emergent experimental institutions that we possess).