



Chapter One-B

Why Rethinking the Foundations of South African Constitutional Law is Necessary

It was in this sphere then, the sphere of legal obligations, that the moral conceptual world of 'conscience', 'duty', 'sacredness of duty' and [free will] had its origins; its beginnings were, like the beginnings of everything great on earth, soaked in blood thoroughly for a very long time ... The creditor could inflict every kind of indignity and torture upon the body of the debtor.

Friedrich Nietzsche

A. The ‘So What’ Question

In chapters 2 through 7, this book puts forward a fairly thick conception of the self and of the social in order to support an equally thick account of the kinds of political institutions and judicial doctrines that South Africa requires to make good the promise of our basic law. The point of this sub-section is to identify a number of difficulties in metaphysical, psychological, political and legal thought that may block a reader’s predisposition to credit the book’s arguments. What these problems have in common is a failure to provide an accurate account of the nature of ‘freedom’ or an inability to account for breakdowns in collective rationality. These problems take three distinct forms: (1) the use of 19th century classical liberal thought as a foundation for a 21st century socially democratic aspirational constitution; (2) the folk psychology of free will; and (3) constitutional doctrines such as judicious avoidance that underestimate the degree of shared, principled norm setting required of state and non-state actors.

B. How 19th Century Classical Liberalism Undercuts a 21st Century Aspirational Constitution

As the reader is already aware, there are other intuition pumps out there, working away in support of different models of constitutional politics. The Constitutional Court has handed down a range of decisions over the past decade that suggest that it is working with at least three competing models.¹

The first model is classically liberal:² explicitly on display in *Ferreira*,³ *Du Plessis*⁴ and *Barkhuizen*,⁵ influential in the early development of the equality and dignity jurisprudence of the Court,⁶ and arguably decisive in the majority opinions in *Prince, Jordan* and *Robinson*.⁷ The second is a liberal democratic model underpinned by a strong theory of individual agency:⁸ such a position appears in the majority judgments in *NCGLE I* and *NCGLE II*.⁹ The third is a socially democratic model married to a strong theory of individual agency found in *Khosa, Occupiers of 51 Olivia Road, Berea Township, Joe Slovo I and II, Abahlali Basemjondolo Movement SA, Merafong Demarcation Forum* and *Ermelo*.¹⁰ All three models are predicated upon a set of metaphysical commitments to individual freedom that we should make every effort to eschew. In *Ferreira*, that ‘freedom’ talk takes a form that may appear hard to gainsay:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.¹¹

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

If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.¹²

The majority's commitment to a very strong form of metaphysical autonomy – a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances – fails dramatically those prostitutes whose alternatives are dramatically cabined if not entirely determined. (Significant numbers of prostitutes are the victims of sexual trafficking. Sexual trafficking is about the sale and exploitation of women and children – of people who have little chance, and no choice, in life's wheel of fortune.¹³) Prostitution, no matter how a person winds up in the trade, is hardly a profession that can be charitably described as chosen.¹⁴

One may think this characterisation of *Jordan's* weltanschauung unfair. The majority judgement speaks for itself:

It was accepted that they have a *choice*, but it was contended that the *choice* is limited or 'constrained'. Once it is accepted that [the criminalisation of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.¹⁵

It's hard to discern how 'knowing' that stigma attaches to an event that takes place under conditions of compulsion makes a prostitute morally and legally culpable.¹⁶ The minority, although sympathetic to the plight of sex workers, offers more of the same freedom-talk:

Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes *knowingly* accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.¹⁷

The freedom-talk on display in *Ferreira* and *Jordan* – the Court's commitment to a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances – reflects the basic metaphysical commitments of the three dominant models of contemporary political theory in South African constitutional law.¹⁸ All three models of contemporary political theory remain committed to free will. None of the three theories do adequate justice to the nature of the decision-making processes of citizens in our constitutional democracy.¹⁹ To put it differently, most of our citizens do not act – and could not act *even were it metaphysically possible* – in light of any of the models of agency or freedom upon which the Court's three dominant theories are predicated.

The three models of political theory ascribed to the Court rest upon a belief that the various rights and freedoms enshrined in the Final Constitution should enable individuals to exercise relatively *unfettered* control over decisions about the intimate relationships and the various

collective practices deemed critical to their self-understanding. However, individual autonomy as a foundation for constitutional theory overemphasizes dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self-consciousness, is a function of a complex set of social and natural narratives over which we exercise little in the way of (self) control. As I argue in Chapter 2, the involuntary and *arational* nature of identity formation – at the level of both the individual and the social – deserves a constitutional theory (that supplants the model of a rational individual moral agent which undergirds much of our current jurisprudence) with a vision of the self that is more appropriately located within and determined by the networks, communities and associations to which we all belong and the universal, natural grammar and dispositional states that we all inherit. In Chapters 4 and 7, I show how a fourth model of political theory – very much alive in our Court’s jurisprudence – better fits both my conception of the self and the more congenial goal of flourishing. Flourishing recognizes simultaneously the radically heterogeneous, socially and physically constructed nature of individual selves, the limited utility of ‘freedom’ as a description of individual behaviour, and the highly circumscribed nature of collective rationality.²⁰

Our constitutional rights, as both constitutive of and the condition for flourishing, are not simply a constellation of negative duties owed by the state to each human subject, or a set of positive entitlements that can be claimed by each member of the polity. Rights bind us together as a polity. This rights-based polity can coalesce only under conditions of mutual recognition. This mutual recognition cannot be merely formal. The Court in *Kbosa* notes that the Final Constitution commits us to an understanding of such rights as dignity, equality and social security in terms of which ‘wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole’.²¹

How then to comprehend constitutional rights as a collective concern (as opposed to rights against the state or some third party)? What the Court wishes us to understand is that for dignity to be meaningful in South Africa, the political community as a whole must provide that basket of goods – including such primary goods as civil and political rights – which each member of the community requires in order to flourish.²² This conception of flourishing possesses striking similarities to Amartya Sen’s development theory and Martha Nussbaum’s capabilities approach. Moreover, the virtue of development theory and the capabilities approach is that one can accept the Constitutional Court’s link between constitutional rights and the need for individual freedom from state intervention without accepting the proposition that the conditions for flourishing *only* demand individual freedom from state intervention. For example, Amartya Sen ties his notion of ‘development as freedom’ to the provision of a basic basket of goods that enables human beings to develop those ‘capabilities’ necessary for each individual to achieve those ends that *each* has reason to value.²³ Sen contends that the covalent norms of dignity and freedom and equality, rightly understood, are meant neither to achieve definitive outcomes nor to prescribe a univocal understanding of the good.²⁴ What these covalent values do require is a level of *material* support (eg, food, water, health, housing) and *immaterial* support (eg, the rule of law plus such civil liberties as rights to fair trials, equality before the law, expression, association) that enables individuals to pursue a

meaningful and comprehensive vision of the good – as those individuals understand the good.²⁵ Put another way, these covalent values should promote the political institutions and the material conditions required for individual and group flourishing.

C. The Problem with the Folk Psychology of Freedom

As RN McCauley writes:

Folk psychology ('FP') is a network of principles which constitutes a sort of common-sense theory about how to explain human behavior. ... Folk psychology ... is deeply ingrained in our commonsense conception of ourselves as persons. Whatever else a person is, he is supposed to be a rational (at least largely rational) *agent* – that is, a creature whose behavior is systematically caused by, and explainable in terms of, his beliefs, desires, and related propositional attitudes. The wholesale rejection of FP, therefore, would entail a drastic revision of our conceptual scheme. This fact seems to us to constitute a good *prima facie* reason for not discarding FP too quickly in the face of apparent difficulties.²⁶

This book's multi-faceted assault on principles of folk psychology should loosen the tenacious hold that folk psychological explanations of the self and the social have over us, show how folk psychology blocks better understandings of who we are as human beings, and demonstrate that the folk psychology of freedom inhibits the formation of a fair and just political order in South Africa.

When it comes to explanations of the self, the social and the constitutional, the folk psychology of freedom suffers from flaws of epic proportions.²⁷ The standard folk psychology of freedom suggests, in a having-your-cake-and-eating-it sort of way, that human beings are not subject to the laws of cause and effect to which every other object in the physical universe is subject. In a manner that goes entirely unexplained, an ostensibly immaterial entity (the soul or the mind) causes a material entity (the body) to undertake action in the world. Only by positing the presence of such an immaterial entity does the folk psychology of freedom liberate human beings from the yoke of determinism that attaches to all other material entities. But this strategy begs several other questions for which proponents of the folk psychology of freedom have no answers.

First, where is the 'mind' or the 'soul' located? It certainly is not, as Descartes suggested, located in the pineal gland. No other *scientific* answer is proffered. The scientific answer is that what we call 'self', or its most salient feature, 'consciousness' is actually the product of a neurological system that is (1) primarily unconscious, (2) distributed throughout the neuromuscular system of the brain and the body, (3) engaged in multiple parallel processes, and (4) of enormous, highly under-utilized capacity.²⁸ The purpose of consciousness on this generally accepted account is three-fold: (a) 'durable and explicit information maintenance' (b) 'novel combinations of operations' and (c) 'intentional behavior'. As Daniel Dennett argues, our conscious beliefs function as 'idealized fictions' that enable us to engage in sophisticated 'action-predicting, action-explaining calculus'.²⁹

Second, how does an immaterial entity (the self) cause a material entity (the body) to act? Once again, those who speak of the 'mind' or the 'soul' do not offer a physical explanation for this unique form of causality. Contemporary neuroscience, cognitive psychology and

materialist theories of consciousness offer such an account. This explanation does away entirely with the need for an independent, immaterial entity like the soul.

Why then is the folk psychology of freedom so deeply embedded in our multiple ways of being in the world?³⁰ 'Free will' is essential for any system of social control. We inculcate a belief in free will – and thus in individual responsibility – in order to ensure greater compliance with the rules that the group, the society or the polity has set up to perpetuate itself. As Dennett writes:

Instead of investigating, endlessly, in an attempt to discover whether or not a particular trait is of someone's making – instead of trying to assay exactly to what degree a particular self is self-made – we simply hold people responsible for their conduct (within limits we care not to examine too closely). And we are rewarded for adopting this strategy by the higher proportion of 'responsible' behaviour we thereby inculcate.³¹

The Darwinian benefit (for the group, or the herd) of the myth of a community of freely willed selves flows from the action-predicting, action-explaining algorithms that the myth supplies (batteries not included). When we operate under the myth (or even without the myth), we know what others will and will not do – if they play by the rules. Most generally do. This shared knowledge ensures greater likelihood of group success. The success of any individual is of limited concern.

However, the real breach – in so far as the folk psychology of free will is concerned – is between constructivism and experimentalism. Constructivism assumes that we, as individuals and communities, possess conscious awareness of most of the rules that govern our lives and that we can consciously plan for all future disruptions accordingly. Experimentalism, grounded in a determinist framework, recognizes that we lack such omniscience, that much of our knowledge is tacit, that we suffer from significant cognitive biases, and that the informal aggregation of knowledge along with a formal commitment to reflexivity with regard to our collective wisdom often produces better results. Most importantly, while it is modest about the limits of conscious individual and collective planning, experimentalism is quite immodest about the possibility of genuine change when multiple experiments regarding the same problems are allowed to occur and accurate information about the results of these experiments is pooled and then disseminated.

Advocates of constructivism and the adherents to the folk psychology of free will would be utterly wrong to think that this Dennettian (Nietzschean) account eliminates freedom, choice or reason in any way that truly matters. Quite the opposite. As Dennett notes:

At every level of organization, from the presumably hard-wired level of memory organization to the level of design of social institutions, the best possible designs, given the constraints of finitude and time pressure, would have to include some arbitrariness and wise risk taking. The (entirely unconscious) organization of memory guarantees that only some approximately appropriate subset of relevant points will occur to one in the time available.³²

In this rather capacious space, in which risk and novel problem solving often take on life and death significance, all the varieties of free will worth wanting reside. The human brain – the body as a whole – is an extraordinarily powerful problem-solving mechanism. Its uniqueness

adheres in its ability to address and to overcome apparently insurmountable obstacles through complex neurological feedback mechanisms that enhance our ability to engage in abstract, future-oriented, action-predictive behaviour. Our problem-solving capacity – our regular inquiries about the nature of our environment, our ability to penetrate the future – is where our freedom ultimately resides. As a result, Dennett rightly claims that his conclusions about free will, though radically different from those explanations on offer from folk psychology, are ‘optimistic.’³³ He writes:

Free will is not an illusion, not even an irrepressible or life-enhancing illusion. When we look closely at the sources of our suspicion and dread, we find again and again that they are not indisputable axioms or overwhelmingly well-supported empirical discoveries, but unfocused images, hastily glanced at – like shadows on the bedroom wall that take on an apparent robustness and menace because we do not look at them closely. ... What we want when we want free will is the power to decide our courses of action, and to decide them wisely, in light of our expectations and desires. We want to be in control of ourselves, and not under the control of others. We want to be agents, capable of initiating, and taking responsibility for, projects and deeds. All this is ours, I have tried to show, as a natural product of our biological endowment, extended and enhanced by our initiation into society. ... We want, moreover, to have enough elbow room in the world so that when we exercise these powers, it is not always a matter of settling for the only desperate course of action that has a chance of fulfilling our desires. We can have this elbow room as well, and it is worth striving for, but not guaranteed. There are real threats to human freedom, but they are not metaphysical. There is political bondage, coercion, the manipulation inducible by the dissemination of misinformation, and the ‘forced move’ desperation of hunger and poverty. No doubt we could do a lot more to combat these impositions on our freedom, were it not for another sort of straightjacket we often find ourselves wearing: the curious sort of self-imposed bondage that we create by the very exercise of our freedom, and in the acknowledgement of our responsibility for the chains, ropes, strings and threads of commitment (explicit and tacit) that tie us to family and friends, that tie us to life projects, and that make us increasingly immovable by appeals for radical action.³⁴

In the above paragraph, Dennett explains the power that the individual does possess: the capacity to build better mousetraps. Moreover, Dennett ties freedom to what really matters to us – the ability to *flourish*. Our efforts to eliminate poverty, hunger, coercion, manipulation and bondage are not aimed at freedom for freedom’s sake. They are aimed at ensuring that all of us are able to pursue lives worth valuing. That is the essence of flourishing.

There is a sting in this tale – and one this book does not shy away from. Flourishing, in the main, is derived from active participation in the associations, communities and networks of which we are a part and the meaning with which these associations, communities and networks imbue our lives. (Flourishing likewise recognizes the extent to which our orientation toward the world is naturally determined.) We do not so much choose such meaning as embrace it. So understood, flourishing forces us to steer a path between the Scylla of tradition (of the social and natural practices that give our lives meaning) and the Charybdis of revolution (the radical change in social and natural practices that will allow others heretofore subject to domination, oppression and discrimination to flourish as well).

This account of freedom will not satisfy those wedded to the existence of a God-given soul. The reply: it coheres best with what we know about the physical world, the brain, the body, social phenomena, politics and the law.³⁵ It is the only account of freedom worth having.³⁶

D. Avoidance Gives Way to Empiricism

Experimental constitutionalism relies heavily on co-operation between the co-ordinate branches of government and the citizens that they govern. The general norm setting practiced by the courts and other branches of government is supplemented by various attempts by other state actors and non-state actors at crafting laws and policies designed to fulfil those constitutional norms. Over time, courts, state actors and non-state actors will have the opportunity to determine whether various political experiments have achieved the ends set for us by our basic law. We will, especially in instances of obvious 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. (Finally, our circumscribed, reflexively understood experiments may tell us something critical about the virtues and the limitations of various tenets of our basic law, and suggest, in the latter case, what revisions to our basic law we ought to make.)

The embrace of the principle of avoidance by our courts and by a number of constitutional commentators poses a unique set of threats to the project of experimental constitutionalism. In its least pernicious form, the principle of avoidance has been articulated by the Constitutional Court in *Mblungu* as follows: '[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.'³⁷ On its face, this salutary rule seems unobjectionable. What is objectionable, even on the Court's own terms, is turning this salutary rule into a full-blown jurisprudence in which a court must never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'.³⁸

The *first objection* is that this early statement in *Mblungu* flatly contradicts the Court's later statement in *Mblungu* as to the nature of constitutional interpretation. The Constitutional Court in *Mblungu* avers that constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'.³⁹ However, if a court refuses to say more than is necessary to decide a case on its facts, then one can hardly expect any meaningfully predictive principle to be drawn from the judgment.

That leads to the *second objection*. The lack of precision and almost casuistic approach to constitutional norm setting means that it is difficult for any actor – another lower court, a government official or a private actor – to anticipate future forms of law or conduct that would or would not satisfy the basic law's general norms. If there is no rule of law to which a state actor or private actor knows that she must conform her behaviour, then it would be surprising to find her attempting to conform her behaviour to some unarticulated and inchoate sense of a 'rule' that is consistent with the Constitutional Court's understanding of what the Final Constitution permits. (This problem continues to arise as a result of the Court's flirtation with the notion of subsidiarity.⁴⁰)

Thus, the *third objection*. The absence of rules of law undermines the ability of other branches of government to comply with the Bill of Rights. It places the court in the unnecessarily uncomfortable position of having to reject or to accept the government's positions in every case as if it were ruling *ab initio*.

Such considerations constitute some of the strongest arguments against a jurisprudence of 'judicious avoidance'.⁴¹ The *fourth objection* against avoidance is that the absence of clearly articulated rules undermines the optimal conditions for (rational) political and social decision making. The incompletely theorized agreements that are the mainstay of minimalism (not South African inflected 'judicious avoidance') were explained by Sunstein (almost two decades ago) as follows:

A minimalist court settles the case before it, but leaves many things undecided. It is alert to the existence of reasonable agreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. ... Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation and responsiveness. It allows for continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values.

However, Sunstein's minimalism only secures traction because it is parasitic upon a deep and widely shared set of norms and recognizes the necessity of a solid core. 'In American constitutional law at the turn of the century', he writes, 'a distinctive set of substantive ideals now form that core.'⁴²

More importantly, Sunstein no longer offers (what appeared to be) an account of judicial deliberation as the primary impediment to optimal individual, social and political decision making.⁴³ Consistent with the findings of a broad array of natural and social scientists, Sunstein identifies deliberation and grand theorizing as but two of a variety of 'thought processes' subject to biases that lead to suboptimal solutions.⁴⁴ Sunstein endorses decision-making methods – such as choice architecture – that produce more accurate assessments and better solutions to problems on substantially larger scales than those dispute-driven quandries faced by courts of law limited to binary oppositions that often yield zero-sum outcomes.⁴⁵ For the empiricist Sunstein, well-regulated markets, though imperfect, often rely upon limited, shared information (sometimes no more than price) and generate substantially more efficient, and *thicker* outcomes. (He never denies, of course, that poorly regulated markets are often subject to devastatingly painful corrections – as we are experiencing now.) But we should always choose well-regulated, socially democratic, state-led corrections of market failures (read Iceland, circa 2008–2012) over extremely long-term corrections to hideous, centrally planned Nazi Germany, Stalinist Russia or Maoist China statecraft any day. Some open-source software, produces incredibly rich results without any central planning. The web itself produces both optimal and suboptimal outcomes, depending on how information is solicited, how it is aggregated and how further co-operative endeavours are organized. (As Jaron Lanier points out, software such as Linux, and search engines such as Google, create forms of lock-in that we should make every effort to eschew).⁴⁶

Thinness is, therefore, no longer a virtue. It may be of limited value within systems with information deficits or significant distortions in the manner in which decision makers use the

information that they possess. As the better part of this book suggests, a growing contingent of constitutional law scholars have recognized that problems of information deficit, lack of cross-cultural understanding and limited institutional competence can be ‘solved’ by a subtle recasting of existing constitutional doctrines and judicial remedies that extract better information, aggregate that information more effectively and thereby achieve *more mindful* results.⁴⁷

The problem with Sunstein’s initial articulation of minimalism was its propensity to be misunderstood.⁴⁸ At least one sitting justice on the South African Constitutional Court stated, in a public forum, that ‘judicial avoidance’ was and remains attractive for members of the Constitutional Court exactly because it does not require the eleven justices to possess a core of shared understandings.⁴⁹ Whether Sunstein should be on the hook for such misapprehensions is neither here nor there.⁵⁰

This much can be said. Reasoned disagreement can only take place when parties agree on the general terms of the debate. The Constitutional Court must, in terms of its institutional role, establish the contours of constitutional norms and thus the general framework for contestation. The Constitutional Court abdicates this institutional responsibility to model rational political discourse when it refuses to state, in a reasonably comprehensive manner, the reasons that ground its conclusions.

A *fifth objection* is that avoidance undermines the integrity of the legal system.⁵¹ It is impossible to create a more coherent jurisprudence without identifying the rules – and the reasons – that ground decisions.⁵²

Chapters 4 through 8 demonstrate why experimental constitutionalism – with its commitment to shared constitutional interpretation and participatory bubbles – abhors a jurisprudence of avoidance. Shared constitutional interpretation relies, fundamentally, upon principled, yet reflexive, exchanges between the courts, various branches of government, and the public. The process of general norm-setting by the courts that initiates a process of rolling best practices by other parts of the state never gains sufficient traction when constitutional norms remain radically under-theorized. Participatory bubbles rely, on the other hand, on a court-initiated structure to ensure that meaningful engagement about optimal outcomes takes place. These 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 and governance are judged to be an attractive set of principles by which to establish political norms (by widespread public agreement) and to assess best practices (by inviting as many stakeholders as possible to design an optimal remedy for a specific social problem) then the jurisprudence of avoidance must be one of the first judicial doctrines to go.⁵³

Endnotes

1. See *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), 2002 (1) SACR 431 (CC), 2002 (3) BCLR 231 (CC) (Rastafarian use of cannabis in religious ritual justifiably impaired by criminal sanctions because the legislature has power and duty to enact legislation prohibiting conduct it considers to be anti-social – whether court agrees with this assessment or not) (*Prince*); *S v Jordan (Sex Workers Education and Advocacy Task Force and others as Amici Curiae)* 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC) (Women’s right to engage in commercial transactions involving sex, though private and often involving economically marginalized classes, deemed insufficient to

outweigh the state's interest in proscription through criminal sanction)(*Jordan*); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Court assumes, for the purposes of analyzing the constitutionality of the use of corporal punishment by teachers, that FC ss 15 and 31 have been infringed; however upon proceeding to limitations analysis, the Court explains why the state is justified in barring corporal punishment and why the court is justified in not crafting an order creating a religious exemption for such punishment)(*Christian Education*).

2. Classical liberalism stresses the capacity of separate, independent selves to choose the aims and attachments by which they will define themselves. As a chooser, 'the [liberal] self', as John Rawls has written, 'is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities'. *A Theory of Justice* (1971) 3–4. In fairness to Rawls, the quote from *Theory* may be misleading. He has never been a classical liberal as that position is described in these pages. See J Rawls *Political Liberalism* (1993); J Rawls 'The Domain of the Political and Overlapping Consensus' (1989) 64 *New York University Law Review* 233. Similar justifications for liberalism appear to rely upon comparable notions of agency. See P Lenta 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 125 *South African Law Journal* 828. Lenta writes: 'Another way to capture the significance of freedom [of liberty] ... is to frame it as a matter of diversity.' William Galston, as Lenta notes, has argued that 'properly understood, liberalism is about the protection of diversity'. W Galston *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (2002) 111, 523. Lenta then invokes Justice William Brennan's justification for liberalism in *Roberts v United States Jaycees*: '[Not only is liberalism designed] to "foster diversity" ... "An individual's freedom to speak [and] to worship ... could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity.' 468 US 609, 619, 622 (1984). Galston, Brennan and Lenta all beg the question as to why we should value diversity – especially where it runs against the grain of egalitarian desires to protect such historically disadvantaged groups such as gays and lesbians. Don't we – as constitutive liberals and egalitarian pluralists – know, morally and empirically, everything we need to know about a gay person's entitlement to be treated with equal dignity and respect? The answer lies in three places: (1) a person must actually have the ability to exit a repressive community; (2) we, as members of various communities and non-members of others, must have the ability to see what 'fits' or 'works' best for us; and (3) we should know generally what counts as an unjustifiable impairment of dignity. See S Woolman 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 *South African Journal on Human Rights* 58. For all that, little distinguishes Professor Lenta's positions from my own. For a hard-charging, but slightly off the mark, radically egalitarian critique of positions adopted by Patrick Lenta and myself, see D Bilchitz 'Should Religious Associations Be Allowed to Discriminate?' (2011) 27 *South African Journal on Human Rights* 219. See, in reply, S Woolman 'Seek Justice Elsewhere: An Egalitarian Pluralist Reply to David Bilchitz on the Distinction between Differentiation and Domination' (2012) 28 *South African Journal on Human Rights* 271. Initial and remaining differences aside, I am grateful to Professor Bilchitz for pushing me to describe the egalitarian pluralism that underlies this book and other works in a far more nuanced fashion. For his own more nuanced, recently developed views, see D Bilchitz 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere' (2012) 28 *South African Journal on Human Rights* 296.
3. *Ferreira v Levin* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(*Ferreira*).
4. *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658(CC)(*Du Plessis*).
5. *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC). See also *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC & Others* 2011 (3) SA 511 (SCA). For a critique of the classically liberal politics that drive *Barkhuizen*, see D Bhana 'The Law of Contract and the Constitution: *Napier v Barkhuizen*' (2007) 124 *South African Journal on Human Rights* 269. While Professor Bhana's analysis of the politics underlying the judgment is accurate, far more persuasive arguments are available, see S Woolman 'Category Mistakes and the Waiver of Constitutional Rights: A Response to

Deeksha Bhana on *Barkhuizen*' (2008) 125 *South African Law Journal* 10. For a more recent critique of the conservative common law inflected approach adopted by the Constitutional Court, the Supreme Court of Appeal and the High Courts, see F Michelman 'Expropriation, Eviction and the Gravity of the Common Law' (Constitution Hill, 21 July 2012), currently available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116643. (A final version of this paper will appear in (2013) 25 (2) *Stellenbosch Law Review* and a festschrift, K Van Marle & S Woolman (eds) *Frank I Michelman's Imagination and South Africa's Constitutional Jurisprudence* (2013).)

6. That this body of learning occupies such a central place in the Court's jurisprudence is poetically just. The majority of the *Ferreira* Court rejected Justice Ackermann's libertarian take of what 'freedom' in the right to 'freedom and security of the person' meant. At the very least, it rejected this analysis with respect to the text of the Interim Constitution. However, the Court's early judgments on the meaning of equality and dignity under the Final Constitution ultimately vindicate Justice Ackermann's understanding of negative liberty by recasting it in terms of dignity. In finding the common law criminalization of sodomy a violation of the right to dignity, the *NCGLI* Court wrote: '[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.' *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28. Moreover, the Court argued, 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy'. *Ibid* at para 30. Individual freedom – negative liberty – thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality. As the Court writes in *Prinsloo*: 'In our view unfair discrimination [the linchpin of equality analysis] ... principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.' *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC). If the link between individual freedom, and dignity and then equality is still not clear, the *Hugo* Court writes: '[D]ignity is at the heart of individual rights in a free and democratic society ... [E]quality ... means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens.' *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (1) SACR 567 (CC), 1997 (6) BCLR 708 (CC). For further analysis of the relationship between equality and dignity, see C Albertyn and B Goldblatt 'Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 35; S Cowan 'Can Dignity Guide Our Equality Jurisprudence?' (2001) 17 *South African Journal on Human Rights* 34. But see S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 36 (Contends that Court's reading of dignity need not end with self-actualization, but clearly embraces a commitment to democratic solidarity in such cases as *Khosa & Others v Minister of Social Development & Others*; *Mablaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)). See, more recently, *Juma Musjid Primary School & Others v Ahmed Asruff Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC).
7. Critics of the early Court's work contended that the dignity-inflected right to equality rendered the latter too elastic to do meaningful work. See D Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *South African Law Journal* 398, 412–413 ('The court has given dignity both the content and scope that make for a piece of jurisprudential Lego-Land to be used in whatever form and shape is required by the demands of the judicial designer.') For the articulation of similar concerns with respect to German jurisprudence, see D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 300–301, 312–313 (the anteriority of the right to dignity to the state complicates judicial control of the concept); S Wermiel 'Law and Human Dignity: The Judicial Soul of Justice Brennan' (1998) 7 *William and Mary Bill of Rights Journal* 223. See, further, C Taylor 'What's Wrong with Negative Liberty' *Philosophy and the Human Sciences: Philosophical Papers* 2 (1985) 211, 213. The classical liberal account, evinced in the Constitutional Court's early jurisprudence, defines individual autonomy primarily in terms of non-interference by

other individuals or the state. This view wrongly identifies flourishing as 'a matter of what we can do, of what is open to us to do' without external restraints. Taylor (supra) at 213. If we instead identify individual flourishing with self-realization, then we may be forced to realize that such control is not solely a function of the absence of external constraints, but also involves overcoming internal barriers as well. (The explanation of, and examples of, feedback mechanisms and error correction in Chapters 2 and 3 explain why this is so.) As Charles Taylor argues, even a classical liberal view of autonomy requires us to discriminate between, and make judgments about, those restrictions which serve significant or important goals, and those which do not. For example, we do not see traffic stop signs and speed limits as significant obstacles to self-realization, but we will likely view restrictions on religion as significant obstacles to flourishing. The point is that even a constitutional state committed to negative liberty forces its citizens to identify some purposes as important for flourishing, and others as unimportant or unrelated to individual self-realization. The upshot of this thesis is that a person's claim that she is doing what she says she wants to do doesn't mean that she should be read as having flourished. Other people may have a better idea of what my own interests are and what will truly enable me to flourish. Thus, contrary to Berlin and classical liberals, Taylor contends that 'we cannot maintain the incorrigibility of the subject's judgments about his freedom, or rule out second-guessing'. Ibid at 228. (Again: the recasting of freedom discourse in terms of error correction, social feedback mechanisms and flourishing reinforces this controversial thesis.) As Taylor points out, all individual actions are in some way addressed towards other individuals and groups with whom they are involved. Since the meaning of any action is often assigned within socially determined horizons of meaning (loosely speaking), other individuals to whom the actions are addressed can have something meaningful to say about the rightness or the wrongness of those actions. *The Ethics of Authenticity* (1992) (I just happen to think that those horizons of meaning are rather broad and widely shared – and that disagreements occur primarily at the margin.) A similar constellation of arguments may be arrayed against the classically liberal position that politics is not the most suitable arena for individual and group value construction. The critique of this political position is that the classical liberal view of autonomy – that people live their lives in accordance with personal ideals – simply operates as a justification for doing what one likes without the need for rational explanation for one's acts to others. The response of a modest, naturalised account of flourishing is that while there is an undeniably justifiable attachment to the belief that the ability of each person to live (largely) as she likes and to author her own law is a necessary condition of a free society, it does not follow that every individual choice is morally or politically justifiable. See J Nedelsky 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in A Hutchinson & L Green (eds) *Law and the Community: The End of Individualism?* (1994) 219, 220–221, 223. What all persons committed to flourishing ought to say is that while value choice is a precondition of flourishing, not every choice is worthy of praise or is politically desirable. These conclusions regarding the flaws of classical liberalism and other forms of liberalism support the following propositions for experimental constitutionalism, and the modest, naturalised account of flourishing upon which it rests. First, members of a given polity can have meaningful disagreements about political ideals and the extent to which particular practices conform to the ideals to which a polity has committed itself in such public documents as a constitution. Second, such disagreements can sometimes make a difference in the way others see us, the way we see others, and the way we live together. Third, disagreements and their resolution through deliberation alone rarely convince us to see the world differently. More often, it is regular, successful action, and seeing how others construct their world, that makes for the most compelling argument. See M Nussbaum *Upheavals of Thought: The Intelligence of Emotions* (2001); M Nussbaum *Love's Knowledge* (1991). See also H Arendt *The Human Condition* (1961). My understanding of action, unlike Arendt's vision, is not one which requires mobilization of the citizenry around noble goals. It has the more modest aim of enabling all members of society to (a) have their basic needs met so that (b) they might engage in meaningful action that (c) would count as evidence for or against a way of living in the world and (d) at a minimum expand the range

- of conditioned choices available in a polity. See A Sen *Development as Freedom* (1999); A Sen *The Idea of Justice* (2010); A Sen *Commodities and Capabilities* (1985); A Sen & M Nussbaum (eds) *The Quality of Life* (1993); M Nussbaum *Creating Capabilities: The Human Development Approach* (2011); M Nussbaum *Women and Human Development: The Capabilities Approach* (2000); M Nussbaum 'Constitutions and Capabilities: Perception against Lofty Formalism' (2007) 121 *Harvard Law Review* 4.
8. For jurisprudential accounts based upon a strong agency model consistent with social democratic theory, see D Meyerson *Rights Limited* (1996); J Rawls *Political Liberalism* (1993).
 9. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('NGCLE I'); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1, 41 (CC), 2000 (1) BCLR 39 (CC) ('NGCLE II').
 10. *Menafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC); *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); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC); *Abablali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31, 2010 (2) BCLR 99 (CC); *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo & Another* 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC). For defenses of a social democratic state tied to ideal speech conditions and strong accounts of individual agency, see D Davis *Democracy and Deliberation* (2000); J Habermas *Between Facts and Norms: A Discourse Theory of Law and Democracy* (1997). The Court's dignity and socio-economic rights jurisprudence evinces a strong social democratic political theory – but one still unnecessarily pinned, in many places, to the metaphysical commitments of freedom and the unencumbered self that comes under attack in these pages. For a discussion of cases emphasizing self-actualization and self-governance, see S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.
 11. *Ferreira* (supra) at 1013–1014.
 12. *Jordan* (supra) at paras 16–17.
 13. S Woolman & M Bishop 'State as Pimp: Sexual Slavery in South Africa' (2006) 23 *Development Southern Africa* 385.
 14. See S Woolman 'Freedom of Association' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. See also S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 64. My pithy point is that Constitutional Court judges, in capitalist economies, also commodify their bodies. No more or less stigma should attach to their 'lofty' work *qua* commodification than the 'dirty deeds' of sex workers.
 15. *Jordan* (supra) at para 16.
 16. See, further, N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex?' (2004) 20 *South African Journal on Human Rights* 230. See also V Barolsky et al *Understanding the Dimensions of Human Trafficking in Southern Africa* (2010).
 17. *Jordan* (supra) paras 16–17. After a public tete-a-tete in early 2013 – just as this book went to bed—Kate O'Regan responded to my mild critique of her minority judgment in *Jordan* by stating (privately) that the only two or three paragraphs in her august career that she regretted were those I had identified in *Jordan*. Justice O'Regan explained that she had to pen them in order to mollify a majority of her brethren. In the end, however, her majority opinion became a minority opinion: and the paragraphs stand as a matter of record. According to Justice O'Regan her views on autonomy are best captured in *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC). Whether *Manamela* or *Jordan* so revised answer metaphysical questions about the meaning of 'autonomy' or suggest that the criminal system can best be explained as a form of social control are beyond the scope of this exculpatory endnote.
 18. A fourth position – largely, but not entirely, inconsistent with the space for private ordering required by South Africa's Constitution – could be described as communitarian. See, eg, M Sandel *Liberalism*

and the Limits of Justice (1982); A MacIntyre *After Virtue* (1984); M Walzer *Spheres of Justice* (1983); C Taylor 'Atomism' *Philosophical Papers II: Philosophy and the Human Sciences* (1991); IM Young 'The Ideal of Community and the Politics of Difference' in *Throwing Like a Girl and Other Essays* (1991). Only BMW Bolsheviks and Rolls Royce radicals in South Africa attempt to squeeze far left ideology into a document that rightly recognizes a significant degree of private ordering. As a philosophical matter, communitarianism largely receded as a significant critique of liberalism because, for the most part, liberal theory absorbed the original Sandelian critique that liberalism relies upon a fiction of persons always capable of rationally ordering their preferences in a manner that maximizes utility. See, eg, C Larmore *Patterns of Moral Complexity* (1987); J Cohen *Rules of the Game* (1986); J Cohen & J Rogers *Associations and Democracy* (1995); J Cohen, A Fung & E Elgar (eds) *Constitutionalism, Democracy, and State Power: Promise and Performance* (1996); A Gutmann *Freedom of Association* (ed)(1998). It's also important to note that communitarianism lost much of its force with the fall of the Berlin Wall and the dissolution of the Soviet Union. All of a sudden capitalist democracies, committed to human rights, had the ideological field almost entirely to themselves. China, if anything, represents classic mercantilism and a state-run oligopoly. Whether the philosophical landscape will again shift as a result of the recent crisis in capitalist economies post-2008 remains to be seen. It goes without saying then, that this book falls squarely within the liberal tradition, but it's a liberalism that has absorbed the contributions of egalitarian pluralists such as Walzer and Taylor. For more on how liberalism has absorbed the critiques levelled against it by communitarianism and postmodernism, see S Benhabib *Situating the Self* (1992)(Benhabib does not argue from within the liberal tradition, but as a feminist, who grounds her ethical theory in universal principles.) Against the classical liberal, the welfare state liberal, and the social democratic liberal, Sandel-like communitarians pit an encumbered theory of the self. In this account, individuals are born into existing political communities, and have their identities or selves created or conditioned by a vast network of political practices. The primary, and most important, difference between the social democratic politics of flourishing and experimental constitutionalism defended here and the communitarian account is how and where they locate the self in relation to the communities out of which the self's primary understandings are constructed. My account recognizes the sources of the self as radically heterogeneous. The self and its sources are made up of linguistic, religious, social, class, racial, ethnic, gender, national and political groupings which may overlap, but which are never identical, and which often conflict with one another. Communitarians (a) tend to privilege the political community over other communities, and underplay existing and historical conflicts between the various communities that source the self, or (b) entirely elide the difference between the polity and other communities that make up a society. For example, George Fletcher writes: 'In a patriotic society, where all individuals share a common past and purpose, each can identify with others and find in them an equal partner in a common cause. The rooting of the self in a culture of loyalty enables individuals to grasp the humanity of their fellow citizens and to treat them as bearers of equal rights.' *Loyalty* (1993) 21 (my emphasis). Fletcher's prose is a perfect example of what might be called the *communitarian shuffle*: the easy move back and forth between discussions about society and polity that obscures the fact that the two are not co-extensive – that polities contain multiple societies, sub-publics and cultures, and that cultures, sub-publics and societies are often rooted in a variety of different states. The difference is important. The communitarian privileging of the state over other communities within the state – or in some cases conflating the state and those communities – has significant repercussions for individual and group flourishing, as well as the construction of the self. Once shared pasts, united purposes and common causes are assumed, the state is further free to assume that important differences between its citizens and the smaller communities (or larger transnational communities) of which they are a part do not exist. Once pluralism is no longer a concern, there is no reason for individual and group flourishing to be. The state is then truly free to impose a more homogenous and standardized way of life. David Bilchitz makes a similar error in an article that extols the putative benefits of reading the South African Constitution as reflective of and committed to a radically egalitarian polity. See D Bilchitz 'Should Religious Associations be Allowed to Discriminate?' (2011) 27 *South African Journal Human Rights* 219. First, his original position begs a host

of unanswered questions about a founding document committed to the simultaneous realization of three basic non-covalent values – dignity, equality and freedom – and a host of civil and political rights (from expression to religious practice to property) that require a significant degree of private ordering. Second, exactly what polity does Professor Bilchitz have in mind? The South African polity in which the current President (then Deputy President) Jacob Zuma tells an audience in KwaZulu-Natal that he would know how to ‘take care of those moffies’? The Constitutional Court as led by a Chief Justice, whose express religious beliefs would make gays and lesbians pariahs in their own land? The vast majority of individual members of South Africa’s heterogeneous array of sub-publics who adhere to extremely traditional (read conservative) values and who, if asked to vote directly, would likely deny gay and lesbian members of our society the equal rights vouchsafed in the Constitution? A strong democratic experimentalist, on the other hand, retains a commitment to a thinner conception of the good: the creation of institutions that vouchsafe rough equality with respect to the distribution of basic opportunities and essential goods and a pluralist’s bounded toleration of other more comprehensive visions of the good. The role of the strong democratic experimentalist state thus remains the mediation of disputes between different individuals and communities with different visions of the good, and roughly equal support for decidedly different visions of the good, even as its basic law (and the institutions that support it) presses upon various publics a politics that can best be described as ‘rough egalitarian pluralism’. 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 on Human Rights* 273.

19. The constitutional theories adumbrated by Davis and Habermas are perhaps closest to the mark. See D Davis *Democracy and Deliberation* (2000); J Habermas *Between Facts and Norms: A Discourse Theory of Law and Democracy* (1997). The kind of limits on individual rationality and autonomy described herein must place some meaningful limits on one’s expectations regarding reasoned political discourse – especially deliberation at the margins. This book supplants a commitment to rationality and ideal speech situations with a cautious experimentalism. Of course, either way one goes, the success of the entire constitutional enterprise depends to a large degree on shared normative assumptions. See S Woolman ‘On the Common Saying “What’s True in Golf is True in Law”: The Relationship between Theory and Practice across Forms of Life’ (2010) 25 *Southern African Public Law* 520.
20. 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 ‘Dignity’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For a similar set of views, offered from a slightly different philosophical perspective, see K van Marle ‘Law’s Time, Particularity and Slowness’ (2003) 19 *South African Journal on Human Rights* 239 (Van Marle shows how greater attentiveness – slowness – promotes a deeper understanding of the requirements of justice.)
21. *Khosa* (supra) at para 74. The Court’s language echoes Rawls’ description of a Kantian ‘realm of ends’ in which: ‘Everyone recognizes everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognized.’ J Rawls *Lectures on the History of Moral Philosophy* (2001) 209. See also S Doctor ‘Dignity, Criminal Law and the Bill of Rights’ (2004) 121 *South African Law Journal* 265, 315 (‘Dignity has a communitarian aspect: by requiring respect for others’ claims to dignity, vindication of the human dignity of all is better assured, and a community of mutual co-operation and solidarity is fostered.’)
22. See D Bilchitz *Poverty and Fundamental Rights* (2006).
23. See A Sen *Development as Freedom* (1999) (‘Development’); A Sen *Inequality Re-examined* (1992); A Sen *The Idea of Justice* (2010).
24. Sen’s relationship to classical schools of political philosophy is far too subtle to be explicated meaningfully here. However, a précis of his positions may suggest why Sen, of all contemporary theorists, offers an account of dignity, equality and freedom that provides the best fit with my own take on these ‘three conjoined, reciprocal and covalent values’ and my ultimate commitment to flourishing. *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 41. Sen rejects Rawls’

(Kantian and deontological) contention in *A Theory of Justice* (1972) – and to a lesser degree in *Political Liberalism* (1993) – that there are certain primary goods – civil liberties such as expression, assembly, the franchise – that ‘cannot be compromised in any way’. Sen *Development* (supra) at 64. Sen has even less time for utilitarian frameworks that make the greatest good for the greatest number the measure of justice. In addition to offering standard criticisms of utilitarianism – its inability to arrive at an acceptable metric for interpersonal comparisons of happiness, its general indifference to radical inequality in the distribution of happiness, and its neglect of rights, freedoms and other non-utility-based concerns – Sen inveighs against the general inclination, especially amongst economists, to measure utility or happiness in terms of wealth (eg, GNP) and wealth in terms of income (per capita). Neither wealth nor income provides adequate information about the well-being and the substantive capacities and life chances of individuals. Both liberals and utilitarians fail to take account of how individual differences – in physical ability or disability, in environment, in social practices, in family structure – create significant asymmetries in the manner in which primary goods and incomes can be exploited. Ibid at 73. Sen’s theory of distributive justice accounts for how the heterogeneity amongst individuals (both within societies and across societies) shapes the meaning of primary goods *and* incomes. For example, the meaning of a primary political good like freedom of assembly will have demonstrably different meanings for a person who is ambulatory and for a person who is not ambulatory, but housebound. Similarly, the utility of an income of R200 000 may have a demonstrably different value for a person who is ambulatory and for a person who is not ambulatory, but housebound. At a minimum, says Sen, quoting Adam Smith, our primary concern ought to be providing individuals with those necessities of life that will give them ‘the ability to appear in public without shame’. Ibid at 73 quoting A Smith *The Wealth of Nations* (1776) (RH Campbell and AS Skinner)(eds)(1976) 469–471. That, in just a few well-chosen words, sounds very much like South African discourse on dignity. Sen thus shifts our focus to the actual ‘freedom generated by civil liberties’, and away from ‘commodities seen on their own’, to the actual freedom generated by civil liberties, and away from formal constitutionally enshrined civil rights viewed in the abstract. Ibid at 74. Sen argues that the best measure of equality or freedom or dignity is the ability of individuals to *convert* such primary goods as *income* or *civil liberties* into the capability ‘to choose a life one has reason to value’ – or in simpler terms, the ability to pursue one’s own ends. Ibid at 75. That is, in sum, how I understand flourishing. The virtue of Sen’s approach is that it recognizes (a) the heterogeneity of capacity that people possess by virtue of biology, custom or class; (b) the heterogeneity of critical functions – from nourishment to civic participation – that may be required to live a life one has reason to value; and (c) the heterogeneity of capabilities that people will possess – different combinations of more basic functions – which will, in turn, enable them to pursue different ‘lifestyles’ or different visions of the good. For an account of flourishing that gave rise to much of contemporary development and capabilities theory, see Martha Nussbaum’s wonderful essay ‘“Finely Aware and Richly Responsible”: Moral Attention and the Moral Task of Literature’ (1985) 82 *The Journal of Philosophy* 516.

25. Sen *Development* (supra) at 75. See also D Cornell *Defending Ideals: War, Democracy, and Political Struggle* (2004).
26. RN McCauley ‘Folk Psychology is Here to Stay’ (1985) 94 *The Philosophical Review* 197, 198.
27. See P Churchland ‘Eliminative Materialism and Propositional Attitudes’ in SM Christensen & DR Turner (eds) *Folk Psychology and the Philosophy of Mind* (1993) 42; P Feyerabend ‘Materialism and the Mind–Body Problem’ in SM Christensen & DR Turner (eds) *Folk Psychology and the Philosophy of Mind* (1993) 3, 15 (‘Is it then possible to reject materialism by reference to the success of a non-materialistic language? The answer is NO and the reason ... is as follows: in order to discuss the weaknesses of an all-pervasive system of thought such as is expressed by the “common” idiom, it is not sufficient to compare it with “the facts”. Many such facts are formulated in terms of the idiom and therefore already prejudiced in its favour.’) For a far more recent defence of materialism and ethics based upon a third party perspective provided by neuroscience, see Patricia Churchland’s recent work: P Churchland *Braintrust: What Neuroscience Tells Us about Morality* (2011). What Feyerabend cavalierly dismissed as an ‘idiom’ employed by both Paul Churchland and Patricia Churchland two decades ago now has

a hefty body of evidence to support many of its original claims. Where is Feyerabend's evidence in support of non-materialistic language? Certainly, others, 'the new mysterians', have taken up his cause. See C McGinn *The Mysterious Flame: Conscious Minds in a Material World* (2000); J Searle *Making the Social World: The Structure of Human Civilization* (2010); D Chalmers *The Character of Consciousness* (2010). McGinn's theory of 'cognitive closure' runs, briefly, as follows: the multitude of tasks that the human mind or brain can carry out does not include the ability to explain how consciousness works. Given the new found capacity of individual human brains, enhanced with computer chips, to move objects or to answer questions without verbal or motor responses by the individual (but through the brain implants), it seems a little early to give up on what Descartes started. Forty odd years of experiments have demonstrated that Locke was clearly wrong about the possibility of inverted colour spectra – a belief about qualia (the stuff of consciousness) maintained by philosophers for almost 300 years. According to the Lockean view, we could never tell what colours another person experienced (is your blue, my blue?) or what colours human beings experience as truly primary. The answer to the latter is four: red, blue, yellow and green. See S Palmer 'Consciousness and Isomorphism: Can the Colour Spectrum Really be Inverted?' in B Baars, W Banks & J Newman (eds) *Essential Sources in the Scientific Study of Consciousness* (2003) 185 (The only real space for inversion is well-known to everyone: colour-blindness. The inversion of red and green occurs because of the proximity and the frequency of the cones and rods for red and green in the retina.) The jury is certainly out on McGinn's 'closure' argument. However, chips designed to carry out cognitive requests without verbal or motor interventions by an individual would suggest that the door to identifying neural correlates of consciousness has been opened. Despite daily revelations as to how consciousness emerges out of the material conditions of existence, this frontier of scientific investigation remains in its incipient stages. Our ignorance is McGinn's true source of bliss.

28. See BJ Baars 'How Does a Serial, Integrated and Very Limited Stream of Consciousness Emerge from a Nervous System that is Mostly Unconscious, Distributed, Parallel and of Enormous Capacity?' in GR Bock & J Marsh (eds) *Experimental and Theoretical Studies of Consciousness* (1993) 282.
29. D Dennett *Brainstorms* (1978) 30. See also D Dennett *Freedom Evolves* (2003).
30. Nietzsche's epigram at the outset of this section of the introduction offers one answer. F Nietzsche *On the Genealogy of Morals* (1887) 64–67.
31. D Dennett *Elbow Room: The Varieties of Freedom Worth Wanting* (1984).
32. *Ibid* at 164. See also C Cherniak 'Rationality and the Structure of Human Memory' (1983) 57 *Synthese* 163.
33. Dennett *Elbow Room* (supra) at 169.
34. *Ibid*.
35. Cf J Searle 'Putting Consciousness Back in the Brain' in M Bennett, D Dennett, P Hacker & J Searle (eds) *Neuroscience and Philosophy: Brain, Mind & Language* (2003) 97.
36. Assume that this descriptive claim about freedom is true. One problem that remains is that of arationality, and the distortion of truth and politics by abuses of power. See S Woolman 'Language, Power and the Margin: Eliot's Philosophy of Language, Wittgenstein on Following a Rule, and Statutory Construction in *Tbembekile Mankayi v Anglogold Ashanti Limited* (2012) 128 *South African Law Journal* 434. One form of 'arationality' has already been identified: the extent to which various ways of being in the world (including comprehensive visions of the good) determine (a) who we are as individuals, and (b) the necessary conditions for flourishing. I am only concerned with this form of arationality to the extent that it prevents – through various forms of coercion – individuals from creating ways of being in the world that enable them to flourish. What we want from a politics of flourishing, ultimately, are institutional arrangements that enable individuals who are square to live in square holes, and individuals who are round to inhabit round holes. No more than that. See J Gray *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (1997) 102 (The politics of flourishing and experimental constitutionalism are only possible against a background of common cultures that ensure the general stability of a society. Or, as John Gray argues, the institutions of the modern social democratic state on offer in these pages 'depends far more on their political and cultural

acceptability than upon the legal framework which supposedly defines and protects them'.) A second form of arationality is more pernicious. This second form of arationality drives the distinction Plato offers in *The Republic* between philosophy and politics. Politics, in Plato's view, is largely the domain of the messy and the venal. It concerns itself with competitive advantages between individuals, with the distribution of the goods in life among various groups in society, with 'the instabilities engendered by changing social and economic relationships'. See LJ Biskowski 'Reason in Politics: Arendt and Gadamer on the Role of the *Eide*' (1998) 31 *Polity* 1. Politics is the enemy of stability and truth, and thus philosophy. See, further, WE Connolly *Political Theory and Modernity* (1988)(Connolly, following Nietzsche, contends that Plato: 'discounts the sensuous world of change, growth, decay and finitude to attain the true world of ideas The sphere of ideas brings the pious and virtuous man to truth and it establishes a set of standards by which the mundane world must be evaluated. This is the first and most confident expression of the western will to truth, of the will to interpret the world in human terms and then to pretend that the interpretation reflects the world as it is in itself.' Ibid at 141–142.) See also S Wolin *Politics and Vision: Continuity and Innovation in Western Political Thought* (1960) 42 (Plato treats these phenomena – of competition, disagreement and instability – 'as the symptoms of an unhealthy society, as the art against which political philosophy and the political art had to contend. Political philosophy and ruling alike had as their objectives the creation of the good society, "politics" was evil, and hence the task of philosophy and of ruling was to rid the community of politics'. Such is Plato's paradox: politics without the political.) Arendt, Dahl, Pitkin and Young – attacking Platonic thought from a variety of very different philosophical angles – also contend that politics is inherently messy, and in the nature of all things human, unavoidable. See H Arendt *The Human Condition* (1960); RA Dahl *Democracy and Its Critics* (1989) 52; HF Pitkin *Wittgenstein and Justice* (1972) 326; IM Young *Justice and the Politics of Difference* (1990) 126–127. That said, we need not adopt the benevolent tyranny of *The Republic* to have some sympathy for Plato's concerns about arationality. For example, Gadamer's reconstruction of Plato reconnects the capacity to recognize 'Ideal Forms' with more general forms of human reasonableness and moral consciousness. See HG Gadamer *Truth & Method* (1968). It should be clear that the capacity to form reasoned judgments is critical both to flourishing – which involves a pre-commitment (grounded in reason) to tolerating some, but not all, ways of being in the world – and to experimental constitutionalism – which involves a pre-commitment (grounded in reason) to making assessments regarding the kinds of 'experiments in living' worth reinforcing and those kinds of experiments *not* worth maintaining. The concern with arationality, then, is not a concern with a failure to recognize 'the one true way'. It is, first, a concern with forms of politics that would impose a single comprehensive vision of the good on all the members of a polity. A theocracy run according to a particularly conservative variation of *shari'ah* (Islamic law) or *halachah* (Jewish law), or a dictatorship run according to a cult of personality, is simply the most pernicious form of the arational in politics. Neither flourishing nor experimentalism is genuinely possible under such regimes. Eliminating the extreme examples is easy. Arationality strongly adheres to the desire to maintain the status quo. (Human beings do not like change. We seek stasis.) I want to suggest that my understanding of human flourishing and experimental constitutionalism constitute radical and persistent challenges to the status quo (defined as the commitment to leaving things as they are, and in the hands of those who currently exercise power) and requires a thicker conception of reasonableness than our current constitutional politics admits. To disentrench established interests, to challenge things as they are, demands both a more thoroughgoing commitment to creating the material conditions for flourishing and a revision of our political arrangements in light of the dictates of experimental governance. To accept anything less is to admit that our current political commitments are simply the product of the arational – both in the Platonic idiom and in the modern sense. As we shall see, flourishing and experimentalism connect us to intercultural attempts to extend shared understandings of the good without reifying 'the good' in a manner that allows any given conception of 'the good' to displace 'the right'.

37. *S v Mblungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

38. *Zantzi v Council of State, Ciskei* 1995 (4) SA 615 (CC) at para 8.

39. *Mblungu* (supra) at para 129.
40. See *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC), [2009] ZACC 33. For trenchant critiques of the Court's adoption of subsidiarity with respect to socio-economic rights, generally, and sanitation, in particular, see M Lanford & R Stacey 'Water' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, May 2011) Chapter 56B; R Kapindu 'The Desperate Left in Desperation: A Court in Retreat – *Nokotyana v Ekurhuleni Metropolitan Municipality* Revisited' (2010) 3 *Constitutional Court Review* 201; D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor?' (2010) 127 *South African Law Journal* 591.
41. See C Sunstein *One Case at a Time* (1996); I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138.
42. Sunstein *One Case at a Time* (supra) at ix–x. See also C Sunstein 'Leaving Things Undecided' (1996) 110 *Harvard Law Review* 4; C Sunstein 'Incompletely Theorized Agreements in Constitutional Law' *John M Olin Law & Economics Working Paper* no 322 (January 2007), available at https://www.law.uchicago.edu/Lawecon/wkngPprs_301-350/322.pdf (last accessed 11 October 2007).
43. Sunstein *One Case at a Time* (supra) at x. At the time it was written, I thought that this work was a strategic (craven) attempt, by an academic with a long politically progressive paper trail, to turn the author into a viable candidate for the US Supreme Court. Not only did such a view of Sunstein's work constitute bad faith on my part, one must now read Sunstein's *One Case* as a throat-clearing exercise and as part of a long-term project to think through the various possibilities for creating better judicial, political and social institutions. No other living American legal scholar can claim to have worked through and turned over such a broad array of jurisprudential problems and built up, as a consequence, a novel theory not just about judicial decision making, but about decision making across a broad range of institutions. Sunstein has contributed to the growth of experimentalism as a way of understanding how everything works, and how things can be made to work better.
44. See C Sunstein *Infotopia: How Many Minds Produce Knowledge* (2007).
45. See R Thaler & C Sunstein *Nudge: Improving Decisions about Health, Wealth and Happiness* (2008).
46. J Lanier *You Are Not a Gadget: A Manifesto* (2010).
47. See, eg, M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267; Michael Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015. For the application of experimental constitutionalism to South African jurisprudence, see S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31; S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34; S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994–2008* (2009); See S Woolman 'On the Common Saying "What's True in Golf is True in Law": The Relationship between Theory and Practice across Forms of Life' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 341.
48. As noted above, Sunstein seems committed to a full-blown institutional empiricism that allows for the possibility of extracting and using information to build better theories and institutions. His 'libertarian paternalism' only puts certain limits on what any polity should do when it undertakes social experiments, regulation creation and constitutional norm setting. Sunstein abjures the tendency in the legal academy to reify deliberation as a problem-solving mechanism. (I share his scepticism.) He has instead become an adherent of emergent experimental governance when it comes to building better theories about the normative content of federal law in the United States. (Sunstein's appointment in 2009 as US President Obama's administrative law Czar – responsible for tweaking, correcting or discarding regulations – reflects this turn.) We shall see below that Sunstein's movement from scepticism to problem solving is consistent with the kind of empiricism that got off the ground with David Hume and the Scottish Enlightenment, that lies at the heart of John Dewey's American pragmatism, and that has reappeared in a number of contemporary currents of legal realism.

49. A Sachs 'Democracy, Dignity and Deliberation', Paper delivered at the *Conference on the Dignity Jurisprudence of Laurie Ackermann* (University of Cape Town, 27 July 2007)(Notes of conference on file with author.)
50. Professor Iain Currie is the only South African constitutional law scholar to have articulated an alternative full-blown theory of judicial review. It closely tracks Sunstein's earlier views on incompletely theorized agreements. Two problems with Professor Currie's decade-old account warrant mention here. Professor Currie may have been correct, as a descriptive matter, to ascribe (some notion of) judicial minimalism to the Constitutional Court in its first few years of existence. The shallowness of the Chaskalson Court's judgments and the unanimity that the Chaskalson Court imposed on its potentially fractious bench are noteworthy features of its first four years. However, Professor Currie has, over time, elevated an accurate description of a small cohort of cases to a highly questionable normative account. His more recent work shows no signs of backing away. See I Currie & J de Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005). Currie's difficulty is that South Africa, circa 1995 to 1999, possessed no core of fully or reasonably theorized agreements about constitutional norms that would allow for meaningful incompletely theorized agreements. As of 2012, the Constitutional Court continues to offer incompletely theorized judgments in the (general) absence of theorized cores. Avoidance of the kind espoused by Professor Currie only works against a background of shared understandings. It is the absence of shared understandings – in the Court and in the society at large – that make it impossible to accept judicial avoidance as either an accurate description of or a desirable prescription for our Bill of Rights jurisprudence. (In liberal societies, this distinction between the shared assumptions necessary for society to work (and to work fairly) and more general assumptions about the correct way to live tracks the philosophical distinction between the right (justice) and the good (morality).) A constitutional democracy, with a justiciable Bill of Rights, requires a significant number of shared assumptions about the right in order to operate: it also consciously leaves space for disagreement about comprehensive visions of the good. See J Rawls *Political Liberalism* (1993). Robert Post & Reva Siegal have offered a far more nuanced set of objections to the original minimalist project. See R Post & R Siegal 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373. In response to Sunstein's original minimalism, which assiduously eschews judicial pronouncements on contentious value choices, they advance a theory called 'democratic constitutionalism': 'Democratic constitutionalism suggests that some degree of conflict may be an inevitable consequence of vindicating constitutional rights, whether rights are secured by legislation or by adjudication. ... Democratic constitutionalism suggests ... that controversy provoked by judicial decision-making might even have positive benefits for the American constitutional order. Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other Americans to embrace their constitutional understandings. These forms of engagement lead citizens to identify with the Constitution and with one another. Popular debate about the Constitution infuses the memories and principles of our constitutional tradition with meanings that command popular allegiance and that would never develop if a normatively estranged citizenry were passively to submit to judicial judgments. ... [the early] Sunstein ... [was] in the grip of an image of constitutional law as "democracy foreclosing". Democratic constitutionalism refuses to accept this image, and it thus provides a more nuanced appreciation of the actual operation of our constitutional system. No court, including the Supreme Court, has the capacity to rule a controversial issue "off-limits to politics". ... Although constitutionalizing a right takes certain legislative outcomes off the table, it can also invigorate and transform politics. ... A theory of the proper relationship between adjudication and democratic politics necessarily lies coiled at the core of every judicially defined and enforced constitutional right. ... Minimalism approaches conflict with the assumption that it is a threat to social cohesion and legitimacy. Democratic constitutionalism, by contrast, examines the understandings and practices that promote the social cohesion and legitimacy of our constitutional order. It considers the possibility that controversy over constitutional meaning might promote cohesion under conditions of normative heterogeneity.' *Ibid* at 391–406. Though I'm not enamoured with this deliberative turn, what is refreshing about Post and Siegal's take on democratic constitutionalism is

- that conflict may, in fact, produce better results and constitutional norms over time, as well as greater normative legitimacy through broader political participation. See, especially, L Greenhouse & R Siegal 'Before (and After) *Roe v Wade*: New Questions about Backlash' (2011) 120 *Yale Law Journal* 2028 (Contend that Supreme Court had to intervene in the debate over abortion because Catholics had mobilized to block decriminalization at the state level. The 1973 decision, so understood, opened up a debate that continues to exercise many Americans, while enabling most women to take advantage of *Roe's* grant of reproductive autonomy.) That said, the polarization of American politics – by what would have been considered the lunatic fringe of half-baked libertarianism just twenty years ago – suggests that public discourse (infected and inflected by huge amounts of money from the wealthy) may actually undermine social stability. Post and Siegal fail to recognize how the web and a highly fragmented media have debased discourse by feeding people 'information' that conforms to, rather than challenges, their existing beliefs. See, eg, G Soros 'My Philanthropy' *The New York Review of Books* (23 June 2011) 4.
51. See, eg, *True Motives (Pty) Ltd v Mabdi and Another* 2009 (4) SA 153 (SCA), 2009 (7) BCLR 712 (CC) (Cameron J's judgment expressly recognizes this very problem and cites my own work as identifying the problem. See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Review* 762.) See also *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at paras 81–88 (The *Makhanya* court, per Nugent J, was rather scathing with respect to the thinness of several of the Constitutional Court's judgments. According to Nugent J, the Constitutional Court had come to two 'mutually destructive findings' with respect to the content of the rule to be followed in lower courts and by other social actors because it had given no express statement as to the true ratio for its decisions. It had left the ratio to be gleaned by highly circumstantial inferences at best.)
 52. See, especially, C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209; M Brassey 'Back Off, but Back Up: Administrative Law Rightly Yields to Labour Law' (2009) 2 *Constitutional Court Review* 209; J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79; A Fagan 'The Confusions of K' (2009) 126 *South African Law Journal* 154; D Davis 'Private Law after 1994: Progressive Development or Schizoid Confusion?' (2008) 24 *South African Journal on Human Rights* 318; G Penfold & D Milo 'Media Freedom and the Law of Privacy: *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC)' (2008) 1 *Constitutional Court Review* 311; L Chenwi 'A New Approach to Remedies in Socio-Economic Rights Adjudication: *51 Olivia Road v City of Johannesburg*' (2009) 2 *Constitutional Court Review* 371.
 53. For a full-blown critique of avoidance that demonstrates its incoherence when elevated to a rule of adjudication, see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Review* 762; S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 31. But for a sharp response to my critique and a robust defence of the Court's Bill of Rights jurisprudence generally, see F Michelman 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2009) 1 *Constitutional Court Review* 1. The colloquy between Professor Michelman and myself has closed down much of the space for disagreement. By and large, a single question remains unanswered: are the Constitutional Court's judgments sometimes too thin to give clear direction to other members of South Africa's legal order? S Woolman 'Between Charity and Clarity: Kibitzing with Frank Michelman on How Best to Read the Constitutional Court' (2010) 25 *Southern African Public Law* 491; F Michelman 'Old Kibitzes Never Die: A Rejoinder to Stu Woolman' (2010) 25 *Southern African Public Law* 515. A more recent work by Frank Michelman on the Court's avoidance of constitutional norms in favour of an *often* unstated reliance upon outdated, conservative common-law regimes or 'practices' suggests that the Court's behaviour does indeed have the capacity to do the kind of damage to our aspirational constitutional order that sparked my first foray into this arena and our initial discord about my initial conclusions. F Michelman 'Eviction, Expropriation and the Gravity of the Common Law' (*supra*).