

THE FRAGILE CONSTITUTION: TIME, CHANGE, STATE-BUILDING & THE PROBLEM OF COLLECTIVE ACTION¹

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You say you want a revolution
Well, ya know
We all want to change the world . . .
You'll say you'll change the constitution
Well, ya know,
We'd all love to see the plan . . .
You say you got a real solution
Well, ya know,
We all want to change your head ...
You tell me it's the institution
Well, you know,
You'd better free your mind instead.
'Revolution' The Beatles (1969)

ABSTRACT

Quite a large number of contributors to the literature on comparative constitutionalism have noted that over the past 20 years, many new constitutional democracies have suffered from similar problems of clientalism, cronyism and corruption. This troika of attributes found in many one party dominant democracies have certainly stunted both development and growth. To that extent, the political-legal science literature provides a partial, yet reasonable explanation for the many false starts over the last two decades. The finest contributions to this discourse – as it pertains to South Africa -- remind us that when we undertake such analysis that we must have (a) a firm handle on a particular country's extant legal doctrine (few systems arise ex nihilo); (b) a nuanced appreciation for the political, social and economic environment in which a new constitutional order is situated (all substructures are not alike); and that established democratic republics suffer similar ills (See Choudhry, 2009; Klug, 2000; Krygier, 2005, Krygier, 2014, Roux, 2009, Roux 2013, Roux 2014; Woolman 2013a; Woolman 2013b.) On the other side of the South African constitutional jurisprudential literature are, for lack of a better locution, the transformative constitutionalists. (See Klare, 1998; Biltchitz; 2006; Liebenberg, 2010.) The tendency here – and I have intentionally cited the most self-aware of this crew – is to assume that an aspirational document that functions as much as a peace treaty as anything else can be used to pull a bunny out of a hat: namely a radically transformed society. Asking apex courts that handle a handful of cases a years to alter dramatically the economic and social structures of a society is both a pipe dream and historically unjustified. (See Ignatieff, 2014; Fukijma, 2013; Sibanda, 2010; Roux, 2008). Constitutions and courts are good places to begin starting over: but they can never be a substitute for the political will needed to bring about genuine liberation. (Sibanda, 2013; Woolman 2013a; Woolman 2013b.) Yet, the dazzling array of promises made in our basic law functions too much like an opium den for too many domestic and international commentators on our basic law. It's hard not to get high on promises of housing, a sustainable environment, food, health, water, social security and an adequate basic education. Like Oliver in *Oliver Twist*, it's hard not to want 'more' and to want it 'now'.

This article (book proposal) therefore begins where my last book (*The Selfless Constitution*, 2013) left off. (Its coda -- 'The Crooked Timber of Democracy' – constitutes the bridge from there to here). Comparative constitutionalists and transformative constitutionalist often remind me of the old joke about a man looking for something under a lamppost late at night. Another man joins him and asks: 'What are you looking for?' 'My glasses.' 'Well why are you looking here?' 'It's where the light is best.' That may be true – but it doesn't mean you are likely even to begin to find what you genuinely need.

The real problems – and their initial solutions -- lie elsewhere. Let's begin with constitutions. We forget that these documents begin as peace treaties of a particular kind – a high browed, but rather thin social contract. Because they are bargains, hard struck, after military engagement, or long drawn out deliberations with swords of Damocles hanging overhead, they tend to be conservative documents. No one gets everything that they desire. As a result, they preserve a substantial portion of the status quo. That's not always so bad. As I argued in *The Selfless Constitution*, most of that which gives meaning to our lives lies elsewhere, not in political demonstrations, but in the daily exchanges and structures that pre-exist most constitutional orders. If new constitutional orders do anything well, then they improve those daily exchanges and structures. Despite the fact that life in South Africa still bears a remarkable resemblance to life on the plantation, our velvet revolution has not left us where we began 20 years ago. The enhanced equality and dignity most South Africans today enjoy is a function of dramatic changes made to our basic law. To the extent that they enjoy them, they can be traced to *three* fundamental changes in the manner in which we South Africans operate. State and citizen, governed and governors, are subject to the rule of law. Political elites – and to a certain degree private power – are held accountable. The state – in conjunction with civil society or other loci of power – deliver those basic goods or capabilities necessary to enable individuals and groups to pursue a lives worth valuing (as they themselves understand the valence of their existence)(Balkin, 2004; Nussbaum, 2007; Sen, 1999; Unger, 1987; Walzer, 1983; Walzer 2002, Woolman, 2013a, Woolman, 2013b).

Of course, here the hands go up and the objections are raised!! "That's not the South Africa I know or inhabit." That's true. The essence then of this paper is explain, in my own particular fashion, why that objection is true, and will remain true, some 20 years after the advent of multi-party constitutional democracy. Time. Change. Collective Action. They are the watchwords of the analysis that follows.

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Time. Our most fleeting and precious good. When we all must get up in the morning, attend to our children, discharge our work responsibilities, and return home again, the time left over for radical revolution (were that our aim) is quite limited. Poof!!! Twenty years is gone in a flash. Fifty years can seem equally speedy. And as my late father, then age 70 said to my uncle, then age 74, while watching the same baseball game on television observed: 'Wasn't it just yesterday that we were playing stickball in a schoolyard in Brooklyn?' Yesterday indeed.

Change. Something that we are not born or breed to do easily: indeed, we resist it because it is so hard. We are born into a multiplicity of communities that make and shape who we are. We are thrown into the world. That facticity makes change – even when it is so obviously required – immensely difficult (though not impossible.) The change that we have witnessed in individuals and in groups over the last 20 years is quite extraordinary, if one knows where to look. That not does mean we should except the status quo. Heavens no. But South Africa as a newly minted democracy rumbles along, in a crooked fashion. We hold fast to the meaning that has made us, even if we know that a healthier dose of egalitarian pluralism would make us all substantially happier. Moreover, we also know that the egalitarian pluralism to which our Constitution aspires is not a goal that lies entirely within our own hands. What South Africans want for themselves, as a nation, and what the world, in an era of disorder and disintegration, will afford us, are two very different things.

Constitutionalism and State-Building. First things first. No recipe yet exists for an immortal republic. But if a constitutional democracy wishes to last more than a few weeks, let alone decades or centuries, three pre-conditions obtain: (1) **the rule of law** – not only are the governors and governed are subject to the same rules, but the citizens themselves are subject to the same rules vis-à-vis one another; (2) **political accountability** – kicking the bums out, now and again, may or may not lead to better policies in the short term, but it does help to prevent Tammany Hall patronage systems from taking root and is the best guarantor that public servants will serve the public irrespective of the part in power at any given moment; (3) **the provision of basic infrastructure by a competent, depoliticized civil service** – properly trained security services, an adequate system of public education, decent roads and ports for personal and commercial transport, proper document control from Home Affairs, and an effective system of taxation by a state revenue service (in the absence of all such public goods things will either fall apart, or muddle along to everyone's dissatisfaction.)

Problems of Collective Action and Constitutionalism as State-Building. Most modern societies (that do not suffer from abject poverty) still remain highly stratified. To secure significant agreement on radical change appears virtually impossible. Save for a two year window in the first Obama administration – that produced significant healthcare, environmental and labour reform – the US has broken no major political ground in 40 years. Whilst that nation has broken new ground through civil rights, women's rights and gay rights, its socio-economic landscape has grown harsher for the majority of its citizens. Europe, post-2008, has shown itself fundamentally incapable of bold economic initiatives, and have reverted to austerity programmes that have only deepened double dip and triple dip recessions. Worse still, anti-immigration political parties (read-racist) have secured a foothold in the small Scandinavian countries we all so admire (save for the snow), and have become game changers in the older democracies we long thought immune to outright bigotry on scale. Russia has either proved wrong the adage that democratically elected governments have never gone to war with one another with its usurpation of the Crimea and its movement of military forces into the sovereign democratic Ukraine or proved right that Putin-era Russia is no more than oligarchic-security state. China is still the China of Tiananmen Square: run by a politburo and a military that does what it wills and annexes the islands that belong to neighbouring countries more as an expression of power than need. As for the Mahgreb spring turned winter of discontent. In the stretch of land that flows from Morocco through Mesopotamia, only Tunisia seems to have gotten it right. By recognizing what it lacked, a robust civil society, and knowing that politics abhors a vacuum (just look next door at Libya), Tunisia slowed down its transition from monarchy to full-blown constitutional democracy. As for our continent, from ocean to ocean, Congo to Somalia, above and below the meridian, it's hard not to find failed states or others the midst of a genocidal conflict (ie, Mali, the Central African Republic or South Sudan). South Africa looks like a dream by comparison to states in the middle and the north of our continent. Why has South Africa not done better in terms of imagination? It's not just the three Cs. It's a classic problem of collective action. Twenty years on, the mutual respect, trust, loyalty and friendship required to foment change to the structures that underlay apartheid do not yet exist. Moreover, consistent with my ruminations about time and change: the slowness thereof is no surprise. I would argue, along with Balkin and Muriel, that when one understands constitutionalism in terms of statebuilding, our one party dominant democracy doesn't look so bad.

Now measure South Africa against the problems that best humanity as a whole. Should it come as any wonder (rhetorically) why we can't get a grip on four wicked global problems: (1) climate change/global warming; (2) nuclear proliferation; (3) the absence of financial institutions capable of controlling national economies and international relations; (4) the sectarian violence that undermines states and erases borders. Well, if we can't address problems at home, in the socially democratic vernacular in which most constitutional law scholars speak, should we be so surprised that problems that affect the populations of some 200 different nations go largely unaddressed . . . as the clock ticks. Modesty about what we can do, married to a modicum of urgency, would serve us well.

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I. TIME: 50/20

In the spring of 2000, my father sat in a lazy boy recliner watching his favourite team, the New York Mets go through their dilatory attempts to cheat the baseball gods by actually winning a game. He picked up the phone and rang my uncle some 1500 miles away in Miami, Florida. He too was watching the Mets' baleful effort. Sometime during course of their conversation, my father said to my Uncle Harry: 'Wasn't it just yesterday that we were playing stickball in playground in Brooklyn?'

No irony intended.

I have just passed my 51st birthday. Some might be deeply appreciative of this milestone. For reasons that I shall shortly explain, I'm not: definitely not, definitely not deeply. The clock does not lie, nor the calendar. If I am lucky, then in 20 years I will be reclining in chair somewhere watching golf, and knowing that it was just 40 years ago yesterday that I had been playing 36 holes a day on the municipal courses of New Jersey.

We don't tend to think a great deal a lot about time in the legal academy; or anywhere else for that matter. (Van Marle, 2003)

First, we repress the outcome from the outset. (Freud, 1918). At best, we imagine our dotage playing out as some pre-Elysian fields where we do everything that we couldn't do prior to retirement. (Can you say assisted living home?)(Emanuel, 2014). (At worst, as Freud noted in his thoughts on the death drive, we behave badly: why wouldn't one act out, or behave reactively, if one knew one's time on the planet was limited. The death drive, as opposed to the pleasure principle, enabled Freud to explain the unholy mess left around him after WWI in *Civilization and its Discontents*. (Freud, 1921).

Second, we don't think about 'time' because we don't have the time. If we are lucky, we are consumed with other concerns. Many of us must get the kids to school in the morning. We then head to our offices, and work til work is complete for the day. Along the way, we pick up our children, run such essential errands as grocery shopping, and alight upon our homes. Dinner is prepared and eaten. Naughty children are reminded to complete their homework, take a nightly bath and to 'Get into bed now!' Again, if we are lucky, then we have a partner with whom to engage (contend). Night falls. Bed beckons. And we start all over again.

If this account of life – thin as it is – sounds despairing and Sisyphean, it most certainly is not. For these daily acts of engagement – at home, in the office, at lunch with friends, our projects, our various associations within manifold communities – are what give our life meaning, even joy. Contrary to what my friend Thaddeus Metz has recently suggested, these Sisyphean efforts, properly understood, are a reminder of what confronts every day. (T Metz, 2014). The rock is our life, and it gives us meaning. Only others tend to see our efforts as pointless.

At the same time, from its earliest days, a long lull, and then its rebirth, the great authors of western civilization, understood life as tragic.(Sophocles, Oedipus and Antigone, Shakespeare, ??). We are born knowing that it will end. We rail against the furies, usurpers of our place in the world, and from beginning to end – our mothers.

We do our best not to think about the shuffling off of our mortal coil. When it happens to those we love – forget our own demise for the moment – we are largely unprepared. Closure is a fool's game. Because we know, say after a parent has passed away, that we are now alone, and next in cue.

I am next in cue.

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The point about time, thus far, is that is our most precious resource. We have so little of it. More importantly, for the purposes of this article, is the period of time in which we lead full adult lives is (for the time being) rather short. For example, after 9 years of tertiary education, I entered the workaday world of legal practice at 27 (almost 28). I was not cut-out for the *Pick-Wick Papers*. That became clear after a year and change. I need to either return to graduate school to finish my PhD (more years), or pursue a path related to my legal and philosophical training that cashed out as a human rights lawyer.

Twas my good fortune to have a very close friend and Columbia classmate in South Africa, Derek Spitz, who, in turn, knew of the work Justice Richard Goldstone had undertaken as the primary investigator and head of the Commission of Inquiry into Public Violence and Intimidation. Richard kindly offered to take me on board as a researcher, and I was able to secure the requisite funding to make a year-long stint possible. At the same time, the University of the Witwatersrand had advertised posts for lecturers. A week after landing in Johannesburg, I interviewed for the position. Two weeks later, I was in front of a classroom. I had the good fortune of teaching Jurisprudence, Constitutional Law (with Etienne Murienik) and an odd course called Post-Apartheid Law. The year: 1993. I was 29 years old. Do we need further evidence not only that life is often what happens to you, but that course of one's life is both slow and fast. Slow to reach 30 and find my place in the world, and even fall in love with my first true partner. Fast. Aware, that at the height of my powers – physical and cognitive – 30 years had passed. (I could recall, from my first years in school (age 6) that I could not imagine what being 30 would mean. It seemed so far away. No more than basic arithmetic. But here I was.

The next 20 years were an exceedingly mixed bag. Two and a half years of early stardom in the legal academy – rewarded with my University's highest accolade – were followed in short order by a disabling illness that ultimately cost me my job, my partnership, my house – and my life in South Africa. Fortunately, depending upon whether you take Kundera's forgetting or Nietzsche's eternal return to heart, I received cutting edge medical care in the United States and returned to South Africa four and a half years after having left.

I faked being 'me' for a solid decade. I am, here 20 years later, because so many people – whether they know it or not -- enabled me to recover. This year, at the ripe middle age of 50, after spending the day having walked the entire old city of Jerusalem, I was: Alive; Happy; Perplexed; Keenly aware that I was 50 and am now 51.

What had I done in these 50 odd years? Stuff. I had dug in, and not given in. My work, at the level at which I work, now justifies the early faith Wits had in me when I began my academic career. Yet I genuinely feel as if I have only just begun. 50 years in.

Others may have similar stories. They may have been divorced, lost jobs, seen children come and go, faced forced removal, or suffered under the political tyranny that suffocated the vast majority of this country until 20 years ago and that still continues to inflict the greatest depredations – a lack of access to adequate food, water, housing, healthcare, social security, education and dignified work – on a grossly disproportionate number of its denizens. (Statistics show that roughly the same percentage of South Africans live lives of not so quiet desperation as they did at liberation in 1994. Only social grants have prevented the poor from becoming poorer. (Sibanda, 2014, Woolman 2013a.)

South Africa is not the only country to have gone from outlandish optimism to a stupefying pessimism in a brief period of time. Around the fin de siècle, I 'lived' in the greatest city in the world. I worked, if you can call it that, on the United Nations Human Rights Committee (for Louis Henkin), taught two years at Columbia Law School (a seminar created by Jack Greenberg) and made the money necessary to survive as an associate at a firm then called Brock Silverstein, that married new technology to old finance. Remarkably, few people in New York had any inkling about what lay ahead. I did. Louis Henkin made countries go through their paces when called before the UNHRC to explain their failure to live up to the standards of the ICCPR. In these heady days after the fall of the Wall – bracketing the former Yugoslavia, Rwanda and Congo if you can – lots of people had Francis Fujiyama Syndrome. We thought, to get or less degrees, that we were nearing the end of history. Each last man, woman and child would soon occupy

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some capacious space in a bourgeois social democracy. My friends George Abraham (a venture capitalist), Andy Frankle (an investment banker at Citi) and my employer Ed Reitler thought that new technology would bridge the gap between the haves and the have nots. They also thought that the 15 year business cycle in modern capitalism had come to an end. Nothing I conveyed to them about the deleterious state of affairs in Africa or South Africa made much of a dent in their unalloyed optimism. (I hate to be right: Fifteen years later, all the stats in Africa show an emerging middle class – but with an increasingly large increase in the most historically disadvantaged class, and ever expanding demands on social programmes designed to keep them above the \$2/per day. (New York Times, 2014).)

Finally, to end our story – a mix of incisive intuition, facts, and imagination.

The firm had a marvellous office 53 stories up in the beautiful Citicorp Building. The conference room had a beautiful bay window that looked downtown on to the Chrysler Building, the Empire State Building, the World Trade Centres and the Statue of Liberty. I would walk in, often, to take in the view. Quite often, I would imagine a flash downtown – at the World Trade Centres – or thereabouts. A dirty bomb. Hardly out of realm of possibility. A truck bomb planted by an Islamist group had exploded just six years earlier in the basement. The heart of Western culture, its financial hub, and the most *emancipated* Jewish city in the world – made it an inevitable target. In the middle of August 2001, my father drove me to JFK to interview for a job back in South Africa. He said two words: ‘Be careful’. (Meaning: Johannesburg is not Disneyworld.) My internal existential time bomb led me to respond: ‘Dad, you live in a far more dangerous city than Jo’burg.’ After a three week stint of interviews in South Africa, I returned to New York on 10 September 2001. Yet no amount of fatigue could keep my mother from awakening me on 11 September 2001. And it really came as no surprise – fog of sleep deprivation and all – to watch the second building struck in real time. We watched, in one of the opening acts of live coverage terror that defines our age, as the first building fell. Despite all I had seen, despite all I had imagined, the fall of the first tower defied even my bleakest fantasy (well, not my bleakest fantasy, thank god.) Indeed, given the proximity of the towers, I denied my mother’s immediate recognition that the first tower had fell. I chalked it up to smoke and fire – and the close proximity of the buildings to one another. Only when the second tower fell did the events hit me with their full effect. A well-planned lucky shot had augured in the age of recession in democracy.

I won’t claim that I was the only person to contemplate the obvious and just wait for it. Don De Lillo’s magnum opus *Underworld* – with the ghostly twin towers and a cross on the cover -- opens with the best 70 page set piece to open a novel: set in 1951 at the Polo Grounds, in Harlem, during the greatest and most famous baseball game ever played (the Brooklyn Dodgers/New York Giants one game playoff), with Frank Sinatra, Toots Shor, Jackie Gleason and J Edgar Hoover sharing a box close to the field. The tension of the incipient civil rights movement is in the air and the black and white action in the stands (that spills into Harlem) is bracketed by the ebullience of post-WWII America’s ascendancy to the top of the world order. Baseball. What could be more important than the outcome of this game? Well, at a critical juncture in the game, an important phone call pulls Hoover away from the antics of his foolish friends. The Russians have just exploded their first Hydrogen bomb. The real game was on – the struggle in the stands between a black boy and his white benefactor, the struggle between the West and the East. The most fuel injected first 70 pages of De Lillo’s masterwork is not just literature at its finest. It’s a cautionary tale. About bread and circuses. The convergence of events that occurred during that remarkable autumn day in 1951 was reoccurring – even as Americans in the late 1990s celebrated their remarkable success. (Cf Fukuyama, 1990.)

That success was about to unravel, again. As Yoda might say: ‘Prescient, De Lillo was.’

Twenty years after a shiny new Constitution was enacted both I and many of my fellow citizens in South Africa live better demonstrably better lives, some marginally better lives. Twenty years – gone in a flash.

The point. That’s how life goes. Gone in a flash. Here. Or somewhere halfway around the globe.

The question: What do you do with the rubble?

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The answer lies not so much in Santayana's famous quote: 'Those who fail to understand history are doomed to repeat it.' We understand our history far better than we ever have, and are at the cusp, perhaps, of truly learning its lessons. Three things stand in the way: (a) time, and the limits it imposes upon us; (b) change, and how difficult change is under the physical, psychological, political, social, environmental and economic conditions into which all 7 billion of us have been born; (c) a failure to understand the rudiments of state-building (especially in the wake of truly barbaric authoritarian rule) and a concomitant delusion that a stable constitutional democracy can be wished into existence without the presence of those intermediate associations, networks and communities commonly called civil society.

II. CHANGE

I began with a mini-disquisition on time, not because I'm aware of the clock ticking behind me, but to make a very different point about change. To change, one must have time. Lots of it. As we can see, we often don't.

More than that, change itself is *hard*. I have described patterns of individual and social life which dominate our lives and the grinding but sometimes joyful repetition of just getting through every day. That description runs against the grain of the way in which most academics, and here I address legal academics in a post-apartheid South Africa, like to think about themselves and the world they inhabit.

As I argued in my last book, *The Selfless Constitution*, the manner in which the vast majority of us think about ourselves as individual and the degree of autonomy we possess is incorrect – dramatically out of step with what the majority of neuroscientists, cognitive psychologists, social theorists, economists and analytic philosophers currently have to say about those subjects. One consequence of these erroneous views is that the manner in which the majority of us understand 'freedom' – as a metaphysical term – is sharply at odds with how things actually are.

The Constitutional Court's body of jurisprudence is a great exemplar of this form of metaphysical stuckness. 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: explicitly on display in *Ferreira* (1997), *Du Plessis* (1996) and *Barkhuizen* (2007), influential in the early development of the equality and dignity jurisprudence of the Court, and arguably decisive in the majority opinions in *Prince* (2001), *Jordan* (2002) and *Robinson* (2003). The second is a liberal democratic model underpinned by a strong theory of individual agency: such a position appears in the majority judgments in *NCGLE I* (1999) and *NCGLE II* (2000). The third is a socially democratic model married to a strong theory of individual agency found in *Khosa* (2004), *Occupiers of 51 Olivia Road, Berea Township* (2008), *Joe Slovo I and II*, *Abahlali Basemjondolo Movement SA* (2009), *Merajong Demarcation Forum* (2009) and *Ermelo* (2010). 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.

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:

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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.

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.) Prostitution, no matter how a person winds up in the trade, is hardly a profession that can be charitably described as chosen. 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. 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. 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.’ 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. 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. 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.

They shouldn’t.

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. 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.

We would do better to think of flourishing, not freedom.

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. Our constitutional rights, as both constitutive of and the condition for flourishing, are not simply a constellation of negative duties owed by

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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 *Khosa* 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’. (*Khosa*, 2004). 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.

This conception of flourishing possesses striking similarities to development theory. Moreover, the virtues of development theory (and its cousin, 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. (Sen, 1999) 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. (Sen, 1999) 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. Put another way, these covalent values should promote the political institutions and the material conditions required for individual and collective flourishing.

Again.

We replicate similar kinds of errors when we think about how various forms of human association are constructed and how change actually occurs within such associations as we do to the construction of the individual and how difficult individual change. Once again, epistemological fallacies with regard to social theory have the consequence of leading us to attribute far greater ‘freedom’ to groups, and individuals within groups, than they actually possess. This second misattribution of autonomy results in institutional political arrangements and constitutional doctrines that operate in a manner contrary to what we know about the human condition.

It also makes collective action to solve problems faced by all 7 billion people on this plant – wicked problems – easy to contrive but immensely difficult to implement. And here let me just reel off the top five: (1) climate change; (2) nuclear proliferation; (3) the absence of financial institutions capable of controlling national economies and international relations; (4) the absence of thick civil societies as the greatest problem confronting new constitutional democracies; (5) sectarian violence manifest as civil wars that reflect the absence of thick civil societies.

In my last book, I offered a vision of the (multiple, radically heterogeneous but naturally and socially determined selves that constitute the) **individual** (itself a function of the (radically heterogeneous but naturally and socially determined) **social realm**, the (radically heterogeneous but naturally and socially determined) **polity** and **the Constitution** that must necessarily respond to this portrait of the human condition because I thought, and still believe, that a more accurate account might help us overcome the autonomy trap into which the Constitutional Court and most human beings fall. This article remains true to that vision – and is set out briefly below. My purpose in reiterating that vision is different. *The Selfless Constitution* offers an egalitarian pluralist reading of the text of the basic law, the case law, superordinate legislation, institutional design and the human condition grounded in experimentalism and flourishing as an optimal reading of what can and should be done. This article uses the same prism to temper our expectations of what a constitution can be expected to do. It suggests why, after 20 years, we South Africans should not be all that disappointed with the results. Indeed, we might have a low key celebration that the train is still on the tracks, and that we can expect more and better in the years to come.

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A. CHANGE AND THE RADICALLY HETEROGENEOUS AND NATURALLY AND SOCIALLY DETERMINED INDIVIDUAL

1. THE UNCHOSEN CONDITIONS OF BEING

‘Meaning makes us’. That bumper sticker flows from two basic propositions. To be crude about it – there’s rarely a thought in your head or an action that you undertake that is not directly sourced from neurological hard-wiring, pre-existing cognitive routines and dispositional states, or shared social practices.

Let’s break that complex proposition into two smaller parts.

We, as a species, tend to overemphasize dramatically the actual space for self-defining choices. In truth, our experience of personhood, of self-consciousness, is a function of a complex set of narratives over which we exercise little in the way of (self) control. Our notion of ‘selfness’ is a function, a very useful by-product, of a complex array of semi-independent neural-muscular networks that control the body’s journey through life. This complex set of dispositional states is a function of both the deep grammar of our brains (and bodies) and the social endowments that have evolved over time to determine various patterns of behaviour. It should be apparent from this brief account that the self or the mind is a valuable abstraction and not an entity that stands back from experience and then dictates to the body what it does in response to various stimuli. Each self, to use Daniel Dennett’s felicitous phrase, is just ‘a centre of narrative gravity’. (Dennett, 1991; Dennett, 2003).

Each centre of narrative gravity – each individual (you or I) – is a set of different, but overlapping narratives. Each narrative, or storyline, reflects a complex set of experiences and dispositional states organized around a particular form of behaviour. ‘I’ – Stu Woolman – consist of narratives that flow from my roles as a male, as an academic, as an English speaker, as a son of Ephraim, as a sexual being, as a native American, as a permanent resident of South Africa, as a golfer, as a sleeper, as a cook, as a Jew, as a disabled person, as a friend of Michael, Lisa and Brahm, as a listener, as a teacher, as a New Yorker, as bald, as the Editor-in-Chief of *Constitutional Law of South Africa*. The list of narratives is not infinite. It is, however, almost as long and diverse as my life.

The individual then is that centre of narrative gravity, that self-representation, which holds together and organizes information, various storylines and dispositional states that make up my sense of ‘me’. It is unique. The variety of narratives that make up ‘me’ is different in a sufficiently large number of respects to allow me to differentiate one ‘self’ from any other ‘self’. It is relatively stable. Though my narratives and dispositional states are always changing, my self-representations enable me to see my ‘individual corporeal self’ as remaining relatively consistent over time. But again, keep in mind that the individual, and its various narratives, is thoroughly a function of physical capacities and social practices over which I have little control or choice. And remember, like a necklace of pearls, this individual corporeal self is delicate. (Parfitt, 1985) This general characterization of the self proves uncomfortable for most readers. However, some solitude can be taken from the fact that a neurological basis exists for what I call ‘core temperament’ and how it provides for a ‘unitary sense of self’.

We, in the western philosophical tradition, also tend to overemphasize dramatically the actual space for rational collective deliberation. We often speak of the associations that make up our lives – that give our individual selves meaning and content – as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Michael Walzer has argued, there is a ‘radical givenness to our associational life’. (Walzer, 1998) What he means, in short, is that most of the associations that make up our associational life are involuntary associations. We don’t choose our family. We generally don’t choose our race or religion or ethnicity or nationality or class or citizenship or sexual orientation. Moreover, even when we appear to have the space to exercise choice, we rarely create the associations available to us. The vast majority of our associations are already there, culturally determined entities that pre-date our existence or, at the very least, our recognition of the need for them. Finally, even when we overcome inertia and do create

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some new association (and let me not be understood to underestimate the value of such overcoming), the very structure and style of the association is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. So gay marriages may be a relatively new legal construct – but marriage itself is a publicly recognized and sanctioned institution for carrying on intimate or familial relationships. Even in times of revolution, mimicry of existing associational forms are the norm. That is, in short, what Heidegger meant when he wrote:

[That shared practices are constitutive of ‘being’] implies that the world is already given as the common world. It is *not* the case that there are first individual subjects which are at any given time have their own world; and that the task of putting them together, by virtue of some sort of arrangement, ... one would have a common world. This is how philosophers imagine things when they ask about the constitution of the intersubjective. We say instead that the first thing that is given is the common world. ... We take pleasure and enjoy ourselves as one takes pleasure, we speak ... about something as one speaks. (Heidegger, 1926).

Social practices are thus very much like the self. They are, for the most part, a function of physical capacities and entrenched group behaviour over which we have little control or choice. Our social world, as Heidegger notes, is already ‘given [as] the common world’. (Again: this notion will make many readers uncomfortable. It shouldn’t. To the extent that it does, this article is an extended meditation on how we might, individually and collectively, challenge and overcome deleterious social customs, habits and practices, and supplant them with new, improved, experimentally tested systems, routines, praxes, doctrines and institutions.) As John Dewey pointed out, we often choose to ignore this inconvenient truth. Individuals, and particularly philosophers, have ‘arrogated to [themselves] the office of demonstrating the existence of a transcendent, absolute or inner reality and revealing to man the nature and features of this ultimate and higher reality’. (Dewey, 1920) As Wittgenstein notes, no such transcendent, higher reality exists. Any given practice, and our ability to master it, comes first: and puts us in unmediated contact with the world. (Wittgenstein, 1953) He writes in the *Investigations* as follows:

To obey a rule, to make a report, to give an order, to play a game of chess are customs (uses, institutions). To understand a sentence means to understand a language. To understand a language means to be *master* of a technique. (§199) ... When I obey a rule, I do not choose. I obey the rule *blindly*. (§219) Would it not be possible for us, however, to calculate as we actually do (all agreeing and so on) and still at every step have a feeling of being guided by rules as by a spell, feeling astonishment at the fact that we agreed? (We might give thanks to the Deity for our agreement.) (§234) ... If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments. (§242) ... One cannot guess at how a word functions. One has to *look at* its use and learn from that. But the difficulty is to remove the prejudice which stands in the way of doing this. It is not a *stupid* prejudice. (§340) ... Speech with and without thought is to be compared with the playing of a piece of music with and without thought. (§341).

What Wittgenstein is saying is: (a) that we already have the material at hand to arrive at verifiable truth propositions about the world; (b) that most of these propositions are shared; (c) that most of them are true; and (d) that mastery of these propositions or capabilities precedes our capacity, or even need, for criticism. (Woolman, 2012) Only at the margins, once we have aggressively learned all there is to be learned from one another, do our differences have any meaningful bite. (Davidson, 1984) Perhaps Baker and Hacker can explicate, somewhat less elliptically, the order of priority between practice and theory – or more accurately, the manner in which they map on to one another:

Wittgenstein ... emphasized that behaviour is a criterion for possession of an ability, and in the specific case of understanding rules, that how one applies a rule is a criterion for how one understands it. ... Using a rule correctly is also a criterion for understanding it (or more generally, how it is used is a criterion of how it is understood.) ... Philosophers in the grip of the Augustinian picture [between word and world] are inclined to think that ‘ultimately’ explanations of expressions by definitions replacing one symbol by others must terminate in an array of ‘indefinables’. These

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expressions, philosophers think, must somehow be *connected with reality*, for it is they that give content to the language. ... In [his] criticism of the Augustinian picture, Wittgenstein ... stressed ... [that] understanding an explanation (understanding a rule) is just knowing how to use the explained word correctly (knowing how to apply the rule.) ... Correct uses of a word are criteria both for understanding an explanation of it and for knowing how to use it correctly. (Baker and Hacker, 1984)

Wittgenstein's astute observation that 'rule' and 'agreement' are cousins and that language, by necessity, requires agreement in both the definition of terms and the judgments that flow from the use of those terms does not forestall error. (Nor can it!) For while we are indeed endowed with a broad array of mutually supporting beliefs, theories, conditions and standards, we can neither claim that this inheritance is a seamless whole nor that all our beliefs are true. Only a hopelessly naïve epistemologist would entertain such a proposition. As Donald Davidson notes: 'Error is what gives belief its point.' (Davidson, 1984) Yet as the result of our mastery of a broad array of techniques, we can claim to possess 'endless true beliefs'. (Davidson, 1984).

Take two recent examples from the exploration of Mars. Does anyone even partially familiar with the years of work undertaken by a large team of scientists able to land the rover Curiosity on the red planet have any doubt regarding the team's mastery of the most complex equations in math and physics, or the engineering necessary to accomplish the unprecedented event of landing an object of its size or function on our neighbour's surface? Every stage from launch to landing went exactly as expected. Expectation and realization had to mirror one another: anything less would have led to a disaster. Indeed, a basic failure to convert measurements from the Imperial units of pound-seconds into the metric system of Newton-seconds led, a decade earlier, to the spectacle of the Climate Orbiter crashing into the surface of Mars. Human beings make mistakes. But this colossal failure was *not* a function of a failure of human beings to match symbol to reality. To their understandable mortification, they simply failed to demonstrate mastery of basic arithmetic. (As a result, the Orbiter entered Martian space at an improperly low altitude and disintegrated upon entry into the planet's atmosphere.) The failure of Orbiter may have led NASA engineers to ensure that precision a magnitude of order greater would lead, to the best of their ability, to the success of Curiosity.

Error may arise in practices for another set of reasons. Our practices themselves are not entirely coherent. All traditions, institutions, games and domains of human inquiry are, as Joshua Cohen writes

... the result, not of legislative design by a single person acting on behalf of a coherent system of values, but of conflicts among individuals acting on behalf of diverse values and ambitions. And unlike the produce of a supreme legislative design, the outcomes of such a history are not likely to be a set of coherent social practices that completely conform to a single scheme of values. (Cohen, 1986)

The problem with the theorist who reifies theory is that she mistakes these faults, fissures and heterogeneous layers within a practice as a problem with the practice – and its usefulness – as a whole. No one doubts that Einstein understood arithmetic as we do. Consider Einstein's contributions to the birth of both relativity theory and quantum mechanics. No working physicist argues that Einstein's views were wrong – in the main – about either basis for modern physics. And yet, with respect to an array of particular hypotheses, Einstein's views in both domains have been proven incorrect. (We often forget both how much and how little we understand about the universe around us.) The final form of bewitchment, against which Wittgenstein warns us, is our widely shared belief that we first form theories and then test these theories against experience. Not so, says Wittgenstein. It is essential – for the purposes of this book – that we get our order of priority straight. Once a practice is established (through trial and error, unconsciously and consciously), we might wish, upon reflection, to test its assumptions through experiments that do or do not confirm aspects of a practice's usefulness. (Curiosity's success constitutes proof of this order of priority and its consequences for virtually all of our endeavours.) That, to put it pithily, is why I place experimentalism at the heart of this theory of South African constitutional law.

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2. TRIAL AND ERROR AND FEEDBACK MECHANISMS

If we, as individuals, are not the product of freely willed actions by a self-made self, then what is the proper way to understand consciousness and that unitary sense of me *qua* me? As I and others have argued elsewhere, consciousness is best described as a feedback mechanism that gives us fresh opportunities to reflect upon experience and plot more or less optimal courses for action to realize the ends and aspirations that have largely, but not irrevocably, made us who we are.

Let's not overcomplicate matters just yet. Think of feedback mechanisms in terms of the more readily understood notion of 'trial and error'. Individual selves (me's) – populated by radically heterogeneous, ways of being in the world – are always experimenting, attempting to divine, through reflection (memory) and action (imagination in motion), what will work with respect to the challenges thrown up by a given environment. Consciousness enables us to focus on aspects of our current environment, and to hold them up for scrutiny, in order to form better responses to immediate and long term problems. Consciousness thus functions as a feedback mechanism in two inextricably related ways. Conscious reports create a record (though not the only available record) of our responses: the construction of our successes as well as our failures. A record of such errors (memory) enables us to respond differently – assuming we survive the error – the next time that we are faced with an appropriate test of our wiles. Put somewhat differently, consciousness, the tip of our cognitive/neural iceberg, comes into play when 'stimuli are assessed to be novel, threatening or momentarily relevant to active schemas or intentions'. (Newman,1997) As Newman notes: 'The defining features of stimuli which engage conscious attention are that they: (1) vary in some significant degree from current expectations; or (2) are congruent with the current predominant intent/goal of the organism. In contrast, the processing of stimuli which are predictable, routine or over-learned is automatically allocated to non-conscious, highly-modulized cognitive systems.' (Newman,1997) Dehance and Naccache extend these observations by requiring that any theory of consciousness accommodate three critical empirical observations:

(1) a considerable amount of neural processing is possible without consciousness, (2) attention is a prerequisite of consciousness, and (3) consciousness is required for some specific cognitive tasks, including those that require durable information maintenance, novel combinations of operations, or the spontaneous generation of intentional behaviour.'(Dehance and Naccache, 2001)

Once we adapt our account of consciousness so that it houses these desiderata, we arrive at the following conclusion. Although the vast majority of cognitive/neuronal processes are and must always be non-conscious, consciousness allows an individual (or networks of individuals) 'to represent a goal and to estimate the outcomes of ... actions before initiating them'. (Dehance and Naccache, 2001) The ability to undertake 'trial and error' experiments within the safe and simulated cognitive framework provided by neurological structures is an enormous advance on having to undertake 'trials and errors' in an actual physical environment. Consciousness, as both a feedback mechanism and a simulator of possibilities, enables us to weed out outcomes less likely to be successful in the world and enhances our capacity to flourish.

This description may seem at odds with how we normally think of the conscious and the unconscious. But it shouldn't be. Over a century ago, Alfred North Whitehead recognized that human civilization advanced by making as many dispositional states and responses to the world as possible unconscious. Why? So that we can attend to new problems as yet unsolved, and whose isolation and solution will enable us to survive and to thrive.

Let's turn for a moment to the complicated task of landing the Curiosity on Mars. What a dedicated team of quite conscious individuals committed to the realization of a single (if complicated) mission did was to run simulation after simulation of how each stage of Curiosity's trip and missives back on its findings would work. Experiments – trial and error with feedback mechanisms in controlled environments designed to replicate what we already knew about space and Mars – enabled the large team of scientists and engineers to separate the chaff from the wheat in advance of the actual launch and the landing of the rover. Were they certain of success? No. But at each stage, from lift-off to landing, they

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received confirmation of their equations, and the various experiments conducted in advance of real-time events. It's worth recalling John Dewey's famous words: 'We only think when confronted by a problem.' The Curiosity team at NASA was confronted by numerous novel problems. Given the enormous amount of knowledge that we already possessed about the universe – and the unique specifications required for travel from Earth to Mars – they were free to apply their individual and collective consciousness to the solution of each and every problem that would confront Curiosity on its voyage. Most of it may have been banal, but individual stages were unprecedented. And the team could not know – until some seven seconds after any particular event occurred – whether their predictions were correct. Extremely smart, but otherwise ordinary human beings, landed the first truly complicated rover on our neighbour's surface. Trial, some error, but ultimately great success means that when we ultimately seek to land human beings on Mars, we will have already learned what works, and what doesn't. Of course, the current scale is smaller. Novel problems, including the return of a larger ship and the astronauts aboard, will throw up a host of new complications that will require conscious deliberation, simulation and the piecing together of a gigantic puzzle into a single whole.

A constitutional democracy is another kind of feedback mechanism that requires conscious engagement, simulations and the stitching together of a gigantic puzzle into a single, if ever changing, whole. A constitutional democracy – a polity comprised of millions of complex, radically heterogeneous naturally and socially determined individuals and groups – is constantly experimenting, attempting to divine through reflection and action what works, and what doesn't.

My first set of thoughts of thoughts addressed questions about what it is to be a person, why we have consciousness, how a self is constructed, and the extent to which that self, so constructed, exercises agency or intention (though not free will in folk psychological compatibilist sense). The second set of thoughts addressed the kind of constitutional politics to which the Constitutional Court has committed us under the Final Constitution. Subsequent to those animating lines of thought appeared the express recognition of this work's two dominant leitmotifs: the unchosen conditions of being and the virtues of feedback mechanisms properly understood. What links these four lines of thought to a reconceptualization of freedom? The modest, naturalized account of freedom offered here first takes cognisance of the limits of individual agency or intention. It then recasts freedom-talk in terms of the less metaphysically problematic concept of flourishing. Having supplanted freedom-talk with flourishing, this book then explains how individual flourishing and group flourishing occur. More importantly, it explains how individuals and groups so thoroughly conditioned and determined by a world of unchosen conditions of being can alter the ends they pursue, as well as the means for pursuing them, through different kinds of feedback mechanisms. These feedback mechanisms allow us to learn from both negative experiences and positive experiences and create new neural and social networks that allow us to create better lives for our individual selves and for the communities to which we belong.

For the purposes of this article, it is essential to identify the severe constraints placed on individuals and societies committed to change. A second reason to recast freedom in terms of flourishing obtains: the mediating role that social formations play in the construction of all meaning. It is trite to note that outside society, and without language, flourishing is a meaningless notion. Only in light of the various practices, forms of life, unchosen conditions of being or language games that social groups provide do we become anything that remotely approximates what we understand to be human. That said, the politics that I derive from flourishing can be almost as *revolutionary* as it is traditional. And do not lose sight of 'almost' here. Again, our differences do not separate us, or merely require tolerance. They form the basis for a profound recognition that, individually and collectively, we are *radically heterogeneous naturally and socially creatures*.³² That radically heterogeneous self – and the heterogeneous society in which we all find ourselves (no matter how repressive) – demands a commitment to pluralism, a deep and profound appreciation for difference. From this commitment to pluralism – the politics not of the majority but of the individual – emanates the commitment to democratic solidarity. How so? Once we recognize our own difference, sexual, religious or otherwise, and demand its recognition by others, we have no coherent choice but to recognize the difference of others. To put it more pointedly, once we recognize the otherness of others and demand such recognition for ourselves, we are committed to a society in which every member can comfortably live out that difference, a polity based upon on democratic solidarity, or egalitarian pluralism.

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This politics of democratic solidarity or egalitarian pluralism – a function of flourishing married to experimental governmental institutions -- commits us to a political order in which the space we demand for ourselves is roughly equal to the space required by others. If that requires, at this particular historical moment, significant redistribution of wealth, then so be it. (The capacity for redistribution will vary from society to society – some polities may have over a 100 million to carry out such redistribution in a land of 300 million. Another nation may have no more than 500,000 to cover the burden imposed upon 50 million. Identical outcomes cannot – in the short term – conceivably be the same.) The bottom line: once you embrace a commitment to democratic solidarity, you must be willing to afford others the material and immaterial conditions in which they can recognize and express their differences, and the meaning that makes them. Only through such a commitment can we forge a nation that makes good the promise of its basic law.

The radical heterogeneity of the self also points out how change occurs without the attribution of free will. Each dispositional state or role has its own set of demands – its own set of responses to the surrounding environment. Again: I find myself regularly challenged by each of my roles as a disabled person son, brother, friend, colleague, lover, business partner, professor, English speaker in a land with eleven official languages, analyst, editor, author, feminist, golfer, majority owner of a closed corporation and apartment owner (just to name a few). Not only does each role or dispositional state itself pose a challenge: the attempt to reconcile all these roles without conflict is simply impossible. Change often comes – is forced upon us – when we must choose the good, the value, or the end to which we wish to give priority in a given set of circumstances. The complexity of, and the friction between, roles does not end with our own selves. We are confronted daily with equally complex, radically heterogeneous selves with whom we must carry out innumerable transactions and who carry out their own roles in ways that invariably pose challenges to our current preferred ways of being. Finally, we are confronted with an environment – neither of our making or choosing – that constantly demands that we alter, ever so slightly sometimes, dramatically at others, who we are and what roles we play. Live long enough and you know how wrong F Scott Fitzgerald was when he wrote: ‘There are no second acts in American lives.’ The problem – to the extent that there is one – is that the play and the new acts never stop – until the play does, and the acts do, and we are but worm-meat. Disruption is a regular part of everyday life, however much we try to hold change at bay. Of course, we sometimes find that the roles we play give us little satisfaction, for reasons of which we may only be dimly aware. The trick is to try to lay down new tracks, parallel tracks, to the existing dispositional states, roles and tracks that we currently run along. It can be done. However, the work is often long, arduous and tedious. Ask my analyst. Well don’t. She won’t tell you a thing. I can say that, without fear of contradiction, ten years of twice-a-week therapy has laid down parallel tracks, tracks that have made me a somewhat happier, healthier and nominally better person. (Scheduler, 2010).

So change is possible. It’s just bloody harder than you think.

B. CHANGE AND THE RADICALLY HETEROGENEOUS *AND* NATURALLY AND SOCIALLY DETERMINED POLITY

Why then is change so difficult at the level of the individual? Why then is change so difficult at the level of the social and the political. At the level of the individual, we can reduce it to three reasons: (1) our hardwiring; (2) our social endowments that turn us from feral into human; (3) the radical heterogeneity of naturally and socially determined individual compromised of selves that pursue dramatically different ends.

At the level of the social and political, we can reduce it to four reasons: (1) the radical heterogeneity of naturally and socially determined individuals compromised of selves locked-in to different ‘ways of being in the world’ or ‘constitutive attachments’; (2) spontaneous orders that determine social and political arrangements without conscious construction of those arrangements; (3) cognitive biases; (4) bonding networks and bridging networks that make meaningful action possible, at the same time as they may exclude participation in practices necessary to pursue a life worth valuing. We often speak of the social practices, endowments and associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have already suggested why such a traditional, hidebound conception of ‘autonomy’ or ‘intention’ or ‘free will’ is not true of our social practices (and our individual selves). The hard question will always be and whether a traditional or revolutionary account of flourishing in a given

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community serves our constitutional imperatives best, or whether remedial equilibrium that requires shared constitutional interpretation or participatory bubbles results in the best intermediate outcomes.

Again: constraints on our ways of being in the world – I prefer the word ‘endowments’ – do not preclude genuine change within the small communities, the large social formations or the bonding networks of which we are a part. It does mean, however, that we must proceed with substantial humility and great circumspection before we proffer mechanisms that we choice architects believe would facilitate optimal forms of change.

Given the aforementioned constraints, my theory of the social in the Selfless Constitution holds that constructive, collective action is best understood in terms of ‘trial and error’. From simple to complex actions, groups use their cognitive modalities to test their environment, and to come up with the best possible solutions to the problem with which they are confronted. Because much of what we do as associations, communities and networks is neither consciously nor deliberately determined, one might argue that ‘a blind variation and selection retention process is fundamental to all inductive achievements, to all genuine increases in fit of system to environment’. (Campbell, 1960)

This account of how trial and error in both cognitive and non-cognitive processes may lead to greater adaptive fit sounds a great deal like a form of evolutionary epistemology. It is. The attraction of this account is that it simultaneously explains the ineluctability of constraint and the mechanisms for change. (Kim, 1997) Moreover, attending to the mechanisms of change in blind variation and selection retention processes, makes it possible to suggest how experiments (trials with their successes and their failures) take place on rather large playing fields of social formation, and why such experiments are, as Friedrich Hayek described them, largely, but not always, the result of ‘human action, but not human design’. (Hayek, 1945).

A somewhat more powerful empirical engine for social change has come out of recent work by legal theorist and political scientist Cass Sunstein. For years, Sunstein appeared so consumed by doubt about grand theorizing that it led him to something akin to pyrrhonian scepticism with regard to constitutional theory. Sunstein’s scepticism ultimately gave way to empirical analysis. In *Infotopia*, Sunstein develops a powerful critique of deliberation as a constructive form of collective decision-making. Sunstein identifies four basic forms of contemporary information pooling or aggregation: (1) statistical averages; (2) deliberation; (3) price or market systems; (4) Internet wikis. (Sunstein, 2007) I develop similar critiques of deliberation in ‘Patent Thickets in Complex Biopharmaceutical Technologies’ and *The Selfless Constitution* (Woolman, 2013a, Woolman, 2013b, Woolman 2004). Pace the dominant pre-disposition of constitutional scholars/talkers, we both suggest that deliberation may well be the least useful of the four. As, Sunstein writes:

Most of the time, both private and public institutions prefer to make decisions through some form of deliberation. ... Does deliberation actually lead to better decisions? Often it does not. (Sunstein, 2007)

To explain the failures of deliberation and the promise of other methods of aggregating information in the pursuit of better decision making, Sunstein explores the consequences of two forces:

The first consists of informational influences, which cause group members to fail to disclose what they know out of respect for the information publicly pronounced by others. ... The second force involves social pressures, which lead people to silence themselves to avoid the disapproval of peers or supervisors. Even if you believe that group members are blundering, you might not want to say a word because you do not want to risk their disapproval.’ (Sunstein, 2007).

Various empirical findings (even those that contradicted Sunstein’s earlier assessments) led Sunstein and others, such as myself, to delve deeper into problems with deliberative political mechanisms and into everyday social biases, aversion, blunders, (false) assumptions, inertia, herd following and temptations that lead all of us to make the most mundane mistakes.

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Having identified good and bad social choice mechanisms in *Infotopia*, Sunstein and Thaler produced a work in ‘choice architecture’: *Nudge* (Thaler and Sunstein, 2008, Sunstein 2013). Although still committed to rooting out biases that lead to suboptimal outcomes, Thaler and Sunstein now show us how to organize social space in a manner that leads to better outcomes without coercing individual choices. As the name of the book suggests, the leitmotif of their work is enabling individuals and groups – with some assistance -- to change their deleterious choice defaults into more positive choice defaults by setting up a testing environment (an experiment) that should reveal more desirable outcomes at both an individual level and a systemic level. These experiments are conducted by choice architects – anyone who ‘has the responsibility for organizing the context in which people make their decisions’. (Thaler and Sunstein, 2008, Sunstein, 2013) Mothers, teachers, judges, engineers, computer programmers, customary leaders, search engine designers, bureaucrats and ballot devisers are all choice architects. Virtually any occupation with responsibility turns the responsible individual into a choice architect.

One important theme is worth noting now.

Choice architects try not to impose a comprehensive vision of ‘the good’ upon the people who participate in their studies. (In any event, a large body of social research and, in particular economics, demonstrates that most of us do not have genuinely ‘true preferences’ in many areas of social life, but often have our preferences determined by access and availability. We have, as second class citizens will confirm (and, as a person with a long-standing disability, I count myself amongst them), many *adaptive* preferences.) The choice architect naturally operates with background assumptions about optimal decisions – but even those assumptions can be overturned as the architect ‘nudges’ groups of (and individual) students into making more optimal choices – ‘as judged by the individuals themselves’. (Thaler and Sunstein, 2008)

A substantial degree of reflexivity is built into the experiments carried out by choice architects or others who govern, maintain and create the systems that govern our lives. (Thaler and Sunstein, 2008) Experimentation as a way of engaging the world is *revolutionary*. Not only do experiments and the people who carry them out seek to better understand the world, but, as often as not, people who undertake experiments seek to overturn preconceived and – in their minds – incorrect ways of viewing various phenomena.

Some hypotheses turn out to be incorrect. Indeed, the large majority do.

The scientific method led one of its avatars, the inventor Thomas Edison, to remark that he learned more from his mistakes than he did from his successes. He failed some 3,000 times to create a viable light bulb. He succeeded twice.

At the same time, the experimentation advocated in *The Selfless Constitution* and in these pages has a built-in brake. A conservative streak, if you must. Not every norm or institution can be subject to constant review and reformation. I have suggested several reasons, thus far, for placing brakes on how we engage and experiment upon social phenomena. The first has to do with the construction of meaning for individuals and groups. **Meaning makes us** (through innumerable natural and social endowments over which we exercise virtually no choice). A just political order recognizes that priority. The various freedoms enshrined in South Africa’s basic law do exactly that. The second turns on the manner in which social norms and institutions are largely created. As Hayek wrote, these institutions and designs are primarily the product of human action, not human design. Sunstein’s gloss on this agnostic approach to social projects and constitutional theory is to agree, in part, and demur, in part. Like Hayek and Campbell, Sunstein is suspicious of grand theorizing. However, as we have seen, social practices are susceptible to experimentation. For example, given a relatively weak normative goal – say, getting children to choose better food for lunch – we can construct a set of experiments that may help us identify the best way to establish the form a cafeteria lunch line takes. Sunstein, ever suspicious of built-in biases in decision making, identifies several ways in which we can aggregate or pool information and nudge individuals and groups towards taking better decisions without dictating exactly what they do. That leads us, finally, to another way of understanding individuals, social formations and political institutions that contain (a) the seeds for experimentation and new institution building; and (b) a brake on the manner in which the state

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undermines existing social networks that provide meaning. This approach to social formations and political institutions goes by the name of social capital theory.

Social capital is – and is a function of – our collective effort to build and to fortify those things that matter. It is our collective grit and elbow grease, our relationships and their constantly re-affirmed vows of trust, loyalty and respect. Social capital emphasizes the extent to which our capacity to do anything is contingent upon the creation and maintenance of forms of association which provide both the tools and the setting for meaningful action. Social capital is often treated as ephemera. That makes sense. It is so hard to see. In fact, it is this elusive quality that makes social capital so fragile. It is made up, after all, not of bricks and mortar, but of relationships and commitments, and the trust, mutual respect and loyalty upon which they are dependent. (Woolman 2004).

A positive spin on social capital can be understood to link up my justifications for flourishing and experimentation in the social realm as follows. Social capital is what keeps our intimate, economic, political, cultural, traditional, reformist and religious associations going. Without it, nothing works. Social capital explains at least part of what is at stake for both individual identity and social cohesion: the constitutive. Social capital recognizes that we store the better part of our meaning in fundamentally involuntary associations. Squander that social capital, nothing that matters *is*. Social capital recognizes both the real and the figurative sense of ownership that animates particular forms of (social) life. If anyone and everyone can claim ownership of and membership in an association, then no one owns it. Social capital takes seriously the threat of various kinds of compelled association. Trust, respect and loyalty have no meaning where the association is coerced. These several virtues can be earned, but never commanded. No trust, respect or loyalty: no social capital. No social capital: none but the most debased forms of (social) life. Finally, without a commitment to preserving extant sources of social capital, we would lack the requisite conditions for the kind of social and political experimentation that makes genuine flourishing (within a modern heterogeneous polity) possible.

However, not all forms of social capital are alike – nor are they fungible. Moreover, some forms of social capital – or the associations that produce such capital – are a function of discriminatory practices that our Constitution rightly sets its face against. (Bilchitz, 2011) To invoke the virtues of social capital is not to invoke an unalloyed good. A Walzerian cum *Spheres of Justice* understanding of egalitarian pluralism – that rests on nuanced distinctions between differentiation and discrimination, monopoly and tyranny – married to Bishop’s rather novel notion of remedial equilibration (Bishop 2008) can move communities away from mores that subordinate some of its members, or leverage their existing stores of real capital so that subordinated members have the ability to exit and to join new sub-publics that would enable these second class citizens to flourish. In short, I suggest how the courts, the state and powerful elements of civil society can enable individuals and groups to ‘seek justice elsewhere’, leave many traditional communities as they already are, and still nudge these communities and the body politic as a whole to consider more equitable and just internal arrangements regarding membership, voice and exit. (Woolman 2012)

Change often comes – is forced upon us – when we must choose the good or the end to which we must give priority in a given set of circumstances. The complexity – and the friction between roles – does not end with our own corporeal selves. As part of our social life in non-totalitarian societies, we are confronted daily with *other* equally complex, radically heterogeneous selves with whom we must carry out innumerable transactions and who carry out their own roles in ways that invariably pose challenges to our current preferred ways of being. We are confronted with an environment – neither of our making or choosing – that constantly demands that we alter, sometimes ever so slightly, sometimes dramatically, who we are and what roles we play. *Disruption and confrontation are part of life, however much we try to hold such challenges at bay.* We have, within our own body of South African constitutional law jurisprudence, intimations as to how selves and groups can dramatically change without top-down social engineering. Such hints can be found in the opinions of Justice Emeritus Albie Sachs.

Sachs is certainly not interested in formal forms of liberalism that preserve the status quo, nor does he confine his legal imagination to the protection of all sorts of discrete and insular minorities. Sachs writes, early on in his judicial career, ‘that the emancipatory elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the

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human kind'. (NCGLE, 1999) Sachs places sexual difference and sexual desire – and its radical heterogeneity of form – at the heart of what it means to be human. He challenges the majority of South Africans to acknowledge the acceptance of their own inevitably idiosyncratic sexuality (and we are all idiosyncratic in and outside the bedroom) in the hope that it will connect them more powerfully to the idiosyncratic sexuality of others and thereby forge a democratic solidarity through the recognition that we are each entitled to 'equal space' to be ourselves and to explore – with the support of others – that which makes each of us unique.

Again and again, Sachs returns, in dissenting and concurring judgments, to various forms of difference and the potential they hold out for radical change. In *Daniels v Campbell NO*, he places customary Muslim marriages on an equal footing with their legally sanctioned civil counterparts. (2004) In *Volks*, Sachs rejects the majority's finding that the appellant, 'having chosen cohabitation rather than marriage ... must bear the consequences' and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act. (2005). In *Prince* – a case not about sex, but about the equally challenging practice of drug use in religious rituals – Justice Sachs articulates his notion of a 'right to be different'. (*Prince*, 2002) In demanding that his colleagues, the state and his fellow citizens 'walk the extra mile' when it comes to marginal publics such as the 10, 000 Rastafarians that inhabit South Africa, Sachs writes:

Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct. (*Prince*, 2002)

He then comes close to accusing those who view dagga use as dangerous of being in the grip of a blinkered hypocrisy. (They hold no such prejudices about alcohol.) He writes:

In *Christian Education* this Court held that a number of provisions in the Constitution affirmed 'the right of people to be who they [were] without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space [had] been found for members of communities [in our democracy] to depart from a general norm. (*Prince*, 2002)

Democracy in a society of radically heterogeneous selves and radically heterogeneous communities, Sachs seems to be saying, presupposes the capability of marginalised and vulnerable minorities to challenge the normative closure into which political communities tend to lapse. A society can only remain free if it values plurality and difference, and allows out-groups to disturb and to challenge deeply held majoritarian beliefs and practices. For this reason, the critical challenge for our constitutional 'democracy' consists 'not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is "unusual, bizarre or even threatening"'.

'Unusual, bizarre or even threatening' – such a vision of the social order ties the ability of individuals to *re-imagine* their own identities to the capacity of society for change, or quiet, piecemeal revolution. (Michelman, 1999) (Michelman, 1988). Of the relationship between the 'romantic-liberal' view of society and the struggle of out-groups for recognition, Frank Michelman writes:

A chief aim of the romantic-liberal constitution must be to free 'the life-chances of the individual from the tyranny of social categories' of 'classes, sexes, and nations'. The benefit accrues not only to the emancipated: it is structural and systemic, and accrues to everyone. Everyone, in the romantic view, has reason to welcome confrontation and challenge of his or her accustomed or habitual ways and values, from all quarters known and unknown. Democracy accordingly becomes not just a procedural but a substantive ideal. (Michelman, 1999).

But what is the content of that radically heterogeneous ideal? In *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs*, Sachs (writing for a Constitutional Court finally on the Sachs J bandwagon) argues that:

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[O]ur Constitution represents a *radical rupture* with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough. ... The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. (Fourie, 2006)

What stands out in these various judgments is that the society Sachs has in mind takes us beyond the franchise, beyond formal equality, beyond tolerance for each group doing its own thing. In his radically heterogeneous democracy, only the actual recognition and material support for difference across individuals, groups and the country as a whole is sufficient. But it requires more an appreciation for difference. It views, as Frank Michelman suggests, difference as an engine for change. How so? As both Sachs and Michelman write, it occurs through the regular confrontation with ways of being in the world that are not reflected in our own subpublics' default positions. A truly democratic society made up of radically heterogeneous selves constantly forces us to acknowledge that there are other, perhaps better, ways of doing things with respect to many of the various roles we undertake and all the forms of life in which we participate. Constant friction forces constant experimentation with alternative ways of being. Such constant friction at the level of 'the social' constitutes a potent engine for constructive change. (As I noted above: it is also true that a self's expression through action of multiple roles correlates closely with greater happiness. Where one role fails, another role steps in, as it were, to give life meaning. So consider multiple roles in a heterogeneous society as a recipe for both change and happiness. (Pillay, 2008)

Whereas I recently concluded in *The Selfless Constitution* that such egalitarian pluralist change might be the most we can squeeze out of our Constitution, there's a question that dangling like a sword of Damocles over this paper: Is it enough? For reasons I anticipated in the Coda of that work – 'The Crooked Timber of Democracy' – the answer may well be no, as matters stand now, no, 'not even close'. Whilst it may provide the best guide to hard questions thrown up by our Constitution – and addressed by our Constitutional Court some 30 times per annum – it is, and cannot be a sufficient guide (even at 650) pages – for the array of imminent threats to both our polity and the international community at large.

III THE SOUTH AFRICAN CONSTITUTION AND STATE-BUILDING

In *The Selfless Constitution*, I engaged problems of change, individual and social, and how we might overcome some of them in pursuit of the lofty goals to which our Constitution aspires. I explained, in terms similar to those above, that individuals are radically heterogeneous, naturally and socially determined entities, who can overcome extant constraints through trial and error, decent feedback and the material conditions necessary to pursue lives worth valuing. I suggested how social bottlenecks could be broken, political institutions that could advance the ends of all, and a theory of constitutional jurisprudence that would advance, in its own modest way, what has been developed in South Africa (and elsewhere) over the past 20 years. I'm satisfied that the book achieved those modest ends.

This article – as the introduction to a new work – has a decidedly different aim and tone. South Africa, in 2014, is a one part-dominant democracy (with all its attendant BIG C troubles), an employment rate of 40%, a population in which 1 in 3 black women has HIV/AIDs, the highest gini-coefficient in the world, the highest rates of sexual violence in a country not at war or riven by civil war, a growth rate of 1.7%, and a business sector that sits on 23% of its assets in cash (that's twice the norm, and its doing nothing). We have a 19th century economy built on mining and agriculture – two sectors that have contracted to roughly 10 per cent of the economy. The remaining economy is built on finance and services. Now that's sort of okay if one lives in a first world country with an educational system capable of producing jobs required for the 21st century. Well are not a first world country and our educational system ranks near the bottom of developing countries. (Fleisch, 2008). It's hard to be bullish under circumstances

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in which roughly 2/3rds of our society will not have the capabilities to pursue lives worth valuing (as they understand value.) (World Bank, 2012).

However, this article is not an assessment of South Africa geared toward an investment banker. We've been asked to assess South Africa's first 20 years of constitutional democracy. And depending upon your colours on your palate, the picture painted might not nearly be as dark as the last paragraph suggests.

If your metric goes by the exacting catchphrase 'transformative constitutionalism', then the South African project must be decidedly disappointing. (Klare, 1999)(Liebenberg, 2010)(Klare and Davis, 2010)(Bilchitz, 2006)(H Botha, A Van der Walt, J Van der Walt, 2003). No nation in history has parachuted from an authoritarian or totalitarian regime into a pleasant bourgeois market driven multi-party constitutional democracy in recorded history. If your angle on the new post-democracies is comparative constitutionalism, the reply is roughly the same.

This section answers both lines of thought in the rough same manner.

First. New constitutions have largely operated as peace treaties – agreements between social groups after the *raison d'être* for the state has crumbled (Eastern Europe) agreements between social groups after dictators who have removed from power in response to their extremely repressive rule (the Mahgreb) rulers who wield power and the rabble, between ethnic groups attempting to share sovereignty (South Africa or Sudan), or usurpers who wish to place a new organizing principle on the table (Iraq/ISIS). The primary goal is to restore some semblance of order.

Second. Next answer to the answer to transformative constitutionalists and comparative constitutionalists alike is because the problems are largely the same, and the solutions are as well. In these new market driven multi-party constitutional democracies all suffer from (a) an absence of institutions capable of delivering basic services; (b) a lack of political accountability and (c) a refusal to take the rule of law seriously. These three pathologies are, in fact, intertwined. And in some instance, comparative constitutionalists have identified them as the primary threat to new constitutional orders.

The next two sections flesh out these responses. From there, we are in position to assess whether our new constitution orders – properly constructed – are in a position to address the problems of collective action or wicked problems that confront them.

A. CONSTITUTIONS AS PEACE TREATIES

Anyone old enough to remember where they were on evening of the assassination of Chris Hani on 10 April 1993, will be old enough to continue the prelude to this part of the story. Shortly after the murder of the Secretary-General of the South African Communist Party and the leader of MK, the country lay on a knife's edge. Civil war loomed above and below as a possibility The ANC, led by Nelson Mandela, leveraged the moment to push all parties toward both a set election date – 27 April 1994 – and an Interim Constitution. Both events constituted monumental achievements. But they are just the penultimate endings of our extended Mandela Moment.

Our Constitution as peace treaty had a long, drawn-out and fraught history.

1 MEETINGS IN THE 1980S, HERE AND ABROAD, ABOVE AND BELOW GROUND (HEALD, 1986)

Neither the regular states of emergency, nor the MK's armed resistance had brought South Africa any closer to a resolution of its simmering civil war. Behind the scenes, important changes were afoot. In the Soviet Union, a bastion of ANC support, some officials suggested that the ANC might do well to concede 'collective rights and group guarantees in a post-apartheid constitution'. (Sparks, 2007) While Soviet officials quickly backed away from such a position, the point was clear: the aim was no longer the

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over-throw of the white minority state, but a negotiated settlement that would bring about a black, democratically-elected government.

The ANC's private position had already changed several years earlier. In 1986, the ANC's President, Oliver Tambo set out the conditions under which the ANC — and other liberation movements — would be prepared to begin negotiations: (1) the release of 'Nelson Mandela and all other political prisoners'; (2) the unbanning of the ANC and other political organizations'; (3) the lifting of the 'state of emergency then in force' and (4) the scrapping of laws central to the maintenance of apartheid. (Sparks, 2007) The armed struggle would continue, however, until such conditions had been met.

The NP likewise recognized that it could no longer rule through force on behalf of a white minority. President FW de Klerk secured substantial support, in a 1989 referendum, to begin negotiations. He released major ANC officials held prisoner since the Rivonia Trial and initiated quiet talks with Nelson Mandela regarding the future shape of South Africa and the logistics necessary for a peaceful transfer of political power. (Bouckaert, 1997).

Those stories are the official party line. The real story goes something like this: elite white capital found South Africa ungovernable – as the ANC and the Unions had successfully planned. It's this tripartite alliance (business, the ANC and the Unions) that allowed elite white capital to leave, or enabled white upper and middle classes to stay and to protect their economic interests, in return for political power hemmed in ever so slightly by a Constitution, that tells yet another part of the story.

All of these changes occurred against a broader political backdrop. South Africa had long been viewed as a pariah state in the West — and the anti-apartheid movement had only increased pressure on the West to stop propping up this racist regime. And while Mikhail Gorbachev might not have known that perestroika would lead to the falling of the Berlin Wall and the end of communism in the Soviet Union, the ANC knew it could no longer count on unequivocal military or political support from governments on the left. (Corder, 1995) Thus, when on 2 February 1990, FW de Klerk announced that liberation organisations were to be unbanned and political prisoners were to be released — including Nelson Mandela, nine days later, on 11 February 1990 — the international community could hardly be said to be surprised.

What's truly interesting is that although the various protagonists might not have been talking off the same hymn sheet, they were shared a lingua franca that made other forms of peace-making easier. In 1988, the ANC published the Constitutional Guidelines for a Democratic South Africa, the ANC's first public expression of its desire to work toward a negotiated settlement in South Africa. (Van Blerk, 1997). In this declaration, the ANC committed itself to the adoption of a justiciable Bill of Rights and to constitutionalism generally. (Hund, 1989). In August of 1989, the Harare Declaration was adopted by the Organization of African Unity. The Harare Declaration set forth several conditions that the apartheid government must fulfill before serious negotiations could begin: the lifting of restrictions on political activity, the legalization of all political organizations, and the release of all political prisoners. This declaration was later adopted by the Non-Aligned Movement and the United Nations' General Assembly.

The South African government initiated its own halting steps in the direction of constitutionalism in April 1986. (Ramaphosa, 2001). The Minister of Justice announced that he had requested the South African Law Commission 'to investigate and make recommendations regarding the definition and protection of group [rights] . . . and the possible extension of the existing rights protection of individual rights'. (Thompson, 1985) The Law Commission subsequently issued a working paper in March 1989 and an Interim Report on Group and Human Rights in August 1991 that engaged even the most hostile elements of the extreme right wing in a debate on a bill of rights and constitutionalism. (Thompson, 1985).

The immediate challenge — after the unbanning — was to bring together all parties interested in negotiating a road map to peace in South Africa. The Congress for a Democratic South Africa ('CODESA') commenced on 20 December 1991. However, it died soon after in 1992. Despite CODESA's problems, the white electorate, in a referendum held on 17 March 1992, conclusively endorsed the efforts of the de Klerk government to continue with constitutional negotiations aimed at establishing a multi-party democracy based on a universal franchise. (Currie& De Waal, 2005)(Bouckaert, 1997).

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2. THE NEGOTIATED CONSTITUTION AND THE TERMS OF PEACE

Before detailing the processes and the negotiations that led to the successful adoption of an Interim Constitution in 1993 and the holding of the first truly democratic elections on 27 April 1994, it's worth understanding the general philosophical aims of the three major parties: the African National Congress, the National Party, and the Inkatha Freedom Party. It is likewise essential to understand the major compromises that allowed the second round of negotiations to succeed.

The ANC's primary goal was to have a constitution — written by a democratically elected assembly — that would create a government of majority rule with as few restraints as possible on its legislative power. (Klug, 2001) (Klug, 1993). Although the ANC was generally successful in this aim, the NP's steadfast insistence on some form of interim government and an initial power-sharing scheme ultimately kept the desired goal of unfettered majority rule from being realized.

The NP, facing the political realities of universal suffrage, argued that the new constitutional order must devolve power to provinces and local governments and thereby place substantial restrictions on the power of the national government. It initially tried to block the idea of a Final Constitution written by a democratically elected assembly. It favoured an extended transitional government and a power-sharing mechanism that would allow the NP to gradually relinquish control and maximize its ability to influence and to restrain the new government. (Klug, 2001) During negotiations, the NP argued that all participating parties should have equal voice in the process. That would, of course, have given undue weight to minority interests. That argument it lost. However, as the negotiation process continued, the NP — with its authority and its resources as government — took the lead as the opposition party to the ANC. Its emphasis on 'collective political rights' — rejected outright by the ANC — shifted to the standard constitutional protections for individuals generally found in a justiciable Bill of Rights. (Savage, 2001)

The IFP, not surprisingly, argued strenuously for a form of federal government that afforded regional governments maximum autonomy. It proposed express limits on the central government's powers (powers it rightly assumed would be wielded by an ANC-led government). As for the eventual adoption of the Final Constitution, 'the IFP argued that since the purpose of a justiciable constitution and a bill of rights is to protect minorities from the tyranny of the majority, the minorities to be protected must give their assent to the particular framework.' (Klug 2001) This logic would have effectively given minor parties — prior to any elections testing their popular strength — a veto over the text of the Final Constitution. The IFP decided that regular walkouts were an appropriate strategy for securing its ends. The incipient threat of civil war in Natal enabled the IFP to secure many of its aims for regional power without remaining present during constitutional talks.

The ANC and the NP were, despite the IFP's absence, able to arrive at a compromise that largely ended the impasse. The two parties agreed to a 5 year, democratically-elected interim government charged with writing the Final Constitution. Both sides lost things for which they had long pressed. The ANC accepted a limited power-sharing arrangement. (Atkinson, 1994) The NP gave up its demands for a mandatory coalition government and a rotating presidency.

However, the most critical concession — by both sides — involved the creation of a set of Constitutional Principles that would be included as a schedule within the negotiated Interim Constitution. The purpose of these 34 principles was to place meaningful constraints on the ANC's ability to draft the Final Constitution. This concession provided both the NP (and the largely absent IFP) with some assurance that they would not be rendered entirely powerless — after universal franchise elections in 1994 — during the process of shaping the Final Constitution. The ANC was placated by three distinct processes. First, the Interim Constitution would go into effect after the first multi-racial elections and parties would be proportionally represented in Parliament. Second, the newly elected representatives in both Houses of Parliament would sit as a Constitutional Assembly and be required to produce the text of a Final Constitution within two years. Third, an independent Constitutional Court, staffed largely by the ANC's preferred appointees, would have the power to ensure that the Final Constitution — as drafted by the democratically elected Constitutional Assembly — satisfied the 34 Constitutional Principles. This critical

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concession, I would contend, tells not just why we had a peaceful transition on 27 April 1994, but why we are in the state we are in, why the current status of our constitutional democracy should come as no surprise and why, after 20 years, the Constitutional Court has discharged its duties as best as could possibly be expected.

B. THE CONSTITUTION AND STATE-BUILDING.

The Interim Constitution was but a weigh station.

Beyond the Interim Constitution lay two new processes: the drafting of a Final Constitution by the Constitutional Assembly (Parliament sitting in another capacity) and the ratification of this new basic law by South Africa's first Constitutional Court. The Constitutional Assembly discharged its responsibilities in May 1996. It remained for the Constitutional Court to assess the New Text's compliance with 34 Principles. Despite near unanimity in the Constitutional Assembly as regards the New Text, the Constitutional Court held in the *First Certification Judgment* (1996) that it failed to comply with 34 principles by which it was to be measured.

Two critical features of the *First Certification Judgment* stand out. Four early, crucial paragraphs -- 27 to 30 -- adumbrate the Court's methodology:

First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT [New Text] comply with the CPs [Constitutional Principles]. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA [Constitutional Assembly] in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business. It may be that reference to the IC [Interim Constitution] is of assistance in trying to ascertain the meaning of a word or phrase in either the NT or the CPs, but it is generally of no consequence that some or other provision in the IC has been omitted from the NT, or has been reproduced in a different form. Provided it remained within the boundaries set by the CPs, the CA was fully entitled to do what it wished with any precedent in the IC. That is not only clear from the provisions of IC chapter 5, but is inherent in the 'solemn pact'. The IC was expressly intended to provide 'a historic bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights' and to facilitate the 'continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution'. Compiled as it was by the unmandated negotiating parties, it has no claim to lasting legitimacy or exemplary status. The CA, composed of the duly mandated representatives of the electorate, was entrusted with the onerous duty of devising a new constitution for the country, unfettered by the provisions of the IC other than those contained in the CPs. It should also be emphasised that, provided there is due compliance with the prescripts of the CPs, this Court is not called upon to express an opinion on any gaps in the NT, whether perceived by an objector or real. More specifically, there can be no valid objection if the NT contains a provision which in principle complies with the requirements of the CPs, or a particular CP, but does not spell out the details, leaving them to the legislature to flesh out appropriately later ... The subsequent legislation will be justiciable and any of its provisions that do not come up to the constitutionally enshrined criteria will be liable to invalidation. Here it is important to note that the CPs are principles, not detailed prescripts.

Elsewhere, I have asked, and answered the question as to whether the Court's distinction above, between law and politics, ought to be taken seriously. Contrary to popular opinion, my answer is a qualified 'yes'. (Woolman, 2013c). But that's not my quarry here. More important for the purposes of this paper, are the grounds for refusal of certification of the New Text.

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The Constitutional Court had no choice but to (i) reject the power of local government to impose excise taxes; (ii) find that Chapter 7's provisions for local government powers were far too "scanty"; and (iii) conclude that the collective bargaining rights in NT 23 failed, in terms of CP XXVIII, to protect adequately the rights of individual employers. The NT had to fail. The Court found several other grounds for refusal – far more interesting than then three above. It held that the CPs required special procedures (in addition to special majorities) for certain forms of amendment of the Constitution, ensured that the process of removing (through special majorities) the Public Protector and the Auditor General guaranteed genuine independence of these Chapter 9 institutions, and demanded that the new Constitution specify the measures by which the Public Service Commission would remain independent and impartial and declared that no Act could be declared beyond judicial review (unless it were made part of the constitutional text itself).

The Constitutional Court, far from *dictating* the future political terrain in any meaningful sense, acted with humility and created the conditions for a robust form of self-governance heretofore unknown in South Africa. The Court's insistence on special procedures (already involving special majorities) for (a) amendments of the Bill of Rights (with its clear commitment to subjecting private power as well as public power to its dictates) or (b) removal of the Public Protector and the Auditor-General²⁸ means (no more than) that the new state about to take shape ensures that (i) those who govern are subject to the same rules and strictures as those who are governed (with respect to both public power and private power) (ii) those who govern are subject to some degree of political accountability. It would have been nice, but over-egging the pudding, to find some indication that the Court was also placing the state under a basic obligation to deliver those civil services – from road repair to revenue generation through taxation -- required to keep the polity running. However, given the time, those halcyon days of a Mandela presidency, ANC majority rule, a TRC and 4% growth, it's hard to read a (iii) to read with (i) and (ii).

What we do see clearly in the *First Certification Judgment* are the lineaments of 'Constitutionalism as State-Building' and components one and two. First. The Rule of Law. Second. Political Accountability.

We don't really see a third: a competent bureaucracy or civil service necessary to keep the this 20 year old project on the tracks. These three objects are what constitutions are best designed to do, whatever stage of their existence. American republicans and constitutional drafters as different as Thomas Jefferson and Thomas Paine – both revolutionaries – never imagined that the state was supposed to provide all goods necessary to pursue a life worth valuing.

And yet, as we shall see it might be this most unheralded of roles that's most critical to constitutional democracies. The first two are nice. The last people need to get on with life.

But before we get on with what's missing . . . sound bureaucracy and a vibrant civil society . . . its worth asking why are getting these fundamentals right is so very important? Look around. Not long after a host of authors from across the political spectrum pronounced that we had reached the end of history, those same authors have recognized that we are, in fact, in a recession of democracy. They have turned their focus toward the foundations of constitutional democracies: understanding what makes them work and what makes them fail. For our immediate purposes, however, it's worth looking at what the court have done to ensure that the project has stayed on tracks – within the limited remit of 30 cases a year.

1. STATE-BUILDING AND THE RULE OF LAW

The Constitutional Court has, in keeping with the commitment to the governors and the governed being subject to the same set of laws, adopted a strong rule of law doctrine. Let's start with the thin account. As the egalitarian pluralist Michael Walzer has argued, what we *all* expect of any legal regime that claims to undergird a fair, legitimate and well-ordered society in something akin to the picture he conjures up:

I want to begin my argument by recalling a picture (... late in that wonderful year 1989) ... It is a picture of people marching in the streets of Prague; they carry signs, some of which say, simply, 'Truth' and others 'Justice'. When I saw the pictures I knew immediately what the signs meant – and so did everyone else who saw the same picture. Not only that: I recognized and acknowledged the values that

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the marchers were defending – and so did (almost) everyone else. Is there any recent account, any post-modernist account, of ... language that can explain this understanding and acknowledgement? How could I penetrate so quickly and join so unreservedly in the language game or the power play of a distant demonstration? The marchers shared a culture with which I was largely unfamiliar; they were responding to an experience I had never had. And yet, I could have walked comfortably in their midst. I could carry the same signs.

The reasons for this friendliness and agreement probably have as much to do with what the marchers did not mean as with what they did mean. They were not marching in defense of the coherence theory, or the consensus theory, or the correspondence theory of truth ... No particular account of truth was at issue here. The march had nothing to do with epistemology. Or better, the epistemological claims of the marchers were so elementary that they could be expressed in any of the available theories – except for those that denied the very possibility of statements being ‘true’. The marchers wanted to hear true statements from their ... leaders; they wanted to believe what they read in the newspapers; they didn’t want to be lied to anymore.

Similarly these citizens of Prague were not marching in defense of utilitarian equality or John Rawls’ difference principle or any philosophical theory of desert or merit or entitlement. Nor were they moved by some historical vision of justice with roots, say, in Hussite religious radicalism. Undoubtedly, they would have argued, if pressed, for different distributive programs; they would have described a just society in different ways ... they would have drawn on different accounts of history and culture. What they meant by the ‘justice’ inscribed on their signs, however, was simple enough: an end to arbitrary arrests, equal and impartial law enforcement; the abolition of the privileges and prerogatives of the party elite – common garden variety justice.” (Walzer, 2002)

What the Constitutional Court does in *First Certification Judgment* is ratify virtually all of the Constitutional Assembly’s attempts to level a radically unequal playing field. To the extent that it did anything noteworthy in refusing to certify the NT, it simply noted that a mere handful of additional features would both (a) comply with the CPs and (b) ensure that the playing field remained level (as possible over time). By simply tracking the language of the CPs, it strengthened institutions and procedures designed so that we might better understand and cooperate with both our fellow citizens and the persons elected to govern us.

Does the Court’s gentle push for greater transparency and accountability mirror the hurly-burly contestations of power that more commonly fall under the moniker of politics? I think not. These conditions constitute the *minimum desiderata* for carrying out the dictates of our basic law – the necessary, but hardly sufficient, conditions for ‘an open and democratic society based upon dignity, equality and freedom’.

Newspapers or the nightly news might lead the ordinary citizen to think otherwise. The ANC has – for now -- become a party that tends to cannibalise itself. (Choudhry, 2009) (Klug 2010) (Roux 2013). It may be true that factional, internecine party politics have, in too many instances, supplanted sustainable (existing) ANC policy initiatives designed to improve the lives of South Africa’s most disadvantaged denizens. Tammany Hall politics aside, it’s difficult to imagine a body – the Constitutional Court – that has been more in lock step with the government’s fitful attempts to realise substantive change.

(What is news, though often unreported, is the hollowing out of the state. A friend in the Office of the President calls it the 15% problem. Only 15% of the bureaucracy functions. He contends that this hollowing out of the state makes it difficult to carry out existing policy and often impossible to implement new policy. Well return to this problem later.)

Back to the rule of law. The Constitutional Court and other courts have found large numbers of statutory provisions, regulations, rules of common law and customary law unconstitutional. A substantial portion of these laws hail from the days of colonial rule and the apartheid state. Where the Constitutional Court and other courts have found post-1994 laws or acts of state invalid, a significant portion of these failures can be traced to the Court’s assessment that the government has either failed to follow proper procedures or that it has failed to meet a somewhat more substantial conception of the rule of law grounded in the Constitution. The Court’s ‘good faith’ deference to coordinate branches in highly charged

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cases, and its more recent meaningful engagement nudges of both public officials and private actors toward the ends of our basic law, fit the standard definition of the rule of law. As Raz would have it, the Court has – in addition to undoing the untold damage done to our collective psyche as a result of the arbitrariness and brutality of apartheid – been attempting to establish a baseline for action to which everyone ought to be able to adhere and coordinate their actions: the rule of law.

Bracketing for the moment Theunis Roux’s careful expatiation of the Court’s delicate navigation between the shoals of principle and pragmatism, it’s both interesting and germane to the simple thesis of this article to note how much effort has gone into the development of the rule of law doctrine or the legality principle. Such early cases as *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (1999) and *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* (2000) established the now trite proposition that:

The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the Interim Constitution this control was exercised by the courts through the application of common law constitutional principles. (*Pharmaceutical Manufacturers*, 2000)

Commentators such as Frank Michelman have explored the potential limitlessness of the power of judicial review that the doctrine now vests in the courts. (While the Constitutional Court as the clear apex court need not worry about the exercise of plenary powers, and stepping on the toes of the Supreme Court of Appeal, it does need to concern itself with how far it wishes to extend its powers of judicial review into every facet of public and private life. *Juma Masjid* (2011), while explicit about the duties the Constitution places on private actors, set out a distinction between the obligations of public actors and private actors). Other expositors, such as Michael Bishop (2012) and Alistair Price (2012), have assessed the contours of rationality review to which the legality principle and the rule of law doctrine have given rise. Here, what might be described as the outer reaches of the rule of law doctrine are of greater interest. I’ll continue to contend that even the outer reaches of the rule of law doctrine are predominantly concerned with securing **order**. Order under law is, as our constitution makes transparent, a necessary condition for the open and democratic society based upon dignity, equality and freedom to which the text says we ought to aspire. First things first.

In *President of the Republic v Modderklip Boerdery (Pty) Ltd* (2004), the Court held that section 1(c) (the rule of law) of the Constitution read with section 34 (access to courts) of the Constitution requires that the state take ‘reasonable steps ... to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.’ The *Modderklip* Court’s reading of section 1 of the Constitution – and the rule of law doctrine – is concerned with those steps the state must take to turn back the forces of anarchy, entropy and rebellion. By transforming those forces into something more benign, we – as represented by the Constitutional Court – forestall the potential abrogation of the social contract reflected in our Constitution and maintain the *de minimus* conditions for its realisation. Although the *Modderklip* Court describes the circumstances of the eviction case before it as extraordinary, they most certainly are not. They are, in so many ways, the circumstances in which many South Africans find themselves now (whether they are particularly concerned with access to housing, health, water, food, education, electricity, social security grants, or a brace of other basic goods necessary for pursuing a life worth valuing). They are the defining characteristic of this moment of history, and the Court again can be understood as attempting to maintain the basic conditions under which the aspirations of the Constitution might one day be realised.

Glenister v President of the Republic of South Africa (2011) does not, strictly speaking, turn on the rule of law doctrine or the legality principle. However, it deploys section 7(2) of the Constitution – which demands the protection, the promotion, the respect and the fulfilment of the rights of all – for strikingly similar ends. Without an independent security service capable of ferretting out corruption and various forms of rent-seeking behaviour in our government – and ensuring that governors play by the same rules as the governed – our fragile polity will simply lack the capacity, once again, to provide the most basic platform for the realisation of the egalitarian pluralist society envisaged by the Constitution. (Despite its novel use of a plethora of various constitutional provisions, surely the majority judgment is doing little more than reminding us, *a la* Hobbes and Locke, that security is a predicate condition for liberty. As Locke long ago

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noted: ‘Where there is no law, there is no freedom.’ (Locke, 1690) A state without an effective, independent set of law enforcement agencies is a state without law or legitimacy or freedom.

The Court, in *Democratic Alliance v President of the Republic of South Africa* (2012), further entrenched our rule of law doctrine when it concluded that the President had acted *irrationally* in making a major constitutional appointment. Based largely on the independently appointed Ginwala Commission of Enquiry’s findings of fact, the *Democratic Alliance* Court found that the decision to appoint Mr Menzi Simelane as National Director of Public Prosecutions (NDPP) was irrational and constitutionally infirm. The *Democratic Alliance* Court placed significant emphasis on the need of the NDPP to be *independent* and conduct its work without fear, favour or prejudice. Such an appointment was starkly contrasted with ambassadorships – positions often held in return for prior favours and held so long as the ambassador communicated effectively the views of the current President and the Executive. Where an ambassador is found to be an impediment to her role as a conduit, her recall is generally accepted as a political act that falls entirely within the discretion of the Executive. The *Democratic Alliance* Court patiently explains why and how the President and the executive, with the quiescence of Parliament, erred so grievously in making this particular appointment and thereby extends accepted constitutional constraints on the exercise of executive power. (Govender, 2014).

While such cases as *Modderklip*, *Glenister* and *Democratic Alliance* are bold and imaginative, they also stand for three rather humble propositions. First, even in such highly charged cases, the Court’s intent is ultimately to ratify the commitment of the coordinate branches of government to the Final Constitution and the kind of post-apartheid society envisaged by the Constitutional Assembly. Second, the Court, compromised of a mere eleven women and men, acknowledges that it cannot (alone) possibly deliver upon such promises. The Court’s immense humility must be read as a recognition of the proposition that the responsibility for the creation of a just, equal and fair social order rests largely with the representatives (of some 50 million South Africans) charged with putting political meat on the legal bone of the Constitution.

The *Shilubana* Court (2009), for example, correctly notes that the responsibility for the delivery of those material and immaterial goods necessary for flourishing often lies with the subpublics, associations and communities (components of civil society) that shape our lives. Given its nuanced and complex understanding of where true ownership of our constitutional project lies, the Court has begun to craft novel judicial doctrines – such as “meaningful engagement” – that afford the universe of government officers, social actors and active citizens the opportunity to arrive at more and more optimal policy solutions to the problems that vex our young, vibrant and still developing state. From *51 Olivia Road* (2008), to *Joe Slovo I* (2010) and *Joe Slovo II* (2011), we have witnessed a Court developing housing and eviction rights doctrine in manner that largely eschews decisions derived from rather weak, and generally unenforceable, *Grootboom*-based criteria. Instead, rather capaciously framed meaningful engagement orders require a panoply of parties – from residents, to municipalities, to provinces, to private land owners, to *amici* and other interested entities – to repair to the negotiating table to hammer out a settlement more likely to lead to a better outcome from the perspective of *all* the participants concerned. The ‘meaningful engagement’ brokered settlement reached by the parties in *51 Olivia Road* became the Court’s final order. Humility, especially from a bench comprised of such an elite group of eleven lawyers, means acknowledging that others – from over-worked members of a shaky bureaucracy, to the poorest of the poor living in (what most readers would consider) uninhabitable environs, to landlords thought to care about nothing more than the return on their investment – will generally possess greater empirical, experiential and pragmatic insight and far more norm-generating legitimacy than the tribunal charged with vouchsafing the most important provisions of our basic law. (Woolman, 2013a). (Other commentators strongly demur. See Dugard, 2014, Wilson, 2014, Bilchitz, 2014). *Joe Slovo I* and *Joe Slovo II* place the Court’s dual commitment to humility and to a distinction between law and politics beyond dispute. The *Joe Slovo I* Court addressed the constitutionality of the state’s controversial N2 Gateway project. The project, as planned, would have moved the residents of existing informal settlements along the N2 highway to Delft – a community some fifteen kilometres away. The residents resisted the removal. The government sought support for the removal through an eviction order. While the *Joe Slovo I* Court split on the question as to whether the state had already meaningfully engaged the community regarding the removal, a majority favoured a new court initiated settlement process. Justice Sachs’ opinion captures the justification for the Court’s meaningful engagement order best:

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This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in ongoing constitutional relationships. It is to everyone's advantage that they be encouraged to get beyond the present impasse and work together once more."

The *Joe Slovo I* Court exhibited a firm normative hand in constructing a participatory bubble that would shape subsequent (fact-driven) negotiations. It then gave its *imprimatur* of approval to an outcome that would enable community dwellers to secure better housing elsewhere. A *Joe Slovo II* Court was then somewhat surprised when virtually all the parties to the litigation returned and stated that they wished to alter the previous order because they had discovered, through on-going negotiations and further analysis of the lay of the land, that the original settlement would have sub-optimal outcomes for all parties concerned. With some quite understandable hesitation, the *Joe Slovo II* Court recognised that the adaptive process that it had initiated had to be followed through to its logical conclusion: changing an initial settlement where that settlement failed to solve the problem that originally seized the Court.

Recall the humility reflected in the *First Certification Judgment* Court's (unspoken) understanding that since a well-nigh infinite number of constitutions could be found compliant with the Interim Constitution's 34 Constitutional Principles, its role was simply to determine whether the text was compliant – not optimal. It's striking, therefore, that having found the New Text non-compliant on primarily state-building grounds, it ratified quickly and easily the Constitutional Assembly's Amended Text. For the Amended Text did no more than tweak the provisions previously found infirm. (*Second Certification Judgment*, 1997)

The *First Certification Judgment* (1996), the *Second Certification Judgment* (1997), *Joe Slovo I* and *Joe Slovo II* Courts all demonstrate a comparable respect for its citizens and the coordinate branches of governments. It's a court inclined to view both individuals and groups within society and a particular organ of state within the broader polity as possessed of the grounded understanding required to decide whether, say, a community should stay put and upgrade its current housing stock or pull up stakes and move 50 km away. Not surprising, after negotiations between the parties revealed the desirability of an *in situ* upgrade, and a joint steering committee was created to work out the technical features of this new joint proposal, the *Joe Slovo II* Court issued the following order:

- (a) There have been no adequate steps by the government to carry out the supervised eviction order made by this Court. The order has for all intents and purposes been left in abeyance.
- (b) There is no intention to proceed with the supervised eviction order as granted.
- (c) The order cannot be executed absent agreement between the parties or a complex amendment to the order.
- (d) The order relates to thousands of people.
- (e) The circumstances that motivated this Court to grant the supervised eviction order have ceased to exist.
- (f) There is no reason why the threat of eviction, in all the circumstances, should continue to disturb the applicants.

It's our good fortune that this Constitutional Court possesses the insight that **state-building** – the rule of law, political accountability, and a responsive bureaucracy – comes first. That means, therefore, that a bench of 11 women and men must inevitably concede that its 50 million citizens and various organs of state possess both better information and a normative vision that more readily coheres with how South Africans writ large and small understand the basic text's multitude of constitutional provisions. The *Joe Slovo II*

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Court thus reflects its commitment to the more humble notion of constitutional court's as state-builders when it concludes:

[T]here is no reason in logic or policy why an order that is made because it is just and equitable to make it should not be susceptible to rescission when justice and equity require that course. Indeed, it seems illogical for this Court to have the power to vary an order issued on the basis that it was just and equitable when changing circumstances require, but not to have the power to discharge an order when the dictates of justice and equity require.

2 STATE-BUILDING & POLITICAL ACCOUNTABILITY

Do we possess further evidence that state-building explains the Court's behaviour in *First Certification Judgment* and in many of the judgments that followed over the next 15 years? We do. Recall the demand for special procedures and special majorities for constitutional amendments and special majorities to ensure that the Public Protector and Auditor General are relatively immune from political pressure.

We have had, for a modern constitutional democracy, relatively few amendments to our basic law – and certainly none that could be said to have radically altered the landscape. The 17th Amendment could be the most meaningful because it has created a unitary judicial system of courts with the Constitutional Court at the apex. (2014)(Albertyn, 2008). However, even a well-known and outspoken Supreme Court of Appeal Judge, Carole Lewis, offered her stamp of approval when the amendment was first suggested. (Lewis, 2008).

One way to understand the special majorities and the special procedures is to require various citizens and groups from different provinces and domains of the Republic -- who have already agreed to the basic law – to think ever more seriously about particular amendments. (I'm not sure a serious case can or has been made that a potential danger exists with having one party with control of two-thirds of each the representatives in the National Assembly and the National Council of Provinces – or in the provinces that select the members of the National Council of Provinces.) In so doing, the *First Certification Judgment* Court appears to be pressing citizens to become members of a republic who truly govern themselves. That's state-building. (And its state building irrespective of the dominance wield by the ANC over the past twenty years.

What about the special majorities required for removal of the Public Protector and the Auditor General?

Well, let's consider the counterfactual: simple legislative majorities are required for the dismissal of the Public Protector and the Auditor General. The Public Protector and the Auditor General could hardly rest assured that they could watch the watchers, if they knew that any threat that they might pose to members of a party who 50% plus one vote in the National Assembly could result in their ouster. The *First Certification Judgment* Court put paid to this counterfactual.

And what of the Public Protector and the Auditor General now, some 18 years on?

Let's not guild the lily here. South Africa suffers from the ills that afflict virtually every one party dominant democracy – graft, corruption and other forms of rent-seeking behaviour that have taken more than a little bit of the shine off the miracle of 1994.

Yet the Public Protector and the Auditor General have been able to discharge effectively their duties: to name and to shame individual politicians and civil servants, as well as entire provincial administrations and municipalities. 'Sunlight' as Justice Louis Brandeis put it, 'is said to be the best of disinfectants'. (Brandeis, 1914). Some might want to see a whole host of individuals behind bars and more national government interventions in the affairs of failed provincial governments and local governments. But one vastly underestimates the power, the intelligence and the will of the South African public, if one thinks that it will remain forever supine in the face of revelation after revelation of untoward and illegal behaviour by our elected representatives. The Office of the Public Protector and the Office of the Auditor General have

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thrown sufficient light on the affairs of state so that South Africans will be able to act on the information put before them.

The Auditor-General's annual reports on municipal and provincial fiscal and administrative mismanagement have led to the constitutionally-mandated assertion of control and power over the affairs of these lower spheres by national government and provincial government on more than a few occasions. The Auditor-General's *Report on Police Service Delivery* (2009) concluded that existing practices in a broad array of areas fell short of the standards required by the Constitution. The short-falls ranged from the lack of an approved policy for sector policing to inadequate training and inadequate recording of cases of domestic violence. The Auditor-General found that many of these shortfalls are a result of inadequate training, a lack of funds, or both. One might be inclined to read the Court's decision in *Glenister* against the background of such reports. Indeed, the Auditor-General have not been alone in this regard. In 2011, the Public Protector Thuli Madonsela released a damning report on irregularities related to the lease of two properties by the SAPS in Pretoria and Durban. The report — *Against the Rules* — led inexorably to the conclusion that the leases for the buildings had been executed of an untoward relationship between SAPS National Commissioner Bheki Cele and a private property owner. After having assisted the Public Protector in the production of the report *Against the Rules*, the SIU announced its own findings regarding corruption in the SAPS. (SIU, 2011). Its reports found failures to abide by tender processes and a pecuniary interest of SAPS officials 'in the companies to whom work was given'. (SIU, 2011). The Public Protector – with quite a lot of time left on her watch – has continued (despite threats to her life attributed to the police) – to investigate malfeasance in the President's Office with respect to the extravagant use of public funds to the enhancement of President's Zuma's private kraal (*Nkandla*, 2014) and a failure by the SABC to appoint appropriate persons to lead the public broadcaster (SABC, 2014).

3 WHAT'S STATE-BUILDING AGAIN?

If one's still not convinced that our Constitution was designed – and ratified – with state-building in mind, then one can turn to two no finer constitutional and public law scholars than Jack Balkin and Etienne Muriénik.

Let's start with the relatively recent ratification (of a critical provision) by the US Supreme Court of the controversial yet historically momentous Affordable Care Act. The Act is arguably the single most important social welfare programme to be rolled out since the Great Society suite of state-sponsored transformation projects in the 1960s. Moreover, it was, initially, a lightning rod for rapid right wing Republicans. (It's success, despite initial hiccups, has led it to fall off the Republican Party's express agenda. Disliking Barak Obama would appear to be enough at the time of writing.) About the Supreme Court's role in legitimating the Act, Jack Balkin has written:

In civics class we learn that federal courts decide whether laws passed by Congress and the state legislatures are constitutional. Therefore the federal courts are the guardians. That is certainly true, but it is not the whole story. In fact the most important function of the federal courts is to legitimate state building by the political branches. That is the best way to understand what happened under in the Health Care Case ... What is 'state building?' Throughout our country's history, our government has taken on many functions. The early nineteenth American state actually didn't do very much more than national defence and customs collection. The executive branch was tiny. Over the years, the federal government took on more and more obligations, offering new protections and new services. After the Civil War, Congress passed a series of civil rights laws, it created the Interstate Commerce Commission to regulate railroads, it passed an income tax and early in the twentieth century it created a central bank. State building really took off after the New Deal, which established the modern administrative and regulatory state and added a host of labour and consumer protection regulations, investments in infrastructure, and Social Security. The National Security State was born after World War II, and the 1960s brought new civil rights laws and new social welfare programs through the Great Society. At the 21st century, the federal government expanded even further, implementing vast new surveillance programs and strategies for dealing with terrorism – including detention of enemy combatants – that I collectively call the National Surveillance State.

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As Balkin points out, sometimes the ratification is quite robust – as in the US Supreme Court’s ultimate support for the New Deal and the Great Society, and our own Constitutional Court’s ratification of the Constitutional Assembly’s Amended Text. At other times, it may be quite restrained – as in the US Supreme Court’s narrow support for the Affordable Care Act, and the South African Constitutional Court’s carefully crafted enforcement of the government’s planned roll-out of Nevirapine to prevent Mother-to-Child-Transmission of HIV/AIDs in *Minister of Health v Treatment Action Campaign (No 2)*(2002).

A local hero, Etienne Mureinik, described the meaning of state-building in South Africa best in his famous article ‘A Bridge to Where?’ (1994). I’ve been loathe to engage my friend and mentor’s work because, in large part, it was reduced to a bumper sticker – and not adequately engaged. Politically, Etienne was a social democrat, and as his own short-lived academic career reflects, something of one right answer Dworkian. But the later had as much to do with Etienne’s principled opposition to apartheid and to the death penalty as anything else. If anything, this brilliant mind was plagued by doubt. It would have been entirely uncharacteristic of him to claim, immodestly, that he or 11 Constitutional Court justices or anyone else had the one and only answer to a vexed question of constitutional law. He is justifiably famous for his argument that South Africa’s new constitution reflected the first attempts at building a political culture of justification, as opposed to the ugly culture of authority that was the hallmark of apartheid and colonial rule. It’s important to stop – 20 years later – and consider what Etienne had in mind. (I can claim no privileged access to what my colleague and co-lecturer truly believed. What he said and wrote publicly are sufficient evidence. When courts, legislatures, executives and private actors are asked what lay behind their decisions, a reasonably compelling justification would generally suffice. That ‘test’, which appears so apparently thin in many rule of law or legality decisions, actually looks incredibly thick when one contemplates a limitations clause that allows the state or a private actor to offer a ‘reasonable’ and ‘justifiable’ explanation for law or conduct in order to overcome a claim that a violation of a constitutional right has occurred. Indeed, he is equally famous – rather bitterly ironically famous – for allaying fears associated with the potential rule by fiat of 11 unelected women and men. For if you think that his support for a culture of justification seems too weak a constitutional project, then you probably would count yourself amongst the many South African jurists and commentators who abhor the construction of our socio-economic rights. Transformative constitutionalists want far more. They want a solid core.

Etienne was well-known for having won the academic debate that managed to secure the inclusion of socio-economic rights. (Mureinik, 1992). The language that found its way into our Final Constitution – and sections 26 and 27 in particular – bear his signature. Now, he didn’t think that he might not have a better answer than most on such matters. But we were now living in a long awaited democracy. Having just begun this democratic project, he thought that responsibility for how we might go about realizing such critical goods were decisions to be shared with 45 million other South Africans and their elected representatives. To them and their representatives, he rightly accorded the responsibility for building a culture of justification. State-building -- something heretofore unknown in South Africa – was our first staging post. My friend rightly rejected -- as the Constitution’s primary purpose -- any essentialist scheme. (Mureinik, 1994).

4 STATE-BUILDING, PARTICIPATORY BUBBLES, CITIZEN PARTICIPATION & A RESPONSIVE CIVIL SERVICE

Thanks to Balkin and Mureinik, we should have a better understanding what ‘state-building’ means. What it means in particular for the South African Constitution, and the success of those who must give this democratic project is another matter.

As I argue elsewhere, the modest role of the judiciary called for by Balkin and Mureinik in complex cases – not only socio-economic rights cases -- has allowed the Court to develop an incredibly creative doctrine of ‘meaningful engagement’ that allows as many interested stakeholders as possible within the South African polity to determine amongst themselves (with a little normative guidance from the Court) the optimal conditions for the realisation of a given right or entitlement. This invitation to parties, initially at odds with one another, to find a way of singing off the same hymn sheet undergirds this optimistic, if modest, view of constitutions as engines for state building and increasingly better statecraft.

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Start with *Ermelo* (2010). Ostensibly, it brought to end a line of cases in which largely undersubscribed single medium schools used language and culture to bar black students from taking classes in English. Beyond the obvious holding, the class also required the state, the school governing body, the teachers, the parents and the learners to do a better job in deciding on the languages of tuition – collectively. The ultimate authority would rest with the state – so long as it followed some semblance of due process in its decision-making. The *Ermelo* Court also asked its readers to consider whether or not English and Afrikaans ought to remain the default languages for almost all learners or whether we have an obligation to one another to learn the language of ‘the other’ and put some effort into placing the 9 official African languages (other than Afrikaans) on a more equal footing. (Woolman and Fleisch, 2014).

A number of parties pitched for *Juma Masjid* (2011) as well. A private trust wanted to end its agreement to rent the land to the state for a public school – not unreasonable given the state’s failure to pay the rent or follow proper procedure in engaging both the private trust or the school governing body or the learners. The school governing body had probably not represented the learners’ interests as well as possible. The *Juma Masjid* Court concluded that all the parties in the matter – public and private – had an obligation not to interfere or to undermine the learners’ FC s 29(1) right to a basic education. No one gets off easy and everyone is found to have constitutionally-grounded obligations to one another to behave as fellow citizens and not, as our history would have repeated it, as antagonists. That’s state-building, even if you think the *Juma Masjid*’s scale appears small. It’s not small at all.

In *TAC* (2002), the Court, with assistance of dogged NGOs, gave the government a lesson in state-building. Despite the odd AIDs denialist in the Cabinet – who vowed to defy the Court if it held against the state – the Court not only got the state to commit to a national roll-out of Nevirapine (based on the state’s own findings of efficacy and safety, but gave more even-keeled members of the ruling party the opportunity to publically state that they would follow whatever ruling the *TAC* Court handed down. Although the public health system remains beset by various problems, and international funding is slowing down, TAC is an unalloyed success in terms of getting civil society, the executive and the courts on the same page – in the service of a weak, stigmatized and vulnerable group (numbering roughly 6 million). Can you imagine such an impressive act of constitutionally-driven state-building by the Court, in concert with array of government and non-governmental players, just 6 years earlier? Can you, that is, imagine this outcome just six years prior to the inclusion of the right to health in the Amended Text of the Final Constitution (1997)?

Blue Moonlight (2012). I expect wolf-whistles from constitutional essentialists and some transformative constitutionalist on this matter. However, the Court not only continues to develop its novel ‘meaningful engagement’ doctrine but adds genuine substantive content to the right to housing by requiring the provision of suitable interim housing between an eviction from housing deemed uninhabitable and the movement of occupants to some new housing stock. Of course, lawyers dealing with matters in court regularly describe a pattern of non-compliance or suboptimal compliance. (Wilson, 2014) (Dugard, 2014). No surprise. I predicted as much shortly after the judgment as a rather likely negative unintended consequence of ‘meaningful engagement’ in housing rights and eviction law matters. (Woolman 2013a). Okay: we know better now. And again that’s a function of more housing and eviction cases, continued pressure by NGOs such as SERI and the LRC, and a Court trying its best to get as many parties around the table to work out what most believe will be the empirically and normatively optimal outcome. That’s state-building.

What a Constitutional Court cannot do – even with multiple contempt orders – is build a competent, non-politicized civil service or bureaucracy. A visit to Home Affairs can be awful experience – but they can replace a lost permanent resident document. SARS remains a competent collector of revenue. Motor Vehicles manages to generate new licences and car registrations in an orderly fashion – with the assistance of the South African Postal Service. On the other hand, the provinces of the Eastern Cape and Limpopo are already subject to national administration, and the reconstruction of these spheres of government is a tall order. A court or two might, for example, be able to demand the delivery of textbooks to schools in Limpopo. It’s in no position to enable teachers to make use of these texts from grade four or beyond. Nor can courts rejig a national system of education in which only one out of six learners graduate from school with a matric that meets the most basic requirements for tertiary education. Roughly 85% of learners leave

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our school system without a high school degree. As we know, few jobs exist in a modern, post-2008 economy unless a learner has a university degree or a technical certificate. State-building under such conditions is difficult: citizens must be educated to a degree in which they are able to work and to participate meaningfully in the solution of public problems that surface, locally, provincially and nationally.

But should we be surprised we are here, 20 years down the line, failing to provide large portions of our population with those good and capabilities necessary to convert their innate capacities into skills that allow them to pursue lives worth valuing? (World Bank 2012). No. To return to the section on constitutions as peace treaties, the deal done before the constitution, and the deal ratified in the Final Constitution itself did little to alter the basic structures of our economic and social life. Citizens who never had a look in, are still excluded. Business still on cash reserves of 23% (twice the norm) and seem uninterested in addressing the problems around them that will promote the sustainable development of the country as a whole or an environment that will secure their own sustainability as for-profit enterprises. Government – while keep the most marginalized alive through social grants, increasing our housing stock by over 2.3 million units and extending the electrification of the country to 81% -- is momentarily stuck. It can do little about our major trading partner – Europe – in which countries are experiencing double and triple dip recessions. It might do well to follow Adolf Hitler's road to prosperity by flipping open John Maynard Keynes and priming the pump through massive public works programmes. I am no economist. So while conservative fiscal policies staved off the worst of the 2008 crisis created by housing bubbles, I'm not sure that why taking on debt under current conditions is not to be preferred to an ongoing obsession with meeting 3 - 6% inflation targets. Part of the problem is the partnership with labour – which is not to blame labour for its desire to protect the interests of its members. Part of the problem is the relationship with business – which has created both black elites, and a black middle class roughly the same in size as the white middle class. The deal has provided a modicum of stability, but it has done little if nothing to address the plight of the poor. Indeed, without government social grants, the poor would be worse off than they were in 1994. That's not a viable economic model, nor does it do much to promote state-building.

Quo vadis?

IV PROBLEMS OF COLLECTIVE ACTION AND THE LIMITS OF OUR FRAGILE CONSTITUTION

The answer to the above question – quo vadis? – is: 'I'm not sure.' Solutions to the problems that face South Africa as 20 year old constitutional democracy lie beyond the ken of your average constitutional law academic. But as the newspapers and comparative constitutional law scholars tell us many of the problems we face are not unique to South Africa. However, the problems we face require collective action, and solving problems of collective action bedevil most other nations and humanity as a whole.

What is a problem of collective action? Mancur Olson, in his classic work, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965) describes the problem as follows. Large groups will confront potentially insuperable costs when they attempt to organize in order to solve problems on a grand scale. Conversely, small groups will face far lower costs when they attempt to organize in order to solve shared/public problems. In addition, individuals in large groups will tend to believe that that they have less to gain – per capita – from successful collective action. Individuals in small groups will already benefit from trust, loyalty, friendship, kinship and more readily see the benefits to be gained individually and collectively through successful collective action. Large groups, say a radically heterogeneous, highly economically stratified country of 50 million called South Africa will have a far harder time acting in the common interest than a small homogenous, relatively economically equal country of 350,000 called Iceland. So whereas Iceland was the first country to explode or implode in 2007 because of the subprime induced catastrophe, it was also able to turn around quickly and collectively by putting back in place the legal and regulatory structures designed to prevent market bursting depressions. Put it this way: everyone saw that they didn't need second houses, and that they were better off in a more highly taxed polity that provided free education through university, free universal healthcare, jobs for all and a relatively pristine environment. South Africa, with relatively insightful guardians in the Reserve Bank and National Treasury could keep interest rates high enough to stave off a subprime induced depression. But there's little the

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Reserve Bank and National Treasury can do to rectify the deeply entrenched inequality that is our inheritance from apartheid and colonial rule.

South Africa in the 1980s and the 2010s fits Olson's description of the conditions for successful collective action almost perfectly. In the 1980s, a liberation movement (the ANC), the trade unions and a white economic elite could see their own interests advanced by doing a deal that made all three (and their members) better off, and headed off the disaster that awaited an increasingly ungovernable society. At least temporarily. However, the agreement only went so far. None of three parties ultimately represented the worst off – although the ANC has put in place policies that successfully address some aspects of abject poverty that the apartheid regime would never have considered to be in the interests of a minority – a benighted view given the stunning wealth pissed away in and on a racist, militarized dictatorship where whites lived comfortably on the plantation. The limited reach of the deal done in the 1980s and reflected, in part, in the Constitution, intentionally left unaddressed the structures that had made South Africa one of the two most radically heterogeneous, highly economically stratified countries in the world. Now, as Malcolm X said after JFK was assassinated, 'the chickens are coming home to roost.' Because of the deal struck between the ANC, the white elites and the unions, change after liberation and the new constitution was deemed undesirable. (Moreover, insufficient trust existed between blacks and whites to make good on a key component of state-building: a competent civil service. Golden handshakes should have only been permitted once skills had been sustainably transferred.) Only now, as the unions see the writing on the wall in mining and other sectors, and the poor recognize that the current arrangement constitutes a barrier to entry on any level but the level occupied prior to 1994, does the possibility exist that the entire collective of 50 million will see their individual interests improved (or at least protected) when all boats rise.

Is this news? No.

What I wanted to bring home are several rather simple points. The Constitution can do something that I and others have called state-building. It could (to varying degrees) entrench the rule of law, hold the governors accountable and provide a competent civil service. It has, through law, made it clear that all South Africans are entitled to be treated equally and with dignity. However, to assume that a Constitution with a Bill of Rights could be the engine of more significant change when it was designed primarily to forestall a civil war and to protect the interests of the parties that brokered the deal is a view held by constitutional essentialists but no one who looks seriously at the deeper structures of the pre-constitutional and post-constitutional orders.

I always want to bring us back to points I made at the outset about TIME and CHANGE. Time flies. Few of us wish to spend our lives in constant revolution. We want order. We want jobs, love, friendship, children and even a community of peers who respect and care about us because they know us. We resist change because change often requires altering the practices that give our lives meaning. We resist change because it is hard – we are wired as we are, naturally and socially. We resist change even when we know that present practices do not serve us as well as new practices might. But as Mancur Olson would remind us, we know – or think we know – what the benefits of current practices are to us as individuals and small groups. It's unclear, when change must be brokered by large number of individuals, whether the ensuing change will redound to our benefit.

Given the fleeting nature of time, the limited degree to which we embrace fundamental change, that constitutions are best understood as statebuilding entities, and that collective action in large nation states face significant challenges, I want to propose a simple proposition. South Africa's 20 years of constitutional democracy should be viewed sympathetically and appreciatively.

Our polity is flawed. But we are not Iceland.

South Africa has had a difficult history we've yet to fully face and embrace. We live, day in and day out, in a society whose basic structures hold out little promise of immediate or dramatic improvement in the lives of the majority of its citizens. No system will alter that tragic state of affairs in a day or even a decade.

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However, it would, simultaneously be wrong to conclude that nothing good has happened over the past 20 years, or that our Constitutional Court has somehow failed to lead us into some promised land. The Constitutional Court has done well in making statebuilding its primary goal, since statebuilding are what Constitutions are primarily designed to do. Our constitution is fragile, but not without its merits.

We would also do well to remember that most of life, and the meaning it provides, is elsewhere. If we truly wish for political and economic change, then perhaps we should seek employment in environments that promote more radical solutions to the problems that face all of us, individually and collectively.