Constitutional drafting and distrust

Rosalind Dixon

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 either choose to adopt either a highly “codified” or detailed approach to constitutional drafting, or rely on a more “framework”-style approach, which places greater trust in constitutional courts as partners in the process of constitutional interpretation. The article investigates the merits of these two different approaches to constitutional drafting, drawing on case-studies from South Africa and India on the right to property and freedom of expression, and the insights of behavioral economics and psychology.

Trusting is hard. Knowing who to trust, even harder.

Maria V. Snyder

The chief lesson I have learned in a long life is that the only way you can make a man trustworthy is to trust him; and the surest way to make him untrustworthy is to distrust him.

Henry L. Stimson

1. Introduction

Constitutions, it turns out, do permit of the prolixity of a legal code. The Indian Constitution is currently over 140,000 words long, compared to the roughly 8,000 words in the amended US Constitution. In between are democratic constitutions spanning the full range

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of long and detailed to short and abstract. The Brazilian Constitution, for instance, contains approximately 65,000 words, the South African Constitution 43,000 words, and the Canadian Constitution 20,000 words. This variation reflects more than mere differences in the scope, or coverage, of constitutions, or the time at which they were drafted.4

In drafting any new constitution or constitutional provision, drafters face a 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 greater detail or specificity regarding the intended meaning and operation of relevant constitutional norms.5 The two models have different relevance in various constitutional settings, both within and across countries. Yet there is a clear trend worldwide toward longer or more codified constitutions,6 and thus an important question for drafters as to the merits of the two drafting styles.

In many contexts, the article suggests, the two styles represent two different approaches to the role of courts in the interpretation of a new constitution, or constitutional amendment.7 The codified approach attempts to use the formal process of constitutional design to constrain judges to consider the aims and understandings of drafters in resolving particular concrete constitutional controversies. The framework-style approach gives broad discretion to judges to shape constitutional meaning. In this sense, the article suggests, the two approaches represent quite different attitudes to trust on the part of constitutional drafters: one approach implicitly assumes at least some degree of distrust toward judges as constitutional interpreters, whereas the other is based on a high degree of faith, or trust, in judges as partners in the process of constitutional design. The article thus approaches the question of the “optimal” specificity of a constitution by examining the merits of these two different approaches to the question of constitutional trust.8

A trust-based approach, the article suggests, carries obvious risks: it gives judges broad authority to shape the meaning of the constitution. If judges are hostile to the aims and understandings of drafters, this will also give them broad scope to defeat those aims and understandings. Any trust-based approach, the article therefore suggests, will necessarily depend on drafters having some confidence that the judges who interpret a new constitution, or provision, will share the same substantive aims or understandings as the drafters themselves, or alternatively, have a commitment to a distinctive interpretive approach—i.e., “originalism”—that requires them to give effect to the aims or understandings of the drafters in interpreting open-ended constitutional language.9 If they do not, at least in the early years of a constitution’s

7 For other factors affecting specificity, see infra Section 2.
operation, a framework-style approach will generally offer drafters little chance of constitutional design success, or influence over subsequent patterns of constitutional interpretation.\textsuperscript{10}

A distrust-based approach, on the other hand, is often seen to carry fewer risks for drafters: it necessarily constrains judges to give at least some indirect attention to the aims and understandings of drafters in resolving concrete constitutional controversies. This will also be particularly valuable for drafters where judges are known to be hostile to drafters’ aims or understandings, or to favor a distinctly non-originalist approach to interpretation. Yet text-based constraints of this kind, the article suggests, will also inevitably be incomplete: any attempt at constitutional codification will necessarily have gaps, or be incomplete in relation to some issues; and any constitutional text must be interpreted by a court, and practices of interpretation inevitably reflect extra-textual practices.\textsuperscript{11} If judges are actively unsympathetic to drafters’ aims and understandings, therefore, drafters will have little chance of successfully constraining judges to follow those aims or understandings.

Moreover, for some judges, the very attempt at constitutional codification may discourage resort to drafters’ aims and understandings, as a guide to interpreting gaps or ambiguities in constitutional meaning. This may be because of orthodox legal principles, which hold that detailed language can be understood as a deliberate signal by drafters that they intend to exclude this kind of gap-filling role on the part of courts. Or it may be because, when faced with expressions of distrust from drafters, judges have a psychological response which involves showing less sympathy for the aims and understandings of drafters themselves.\textsuperscript{12} Distrust, in this sense, may thus be a self-fulfilling prophecy for drafters: even where drafters have no reason to distrust particular judges, the very act of expressing distrust toward courts as interpreters may convert certain judges into interpreters who in fact merit distrust—i.e., who are opponents, rather than allies, in the process of constitutional design.

Wherever possible, the article therefore suggests, constitutional design should be based on a model of trust rather than distrust toward judges: drafters should both ensure that they have good reason to trust constitutional judges as partners in the process of constitutional design, and approach the task of drafting relevant provisions accordingly. In some cases, this model may simply not be an option for drafters: they may have good reason to distrust constitutional judges, based on past judicial decisions or practices, but no means of creating a new constitutional court or influencing the composition of an existing court, so as to make it more sympathetic to their aims and understandings. But drafters in such circumstances should also understand the nature of the task they are undertaking when opting for a highly codified approach to constitutional drafting—i.e., that the approach they are adopting is one based on necessity, rather than optimal principles of constitutional design; and one that, in many instances, will likely fail to achieve its full range of desired objectives.


\textsuperscript{11} Dixon & Ginsburg supra note 10; Ginsburg, supra note 4.

\textsuperscript{12} See infra notes 128–138.
The article makes these arguments by reference to case studies from India and South Africa on the right to property and freedom of expression—areas in which the two countries have significant similarities in terms of underlying political commitments, but significant historical differences in terms of the specificity of relevant constitutional provisions. The two countries also share a range of other historical and institutional similarities, which increase the reliability of direct comparison in this context: they have a shared history of political struggle for independence and democracy, dominant party democracy, race- and caste-based discrimination, and severe economic inequality, as well common legal and political institutions, such as parliamentary democracy and the common law. Neither of the case studies, however, purports to provide a definitive account of what has actually driven drafters or judges/interpreters in each country in the relevant context. Indeed such an account is largely impossible in the context of any qualitative comparative constitutional study. Instead, the aim of the relevant case studies is simply to illustrate the potential logic to both trust- and distrust-based approaches to constitutional design.

The article proceeds in five sections following this introduction. Section 2 examines the range of factors influencing drafters in processes of constitutional design, and the degree to which drafters have a shared concern to exert influence over subsequent practices of constitutional interpretation. Section 3 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, and most important, questions of trust versus distrust in constitutional drafting. Section 4 focuses on a framework or trust-based approach, and explores the necessary preconditions for the success of such an approach, or the risks of such an approach in cases where judges are not in fact sympathetic to the substantive aims or understandings of drafters, or self-consciously “originalist” in their approach. Section 5 focuses on a distrust-based approach, and its particular history in India, as a means of exploring both the potential advantages, and limits, of attempts to design constitutional provisions based on a spirit of distrust toward judges. Section 6 furthers this analysis, by considering the potential downsides to distrust-based approaches, in terms of their capacity to decrease sympathy or reciprocity from otherwise potentially sympathetic judges, for the aims and understandings of the framers. Section 7 offers a brief conclusion about potential lessons for constitutional drafters.


14 The SA Constitution is 43,000 words long, compared to the 140,000 words in the Indian Constitution, and there are clear differences in actual length of the relevant clauses in this context: see further infra text accompanying notes 38–45.

2. Constitutional drafting and 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 shorthand; and one that depends on drafters’ aims being understood in a sufficiently general or high-level way.16

Understood in this way, for most 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,17 as well as more specific objectives relating to social and political “transformation.”18 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 will be in a position to reach relatively concrete bargains or agreements over how best to realize certain ideals. Where constitutional drafters do 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.19

Constitutional drafters need not purely be self-interested to want to exert interpretative 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.20 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.21 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 democratically-elected drafters, this can provide an entirely non-self-serving motivation for attempting to exert influence over practices of constitutional

19 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: see, e.g., H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 901 (1985).
20 28 Id.
21 Id.
interpretation: that is, to ensure that the political choices they are elected to make ultimately matter in subsequent processes of legislative or judicial decision-making.\(^\text{22}\)

The desired time-horizon for such influence may certainly vary among constitutional drafters. In transitional contexts, some constitutional drafters may want to ensure that their present aims, or understandings, do not have undue influence upon long-term constitutional practices because they expect to be in a position in the future to adopt quite different 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 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. This may also influence how they approach the benefits of achieving short-term constitutional influence, compared to longer-term constitutional stability and endurance.

For democratic constitutional drafters in particular, there may also be some outer-limit to the time frame over which they wish to exert such influence, as opposed to allowing future democratic majorities to decide questions of constitutional meaning. This time frame might be a matter of years, or decades, or roughly a generation.\(^\text{23}\) But it cannot be indefinite: 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 either via formal constitutional amendment or more “informal” processes of constitutional interpretation.\(^\text{24}\)

Some form of effective 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, also necessarily raises complex questions about constitutional drafting-style—or the degree to which they should adopt a more framework-like, versus codified, approach to constitutional drafting.

3. The framework vs. codified constitution

Even with large differences in substance and scope, constitutions worldwide embody two broad styles of constitutional drafting: 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 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

\(^{22}\) This is also equally true for drafters who are required to make compromises over constitutional language, as for those able to exert stronger unilateral influence.


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. More codified approaches, in contrast, will generally involve provisions attempting to resolve, rather than defer or delegate, key constitutional questions.

The two approaches thus bear a close relationship to the distinction between “standards” and “rules” in constitutional decision-making. Constitutional standards, as Kathleen Sullivan notes, tend to “collapse decisionmaking back into the direct application of the background principle or policy to the fact situation”; whereas constitutional rules attempt to “bind a decisionmaker to respond in a determinate way to the presence of delimiting triggering facts.” Constitutional standards, in this sense, are akin to framework-like provisions in the text of a constitution; whereas constitutional rules are similar to code-like provisions. The only difference is that, for the text of a constitution, a useful way to track this distinction is to focus on the length as well as actual language of relevant constitutional language; whereas for doctrinal rules, it is generally more useful to focus directly on the wording of relevant constitutional tests (and whether, for example, they contain explicitly evaluative notions, such as “unreasonableness,” “the public interest,” or an “undue burden”).

A key difference between the two styles, or approaches, in both contexts is their attitude toward the trustworthiness of judges as partners in the process of constitutional interpretation or decision-making. A framework-like approach necessarily depends on a degree of trust in judges as partners in the process of constitutional decision-making; whereas a more codified approach will often be animated by an explicit distrust of judges as constitutional interpreters. Sometimes, this need not be true. For instance, 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 and unambiguous if they are to perform their functions. The specificity of a constitution in this context, therefore, will also have relatively little connection to questions of trust, versus distrust, in courts.

Similarly, specific constitutional provisions may in some cases simply reflect the processes that underpinned the process of constitutional design. In some cases, constitutions may be drafted in ways that involve broad public participation, which may lead to the inclusion of a large number of quite specific provisions reflecting the interests of particular subgroups of the population. In other cases, parties to constitutional

25 Id.
27 Versteeg & Zackin, supra note 4, at 13, citing A. M. Eaton, Recent State Constitutions, 6 Harv. L. Rev. 109, 121 (1892).
negotiations may find that the only way to resolve disagreement over certain constitutional issues is to adopt a highly specific compromise or form of “insurance swap,” which offers them and their supporters explicit protection against the danger of undesirable action by their political opponents, should they win government.  

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. Similarly, how broad, or narrow, constitutional drafters wish to be in conferring various sources of legislative or executive power, or defining various rights, will be relevant: 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. Over time, for instance, the accumulation of constitutional precedents and conventions 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 the two different ways in which constitutions approach the question of constitutional specificity or detail, and in many instances, in the degree to which in doing so drafters show a willingness to trust judges as partners in the process of constitutional design. Consider constitutional provisions in South Africa and India dealing with freedom of expression or the right to property. In the context of freedom of expression, § 16 of the South African Constitution (“SA Constitution”) explicitly excludes certain categories of speech from the scope of the guarantee of freedom of expression. But most limitations on the right to freedom of expression will ultimately be assessed under the quite broad language of the general limitation clause in § 36:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

In India, the Constitution includes a more detailed, clause-specific form of limitation clause, setting out the range of permissible bases for limitations on speech. In

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32 For this reason, several scholars distinguish between what they call the “scope” and “detail” of a constitution: see, e.g., Ginsburg, supra note 4; Versteeg & Zackin, supra note 4.
its original form, article 19(2) provided that nothing in the guarantee of free speech in article 19(1) 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.” Similarly, following amendments passed in 1951, article 19(2) now provides for “reasonable restrictions on the exercise of the right conferred by [article 19(1)] in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”

As to the right to property, in South Africa, constitutional provisions dealing with the right are somewhat specific. Section 25 provides that for any expropriation of property to be valid, the amount of the compensation and the time and manner of payment “must be just and equitable,” “reflecting an equitable balance between the public interest and the interests of those affected,” having regard to all relevant circumstances, including a range of defined factors. Section 25(4) further defines 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.” At the same time, the core notion of “just and equitable” compensation is quite open-ended, thereby meaning that the constitutional language remains largely framework-like in nature.

In India, the original language of article 31(1) of the Indian Constitution provided simply—in a framework-like way—that: “No person shall be deprived of his property save by authority of law,” and that no property should:

- Be 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 (article 31(2)).

The drafters also endorsed a “savings” clause (article 31(4)) designed to remove any doubt over the constitutional validity of existing attempts to abolish zamindari estates, such as measures of this kind already in place in Bihar and Madras.

However, 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 dealing with the right to property, which provided that: “No 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” the right to property (article 31A). Article 31B further provided that:

34 Other provisions in § 25, such as §§ 25(5)–(7) explicitly endorse various land reform measures as consistent with §§ 25(1)–(2), and the state’s duty to take such measures.
36 Article 31A also defined the words “estate” and “right” in considerable detail, and added additional qualifications.
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.

While many of the original provisions of the Indian Constitution were more code-like than article 31(2),\(^\text{37}\) a great deal of the overall length of the Indian Constitution is 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.\(^\text{18}\) 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.\(^\text{39}\)

4. The framework-constitution: A trust-based model of constitutional design

In many key areas, the 1996 SA Constitution was a constitution based on trust. It was not as open-ended or framework-like, as, say, the original Indian Constitution in regard to the right to property. But, in most key areas, it is far more open-ended than both the amended Indian Constitution and many other contemporary constitutions—especially those that seek to achieve a significant degree of democratic, social, and economic transformation.\(^\text{40}\) In interpreting and applying these provisions in the first decade of constitutional democracy, the Constitutional Court of South Africa (CCSA) has also largely validated this expression of trust on the part of the Constituent Assembly (CA): in giving content to the key provisions, such as the right to property and freedom of expression, it has consistently adopted an approach consistent with the aims and understandings of the African National Congress (ANC) majority in the CA.

In the context of the right to property, for instance, the CCSA has consistently endorsed the kind of “moderate” or weakened form of right to property that emerged from the complex negotiations between the National Party (NP) and ANC in the transition to democracy.\(^\text{41}\) In First National Bank of SA v. Minister of Finance,\(^\text{42}\) the first case

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\(^{37}\) See, e.g., arts. 19(1)–(2), as discussed in infra Sections 2 and 4.

\(^{38}\) CPP Rankings, COMPARATIVE CONSTITUTIONS PROJECT, http://comparativeconstitutionsproject.org/ccp-rankings/ (noting length of approximately 73,000 in 1951).

\(^{39}\) Id.

\(^{40}\) Cf., e.g., Brazil, Colombia, and Kenya. On South Africa as transformative in this context, see, e.g., Karl Klare, Transformative Constitutionalism and the Common and Customary Law, 26 S. Afr. J. Hum. Rts. 403 (2010).


\(^{42}\) 2002 (4) SA 768 (CC) (“First National Bank”).
to come before the CCSA involving the right to property under the 1993 Constitution, the Court endorsed a flexible test for determining the reasonableness of limitations on the right to property, which gave explicit emphasis to concerns that the right to property should not undermine efforts to achieve social and economic redistribution, or legislation in the public interest. The CCSA suggested that the express reference to the “public interest” and other non-market factors in §§ 25(4)–(9) of the Constitution “[u]nderline[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 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.”

On this basis, the CCSA also upheld a law allowing for the imposition of statutory liens on property for unpaid customs duties, reasoning that such liens were a necessary means of ensuring payment of state duties, and did not unduly affect the property rights of third parties. Similarly, in *Port Elizabeth Municipality v. Various Occupiers*, a case involving the lawfulness of attempts to remove informal occupiers of land from their homes under the 1996 Constitution, the CCSA 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 CCSA suggested, reflected the constitutional matrix created by the rights to property and access to adequate housing under the Constitution. This matrix recognized both the individual rights of property owners, and thus the possibility of eviction of unlawful occupants of land, 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 Court also endorsed the reasoning in *First National Bank* as to the need to ensure a balance between property as an individual right, and the broader public interest.

This approach was also directly consistent with the concerns of key drafters of the Constitution, and in particular the left-wing of the ANC, that the protection of the right to property under the Constitution should be consistent with a commitment to social and economic transformation. In negotiations over the 1993 Interim Constitution, which was to govern the transition to democracy, the NP argued for the inclusion of an extremely strong right to property, which entailed both a requirement that any taking of property had to be for a “public purpose” and at full market value, and a prohibition on any form of tax imposing “unreasonable inroads upon the enjoyment, use or value of such property.” The ANC, on the other hand, initially opposed including any right to property, on the basis that such a right could make it at least overly difficult for a future democratic government to restore land wrongfully

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43 Id. ¶ 49.
44 2005 (1) SA 217 (CC) (“Port Elizabeth”).
45 Id. ¶ 21.
46 Id. ¶ 15.
48 Republic of South Africa Government’s Proposal on a Charter of Fundamental Rights, supra note 47.
taken under apartheid, or redistribute land and resources with a view to addressing homelessness. 49 When it became clear that this position was untenable, because of the strength of the NP’s commitment to property rights, 50 the ANC responded by arguing for a quite weak right to property, which left the content of the right to be “determined by law,” subject to an overriding public interest test. 51 Ultimately, the right to property adopted in section 28 of the 1993 Constitution was a true compromise between the divergent positions of the NP and the ANC—which sought to give clear protection both to individual property rights and the public interest. 52 In the 1996 Constitution drafted by a democratically elected, and ANC-dominated, CA, much of this same language was retained. 53 The new property clause in the 1996 Constitution simply added further language expressly qualifying the right, toward greater emphasis on the public interest.

Similarly, in cases involving freedom of expression, the CCSA has exercised the broad interpretive discretion given to it—to determine the “reasonableness” of legislative limitations—to uphold a range of legislation enacted by the National Assembly, and supported by key drafters of the 1996 Constitution. In Islamic National Unity, 54 in 2001, the CCSA 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.” 55 It held that such regulations were clearly outside the scope of the carve-outs found in section 16(2). At the same time, the CCSA 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 CCSA suggested, “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. 56 The provision, however, could also be seen as constituting an “implicit acknowledgment that certain expression does not deserve constitutional protection,” and 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.” 57 In the Court’s view, it could thus be seen as supporting arguments, such as those made by the respondents in Islamic National Unity, that forms of regulation serve a legitimate and important government interest within the meaning of section 36(1). 58

49 See, e.g., Budlender, supra note 41, at 304; van der Walt, supra note 41, at 47.
50 Chaskalson, supra note 41.
51 Id. at 226.
52 Id.
53 See Dixon & Ginsburg, supra note 31.
54 Islamic Unity Convention v Independent Broadcasting Authority, CCT 36/01 (“Islamic National Unity”).
55 Id. ¶¶ 2, 22
56 Id. ¶¶ 32–33.
57 Id.
58 Id. ¶ 45.
In taking this approach, the CCSA not only acted consistently with the views expressed by members of the CA when drafting § 16(2), both in debate and via the CA's official public newsletter. It also made explicit mention of the historical background to provisions such as §§ 16 and 192 (which imposes a duty on parliament to enact broadcasting regulations), 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.”

What was clearly critical to the CCSA’s approach in each of these contexts, however, was also a strong degree of sympathy on the part of the members of the Court for the substantive aims and objectives of the drafters of the 1996 Constitution—i.e., for the relevant project of constitutional democratic transformation. Members of the CCSA have consistently endorsed a role for the Court in “uphold[ing] the values of our Constitution and . . . fulfil[ling] its transformative mandate,” “achiev[ing] . . . the vision of [the] Constitution,” and “serving as guardians of the ideals and founding values of the Constitution.” 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.”

The background of all the judges appointed to the CCSA, by President Mandela, also ensured that they had some real degree of sympathy for the substantive goals endorsed by a majority of ANC drafters in the context of issues such as the right to property and freedom of expression. While all of the first eleven judges appointed to the Court were distinguished lawyers, they also had a demonstrated commitment to the broader constitutional goals of social, political, and economic transformation: Some of the justices were appointed on the basis of their previous track record as judges willing to uphold individual rights and liberties. Others, who were not judges, had explicitly committed themselves in hearings before the Judicial Services Commission to a “broad, purposive, constructive” approach to the interpretation of the Constitution, or an approach to interpretation based on “the values and purposes of the Constitution.”

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60 Islamic National Unity Case, CCT 36/01 ¶ 43.
64 Interview by the Judicial Services Commission with Justice Johan Christiaan Kriegler, Judge of the Appellate Division (Oct. 5, 1994).
66 Interview by the Judicial Services Commission with Justice Johan Christiaan Kriegler. supra note 64.
67 Interview by the Judicial Services Commission with Kate O’Regan, Associate Professor, University of Cape Town (Oct. 3, 1994).
Others had been members of the ANC, or even ANC representatives in the process of constitutional drafting itself. All had a demonstrated commitment to the substantive values or purposes of the 1996 Constitution, so that in cases such as *Port Elizabeth* and *Islamic National Unity*, the result was largely over-determined—it was a product of both a purposive, historically sensitive approach to interpretation by the CCSA, and an overlap in political outlook between the majority of the CA and majority of the Court.

If the members of a court lack this kind of sympathy for the substantive aims and understandings of drafters, there is also a very real possibility that they will end up interpreting open-ended constitutional language in a way that directly frustrates, rather than advances, drafters’ ends: There will simply be nothing in the text of the constitution itself to prevent such a result.

Take the approach of the SCI to the original language dealing with the right to property. In *State of West Bengal v. Bela Banerjee*, in 1954, the SCI faced a challenge to 1948 West Bengal legislation designed to provide for the development of housing for immigrants (or refugees) from East Bengal, which provided compensation to previous land-owners at or below the market value of the property in 1946. The Attorney-General of India, in defending the constitutionality of the legislation, 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. The understanding of the majority of the Assembly, in adopting the original language in article 31(2), for instance, was that it was primarily for the legislature to determine the appropriate quantum of compensation for any taking of property, and that the judiciary would play a role only where there was a “gross abuse of the law” or a “fraud on the Constitution.”

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”—i.e., “full indemnification of the appropriated owner.” The Court thus struck down the relevant legislation, as unconstitutional and void.

What explains this result? Fundamentally, the SCI in the 1950s was 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:

68 President Arthur Chaskalson and Justice Albie Sachs: *see Former Judges, supra* note 65.
70 *Id.*
Court were the product of the English common law system in which market-based compensation for takings are the norm; all had practiced as lawyers, and had extensive experience as judges in high courts or the federal court.\textsuperscript{73} Two (Justices Das and Ali) were also educated in England.\textsuperscript{74} Nor, in general, did the judges on the SCI at the time adopt an “originalist” approach to constitutional interpretation.

Judges who endorse an originalist approach to interpretation may differ in the emphasis they place in on the aims, versus the understandings, of the drafters: on one version, originalism means an attention to “original meaning”; whereas on another, it means a focus on “original intentions.”\textsuperscript{75} Originalists all agree, however, on the importance of \textit{direct} attention to the background, or history, behind particular constitutional provisions as part of any process of constitutional interpretation, and thus to some degree, the idea that open-ended constitutional language should be interpreted so as to further the aims or understandings of key drafters. The SCI, however, has not given any general endorsement to the idea of an originalist approach to interpretation; and in many early cases, the court almost entirely omitted any form of attention to constitutional history.

In \textit{Bela Banerjee}, for instance, the SCI simply made no mention of the legislative debate, or history, behind article 31(2). Several proposals were in fact made in debate in the Constituent Assembly to adopt specific language under article 31(2) making 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.\textsuperscript{76} The 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. The SCI, however, made no mention to this debate, or the fact that in response to such proposals, a majority of delegates suggested that such language was unnecessary. Instead, the SCI adopted a far more forward-looking, market-oriented approach to the right to property.

5. \textbf{A distrust-based model—advantages and limits}

A key motivation for the decision to adopt relatively code-like language in amendments to the Indian Constitution, therefore, was a perception among members of the Lok Sabha that members of the SCI did \textit{not} in fact share the substantive political commitments of a majority of the Constituent Assembly.\textsuperscript{77} Against this backdrop, there was good reason for the members of India’s parliament to adopt a codified approach to constitutional drafting, which sought to constrain future judges to adopt this more social democratic, or pro-government, approach. Given distrust of the judiciary by

\textsuperscript{73} Austin, supra note 72.
\textsuperscript{74} Id. at 124; Gadbois, supra note 72.
\textsuperscript{76} Austin, supra note 72, at 287.
\textsuperscript{77} See supra text accompanying note 73.
drafters, the advantage of a codified approach to constitutional drafting is quite clear: unlike a framework-style approach, a codified approach will at least to some degree constrain judges to consider the drafters’ aims and understandings in deciding relevant constitutional controversies—by embedding more of their aims and understandings in the text of the constitution itself.\(^7\)

Almost all constitutional theories within the liberal tradition treat attention to a constitution’s text as at least a minimally binding constraint on judges in interpreting constitutional provisions for the first time. Judges, when they engage with codified constitutional provisions, will thus 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 benefits to constitutional specificity in this context, however, should also not be over-estimated: Even where specific constitutional language does constrain judges in particular cases, that constraint will inevitably be only “partial” or incomplete as an influence on constitutional interpretation.\(^7\) For one thing, any constitutional code is likely to have certain areas of incompleteness, or gaps in the degree to which it covers relevant topics or circumstances. Constitutions are frequently drafted in circumstances that make complete agreement by parties to negotiations on every conceivable constitutional issue if not impossible, than prohibitively costly.\(^8\)

For drafters, as individuals, there will often be limits to their ability to foresee the full range of contexts or circumstances in which the provisions they draft will, or should, apply, or the ways in which such provisions may conflict.\(^8\) This will also inevitably give judges a significant degree of discretion in deciding how best to apply code-like language to the facts of unforeseen cases or conflicts: Take the famous attempt by Frederick the Great, in the context of the Prussian Civil Code of 1794, to create a truly comprehensive code, which would eliminate the need for (and thus vagaries of) all judicial interpretation.\(^8\) As Merryman notes, it is widely accepted that the Code failed to achieve its objectives: “detailed as it was, it did not provide obvious answers for all cases,” and it clearly failed to eliminate the need for, or exercise of, interpretive judgment by courts.\(^8\)

Indeed, no constitutional language can ever hope to constrain judges in the resolution of concrete constitutional controversies—even where drafters fully foresee such

\(^7\) 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.


\(^8\) Issacharoff, supra note 79.

\(^8\) Id.


\(^8\) Merryman & Perez-Perdomo, supra note 82, at 39.
Constitutional drafting and distrust

...controversies, and agree as to how they should be resolved. Judges may be required to consider specific constitutional language, as part of engaging in a legitimate process of constitutional interpretation. But they are not required to give it the effect intended by the drafters. It would be impossible for drafters to ensure such a result: the meaning of any 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.84 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.85 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.86 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.87

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 application of non-textual constitutional sources, in line with the actual text of the constitution.88 Judicial gap-filling of this kind, as former Israeli Justice Barak has noted, is a well-recognized part of civil law traditions of interpretation.89 Judges in the civil law tradition will often fill gaps in a partial statute or legislative code where partialness would negate its purpose, by giving effect to analogous concepts, or norms, or applicable general legal principles. 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.90

A similar analysis applies to courts’ approaches to reconciling a constitution’s text with other modalities of constitutional argument. If the text of the constitution is only

86 On these modalities, see P. Bobbitt, Constitutional Fate: Theory of the Constitution (1984). 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).
87 See Issacharoff, supra note 79, at 982.
90 Id.; Aharon Barak, Purposive Interpretation in Law (2005).
one of the many sources courts consider in reaching a decision on any given constitutional question, drafters’ ability to achieve their aims will inevitably depend on courts approaching the broader task of decision-making in a sympathetic, or purposive way. If judges start with a position that is directly hostile—or unsympathetic—to drafters’ aims and understandings, there is also almost no chance that any form of specific constitutional language will be powerful enough to overcome this interpretive leaning.

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—and thereby, in some cases, also re-assert the 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. 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 constitution. In drafting amendments, constitutional designers will generally have more concrete information about the particular constitutional issue to be addressed, and fewer time-constraints, or pressures, of the kind that might prevent them from engaging in detailed debate 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 seem to confirm the dangers of this kind of approach to constitutional drafting.

The First Amendment to the Indian Constitution passed in 1951, as Part I notes, was designed 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) (article 31A), and removing various statutes (listed in the Ninth Schedule) from the scope of judicial review (article 31B). 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.

92 Art. 31A. This article also defined the words “estate” and “right” in considerable detail.
In *State of Bihar v. Kameshwar Singh*, 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. 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.

Similarly, in *Karimbil Kunhikoman v. State of Kerala*, 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 “rotwary 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.

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 decisions of the SCI in these cases also 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 drafters’ clear aims and understandings.

6. Distrust and the downsides to codification: Less sympathetic or purposive interpretation

Worse still, for drafters, the very attempt at constitutional codification may have distinctly perverse consequences—by actively discouraging certain judges from adopting
the kind of sympathetic, purposive approach necessary for drafters actually to achieve their aims.

For some judges, 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. In a constitutional context, common law courts have 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.

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, 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. 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, however, the SCI ultimately took an extremely narrow, non-purposive view of the scope for limitations under this language. The question for the SCI was whether a 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 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

98 See, e.g., Tate v. Ogg, 195 S.E. 496, 499 (Va. 1938).
99 For similar examples, see, e.g., decisions of the Supreme Court of Nambia such as Kauesa v. Minister of Home Affairs, 1995 NR 175 (SC); State v. Smith, 1996 NR 367 (HC).
100 See letter from Alladi Krishnaswami Attar to BN RA, April 4, 1947, as quoted in Rao, supra note 35, at 212. See also ibid., at 223.
“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.\footnote{Id. at 602.}

In adopting this approach, the Court also explicitly relied on the \textit{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 \textit{the sole justification for} legislative abridgement of free speech and expression.”\footnote{Id. at 601 (emphasis added).} From this, the Court also proceeded to suggest—without further justification—that the relevant limitations should be construed “narrowly” and “stringently,” so 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.”\footnote{Id.} 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.”\footnote{Id. at 2201–2222.} 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.\footnote{See id. at 216–217. But cf. Soli J., Sorabjee J.} 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.”\footnote{See id. at 216–217. But cf. Soli J., Sorabjee J. See id. at 216–217. But cf. Soli J., Sorabjee J.}

What could possibly explain a constitutional court adopting this kind of overtly unsympathetic 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 might be that the members of the SCI in \textit{Romesh Thappur} were in fact inherently hostile to the drafters’ aims and understandings in relation to freedom of expression, and thus that the SCI’s approach in the case was ultimately simply a vindication of the drafters’ distrust of judges in adopting the specific language of article 19. The evidence from other cases, however, does not entirely bear this out: the Court that decided \textit{Romesh Thappur} was a six-judge bench;\footnote{Gadbois, supra note 72, at 245.} and of these judges, only one (Justice Mahajan) voted consistently in other cases to uphold individual rights: two (Justices Das and Sastri) in fact voted consistently in favor of the government, or collective interests.\footnote{Gadbois, supra note 72, at 245.} And in interpreting the somewhat different...
language of the amended article 19(2), many of these same judges adopted a quite different approach to attempts to regulate speech in the interests of public order.\textsuperscript{110}

Thus, what seems to have been at work in *Romesh Thappur* was a more direct response by members of the SCI to the language of article 19.

In interpreting article 19, the judges of the SCI seemed to see the specific language it contained as itself favoring a narrow, non-purposive approach to limitations on the right to freedom of expression. Why, then, did the SCI respond to the specificity of article 19 in this way? One potential reason 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.\textsuperscript{111}

The more specific or complete contractual terms are, the less likely courts generally are to find that there was an intention on the part of the parties that a court should “imply” terms into the contract.

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 drafters’ aims or understandings 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.\textsuperscript{112}

For some judges, the code-like character of particular constitutional provisions could thus be seen as providing an originalist basis for adopting a 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.\textsuperscript{113}

Another, more contentious explanation for this same pattern—of deliberate blindness by a court 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. Signals of trust, or distrust, social scientists have shown, can 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.\textsuperscript{114}

This depends on a 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.


\textsuperscript{113} Id. at 578, ¶ 12.

levels on the part of relevant employees. Employees in such settings also frequently work in excess of the minimum work standard set by the employer. One explanation for this, economists such as George Akerlof have argued, is the relevance of norms of reciprocity.

Similar dynamics, economics have shown, often operate in reverse. Where a firm or employer offers a low wage, for example, 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.” The perceived motives, or intentions, of other players can also be crucial to whether positive or negative reciprocity is shown: fairness, as 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. Judgments about “niceness,” and “meanness,” are also inevitably quite subjective, and context-dependent.

These findings have clear potential logical relevance to constitutional law, 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 drafters’ aims or understandings, 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 drafters’ aims and understandings. 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 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. Similarly, the plausibility of such a

116 Id.
120 Id. at 1286.
121 For work exploring this dynamic’s relevance 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).
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. Norms of reciprocity also seem most likely to apply in contexts that involve some form of face-to-face, or at least contemporaneous, relationship. 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 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 reciprocity—or trust and distrust—based dynamics 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 CCSA linking the Court’s broad and purposive approach to constitutional interpretation with the responsibilities entrusted to the CCSA under the 1996 Constitution:

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 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.

7. Conclusion

For democratic constitutional drafters in particular, it will often be difficult to know when it is safe to trust judges as partners in the process of constitutional design. Unlike authoritarian drafters, there is no possibility of simply appointing judges who are known to be politically loyal to the government, or regime, and who lack a basic commitment to judicial independence. Some minimum degree of independence on the part of judges—i.e., structural insulation from the political branches, and

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121 I am indebted to Wojciech Sadurski and Lior Strahilevitz for pressing me on this point.  
123 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 316-328 (2002).  
126 See, e.g., Constitutions in Authoritarian Regimes (Tom Ginsburg & Alberto Simpser eds., 2013).
commitment to law as at least a quasi-autonomous form of reasoning—is a hallmark of any truly democratic constitutional system.128 Without it, there can be no meaningful protection for individual rights or the rule of law, or notion of constitutional law as a distinct source of constraint on government actors.

In some settings, democratic drafters may also have quite good reason not to trust existing constitutional judges as partners in a process of constitutional design. In South Africa, for instance, there was clearly good reason for the ANC not to trust the nearly all-white, male-dominated apartheid-era judiciary as interpreters of a newly democratic constitution.129 The South African judiciary under apartheid, as Dugard famously noted, was generally highly “positivistic” or literal in its approach to the interpretation of apartheid era legislation, and played a very limited role in protecting individual rights, or guarding against arbitrariness or inequality in the application of such laws.130 It was thus entirely rational for the ANC to demand the creation of a new court, which would have ultimate authority for the interpretation of the Constitution, as part of the transition to a nonracial democracy.

How much drafters should trust the judiciary in a particular setting will also be inextricably linked to the degree of control drafters have, or are likely to have in the future, over the process of judicial appointment. Of course, no set of drafters can hope to achieve long-term control over the process of judicial appointment. But the most important period of control for drafters will often be the first few decades of a new constitution’s (or provision’s) operation; and drafters, in this context, will have quite variable levels of control over the process of appointments. The success of any process of constitutional design, for drafters, will thus also often be closely tied to constitutional procedures for the appointment of constitutional judges.111

Knowing who to appoint to court can also raise difficult questions for drafters. To fulfill their role in a democracy, judges must have a significant degree of legal skill and independence of judgment. At the same time, to fulfill drafters’ substantive aims, they must have some degree of sympathy for the purposes or values underpinning a constitution (or a particular amendment). Finding lawyers who are both sufficiently independent and sympathetic can also be a difficult task. Judges with a long track record on a lower court will often be leading candidates for combining these qualities.132 Certain kinds of judicial appointment procedure may also help provide information about the substantive political philosophy of potential appointees, without compromising a


132 See, e.g., supra text accompanying note 65, on Justices Mahomed, Ackermann, Goldstone and Didcott.
commitment to judicial independence.\textsuperscript{133} Equally, a judge’s prior record as supporter or member of a political party involved in the drafting process—or even as an active participant in that process—can provide valuable information as to their substantive political orientation.\textsuperscript{134} But, even with these sources, drafters may have quite limited information about a judge’s substantive legal or political philosophy, in ways which mean that there is a clear risk that placing trust in particular judges, as partners in the process of constitutional design, will ultimately turn out to be misplaced.

A trust-based approach to constitutional drafting also need not preclude drafters from seeking to provide a degree of guidance to judges, in certain contexts, as to their desired approach to constitutional meaning. Guidance of this kind may be particularly valuable, for drafters, where they are seeking to change prior patterns of constitutional interpretation in a country, or adopt an approach that is somewhat distinctive, compared to global constitutional norms. Some level of specificity in the definition of constitutional norms can help reduce the risk that judges will simply look to past precedents, as a guide to constitutional interpretation, when the aim of drafters is to create a much more “decisive break” in the country’s approach in a particular context. Similarly, specific constitutional language can help provide evidence that drafters do not in fact intend for judges to interpret domestic constitutional provisions in line with global norms, or trends.\textsuperscript{135}

If drafters, however, start with a position of active distrust toward judges, the Indian experience of constitutional amendment over the last sixty years suggests that there will be enormous obstacles to successful constitutional design. One option for drafters in this context may be to attempt to remove existing judges, and replace them with new judges more sympathetic to the aims and understandings of drafters. A process of judicial “lustration” of this kind was used in several Central and Eastern European countries, as part of the transition to democracy in 1989, and has some precedent elsewhere.\textsuperscript{136} But there are also obvious difficulties with such an approach from the perspective of judicial independence.\textsuperscript{137} In most cases, therefore, such an approach will necessarily take place only over a number of years, as previous judges retire. A related strategy, of increasing the size of an existing court, can hasten this process of transition, but again only at the expense of commitments to judicial independence.\textsuperscript{138}

\textsuperscript{133} See, on Justices Kriegler and O’Regan, Former Judges, supra note 65; Interview by the Judicial Services Commission with Justice Johan Christiaan Kriegler. supra note 64; Interview by the Judicial Services Commission with Kate O’Regan, supra note 67.

\textsuperscript{134} See supra text accompanying note 68, on Justices Chaskalson and Sachs. See also Rosalind Dixon, Constitutional Drafters as Judges (2015) (unpublished manuscript) (on file with author).

\textsuperscript{135} See Dixon, supra note 15.


Another, more promising option for drafters, as the South African example itself shows, will often be to attempt to create a new court with responsibility for interpreting the constitution, which can be staffed with entirely new judges. Such an approach has the advantage of respecting existing formal commitments to judicial independence, while allowing a one-off shift in the composition of the judiciary. Sometimes, however, the existing constitutional arrangements in a country may make such an approach extremely difficult: there may already be a specialized constitutional court, which cannot easily be replaced or by-passed via the creation of a new constitutional tribunal. Or existing legal and political dynamics may impose other obstacles to achieving such change: in India, for instance, the SCI has enormous power over the process of judicial appointments, and has arguably been reluctant to surrender that power, as part of any reform of the judicial appointments process. If the Lok Sabha were to attempt to create a new constitutional court in India, with a quite different model of appointment, the SCI could thus also quite likely be expected to oppose such a change. The “basic structure” doctrine developed by the SCI could also provide the SCI with the legal tools necessary to enforce such opposition.

Drafters, in some cases, may thus necessarily be required to approach the process of constitutional design from a vantage-point of distrust: existing judges may have rendered decisions that make clear that they do not share the substantive political aims of drafters; and yet, there may be no legally or practically feasible way in which to change the composition of the constitutional judiciary. In this context, it will also make sense for drafters to adopt a codified approach to constitutional drafting: there is little chance that judges will interpret framework-like constitutional language in a way that advances drafters’ aims and understandings, and thus also little to be lost from attempting to require judges to give indirect consideration to such aims and understandings, via the use of codified constitutional language.

Drafters in this context, however, should also appreciate the nature of the exercise they are undertaking: they are using constitutional language as a last resort, in the face of evidence suggesting that they are in any event extremely unlikely to succeed in achieving their substantive aims and understandings. A turn to constitutional codification, in this context, should not be confused—either by drafters themselves or others seeking to draw lessons from their experience—as an optimal or “first-best” approach to constitutional design.

No amount of specificity in constitutional language can ever hope to be entirely complete, or exhaustive, in setting out the aims and understandings of drafters. Even

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if it could be, it would also still need to be interpreted by judges, in order to have effect. Processes of constitutional drafting based on distrust, in this sense, will largely be doomed to fail from the outset: they will attempt to respond to a distrust of judges by imposing legal constraints on judges that can never actually be broad or strong enough to overcome the reasons for their in-going distrust.

In cases where drafters face potentially more propitious conditions for constitutional design, the relationship between constitutional specificity and distrust may also operate in exactly the opposite direction. Judges, in some cases, may be undecided in their approach to a range of substantive political questions, and thus, quite open to interpreting a constitution in a purposive way, or in line with drafters’ aims and understandings of drafters. For some judges, however, the very attempt at constitutional codification by drafters may provide a reason to reject this kind of purposive approach, and prefer a narrower, more literal approach to constitutional interpretation. The relationship between constitutional specificity and distrust, in this setting, may thus be exactly opposite to that which applies in cases of well-founded distrust toward judges: instead of being a rational response to evidence of judicial hostility to drafters’ aims and understandings, constitutional codification may actually cause judges to become interpreters worthy of distrust.

The relationship between constitutional drafting and distrust, therefore, is ultimately at once both startlingly complex and simple: distrust can be both a reason for and consequence of attempts at constitutional codification. This, at least, is one way to understand the Indian constitutional experience over the last sixty years. But, as the Indian experience itself suggests, no process of constitutional design can ever hope fully to succeed without trust toward the constitutional judiciary as a basic ingredient. If constitutional drafters wish to succeed in the process of constitutional design, therefore, they should arguably take two basic lessons from the trust-based approach to constitutional design adopted in South Africa in 1993–1996: first, exhaust every possible avenue for appointing constitutional judges who can in fact be trusted; and second, draft constitutional language accordingly—i.e., attempt to make such judges fully trustworthy, by reposing an appropriate degree of trust in them in drafting relevant constitutional language.