CAN CONSTITUTIONAL DRAFTERS SEE THE FUTURE? NO, AND IT'S TIME WE STOP PRETENDING THEY CAN

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Perhaps the greatest trouble with constitutional drafting is its tendency to look backward, at the country's own political and legal history along with international comparative sources that were most often drafted looking backwards in their own right. While this is problematic for a number of reasons, one of the more prominent is that it makes it difficult to find a textual basis for regulation of modern technologies. While such technologies must be dealt with, they are often brought in by judges who can be unprepared for such technological analysis. This paper provides a history of "influential" constitutions and the circumstances that brought about privacy and search and seizure provisions, along with drafting recommendations that will alleviate this problem for future drafters.

INTRODUCTION

In the Fall of 2012, at an event at Rice University, the United States Supreme Court's Chief Justice John Roberts barely hesitated when he was asked what the biggest challenge for the Court would be in coming years.[1] There would be no more difficult project for the Court than taking a bill of rights, drafted at the end of the 18th century, and applying it to modern technology.[2]

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1. *See* Mike Tolson, *Chief Justice Roberts: Technology Among Top Issues for the Court*, HOUSTON CHRON. (Oct. 17, 2012, 11:22 PM), http://www.chron.com/news/houston-texas/houston/article/Chief-Justice-Roberts-Technology-among-top-3957626.php.

2. *Id*.

Intuitively, this is unsurprising. While it may sound flippant, life is quite different today than it was in 1787, at the creation of America's foundational legal document. This means that the application of provisions written by individuals, who could not comprehend the existence of computers, smartphones, the internet and a great number of other facets of everyday life, is difficult, to say the least.

What are the lifestyle differences? To start, population estimates put the current population of the United States at approximately 320 million.[3] This compares to just over 3.5 million in the first census in 1790, of which only approximately 80% were free citizens, able to enjoy the rights of the Constitution.[4] Even the populations themselves were extremely different. In the 2010 census, 80.7% of Americans resided in urban areas.[5] In sharp contrast, in the first census taken in 1790, that number was just over 5%.[6] Even the 5% is high compared to what we currently think of as urban areas as much of the population of the young nation's largest city, Philadelphia, was, in fact, agricultural, rather than what we would think of as "urban workers."[7]

This is, of course, only one arena. A comparative study of populations and lifestyles in 1787 versus one in 2014 would be a series of books and is well outside this particular article's purview. Put simply, life is different and while no area of modern life is immune from the differences, technological advancement occurs at a speed that dwarfs non-technological areas such as population growth and mass urbanization.

There may be no area where constitutional interpretation is immune to the vast differences between life in 2015 and life at the promulgation of the U.S. Constitution. In one often maligned example, the idea of lifetime tenure for federal judges takes on a completely different meaning when one looks through a historical lens. In 1787, the average life span of an individual was around 36 years.[8] That has more than doubled in the intervening centuries to

3. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock (last visited Sept. 11, 2016).

4. *Population Estimates Used at the Philadelphia Convention in 1787*, U. DEL. http://www.dcte.udel.edu/hlp/resources/newnation/pdfs/PopEstim.pdf (last visited Sept. 11, 2016).

5. *Frequently Asked Questions*, U.S. CENSUS BUREAU, https://ask.census.gov/faq.php?id=5000&faqId=5971 (last visited Sept. 23, 2016).

6. Lisa Lambert, *More Americans Move to Cities in Past Decade-Census*, REUTERS (Mar. 26, 2012, 1:28 PM), http://www.reuters.com/article/2012/03/26/usa-cities-population-idUSL2E8EQ5AJ20120326; Population 1790 to 1990, U.S. CENSUS BUREAU https://www.census.gov/population/censusdata/table-4.pdf (last visited Sept. 23, 2016).

7. Gary B. Nash & Billy G. Smith, *The Population of Eighteenth-Century Philadelphia*, PENN. MAGAZINE OF HISTORY & BIOGRAPHY, July 1975, at 362.

8. Jamal Greene, *Revisiting the Constitution: We Need Term Limits for Federal Judges*, N.Y. TIMES: OPINION PAGES: ROOM FOR DEBATE (last updated July 31, 2015, 5:04 PM).

over 78 years.[9] A recent study calculated that from 1971 through 2006, the average age of appointment for a Supreme Court justice was 53 and the average age of retirement was 79, totaling 26 years on the bench.[10] For an individual to serve 26 years while fitting into the 1787 average life span, they would have to don the robe at 10—something that, to this author's knowledge, has never occurred.

The intervening centuries between the Constitution's drafting and today have not only allowed people to live longer, they have also changed the machinery of everyday life that those interpreting the Constitution must contend with. A common argument of American gun control advocates is that even if the Second Amendment to the U.S. Constitution guarantees an individual right to a gun, the founders could not possibly have envisioned the sheer killing power of modern weaponry. While the Constitution was drafted in the context of muskets, long-rifles and single-shot pistols,[11] today's legally available semi-automatic weapons, capable of shooting at least three shots in under a second,[12] would be so unrecognizable as to be a completely different technology, rendering an analogy of the technology experienced by the long-gone founders near irrelevant on the topic.

In these two examples, changes in lifespan and gun technology created tremendous interpretive or logical difficulties. However, perhaps the most prominent area in which technological advances have created interpretive difficulty and awkward analogy is in search and seizure and privacy law through the Fourth Amendment to the U.S. Constitution. While the Amendment protects "persons, houses, papers, and effects,"[13] it must now often contend with digital communications stemming from an ever changing technological environment. Fitting such advancements into the "persons, houses, papers and effects" has often led to confusion.

It is now possible to communicate with individuals in all corners of the globe in fractions of a second, whether it be through textual conversations such as email, text message or any number of applications designed specifically for that purpose, sound through phone or other applications or video, also through phone or a wide variety of applications. This compares

9. *Id*.

10. David Stras, *Life Tenure, Term Limits and Supreme Court Justices*, SCOTUSBLOG (Sept. 11, 2007, 11:18 AM), http://www.scotusblog.com/2007/09/life-tenure-term-limits-and-supreme-court-justices/.

11. *See generally* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787-1823*, 7 WM. & MARY BILL RTS. J. 347 (1999).

12. Brian Palmer, *How Many Times Can You Shoot a Handgun in 7 Minutes?*, SLATE (Nov. 10, 2009, 6:25 PM), http://www.slate.com/articles/news_and_politics/explainer/2009/11/how_many_times_can_you_shoot_a_handgun_in_seven_minutes.html.

13. U.S. CONST. amend. IV.

to 1787, where it could take up to two weeks for a letter to travel from New York to Philadelphia,[14] a distance of just over 100 miles that can now be driven in well under two hours.

The American Constitution is, of course, an anomaly, lasting some 228 years and counting. The mean lifespan of a constitution worldwide is 17 years since the American document came into effect.[15] Only 19% of constitutions will last half a century, while 7% will be replaced after one year.[16] The mode, or most commonly occurring length of a constitutional regime, is one year.[17] This means that the extraordinary differences between everyday life of the drafters and those currently operating under its legal umbrella are also an anomaly.

There was a time when despite (or perhaps, in part, because of) the age of the American document, it was the centerpiece of any comparative constitutional law discussion. The document had wide ranging influence on the drafting and analysis of any number of constitutions globally.[18] According to recent analysis, this era is past. Not only has the document's normative appeal begun to wane, with no less an American constitutional scholar than Supreme Court Justice Ruth Bader Ginsburg stating that she would look elsewhere, specifically to South Africa or Canada,[19] if she were drafting a constitution today, but the empirics bear it out.

In a recent article entitled *The Declining Influence of the United States Constitution*, Professors David S. Law and Mila Versteeg come to an important conclusion, both for rights-related provisions and basic structural components of modern constitutional drafting. "Whether the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same: The U.S. Constitution has become an increasingly *unpopular* model for constitutional framers elsewhere."[20] The pair goes on to analyze South Africa's Constitution, the Canadian Charter of

14. *Man of Letters*, PBS (2002), http://www.pbs.org/benfranklin/l3_world_letters.html.

15. Thomas Ginsburg, Zachary Elkins, & James Melton, *The Lifespan of Written Constitutions*, RECORD ONLINE (Spring 2009), http://www.law.uchicago.edu/alumni/magazine/lifespan.

16. *Id*.

17. *Id*.

18. *See* David Weigel, *Ruth Bader Ginsburg Makes Banal Point, Destroys the Republic*, SLATE (Feb. 3, 2012), http://www.slate.com/blogs/weigel/2012/02/03/ruth_bader_ginsburg_makes_banal_point_destroys_the_republic.html.

19. *Id*.

20. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 769 (2012).

Rights and Freedoms, the Indian Constitution and Germany's Basic Law for international influence.[21]

Outside of the American Constitution, of the regimes analyzed by Law and Versteeg, the German Basic Law, originally promulgated in 1949,[22] is the oldest, nearly quadrupling the mean lifespan of constitutional regimes, while the Indian constitution came into effect a year later.[23] Canada's Charter of Rights and Freedoms, also a subject of Justice Ginsburg's comments, was drafted in 1982,[24] nearly doubling the average length of a constitutional regime. The youngest of the constitutions analyzed by the pair, and also a favorite of Justice Ginsburg, is the South African constitution. South Africa's foundational document, having just turned twenty,[25] is long in the tooth compared to the mean, even while much of the founding generation is still alive and occupying high ranking government positions.

The age of "influential" constitutional regimes is, of course, predictable. A constitutional regime does not become influential by dying within the first decade or joining the scores of other such documents that cannot make it through a calendar year. The German, Indian and Canadian documents have had decades to make their way into comparative constitutional law discussions.

While Law and Versteeg cast some doubt on the empirical influence of the youngest of such "influential" documents, from South Africa, their preeminent question seems to be more of causation than correlation. The pair states that "South Africa's initial movement into the constitutional mainstream in the mid-1990s reflected domestic adoption of global standards, as opposed to domestic influence upon global standards."[26] However, the pair concedes that in the decade that followed wholesale constitutional change in South Africa, "the world's constitutions drifted somewhat" in the direction of South Africa.[27] While this clearly does not prove influence, there is anecdotal evidence of South Africa's constitution playing a role in the drafting of other such documents.

In analyzing Kenya's Constitution of 2010, itself sharing the title of "most progressive" constitution on the continent with South Africa's foundational legal document, Cornelia Glinz called the resemblance between

21. *See id.*

22. *See id.* at 823 n.144.

23. *Constitutional History of India*, CONSTITUTIONNET, http://www.constitutionnet.org/country/constitutional-history-india (last visited Oct. 20, 2016).

24. *See* Law & Versteeg, *supra* note 20, at 810-11.

25. *See id.* at 827.

26. *Id*. at 829.

27. *Id*.

the two "striking."[28] She went further, stating that Christina Murray, a South African Professor and constitutional scholar, had been on the Kenyan Committee of Experts and had tremendous personal influence.[29] While such anecdotes do not prove a global importance, the idea that an "influential" constitution was drafted recently enough that scholars and members of the drafting generation can play a role in drafting other constitutions leaves a role to be played, whether that role is played or not.

This is important, as tremendous technological changes can happen within a very short period of time. The two decades of modern South African constitutionalism or 17-year mean time frame for constitution change are more than enough time for a fundamental change in commonly used technology and such changes can vastly alter the means and type of interpersonal relations and communications between individuals.

Take, for example, Facebook, now a global phenomenon boasting more than 1.3 billion users, nearly two-thirds of whom use the site daily.[30] The site was created in 2004,[31] eleven years ago. Its messaging system, allowing users to communicate directly with each other was launched a mere five years ago.[32] Skype, a video and audio messaging program that allows users to connect with others across the globe without the previously prohibitive costs, is comparatively old, at 12 years old.[33] Twitter's 140 character communications have only been around for nine years, founded in 2006.[34] Snapchat may have been the fastest riser in prominence over the past few years, both in users and in the *zeitgeist*, due in part to legal issues surrounding the social media site's security. The mobile app is a mere infant at only four years old, founded in 2011.[35] There is little doubt that by the time this article reaches publication countless new social media sites or means of communication will have come and gone, perhaps even with a new "next big thing" that will stick around for some time.

28. CORNELIA GLINZ, KENYA'S NEW CONSTITUTION 5 (2011), http://www.kas.de/wf/doc/kas_22103-1522-2-30.pdf?110412154839.

29. *Id*.

30. Mark Prigg, *Facebook Now Has 1.32 Billion Users, with 30% Only Using it on Their Mobile - and the Average American Spends 40 Minutes a Day on the Site*, DAILY MAIL U.K. (July 23, 2014, 5:21 PM), http://www.dailymail.co.uk/sciencetech/article-2703440/Theres-no-escape-Facebook-set-record-stock-high-results-beats-expectations-1-32-BILLION-users-30-mobile.html.

31. *Company Info*, FACEBOOK, https://newsroom.fb.com/company-info (last visited Sept. 23, 2016).

32. *Products*, FACEBOOK, http://newsroom.fb.com/products (last visited Sept. 23, 2016).

33. *About Skype*, SKYPE, https://www.skype.com/en/about (last visited Sept. 23, 2016).

34. *Twitter Milestones*, TWITTER, https://about.twitter.com/company/press/milestones (last visited Sept. 23, 2016).

35. Jordan Crook & Ann Escher, *A Brief History of Snapchat*, TECHCRUNCH (Oct. 15, 2015), https://techcrunch.com/gallery/a-brief-history-of-snapchat.

The boon of technology forces constitutional regimes that were designed based on the ordinary lives and technology of the day to fit in, sometimes awkwardly, advancements in how people communicate. Put perhaps more simply, and at the risk of being overly obvious, technology exponentially out paces constitutional drafting, whether that be the average constitutional regime of 17 years or the longer lifespan of constitutions that are deemed "influential." The tremendous pace of technological growth in comparison to constitutional change is the root cause of necessarily awkward analogies that, while sometimes leading to decisions most believe to be correct policy-wise, are difficult to square with a grounding in a document drafted by those that would be wholly perplexed by new technologies.

For this reason it is vitally necessary to draft a constitution knowing that if the document is even remotely successful, technology will change repeatedly before the regime is replaced. This makes it necessary for constitutional drafters to work to ensure that the decision whether to include a new technology is not left solely to the whims of often unelected and unprepared judges but constitutional drafting and elected or informed bodies provide as much guidance as possible for future legal decision makers.

This article will proceed thusly. Section I will take a brief look at literature on the topic of constitutional drafting and privacy provisions, attempting to ascertain any overlap and understand the prominent hole that exists in forward-looking drafting guidance. Section II will provide a discussion of the linguistic similarities and differences between privacy or search and seizure provisions in a number of constitutions and the circumstances surrounding their drafting. Section III will categorize these provisions based on methods of judicial interpretation. Section IV will discuss the problems associated with the current means of drafting and interpretation. Section V will discuss a number of potential remedies to the problem along with potential criticisms of such remedies. Finally, Section VI will conclude, discussing the major issues and identifying potential other areas of analysis.

I. LITERATURE REVIEW

Predictably, much has been written on the drafting of rights provisions in various "influential" constitutions. This includes a number of prominent articles on the theme of "what rights do most or all constitutions include?" that necessarily presupposes what individual provisions will be included in future constitutions. There is a common thread of micro-level analysis as to "why has an individual provision, in an individual situation, been shaped the way it has?" There is surprisingly little literature that takes these two lessons

and attempts to lean forward, asking "based on what is in most constitutions and how those provisions are structured, what should future *individual* provisions look like?"

Perhaps the most influential and important piece of the last decade in the overarching analytical category was the Law and Versteeg piece detailed above. Among a number of other important conclusions, the piece details what I will call "top order rights," or the five most prominent rights in modern constitutional regimes. Law and Versteeg determine that 95% of modern constitutions have a privacy provision,[36] thus it is virtually assured that any new constitution will include such a provision. Notably (and perhaps intentionally), the piece says nothing about the contents of such an article.[37] The same is true of Law's earlier work, including a seminal article entitled *Generic Constitutional Law*,[38] that again focuses on the level of "borrowing" among constitutions and the creation of a *lingua franca* of constitutions rather than what that language entails. The pair also collaborated on *The Evolution and Ideology of Global Constitutionalism*, attempting to categorize constitutions based on their "comprehensiveness" (number of rights contained) and "ideology" (statist versus libertarian, based on the role envisaged for the state).[39] This similarly fits into the overarching theme of constitutional content rather than detailed analysis of individual provisions.

There is also substantial literature on the external forces that come into play during constitutional drafting. This ranges from the type of influence, such as Zaid al-Ali's recent chapter *Constitutional Drafting and External Influences*, detailing the types of external influence that can play a part in constitutional drafting, from the textual "borrowing" that is more and more prevalent in constitutional drafting to actual military intervention, as was experienced in post World War II Japan or al-Ali's own Iraq.[40]

The individual provision analysis of privacy/search and seizure provisions is perhaps best highlighted by the incredible level of ink that has been spent on the American Fourth Amendment. This may be equal parts the age of the provision, its status as the first written provision of its kind and (potentially) the change in language and technology that has resulted in

36. Law and Versteeg, *supra* note 20, at 773.

37. It is important to note that the Law and Versteeg piece is meant as a general review of contents of constitutions and where they come from rather than an analysis of individual provisions. As such, it does not include detailed analysis of any individual rights provision. Privacy/Search and Seizure is not alone in this regard.

38. *See* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

39. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1164 (Oct. 2011).

40. *See generally* Zaid Al-Ali, *Constitutional Drafting and External Influence*, *in* COMPARATIVE CONSTITUTIONAL LAW 77 (Tom Ginsburg & Rosalind Dixon, eds., 2011).

difficulty comprehending its original meaning and standing in modern society that this article seeks to address. There may be no scholar that has worked more diligently to analyze and apply the Fourth Amendment than Thomas K. Clancy. Professor Clancy has written more than a dozen articles and two books on the scope of the Amendment, constantly implicating its history and the way in which such history analogizes to the modern era. In one of the most prominent such articles, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment* Clancy develops a theory on the history of the right, being informed by John Adams' experience as a lawyer during the "writ of assistance" or general warrant eras that will be discussed in great detail later.[41] Similar analysis exists on the drafting of various provisions in the other constitutions, but, for the reasons listed above, they are less extensive.

The provision level analysis also extends to how woefully unprepared the American Fourth Amendment, drafted more than two centuries ago, is for modern technology. In a perfectly representative Brookings Institute study, *Constitution 3.0* presents popular (rather than academic) takes by prominent American constitutional scholars in an attempt to illustrate just how little modern technology can reasonably be read into the American constitution.[42] No such provision level literature exists for international constitutional drafting, even with respect to post-war constitutions such as Germany and India that are more than half a century old.

Unfortunately, this leaves a hole for those interested in drafting a new constitution. That is, how should individual provisions be crafted. Historically, this has mainly been the provenance of white papers and policy briefs by governments, inter-governmental agencies and non-governmental actors. Simply put, it should not be. In order to operationalize the research listed above there must be rigorous, academic work that includes not just the forward-thinking work of Law and Versteeg on what rights are *and should be* a part of constitutional regimes, but also what those provisions should entail based on the experience of a wide variety of countries in their own drafting process and intervening years and decades.

41. *See* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 981 (2011).

42. *See generally* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE (Jeffery Rosen & Benjamin Wittes eds., 2011).

II. CONSTITUTIONAL PROVISIONS

Extremely rapid technological changes make privacy and search and seizure provisions perhaps the most temporally effected of all constitutional provisions. The two major constitutional-age related issues with the United States constitution that are discussed in the introduction, life-tenure for federal judges and the right to bear arms, are both anomalies on the same order as the U.S. Constitution's age. While life-tenure for high court judges are present in the constitution of no other Western democracy,[43] the right to bear arms is present in only three constitutions worldwide, the United States, Mexico and Guatemala, the latter two specifically allowing for the right to be regulated by law.[44]

However, other rights provisions that are prominent parts of most constitutional regimes are generally less affected by the passage of time than privacy clauses. According to Law and Versteeg, there are five rights that were included in at least 95% of all constitutional regimes as of 2006.[45] This included Freedom of Religion, Freedom of the Press and/or Expression, a constitutional guarantee of equality, the right to private property and the right to privacy.[46] While it is not difficult to envision situations in which the freedom of religion is rapidly developing, or what constitutes press or expression is challenged, the right to privacy faces a constantly changing environment with a steady barrage of new technology. This is unlike any other top order constitutional right.

The effect of rapid technological change also makes a chronological analysis structure appropriate for privacy rights. For this reason the paper will examine the U.S. Constitution, along with the German Basic Law, the South African Constitution and the Kenyan Constitution for drafting circumstances and textual similarities that can inform future drafting efforts. These selections represent the first written constitution, an influential post-war document, a constitution drafted in the wake of the fall of the Soviet Union and a modern document that, while not having the time to become broadly influential, has been widely praised for its progressive nature.

43. Eric Segall, *Supreme Court Justices: The Case for Hanging it Up*, L.A. TIMES (Feb. 24, 2013), http://articles.latimes.com/2013/feb/24/opinion/la-oe-segall-justices-supreme-court-tenure-20130224.

44. Thomas Ginsburg, Zachary Elkins, & James Melton, *U.S. Gun Rights Truly are American Exceptionalism*, BLOOMBERG VIEW (Mar 7, 2013, 6:30 PM), http://www.bloombergview.com/articles/2013-03-07/u-s-gun-rights-truly-are-american-exceptionalism.

45. Law and Versteeg, *supra* note 20, at 773-74.

46. *Id*.

A. United States

> ***Fourth Amendment***
>
> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*[47]

The American Fourth Amendment, as any constitutional provision or law, is derived from an enormous number of sources. According to Professor Thomas K. Clancy, none of these influences is greater than the experience of the colonists with general warrants or "writs of assistance" at the hands of the English crown.[48]

While the colonies were still under English law it was not uncommon for "writs of assistance" to be written, without specificity, allowing for law enforcement to enter innumerable homes under the guise of judicial order.[49] The lack of specificity is important in the development of the eventual constitutional provision, as ambiguity allowed for selective enforcement and an escape from the rule of law. This would be perfectly stated by Justice Robert Jackson more than a century and a half after the constitution was drafted, "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[50] It is this experience that would lead to the focus on particularity described in the second clause of the Fourth Amendment.

There is also tremendous common law influence found in the provision, with the inclusion of "home" alongside persons, papers and effects. This is a constitutional representation of the oft-uttered maxim that at English common law "every man's home is his castle," going back to at least 1603.[51]

The further inclusion of "persons . . . papers and effects" seems to simply reflect a security in one's person and the methods of communication and information of the time. This element of the text never underwent any serious wording changes during the drafting and ratification processes, rather, they seem to have been widely agreed upon.[52]

47. U.S. Const. amend. IV.
48. Clancy, *supra* note 41, at 994.
49. *Id*. at 993-94.
50. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).
51. *See generally* Semayne's Case, (1604) 77 Eng. Rep. 194 (K.B.) 195; 5 Co. Rep. 91a, 93b.
52. Clancy, *supra* note 42, at 1044-1051.

Throughout the creation of the Fourth Amendment of the United States Constitution, we see a number of elements being taken into account by the drafters. First, there is the explicit experience of the colonists in the pre-constitutional and pre-independence era. Second, there is English Common Law, a body of law in which a substantial number of the drafters were trained. Finally, there is an element of the average daily experience of individuals at the time, who communicated and took notes and sent letters as "papers," carried their lives on their "persons" or in their "houses" and had "effects."

B. Germany

> ***Article 10***
>
> *1. The privacy of correspondence, posts and telecommunications shall be inviolable.*[53]
>
> ***Article 13***
>
> *1. The home is inviolable.*[54]

Germany's Grundgesetz, or Basic Law, is another one of the constitutions generally regarded as extremely influential on international constitutional drafting. In particular, the Grundgesetz has been called the "most important post-war constitution."[55] While the Basic Law itself has seen a decreasing, or at very least stagnating, influence on constitutional drafting,[56] the privacy provision, above, presents a model of domestic experience influencing both the means of protection and the rigid levels of protection of privacy in constitutional drafting.

According to Professor James Q. Whitman, the privacy provisions found in the German Basic Law come from two major elements of German history.[57] The first goes back even further than the Grundgesetz, stemming

53. GRUNDGESETZ [GG] [BASIC LAW], art. 10(1), translation at https://www.constituteproject.org/constitution/German_Federal_Republic_2012.pdf?lang=en art.; GRUNDGESETZ [BASIC LAW], art. 13(1).

54. The two provisions would be amended in 1968 and 1998, allowing for significant legal restrictions on the right to privacy. The full text of both articles 10 and 13, along with 17(a), now provides for times when such rights may be derogated from. *See* GRUNDGESETZ [BASIC LAW], art. 10; GRUNDGESETZ [BASIC LAW], art. 13; GRUNDGESETZ [BASIC LAW], art. 17(a). Consistent with the Castle doctrine discussed above, the restrictions on derogation from the inviolability of the home are considerably better laid out and more stringent than the open "pursuant to law" potential for derogation from the privacy of correspondence, posts and telecommunications.

55. Law and Versteeg, *supra* note 20, at 824.

56. *Id*.

57. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1180 (2004).

from a German intellectual and legal tradition of "personality."[58] According to Professor Whitman, "Personality is a characteristically dense German concept, with roots in the philosophies of Kant, Humboldt, and Hegel. Standard texts describe this concept in the daunting language of continental philosophy. As one recent author explains, the German law of personality is a law of freedom-the law of the Inner Space, 'in which . . . [humans] develop freely and self-responsibly their personalities.'"[59]

While near-identical such provisions were present in the Weimar Constitution,[60] this intellectual and legal tradition became an answer to the tyranny of World War II era Germany, when the concept "flourished."[61] In spite of the textual similarities, the break with the Weimar Constitution is one of unwritten constitutionalism as "[t]he German literature routinely declares that personality was only fully protected in the 1950s, as a consequence of the new commitment to freedom and dignity that took hold in the wake of Nazism."[62] In particular, it delved into a German intellectual tradition that viewed freedom as antithetical to determinism, rather than the Anglo-American concept of freedom as antithetical to tyranny.[63] Under this construction, what World War II Germany represented could be fought by legal personality and privacy, the freedom to determine.

Not only, then, was the Grundgesetz the culmination of a German legal and intellectual history that demanded stringent privacy protections, it is also the historical answer to tremendous political strife and tyranny experienced within the country's borders. While the country's intellectual and political history informed the stringency of the protections, the textual inclusion of posts, correspondence and telecommunications represent the communications technology of the day. In a remarkably forward-looking provision, the Weimar Constitution, drafted in 1919, contained similar protections including telecommunications.[64]

In determining the privacy protections that would be present in the German Grundgesetz, Germany looked to several sources. First, the country looked to its own legal and constitutional history. The privacy protection is nearly a duplicate of that espoused by the country's pre-World War II Weimar Constitution. The document also looked to enumerate the country's intellectual and legal history of "personality," that would fight tyranny

58. *Id*.
59. *Id*.
60. Weimar CONST. Aug. 11, 1919, art. 117.
61. Whitman, *supra* note 57, at 1180.
62. *Id*. at 1186.
63. *Id*.
64. Weimar CONST. Aug. 11, 1919, art. 117.

through self-determinism and an exclusive sphere of self that could not be corrupted by the government. Tyranny, of course, being something the country knew intimately in the wake of World War II.

C. South Africa

> ***Section 14 - Privacy***
>
> *Everyone has the right to privacy, which includes the right not to have-*
>
> *(a) their person or home searched;*
>
> *(b) their property searched;*
>
> *(c) their possessions seized; or*
>
> *(d) the privacy of their communications infringed.*[65]

South Africa, as the newest "influential" constitution included in this analysis, predictably includes considerable influence from comparative constitutional law. This sits in sharp contrast to the American constitution that was heavily influenced by English Common Law (the predecessor to domestic law in the American system) and the German document that borrows heavily from domestic constitutional and legal history along with the country's intellectual history. According to Professor Jeremy Sarkin, the country "followed the recent trend, discernible elsewhere, of borrowing from international instruments, national constitutions and international and foreign decisions in order to benefit from the lessons learned by others."[66]

Professor Sarkin's commentary is confirmed by Law and Versteeg in their own analysis of South Africa's constitutional regime. In their comparative analysis of international constitutions, they measure similarity on a -1 to 1 scale where -1 represents perfect dissimilarity and 1 represents the inclusion of an identical list of provisions.[67] The international average for similarity is .35.[68] At the promulgation of the country's current constitution, South Africa underwent a "mainstreaming," going from well below average, under the apartheid regime, to slightly above average in only two steps, the passage of the country's interim constitution in 1993 and the permanent document in 1996.[69]

65. S. AFR. CONST., 1996, sec. 14.

66. Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L.. 176, 177 (1998).

67. Law and Versteeg, *supra* note 20, at 770-72.

68. *Id*. at 772

69. *Id*. at 828.

This comes as no surprise when one considers the individuals who would play a large part in the constitutional drafting process. For years they had fought against an apartheid system that shunned all international covenants and human rights instruments along with entire bodies of international and comparative law. Additionally, many had left apartheid-era South Africa, studying and teaching law in a number of different countries. According to Professor Sarkin, while many potential bills of rights floated around the South African transitional period, they all "borrowed from the international experience."[70] During the drafting process itself the technical committee "looked to analogously framed bills of rights in other countries, including the German Basic Law and the Canadian Constitution. Similarly, the impact of international human rights documents and the experiences of other countries were also examined."[71]

As the youngest of the "influential" constitutions analyzed, the South African experience had a much larger field of law to draw from, including 120 constitutions that were promulgated in the time between the German Basic Law and the South African Constitution,[72] along with a wide variety of international human rights treaties. The focus on international sources was no accident but a reaction to the political realities of a post-apartheid state that had shunned all foreign law in favor of insular, segregationist and tyrannical governance.

D. Kenya

> ***Section 31 - Privacy***
>
> *Every person has the right to privacy, which includes the right not to have-*
>
> *(a) Their person, home or property searched;*
>
> *(b) Their possessions seized;*
>
> *(c) Information relating to their family or private affairs unnecessarily required or revealed; or*
>
> *(d) The privacy of their communications infringed.*[73]

Kenya's foundational document is included not due to any international influence it plays, as the document is only a few years old, this would be difficult to discern. It is also not included for the purposes of some deep dive

70. Sarkin, *supra* note 66, at 180.

71. *Id*. at 181.

72. Constitute Project, filtered by date between 1949 and 1996, https://www.constituteproject.org/search#?from_year=1949&to_year=1996.

73. CONST. art. 31 (2010) (Kenya).

into the electoral violence and power sharing agreement that led to its drafting. It is included because, as Cornelia Glinz noted, the similarity between the Kenyan constitution and the South African document is "striking."[74] There are few provisions where this is more evident than the privacy clauses of the two regimes. The Kenyan constitution takes the South African provision wholesale, adding an additional clause, giving Kenyans the right to not have "*information relating to their family or private affairs unnecessarily required or revealed.*"[75]

The similarity between the two documents can be accounted for in two ways. First, there is the reputation enjoyed by South Africa's constitution as the continent's most progressive document that led Kenya to look to it for guidance.[76] While it could be argued (and indeed is, by Law and Versteeg) that the similarity need not necessarily imply causation, there is significant evidence that Kenya looked to the trends of comparative constitutional law when drafting its document. According to Law and Versteeg, the country currently has the 7th most "generic" constitution in rights content in the world.[77] This means that the constitution contains remarkably similar content to a "generic bill of rights," crafted from the most common provisions in international constitutionalism.[78] The second potential reason for the vast similarity is described by Ms. Glinz as the active participation by an influential South African constitutional scholar in the drafting and promulgation of the Kenyan document.[79]

While this accounts for the identical provisions of the Kenyan constitution, the additional provision regarding the privacy of information regarding family at 31(c) is unaccounted for anywhere else in the world of constitutional law. This is the clearest evidence available of the "stand on the shoulders of giants" method of constitutional drafting, where the constitutions of other, influential or like-minded countries are used as a basis for constitutional drafting and additions are placed on due to unique circumstances, the passage of time or experiences.

74. GLINZ, *supra* note 28, at 5.

75. CONST. art. 31 (2010) (Kenya).

76. Several scholars have since posited that Kenya's own document has supplanted South Africa's as the continent's most progressive constitution.

77. Law and Versteeg, *supra* note 20, at 778.

78. *Id*. at 776-77.

79. GLINZ, *supra* note 28, at 5 (referring to Christina Murray).

III. ANALOGY AND "CATCH-ALL" METHODS OF INTERPRETATION

Of particular interest when looking into privacy provisions with an eye towards technological advancement are provisions related to "communications." The table below details what is specifically included in the text of the four constitutions discussed above.

USA	Papers and effects
Germany	Correspondence, posts and telecommunications
South Africa	Communications
Kenya	Communications

The two former constitutional regimes use specific types of communication, leaving future jurists to work primarily through analogy, while the South African and Kenyan documents opt instead for catch-all provisions, requiring substantial analysis and know-how on the part of the judiciary. Judicial histories have shown significant problems with both approaches.

A. Analogy

Constitutional interpretation through analogy is a time-worn method of judicial interpretation, but it is not without difficulties and awkwardness, as often unelected judges are asked to make what amount to policy determinations. Nowhere is this more evident than in rapidly advancing technology in the face of aged privacy provisions, something judges are often unschooled in and unprepared for.

Take, for example, one analysis at the U.S. Supreme Court over government monitoring of communications technology that did not exist at the time of the constitution's drafting. Famously, in 1928, the Supreme Court held in *Olmstead v. United States* that a wiretap, installed without a court order, did not constitute a search or seizure and thus did not violate the Fourth Amendment to the United States constitution.[80] Writing for the Court, Chief Justice William Howard Taft held "by the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the

80. Olmstead v. United States, 277 U.S. 438, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

Amendment *cannot be extended and expanded* to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."[81] Taft's analysis included the fact that papers and effects required a tangible taking or a physical intrusion into the property of the defendant, because "[t]he evidence was secured by the use of the sense of hearing, and that only[,]"[82] there existed no such violation.

In a blistering dissent, Judge Brandeis criticizes the Court's opinion for "rel[ying] on the language of the Amendment"[83] rather than expounding it to modern technologies. As new technologies had been invented since the Constitution was drafted, it was necessary to include them within the spirit of the Amendment rather than confining it to physical takings.[84] At the time of the Constitution, "[f]orce and violence were then the only means known to man by which a Government could directly effect self incrimination" the privacy concerns of the case, and as such those were all that was included.[85]

In addition to Brandeis' criticism of the case in front of him, he showed substantial prescience, saying that "[t]he progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home."[86] This, of course, would be something the Court would have to contend with in future cases.

Analogy in judicial interpretation cannot escape this fundamental question. Should textual considerations play *the* central role or be pushed aside based on the "spirit" or "changing means" of what was supposed to be avoided by the Constitutional Amendment. In this particular instance, Justice Brandeis would win the day, as the decision was overturned by *Katz v. United States* in 1967.[87] However, it stood for nearly forty years as good law, a period more than twice the length of the average constitutional regime, and in overturning the decision the majority held that the *Olmstead* decision had been "so eroded" that it could "no longer be regarded as controlling."[88]

81. *Id*. at 465 (emphasis added).
82. *Id*. at 464.
83. *Id*. at 472 (Brandeis J., dissenting).
84. *Id*. at 472-73.
85. *Id*. at 473.
86. *Id*. at 474.
87. Katz v. United States, 389 U.S. 347, 353 (1967).
88. *Id*.

While modern audiences will find the thought that a warrant would not be required for a telephone wiretap absurd, it took the American Supreme Court nearly four decades and a series of decisions "eroding" the *Olmstead* decision to get there. The age of both *Olmstead* and *Katz* may make it difficult to fully draw on the lessons of the Court. It is easy to believe that the fact that *Olmstead* existed nearly a century ago its mistakes would not be repeated. Let us examine one of the Court's most celebrated decisions of 2014.

In *Riley v. California*, the Supreme Court was asked to interpret where smartphones fall in the "search incident to arrest" doctrine that allowed police officers, for safety and in order to prevent the concealment or destruction of evidence, to search the arrestee's person and immediate vicinity without first obtaining a warrant.[89] At issue was whether, at the time of arrest, an officer could go through an individual's smartphone.[90] On one hand, the phone was physically on their person, but on the other hand such advanced technology could contain a near unending amount of digital information.[91]

The Supreme Court held unanimously that this was beyond the doctrine, with Chief Justice Roberts identifying the underlying interpretative principle that would inform the decision.[92] "The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."[93]

To start, the sheer memory of a smartphone allowed for the storage of "millions of pages of text, thousands of pictures or hundreds of videos."[94] That went beyond the "narrow intrusion of privacy" previously allowed by the search incident doctrine.[95] This is particularly important when compared to the time period where the search incident doctrine was developed. According to the Court, where "[a] decade ago officers might have occasionally stumbled across a highly personal item such as a diary. . .adults who own cell phones keep on their person a digital record of nearly every aspect of their lives."[96] Additionally, the various types of information had the potential to "reveal much more in combination than any isolated record"

89. Riley v. California, 134 S. Ct. 2473, 2477 (2014).
90. *Id*. at 2480.
91. *Id*. at 2478.
92. *Id*. at 2494-95.
93. *Id*. at 2495.
94. *Id*. at 2489.
95. *Id*.
96. *Id*. at 2490.

and the "phone's capacity allows even just one type of information to convey more than previously possible."[97]

It is easy to look at *Riley* and believe it belies the problem with analogy. After all, not only was the decision lauded by civil libertarians as the correct policy result, it was also claimed by court-watchers that this "signal[ed] a Court more prepared to engage in the challenges of the digital age ahead."[98] Unfortunately this ignores what it took for the case to arrive at the Supreme Court.

In addition to the case's procedural history, which had seen the California Supreme Court rule that the officer was able to search Riley's cell phone incident to arrest relying on a recent California Supreme Court case *Diaz v. California* holding the very same, there existed a significant circuit split on search incident to arrest and smartphones.[99] According to the Electronic Privacy Information Center's *amicus* brief in *Riley*, prior to the Supreme Court's decision, "The Fourth, Fifth, and Seventh Circuits [had] ruled that officers can search cell phones incident to arrest under various standards, and that rule has been followed by the Supreme Courts of Georgia, Massachusetts, and California. Other courts in the First Circuit and the Supreme Courts of Florida and Ohio [had] disagreed."[100]

While the circuit split and the time between the California Supreme Court ruling and the Supreme Court overturning is insignificant in comparison to the nearly four decades between *Olmstead* and *Katz*, it is not the time frame that is important when examining the failure of privacy law in adapting to technology. More important is the time that lapsed between the widespread use and ownership of cell and smartphones and the original legal failure to understand or provide guidance on their Fourth Amendment implications.

According to Pew Research, as of 2000 more than half of American adults had a cell phone.[101] Smartphones are a more recent technological advancement, but even they are now in the hands of nearly two thirds of American adults, up from just over one third when the question was first

97. *Id*. at 2489.

98. Marc Rotenberg & Alan Butler, *Symposium: In Riley v. California, a Unanimous Supreme Court Sets Out Fourth Amendment for Digital Age*, SCOTUSBLOG (June 26, 2014), http://www.scotusblog.com/2014/06/symposium-in-riley-v-california-a-unanimous-supreme-court-sets-out-fourth-amendment-for-digital-age.

99. *See Riley v. California*, ELEC. PRIVACY INFO. CTR., http://epic.org/amicus/cell-phone/riley (last visited Sept. 23, 2016).

100. *Id*.

101. Device Ownership Over Time, PEW RESEARCH CTR., http://www.pewinternet.org/data-trend/mobile/device-ownership (last visited Sept. 23, 2016).

posed in 2011.[102] Additionally, as of early 2014 more collective time was spent accessing the internet on mobile devices than was spent on personal computers.[103]

While the most rapid advancement in smartphone usage has taken place over the last few years, cell phone usage has been prominent for nearly a decade and a half. This is long enough that there should not be the confusion over Fourth Amendment implications that led the California Supreme Court to issue an opinion that would ultimately be overturned.

As the circuit split and California Supreme Court case that led to the Supreme Court finally weighing in on the search of smart phones incident to arrest demonstrate, a significant amount of time is spent playing catch up when analogy is used to determine what is protected in privacy and search and seizure provisions. Even after a long period elapses, there is no guarantee that the Court will know how to contend with new technologies, as the Supreme Court demonstrated in *Olmstead*. It is true, as Chief Justice Roberts wrote, that new technology is no less worthy of protections simply because it fits in a pocket,[104] but it is also true that courts have had some difficulty knowing when or how to protect such information.

This is not a uniquely American problem. As discussed in great detail above, the average constitutional regime is 17 years, which, while miniscule in comparison to the unique and unchanging American document, is long enough to be vastly outpaced by technology.

The German Grundgesetz also uses the analogy method of constitutional interpretation, specifying the protection of "correspondence, posts and telecommunications." While the German Federal Constitutional Court need not deal with the likes of *Olmstead* due to the express protection of telecommunications, technological advances have also forced the Court to do some "gap-filling."[105]

The main method of the Constitutional Court has been the expansion of the legal "personality" concept that informed the privacy sphere of the country's Basic Law. In particular, the Court has created a right of

102. *Id*.

103. Rebecca Murtagh, *Mobile Now Exceeds PC: The Biggest Shift Since the Internet Began*, SEARCH ENGINE WATCH (July 8, 2014), http://searchenginewatch.com/article/2353616/Mobile-Now-Exceeds-PC-The-Biggest-Shift-Since-the-Internet-Began.

104. *Riley*, 134 S. Ct. at 2495.

105. Paul M. Shwartz, *Regulating Governmental Data Mining in the United States and Germany: Constitutional Courts, the State and New Technology*, 53 WM. & MARY L. REV. 352, 367 (2011).

"informational self-determination" that "safeguards the general ability to decide 'when and within which borders, personal life facts are revealed.'"[106]

Not only, however, is this a judicially created right, it is not unlimited. According to the Court's *Census* decision, the individual does not have a right in the sense of an absolute mastery over 'his' data; he is rather a personality that develops within a social community and is dependent upon communication."[107]

The limitations on this right were reiterated in the recent *Data Screening* case, where the Court detailed a balancing act test for applicability of the right, writing "the fundamental right of informational self-determination is not guaranteed without limits. Rather, the individual must accept such limitations of his right that are justified by weightier public interests."[108]

The balancing interests method detailed in the *Data Screening* case is a commonality of important constitutional analysis worldwide. Quite often in the ordinary course, courts are asked to weigh the most important of individual rights against one another. This is a predictably difficult and unscientific process, but one that justices are well suited for based on their legal expertise. It is only made more difficult with limited guidance from either the constitution or the legislature, as is the case too often in constitutional democracies.

The German Federal Constitutional Court has placed an additional balancing test on the question, further complicating the matter for lower courts, the principle of subsidiarity.[109] This requires a balancing of privacy interests that allows for the determination of a "least intrusive" means of surveillance.[110] More intrusive methods may only be used when less intrusive means are "exhausted or at least considered," and the less intrusive means make monitoring impossible or "significantly more difficult."[111]

This test was lauded for "pursu[ing] proportionality between investigative means and evidentiary payoffs" in an effort to avoid the total surveillance that the Federal Constitutional Court has ruled unconstitutional.[112] However, it adds another layer to the balancing test of standard constitutional analysis, and the layer added is one that justices are

106. *Id*. at 368 (*quoting* Dragnet II, 115 BVerfGe 320, dec., para. 69, (German Federal Constitutional Court, Apr. 4, 2006).

107. 65 BVerfGe 1, jgmt., para. 156, (German Federal Constitutional Court, Dec. 15, 1983).

108. Dragnet II, 115 BVerfGe 320, judgment, para. 81, (German Federal Constitutional Court, Apr. 4, 2006).

109. Jacqueline E. Ross, *Germany's Federal Court and Regulation of GPS Surveillance*, 6 GERMAN L.J. 1805, 1808 (2005).

110. *Id*.

111. *Id*.

112. *Id*. at 1808-09.

ill suited for. While the experience of judging makes weighing rights and legality well within the competence of a justice, adding "evidentiary payoffs" and new technology to the equation throws in two areas that judges almost certainly lack competence, further complicating the relationship between privacy concerns, new technology and the law.[113]

B. Catch-All

The "catch-all" provisions of South Africa and Kenya create a difficult temporal problem that stems from a potential over-broad initial interpretation and confusion on a time frame. A judge analyzing new technology for the applicability of South Africa's Section 14 could feasibly fit virtually anything into communications, leading to its protection against infringement by the Constitution.

Take, as an analogy, the communications technology of the 1800's that are specifically protected in both the American and German constitutions.

There is little, if any, doubt that letters constitute communications that would implicate Section 14 of the South African Constitution.

However, at what point of storage are they no longer communication?[114] If an individual saved every letter ever written to him or her, would their letters continue to warrant protection forever? The most reasonable answer to this question seems yes.

How about adapting the issue to modern technology as was implicated by American Chief Justice Roberts in *Riley*, where correspondence that would have filled an entire library now fits within a cell phone in one's pocket?

An email sent to an account years ago could remain in the bowels of a server, seldom (if ever) thought about, however accessible by a few keystrokes or, more aptly, a swipe or two on a smartphone. Does this remain a communication under the meaning of South Africa's Section 14? Again, the answer seems yes.

What if the email leaves the email server but is stored on a cloud service that is accessible only by the recipient? Who, then, is the communication with? Must communications be two sided? If they are not, then when, after years in storage, does email cease being a communication? Text messages? Messages through social media?

113. *Id*. at 1808.

114. This analogy comes from an email exchange with Stephen Ellman, Professor of Law and Co-Chair of the South Africa Reading Group at New York Law School.

How is this effected if one intends to destroy a message but it is saved through an internet failsafe? What about messages that are meant to be destroyed but accidentally saved?[115]

If the answer to all of these questions is that they are communications and thus implicate section 14, law enforcement could be significantly hampered by the tendency of modern technology to save everything on a cloud service, leaving the possibility open that one is "communicating" with a cloud service.

In effect, the difficulty of a "communications" catch-all is that in being over-broad it ceases to have meaning. If everything can be a communication in the meaning of the section then nothing can be protected any more stringently than anything else.

The reality between analogy and catch-all provisions is, of course, much more muddled. Judges routinely use analogy to past cases, and previously encountered situations, in order to bring in new technology via catch-all provisions and analogy broadens specific wording in ways that make even the most specific provisions appear to be catch-alls. This, of course, is part of the problem. Adapting a static constitution to ever-changing technological advancement breeds awkward analogies and limited fealty to text. While it is often necessary, very few would say it is an ideal way to deal with constitutional drafting.

IV. PROBLEMS WITH THE CURRENT METHOD OF DRAFTING AND INTERPRETATION

In the above analyzed provisions we have identified a pair of problems. First, the major sources of constitutional drafting are necessarily backward looking. This, while problematic in its own right, compounds the second problem, a lack of technological expertise among judges by lacking specificity and increasing the interpretative power of often ill-equipped judges.

A. Backward-Looking Drafting

Predictably, the two greatest sources of international constitutional law are domestic history and comparative constitutional law. There seems to be something of an inverse relationship, where newer constitutions, seeing a

115. *See* Terrence McCoy, *A Massive Leak of Private Snapchat Pics - and an Era When Even Disappearing Photos Can Reappear*, WASHINGTON POST (Oct. 13, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/10/13/a-massive-leak-of-private-snapchat-pics-and-an-era-when-even-disappearing-photos-can-reappear.

much richer history of international constitutional law, make greater use of that body. This necessitates less innovation and a smaller focus on the country's political, legal or intellectual history.

For example, while America looked at its own legal and political history and Germany reached back to its own intellectual history for the legal "personality" that demanded stringent privacy protections, South Africa looked to international documents, both due to a much greater body of such documents and as a political answer to a despotic government that had long shunned such comparative and international sources. Kenya, drafted a decade and a half after the South African document, had even greater access to comparative and international sources, using identical language to South Africa but adding a new clause.

This furthers the problem of a backward-looking document. In order for a constitutional provision to become "influential," it must have time to prove its worth. That makes it a further reach into the past for drafters looking to it for guidance, where technology may have looked nothing like what it does today.

Simply put, as the body of international and comparative law grows, there is much more experience and text to draw upon, and it is drawn upon. As Law and Versteeg's research shows, the list of rights included in constitutions is getting more and more similar.[116] Namely, "the world's constitutions increasingly share a generic, and growing, core of rights-related provisions."[117] It stands to reason that as constitutions move towards a standard or "generic" collection of rights, there would be increasing textual similarities between those rights.

Without regard to the level each is implicated, domestic history and comparative constitutional law being the primary methods for constitutional drafting pose a substantial problem with technological advancement. Namely, they are both backward looking. While it is vitally important to look to both political and legal history, as well as comparative sources and experiences for guidance, as discussed earlier, even the experiences and sources of a decade ago may have succumbed to near-irrelevancy based on rapid technological advancements.

B. Lack of Technological Expertise on the Bench

The second major problem stems from the simple fact that judges need not be schooled in technological advance in order to earn or maintain a seat on the bench. Whether the preferred method of interpretation is through

116. Law and Versteeg, *supra* note 20, at 779.

117. *Id*. at 776.

analogy or a catch-all provision, the judge is asked to determine the applicability of privacy and search and seizure provisions on new technology that he or she may not understand. In the American example, it took nearly four decades for the Supreme Court to determine that wiretapping was akin to the correspondence of old. The German example, while attempting to set up a balancing test that will allow law enforcement the necessary leeway while protecting privacy concerns, simply sets up another layer of technological and evidentiary analysis that German judges must work with, and these are just the examples discussed above.

A lack of understanding of modern technology is a virtual hallmark of judges who have risen to a position where they are tasked with constitutional interpretation, whether that be in a constitutional court as is the case in much of the world or in an American federal court.

There are a number of anecdotes regarding the slow speed of courts to adopt or understand technology. In oral arguments at one recent case an American Supreme Court Justice referred to popular internet movie system Netflix as "Netflick," elucidating harsh criticism from analysts.[118] In a similar slip up, Chief Justice Roberts seemed positively baffled when finding out that there are individuals who carry more than one cell phone.[119]

If it were simply anecdotes that did not change legal reasoning, this would simply be fodder for cheap laughs, but the lack of understanding often works its way into legal reasoning. During the *Riley* oral arguments, Justice Breyer (who was ranked second of the nine members of the Court in technological savviness after the *Aereo* arguments discussed below[120]) stated that he thinks "there are very, very few things that you cannot find an analogue to in pre-digital age searches."[121] This is a problem for the outcome of cases.

In one prominent American case, *ABC v. Aereo*,[122] technological ineptitude on the high court was on full display. The Supreme Court, in attempting to make analogy to technology that was statutorily regulated, continually failed to understand the technology at hand. According to Notre

118. Lawrence Hurley, *In U.S., When High-tech Meets High Court, High Jinks Ensue*, REUTERS (May 9, 2014), http://www.reuters.com/article/us-usa-court-tech-idUSBREA480N420140509.

119. Selina MacLaren, *The Supreme Court's Baffling Tech Illiteracy is Becoming a Problem*, SALON (June 28, 2014), http://www.salon.com/2014/06/28/the_supreme_courts_baffling_tech_illiteracy_is_becoming_a_big_problem/.

120. Andrew Freedman & Jason Abbruzzese, *The Supreme Court Justices: Ranked by their Tech Savvy in the Aereo Case*, MASHABLE (Apr. 22, 2014), http://mashable.com/2014/04/22/supreme-court-justices-tech-knowledge.

121. MacLaren, *supra* note 120.

122. 134 S. Ct. 2498 (2014).

Dame Law Professor Mark McKenna, this fit into a wider divide between courts attempting to understand new technology.[123] On one hand, courts attempt to view new technology in non-technical terms, thus analogizing through the effect of such innovation.[124] On the other hand courts have attempted to view in technical terms, something many are unable to do adequately.[125]

The former is problematic as it causes over-broad analogies that implicate (often errantly) wide ranges of technological advancement. It is also a prominent feature of constitutional analysis in privacy provisions.

Such analysis is not meant to bemoan the legal scholars who currently sit on the bench. American Supreme Court Justices from both sides of the ideological divide, for their part, have openly discussed their lack of technological expertise. Justice Stephen Breyer, in a speech at Vanderbilt Law School, admitted that he was confounded by the film *The Social Network* in the context of his personal difficulty in applying the First Amendment to things like "the internet" and "Facebook."[126] Justice Samuel Alito similarly told the Federalist Society that while the Court is tasked with determining what is a "reasonable expectation of privacy" in certain technologies, they are "very ill-positioned to make [such] determinations" because they are "not up on all the latest technology."[127]

The broad South African and Kenyan examples exacerbate the problem, in comparison to the relative specificity of the American or German provisions. The potentially over-broad "communications" clause allow wide leeway to often unprepared judges, giving them no guidance rather than the limited amount provided by more specific provisions. It may also be problematic because the lack of specificity, in theory, enhances the problem of lack of technological skills on the bench by giving judges even more interpretive power.

In either drafting strategy, a judge, who may have no particular knowledge regarding communications technology, may make errant analogies that errantly include or exclude technology from constitutional protections.

123. Mark P. McKenna, *The Limits of the Supreme Court's Technological Analogies*, SLATE (June 26, 2014), http://www.slate.com/articles/technology/future_tense/2014/06/abc_v_aereo_ruling_the_supreme_court_s_terrible_technological_analogies.single.html.

124. *Id*.

125. *Id*.

126. Nitasha Tiku, *Justice Breyer Confounded by The Social Network*, N.Y. MAGAZINE (Nov. 17, 2010), http://nymag.com/daily/intelligencer/2010/11/justice_breyer_thoroughly_conf.html.

127. *Staci Zaretsky, Justice Alito says SCOTUS is Clueless on New Tech, Which Makes Privacy Cases Even Harder*, ABOVE THE LAW (Sept. 21, 2015, 1:46 PM), http://abovethelaw.com/2015/09/justice-alito-says-scotus-is-clueless-on-new-tech-which-makes-privacy-cases-even-harder.

It is true that this is a necessary part of constitutional law, judges determining whether constantly changing situations fit into broad provisions drafted at a country's legal beginning. However, the particular speed of technological and communications advancement makes it a different entity than say, the adapting standards of cruel and unusual punishment or expanding classes in equality and equal protection provisions. As discussed in great detail above, speed of communications technology has vastly outpaced any other area implicated by constitutional law. This has left judges, who are often ill-equipped to make often awkward analogies, include everything or move towards ignoring the actual language of the constitution.

V. CRITICISMS AND POLICY PRESCRIPTIONS

So far in this article we have identified a two pronged problem. First, constitutional privacy provisions are drafted in a way that is fundamentally backward looking. Second, such privacy provisions are necessarily interpreted by judges that are not technologically savvy enough to adequately understand the latest technology. While the two prongs themselves may be difficult to fix individually, the common result, of flawed analogy and difficult inclusion of modern technology in aging constitutional regimes, requires significant analysis.

In order to draft a privacy provision that will stand up to time and adapt to changing technology, the drafters must be forward thinking and greater clarity is necessary for judges that are not necessarily technologically literate. This section will proceed by first detailing a potential criticism of fundamentally remaking future constitutional regimes in an effort to remedy the problem above. That is, the current existence of *amici* in many constitutional regimes, meant to aid the judiciary in reaching decisions on areas outside its competence. After detailing why relying on such friend of the court briefs is not an adequate solution, the section will detail three potential solutions: the use of a special master and two others, referred to as the administrative method and the amendment method. The section concludes that the last two are preferable because the special master method suffers from many of the same pitfalls as *amici.*

A. Amicus Curiae *Briefs*

One of the most important criticisms of this approach is that innovation, or starting a new program anew, is unnecessary as *amicus curiae* briefs already exist to give guidance to ill-informed judiciaries on issues outside their legal specialties. Such criticism results from a flawed understanding of both the efficacy and reliability of such briefs.

Amicus curiae, or friend of the court briefs, have long served to inform courts on issues of which they are ill-informed. Not only are such briefs an important part of common law jurisdictions across the globe, they are also becoming increasingly common in civil law jurisdictions.[128]

While *amici* serve a valuable purpose in theory, the tremendous increase in such briefs worldwide leads to the possibility that they will fade to the background as partisan white noise, where so many such briefs are filed from advocacy groups that they are regarded as mere advocacy rather than reliable information. In the American example, recent terms have set records in terms of *amici* filed, with more than 800 filed in the 2013-2014.[129] While this did not eclipse the record, set in 2012-13 of 1001, it did amount to more than 12 per signed decision.[130]

The trend is not just in America. The United Kingdom, Canada and Australia have all seen upticks in *amici* participation over the last few decades due to increases in cases involving constitutional interpretation.[131]

As Professor Alison Orr Larsen points out in the University of Virginia Law Review, as the numbers of *amici* increase, so too does the flood of information and "it becomes increasingly difficult to sort the reliable *amici* information from the unreliable."[132]

This is important as "[i]t is a mistake to conclude that the Justices can easily tell which of these *amici* are real factual experts and which of them are not. Most of the names on the covers of the briefs sound neutral and mask the advocacy that may be motivating them,"[133] and Justices are not seeking to do so. Instead, the Supreme Court is increasingly citing the briefs as "factual authorities" without critically examining the advocacy/motivation behind studies or journal articles.[134] This is a troubling development.

According to Professor Larsen, one of the major drivers of such expansive and questionable "facts" in *amici* is the ease of posting biased or "junk science" studies on the internet, which then find their way into *amici*

128. *See generally* Steven Kochevar, Comment, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L.J. 1653 (2013).

129. Anthony J. Franze & R. Reeves Anderson, *Justices are Paying More Attention to Amicus Briefs*, NAT'L L. J. (Sept. 8, 2014), http://www.nationallawjournal.com/supremecourtbrief/id=1202668846551/Justices-Are-Paying-More-Attention-to-Amicus-Briefs?slreturn=20140923110830.

130. *Id*.

131. John C. Mubangizi & Christopher Mbazira, *Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa?*, 16 L., DEMOCRACY & DEV. 199, 202 (2012).

132. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1762 (2014).

133. *Id*.

134. *Id*.

and, occasionally, Supreme Court decisions.[135] As internet access grows, this trend is likely to replicate across the *amici* accepting world.

As technology advances, it becomes increasingly important to give guidance to those not schooled in such advances who make policy. This includes not just the generalists who occupy the seats of legislatures, but also the legal specialists who occupy constitutional courts. As the trustworthiness of *amici* fades into the background, it becomes increasingly difficult to give guidance to the bench, even as it becomes increasingly important to do so.

The inability to give adequate, impartial guidance to ill-prepared justices on issues of technology and privacy leaves two options for remedying the problem discussed above. First, one could ensure that only the technologically savvy are invited to the bench. This seems like an impossibility, as those with distinguished enough legal knowledge to serve as judges cannot be expected to be experts in the minutiae of every area in which they will rule even within the law, much less of it. Second, a method must be fashioned that allows greater guidance to the judges from the constitution they will be interpreting. Below are three potential ways to do just that.

B. Special Master Method

The first potential solution is through the use of a slightly modified special master. This method would serve to maintain the general structure of systems that currently exist, but attempt to remove the potential bias stemming from *amici* identified above.

Traditionally, special masters are individuals appointed by courts to ensure judgments are followed.[136] According to Federal District Judge Jack Weinstein, a special master acts as both "a bridge" and "a buffer" for the Judge.[137] While this can be the case in everyday cases involving things such as family law or injunctions, its applicability to the problem discussed above is much more similar to that of *amici*.

With a slight modification, a special master, either as an individual or a committee, could be appointed to advise judges on modern technology. This would serve to assist with competence on technological issues but potentially avoid the bias of *amici* discussed by Professor Orr Larsen above.

While such a system has the distinct advantage of limiting differences between future systems and ones currently in existence, it does not solve the

135. *Id*. at 1761-62.

136. *See* Jack B. Weinstein, *Federal Trial Judges: Dealing with the Real World*, 69 U. MIAMI L. REV. 355, 358 (2015).

137. *Id*.

problem at the source and merely serves as a bandage over the symptoms. As discussed above, the broad problem is the requirement that ill-prepared judges are tasked with determining the applicability of constitutional provisions drafted looking backwards rather than forward at constantly advancing technology. A special master would serve to inform such judges, but the ultimate decision would either: a) lay with judges who cannot possibly be asked to master a new technology for each case; or b) be arrived at through near-total deference to a special master who would be outside the constitutional or statutory framework for judicial appointments.

There is also a possibility in deeply polarizing and controversial issues that the special master method would fail to alleviate the bias present in *amici*. There is no doubt that in particularly controversial issues, the individual or individuals appointed to the special master position would be a matter of exceptional political wrangling. This allows for the insertion of partisan or "junk science" into the process, with the major difference between *amici* and a special master being the positioning of the source, inside the system for a special master versus outside for *amici*, rather than a lack of bias stemming from the special master method.

Even if the position is purely meritocratic, some individuals will no doubt exercise much greater influence over judges than others. Judge Weinstein nearly admits such when he recommends using "smart" special masters "who you know would never embarrass the court-preferably a friend."[138] One does not need extensive psychological training to be concerned that a friend would exercise greater influence than an independent outsider, regardless of training and talent.

C. Administrative Method

The administrative method would be facilitated by the creation of an annex to the constitution that lists technology to be included under a broad banner of privacy protections. In such a system, a constitutional drafting committee would write a provision somewhat akin to the system used in South Africa or Kenya, but instead of including "*the privacy of communications shall not be infringed*" the drafting committee would include "*the privacy of communications of technology in Annex A shall not be infringed*" along with the creation of an annex to the constitution that includes technological avenues for communications that are protected by the provision. A sample annex today would include telecommunications, e-mail, text messages and various forms of social media.

138. *Id*.

The key to such an annex would be those tasked with its upkeep. In addition to the provision creating such an annex, a committee should be tasked with near-constant updating of the list. There are three immensely important elements of such a committee tasked with the upkeep of such an annex.

First, the committee must be able to update the annex outside of the normal amendment process. This would allow for an annex that can be updated, rather than allowed to lag behind the creation of modern technology. This would prevent a situation in which it takes nearly four decades for search and seizure provisions to apply to non-physical intrusions such as telecommunications or e-mail.

Second is the independence of such a committee. As the judiciary is already the entity most often tasked with interpreting the constitution even if it is occasionally woefully unqualified, independence procedures and safeguards for such a committee could mimic those of judicial independence. The literature on such procedural safeguards is huge, but there is some indication that the main factors influencing independence that are relevant to such a committee are the selection procedure, tenure, salary and whether or not decisions are published or kept private.[139] These should all be addressed in the creation of such a constitutional committee, ensuring that it is independent from other elements of government, such as the executive branch that may seek greater police powers.

Finally, the qualifications of individuals on such a committee are also imperative. As the idea stems from taking a task that the judiciary is woefully under qualified for out of the hands of judges, it is necessary that such decisions are passed off to qualified individuals.

This approach has the advantage of taking the task of analogizing or including communications technology that judges often do not fully understand out of the hands of the judges themselves, instead giving them extensive guidance. An annex that includes technologies could be used as statutory language and judges would be able to simply interpret the law, the job they are most equipped for. For example, rather than determining whether Snapchat or a blog deserve the same protections as their predecessors, correspondence and newspapers, judges can spend time determining whether a search or seizure took place and what the appropriate remedy for a violation is.

The administrative approach would also assist in the temporal issue by removing the addition of new technologies from the ordinary amendment or

139. Lars P. Feld & Stefan Voigt, *Making Judges Independent: Some Proposals Regarding the Judiciary*, CESIFO WORKING PAPER NO. 1260 9 (2004), http://www.econstor.eu/bitstream/10419/18898/1/cesifo1_wp1260.pdf.

common law process. Where it can take years or decades for new technology to be included into privacy protections from judicial decree, or potentially much longer for the inclusion through amendment, a independent committee of experts would be able to update much faster. While the law will always lag behind technological advancement, the administrative approach would go far in attempting to keep the law from lagging too far behind.

D. Amendment Method

The final approach involves a tiered amendment procedure that is what Ginsburg, Melton and Elkins call "substantive variation."[140] Under such a system the substantive focus of the amendment to a constitution determines the level of support needed for passage. In one example, as Professor Richard Albert has observed in the Trinidadian Constitution, there exist three distinct procedures for constitutional amendment. Depending on the particular issue being amended, in addition to the assent of the country's president, an amendment can require a three-fourths supermajority in the House along with a two-thirds supermajority in the Senate, a two-thirds supermajority in each chamber or a simple majority in each chamber.[141]

Using such a tiered system as guidance, it is easy to envision a situation by which a technological annex is created similar to in the administrative method, but technological advancements are added to the list by a lower vote threshold than other amendment procedures.

In creating such a system the formal amendment procedure is maintained and the potential for political wrangling over the makeup of such a committee is avoided, but the difficulty of technological analogy and inclusion is still taken out of the hands of ill-suited judges. Legislators, who may have no particular technological acumen, are less elevated above the people and thus are asked to have staffers with various specialties and to reach out to various interests to determine the correct answer on particular topics. This makes them generalists with a wide constituency and influences rather than legal specialists like those on the bench.

140. Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, COASE-SANDOR INST. FOR L. & ECON. Working Paper No. 682, 6 (2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2348&context=law_and_economics.

141. *Id*.

An easily amendable provision avoids the trap of a constitution written for technology that is out of date and does not apply to rapidly advancing technologies but may be preferable to legislators who are unwilling to cede additional power to independent commissions, as in the administrative method.

VI. CONCLUSION

According to analysis done by Ginsburg, Elkins and Melton, the average constitutional regime lasts around 17 years.[142] While this is a mere blink of an eye in comparison to some of the older documents, it is long enough to witness substantial changes in the technology of the day. One of the most rapid technological advances in recent years has been in communications technology. This trend seems destined to continue, as new methods for communication pop up on a near-daily basis.

This paper seeks to identify and propose solutions to a problem with constitutional drafting, where backward facing provisions are applied to this constantly changing technology. This leaves often ill-equipped judges with little guidance through overly broad catch-all provisions or necessitates awkward analogy through more specific provisions.

Put simply, this must be changed. Among the proposed solutions, two require little to no change in constitutional drafting, while two require radically new drafting techniques. For a variety of reasons, the former are flawed, leaving new drafting methods necessary.

While *amici,* currently in existence in many constitutional regimes, would require no change to boiler plate constitutional drafting, it is inadequate. Similarly, the use of a special master, requiring only a minor change, is wrought with difficulty. These tools to assist judicial interpretation do not address the underlying issues. For this reason, the paper suggests an administrative method and an amendment method, both of which would allow for the inclusion of experts within the constitutional framework, thus ensuring ill-prepared judges are not left to fend for themselves.

Should the problem not be addressed, with constitutional drafters continuing to use comparative constitutional law and political, legal and intellectual experience to draft constitutional privacy provisions they will only continue to give justices limited guidance through backward-looking provisions. Simply put, by not addressing the problem, one can only expect it to get worse, not better.

142. Ginsburg, Elkins, & Melton, *supra* note 16.