



Chapter Nine

Coda

If they don't believe me now, will they ever believe me?

Morrissey

I am constantly preparing for the last judgment, from the highest court. ... But why does this final evaluation matter so much to me? After all, at that point, I shouldn't care. But I do care, because I am convinced that my existence – like everything else that has happened – had ruffled the surface of Being, and that after my little ripple, however marginal, insignificant and ephemeral it may be, Being is, and always will be different than it was before.

Vaclav Havel

We take care of our own. Wherever this flag is flown. We take care of our own.

Bruce Springsteen

We have always understood that when times change, so must we; that fidelity to our founding principles requires new responses to new challenges, that preserving our individual freedoms requires collective action. Being true to our founding documents does not require us to agree on every contour of life. It does not mean that we all define liberty in the same way or follow the same precise path to happiness. Progress does not compel us to settle centuries' long debates about the role of government for all time, but it does require us to act in our time. For now decisions are upon us and we cannot afford delay. We cannot mistake absolutism for principle, or substitute spectacle for politics, or treat name calling as reasoned debate. We must act, knowing that today's victories will be only partial, and that it will be up to those who stand here four years and forty years and 400 hundred years hence to advance the timeless spirit of liberty conferred upon us in a spare hall in Philadelphia.

Barack Obama

Overcoming poverty is not a task of charity; it is an act of justice. Like slavery and apartheid, poverty is not natural. It is man-made and can be overcome by the actions of human beings.

Nelson Mandela

If you look at the history of nations that maximized the virtues that we associate with democracy, you notice that what came first was constitutionality, rule of law, and the separation of powers. Democracy almost always came last. If by democracy we mean the right of all adults to take part in the choice of government that's going to rule over them, that came very late – in my lifetime in some countries that we now think of as great democracies, like Switzerland, and certainly in my father's lifetime for other European countries like France. So we should not tell ourselves that democracy is the starting point. ... Democracy bears the same relationship to a well-ordered liberal society as an excessively free market does to a successful, well regulated capitalism. Mass democracy in an age of mass media means that on the one hand, you can reveal very quickly that Bush stole the 2000 election, but on the other hand, much of the population doesn't care. ... So we pay a price for the massification of our liberalism, and we should understand that. That's not an argument for going back to restricted suffrage. ... But it is an argument for understanding that democracy is not the *only* solution to the problem of unfree societies. ... Democracy has been the best short-term defense against undemocratic alternatives, but it is not a defense against its own genetic shortcomings. The Greeks knew that democracy is *not* likely to fall to the charms of totalitarianism, authoritarianism, or oligarchy; it's much more likely to fall to a corrupted version of itself. Democracies corrode quite fast; they corrode linguistically, or rhetorically, if you like – that's the Orwellian point about language. They corrode because most people don't care very much about them. Notice that the European Union, whose first parliamentary elections were held in 1979 and had an average turnout of over 62%, is now [in 2012] looking to a turnout of less than 30%, even though the European Parliament matters more now and has more power. The difficulty of sustaining voluntary interest in the business of choosing the people who will rule over you is well attested. And the reason why we need intellectuals ... is to fill the space that grows between the two parts of democracy: the governed and the governors.

Tony Judt

Generalissimo Francisco Franco is *still* dead.

Chevy Chase

A. The Book as a Framing Device

I don't expect the majority of readers to believe me now. However, good reasons exist to believe that many of empirical claims propounded herein about the self will become accepted facts about our brains and bodies as neuroscientists and philosophers effectively challenge the erroneous folk psychology that underpins current conceptions of free will and consciousness. The same holds true for empirically based claims about the nature of social formation. Both social capital theory and choice architecture are no more than twenty years old and ten years old respectively: advances in both disciplines will increase our appreciation of the manner in which our (diverse, heterogeneous) communities operate and how we can nudge them in a direction best for all of their respective inhabitants. Whether experimental constitutionalism wedded to a politics of flourishing will overtake – or even challenge – dominant forms of constitutional theory and practice is far from evident. As it stands now, most countries are neither genuinely democratic nor committed to constitutionalism. Within the clutch of constitutional democracies that function as such, a theory grounded in experimentalism and flourishing has a vast number of competitors that it will find difficult to displace.

Here's the real clue for unlocking the meaning and the purpose of this work: *the book is an extended framing device*.

Though long on length, the scale upon which this book operates is quite modest. It means to engage primarily my fellow South Africans for whom such ideas matter. The ultimate purpose of this book *qua* framing device has been to challenge some basic assumptions about the self, the social and the political in the service of a non-dominant (but perhaps helpful) argument as to how we should work with the South African Constitution. Yes, it's a bit of cheat. Just as the trolley car cases are constructed to drive one's moral intuitions in a particular direction (or to unearth disconcerting presuppositions), this book pushes its readers to reconsider previously held positions on a range of constitutional doctrines and the design of political institutions intended to make good on the promises of our basic law. Whether you believe me now or not, if you have drawn back the cover, *kept your head down and followed through*, then this experiment has been a success.

B. The Crooked Timber of Democracy

The path to democracy is never straight. As Tony Judt notes in the quote above, the kind of egalitarian pluralist democracy so often held out in South Africa as an oh-so-proximate ideal is quite often the very last staging post, much as the final emotion to crawl meekly out of Pandora's box is hope. But hope, as both Nelson Mandela and Barack Obama observe, is no substitute for action. While the success of any course of action may seem partial at the time, and thus a source of frustration, history again cautions us against all or nothing wagers. Who better than Mandela and Obama, riding their respective waves from Robben Island and Rosa Parks to Soweto and Selma, to remind us how long, centuries long, it has taken various polities to design and redesign their institutions so that each and every denizen might rise in value from nothing to three-fifths to one to first among equals.

Judt's, Mandela's, Havel's and Obama's words serve a six-fold purpose for this work.

First. Readers should pause before they consider this work out of step or out of time with contemporary South African politics. It most certainly is not. As the drafters of our Constitution recognized, constitutionality, the rule of law and the separation of powers come first. We have, somewhat successfully, arrived at this first staging post.

Second. To the extent that some perfect democracy – in which we are all constantly engaged in debates in our piazzas and public squares on issues of great moment – holds philosophers and theorists of various stripes in its thrall, we should again take heed of the lessons of history. People, being people, have other, more pressing matters (by their lights) going on in their lives. While advancing an egalitarian pluralist agenda, this book takes cognizance of the limited role politics can play in everyday life. Children must be fed and sent to school. Dignified work ought to occupy our hands. Engagement with others, in the various associations and communities into which we are born and which give our lives meaning, fill our hearts and minds. Just getting through such a day is often the most meaningful measure of success. That's why 'participatory bubbles', with their emphasis on engagement between multiple parties with respect to a rather narrow political issue over a short duration of time, play such a central role in this work. We attempt to solve the 'problem' (as set by a Mandela or an Obama, or any of their surrogates) as best we can – and then get on with life.

Third. We ought to bracket the inclination toward Springsteen's bitterly ironic pessimism: that our common South African flag masks a common tendency in South African politics for kin and clan to take care only of their own. Eighteen years after liberation, the majority of South Africans have every right to feel deeply aggrieved. We still have a long road to travel before reaching our second staging post: the provision of those basic entitlements that will enable all South Africans to appear in public without shame. Neither cock-eyed optimism nor abject pessimism (flip-sides of the same coin) constitutes an appropriate response. Havel, just like my father, had it right. Each of us must appreciate that as a result of every 'little ripple' – ie, the treatment of all others as subjects of equal worth – 'however marginal, insignificant and ephemeral it may [seem], "Being" is, and always will be different than it was before'.

Fourth. If this book has a single unifying theme, then it is that life is a series of constant disruptions. The measure (or mettle) of a person, a society or a democratic state is how creatively she, he, or it responds to the problems with which she, he, or it is confronted. What we need and want is a resourceful and imaginative realism. Here, an example from recent South African history casts the proper light on the problems that currently beset us. In April 1993, Chris Hani was assassinated. This tragedy could have been easily exploited by demagogues out to destabilize the country to such a degree that civil war became the inevitable outcome (as it did in Yugoslavia and Rwanda). Nelson Mandela, and the liberation movement he led, chose a different path. In public pronouncements immediately following Hani's murder, Mandela leveraged the calamity to secure a commitment to an election on 27 April 1994 and the drafting of an Interim Constitution that would bind South Africa until an elected, representative Constitutional Assembly could devise a new scheme of norms, principles, standards, and institutions. This book does not place its faith in another messianic 'Mandela Moment'. Rather it recognizes that when we accord fellow members of our society the dignity, equal respect, tolerance, trust, care, loyalty and other material and immaterial

goods that we demand for ourselves, then we also possess the resources to solve the problems with which we are all daily confronted.

Fifth. However imperfect our current union may be, however ill equipped our current one party-dominant democracy might be to deliver *fully* upon the aspirations of our basic law, we ought to view the Cassandra-like predictions of political scientists and comparative constitutional law scholars with a healthy dose of scepticism. That's not to say that my peers and betters who engage in comparative constitutionalism are wrong. Their bracing assessments of how recently created constitutional courts have failed to operate as hedges against democratic authoritarianism are often spot on the mark. The problem is the framing of the picture, of zooming in too tight. These scholars inevitably concentrate on too limited a period of time in assessing the merits of newly minted constitutional democracies and the demerits of what we have long acknowledged as 'the weakest branch': a constitutional court without the arms to execute its orders or the bread and butter for those who require such sustenance in order to pursue lives worthy valuing. Chevy Chase's laugh line in 1975 – 'Generalissimo Francisco Franco is *still* dead' – should give critics pause. If Spain's modern democracy, roughly forty years old, and teetering on the brink of financial collapse brought on by the government's irresponsible spending and blinkered (de)regulation of the economy, is not viewed through the same prism as the South African state, then we might want to ask 'why?' It would seem, as Chevy Chase often pronounced for the next two years, that 'Generalissimo Francisco Franco is fighting to remain dead'. Even academics can find themselves trapped in a seemingly endless news cycle of dread and woe.

Sixth. I am a South African, American-born. This double consciousness regularly reminds me that our limitations have more to do with a lack of imagination and a failure to recognize that the partial contributions we each make, in good faith, every day, still count as progress. The problems that we confront, as Mandela reminds us, are solvable. If apartheid can be overcome, than so can an education system that graduates but a third of its entrants, and so can a security service so riven by politics that no line of authority exists (save in name only), and so undisciplined that women fear the very police charged with their protection. The solutions at which we arrive for such problems may not, as Obama acknowledges, make our imperfect union perfect. But the novel experiments that show us the way to regular, successful action, in some, but not all, domains, are certainly to be preferred to just kicking the can down the road. Finally, we are nowhere in the vicinity of 'the end of history', here, in South Africa, or there, in the United States. This book then is a blueprint for politics at various staging posts – be they a score, or 200 years more, in age. It's a Judtian-inflected work 'that fills in the space that grows between the two parts of democracy: the governed and the governors' and *suggests how we might move from one staging post to another* – by revealing a little bit more about (a) radically heterogeneous determined selves still capable of change and flourishing; (b) socially constructed creatures adept at breaking traditional bottlenecks, and who figure out, experimentally and collectively, how to continue to fit square blocks into square apertures, whilst they carve out radically new holes for radically new pegs; and (c) citizens, politicians and jurists committed both to the provision of those predicate conditions

necessary for all to appear in public without shame and to the meaningful engagement with one another required to solve the most immediate problems on our horizon.

Modest, creative folk are Judt, Mandela, Havel and Obama – much like my ancestors in Tiahuanaco. They have neither ignored the problems confronting them in the hopes that they would go away, nor have they blithely assumed that some outside beneficent force would save them at the eleventh hour. All endorse a modest form of collective self-reliance: the experimental method. At the same time, neither Judt, nor Mandela, nor Havel, nor Obama reject the various bodies of knowledge that have been bestowed upon them, nor do they disavow the obvious benefits of the social capital that ground their society and allow (some of) them to work together towards solving collective concerns. They also recognize that only a decidedly significant degree of common beliefs and common property – a ‘commons’ – will allow all to flourish. This two-fold recognition regarding the benefits of and the conditions for experimentalism and flourishing lies at the heart of their thinking. That two-fold recognition lies at the heart of this work on South African constitutionalism. I could not ask for better company, or stronger endorsements.