
1. Constitutional interpretation in the Third Wave: the importance of text and context

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1. INTRODUCTION

Constitutional interpretation is a central feature of modern constitutional practice. Courts, government actors, and non-state actors all engage in it, and comparative studies of constitutional interpretation are a core element of comparative constitutional law. Most of those studies are thematic. They typically examine how apex courts have addressed a specific constitutional issue. For example, there has been a proliferation of comparative research in recent years on constitutional interpretation concerning rights, the separation of powers, federalism, remedies, procedure, socio-economic rights, proportionality, horizontality, freedom of expression, constitution-making, and constitutional and unconstitutional amendments.¹ In addition, some of this thematic work addresses cross-cutting themes: for example, the burgeoning literatures on judicial responses to democratic backsliding or how Global South apex courts interpret constitutions for transforming societies traverse many of these specific issues.²

¹ Matthias Klatt, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012); Eoin Carolan, *The New Separation of Powers* (Oxford University Press 2009); Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press 2022); Jud Mathews, *Extending Rights' Reach: Constitutions, Private Law, and Judicial Power* (Oxford University Press 2018); Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus – Journal for Constitutional Theory and Philosophy of Law* 51; Aharon Barak, *Proportionality: Constitutional Rights and their Limitation* (Cambridge University Press 2012); Matthias Kumm, 'Global Constitutionalism, Human Rights and Proportionality: Institutionalizing Socratic Contestation' (2022) 9(2) *Journal of Constitutional Justice* 193; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012); Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, *Oxford Constitutional Theory* (Oxford University Press 2017); Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019); Malcolm Langford and Katharine G Young (eds), *The Oxford Handbook of Economic and Social Rights* (Oxford University Press 2022); Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010).

² Tom Daly, 'Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro' (14th International Human Rights Researchers' Workshop: 'Democratic Backsliding and Human Rights', *Law and Ethics of Human Rights Journal*, 11 March 2019); Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago University Press 2018); Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015); Armin von Bogdandy, 'Ius Constitutionale Commune in América Latina: A Conceptual Clarification' in Armin von Bogdandy and others (eds),

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The *Research Handbook on Constitutional Interpretation* is different. It is about the interpretive method used by apex courts. We focus on constitutional interpretation by apex courts rather than other actors and institutions for two reasons. First, apex courts give public reasons for their interpretation, while non-judicial actors typically interpret the constitution ordinarily without providing public reasons.³ Second, in systems with judicial review, constitutional interpretation by apex courts is final and can only be superseded by constitutional amendment.

The *Research Handbook on Constitutional Interpretation* stands back from the particulars of how apex courts interpret and should interpret specific elements of constitutions. Instead, it cuts across specific constitutional issues. It investigates how apex courts, when interpreting constitutional texts, work and, to some extent, *should* work with the **constitutional text** and **constitutional context** – terms we define further below. This volume contains 22 thematic chapters and 11 country case-studies prepared by sitting or former judges and includes examples from dozens of jurisdictions. This introductory chapter draws on this material to develop some synthetic claims about the phenomenology of constitutional interpretation that are not tied to a specific country while, at the same time, acknowledging that constitutional interpretation varies considerably across legal and political contexts.

Our argument runs as follows. Specific understandings of the methodology of constitutional interpretation by apex courts – for instance, Bobbitt’s well-known typology of the “modalities” of constitutional interpretation in the American constitutional tradition,⁴ and Savigny’s account of the methods for legal interpretation in civil law systems⁵ – have been extremely influential in categorizing types of interpretive arguments. The interpretive “modalities” approach to analyzing constitutional argument proceeds on the assumption that there are forms of reasoning or argument that are widely accepted to be legitimate, even if the relationship between the different modalities varies across systems and over time.

Bobbitt’s and Savigny’s taxonomies of legal argument never purported to explain which methods of interpretation are (and should be) influential across different legal systems. Moreover, since Bobbitt’s and Savigny’s taxonomies of legal argument were developed, the political, social, constitutional, and international legal domains have changed considerably. The major changes, we suggest, are encompassed by the Third Wave of democratic constitutionalism, which first emerged in the 1970s and is discussed more fully below.⁶

Nevertheless, in the wake of the Third Wave, organizing and analyzing the typologies of the methods of constitutional interpretation – such as Bobbitt’s or Savigny’s – remains a valid and important exercise because it provides a helpful classification of constitutional arguments, many of which are to be found in constitutional jurisdictions across the globe. But a key difference between our approach and both Bobbitt’s and Savigny’s accounts is that we seek to reflect on and engage with the diversity of constitutional interpretive practice across the world. The chapters of this volume collectively set out a new typology of interpretive modalities in

Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune (Oxford University Press 2017).

³ Wojciech Sadurski, *Constitutional Public Reason* (Oxford University Press 2023).

⁴ Philip Bobbitt, ‘The Modalities of Constitutional Argument’ in *Constitutional Interpretation in the US* (Princeton University Press 1991).

⁵ Friedrich Carl Savigny, *System des heutigen Römischen Rechts*, vol 1 (Berlin 1840).

⁶ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1993).

constitutional interpretation, take those modalities into account, analyze the kinds of arguments implied in those modalities, assess their use, and explain them as elements of legal practices and cultures.

We are interested in how accepted forms of reasoning in different constitutional systems can serve as constraints on constitutional interpretation, with the consequence that constitutional adjudication is not always reducible to politics by other means. Whatever their content may be, the modalities of constitutional interpretation should define both the argumentative space within which courts, lawyers, and parties debate the meaning of the constitution and the not impermeable boundary between law and politics. Constitutional interpretation is then not only about political power but also legal plausibility, as understood within the law and the legal–political culture of a specific polity. The point of grounding constitutional interpretation in reasons linked to the modalities is the attempt of apex courts to reach plausible decisions in cases and to offer justifications for those decisions that distinguish them from politics.

Taking constitutional interpretation seriously implies acknowledging that the prevailing interpretation of constitutions should not be based on the power of the majority opinion in courts but on plausible legal argument. This foundation renders apex courts accountable to the people and their representatives within the broader space of constitutional discourse. Based on these premises, the core questions addressed in this book are: what are plausible legal arguments in constitutional interpretation? Why are certain types of argument dominant in some systems and not others? What is the significance of different interpretive modalities for the collaboration and, at times, disagreement between regional human rights courts and domestic courts?

We answer these questions by drawing a critical and analytical map of constitutional interpretation as experienced in the Third Wave of constitutionalism. In doing so, we broaden the lens of the study of constitutional interpretation to include a wide range of democratic constitutional jurisdictions. Our approach encompasses and expands Bobbitt’s and Savigny’s taxonomies and steps into uncharted waters to analyze the modalities in different settings and to commence an account of why, in some settings, certain forms of argument are more dominant than others.

As stated above, constitutional interpretation in the Third Wave has two main components: *constitutional text* and *constitutional context*.

The *constitutional text* is a central element of constitutional interpretation. The constitutional text extends beyond the traditional focus on the operative text (i.e., provisions that create institutions, allocate powers to them, and confer rights) to constitutive commitments found in preambles, epilogues, directive principles, substantive limits on constitutional amendments, and the overall “structure” of the constitutional framework. In addition, there are a variety of methods to interpret the constitutional text. Some of these methods are encompassed by Bobbitt’s and Savigny’s modalities, such as literal and purposive interpretation, living constitutionalism, and history and precedent. However, there are interpretive methods they did not identify that are part of constitutional interpretation in the Third Wave. These include, for example, aversive interpretation (interpreting the constitutional text to decisively repudiate an evil and/or undemocratic past) and popular constitutionalism (the people should have a role in constitutional interpretation, and the courts may not enjoy supremacy in constitutional interpretation).

The *constitutional context*, broadly speaking, represents the constitutional setting within which courts rely on the modalities to interpret the constitutional text. Our focus on context

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rejects the idea that there is, or should be, one right way to interpret a constitution based on these modalities. We are also not convinced that it is desirable – or even possible – to develop a single, normative account of how courts should interpret constitutions that has application across all jurisdictions.

An important starting point for understanding constitutional context is to realize that constitutions are often drafted at times of political transition or even crisis, when the political community is fragile and the prospects of constitutional stability are not certain.⁷ Over the past 75 years, constitutions have been adopted when countries are emerging from authoritarian government, civil war, and colonial rule. These transitions often cast long shadows over the project of constitutionalism and constitutional interpretation. These moments of transition also often result in mission-driven constitutions, in which arguments from context are particularly powerful. We suggest there are at least five archetypal forms of constitutional mission: *plurinationalism*, *transitional contexts*, *social transformation*, *post-authoritarianism*, and *defensive anti-authoritarianism*. A constitutional framework may endorse one or more of these missions, and the precise character of these missions may vary across systems. Constitutional texts codify these missions through founding provisions and preambles, directive principles, and eternity clauses – provisions that are less generic and more particular to specific national contexts. In so doing, the constitutional text defines the overarching purpose of the constitutional order and often reflects the constitutional founding moment.

A second important factor that is relevant to constitutional context is geographic location, which can also powerfully shape constitutional interpretation. This is particularly true when the state combines a domestic law commitment to judicial review with international legal obligations to subject themselves to regional human rights treaties enforced by a regional court. Geographic context has been very important in Latin America and Europe. As we show below, regional human rights courts and national apex courts have fashioned complex bridges between national constitutions and regional human rights treaties, out of constitutional texts, treaty provisions, and legal doctrines at the supranational and national levels, that structure the relationship between regional and national legal orders around questions of rights protection.

Finally, we argue that a third factor of constitutional context is legal professional culture – as developed and defined by courts and lawyers – which will often affect the weight attached to interpretive modalities, and the relationships between them, in different constitutional systems.⁸ Legal professional culture is a matter of convention, with legal actors within a particular legal system defining the “common sense” of what are stronger and weaker legal arguments. To be sure, legal professional culture will often be contested and shift over time, and it will influence the relevance of most, if not all, forms of interpretive modality. In our view, the role of public international law in constitutional interpretation – including not only international human rights law (as opposed to regional human rights law) but also economic, criminal, humanitarian, and refugee law – will often be principally a function of legal and professional culture, although this rule does not hold as strongly when there is a textual mandate authorizing recourse to international law as an interpretive guide. And similarly, whether and the

⁷ Catherine O'Regan, *Courts and the Body Politic* (The Hamlyn Lectures 2022, Cambridge University Press 2025, forthcoming).

⁸ In asserting the significance of legal professional culture in constitutional interpretation, we draw on the work of Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press 2018).

extent to which courts may rely on the jurisprudence of foreign countries in interpreting constitutional text will be influenced by legal professional culture. Put simply, legal professional culture matters fundamentally to how the interpretive modalities figure into constitutional argument in particular constitutional settings.

Accordingly, we aim to provide the best account of constitutional interpretation in the Third Wave from the ground up in a manner that recognizes that the practice is inevitably heterogeneous both across and within jurisdictions and seeks to be normative, without being polemical. Both constitutional text and context are key to heterogeneity. The studies of this volume provide evidence to conclude that there is not one paramount worldwide method of constitutional interpretation. To attempt to assert such an approach would be to overlook the important specificities of the wide variety of approaches to interpretation that are embedded in their own text, vernacular legal culture, and historical and political context. Because our approach does not claim universality but contextuality, it is different from approaches such as Alexy's (constitutional interpretation is a matter of adjudicating cases by using moral principles institutionalized as constitutional rights),⁹ or Dixon's (in approaching the task of constitutional interpretation, courts should take into account the goal of bolstering democracy and identifying any democratic deficits that may need to be addressed).¹⁰ Instead, we claim that courts can and should use constitutional interpretation with different purposes in distinct contexts. This depends on the self-perception of every apex court within its constitutional context.

This chapter will begin by briefly explaining the two accounts of modalities of constitutional interpretation that have been dominant in constitutional discourse to date: the American tradition, founded on the work of Bobbitt (Section 2), and the European or civilian tradition, building on the work of Savigny (Section 3). The chapter then turns to an outline of the key characteristics of what we call the new global context, which forms the backdrop to the argument we develop in this chapter (Section 4). We then turn to an overview of the thematic chapters in the first part of this collection, many of which develop aspects of our argument (Section 5). We then shift to an overview of the individual country studies in the book, observing both the similarities and differences in the approach to constitutional interpretation across constitutional systems (Section 6). The final section of the chapter concludes by restating our argument in the light of what has preceded it (Section 7).

2. THE AMERICAN TRADITION

In his seminal text, *Constitutional Fate*, Bobbitt posited that constitutional argument in the American constitutional system, in general, consists in at least six kinds of interpretive modalities (Bobbitt acknowledged there may be others): *historical*, based on the original intent of the constitutional framers; *textual*, which relies on the plain meaning of constitutional language, and cuts in favour of present day meanings; *structural* claims that derive a constitutional principle or rule from the constitutional system, both in relation to structure and rights; *prudential* arguments, best illustrated by doctrines of decisional avoidance; *doctrinal* arguments built

⁹ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002).

¹⁰ Rosalind Dixon, *Responsive Constitutional Review* (Oxford University Press 2023). See further discussion below.

around precedents and the common law method; and *ethical* arguments, which he defined by reference to the ethos of the American people.¹¹ In developing his account, Bobbitt limited his focus to the approach of the US Supreme Court, and he argued that his six modalities established a “legal grammar” that set the boundaries of acceptable constitutional argument.

Although Bobbitt wrote more than four decades ago, as David Pozen and Adam Samaha recently observed, his taxonomy of modalities has shown remarkable endurance. To be sure, the understanding of his six modalities has evolved and been supplemented, particularly through the work of scholars based in North America.¹² Original intent has now been supplanted by original public meaning (the latter was always part of the European tradition)¹³ and Jack Balkin’s framework originalism.¹⁴ Precedent has given way to David Strauss’s living constitution.¹⁵ Issacharoff and Morrison’s constitution by convention (building on the interpretive concept articulated by Justice Frankfurter as “historical gloss”) is arguably an omission or, alternatively, a helpful expansion of Bobbitt’s doctrinal modality to accommodate settled institutional practice in other branches of government, particularly as it relates to the separation of powers.¹⁶ While Richard Fallon and Robert Post offer somewhat different accounts of the modalities of American constitutional interpretation, these are differences in detail and not in basic conception.¹⁷ Of course, in specific cases, arguments may sound in more than one modality and may combine them. Bobbitt does not identify global meta-rules governing the priority among modalities that point to different outcomes or establish the order in which modalities are employed. Different judges on the same cases rely on different modalities, and disagreements on outcomes often turn on underlying disagreements on interpretive method. But the basic idea that constitutional interpretation is a form of professional legal argument, and as such, the interpretive modalities define the boundaries of plausible and recognizable constitutional interpretation for actors and institutions that engage in it is widely accepted.

While Bobbitt set out the modalities in the hope of justifying the legitimacy of judicial review, he did not articulate his major implicit premise: that the modalities define the boundary between law and politics, as legal and political argumentation take different forms. This is true even though constitutional courts operate within a political context, address politically controversial issues, and issue judgements with important political effects. Nor did Bobbitt articulate another implicit premise – that the forms of legitimate constitutional interpretation are, to a considerable degree, matters of convention that are contingent and contestable. If the modalities are rooted in underlying conceptions of the law/politics divide, particular national

¹¹ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1991).

¹² David Pozen and Adam Samaha, ‘Anti-Modalities’ (2021) 119 *Michigan Law Review* 729.

¹³ See the helpful account of different accounts of originalism provided by Lawrence Solum, ‘Originalism and Constitutional Construction’ (2013) 82 *Fordham Law Review* 453.

¹⁴ Jack Balkin, *Living Originalism* (Harvard University Press 2011) and Jack Balkin, ‘Framework Originalism and the Living Constitution’ (2009) 103 *Northwestern University Law Review* 549.

¹⁵ David A Strauss, *The Living Constitution* (Oxford University Press 2010).

¹⁶ Samuel Issacharoff and Trevor Morrison, ‘Constitution by Convention’ (2020) 108 *California Law Review* 1913.

¹⁷ Richard Fallon, ‘A Constructivist Coherence Theory of Constitutional Interpretation’ (1987) 100 *Harvard Law Review* 1189; and Robert Post, ‘Theories of Constitutional Interpretation’, (1991) 30 *Representations* 13.

views of the nature of that relationship should lead to differences in the acceptable forms of constitutional interpretation.¹⁸ Finally, as we develop further below, Bobbitt overlooks how apex courts' approach to the overall purpose of the constitution profoundly affects how the different modalities are used in constitutional interpretation.

Pozen and Samaha helpfully clarify the first two points. They set out a series of “anti-modalities” of arguments that are not accepted forms of legal argument but that may be permissible in political discourse. As they put it, these anti-modalities – such as fundamentalist and policy arguments – “haunt” the modalities, because “[t]hey are latent competitors with and complements to the accepted forms of constitutional argument”.¹⁹ While they acknowledge that the modalities are rooted specifically in the American context, a particular set of modalities and anti-modalities, taken together, can define the law/politics divide in any constitutional system.

Notwithstanding its roots in the particularities of the American constitutional experience, and despite the absence of any claims to comparative applicability, Bobbitt's interpretive modalities approach has been drawn on by scholars in other parts of the world. Indeed, in this volume, Dhananjaya Chandrachud, former Chief Justice of India, draws on Bobbitt in his account of constitutional interpretation in India.²⁰ A prominent example of scholarly reliance on Bobbitt's account is Jeffrey Goldsworthy's influential study of constitutional interpretation in federal constitutional democracies – Australia, Canada, Germany, India, South Africa, and the United States – in *Interpreting Constitutions: A Comparative Study*.²¹ Goldsworthy's conclusion is worth quoting in full:²²

Constitutional interpretation is guided by similar considerations in all six countries. The main ones are: the words of the constitutional text, understood in the context of related provisions; other evidence of the intentions, understandings or purposes of the founders; presumptions favouring broad, and purposive, interpretations; precedent and doctrine developed from it; so-called “structural” principles regarded as underlying particular provisions or groups of provisions; and considerations of justice, practicality and public policy.

As he explained, “[t]hese can all be sorted into Philip Bobbitt's six ‘modalities’ of constitutional interpretation, namely, textual, historical, structural, doctrinal, ethical, and prudential”.²³ For Goldsworthy, constitutional systems only differed in the “relative priorities or weights” given to the modalities – for example, originalism is relied on more in Australia and the United States than in Canada and India, and structural interpretation is more important in Canada, Germany, and India than in the Australia or the United States. Different systems may emphasize or prioritize some of the forms of argument.²⁴ For example, in mission-driven constitutional systems, arguments going to mission may take precedence over other arguments.

¹⁸ See, for a similar argument, Theunis Roux, *The Politico-Legal Dynamics of Judicial Review* (Cambridge University Press 2018).

¹⁹ Cited above n 12, 740.

²⁰ Dhananjaya Chandrachud, ch 29, below.

²¹ Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2016).

²² *ibid.* 325.

²³ *ibid.*

²⁴ *ibid.*

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In systems that rely on more formalist modes of reasoning, arguments going to context and purpose may rarely be made.

But Goldsworthy's analytical frame led him, at times, to not permit his primary source materials to speak on their own terms in a manner that Bobbitt's modalities do not address. In a telling sentence, Goldsworthy states: "we have seen that all three post-War constitutions include express references to founding values and structural principles, which encourage a normativist approach to interpretation".²⁵ This is a reference to the German, Indian, and South African constitutions. These kinds of provisions reflect the constitutive commitments of a constitutional order and are examples of what, earlier in this chapter, we labelled *mission-driven* constitutions. These commitments, which often are rooted in the founding constitutional moment, condition the interpretation of a range of other provisions, such as fundamental rights, questions of federalism, and the separation of powers. When courts deploy these provisions, they engage in neither textual interpretation *tout court* nor historical interpretation but something else that the modalities do not quite capture.

This example points to a deeper problem with Bobbitt's modalities: they have not been developed to accommodate the experience of constitutional review in other jurisdictions. Since the 1950s, Germany and India have also been leading models of constitutional review, and both exemplify distinctive contexts for constitutional interpretation: Germany as the paradigmatic exemplar of post-authoritarian constitutionalism, and India as the leading example of a constitution harnessed in service of a broader social transformation. The range of jurisdictions with courts that engage in constitutional interpretation since then has only grown. The American case is no longer the only example of constitutional review, and scholarship concerned with the American constitution may not be valuable as the predominant frame for the comparative understanding of the phenomenology of constitutional interpretation.

3. THE EUROPEAN OR CIVILIAN TRADITION

Similar remarks can be made about a dominant European or civilian conception of constitutional interpretation, which draws on Savigny's four types of legal interpretation set out in his *System des heutigen Römischen Rechts*.²⁶ The four interpretive modalities that can be linked to his account are *textual*, *systematic*, *historical*, and *logical*.²⁷ It is important to note that Savigny's work was about statutory interpretation, not constitutional interpretation. His main purpose was to justify parliamentary sovereignty and the consequent supremacy of statutes, with the aim of influencing judges who were infused with the political and legal way of thinking of the *ancien regime*, in which judges were accustomed to deciding cases according to the old monarchical rules. First in France, and then in Prussia, the values of modernity were implemented by a parliament through legislation. The discrepancy between the new legislation and the old rules created the risk that judges would continue to apply the latter and not the former. Montesquieu addressed this risk with his famous rule according to which the judge

²⁵ *ibid.* 341.

²⁶ Cited above n 5. In our view, the best modern restatement and elaboration of the European or civilian tradition is A Jakab, *European Constitutional Language* (Cambridge University Press 2016).

²⁷ Savigny, *System des heutigen Römischen Rechts*, cited above n 5, 213.

is only the mouth pronouncing the words of the statutes.²⁸ Consistent with this view, Savigny accorded pre-eminence to text in legal interpretation.

In more recent times, scholars and courts have adapted Savigny's modalities approach to constitutional interpretation both within and beyond Europe (chiefly in Latin America). In this sense, legal cultures in Europe and Latin America have extended the domain of Savigny's modalities so that they have become widespread legal methodological tools for judges in constitutional interpretation as well. For example, Gertrude Lubbe Wolf's account of constitutional interpretation in Germany, contained in Section B of this volume, starts with a discussion of Savigny's canon of interpretive methods.²⁹ Following the adoption in Chile of a version of the 1804 Napoleonic Civil Code in 1855, many Latin American jurisdictions adopted the continental European tradition, which led Latin American scholars first to engage with Savigny's modalities in matters concerning private law, and later, in administrative and constitutional law.

In Savigny's system, the textual interpretive modality asserts that judges and others engaged in statutory interpretation must do so according to the technical or ordinary meaning of legal provisions. Alexy and Dreier have referred to this modality as "semiotic", "philologic", or "grammatical" interpretation.³⁰ The basis of this textual modality is the acknowledgement that the legislator uses words to communicate meanings to the legal community. Words structure legal provisions. Each word taken separately, and jointly in sentences, has a meaning or reference. When statutes incorporate technical language, interpreters should employ technical semantic rules to define the literal meaning of statutes. When statutes use ordinary language, interpreters should use ordinary or colloquial semantic rules to define that literal meaning.

In relation to the textual modality, three questions that give rise to disagreement are can judges adopt an interpretation of a legislative provision that does not accord with its ordinary meaning, may the ordinary meaning of a legislative provision change over time, and how should a judge determine the semantic ambit of statutory provisions.³¹ The textual modality and the issues it raises are also relevant to constitutional interpretation. When interpreting constitutional provisions, continental courts refer to the rules of language to help them determine the meaning of constitutional concepts. An example can be found in a judgement of the Spanish Constitutional Court in which it ruled that hotel rooms where people live for a considerable amount of time are a kind of domicile that attracts the corresponding constitutional privacy protections.³² Nevertheless, due to the open texture of constitutional concepts, such as freedom or equality, which admit of several and different readings rooted in underlying ideological frameworks, the literal modality often does not suffice to provide a single determinate meaning.

Savigny's systematic modality arises from the recognition that the legislature often legislates on a range of issues, which need to be interpreted as a coherent whole. Adopting this approach requires a court to analyze how a provision is embedded in a constitution, as well

²⁸ Montesquieu, *The Spirit of Laws*, Chapter 5 (Thomas Nugent tr, Hafner Publishing 1949).

²⁹ Gertrude Lubbe Wolf, ch 28 below.

³⁰ Robert Alexy and Ralf Dreier, 'Statutory Interpretation in the Federal Republic of Germany' in MacCormick and Summers (eds), *Statutory Interpretation. A Comparative Study* (Routledge 1991).

³¹ Robert Alexy, *A Theory of Legal Argumentation* (Oxford University Press 2009), 289.

³² Sentencia del Tribunal Constitucional 10/2002 de 17 de Enero (Spain).

as its relationships with other provisions, to determine its meaning. Systematic interpretation is of particular importance in constitutional law because of the need to harmonize both far-reaching constitutional guarantees and constitutional governing structures.³³

Savigny's historical modality refers to interpreters' reliance on how legal rules were understood by the legislature on the basis of the linguistic rules of the community at the time of their enactment. In constitutional interpretation, courts use this modality to incorporate in their analysis the genetic context of the constitution, the public meaning of the words of the constitution at the time of enactment, and the meaning of constitutional context across the constitutional history of a nation. The last aspect brings to the interpretive exercise the acknowledgement that the current constitution builds on the experiences of previous constitutions in which interpreters pay attention to the question whether a provision follows the text of a provision in an earlier enactment, is based on a specific constitutional tradition, or is new and may indicate a departure from a pre-existing constitutional rule or culture.

Finally, Savigny's logical modality, as Lubbe Wolf explains in her contribution (Chapter 28), would today be considered to overlap with the systematic modality. Although Savigny did not endorse the use of teleological reasoning as a modality of interpretation, it has become a central modality of reasoning in the German Federal Constitutional Court. Teleological reasoning entails that the meaning of a statute may be determined by identifying the aim sought to be achieved by the legislature in enacting the statute. This modality is an extremely important tool in constitutional interpretation more widely in continental Europe and Latin America. Courts often use it for justifying their departure from the original literal meaning of a constitutional provision.

Savigny's modalities of interpretation attracted the focus of apex courts in continental Europe and Latin America during the nineteenth century. In that period, courts in those jurisdictions remained faithful to the traditional French model that asserted the sovereignty of parliament. For this reason, the initial focus of interpretation was on statutes, which were considered supreme in the absence of a jurisdiction to subject legislation to judicial review. Savigny's interpretive approach, focused as it was on statutory interpretation, is, thus, crucially different from Bobbitt's, who was concerned only with constitutional, not statutory, interpretation.

The legal landscape in Europe was transformed after the enactment of the German *Basic Law*, which acknowledged the supremacy of the constitution, entrenched constitutional rights, and institutionalized a system of constitutional review undertaken by the German Federal Constitutional Court. These sweeping structural changes, which spread across Western Europe and Latin America, led judges to adapt Savigny's interpretive modalities to the task of constitutional interpretation. German scholars, such as Konrad Hesse and Ralf Dreier, rapidly acknowledged the insufficiency of Savigny's methods for constitutional interpretation and proposed they be supplemented with others.³⁴ One of their key insights was that Savigny's framework gave pre-eminence to parliament and statutory interpretation and that such an approach was at odds with the new mission of constitutional courts, namely, interpreting the

³³ Matthias Herdegen, 'Interpretation in International Law' in Max Planck *Encyclopedia of Public International Law* (Oxford University Press 2007).

³⁴ Konrad Hesse, *Grundzüge Des Verfassungsrechts Der Bundesrepublik Deutschland*, (CF Müller Verlag 1999), 3–4; Ralf Dreier, Introduction, in *Probleme Der Verfassungsinterpretation* 13, 25 (Ralf Dreier & Friedrich Schwegmann eds 1976).

constitution to undertake judicial review. Indeed, in Latin America, it can, perhaps, be said that there is a clash in interpretive paradigms between lower and apex courts, with the former adhering to Savigny and the supremacy of parliament, and the latter following newer continental approaches to interpretation, drawing on the practice of the German Federal Constitutional Court.

Many of the new concepts and approaches developed by European constitutional courts have been transplanted to other jurisdictions. Balancing is perhaps the most successful of those transplants. Alexy's conception of balancing has been highly influential in civil law jurisdictions. According to Alexy, constitutional rights are principles, namely, requirements that should be optimized in every context. Balancing is the procedure for optimizing competing principles. According to Alexy, the law governing balancing is: "[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other".³⁵ Due to the abstract nature of the structure of balancing, these methodologies can easily be transplanted across jurisdictions. However, the concept of balancing can be different in each jurisdiction. Indeed, there are many research outputs comparing the use of this abstract methodology across jurisdictions.³⁶ This specific literature overlooks the complexities of the Third Wave, in which balancing can lead to different outcomes in different contexts. For instance, balancing has become the basic tool for Latin American apex courts and the Inter-American Court of Human Rights to solve collisions between constitutional and regional human rights. We see balancing as the modern evolution of systematic interpretation, as it aims to ensure the coherent interpretation of different constitutional provisions. Salient examples include cases in which those courts have balanced freedom of speech against the right to privacy or the right to equality against economic freedoms.³⁷ Another prominent example is the doctrine of the horizontal effect of constitutional rights, which make it possible for private individuals and companies to be held as duty-bearers of constitutional rights.³⁸ In this context, judges should balance the rights of the right-holder (e.g., the right to freedom of speech) against the rights of private institutions (e.g., the right of a corporation to maintain a good reputation, in cases in which employees publish critical views about the company in social media).

The employment of the interpretive tools grounded on Savigny's work, especially balancing, has become more common in Latin America following the Third Wave of constitutionalism. Since the end of the 1980s, legally binding constitutions have been adopted across Latin America, entrenching constitutional rights and establishing a constitutional mission to be furthered by, amongst others, constitutional courts. These missions generally seek to deepen democracy, reduce arbitrariness, limit presidential power, enhance freedom and equality, incentivize political participation, and reduce poverty.³⁹

³⁵ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), 102.

³⁶ Jaco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press 2013).

³⁷ Carlos Bernal, *El principio de proporcionalidad y los derechos fundamentales* (3rd edn, Universidad Externado de Colombia, 2014).

³⁸ Juan María Bilbao Ubillos, *La eficacia de los derechos fundamentales frente a particulares* (Madrid, Centro de Estudios Políticos y Constitucionales, 1997).

³⁹ Armin von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017).

In conclusion, apex courts and scholars in Latin America and Continental Europe have refined and expanded the modalities grounded in Savigny's seminal work. The textual, systematic, historical, and teleological approaches continue to be relevant to constitutional interpretation, but they have been supplemented by the development of other tools, notably balancing.

4. THE GLOBAL CONTEXT OF CONSTITUTIONAL INTERPRETATION

We turn now to consider how the world has changed in the past 40 years. We highlight *five* key developments, which, in our view, should prompt the field of comparative constitutional law to build a new account of constitutional interpretation – one that incorporates the older reliance on the interpretive modalities approach but extends it in the light of the contemporary experience of constitutional adjudication across the world.

The *first* development is the Third Wave of democratization, which, in addition to judicial review to enforce bills of rights, adopted some new structural features – for example, a revised separation of powers, federalism, and guarantor institutions such as electoral and human rights commissions – which were often added to the standard constitutional package of a written constitution, an elected legislature, and a directly or indirectly elected executive. Particularly notable in the period has been the establishment of new constitutional courts as part of post-authoritarian transitions to democratic rule often with the textually explicit role of interpreting and enforcing the constitutional text. This expansion of the role of courts in constitutional review implied a radical change from an older paradigm (especially in Europe and Latin America), where many constitutions had previously been premised on the principles of parliamentary sovereignty and supremacy of the law. In these earlier constitutional systems, the constitution was primarily directed at establishing the structures of government. Even when constitutional rights were entrenched in many post-colonial African countries, for example, they were often inconsistently enforced for a range of reasons, which included that they were alien to societies previously premised on parliamentary sovereignty and that many jurisdictions had a weak legal professional culture and a dominant executive that demanded a compliant judiciary. These earlier constitutional frameworks were often considered to have been a contributor to constitutional failure, which led to their replacement during the transition from authoritarian rule by constitutions with a constitutional mission committed to democracy and the rule of law as well as the protection of fundamental rights.

The first post-authoritarian constitutional court was established in Italy in the 1948 Constitution. It was soon followed by the Federal Constitutional Court of Germany in 1950. With the transitions to democracy in Southern Europe, new constitutional courts were established in Spain in 1978, and then in Portugal in 1992. Since the end of the dictatorships in Chile, Brazil, and Argentina, Latin America began an era of re-democratization, with constitutional courts established in some of these jurisdictions. This led to 30 years of enactment of new constitutions entrenching the basic principles of democratic constitutionalism. After 1989, the geographic scope of the constitutional court model expanded dramatically to encompass Eastern and Central Europe and the former Soviet Republics as well as South Africa, francophone Africa, East Asia, Latin America, and the Arab world. As of 2021, 90 of the 193 constitutions in force provide for constitutional courts. Constitutional courts

may be specialist courts that, therefore, have a coordinate relationship with non-constitutional supreme courts that must be worked out (e.g., Germany) or may be apex courts themselves (e.g., South Africa since 2013). In post-authoritarian and post-civil war constitutional transitions, a specialist constitutional court has become one increasingly important model of constitutional review. The character of these transitions defined the mission of the new constitutional order, which is often expressly embodied in the terms of the constitutional text. As we mentioned in the introduction, these constitutional missions, and the provisions that implement them, have significant implications for constitutional interpretation.

But the expansion of judicial review has also occurred in the Commonwealth, through a combination of the adoption of constitutional bills of rights that have empowered existing national supreme courts – a prominent example being Canada – but also in Africa (e.g., Kenya), the Caribbean, and the Pacific, where it has often been accompanied by the abolition of appeals to the Privy Council and the vesting of ultimate authority in national courts or regional courts (such as the Caribbean Court of Justice and the Eastern Caribbean Supreme Court). Moreover, Asian jurisdictions have both created constitutional courts (e.g., Indonesia, Mongolia, South Korea, Taiwan, and Thailand) or entrusted judicial review to generalist supreme courts (e.g., Bangladesh, India, Malaysia, Pakistan, Philippines, and Singapore).

The dramatic expansion of the scope of judicial review has generated a large literature on why powerful political actors create such institutions, vest them with power, and abide by their judgements. Issacharoff's "democratic hedging" and Tom Ginsburg's "political insurance" theories, Ran Hirschl's "hegemonic preservation" thesis, or Choudhry's "institutional layering/bypass" theory offer competing explanations.⁴⁰ Our question here is different and looks at the impact on the global expansion of judicial review on the *character* of constitutional interpretation. The creation and empowerment of courts should be understood in the context of the mission of the constitution it is charged with interpreting. In this new political–constitutional context, the "modalities" must be revisited and updated.

The *second* development is the decline in the global prestige of the American constitutional model.⁴¹ To be sure, American constitutional doctrines on freedom, equality, due process, and federalism are still highly influential in the jurisprudence of many apex courts around the world. Nevertheless, Theunis Roux's important work on the political–legal dynamics of judicial review offers a sociological account of judicial review based on the extent to which legal actors consider whether law can and should be autonomous from politics. Although Bobbitt's modalities (and especially his "prudential" modality, which he associates strongly with the jurisprudence of Felix Frankfurter) acknowledged that legal reasoning was not entirely autonomous of politics, he did not explore the ideology of legalism, which is the focus of Roux's work. Of course, Bobbitt wrote within a particular jurisdiction at a specific point in time. His work on constitutional interpretation first appeared in the United States in the mid-1980s,

⁴⁰ Sujit Choudhry, 'Constitutional Courts' in JM Smits et al., *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2023), 401; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

⁴¹ David Law and Mila Versteeg, 'The Declining Influence of the US Constitution' (2012) 87 *New York University Law Review* 762.

during the final years of the Warren–Burger court. The spread of judicial review provided a platform for intense global attention on the work of the Warren–Burger court, which was seen as a global model for how an apex court should interpret a written, constitution-backed judicial review, especially its bill of rights.

For international observers – many deeply knowledgeable about American constitutional law – there are many reasons why they no longer see the American case as an exemplar of the “core” case for judicial review, to use Jeremy Waldron’s term.⁴² One important factor is the centrality of ideology to Supreme Court appointments. As Richard Hasen has explained, until the 1990s, ideological alignment between the nominating president and Supreme Court nominees was one of many factors at play.⁴³ A pivotal moment was the Senate’s refusal to confirm Judge Robert Bork, a conservative judicial nominee who sharply disagreed with leading precedents of the Warren–Burger court on reproductive rights and affirmative action. After the failed Bork nomination, both the Democratic and Republican parties appear to have prioritized ideological reliability in Supreme Court appointments. Ideological appointments have also interacted with growing political polarization to produce a deeply divided Supreme Court. Over time, Republican judicial appointments have culminated in a sharp change in the approach of the Supreme Court, as is evidenced by recent decisions to narrow and overrule key Warren–Burger Court decisions on reproductive rights (*Dobbs* overruling *Roe*)⁴⁴ and affirmative action (*Students for Fair Admissions* overturning *Bakke*).⁴⁵ These developments are explored in Nancy Gertner’s chapter in Section B.⁴⁶

Indeed, at times, the US Supreme Court has appeared to decide cases on a partisan basis. In *Bush v Gore*, the conservative majority on the Supreme Court intervened in the 2000 presidential election to terminate the vote count in Florida, with the consequence of handing victory to Bush. As Frank Michelman put it, the decision was “suspicious” because the Court intervened and resolved an issue that Congress was arguably institutionally placed to address and the legal grounds for the decision were narrow, novel, and could not be mapped onto any “any cognizable grid of constitutional principles and ideals, or competing sets of them, that independently might explain the Court’s division over these issues” in light of the cluster of positions that divided the liberal and conservative wings of the Court.⁴⁷ From a global perspective, the fear that law collapsed into politics in *Bush v Gore* marked a search for new judicial exemplars, including among the new constitutional courts of the Third Wave.

The *third* development is the interpenetration of different forms of international treaties with national constitutions. As Tom Ginsburg has demonstrated, over time, constitutions became more likely to incorporate international treaties into domestic law, with the status

⁴² Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 Yale Law Journal 1346.

⁴³ Richard Hasen, ‘Polarization and the Judiciary’ (2019) 22 Annual Review of Political Science 261.

⁴⁴ *Dobbs v Jackson Women's Health Organization*, 597 US (2022); *Roe v Wade*, 410 U.S. 113 (1973).

⁴⁵ *Students for Fair Admissions, Inc v President and Fellows of Harvard College and University of North Carolina*, 600 US 181 (2023); *Regents of Univ. of California v Bakke*, 438 U.S. 265 (1978)

⁴⁶ Nancy Gertner, ch 34, below.

⁴⁷ Frank I Michelman, ‘Suspicion, or the New Prince’ (2001) 68 U Chicago LR 679, 680.

varying from infra-statutory to supra-statutory, constitutional, or even supra-constitutional.⁴⁸ This is particularly true for new democracies. States' incentives to bind themselves to international treaties, roughly speaking, fall into two sets of categories: public goods rationales (treaties enable states to pursue policy goals that require international cooperation) and domestic commitment rationales (treaties are pre-commitment devices that survive changes in governing party).

Public goods rationales are principally served by multilateral treaties with global reach. These include not only international human rights treaties, whose subject matter clearly overlaps with and has frequently served as the basis for bills of rights, but also treaties regulating international economic law (although we would suggest that bilateral investment treaties are different), criminal law, humanitarian law, and refugee law. Intensifying of global connections (trade, travel, production, and communications) since the 1980s has increased the breadth and importance of international treaties to regulate the relationships that these closer connections have fostered and has also, perhaps, reduced the autonomy of nation-states to not regulate these matters.

Even for systems that do not accord formal domestic legal status to international treaties, there is an intersection between the semantic domain of the provisions entrenching constitutional rights and provisions of international human rights treaties that makes them relevant to the domestic understanding of constitutional rights. Moreover, several constitutions attribute to constitutional courts the power to interpret the constitutionality of international treaties as a part of the ratification process, which creates necessary connections between international law and constitutional interpretation. Finally, the protection of investors by international investment treaties is sometimes in tension with constitutional rights, which has led apex courts and international investment tribunals to address this tension, in part, through the interpretation of those treaties and constitutions.

Domestic commitment rationales are predominantly served by regional human rights treaties, originally in Europe (*European Convention on Human Rights*) and, subsequently, in the Inter-American system (*American Declaration of Human Rights*; *American Convention on Human Rights*) and most recently in Africa (*African Charter on Human and People's Rights*; *African Charter on Democracy, Elections and Governance*). Unlike multilateral treaties, regional human rights treaties are interpreted and enforced by a system of regional human rights courts. While there may be public goods rationales for some of these instruments (e.g., the cross-border spillover effects of civil conflict), they are principally pre-commitment devices.⁴⁹ The domestic legal status of international treaties raises the question of what role they play in constitutional interpretation. For regional human rights systems, there is the additional question of the status of regional human rights jurisprudence, including on the question of the international legal obligations to comply with regional human rights treaties, an important issue in the European and Inter-American systems.

The *fourth* development is the growth in the use of comparative method and the consequent influence of the jurisprudence of other courts in constitutional interpretation. The use of comparative jurisprudence in constitutional interpretation has emerged as a central feature

⁴⁸ Tom Ginsburg, *Democracies and International Law* (Cambridge University Press 2021).

⁴⁹ See A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe' (2000) 54 *International Organization* 217.

of modern constitutional practice. We can think of “supply” and “demand” side dimensions to this practice. On the “supply” side, the vectors of influence of the leading sources of comparative insight vary: the first post-colonial, republican constitution adopted by a country that emerged as the world’s leading economic and military superpower (United States); metropolitan constitutions that remained influential during the process of decolonization (France, United Kingdom); the distinct attraction of post-authoritarian, dignity-protecting constitutions that resonate with countries undergoing similar transitions, especially after the fall of Communism (Germany); constitutional models from the Global South attuned not only to the need to constrain public power, but also to mandate and channel its exercise in the service of human development in the context of deeply entrenched socio-economic inequality (Colombia, India, South Africa); a rights-protecting liberal democracy characterized by multiple forms of diversity (immigrant, Indigenous, plurinational) that is prosperous, peaceful, and stable and deeply committed to the rule of law (Canada).⁵⁰

The “demand” for comparative law in constitutional interpretation turns on its status as a *persuasive* source, as opposed to binding sources such as international or regional treaties or jurisprudence. The persuasiveness of comparative law may exist for different reasons: constitution-making processes, in which comparative examples were relied on; constitutions (such as South Africa’s and Kenya’s) that permit courts to have recourse to comparative law; the relative youth of the new constitution; a legal tradition that supports reliance on comparative law in non-constitutional matters (e.g., Commonwealth courts looking to other common law jurisdictions); and/or membership in a regional organization that links national courts as nodes in a system of treaty enforcement, who, by necessity, engage with each other’s case law. Our focus is the demand side, and the methods whereby comparative law is used by courts.

The *fifth* development is the fragility of the Third Wave. We are currently living through a moment of democratic backsliding, whereby a democratically elected government or president uses autocratic legalism to manipulate rules and institutions to remain in power in future electoral cycles, *inter alia* with respect to electoral system design, election administration, political party regulation, presidential term limits, civil and political liberties, independent institutions such as constitutional courts and agencies, and media regulation.⁵¹ They justify these measures by reference to the popular will. Although the leading contemporary examples of constitutional populism are Modi’s India, Erdogan’s Turkey, Orbán’s Hungary, PiS’s Poland, Obrador’s and Sheinbaum’s Mexico, and Chavez’s and Maduro’s Venezuela, the classic case lurking in the background of all contemporary discussions is the fall of Weimar Germany, which was captured from within. And although democratic backsliding by populist leaders is a heterogenous phenomenon, as Sam Issacharoff persuasively argues, what unites them is an “anti-institutionalism”, i.e., a visceral hostility “to institutionalized politics that presume deliberation, procedural order, and compromise”.⁵² Constitutionally, populists occupy the executive and target competing power centres within the constitutional system – legislatures,

⁵⁰ Sujit Choudhry, ‘The Canadian Constitution and the World’ in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017) 1075, 1076.

⁵¹ Alvin Cheung, ‘Legal Gaslighting’ (2022) 72 U Toronto LJ 50; Kim Scheppele, ‘Autocratic Legalism’ (2018) 85 U Chicago LR 545; A Sajo, *Ruling by Cheating* (Cambridge University Press 2024); Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019).

⁵² Samuel Issacharoff, *Democracy Unmoored* (Oxford University Press 2023), 9.

subnational governments in federal or devolved systems, and judiciaries, including apex courts with the power of constitutional review. The apex court, as the guardian of the constitutional order, safeguards these institutions, including itself. For those interested in constitutional interpretation across different systems, these circumstances give rise to questions about how courts defend themselves and other institutions from emergent authoritarianism.

These five developments across the range of comparative constitutional practice influence how we should build a new map to understand how courts engage with constitutional interpretation in the Third Wave. It is in light of these developments that authors in Section A of this volume explore different themes of constitutional interpretation in a manner that begins to build a broader and deeper appreciation of how courts employ interpretive modalities in their work.

5. A THEMATIC APPROACH TO CONSTITUTIONAL INTERPRETATION IN THE THIRD WAVE

Unlike both Bobbitt and Savigny, our focus is to develop a map of the modalities of constitutional interpretation across the wide array of jurisdictions that are engaged in constitutional democracy in the Third Wave. Our map encompasses but extends beyond the modalities set out in the American and European traditions. We organize these modalities around the constitutional text and the constitutional context, with examples drawn from the thematic and case study chapters.

In addition to presenting these examples, we ask more fundamental questions. Do historical, political, and/or geographical context – including constitutional mission – legal and political culture, and/or constitutional text or any other factors add weight to one or another type of argument in a manner that gives them priority in a particular national constitutional setting? If context matters, how does this deepen our understanding of constitutional interpretation in comparative perspective, beyond the taxonomies produced by Bobbitt, Savigny, and others?

(a) **Constitutional Text**

Constitutional text remains central to the enterprise of constitutional interpretation globally. This stands in contrast to the American constitutional system, in which arguments from the constitutional text have largely been overtaken by doctrinal, historical, and prudential legal argument. But the importance of the United States as the perceived central case for the comparative study of the methodology constitutional interpretation – an error, in our view – has perhaps been a factor in the tendency to downplay the importance of constitutional text within field of comparative constitutional law.

Why constitutional text matters

There are three explanations for the relatively greater importance of text to the practice of constitutional interpretation outside the United States.

First, as Tom Ginsburg and Zachary Elkins have observed, the American constitution is relatively short in comparative terms, and over time, the length of constitutions has increased,

as has the detail of constitutional provisions.⁵³ For example, the length and detail of the Indian Constitution – including on issues such as the public service, government contracts, and fiscal federalism – have contributed “a variety, a thickness of doctrines and incentives to conceptually innovate” around the constitutional text.⁵⁴ With increasing length has come more text to interpret; hence, an increase in the relative importance of textual arguments.

Second, constitutional texts are the products of constitution-making processes that involve bargaining among political elites who then operate the gears of the resulting constitutional system by occupying its institutions and often by the people (or peoples) who govern themselves under the constitutional texts. These processes often involved intense negotiations over constitutional texts and sometimes deep public controversy over specific issues. The engagement of political elites and the public with the resulting constitutional text defines the political context within which courts interpret it.

Third, and relatedly, the importance of text in the Third Wave lies in the number of constitutions that have been relatively recently adopted. In many cases, constitutions have been adopted within living memory or no more than a generation ago. This, of course, is not the case in the United States, but it is the case in many other jurisdictions. The political and legal salience of a constitutional text has greater force in constitutional interpretation when the constitutional process that give rise to it remains fresh in the minds of those who work with the text of the constitution, whether as judges, politicians, civil servants, academics, or practising lawyers.

Constitutional texts: beyond the operative text

Contributors to the thematic chapters analyze five elements of constitutional texts, in addition to its operative provisions, which are part of constitutional interpretation in the Third Wave.

First, courts turn to preambles. As Jaclyn Neo and Diego Arguelhes explain, preambles are heterogenous; for example, preambles may set out historical narratives, ideological agendas, the source(s) of sovereignty and bearers of constituent power, and religious identity.⁵⁵ If a preamble embodies a constitutional mission, it can serve as a meta-interpretive norm that shapes the interpretation and application of the constitutional text. But courts have gone further, to give different kinds of legal effects to preambles. For example, in the 1971 Freedom of Association case, the French Conseil Constitutionnel interpreted the references in the preamble to the 1958 Constitution to the Declaration of 1789 and to the Preamble to the 1946 Constitution as incorporating freedom of association by necessary implication, to which it gave constitutional status over inconsistent legislation.⁵⁶ Globally, the decision served as the basis for the doctrine of the “constitutional block” – legal norms that lie outside the constitutional text but that are on the same plane as the constitution itself and that prevail over inconsistent legislation – which has intersected in Latin America with the Inter-American human rights regime (as explained below).

⁵³ Tom Ginsburg and Zachary Elkins, *The Endurance of National Constitutions* (Cambridge University Press 2009).

⁵⁴ Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), ‘Introduction’ in *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 1.

⁵⁵ See Neo and Arguelhes, ch 5, below.

⁵⁶ Constitutional Council of France, DC 71–44 (1971) (Freedom of Association).

Second, courts have used preambles to define the content of unconstitutional constitutional amendment doctrines. Because these doctrines limit the power of constitutional amendment, in this context, preambles are given a status above the rest of the constitution itself. For example, as Rehan Abeyratne and Yaniv Roznai explain, the Supreme Court of Pakistan established the “salient features” doctrine based on the key aspects of the Objectives Resolution adopted by the Constitutional Assembly of Pakistan, which itself was the basis of the Preamble shared by all Pakistan’s post-independence constitutions.⁵⁷ One such “salient feature” is judicial independence, which the Court used to read down constitutional amendments that would have enhanced parliament’s power over judicial appointments relative to the judiciary-led Judiciary Commission (like India’s Collegium), in *Munir Hussain Bhatti v Federation of Pakistan* and *District Bar Association v Federation of Pakistan*.⁵⁸

Third, in addition to preambles, there are epilogues, which also set out a constitutional mission. Courts have derived concrete legal consequences from such provisions. As explained by O’Regan in her chapter, the most famous example is the epilogue to South Africa’s 1993 Interim Constitution, which described that document as a bridge between a racist, authoritarian past and a future based on democracy and human rights free from racial and other forms of discrimination.⁵⁹ The epilogue mandated the adoption of legislation to create the Truth and Reconciliation Commission, including the provision of amnesty. As Ruti Teitel explains, in the *AZAPO* decision, the Constitutional Court of South Africa relied on the epilogue to turn back a constitutional challenge to amnesties for civil liability on the basis that the epilogue authorized that measure, in effect, giving that legislation the same status as the constitution itself.⁶⁰

Fourth, another new feature of constitutional texts are directive principles. As Lulu Weiss explains, directive principles are constitutional obligations directed toward the legislature and the executive. As she terms it, directive principles uniquely combined two features.⁶¹ They are obligatory – i.e., they require the state to take positive action – but, at the same time, contrajudicative – i.e., are expressly non-justiciable, although some provide that they may aid interpretation. Directive principles originated in the 1937 Constitution of Ireland and the 1950 Constitution of India and are now found in at least two dozen constitutions. The manner in which courts approach directive principles varies. A common scenario is when legislation is challenged under a bill of rights and is defended on the basis that it is mandated by it, discharging a constitutional obligation established by a directive principle – so-called “directed legislation”. A related technique is for the directed legislation to be accorded significant deference under proportionality analysis. In both approaches, directive principles can be understood as conferring a form of quasi-constitutional status on certain legislation that places it in between ordinary legislation and the constitution itself.

Fifth, there are eternity clauses, which render certain constitutional provisions unamendable. They textually authorize doctrines of unconstitutional constitutional amendments and,

⁵⁷ See Roznai and Abeyratne, ch 7, below.

⁵⁸ *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 SC 407; *District Bar Association v Federation of Pakistan*, PLD 2015 SC 401.

⁵⁹ See O’Regan, ch 32, below.

⁶⁰ See Teitel, ch 12, below; *AZAPO v The President of the Republic of South Africa* [1996] ZACC 16.

⁶¹ See Weiss, ch 6, below.

therefore, do not raise the same spectre of judicial illegitimacy that judge-made versions of the doctrine do (most famously, the Supreme Court of India's basic structure doctrine established by *Kesavananda Bharati v State of Kerala*, which has been followed throughout South Asia).⁶² Eternity clauses set out the most fundamental or basic features of a constitution – a form of supra-constitutional text that has a higher status than other provisions of the constitutional text. A famous example is Article 79(3) of the *Basic Law*, which prohibits constitutional amendments that would abrogate Germany's status as a federal democratic republic, including elections, the separation of powers, constitutional supremacy, and the inviolability of human dignity. Abeyratne and Roznai helpfully distinguish between “strong form” judicial review under eternity clauses, in which courts strike down constitutional amendments, and “weak form” judicial review, in which courts read down constitutional amendments to comply with an eternity clause.⁶³ An example of weak form review is the German Federal Constitutional Court's Electronic Eavesdropping decision that read down a constitutional amendment that authorized electronic surveillance in people's homes to not authorize violations of human dignity.⁶⁴ In effect, the Court relied on the eternity clause as a meta-interpretive norm that constrained the constituent power itself but, at the same time, did not assert the ultimate power to find the amendment unconstitutional – an assertion of judicial power that avoided a potential institutional conflict with the political branches had the amendment been struck down.

How to interpret the constitutional text

One question that arises is whether interpreting constitutional text is different from interpreting statutes. Stéphane Beaulac addresses this question in his contribution to this volume, concluding that the differences between the exercises are less significant than sometimes suggested.⁶⁵ Given the important legacy of Savigny in relation to constitutional interpretation in civilian systems, it is perhaps not surprising that a civilian scholar such as Beaulac would make this claim. Common law scholars and judges, however, may take issue with this conclusion.

Turning to the interpretation of constitutional text, this volume demonstrates that there are very different approaches. One approach, exemplified by the Australian courts, as examined by James Edelman and Theunis Roux in this volume,⁶⁶ turns on the “essential meaning” of the constitutional text, which may be added to but not fundamentally departed from. This is textual interpretation, as it has been traditionally characterized, as turning on the *literal* meaning of the constitutional text. As Roux explains, the Australian High Court applied this variety of textualism in the *Same Sex Marriage* decision, to hold that the Commonwealth's marriage power encompassed the power to legislate same sex marriage, which rested on conceptualizing marriage at a high level of generality as a union between two persons.⁶⁷

But the Australian *Same Sex Marriage* decision is not the only way to conceive of and execute textual interpretation. A different approach, taken by the Supreme Court of Canada

⁶² *Kesavananda Bharati v State of Kerala* (1973) SCC 225.

⁶³ See Roznai and Abeyratne, ch 7, below.

⁶⁴ BVerfGE 109, 279 (2004).

⁶⁵ See Beaulac, ch 8, below.

⁶⁶ James Edelman, ch 24, below; Theunis Roux, ch 9, below.

⁶⁷ *Commonwealth v Australian Capital Territory* [2013] HCA 55, (2013) 250 CLR 441 (*Same Sex Marriage Case*).

in *Big M* on freedom of religion, is that constitutional texts should be interpreted not literally, but purposively “in the light of the interests it was meant to protect”.⁶⁸ Nevertheless, constitutional text – i.e., “the language chosen to articulate the specific right or freedom” – remains a central guide to determining that purpose and those interests, such that interpretation “not ... overshoot the actual purpose of the right or freedom in question”.⁶⁹ The purposive interpretation of a constitutional text can apply beyond rights to other constitutional elements, such as the separation of powers and federalism.

Living constitutionalism is another version of textual interpretation. As Aileen Kavanagh puts it, on this approach, a constitution “must navigate the fundamental tension between providing a stable framework for the legal system as a whole and allowing for flexibility and change over time ... in order to meet the needs of an evolving society”.⁷⁰ The European Court of Human Rights, for example, proclaimed in *Tyrer* that the European Convention on Human Rights must be interpreted as a “living instrument ... in light of present-day circumstances”.⁷¹ In a sense, living constitutionalism can be understood as combining elements of literalist and purposive forms of textual interpretation. An example of living constitutionalism may, in fact, be the Australian *Same Sex Marriage* decision; Theunis Roux argues that the Australian High Court was really interpreting the text in light of evolving social values regarding sexual orientation and same sex marriage, not its essential meaning.

Precedent and history can also be understood as forms of textual interpretation. Like living constitutionalism, these modalities of interpretation look beyond the four corners of the text to interpret the constitution. As Jamal Greene and Yvonne Tew explain, precedent and history can be understood as distinct. Precedent is synonymous with the doctrine of *stare decisis*.⁷² Traditionally seen as a defining contrast between common law and civil law adjudication, the rise of constitutional adjudication in the civil law world has rendered this characterization out of date. History is synonymous with originalism, understood as the public meaning of the constitutional text at the time of enactment. While most famously identified with the United States, originalist arguments are used in other constitutional systems – Greene and Tew provide examples from Australia, Canada, and Singapore. In *Blais*, for example, the Supreme Court of Canada held that the Métis (a post-contact people arising from intermarriage between European colonists and Indigenous peoples) did not enjoy a constitutional right of “Indians” to hunt for food. But it is helpful to see these two methods of interpretation as linked, as “history is conceptually continuous with precedent”, inasmuch as the past practices of political actors established a baseline of expected consistency for constitutional interpretation.⁷³

Aversive interpretation interprets a constitutional text dialectically by reference to a negative constitutional “other” or “anti-model”.⁷⁴ As Tarunabh Khaitan explains, aversive interpretation “requires more than mere indifference, dislike, rejection, or non-borrowing” because a constitutional option is “unsuitable, sub-optimal, or wrong”; it entails “a strong emotional

⁶⁸ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, [116].

⁶⁹ *ibid* [117].

⁷⁰ Aileen Kavanagh, ch 3, below.

⁷¹ *Tyrer v The United Kingdom*, [1978] ECHR 2, (1979-80) 2 EHRR 1.

⁷² See Jamal and Tew, ch 2, below.

⁷³ *R v Blais* 2003 SCC 44, [2003] 2 SCR 236.

⁷⁴ Sujit Choudhry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ (1999) 74 *Indiana LJ* 820.

and moral response, based on fear, hatred, disgust or strong approval”.⁷⁵ Aversive constitutional interpretation is usually framed in relation to an utterly discredited constitutional past that the new constitutional order fundamentally repudiates. The *Makwanyane* decision of the Constitutional Court of South Africa, which struck down the death penalty, provides an example of aversive interpretation.⁷⁶ Members of the Court reached their conclusion by recalling features of the apartheid regime – its savagery and racism, its arbitrary and unequal imposition of the death penalty based on race, and, more generally, its history of denial of human rights, institutionalized racism, lack of democracy, and oligarchy.

We identify popular constitutionalism as another method of interpretation. Sergio Verdugo explains that popular constitutionalism entails two interrelated but distinct claims: that the people should have a role in interpreting or shaping constitutional law and, potentially, that courts should not enjoy supremacy in matters of constitutional interpretation.⁷⁷ To be clear, the people do not interpret the constitution in the same way as a court does. Nonetheless, as a method of interpreting the constitutional text, popular constitutionalism can mandate judicial deference to popular interpretations of the constitutional text and, in some circumstances, can generate doctrines of non-reviewability. An example is Decision 138 of the Colombian Supreme Court, which upheld the legality of an executive order that added a ballot to the March 1990 election asking citizens whether Colombia should convene a constituent assembly to convene a new constitution.⁷⁸ The ballot proposal, even though it was ultimately rooted in an executive order, was, on its face, unconstitutional. But the Supreme Court upheld it as an exercise of the people’s constituent power, which could not be legally limited, rendering the executive order seemingly unnecessary. In our view, doctrines of decisional avoidance can also be understood through the lens of popular constitutionalism. Although they are unlike doctrines of non-reviewability because they reserve the power of judicial review, they are often deployed by courts in similar contexts – often at moments of intense political controversy to avoid conflict with the political branches acting on the basis of a popular mandate by declining to second-guess the constitutionality of legislative and/or executive actions.

Finally, there are circumstances in which a court disregards the text to give effect to the purposes underlying the particular provision or, indeed, the constitutional system itself. We term this *teleological interpretation*. One example is the interpretation of Article 68 of Germany’s *Basic Law* to deny the chancellor the power seek the dissolution of the Bundestag in the event the loss of a vote of confidence was contrived and not based on a real breakdown of the ability to govern – the real mischief at which the provision was directed.⁷⁹ Another is *Robinson*, in which the UK House of Lords held that notwithstanding a clear six-week limit on the election by the Northern Ireland Assembly of the power-sharing executive in the *Northern Ireland Act 1998* (legislation that serves a constitutional function), the Assembly could elect an executive after the expiry of that period because it would further the goals of power-sharing.⁸⁰ Notably, both these cases involved different aspects of the political process (government formation, legislative dissolution) and were rooted in the missions of their respective constitutional

⁷⁵ See Khaitan, ch 11, below.

⁷⁶ *S v Makwanyane* [1995] ZACC 3.

⁷⁷ See Verdugo, ch 14, below.

⁷⁸ Decision 138 (Colombian Supreme Court) (9 October 1990).

⁷⁹ BVerfG, Judgment of the Second Senate of 25 August 2005, 2 BvE 4/05.

⁸⁰ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390.

orders. In Germany, Weimar had been plagued by legislative instability, and the *Basic Law* was designed to incentivize the formation of stable governments. In Northern Ireland, the goal of power-sharing was to put an end to violent conflict and to construct effective governing institutions for a plurinational polity. The constitutional texts implemented those basic constitutional projects – the constitutional *telos* – albeit by compromising strict fidelity to the express terms of constitutional text.

(b) Constitutional Context

Constitutional missions

Constitutional texts frequently memorialize and codify *constitutional missions*, which define the constitutional context within which interpretation occurs. Constitutions define constitutional missions through a diverse set of provisions. These provisions have been interpreted by courts to derive concrete legal effects from those constitutional missions across a broad range of constitutional issues, including (but not limited to) the nature of legislative, executive, and judicial power; which rights are protected and the extent of their protection; proportionality; remedies; and constitutional amendment. We now turn to the question of those constitution missions themselves.

Surveying the global landscape, we identify at least five archetypal constitutional missions for constitutions in the Third Wave: *plurinationalism*, *transitional contexts*, *social transformation*, *post-authoritarianism*, and *defensive anti-authoritarianism*. The value of identifying these missions is that they underpin the constitution and shape its interpretation, explain specific operative provisions (e.g., those relating to executive power-sharing or federalism), or are mediated through other provisions (e.g., preambles, directive principles, eternity clauses) that shape the interpretation of the constitutional text. To be sure, these varieties of constitutional mission unavoidably overlap in practice. Devolution in Northern Ireland combines elements of plurinationalism with a transitional context; Colombia's constitution is committed to social transformation and has been amended in a transitional context; the constitutional mission for post-apartheid South Africa was at once transitional and post-authoritarian and committed to social transformation. Nonetheless, identifying these missions brings analytical clarity to their potential impact on the interpretive task. While multiple missions may pull in same direction, in particular cases they may not, and disentangling these missions renders the trade-offs at stake visible.

An example of interpretation in a *plurinational* context is the decision of the Supreme Court of Canada in the *Quebec Secession Reference*, discussed by Karl Kössler in his chapter.⁸¹ The case arose against the threat by Quebec to secede from Canada by issuing a unilateral declaration of independence. The Court had been asked to rule on the legality of unilateral secession under the Canadian constitution. While the constitution clearly prohibited unilateral secession, the Court, nonetheless, held that the vote of a clear majority on a clear question in favour of secession in a province would trigger corresponding duty to negotiate the terms of secession on the part of the federal government. The Court derived these rules from unwritten constitutional principles, which, in turn, were derived from an understanding that the basic mission of Canadian federalism was to manage the problem of plurinationalism – i.e.,

⁸¹ Karl Kössler, ch 10, below; *Reference Re Secession of Québec* [1998] 2 SCR 217.

the presence of competing nationalisms (Quebec nationalism and Canada-wide nationalism) within the same state – and that constitutional design and interpretation were tools to manage this kind of conflict.

As Ruti Teitel explains in her chapter, a *transitional* constitution is one in which peace processes, including transitional justice mechanisms, might lead warring parties to agree on measures – sometimes in a formal peace agreement – that sit in deep tension with the legal–constitutional order.⁸² In the place of the normal legislative process, warring parties might enter to peace agreements that purport to be legally binding or, alternatively, that modify the standard legislative procedure. Parties might create new institutions altogether that do not fit within the existing separation of powers. Amnesties to facilitate the transition from violent conflict to political competition may depart from the norm of criminal prosecutions and civil liability for human rights abuses. Interim self-governing arrangements might be unconstitutional under a unitary constitution. The *AZAPO* case, discussed earlier, sets out one such tension in the context of the constitutional right to advance civil claims against individuals and governments for human rights violations. On the other hand, the Colombian Constitutional Court struck down temporary constitutional amendments arising from a peace agreement that created a “fast track” legislative procedure for congressional approval of the peace agreement that fettered the power to amend legislation and required a vote on the law in its entirety, on the basis of the “substitution of the constitution” doctrine, because they were inconsistent with the core of deliberate democracy.⁸³

A constitution devoted to the mission of *social transformation*, according to Gautam Bhatia, is a constitution that is committed to a project for the distribution of economic and social power.⁸⁴ The Indian Constitution, for example, was not just a post-colonial constitution that established democratic institutions and universal suffrage; an equally important purpose was for those institutions to exercise the power to radically transform a deeply hierarchical and unequal society. The Indian Constitution’s mission to mandate social transformation underpinned a broad interpretation of scope of rights with horizontal effect. For example, Article 15(2) prohibits discriminatory access to private “shops” that are not part of the state, including on the basis of caste, but in *IMA v Union of India*, the Supreme Court of India interpreted shops to encompass private institutions that provide services of any kind, including private schools.⁸⁵ It did so in light of the social transformation mission of the Indian Constitution in the specific context of the denial of access by lower castes to basic goods and services by dominant caste groups.

Another constitutional mission is the *post-authoritarian* one of demarcating a complete break from an undemocratic past through the establishment of a constitutional democracy built around the essential elements of universal suffrage and periodic elections to the legislature, a democratically accountable or elected executive, independent courts and the rule of law, and basic human rights, all protected within a system of constitutional supremacy enforced by judicial review. The anti-authoritarian mission of the German constitution was

⁸² See Teitel, ch, 12 below.

⁸³ See, Judgment C-332/2017 (Colombia Constitutional Court 17 May 2017). On the significance of this decision in the context of the peace process, see Beatriz Botero Arcila and Mark Tushnet, ‘Conceptualizing the Role of Courts in Peace Processes’ (2020) 18 *ICON* 1290.

⁸⁴ Gautam Bhatia, ch 13, below.

⁸⁵ *IMA vs Union of India* (2011) 7 SCC 179.

at the heart of the German Federal Constitutional Court's decision in the *Civil Servants* case, referenced by Tarunabh Khaitan in his chapter.⁸⁶ The issue was the interpretation of Article 131 of the *Basic Law*, which required the enactment of legislation regulating the reinstatement of civil servants who had been employed by the Nazi regime but dismissed by Allied authorities. The Court held that civil servants did not have a constitutional right to reinstatement. Because Nazi civil servants had transferred their loyalty from the German state to Hitler personally, there was, therefore, no pre-existing civil service employment to restore. In substance, the real reason for the decision was that the basis of political authority was so different under the Nazi regime that it would undermine the mission of the constitution to recognize any right to reinstatement.

Finally, there is *defensive anti-authoritarianism*. As Tom Daly explains in his chapter, this is not a constitutional mission *per se* but, rather, a political context within which constitutional interpretation occurs – that is, one of democratic breakdown and decay in the face of pressure from an authoritarian executive intent on undermining constitutional democracy.⁸⁷ The leading contemporary examples of anti-authoritarian interpretation, of course, would be the multi-faceted attempts by a broad variety of Polish courts to resist capture by the Law and Justice Party, as documented definitively by Wojciech Sadurski.⁸⁸ Another example is the *Military Intervention Case* from Brazil, in which the Supreme Court rejected the existence of a “supra-constitutional tutelary power” in the Brazilian military to take steps to safeguard the democratic system from alleged threats, including against the Court itself. The purported basis of this power was Article 142 of the Brazilian Constitution, which gives the military the mandate to “guarantee the constitutional branches of government”.⁸⁹ The Court rejected this argument and held that the military's constitutional powers had to be exercised *within* the overarching framework of civilian control of the military and could not step outside of it, as they would deny Brazil's transition to democracy from military rule.

Geographic location: regional human rights systems

Another new element of the constitutional context in the Third Wave is geographic location, which manifests itself in the role of regional human rights law in constitutional interpretation. Apex courts within domestic constitutional systems have developed a broad variety of approaches to the precise force and effect of regional human rights law. These turn on a combination of domestic constitutional texts and doctrines regarding the status of international legal obligations, generally, and those flowing from regional human rights treaties, in particular, including its hierarchical relationship to the constitution and statute; and conversely, the jurisprudence of regional human rights courts regarding the obligations created by their constituent treaties for national constitutional interpretation, including its status relative to the constitution itself. This precise combination of these legal factors varies both across (Africa, Europe, Latin America) and within regional systems (i.e., in country-specific ways). Generalization is difficult. But with this caveat in mind, we provide an illustrative example from each regional system.

⁸⁶ Tarunabh Khaitan, ch 11, below; BVerfGE 3, 58 (1953).

⁸⁷ Tom Daly, ch 15, below.

⁸⁸ Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

⁸⁹ *Supremo Tribunal Federal (STF) Military Intervention Case* MI 7.311 (10 June 2020) and MC ADI 6.457 (12 June 2020).

Adem Abebe and Charles Fombad, in their chapter, present the example of the Constitutional Court of South Africa's decision in *New Nation Movement NPC and Others v President of the Republic of South Africa*, which considered a constitutional challenge to the ban on independent candidates.⁹⁰ Section 39(1) of the Constitution of South Africa provides a court "must consider international law" when interpreting the Constitution. Section 39(1) does not accord a different status to regional human rights treaties, as opposed to international law more generally. Nor does it specify how courts must consider international law in constitutional interpretation. The Constitutional Court relied on the decision of the African Court of Human and Peoples' Rights in *Tanganyika Law Society v United Republic of Tanzania; Mtikila v United Republic of Tanzania* that a ban on independent candidates violated the right to political participation under the *African Charter on Human and Peoples' Rights*.⁹¹ Relying on the African Court's decision, the Constitutional Court held that that the *Electoral Act* is unconstitutional to the extent it requires that adult citizens be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.

In the Inter-American system, national constitutional courts and the Inter-American Court of Human Rights have developed interconnected doctrines, arising respectively under national constitutional law and the *American Convention on Human Rights*, that structure the relationship between the *American Convention* and national constitutions in constitutional interpretation. As Jorge Contesse explains in his chapter, through constitutional interpretation (e.g., Colombia) and the constitutional text (e.g., Bolivia), constitutional courts in Latin America have accorded constitutional rank to international human rights law – including the *Convention* – through the "constitutionality block" doctrine as a matter of domestic law.⁹² The Inter-American Court has set out the corresponding doctrine of "conventionality control", whereby national courts must give domestic effect to the *Convention* and the decisions of the Inter-American Court that interpret it, including in constitutional interpretation, as a matter of international law. The doctrines are mutually reinforcing. They have no equivalent in the African regional human rights system. An example of how they interact is the decision of the Peruvian Constitutional Court in Santiago Enrique Martín Rivas.⁹³ In *Barrios Altos v Peru*, the Inter-American Court found that Peru's amnesty law violated the *American Convention*, because it prevented the investigation and punishment of violation of non-derogable rights under international human rights law (e.g., torture, extra-judicial execution, and forced disappearance).⁹⁴ The Constitutional Court in Santiago Enrique Martín Rivas then rejected a challenge to the decision of the military court to reopen a case against an accused who had benefited from the amnesty law, both pursuant to its domestic (constitutionality block) and international (conventionality control) obligations.

⁹⁰ Adem Abebe and Charles Fombad, ch 17, below; *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11, 2020 (6) SA 257 (CC), 2020 (8) BCLR 950 (CC) (11 June 2020).

⁹¹ *Tanganyika Law Society v United Republic of Tanzania*, App Nos 009/2011 and 011/2011 (African Court on Human and Peoples' Rights, 14 June 2013).

⁹² Jorge Contesse, ch 18, below.

⁹³ Exp. No. 4587-2004-AA /TC, November 29, 2005.

⁹⁴ *Barrios Altos v Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 Inter-Am. Ct. H.R. (14 March 2001).

The *European Convention on Human Rights* also plays a central role in constitutional interpretation in member states. The *European Convention* (like any other international treaty) asserts its supremacy over domestic law, including constitutions, but does not require any one mode of incorporation in the internal legal order of states. Thus, there is no direct counterpart in *European Convention* jurisprudence to conventionality control in the Inter-American system. Moreover, as Helen Keller and Alec Stone Sweet demonstrated, there is no one way in which constitutional courts enforce the European Convention, arising from the diverse ways in which national legal systems accord legal status to the convention and international treaties more generally.⁹⁵ For example, the *European Convention* is frequently used by constitutional courts to interpret existing national bills of rights or has been given supra-legislative but infra-constitutional status – both different from the Latin American constitutionality block, which accords constitutional status to the *American Convention*. Nor do these categories exhaust the terrain of doctrinal possibilities. Colm O’Cinneide, in his chapter, gives the example of the decision of the German Federal Constitutional Court in *Görgülü*.⁹⁶ The European Court of Human Rights had ruled that a German court had violated his rights under the *European Convention* in a custody dispute.⁹⁷ The claimant was unsuccessful in his attempt to enforce the European Court’s decision domestically. The Constitutional Court then held that a lower court’s disregard for relevant jurisprudence of the European Court of Human Rights when interpreting the *Basic Law* could itself give rise to a complaint to the Constitutional Court – as distinct from enforcing either the decision of the European Court of Human Rights or the *European Convention* itself.

Legal professional culture – comparativism and reliance on public international law

Another important determinant of context is the dominant legal professional culture within constitutional settings that legitimates certain types of constitutional reasoning. In their edited collection of empirical studies of modes of reasoning, Andras Jakab, Arthur Dyever, and Giulio Itzcovich explored how modes of legitimating reasons for judicial decisions vary across legal systems. They define reasoning as the justifications that decision-makers publicly provide for their decisions⁹⁸ and conceptualize constitutional reasoning as an exercise in persuasion.⁹⁹ Some of the modes of reasoning they explore are not directly relevant to interpretation; for example, in addition to some key interpretive modalities, they investigated the structure of legal arguments, whether constructed as a chain or parallel conclusive reasoning (legs of chair reasoning or dialogical reasoning) and some key constitutional concepts. They argue that there are three factors that affect the modes of reasoning adopted: judges’ values and preferences, including their conception of the judicial role; the views of the judicial role held by their perceived audiences; and judges’ ability to craft arguments that reflect their views

⁹⁵ Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008).

⁹⁶ Colm O’Cinneide, ch 19, below; BVerfG, Order of the Second Senate of 14 October 2004, 2 BvR 1481/04).

⁹⁷ *Görgülü v Germany*, 74959/01 [2004] ECHR 89, [2004] Eur. Ct. H.R. 89 (Feb. 26, 2004).

⁹⁸ Andras Jakab, Arthur Dyever and Giulio Itzcovich, *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

⁹⁹ *ibid.* 18.

while remaining attuned to the expectations of their audiences.¹⁰⁰ They conclude that courts vary widely in relation to their use of modes of reasoning. Jakab et al.'s study suggests how important the audience is for the forms of reasoning judges adopt.

In his contribution to this book, Roux explores how legal professional culture affects modes of interpretation.¹⁰¹ He defines legal professional culture, a notoriously slippery concept, as the “beliefs, attitudes and assumptions – inculcated through legal professional training and practice that condition the way judges decide cases”.¹⁰² Like Jakab, he observes significant differences across systems, suggesting that professional legal culture is an important determinant of what forms of interpretive tool will be considered legitimate in any system. In addition, he reaches an interesting conclusion, that in four of the six systems he examined (Australia, Germany, South Africa, and the United States), the courts have avoided developing a “rigorous, sequenced, and systematic” approach to constitutional interpretation, and in the other two, although they appear to have adopted a firmer approach (Canada’s “living tree” approach and India’s “structuralist” approach), these approaches do not “tie the courts’ interpretivist hands”.¹⁰³ He argues that this shared approach to flexibility may arise both from the difficulty of establishing a one-size-fits-all approach to constitutional interpretation, even in one legal system, and from the reluctance of courts to adopt an overarching theory of interpretation that may restrict their ability to negotiate the political constraints they may face.

Whatever the case may be, what is clear is that interpretive modalities considered to be legitimate within the legal professional culture of a particular constitutional framework will be an important contextual determinant of the modalities that are adopted. The significance of legal professional culture is probably important in relation to all interpretive modalities. However, we suggest that shared understandings of legitimate modes of interpretive reasoning are particularly important (and varied) in relation to two tools of interpretation considered in this volume. The first is reliance on rules or norms of public international law, other than regional human rights systems, which we have just discussed, and the second is reliance on foreign law – what we call comparativism.¹⁰⁴ Reliance on these two interpretive modalities is perhaps best explained as being importantly determined by their perceived legitimacy as modalities within legal professional culture. We note, however, that in some constitutional settings, the constitutional text may provide that use of these modalities of constitutional interpretation is permissible or even required. In these circumstances, the employment of these modalities may be better understood as arising, at least in part, from constitutional text, even though the precise manner in which those modalities occur is not always stipulated by the text and is a matter of interpretation, as we explain below.¹⁰⁵

Public international law is an important element of constitutional interpretation in the Third Wave. It is noteworthy that it is a form of interpretive modality not included in either Bobbitt or Savigny’s lists of modalities.

¹⁰⁰ *ibid.* 18–19.

¹⁰¹ Roux, ch 9, below.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ See s 39 (1) of the South African Constitution, which provides that when interpreting the Bill of Rights, a court *must* consider international law and *may* consider foreign law.

The focus of the literature on the role of international treaties in constitutional interpretation has principally been on international human rights treaties. The two sets of rights-protecting instruments have a mutually constitutive relationship, with bills of rights serving as the origin of many of the rights protected by the core multilateral human treaties, and those treaties, in turn, influencing the drafting of new bills of rights. Moreover, their formal legal status does not necessarily answer the question of how they shape constitutional interpretation, which varies enormously across jurisdictions and, to a significant extent, reflects legal professional culture. James Fowkes and Dire Tladi, in their chapter, give the example of the Supreme Court of India's decision in *National Legal Services Authority v Union of India*.¹⁰⁶ The Court declared that the non-recognition of gender identity for transgendered individuals violated the rights to equality and privacy. As they explained in that decision, the Supreme Court relied heavily on a broad variety of international human rights sources, not as binding constraints on the interpretation of the rights in Part III of the Indian Constitution, but as persuasive sources of authority to flesh out the meaning of those provisions.

International human rights treaties are not the only body of international treaties that shape constitutional interpretation. Another is international humanitarian law and international criminal law. Hannah Woolaver explains in her chapter that the Colombian Constitutional Court has interpreted the provision requiring that the Colombian Constitution be interpreted in accordance with international human rights treaties to encompass international humanitarian law treaties.¹⁰⁷ The Court relied on international humanitarian law in Decision C-291/07 of 2007 to strike down the offence of hostage taking under domestic law on the basis that it included a requirement that demands by captors be made to the other party in the armed in conflict.¹⁰⁸ However, the Court divided on whether this is what international humanitarian law demanded; the majority held that this condition unconstitutionally narrowed the scope of international humanitarian law based on the definition of hostage taking in the International Criminal Court's Elements of Crime document, whereas the dissent objected that this source was not part of the *Rome Statute* of the International Criminal Court, and neither the *Rome Statute* nor the *Geneva Conventions* defined hostage taking. This decision illustrates that recourse to international humanitarian law – or any other international treaty for that matter – to interpret domestic constitutions may merely replicate disagreements from the international plane about the content of international humanitarian law obligations on the domestic plane and is not a mechanical exercise.

Another important category of international treaty obligations is found in international refugee law, principally the *Refugee Convention*. As with international humanitarian law, international refugee law can be seen as a subcategory or cognate area of international human rights law. Daniel Ghezlbash, in his chapter, provides the example of the Constitutional Court of Ecuador's decision in *Re Presidential Decree 1182*.¹⁰⁹ The Constitution of Ecuador incorporates international treaties into domestic law and even gives them supra-constitutional status. The Court struck down the definition of refugee for being too narrow. It relied on the

¹⁰⁶ James Fowkes and Dire Tladi, ch 20, below; *National Legal Services Authority v Union of India*, Writ Petition (Civil) No. 400 (Supreme Court of India, 15 April 2014).

¹⁰⁷ Hannah Woolaver, ch 21, below.

¹⁰⁸ Constitutional Court of Colombia, Decision C-291/07 of 2007.

¹⁰⁹ Daniel Ghezlbash, ch 22, below; Sentencia N. 002-14-Sin-CC, Case No.: 0056-12-IN y 0003-12-IA, August 14, 2014.

1984 *Cartagena Declaration on Refugees*, which unlike the *Refugee Convention*, includes individuals fleeing from generalized violence – particularly relevant to Ecuador, which had many asylum seekers fleeing the Colombian civil war. But yet again, this decision again illustrates how the reliance on international treaties may not resolve but merely replicate interpretative disagreement from the international to the domestic planes, as the Court treated the *Cartagena Declaration* as legally binding, even though it is a soft law instrument.

The final category is international economic law, which encompasses both international trade law and international investment law. As David Schneiderman explains in his chapter, international economic law is designed to check states' regulatory authority – a form of what he terms “constitutional dispossession”.¹¹⁰ But constitutional interpretation is not simply a means whereby these international treaty obligations are given effect in domestic law. Courts can review the constitutionality of international economic law. An important example he provides is *Judgment C-252/19* of the Colombian Constitutional Court on the *Colombia–France Bilateral Investment Treaty*.¹¹¹ The Court focused on the lack of certainty created by the Fair and Equitable Treatment and National Treatment rules, which are standard to bilateral investment treaties. The lack of certainty was unconstitutional on the basis that it violated constitutional provisions on national sovereignty and the principle of legal certainty. The Court issued multiple declarations of “conditional constitutionality”, in effect reading down the treaty to comply with the Colombian Constitution. The consequence was to require the executive to negotiate an interpretive declaration with France to keep the Colombia–France Bilateral Investment Treaty within constitutional bounds.

A crucial modality of constitutional interpretation in the Third Wave is comparativism. Neither Bobbitt nor Savigny discussed the reliance on jurisprudence from other jurisdictions as a modality of constitutional interpretation. That seems a striking lacuna today. As Cheryl Saunders explains in her chapter, comparative materials are broad in scope and range beyond judicial decisions to “the text and structure of other constitutions; concepts, principles and values that are drawn from a constitution or elucidated in secondary sources; legislation with constitutional significance; political practice; and underpinning constitutional theory”.¹¹² She persuasively argues that comparative materials can be used in three ways: *formatively* making an active contribution to interpretation, *confirmatively* by reinforcing a conclusion reached on the basis of internal legal sources, or *self-reflectively* as a catalyst to self-reflection, even if they are rejected.

The *Robinson* decision of the Supreme Court of Jamaica – a constitutional challenge to legislation to create national identification numbers and cards – illustrates all three uses.¹¹³ The Supreme Court relied on comparative law formatively in applying the Supreme Court of Canada's famous decision in *Oakes*¹¹⁴ to interpret the *Jamaican Charter of Fundamental Rights and Freedoms*' limitations clause, and the Supreme Court of India's application of the right to privacy to the collection and management of information in *Puttaswamy I*.¹¹⁵ The Court relied on *Puttaswamy II* to confirm that constitutional judicial review required a

¹¹⁰ David Schneiderman, ch 23, below.

¹¹¹ Judgment C-252/19 (Case LAT-445) (Colombia Constitutional Court 6 June 2019).

¹¹² Cheryl Saunders, ch 16, below.

¹¹³ *Robinson v Secretary of State for the Home Department* [2019] UKSC 10.

¹¹⁴ *R v Oakes* [1986] 1 SCR 103.

¹¹⁵ *Puttaswamy v Union of India I* (2017) 10 SCC 1 (*'Puttaswamy I'*).

different approach to the standard of review for violations of rights – proportionality – than existed under the previous rights protection instrument, the *Bill of Rights*.¹¹⁶ Finally, the Court drew self-reflectively on comparative materials to understand that the *Jamaican Charter of Fundamental Rights and Freedoms* was fundamentally different from the *Bill of Rights* and required not just a new approach to the interpretation of rights and proportionality but also the presumption of constitutionality and burden of proof.

6. JUDICIAL REFLECTIONS AND THE ROLE OF THE JUDGE

A distinctive contribution of the *Research Handbook* lies in the chapters authored by sitting or former judges of courts in different parts of the world. Section B contains these chapters, which provide judicial reflections on the approach to constitutional interpretation in 11 important jurisdictions, four from the Americas (Brazil, Canada, Colombia, and the United States), three from Europe (Germany, Poland, and the United Kingdom), two from Africa (Kenya and South Africa), and two from Asia, India and Australia. These chapters demonstrate one of our principal arguments: approaches to constitutional interpretation in the Third Wave are heterogeneous, even if the modalities identified by Bobbitt and Savigny are to be found, to some extent, in all the jurisdictions under study.

These chapters illustrate how central constitutional interpretation is to the practice of constitutional democracy in many of these jurisdictions. Roberto Barroso, for example, in describing Brazil, speaks of the “intense judicialisation of life” noting that “there is practically no issue of even minor relevance – political, economic, social, or ethical – that does not reach the Brazilian Supreme Court”.¹¹⁷ Although Barroso suggests that this phenomenon is more prevalent in Brazil than elsewhere, we might suggest that it is a growing phenomenon in the Third Wave and that similar statements could be made of both Colombia and South Africa and, perhaps, even of India and Germany.

The chapters also illustrate how important text remains to constitutional interpretation in the Third Wave, as we have discussed in the previous section. Yet, again, there is a distinctive array of approaches across the jurisdictions. As mentioned above, James Edelman observes that, in Australia, constitutional interpretation commences (as does statutory interpretation) with the search for the “essential meaning” of the text. Edelman also outlines how Australian courts have developed an approach to constitutional interpretation that enables the text of Australia’s 1901 Constitution to retain contemporary relevance. He writes that “a distinction is often drawn between the connotation of statutory words (which cannot change) and the denotation of those words (which can change)”.¹¹⁸ As Edelman describes “[t]he higher the level of generality at which the purpose, and therefore the essential meaning is characterised, the more scope there will be for the constitutional or statutory provision to develop and adapt consistently with constitutional fit and justification”.¹¹⁹

¹¹⁶ *Justice K S Puttaswamy v Union of India* [2018] SC 535 (*Puttaswamy II*).

¹¹⁷ Roberto Barroso, ch 25, below.

¹¹⁸ See James Edelman, ch 24, below.

¹¹⁹ *ibid.*

In Germany, Gertrude Lubbe Wolf notes that while “wording is usually the starting point ... [it] is not necessarily decisive”.¹²⁰ She provides the interesting example, also mentioned earlier, of the 2006 dissolution of the Bundestag by the Federal Chancellor, Gerhard Schröder, under Article 68 of the *Basic Law*, which provided that if a motion of confidence proposed by the Federal Chancellor is not supported by a majority of the Bundestag, the Federal Chancellor may approach the Federal President to dissolve the Bundestag within 21 days. The chancellor had, indeed, lost a vote of confidence and then sought the dissolution of the Bundestag, but the dissolution was challenged on the basis that the failure of the vote of confidence had been a collusive attempt to bring the date of elections forward. The German Federal Constitutional Court held that the chancellor’s conduct, while in step with the wording of Article 68, was in conflict with the provision’s purpose, which is to ensure a viable government and not to bring forward an election.¹²¹

Lech Garlicki explains that the Polish courts between 1989 and 2015 adopted an approach of what he calls “creative textualism” to constitutional interpretation, which draws on rules, principles, and values, particularly the principle of the *rechtsstaat*. He explains that one of the reasons for the development of this approach is that in the aftermath of the shift to democracy in 1989, the 1952 constitution remained in force until 1997 when a new constitution was adopted. Given the fundamental changes after 1989, the courts had to develop a new way to interpret the 1952 constitution, and the approach developed in those years persisted after the 1997 constitution was adopted (at least until 2015).¹²²

It is also clear from the contributions to Section B, that most of the jurisdictions under consideration do not adopt an originalist approach to textual interpretation. Rosalie Abella, for example, discusses the seminal Privy Council decision of *Edwards v Canada (Attorney General)*,¹²³ in which Lord Sankey held that the Constitution Act, 1867 “planted in Canada a living tree capable of growth and expansion within its natural limits”, not to be cut down “by a narrow and technical construction, but rather [given] a large and liberal interpretation”.¹²⁴

The consequence was that the phrase “qualified persons” in the 1867 text describing those who could be appointed to the Canadian Senate should not be interpreted in light of how people might have understood the phrase in 1867 because, as Abella states, the phrase should not be understood to be “frozen in time”.¹²⁵ Brenda Hale also discusses the *Edwards* decision in her chapter. She notes that in reaching its conclusions that “qualified persons” could include women, the Judicial Committee of the Privy Council “blithely swept aside” earlier decisions in the United Kingdom that had held that women did not fall within the definition of persons and, thus, rejected the argument that the Canadian constitution should be interpreted in the light of the intention of its drafters or what would have been understood by its original readers.¹²⁶

Lubbe Wolf notes that originalism “as a methodological concept is not a seriously debated issue” in the German Federal Constitutional Court and that German lawyers discuss it only

¹²⁰ See Gertrude Lubbe Wolf, ch 28, below.

¹²¹ Gertrude Lubbe Wolf, ch 28, below.

¹²² Lech Garlicki, ch 31, below.

¹²³ *Edwards v Canada (Attorney General)* [1930] 1 DLR 98 (PC) 106–107.

¹²⁴ Rosalie Abella, ch 26, below.

¹²⁵ *ibid.*

¹²⁶ Brenda Hale, ch 33, below; *Nairn v University of St Andrews* [1909] AC 147.

“as a US oddity”.¹²⁷ The originalist approach has also not been adopted in Poland, at least in the period between 1989 and 2015 as Garlicki explains, noting that the courts held that after 1989, the will of the 1952 legislators were not relevant in the post-1989 period and that reliance had to be placed instead when interpreting the text of the 1952 constitution on newly introduced principles, such as the principle of the *rechtsstaat*.¹²⁸ In India too, Dhananjaya Chandrachud states, the Supreme Court has adopted a living tree approach to the interpretation of the Indian Constitution and emphasized the need for constitutional interpretation to “continuously undergo a process of re-engineering”.¹²⁹

In this regard, the United States (and perhaps Australia) is an outlier. In her chapter on constitutional interpretation in the United States, Nancy Gertner describes the long controversy about originalist interpretations of the United States constitution and how an originalist approach to interpretation underpinned the infamous 1857 decision of the US Supreme Court in *Dred Scott v Sandford*, in which the court rejected the claim that a free Black person was a citizen of the United States.¹³⁰ Gertner reminds us that Chief Justice Taney held that the change in public opinion since the adoption of the Constitution could not change its construction and meaning.¹³¹ Gertner describes how the controversy between originalist and living constitutionalist approaches to interpretation continue to dominate US constitutional conversations. She describes what she calls the new originalist approach of the last few decades, which eschews the emphasis on the actual intentions of the framers of the constitution and focuses, instead, on the meaning the constitution would have had at the time. This approach, Gertner observes, appears no longer to be concerned about unelected judges imposing their views as to how the constitution should be read, a concern that animated earlier originalist approaches.¹³² We would tentatively suggest that the bitter debates in the United States about originalism may well have informed approaches in other parts of the world that have rejected originalist approaches to constitutional interpretation.

Originalism may not be widely employed as a method of constitutional interpretation, but social and political history are very important to interpretation, particularly in constitutions that are mission driven. When constitutions have been adopted to enable transitions from periods of deep injustice or authoritarian forms of government, arguments from history have a particular cogency. Again, as Lubbe Wolf notes, in Germany, “[a]nything else would be amazing, considering the importance of the transformative motive (‘never again’) underlying and shaping the *Basic Law* as a whole”.¹³³ However, she also observes that the German Federal Constitutional Court has tended to downplay the importance of history, stating that it is not “necessarily decisive”. In her chapter, Catherine O’Regan notes how important history and, in particular, the rejection of racist and authoritarian approaches to government have been in interpreting South Africa’s post-apartheid constitution.¹³⁴ History has also played an

¹²⁷ Gertrude Lubbe Wolf, ch 28, below.

¹²⁸ Lech Garlicki, ch 31, below.

¹²⁹ Dhananjaya Chandrachud, ch 29, below. The phrase is from the recent leading case on privacy in the Indian Constitution, *Puttaswamy I*.

¹³⁰ *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

¹³¹ Nancy Gertner, ch 34, below.

¹³² *ibid*.

¹³³ *ibid*.

¹³⁴ Catherine O’Regan, ch 32, below.

important role in the interpretation of Kenya's 2010 Constitution, as Willy Mutunga describes in his chapter, particularly noting the importance of history in the recent *BBI* case, in which all three tiers of court (the High Court, Court of Appeal, and Supreme Court) held that a series of constitutional amendments proposed by the president were not consistent with the constitution.¹³⁵

The chapters also illustrate how the concept of transformative constitutionalism, which recognizes that the mission of constitutions is often to deliver fundamental social and political change, has become a widely cited mode of constitutional interpretation, particularly in jurisdictions in the Global South. The phrase probably first was employed to describe the South African post-apartheid constitutional project, as O'Regan discusses in her chapter. She notes that the concept of transformative constitutionalism asserts "a purposive understanding of the South African Constitution". She observes that the understanding that "the Constitution is 'mission driven'" has profound implications for how the Constitution is interpreted. It reduces the significance of the intention of "the founders" or "drafters" of the text and replaces founders' intent with the concept of a constitutional purpose that is not only drawn from history and context but also from the text itself.¹³⁶

The term "transformative constitutionalism" has also been adopted in India, as Chandrachud describes in his chapter. He notes that the concept "finds its roots in the belief that the moment of our constitutional founding marked a break from the past in that our Constitution sought to facilitate a transition from a colonial regime to a progressive democratic legal order".¹³⁷ Carlos Bernal also discusses how the concept of the constitution as transformative has informed the Colombian Constitutional Court's jurisprudence concerning the economic and social rights of the most vulnerable members of society and also its approach to the elimination of discrimination and mitigation of inequality.¹³⁸ In Kenya, too, as Mutunga describes, the idea that the constitution has a transformative purpose is of central importance to the project of constitutional interpretation. As he describes it, the transformative purpose of the Constitution means that the Constitution should be understood as "an instrument for the transformation of society rather than an historical, economic, and socio-political pact to preserve the status quo as the earlier constitutions did".¹³⁹

The judicial reflections on constitutional interpretation in this volume also provide support for another argument we make in this chapter: constitutional interpretation in the Third Wave often draws on regional and international human rights norms, other norms of public international law, and the constitutional jurisprudence of other jurisdictions. As we have noted, these are modes of interpretation that neither Bobbitt nor Savigny identified.

Bernal, in describing the approach of the Colombian Constitutional Court, argues that the Court has relied on both the jurisprudence of the regional system of human rights under the Inter-American Convention, as well as drawing on the jurisprudence of other countries.¹⁴⁰ Abella not only discusses how the Canadian Supreme Court has drawn on the jurisprudence of other countries but also outlines how influential the jurisprudence of the Canadian Supreme

¹³⁵ Willy Mutunga, ch 30, below.

¹³⁶ O'Regan, ch 32, below.

¹³⁷ Dhananjaya Chandrachud, ch 29, below.

¹³⁸ Carlos Bernal, ch 27, below.

¹³⁹ Willy Mutunga, ch 30, below.

¹⁴⁰ Carlos Bernal, ch 27, below.

Court has been across the globe over the past 40 years, particularly in relation to the interpretation of fundamental rights and freedoms.¹⁴¹ Barroso discusses what he calls the concept of “cosmopolitanism”, which he says has made “an indelible mark” on constitutional interpretation in Brazil and provides several examples of constitutional principles and techniques that have been adopted in Brazil, such as the principle of proportionality and the concept of implicit powers, which he says have been adopted in Brazil as part of what he calls “the migration of constitutional ideas”.¹⁴²

Chandrachud also notes how Indian courts have sought to develop domestic rights and constitutional jurisprudence “in lockstep with international law” and also that the Indian courts do rely on the jurisprudence of other jurisdictions in their decisions, “while being cognizant of relevant textual and contextual differences”.¹⁴³ In both South Africa and Kenya, the constitutional text mandates reliance by courts both on international law and the jurisprudence of other countries when interpreting the bill of rights.¹⁴⁴

A final point about heterogeneity may be drawn from the chapters. The approach to constitutional interpretation does not only vary across jurisdictions, but it also often changes over time within jurisdictions and is often contested. Gertner describes how the Supreme Court’s approach to constitutional interpretation has shifted over the decades in the United States and how deeply contested the question of the proper approach to interpretation is in the United States.¹⁴⁵ Barroso also notes that in the first years of the 1988 Constitution, the courts approached constitutional interpretation “with restraint, if not ill-will” but that, over the years, that has changed.¹⁴⁶ Chandrachud recounts the changes in approach to constitutional interpretation in India, where in the early years after independence, the courts adopted a strict textualist approach to constitutional interpretation, but that shifted in the late 1960s when the courts began to adopt a more structural approach to interpretation.¹⁴⁷ Hale provides an interesting analysis of the differences in approach to constitutional interpretation adopted by the Privy Council on the one hand, which is tasked with the interpretation of the constitutions of independent states that form part of the Commonwealth, and the UK Supreme Court on the other, which is tasked with interpreting the constitutions of three of the constituent parts of the United Kingdom, Northern Ireland, Scotland, and Wales.¹⁴⁸

7. CONCLUSION: CONSTITUTIONAL INTERPRETATION IN THE THIRD WAVE

The Third Wave of constitutionalism has seen a vast increase in the number of courts engaging in constitutional interpretation. While Bobbitt and Savigny’s catalogues of interpretive arguments remain relevant in this new era, it is also clear that a wider array of modalities

¹⁴¹ Rosalie Abella, ch 26, below.

¹⁴² Roberto Barroso, ch 25, below.

¹⁴³ Dhananjaya Chandrachud, ch 29, below.

¹⁴⁴ Willy Mutunga, ch 30, below and O’Regan, ch 32, below.

¹⁴⁵ Nancy Gertner, ch 34, below.

¹⁴⁶ Roberto Barroso, ch 25, below.

¹⁴⁷ Dhananjaya Chandrachud, ch 29, below.

¹⁴⁸ Brenda Hale, ch 33, below.

of interpretive argument is being employed by courts and that the manner of their employment varies across systems. A better way to conceive of constitutional interpretation in the Third Wave is as consisting of two components: constitutional text and constitutional context. The constitutional text encompasses the operative text, preambles, epilogues, directive principles, substantive limits on constitutional amendments, and constitutional structure as well as modalities to interpret that text, including literal and purposive interpretation, living constitutionalism, history and precedent, aversive interpretation, popular constitutionalism, and teleological interpretation. The constitutional context represents the constitutional setting within which courts rely on the modalities to interpret the constitutional text and includes the mission of the constitutional order as well as its geographic location. Legal professional culture will often affect the weight attached to interpretive modalities and the relationships between them, in different constitutional systems, and importantly will affect whether and how norms of public international law and comparativism may be employed as interpretive tools.

Constitutional interpretation in the Third Wave is inevitably heterogenous, both across and within jurisdictions. This heterogeneity can, perhaps, be illustrated by considering the category of constitutional text. A core set of interpretive modalities relating to text exist everywhere, but they are distinctively different. For example, in most jurisdictions, the constitutional text is understood to be a living document whose meaning may shift over time in the light of changing circumstances, but in others, there may be arguments that the meaning of the text must be rooted in the public meaning at the time of its adoption. These approaches to text matter and are, to a significant extent, determined by the legal and political culture of the relevant jurisdictions. Another question that arises is whether non-operative provisions are relevant for constitutional interpretation. The answer to this question varies. In mission-driven constitutions, these provisions often play a role as crucial interpretive guides, but in other settings, these provisions may rarely be invoked.

Our exploration into how constitutional interpretation is being undertaken in the Third Wave has rendered us somewhat sceptical of arguments that propose a single normative approach to constitutional interpretation, irrespective of differences in constitutional texts and the political and historical contexts. In her thought-provoking and ambitious new book, Rosalind Dixon proposes such an account. She argues that when courts are interpreting a constitutional text, they should generally seek to counter risks of democratic monopoly power and of democratic blind spots and burdens of inertia by calibrating the intensity and reach of constitutional law accordingly and by being mindful of the limits of their own competence and legitimacy.¹⁴⁹

There is much that is intuitively attractive about Dixon's argument. However, we are doubtful about its ambitious claim to be valid across different constitutional histories, texts, and institutional cultures. Moreover, we worry about the argument that specific constitutional interpretations by judges that are adopted to "protect the 'minimum core' of democracy will generally be legitimate regardless of the degree of existing legal support" (which we take to mean of the basis in the existing constitutional text or doctrine) for such an interpretation because such interpretations will draw their legitimacy from political arguments in favour of courts responding to perceived systemic risks to democracy and constitutionalism.¹⁵⁰ In our

¹⁴⁹ Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press 2023), 271.

¹⁵⁰ *ibid.* 100.

view, this argument does not satisfactorily account for the importance of text in most constitutional settings, which should not be overlooked. Moreover, we wonder whether the argument does not open the door too wide to the risk of adoption by bad actors who may capture and weaponize the courts to serve their own ends – for example, as has occurred in Central America, where courts have struck down constitutional term limits (which protect democracy from autocratic presidents) based on unconstitutional amendment doctrines.¹⁵¹ It is rare for authoritarians in the contemporary era to claim that their constitutional interventions are aimed at curbing democracy or constitutionalism. The converse tends to be true, so there may be deep political disagreement about the purposes and effects of interventions. For courts to abandon fidelity to text in such circumstances may create the risk of deeply perverse consequences. For prudential reasons alone, fidelity to text may be the safest approach, mitigating the risk of weaponized courts at the price of foregoing heroic courts.

In conclusion, there can be little doubt that there is much work to be done by scholars on constitutional interpretation in the Third Wave. We hope that the *Research Handbook* will spur further work in the field. If constitutional democracy and the rule of law are to thrive in the twenty-first century, something that is by no means certain, engaging with how courts are approaching their task will be of crucial importance.

¹⁵¹ David Landau, Rosalind Dixon, and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 40.