PARTIAL CONSTITUTIONAL CODES

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Constitutions across the globe vary markedly in length and specificity. In drafting constitutions, constitution-makers thus face important choices of style, as well as substance: They can choose to adopt a highly "codified" or detailed approach to constitutional drafting, or rely on a more "framework"-style approach, which places greater reliance on sympathetic forms of legislative or judicial decision-making. The benefit of a codified approach, the article suggests, is that it provides a stronger constraint on judges to give indirect attention to the aims and understandings of the drafters, regardless of their legal or political ideology. The potential cost, however, is that almost any constitutional code will inevitably be incomplete as a constraint on judges; and for some judges, the mere attempt at constitutional codification by drafters may discourage the kind of sympathetic, purposive approach to interpretation necessary to fill relevant gaps. The article makes these arguments using case-studies from South Africa and India relating to the rights to property and freedom of expression.

Constitutions, it turns out, *do* permit of the prolixity of a legal code.[1] The Indian Constitution is currently over 140, 000 words long, compared to the roughly 8, 000 words in the US Constitution.[2] In between are democratic constitutions that span the full range of long and detailed to short and abstract. The Brazilian Constitution, for instance, contains approximately 65, 000 words, the Colombian Constitution 47, 000 words, the South African Constitution 43, 000 words, and the Canadian Constitution 20, 000 words. Constitutions also vary significantly in their length, or specificity, across numerous dimensions.

First, grants of power: In allocating power to the legislature, or executive, some constitutions confer only quite general sources of power. Others confer a longer list of more specific powers. *Second, constitutional rights and prohibitions*: Likewise in setting limits on power, some constitutions contain only quite broad, general limitations, while others contain a greater number of more specific limitations. *Third, constitutional definitions, examples and carve-outs*: Constitutions in both contexts also vary in the degree to which they seek to provide explicit guidance as to the scope or meaning of relevant provisions, either via examples of their intended meaning, or express "carve-outs" or claw-backs. Some constitutions contain numerous examples and carve-outs of this kind, while others leave many key terms undefined. *Fourth, constitutional limits/limitations*: Finally, constitutions also differ in the degree to which they spell-out the circumstances in which various provisions may be limited. Some constitutions leave such questions almost entirely to courts and legislatures, as a matter of interpretation; whereas others contain quite detailed general or clause-specific limitation clauses.

In drafting any new constitution, or constitutional provision, constitutional drafters thus inevitably face an important choice between two broad approaches to constitutional drafting: a "framework-style" approach, which provides only quite general textual guidance as to the meaning or operation of particular constitutional norms; and a more "codified" approach, which provides far

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[1] *Cf.* McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (Marshall, C.J.).

[2] This includes amendments. The original constitution was approximately 4, 400 words.

greater detail or specificity regarding the intended meaning and operation of relevant constitutional norms. The two models are, of course, simply ideal types; most real-world constitutions adopt a combination of both framework-like and codified approaches across different areas. Certain areas in a constitution necessarily call for quite detailed approaches to constitutional design, while others allow for, or even call, for a far more abstract approach. The degree of codification in any particular area in a constitution will also invariably be the product of local political circumstances. Yet there is also a clear trend worldwide toward more codified or detailed constitution-making,[3] and thus a question about the merits of the two general drafting styles in the context of various key operational aspects of the constitution.

The article examines this question by focusing on one specific dimension of potential difference between the two models – the capacity of the models to create predictable patterns of constitutional interpretation, or encourage judges to interpret a constitution's text in line with the aims and understandings of drafters, at least in the early years of a constitution's operation. It offers a way of thinking about the degree to which a constitution is codified versus framework-like in this context, as well as the likely costs and benefits for drafters of attempting to adopt a more codified approach. In particular, it stresses the potential downsides for drafters of attempts at constitutional codification, and thus provides an important caution against the increasing trend toward longer, more codified constitutions.

A range of questions about the relative performance of framework versus codified constitutions could, of course, also be considered important, or even logically prior or first-order. One such question is the relationship between constitutional drafting-style and the formal, as well as *de facto*, endurance of a constitutional text. Another is the relationship between constitutional drafting styles and the chances of compliance by executive and other officials with various constitutional requirements. These questions, however, are ones that are left for another day. Instead, the focus of the article is on the capacity of constitutional drafters to use constitutional language to achieve various substantive constitutional outcomes, or to influence the substantive direction of constitutional interpretation.

The key benefit to code-like approaches to constitutional drafting from this perspective, the article suggests, is their capacity to require judges to give at least some consideration to the aims and understandings of the drafters, even if only indirectly, via attention to the constitutional text itself. This kind of constraint will also be particularly valuable for drafters where judges are known to have a different political philosophy or ideology to that of drafters: or where judges are likely to be distinctly non-originalist in their approach to interpretation, or give little direct attention to the aims or understandings of drafters.

Code-like approaches to constitutional drafting, however, will inevitably be incomplete or "partial" as a form of constraint on judges' approaches to constitutional interpretation. First, any attempt at constitutional codification will inevitably have gaps, or be incomplete in relation to some issues.[4] Second, any constitutional text must be interpreted by a court, and practices of interpretation inevitably reflect extra-textual practices. The achievement of drafters' aims will, in most cases, require that judges adopt at least a somewhat sympathetic, purposive approach to interpretation. The attempt at constitutional codification by drafters, however, may actively *discourage* some judges from adopting this kind of purposive approach. The very fact that drafters have attempted to codify aspects of the constitution may provide a reason, for some judges, to reject the kind of purposive or sympathetic approach to interpretation that might otherwise help fill these gaps. This may be because of orthodox legal principles, which hold that detailed language is often best understood as a deliberate signal by drafters that they intend to exclude this kind of gap-

[3] Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* (Univ. of Chicago, Public Law Working Paper No. 330, 2010), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707619.

[4] Rosalind Dixon & Tom Ginsburg, *Deciding not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636 (2011); Ginsburg, *supra* note 3.

filling role on the part of courts. Or it may be because, when faced with code-like constitutional language, judges have a psychological response, which involves them being less sympathetic or grudging in their attitude toward the aims and understandings of the drafters. Both responses will be particularly costly for drafters if judges are otherwise sympathetic to drafters' aims or understandings, or undecided in their approach to substantive issues or questions of interpretation.

The article makes these arguments by reference to case-studies from India and South Africa on the rights to property and freedom of expression. Neither of these case-studies purports to provide a definitive explanation, or account, of what has actually driven drafters or judges/interpreters in these countries or contexts. Rather, they are simply used to illustrate the plausibility of the various interpretive moves posited by the article; and thus to make more real the potential costs, and benefits, of more codified, as opposed to framework-like, approaches to constitutional drafting. The case-studies, however, are chosen for their ability to highlight relevant differences – i.e. the degree of detail or codification in relevant constitutional textual provisions – while holding constant a range of other factors, including the degree to which both India and South Africa share a commitment to market-based and social democratic principles, similar degree of development, history of race/caste-based discrimination, national liberation struggle and common law heritage.[5]

How those potential costs and benefits to constitutional codification are traded-off in other countries, and contexts, will inevitably depend on the particular context. The downsides to constitutional codification in a country such as India, for instance, may to some degree reflect common law traditions or influences, which have limited relevance to civil law countries with quite different traditions regarding legislative codification.[6] Similarly, the desirability of constitutional codification in various countries, or contexts, will depend on a range of context-specific factors, including the degree to which constitutional drafters are seeking to affirm, or depart, from global constitutional norms, or prior domestic norms, and the predictions of constitutional drafters about the likely approach or ideology of local constitutional judges.

A key aim of the article, however, is to draw particular attention to the potential downsides, as well as advantages, to more codified approaches to constitutional drafting by highlighting, first, the inevitable incompleteness or "partial" nature of any text-based constitutional constraint, and second, the degree to which text-based constraints may actively crowd or drive-out the voluntary willingness of courts to give direct effect to drafters' aims and understandings, via certain forms of purposive interpretation or sympathetic gap-filling. In this sense, the article may also be seen as offering the beginnings of a general defense of the idea of a "framework" constitution, as opposed to a more codified constitutional model, or a place-marker for a broader attempt to revive the framework constitution as a preferred model for constitutional drafters.

The article proceeds in five parts following this introduction. Part I sets out the basic distinction between more framework and codified approaches to constitutional drafting, and how they relate to other dimensions of constitutional design such as questions of scope, timing, audience and enforcement. Part II sets out the arguments in favor of the codified constitution in terms of its capacity to constrain judges to give at least some indirect consideration to drafters' aims and understandings, and how this constraint may be particularly helpful where the judges charged with interpreting a new constitution are predicted to be both legally and ideologically disinclined to give more direct effect to drafters' aims. Part III outlines the inevitable gaps in any constraints of this

[5] *See, e.g.,* ZOYA HASAN & MARTHA NUSSBAUM, EQUALIZING ACCESS: AFFIRMATIVE ACTION IN HIGHER EDUCATION: INDIA, UNITED STATES, AND SOUTH AFRICA (2012). This is thus an attempt, albeit an imperfect one (particularly in terms of the differences in judicial ideology in the two countries: see *infra* Part V) to employ what Ran Hirschl calls the "most similar cases" principle: *see* RAN HIRSCHL, CONMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 245–46 (2014).

[6] South Africa in this context is, of course, a mixed system, which combines common law and Roman Dutch-law principles: *see* REINHARD ZIMMERMAN & DANIEL VISSER, SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 4–5 (1997).

kind, and the argument that attempts at constitutional codification by drafters may ultimately discourage more direct resort by drafters to the aims and understandings of drafters, or the kind of purposive or sympathetic approach to drafters' aims and understandings that is necessary to fill the gaps. Part IV offers a brief conclusion, which reflects on the difficulties of drawing definitive conclusions about the effects of different forms of drafting style, as well as the likely temporal limits to the arguments made in earlier parts of the article.

I The Framework v. Codified Constitution

There is, of course, no such thing as a wholly "framework"-like constitution: No democratic constitution can be wholly general across all topics. Where constitutional provisions are designed to settle the basic procedural rules for democracy, there will be relatively little room for debate about how specific the constitution should be: provisions of this kind *must* be relatively specific, or rule-like and unambiguous, if they are to perform their functions.[7] One such function is to encourage coordination among different political parties, or factions, who have a clear interest in cooperating in the process of democratic self-government, but potentially radically different preferences over the particular form of elections (e.g., whether direct or indirect, frequent or infrequent, or based on a narrow or broad franchise) or model of government (e.g., whether unicameral or bicameral, or presidential, semi-presidential or parliamentary).[8] To do this, constitutions must also provide a quite clear and specific focal point. If they leave significant room for interpretation, or interpretive disagreement, among different political parties or actors, they will tend simply to shift political conflict, or transaction costs, downstream. They therefore must be relatively specific and rule-like in order to serve their basic function of enabling, or reducing the transaction costs, of ordinary politics.[9]

Similarly, no constitution can be completely code-like, or attempt to define all relevant concepts, and still hope to serve as a site for popular identification. In the United States, it is often suggested that a constitution must by definition be somewhat abstract or non-specific, or mark only "great outlines" or "important objects", to retain its constitution-like "nature".[10] One justification for this, offered by Chief Justice Marshall himself in *McCulloch v. Maryland*, is that if a constitution is too code-like, it can "scarcely be embraced by the human mind" and will "probably never be understood by the public".[11] This may also directly affect the capacity of a constitutional text to serve as a site of popular identification, and thus to support the stability of the constitution as a framework for democratic self-government. This stabilizing function of a constitutional text, however, could in theory at least also be performed by some sub-section of the constitution: This sub-section, which one might call the "aspirational" constitution, could be a constitutional preamble, or a set of provisions defining basic constitutional rights and values. It need not be the entire constitutional context. But whatever section of the constitution it was, it would clearly need to be both sufficiently substantively appealing – and understandable to a popular audience – to provide the possibility of popular identification with the constitution.[12] There is thus clearly some outer limit on the degree to

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[7] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319; SANDFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012).

[8] On the co-ordinating function of specific constitutional rules in this context, *see, e.g.,* Richard H. McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009); Dixon, *supra* note 7.

[9] *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001).

[10] *Id.* at 407. See McCulloch v. Maryland, 17 US 316 (1819); Dunn v. the Florida Bar F, 11 USCA 1743 (1989); Freytag v. Commissioner, 501 US 868 (1991); Davis v. Passman, 442 US 228 (1979); Nevada v. Hall, 440 US 410 (1979); Southern Pacific Co. v. Jensen, 244 US 205 (1916).

[11] EISGRUBER, *supra* note 9, at 407.

[12] India is a good example: the Directive Principles of State Policy found in Part IV of the Constitution are only about 1000 words long; whereas the Constitution as a whole contains approximately 140, 000 words.

which a constitution can be completely codified, across the board, including in this more aspirational component.

What it means to talk of a framework-versus codified approach to constitution-making will also differ by country and with time. Constitutions may be quite long in some contexts simply because they attempt to address a large number of different topics: they may thus appear quite codified in nature, when in fact they simply take a framework-like approach to a large number of different issues. Similarly, how broadly, or narrowly, constitutional drafters wish to be in conferring various sources of legislative or executive power, or defining various rights, will affect how framework-like, or codified, an approach they can take. Where drafters intend particular provisions to have clear limits, they will almost always need to use more words to express this two-fold intention (i.e., the grant of a power or right, and its limitation) than if they intend to grant more unlimited sources of power, or rights.

Whether a constitution can be identified as more or less framework-like, or codified, in approach will also be a judgment that varies with time. Changes in technology, and the complexity of modern political and economic life, invariably mean that constitutions have had to address a greater number of topics over time.[13] This means that in many areas newer constitutions will often be longer, without necessarily involving a greater degree of constitutional detail or codification. Conversely, the accumulation of constitutional precedents and conventions over time may mean that a smaller number of words are required to convey the same meaning as before, thereby creating new opportunities for more framework-like approaches to constitutional drafting.

Yet there is still a clear distinction to be drawn between two broad styles or approaches to constitutional drafting in certain contexts: one which is more general, and open-ended, in its approach to defining constitutional concepts and terms; and another which attempts to be more specific, and detailed, in defining the meaning and scope of various concepts. More general or framework-like approaches will generally involve constitutional provisions in two forms: first, provisions that explicitly defer, or delegate, certain constitutional decisions to legislatures, via the use of language that requires certain constitutional questions to be settled "by law" or by ordinary legislation; and second, provisions that are sufficiently vague or abstract in scope or meaning that they inevitably require some form of judicial interpretation.[14] More codified approaches, in contrast, will generally involve provisions attempting to resolve, rather than defer or delegate, all key constitutional questions. These differences in style can also operate across numerous different constitutional areas or dimensions, including, as already noted, the grant of power, the recognition of various rights or prohibitions, and the definition, or limitation, of other constitutional provisions.

Take the right to property, and the potential limits on such a right, under the South African and Indian Constitutions. In South Africa, section 28 of the 1993 South African Constitution adopted a quite code-like approach to the right to property, which provided that for an expropriation of property to be valid, it must be "*for public purposes only*" and "subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected". The property clause in section 25 of the 1996 Constitution largely adopted this same approach, and simply added further language expressly qualifying the right by providing that, in determining what was just and equitable compensation for the purposes of section 25(2), it was relevant to consider "(a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the

[13] *Cf., e.g.*, U.S. CONST. art. I (giving Congress power to "establish post offices and post roads"); AUSTRALIAN CONSTITUTION s 51(v), (xxxiv) (giving the Australian Parliament power over "Postal, telegraphic, telephonic, and other like services", **"**Railway construction and extension in any State with the consent of that State:); S. AFR. CONST., 1996 sch. 4 (setting powers in respect of airports, public transport, traffic regulation).

[14] Dixon & Ginsburg, *supra* note 4.

extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation", and the need to "achieve an equitable balance between the public interest and the interests of those affected". Section 25(4) further defined the public interest as "including the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources".[15] This was also in addition to the general limitation clause found in section 36(1) of the Constitution.

In India, in contrast, in its original form, article 31(1) of the Constitution adopted a highly framework-like approach, which simply provided that: "No person shall be deprived of his property save by authority of law", and article 31(2) stated that no property should:[16] "[b]e taken possession of or acquired for public purposes under any law . . . . Unless the law provides for compensation for the property . . . and either fixes the amount of compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given". Over time, as the Indian Parliament has sought to amend the Constitution to override various decisions of the Supreme Court of India (SCI), Indian constitutional drafters have adopted a progressively more code-like approach. For instance, the First Amendment to the Constitution, passed in 1951, inserted two new provisions into the Constitution dealing with the right to property, which provided that: "[n]o law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part…. Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent" (art. 31A);[17] and that: "Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force" (art. 31B).

While many of the original provisions of the Indian Constitution were more code-like than article 31(2),[18] a great deal of the overall length of the Indian Constitution is also due to this pattern of code-like constitutional amendment in India: almost half of the total length of the Indian Constitution was added after 1950, by way of amendment.[19] In South Africa, in contrast, there has been almost no change to the initial length of the 1996 Constitution (approximately 43,000 words); and the 1993 Interim Constitution remained at approximately 60,000 words for its entire operation.[20]

II. Constitutional Drafting & Interpretative Influence

Constitutional drafters are a "they" not an "it". They bring a range of different aims and understandings to the drafting of particular constitutional provisions. This is particularly true where constitutions are negotiated, or drafted by parties with different political ideologies or constituencies. To speak about constitutional drafters' aims, therefore, is clearly to use a form of

[15] Other provisions, such as s. 25(5)-(7) explicitly endorse various land reform measures as consistent with s. 25(1)-(2), and the state's duty to take such measures.

[16] INDIA CONST. art. 31(2). The Constitution also contained certain additional savings clauses in art. 31(4).

[17] Art. 31A also defined the words "estate" and "right" in considerable detail.

[18] *See, e.g.*, art. 19(1), (2), as discussed in *infra* Parts I and III.

[19] *CPP Rankings*, COMPARATIVE CONSTITUTIONS PROJECT, http://comparativeconstitutionsproject.org/ccp-rankings/(noting length of approximately 73, 000 in 1951).

[20] *Id.*

short-hand; and one that depends on drafters' aims being understood in a sufficiently general or high-level way.[21]

Understood in this way, for most constitution drafters the process of drafting a written constitution will have a range of first-order objectives – including objectives relating to political legitimacy, social justice and economic welfare,[22] as well as more specific objectives relating to social and political "transformation".[23] Parties to constitutional negotiations or deliberations will often disagree about these ideals and how best to encapsulate them in specific constitutional provisions. However, in at least some cases parties to constitutional negotiations or deliberations *will* be in a position to reach relatively concrete bargains or agreement over how best to realize certain ideals. Where constitutional drafters do agree on or adopt concrete constitutional bargains of this kind, they will generally have a strong interest in ensuring that such bargains endure – both in the text of the constitution itself and at the level of constitutional interpretation or practice. This will also include effective influence over the interpretation of a constitutional text by courts, as well as legislators and executive officials.[24]

Constitutional drafters need not purely be self-interested to want to exert interpretive influence of this kind. Constitutions are often drafted in political and historical circumstances that promote heightened forms of deliberation, or public reason-giving, by policy-makers.[25] Constitution-makers may also have access to certain forms of specialized knowledge or experience that make them better placed in certain contexts to reach optimal constitutional decisions than subsequent decision-makers.[26] Where constitutional courts are concerned, drafters may also have powerful democratic reasons for wishing to influence subsequent practices of constitutional interpretation: while processes of constitutional amendment may provide some ongoing scope for democratic influence over practices of interpretation, in most cases the effectiveness of the initial choices made by democratic constitutional drafters will largely depend on how those choices are interpreted by courts in the early years of a constitution's operation. For drafters, this can provide an entirely non-self-serving motivation for attempting to exert influence over practices of constitutional interpretation: for democratically-elected drafters, it may simply be an attempt to ensure that the political choices they are elected to make ultimately matter in subsequent processes of legislative or judicial decision-making.

The desired time-horizon for such influence may certainly vary among constitutional drafters.[27] In transitional contexts, some constitutional drafters may want to ensure that their present aims, or understandings, do *not* have undue influence upon long-term, as opposed to short-term, constitutional practices because they expect to be in a position in the future to adopt quite different – more ambitious or radical – constitutional aims. In other contexts, constitution-makers may vary in the degree to which they value constitutional influence over the short- versus longer-term. Some constitution-makers, for instance, may have high political "discount rates" which make

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[21] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006).

[22] *See e.g.*, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 22 (1690); FRIEDRICH VON HAYEK, THE ROAD TO SERFDOM 75 (6th ed. 2005) (on liberty); JOHN RAWLS, A THEORY OF JUSTICE (1971) (on various "constitutional essentials", including liberty, political freedom and political participation, and equal opportunity); Douglass C. North, *Institutions,* 5 J. ECON. PERSPECTIVES, 97 (1991) (on the relationship between legal rules and economic welfare).

[23] *See, e.g.*, Karl E. Klare, *Legal Culture & Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS 146 (1998).

[24] This may not always have been the case: some drafters of early constitutions may largely have had a political rather than legal audience in mind, or have overlooked the potential for disagreement over practices of interpretation. But at some point, the history of common law modes of decision-making or constitutional review by courts across the globe likely meant that, for most drafters, there was an obvious need to consider the direction of future judicial interpretation. *See, e.g.*, discussion in H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 901 (1985). I am indebted to Sam Issacharoff for this point.

[25] *Id.*

[26] *Id.*

[27] *See further infra* notes 139–41.

them most concerned to influence constitutional practices in the short- to medium-term, while others may have much lower discount rates, which cause them to take a longer view of interpretive influence. For the drafters of a democratic constitution, there may also be a clear logical outer-limit to the time-frame over which they wish exert such influence, as opposed to allowing future democratic majorities to decide questions of constitutional meaning.[28]

Constitutional drafters may also vary in how they assess the benefits of effective constitutional control, compared to the benefits of being *seen* to win particular constitutional concessions, or victories, in areas subject to particular constitutional controversy. Only the most cynical or "sham" constitution-makers, however, would seem willing to wholly prioritize the appearance of constitutional victory over any expectation that such a victory would influence subsequent interpretive practices.[29] This is equally true for constitutional drafters who simply reach an "overlapping consensus" on the scope of particular constitutional language,[30] or make reciprocal concessions over the language of particular provisions, as for those who reach deeper agreement on the principles behind such language. Shallow agreement or concessions of this kind will often be a useful means for parties to reduce the transaction costs of constitutional bargaining, and thereby to promote successful constitution-making.[31] However, they also require that parties can expect particular constitutional provisions to be interpreted in a relatively predictable and consistent way for some period at least: otherwise, it will often be rational for parties simply to "hold out" for a more favorable constitutional outcome on all relevant constitutional terms.[32]

Some form of effective interpretive control ("interpretive influence") over some time-period, therefore, will be a key second-order aim for almost all constitutional drafters, at least in some contexts. This, for drafters, necessarily raises complex questions about the degree to which they should adopt a more framework-like, versus codified, approach to constitutional drafting.

Questions of style of this kind will, of course, inevitably intersect with choices drafters make about the *scope* and *substance* of various constitutional provisions. Judges, for example, may be more willing to give stable effect to constitutional provisions they regard as internally consistent than those they see as having a more *ad hoc* or inconsistent quality.[33] Similarly, judges may be more likely to give effect to constitutional norms they see as reflecting commitments to human rights and democracy than provisions that appear to reflect more repressive or anti-democratic impulses.[34] It also seems plausible, however, to analyze questions of constitutional style as both inter-dependent with – and distinct from – questions of substantive constitutional design of this kind.

II. Constitutional Codification & Constraint

A. Codification & Indirect Attention to Drafters' Aims & Understandings

For drafters seeking later interpretive influence, a codified approach to constitutional drafting will offer one clear and important benefit: it will provide drafters with a means of embedding their aims and understandings in the text of the constitution itself.[35] This, in turn, will allow drafters to exploit a clear, and also quite unique, consensus among (liberal or non-ultra-realist) constitutional lawyers as to the status of the text as a binding constraint on legitimate practices of constitutional "interpretation".

Different constitutional theories within the liberal tradition certainly differ as to how much weight they ascribe to a constitution's text, as opposed to other constitutional sources. Almost all

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[28] *See infra* note 157.

[29] *Cf.* David Law & Mila Versteeg, *Sham Constitutions,* 101 CAL. L. REV. 863 (2013).

[30] *Cf.* RAWLS, *supra* note 22.

[31] *Cf*. Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009).

[32] *Cf.* Dixon & Ginsburg, *supra* note 4.

[33] Rosalind Dixon, Partial Bills of Rights (2014) (unpublished manuscript) (on file with author).

[34] *See, e.g.*, RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010).

[35] In some jurisdictions, another answer is that courts cannot be expected to give any real force to such directives, based on interpretations of relevant separation of powers principles.

theories, however, treat attention to the text as at least a minimally binding constraint on judges in interpreting constitutional provisions for the first time. For constitutional history, or the aims or understandings of drafters, in contrast, there is often significant disagreement among constitutional lawyers as to both the weight and basic relevance of these sources.[36]

For originalist constitutional lawyers or theorists it will clearly be legitimate and appropriate for courts to consider evidence as to the aims or understandings of those who wrote and ratified a particular constitutional instrument. But for many "textualists", the meaning of particular textual provisions is best ascertained by reference to the text itself and its broader context, not any extrinsic evidence of the understandings or intentions of the drafters.[37] Similarly, many "living constitutionalists" reject the appropriateness of attempts by courts to consider the original aims or understandings of a constitution's drafters.[38] Attention to such sources, they argue, tends simply to advance the "dead hand" of the drafters over the views of current generations, and thereby to undermine democratic self-government.[39]

For drafters, the existence of disagreement of this kind over constitutional interpretive methodology can create a clear obstacle to successful interpretive influence – because drafters will rarely be in a position to control the appointment of constitutional court judges over the medium to long-term.[40] In fact, in many cases, drafters may face a situation in which the court that interprets the document they draft will be distinctly *un*sympathetic to their substantive aims or understandings, or notably anti- or non-originalist in their approach to constitutional interpretation.

Against this backdrop, codified approaches to constitutional drafting offer drafters an important benefit: By connecting drafters' aims or understandings to the text of the constitution, more specific, codified constitutional language allows drafters to ensure that *all* constitutional interpreters, not simply those who share the substantive aims of the drafters or who are self-consciously originalist, give some attention to their aims or understandings. Judges, when they engage with codified constitutional provisions, will necessarily be required to give *indirect* attention to the aims or understandings of the drafters – because those aims and understandings are reflected in the text itself. This is also true for all judges, even those who are actively hostile to the substantive aims or understandings of the drafters, or self-consciously anti-or non-originalist in approach. The text of the constitution itself will simply require, or constrain, all judges to give some form of indirect attention to drafters' aims and understandings.

To see how this kind of indirect constraint can work in practice, consider the approach of the Constitutional Court of South Africa (SACC) to the right to property under the 1993 and 1996 South African Constitutions. The drafting of these clauses under the 1993 Constitution reflected an attempt by drafters to reach a crucial form of compromise between the National Party (NP) and African National Congress (ANC) in the transition to democracy.[41] In negotiations over the text of the Interim Constitution, the NP had argued for the inclusion of an extremely strong right to property, which entailed both a requirement that any taking (or expropriation) of property had to be for a

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[36] P. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1984).

[37] *See, e.g.,* discussion in *infra* note 54.

[38] *See, e.g.,* Vicki C. Jackson & Jamal Greene, *Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?, in* COMPARATIVE CONSTITUTIONAL LAW 599 (Tom Ginsburg & Rosalind Dixon eds., 2011).

[39] *Id.* Indeed, my own position has generally been that, subject to certain limitations, living constitutionalists have the better argument: *See, e.g.*, Rosalind Dixon, *A Democratic Theory of Constitution Comparison*, 56 AM. J. COMP. L. 947 (2008).

[40] I intend to explore this issue further in related work on the relationship between constitutional specificity and judicial appointments processes, and in particular, the role of constitutional drafters as judges.

[41] This account is derived from joint work with Tom Ginsburg: Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court & Socio-Economic Rights as Insurance Swaps*, 4 CONST. CT. REV. 1 (2011).

"public purpose" and at full market value,[42] and a prohibition on any form of tax imposing "unreasonable inroads upon the enjoyment, use or value of such property".[43] By contrast, the ANC had initially opposed including any right to property or occupational freedom in a South African constitution, on the basis that such rights could undermine attempts at economic reconstruction and development,[44] and specifically attempts by a future democratic government to restore land wrongfully taken under apartheid, or to redistribute land and resources with a view to addressing homelessness.[45] When it became clear, however, that this position was untenable because of the strength of the NP's commitment to property rights,[46] the ANC responded by arguing for an extremely weak right to property which left the content of the right to be "determined by law", subject to an overriding public interest test, or for compensation for any taking based on an "equitable balance" between the public interest and the interests of the property owner.[47] The final language of the property clause in sections 28 of the 1993 Constitution thus reflected a true form of compromise between these two competing positions.[48] In 1996, in drafting the language of the final Constitution, the majority of the (ANC-dominated) Constituent Assembly chose largely to retain this compromise, simply adding certain language further limiting the right to compensation for any taking of property in the public interest, and "hedging" or qualifying the right to property by the addition of various socio-economic rights with the potential to balance its operation, such as the right to housing.[49] This, in part, reflected the beginnings of a shift within the ANC itself by at least one key (pro-market) faction toward greater support for the NP's position on property rights.[50]

In interpreting these provisions under both the 1993 and 1996 Constitutions, the SACC has taken a consistent approach entirely in line with these dual sets of understandings – or forms of constitutional compromise between the NP and ANC, or different factions of the ANC. Yet it has done so largely without any direct reference to the aims or understandings of the drafters – but simply by reference to the relatively code-like language of the constitutional text itself.

In *First National Bank of SA t/a Wesbank v. Minister of Finance*,[51] the SACC upheld a challenge to legislation allowing for the imposition of statutory liens on (movable) property for unpaid customs duties, including the property of a third-party, but in doing so, endorsed a flexible test for determining the reasonableness of limitations on the right to property. The justification for this flexible standard, the court suggested, was the need to ensure that the Constitution struck a proportionate balance between "protecting existing private property rights" (the NP or ANC right's objective) and "serving the public interest" mainly but not solely "in the sphere of land reform" (the ANC left's objective); or between both "individual rights" (the NP's objective) and commitments to democracy and "social justice" (the ANC left's objective). The property clause, Justice Ackermann suggested, needed to be interpreted with a view to mediating these tensions, or achieving these dual objectives.[52]

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[42] REPUBLIC OF SOUTH AFRICA, GOVERNMENT'S PROPOSAL ON A CHARTER OF FUNDAMENTAL RIGHTS: 2 FEBRUARY 1993 11, (1993). See also discussion in Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. HUM. RTS. 222, 224 (1995).

[43] REPUBLIC OF SOUTH AFRICA, GOVERNMENT'S PROPOSAL ON A CHARTER OF FUNDAMENTAL RIGHTS: 2 FEBRUARY 1993 (1993).

[44] RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 355–56 (2000).

[45] *See, e.g.*, G Budlender, *The Right to Equitable Access to Land*, 8 S. AFR. J. HUM. RTS. 295, 304 (1992); A. J. van der Walt, *Developments that May Change the Institution of Private Ownership so as to Meet the Needs of a Non-Racial Society in South Africa,* 1 STELLENBOSCH L. REV. 26, 47 (1990.

[46] Chaskalson, *supra* note 42.

[47] *Id.* at 226.

[48] *Id.*

[49] *See, e.g.*, Rosalind Dixon & Tom Ginsburg, *supra* note 41.

[50] THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 (2013).

[51] 2002 (4) SA 768 (CC).

[52] *Id.* at ¶¶ 15–21.

Similarly, in *Port Elizabeth Municipality v. Various Occupiers*,[53] a case involving the lawfulness of attempts to remove informal occupiers of land from their homes, the SACC both upheld the validity of the 1998 legislative scheme governing the lawfulness of evictions from land, and affirmed a lower court decision barring the eviction of the respondents. The relevant statutory scheme, the SACC suggested, reflected the constitutional matrix created by the right to property and right of access to adequate housing under sections 25 and 26 of the Constitution. This matrix recognized both the individual rights of property owners, and thus the possibility of eviction of unlawful occupants of land (the NP or ANC right's objective),[54] and the "need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past" (the ANC left's objective).[55] The court also endorsed the reasoning of the court in *First National Bank* as to the need to ensure a balance between property as an individual right, and the broader public interest.

The court in both cases endorsed this two-fold approach almost entirely without any direct reference to the aims or understandings of either the NP or ANC in regard to the right to property.[56] The court in *First National Bank* suggested that the right to property should be interpreted in its "historical context", including the fact that "one of the most enduring legacies of racial discrimination in the past" was "the grossly unequal distribution of land".[57] Similarly, in *Port Elizabeth*, the court suggested that the relevant legislation, and underlying constitutional matrix, should be understood as in significant part a direct response to the history under apartheid of arbitrary and racially-motivated removals of black people from land, which "forced removal of black people from land and compelled them to live in racially designated locations."[58] At no point, however, did Justices Ackermann or Sachs in their opinions for the court make any direct reference to negotiations between the NP and ANC prior to 1993, or the compromise that the language of section 25 represented – and carried over – into the 1996 Constitution. Instead, to support their approach, the court stressed comparative constitutional case-law on the right to property, academic commentary, and the specific language of section 25 and the provisions of section 26(3) regarding the right to housing.[59]

The language of section 25(4), Justice Ackermann suggested in *First National Bank*, made plain that the right to property under the Constitution was an individual right that enjoyed a broad meaning, and was not limited to land.[60] At the same time, provisions such as sections 25(4)-(9) also "underline[d] the need for … redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa", or that under the Constitution "the protection of property as an individual right is not absolute but subject to societal considerations".[61] Likewise in *Port Elizabeth Municipality*, Justice Sachs pointed to the language of sections 25(4)-(9) and 26(3) as both "expressly acknowledging that eviction of people living in informal settlements may take place"[62] and that persons cannot be "arbitrarily evicted from their homes", and that it is the court's role "to balance out and reconcile the opposed claims in as just a

[53] 2005 (1) SA 217 (CC).
[54] *Id.* at ¶ 21.
[55] *Id.* at ¶ 15.
[56] This also accords with the more general unwillingness of members of the SACC to adopt an explicitly originalist approach to constitutional meaning: *see, e.g.*, Justice Zac Yacoob, South Africa: The Road to Democracy at the Francis King Carey School of Law, University of Maryland (Oct. 16, 2012).
[57] *First National Bank* 2002 (4) SA 768 (CC) ¶ 41.
[58] *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) ¶¶ 8–12,
[59] For the importance of comparative case-law in this context, *see, e.g.*, *First National Bank* 2002 (4) SA 768 (CC) ¶
[60] *Id.* at ¶ 48
[61] *Id.* at ¶ 49.
[62] *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) ¶ 21

manner as possible taking account of all the interests involved and the specific factors relevant in each particular case".[63]

This is in direct contrast to the approach taken by the SCI in the context of the more framework-like language of the original property clause found in article 31(2) of the Indian Constitution. Like a majority of constitutional drafters in South Africa in 1996, a clear majority of the Constituent Assembly in India adopted the view that the Constitution should simultaneously protect property rights *and* permit legislation designed to achieve land, or other social, reform – including via measures designed to exclude the judiciary from reviewing the adequacy of compensation paid to owners of property taken as part of such reforms.[64] In fact, several proposals were made in debate in the Constituent Assembly to adopt specific language, under article 31(2) of the Constitution, which made clear that the right to property would not affect "provisions of any law which the State might make for the purpose of regulating the relation between the landlords and the tenants in respect of agricultural land or in the discharge of its duty to give effect to the directive principles" of state policy.[65] Such Directive Principles, contained in part 4 of the Constitution, also include duties to ensure "social" and "economic" justice, and to prevent the undue concentration of economic resources.

In early cases, however, the SCI and lower courts adopted a quite different – and far more market-oriented – approach to the right to property. In 1954, for instance, in *State of West Bengal v. Bela Banerjee*,[66] the SCI heard a challenge to 1948 West Bengal legislation designed to provide for the development of housing for immigrants (or refugees) from East Bengal. The legislation in question provided for compensation to the previous land-owners equivalent to the market value of the property in 1946 (as opposed to 1948). This difference was said by the petitioners to be inconsistent with the requirements of "compensation" for any acquisition of property under article 31(2). Further, in defending the constitutionality of the legislation, the Attorney-General of India sought to persuade the court to adopt a "flexible" understanding of the term "compensation" in article 31(2), consistent with the vision of a majority of the Constitution's drafters.[67] The court, however, emphatically rejected this understanding – in favor of its own far more absolutist conception of the right to property. While it was true, the court noted, that article 31(2) gave the legislature discretionary power to "la[y] down the principles which should govern the determination of the amount to be given to the owner for the property appropriated", in the court's view, such principles also required that "what is determined as payable must be compensation" – that is, "full indemnification of the expropriated owner".[68] This not only meant that the West Bengal legislation in question was invalid for failure to provide full market compensation; it also meant that the validity of many other legislative efforts at land reform, of the kind envisaged by the Indian drafters, was in doubt.

III Constitutional Codification & Non-Purposive Interpretation

The difficulty for drafters in relying on this kind of codified approach, however, is that it will almost always be incomplete or "partial"– both in coverage, and as a form of constraint on judges.[69] Any constitutional code is likely to have certain areas of incompleteness, or gaps in the degree to which it covers relevant topics or circumstances. Constitutional drafters, like all of us, are inevitably subject to forms of bounded rationality, which mean they will fail to foresee the full range of

[63] *Id.* ¶ 23.
[64] *See, e.g.,* RAO, THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 281–300 (1968).
[65] *Id.* at 287.
[66] 1954 S.C.R. 558.
[67] *Id.*
[68] *Id.* at 563.
[69] *Cf.,* e.g., Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L. J. 961, 980–82 (2010). Partial here is used simply to denote the idea of incompleteness, rather than non-neutrality: *Cf.* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

contexts or circumstances in which the provisions they draft will, or should, apply, or the ways in which such provisions may conflict. Constitutions are also frequently drafted in circumstances that make complete agreement by parties to constitutional negotiations on every conceivable constitutional issue if not impossible, than prohibitively costly.[70] In many contexts, there will be significant "transaction" or bargaining costs for drafters in reaching even partial agreement on many constitutional questions.[71] For drafters, such costs will often mean it is practically impossible to reach complete agreement on all questions of constitutional detail.

Any text-based constitutional agreement on the part of drafters will also inevitably be incomplete as a form of constraint on judges in the resolution of particular constitutional controversies. Judges may be required to *consider* the language of the constitutional text as part of any legitimate process of constitutional interpretation, but they are certainly not required to give it the effect intended by the drafters. Indeed, it would be impossible for drafters to ensure such a result: the meaning of any text, including a text directing judges how to interpret other parts of the text, can only be ascertained through a process of interpretation, and judges will inevitably approach questions of interpretation by reference to extra-textual factors or practices.[72] Most constitutional courts also explicitly reject the idea that a constitutional text can be interpreted simply by reference to its plain or literal meaning – or by reference to a strictly "textualist" approach.[73] Instead, they look to a range of other constitutional modalities or arguments as relevant to resolve ambiguities in the constitutional text, or as adding further layers of complexity to the preferred "reading" of a constitutional text. Some of these modalities – such as constitutional structure and values – are sources over which drafters have some control; though again, how courts see them will be filtered by processes of judicial interpretation, and the relevant norms governing those processes.[74] Other modalities – such as arguments from constitutional practice (post constitutional-enactment), constitutional case-law or 'jurisprudence', or more general values or normative principles – are also sources over which drafters have almost no control.[75]

Consider the history of attempts in India to rely on constitutional amendment as a means of overriding various decisions of the SCI on the right to property. For many scholars, constitutional amendment procedures provide an important means by which democratic majorities can override court decisions[76] – and thereby, in some cases, also re-assert the prior aims or understandings of constitutional drafters. In this sense, flexible amendment procedures might also be considered one means by which drafters could overcome the potential future dangers of an overly codified approach to constitutional drafting.[77] In general, one would also expect there to be far fewer gaps in the text of relevant 'override' amendments than in equivalent provisions in the original

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[70] *Id.*

[71] *See* Dixon & Ginsburg, *supra* note 4.

[72] Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 2029 (2007). There is, of course, a complex theoretical debate about legal meaning in this context, which it is beyond the scope of the article to address. For select contributions to this debate, however, *see, e.g.*, Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1991); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152 (Larry Alexander ed., 1998); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 849 (1985).

[73] Jackson & Greene, *supra* note 38.

[74] On these modalities *see* Bobbitt, *supra* note 36. On processes of interpretation in this context, *see e.g.*, Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and Literary Criticism*, 9 CRITICAL INQUIRY 201 (1982).

[75] *Id*.

[76] See Rosalind Dixon, *Constitutional Amendment: A Comparative Perspective, in* COMPARATIVE CONSTITUTIONAL LAW 96 (Rosalind Dixon & Tom Ginsburg eds.,2011) ; Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to Strauss*, 77 TUL. L. REV. 247 (2002).

[77] For a more in-depth exploration of the dynamics of constitutional amendment in this and related contexts, *see* Rosalind Dixon & David Landau, Updating Constitutional Codes (2014) (unpublished manuscript) (on file with authors).

constitution.[78] In drafting amendments, constitutional designers will generally have a great deal more concrete information about the particular constitutional issue to be addressed or confronted, and fewer time-constraints, or pressures, of the kind that might prevent them from engaging in detailed debate or negotiation over particular language. Yet, even for amendments of this kind, in India there is clear evidence of gaps in relevant constitutional language; and instances of the SCI "glossing" the meaning of relevant constitutional language in order to assert its preferred reading of the right to property, in line with previous common law understandings or more structural readings of the Constitution. Far from providing a complete answer to the problem of constitutional codification, therefore, amendment processes themselves seem to confirm the dangers of this kind of approach to constitutional drafting.

As part I notes, for instance, the First Amendment to the Indian Constitution was designed by its drafters to override various high court decisions, which foreshadowed the SCI's decision in *Bela Banerjee*, by inserting quite detailed, code-like language providing that "no law providing for the acquisition by the State of any estate or of any rights therein" or their extinguishment or modification should be deemed invalid for inconsistency with part 3 of the Constitution (dealing with fundamental rights) (art. 31A), and removing various statutes (listed in the Ninth Schedule) from the scope of judicial review (art. 31B).[79] The Fourth Amendment, passed in 1955, attempted to further immunize land reform measures from challenge by, among other things, attempting to protect all laws "for the acquisition by the State of any estate or of any of the rights therein" from challenge under articles 14, 19 and 31. The SCI, however, ultimately found that both amendments had clear gaps in terms of their capacity to override prior decisions.[80]

In *State of Bihar v. Kameshwar Singh,*[81] however, the court held that article 31A did not remove the (implicit) requirement under entry 36 of list II, and entry 42 of list III, of the Constitution (dealing with the compulsory acquisition of property) that, for a law to be validly enacted by a state legislature, it must either serve a public purpose, and/or provide a non-colorable measure of compensation. By transferring various land-holdings to the state with no immediate plan for their redistribution, certain justices held, the relevant land reform statute also lacked a true "public purpose". Similarly, by providing for the transfer of land-holdings and any associated rights to rental arrears, subject to a general requirement of compensation, other justices held, the state legislature had provided a form of compensation that was "colourable" and outside the requirements of entry 36 of list II, and entry 42 of list III.[82] A majority of the SCI accordingly struck down the relevant land reform statutes, as failing to come within the terms of entry 36 in list II.[83] Similarly, in *Karimbil Kunhikoman v. State of Kerala*,[84] the court held that, even after the Fourth Amendment, the term "estate" under article 31A did not apply to interests in Madras, such as a form of long-term tenancy called a "rotwaryi settlement", which fell short of a full proprietary interest or the definition of "estate" under state law. It accordingly struck down various land reform measures in Madras and Kerala as beyond the scope of the state legislatures' power under entry 36 of list II, and entry 42 of list III, and inconsistent with the prohibition on discrimination under article 14 of the Constitution.

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[78] For other potential differences between amendments and the original text of a constitution in this context, see also Adrienne Stone & Rosalind Dixon, Constitutional Amendment & Political Constitutionalism: A Philosophical & Comparative Reflection (2014) (unpublished manuscript) (on file with authors).

[79] Art. 31A. This article also defined the words "estate" and "right" in considerable detail.

[80] I use the word "ultimately" here, because there was a brief period in which the Court did in fact defer to the language of these amendments: *see, e.g.*, Shankari Prasad Singh v. Union of India, A.I.R. 1951 S.C. 458; Sajan Singh v. State of Rajisthan, A.I.R. 19065 S.C. 845. *See also* discussion in Bert Neuborne, *The Supreme Court of India,* 1 INT. J. CONST'L L. 476, 482–92 (2003); C. C. Aikman, *The Debate on the Amendment of the Indian Constitution*, 9 VICTORIA U. WELLINGTON L. REV. 358, 366–74 (1978).

[81] (1952) 1 S.C.R. 889.

[82] Mahajan J. (Aiyar J. concurring).

[83] Mukherjea J.

[84] 1962 A.I.R. 723l.

The result in both cases would have been difficult for the drafters of either the First or Fourth Amendments readily to foresee: the focus in early high court cases, and *Bela Banerjee* itself, was entirely on the effect of the right to property under article 31, and not any issue of federal or state legislative power. The original text of entry 36 of list II, and entry 42 of list III, also made no express mention of any requirement of public purpose, or just compensation: it simply provided that the state legislature had power in respect of the "acquisition of requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of list III". Similarly, in 1955, in passing further amendments designed to protect land reform measures from challenge, it would very likely *not* have occurred to members of the Lok Sabha that the concept of "estate" would fail to cover all relevant forms of proprietary interest in states such as Kerala and Madras. Cases such as *Bela Banerjee* and *Kameshwar Singh* arose out of West Bengal, Bihar, Madya and Uttar Pradesh, where state law defined the concept of "estate" quite broadly.[85] By focusing on those cases in drafting the Fourth Amendment, members of the Lok Sabha would thus have had little reason to know that state law definitions of property were in fact much narrower in some states. The only way to discover that would have been to engage in a comprehensive examination of property law in every Indian state, which would very likely have involved prohibitive forms of "transaction cost".

Similarly, the decisions of the SCI in these cases demonstrate the ultimate weakness of any text-based constitutional constraint, compared to other constitutional modalities or sources. In *Kameshwar Singh*, in implying notions of "public purpose" and minimum "compensation" into the terms of entry 36 of list II, and entry 42 of list III, the court relied on prior common law understandings, in preference to the quite explicit text-based constraint on judicial review imposed by article 31A of the Constitution. Likewise in *Karimbil Kunhikoman,* in reading the word "estate" in article 31A so narrowly as to deprive it of almost all relevant effect, the court gave direct effect to prior common law approaches to the meaning of "estate", in preference to the clear aims and understandings of the drafters.

B. Sympathetic Gap-Filling & the Judicial Response to Codification

For drafters actually to achieve their aims in most cases, therefore, they will inevitably need judges to engage in a degree of sympathetic gap-filling, or sympathetic application of non-textual constitutional sources, in line with the actual text of the constitution.[86] Judicial gap-filling of this kind, as former Israeli Justice Barak has noted, is a well-recognized part of civil law traditions of interpretation.[87] Judges in the civil law tradition will often fill gaps in a statute or legislative code by giving effect to analogous concepts, or norms, or applicable general legal principles. Gap-filling of this kind is generally understood to be authorized in civil law countries wherever a statute is partial, and partialness would negate its purpose. In a constitutional context, this would mean a court giving effect to general constitutional purposes, or analogous constitutional concepts, wherever the text of the constitution seems incomplete, and filling that gap could be seen to advance the purposes or aims of the drafters of the constitution, or a relevant amendment. Barak himself likens this to a form of "purposive" constitutional interpretation.[88]

A similar analysis applies to courts' approaches to reconciling a constitution's text with other modalities of constitutional argument. If a constitutional text is only one of several sources courts consider in reaching a decision as to the effect of particular constitutional provisions, drafters' abilities to achieve their aims will inevitably depend on courts either giving direct effect to those aims, or adopting an understanding of other constitutional modalities that is sympathetic to those

[85] See discussion in Karimbil Kunhikoman, 1962 A.I.R. 723l.

[86] See Issacharoff, *supra* note 69 at 982 (making similar arguments in relation to a constitution's provision for the basic requirements of democracy).

[87] Barak, Constitutional Implications (Paper presented at Conference on the Philosophical Foundations of Constitutional Law, Toronto, April 2014).

[88] *Id.*; AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (2005).

aims. Otherwise, there will be little chance that the 'constraint' imposed by constitutional language will be sufficient to ensure that courts interpret relevant language in line with drafters' aims.

For some judges, however, the very fact that drafters have attempted to codify certain aspects of the constitution may provide a reason to reject a sympathetic or purposive approach to constitutional interpretation. Instead, the specificity of the constitution's text may provide a reason to adopt a quite narrow, non-purposive approach to the interpretation of that language; or in common law systems, to rely on canons of interpretation – such as the *expressio unius* canon – that have a strongly narrowing effect. In a statutory context, in most common law systems, the principle of *expressio unius est exclusio alterius* states that, in general, the provision for one thing excludes the provision for another.[89] In a constitutional context, common law courts have also frequently relied on this canon to give a narrow interpretation to relatively specific, code-like constitutional language – sometimes even in the face of quite clear evidence of a contrary intention on the part of the constitution's framers. For constitutional drafters, this will imply a clear loss – particularly where constitutional judges might otherwise have been expected to be sympathetic to their substantive aims or understandings, or undecided or uncommitted in their approach.

Consider the experience in India of attempts by the drafters to provide for relatively broad limitations on freedom of expression in the interests of public order. In debate in the Constituent Assembly in India, there were numerous statements by key drafters of the Constitution that conditions in India at the time of constitution-making required "that all fundamental rights guaranteed under the Constitution", including freedom of expression, be subject to public order, security and safety" exceptions or limitations.[90] This was one reason why the drafters chose to adopt a relatively code-like approach to defining the permissible limitations on such rights, under article 19 of the Constitution, which in its original form provided that nothing in the guarantee of free speech in article 19(1) of the Constitution should: "affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State".

In *Romesh Thappar v. State of Madras*,[91] however, the SCI ultimately took an extremely narrow, non-purposive view of the scope for limitations under this language. The question for the SCI in *Romesh Thappur* was whether a Madras law allowing for limits on the sale and distribution of material deemed a threat to "public safety and the maintenance of public order" was a limitation within the scope of the original terms of article 19(2). In answering this question, the SCI also ultimately took an extremely narrow view of the concept of "security … of the state", which excluded attempts by the state to prevent breaches of the peace with only relatively minor significance, or of the kind likely to create only localized insecurity or public disorder. In order to pass muster under article 19(2), the SCI further held, legislation had to be directed *solely* toward preventing the "undermining of the security of the State or the overthrow of it", and not seek in any way to regulate more minor breaches of the peace that could cause more localized insecurity or public disorder.[92] In adopting this approach, the court also explicitly relied on the *expressio unius* principle. By placing in "a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it", the court suggested, article 19(2) should be interpreted as making their prevention *the sole justification for* legislative abridgement of free speech and expression".[93] From this, the court also proceeded to suggest – without further justification – that the relevant limitations should also be construed "narrowly" and "stringently", so

[89] *See, e.g.,* Tate v. Ogg, 195 S.E. 496, 499 (Va. 1938) (a statute that applied to "any horse, mule, cattle, hog, sheep or goat' did not apply to turkeys).
[90] *See* letter from Alladi Krishnaswami Attar to BN RA, April 4, 1947, as quoted in RAO, *supra* note 64, at 212. *See also* RAO, *supra* note 64, at 223.
[91] 1950 S.C.R. 594.
[92] *Id.* at 602.
[93] *Id.* at 601.

that "nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression".[94] Legislation that was overbroad in this context, the court further held, could not be read down, or severed, so as to achieve even partial validity.

In adopting this approach, the SCI also relied on a highly selective account of the drafting history behind article 19(2). The court, for example, noted that the word "sedition" was deleted from previous drafts of article 19(2), and suggested that this provided direct support for the narrow interpretation adopted by the court of the concept "security of the state".[95] It in no way considered other plausible explanations for this change in language, such as the oppressive application of anti-sedition laws by the British, or continuing confusion and uncertainty surrounding the concept of "sedition" at common law.[96] It also failed to take account of explicit statements by members of the Constituent Assembly that the concept of public security (as opposed to say, "defense") was "a comprehensive word which embraced both internal and external security".[97]

In South Africa, in contrast, the SACC has generally adopted a more generous, purposive approach to the more framework-like limitations found in sections 16 and 36 of the Constitution, which provide that the right to freedom of expression does not extend to: (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm,[98] and that limitations on the right are permitted where they are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[99]

In the *Islamic National Unity Case*,[100] for instance, the SACC considered a challenge to the requirement under the national Code of Conduct for Broadcasting Services that holders of a broadcast license refrain from broadcasting material "likely to prejudice the safety of the State or the public order or relations between sections of the population".[101] In doing so, it also held that such regulations were clearly outside the scope of the carve-outs found in section 16(2). At the same time, the SACC held that these carve-outs did *not* necessarily exhaust the scope for the National Assembly to restrict hate speech or other forms of potentially dangerous speech. Section 16(2), the SACCC suggested in the *Islamic National Unity Case*, "defines the boundaries beyond which the right to freedom of expression does not extend", and thus ensures that there is no constitutional bar to any regulation that falls within its scope.[102] The provision, the court held however, could also be seen as constituting an "implicit acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm", or that the "state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality".[103] In the court's view, it could thus be seen as *supporting* arguments, such as those made by the respondents in the *Islamic National Unity Case*, that related forms of regulation, such as the national Code of Conduct for Broadcasting Services, served a legitimate and important government interest within the meaning of section 36(1).[104]

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[94] *Id.*
[95] *Id*.
[96] *See id.* at 2201–22.
[97] *See id.* at 216–17. *But cf.* Soli J. Sorabjee J.
[98] S. AFR. CONST., 1996, s. 16(2).
[99] S. AFR. CONST., 1996 , s. 36(2).
[100] Islamic Unity Convention v. Independent Broadcasting Authority, CCT 36/01 ("Islamic National Unity Case").
[101] *Id.* at ¶¶ 2, 22
[102] *Id.* at ¶¶ 32–33.
[103] *Id.*
[104] *Id.* at ¶ 45.

In taking this approach, the SACC also made explicit mention of the historical background to provisions such as sections 16 and 192 (which imposes a duty on parliament to enact broadcasting regulations[105]), noting that: "South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear", and that given this, there was a "critical need, for the South African community, to promote and protect human dignity, equality, freedom, the healing of the divisions of the past, and the building of a united society".[106] The court's approach was also consistent with the understanding expressed by members of the Constituent Assembly when drafting section 16(2), both in debate and via the Constituent Assembly's official public newsletter, *Constitutional Talk*.[107]

Indeed, the court's approach in this context accords with a more general willingness on the part of many judges in South Africa to give effect to the broad aims and understandings of the Constitution's drafters when interpreting the language of the constitutional text. Members of the constitutional court in South Africa have consistently endorsed a role for the court in "uphold[ing] the values of our Constitution and . . . fulfil[ling] its transformative mandate",[108] "achiev[ing] . . . the vision of [the] Constitution",[109] and "serving as guardians of the ideals and founding values of the Constitution".[110] In doing so, they have also explicitly rejected the idea of the court interpreting the constitution "according to the letter" of its language, or the role of the court as "an interpreter of the law pure and simple". [111]

What, one might ask, could possibly explain a constitutional court adopting a less generous approach to more code-like constitutional language – even in the face of evidence that constitutional drafters themselves intended such language to have a broader operation? One explanation is extremely orthodox, and depends on a direct analogy to rules of interpretation common in contract law. In a contractual setting, courts often treat the relative specificity, or "completeness", of a contract as an important indicator of the parties' intentions in relation to the implication of terms.[112] The more specific or complete contractual terms are, the less likely courts generally are, in this context, to find that there was an intention on the part of the parties that a court should "imply" terms into the contract intended to reflect the parties' intentions.

The same analysis could also be applied by a court to code-like constitutional provisions: the relative detail or completeness of such provisions, a judge might infer, could be seen as a signal by parties to constitutional negotiations that they did *not* intend courts to play any significant form of gap-filling role – or to make direct resort to the aims or understandings of the drafters in interpreting express constitutional language. Instead, such language could be seen as a signal by drafters that they intended courts to adopt a far more strictly text-based, as opposed to more purposive, approach to constitutional interpretation.[113] For some judges, the code-like character of particular constitutional provisions could thus be seen as providing an *originalist* basis for adopting a

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[105] S. AFR. CONST., 1996 s. 192.

[106] Islamic National Unity Case, CCT 36/01 ¶ 43.

[107] *See, e.g., Issue One*, CONSTITUTIONAL TALK, Feb. 9–29, 1996 at 5; Lene Joahannessen, *A Critical View of the Constitutional Hate Speech Provision*, 13 S. AFR. J. ON HUM. RTS 136, 137–38 (1997).

[108] Chief Justice Mogoeng Mogoeng, Celebrating 15 Years of the Signing of the South African Constitution (Dec. 11, 2011).

[109] Chief Justice Arthur Chaskalson, The Vision of the South African Constitution at the Judges' Conference to Mark the Inauguration of the New Building for the Constitutional Court of South Africa (Mar., 2004).

[110] Chief Justice Pius Langa, Judging in a Changing Society: The South African Context (Mar. 18, 2004.

[111] Interview by the Judicial Services Commission with Justice Johan Christiaan Kriegler, Judge of the Appellate Division (Oct. 5, 1994).

[112] *See, e.g.,* Trinova v. Pilkington Bros., P.I.C. 638 N.E. 2d 572, 575 (Ohio 1994). *Cf. also* Pulaski Nat'l Bank v. Harrell, 123 S. E. 2d 382, 387 (Va. 1962).

[113] *See, e.g.*, *A-G (Vic) ex rel. Black v Commonwealth ("DOGS Case")* (1981) 146 CLR 559, 582 (Austl.) (Barwick C.J.) (rejecting historical arguments in favour of a broad effects-based reading of § 116 of the Australian Constitution, in favour of a narrower text-based approach, and emphasizing "the long and *complete* [nature of] list of the limits on Commonwealth power" as factor pointing in favor of such a heavily text-based approach).

quite strict, non-purposive approach to the interpretation of the language of such provisions. Courts in some cases have also relied on exactly this kind of logic to reject direct attention to the history of a constitutional provision, or the aims of its framers.[114]

Another, more contentious explanation for this same pattern – of deliberate blindness by courts to the (relatively) broad aims or understandings of the drafters – is the degree to which judges may perceive specific constitutional provisions as signaling a form of distrust toward them as constitutional interpreters. Constitutional norms often have important expressive or "signaling" functions: they convey important messages to citizens about shared values, or about the priorities of different institutions.[115] For judges, constitutional provisions may also send signals about constitutional drafters' relative confidence, or lack of confidence, in them as interpreters: More abstract provisions tend to impose fewer constraints on courts, and thereby to signal to judges an important degree of trust in their capacity to act as faithful agents of drafters' aims and understandings.[116] More specific provisions, in contrast, will be equally attractive to constitutional drafters who do and *do not* have confidence in courts as faithful agents of their aims and understandings. Unless it is clear that there are other explanations for the codified nature of particular constitutional provisions, either in general or in the particular context, the code-like nature of constitutional language may thus be perceived by courts as a clear message of *distrust* toward them as interpreters.

Signals of trust, or distrust, social scientists have shown, can also have a powerful impact, on individuals' tendency to show *reciprocal* forms of generosity or goodwill. In an employment setting, for example, employers often pay employees an above-market wage.[117] This also depends on a certain kind of "trust" on the part of employers, because when setting wage levels, or other benefits, employers do not know whether higher wages will in fact lead to higher effort levels on the part of relevant employees.[118] Employees in such settings also frequently work in excess of the minimum work standard set by the employer.[119] One explanation for this, economists such as George Akerlof have argued, is the relevance of norms of reciprocity.[120]

Similar dynamics, economics have shown, also often operate in reverse. Where a firm or employer offers a low wage, for example, subjects in the role of workers tend to respond with low effort levels. In some cases, experimenters have found, workers are also willing to incur additional costs in order to punish employers who offer low wage levels – or act according to a logic of "negative reciprocity".[121] The perceived motives, or intentions, of other players can also be crucial to whether positive or negative reciprocity is shown: fairness, as Matthew Rabin notes, dictates that if somebody is "nice" to you, you are nice to them in return, and means that, if someone is "mean" to you, you may be mean in return.[122] Judgments about "niceness", and "meanness", are also inevitably quite subjective, and context-dependent.[123]

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[114] *Id.* at 578, ¶ 12.

[115] *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement,* 148 U. PA. L. REV. 1503 (2000). *Cf. also* Richard Albert, *The Forms and Functions of Constitutional Amendment Rules* (2013) (unpublished manuscript) (on file with author).

[116] *See* Michael A. Spence, *Job Market Signaling,* 87 Q .J. EC. 355 (1973).

[117] *See* discussion in George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. ECON 543 (1982).

[118] *See, e.g.*, Noel D. Johnson & Alexandra A. Mislin, *Trust Games: A Meta-Analysis*, 32 J. ECO. PSYCH. 865 (2011).

[119] *Id.*

[120] *Id.* at 544. Norms of this kind also hold equally, if not more powerfully where the "gift" given by an employer takes a non-pecuniary form: *See, e.g.*, Sebastian Kube et al., *The Currency of Reciprocity – Gift-Exchange in the Workplace* (University of Zurich Working Paper No. 377, Feb. 2010); Armin Falk, *Gift Exchange in the Field,* (University of Bonn, Institute for the Study of Labour, May 2005).

[121] Paulo Trigo Pereira, Nuno Silva & Joao Andrade e Silva, *Positive and Negative Reciprocity in the Labor Market* 11–14 (Instituto Superior de Economia e Gastao, Technical University of Lisbon), *available at* http://pascal.iseg.utl.pt/~ppereira/docs/pereira_ESA.pdf.

[122] Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. EC. REV. 1281 (1993).

[123] *Id.* at 1286 (modelling trust games as a psychological game).

These findings have clear potential *logical* relevance to constitutional law,[124] and more particularly, the relationship between constitutional drafters and interpreters. Given dynamics of reciprocity, judges who see themselves as enjoying the trust of drafters may be more willing than otherwise to give *direct*, *voluntary* consideration to the aims or understandings of drafters, or to adopt a generous, purposive approach to the actual language used by drafters. Conversely, judges who see themselves as the object of clear distrust by drafters may be more grudging, or ungenerous, in their willingness to read the constitution's text so as to advance the aims and understandings of its drafters. This dynamic also need not be conscious on the part of judges to influence their approach to interpretation: it simply requires that judges register more or less code-like constitutional language as signaling a form of institutional trust, or distrust, by drafters.

The ultimate plausibility of such a dynamic in a constitutional context will, of course, depend in part on how one understands the process of constitutional interpretation: the more legally-constrained such a process is, the less scope there will be for such dynamics to arise; whereas, the more open-ended and evaluative it is, the greater scope for this kind of psychological dimension to judging.[125] Similarly, the plausibility of such a dynamic will also vary by context and time. Judges, for example, may have a different response to framework-like constitutional language, depending on whether they are operating within the common law or civil law tradition, or at an ultimate appellate or lower court level: civil law judges may be less comfortable exercising broad interpretive discretion than judges in the common law tradition; and lower court judges may see broad constitutional language as carrying a distinctive risk, not faced by ultimate appellate judges, of appeal or appellate correction. These differing responses or perceptions may also affect the degree to which judges see framework-like constitutional language as conferring a benefit or showing trust, rather than imposing a cost.[126] Norms of reciprocity also seem most likely to apply in contexts that involve some form of face-to-face, or at least contemporaneous, relationship.[127] In a constitutional context, this may mean that such a dynamic is relevant only in the first generation of a constitution's operation, when drafters and interpreters are known to each other, or have some actual personal relationship or connection. Thereafter, it may have effect, if at all, only through processes of common law reasoning, or the tendency of courts to follow earlier precedents that themselves reflect this kind of trust-based dynamic.

The striking nature of the dynamic in other contexts, however, suggests that it may have some application to the relationship between constitutional drafters and judges, at least in certain contexts. There is also some modest support for its plausibility in the statements of various members of the South African Constitutional Court linking the court's broad and purposive approach to constitutional interpretation with the *responsibilities* entrusted to the court under the 1996 Constitution:[128] Statements of this kind were notably absent from the rhetoric of members of the Indian Supreme Court in the 1950s and 1960s. Indeed, statements by members of the court about

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[124] For previous work exploring the relevance of this dynamic to law in other settings, *see, e.g.*, DAN M. KAHAN, *The Logic of Reciprocity: Trust, Collective Action, and Law, in* MORAL SENTIMENTS AND MATERIAL INTERESTS (Herbert Gintis et al. eds., 2005).

[125] *Compare, e.g.*, Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty,* 69 TEX. L. REV. 1881 (1991).

[126] I am indebted to Wojciech Sadurski and Lior Strahilevitz for pressing me on this point.

[127] Some anthropological work shows that dynamics of gift exchange can apply even to (at least recently) deceased persons, or their families: *see, e.g.*, MARGARET LOCK, TWICE DEAD: ORGAN TRANSPLANTS AND THE REINVENTION OF DEATH 316–28 (2002). In general, however, dynamics of reciprocity can be expected to be most relevant in personal, contemporaneous relationships.

[128] Interview by the Judicial Services Commission with Justice SS Ngcobo for the position of Chief Justice; Deputy Chief Justice Dikgang Moseneke, Transformative Adjudication at the Fourth Bram Fischer Memorial Lecture, Nelson Mandela Civic Theatre, Johannesburg (Apr. 25, 2002).

the nature of the judicial role in this period were more likely to involve an explicit rejection of this kind of purposive approach to interpretation, than its endorsement.[129]

IV. Conclusion

How these two potential effects of constitutional codification – that is, the potential constraining effect, versus crowding-out more purposive approaches to interpretation – balance out will depend a great deal on the particular constitutional context. One overriding factor, as part III notes, may be the degree to which a country enjoys a common law versus civil law heritage: common law judges are far less accustomed than civil law judges to interpreting statutory codes, and more accustomed to applying narrowing canons such the *exclusio alterius* principle. They may thus have a quite different response to constitutional codes than judges in civil law countries. Three additional factors may also be particularly relevant to this balance in various contexts.

First, the general constitutional context: In contexts where drafters are seeking to create significant change in patterns of constitutional interpretation, it may be particularly valuable for drafters to adopt quite detailed, code-like language which requires judges to confront evidence that the drafters intended to change that pattern of interpretation.[130] Otherwise, the tendency may be for judges simply to continue to look to past patterns of interpretation, when in fact the aim of drafters is to create a much more "decisive break" in the country's approach in a particular context.[131] Where, in contrast, drafters are seeking more squarely to preserve existing constitutional practice, or practices of interpretation, it may be less important to adopt a more codified approach. Instead, the safer approach may in fact be to adopt language that is largely framework-like in nature, and thus gives significant scope for continuity in common law-type reasoning.[132]

Second, the global constitutional context: Another factor affecting the desirability of constitutional codification in particular contexts will be the degree to which drafters are seeking to create constitutional provisions that operate similarly – or differently – to prevailing constitutional norms in other constitutional democracies. In most areas, there will be no clear global constitutional "norm": constitutions are simply too diverse to generate such a clear set of (concrete) norms.[133] However, in certain areas, either because of international law norms, or gradual borrowing or pressures toward convergence, there will be a greater degree of overlap in the practices of constitutional democracies, or a dominant trend in constitutional practice.[134] Moreover, outside the United States, most constitutional courts make some use of comparative constitutional experience, or precedents, in approaching novel constitutional questions.[135] In civil law systems, this is often only implicit; whereas in common law systems, it is generally far more wide-ranging and explicit.[136] However, in most constitutional democracies, there is some pattern of comparative engagement by

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[129] A.K. Gopalan v. State of Madras, 1950 A.I.R 27, 121. See also Ramakrishna Singh v. State of Mysore, A.I.R. 1960 Kant 338, ¶ 7 (Das Gupta C.J.); Municipal Committee v. State of Punjab, 1969 S.C.R. (3) 447, 453 (Shah J.C.).

[130] *Cf.* David Fontana, *Revolutionary and Reorganizational Constitutions* (2011) (unpublished manuscript) (on file with authors); Karl Klare, *Legal Culture & Transformative Constitutionalism*, 14 S. AFR. J. ON HUMAN RIGHTS 146 (1998).

[131] For this idea, as particularly relevant to the context of the 1993 South African Constitution, see e.g., S v. Makwanyane, 1999 (3) SA 391 (CC) para 262 (Mahomed J.).

[132] This was arguably an important difference between the 1993 and 1996 South African Constitutions, in terms of their relationship to prior practices of constitutional interpretation: *see, e.g.*, Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 J. CONST. L. 205 (1998).

[133] *See* Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, 11 U. CHI. J. INT'L L. 399 (2011).

[134] *See, e.g.*, *id.*; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009).

[135] Cheryl Saunders, *Judicial Engagement, in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA 80 (Rosalind Dixon & Tom Ginsburg eds., 2013) .

[136] *Id.*

courts; and this pattern will often mean that courts interpret domestic constitutional provisions in line with global norms or trends.[137] If drafters wish to achieve an approach to constitutional meaning that is typical, in global terms, they will thus be quite safe in adopting a framework-like approach; whereas if they wish to create a more distinctive approach to interpretation, domestically, they will often need to adopt quite code-like language, which makes clear this intention to create a different approach.[138]

Third, the judicial context: As parts I and II note, constitutional codification will be particularly valuable for drafters where they have reason to believe that the judges who will interpret a constitution are likely to be hostile to their aims or understandings – or have a quite different political ideology or philosophy to that of a majority of drafters.[139] Where the members of the court are predicted to be ideologically sympathetic to the drafters' goals, it will generally be unnecessary for drafters to constrain judges to consider those goals: they are likely in any event to give effect to those goals, where the formal legal materials allow. The question will be whether the text of the constitution itself provides them either the opportunity, or encouragement, to do so. A harder case will be where the likely ideology and interpretive approach of a majority of judges is more uncertain, or unknown, to drafters, but here too there will be a strong argument for seeking to co-opt, rather than constrain, judges into giving effect to the drafters' aims. But where constitutional judges are predicted to be largely unsympathetic to drafters' substantive aims and understandings, it will generally be far more important for drafters to adopt code-like constitutional language: Unless such judges are committed originalists, code-like constitutional language will often be the *only* means by which drafters can encourage such judges to give effect to their aims or understandings.

One difficulty for both drafters and comparative constitutional scholars in this context will be to determine how this ideological context intersects with judgments about the relative "success", or failure, of various constitutional design choices.[140] If constitutional drafters, for instance, are generally more willing to give interpretive latitude to judges where they are confident that those judges share their substantive political ideology, or philosophy, it may be difficult to determine the *causal* effect of a decision to adopt such framework-like constitutional language. The interpretive discretion such language creates may itself encourage a more sympathetic, or purposive, approach to interpretation by relevant judges – but when such interpretation is observed, it could equally be the case that it is judicial ideology, rather than the framework-like nature of the constitution, that is instrumental in creating the desired interpretive outcomes. Conversely, if drafters are more likely to attempt to constrain judges via the adoption of code-like language where they have reason to believe that judges are likely to be unsympathetic to their substantive aims or understandings, it may be difficult to untangle the causal origins of any subsequent judicial decision that frustrates those aims or understandings. If judges interpret constitutional language in line with drafters' aims and understandings, this may present a relatively straightforward case of design "success". But if judges give a narrower, more grudging interpretation to that text, it may be difficult to disentangle cause and effect: the reason for drafters adopting such specific constitutional language may have been a distrust of the relevant judges, and it may be that, in interpreting such language, judges are simply confirming the basis for that distrust, rather than responding to it, as a signal of distrust.

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[137] *See, e.g.*, S v. Makwanyane, CCT3/94 (1995); Roper v. Simmons, 543 U.S. 551 (2005). *See also* discussion in Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); Ernest A. Young, *Foreword – Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005); Judge Richard A. Posner, *Foreword – The Supreme Court 2004 Term: A Political Court*, 119 HARV. L. REV. 31 (2005).

[138] This is one potential important difference between India in 1950 and South Africa in 1996. In 1996 the South African drafters were largely seeking to adopt a set of constitutional norms that were in line with global human rights norms, whereas in 1950, the Indian drafters were seeking to achieve a far more distinctive social democratic gloss on prior common law, or US, models of constitutionalism.

[139] This, of course, also intersects with the substance of relevant constitutional provisions: see *supra* note 40.

[140] *See* MARK TUSHNET, ADVANCED INTRODUCTION TO CONSTITUTIONAL LAW (2014).

Take the South African constitutional context as an example: In 1992, when the multi-party negotiations were conducted on the terms of the Interim Constitution, there was significant uncertainty as to the results of democratic elections. Both the NP and the ANC, therefore, had a clear interest in ensuring that any judge appointed to the Constitutional Court was constrained to give at least some effect to their aims and understandings in interpreting the Interim Constitution, and the constitutional principles it established to govern the transition to a fully democratic constitution.[141] By 1994, however, the ANC's decisive victory at the first multi-party democratic elections meant that the ANC was in a position to control the appointment of almost all the judges on the Constitutional Court. The ideological composition of the court thus meant that, to a greater or lesser extent, the result in all of the South African cases discussed in parts II and III was over-determined: it was potentially the product of both relevant textual factors and the substantial overlap that existed between the political philosophy of the majority of members of the court and the ANC-dominated Constituent Assembly. For cases, such as the *Islamic National Unity Case*, which involved the court giving a sympathetic reading to quite abstract, framework-like constitutional language, it would also be difficult to say that either the text or judicial ideology played a decisive role in producing the relevant result.

Conversely, in India, a key motivation for adopting relatively code-like language in the original Constitution and subsequent amendments was a perception among members of the Constituent Assembly and Lok Sabha that members of the SCI did not share the substantive political commitments of a majority of the Constituent Assembly. Indeed, it seems clear that the SCI in the 1950s was generally *not* a bench that shared the social-democratic vision of the Indian framers in regard to property or land reform, or the commitment of the framers to protecting India's territorial integrity, by preventing against public unrest or breaches of the peace. Instead, many judges were committed to a more classically liberal vision of the state, and to strong protection of common law rights and liberties: all of the justices had practiced as lawyers, and had extensive experience as judges in high courts or the federal court.[142] Two (Das and Ali JJ.) were also educated in England.[143] Against this backdrop, there was good reason for the Indian drafters to adopt a relatively codified approach to constitutional drafting, which sought to constrain future judges to adopt this more social democratic, or pro-government, approach. The difficulty this creates in judging the subsequent record of constitutional interpretation by the SCI in the 1950s and 60s, however, is that it is difficult to say whether the court's distinctly non-purposive approach in cases such as *Romesh Thappur*, or *Kameshwar Singh* and *Karimbil Kunhikoman*, simply vindicated the initial distrust of the court by relevant drafters, or instead, was in some way responsive to the specificity of the relevant constitutional text – and thus caused by the choices made by drafters in 1950, 1951 or 1955.

Another difficulty for drafters and scholars alike will be to determine the appropriate time-horizon for judging the success, or failure, of interpretive influence for drafters. In a democratic constitutional context, there must necessarily be *some* time-limit on the value of fidelity by judges to drafters' original aims and understandings. This time-horizon might be a matter of years, or decades, or roughly a generation (which, for Jefferson, was 19 years, and for modern drafters, more like 25 years[144]). But it cannot be indefinite, unless we are to adopt a definition of interpretive influence that is entirely insensitive to democratic concerns. In a democracy, a constitution must clearly afford opportunities for ongoing change, or revision, to constitutional meaning, as well as create minimum conditions for democratic stability. Change of this kind can potentially occur via either formal

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[141] LAUREN SEGAL, SHARON CORT & CYRIL RAMAPHOSA, ONE LAW, ONE NATION: THE MAKING OF THE SOUTH AFRICAN CONSTITUTION (2011).

[142] GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 124 (1999).

[143] George H. Gadbois Jr, *Indian Supreme Court Judges: A Portrait*, 3 L. & SOC'Y REV. 317 (1968) (discussing the English common law training and background of various judges); AUSTIN, *supra* note 142, at 124 (discussing this background and English common law notions of market-based takings).

[144] *See* TOM GINSBURG, ZACHARY ELKINS & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009). *See also* Bennett M. Berger, *How Long is a Generation?*, 11 BRIT. J. OF SOC. 10 (1960).

constitutional amendment *or* more 'informal' processes of constitutional interpretation.[145] Different constitutional theories may differ in how they view the legitimacy of these different modes of change, but there is no general consensus among different constitutional theories that "common law" forms of change of this latter kind are necessarily illegitimate. In cases, therefore, where at some later point in time a court departs from drafters' original aims and understandings, and adopts an "updated" interpretation of the constitution's text,[146] one cannot necessarily label such a decision an instance of democratic design failure. Whether or not it counts as such will largely depend on one's ingoing theory of the appropriate relationship between constitutional change and interpretation.

The key aim of the article, however, is not to offer a set of precise prescriptions for constitutional design, or for judgments about democratic constitutional design "success" or "failure". Instead, the aim of the article is to provide a clearer picture of both the potential advantages *and* disadvantages to specificity in constitutional drafting from the perspective of one key measure of design success, namely the effective influence of formal democratic design choices over subsequent practices of constitutional interpretation. For drafters, these insights could have two potential uses in honing or refining their initial constitutional draft, so as to avoid unnecessary interpretive costs or downsides.

First, for constitution-makers who start with a distinctly framework-style approach to drafting, the insights offered by the article could provide an important check against the dangers of an overly vague or framework-like approach to drafting. Given the insights of the article, constitution-makers who start from this position might usefully ask themselves: could I do more to define notably ambiguous constitutional concepts, or to clarify the meaning of concepts intended to have a distinctly different scope to prior constitutional practices, or to global constitutional norms? By taking this approach, drafters could potentially go a significant way toward requiring judges to pay attention to their aims and understandings where it matters most – that is, where judges are most likely to ignore or depart from those understandings. At the same time, they need not necessarily run into all of the dangers explored in part III: if a constitution has select areas of codification, but remains sufficiently framework-like in other areas, courts may still be willing to adopt a purposive approach to filling relevant gaps, rather than a narrower, more strictly text-based approach.[147] It may thus be possible for drafters to achieve a significant portion of the benefits to both a more codified and framework-like approach to interpretation.

Equally, for constitution-makers who start at the opposite end of the spectrum, the article counsels against too ready a willingness to follow the global trend toward greater constitutional codification. Some of this trend may not be the product of any deliberate or self-conscious choice by constitutional designers: indeed, it may simply reflect approaches to constitutional drafting in which there is such broad participation that there is no clear set of drafters with any unified or coherent set of aims or "will". In other contexts, however, the adoption of more code-like constitutional language does seem to reflect a more deliberate design choice on the part of some sub-set of constitutional drafters. For these drafters, at least, the article also provides a potentially important caution. It suggests, first, that any attempt at constitutional codification will inevitably be partial, or incomplete, or involve gaps in both its coverage of various topics and its capacity to constrain judges to adopt a particular result, rather than simply consider certain arguments. Second, and perhaps even more importantly, is suggests that even the mere attempt at codification by drafters can have strongly counter-productive consequences by undermining courts' willingness – as more unconstrained interpreters – to adopt the kind of directly purposive or sympathetic gap-filling

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[145] Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective, in* COMPARATIVE CONSTITUTIONAL LAW 96 (Rosalind Dixon & Tom Ginsburg eds., 2011).

[146] *See, e.g.,* Minnerva Mills v. Union of India, A.I.R. 1980 S.C. 1789; Olga Tellis v. Bombay Municipal Council [1985] 2 Supp S.C.R. 51; discussion in Rosalind Dixon, Partial Bills of Rights (2014) (unpublished manuscript) (on file with author).

[147] This for example is arguably the approach of both the 1993 and 1996 South African Constitutions.

approach that is actually likely to achieve drafters' goals. This, for drafters, also suggests that they may do well to consider selective "trimming" of constitutional language in reviewing and revising an initial constitutional draft,[148] or even to reconsider the merits of a more generally framework-like approach to constitution drafting.

Judging the full merits of this more framework-style approach may require attention to questions of constitutional endurance and compliance that are beyond the scope of this article. But the article highlights one clear potential advantage to such a model which should give drafters pause before adopting a general preference for constitutional codification: such a model seems significantly more likely to encourage judges to adopt the kind of sympathetic, purposive approach to interpretation that can help drafters' directly realize their goals. At the very least, the lessons from India and South Africa in this context seem to be that sometimes "less will be more" when it comes to drafters' successful influence over subsequent practices of constitutional interpretation by courts. Whether or not this is ultimately sufficient to make the case for a framework-style approach to constitutional drafting, it is certainly sufficient to make the case against a blind rush to constitutional codification.

[148] *Cf.* Sunstein, *supra* note 31. I use the term in a more literal way than Sunstein, but like Sunstein, to convey the idea of a compromise approach. The idea of "trimming" here might thus be understood to involve a preference for something like mid-level or mid-range constitutional specificity.