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Steve Allcock, Publisher
Juta Law Publishing
Claremont, Cape Town

Dear Steve,

I have been asked, by you, to peer review a manuscript of a book entitled *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law*. My views regarding the book's originality, worthiness of publication and places for improvement appear below. .

The Selfless Constitution delivers something extremely rare in South African legal literature: an intellectually ambitious book that fuses insights from fields outside the law with a thorough and imaginative engagement with legal precedent. The author invites his readers to engage with both ancient philosophical debates, and modern scientific and economic breakthroughs, about what it means to be free. He then carefully explains why the philosophers' and scientists' work is vital to understanding the functioning of our constitutional democracy. The author's multidisciplinary approach and novel use of the theories of flourishing and experimental constitutionalism in the South African context challenges, enhances and reshapes traditional understandings of constitutional doctrine and paves a new path for future

constitutional jurisprudence and democratic governance. In doing so, the author also makes a significant contribution beyond South African borders to the exciting and developing fields of experimental constitutionalism and new governance theory.

The *Selfless Constitution* is such a wide ranging and detailed book that it is impossible to capture all the arguments the author makes. In this letter, I focus on four issues where the author has made particularly significant contributions to legal thought.

First, the South African legal academy – unlike its American counterpart – is not known for frequent or profound engagement with other academic disciplines. There will be an occasional mention of economic or social theory in a journal article, but in the way that law is taught and written about, other disciplines play, at best, a bit part. The author turns that standard model on its head. It is not until Chapter 5 (259 pages in) that author begins his analysis of the case law and legislation that links his underlying thesis about the nature of human action to the legal world. More important than the range – he deals with at least five non-legal disciplines – is the way that the author relies on those other disciplines. He does not use them to make a point about a particular legal doctrine, or argue for a change in a law. He uses them to develop a comprehensive idea of the self, and then relies on that concept to build a theory of constitutional governance. That is a truly impressive achievement in any country; in South Africa it is unprecedented and welcome. I can only hope that this book will inspire other academics to engage in similar interdisciplinary projects.

Second, the author makes a significant contribution to the field of experimental constitutionalism or experimental governance theory. The traditional philosophical grounding for that theory rests in the work of philosophical pragmatists like Charles Pierce, William James, John Dewey and Richard Rorty. While the author acknowledges that debt, he also creates a much wider and more stable foundation. By showing how experimentalism resonates with recent scientific understandings of the way humans work – biologically, psychologically and economically – the author argues convincingly that experimentalism is a necessary response to the human condition. Although other writers have considered the impact and use of experimentalism in South Africa, *The Selfless Constitution* is the first thorough engagement with the Constitution and Constitutional Court precedent through the lens of experimentalism. It shows how the theory is not limited to rich, established democracies but can apply even (indeed, is particularly helpful) in a developing country with a new constitution and limited resources. That on its own is a significant contribution.

Third, the author provides a coherent and compelling explanation for a range of Constitutional Court cases that may have seemed unrelated. In doing so he provides both a description of what the Court has done, and a roadmap for how lawyers and judges can continue that work in the future. The descriptive accomplishment should not be underestimated. Often nobody in the legal field – even the judges themselves – will identify the common theme that ties some of their judgments together. Cases are generally decided on their own merits without a grand theory behind them. The work of legal academics is to identify those theories that – consciously or not – drive the outcomes in cases. Once that theory is identified, it will push courts to decide similar future cases in line

with that theory. The judges of the Constitutional Court have never identified their work as “experimentalist”, yet the author explains why that is the best way to understand those judgments. His argument is convincing and we can expect far more use of “experimentalism” in the discourse and practice of our courts after the publication of *The Selfless Constitution*.

Fourth, the author does not limit himself to discussions of the cases. He considers the structure of the Constitution as a whole for signs of experimentalism and conducts in depth investigations of the education and housing sectors. I found the last two particularly helpful in both giving content to the theory in the rest of the book, and in explaining how experimentalism functions in practice. On their own, those discussions of housing and education would contribute to the increase in knowledge.

I have few criticisms of this book. One would be that the author is wrong to claim that his thesis is “*disarmingly simple*”. It isn’t: it is complex, nuanced, and wide-ranging. While I found the book’s engaging style, some readers may find it distracting; it is not the traditional legal style, but then it is not a traditional legal book. The book is long and arguably the author could have made his arguments in slightly less space, and there is some perhaps unnecessary repetition of ideas. However, considering the highly interesting material, it was not a difficult read.

As to the substance, *The Selfless Constitution* is an ambitious project and the author does not convince at every turn, and does not win every argument. Some will remain unconvinced about the philosophical and legal implications of the science he discusses. Others will question the extent to which

experimentalism can provide an answer to difficult constitutional problems. Some may fear the implications of his theory for traditional liberal ideals. I do not agree with his analysis of every case he considers, although even when I disagree, I find his analysis enlightening.

But, adhering to the experimentalist creed he proclaims, winning the argument is not his goal. His aim is to try new things, seek new ways of doing and being, make new connections between old ideas, and encourage experimentation to improve our understanding of the world and our place in it iteratively and through engagement and conversation. Nobody who reads *The Selfless Constitution* will come away unchallenged or with all their settled ideas about the law, or about themselves, intact. One can hardly ask for more from such a book.

The Selfless Constitution not only enriches South African legal and political discourse, it redefines what legal scholarship in South Africa can be. It ranks in the highest echelon of constitutional scholarship and is a book every person interested in constitutional law, or in contemporary ideas of freedom, should read. That conclusion speaks to its originality and worthiness of publication: which, it should now be very clear, are beyond doubt.

Yours sincerely,

A handwritten signature in black ink, consisting of the letters 'M', 'B', and 'i' in a stylized, cursive font, followed by a long horizontal flourish.

Michael Bishop