

## Constitutional Design Two Ways: Constitutional Drafters as Judges

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*Constitutional scholarship often assumes a strict separation between processes of constitutional drafting and interpretation. Yet on constitutional courts around the world, the judges charged with interpreting a constitution's text are often the same people who helped write or ratify that text only a few years before. This Article examines the phenomenon of constitutional drafters as judges and the insights to be gained from a study of such judges about the nature of democratic constitution-making — i.e., the degree to which constitution making inevitably takes place over an extended time period, involves processes of constitutional interpretation as well as drafting, and combines forms of legal and political judgment. It further suggests that insights of this kind may invite closer attention to the virtues of certain kinds of judges as agents of democratic constitutional change — i.e., judges who resemble a majority of democratic constitutional drafters by possessing both legal and political relationships, skills, and commitments, or who resemble many actual drafter-judges in that they are lawyer-politicians.*

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## I. INTRODUCTION

In many new constitutional democracies, there is significant overlap between those who draft and interpret a constitution. Indeed, in the context of major democratic constitutional changes, those who help draft changes often are appointed to lead the court that is charged with interpreting the new constitutional text. This is true across a wide variety of different regions and contexts: it was the case in Hungary in 1989, in Indonesia from 1999 to 2002, in South Africa in the early 1990s and then again from 1995 to 1996, and to a lesser extent in Colombia in 1991.

This pattern of constitutional drafters as judges also has a long history in constitutional democracies across the world. In Austria, after designing a new model of judicial review — based on abstract, *ex ante* rather than concrete, *ex post* review — Hans Kelsen was appointed as a member of the world’s first “Kelsenian court” — i.e., the Constitutional Court of Austria.<sup>1</sup> In Australia, the leading drafters of the 1901 Constitution were appointed as members of the first High Court of Australia. In fact, the Court was comprised solely of drafters for the first twenty years or so of its existence.<sup>2</sup> In other Commonwealth constitutional settings, such as Canada and New Zealand, the drafters of new rights charters have also at times played a role as interpreters of these same charters — as members of the nations’ ultimate or intermediate courts of appeal.<sup>3</sup> Even the Americas have had prominent examples of drafter-judges playing a central role in

1. See Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77, 79 (2002).

2. See, e.g., Murray Gleeson, *The Constitutional Decisions of the Founding Fathers*, 9 U. NOTRE DAME AUSTL. L. REV. 1, 4 (2007); John Williams, *The Griffith Court, in THE HIGH COURT, THE CONSTITUTION AND AUSTRALIAN POLITICS 77* (Rosalind Dixon & George Williams eds., 2015).

3. See Kenneth J. Keith, *The New Zealand Bill of Rights Experience: Lessons for Australia*, 9 AUSTL. J. HUM. RTS. 119 (2003). Keith played a key role in the drafting of New Zealand’s 1990 statutory Bill of Rights and was later appointed to the Supreme Court of New Zealand.

constitutional interpretation, such as in Puerto Rico and, more recently, in Ecuador.<sup>4</sup> In the early years of the United States, while the central players at Philadelphia largely went on to occupy roles in the executive and legislative branches,<sup>5</sup> many justices had important roles in debates over the ratification of the Constitution. Even later United States justices have been involved in the adoption of formal and “informal” constitutional amendments.<sup>6</sup>

This Article explores the phenomenon of constitutional drafters as judges as an important and, to a large extent, under-explored dimension of democratic constitutional practice. Studying the role of constitutional drafters as judges can shed valuable light on the nature of democratic constitutional design itself. Drafters who are partisans of a particular constitutional vision do not necessarily stop advancing that vision simply because they become judges or assume a different institutional role. The central role that drafter-judges have played in countries such as South Africa, Hungary, Indonesia, and Colombia, therefore, invites us to rethink our assumptions about the nature of constitutional design itself. It suggests that, rather than being a process that begins and ends with the drafting and adoption of a new constitutional text, it is a process that continues well beyond that, into the period in which a constitutional court interprets and applies that text, and which involves a complex mix of law and politics or legal drafting and interpretation.

An understanding of this process may itself help shed further light on the kinds of judges that are most likely to be effective agents of democratic constitutional change. At least until recently, constitutional courts in countries such as South Africa, Hungary, Indonesia, and Colombia have all played a central role in mediating a successful process of democratic constitutional transition. Drafter-judges have been prominent on these courts. Their contribution to the process of democratic constitutional transition thus seems worthy of further examination: while there seems to be nothing truly distinctive about their prior role as drafters that explains this success, they do seem to share a set of attributes as “lawyer-politicians” — i.e., lawyers who have additional political relationships, skills, and commitments, compared to more traditional practicing lawyers or members of the ordinary (lower) court system.

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4. See ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776–1860* (2010).

5. Cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing that in one sense Madison, as a member of Congress, was in fact a “judge” or interpreter of the meaning of the Constitution). This article, however, uses the term “judge” in the narrower, more institutionally confined sense.

6. See *infra* note 84 (discussing Justice Felix Frankfurter, who played an important role in designing key pieces of the New Deal legislation, such as the Social Security Act).

This Article suggests that during processes of democratic constitutional change or transition, the relational and professional attributes of lawyer-politicians may help contribute in a variety of ways to the successful building of the institutional capacity and legitimacy of a new court. Similarly, judges who share the substantive political commitments of a majority of drafters may help contribute to a process of successful constitutional change by ensuring the success of the substantive constitutional vision, or particular democratic project, that a majority of drafters seek to achieve in adopting (or substantially re-drafting) a new constitution.<sup>7</sup>

This Article makes these arguments by drawing on case studies from South Africa, Indonesia, Colombia, and Hungary, with a particular focus on cases involving socio-economic rights and same-sex marriage. This focus reflects an attempt to draw on a “most similar cases” principle, whereby comparisons are drawn across jurisdictions with similar substantive constitutional commitments but also somewhat different experiences in terms of constitutional interpretation and drafting.<sup>8</sup> These are also all jurisdictions in which the existing comparative literature suggests that there has been some clear track record of constitutional design “success.”<sup>9</sup> They are thus natural contexts in which to explore the question of whether there is anything distinctive about the identity of judges, as former drafters, which might increase their chances of acting as successful agents of democratic constitutional change.

At the same time, this Article points to two potential examples of constitutional design “failure”: the dramatic rise and fall of the Constitutional Court of Russia as an actor in Russian constitutional politics in the 1990s, and the role of the Supreme Court of India in the 1950s and 1960s in defeating the social democratic aims of the majority of framers of the Indian Constitution. In both cases, this Article suggests, the relevant courts were comprised of judges who did not fit the description of true lawyer-politicians: In Russia, Valery Zorkin was insufficiently seasoned as a constitutional politician to recognize the dangers of continuing to expand

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7. Rosalind Dixon, *Constitution Drafting and Distrust*, 13 INT'L J. CONST. L. 819, 831 (2015); Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 637 (2011).

8. RAN HIRSCHL, *COMPARATIVE MATTERS* (2014).

9. See, e.g., SOLOMON A. DERSSO, *TAKING ETHNO-CULTURAL DIVERSITY SERIOUSLY IN CONSTITUTIONAL DESIGN: A THEORY OF MINORITY RIGHTS FOR ADDRESSING AFRICA'S MULTI-ETHNIC CHALLENGE* 236–37 (2012) on South Africa; Susan Alberts, Chris Warshaw & Barry R. Weingast, *Democratization and Counter-majoritarian Institutions: The Role of Power and Constitutional Design in Self-Enforcing Democracy*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 69, 74 (Tom Ginsburg ed., 2014) on Colombia; Andrew Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, in *FRAMING THE STATE IN TIMES OF TRANSITION* 350, 350 (Laurel E. Miller ed., 2010) on Hungary.

the court's role in mediating the tension between the president and parliament. In India, most members of the Supreme Court had no demonstrated commitment to social democratic values.<sup>10</sup>

This Article is divided into six parts. Part II explores the notion of what it means to be a “drafter” and a judge, and it provides examples of different kinds of drafter-judges. Part III explores the continuities in the role of two drafter-judges, Albie Sachs and Manuel José Cepeda-Espinosa, in the context of key constitutional guarantees in South Africa and Colombia, and the light this sheds on the nature of processes of constitutional drafting and interpretation. Part IV considers the implications of Part III for our understanding of the *kinds* of judges appointed to a constitutional court charged with carrying out a process of successful democratic constitutional change and, in particular, the importance of judges' certain political skills, relationships, and substantive commitments to a successful process of democratic constitutional design. It also notes the degree to which these characteristics may be shared by many, although not all, drafter-judges, as well as the degree to which they are not unique to such judges. Part V adds a note of caution to this understanding by exploring the potential dangers of an overly political approach to the judicial role of constitutional judges. It focuses in particular on examples from the United States and Russia, where constitutional judges arguably adopted an overly political approach in the early years of a court's operation, in ways that created clear institutional dangers for their respective courts. Part VI offers a brief conclusion focused on the value and lessons of studying drafter-judges as a phenomenon.

## II. DRAFTERS AS JUDGES

Democratic constitutions are, by definition, the product of “many minds”: if a constitution is adopted by a process that involves no real form of citizen participation, or no notion of democratic consent, we generally do not think that it is fully democratic in nature.<sup>11</sup> To be truly democratic, constitutions must not only provide for the institutions necessary for

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10. Note, however, that some scholars contest whether it is appropriate to include Russia in any study of democratic constitutional transition, on the basis that it never fully embarked on such a path. See, e.g., William Partlett, *The Dangers of Popular Constitution-Making*, 38 BROOK. J. INT'L L. 193, 212–13 (2012).

11. On the concept of “many minds,” see Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. L. ANALYSIS 1 (2009). On participation in constitution-making, see, e.g., Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008); Justin Blount, *Participation in Constitutional Design*, in COMPARATIVE CONSTITUTIONAL LAW 38 (Tom Ginsburg & Rosalind Dixon eds., 2011).

ordinary democratic government;<sup>12</sup> they must also meet minimum procedural requirements for democracy or citizen consent in the process of self-government. This also implies that democratic constitutions almost always will be the product of a complex process involving a vast array of different actors.

The drafters of a democratic constitution, accordingly, will be many. In some sense, every citizen in a democracy will be a drafter of the constitution, at least if the constitution is adopted in their adult lifetime. They will play some indirect role in shaping constitutional meaning either by electing delegates to a constitutional assembly, which then has the responsibility for drafting the final text of the constitution, or by voting to accept or reject a constitutional draft or other representative drafting body produced by such an assembly. Many scholars also argue that the possibility of constitutional amendment under a democratic constitution means that all citizens play a role as “drafters” or agents who provide some degree of consent for the ongoing force of the constitution as the foundational document.<sup>13</sup> When we speak of constitutional “drafters,” however, we generally think of a smaller subset of citizens who have played a more distinctive individual role in shaping the scope or language of a constitutional text.<sup>14</sup>

This role may be more or less political, or legal or technical. Some of those involved in the constitutional drafting process will be leading political figures whose role is to bargain over the substance of key constitutional terms or compromises. Others will be involved only as advisors to these political figures — some in a political capacity, others in a more distinctly legal or technical capacity. There will clearly be a difference between drafters whose role it is to negotiate the basic terms of a constitutional agreement and those whose role it is to translate that agreement into concrete legal or constitutional language. Some drafters may play both roles, but otherwise, the background and experiences of the two sets of drafters will be quite different.

Constitutional drafters may also vary in the degree to which they are “insiders” versus “outsiders” in any formal process of constitutional drafting. Some drafters will have an official role in drafting, proposing, or adopting the constitutional text; others will play a more unofficial role by

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12. Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 611–12 (2015).

13. See Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW (David Dyzenhaus & Malcolm Thorburn eds., 2016).

14. Of course, within this category, there will also be important differences between countries as to the degree to which drafters are a narrow subset, or rather more or less co-extensive, of all political representatives in a polity at a given time. See *infra* note 251.

lobbying or persuading those on the inside to adopt a particular approach to constitutional meaning. Some political figures or public intellectuals may occupy a middle position: they may not be directly elected or appointed to play a role in constitutional drafting but may still be consulted by official drafters in their own decisions about constitutional drafting.<sup>15</sup> The move toward greater public participation in constitution-making also will greatly increase the possibility that individuals will occupy this kind of informal drafting role: most modern democratic constitution-making involves not only a form of public election or ratification process but also a broader process of informal public consultation.

Similarly, drafters may play a role in influencing constitutional drafting that is more or less immediate in nature. Some drafters will be present in the room when the final text of the constitution is agreed upon or adopted; others only will have been present much earlier, when the basic ideas or principles endorsed by a particular party taking part in the constitutional negotiations are formulated. Some drafters may also have ongoing influence only by virtue of the fact that other, later drafters endorse or copy prior decisions they have made: formally, the constitution they helped draft may have been replaced or substantially amended, but if certain key drafting choices they made are carried over into a new constitution or set of provisions, they may still remain drafters in some important sense.

Equally, there may be quite different time frames in which drafters may play a role as judges. Some judges may be appointed prior to the completion of formal processes of constitutional design.<sup>16</sup> In this sense, they may be drafters of any formal constitutional provisions in only a provisional or inchoate sense. Others may be appointed immediately afterward or as part of the agreement leading to the adoption of the final constitutional text.<sup>17</sup> Others still may be appointed significantly later, long after the initial constitutional agreement leading to the creation of a new constitutional court or the conferral of a new and distinctive jurisdiction

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15. *See, e.g.*, DILIP KUMAR CHATTERJEE, *GANDHI AND CONSTITUTION MAKING IN INDIA* (1984) (discussing Mahatma Gandhi and the Indian Constitution); DERMOT KEOGH & ANDREW J. MCCARTHY, *THE MAKING OF THE IRISH CONSTITUTION, 1937* 106–22 (2007) (discussing the Archbishop of Dublin John Charles McQuaid and the 1937 Irish Constitution).

16. *See, e.g.*, *Justice Albie Sachs*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicealbiesachs/index1.html>; *Chief Justice Arthur Chaskalson*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicearthurchaskalson/index1.html>. Justice Sachs and Chief Justice Chaskalson were appointed after the 1993 Interim Constitution and prior to the finalization of the 1996 South African Constitution.

17. *See, e.g.*, LASZLO SOLYOM & GEORGE BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* (2000) (discussing the experience in Hungary); *infra* Part III.

onto an existing court.<sup>18</sup> If one includes informal acts of constitutional design in the definition of drafting, some judges may also assume the status of drafter-judges only after being appointed to a court: they may already be constitutional judges when they broker a new set of constitutional arrangements.<sup>19</sup>

Drafting will also be a quite different exercise when it is conducted as part of a limited process of constitutional change or amendment rather than as a wholesale constitutional replacement or revision.<sup>20</sup> Thus, judges who are involved in the drafting of narrower sets of amendments may have a quite different background or sensibility from those who play a role in broader processes of constitutional change. The same contrast could be drawn between judges who participate in actual processes of constitutional change versus those who advise on or contribute to the drafting of proposed changes that ultimately fail to gain the necessary degree of support from democratic actors. Judges may still see themselves as “drafters” in this latter context, but from a broader perspective they may be understood as authors only of failed attempts at constitutional change.<sup>21</sup> Similarly, there will clearly be a difference between individuals who participate in formal processes of constitutional change, which necessarily involve the formulation of constitutional language designed to capture background political aims and understanding, and those who contribute to more informal processes of constitutional change, or constitutional “moments,” which can often occur via more political channels.<sup>22</sup>

Some drafters may also go on to play important roles as members of parliament or the executive, and thus play an important role as interpreters of the constitution in that context.<sup>23</sup> The task of interpreting a written constitution clearly is not limited to constitutional courts or judges, and

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18. See, e.g., *Deputy Chief Justice Dikgang Moseneke, Arthur Chaskalson*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/index1.html>. In 1993, Deputy Chief Justice Moseneke served on the Technical Committee, which drafted the 1993 Interim South African Constitution, and was appointed to the South African Constitutional Court in 2002.

19. See, e.g., *infra* Part V (discussing Zorkin).

20. See generally, Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96 (Tom Ginsburg ed., 2011); David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 *WAKE FOREST L. REV.* 859 (2015).

21. See, e.g., *infra* Part V (discussing the experience of Zorkin in 1990).

22. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1993); Bruce Ackerman, *Three Paths to Constitutionalism — and the Crisis of the European Union*, 45 *BRIT. J. POL. SCI.* 705 (2015).

23. This, of course, applies to Madison and Hamilton. See *supra* note 5; compare Rutledge, *Barton*, *infra* note 59 and K. H. Bailey, *Sir Robert Garran*, 29 *AUSTL. Q.* 9 (1957) for a discussion of Barton and Garran in Australia.

thus in some sense any drafter who goes on to serve in government will play some role as a constitutional “judge.” The focus of this Article, however, is on the idea of “judges” in a narrower, more institutionally limited sense, in part because one of this Article’s aims is to consider whether there are particular kinds of judges who, if appointed to a court, are more likely to help the institution itself play a successful role in the process of democratic constitutional change or transition.

In their role as judges, drafters may also vary in the degree to which they act individually or collectively, as well as whether they are part of a court on which there are a number of judges with prior drafting experience. In some cases, a single judge may be able to draw on his or her insight or experience as a drafter to influence the approach of a constitutional court as a whole. This is particularly true where a drafter-judge is chief justice or president of a court, or has other claims to particular individual respect or authority.<sup>24</sup> But in many cases, it will take more than one judge to convince the majority of the court to adopt a particular approach, and thus, for judges’ experience as drafters to play a meaningful role in constitutional interpretation, they must generally be part of a court in which there are a number of other judges with similar experiences.<sup>25</sup>

No matter how one understands the idea of constitutional drafters, it is clear that in many new democracies, drafters have played a notable role as interpreters, as well as authors, of new constitutional provisions.<sup>26</sup> The examples of this are too numerous to list in a single article, and the following examples in no way purport to be comprehensive. But it is also notable that some of the leading examples of this phenomenon come from countries such as Hungary, Indonesia, Colombia, and South Africa, which — at least until recently — have been credited with some of the most

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24. See, e.g., PETRA STOCKMAN, *NEW INDONESIAN CONSTITUTIONAL COURT: A STUDY INTO ITS BEGINNINGS AND FIRST YEARS OF WORK* (2007) (discussing Chief Justice Asshiddiqie in Indonesia); Manuel Jose Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529 (2004) (discussing Justice Cepeda-Espinosa in Colombia).

25. See, e.g., *infra* notes 75–82 (discussing the HCA).

26. At an international level, it is also notable that drafters of key international instruments and legal opinions have long played a role as judges who are required to draw on those sources. See, e.g., Martti Koskenniemi, *Hersch Lauterpacht (1897–1960)*, in *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* 601 (J. Beatson & Reinhard Zimmermann eds., 2004) (discussing Hersch Lauterpacht, a judge on the International Court of Justice (ICJ) between 1955 and 1960 and former member of the International Law Commission); *Judge James Richard Crawford*, INTERNATIONAL COURT OF JUSTICE (2015), <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=200> (discussing James Crawford, a judge of the ICJ since 2014 who served previously as a member of the Commission, a special rapporteur on state responsibility, and drafter of the draft statute of the International Criminal Court).

successful processes of democratic constitutional transition in the last few decades.<sup>27</sup>

In Hungary in 1989, the communist-controlled Parliament passed a range of constitutional amendments designed to pave the way for a transition to multiparty democracy and a market-based economy.<sup>28</sup> As part of the 1989 roundtable talks, the amendments in question also sought to capture the terms of the agreement reached between the (former communist) government and various opposition parties.<sup>29</sup> Among those who participated in those talks was Lazlo Sólyom, who became the president of the new Constitutional Court that was created as a result of one of those amendments. Sólyom was one of the lead negotiators at the talks for the Democratic Forum (MDF) — the opposition party that ultimately won forty-three percent of the vote in the first democratic elections held in 1990 and formed a center-right coalition government.<sup>30</sup>

In Colombia in 1989, in response to ongoing violence, a wide range of political leaders agreed to support the election of a Constituent Assembly to draft a new democratic constitution. The new constitution adopted by the Assembly in 1991 ultimately contained a number of important institutional innovations, as well as “reforms” to prior institutions under the 1886 Constitution:<sup>31</sup> among other changes, it created a new Constitutional Court, a new *tutela* action — a new form of concrete review jurisdiction on the part of the Constitutional Court designed to give

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27. On recent doubts regarding Hungary and South Africa, see, e.g., Andras Bozoki, *The Hungarian Shock: The Transition from Democracy?*, DELIBERATELY CONSIDERED (Feb. 1, 2011) <http://www.deliberatelyconsidered.com/2011/02/the-hungarian-shock-the-transition-from-democracy/>; Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285, 295–98 (2015); Robert P. Inman & Daniel L. Rubinfeld, *Understanding the Democratic Transition in South Africa*, 15 AM. L. & ECON. REV. 1 (2013); Renáta Uitz, *Can You Tell when an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279 (2015).

28. See Andrea Mezei, *The Role of Constitution-Building Processes in Democratization* 20, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (2005), [http://www.constitutionnet.org/sites/default/files/CBP\\_hungaryF.pdf](http://www.constitutionnet.org/sites/default/files/CBP_hungaryF.pdf).

29. For discussion of the roundtable talks, see, e.g., András Bozoki, *Hungary's Road to Systemic Change: The Opposition Roundtable*, 7 E. EUR. POL. & SOC. 276 (1993); András Bozoki, *The Roundtable Talks of 1989: Participants, Political Visions, and Historical References*, 14 HUNG. STUD. 241 (2000); József Bayer, *The Process of the Change of the Political System in Hungary: Deepening Crisis, Emerging Opposition*, 39 E. EUR. Q. 129 (2005).

30. See Andre Arato & Zoltán Miklósi, *Constitution Making and Transitional Politics in Hungary*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 350, 353, 388 n.60 (Laurel E. Miller ed., 2010); Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757, 1773–75 (2006); John W. Schiemann, *Explaining Hungary's Powerful Constitutional Court: A Bargaining Approach*, 42 EUR. J. SOC. 357, 357 n.1 (2001); Mezei, *supra* note 28, at 16–17.

31. Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139, 146–49, 153–55 (1992).

individuals rapid and direct access to the Court in cases involving “fundamental rights” — and a range of new rights protections, including rights to education, housing, health, and social security.<sup>32</sup> Several future members of the Constitutional Court were also involved in this process: the most important member was Manuel José Cepeda-Espinosa, who would go on to become president of the Court. Cepeda-Espinosa was a key advisor to President Barco, the initiator of constitutional change in the late 1980s, and then to President Gaviria, who was president during the deliberations of the Constituent Assembly. As presidential advisor, Cepeda-Espinosa was responsible for preparing the draft of the new constitution that was submitted by Gaviria’s government to the Constituent Assembly. Cepeda-Espinosa also represented the government in the Codification Commission, which was responsible for preparing the final draft of the Constitution that was later approved by the Assembly. As part of this process, Cepeda-Espinosa is also widely credited with helping design a number of key specific constitutional changes, including the creation of the *tutela* action.<sup>33</sup>

In Indonesia, between 1999 and 2002, in response to a broad movement for democratic reformation (“*reformasi*”), the Indonesian People’s Consultative Assembly (MPR) adopted four major constitutional amendments designed to achieve a transition from a system of *de facto* one-party rule to a system of true multiparty democracy.<sup>34</sup> The relevant amendments introduced new procedures for the direct election of the president, vice president, and regional legislators;<sup>35</sup> reduced the power of the president by imposing formal term limits on the presidency and by removing the president’s power to pass or even veto legislation;<sup>36</sup> and

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32. *Id.* at 153, 156, 159–60; David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 204–06 (2012); Luis Eslava, *Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparison*, 22 REVISTA DERECHO DEL ESTADO 183, 202–204 (2009); Julio Faundez, *Democratization through Law: Perspectives from Latin America*, 12 DEMOCRATIZATION 749, 758–59 (2005).

33. Justice Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 546 (2004); Rodrigo M. Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health*, 52 LATIN AM. POL. & SOC. 67, 77 (2010).

34. For the history of democratic competition and opposition in Indonesia prior to 1999, see, e.g., Anders Uhlin, *Transnational Democratic Diffusion and Indonesian Democratic Discourses*, 14 THIRD WORLD Q. 517 (1993); R. William Liddle, *Indonesia’s Democratic Opening*, 34 GOV’T & OPPOSITION 94 (1999); SYED FARID ALATAS, *DEMOCRACY AND AUTHORITARIANISM IN INDONESIA AND MALAYSIA: THE RISE OF THE POST-COLONIAL STATE* (1997).

35. SIMON BUTT & TIM LINDSEY, *THE CONSTITUTION OF INDONESIA* (2012); Simon Butt & Tim Lindsey, *Economic Reform When the Constitution Matters: Indonesia’s Constitutional Court and Article 33*, 44 BULL. INDON. ECON. STUD. 239, 239–40 (2009); Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6 SING. J. INT’L & COMP. L. 244, 249–50, 259 (2002).

36. See CONSTITUTIONAL COURT OF SOUTH AFRICA, *Judges: Justice Laurie Ackermann*, <http://www.constitutionalcourt.org.za/site/judges/justicelwhackermann/index1.html> (last visited July 16, 2016).

removed the formal role of the military in politics by repealing the provision that reserved seats in the Parliament for the military.<sup>37</sup> Additionally, they introduced a range of new constitutional rights guarantees and created a new court with jurisdiction to hear a wide range of constitutional and electoral disputes.<sup>38</sup>

One of the key advisors to the MPR in this process, Jimly Asshiddiqie, became the first chief justice of the newly created Constitutional Court.<sup>39</sup> Asshiddiqie had also previously served as an advisor to President Wahid, who was a key figure in the transition from authoritarian rule under President Soeharto, and a proponent of legal and democratic reform.<sup>40</sup> The third chief justice of the Court, Hamdan Zoelva, was a member of the MPR, representing the Islamic Crescent and Star Party, and was closely involved in the MPR ad hoc committee that was responsible for preparing the draft of the Third Amendment, including the provisions creating the Constitutional Court.<sup>41</sup> Another later member of the court, Justice Harjono, was a member of the MPR as a representative of the Indonesian Democratic Party of Struggle (PDIP) party.<sup>42</sup> The second chief justice, Mohammad Mahfud, was Minister of Defense and Minister of Justice and Human Rights under President Wahid, and thus integrally involved in the more political side of the relevant set of democratic reforms.<sup>43</sup>

In South Africa, the constitutional transition from apartheid occurred in two stages: First, via the adoption of an interim Constitution designed to reflect the results of a multiparty negotiating process (MPNP) and govern the transition to democracy in 1994. Second, via the adoption of a new Constitution adopted by a democratically elected Constituent Assembly in 1996.<sup>44</sup> The two stages of constitution-making were also

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37. Simon Butt & Tim Lindsey, *Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33*, 44 BULL. INDON. ECON. STUD. 239, at 239–40; Lindsey, *supra* note 35, at 268–69.

38. Butt & Lindsey, *Economic Reform When the Constitution Matters*, *supra* note 37, at 240; Lindsey, *supra* note 35, at 253, 260–61; SIMON BUTT, *THE CONSTITUTIONAL COURT AND DEMOCRACY IN INDONESIA* (2015); Jimly Asshiddiqie, *Creating a Constitutional Court for a New Democracy*, Address at the Melbourne Law School (Mar. 11, 2009).

39. Stefanus Hendrianto, *The Divergence of a Wandering Court: An Inquiry into Socio-Economic Rights and Freedom of Expression in the Indonesian Constitutional Court* 115–16 (unpublished manuscript) (on file with author).

40. *Id.* at 113–14.

41. *Id.* at 40–43.

42. Björn Dressel & Marcus Mietzner, *A Tale of Two Courts: The Judicialization of Electoral Politics in Asia*, 25 GOVERNANCE 391, 405 (2012).

43. Hendrianto, *supra* note 39, at 18–19.

44. On the South African constitutional transition, see, e.g., RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* (2000); HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS* (2010).

connected through a novel procedure, which required that a newly created Constitutional Court of South Africa (CCSA) certify that the final Constitution was in conformity with thirty-four basic “constitutional principles” agreed to by parties to the MPNP and contained in the interim Constitution.

Several of the key architects of the 1993 Interim Constitution, and this broader two-stage constitutional process, also were appointed as original members of the CCSA.<sup>45</sup> The first president of the Court, Arthur Chaskalson, was a member of the Technical Committee on Constitutional Issues, which advised the negotiating council responsible for agreeing on the Interim Constitution at Kempton Park in 1993.<sup>46</sup> Scholars widely credit Chaskalson with having a major impact on the language of the 1993 Constitution.<sup>47</sup> Another member of this Committee was future Deputy Chief Justice Dikgang Moseneke.<sup>48</sup> Future Justice Zac Yakoob was also a member of the Technical Committee on Fundamental Human Rights, which advised the MPNP on the Bill of Rights under the Interim Constitution.<sup>49</sup>

Several justices also had a history of involvement in the process of constitutional drafting on the African National Congress (ANC) side. Chaskalson was never a general member of the ANC, but he was part of the ANC Constitutional Committee.<sup>50</sup> Justice Albie Sachs and Chief Justice Pius Langa also served with Chaskalson on the Committee from 1990 to 1991.<sup>51</sup> That committee adopted a set of “Constitutional Guidelines for a Democratic South Africa” that served as the basis for negotiations by the ANC at the MPNP.<sup>52</sup> Sachs, in particular, is also

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45. See generally THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005* ch. 5 (2013).

46. *Judges: Justice Arthur Chaskalson (1931–2012), Chief Justice of South Africa (2001–2005)*, CONSTITUTIONAL COURT OF SOUTH AFRICA, (July 27, 2016, 12:00 PM), <http://www.constitutionalcourt.org.za/site/judges/justicearthurchaskalson/index1.html>.

47. Geoff Budlender, *In Memoriam: The Late Former Chief Justice Arthur Chaskalson*, *ADVOCATE*, Apr. 2013, at 8.

48. *Judges: Deputy Chief Justice Dikgang Moseneke*, CONSTITUTIONAL COURT OF SOUTH AFRICA (July 27, 2016, 12:00 PM), <http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/index1.html>.

49. *Judges: Justice Zak Yakoob*, CONSTITUTIONAL COURT OF SOUTH AFRICA (July 27, 2016, 12:00 PM), <http://www.constitutionalcourt.org.za/site/judges/justicezakYakoob/index1.html>.

50. Franny Rabkin, *Chaskalson's Peers Defend His Reputation*, *BUS. DAY LIVE* (Dec. 12, 2012, 12:55 PM), <http://www.businesslive.co.za/bd/> (on file with The Virginia Journal of International Law).

51. *Judges: Justice Albie Sachs*, CONSTITUTIONAL COURT OF SOUTH AFRICA (July 27, 2016, 12:00 PM), <http://www.constitutionalcourt.org.za/site/judges/justicealbiesachs/index1.html>; *Judges: Former Chief Justice Pius Langa (1938–2013)*, CONSTITUTIONAL COURT OF SOUTH AFRICA (July 27, 2016, 12:00 PM), <http://www.constitutionalcourt.org.za/site/judges/justicepiuslanga/index1.html>.

52. *Constitutional Guidelines for a Democratic South Africa, 1989*, *AFRICAN NATIONAL CONGRESS* (July 27, 2016, 12:00 PM), <http://www.anc.org.za/show.php?id=294>; see also Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38

widely credited with shaping ANC constitutional thinking in this and earlier contexts toward a view that embraced the adoption of a Bill of Rights that contained broad civil, political, and socio-economic rights; a commitment to non-racism, non-sexism, and gay rights; and a strong commitment to the rule of law.<sup>53</sup> Similarly, other future justices (e.g., Justice Laurie Ackermann<sup>54</sup>) were involved at an earlier stage of constitutional drafting as part of discussions with the ANC leadership, who were in exile, about a future democratic South African constitution.

Several later members of the CCSA were also involved in providing advice on the drafting of the 1996 Constitution. Of the seven-member panel of independent experts appointed to advise the Constitutional Assembly from 1995 to 1996, two were later appointed to the Constitutional Court: Justices Zac Yacoob and Johann van der Westhuizen.<sup>55</sup> Yacoob in particular provided advice on the substance of various federalism provisions, provisions involving local government and finance, and the chapter on fundamental rights.<sup>56</sup> Other justices, such as Pius Langa, played a role in advising the Assembly on the repeal or amendment of legislation that affected free political activity or that was racially discriminatory.<sup>57</sup>

The role of constitutional drafters as judges also has a much longer history in constitutional democracies worldwide. In Australia, *all* of the first five justices appointed to the High Court of Australia (HCA) were either involved in the process of drafting a federal constitution in the 1890s or served as delegates at the two federal constitutional conventions

COLUM. HUM. RTS. L. REV. 321, 330–33 (2007); Hugh Corder & Dennis Davis, *The Constitutional Guidelines of the African National Congress: A Preliminary Assessment*, 106 S. AFR. L.J. 533 (1989).

53. See, e.g., DRUCIALI CORNELL & KARIN VAN MARLE, WITH ALBIE SACHS, ALBIE SACHS AND TRANSFORMATION IN SOUTH AFRICA: FROM REVOLUTIONARY ACTIVIST TO CONSTITUTIONAL COURT JUDGE (2014); Mark F. Massoud, *The Evolution of Gay Rights in South Africa*, 15 PEACE REV. 301, 302–03 (2003); ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW (2009); Albie Sachs, *Preparing Ourselves for Freedom: Culture and the ANC Constitutional Guidelines*, 35 TDR 187 (1991); Albie Sachs, *Towards a Bill of Rights for a Democratic South Africa*, 35 J. AFR. L. 21 (1991).

54. See *Judges: Justice Laurie Ackermann*, *supra* note 36.

55. *Judges: Justice Zak Yacoob*, *supra* note 49; CONSTITUTIONAL COURT OF SOUTH AFRICA, *Judges: Justice Johann van der Westhuizen*, <http://www.constitutionalcourt.org.za/site/judges/justicejohannvanderwesthuizen/justicejohannvanderwesthuizen1.html> (last visited July 16, 2016).

56. Interview by Judicial Services Commission with Adv. Z. Yacoob (Oct. 1997), available at <http://www.constitutionalcourt.org.za/site/judges/transcripts/piusnkonzolanga.html>; Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. ON HUM. RTS. 222, 226–28 (1995). Van der Westhuizen's role as part of the technical refinement team was more directly focused on encouraging clear and plain language in the drafting of the Constitution. See *Justice Johann van der Westhuizen*, *supra* note 55; Johann van der Westhuizen, Justice of the Constitutional Court of South Africa, Address to law clerks of the Constitutional Court, Legal Language: Instrument of Deception or Empowerment? (Notes on Plain Language and the Constitution) (Sept. 12, 2013).

57. *Judges: Former Chief Justice Pius Langa (1938–2013)*, *supra* note 51; Interview by Judicial Services Commission with Adv. Pius Nkondo Langa (Oct. 6, 1994).

held in 1891 and from 1897 to 1898. Samuel Griffith, Australia's first Chief Justice, was an early member of the Federal Council that debated the idea of a federal union among various colonies in Australia; was a lead delegate representing Queensland at the 1891 Convention; and chaired the Convention's Constitutional Committee, which had the responsibility to produce a first draft of the Commonwealth Constitution.<sup>58</sup> Edmund Barton, a later Prime Minister of Australia and someone identified as "the acknowledged leader of the federal movement," was another original member of the High Court and represented New South Wales at both Conventions.<sup>59</sup> He played an important role in assisting Griffith in the work of the constitutional drafting committee in 1891,<sup>60</sup> and he was elected leader and chair of the drafting and constitutional committees at the 1897–1898 Convention.<sup>61</sup> Later, he played a central role in ensuring the ratification of the Constitution in New South Wales and the passage in London by the British Parliament of the Commonwealth of Australia Constitution Act. The third original member of the HCA, Richard O'Connor, was a delegate to the 1897–1898 Convention and a central member of the Constitutional Committee. He was second only to Barton in his influence on the Committee's work and a key advocate for the ratification of the Constitution in New South Wales.<sup>62</sup> Finally, the second set of justices appointed to the HCA in 1906, Sir Isaac Isaacs and Henry Higgins, were both leading delegates at the 1897–1898 Convention, although they were often in the minority on key constitutional questions.<sup>63</sup>

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58. F. R. Beasley, *Sir Samuel Griffith*, 25 AUSTL. L.J. 8, 8 (1951). As part of this process, Griffith is widely credited with having drafted various sources of federal legislative power and the language of section 92 of the Constitution providing that "trade and commerce among the states shall be absolutely free." See J. A. LA NAUZE, *THE MAKING OF THE AUSTRALIAN CONSTITUTION* 37 (1972); J. A. La Nauze, *A Little Bit of Lawyers' Language: The History of "Absolutely Free", 1890–1900*, in *ESSAYS IN AUSTRALIAN FEDERATION* 57 (A. W. Martin ed., 1969). While Griffith left the formal drafting process to become Chief Justice of Queensland in 1893, drafters at subsequent conventions continued to consult him on technical drafting matters. See ROGER B. JOYCE, *SAMUEL WALKER GRIFFITH* 212–15 (1984); Geoffrey Bolton, *Samuel Griffith: The Great Provincial*, in *13 PAPERS ON PARLIAMENT* (Research Section, Procedure Office, Dep't of the Senate ed., 1991).

59. Martha Rutledge, *Barton, Sir Edmund (1849–1920)*, in *7 AUSTRALIAN DICTIONARY OF BIOGRAPHY* 194, 197 (Bede Nairn & Geoffrey Serle eds., 1979).

60. Most historians credit a voyage aboard Griffith's yacht, the *Lucinda*, as producing the first draft of the Constitution. Barton was among the six passengers on the voyage, after replacing another member of the committee, Andrew Inglis Clark, who was ill. See JOYCE, *supra* note 58, at 195.

61. Rutledge, *supra* note 59, at 197.

62. See ALFRED DEAKIN, *THE FEDERAL STORY* 63–64, 78, 95 (1944). O'Connor was also a Senator and member of the Barton federal cabinet. See, e.g., L. A. Jeckeln, *O'Connor, Richard (1810–1876)*, in *5 AUSTRALIAN DICTIONARY OF BIOGRAPHY* (Bede Nairn ed., 1974); G. Bolton, *The Art of Consensus: Edmund Barton*, in *30 PAPERS ON PARLIAMENT* (1997).

63. See, e.g., ZELMAN COWEN, *ISAAC ISAACS* (1967); L. F. CRISP, *THE UNRELENTING PENANCE OF FEDERALIST ISAAC ISAACS 1897–1947* (1981); John Rickard, *Henry Bourne Higgins*, in *9 AUSTRALIAN DICTIONARY OF BIOGRAPHY* 286 (1983).

Isaacs narrowly lost out on being elected to the 1897 Constitutional Committee in part for these reasons,<sup>64</sup> and Higgins was one of only two delegates in 1898 to vote against adoption of the draft Constitution.<sup>65</sup>

Similarly, in “newer” Commonwealth constitutional settings, where countries have adopted some form of statutory or otherwise weakly entrenched charter of rights, key drafters of relevant charters have sometimes been appointed to the nation’s highest courts. In Canada, as the Assistant Deputy Minister of Justice, Barry Strayer was a key advisor to the Attorney-General in the drafting of the 1982 Charter of Rights and Freedoms and was later appointed to the Federal Court of Appeal.<sup>66</sup> In New Zealand, Judge Kenneth Keith played a key role in the drafting of New Zealand’s 1990 statutory Bill of Rights (BOR). He was one of three authors of the 1985 White Paper on the Bill of Rights, which included an extended discussion of the intended scope and effect of the proposed statutory BOR, and the first draft of such a Bill.<sup>67</sup> Later, Keith also worked closely with the Minister for Justice, Geoffrey Palmer, in making amendments to the Bill that were designed to ensure its passage through Parliament. In 1996, he was appointed to the New Zealand Court of Appeal, which until 2004 was the highest court in New Zealand and responsible for interpreting the scope and effect of the BOR.<sup>68</sup> He was appointed to the new Supreme Court of New Zealand in 2004, and in 2006 he was appointed to the International Court of Justice.<sup>69</sup>

Perhaps one of the most famous examples of this phenomenon is the role of Hans Kelsen in drafting the Austrian Constitution. Kelsen was the principal constitutional advisor to Karl Renner, the Social Democratic Chancellor of Austria from 1918 to 1920 (and again after 1945). As constitutional advisor, Kelsen played a lead role in drafting the 1919 Provisional Constitution, as well as the 1920 Austrian Constitution after the Social Democrats won a plurality of seats in the Constituent Assembly. As part of that process, Kelsen was widely credited with an important innovation in constitutional design — i.e., the creation of a specialized

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64. Most historians and biographers also attribute this to aspects of Isaacs’s personality or interpersonal style. *See, e.g.*, COWEN, *supra* note 63, at 55–60; Zelman Cowen, *Sir Isaac Isaacs and the Workings of the Australian Constitution*, 29 *MONASH U. L. REV.* 1, 5 (2003); Michael Kirby, *Sir Isaac Isaacs — A Sesquicentenary Reflection*, 29 *MELB. U. L. REV.* 880, 885 (2005).

65. Rickard, *supra* note 63, at 286.

66. *See* BARRY L. STRAYER, *CANADA’S CONSTITUTIONAL REVOLUTION* (2013).

67. K. J. Keith, *The New Zealand Bill of Rights Act 1990 — An Account of Its Preparation*, 11 *N.Z. J. PUB. & INT’L L.* 1, 8 (2013).

68. Keith was also a member of the Judicial Committee of the Privy Council. *See Judge Kenneth Keith*, *INTERNATIONAL COURT OF JUSTICE*, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=157>.

69. *Id.*

constitutional court, which had exclusive power to review the validity of legislation.<sup>70</sup>

Even in the Americas there is a long history of drafters playing a key role in the interpretation of certain constitutions. In Puerto Rico, José Trias Monge was a member of the 1951–1952 Constituent Assembly and played a key role in helping to draft the provisions of Article V of the Puerto Rican Constitution, which concerned the judiciary and judicial power.<sup>71</sup> Monge was appointed Chief Justice of the Supreme Court of Puerto Rico in 1974. Similarly, in Ecuador in 1998 to 1999, Nina Pacari, an indigenous rights lawyer and congresswoman, was a delegate to the National Assembly charged with amending the Ecuadorian Constitution. She played a central role in designing changes to the Constitution that were intended to give greater recognition to indigenous peoples.<sup>72</sup> In 2007, she was appointed to the Supreme Court of Ecuador.<sup>73</sup>

In the United States, there was arguably less overlap between the key delegates at Philadelphia and the early members of the Supreme Court.<sup>74</sup> Justices James Wilson and John Rutledge were both members of the Constitutional Convention in Philadelphia and members of the Committee of Detail, which prepared the first draft of the Constitution.<sup>75</sup> Wilson was also a signatory of the Declaration of Independence. However, before he could decide a case, Rutledge resigned from the Supreme Court to become Chief Justice of the South Carolina Court of Common Pleas and

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70. See, e.g., John W. Boyer, *Silent War and Bitter Peace: The Revolution of 1918 in Austria*, 34 AUSTRIAN HIST. Y.B. 1 (2003); Leo Gross, *Hans Kelsen: October 11, 1881–April 15, 1973*, 67 AM. J. INT'L L. 491, 492 (1973); Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 RATIO JURIS 206, 214 (2003); Georg Schmitz, *The Constitutional Court of the Republic of Austria 1918–1920*, 16 RATIO JURIS 240 (2003).

71. Martin J. Collo, Book Review, 32 J. DEV. AREAS 282, 282 (1998) (reviewing JOSÉ TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997)); Paul Lewis, *José Trias Monge, 83, Puerto Rico Chief Justice*, N.Y. TIMES (June 27, 2003), <http://www.nytimes.com/2003/06/27/us/jose-trias-monge-83-puerto-rico-chief-justice.html>.

72. See, e.g., Marc Becker & Judy Hinojosa, *Nina Pacari*, in NOTABLE TWENTIETH-CENTURY LATIN AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY 218–22 (Cynthia Margarita Tompkins & David William Foster eds., 2001); Kenneth J. Mijeski & Scott H. Beck, *Mainstreaming the Indigenous Movement in Ecuador: The Electoral Strategy*, Address at the XXI International Congress of the Latin American Studies Association (Sept. 24–26, 1998), at 9–10.

73. See Manuela Lavinás Picq, *Where Did the Women Go? Gender Inequalities in Ecuador's Ethno-Politics*, SOC. DEV. ISSUES., Nov. 2014, at 92, 97.

74. See, e.g., R. B. BERNSTEIN, *THOMAS JEFFERSON: THE REVOLUTION OF IDEAS* (2004) (on the role of Thomas Jefferson); NEAL RIEMER, *JAMES MADISON: CREATING THE AMERICAN CONSTITUTION* (1986) (on the role of James Madison).

75. See JOSEPH C. MORTON, *SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY* 265, 301 (2006).

Sessions,<sup>76</sup> and Wilson heard only nine cases during his time on the Court.<sup>77</sup>

Many subsequent justices, however, have arguably fit the description of either a formal or informal drafter-judge. Chief Justice John Jay played an important role in debates over New York's ratification of the Constitution and is widely believed to have contributed to the writing of five of the Federalist Papers,<sup>78</sup> while Justice James Iredell was a lead advocate for the ratification of the Constitution in North Carolina.<sup>79</sup> Among later justices, Justice William Paterson, Justice John Blair Jr., and Chief Justice Oliver Ellsworth were all at Philadelphia. Ellsworth also was a member of the Committee of Detail, but he left the Convention before the final constitutional draft was complete.<sup>80</sup> Justice Samuel Chase was a delegate at Philadelphia,<sup>81</sup> while Chief Justice John Marshall was a committed federalist, was Secretary of State under John Adams, and also played an important role in debates over the ratification of the Constitution.<sup>82</sup> Later periods in U.S. history have followed a similar pattern: previously a member of President Lincoln's cabinet, Justice Salmon P. Chase was a leading advocate of the Reconstruction Amendments;<sup>83</sup> and as an advisor to President Franklin Roosevelt, Justice Felix Frankfurter played an important role in designing key pieces of the New Deal legislation, such as the Social Security Act, which scholars such as Bruce Ackerman argue are now key informal parts of the U.S. Constitutional settlement.<sup>84</sup>

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76. See JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 26 (1998).

77. See MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742–1798* 25 (1997).

78. Justice Harry A. Blackmun, *John Jay and the Federalist Papers*, 8 PACE L. REV. 237, 238 (1988).

79. See MORTON, *supra* note 75; Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 198, 210 (Scott Douglas Gerber ed., 1998).

80. Justice Johnson was also an advocate for ratification in Maryland, and Moore was an advocate for ratification in North Carolina. Bernard C. Steiner, *Maryland's Adoption of the Federal Constitution*, 5 AM. HIST. REV. 22, 23 (1899); LOUISE IRBY TRENHOLME, *THE RATIFICATION OF THE FEDERAL CONSTITUTION IN NORTH CAROLINA* (1932).

81. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 65 (1988).

82. See R. KENT NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 19–20 (2d ed. 2006) (detailing Marshall's role at the Virginia ratifying convention).

83. HAROLD M. HYMAN, *THE RECONSTRUCTION JUSTICE OF SALMON P. CHASE: IN RE TURNER & TEXAS V. WHITE* 129–30, 131 (1997).

84. BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 2: TRANSFORMATIONS* Pt. 3 (1998); see also Sanford Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973); Tamara Ehs, *Felix Frankfurter, Hans Kelsen, and the Practice of Judicial Review*, 73 HEIDELBERG J. INT'L L. 451, 467 (2013).

## III. DESIGN VERSUS INTERPRETATION?

Drafter-judges are not only a significant, and under-studied, part of the constitutional practice and history of many leading constitutional democracies. Studying drafters as judges also can offer a range of potentially valuable insights as to the nature of democratic constitution-making itself. Perhaps most importantly, attention to the role of such judges both before and after the enactment of a new democratic constitution (or set of amendments) can help draw attention to the important degree of continuity, as well as the disjuncture, between processes of constitutional design and interpretation.

Take two landmark decisions of drafter-judges in South Africa and Colombia, namely the judgment of Justice Sachs in *Fourie*<sup>85</sup> and the judgment of Justice Cepeda-Espinosa in the *IDP Case*.<sup>86</sup> In *Fourie*, Justice Sachs wrote for the CCSA in finding that it was inconsistent with the constitutional commitment to dignity and equality for the government to recognize opposite sex marriage while providing no similar form of practical or symbolic recognition for same-sex relationships.<sup>87</sup> A key part of the Court's reasoning was that the differential treatment of opposite and same-sex relationships in this context amounted to unfair discrimination on the grounds of sexual orientation, in breach of section 9(3) of the Constitution.<sup>88</sup> This language, in turn, was directly borrowed from language in section 8 of the 1993 Constitution. Sachs played a critical role in helping shape the 1993 Constitution through debates within the ANC about the extent to which commitments to non-racism would extend to other forms of discrimination.<sup>89</sup>

In the *IDP Case*, Cepeda-Espinosa wrote for Colombia's Constitutional Court in holding that the situation of the two to three million people internally displaced in Colombia, as a result of the long-standing conflict between the government and various guerrilla groups, constituted an "unconstitutional state of affairs."<sup>90</sup> The Court further ordered the government to remedy this state of affairs within one year by allocating "the required budget to ensure that displaced people's

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85. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

86. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm>.

87. *Fourie* 2006 (1) SA 524 at para 72.

88. *Id.* at paras. 77–78.

89. See Massoud, *supra* note 53, at 302; Derrick Fine & Julia Nicol, *The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement*, in *DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA* 269, 271–73 (Edwin Cameron & Mark Gevisser eds., 1995).

90. Translation of case available in *COLOMBIAN CONSTITUTIONAL LAW* 165 (Manuel Jose Cepeda Espinosa & David Landau eds., 2017).

fundamental rights [were] fully realized.”<sup>91</sup> In making this order, Cepeda-Espinosa also directly relied on the aggregation of 108 *tutela* writs from individual displaced families, a form of procedural mechanism which Cepeda-Espinosa himself was widely credited with having helped create.<sup>92</sup>

There were also other important continuities between the actions taken by both Sachs and Cepeda-Espinosa, which went well beyond reliance on the formal provisions of the constitutional text that each judge helped shape as a drafter. Sachs, for example, showed a deep commitment to recognizing and promoting the dignity and equality of gays and lesbians in South Africa at all levels, both in his role as judge and drafter. Sachs was one of the earliest members of the ANC to join a gay pride parade during the apartheid era,<sup>93</sup> and his reasoning as a judge in *Fourie* showed deep sensitivity to both the symbolic importance of affirming gay and lesbian identity as well as the more practical dimension to same-sex marriage recognition.<sup>94</sup> As both a drafter and a judge, Sachs also showed a clear commitment to protecting the rights of both sexual and religious minorities: In various scholarly writings in the early 1990s, Sachs urged other members of the ANC to embrace the Bill of Rights as part of the transition to democracy.<sup>95</sup> He also argued that, while generally rejecting the claim by white leaders for recognition of various group rights, such a rights charter should give special protection to the right of minorities to “preserve and develop their cultural linguistic and spiritual heritage,” or to maintain their “cultural, linguistic or religious identity in the face of pressure to adopt the ways of the majority.”<sup>96</sup>

In *Fourie*, Sachs was quite explicit in addressing the argument from religious groups that recognition of same-sex marriage violated their beliefs and traditions. While he ultimately rejected the relevance of such arguments to determining the meaning of unfair discrimination in this context, he expressly acknowledged the sincerity of the beliefs of religious objectors, noting that “in the open and democratic society contemplated by the Constitution there must be mutually respectful coexistence between secular and sacred” and that recognition of same-sex marriage by the state did not require religious organizations to celebrate same-sex marriage.<sup>97</sup>

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91. *Id.* at 167.

92. Cepeda-Espinosa, *supra* note 33, at 614–15.

93. ALBIE SACHS, *THE STRANGE ALCHEMY OF LAW AND LIFE* 231–32 (2009).

94. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at paras. 72–77.

95. See, e.g., Sachs, *Preparing Ourselves for Freedom*, *supra* note 53, at 192–93; Sachs, *Towards a Bill of Rights for a Democratic South Africa*, *supra* note 53.

96. SACHS, *supra* note 93, at 206.

97. *Fourie* 2006 (1) SA 524 at paras. 93–94, 98.

Cepeda-Espinosa, in turn, showed explicit sensitivity in the *IDP Case* to the connection between narcotic-fueled violence and broader social and economic deprivation and inequality in Colombia. His opinion for the Court explicitly notes that “the internal armed conflict, especially the actions carried out by illegal armed groups,” caused the situation of internally displaced persons (IDPs) but goes on to emphasize the duty that the Constitution imposes on the state to respond to this situation.<sup>98</sup> Off the bench, as a drafter and political advisor, Cepeda-Espinosa also consistently sought to connect the goals of constitutional equality and peace. He argued that part of the aim of the Constitution was to offer an “important space for political and civic participation, which [could] delegitimize the violence as a means to gain power”<sup>99</sup> and help increase social and economic inclusion, in ways that could then reduce the likelihood that poor Colombians would turn to illegal drug cultivation as a means of subsistence.<sup>100</sup> As an advisor to Presidents Barco and Gaviria, Cepeda-Espinosa was also a key advocate of the idea that increased protection of individual rights could help address the problem of violence: in fact, as an advisor to Barco, Cepeda-Espinosa was widely credited with being the first to introduce the idea (via memorandum to Barco) that a referendum to amend the Constitution could provide “an institutional way out to the crisis of public order” that prevailed in Colombia in the 1980s.<sup>101</sup>

These specific connections can also potentially help draw our attention to deeper, more general connections between the process of constitutional design and interpretation. For one, it suggests that constitutional design often takes place across an extended timeframe, which begins but does not end with the drafting or adoption of a new constitutional text. Often, for more or less deliberate reasons, that text will contain silences that require filling by future judges, or general phrases that assume concrete meaning only when “implemented” by later judges.<sup>102</sup> The notion of “unfair discrimination,” for instance, necessarily delegates to future judges and political leaders the task of developing standards for assessing questions of

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98. COLOMBIAN CONSTITUTIONAL LAW, *supra* note 90, at 165; *see also* Landau, *supra* note 32; Manuel José Cepeda-Espinosa, *Transcript: Social and Economic Rights and the Colombian Constitutional Court*, 89 TEX. L. REV. 1699 (2011).

99. Gabriel Bustamante Peña, *La Constitución del 86 ya no interpretaba al pueblo colombiano*, SEMANA MAGAZINE (Mar. 16, 2011), <http://www.semana.com/nacion/articulo/la-constitucion-del-86-no-interpretaba-pueblo-colombiano/236883-3> (interview with Cepeda-Espinosa).

100. *See, e.g.*, Cepeda-Espinosa, *supra* note 33, at 579.

101. *See* DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* 52 (2000); *see also* STEVEN LYNN TAYLOR, *VOTING AMID VIOLENCE: ELECTORAL DEMOCRACY IN COLOMBIA* 54 (2009).

102. RICHARD FALLON, *IMPLEMENTING THE CONSTITUTION* (2001).

fairness; and the notion that the state is obliged to “guarantee the effectiveness of rights” or protect “life” and “dignity” requires judges to determine the concrete meaning of what is necessitated by notions of a “guarantee,” or “protection,” in the face of threats posed by third parties. When judges engage in processes of constitutional review under a new constitution, there is an important degree to which they are directly contributing to the process of constitution-*making* — not simply “interpretation.” Constitutional design, in other words, is often a project that not only takes place over an extended time period; it is also a process that involves judges *qua* drafters, as well as legal interpreters.<sup>103</sup>

The work of individuals such as Sachs and Cepeda-Espinosa also helps highlight the degree to which processes of drafting and interpretation often *both* call for the exercise of legal and political forms of judgment. Often, we think of drafting as distinctly political in nature and interpretation as distinctly legal. The reality, however, is that both generally will involve the exercise of legal and political forms of judgment.

Take, for example, the drafting of section 9(3) of the South African (SA) Constitution and its predecessor, section 8(3) of the 1993 SA Constitution; the 1991 Colombian Constitution; and the decisions of Sachs and Cepeda-Espinosa in *Fourie* and the *IDP Case*. In deliberations over the equality clause in South Africa in 1992 to 1993, it became clear that a majority of the ANC leadership was willing to support some form of commitment to non-discrimination against gays and lesbians but *not* a commitment that ANC supporters would see as too broad or that would immediately require recognition of same-sex marriages.<sup>104</sup> In arguing for the inclusion of section 8(3), therefore, Sachs was arguably acting not only as a political advocate for equality but also as a legal interpreter who determined that the language of section 8(3) could be reconciled with the

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103. Kelsen, perhaps the most famous of all drafter-judges, was quite explicit in making this argument in *The Pure Theory of Law*. See, e.g., HANS KELSEN, PURE THEORY OF LAW 234–35 (1934) (arguing that the “two concepts” — of legal creation and interpretation — are in fact “not in absolute opposition to each other as assumed by traditional theory,” and that every legal act “is at the same time the application of a higher norm and the creation of the lower norm,” and that this is equally true for the act of judges as legal interpreters, as well as for legislators or constitution makers engaged in writing a new legislative or constitutional text).

104. See Edwin Cameron, *Archive: Presentation to GLOW Action Committee and SHOC Workshop*, in SEX AND POLITICS IN SOUTH AFRICA 178, 185–86 (Neville Wallace Hoad, Karen Martn & Graeme Reid eds., 2005); Edwin Cameron, “Unapprehended Felons”: *Gays and Lesbians and the Law in South Africa*, in DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA 89, 95–96 (Edwin Cameron & Mark Gevisser eds., 2013); Mark Gevisser, *A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to the 1990s*, in DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA 14, 75–76 (Edwin Cameron & Mark Gevisser eds., 2013).

qualified form of commitment to non-discrimination desired by the ANC leadership.<sup>105</sup>

Similarly, in debates over the inclusion of various social rights under the 1991 Colombian Constitution, many economists expressed concern that such rights would undermine the ability of the government to pursue market-based economic reform.<sup>106</sup> President Gaviria himself was also generally a center-right leader, seen as someone who supported such reforms.<sup>107</sup> In defending the inclusion of such rights in the 1991 Constitution, therefore, both Gaviria and Cepeda-Espinosa, as Gaviria's advisor, ultimately made an important political and legal judgment: a political judgment that such rights were likely to be necessary to preserve the support of the left for the process of constitutional reform, and a legal judgment that such rights would not prevent the government from pursuing necessary reforms.<sup>108</sup>

Equally, in cases such as *Fourie* and the *IDP Case*, there were clear signs of political, as well as legal, judgment on the part of Justices Sachs and Cepeda-Espinosa. In *Fourie*, one of the key issues facing the court was the remedy it would choose in response to a finding of constitutional under-inclusiveness in the common law definition of marriage. One possibility, endorsed by Justice O'Regan in dissent, was for the Court itself simply to "read in" same-sex marriage into the relevant common law and statutory framework.<sup>109</sup> Another was to suspend the legislative framework on marriage and allow the Parliament to amend the relevant framework so as to more adequately recognize same-sex relationships. Both options carried clear political risk: an immediate remedy would risk provoking a greater backlash against the Court's decision and alienate the National Assembly, and a delayed remedy would risk the National Assembly simply amending the law to recognize civil unions, rather than same-sex marriage, thereby perpetuating the second-class citizenship of gays and lesbians. Justice Sachs, however, adopted an ingenious compromise, which avoided both these dangers, by combining a delayed remedy with substantive reasoning that strongly indicated the *impermissibility* of the National Assembly

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105. For discussion of Sachs's role in this context as an advocate for gay rights, see, e.g., Gevisser, *supra* note 104, at 82–83.

106. *Palabras de Manuel José Cepeda Espinosa en Homenaje a Cesar Gaviria Trujillo, con motivo de los 20 Años de la Constitución de 1991*, DISCURSOS (June 29, 2011) (on file with The Virginia Journal of International Law).

107. See, e.g., Sergio Roberto Matias Camargo, *The New Colombian Constitutional Order*, 16 PAP POLIT 13 (2011).

108. *Id.* (describing the personal decision Gaviria made to keep such rights in the Colombian Bill of Rights).

109. *Fourie* 2006 (1) SA 524 ¶ 169.

adopting a two-tier system for recognizing opposite and same-sex relationships.<sup>110</sup>

In the *IDP Case*, Justice Cepeda-Espinosa likewise showed clear sensitivity to the role and reputation of Congress. He emphasized the degree to which the legislature had already “overtly acknowledged” the seriousness of the violation of rights facing displaced people and had taken measures to address their condition, and he delayed the relevant remedy in the case, thus giving Congress the opportunity to adopt a legislative response on its own terms.<sup>111</sup> He also showed important political judgment in seeking to harness the work of non-governmental organizations (NGOs) as a source of legitimacy for the decision and as a tool for its future enforcement: the Court explicitly noted the factual findings of NGOs regarding the seriousness of the problems facing displaced persons, and in exercising its supervisory jurisdiction in respect of enforcement of the decision, the Court directly invited the participation of NGOs.<sup>112</sup> While the government was initially reluctant to comply with the Court’s ruling and the Court has had to retain an extremely active role in enforcement of its holding, the government ultimately allocated more than \$450 million to a program designed to benefit IDPs.<sup>113</sup> Many observers also credit the Court’s remedial strategy, and the role of NGOs in the enforcement of the court’s decision, for this result.<sup>114</sup>

Attention to the role played by various drafter-judges, in different contexts, thus not only helps draw our attention to the continuities between formal processes of constitutional drafting and interpretation; it also highlights the degree to which, on both sides of this divide, individuals are engaged in actions that involve forms of legal creativity *and* fidelity, and political as well as legal judgment. This understanding of the nature of processes of constitutional drafting and interpretation may itself also have implications for how democratic actors approach the question of judicial

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110. *But see* Graham Gee & Grégoire C. N. Webber, *A Confused Court: Equivocations on Recognising Same-Sex Relationships in South Africa*, 69 MOD. L. REV. 831 (2006) (criticizing the Court’s approach in this context as far more incoherent).

111. COLOMBIAN CONSTITUTIONAL LAW, *supra* note 90, at 168.

112. *See* Landau, *supra* note 32, at 227; David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319, 360 (2010); *see also* Manuel José Cepeda-Espinosa, *How Far May Colombia’s Constitutional Court Go to Protect IDP Rights?*, FORCED MIGRATION REV., Dec. 2006, at 21.

113. Faundez, *supra* note 32, at 761.

114. *See* Rodrigo Uprimny Yepes & María Paula Saffon Sanin, *Justicia transicional y justicia restaurativa: tensiones y complementariedades*, in JUSTICIA TRANSICIONAL SIN TRANSICIÓN? VERDAD, JUSTICIA Y REPARACIÓN PARA COLOMBIA 109, 131 (Rodrigo Uprimny Yepes et al. eds., 2006) (describing a “tactical alliance” between the court and civil society in the enforcement of the court’s decision); *see also* Cepeda-Espinosa, *supra* note 112, at 22–23.

appointment — or the kinds of judges that are most desirable as agents of democratic constitutional change or transition.

#### IV. CONSTITUTIONAL ‘DESIGN’ SUCCESS AND DRAFTER-JUDGES AS LAWYER-POLITICIANS

When constitutional design is understood in this way, it also becomes clear that there may be important continuities in the kinds of attributes necessary for individuals to engage in successful processes of constitutional drafting and “interpretation.” There is no doubt, based on our existing constitutional understandings, that one of the requirements for successful constitutional interpretation by judges is that they take law and legal reasoning seriously and have both the skills and sensibility necessary to do so. But if judges are involved in a process that is also inherently creative and political, as well as legally constrained, something more may be required for judges to succeed in carrying out this role — i.e., a set of political skills and relationships, and a set of substantive political commitments that actually align with those of a majority of earlier constitutional drafters.

There is, of course, nothing inherent about being a “drafter” of a constitution that is necessary, or even sufficient, to ensure that an individual judge will have these attributes. Judges may have personal relationships with individual political leaders which predate, or are developed outside, any process of constitutional drafting, and which contribute to dynamics of trust or provide valuable information to drafters collectively about the likely political beliefs and attitudes of particular judges.<sup>115</sup> Some judges, prior to being appointed to a court, may also have a career as an activist or legal scholar, in which they express a public view on a range of politically sensitive questions.<sup>116</sup>

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115. In South Africa, for instance, Chaskalson was the lawyer to a large number of ANC figures, including Mandela; Justice O’Regan gave advice to the ANC on land claims legislation prior to her appointment to the CCSA; and Justice Kriegler interacted repeatedly with key ANC leaders as an electoral commissioner. See *Chief Justice Arthur Chaskalson*, *supra* note 16; *Judges: Justice Kate O’Regan*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicekateoregan/index1.html>; *Judges: Justice Johann Kriegler*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicejohannkriegler/index1.html>.

116. In the United States, this is increasingly unlikely due to the barrier it would create to successful confirmation of a potential judicial nominee. But in many other constitutional democracies, this remains entirely plausible: either the process of judicial appointments does not create as many barriers to successful judicial appointment, or there is greater political consensus around the kinds of political values or understandings that make someone suitable for judicial appointment. See, e.g., *South African Judge Speaks Out on Life with HIV*, ABC (May 7, 2013), <http://www.abc.net.au/radionational/programs/lawreport/judge-edwin-cameron/4672000> (discussing Edwin Cameron, who was a well-known HIV/AIDS and gay rights activist before his appointment to the CCSA); JIMLY ASSHIDDIQIE, GAGASAN KEDAULATAN RAKYAT DALAM

In modern democratic constitutional settings, judges likewise will often be affiliated prior to appointment with particular political parties, or sub-factions of parties, in ways that mean they have close relationships with leading political figures, without any form of involvement in formal processes of constitutional design. They also often will be required to endorse a distinctive set of constitutional and political commitments and objectives.<sup>117</sup> Some drafter-judges also may be drawn from a sub-faction within the broader drafting body that is clearly on the losing side of key constitutional questions.<sup>118</sup> If such a judge simply continues to adhere to that prior political view once on the bench, this is likely directly to contribute to undermining — rather than promoting — an overall approach to constitutional interpretation that aligns with the broad purposes of a majority of drafters. In some cases, the willingness of a judge to take this kind of “losers’ view of history” may in fact directly undermine the perceived legitimacy and authority of a new court, consequently undermining its role in promoting democratic constitutional change.<sup>119</sup>

At most, therefore, a judge’s participation in a process of constitutional drafting may provide one additional reason why judges may have a mix of both legal and political relationships and skills, or political values that align, and are known to align, with those of a majority of democratic drafters. The process of being a drafter may provide one form of opportunity, among many, to develop relationships with other political leaders, or it may provide an opportunity to hone and refine an individual’s political skills — although in many cases the individual’s political skills may predate their selection as a drafter and may in fact be the reason for their selection.

For this reason, the category of “drafter-judge” may also have limited distinctive meaning in some settings: in some countries, there may be such a small pool of experienced lawyers that all suitably qualified lawyers are “drafted to draft” a new constitution and then to sit on a new constitutional court. There may be no real alternative set of candidates

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KONSTITUSI DAN PELAKSANAANNYA DI INDONESIA: PERGESERAN KESEIMBANGAN ANTARA INDIVIDUALISME DAN KOLEKTIVISME DALAM KEBIJAKAN DEMOKRASI POLITIK DAN DEMOKRASI EKONOMI SELAMA TOGA MASA DEKORASI, 1945–1980 (1994) (discussing Article 33).

117. In South Africa, for instance, five of the original members of the Constitutional Court — i.e., Justices Langa, Mokgoro, O’Regan, Sachs, and Yacoob — were members of the ANC at the time when they were appointed to the CCSA. Of these justices, only Sachs and Yacoob played any significant role in the process of constitutional drafting on behalf of the ANC. *See Former Judges, CONSTITUTIONAL COURT OF SOUTH AFRICA*, <http://www.constitutionalcourt.org.za/site/judges/formerjudges.htm>.

118. In Australia, for instance, two of the five judges on the original HCA, Isaacs and Higgins, were also clearly from the “losing side” at the constitutional conventions. *See supra* notes 62–64.

119. Another possibility, of course, is that ventilating such disagreement publicly may promote a court’s legitimacy, particularly in the face of disagreement within the public at large.

available for appointment to a court and thus no real distinction between drafter-judges and other judges.

What is striking in particular, however, about the drafter-judges who have served on the constitutional courts of countries such as Hungary, Colombia, and South Africa is that in countries with a large pool of qualified lawyers, most of these judges have been individuals with exactly the kinds of relationships, skills, and commitments that align with the majority of democratic drafters.<sup>120</sup> Most of the drafter-judges who served on these courts had direct personal relationships with those responsible for the process of judicial appointment: In South Africa, Chaskalson had been Mandela's personal lawyer for three decades and part of Mandela's defense against capital charges at the Rivonia Treason trial in 1963–1964, and both he and Sachs worked closely with the ANC political leadership as part of the ANC constitutional committee.<sup>121</sup> Later drafter-judges, such as Yacoob and Van der Westhuizen, had also worked with other parts of the ANC leadership in the process of drafting the 1996 Constitution.<sup>122</sup> In Hungary, the first Prime Minister of Hungary post-1989 was József Antall, the MDF leader with whom Sólyom had worked closely during the roundtable talks.<sup>123</sup> In Colombia, President Gaviria, who Cepeda-Espinosa had advised during the process of constitutional reform in 1990–1991, openly campaigned for Cepeda-Espinosa's appointment by the Senate,<sup>124</sup> and in Indonesia, Asshiddiqie was nominated by both the President and the MPR, having served as an advisor to both.<sup>125</sup>

They were also almost all judges with significant political skills. Some drafter-judges, such as Sólyom, later were elected to high political office.<sup>126</sup> Others, like Cepeda-Espinosa, served in a range of quasi-political roles, such as the role of ambassador, prior to appointment to the Court. Since the expiration of his term, Cepeda-Espinosa consistently has been consulted by the Colombian government to provide a range of political as well as legal advice.<sup>127</sup> Others have had no formal political role but have

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120. Cf. Scheppele, *supra* note 30 (discussing court presidents).

121. See *Chief Justice Arthur Chaskalson*, *supra* note 16; *Justice Albie Sachs*, *supra* note 51. It is, of course, important to note that there was a twenty-five-year period prior to his appointment in which Chaskalson did not formally represent Mandela. See *South Africa v. South African Rugby Football Union* 1999 (4) SA 146 (CC) at para. 79.

122. *Judges: Justice Zak Yacoob*, *supra* note 49; *Justice Johann van der Westhuizen*, *supra* note 55.

123. See, e.g., *Bayer*, *supra* note 29, at 140.

124. *Palabras de Manuel José Cepeda Espinosa en Homenaje a Cesar Gaviria Trujillo*, *supra* note 106.

125. Asshiddiqie, *supra* note 38, at 23.

126. Tracey Wheatley, *Hungary's First "Eco-President"*, RED PEPPER, May. 25, 2015, <http://www.redpepper.org.uk/Hungarysfirstecopresident/>.

127. See, e.g., Juanita León, *Manuel José Cepeda: el supermán jurídico [Manuel José Cepeda: Legal Superman]*, LA SILLA VACIA (Sept. 12, 2012), <http://lasillavacia.com/historia/manuel-jose-cepeda-el-superman-juridico-39482>.

been widely praised for their skill as judicial politicians: Jimly Asshiddiqie, for instance, was consistently praised as “politically astute” in how he sought to build the Court’s institutional role and legitimacy.<sup>128</sup>

Almost all of these judges were also individuals with substantive political views, or values, in line with those of a majority, or at least a substantial faction or plurality, of drafters. In Hungary, five of the original judges appointed to the Court were agreed to *by name* as part of the roundtable negotiations, and Sólyom was among that list as a nominee of the MDF.<sup>129</sup> In Indonesia, Assidique enjoyed the support of both the President and the MPR, having served as an advisor to both.<sup>130</sup> And in South Africa, Langa, Sachs, and Yacoob were all members of the ANC when they were appointed to the CCSA, while Chaskalson and Van der Westhuizen had served as members of the ANC Constitutional Committee or as ANC representatives in the process of constitutional drafting.<sup>131</sup>

In the cases analyzed above, it is also notable that many of the courts on which leading drafter-judges have served have in fact been perceived, at least at certain times, as extremely powerful, or “successful,” in comparative terms. In Hungary, until 2011 when the Fidesz-led Government adopted a new Constitution, which significantly curbed the powers of the Court, the Constitutional Court was seen as one of the leading constitutional courts among democracies worldwide, with a reputation “for bold, principled decision-making.”<sup>132</sup> At certain points, the Court was widely regarded as “perhaps the most activist constitutional court . . . in the world,” but it also was broadly perceived as legitimate and effective in ensuring compliance with its decisions.<sup>133</sup> In Colombia, the Constitutional Court has played what many scholars describe as “a leading role in Colombian life” and has been active in protecting individual and minority rights as well as controlling potential abuses of power, yet it has

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128. Marcus Mietzner, *Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court*, 10 J. E. ASIAN STUD. 397, 404–05 (2012).

129. John W. Schiemann, *Explaining Hungary’s Powerful Constitutional Court: A Bargaining Approach*, 42 EUR. J. SOC. 357, 379–83 (2001); Scheppele, *supra* note 50, at 1775.

130. Asshiddiqie, *supra* note 38, at 23.

131. See *Judges: Justice Albie Sachs*, *supra* note 51; *Judges: Justice Pius Langa (1938–2013)*, *supra* note 51; *Judges: Justice Zak Yacoob*, *supra* note 49; Rabkin, *supra* note 50; *Justice Jobann van der Westhuizen*, *supra* note 55.

132. ROUX, *supra* note 45, at 68; see also Herman Schwartz, *Eastern Europe’s Constitutional Courts*, 9 J. DEMOCRACY 100, 106 (1998) (agreeing that the Hungarian Constitutional Court “has been perhaps the boldest of all the new constitutional courts, particularly in the area of human rights including economic and social rights,” and suggesting that “this may be in part due to the outstanding qualities of its first president, László Sólyom, who has become a major figure in the international constitutional community”).

133. Jonathan Bond, *Concerning Constitutional Courts in Central and Eastern Europe*, 2 INT’L PUB. POL’Y. REV. 5, 8–9 (2006); Scheppele, *supra* note 30.

enjoyed significant popular support.<sup>134</sup> While clearly subject to criticism, and more recently a serious scandal involving corruption,<sup>135</sup> the Court also has generally enjoyed a strong reputation for independence and the capacity to ensure compliance with its decisions.<sup>136</sup>

In Indonesia, prior to a scandal involving corruption in 2011, the Constitutional Court generally was seen to have made a “significant contribution to Indonesia’s transformation from a conflict-ridden, politically unstable country into a consolidating democracy”<sup>137</sup> and to have “performed with professionalism and integrity unmatched by Indonesia’s other judicial institutions, perhaps even in Indonesian legal history.”<sup>138</sup> In South Africa, both internal and external observers have celebrated the Constitutional Court’s role in the transition to a multiparty democracy. South African scholars such as Theunis Roux have recognized the Court’s “remarkable effectiveness as a veto player in South African politics” and its role in “contributing to the quality of South African democracy.”<sup>139</sup> International observers such as Ronald Dworkin and Cass Sunstein have likewise celebrated the Court’s role in creating “a smooth transition from oppression to democratic rule of both law and principle”<sup>140</sup> and as one “of the most influential [constitutional] courts” in the world.<sup>141</sup>

In this sense, the contribution of various drafter-judges to the successful process of democratic constitutional change, in countries such as South Africa, Hungary, Colombia, and Indonesia, may also be understood not so much as a contribution of such judges qua drafters but rather as individual judges with a clear mix of legal and political relationships, skills, and sensibilities.<sup>142</sup>

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134. Rodrigo Uprimny & Mauricio Garcia-Villegas, *The Constitutional Court and Social Emancipation in Colombia*, in DEMOCRATIZING DEMOCRACY: BEYOND THE LIBERAL DEMOCRATIC CANON 66 (B. de Sousa Santos ed., 2005); Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL LEGAL STUD. 173, 191–92 (2009).

135. *Colombia’s Judiciary: Trouble at the Top*, THE ECONOMIST (May 2, 2015), available at <http://www.economist.com/news/americas/21650182-even-highest-courts-are-not-immune-scandal-trouble-top>.

136. Juan Carlos Rodríguez-Raga, *Strategic Deference in the Colombian Constitutional Court, 1992–2006*, in COURTS IN LATIN AMERICA 81 (Gretchen Helmke & Julio-Rios Figueroa eds., 2011).

137. Mietzner, *supra* note 128, at 416–17.

138. Simon Butt, *Traditional Land Rights Before the Indonesian Constitutional Court*, 10 LAW ENV’T & DEV. J. 57, 3 (2014); see also Susi Dwi Harijanti & Tim Lindsey, *Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court*, 4 INT’L J. CONST. L. 138 (2006).

139. ROUX, *supra* note 45, at 35–36 (noting the Court’s role as a forum in which the rules of the electoral game could be contested and as a protector of constitutional rights).

140. Ronald Dworkin, *Response to Overseas Commentators*, 1 INT’L J. CONST. L. 651, 651–52 (2003); see also Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996).

141. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 74 (2009).

142. It is worth noting that I am not making any claim as to whether this correlation is the product of deliberate constitutional design choices by the framers of these constitutions, political

*A. Judges' Relationships, Skills, and Democratic Institution-Building*

In the behavioral psychology literature, there is strong experimental evidence showing that people tend to be more altruistic, or cooperative, toward those they know than toward strangers.<sup>143</sup> This same dynamic also might carry over into a constitutional setting: judges might be more likely to “co-operate” with political actors they know than those with whom they have no prior relationship. For members of the executive or legislature, this could have a range of benefits: It could mean judges are less likely to question their good faith in assessing questions of legislative purpose or the appropriateness of certain judicial remedies.<sup>144</sup> It could mean judges are willing to show additional deference to political actors in certain contexts, thereby increasing the freedom for such actors to adopt their preferred policy choices, consistent with relevant constitutional constraints. Or it might mean that, in interpreting the text of the constitution or later statutes, judges will be more likely to adopt a “generous” or purposive approach, which attempts to give effect to the underlying aims and purposes of the drafters, rather than a narrower, more literal approach.<sup>145</sup>

All of these benefits may also help increase the willingness of political elites to support the creation of a new constitutional court. In some contexts, there may be no need to create a new court as part of the transition to democracy. An existing court may have sufficient legitimacy to be entrusted with the interpretation of a new, or newly amended, democratic constitution and an entrenched jurisdiction to consider constitutional matters. Thus, the question facing drafters simply will be as to which judges to appoint to a court, not what jurisdiction to give such a court over constitutional matters. In other settings, however, there may be a much weaker tradition of constitutional judicial review or a lack of trust in the courts' capacity to exercise such functions — for example, because of the historical ties between judges and the outgoing regime, or because of a court's poor history of institutional independence and effectiveness. The creation of a new court, with the power and independence to exercise such review functions, will thus be critical to the task of democratic constitutional consolidation. The more that political elites trust particular

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leaders who made relevant judicial appointments, or more contingent circumstances or “accidental” dimensions to successful constitutional design.

143. See, e.g., J. Bell et al., *The Impact of Cost on Student Helping Behavior*, 135 J. SOC. PSYCHOL. 49, 50, 54 (1995); M. S. Clark & J. Mills, *The Difference Between Communal and Exchange Relationships; What It Is and Is Not*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 684, 686 (1993).

144. The benefit of this, in turn, is that suggestions of bad faith may be quite costly for political actors in terms of broader public perception.

145. See Dixon, *Constitution Drafting and Distrust*, *supra* note 7, at 841.

judges — to exercise powers of constitutional review in a way that respects their own good faith, institutional responsibilities and strengths, or substantive political vision — the more likely they also are to support the creation of an institution of this kind.

Take the creation of the South African Constitutional Court and the jurisdiction it was given by parties at the MPNP at Kempton Park to review the constitutionality of the final constitutional draft adopted by the members of the 1994 democratically elected Constituent Assembly. Initially, the key parties to constitutional negotiations, the ANC and National Party (NP), could not agree on the procedure by which a constitution for a newly democratic South Africa would be drafted: The NP wanted to ensure that the 1992 multiparty forum adopted a final constitution that could not readily be changed by a later black majority government. The ANC, on the other hand, insisted that a true commitment to democracy required that any new final constitution be adopted by a democratically elected body. This disagreement proved almost impossible to resolve until the parties agreed to a two-stage drafting process, according to which the MPNP was given responsibility for drafting only an interim constitution, while authority to draft a final constitution was given to a democratically elected constituent assembly. The two stages were connected by a requirement that the final constitution respect certain key “constitutional principles” agreed to under the interim constitution.<sup>146</sup> Without this compromise, it is unclear whether a negotiated transition to democracy could in fact have succeeded in South Africa, and a key part of this compromise was the idea that the Constitutional Court would be required to certify whether the constitutional principles requirement had been satisfied.

For both parties, an important part of their willingness to reach such a compromise was also arguably that they had significant trust in those likely to be appointed to a new constitutional court. For the ANC, the requirement under the 1993 Constitution that the president appoint six of the eleven members of the Court from a list submitted by the Judicial Services Commission ensured that at least some lawyers known to or trusted by the ANC leadership would be appointed to the court.<sup>147</sup> Many of the early judges actually appointed to the CCSA in fact had close personal relationships with the ANC political leadership. The most striking

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146. See, e.g., Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 111 (Laurel E. Miller, ed., with Louis Aucoin, 2010); Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 REV. CONST. STUD. 18, 51–52 (1996); Catherine Barnes & Eldred De Klerk, *South Africa's Multi-Party Constitutional Negotiation Process*, 13 ACCORD 26, 31 (2002).

147. ROUX, *supra* note 45, at 168–69.

example was President Chaskalson,<sup>148</sup> but other examples included judges who were not formal drafters: (Acting) Justice Sydney Kentridge, for instance, had represented Mandela in earlier cases involving charges of treason.<sup>149</sup> For the NP, the 1993 Constitution required that four members of the Court be appointed from the sitting judiciary. Other than one black judge appointed in 1993 (Madelo), all those eligible for appointment in this category had been appointed by the NP and were thus judges with whom the NP leadership had some form of an existing relationship.<sup>150</sup> Some, such as Richard Goldstone, had also developed a close working relationship with the NP leadership by conducting an important inquiry into “third force” violence in the transition to democracy.<sup>151</sup>

“Co-operative” dynamics of this kind may also be reciprocal. The more judges show comity, deference, or generosity toward the political branches, the more likely it may be that the executive or Parliament itself will show reciprocal cooperation toward courts. Similarly, judges who have a personal relationship with members of the political branches of government may find that those branches are more willing to cooperate with the court than in situations where no such personal connections exist. Dynamics of this kind also will be extremely valuable to supporting and promoting the effectiveness of a new constitutional court. At a basic level, these dynamics will be necessary for ensuring that a court has access to the budget and infrastructure needed to exist as an institution and, beyond that, for ensuring that the executive cooperates with court procedures and complies with court orders.

Take the Indonesian and South African examples. In Indonesia, the third amendment to the Constitution provided for the creation of the Constitutional Court and gave the Court broad jurisdiction over most types of electoral dispute as well as a range of other constitutional matters. But the political branches were extremely slow in creating the infrastructure necessary for the Court to function. When the Court first started, it had no physical home, no place for non-Jakarta-based judges to stay, and no formal mechanism for accepting petitions. The first Chief Justice of the Indonesian Constitutional Court, Jimly Asshiddiqie, however, had close personal connections to those in Parliament and the President’s office. He drew on those connections to overcome the Court’s

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148. See *Chief Justice Arthur Chaskalson*, *supra* note 36.

149. Rabkin, *supra* note 50.

150. ROUX, *supra* note 45, at 166–67.

151. *Id.* at 226.

obstacles and ensure that the Court soon had access to the budget, staff, and buildings necessary to function successfully.<sup>152</sup>

In South Africa, there was a much greater degree of political support for the Constitutional Court as an institution: many key ANC leaders, and particularly President Mandela himself, had a deep commitment to the rule of law, or the transition to a fully *constitutional* democracy, and saw the Court as playing a key part in that.<sup>153</sup> The Court also needed to be functioning, and perceived as legitimate for it to perform its role in certifying the 1996 Constitution.<sup>154</sup> There was still, however, significant doubt as to how effective the Court could be in promoting human rights and the rule of law against the backdrop of both a legacy of apartheid *and* the overwhelming success of the ANC at the first democratic elections.<sup>155</sup>

One important ingredient in the early success of the CCSA was also arguably the degree of trust that existed between the Court and the first democratic government of South Africa.<sup>156</sup> As Theunis Roux has noted,

[T]hat the members of the Chaskalson Court had close personal and ideological ties to the ANC political elite must surely have made a difference to the ANC's inclination to attack. It is one thing to be told to amend a policy by a known ideological opponent, another beach to be told the same thing by a person who lost a limb in the course of a shared liberation trouble.<sup>157</sup>

There are also potential advantages, from a democratic perspective, to judges having distinctive political skills in addition to more traditional legal

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152. Hendrianto, *supra* note 39, at 100–02. For the importance of the building in this context, see Mietzner, *supra* note 128, at 405 (noting that initially the Court was housed in emergency buildings and held its trials at Parliament or police headquarters, whereas Jimly succeeded in obtaining funds for a lavish new court building that was arguably “the most elaborate structure of any new state institution created after Suharto’s fall” and went a long way to evidencing as well as explaining the Court’s success in Indonesia’s status-conscious society).

153. See Nelson Mandela, Speech at the Inauguration of the Constitutional Court (Feb. 14, 1995), <http://www.constitutionalcourt.org.za/site/thecourt/mandelaspeech.html>.

154. To perform this role successfully, a broad range of actors, both inside and outside the country, arguably needed to perceive the Constitution as legitimate. See Landau & Dixon, *supra* note 20, at 887.

155. See, e.g., ROUX, *supra* note 45, at 126–28; see also Sujit Choudhry, “He Had a Mandate”: *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1 (2009); Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585 (2014); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 171 (2015).

156. See, e.g., *South Africa v. South African Rugby Football Union 1999* (4) SA at para. 79 (where Mandela appeared before the high court as a witness in a matter later heard before the constitutional court).

157. ROUX, *supra* note 45, at 127

ones. As U.S. experience has shown, skills of this kind can be important to justices building a majority on a court and thus to promoting a particular view of constitutional meaning.<sup>158</sup> In a new democracy, such skills may be even more critical — they may be necessary to ensure compliance with court decisions or even to access the budget and infrastructure necessary for the court to function as an institution.

Judges such as Sólyom and Asshiddiqie, for instance, have engaged in a range of seemingly quite political strategies to increase support for the newly created constitutional courts on which they serve: they have moved to publish their opinions online, to televise their proceedings or otherwise open them to the media, and to provide brief summaries of key decisions designed for use by the media.<sup>159</sup> In some cases, they also have sought to engage directly with the media by holding press conferences designed to explain or defend particular court decisions. This is also a strategy observable in the approach of a number of other politically skilled constitutional judges in new or otherwise fragile democracies.

In Hungary, for instance, following the Constitutional Court's controversial decision in the *Welfare Benefits Case* in 1995, Sólyom gave a number of interviews to Hungarian magazines and newspapers defending the Court and the degree to which it was acting as “a guardian over basic rights and institutions” in the face of actions by the political branches involving “the use” of “rights and freedoms” as “tools . . . for their own interests.”<sup>160</sup> Sólyom regularly made such comments in response to the Court's politically controversial decisions.<sup>161</sup> In Indonesia, soon after the Court was created, Asshiddiqie created a weekly program on national television and radio designed to explain the workings of the Constitutional Court and particular decisions of the Court.<sup>162</sup> Asshiddiqie also gave numerous press conferences following controversial decisions, such as the *Communist Party Case* allowing former communist party members to retain

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158. Contrast the success of Justice Brennan in building a liberal majority on the Warren Court with Justice Scalia and other conservative justices seeking to overturn Warren and Burger Court precedents in the 1980s. See, e.g., PAUL FINKELMAN, *THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS 1147–48* (2014); MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008); MARK V. TUSHNET, *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (1996).

159. To some extent, this trend may simply reflect modern notions of good government in a democracy or an intrinsic commitment to transparency in governmental decision making of all kinds. See, e.g., Sir Anthony Mason, *Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?*, 24 *ADELAIDE L. REV.* 15, 21 (2003). But there is also a degree to which these actions go beyond what is necessary to fulfill this commitment in ways that suggest an additional, more strategic political element.

160. For a useful discussion and translation, see Lane Scheppelle, *supra* note 30, at 1783–84.

161. For a comparative discussion of Sólyom's practices see, e.g., Hendrianto, *supra* note 39, at 224.

162. *Id.* at 108–09.

office<sup>163</sup> and the *Bali Bombing Case* finding that the retrospective application of anti-terrorist provisions was unconstitutional.<sup>164</sup>

Another way in which these same constitutional judges have sought to increase compliance with their decisions has been to engage in direct negotiations with the executive in certain cases. In a more established democracy, this often would be seen as being in direct conflict with a commitment to the separation of powers. But in a newly democratic setting, quite different understandings may sometimes apply: a weak tradition of respect for court rulings, or the rule of law more generally, may mean that it is widely seen as necessary for a court to take active steps to ensure compliance with its decisions. Where judges are able to engage with the executive and persuade them to pay greater attention to a court's decision, this may also be seen as an important step toward promoting rather than undermining constitutional democracy and the rule of law. In Indonesia, for example, when the government continued to maintain a system of market-based fuel pricing, Asshiddiqie wrote to the president, reminding him of the Court's decision in the *Oil and Natural Gas (Migas) Law Case* and the fact that it prevented the government from adopting this new regulation. Asshiddiqie has also suggested that he sent numerous letters of this kind during his time in office but that, unlike the letter in this case, those letters did not become public.<sup>165</sup>

### *B. Substantive Constitutional Success*

Where judges have a clear commitment to a particular set of political values, this can also help promote the *substantive* success of various forms of democratic constitutional change. In most cases, democratic constitutional change is designed to operate at two levels: 1) transitioning from a system of limited or no elections to a system of free and fair elections based on multiparty competition, and 2) accomplishing certain substantive goals. For a constitution to achieve these goals, it is also necessary for courts to “interpret” the actual language of a written constitution in line with those goals.<sup>166</sup> Judges who share the substantive political values or commitments of a majority of drafters are distinctly more likely than other judges to adopt such an approach.

Consider the different experiences in South Africa and India in relation to the interpretation of the constitutional right to property — a guarantee that, in both countries, was clearly designed to balance

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163. Case No. 011-17/PUU-I/2003.

164. Case No. 013/PUU-I/2003; *see also* Hendrianto, *supra* note 39, at 151–56.

165. Hendrianto, *supra* note 39, at 218–19.

166. *See* Dixon, *Constitution Drafting and Distrust*, *supra* note 7, at 820, 831–32, 843.

commitments to individual property rights and broader goals of social and economic transformation.<sup>167</sup> In South Africa, in *First National Bank of SA t/a Wesbank v. Minister of Finance*,<sup>168</sup> the CCSA considered legislation that allowed for the imposition of statutory liens on property for unpaid customs duties. The Court upheld this legislation as a valid and proportionate limitation on the right to property on the basis that it was a necessary means of ensuring payment of state duties and did not unduly affect the rights of third parties. In reaching this conclusion, the CCSA also gave express endorsement to the idea that property rights were inherently limited or weakened by competing rights and constitutional values under the 1993 Constitution. The CCSA reaffirmed this view in *Port Elizabeth Municipality v. Various Occupiers*,<sup>169</sup> a case involving the lawfulness of attempts to remove informal occupiers of land from their homes. The Court defined the right to property as designed to “protect existing private property rights as well as serv[e] the public interest,” and further to “stri[k]e a proportionate balance between these two functions.”<sup>170</sup>

In India, in contrast, in *State of West Bengal v. Bela Banerjee*,<sup>171</sup> a case involving West Bengal legislation designed to provide for the development of housing for immigrants (or refugees) from East Bengal, the Court emphatically rejected the argument that art. 31(2) of the Indian Constitution allowed the legislature to adopt a “flexible” approach to the level of compensation provided for a taking of property.<sup>172</sup> Contrary to the understanding of most Indian framers, the Court held that compensation in this context necessarily meant full market value or “full indemnification of the appropriated owner.”<sup>173</sup>

When the Indian Parliament attempted to reassert the original social-democratic vision of the Indian Constitution, the Supreme Court also responded via a series of decisions effectively defeating the substance of relevant constitutional amendments.<sup>174</sup> In *State of Bihar v. Kameshwar*

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167. See Hanri Mostert, *Liberty, Social Responsibility and Fairness in the Context of Constitutional Property Protection and Regulation*, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 131 (Henk Botha, Andries Johannes Van der Walt & J.C. Van der Walt eds., 2003); Javir Singh, *(Un)Constituting Property: The Deconstruction of the “Right to Property” in India* (Centre for the Study of Law and Governance, Jawaharlal Nehru University, Working Paper No. CSLG/WP/05); R. Rajesh Babu, *Constitutional Right to Property in Changing Times: The Indian Experience*, 6 VIENNA J. ON INT’L CONST. L. 213 (2012).

168. *First National Bank of SA v. Minister of Finance* 2002 (4) SA 768 (CC).

169. 2005 (1) SA 217 (CC).

170. *Id.* at para 16 (Sachs, J.) (quoting Van der Walt).

171. AIR 1954 SC 170; (1954) SCR 558 (India) (“*Bela Banerjee Case*”).

172. *Id.* at 563.

173. *Id.*

174. See, e.g., INDIA CONST., amended by The Constitution (First Amendment) Act, 1951; INDIA CONST., amended by The Constitution (Fourth Amendment) Act, 1955.

*Singh*,<sup>175</sup> which was heard a year after the passage of the First Amendment, the Court held that the language of the amendment did not remove the requirement that, for a law to be validly enacted by a state legislature, it must serve a public purpose and provide compensation, nor did it remove the possibility of judicial review on these grounds.<sup>176</sup> Similarly, a decade later in *Karimbil Kunbikoman v. State of Kerala*, the Court held that the term “estate” in the First Amendment did not apply to interests, such as long-term tenancies, that fell short of a full proprietary interest.<sup>177</sup> Thus, the Court consistently invalidated a range of important land reform statutes as either failing to provide adequate compensation, or violating federalism or equality-based constraints.

There was, of course, a range of important differences between the two countries that contributed to these divergent outcomes, including differences in constitutional language. Over time, however, as the Indian Parliament passed a series of amendments designed to limit the scope of judicial review based on the right to property, the text of the Indian Constitution became even more specific than the 1993 and 1996 South African Constitution in seeking to ensure the validity of relevant economic redistribution measures.<sup>178</sup> Similarly, while political dynamics in India continued to favor a narrow interpretation of the right to property, in South Africa, the ANC itself shifted toward a more market-oriented (or strong rather than weak) approach to the right to property.<sup>179</sup>

A clear difference between the two countries throughout the period, however, was in the *kinds* of judges appointed to the court in the early years of the new constitution’s operation: In South Africa, all of the judges who decided *First National Bank* and *Port Elizabeth* were appointed by the ANC and had a long history of service to the ANC or ANC causes, and thus a demonstrated commitment to ANC political ideals regarding economic transformation.<sup>180</sup> In India, in contrast, all of the early justices appointed to the Supreme Court were practicing lawyers or lower-court

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175. (1952) 1 SCR 889.

176. INDIA CONST. art. 31, *amended by* The Constitution (First Amendment) Act, 1951. This article also defined the words “estate” and “right” in considerable detail.

177. AIR 1962 SC (Supp. (1) 829).

178. *See* INDIA CONST. art. 31, *amended by* The Constitution (First Amendment) Act, 1951; S. AFR. CONST., 1996; Dixon, *Constitution Drafting and Distrust*, *supra* note 7, at 836–37.

179. *See e.g.*, TOM LODGE, POLITICS IN SOUTH AFRICA: FROM MANDELA TO MBEKI 26 (2002); Roux, *supra* note 45, ch. 8; Dennis Davis, *Socio-Economic Rights in South Africa: The Record after Ten Years*; 5 ESR REV., at 3, 6 (2004); *see also* Dixon, *Constitution Drafting and Distrust*, *supra* note 7, at 829–30.

180. Dixon, *Constitution Drafting and Distrust*, *supra* note 7, at 831.

judges with little or no demonstrated commitment to social democratic principles.<sup>181</sup>

#### V. UNSUCCESSFUL CONSTITUTIONAL COURTS AND DESIGN: THE ROLE OF OVERLY POLITICAL JUDGES?

In noting the important role played by various lawyer-politicians and in constructing the substantive jurisprudence and effectiveness of a new constitutional court, it is important to note the dangers of judges attempting to straddle the law/politics divide: some judges who attempt this role will end up being “politicians in robes” or, worse still, *unskilled* politicians in robes who end up undermining the perceived independence and legitimacy of a new constitutional court.<sup>182</sup>

Judges who show a lack of basic respect for notions of judicial independence, or the separation of powers, potentially undermine basic commitments to the rule of law. They also put the institutional legitimacy of a constitutional court as a whole at risk by linking its prestige and legitimacy to the successful resolution of a particular political crisis. When the court succeeds in resolving a particular political crisis, its institutional prestige and legitimacy may increase as a result.<sup>183</sup> But where it fails to do so, often for reasons well beyond the control of individual judges, the court may suffer a dramatic loss in legitimacy from the perspective of key political factions or the public at large.

Dynamics of this kind can also render a court, as an institution, highly vulnerable to political attack: the more that the public at large perceives the court as partisan or political, the less likely the public will be to support the court in the face of attempts by the political branches to attack its independence or jurisdiction. Similarly, where judges overstep the bounds of true independence or impartiality, this can provide a pretext for action by political actors who wish to attack a court for other reasons.<sup>184</sup>

Take the well-known history of Justice Samuel Chase’s behavior as an ardent pro-Federalist member of the U.S. Supreme Court. Chase was initially opposed to the Constitution as unduly infringing on state rights

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181. GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 124 (1999).

182. *Cf.* Cass R. Sunstein, *If Judges Aren’t Politicians, What Are They?*, BLOOMBERG VIEW (Jan. 7, 2013, 7:07 P.M.), <http://www.bloomberglaw.com/articles/2013-01-08/if-judges-aren-t-politicians-what-are-they->.

183. *See, e.g.*, Hendrianto, *supra* note 39, 226–27 (noting that Asshiddiqie attempted to play a role in resolving the conflict between the Supreme Court and the National Audit Agency).

184. *Cf.* Lane Scheppelle, *supra* note 30, at 1848–49 (noting that where courts stay within the bounds of certain apparently legal functions, it is much harder for political elites to attack them, even when they disagree or dislike their decision, compared to when they engage in more explicit exercises of political power).

but soon reversed his position and became a strong supporter of the Federalist Party. He was appointed to the Supreme Court by President George Washington in 1796, and actively supported President John Adams and his attempt to resist the challenge posed by the emerging Republican Party led by (Vice President) Thomas Jefferson.<sup>185</sup> In 1798, the Federalist-controlled Congress passed the Alien and Sedition Acts, which allowed for the deportation of non-citizens in a wide variety of circumstances and made it a crime for American citizens to “print, utter, or publish . . . any false, scandalous, and malicious writing” about the Government.<sup>186</sup> The Act was ostensibly directed toward promoting national security, but in practice it was used to suppress political opposition to the Federalist Party and, to that extent, was clearly inconsistent with the First Amendment. Justice Chase, however, showed no sympathy for this concern and instead actively sought to enforce the Act against those alleged to have criticized President Adams.<sup>187</sup> In doing so, he also clearly overstepped the bounds of an independent legal role and assumed the role of a distinctly political advocate for the Federalist cause.

In the *Cooper Case*, an 1800 prosecution under the Act against a Pennsylvania newspaper publisher, Justice Chase told the jury that he viewed the defendant’s conduct as “a gross attack on the President” and designed “to mislead the ignorant . . . and influence their votes at the next election.”<sup>188</sup> In the *Callender Case*, involving a prosecution for libel against the writer of an article critical of Adams, Chase was alleged to have refused to admit evidence tending to prove that part of Callender’s statements were true, to postpone the hearing to allow a material defense witness to appear, to excuse a juror who admitted having prejudged the defendant’s guilt, or to allow Callender’s counsel to make a range of certain arguments to the jury.<sup>189</sup> And in other cases, Chase was alleged to have attempted to persuade a grand jury to indict the printer of a newspaper.<sup>190</sup>

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185. See, e.g., CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 273–75 (1926).

186. Sedition Act, ch. 74, 1 Stat. 596, § 2 (1798).

187. See, e.g., Robert R. Bair & Robin D. Coblenz, *The Trials of Mr. Justice Samuel Chase*, 27 MD. L. REV. 365 (1967); Charles D. Harris, *The Impeachment Trial of Samuel Chase*, 57 A.B.A. J. 53 (1971); Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49 (1960); Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725 (2010); Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUD. AM. POL. DEV. 55 (1995).

188. *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800).

189. Perlin, *supra* note 187, at 734–37.

190. *Id.* at 732.

While the resulting attempt to impeach Chase based on these and other incidents ultimately failed,<sup>191</sup> this attempt played an important role in defining informal understandings of judicial independence in the U.S.: following Chase's failed impeachment, most constitutional scholars agree, "no federal or state judge [c]ould conceivably conduct himself as Chase did prior to his impeachment trial" consistent with notions of judicial independence.<sup>192</sup> Equally, the modern understanding is that the House of Representatives and the Senate cannot remove a member of the U.S. Supreme Court simply because they disagree with particular rulings issued by the justice in his or her official capacity. If, however, impeachment had succeeded, the United States likely would have a quite different understanding of both judicial independence and the role of the Court: most scholars agree that Jefferson would have attempted to use the same procedure to remove Chief Justice Marshall from office.<sup>193</sup> This would have occurred only a year after the decision of the Supreme Court in *Marbury v. Madison*,<sup>194</sup> which determined the power of judicial review in respect of federal legislation. Had either impeachment attempt succeeded, the Court as a whole would almost certainly have played a much weaker, less central part in the definition and consolidation of constitutional government in the United States thereafter. No future Supreme Court would have taken the risk that, in asserting a bolder or more robust view of judicial power, they would face the same kind of impeachment proceedings.

Another potential example involves the role of Valery Zorkin as the first president of the Russian Constitutional Court. When Zorkin first intervened in broader Russian constitutional politics to try to broker a compromise between Parliament and President Yeltsin, he took actions that were highly political in nature: he threatened to impeach both the President and Prime Minister if they continued to escalate the emerging constitutional crisis, and he proposed roundtable talks between the parties, led by himself as chief moderator.<sup>195</sup> At the time, these actions were highly effective in creating a new political or constitutional settlement, and he was

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191. Other key incidents included Chase's conduct in the trial of John Fries for federal tax evasion and in addressing a grand jury in Baltimore in 1803. Whittington, *supra* note 187, at 60–61, 62–63; Perlin, *supra* note 187, at 734, 738–40.

192. Harris, *supra* note 187, at 57.

193. *Id.*; Perlin, *supra* note 187, at 782–88; Lillich, *supra* note 187, at 70–72.

194. 5 U.S. 137 (1803).

195. Lane Scheppele, *supra* note 30, at 1806–08; Robert Sharlet, *The Russian Constitutional Court's Long Struggle for Viable Federalism*, in *RUSSIA AND ITS CONSTITUTION, PROMISE AND POLITICAL REALITY* 29, 35 (Gordon B. Smith & Robert Sharlet eds., 2008) (describing this action as "plunging headlong into the political arena").

widely praised in Russia and overseas for his apparent judicial statesmanship.<sup>196</sup>

However, the compromise he brokered soon began to unravel. A number of regions threatened not to conduct the proposed referendum and, in part because of this threat, the Speaker of Parliament withdrew his support for the proposed referendum. Yeltsin, on the other hand, still wanted the referendum to proceed. When Zorkin refused to continue his previous role as mediator between these two positions, or express active support for the prior referendum timing, Yeltsin accused him of “renegeing on the plan that he himself had proposed.”<sup>197</sup> When tensions further increased between the President and Speaker, Zorkin initially responded in quite orthodox terms: he authored an opinion for the Court striking down certain decrees of the speaker, which sought to limit the powers of the President.<sup>198</sup> Soon afterwards, however, President Yeltsin appeared on national television declaring a state of emergency and announcing that he would rule by decree until a referendum on April 25, 1993, and that in the meantime all decisions of the Constitutional Court would have no effect.<sup>199</sup> Zorkin, in turn, responded by acting in a manner that was overtly political. He joined the Speaker, Vice President, and Procurator-General at a press conference denouncing the President’s actions and led the Court in delivering a decision finding the President’s actions unconstitutional — even prior to the President issuing any formal decree or receiving any formal complaint about its constitutionality.<sup>200</sup>

Yeltsin’s responded by launching a very direct attack, not only against Zorkin personally but also against the Court as an institution.<sup>201</sup> Yeltsin ordered that the Court’s phone lines be cut, its security withdrawn,<sup>202</sup> and effectively forced Zorkin to resign from the presidency of the Court. The Court itself also narrowly survived a proposal to abolish it and transfer its jurisdiction to the Supreme Court, and only resumed sitting after a sixteen-month hiatus.<sup>203</sup> Even then, the Court was generally seen to be much more limited in its capacity, or willingness, to police the boundaries of democratic politics in Russia. Zorkin is thus often seen as having not only

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196. See, e.g., Editorial, *A Russian Democrat*, N.Y. TIMES, Dec. 18, 1992, at A38 (citing comparisons to John Marshall and his receipt of the National Accord Prize).

197. Sharlet, *supra* note 195, at 36.

198. *Id.* at 26–37.

199. Lane Scheppelle, *supra* note 30, at 1812; Sharlet, *supra* note 195, at 36.

200. Sharlet, *supra* note 195, at 37.

201. Lane Scheppelle, *supra* note 30, at 1815–18.

202. Schwartz, *supra* note 132, at 110.

203. *Id.* at 110.

brought the Court to a “distinct low” in 1993 but also as having altered the long-term path of the Court’s role in constitutional politics in Russia.<sup>204</sup>

When one speaks, therefore, of lawyer-politicians playing a valuable role in processes of constitutional design, it is important to note the degree to which this is designed to refer to judges with a *dual* set of skills or sensibilities — i.e., judges who are both lawyers and politicians, not simply either lawyers or politicians occupying legal office. And while some drafter-judges, such as Sachs, Chaskalson, Yacoob, Van der Westhuizen, Asshiddiqie, Cepeda-Espinosa, and Sólyom have been able to exercise and balance both roles, others, such as Chase and Zorkin, have not.<sup>205</sup>

There is also arguably some connection in this context to the role played by these various judges in the formal process of constitutional drafting. Judges such as Sachs, Chaskalson, Yacoob, Van der Westhuizen, Asshiddiqie, Cepeda-Espinosa, and Sólyom were all ultimately involved in successful processes of constitutional design. Not only did they participate in the formal adoption of a new democratic constitution (South Africa and Colombia) or series of major constitutional amendments (Hungary and Indonesia); they also were on the “winning” side of key constitutional disagreements, thereby suggesting not only a significant degree of ingoing political support but also a degree of political skill in navigating disagreements with members of the political opposition.

In Russia, in contrast, while Zorkin was an advisor to the Constitutional Commission charged with drafting a new constitution for a post-Soviet Russia,<sup>206</sup> he was appointed to the Court before the adoption of the new Russian Constitution in 1993. In a range of key ways, the 1993 Constitution also departed from the recommendations of the Constitutional Commission. In this sense, Zorkin was not simply a non-drafter of the 1993 Constitution. He was also arguably a “failed drafter” who had not succeeded in 1992 in brokering the necessary degree of political support for the adoption of a new constitution based on a stable form of democratic compromise.<sup>207</sup> Likewise in the United States, while Chase was a delegate at Philadelphia, he played no formal role in the

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204. Sharlet, *supra* note 195, at 29.

205. *See, e.g.*, Lane Scheppele, *supra* note 30, at 1849–50 (discussing the degree to which Zorkin stepped into a purely political role in 1993 but then later returned as president of the court with a quite different orientation, which did not involve “a return as politician”). What is also notable about the former category of drafter-judge, compared to the latter, is the degree to which the drafter-judge has played some direct role in drafting the actual language of a legally enforceable constitutional document, rather than simply a set of proposed constitutional changes or informal constitutional solutions (Zorkin), or broad statement of constitutional values (Chase).

206. *See* Robert Sharlet, *Chief Justice as Judicial Politician*, E. EUR. CONST. REV., Spring 1993, at 32, 32; Herman Schwartz, *Eastern Europe’s Constitutional Courts*, 9 J. DEMOCRACY 100, 109 (1998).

207. Lane Scheppele, *supra* note 30, at 1907; Sharlet, *supra* note 195, at 35–37.

drafting or ratification of the Constitution. Even when appointed to the Court by President Washington, he lacked any real proven history of successful constitutional negotiation or diplomacy.<sup>208</sup>

## VI. CONCLUSION

The study of constitutional drafters as judges offers a range of insights about the nature of processes of democratic constitutional design: as a process that begins with the writing of a constitutional text but continues for many years after via processes of interpretation; and in ways that involve significant forms of legal creativity, fidelity, and political as well as legal judgment on the part of courts. In doing so, it also points scholars and practitioners of constitutional design to important insights about the *kinds* of judges who are best suited to act as agents of democratic constitutional change or transition — i.e., judges who have the kinds of political, as well as legal, skills and orientation to allow them to engage in constitutional design of this kind with appropriate skill and sensitivity.

It is, of course, ultimately quite contingent, and hard to predict, as to whether any particular judge will have these kinds of skills or orientation, and this applies as much to drafter-judges as to any other judge.<sup>209</sup> Involvement in the drafting process is certainly neither necessary nor sufficient for an individual to have the relationships, skills, or substantive commitments that equip them to contribute to a process of democratic constitutional change. At most, the process of constitutional drafting offers certain opportunities for an individual to make connections, hone their skills, or demonstrate their commitments, in ways that may mean they are somewhat more likely than others to play this role.

In countries such as South Africa, Hungary, Indonesia, and Colombia, however, it is equally clear that key drafter-judges have in fact been the kinds of skilled, connected, and committed lawyer-politicians who are likely to contribute to building the legitimacy and effectiveness of the

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208. See M.E. Bradford, *THE RESTLESS INCENDIARY: SAMUEL CHASE OF MARYLAND* (1991); James Haw et al., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* (1980).

209. A related question, which is beyond the scope of this article, is whether there are particular methods of judicial appointment that perform better than others in encouraging the appointment of true lawyer-politicians of this kind, rather than encouraging the appointment of either pure lawyers or politicians. Questions that might be relevant here, for instance, relate to the timing of appointments to the court compared to appointments to other institutions, the qualifications for judicial office, and whether a constitution adopts a shared or cooperative model of judicial appointment. See, e.g., Brian Opeskin, *Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges*, 35 OXFORD J. LEGAL STUD. 627 (2015); Katalin Kelemen, *Appointment of Constitutional Judges in a Comparative Perspective — with a Proposal for a New Model for Hungary*, 54 ACTA JURIDICA HUNGARICA 5, 16 (2013); Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. J. GLOBAL LEGAL STUD. 59, 81 (1995).

constitutional court on which they have served, and achieving various substantive democratic goals. The central role played by such judges in their respective countries' successful transition to constitutional democracy thus also invites us, as constitutional scholars and practitioners, to think more closely about the more general value of having this kind of legal statesman or woman on a new constitutional court, where he or she is engaged in the process of attempting to protect and promote constitutional democracy.<sup>210</sup>

Of course, many constitutional theorists already know this about democratic constitutional change and institutional design.<sup>211</sup> Others may come to this realization in a variety of ways without the need to engage in a detailed study of the role of constitutional drafters as judges. Others might reach a similar conclusion, but starting from the opposite direction, namely by considering the role of judges as drafters or the way in which certain retired judges, or those who have formally held high judicial office, have played a role in the actual drafting of formal change.<sup>212</sup> For some observers, however, the conclusion may be reached directly via a study of constitutional drafters as judges.

The lessons to be drawn from a study of constitutional drafters as judges, therefore, may not ultimately be limited to insights gained as to the nature of the process of constitutional design itself. Rather, attention to these insights, together with the role played by such judges in various successful processes of democratic transition, may point to quite separate insights for democratic actors as to the virtues of appointing certain types of judges — individuals who bring to the judicial task a combination of legal and political skills, relationships, and sensibilities. Individuals who look a lot like drafter-judges, and who can thus help guide a court as it charts its path in a new democracy or democratic constitutional moment.

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210. Cf. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEAS OF THE LEGAL PROFESSION* 3 (1993).

211. See, e.g., KELSEN, *supra* note 103; Scheppele, *supra* note 30 (arguing for the importance of constitutional court presidents as guardians of a constitution and as needing to exercise political as well as legal judgement in doing so — in part by deliberately avoiding overtly political rather than legal exercises of power).

212. See, e.g., Cepeda-Espinosa, *supra* note 33, at 547–58 n.49 (describing the role of a former Supreme Court Justice of Colombia in the 1991 drafting process).

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