



Glossary (Critical Concepts)

Bewitchment of Language – against which Wittgenstein warns us, is our widely shared belief that we generally first form theories (in the form of language, or other symbols) and then test these theories against experience. In fact, regular successful action comes first, and has priority and primacy of place.

Bundle Theory – Every person is *no more than* a series of different or discrete states, events, thoughts, and sensations – unified through memories – and tied up, as David Hume and Derek Parfit have argued, like a ‘bundle of string’. Thus, the person addressed as Stu on Monday – or time 1 – is not the same person addressed as Stu on Tuesday – or time 2. Bundle theorists deny the existence of a unitary self over time.

Brief Tour of the Brain – (Gleaned from an array of sources, but primarily, VS Ramachandram *The Tell-Tale Brain: A Neuroscientist's Quest for What Makes Us Human* (2011). See also H Gray *Gray's Anatomy* (1862)(A childhood gift from my Uncle Harry); KS Saladin *Anatomy & Physiology: The Unity of Form and Function* (2007); S Greenfield *Brain Story* (2000) and, yes, *Wikipedia*). The primary purpose of this tour is to demonstrate the physiological basis for the general claim of global neuronal workspace theory that specific conscious experiences arise as a result of the interaction between neurological components widely distributed across the brain (and the body) and not, as Descartes (with his pineal gland theory of the mind/body connection) and many others assumed, from a singular location (with a homunculus (a little ‘me’) pulling the strings.) Ramachandram writes: ‘The brain is made up of about 100 billion nerves cells or neurons Neurons ‘talk’ to each other through threadlike structures that alternately resemble dense, twiggy thickets (dendrites) and long, sinuous transmission cables (axons). Each neuron makes from 1,000 to 10,000 contacts with other neurons. These points of contact, called synapses, are where information gets shared between neurons. Each synapse can be excitatory or inhibitory, *and* at any given moment can be on or off. With all these permutations, the number of brain states is staggeringly vast; in fact, it exceeds the number of *known* particles in the known universe. [Author's note: it's worth acknowledging that we currently only understand 5% of the matter in our universe (of which we currently aware).] ... Fortunately, underlying all this ... complexity there is a basic plan of organization that's easy to understand. Neurons are connected into networks that can process information. The

brain's many dozens of structures are ultimately all purpose-built networks of neurons, and often have elegant internal organization. Each of these structures perform discrete (though not always easy to decipher) cognitive or physiological functions. Each structure makes patterned connections with other brain structures, thus forming circuits. Circuits pass information back and forth, ... in repeating loops, and allow ... structures [spread throughout the brain] to create sophisticated perceptions, thoughts, [memories], and behaviours [even as these structures and networks of structures engage in tasks that are primarily unconscious and, in the main, inaccessible to conscious awareness.] Ramachandram (supra) at 14–15, and more generally, 14–23.

- *Emotions appear to arise from, but are not exhausted by, the interaction of the amygdala* (limbic system component (located in an archaic part of the midbrain)) exercises critical role in processing of emotions and memories and receives sensory system information; (and you wonder why certain songs or smells trigger both memories and emotions? Christopher Cross' 'Sailing' elicits fond memories of my Uncle Harry taking my brother David and I to play pitch and putt in Cresskill, New Jersey almost every day over a two week period almost 40 year years ago (at exactly the same time as mother was hospitalized for ulcerative colitis; the smell of yeast and sugar in a passage adjacent to Fournos' Bakery in Rosebank, Johannesburg reminds of wandering the streets of Paris, largely alone, when I was in college, 30 years ago)); *temporal lobes* ((located near the midbrain) engage in higher perceptual functions – from visual and auditory processing, creation of visual and new memories and language comprehension); *superior temporal sulcus* ((found within the temporal lobe) plays role in joint multiple person attention to objects that also enables individual to gage emotions of others); *parietal lobe* (left and right lobes located near top and rear part of brain) aggregates multiple forms of sensory perception and bodily functions to generate a rich sense of the corporeal self (destruction of the right lobes may lead to distortions in body image – false limbs, denial that parts of a body belong to the individual, while injury to the left lobe may impair the ability to engage in abstract thought or to conjure up or understand metaphors)); *insula cortex* ((part of cerebral cortex located at intersection of temporal, frontal and parietal lobes) regulates emotions, such as disgust (and is linked to a range of psychopathologies), at the same time as it plays a role in general bodily homeostasis and fine motor coordination).
- *Consciousness, higher cognitive processes and other cognitive processes rely upon*
 - cerebral cortex (convoluted (folded) structure split into right hemisphere and left hemisphere) plays role in virtually all higher cognitive level functions – from consciousness to memory to attention to language to thought to awareness)(only dolphins and primates possess its advanced convoluted structure);
 - cerebellum (responsible for calibration of gross motor co-ordination and some supervised learning, as opposed to reinforced learning or unsupervised learning (a substantial structure, almost independent in appearance) located at the very base of the brain below the far larger cerebral cortex and surrounding the brain stem);

- thalamus (relays sensory inputs from the body to more sophisticated parts of the brain for analysis (located, appropriately, atop the brain stem));
- basal ganglia (responsible for control of automatic movements related to or subject to 'volitional alteration' (located, likewise, atop the brain stem (where body's nervous system connects with the brain));
- temporal lobe (engages in higher perceptual function (found near centre of the brain));
- occipital lobe (undertakes visual processing (found near the back of the brain));
- parietal lobe (aggregates multiple forms of sensory perception and bodily functions to generate a rich sense of the corporeal self and the physical environment within which the corporeal self is located, and also contains the left angular gyrus and right angular gyrus that are responsible for higher order mathematics, abstraction, language and orchestrated skill movements (found between occipital lobe, parietal lobe and temporal lobe in middle to back half of brain);
- frontal lobe (responsible for simple motor commands, mid-to-long term planning, and working memory (lobe located, not surprisingly, in front of brain)
- prefrontal lobe (critical structure that appears to shape our individual personality (located adjacent to frontal lobe))
- *language use requires participation of* (a) Wernicke's area (one part of cerebral cortex required for speech); (b) Broca's area (part of posterior inferior frontal gyrus required for speech); (c) inferior parietal lobe (important for tool use along with language, mathematical calculations and self-perception of body); (d) temporal lobe (see above); (e) superior parietal lobe; (f) anterior cingulate cortex (located in the rear of the cerebral cortex) while it plays a role in a broad array of autonomic functions, including heart rate and blood pressure, its more fascinating functions may turn on the large number of spindle cells present (found only in other higher primates (eg, gorillas), whales, dolphins, and porpoises, and curiously, elephants) that enable human beings to engage in complex problem solving, to obtain the state of conscious awareness, to experience heightened, conscious forms of emotion, to undertake error recognition, and to reflect pain recognition through verbal expression).
- *mirror neurons* – neurons (located in the frontal lobe) whose genius may have only been truly realized within the past 75,000 years, enable human beings to undertake a series of thought processes that make our most sophisticated actions, and civilization, possible: (1) they enable us to imitate the behaviour of others and thus learn a host of complicated tasks for which we are NOT innately hard-wired; (2) each mirror neuron appears to correlate with the development of each step of learning/indoctrination into a social/cultural/cognitive practice; (3) more astonishing, however, is that mirror neurons not only fire when we learn or replicate the actions of other human beings: they fire in (generally accurate) anticipation of the behaviour of other human beings (the easier the task the more accurate the anticipation); (4) the presence and the activity of mirror neurons answers an age old philosophical conundrum – the problem of other minds; (5) mirror neurons enable us to model the cognitive/thought processes of other human

beings and predict what they are about to do; (6) while the process by which mirror neuron firings are read by higher brain structures is far from clear, as Ramachandram notes, human beings go far beyond a monkey's modelling: 'The same neuron is firing in my brain as would be firing if I were reaching out for a banana; so the other monkey must be intending to reach for that banana now.' Ramachandram (supra) at 120 – 121; (7) our sophisticated mirror neurons, when connected to an array of higher echelon brain structures and networks, enable us to engage in far more sophisticated analyses of the complex interpretations of others; (8) think for a moment how a grandmaster in chess is able to play 30 opponents simultaneously, and possesses sufficient capacity to read and to predict the complex intentions of others and defeat all 30 opponents; (9) this ability to model the thoughts and minds of others makes human beings capable of empathy for others (we literally 'feel and understand their pain'), as well as more Machiavellian behaviour that allows us to outwit and trick our competitors; (10) the capacity of mirror neuronal firing, to be read by other brain structures and networks, in order to predict or to anticipate the most complex actions of both individuals and entire communities of human beings should put paid to the 'problem of other minds'; (11) we are built to know what other persons know, what they experience, and what they will do.

All of the above activities and cognitive capacities, and their correlated neuronal and structural networks, rely upon such core structures as

- the spinal cord (a thick bundle of nerve fibers running from the brain down to the base of the spine that transmits a continuous – predominantly unconscious – stream of messages back and forth between the brain and the rest of our body);
- brain stem (terminal point of spinal cord in the brain, no longer sheathed by bony vertebrae, made up of the following three parts);
- medulla oblongata (generally regulates breathing, heart rate blood pressure and other autonomic bodily functions);
- midbrain (controls basic bodily functions such as breathing and blood pressure);
- pons (relays signals from forebrain to the cerebellum, and in conjunction with nuclei at its base plays a critical role in such non-conscious activities as respiration, swallowing, hearing, equilibrium, taste, eye movement, facial expressions, facial sensation, sleep, bladder control, and posture.)

Centre of Narrative Gravity – Dennett's description of a disaggregated individual (made up of many selves) in which an almost infinite number of variety of brain-based dispositional states, capacities, cultural endowments and learned behaviour dispersed over and coordinated by massive range of neural networks and brain structures that overlap, and cohere, in a single corporeal entity that we call 'me', the individual, but where there is no single seat of consciousness or selfhood. It cashes out in this work in terms of theories of consciousness, free will, social theory, trial and error, democracy and experimental governance.

Choice Architecture – Choice architects – a neologism coined by a number of behavioural economists, social psychologists and legal theorists – acknowledge that our existing forms of life often constitute large playing fields against which experiments in life are played out. They contend, however, that we can, quite consciously, construct social experiments that (act as feedback mechanisms that) elicit significant amounts of information about forms of behaviour that no longer work, or new forms of behaviour that work ‘better’. These new default positions, as identified by the architects, enable us to create environments across a wide array of social practices that nudge individuals and groups toward making decisions that lead, as Richard Thaler and Cass Sunstein have written, to greater health and happiness.

Classical Liberalism – Political philosophy committed to the maximum autonomy of the individual and the related ideal of limited government. A classical liberal state will be committed to negative liberty – the freedom from interference by the state and non-state actors with an individual’s preferred mode of living and activity. Classical liberals, such as FA Hayek, are generally committed to the virtues of fairly unfettered free markets and the night watchman state. They support limited degrees of social welfare in order to make markets more efficient, and individuals and groups in better position to pursue their preferred ends. For example, while Adam Smith may have been a proponent of free markets, he understood that certain predicate conditions must obtain – trust, dignity, tolerance, rough equality of resources, mutual respect – to enable market-based polities to create a just and fair society and for their markets to operate efficiently.

Critique (by Charles Taylor) of Classical Liberalism – Most forms of liberalism often claim to be neutral but in fact require a significant degree of interference in individual and group choice based upon a majority’s preferred notion of the good. The interference required to maintain order in the night watchman state of classical liberalism will range from traffic laws to decisions about whether children ought to receive medical treatment irrespective of their parents’ religious beliefs. Moreover, others – call them experts – may often have a better understanding of our own good than we do.

Cognitive Biases – In *Infotopia* and *Nudge*, Cass Sunstein develops a critique of deliberative politics as a constructive form of information aggregation and decision-making that identified four basic forms of information aggregation and two deleterious influences on the manner in which we arrive at collective decisions. Sunstein’s four basic forms of contemporary information pooling are: (1) statistical averages; (2) deliberation; (3) price or market systems; (4) Internet wikis. Pace the dominant pre-disposition of constitutional scholars, Sunstein’s writings suggest that deliberation may well be the least useful of the four. He 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. 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.' Eliot Fishman, Michael Fisher and I, following Heller and Eisenberg, have identified similar kinds of failures in deliberation when it comes to patent thickets or anti-commons effects in complex biopharmaceutical technologies. Perfectly 'rational' actors – the patent holders – fail to deliver well-designed novel, commercially viable products to downstream markets due to: (1) high transaction costs, (2) the heterogeneous interests of rights holders, (3) cognitive biases of license holders and (4) attributive biases of the participants. Not surprisingly, ordinary owners of upstream biomedical or pharmaceutical research patents tend, like human beings generally, to overvalue their own contributions and intellectual property.

Communitarianism – Political philosophy that emphasizes the need to balance, and in many instances to subordinate, individual interests to the interests of the community to as a whole. Communitarians tend to argue that the manifold scripts of individual lives are largely shaped by the polity they inhabit. Given our various innate dispositions and the many communities into which we born, it's difficult to credit this elision between the state and all other publics that we inhabit and from which we draw meaning. Contemporary communitarianism in modern political philosophy can be understood as a response to John Rawls' *A Theory of Justice*. However, the communitarian critique of Rawls as an epistemological and political atomist has largely been rebutted by social democrats who (a) absorb the critique by noting that the many and variable communities into which we are born make us (the radically heterogeneous creatures) we are (even in the most repressive states) and (b) reject the contention that the nation-state can be the source of value for most individuals living in heterogeneous societies because most of us draw our deepest meaning from other sources of the self.

Communitarian Shuffle – Communitarians (a) tend to privilege the political community over other communities, and underplay existing and historical conflicts between the various communities that source the self, or (b) entirely elide the difference between the polity and other communities that make up a society. In *Loyalty*, George Fletcher writes: 'In a patriotic society, where all individuals share a common past and purpose, each can identify with others and find in them an equal partner in a common cause. The rooting of the self in a culture of loyalty enables individuals to grasp the humanity of their fellow citizens and to treat them as bearers of equal rights.' Fletcher and others prone to this kind of argument move back and forth between discussions about society and polity in a manner that obscures the fact that the two are not co-extensive. Polities contain multiple societies, sub-publics and a variety cultures. Cultures, sub-publics and societies are often rooted in a significant number of different states. The communitarian privileging of the state over other communities within the state – or in some cases conflating the state and those communities – has significant repercussions for individual and group flourishing, as well as the construction of the self. Once shared pasts, united purposes and common causes are assumed, the state is further free to assume that important differences between its citizens and constituent communities (or larger transnational communities) of which they are a part do not exist. Once pluralism is no

longer a concern, there is no reason for individual and group flourishing to be. The state is then truly free to impose a more homogenous and standardized way of life.

Consciousness – Consciousness, properly understood, can be explained in a number of different but co-extensive ways. It can be described as a function of the neuromuscular system, that is: (1) primarily unconscious, (2) distributed throughout the brain and the body, (3) engaged in multiple parallel processes, and (4) of enormous, highly under-utilized capacity. It would appear to have three primary purposes: (1) durable and explicit information maintenance; (2) novel combinations of operations; and (3) intentional behaviour. Put slightly differently, consciousness operates 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. Its evolutionary purpose has been to equip us for surprises and enable us to form complex simulated responses to the environment before we actually try them out in the real world. In short, it's the most powerful survival mechanism for sentient creatures on Earth. Several conditions, and roughly five main categories of neural systems, must obtain for consciousness to arise: (1) perceptual circuits that inform us about the present state of the environment; (2) motor circuits that allow the preparation and controlled execution of actions; (3) long-term memory-circuits that can reinstate past workspace states; (4) evaluation circuits that attribute [percepts] a valence in relation to previous experience; and (5) attentional or top-down circuits that selectively gate the focus of interest. Consciousness possesses the following striking similarities to constitutional democracies: both are densely populated communities with millions of complex, heterogeneous selves constantly experimenting, attempting to divine through action and reflection, what works best for majority of constituents.

Conservative Flourishing and Traditional Forms of Life – Commitments in the South African Constitution to religious freedom, cultural and linguistic community rights, property rights, associational freedom and even freedom of trade, occupation and profession ensure a relatively high degree of private ordering (largely, but not entirely) beyond the reach of the state, and the pluralism to which these rights are committed does not generally lead to greater heterogeneity, new experiments in living and more egalitarian outcomes. (But see Revolutionary Flourishing and Radical Reformation.) The conservative dimension of this work's politics reflects an initial understanding of the self and the social that acknowledges that human flourishing largely consists of doing that which we are already doing – only better. It requires the reinforcement or the creation of social space that enables the group practices upon which individual meaning is contingent to continue. A conservative politics recognizes the extent to which 'meaning makes us'.

Densely Populated Me – Michael Walzer, in a description of the self of a piece with Dennett's 'Centre of Narrative Gravity', writes that the self that we tend to identify with the corporeal individual possesses 'no linearity, ... and no hierarchy. The order of the self is better imagined as a thickly populated circle, with *me* in the centre surrounded by my self-critics who stand at different temporal and spatial removes (but don't necessarily stand still). Insofar as I am receptive to criticism, ready for (a little) castigation, I try to draw some of the critics closer,

so that I am more immediately aware of their criticism; or I simply incorporate them, so that I become a worried self. I am like a newly elected president, summoning advisors, forming a cabinet. Though he is commander-in-chief, his choices are quite limited, his freedom qualified; the political world is full of givens; it has a history that pre-dates his electoral triumph. My inner world is full of givens, too, culturally bestowed or socially imposed – I manoeuvre among them insofar as their plurality allows for manoeuvring. My larger self, my worried self, is constituted and self-constituted by the sum of them all. I am the whole circle and also its embattled centre.’ Of course, in this work’s account, it’s not clear that the embattle centre does anything – or can do anything like make choices. It’s actually a metaphor for how our competing narratives overlap, and rub up against each other and produce the friction that so often ushers in change. Again, see Dennett’s Centre of Narrative Gravity above: a ‘Centre of Narrative Gravity’ has no need for the embattled centre, for there is none, even if we have a well-developed sense of continuity, and fairly definitive physiological/neurological explanation for this experience.

Destabilization Rights – In their thinnest form, these ‘rights’ provide remedies for stakeholders who seek accountability from either a government agency that influences private ordering or a social institution that exercises significant public power. Such destabilization rights offer two distinct forms of relief to the stakeholders. First, they require those persons in power to account for their decisions on the basis of evidence and reasonable arguments. Second, they bestow upon stakeholders rights of participation in the processes meant to address the problems that concern them. For more robust forms of destabilization rights, see Roberto Unger’s rotating capital fund and Michael Bishop’s notion of remedial equilibration (as recast by myself).

Development Theory and the Capabilities Approach – This political theoretical framework rests upon several empirical normative claims. As an empirical matter, Amartya Sen’s theory of ‘development as freedom’: (a) rejects the deontological/Rawlsian/Kantian constructivist contention that a panoply of political and civil goods ought to be lexically prior to redistributivist/utilitarian claims; (b) demonstrates that people within societies and across polities will value basic immaterial and material goods differently – ie, a non-ambulatory person, making R200,000 per annum, will value health entitlements and access to the physical environment more than an ambulatory person in good health, making R200,000 per annum, who, conversely, wishes to regularly exercise her right to assemble, demonstrate and protest; (c) proves that various cultural, social, political and economic arrangements that make women or other members of a society second class citizens can be quantitatively identified and then altered in order to establish more egalitarian arrangements; (d) establishes, following modern social choice theory, that preferences (i) are quite adaptive, (ii) often turn the exigencies of existence, and (iii) tend to be most adaptive for individuals from historically disadvantaged or marginalized groups; (e) argues that genuine substantive equality of opportunity must turn on the provision of baskets of immaterial and material goods tailored to each individual – ie, pregnant women ought to receive nutritional packages that cater for the unique demands of gestation and should be entitled to more, by way of nutrition, than non-pregnant woman or

men; and (f) concludes that these sometimes idiosyncratic baskets of goods are necessary for individuals to pursue lives worth valuing and that the development of each individual in this manner is the most effective means for development of a country as a whole. The prescriptive claims track the descriptive propositions above: (1) the freedom to achieve well-being, through development, is of primary moral importance; and (2) the freedom to achieve well-being must reflect *real* opportunities for individuals to pursue lives that they have reason to value. The avatar of development theory, and ultimately the capabilities approach, Amartya Sen, remains somewhat agnostic as to which ‘capabilities’ will enable ‘most’ individuals to flourish. Martha Nussbaum, a long-time collaborator, contends that a decalogue of rather broadly defined capabilities are the preconditions for development, well-being and flourishing. Nussbaum contends that some basic entitlements have a universal appeal and that the machinery of distribution in a modern nation state requires clear desiderata of material and immaterial goods for development and the capabilities approach to get off the ground.

Endless True Beliefs (as opposed to Incommensurable Conceptual Schemes) – Heterogeneity does not, as Donald Davidson notes, entail incommensurable conceptual schemes that preclude translation and general agreement about most truth propositions (whether scientific or ethical or constitutional.) The kind of pragmatism adopted in these pages need not be held hostage by a Fishian anti-foundationalism. To understand why this is so, it is necessary to take a step back and consider the theory of interpretation and truth upon which this book is grounded. On this account, ‘snow is ‘white’ because snow is white in the world – in English, in Sepedi, in German or in Zulu – and not because snow is ‘white’ relative to a particular linguistic set of conventions. That does not mean that our statements about the world cannot be false. As Donald Davidson powerfully puts the point: ‘But of course it cannot be assumed that speakers never have false beliefs. Error is what gives belief its point. We can, however, take it as given that *most* beliefs are correct. The reason for this is that a belief is identified by its location in a pattern of beliefs: it is this pattern that determines the subject matter of the belief, what the belief is about. Before some object in, or aspect of, the world can become part of the subject matter of a belief (true or false) there must be *endless true beliefs* about the subject matter.’ ‘Endless true beliefs’. It is this notion of ‘endless true beliefs’ that allows us – today – to engage texts several millennia old, or a variety of 21st century South African texts in Zulu, Sepedi, Afrikaans, Xhosa and English, or bodies of constitutional law in a variety of polities, say Germany, India and Canada. Put somewhat differently, Davidson writes: ‘It isn’t that any one belief necessarily destroys our ability to identify further beliefs, but the intelligibility of such identifications must depend on a background of largely unmentioned and unquestioned true beliefs ... What makes interpretation possible then is the fact that we can dismiss a priori the chance of massive error. A theory of interpretation cannot be correct that makes a man assent to very many false propositions: it must generally be the case that a sentence is true when a speaker holds it to be true. But of course the speaker may be wrong; and so may the interpreter. On this account of knowledge, interpretation and truth, we must recognize that most of our fellow human beings are generally correct about most of the statements that they make about the world. This working assumption actually allows us to sharpen areas of disagreement – so that we might later arrive at more precise propositions about the truth.’

Problems arise – in constitutional law, as in any other domain of thought – primarily when we refuse to state our presuppositions or our conclusions clearly (when ‘language goes on holiday’) and when those who make the law or control various avenues of expression abuse their positions of power. Again: most beliefs that (sane) human beings hold *are* true, and distortions primarily occur at the margins. Were it otherwise, conversation and translation that occurs every day would be impossible. We would find it similarly impossible to navigate our way through a world in we were constantly misunderstood – or not understood at all. This proposition does not merely hold for homogeneous societies. In the radically heterogeneous and stratified society in which I live, South Africa, I can move between townships such as Alexandra to wealthy peri-urban areas in nearby Sandton to my extremely diverse setting at the University of the Witwatersrand without experiencing misunderstanding. The moral salience of everyday life here in Johannesburg – where every exchange (no matter how small) carries a moral charge – has taught me that most misunderstandings are wilful (and flow from distortions of power.)

Experimental Constitutionalism (or Experimental Governance) – Political or constitutional theory reflects an attempt to ground the answers to constitutional (and mundane political) questions in empirical findings, in best practices, judicial doctrines, and in political institutional design. These findings, practices, doctrines and institutions are arrived at through trial and error, a shared commitment to forward and lateral looking analysis of solutions (arrived at by other individuals and communities) that serve our current ends best, reflexivity with respect to those ends themselves, and flattened hierarchies with respect to persons or associations who engage in polycentric decision-making. (See *Shared Constitutional Interpretation, Participatory Bubbles, Feedback Mechanisms*)

Flourishing – a neo-Aristotelian concept that, as expounded upon by Martha Nussbaum and Amartya Sen, emphasizes the radically heterogeneous and reflexive nature of what it means to ‘pursue lives worth valuing’. Not only will different groups and different individuals within a given polity possess different conceptions of the good, individuals themselves may pursue different conceptions of the good from time to time. Rather than concentrate on which conception of the good is to be preferred, flourishing (or development theory or the capabilities approach) envisages a political order that creates the space and that provides the material means for the pursuit of different lives worth valuing. In terms of contemporary ethical thought, Nussbaum’s emphasis on flourishing tends to emphasize the relational character of choices, and the use of standards (not rules) which individuals employ, in concert with one another, to work out the best arrangement for all concerned. (See also *Development Theory* and the *Capabilities Approach* and *Perceptive Equilibrium*.)

Feedback Mechanisms – Experiments, Consciousness, Experimental Constitutionalism – The human brain is an extraordinarily powerful problem-solving mechanism. Its uniqueness, as compared to the brains of other forms of sentient life, adheres in its ability to address apparently insurmountable obstacles through complex neurological feedback mechanisms that enhance our ability to engage in abstract, future-oriented thought and action-predictive behaviour. *Experiments* – and the feedback we receive – improve our chances at

arriving at better answers over time to questions – factual and normative – that require a more or less immediate solution. *Consciousness* functions as a feedback mechanism in two inextricably related ways. Conscious reports create a record (though not the only available record) of our responses to the world around us: the construction of our successes as well as our failures. A record of such errors (memory) enables us to respond differently, the next time that we are faced with an appropriate test of our wiles. 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 notes that the defining features of stimuli which engage conscious attention are: (1) variance to a significant degree from current expectations; or (2) congruence 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 that do not require the complex feedback mechanisms that consciousness offers. *Consciousness* is the result of competing, and yet co-operative, feedback mechanisms meant to address and to solve various problems with which we are confronted at any given moment. *Extant feedback mechanisms* – individual dispositional states and social practices – 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. *Experimental constitutionalism* dovetails with a very modest, naturalized notion of flourishing and experimental social theory, because all three accounts (1) take the radical givenness of existing constitutive attachments seriously; (2) recognize the boundedness of individual and collective rationality; and (3) describe various kinds of feedback mechanisms that allow for error correction. At the level of the social, the more *Millian ‘experiments in living’* we undertake, the more likely we are to find a way of being in the world that better ‘fits’ with our preferences (something we often know only after we have tried out a new way of doing things). At the level of the state, it enables more citizens to see what systems work and what systems doesn’t, and allows us to alter our basic so as to enhance that fit from time to time.

Global Neuronal Workspaces and Global Workspace Theory – Baars’ global neuronal workspace theory and its description of the actual architecture of the brain, along with Dennett’s characterization of the self as a centre of narrative gravity (with its emphasis on how different selves co-exist within a single corporeal individual), explain how consciousness and our multiple selves emerge. They work together to displace the Cartesian view of the self as a fully integrated, rational, freely-willed chooser of its ends. However, the depiction of a centre of narrative gravity that underpins the densely populated ‘me’ and a materialist account of consciousness are offered not merely to rebut the folk psychology of freedom. These conceptual frameworks also explain how constructive change (and thus the subjective experience of freedom) is possible in a determined and conditioned self. Baars generally employs the metaphor of politics and coalitions, rather than a Cartesian theatre, though a small part of the stage metaphor for consciously and non-consciously initiated behaviour creeps in: ‘[T]he global workspace resembles more a deliberative body than a theatre audience. Each expert has a certain degree of ‘influence’, and by forming coalitions with other experts can contribute to deciding which issues receive immediate attention and which

are 'sent back to the committee'. Most of the work of the deliberative body is done 'off-stage' (ie, non-consciously). Only matters of greatest relevance 'in the moment' gain access to consciousness.' Consciousness is not a particular thing or even a particular kind of feeling, but rather the architecture that enables discrete and disparate neurological processes to solve a host of pressing, medium-term and long-term problems. Again: Consciousness generally comes into play when stimuli are assessed to be novel, threatening or momentarily relevant to active schemas or intentions. That holds for our social life and our political undertakings as well – eg, a first date, or a financial crisis. Dehance and Naccache's global neuronal workspace theory holds that: '[B]esides specialized processors, the architecture of the human brain ... comprises a distributed neural system or 'workspace' with long-distance connectivity that can potentially interconnect multiple specialized brain areas in a co-ordinated though variable manner. Through the workspace, modular systems that do not directly exchange information in an automatic mode can nevertheless gain access to each other's content. The global workspace thus provides a common 'communication protocol' through which a particularly large potential for the combination of multiple input, output, and internal systems becomes available.' According to Dehance and Naccache's global workspace theory, the purpose of consciousness, upon reflection, cashes out as follows: "The evolutionary advantages that this system confers to the organism may be related to the increased independence it affords. The more an organism can rely on mental simulation and internal evaluation to select a course of action, instead of acting out in the open world, the lower are risks and the expenditure of energy. By allowing more sources of knowledge to bear on this internal decision process, the neural workspace may represent an additional step in a general trend towards increasing internalization of representations in the course of evolution, whose main advantage is the freeing of the organism from its immediate environment.'

Heterogeneity of the Good – see Charles Larmore's *Patterns of Moral Complexity* – no single ethical system exhausts justifiable responses to every moral dilemma and secures primacy of place amongst ethical systems This view, well-grounded in both neuroscience and experimental philosophy, rejects: (1) the Rawlsian deontological grounded claim of the existence of certain primary goods; (2) Singer's radical utilitarian framework, or any utilitarian calculus, as sole measure of justice; (3) Sandel's communitarian mapping of the political realm on to the radically heterogeneous social realm, or the elision between a majority's comprehensive vision of the good and a subpublic's comprehensive vision of the good.

Intuition Pumps – Intuition pumps (and framing devices) are rhetorical strategies, commonly used in philosophy, that are designed by their creators to draw the reader's attention to certain salient features of a philosophical problem. By emphasizing critical features of a problem, often isolating them from other features, the theorist hopes to make it easier for the reader to see the problem (as she sees it) and to appreciate the novel explanation proposed. My views on the self and on the social are intuition pumps in the sense that various characterizations of the self and of the social emphasize certain views about 'trial and error' and 'feedback mechanisms' that hold true not only for the self and the social, but for the political and the constitutional.

Is/Ought Distinction or Fact/Value Distinction – David Hume is often credited with the ‘is/ought’ or the ‘fact/value’ distinction, and the counsel that flows from it. However, as a naturalist, a materialist and an ethicist, Hume intended something far more subtle in arriving at his distinction between what is and what ought to be. First, reason grounds morality. Second, when Hume writes that reason ‘is and only ought to be the slave of the passions’, he certainly meant ‘passions’ to embrace what he and his friends Adam Smith and Adam Ferguson meant by ‘moral sentiments’. As Patricia Churchland notes, ‘moral behaviour’, according to the Scottish Enlightenment, while informed by ‘reflection’, was rooted in ‘deep’, ‘widespread’, ‘enduring’ and conventional understandings of human relations. What concerned Hume most was not the cleavage between is and ought, but ‘*simple sloppy inferences*’ that led exponents of a particular position about what *is* to a less than desirable position about what ought to be. The thin account of Hume’s distinction ultimately came to be known, as a result of GE Moore’s writings, as the ‘naturalistic fallacy’. Moore claimed that a naturalistic fallacy is committed whenever a philosopher attempts to prove an ethical or political claim through an appeal to a definition of the term ‘good’ that relies in turn on the presence of a natural property or a set of natural properties. The ‘good’, on Moore’s intuitionist account, is a simple, non-natural, ineffable property. ‘Natural’, by contrast, means something that can be studied within a scientific discipline. Prior places the following gloss on Moore’s definition: ‘The naturalistic fallacy [rests] on the [implicit but unwarranted] assumption that because some quality or combination of qualities invariably and necessarily accompanies the quality of goodness ... this quality or combination of qualities is identical with goodness. ... The naturalistic fallacy is the assumption that because the words ‘good’ and, say, ‘pleasant’ necessarily describe the same objects, they must attribute the same quality to them.’ Contemporary exasperation with the is/ought (fact/value) distinction is crisply captured by Kwame Anthony Appiah: ‘The universes inhabited by the sophisticated realist and anti-realist, the sophisticated cognitivist and non-cognitivist, are the same universe; and what most of those thinkers want to say about first order ethics is the same.’ Elsewhere Appiah writes: ‘There is one world.’ Forays into every subject traversed in this work are imbued with the same sentiment. We live in one world, and every day we learn something new about the antics of the objects that populate it, including ourselves, whether we call them facts or values.

Libertarian Paternalism – Political disposition (not a theory), articulated by Richard Thaler and Cass Sunstein, that disputes the (false) assumption almost all people, almost all of the time, make choices that are in their best interest. Instead, their thesis lays the groundwork for theories of choice architecture and social experimentation in which we discover how to nudge people toward making better decisions for themselves, as individuals, and for society as a whole.

Meaningful Engagement – The promise of such a process is that each participant adopts a reflexive stance toward their own views and attempts ‘to make the interests of others their own, [and to recognize] the circumstances in which they should give moral priority to what is good for others or for the polity as a whole.’ Meaningful engagement *qua* participatory bubbles facilitate processes of institutional reform that proceed within the vocabulary and the norms

of the relevant institutions and communities, instead of via imposition by judicial authority. The reflexive stance of the bubbles' participants should both foster a deeper commitment to social movement based politics (and not mere court initiated change) and enhance individual and group aptitudes for experimentation and error-correction. The *Occupiers of 51 Olivia Road* Court's ingenuity at the outset of the hearing distinguished itself from its many socio-economic rights decision predecessors. Rather than impose a decision on the parties framed by *Grootboom*-based criteria, the Court ordered the residents and the City of Johannesburg to repair to the negotiating table in order to reach a settlement that would lead to a more optimal outcome for both sides. The parties did. Their settlement then became an order of the Court. In *Joe Slovo I*, Justice Ngcobo offered the following justification for meaningful engagement as an alternative dispute mechanism in constitutional matters: 'The requirement of engagement flows from the need to treat residents with respect and care for their dignity. ... It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns. ... The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. ... Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.' Political process reinforcement concerns were not originally what drove the Court into developing in this doctrine. The Constitutional Court has held that courts must be willing to articulate rather abstract, but still tangible, constitutional norms that enable less powerful stakeholders to have a meaningful role to play in a polycentric decision-making process. The Constitutional Court has, on numerous occasions now, set out a *very* general normative framework within which 'meaningful engagement' between conflicting parties can take place. The Court's commitment to meaningful engagement possesses three features that deserve closer attention. First, they may not (necessarily) be limited to the initial parties to the litigation. Other interested stakeholders – amici et al – may participate in the problem-solving process. The aim, again, is two-fold: greater elicitation of information; greater normative legitimacy of any decision ultimately taken. Second, the other salient feature of these participatory bubbles is that they may not remain within the domain of the courts. We can easily imagine greater community participation in hearings called by the South African Human Rights Commission, other Chapter 9 institutions, national or provincial legislatures, or school governing bodies in other social and political fora. The Constitutional Court has shown itself alive to the need for participatory bubbles when provincial legislatures take decisions that affect the lives of the denizens within their boundaries. South Africa, despite the limits imposed by what remains a largely one party dominant state, has the tools available to make meaningful engagement qua participatory bubbles the norm in norm-setting environments. Third, participatory bubbles lose their cohesion – and the pressure to produce better than zero-sum outcomes – if the court's fail to articulate the norms within which a preferred solution is meant to occur. If experimental constitutionalism is judged to be an attractive set of principles by which to establish constitutional norms (by widespread

public agreement) and to assess best practices (by inviting as many stakeholders as possible to design an optimal remedy for a specific social problem) then the jurisprudence of avoidance in the South African vernacular must be one of the first judicial doctrines to go. Several of the Constitutional Court's judgements in 2011 – including *Glenister* and *Blue Moonlight* – demonstrate the potential of a Constitutional Court that sets its horizons beyond a largely process-driven jurisprudence and alights upon something more substantial. These decisions model rational discourse (in a country sorely in need of it) by offering a thicker vision of the basic law that initiates discussion, engagement and action in other quarters of the republic. As Landiwe Mahlangu writes: '[Meaningful engagement] is less costly, in both financial and emotional terms, and can only result in improved collectivism to tackle issues as a country. ... It is preferable to settle all demarcation differences through open, frank, inclusive and transparent dialogue as opposed to the courts. ... [When] all parties commit to co-operation as opposed to conflict there tends to emerge a progressive outcome that takes our country forward.'

Minimalism vs Judicious Avoidance – Minimalism, properly understood is a constitutional predisposition (rather than a theory) first propounded by Cass Sunstein. It runs as follows: 'A minimalist court settles the case before it, but leaves many things undecided. It is alert to the existence of reasonable agreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. ... Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation and responsiveness. It allows for continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values.' However, Sunstein's minimalism only secures traction because it is parasitic upon a deep and widely shared set of norms and recognizes the necessity of a solid core. 'In American constitutional law at the turn of the (20th) century', he writes, 'a distinctive set of substantive ideals now form that core'. A close cousin to experimental constitutionalism, minimalism likewise eschews grand theorizing as necessary preconditions for a constitutional order. It goes on, in later iterations, to demote deliberation – given the propensity for cognitive biases (as well as unintended consequences) to undermine what there is to be learned from persistently putting our beliefs and values to the test. Unfortunately, the problem with Sunstein's initial articulation of minimalism was its propensity to be misunderstood. At least one justice of the South African Constitutional Court stated, in a public forum, that 'judicial avoidance' was and remains attractive for members of the Constitutional Court exactly because it does not require the eleven justices to possess a core of shared understandings. Whether Sunstein should be on the hook for such misapprehensions is neither here nor there. This much can be said. Reasoned disagreement can only take place when parties agree on the general terms of the debate. The Constitutional Court must, in terms of its institutional role, establish the contours of constitutional norms and thus the general framework for contestation. The Constitutional Court abdicates this institutional responsibility to model rational political discourse when it refuses to state, in a reasonably comprehensive manner, the reasons that ground its conclusions. The principle of (judicious)

avoidance was first articulated by the Constitutional Court in *Mblungu* as follows: '[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed.' On its face, this salutary rule seems unobjectionable. What is objectionable, even on the Court's own terms, is turning this salutary rule into a full-blown jurisprudence in which a court must never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' The *first objection* is that this early statement in *Mblungu* flatly contradicts the Court's later statement in *Mblungu* as to the nature of constitutional interpretation. The Constitutional Court in *Mblungu* avers that constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.' However, if a court refuses to say more than is necessary to decide a case on its facts, then one can hardly expect any meaningfully predictive principle to be drawn from the judgment. That leads to a *second objection*. The lack of precision and almost casuistic approach to constitutional norm setting means that it is difficult for any actor – another lower court, a government official or a private actor – to anticipate future forms of law or conduct that would or would not satisfy the basic law's general norms. If there is no rule of law to which a state actor or a private actor knows that she must conform her behaviour, then it would be surprising to find her attempting to conform her behaviour to some unarticulated and inchoate sense of a 'rule' that is consistent with the Constitutional Court's understanding of what the Final Constitution permits. (This problem continues to arise as a result of the Court's flirtation with the notion of subsidiarity.) A *third objection* restates the second objection as follows: the absence of rules of law undermines the ability of other branches of government to comply with the Bill of Rights. It places the court in the unnecessarily uncomfortable position of having to reject or to accept the government's positions in every case as if it were ruling *ab initio*. A *final objection* is that avoidance, as reflected in the third objection, undermines the integrity of the legal system. It is impossible to create a coherent jurisprudence without clearly identifying the norms that ground decisions.

Participatory Bubbles – The physical metaphor of bubbles is meant to convey three qualities of small-scale political processes. First, processes of participation and negotiation are a natural part of ongoing social interactions. They originate when challenges to a given institutional authority accumulate and finally come to a boil. Second, bubbles are meant to suggest limits on the scope of participation. Bubbles only enclose a small amount of space – both in terms of the issues raised and the number of actors involved. Third, bubbles are ephemeral. After satisfactory resolutions emerge from processes of participatory engagement, the *raison d'être* for the particular bubble ceases to exist. The bubble bursts. Participants can return to their daily lives. Still, various supervisory structures must often remain in place. We want to ensure that the experimental resolutions are, in fact, carried out. We want to learn as much as possible from the experiments – whether they work, and whether they alter our understanding of the norms that frame them. How else might bubbles relate to constitutional interpretation? Even if a party does *not* feel vindicated by the outcome, participatory bubbles leave a residue of (otherwise trapped) information or (previously tacit) knowledge elicited

from all parties and provide a sense of normative legitimacy that flows from the fact of the party having been heard.

Perceptive Equilibrium – According to Martha Nussbaum, the right (justice) and the good (ethics) are best served when we work back and forth between standards and the actual contours of the relationships that demand our engagement. Standards and principles are to be preferred to rules that dictate outcomes without careful reflection or the kind of perception borne of practice (wisdom). Even if we accept the priority of well-informed perception by persons ‘upon whom nothing is lost’, we must still acknowledge that somewhat thickly described norms are necessary to get a constitutional, or ethical, project off the ground. One example is Nussbaum’s Decalogue of capabilities. Another example is our own well-established Bill of Rights and the well-nigh two decades of jurisprudence that has grown up around it.

Politics of Equal Dignity vs Politics of Difference – A politics of equal dignity is predicated on the idea that each individual human being is equally worthy of respect. A politics of difference tends to revolve primarily around the claim that every group of people ought to have the right to maintain its own equally respected community. The first claim focuses on what is the same in all of us – that we all have lives and hopes and dreams, and that we should all be granted a *real* opportunity, and thus the means, to pursue them. The second claim focuses on a specific aspect of our identity, our membership in a group. According to this second demand, the body politic ought to nurture or to foster that particularity. The power of this second form of liberal politics springs largely from its involuntary character – the sense that we have no capacity to choose this aspect of our identity. It chooses us. One of the problems South Africa faces is that it is difficult, if not impossible, to accommodate both kinds of claim. As Charles Taylor notes, while ‘it makes sense to demand as a matter of right that we approach ... certain cultures with a presumption of their value ... it can’t make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.’

Principle of Interpretive Charity – Frank Michelman articulates this Davidsonian proposition as follows: ‘The aim is to learn. It is aggressively to learn what there is to be learnt from puzzles ... interlocutors pose to us, by *assuming* there is method in their madness and doing our best to ferret that out, using everything else we know or can guess (in part from their likeness and kinship to us) about where they are coming from.’ The principle is of a piece with the rejection of ‘conceptual schemes’ and the notion of ‘endless true beliefs’.

Radically Heterogeneous Selves – Change often occurs through the friction created by the various selves that ‘populate’ a single corporeal *radically heterogeneous* determined ‘me’. The multiple roles that we individuals have been conditioned to play make different demands upon us – they often pull us in dramatically different directions. A *radically heterogeneous society* (such as that of South Africa), populated by a *radically heterogeneous population of individuals*, can be an engine for *revolutionary change*.

Readiness Potential – change in the electrical activity of neural networks that occurs roughly 0.8 seconds before the subject’s conscious awareness of a decision to initiate an action.

Reflexivity – Reflexivity refers to certain kinds of relationships between cause and effect. First, a reflexive relationship is bidirectional. The cause and the effect – or the means and the ends – influence the shape the other takes over time. They are not static positions. In a reflexive domain, the action bends back on itself. What was once merely the goal may shift as the agent sees what works and what doesn’t. That is, the means, whether deemed successful or unsuccessful, should give the agent pause to consider whether other norms or goals are to be preferred. Or slightly differently, often as our means to address a problem change – with experience – so does our view of the end itself. Second, ethical, political and constitutional empiricism requires that we evaluate social norms and institutional arrangements against our practical experience instead of a priori norms or mere intuition; reflexivity demands that we be willing to examine and to put to the test, individually and collectively, our preferred ends and the means for achieving them. This dimension of experimentalism corresponds with the notion that, in a representative and participatory democracy, no ideas or policies should be regarded as above criticism or immune to change. It follows that social norms and associational arrangements ought to be altered in light of the success or the failure of various experiments in living. However, it’s naïve to think that any given decision procedure or a particular institution exists that determines what counts as success or failure in all domains of human action.

Remedial Equilibrium – This rights-limitations-remedies doctrine gets off the ground via Michael Walzer’s elegant distinctions (in *Spheres of Justice*) between differentiation and domination, and monopoly power and tyranny. This approach can assist us in developing a sliding scale of ‘interdependent and interrelated’ rights and remedies by which the rules that govern various non-state publics, communities or associations might be assessed when charges of discrimination are laid. A court order based upon remedial equilibration possesses a number of distinct virtues. Where differentiation rises to the level of unfair discrimination, remedial equilibration allows a court: (a) to acknowledge the constitutional infirmity of the conduct, (b) to appropriately remonstrate the association responsible for such conduct without necessarily eviscerating the power of the association to continue to determine its rules for membership, voice and exit, (c) to require the association, and where appropriate the state, to bear the pecuniary costs of the dismissal or expulsion, and (d) to assist the person harmed to secure employment or some other good (eg, marriage) in a more congenial environment and thereby ‘seek justice elsewhere’. Seeking justice elsewhere and remedial equilibrium are remedies that enable individuals, groups and states to find round holes for round souls, and square apertures for square characters. At the same time, remedial equilibrium enables individuals and groups to experiment with new forms of life, even as they look over their shoulders at what they have left behind. The more sub-publics we possess, the greater chance that individuals will be able to engage in ‘experiments in living’ that may enable them to flourish.

Revolutionary Flourishing and Radical Reformation – Commitments in our Constitution to socio-economic rights – to education, to housing, to a healthy environment, to food, to water, to adequate health care and to social security – have the potential to bring about *radical* change (even as one must acknowledge that they have as yet only been partially vindicated.) The radical dimension of this work's politics recognizes the vast inequalities in existing stocks of social and economic capital that sustain various stores of meaning in South Africa. We cannot commit ourselves to flourishing without acknowledging that all citizens must have roughly equal access to the kinds of capital needed to support practices that have been historically marginalized. The nation state is, as things stand, the preferred engine for the redistribution of those resources that will support such practices. If we tie our constitutional project too closely to tradition and conservation, then the danger exists that the state will not be able to prevent individuals and groups from using existing practices and associational forms to reinforce domination and tyranny. Radical reformation and radical flourishing must hold out to individuals the promise of moving away from a way of being in the world that diminishes the self, to a way of being in the world that holds out the potential for the enrichment of the self.

Rolling Best Practices – From an experimentalist's perspective, the space created by legal norms set at a high degree of abstraction would enable co-ordinate branches of a central government, various agencies, different states or provinces, thousands of municipalities and innumerable private parties and stakeholders to undertake alternative approaches to the problems thrown up by constitutional litigation and more humdrum matters raised tens of thousands of times over in such venues as specialized drug treatment tribunals, school systems and family courts. Over time, so the argument goes, we would be able to see which experiments undertaken by different constellations of stakeholders worked best. These best practices could then be used to revisit our previous understanding of constitutional, statutory, common law and traditional norms so as to realize a better fit between means and ends. As importantly, the general normative commitments themselves (our ends) might change as we came to see, for example, that rehabilitation for drug users (however difficult) produced better results (for all concerned) than incarceration.

Shared Constitutional Interpretation – This core component of experimental constitutionalism (and governance) cashes out in terms of four basic propositions. First. It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content. Second. It draws attention to a shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text does not exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state or to nonstate actors to come up with their own alternative, but ultimately consistent, gloss on the text. Third. Shared constitutional competence married to a rather open-ended or provisional

understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and to maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization. Fourth. A commitment to shared interpretation ratchets down the conflict between co-ordinate branches of government and between the state and its citizens. Instead of an arid commitment to separation of powers – and the rhetorical flourishes about courts appropriately engaging in legal interpretation, not politics – courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the basic text can co-exist. The courts and all other actors have more to gain from seeing how variations on a given constitutional norm work in practice.

Socially, Radically Heterogeneous, Determined Selves & Naturally, Radically Heterogeneous Determined Selves – Each individual is, in terms of Dennett's felicitous phrase, just 'a centre of narrative gravity'. Each centre of narrative gravity – each individual – 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. Stu Woolman consists of such diverse narratives as male, heterosexual, academic, caucasian, son, brother, nephew, cousin, English speaker, writer, comedian, American citizen, teacher, golfer, Jew, 'little brother' of Brahm, editor, gym-rat, disabled person, South African citizen (in waiting), New Yorker – and an almost infinitely long list of both ascriptive and descriptive characteristics. However, the list of narratives is not infinite: it is as long and as varied as any 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 a 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 a person to differentiate his 'individual self' from any other 'individual self'. It is relatively stable – though a person's narratives and dispositional states are always changing, a person's self-representations enable him to view his 'self' as remaining relatively consistent over time. It is socially and physically determined. The self, and its various narratives, is thoroughly a function of physical capacities and social practices over which we have little control or choice. We are all socially conditioned creatures, highly populated 'me's, radically heterogeneous concatenations of selves, and centres of narrative gravity. Current studies in contemporary neuroscience and experimental philosophy support the contention that we are hard-wired to be radically heterogeneous creatures. That is, analysis of activity in various parts of the brain, and the different networks that connect those parts, suggest that the human brain itself produces radically heterogeneous creatures accountable for the countless roles that we play, and sometimes dictates different (*competing*), (*moral*) outcomes under roughly the same circumstances. All of us, men and women alike, share neurological and hormonal systems that give rise to divergent and to competing moral selves. Second, none of these 'moral' selves has clear primacy of place. No single ethical system plausibly explains the best response to each and every moral dilemma that we confront.

Were it otherwise, one would have assumed that ethics as a field of inquiry would be far more settled than it is. Third, the complexity of our moral make-up (bracketing, of course, the many socially determined, comprehensive views of the good that suppress natural moral selves) suggests that as enticing as any algorithm might be, the actual practice of moral behaviour requires the ability to negotiate the thicket of possible responses that hard ethical dilemmas throw up. Though the above account may have the ring of socio-biology, it should and it shouldn't. We are radically heterogeneous determined selves – and much of what we call freedom and progress is a function of the competition between these socially-endowed selves and our natural hard-wired selves.

Social Capital – Social capital is a function of our varied, collective efforts 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, respect and loyalty upon which they are dependent. 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. 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. For the purposes of this book, and for South African life in particular, two forms of networks (each with different degrees and dimensions of social capital) are of particular import: bonding networks and bridging networks. Robert Putnam puts the difference between these two distinct associational forms of social capital or social networks as follows: 'Some forms of capital are, by choice or necessity, inward looking and tend to reinforce exclusive identities and homogeneous groups. ... Other networks are outward looking and encompass people across diverse social cleavages.' The former kind of associational form are called *bonding networks*. The second kind of associational form are called *bridging networks*.

Social Democracy – This political ideology is currently dominant in the western academy and reflects the politics of the centre-left in many advanced democracies. Historically, social democratic thought viewed itself as a form of revolutionary reformist socialism. However, the contemporary social democratic movement seeks to reform capitalism to align it with ethical

ideals of social justice while maintaining a mixed model of capitalist and state-sponsored modes of production. It has largely jettisoned critical components of Marxism, including revolution and class struggle, and embraced welfare and the regulatory state as means to enhance the rights and the lives of all citizens, but most especially, workers, the poor and the historically marginalized and disadvantaged.

Spontaneous Orders – Spontaneous orders possess two notable features. They do not rely upon a centralized form of command and control to achieve optimal outcomes. They provide, in the form of abstract rules, constraints on individual behaviour that by their very abstraction enable individuals to respond constructively – singularly and collectively – to changes in the environment. The archetypal example of a spontaneous order is the market. The real purpose of markets, as Hayek argues, is not the making of money. It is the co-ordination of knowledge, information and goods – in an intelligent manner – without the direction of any one person or one elite group of persons. Markets (and other spontaneous orders), in order to truly serve the needs of individuals and society as a whole, must be extremely well-regulated. Left unregulated, markets lead to distortions not unlike those created by central planners – the greed and power of a few can lead to the concentration of power in the hands of a small elite and the exploitation of the majority of citizens. The same (unfortunate) conclusions can be drawn about software and the common law: they can easily lead to lock-in of behaviour and conservative, suboptimal outcomes.

Successful, Regular Action – Wittgenstein's notion that, in most forms of life, language games, ways of being in the world – the practice comes first, as sifted through trial and error (mostly unconscious), and reinforced by successful regular action. The practice itself may, in time, be subject to conscious scrutiny through conscious trials, comparisons with other practices, or simulated thought experiments. For example, the unsuccessful entry into the Martian atmosphere by the Climate Orbiter (which crashed due to an embarrassingly basic error in mathematical calculation), was followed by the successful landing by the Rover Curiosity on Mars – a function, in part, of learning from previous errors. All of Curiosity's successful actions (through previously simulated 'thought' experiments) were confirmed through successful action.

Timing Experiments & The Illusion of Volition – The work of empirical psychologist Benjamin Libet has provided a well-established framework for understanding delayed conscious awareness of unconsciously initiated action. Libet's experiments demonstrate that a readiness potential – 'a change in the voltage in the brain' – occurs 0.6 seconds before what we describe commonly as conscious awareness of imminent action and 0.8 seconds before action. One might be inclined to think that if the conscious intention were really the cause of the action, then it would antedate the action by at least 0.8 seconds. But even this intuition – unsupported by the evidence – is insufficient grounds for establishing consciously willed action. Even if conscious intention were simultaneous with readiness potential, it could not be a cause of the action. It would remain epiphenomenal. Only conscious intention prior to readiness potential would demonstrate consciously willed action. No empirical evidence exists for such awareness. Moreover, as Dennett argues, there may be good reasons to believe that

the ‘conscious awareness’ of the intention cannot be accurately determined even within the parameters of the 0.8 seconds afforded us. In his challenging and not uncontroversial account of mental events, Dennett suggests that the brain produces multiple – and often partial – drafts of phenomena and that the ‘memory’ or ‘awareness’ of intention is simply one report that facilitates future use of the information, and that the fixing of conscious time effects another kind of report that serves to maintain the connection between cause and action. In sum, Dennett’s theory of multiple drafts – which plays an important role in demolishing the Cartesian theatre and explaining our experience of consciousness – explains why there is no master discriminator to organize consciousness and that without such a master discriminator it is difficult, if not impossible, to fix an exact time for when ‘consciousness’ of a mental event has occurred. Remember: all we have are the mental events themselves. We do not possess a separate consciousness of the mental event. All that we might possess is a separate and distinct conscious awareness of a previous mental event. But that is another mental event – fixed, if it can be fixed, at another moment in time.

Unchosen Conditions of Being, Forms of Life, Ways of Being in the World, Constitutive Attachments – It is trite to note that outside society, individual flourishing is a meaningless notion. It is only in light of the various practices, ways of being in the world, forms of life, or language games that social groups provide that we become anything that remotely approximates what we understand to be human. At the same time, these social practices and forms of life from which we derive meaning in our lives also constrain our actions and often limit our ability to behave in a manner that we believe will promote our own well-being, in particular, and human flourishing, generally. (How can we recognize the value of the radical givenness of social life and still attempt to alter social structures in a manner that changes things for the better? The answer lies somewhere in this book’s account of the constant friction and disruption we daily encounter, and how we best respond to such disruptions.) The constitutive nature of our attachments and practices forces us to attend to an often overlooked feature of social life. 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. Such a notion of choice is generally not true of us as individuals. It is also largely not true of social life generally. When Michael Walzer argues that there is a ‘radical givenness’ to our social world and the practices that make it up, what he means is that most of the practices that make up our social life are involuntary. We don’t choose our family. We (generally) don’t choose our race or language or ethnicity or nationality or class or religion. Moreover, even when we appear to have the space to exercise choice, we rarely create the practices available to us. The vast majority of our practices and forms of life are already there, culturally determined entities that pre-date our existence. Finally, even when we overcome inertia and do create some new practice, the very structure and style of the practice is almost invariably based upon an existing rubric. Corporations, marriages, co-edited and co-authored publications are modelled upon existing associational forms. Gay marriages may be of recent vintage. But marriage itself is a publicly recognized and sanctioned institution for carrying on intimate relationships that dates back well over three millennia. Even in times of radical transformation, mimicry of existing social practices is the norm. Perhaps Walzer’s most

interesting challenge flows from his invitation to think of what it might mean for individuals to lack involuntary associational ties, to be ‘unbound, utterly free?’ One image, he suggests, might be that of wild horses. But this very image is the antithesis of what makes us human. We are human, and not feral, because of the involuntary practices into which we are born and which have been sustained and developed over time. Even schools designed to enable us to make the most of our freedom do not let us do whatever we so wish. Quite the opposite. We have to learn to be free. Flourishing – freedom rightly understood – remains predicated upon practices that are involuntary and unchosen in almost all important respects.