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Dear friends:

In *The Selfless Constitution*, Stu Woolman has accomplished a tour de force of interdisciplinary legal thought. Drawing on insights ranging from the neuroscientific evidence on the nature of consciousness to an encyclopaedic knowledge of the issues and decisions of South African constitutional law's first twenty years, Woolman builds a theory of experimental constitutionalism keyed to South African conditions and to post-apartheid South Africa's normative commitments to dignity, equality and liberty. The result is a provocative description of what the Constitutional Court is actually doing, as well as a call for the Court (and for South Africa as a whole) to do even more. Woolman's book is an invitation to reflect, to dispute, and to contribute to the creation of a rule of law that is, as he passionately urges it should be, open and participatory and humane.

I found his engagement with the nature of the human self particularly intriguing and novel. I am not certain that he has demonstrated that what he calls "outré" notions of freedom are simply fallacious, but I do feel he effectively shows that a great deal of what we are is determined, pre-set, and that the core of what we can actually do in life is to work with what we've been given. That proposition of neuroscience, or psychology, or philosophy, turns out to have significant constitutional implications. If we are not completely free, then seeking complete freedom makes little sense, and so resting constitutional theory on the primacy of absolute freedom also is unsound. That's an argument that might be taken a long and unfortunate way, into true departure from democratic liberty. But that isn't Woolman's point at all. He argues, instead, that what we know about ourselves is that we are large and contain multitudes (as Whitman said), and that what we should seek is to enable each of us to "flourish." Flourishing - becoming what we can make of ourselves - in turn requires liberty (as well as, importantly, "rough equality"), because without liberty options are shut down and the chance of discovering how to make the best of ourselves is diminished. He does not believe in free will, but he certainly believes in a free society.

How, concretely, should South African constitutional law seek to foster human flourishing? A crucial element of Woolman's answer is the idea that constitutional law that fosters flourishing should not be made from on high but through consultation and experimentation over time. He envisions a process of constitutional governance in which constitutional mandates are given shape not by elaborate prescription from above but rather by a guided process of experimentation involving the people who

must implement the constitution “on the ground” and taking into account the insights of the many different groups concerned with the matter, including government officials, public interest groups, and those who stand to gain or lose or both from the decision.

In framing this argument, Woolman fully acknowledges his debt to other theorists, notably the experimental governance writers in the United States. But he takes these ideas in his own distinctive directions. Experimentalism makes a new sort of sense if people are the sorts of tentative, complex creatures Woolman has described. At the same time, experimentalism by itself sounds anomic; Woolman insists on normative constraints to the course of the constitution’s experiments. He also makes the case that many parts of the South African constitution can be understood as designed to promote constitutional development of this sort. I think he is on very firm ground in arguing that many important Constitutional Court decisions embody the Court’s efforts to develop a body of experimental, participatory law as a response to the extraordinarily vexed social issues South Africa faces; in this respect, the book can well be described as a theory of the Constitutional Court’s most innovative work.

This book is illuminating about the nature of human beings, the current state of South African law (which Woolman knows comprehensively), and the shape of the project of constitutional governance, in South Africa and for the world. Perhaps it’s not surprising that a book of such scope, which explores and elucidates its ideas from many angles, may also be somewhat overlong. Similarly, the book’s passionate arguments, as penetrating as they are, sometimes leave important questions still to be fully answered – just how far, for example, should the old rights of individual autonomy be abridged when doing so is arguably necessary for broader flourishing? I suspect Woolman would accept these critiques, and that he would respond that there are, indeed, many questions still to be answered in light of his overall approach, and that the very point of his approach is to shape the way we go about addressing these issues over the years to come. It seems clear to me, in any event, that this book provides an original, enlightening and important part of the answer.

Sincerely,

Stephen J. Ellmann  
Professor of Law