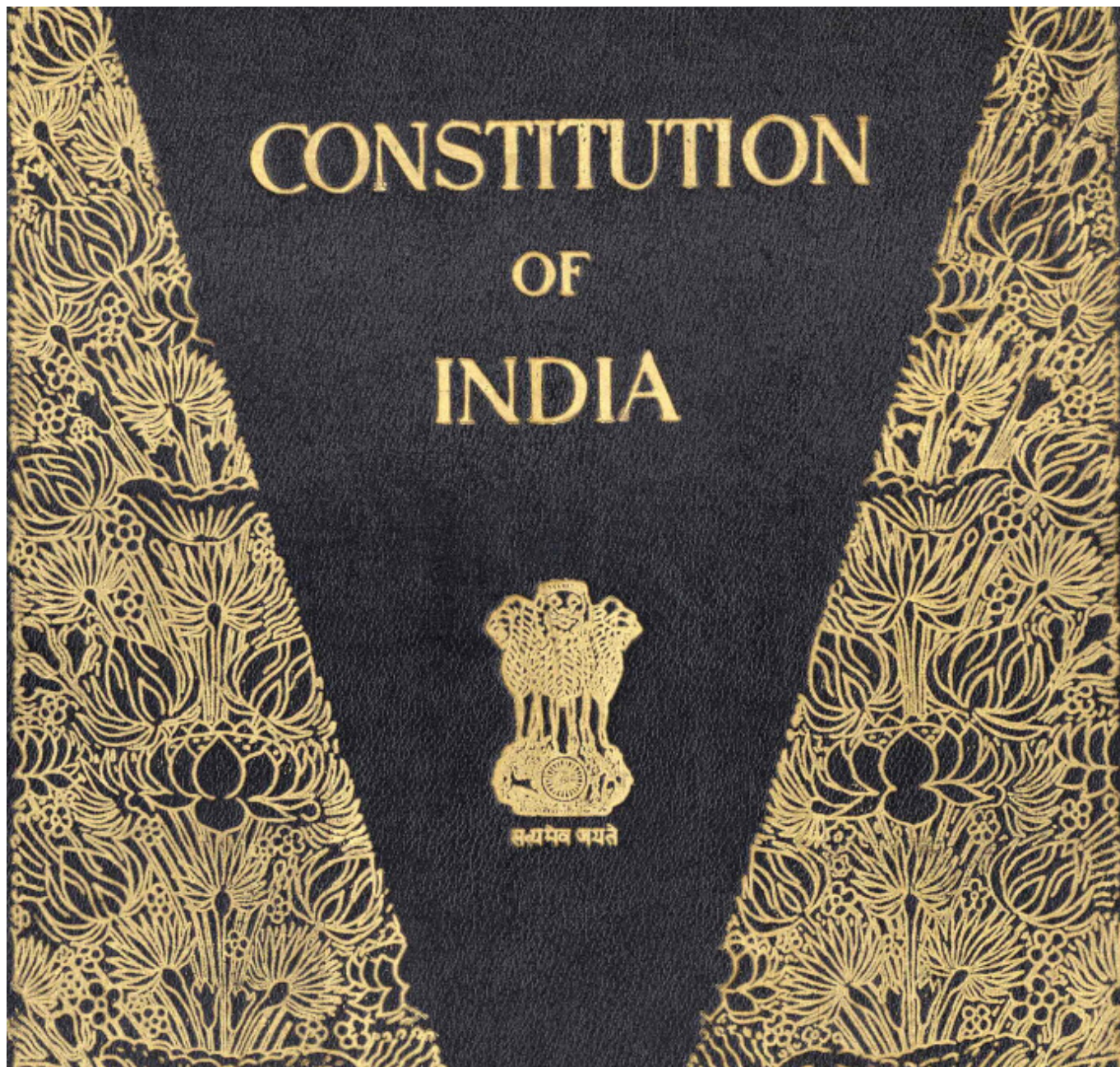


TIF - The Enduring Constitution

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Two recent books that talk about India's Constitution as a people's charter and its transformative character remind us why it remains an enduring document.

Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic*,

Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts*

In early April 1950, M.K. Nambiar sequestered himself at his office in Madras to prepare for the case of his lifetime. Books occupied every table and many volumes were stacked on the floor. The case involved A.K. Gopalan, a communist organiser, who had been jailed for making "violent" speeches. The provincial government slapped case after case against Gopalan to keep him in custody even though the Madras High Court had twice ordered his release. In March that year, the government detained Gopalan under the newly enacted Prevention

Detention Act.

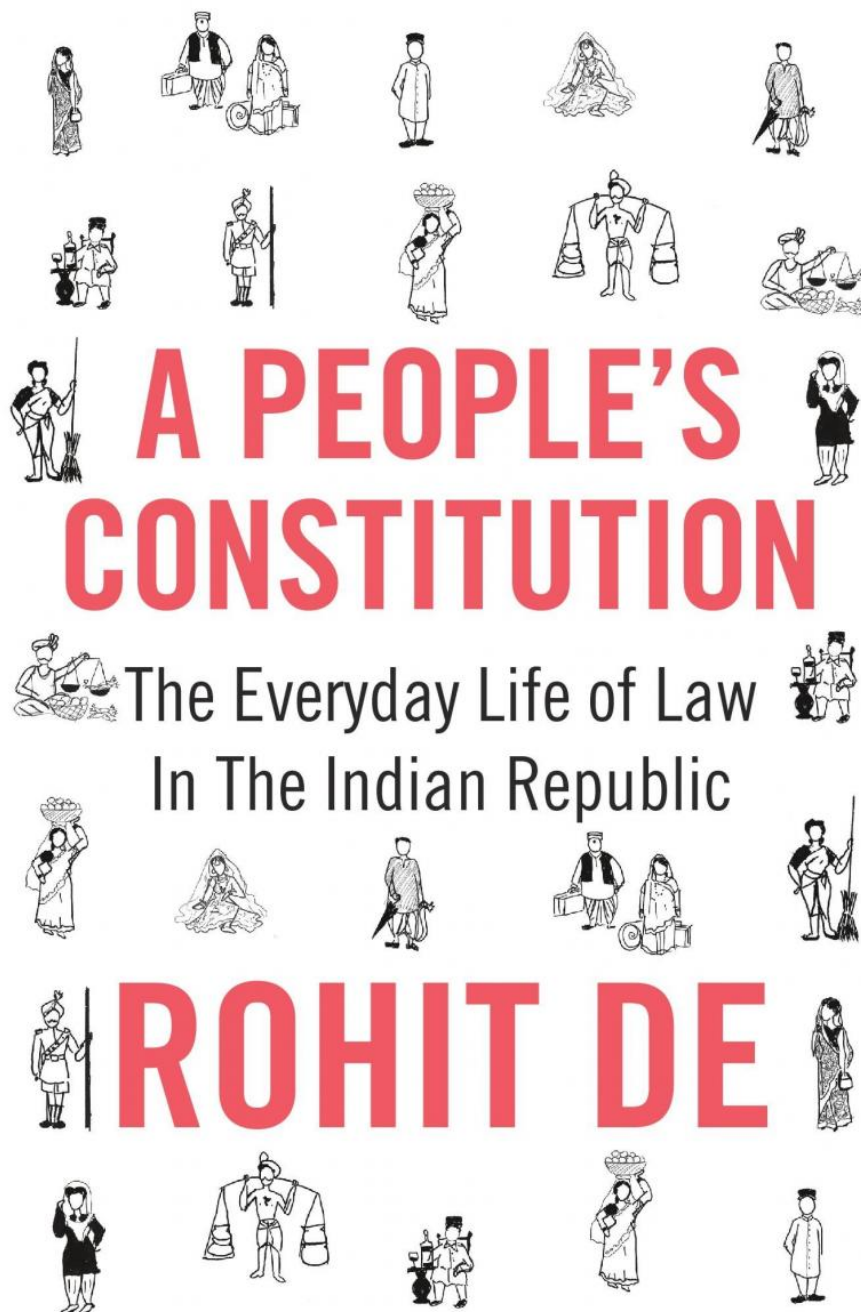
Gopalan challenged his detention before the recently established Supreme Court and Nambiar agreed to represent him. As the new court did not have its own building, the justices assembled in Parliament House's Princes' Chamber. They sat just a stone's throw from where the Constituent Assembly had debated and only just adopted the Constitution.

Nambiar was on his feet for several days. The judges listened to him so attentively that only the advocate's voice and his rustling of papers could be heard in the chamber. Nambiar told the bench that Gopalan was neither aware of the charges against him nor given an opportunity to defend himself. His detention violated his constitutionally-protected personal liberty and freedom to speak and travel around India.

In late May, the Court delivered its ruling and declared that Gopalan had been validly detained. The judges were unwilling to examine whether the Preventive Detention Act unfairly interfered with Gopalan's personal liberty. They also ruled that Gopalan could not complain that his freedom of movement had been restricted as only a free person could exercise that freedom.

Gopalan's Case gave the Court an early opportunity to interpret the Constitution's fundamental rights and freedoms. In admitting Gopalan's writ petition, the Court showed no hesitation in allowing a communist to rely on the Constitution whose legitimacy his party had unrelentingly attacked. But Gopalan was no exception. His fellow traveller, Romesh Thapar, was also an early litigant before the Court. Thapar's pro-Communist magazine had been effectively banned in Madras on the grounds of public safety and public order. In this case, however, the Court found the ban impermissibly restricted Thapar's freedom of speech.

In its early years, the Court faced a flood of cases from parties, like Gopalan and Thapar, invoking their fundamental rights and freedoms under the new charter. In *A People's Constitution*, Rohit De unravels the histories of four such cases. The petitioners or appellants in these cases had varying motivations, occupations, and social backgrounds. They included drinkers, smugglers, petty traders, butchers, and prostitutes. As dissimilar as these parties might seem, De argues they represented groups who were traditionally marginalised or excluded from the legal system.



A lawyer by education, De is an associate history professor at Yale University. His accessible story-telling ability sets him apart from most historians. His work is, however, neither based on fiction nor nostalgia. De is a distinguished scholar and prodigious researcher. A few years ago, at the Nehru Memorial Library and Museum, one of us noticed De's name in virtually every file's requisition history. Indeed, De shows such attention to detail that he himself drew the pen sketches of ordinary people on his book's dust jacket.

Granville Austin once claimed that the Constitution is put to hourly use. De demonstrates the ringing relevance of this idea. His book reveals that courtrooms became frequent forums for unprecedented legal encounters between the state and citizen.

For his project, De went where no one dared to tread before: the Supreme Court's official archives. He did so by approaching Chief Justice K.G. Balakrishnan, who reportedly conferred with two senior colleagues, before

allowing De into the hallowed records room. In so doing, De pulled off a research coup rivalled only, perhaps, by Granville Austin who persuaded President Rajendra Prasad to let him microfilm his papers on the Constitution's framing. While Austin endured envious criticism for his privileged access, De's feat should inspire confidence, rather than envy, in other scholars.

Granville Austin once claimed that the Constitution is put to hourly use. De demonstrates the ringing relevance of this idea. His book reveals that courtrooms became frequent forums for unprecedented legal encounters between the state and citizen.

A People's Constitution opens with a riveting account of Fram Balsara's dogged campaign against prohibition in Bombay. A Parsi journalist, Balsara successfully persuaded the Bombay High Court to overturn several prohibition-related restrictions and give him a special alcohol permit. An incensed state government appealed to the Supreme Court, which substantially reversed the high court judgment. But the Court ruled that individuals could possess, sell, purchase, and consume alcohol-based medicines and toiletries.

A month later, Behram Pesikaka was arrested and subsequently convicted for driving under the influence. Pesikaka insisted that he had only consumed an alcohol-based tonic, not an alcoholic drink. The Supreme Court set aside Pesikaka's conviction as the prosecution failed to establish that the defendant had, indeed, consumed alcohol. De offers us fascinating insights into the personalities, politics, and policies associated with these cases.

Next, De narrates how Harishankar and Gomtidevi Bagla, a Marwari couple, challenged their convictions under the Essential Commodities Act for transporting five-hundred pounds of cotton cloth. The Baglas hired a skilled lawyer, G.S. Pathak, who later became India's vice president. A shrewd tactician, Pathak argued that his clients had been convicted under an unconstitutional law that gave the bureaucracy too much authority.

Pathak was unsuccessful in getting the Supreme Court to overturn the Baglas' convictions. But his advocacy paved the way for others to challenge arbitrary government actions as the license-permit-quota raj grew stronger. As De explains, petty traders like the Baglas lacked the ability to lobby or rent-seek for licenses, permits or exemptions. Yet, they were able to challenge government restrictions that impacted their businesses by invoking the emerging, judge-made field of administrative law.

De then turns to *Hanif Qureshi v. State of Bihar* in which thousands of butchers challenged rising state restrictions on cow slaughter. Uncovering dusty records, De dramatically reveals how entire communities were mobilised to join the effort. The butchers told the Court that the cow-slaughter restrictions infringed their religious liberty and freedom to trade. After a lengthy hearing, the judges upheld most of these restrictions. But the Court forbade blanket bans on slaughtering aged bulls or unproductive cows. In a decades-later coda, the Court dramatically reversed itself and held that some blanket bans may be permissible. How and why this reversal took place is a subject, we hope, De will return to in future work.

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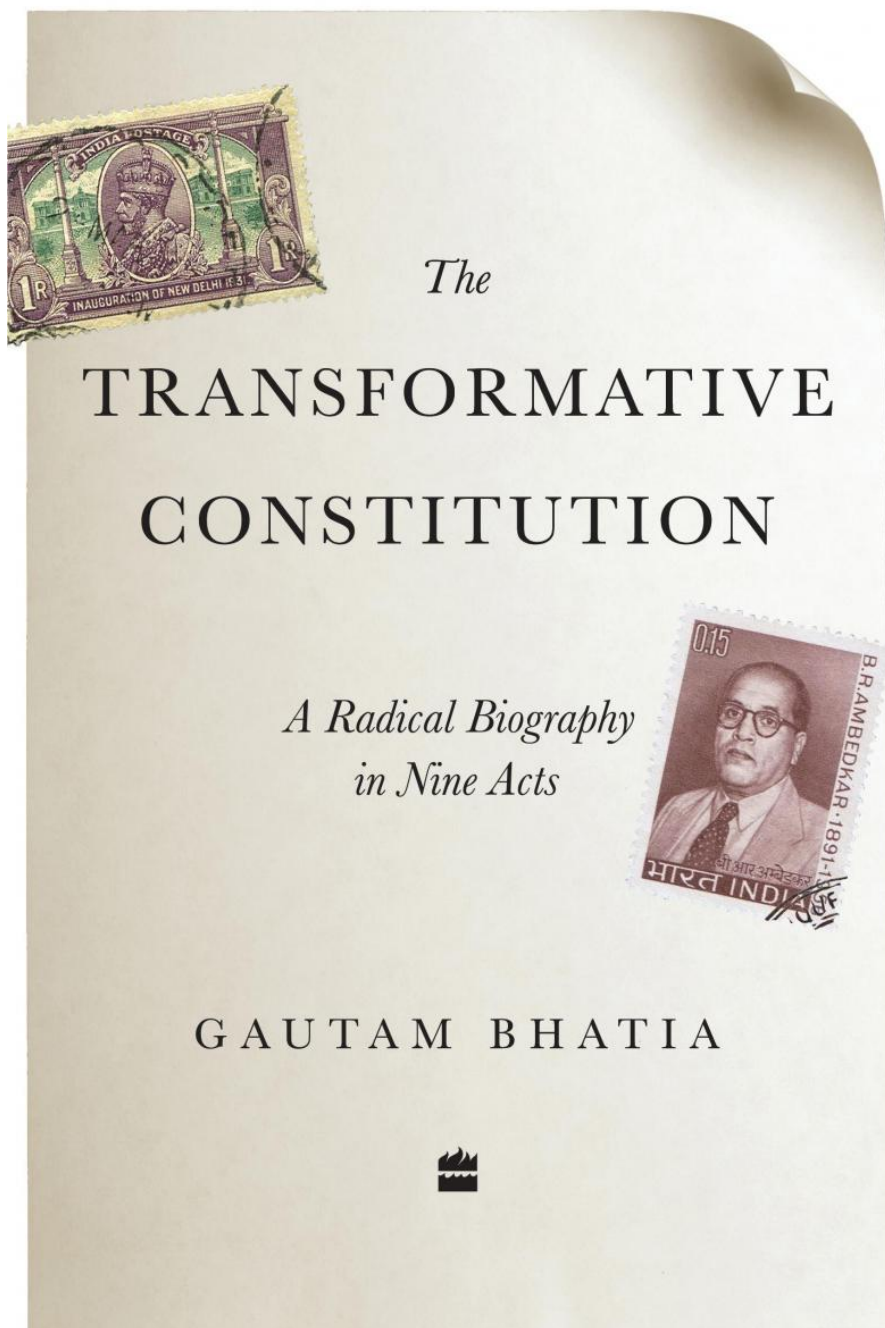
In his final set of cases, De describes how Husna Bai challenged the Suppression of Immoral Traffic in Women and Girls Act ("SITA") before the Allahabad High Court. Husna Bai argued that the act infringed her right to practice her profession as a prostitute. Although the judge agreed with some of Husna Bai's submissions, he dismissed her petition on technical grounds. By then, however, the case had received national attention leading to furious reactions from nationalist feminists. It also inspired copycat litigation in other high courts. Eventually, the matter reached the Supreme Court, which readily upheld SITA. As the feminist scholar, Ratna Kapur suggests, De's work on these cases represents a crucial archive for marginalized women and other subalterns to

draw upon in future legal battles.

De details how, in the Republic's early years, the government launched a major campaign to promote awareness about the Constitution. The charter's salient features, including the fundamental rights, received extensive newspaper coverage. Documentary films about the topic were watched by lakhs of people. In this respect, De's account resembles Michael Kammen's a classic study of the American constitution in popular culture called *A Machine That Would Go of Itself*.

It is unclear whether public awareness about the Constitution directly contributed to the four cases in De's book. There is insufficient evidence to indicate that the parties themselves chose to exercise constitutional remedies instead of being persuaded to do so by their lawyers. This does not, however, diminish De's argument that the Constitution's adoption emboldened disenfranchised citizens to challenge laws, regulations, and policies that infringed their rights. These challenges undermined the traditional ruler-subject relationship and transformed how ordinary Indian citizens do business with the state. In this respect, De's work has profound implications for political science, development, and governance studies.

A People's Constitution is a perfect segue to Gautam Bhatia's *Transformative Constitution*, which comes in a whitish-gray cover featuring two postage stamps. At the top left corner is a One Rupee stamp issued in 1931 to commemorate New Delhi's inauguration. It depicts George V and the famed Dominion Columns on Raisina Hill. (The columns symbolise the First Round Table Conference's aspiration that India achieve dominion status like Australia, Canada, New Zealand, and South Africa). At the cover's mid-rib is a plum 15 paise Ambedkar stamp issued in 1966 for Babasaheb's 75th birthday.



A talented legal scholar, Bhatia moonlights as a science fiction commentator. Currently a DPhil student at Oxford, Bhatia wrote substantial chunks of this book while practicing law in Delhi. Like De, Bhatia's recent proximity to the Court gives him a unique vantage point. But, unlike De, Bhatia's focus is on the judgments themselves and not on archival materials or surrounding ephemera.

Citing the human rights activist K.G. Kannabiran, Bhatia submits that the Constitution embodies a society's hopes and aspirations at its framing. Its provisions must, therefore, be interpreted with a transformative lens.

Although the term "transformative constitutionalism" was first used in the United States, it gained currency in the 1990s when South Africa transitioned from apartheid's darkness to an inclusive constitution's sunlight. Bhatia skillfully adopts and adapts this concept to the Indian context. He asserts that the Indian Constitution,

despite its colonial foundations, is a fundamentally transformative document which envisages a fundamental reordering of Indian society. For this reason, besides vertically regulating state-citizen relations, the Constitution also seeks to horizontally disrupt social discrimination and exclusion. Citing the human rights activist K.G. Kannabiran, Bhatia submits that the Constitution embodies a society's hopes and aspirations at its framing. Its provisions must, therefore, be interpreted with a transformative lens.

But why do we need a new theory to interpret a charter that has been in existence for seventy years? Anticipating this question, Bhatia argues that the two dominant interpretative approaches in Indian constitutional law are simply inadequate to the task. The first approach treats the Constitution as a "living tree" that must be dynamically interpreted with the changing times. Bhatia is critical of this technique because it has contributed to a significant expansion in the judiciary's powers. He also notes that the Supreme Court is yet to offer an adequate conceptual basis for the technique. The second approach is originalism, which demands that legal texts be interpreted in their true historical context. However, Bhatia believes that originalism has been widely discredited after the Court's decision in *Gopalan's Case*, although he does not discuss whether and how the judges in that case adopted an originalist reading of the Constitution.

Bhatia then offers the astonishing assessment that all constitutional interpretation in India now "seems to be at an impasse." As a way out, Bhatia advocates transformative constitutionalism as an interpretative approach. He readily concedes, however, that his approach is neither the only one nor a superior technique to understanding the Constitution. After searching the law reports, Bhatia identifies nine cases that best epitomise the charter's transformative tradition. He organizes these cases into three important buckets: equality, fraternity, and liberty, which, Bhatia posits, constitute a constitutional trinity for India.

Bhatia begins his survey with equality by highlighting the Constituent Assembly's adoption of universal adult franchise. This decision, he argues, firmly repudiates any notion that women must be treated in "separate spheres" from men. Through this prism, Bhatia critically discusses cases in which judges relied on dangerous stereotypes about gender roles. Notable among these cases is *Air India v. Nargesh Meerza* in which the Court declined to invalidate a lower retirement age for female cabin crew. These cases, Bhatia proffers, could and should have been better decided through a transformative approach.

In our recollection, it was Ratna Kapur who first argued that *Nargesh Meerza* and other similar decisions embody a rigid and "formal approach" to equality. Adopting a "substantive approach" to equality claims, Kapur reasoned, could have produced fairer outcomes in these cases. Although Bhatia acknowledges Kapur's work, he does not reveal whether his transformative approach is different from her substantive equality proposals.

Bhatia holds up *Anuj Garg v. Hotel Association of India* as a shining star for the transformative approach. In that case, the Court struck down restrictions on women working in bars or liquor shops. Bhatia applauds the judges for examining the restriction's discriminatory impact rather than its deeply paternal objective of protecting women from exploitation.

Next Bhatia turns to caste and job-reservations. The subject is such a vast one that it can run to several book lengths. Wisely, therefore, Bhatia focuses on a few leading cases. He offers an extended appreciation of *State of Kerala v. N.M. Thomas*, particularly Justices Mathew and Krishna Iyer's opinions. They best embody, he contends, the Assembly's intentions of expanding opportunities and ending discrimination.

As Bhatia concedes, the decisions after *Thomas* took a somewhat different approach. Notable among them is *Indira Sawhney v. Union of India* in which the Court largely upheld the Mandal Commission's recommendations but imposed ceilings and restrictions on job reservations. *Indira Sawhney* led to constitutional amendments and much litigation in its wake. Although Bhatia does not analyse these subsequent developments, how *Thomas* might affect today's reservation controversies is a puzzle worth tackling in the future.

After equality comes fraternity. Bhatia is very critical of the Court's decision in *Zoroastrian Cooperative v. District Registrar* upholding a cooperative society's rules that restricted housing only to Parsis. Bhatia concedes that

Parsis are entitled to protections as a minority group. But their minority status does not entitle them to engage in discriminatory behaviour. By contrast, Bhatia celebrates *Indian Medical Association v. Union of India*, in which the Court rejected a private, unaided medical school's reliance on students' test scores for admissions. This outcome, Bhatia suggests, is entirely consistent with Babasaheb Ambedkar's bold abolitionist vision of ending discriminatory practices including in economic transactions among private parties.

Bhatia argues that technological self-determination should be at the heart of any transformative constitutional order.

Moving along, Bhatia reviews cases on religious freedom and group identity. He calls upon the Supreme Court to abandon its long-standing "essential religious practices" test to determine whether a particular religious practice or tradition is entitled to constitutional protection. As an alternative, Bhatia proposes the anti-exclusion principle, which he unearths from a decades-old dissent by Chief Justice Sinha. In a post-script, Bhatia notes with some satisfaction that Justice Dhananjaya Chandrachud in the *Sabrimala Case* makes a strong case against the essential religious practices test.

In analysing liberty under the Constitution, Bhatia heaps praise on the obscure, but landmark, *T. Sareetha vs Venkatasubbaiah*. In that case, the Andhra Pradesh High Court invalidated a statutory provision permitting one spouse to seek "restitution of conjugal rights" from the other spouse. Under liberty, Bhatia also explores *Selvi v. State of Karnataka*, which prohibits the use of forced interrogation techniques like narco-analysis, polygraphs, and brain mapping. Bhatia hails it for emphasising the Constitution's command that no accused persons may be compelled to be witnesses against themselves.

The book ends with an epilogue dedicated to the *Aadhar Case* in which Bhatia was closely involved. Dismayed by the Court's decision for several reasons, Bhatia argues that technological self-determination should be at the heart of any transformative constitutional order.

Bhatia's treatise on transformative constitutionalism is both relevant and timely. Indeed, some Supreme Court judges, notably Justice Dhananjaya Chandrachud, have invoked transformative constitutionalism in their opinions. Examples include *Navtej Johar*, which invalidates Section 377 of the Indian Penal Code and the *Sabrimala Case*, which ends restrictions on women between the ages of 10 and 50 from entering the Ayyappa temple.

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Although they are entirely independent projects, De and Bhatia's books intersect and overlap in some notable respects. Relying on their respective sets of carefully selected cases, both authors rigorously analyse each decision. Where they disagree with a judgment's reasoning or outcome, they emphasise the fact that a worthy fight for constitutional principles has been waged.

The two authors, however, employ very different styles. Relying on extensive archival research, De vividly reconstructs each case's factual and contextual setting. He is especially interested in the identity and background of the litigants, lawyers, and judges involved, even as he surveys each decision's impact on affected communities and broader social policy.

By contrast, Bhatia takes us directly to the key constitutional questions in his nine cases. He does not spend much time laying out their facts or social contexts although he does offer significant "excavations" of the relevant constitutional provisions at stake in each case.

De relies on every conceivable primary and secondary source: official files, private papers and correspondence,

newspapers, films, oral histories, scholarly books, and popular titles. Bhatia's "excavations," on the hand, are more austere. Besides the relevant judgments, Bhatia largely relies on the Constituent Assembly debates and an eclectic selection of literary and scholarly work. His lengthy footnotes are filled with rich and relevant comparative citations. But he is unusually selective in engaging other scholars especially those who have previously studied and analysed the book's nine cases.

At first blush, Bhatia's constitutional trinity of equality, liberty, and fraternity reminds us of senior Justice Chandrachud's dramatic suggestion that the Constitution's equality, freedom, and liberty provisions stand between Tagore's heaven of freedom and "the abyss of unrestrained power." But Bhatia's trinity also has at least one scholarly antecedent: Justice A.M. Bhattacharjee's Setalvad lectures titled *Equality, Liberty, and Property*. In those lectures, Bhattacharjee critically examined judgments under the classical liberal trifecta of constitutional rights. Although Bhattacharjee's reasoning and conclusions markedly differ from Bhatia's, there are some points of convergence. For instance, both the judge and the scholar are critical of the Court's decision in *Maneka Gandhi*, which overruled *Gopalan's Case*.

Bhatia's trinity also vaguely resembles Granville Austin's dictum that the Constitution is spun from a "seamless web" of three interrelated motivations: (i) instigating a social revolution for a more equitable society; (ii) preserving and enhancing national unity and integrity; and (iii) enshrining institutions of democracy. Unlike the broad elements of Austin's seamless web, however, Bhatia's trinity is much narrower and rights focused.

Austin's dictum, of course, has its fair share of critics. But the elements of Austin's seamless web remind us that the Constitution has important structural and institutional pillars beyond its Bill of Rights. These pillars include the President, Parliament, and Union Council of Ministers; governors, state legislatures, and state cabinets; the allocation of responsibilities between the Union and the states; the Supreme Court and high courts; urban and local bodies; and the independent institutions for public administration, supreme audit, finance, and elections, such as the Election Commission.

Due to space and thematic limitations, neither De nor Bhatia deal with these structural and institutional pillars. Several of these pillars are basic or enduring features of the Constitution that lie beyond Parliament's amending power. Their ethnographical aspects, biographical details, and interpretational implications behove further exploration and study.

De's focus on *aam admi* litigants from the Court's fledgling years should not obscure the fact that, during this time and later, the justices also decided many cases involving wealthy landlords, large corporations, and big state-owned agencies. These entities were equally assertive in seeking constitutional and administrative remedies in disputes as wide ranging as land acquisition and industrial regulation to taxes and labour.

According to George Gadbois, during the Court's first two decades, the archetypal judge was a Hindu, upper-caste male in his early 50s who had largely stayed away from the national movement.

Indeed, the Court's jurisprudence on federalism emerged, in large part, through writ petitions or civil appeals bearing names such as Tata Iron and Steel, United Motors, and Gannon Dunkerley. As their names suggest, these petitions typically involved a well-resourced private party that challenged a direct or indirect tax as beyond the legislative competence of either Parliament or the state legislatures under the Constitution.

As De hints in his book, the background and philosophy of judges greatly impact case outcomes. According to George Gadbois, during the Court's first two decades, the archetypal judge was a Hindu, upper-caste male in his early 50s who had largely stayed away from the national movement. The training and outlook of these generally conservative men were very different from their successors who joined the bench in the 1970s. Indeed, as M.P.

Singh argues, it was the post-Emergency class of judges who began to fully explore the Constitution's transformative potential and promise. Indeed, most of the decisions that Bhatia endorses in his book were handed down after the Emergency.

We share both authors' infectious enthusiasm in using history to better understand the Constitution and its caselaw. But we believe that Bhatia's historical method to constitutional interpretation under the transformative approach warrants important caveats.

First, not every constitutional claim or controversy can or should be resolved by relying on the Constituent Assembly's discussions, emancipatory literary traditions, or the histories of pre-independence peoples movements. To take just the Constituent Assembly, it is often difficult to determine what the members' intentions were about a particular issue. Referring to this speech or that intervention in the chamber, even one by Ambedkar, is not a reliable guide to the founders' collective thinking. After all, cherry picking historical references is a temptation that most judges, lawyers, and commentators find impossible to resist. Yet, which cherries are picked and by whom can have a significant, distorting impact on a decision's reasoning and ruling.

Second, although both authors rely on a wide variety of materials, Bhatia is particularly diverse in his historical sources. In discussing equality under the Constitution, he refers to Bankim Chandra Chattopadhyay's *Samya*; Rukhmabai's letters to the *Times of India*; and the All India Women's Conference's proceedings. We do not deny that these sources may be relevant, useful, and revealing. However, one could just as easily assemble an equally pedigreed list of literary and historical references that point entirely to the opposite conclusion.

Third, a strictly historical approach can obscure the fact that sometimes the Assembly simply got it wrong. Language is an important and vivid example. As Austin tells us, the Assembly's "Hindiwallahs" steamrolled dissenting views on language by members from Madras and Bengal. Their insistence that the Constitution recognise only Hindi as an official language had grave downstream consequences. It led to the anti-Hindi agitation, which seriously threatened national unity until a constitutional compromise was adopted. In language cases, judges who mechanically apply the transformative approach could overlook that delicate compromise. They may do so by merely relying on the divisive and at-time ugly Assembly debate on language while choosing to ignore the anti-Hindi agitation, which was a real people's movement.

Fourth, as De's own Phd advisor, Gyan Prakash seems to suggest in *Emergency Chronicles*, events like the Emergency must be appreciated through the prism of what happened in the Assembly. During the debates, Nehru and Patel repeatedly emphasised the importance of a strong and centralised union while member after member rose to defend the Constitution's emergency provisions. We cannot forget that, in declaring and sustaining the Emergency, the government of the day dutifully followed the Constitution's own roadmap for doing so.

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By varying degree, both books seek to dispel questions about the Constitution's legitimacy owing to the Assembly's elite-dominated composition. Such claims date back to the debates during which members complained about the very exercise in which they were participants. Doubts and questions about the Constitution continued unabated after India became a republic and constitutional democracy took root through regular general elections.

Dissatisfaction with the Constitution rose sharply in the late 1960s after the Supreme Court in *Golak Nath's Case* enjoined Parliament from amending the fundamental rights. As a lead counsel in the proceedings, Nambiar helped influence the Court's thinking by arguing that there were implied limitations to Parliament's amending powers. Nambiar's involvement, however, did little to pacify a prominent critic of the Constitution and the Court: his former client, Gopalan.

In a fiery Lok Sabha speech, Gopalan demanded that the Constitution must be "changed lock, stock and barrel."

The Assembly, he declared, had been packed with representatives of princes, big businesses, and landlords. And the Constitution's textual provisions contradicted its own preamble's goal of social justice. Gopalan highlighted how the same Court, which had endorsed curbs on his personal liberty, had sought to restraint Parliament from duly exercising its amending power.

Anti-constitutional rhetoric reached a deafening pitch in the early seventies. Drawing upon Nambiar's *Golak Nath* submissions, the Court in *Kesavananda Bharati's Case* held that Parliament could not amend the Constitution's enduring or basic features. In response, Parliament effected sweeping constitutional changes through the Forty Second Amendment. Among other things, that amendment significantly curbed judges' power of judicial review. Weakened by supercessions and transfers, the judiciary largely acquiesced to this mutilation. Ultimately, it took the enactment of the Forty Fourth Amendment after the 1977 elections to undo most of the damage.

This painful saga, however, did little to diminish frequent demands for radical constitutional change. They led, in part, to the government's decision in 2000 to constitute the National Commission to Review the Working of the Constitution. The review exercise, however, was largely a flash in the pan after it was announced that the Constitution's basic features would remain unaffected.

It is anyone's guess whether or when a more comprehensive review, which could include the Constitution's basic features, might take place. As we head into these uncharted waters, De and Bhatia's books are indispensable guides to explaining why a people's charter and transformative constitution must also remain, as Nambiar argued in *Golak Nath*, an enduring one.

The views expressed here are personal.

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