

Words of Liberty:
The Origins and Evolution of
Constitutional Ideas

Mila Versteeg
Balliol College

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Mila Versteeg
Balliol College

Abstract

It has become near-universal practice for countries to adopt written constitutions that include a bill of rights. Much less is known, however, about the origins and evolution of this practice on a global scale. Are national constitutions unique and defining statements of the nation's character and identity? Or are they more standardized documents that are similar across countries, and vary only at the margins? Are substantive constitutional features rooted in the society for which they are written, or are they borrowed from elsewhere? What are the origins of the world's "words of liberty"?

This thesis presents the first-ever systematic substantive exploration of the world's written constitutions. It presents a new database, based on the coding of the constitutions of 188 countries, for the period 1946-2006. With this data, it explores the world's written constitutions and offers explanations for their substantive content.

Its most important finding is that constitutions are inherently "transnational" documents. As it turns out, substantive constitutional choices are remarkably unrelated to local needs and values. Constitutions do not express identity or national character. Instead, it turns out that the most important predictor of whether any particular country adopts any particular constitutional provision is whether other countries previously did the same thing. Constitutions do not tell stories of the nation's history, but rather tell stories of transnational interactions and international politics. As a result, constitutions have become at least partly standardized documents that vary predictably along a small number of underlying dimensions. But this does not mean that all constitutions are the same, or that there has been a global constitutional convergence. Instead, the world's constitutions divide in a limited number of constitutional families.

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I. INTRODUCTION: WORDS OF LIBERTY

In a 1792 edition of the *National Gazette*, James Madison described, and praised, the adoption of “great charters of liberty.” At that time, Madison had become a fervent advocate of such Charters.¹ “Every word,” Madison wrote, “decides a question between power and liberty.”² Since Madison’s days, nation-states have routinely made written declarations of liberty. From Philadelphia, to Paris, to Johannesburg, constitution-makers have labored over the wording of their written constitution. But what exactly did they write? Which words did they chose? How did they resolve the questions between power and liberty?

By now, it has become nearly universal practice for countries to adopt formal written constitutions that include Madison-style “charters of liberty.” “Our age,” it has been proclaimed, “is the age of rights.”³ Particularly since the WWII, constitutionalism has taken flight. Governments increasingly pre-commit themselves to substantive constraints on democratic politics. Over the past decades, the world has witnessed a wave of constitutional reconstruction.⁴ Constitutional rights have been at the forefront of these reforms. Constitutions have gradually expanded their catalogue of rights. First-generation negative liberty rights have been complemented with second-generation positive socio-economic rights and third-generation cultural and group rights.⁵ The enforcement of constitutional rights is moreover increasingly placed in the hands of the judiciary. No less than eighty percent of the world’s constitutions today mandate the judiciary to overturn democratic decisions that

¹ For an account on the evolution of Madison’s thinking on Bills of Rights see Jack N. Rakove, *James Madison and the Bill of Rights*, in *THIS CONSTITUTION: A BICENTENNIAL CHRONICLE* 1 (1987).

² *Charters*, *National Gazette* (18 Jan 1792).

³ LOUIS HENKIN, *THE AGE OF RIGHTS* ix (1990).

⁴ See e.g., Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 368-73 (1995). See generally, chapter III, *infra*.

⁵ See chapter III, section C, *infra*.

violate rights. What Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state.⁶

But with constitutionalism on the rise, we still know remarkably little of what the world's written constitutions actually look like. Are these constitutions unique and defining statements of national aspiration and identity, as legal scholars have often argued? Or are they instead standardized documents that vary little across countries? Do constitutions evolve organically from their distinctive historical roots, or do they evolve along well-defined pathways shared by likeminded countries? Are constitutions becoming increasingly similar or dissimilar to one another over time, or is there no overall pattern to their development? These questions go to the very nature of constitutional law. They relate to the fundamental choices between “power and liberty,” and the range of values that are placed beyond the reach of democratic politics. Any answer to these questions is also an answer to the question what constitutions are about and which goals they are meant to serve.

To take up these questions, this thesis introduces a unique new dataset based on the coding of the written constitutions of 188 countries for the period 1946-2006. From a total of 729 documents, 237 variables on rights, rights-related policies and judicial review were coded. With this data, this thesis presents the first-ever systematic exploration of the substantive content of the world's written constitutions. It documents the evolution of constitutional ideas and maps the face of the global constitutional landscape. It moreover offers a causal explanation for the range of substantive choices made by the world's constitutions.

The main findings from this thesis are likely to surprise many readers. As it turns out, substantive constitutional choices are remarkably unrelated to local needs and values. Constitutions do not express the “identity” or the particular character of the nation. Instead, and perhaps most surprisingly, constitutions are inherently “transnational” documents. The most important predictor of whether any particular country adopts any particular constitutional provision is whether other countries previously did the same thing. Constitutional ideas diffuse, and spread from

⁶ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73-76 (Richard D. Heffner trans., 2001 ed.) (1835) (deeming “the right of judges to found their decisions on the Constitution rather than on the laws” a form of “immense political power” that is “peculiar to the American magistrate”).

constitution to constitution. Constitutions do not tell stories of the nations history, but rather tell stories of transnational interactions and international politics. Powerful states, with carrots and sticks, push a liberal constitutional model in not-so-liberal places. Constitution-makers consciously assemble foreign constitutional texts as a source of inspiration. Other times, they follow the examples of others simply to signal good intentions to the international community. In all these cases, constitution-making is characterized by substantial spatial interdependence. Modern constitutions, this thesis contends, are transnational constitutions.

A. Constitutions as Ideas

Recent years have witnessed something like a “renaissance” in comparative constitutional law scholarship. From a small field occupied by only few scholars, comparative constitutional law has moved to the center of academic attention.⁷ This growing attention has tracked the growing importance of constitutionalism around the world. Now that largest majority of countries are formally democratic, constitutions are regarded as crucial instruments to facilitate the rule of law, protect individual liberty, and to prevent unconstrained majority rule. Constitutions, for that reason, merit a renewed academic attention.

But the “new” comparative constitutional law is different from the old. The old “comparison” often used to be just that: comparison for the sake of comparison. The new comparative constitutional law, by contrast, has taken a realist turn. It intersects with comparative politics, and political science more generally.⁸ Constitutions are not just a set of legal rules, but are important manifestations of power. They are the result of domestic power play, with both winners and losers. Leading studies in the new comparative constitutional law tradition seek to explain

⁷ See David Fontana, *The Fall and Rise of Comparative Constitutional Law* (Manuscript (2010)); Ran Hirschl, *Montesquieu and the Renaissance of Comparative Constitutional Law* in *MONTESQUIEU AND HIS LEGACY 199* (Rebecca Kingston ed., 2009).

⁸ Charles Lees, *We Are All Comparativists Now: Why and How Single Country Scholarship Must Adapt and Incorporate the Comparative Politics Approach*, 39 *COMP. POL. STUD.* 1084 (2006).

constitutions as a product of domestic politics.⁹ They address an important question of political economy: why would self-interested elites willingly constrain themselves by constitutional means? Their basic premise, and main answer to this question, is that constitutional constraints are supplied by the ruling elites when it is in their interest to do so.

But constitutions are *not only* manifestations of power. Constitutions are also a set of ideas. Historical and ideational factors, that is, shared historical experiences, values, and identities are also likely to be important predictors of constitutionalism.¹⁰ Or, it may be that, in the words of Oliver Wendell Holmes, the “law embodies the stories of the nations development through many centuries.”¹¹ The new comparative constitutional law has paid little attention to the ideational and historical context in which constitutions are adopted. If anything, the realist explanations are presented as an alternative to vague notions of a “growing rights consciousness” and other sorts of local demands for rights.¹² However, the main problem with ideational approach, as propagated thus far, is that it attempts to explain constitutions as a product of ideas, without looking at the ideas that are actually enshrined in the constitutional document. By shifting our attention to the constitutional text, this thesis aims to remedy this inattention for substantive constitutional ideas.

The constitutional universe can be conceptualized along three dimensions of variation. Constitutions differ across *countries*, across *time*, and across the *content of the constitutional document*. The prevailing realist explanations hold strong explanatory power along the first two dimensions. They explain why a particular country, at a particular time, reforms its constitution and constrains itself by constitutional means. But they are less explicit about what is actually adopted, or why

⁹ See e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY* 1-10 (2005); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN EAST ASIA* (2003); JODI FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU AND MEXICO IN THE 1990S* (2004); DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* (2010).

¹⁰ See e.g., Lisa Hilbink, *Empowerment The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment*, 62 POL. RES. QUART. 798 (2009).

¹¹ OLIVER WENDELL HOLMES, JR. *THE COMMON LAW* 1-2 (Transaction Publishers 2005) (1981).

¹² See e.g., GINSBURG, *supra* note 9, at 11.

countries, at that time, adopt some rights and not others. The third dimension of variation, the content of the constitutional document, remains largely unexplained.¹³ But it is exactly along this third dimension that ideational perspectives hold their largest explanatory power. In fact, if the ideational perspective is explored along this third dimension of variation, the realist and ideational perspectives may be viewed as complementary rather than contradictory accounts. The realist perspective explains when and why countries engage in constitutional reform, or what “triggers” the adoption of additional constitutional constraints, while the ideational perspective explains which constitutional ideas are adopted.¹⁴ Of course, this does not preclude the possibility that constitutional ideas are adopted for strategic reasons. They often are. In perhaps a “thin” notion of what constitutes an ideational perspective, this thesis simply aims to explain constitutions as a bundle of ideas.

To explain constitutions as a bundle of ideas, this thesis turns to one particular part of the constitution, which is the part that commits to substantive constitutional values, in the form of rights and rights-related policies. Its focus is, roughly speaking, on the part of the constitution that is most commonly referred to as the “bill of rights,” as well as its enforcement by the judiciary. While almost every constitution has a bill of rights in some form, there exists substantial cross-country variation in its content. Some constitutions contain civil and political rights only, as in the United States and Canada, while others mainly stress socio-economic rights, as in many of the Islamic countries. Some prohibit abortion, as in the Irish constitution, while others recognize homosexuality, as in the South African constitution. It is exactly in these types of choices that this thesis seeks to explain. A bill of rights may be universal, but its exact content is not.¹⁵

¹³ One exception is HIRSCHL, *supra* note 9, who argues that a neo-liberal constitutional model is adopted, although he does not go all the way towards setting out the precise features of this model.

¹⁴ Transnational diffusion may have *some* explanatory power on the timing of constitutional reform. But for the most part, this thesis takes for granted the prevailing explanations on the domestic supply of constitutional reforms. In the empirical analysis, these stories of domestic politics will be controlled for and are not the object of substantive analysis. The author does have a separate manuscript that tests the prevailing realist explanations Large-N, but has omitted this manuscript from this thesis here. *See also* note 783 *infra*.

¹⁵ *See* John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL, 133, 138 (George M. Thomas et al, eds., 1987).

The subsequent chapters present two competing theories to explain the substantive choices that lie within the bill of rights. The first holds that particular substantive constitutional choices are an expression of national character and identity, or local needs and values. As it turns out, there is little empirical evidence that supports this view. The second theory holds that the substantive ideas enshrined in the constitutional document are transnational in character, shaped by international interactions. This theory is confirmed by the data. It turns out that the content of written constitutions reflects the consensus among groups of foreign countries. The substantive range of choices in each document is primarily a function of constitutional developments elsewhere. Constitutions are inherently transnational documents.

B. Why Written Constitutions?

Why, if at all, should we care about written constitutional documents? From a perspective of power, written constitutional documents may be notoriously unimportant. For that reason, social scientists tend to focus on actual constitutional practices, and ignore formal constitutional rules.¹⁶ Even lawyers might express skepticism over studying constitutional texts. Ever since Karl Llewellyn, we know that most of actual constitutional law is built around, but mostly found outside, the written constitutional document.¹⁷ In fact, it is now well established that formal, *de jure*, or “Large-C” constitutional commitments are not the same as *de facto*, or “small-c” constitutional practices. And it is true: the written constitution is just a piece of paper. But so is a million-dollar check.¹⁸ Pieces of paper matter, at least under some circumstances. Some pieces of paper merit our close attention, and it is the basic premise of this thesis that constitutions fall within this category.

¹⁶ See e.g., THORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2004).

¹⁷ See Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934). See also e.g., Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411 (2007).

¹⁸ This analogy is borrowed from Stephen Holmes, *Foreword*, in *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM I* (Andras Sajó, 1999).

From a conventional legal viewpoint, the constitutional document is actually a rather important one. The constitutional document is the natural starting point for the study of constitutional law in any legal system. The constitutional document sets up the patterns of authority and divides powers between different organs of government. Constitutions coordinate state power.¹⁹ Constitutions moreover provide a set of ideals and principles to which future laws and regulations must conform. And in that capacity, constitutions potentially affect the entire legal order.

Of course, the constitutional document is only a part of a country's larger body of constitutional law. This larger body of constitutional law also consists of semi-constitutional documents, or "super-statutes,"²⁰ judicial decisions, and unwritten constitutional conventions. At least some of the time, the constitutional document is bound to be unrelated to this larger body of constitutional law. The legal realists, for instance, have long taught us that, in many cases, the constitution is simply what the court says it is.²¹ To know the constitution, we have to study the courts. Yet most of the time, we would expect the constitutional document to bear at least *some* connection to the larger constitutional order. For example, it would be a rare occasion in which judges resolve a case without mentioning the constitutional document altogether. Even those who propagate "purposive," "moral," or generally broad constitutional interpretation, pay attention to the constitutional document itself.²² And according to those who oppose judicial activism, the constitutional document is all that matters. As U.S. Supreme Court Justice Scalia puts it: "the Constitution is not a living organism, it is a legal document. It says something and doesn't say other things."²³

¹⁹ See e.g., RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY* (2003).

²⁰ See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1275-76 (2001).

²¹ See Llewellyn, *supra* note 17.

²² See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTIONS* (1996) (propagating "moral" interpretation); STEVEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (propagating "purposive" interpretation); AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005).

²³ MSNBC News, *Scalia Blasts Advocates of "Living Constitution"* (Feb. 14th, 2006).

But even if the constitutional document tells us something about the larger body of constitutional law, the social scientist objection still remains. It is possible that none of written constitutional law, including judicial decisions, have any effect on government behavior. Constitutions may be “written to deceive” and simply be “façade,” or “sham.”²⁴ And, at least in theory, judicial decisions can just as easily be ignored by the government as the written constitutional document itself. For that reason, the social scientist would typically want to study actual practices and actual government behavior, and not written constitutional law, in whatever form.

Even if we accept the social scientist objection, then constitutions might still be of interest. Constitutions are not only legal documents, but also represent and reflect important social and political phenomena. Constitutions capture how a government explains and advertises itself to its citizens and to the rest of the world. Constitutions are highly visible documents that serve as important signals to a number of audiences.²⁵ Constitutions may be used to signal good intentions to international leaders, to foreign aid donors or foreign investors. With a promise of secure property rights, for example, governments may try to attract foreign investors.²⁶ Similarly, with a promise secure civil liberties and “good governance,” governments may attempt to secure foreign aid and development assistance. In the same vein, constitutions may tell us something about the country and its particularities. There is a long-standing belief that constitutions are expressive documents that reflect local needs and values, beliefs and identities. Thus, if nothing else, constitutions are important statements of domestic character and international politics.

And even meaningless or sham constitutional documents may come to matter in the end. The notion that even empty promises can be turned into more genuine ones is one of the core insights from international law. International human rights treaties, in many ways, resemble constitutions. Both entrench nice promises, but both

²⁴ See e.g., Giovanni Satori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SC. REV. 853 (1962).

²⁵ See e.g., Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85–94, 98 (2002).

²⁶ See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1307-42 (2008). See also chapter V *infra*.

are ultimately unenforceable against the government. Of course, in the case of constitutions, enforcement is placed in the hands of the judiciary. But ultimately, judicial decisions can just as easily be ignored as written constitutional promises. Both constitutional law and international law, therefore, is “law for states.”²⁷ Yet in international law, there is an increasingly sophisticated debate on if, how and when international law “matters.” One of its core insights is that, more often than not, treaty ratification has little effect on government behavior.²⁸ But at the same time, international relations scholars have also shown even empty promises can alter the local political landscape in a number of ways.²⁹ Through the “civilizing force of hypocrisy,” such as media attention, human rights advocacy and political opposition, human rights commitments may come to matter in unexpected ways.³⁰ The same may be true for constitutions. Even in the absence of good intentions, constitutional commitments may be powerful tools in the hand of political opposition. The longer they linger on paper, the more likely they will be put into practice.

Since James Madison’s days, constitutional designers have labored over the wording of their constitutional document. Have their efforts been in vain? Undoubtedly, there are instances where words decide on neither “liberty” nor “power,” but are just that “words.” But it seems too soon to abandon our interest in constitutional texts altogether. At least some of the time, constitutional documents will be connected to the larger constitutional order. At least under some circumstances, constitutional documents are likely to make a difference. And even where they do not, or not yet, actually affect government behavior, constitutions may

²⁷ See e.g., Jack Goldsmith et al., *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

²⁸ See Linda Camp Keith, *The United Nations International Convention on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?* 36 J. PEACE RES. 95 (1999); Oona Hathaway, *Do Human Rights Treaties Make A Difference?* 111 YALE L. J. 1935 (2002); Emily M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* 49 J. CONFLICT RESOLUTION 925 (2005).

²⁹ See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

³⁰ *Id.*

nonetheless reflect domestic needs and values, as well as important considerations of international politics.

C. Methodological Approach

More than ten years ago, Bruce Ackerman considered, but dismissed the possibility of systematic quantitative analysis of the world's constitutions. "Looking broadly over this half-century, are there patterns that repeat themselves in the successful establishment of written constitutions? If so, do different founding patterns shape the subsequent style and substance of judicial review? At this stage, there can be no hope of rigorously quantitative answers to such questions. The number of success stories is much too small for statistical analysis; the number of variables much too large. There is no way out but an appeal to old-fashioned insight."³¹

This thesis does exactly what Ackerman deemed impossible ten years ago. It uses quantitative methods to analyze patterns in the world's constitutions. And it is among the first to do so. While comparative constitutional law now intersects with comparative politics, it has been largely qualitative in nature. A notable exception is the work by Tom Ginsburg, Zachary Elkins and James Melton, who, amongst other things analyze the lifespan of written constitutions.³² But for the largest part, comparative constitutional law is the field of the single-country study.³³ Such single-country studies have generated invaluable insights on specific constitutional systems. However, single-country studies are typically limited in their applicability. A small-N approach largely prevents generalization.³⁴ In contrast with prevailing studies, this thesis explores substantive constitutional choices for no less than 188 countries over the course of six decades. In taking this approach, it hopes to bring new insights to the existing literature.

³¹ See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 773 (1997).

³² ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

³³ See e.g. note 10 *supra*. Mark Tushnet, *The Continuing Significance of "Country Studies" in Comparative Constitutional Law* (Manuscript, 2010).

³⁴ See generally Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. Law 125 (2005); Ran Hirschl, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 39 (Suijt Choudhry ed., 2007).

A large-N, or quantitative, approach requires quantification along various dimensions. Most importantly, it requires the coding of the content of all historical and current constitutions for a large number of countries. The coding of constitutions across time and space is not a value-free process and requires a range of decisions to be made. Therefore, chapter II will introduce the constitutions dataset for this study in some detail. But the quantification of societal features and actual rights practices may be even more difficult. Radically different practices, full of nuances, are reduced to simple indicators. Take the example of human rights indicators. While human rights advocates write detailed reports on rights abuses in countries like Zimbabwe, Afghanistan or Iran, indicators express these practices in one simple number only. Zimbabwe is no longer about Robert Mugabe and the torture of political supporters of the “Movement for Democratic Change” but a score of 5 on the so-called “political terror scale.”³⁵ Needless to say that such indicators are not uncontroversial.³⁶ But acknowledging these problems does not mean that the large-N enterprise has to be abandoned altogether. Though imperfect, indicators often do capture relevant differences across time and space.

And the large-N approach may reveal patterns that remain hidden to the qualitative eye. In human rights studies, there exists a well-know gap between quantitative and qualitative approaches. Human rights tend to look rather different depending on whether they are viewed through qualitative or quantitative eyes.³⁷ And usually, the qualitative eyes see a rosier picture than the quantitative ones.³⁸ There is more at stake here than a mere academic debate. Over the last half-century, constitutional scholars have often been involved in constitution-making across the globe. Serving as founding fathers in exotic places, they used their in-depth knowledge on a limited set of constitutional systems. But who knows what the world

³⁵ For an explanation of this dataset see www.politicalerrorscale.org. See generally TODD LANDMAN & EDZIA CARVALHO, *MEASURING HUMAN RIGHTS* (2010).

³⁶ See e.g., Sally Merry, *Measuring the World: Indicators, Human Rights, and Global Governance* (Manuscript (2009)); Margaret L. Satterthwaite & Ann Janette Rosga, *The Trust in Indicators: Measuring Human Rights*, 29 *BERKELEY J. INT’L L.* 256 (2009).

³⁷ Emily Hafner Burton & James Ron, *Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes?* 61 *WORLD POLITICS* (2009).

³⁸ *Id.*

would have looked like if both quantitative and qualitative insights had been taken to the constitutional drawing board?

Of course, quantitative claims also have their limitations. Importantly, large-N patterns do not automatically imply causal relationships. In this respect, it is important to distinguish between “correlation” and “causation.” Correlation is simply the relationship between two variables. For example, there exists a positive correlation between democracy and constitutional rights. More democratic countries have more constitutional rights. But crucially, this does not mean that *because of democracy*, countries adopt more rights. In reality, it could be the other way around; countries with more rights become more democratic. This is called the “reversed causality problem.” Based on correlations alone, it is impossible to say whether A affects B, or B affects A. Moreover, both democracy and constitutional rights may be driven by a third factor. In reality, it could be that income drives both; when countries become richer they become more democratic *and* adopt more rights. This is called the “omitted variable bias problem.” Based on correlations alone, it is impossible to say whether there are other factors, let’s call them C, that are responsible for the relation between A and B. Establishing causation is the main challenge of all large-N empirical research. And, importantly, it is not always able to meet this challenge.

Where possible, subsequent chapters *do* attempt to reveal causal relationships. One common way to address omitted variable bias and reversed causality is to find an exogenous source of variation for each of the regressors, which can be used as an so-called “instrumental variable” in a two-stage least squares regression. Instruments that have been used in a cross-country setting include things like settler mortality and rainfall.³⁹ Omitted variable bias can moreover be limited by maximizing the explanatory power of the regression model. The use of fixed effects allows one to do so. Rather than including all specific variables, fixed effects allows one to control for all possible variation along one or more dimension.⁴⁰ The empirical chapters in this

³⁹ See e.g., Daron Acemoglu, et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*. 91 AM. EC. REV., 1369 (2001) (using settler mortality as an instrument for institutional quality); Edward Miquel et al., *Economic Shocks and Civil Conflict: An Instrumental Variables Approach*. 112 J. POL. ECON. 725 (2004) (using rainfall as an instrument for civil war).

⁴⁰ Compare Donald P. Green et al., *Dirty Pool*, 55 INT’L ORG. 441 (2001) with Nathaniel Beck & Jonathan N. Katz, *Throwing Out the Baby with the Bath Water: A Comment on Green, Kim, and Yoon*

thesis, at various points, apply these techniques. But even so, real world data do not always equally allow one to satisfactorily establish causality. When revealing real world relationships, there turn out to be many unobservables, many data limitations and even computational constraints. Therefore, one should always apply some dose of skepticism to causal claims. The large-N nature of this study does not automatically imply that all claims are truly causal ones. Yet, at the minimum, they reveal interesting patterns and relationships, on a topic that has gone largely unexplored so far. This thesis provides a first glance at the global constitutional landscape. And even with all their possible methodological pitfalls, large-N studies provide a new frontier for constitutional research.⁴¹

One of the central claims in this thesis is that constitutions are a product of transnational influences. A focus on transnational influences on the law is not new. Lawyers have long studied “transplantation”, or the migration of laws from one country to the other.⁴² Alan Watson once provocatively stated that “all legal change occurs through imitation.”⁴³ Constitutions are not usually analyzed as an object of transplantation. If anything, constitution is the document where transplantation is least expected, because of its alleged link to national identity and self-determination.⁴⁴ And indeed, it seems unlikely that constitution-makers will engage in a wholesale cutting and pasting of constitutional texts. Foreign influences are likely to be subtler, with bits and pieces of the constitution being borrowed from different countries and core provisions being rephrased along the way.⁴⁵ But since transplant

55 INT'L ORG. 487 (2001).

⁴¹ Christopher Whytock, *Taking Causality Serious in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy* 41 LOYOLA OF LOS ANGELES L. R. 629, 636 (2008).

⁴² See e.g., ALAN WATSON, LEGAL TRANSPLANTS (1974); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 498 (1995); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003).

⁴³ ALAN WATSON, *supra* note 42.

⁴⁴ Fredrick Schauer, *On the Immigration of Constitutional Ideas*, 37 CONN. L. REV. 907, 913-17 (2005).

⁴⁵ *Id.*, at 913-917.

studies typically document the wholesale transplantation of a law from country A to country B, the traditional methodological approach of transplant studies is bound to be inadequate.⁴⁶

This thesis therefore takes a different track. It relies on the social science literature on “diffusion” rather than the legal literature on transplantation.⁴⁷ Doing so has both conceptual and methodological implications. Conceptually, it implies a focus on the social mechanisms through which particular innovations, institutions or policies diffuse. Examples of diffusion mechanisms that have been identified in the literature include “competition,” “learning,” “herding,” “bandwagoning” or “mimicry.”⁴⁸ In this sense, the diffusion literature provides a richer conceptual framework than the legal transplant literature. Methodologically, it means that the researcher does not a priori identify the origin of the transplanted law. This is something to be determined by the data. The general approach is to estimate a regression model that includes a set of explanatory variables that capture the adoption of a particular legal rule by other states. If diffusion is at work, adoption by other states increases the probability that any given state will follow this example.⁴⁹ The more states adopt a particular rule, the more likely others are to follow. The variable that captures adoption by other states is weighted along several spatial dimensions.⁵⁰ For example, the researcher may be interested in how the adoption by language partners affects adoption. Or how adoption by geographical neighbors matters. The particularities of the spatial relationships allow the research to conceptualize which diffusion mechanisms are at work.

⁴⁶ See e.g. William Twining, *Diffusion of Law: A Global Perspective* (Manuscript, 2004).

⁴⁷ See William Twining, *Social Science and Diffusion of Law*, 32 J. L. SOC. 203, 210-13 (2005).

⁴⁸ See e.g. Beth A. Simmons & Zachary A. Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Economy*, 98 Am. Pol. Sc. Rev. 171 (2004). For a full account, see chapter V *infra*.

⁴⁹ See e.g., David Strang & Sarah A. Soule, *Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills*, 24 ANN. REV. SOC. 265 (1998). For a full account, see Chapter V *infra*.

⁵⁰ For the methodological approach of “spatial econometrics” see LUC ANSELIN, *SPATIAL ECONOMETRICS* (1988); Robert J. Franzese & Jude C Hays, *Empirical Models of Spatial Interdependence*, OXFORD HANDBOOK OF POLITICAL METHODOLOGY 570 (2008).

Building on the diffusion framework, this thesis proposes a new theory on the origins of written constitutions. It is a theory of the “transnational constitution.” Theory, for this purpose, is not meant as a grand normative theory,⁵¹ such as a search for universal principles of constitutional justice⁵² or the “ultimate rule of law” across all liberal systems.⁵³ Rather, it is a social science theory, or a theory on social life, meant for empirical testing.⁵⁴ Robert Merton defines such theory as “logically interconnected sets of propositions from which empirical uniformities can be derived.”⁵⁵ This thesis will set out such a theory, derive hypotheses and test them empirically. After all, in a modern rephrasing of Emanuel Kant “theories without data are empty; data without theories is blind.”⁵⁶

In developing its theory, this thesis will build on both rationalist and constructivist approaches in the social sciences. In this sense, it borrows from the conceptual approach of the combined interdisciplinary research agenda of international law and international relations.⁵⁷ Contemporary scholarship in the field of international law often contrast the rationalist approaches of “power and interests” with more constructivist approaches of “norms and values.”⁵⁸ The rationalist perspective views international relations as the interactions among self-interested power-seeking utility-maximizing states.⁵⁹ Its focus is on “hard power,” or the reign

⁵¹ See e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁵² See e.g., TREVOR ALLEN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001).

⁵³ See e.g., DAVID BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

⁵⁴ AUSTEN HARRINGTON, *SOCIAL THEORY: AN INTRODUCTION* (2005).

⁵⁵ ROBERT KING MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 39 (1967).

⁵⁶ See HARRINGTON, *supra* note 54, at 5.

⁵⁷ Anne Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT’L L.* 205 (1993).

⁵⁸ See e.g., Hathaway, *supra* note 28, at 1944; Ryan Goodman & Derek Jinks, *How to Influence States? Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004); Benedict Kingsbury, *The Concept of Compliance as Function of Competing Functions of International Law*, 19 *MICHIGAN J. INT’L L.* 345 (1998).

⁵⁹ See e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* (2007).

of the most powerful states. By contrast, the constructivist perspective views international relations as interactions between states whose preferences are shaped by international norms and values. Its focus is on “soft power,” such as persuasion and normative influences.⁶⁰ It turns out that international law looks rather different depending on whether it is viewed as a product of self-interested, utility-maximizing states or a manifestation of important international norms and values. Constitutions, too, may look rather different depending on whether a rationalist or a constructivist perspective is adopted. Throughout this thesis, both the rationalist and constructivist perspectives will, either explicitly or implicitly, be adopted and the resulting differences will be highlighted. The overarching focus on “constitutions as ideas”, or the substance of the constitutional document, does not preclude such a dual perspective. Constitutional ideas may reflect both strategic and more normative considerations. In a transnational setting, ideas emerge and diffuse through both “hard power” and “soft power,” or through both force and attraction.

D. The Argument in Brief

If constitutions are a bundle of ideas, and we want to study the origins and evolution of these ideas, the logical starting point for such a study would be to examine the nature of the country that adopted the constitution. Naturally, we would be inclined to believe that constitutional ideas reflect the historical circumstances of the nation, as well as the views and values of its people. This, in fact, is the “null-hypothesis” from which this study starts. This “null-hypothesis” ties in closely with a well-established view on the constitution, commonly referred to as the “expressive” view on the constitution. On this view, constitutions are unique and defining statements of national aspiration and identity. They reflect the nation’s needs and

⁶⁰ See e.g., Goodman & Jinks, *supra* note 58. Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 INDIANA L. J. 1397 (1998); Abran Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

values, and its hopes and aspirations. Constitutions grow organically, and they mirror society.⁶¹

But when taking this theory to the data, it turns out that there is little evidence to support it. Substantive constitutional choices are remarkably unrelated to the indigenous features of society. For example, there is no relationship between ethnic fractionalization and minority group rights; no relationship between women's emancipation and women's rights; no relationship between living conditions and socio-economic rights; no relationship between illiteracy rates and education rights; no relationship between environmental pollution and environmental rights; no relationship between the proportion of old people and rights for the elderly; no relationship between popular opinion on homosexuality and gay rights; no relationship between popular opinion on work and the right to work; and no relationship between popular opinion on marriage and the right to get married. Across a range of issues, and at different points in time, the views and features of society are unrelated to the content of the constitutional document. Thus, the "expressive" view of the constitution seems to be empirically false, more myth than reality.

There is another, and competing, view on the nature of constitutions, that could make sense of this gap between substantive constitutional choices and domestic needs and values. Constitutions are not only expressions of national identity, but are also very functional documents, that serve important goals, such as the promotion of the rule-of-law, democracy, civil liberty, and accountable government. And more often than not, such goals do not emerge organically from society, but are the product of conscious and rational design. Under this view, constitution-makers are not to design the constitution based on what the nation has been like in the past, but based on what they aspire it to be in the future. Rational constitution design does not start from the particularities of society but from the universal prescripts of sound constitutional rules.⁶²

These two different views on constitutions, let's call them "organic growth" and "rational design," were most famously stated in the debate between Edmund

⁶¹ Contemporary statements of expressive constitutionalism include. For a full overview, as well as an historical account of this view *see* Chapter IV, sections A-C *infra*.

⁶² For a full exposition of this view *see* Chapter IV, section A and B *infra*.

Burke and Thomas Paine, which took place in the aftermath of the French Revolution. Edmund Burke, in his *Reflections of the Revolution of France* attacked the French revolutionary ideals for their abstract rationalism. According to Burke, constitutions should reflect the accumulated wisdom of the past. Constitutions are to change gradually over time, through evolution, not revolution. According to Burke, the French revolutionaries' reliance on abstract theory and contempt for historical experience was a big mistake. Thomas Paine takes the opposite view. In an impassionate response to Burke, his *Rights of Man* defends the idea that constitutions can be made *de novo* and designed through human reason. For Paine, the constitution is the perfect tool for social engineering. With the constitution, we have it in our power to begin the world over again. And therefore, to once again use James Madison's words "every word, decides a question between power and liberty."

Burke's position reflects an older constitutional tradition, that characterized most of the ancient world; from the ancient Greeks to the Roman Republic and that lasted throughout the Middle Ages. But over the course of the twentieth century, this tradition has largely been defeated by the Enlightenment ideal of rational constitutional design. With the growing confidence in the unlimited possibilities of human reason, and a growing importance of the nation-state as centralized law-maker, the constitution became the perfect drawing board for the state. With the constitution, the state can design liberty, freedom and equality. The famous words "the past is another country" squarely fit the modern constitutional tradition. It is only very recently, with the rise of post-modernist thinking, that the Burkean position has gained some renewed popularity. Like Burke and some early conservatives, today's post-modernists challenge the unlimited possibilities of human reason and rational design. But in the real world, constitution-makers are likely to be too ambitious to adopt such a view.

It is this view of constitutions as products of rational design that explains why substantive constitutional choices are largely unrelated to the indigenous features of society, and that allows for the main findings of this thesis, which is that constitutional ideas have transnational origins. If constitutions are a product of human

choice and reflection, rather than fortune and inheritance,⁶³ constitution-makers will search for sound, or “the best” constitutional principles. And this search is bound to take them beyond their own borders, and turn their eyes to constitutional development elsewhere. It is rational constitutional design that facilitates large-scale constitutional borrowing.

One of the core findings from this thesis is that, in terms of substantive constitutional choices, modern constitutions are inherently transnational documents. An important predictor of whether a given country adopts a particular constitutional provision is if other countries have previously done the same. But this is only part of the story. If constitutions are a product of borrowing, what are the mechanisms through which such borrowing take place? Why do countries turn abroad? And why do they borrow from some countries, and not others? There are different, and competing, rationales for constitutional borrowing. This thesis conceptualizes, and tests, four competing mechanisms through which such borrowing may take place, which are *competition*, *coercion*, *learning* and *acculturation*. Each of these mechanisms implies a distinct process through which foreign constitutional models are incorporated into the domestic constitutional order. Each of these mechanisms, moreover, results in a different prediction on the extent to which the borrowed constitutional rules will be complied with in practice.

Probably the most familiar of these mechanisms is *constitutional learning*.⁶⁴ One of the basic premises of the comparative constitutional law enterprise is that, through comparison, we can learn from the constitutional experiences elsewhere. Through constitutional comparison, we can extend Justice Brandeis’ “laboratory of democracy” to the global plane.⁶⁵ Constitution-makers, too, may follow this logic. They turn their eyes to constitutional successes and failures elsewhere, to import the “best” constitutional solutions into their own constitutional systems. It has often been documented that constitution-makers consciously assemble the constitutions of foreign countries and use them as a source of inspiration. At the same time, it is

⁶³ Federalist Number 2

⁶⁴ For a full exposition of this argument, and all relevant references, see Chapter V, section A, 2, *infra*.

⁶⁵ See *New State Ice Co. V. Liebmann*, 285 U.S. 262 (1932) (Brandeis J., dissenting).

equally well-documented that such constitutional learning is limited by information constraints. Not all foreign models are equally influential. Instead constitution-makers draw on upon the models of the countries they are most familiar with, or countries with which they share relevant pre-existing similarities. This thesis, in fact, presents fresh evidence that constitution-makers typically learn from countries with the same legal systems (such as a common law or civil law system) as well as from countries with the same religion (such as the Islam). By contrast, there is no evidence whatsoever that constitutional learning is a global process.

The search for foreign constitutional principles may also be driven by strategic economic considerations. In that case, constitutional provisions diffuse through *constitutional competition*.⁶⁶ In the increasingly global economy, countries can gain a competitive advantage by offering a legal infrastructure that appeals to buyers and investors in international markets. International investors, for various reasons, tend to favor countries that respect property rights and basic civil liberties. All other things being equal, a country that credibly commits to respect such rights will be more attractive to international investors, whereas a country that fails to do so will be at a competitive disadvantage. Perhaps the most credible way for a country to signal a protection of property rights and basic liberties is to offer guarantees in the form of constitutional rights, and back this commitment up by establishing an independent judiciary that is equipped with the power of judicial review. When one country successfully attracts economic capital by offering favorable bundles of rights, others may follow its example. The result is constitutional competition and a “race to the top,” whereby economic competitors end up with higher levels of rights protection. Thus, if competition is at work, constitutional provisions diffuse among countries that compete for foreign investment and/or the same export markets. However, this thesis finds at best limited empirical evidence that such competition is at work.

But foreign constitutional models are not always voluntarily adopted. Oftentimes, constitutional models are promoted by the carrots and sticks of powerful foreign states. In that case, constitutional provisions diffuse through *constitutional*

⁶⁶ For a full exposition of this argument, and all relevant references, see Chapter V, section A, 1 *infra*.

coercion.⁶⁷ In the international politics, some states are more powerful than others. And powerful states, in various ways, may set the constitutional agendas of the less powerful ones. Such constitutional coercion includes the imposition of constitutional rules through force, but also subtler processes through incentives and sanctions. Cases of wholesale constitutional imposition can mainly be found in the post-colonial context and in situations of *de jure* and *de facto* military occupation. One of the classical examples of an imposed constitution is the Japanese constitution of 1947, which was written by U.S. General McArthur after the surrender of Japan in 1945. Less well known, but perhaps even more stereotypical, are the independence constitutions of the former British colonies in Africa and the Caribbean, that were simply handed out by the Colonial Office in London. But in an age of widespread commitment to democracy, constitutional coercion is often subtler than wholesale imposition. Probably the most important tool for constitutional coercion, today, is the offering of foreign aid. Aid donors often condition financial assistance upon certain principles of good governance and human rights. To signal commitment to these principles, aid recipients may reform their constitutions and embrace the constitutional models favored by their aid donors. This thesis finds substantial evidence of constitutional coercion, both in the post-colonial context and through the offering of foreign aid.

Finally, foreign constitutional models may be adopted in a process that involves neither coercion, nor a genuine learning. Constitutional rights may be adopted simply to signal good intentions to the international community, also by states that are not genuinely committed to these rules. This last diffusion mechanism, which is probably least familiar to the reader, will be described as *acculturation*.⁶⁸ If acculturation is at work, states commit to seemingly legitimate constitutional principles in order to obtain a favorable treatment from others and to enhance their standing in the international community. Not because they are convinced about the substance of these principles, but because of the social relationships these principles represent. Through this process, states conform to global constitutional “norms,” “blueprints,” or legitimate “scripts of modern statehood,” that are adopted by all

⁶⁷ For a full exposition of this argument, and all relevant references, see Chapter V, section A, 1, *infra*.

⁶⁸ For a full exposition of this argument, and all relevant references, see Chapter V, section A, 3 *infra*.

states alike. However, this thesis finds only limited evidence that acculturation is at work.

All the empirical evidence suggests that constitutional rights primarily diffuse through constitutional learning and constitutional coercion, or, more precisely, among countries with a shared legal system, a shared colonizer, a shared aid donor and a shared religion. But if constitutions are rationally designed, and if substantive constitutional provisions diffuse through foreign pressures or through learning from like-minded states, what kind of constitutions do we end up with? This thesis finds, perhaps surprisingly, there has been no global constitutional convergence. There is no empirical basis for the claims that the world's constitutions have converged around a single liberal model, and that we have witnessed something like the end of constitutional history. Nonetheless, even though there are many complex borrowing patterns for individual constitutional provisions, there also exists a more general picture. First, a number of rights are near universally adopted and could be described as "generic" constitutional rights. But also beyond this common core of rights, constitutions are at least partly standardized documents. In particular, a substantial part of all variation in the rights-related content of the world's constitutions is a standardized function of whether a country has a common law or a civil law system. Along these lines, the world's constitutions roughly divide in two different families, each with their own unique constitutional features.

One set of constitutions can be described as unambiguously "libertarian." These libertarian constitutions emphasize negative liberty rights and omit positive social welfare rights. Rather than empowering or obligating the state to provide for the welfare of its citizens, these constitutions seek to carve out a zone of private autonomy into which the state may not intrude. These constitutions moreover place substantial emphasis on judicial process rights, such as the right to habeas corpus and various provisions relating a fair, speedy and public trial, thereby highlighting the role of the judiciary as a protector of individual liberty and a constraint on the government. In many cases, they also allow for judicial review. This libertarian constitutional model is strongly associated with the Anglo-American constitutional tradition. And it is a model that has been gaining in prominence over the past six

decades. If there has been any type of constitutional convergence, it is the convergence of common law constitutions upon this particular constitutional model.

But there is also a different constitutional model, which is more statist than libertarian. The constitutions that embrace this model place substantial emphasis on positive rights. They contain a number of negative liberty rights, but supplement them with a broad social welfare agenda. They envision a larger and more active role for the state, in the form of obligations on the part of the government to bring about certain social and economic conditions and to provide citizens with a range of basic necessities. The state is not simply a threat to liberty but also a guarantor of welfare and source of sustenance. By contrast, the judiciary is not nearly given the same degree of explicit responsibility for defining and implementing restrictions upon the exercise of state power against individuals. This constitutional model, in general, fits both civil law systems and former soviet republics. But on a whole, this model is less coherent than the libertarian model. Moreover, over the past decades, it has been increasingly modified in line with the libertarian tradition, though it has not disappeared altogether.

Not all the substantive constitutional variation is standardized. There are number of constitutional provisions that do not fit any of these models. Whether or not a country adopts third generation rights, for example, is not a function of whether it belongs to either of these families. And within the statist family in particular, constitutions differ in the extent to which they also emphasize negative liberty rights. These differences are explained by more specific diffusion patterns. But in general, it is diffusion that shapes the substantive trajectory of the world's written constitutions.

By now, the reader may have wondered what to make of this all. What are the consequences of these transnational influences, and the lack of expressive constitutions? Is this a good or a bad thing? At first sight, one may think that the main findings of this thesis are cause for celebration. Through transnational influences, or diffusion, liberal models reach illiberal places. Around the world, countries have embraced a number of "generic rights" and strengthened their commitments to human rights in general. Either willingly or unwillingly, they have imported best practices from elsewhere. Even rights-abusing dictators such as Zimbabwe's Robert Mugabe or Egypt's Hosni Mubarak stress their constitutional commitments to rights and appoint

judges to their constitutional courts to uphold the constitution. Rather than simply ignoring his rights commitments, Robert Mugabe amended the Zimbabwean Bill of Rights no less than nineteen times since independence.⁶⁹ Constitutionalism has become a universal language that is spoken around the world.

But there is an inherent danger to the transnational constitution. Its largely liberal principles, and constraints on the government, are not a product of domestic power struggles, contestation or constitutional rioting, aspects that characterized the writing of the world's first constitutions. While most constitutional ideas emerge in response to deep historical crises, they subsequently evolve into fashionable constitutional attributes. And fashionable legal ideas, borrowed from elsewhere, may fail to deliver. This, in fact, is one of the core insights from the comparative law literature. The comparative law literature has often documented the existence of a "transplant-effect."⁷⁰ Under this logic, borrowing and transplantation undermines the effectiveness of laws. If laws are simply transplanted, they may be unrelated to the needs and values of society. As a result, the "laws-on-the-books" will diverge from "law-in-action." The world's words of liberty may be nothing but a dead letter.

But while the comparative law literature is skeptical about transplanted laws in general, the distinct logic of each of the four different diffusion mechanisms conceptualized in this thesis, *learning*, *competition*, *coercion* and *acculturation*, suggests that whether or not such a "transplant-effect" occurs depends on the diffusion mechanism at work. When diffusion reflects a genuine learning, for example, states are likely to be intrinsically committed to the adopted provisions. Through learning, state preferences change. More worrisome, by contrast, is the case where constitutional rules are imposed on unwilling recipients. Nice sounding constitutional rules may be adopted, but state preferences do not change, suggesting that the government may try to circumvent its constitutional commitments. In this case, the "transplant-effect" is most likely to occur.

⁶⁹ Alexandra Guhr, *The Republic of Zimbabwe, Introductory Note*, in *Constitutions of the Countries of the World*, electronic database, accessed December 2010.

⁷⁰ See e.g., Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 *EUROPEAN ECONOMIC REVIEW* 165, *passim* (2003). Cf Daron Acemoglu et al., *The French Revolution: The Consequences of Radical Reform* (Manuscript, 2010). For a full exposition of this argument, and all relevant references see Chapter VII.

Unlike for the other empirical questions discussed thus far, this thesis does not offer a definite answer to the question of whether transplantation, in fact, undermines the effectiveness of constitutional rules. Doing so would require full testing on the “effectiveness” of written constitutions, which is a challenging, and perhaps impossible, task that is beyond the scope of this thesis. But as a tentative first step, the concluding chapter of this thesis does highlight, in a descriptive fashion, that in many cases, there does exist a gap between *de jure* constitutional rules and *de facto* constitutional practice. What constitutions say is not the same as what constitutions do. Thus, while we may proclaim that the “enlightenment hope in written constitutions is sweeping the world,”⁷¹ it remains yet to be seen whether this is not, in fact, a false dawn.

E. Organization of the Book

This thesis is organized in three parts. The first part is descriptive and historical. Chapter II will introduce the new dataset on which the empirical analysis in this thesis is based. It will set out the basic coding rules and justify the most important choices in the selection and coding of constitutions. Chapter III will use this dataset to describe some global trends and patterns in the world’s constitutions over time. It traces the intellectual and historical origins of some important constitutional ideas. Using simple descriptive tools, it moreover shows how these ideas subsequently spread among the world’s constitutions. The overwhelming impression that is painted in this chapter is that constitutional ideas are often rooted in deep historical crises, but subsequently evolve into fashionable constitutional attributes, that spread across the globe. Over the past six decades, almost all conceivable constitutional ideas have proliferated. More constitutions adopt more rights, and also share more rights in common. Rights creep. Their enforcement, moreover, is increasingly placed in the hand of the judiciary.

The second part is the meat and flesh of this thesis. It offers a causal account of the origins of constitutional ideas. Chapter IV explores domestic origins, and conceptualizes an “expressive constitution” that is closely linked to the indigenous

⁷¹ See Ackerman, *supra* note 31, at 772.

features of society. But when taking this theory to the data, it turns out that there is little empirical evidence to support it. Substantive constitutional choices are remarkably unrelated to local needs and values. Chapter V explores a competing account, which is that constitutions have transnational origins. It conceptualizes four mechanisms through which constitutional ideas may diffuse: learning, competition, coercion and acculturation. It finds substantial empirical evidence that constitutions are shaped through transnational influences. It turns out that constitution-makers often follow the example of countries with the same pre-existing legal system, the same religion, the same colonizer and the same aid donors. These findings primarily point at learning and coercion as the driving forces behind constitution-making.

The third part of this thesis will focus on the consequences of these findings, but is more tentative in nature. Chapter VI will take up the question of constitutional convergence, or whether the world's constitutions are increasingly similar to each other. It turns out that the world's constitutions are at least partly standardized documents. A wide range of constitutional choices can be reduced to a small number of underlying, or "latent" dimensions. Most of the variation in the constitutional universe, in fact, represents a divide into two distinct constitutional families: one libertarian family that fits with the Anglo-American, or common law tradition and one more statist family that is characteristic of the civil law tradition. And yet, despite sweeping claims to the contrary, there is no evidence of a global constitutional convergence, or the end of constitutional history. The only convergence type of convergence that is apparent from the data is the convergence among common law constitutions. Chapter VII concludes this thesis. It will present a tentative discussion of the implications of these findings. If constitutions are shaped by transnational influences, is this a good or a bad thing? Its main finding is that, despite a proliferation of nice sounding constitutional rules, there is reason for caution. "Large-C" written constitutional commitments often diverge from "small-c" constitutional practice. What constitutions say is not the same as what constitutions do. It moreover sets out an agenda for future research, to further explore this tentative finding.

II. NEW DATA ON THE WORLD'S WRITTEN CONSTITUTIONS: 1946-2006

A. *Introduction: Measuring the World*

Ever since there exists nation-states, there exists nation statistics that facilitate cross-national comparison. Economics has a long tradition of using GDP data to explain economic growth in a cross-country setting. Over time, the availability of national statistics has increased steeply. Not only economics, but also political science, sociology and international relations scholars now routinely use statistical data to explain social and political differences across countries. A number of groundbreaking datasets have facilitated such comparisons. Today, for almost all of the world's countries, there exists data on electoral systems, democratic performance, voting in the UN General Assembly, and human rights practices, just to name a few. Unmistakably, there is a trend towards, and appetite for, “measuring the world.”⁷²

But this general trend notwithstanding, the constitutional universe still goes largely unexplored. While comparative politics has surged as an academic field, formal constitutional rules have rarely featured as object of analysis. This thesis, therefore, presents the first-ever exploration of substantive constitutional choices around the world.⁷³

To that end, it introduces a unique new dataset based on the coding of all historical constitutions for 188 countries since the WWII. Quantifying constitutional texts is not common practice in the study of constitutional law. And doing so is not a value-free process. It requires a range of choices as to what is coded, how and why. Therefore, this chapter will introduce the dataset in some detail. It conceptualizes what constitutes a “constitution” for the purpose of the coding and justifies the most important coding rules. An extensive 100+ page codebook will be made available on the author's website.

⁷² See e.g., Sally Merry, *Measuring the World: Indicators, Human Rights, and Global Governance* (Manuscript (2009)).

⁷³ Cf. Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMPARATIVE POLITICS* 217, 235 (Daniele Caramani ed., 2008) (noting as of 2008 that “[t]here has been no systematic research or data collection on constitutions, rights, and rights protection”).

B. *Quantifying the Constitutional Universe*

The dataset presented in this chapter is one of the first of its kind. But it is not the first attempt to code written constitutions. In the past, there have been a number of smaller coding efforts, while another large-scale project was undertaken simultaneous with the data collection for this thesis.

Over the past three decades or so, a number of scholars have made efforts to code written constitutions. Most of these projects, however, code only a limited number of variables and/or cover a limited time period.⁷⁴ A 1978 study by two Dutch constitutional law professors, Henk van Maarsseveen and Ger van der Tang stands out for the comprehensive range of variables coded. It covers 233 variables, on a range of constitutional topics, including the Bill of Rights.⁷⁵ However this data is not time-varying, but rather a cross-section of constitutions in 1978. By contrast, the 1976 study by John Boli stands out for its comprehensive time coverage, covering all constitutions from 1870-1970, although not moving beyond that period.⁷⁶

A recent project is substantially more ambitious than any of these early studies. With funding from the American National Science Foundation and a team of researchers, Zachary Elkins, Tom Ginsburg and James Melton are coding the historical constitutions of all countries from 1788-2008.⁷⁷ For each constitution, they code approximately 600 variables across the constitution. Arguably, this is the biggest data effort in constitutional law so far. The substantive coding however is still in

⁷⁴ See e.g., John Boli-Bennet, *The Expansion of Nation-States, 1870-1970*, Phd Dissertation Stanford University (1976); HENC VAN MAARSSEVEEN & GER VAN DER TANG, *WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY* (1978); Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. LAW AND ECON. 87 (1999); Christian Davenport, "Constitutional Promises" and Repressive Reality: A Cross-Sectional Time Series Investigation of why Political and Civil Liberties are Suppressed, 48 *Journal of Politics* 627 (1996); JOE FOWERAKER & TODD LANDMAN, *CITIZENSHIP RIGHTS AND SOCIAL MOVEMENTS: A COMPARATIVE AND STATISTICAL ANALYSIS* (1996); Linda Camp Keith, *Constitutional Provisions for Individual Human Rights(1976-96): Are They More Than Mere "Window Dressing"?* 55 *POL. RES. QUART.* 111 (1999); Avi Ben-Bassat & Momi Dahan, *Social Rights in The Constitution and in Practice*, 36 *J. COMP. ECON.* 103 (2008).

⁷⁵ MAARSSEVEEN & VAN DER TANG, *supra* note 74.

⁷⁶ The study codes 150 variables, mainly relating to rights. See Boli-Bennet, *supra* note 74; GEORGE M. THOMAS ET AL., *INSTITUTIONAL STRUCTURE: CONSTITUTING THE STATE, SOCIETY AND THE INDIVIDUAL* 329-33 (1987).

⁷⁷ See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

progress, and the data is still awaiting public release.⁷⁸ Unlike the data presented in this chapter, the Elkins et al. data does not only cover the bill of rights and judicial review, but also covers the procedural part of the constitution, that establishes the branches of government and arranges the interrelationships among them. However, with respect to the substantive part of the constitution, or constitutional rights and rights-related policies, the dataset presented in this chapter is the more comprehensive one. It does not only document whether certain rights are present in the constitution, but also how they are framed, where they are placed, and so on. At the time of writing, the dataset presented here is the first comprehensive coding on substantive constitutional provisions. And even after the release of the Elkins et al. data, it will be the most comprehensive database on constitutional rights.

C. Conceptualizing Constitutions

A threshold question for a large-N constitutions project is that of how to define the object of study: when analyzing data on the world's constitutions, what constitutes a "constitution"? There is a substantial and long-established literature on the question of what constitutes a constitution and, consequently, a number of ways in which the term may be defined.⁷⁹ The fundamental divide is between definitions geared to formal legal status and definitions geared to actual practice: one may study either a country's de jure or "large-C" constitution, meaning the formal legal rules that purport to be foundational, or its de facto or "small-c" constitution, meaning "the body of rules, practices, and understandings that actually determines who holds what kind of power, under what conditions, and subject to what limits."⁸⁰

⁷⁸ For the status of this project see <http://www.comparativeconstitutionsproject.org/>.

⁷⁹ See, e.g., A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 22 (8th ed. 1915); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934); Matthew S.R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons From an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 592-93 (2006); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411 (2007); ELKINS ET AL., *supra* note 77, at 36-40.

⁸⁰ See David S. Law, *Constitutions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 379 (Peter Cane & Herbert Kritzer eds., 2010).

The world's first constitutional comparativist, Aristotle, defined the constitution as the way in which the (city-) state is actually organized.⁸¹ Aristotle compared “small-c” or de facto constitutions. This is not surprising, as the first “modern” written national constitutions (America 1789, Poland 1791, France 1791) would not be written for another 2000 years. This study chooses the exact opposite definition of Aristotle: it studies written constitutional documents, or “large-C”, de jure constitutions.

The “large-C” constitution, in its typical form, is some document called the “constitution of country X,” issued at day Y of some year Z.⁸² Since the American and French revolutions, it has become standard practice of states to adopt such constitutional documents.⁸³ They comprise of a number of articles about the state, and sets out the basic rules that state activities are supposed to follow. In most cases, they moreover include a Bill of Rights that places substantive constraints on democratic politics; the main object of analysis in this thesis.

Although this definition of a constitution is a relatively simple one, it is not always a priori clear which legal document(s), in fact, should be counted as a country's “large-C” constitution. Not all constitutions fit the aforementioned format. Some “constitutions” are more accurately described as military decrees, electoral manifestos of the communist party, or documents written in the honor of a glorious leader. More commonly, some regular laws may enjoy semi-constitutional status, while some constitutions may be weakly entrenched and may be changed by an ordinary majority.

Constitutions have been included in the data based on either one of two criteria. First, any document or set of documents that a country formally designates as its “constitution” is treated as such, regardless of whether it is enacted like ordinary legislation or purports to be entrenched. Most of the constitutions in the data were included pursuant to this criterion. Second, formal legal instruments that are not explicitly labeled “constitutional” but nevertheless govern functionally constitutional

⁸¹ ARISTOTLE, POLITICS (IV.11.1295a40-b1, VII.8.1328b1-2).

⁸² JAN ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 5 (1996).

⁸³ *Id.*

matters such as the basic structure, powers, and limits of the state are also treated as constitutional. Examples in this category are Israel's Basic Laws,⁸⁴ the United Kingdom's 1998 Human Rights Act,⁸⁵ and Canada's 1960 Bill of Rights.⁸⁶ More generally, legislative Bills of Rights that are separate from the main constitutional documents are included in the data.⁸⁷ Excluded from this category, by contrast, are statutes enacted to implement constitutional requirements or execute constitutional obligations. Few constitutions were included in the data on the sole basis of this second criterion.⁸⁸

Large-C Constitutions are considered to be in force until they are amended or a new document is enacted. Whenever constitutions are replaced or amended, the new constitutional arrangements are analyzed. But constitutional changes only affect the data when these changes concern one of the substantive elements of the coding scheme, as described below. Thus, if the substantive choices of the new constitution are the same as in the old, the data does not change.⁸⁹ Suspension of a constitution was not coded as a substantive change in constitutional arrangements, unless the suspension was pursuant to another constitutional document that thereby effectively superseded the suspended constitution. The main reason for following this rule is that, during times of constitutional suspension, it is hard to determine, let alone code,

⁸⁴ *E.g.*, Basic Law: Human Dignity and Liberty, 5752-1992, 1391 LSI 150 (1992) (Isr.).

⁸⁵ Human Rights Act, 1998, c. 42 (Eng.).

⁸⁶ Canadian Bill of Rights, S.C. 1960, c. 44 (Can.).

⁸⁷ Further examples include Latvia's Bill of Rights 1991, Libya's Bill of Rights 1991 and the New Zealand Bill of Right 1990.

⁸⁸ These two criteria closely resemble Jon Elster's definition of a large-C Constitution. Elster adds a third criterion, however, which is a document that is hard to amend. For Elster, "rigid documents" are also constitutions. *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. J. 364, 366 (1995). For practical reasons, Elster's third criterion is not used here. Including rigid documents that are neither called constitution nor regulate fundamental matters, in principle, could take the project outside the realm of public law, which seems undesirable. The approach taken here moreover resembles the coding rules of the Elkins et al. dataset, that uses both of the aforementioned criteria, although it also includes documents that have a status of highest laws, even if they are neither called "constitution" nor regulate fundamental matters. *See* ELKINS ET AL., *supra* note 77, at 49. For all practical purposes, their document selection is likely to be rather similar to mine.

⁸⁹ The definition of constitutional change is thus a substantive one, not a formal one. For a discussion see, ELKINS ET AL., *supra* note 77, at 55-59.

which constitutional rules govern the country, and which part of the constitution remains in force.

International human rights treaties are not generally considered to be part of the large-C constitution, even when these are referred to in the constitution. Only where the provisions of the international human rights treaties are explicitly set forth or repeated in the constitution, they were coded as part of the constitution. Thus, for example, the United Kingdom's Human Rights Act 1998, which not only incorporates the European Convention on Human Rights but sets forth the latter in full as an appendix, was coded as including the provisions of the latter document.⁹⁰ By contrast, when international human rights instruments are merely referred to, these instruments are not coded as part of the constitution.

A related question is for which countries the constitution should be coded. To conceptualize countries, I relied on the World Bank's list of countries, which is used for all World Bank datasets. This list is longer than the United Nations country classification, and slightly less political. It includes West Bank and Gaza, for example, although not Taiwan. From this World Bank list of countries, I exclude those countries that are not fully independent and governed in part by the constitution and laws of other countries. For example, the constitutions of Greenland and the Netherlands Antilles are excluded because they have been dictated by Denmark and the Netherlands, respectively.⁹¹ As a result, this thesis only compares the constitutions of fully independent countries. Of course, some independent countries may have inherited their constitutions from their former colonizer. But in that case, they at least have had the chance to change it, would they have wished to do so.

⁹⁰ Human Rights Act, 1998, c. 42, sched. 1 (Eng.).

⁹¹ I rely on Flanz & Blaustein's collection on constitutions of "dependencies and territories" to determine which countries are not fully independent and should thus be excluded from the analysis. The following countries were excluded; American Samoa (part of the US), Andorra (part of France), Aruba (part of the Netherlands), Bermuda (part of the UK), Cayman Islands (part of the UK), Channel Islands (part of the UK), Farao Islands (part of Denmark), French Polynesia (part of France), Greenland (part of Denmark), Guam (part of the US), Hong Kong (part of the UK and later China), Isle of Man (part of the UK), Macao (part of China), Mayotte (part of France), Monaco (part of France), Netherlands Antilles (Part of the Netherlands), New Caledonia (part of France), Northern Mariana Islands (part of the US), Puerto Rico (part of the US), San Marino (independent but no data), Virgin Islands (part of US), West Bank and Gaza (part of Israel).

Following the conventional approach of all World Bank datasets, I only code the constitutional history of the countries that are in existence today. This means that countries that are no longer in existence are excluded from the sample. The Soviet Union is thus excluded, as are East and West Germany, for example. Countries that exist today are coded from the moment they came into existence. Yet, the censoring of the sample period, from 1946-2006, slightly complicates this rule. When a country was already in existence before 1946, it is coded from 1946 onwards. By contrast, new countries, coming into existence after 1946, are coded from the moment the first new constitution was adopted or, if the first constitution precedes independence, from the moment of independence. In the large majority of cases, this is either with, or shortly after, independence. Only for eight countries, their first constitution precedes official independence, in which case they are coded from independence onwards.

For new countries that used to be colonies, their independence constitution can safely assumed to be the first-ever national constitution. Most colonies used to have rules that arranged their relationship with the mother country, but nothing like a real constitution, granting citizenship, defining the territory and providing rights. By contrast, for “new” countries that were formed through the falling apart of another, there is a previous constitutional history to draw on. The former Soviet Republics, for example, were governed by the Soviet constitution. Similarly, “new” countries that were formed through re-unification, too, tend to have a constitutional history to draw on. This is the case for Germany and Yemen for example. Even in these cases, the “new” countries are coded from the moment they adopt their first constitution. A transitional period after independence, in which they are still governed by (a revised version of) the old constitution, while drafting a new one, is excluded, as it is impossible to find consistent information on the transitory arrangements. In principle, the constitutions of the historical entities (e.g. the Soviet Union, Yugoslavia, Czechoslovakia, Ethiopia, East Germany, West Germany, North Yemen and South Yemen) are excluded from the data.⁹² However, as a separate exercise, the last

⁹² A special case is Cyprus, where I code all the historical constitutions, even though the Turkish part of Cyprus withdrew from the constitutional arrangement and claimed an independent state. The reason is that formally Cyprus remained one country and formally the constitution applied to the entire territory.

constitutions of these entities were coded in order to be able to control for structural similarities and path dependency in constitution-making.

Finally, if more than one group claims to be the “government” of a country, and both of these groups have their own constitution, than only the constitution of the government that actually controls the territory is coded. In that case, it does not matter whether this government is “legitimate” or whether it is recognized by the United Nations or other states. Thus, constitutions of governments in exile are not coded. One example is Cambodia in 1981 where there was one constitution of the government in exile and one by the government that controlled the territory.

In this fashion, I identified 188 countries. And for these 188 countries, a total of 729 constitutional documents were coded. At any time, each country had one or more (though usually one) constitutional documents. Only two countries, Bhutan and Oman, for some time, had no constitutional documents at all. For a total of 121 countries, coding starts from the first constitution onwards. For other countries, the first constitution was adopted before the start of the sample period and thus not included in the dataset. For almost all of these countries, every single constitution was identified.⁹³ To identify the episodes of constitution-making and constitutional change, as well as to code the content of these constitutions, I use two main sources, which were Peaslee’s *Constitutions of Nations*⁹⁴ and Blaustein and Flanz’s *Constitutions of the Countries of the World*, a continuously updated loose-leaf collection.⁹⁵

⁹³ However, a few constitutions identified were unavailable in any of the data sources. In these cases, an “informed guess” was made based on the information in the previous constitution, the subsequent constitution and background reading. In total, coding was based on an informed guess in 63 out of all observations in the sample, which is less than 1% of the cases.

⁹⁴ 1-3 AMOS J. PEASLEE, *CONSTITUTIONS OF NATIONS* (1st ed. 1950); 1-3 AMOS J. PEASLEE, *CONSTITUTIONS OF NATIONS* (2d ed. 1956); 1-4 AMOS J. PEASLEE, *CONSTITUTIONS OF NATIONS* (3d ed. 1965).

⁹⁵ *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1971 & supp.). These sources were supplemented where necessary or appropriate by a variety of additional sources that included ROBERT L. MADDEX, *CONSTITUTIONS OF THE WORLD* (3d ed. 2007) and 1-2 D.G. LAVROFF & G. PEISER, *LES CONSTITUTIONS AFRICAINES* (1961).

The table below lists all the different historical documents that were coded for each country. The first column lists the year of the first constitution, while the other columns list the date of subsequent constitutions per decade.

Table 1: Date of Historical Constitutions Coded for Each Country

	<i>First Constitution</i>	<i>1940s</i>	<i>1950s</i>	<i>1960s</i>	<i>1970s</i>	<i>1980s</i>	<i>1990s</i>	<i>2000s</i>
<i>Afghanistan</i>	1931			1964	1977 1979	1987	1990	2004
<i>Albania</i>	1946*				1976		1990 1991 1998	
<i>Algeria</i>	1963			1963	1976	1989	1998	
<i>Angola</i>	1975				1975	1980	1992	
<i>Antigua & Barbuda</i>	1981					1981		
<i>Argentina</i>	1853**	1949	1956				1994	
<i>Armenia</i>	1995						1995	2005
<i>Australia</i>	1900**							
<i>Austria</i>	1920**					1988	1997 1998	2004
<i>Azerbaijan</i>	1995						1995	2002
<i>Bahamas, The</i>	1973				1973			2002
<i>Bahrain</i>	1973				1973			2002
<i>Bangladesh</i>	1972				1972 1973 1977	1988	1991	
<i>Barbados</i>	1966			1966		1981		
<i>Belarus</i>	1994						1994 1996	2004
<i>Belgium</i>	1831**				1970	1980 1988	1992 1994	2000 2002 2005
<i>Belize</i>	1981					1981		2001
<i>Benin</i>	1960			1960 1964	1970	1977	1990	
<i>Bhutan</i>	2008							2008
<i>Bolivia</i>	1945	1945		1961 1967			1994	2002
<i>Bosnia & Herz.</i>	1995						1995	
<i>Botswana</i>	1966			1966 1969			1997	
<i>Brazil</i>	1946			1968		1988	1993	2000 2004
<i>Brunei</i>	1984					1984		
<i>Bulgaria</i>	1911**	1947			1971		1991	
<i>Burkina Faso</i>	1960			1960	1970 1977	1988	1991	1997
<i>Burundi</i>	1962			1962	1974	1981	1992 1998	2004
<i>Cambodia</i>	1947	1947			1976	1981	1993 1999	

<i>Cameroon</i>	1960			1960 1961	1972		1996	
<i>Canada</i>	1867**			1960		1982		
<i>Cape Verde</i>	1980					1980	1992	
<i>Central African Rep.</i>	1960			1960	1976	1981 1986	1995	2004
<i>Chad</i>	1960			1960 1962 1965 1967	1978	1982 1989	1991 1993 1996	
<i>Chile</i>	1925**			1963 1967	1970 1971 1975 1976	1980 1989	1999	2001 2005
<i>China</i>	1946*		1954		1975 1978	1982	1999	2004
<i>Colombia</i>	1945	1945		1968			1991 1997 1999	
<i>Comoros</i>	1978				1978		1992 1996	
<i>Congo, Dem. Rep.</i>	1964			1964 1967	1970 1971 1974	1982	1990	2003 2005
<i>Congo, Rep</i>	1961			1961 1963 1969	1979	1984	1992 1997	2002
<i>Costa Rica</i>	1871**	1949				1989	1994 1996 1998	
<i>Cote d' Ivoire</i>	1960			1960 1963	1975	1980 1985	1990 1998	2000
<i>Croatia</i>	1991						1991	2001
<i>Cuba</i>	1940				1976		1992	2002
<i>Cyprus</i>	1960						1996	2004
<i>Czech Republic</i>	1993						1993	2001
<i>Denmark</i>	1949**		1953					
<i>Djibouti</i>	1977				1977	1981	1992	
<i>Dominica</i>	1978				1978	1984		
<i>Dominican Republic</i>	1942	1947	1955	1962 1966			1994	2002
<i>Ecuador</i>	1945	1946		1967	1972 1979	1983	1992 1998	
<i>Egypt</i>	1923**		1953 1956	1964	1971	1980		2007
<i>El Salvador</i>	1866**		1950	1962		1983	1991 1996 1999	2000 2003
<i>Equatorial Guinea</i>	1973				1973	1982	1991 1995	
<i>Eritrea</i>	1997						1997	
<i>Estonia</i>	1991						1991	2003
<i>Ethiopia</i>	1991						1991 1995	
<i>Fiji</i>	1970				1970		1990 1997	

							1998	
<i>Lebanon</i>	1926**						1990 1991	
<i>Lesotho</i>	1966			1966	1970	1983	1993	
<i>Liberia</i>	1947**					1984		
<i>Libya</i>	1969			1969			1991	
<i>Liechtenstein</i>	1921**						1992	2003
<i>Lithuania</i>	1992						1992	
<i>Luxembourg</i>	1868**	1948					1996 1999	
<i>Macedonia</i>	1991						1991	
<i>Madagascar</i>	1959		1959		1975		1992 1998	
<i>Malawi</i>	1964			1964 1966			1994	
<i>Malaysia</i>	1957		1957					
<i>Maldives</i>	1964			1964			1992	
<i>Mali</i>	1960			1968	1974		1992	
<i>Malta</i>	1964			1964			1991	
<i>Marshall Islands</i>	1979				1979		1990	
<i>Mauritania</i>	1961			1961 1965	1978	1985	1991	
<i>Mauritius</i>	1968			1968		1983	1991 1994	
<i>Mexico</i>	1917**			1968	1973 1974 1977	1980 1982 1983 1987	1992 1993 1996	2001 2003 2004 2007
<i>Micronesia</i>	1981					1981		
<i>Moldova</i>	1994						1994	
<i>Mongolia</i>	1940**			1960			1992	
<i>Morocco</i>	1962			1962			1992 1996	
<i>Mozambique</i>	1975				1975		1990	
<i>Myanmar</i>	1948	1948			1974			
<i>Namibia</i>	1990						1990	
<i>Nepal</i>	1948	1948	1959	1962 1969			1990	2006
<i>Netherlands</i>	1848**					1983		
<i>New Zealand</i>	1852**			1962	1971 1977	1982 1986	1990 1993	
<i>Nicaragua</i>	1948	1948	1950		1974	1986	1995	2000
<i>Niger</i>	1960			1960		1989	1992 1996 1999	
<i>Nigeria</i>	1960			1960	1979		1999	
<i>Norway</i>	1814		1950	1964		1988	1992 1994 1995	2004
<i>Oman</i>	1996						1996	
<i>Pakistan</i>	1956		1956	1962	1973			
<i>Palau</i>	1981					1981		
<i>Panama</i>	1946*				1972			2004
<i>Papua New Guinea</i>	1975				1975			
<i>Paraguay</i>	1940**			1967			1992	

<i>Peru</i>	1933**					1980 1988	1993	
<i>Philippines</i>	1935**				1973	1986		
<i>Poland</i>	1921**	1947	1952			1989	1990 1992 1997	
<i>Portugal</i>	1933**		1959		1976	1982 1989	1997	2004
<i>Qatar</i>	1971				1971			2003
<i>Romania</i>	1948	1948	1952	1965			1991	2003
<i>Russian Federation</i>	1993						1993	
<i>Rwanda</i>	1962			1962	1978		1991	2003
<i>Samoa</i>	1962			1962				
<i>Sao Tome and Princ.</i>	1975				1975		1990	
<i>Saudi Arabia</i>	1932**		1958				1992	
<i>Senegal</i>	1960			1960 1963			1992	2001
<i>Serbia and Mont.</i>	2003							2003
<i>Seychelles</i>	1976				1976 1979		1993	
<i>Sierra Leone</i>	1961			1961	1978		1991	
<i>Singapore</i>	1965			1965 1969		1988	1994	
<i>Slovak Republic</i>	1993						1993	2001
<i>Slovenia</i>	1991						1991	2004
<i>Solomon Islands</i>	1978				1978			
<i>Somalia</i>	1960			1960	1979			
<i>South Africa</i>	1909**			1961		1983	1994 1996	
<i>Spain</i>	1945	1947	1958	1966	1978			
<i>Sri Lanka</i>	1946				1972 1978			
<i>St. Kitts and Nevis</i>	1983					1983		
<i>St. Lucia</i>	1979				1979			
<i>St. Vincent and Ger.</i>	1979				1979			
<i>Sudan</i>	1958		1958	1962 1964	1973	1985	1998	2005
<i>Suriname</i>	1975				1975	1983 1987		
<i>Swaziland</i>	1968			1968	1973 1978			2005
<i>Sweden</i>	1866**	1949		1964	1974		1991	2002
<i>Switzerland</i>	1874**			1969		1981	1999	2000
<i>Syria</i>	1944			1964	1973			
<i>Tajikistan</i>	1994						1994	2003
<i>Tanzania</i>	1962			1962 1965	1977	1984	1992	
<i>Thailand</i>	1932**	1949		1960 1968	1971 1972 1974 1976 1978		1991 1995 1997	2007
<i>Timor-Leste</i>	2002							2002
<i>Togo</i>	1960			1960	1979		1992	2002

				1963 1967				
<i>Tonga</i>	1875**							
<i>Trinidad and Tob.</i>	1962			1962	1976			
<i>Tunisia</i>	1959		1959					
<i>Turkey</i>	1945			1961		1982		2001 2004
<i>Turkmenistan</i>	1992						1992 1999	
<i>Uganda</i>	1962			1962 1967			1995	2005
<i>Ukraine</i>	1996						1996	
<i>United Arab Em.</i>	1971				1971			
<i>United Kingdom</i>	1940**						1998	2005
<i>Uruguay</i>	1934**		1952	1966	1977	1981	1996	2004
<i>Uzbekistan</i>	1992						1992	
<i>Vanuatu</i>	1980					1980		
<i>Venezuela, RB</i>	1947	1947 1948	1953	1961			1999	
<i>Vietnam</i>	1980					1980	1992	
<i>Yemen, Rep.</i>	1994						1994	
<i>Zambia</i>	1964			1964	1973		1991 1996	
<i>Zimbabwe</i>	1979				1979		1990 1996	2000 2005
* constitution published in 1946 edition of Peaslee's 'Constitutions of Nations', date unknown								
**Date of original constitution, but version coded includes amendment from original dates to 1946								

D. Substantive Interpretation and Coding Rules

For each of these 729 constitutions, 237 variables were coded, covering a range of constitutional provisions relating to the substantive part of the constitution, or the Bill of Rights and its enforcement. In selecting these variables, my main consideration was to include as many as possible real word constitutional features. In this section, I will describe some of the most important general rules for substantive coding of the world's written constitutions. The more specific coding rules for individual provisions will be made available in a separate codebook.

The most important coding rule, which applies to all constitutional provisions, is that only explicit constitutional statements are coded. For example, if the constitution contains a "right to liberty," this is not coded as a "prohibition of arbitrary arrest and detention," even if the word "liberty" could be interpreted in such a manner by the courts. Coding thus literally follows the text of the constitution, and coder interpretation is minimized. In the coding of each provision, the larger document as a whole is ignored, as are the underlying purposes and the possible

intent of the framers. Interpretation is purely textual, and thus bound to differ from judicial interpretation of the document, which typically takes account of underlying purposes and intent.

Following this general approach, limitation clauses that attempt to limit the scope of rights in a constitution, often in a boilerplate or blanket manner, were not coded.⁹⁶ From the text of a limitation clause alone, it is often hard to determine to which extent rights may actually be limited. The actual impact of a limitation clause can be difficult to ascertain. To do so would have required in-depth, subjective determinations as to purpose, intent, and judicial interpretation. Moreover, the manner in which limitation clauses are framed varies substantially across countries, making it hard to draw systematic comparisons.

The vast majority of coded provisions concern constitutional rights. But constitutional rights come in different varieties. They can be provided as prohibitions for the government not to do certain things or as positive entitlements for citizens, as “rights” or “guarantees” for all. The exact formulation often depends on the type of right in question. For example, negative liberty rights are often cast as prohibitions (“no one shall be tortured,” “no one shall be deprived of his liberty, except by law”), while fair trial rights are often cast as guarantees (“trials shall be held in public,” “everyone is guaranteed a defense”). And in both cases, these prohibitions or guarantees could also be explicitly provided as rights (“everyone has a right not to be tortured,” or “everyone has the right to a public trial”). The general coding rule is that, as long as the constitution offers protection, these protections are cast as rights. While this is not a particularly high threshold, certain provisions do not meet it. When the constitution merely states that certain rights may be regulated, this is not coded as a substantive protection. For example, “the law regulates inheritance” or “the press is regulated by law,” does not constitute a right to inheritance or press freedom.

While in general, the exact formulation of rights is deemed to be mere semantics; there is a relevant difference for positive social welfare rights. For positive social welfare rights, I *do* code whether they are provided as rights for citizens or as

⁹⁶ A typical example is section 1 of the Canadian Charter of Rights and Freedoms, which stipulates that the rights contained therein are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” CAN. CONST. (Constitution Act, 1982) § 1.

goals for the government. I do so because of the controversy over the justiciability of positive social welfare rights in the literature. Social welfare rights are generally deemed unenforceable, because they are considered to be policy goals for the government rather than real rights. At the same time, there is a growing trend towards the judicial enforcement of these rights, with some high-profile cases in South Africa, India and Brazil, amongst others.⁹⁷ In light of this debate, semantics perhaps *do* matter, and the status of social welfare rights may depend on whether they are formulated as real rights (e.g., “everyone has the right to free healthcare”) or rather goals for the government (e.g., “the government shall take step to offer free healthcare”).

Constitutional rights are only coded when they apply to all citizens. Thus, as an example, a right to housing for children is not coded as a right to housing, as this right to housing does not apply to all citizens. Instead, it is coded as part of children’s rights. Similarly, the right to schooling for indigenous groups is not coded as a general right to education, but rather as a minority group right. There are two exceptions to this general rule. First, physical needs rights (education, housing, food or health care), are coded even when these only apply to the poor, weak or needy people in society. The rationale is that all citizens are still entitled to these rights in the case they would become poor or weak. Second, education rights are coded even when they only apply to children. As an additional rule, constitutional rights are only coded when they apply in all circumstances, and not in some cases only. As an example, a right to equality in voting is not coded as a general equality right. Similarly gender equality during working hours is not coded as a general right to gender equality.

In coding constitutional rights, the text of the entire constitution is analyzed. While most rights are placed in a Bill of Rights, they can also, or instead, be found in other places. Social welfare rights may be placed in a section on government policies. Fair trial rights may be provided in a section on the judiciary. Religious freedom and voting rights are sometimes stated in a preliminary and general section of the constitution. Voting rights may be placed in a section on parliament. And some

⁹⁷ See Chapter 3, section B, *infra*.

constitutions place their entire Bill of Rights in the preamble or appendix of the constitution.⁹⁸ The general rule is that it does not matter whether rights are part of the Bill of Rights or placed elsewhere in the constitution. As long as they provide an explicit guarantee, they are coded as rights.

But the dataset does not only capture constitutional rights. It also captures the enforcement of these rights, in particular through judicial review. The constitutional provisions relating to judicial review are coded somewhat differently than constitutional provisions on rights. Constitutions vary greatly in the extent of detail with which they describe the arrangements of the judiciary and judicial review. A constitution may mention, for example, that there is some form of judicial review, but remain silent on *when* judicial review can be initiated or by *which* parties. Importantly, this omission should not be taken to mean that that judicial review can never be initiated by anyone. Thus, the general coding rule for constitutional rights - which is that if something is not mentioned, it does not exist- does not apply to the coding of judicial review. Moreover, for judicial review, the information in the constitution has been complemented with information on actual practice. There are important cases (especially the older constitutional democracies such as the United States or Norway) where judicial review was established outside the constitution, for example through judicial decision making. In order to capture these cases, the information from the constitution was complemented with secondary materials.⁹⁹ The table below provides a short description of all variables in the dataset. A more comprehensive codebook will be made available on the author's website.

Table 2: Overview of Substantive Coding

Rights Provisions

Right to Life

Right to life

- ❖ Is there an absolute right to life? (based on phrasing of text)

Prohibition of death penalty

- ❖ Death penalty only in special circumstances, such as grave crimes or state of emergency

Protection of rights for unborn children

⁹⁸ Particularly in Francophone African countries the Bill of Rights tends to be placed in the preamble (like in the 1946 French constitution). Examples of countries where rights are placed in the schedules are the United Kingdom and Malaysia.

⁹⁹ Sources for these materials will be listed in the appendix.

Negative Liberty Rights

Prohibition of Torture

- ❖ Absolute Prohibition of torture?

Prohibition of slavery

Prohibition of arbitrary arrest and detention

Freedom of movement

Free development of personality

Right to bear arms

Right not to be expelled from home territory

Fair Trial Rights

Right of access to court, not to be deprived of lawful judge

- ❖ Right of access to court that is framed as 'habeas corpus'

Right to present a defense

Presumption of innocence

Right to appeal to higher court

Right to an interpreter or to be tried in a language that one understands

Prohibition of ex post facto laws (retroactive laws)

Right to public trial

Prohibition of double jeopardy

Right to remain silent

Right to a timely trial

Right to council

- ❖ Right to receive council free of charge

Right to 'fair trial'

Right to 'due process'

Rights for prisoners

Rights for victims of crimes

Privacy Rights

Right to personal privacy

Right to privacy of the home

Right to privacy of personal data

Right to privacy of family life

Right to privacy of communication

Right to protection of one's reputation, honor or good name

Civil and Political Rights

Right to freedom of religion

Freedom of expression

- ❖ Restrictions on the content of what may be freely expressed?

Freedom of press

Right to vote

- ❖ Is the vote universal?

Right to assembly

Right to association

Freedom to form political parties

Equality Rights

General equality clause, 'everyone' is equal

- ❖ Equality clause framed in negative terms, i.e. non discrimination
- ❖ Equality clause framed in positive terms, i.e. remove obstacles to equality
- ❖ Affirmative action, positive discrimination of certain groups

Equality regardless of race

Equality regardless of place of origin

Equality regardless of ethnicity

Equality regardless of education

Equality regardless of social status

Equality regardless of caste

Equality regardless of tribe

Equality regardless of religion

Equality regardless of belief/ philosophical conviction

Equality regardless of political preferences/ opinion

Equality regardless of economic status/ property

Equality regardless of ancestry

Equality regardless of nationality

Equality regardless of disability

Equality regardless of age

Equality regardless of sexual orientation

Equality regardless of language

Equality regardless of hiv/ aids

Women's Rights

Equality regardless of gender

- ❖ Is gender equality entrenched in a separate provision or part of general equality provisions?

- ❖ Does gender equality (explicitly) refer to 'all spheres of live'?

Woman empowerment in labor relations (e.g. equal pay for equal work)

Equality husband and wife within the family

Special protection of women (e.g. special conditions at work)

Right to maternity leave

Special protection of mothers

Rights for particular groups: children, family, minorities, disabled etc

Rights for children

Prohibition of child labor

Rights for the family

Right to get married

Right to asylum

Rights for consumers

Rights for elderly people

Rights for handicapped people

Special protection of minorities

Protection of minority language

Right to preserve traditional ways of life, or minority culture

Right for minority groups to establish their own schooling.

Right for minorities to be represented in national government

Right to use traditional lands

Right to some degree of autonomy for minority communities

Socio- and Economic Rights

Right to work

- ❖ Type of right to work, i.e. right to have work or right to choose work

- ❖ Type of right to work, i.e. right for citizens or goal for government

Right to minimum wage

- ❖ Type of right to minimum wage, i.e. right for citizens or goal for government

Right to form trade unions

Right to strike

Right to favorable working conditions

- ❖ Type of right to favorable working conditions, i.e. right for citizens or goal for government

Right to rest

- ❖ Type of right to rest, i.e. right for citizens or goal for government

Right to work for the government (in civil service)

Freedom of enterprise

Right to social security

- ❖ Type of right to social security, i.e. right for citizens or goal for government

- ❖ Type of social security provided, for all without jobs or for certain vulnerable groups only

Right to adequate standard of living

- ❖ Type of adequate standard of living, i.e. right for citizens or goal for government

Right to food

- ❖ Type of right to food, i.e. right for citizens or goal for government

Right to housing

- ❖ Type of right to housing, i.e. right for citizens or goal for government

Right to water

- ❖ Type of right to water, i.e. right for citizens or goal for government

Right to health

- ❖ Type of right to health, i.e. right for citizens or goal for government

- ❖ Right to free healthcare

Right to education

- ❖ Type of right to education, i.e. right for citizens or goal for government

- ❖ Right to free education

Freedom of education

Right to establish private schools

Right to sport, physical education

- ❖ Type of right to sport, i.e. right for citizens or goal for government

Right to culture

- ❖ Type of right to culture, i.e. right for citizens or goal for government

Environmental Rights

Right to a healthy environment

- ❖ Type of right to a healthy environment, i.e. right for citizens or goal for government
- ❖ Do citizens have a duty to protect the environment?
- ❖ Does the constitution establish (civil or criminal) liability for damaging the environment?
- ❖ Do citizens have a right to information about the environment?
- ❖ Are citizens entitled to compensation when their living environment is damaged?
- ❖ Do citizens have a right to participate in environmental planning?

Property Rights

Property clause, is there a property clause of some sort?

- ❖ Do citizens have a right to private property?
- ❖ Is the right to private property framed in negative terms (e.g. no one shall be expropriated)?
- ❖ Is the right to private property framed in positive terms (e.g. everyone enjoys a right to property)?
- ❖ Does the constitution distinguish different property regimes (e.g. private, public, communal etc)?
- ❖ Can property be limited through regulation?
- ❖ Are citizens to be compensated when property is limited through regulation?
- ❖ Are there substantive limits on property (e.g. 'property is limited by its social function')?
- ❖ Expropriation clause, can private property be expropriated?
- ❖ Does the constitution contain procedural guarantees against expropriation?
- ❖ Does the constitution require judicial involvement in expropriation?
- ❖ Does the constitution require a legal basis for expropriation?
- ❖ Does the constitution specify that expropriation need to serve the public interest?
- ❖ Does the constitution require that citizens are to be compensated when expropriated?
- ❖ Does compensation with expropriation have to be paid in advance?
- ❖ Does the constitution prohibit confiscation of property as a punishment?
- ❖ Does the constitution restrict land rights?
- ❖ Does the constitution mandate land reform?
- ❖ Is there a right to inherit property?
- ❖ Are foreigners protected in their property rights?

Good Governance, transparency

Right to information about government

Right to petition

Right to a remedy when rights are violated

Right to a 'petition for amparo'

Right to resist government when rights are violated

Right to compensation when rights are violated by government

Structure of (the Bill of) Rights

Does the Bill of Rights have a general limitation clause?

Do rights in the Bill of Rights typically contain a detailed list with possible limitations?

Do all or any of the limitation clauses state that limitations should be reasonable and justifiable in a 'democratic society'?

Is (part of) the Bill of Rights placed in the preamble?

Does the constitution refer to, or incorporate, international human rights treaties?

<ul style="list-style-type: none"> ❖ Does the reference to international human rights treaties take place in the preamble? Does the constitution contain duties for citizens? Where are fair trial rights placed in constitution? Where are workers rights placed in constitution? Where are social security rights placed in constitution? Where are health rights placed in the constitution? Where are education rights placed in the constitution? Where are electoral provisions (right to vote) placed in the constitution? Where are environmental rights placed in the constitution? Where are property rights placed in the constitution? Are socio-economic rights placed in section on ‘directive principles’ of state policy? Are socio-economic rights placed in special section on socio-economic rights Are socio-economic rights placed in multiple subsections on socio-economic policies, such as ‘education’, ‘culture’, ‘work’, ‘the family’ (as typical in Latin American constitutions) etc Are socio-economic rights explicitly made non-justiciable?
<p>Constitutional (Rights-related) Policies</p> <ul style="list-style-type: none"> Does the constitution proclaim an official state religion? Does the constitution provide for the separation of church and state? Does the constitution require ‘good governance’, transparent government, or something along those lines? Prohibition of corruption <ul style="list-style-type: none"> ❖ Can government officials be removed from office for corruption? Constitutional prohibition of, or statement on, genocide Constitutional prohibition of, or statement on, crimes against humanity Does the constitution contain a goal to fight ‘terrorism’. Does the constitution require the teaching and dissemination of human rights principles? Does the constitution specify certain policies that should be taught at schools <ul style="list-style-type: none"> ❖ Do religious principles have to be taught at school ❖ Do communist principles have to be taught at school ❖ Do nationalist principles have to be taught at school ❖ Do internationalist principles have to be taught at school ❖ Do democratic principles have to be taught at school Does the constitution contain a regime on national resources, such as oil, minerals etc <ul style="list-style-type: none"> ❖ Ownership of natural resources ❖ Does the constitution state that natural resources have to be used effectively? ❖ Does the constitution state that natural resources have to be used for the benefit of all people?
<p>General Constitutional Structure</p> <ul style="list-style-type: none"> Does constitution have a preamble? Does constitution refer to specific historic events? What is the first provision in the Bill of Rights? Does the Bill of Rights have an atypical form? What is the length of the constitution?
<p>Enforcement provisions</p> <ul style="list-style-type: none"> Does the constitution establish an ombudsman? <ul style="list-style-type: none"> ❖ What is the mandate of the ombudsman? ❖ If the mandate of the ombudsman concerns human rights, is it geared towards international or constitutional rights Does the constitution establish a human rights commission? <ul style="list-style-type: none"> ❖ What is the mandate of the human rights commission? ❖ If the mandate of the concerns human rights, is it geared towards international or constitutional rights? Does the constitution establish an anti-corruption provision? <p>Judicial review</p> <ul style="list-style-type: none"> Is there judicial review in a country, either established through the constitution or outside the constitution?¹⁰⁰

¹⁰⁰ For coding of this provision, information from the constitutional text is combined with background reading.

<p>Does the constitution establish judicial review?</p> <p>Which court(s) has the mandate of judicial review?</p> <p>Is judicial review conducted by a general or specialized court?</p> <p>Is judicial review of legislation possible prior to the adoption the legislation?</p> <p>Is judicial review of legislation possible after the adoption of the legislation?</p> <p>Can state actors, such as the president or members of parliament, initiate judicial review?</p> <p>Can individual citizens bring judicial review?</p> <p>Can the court review legislation?</p> <p>Can the court review administrative law?</p> <p>Can the court review international treaties?</p> <p>Is there only a limited form of judicial review</p> <ul style="list-style-type: none"> ❖ Can court only create inapplicability of the law in a specific case (without striking it down)? ❖ Does the constitution only provide for ‘popular constitutionalism’, and is the final word on the constitution left to elected representatives? ❖ Does the constitution only provide for hybrid review- by a tribunal consisting both of judges and politicians? ❖ Does the constitution provide for review of sub national laws only? ❖ Does the constitution provide for review of administrative laws only? ❖ Does the constitution provide for review of treaties only? ❖ Does the constitution provide for review based on separation of power provisions only <p>What is the tenure of the judges that conduct judicial review?</p>

E. Conclusion: Large-N Constitutional Comparisons

There is a long-established comparative law tradition that views comparison as a “way of life.”¹⁰¹ To know the laws of France, for example, one has to live in France at least some while, speak and read French, and know the sentiments of the Frenchmen. Only then, one can compare the laws of France with that of ones own country. The kind of data introduced in this thesis allows for a very different kind of comparison, which is “large-N” constitutional comparison. This type of comparison is not new. It features frequently in comparative politics. And it builds on a well-established methodological framework, the social science “rules of inference.”¹⁰² It is this type of comparison, moreover, that fits with the emerging trend of “empirical legal studies.”¹⁰³

¹⁰¹ David Kennedy, *The Methods and the Politics in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (Pierre Legrand & Roderick Munday eds., 2002) (quoting William Twining).

¹⁰² Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHIC. L. REV. 1(2002).

¹⁰³ See e.g., Michael Heise, *The Past Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, UNIVERSITY OF ILLINOIS L. REV. 819 (2002); Holger Spamann, *Large-N, Quantitative Research Designs for Comparative Law?* 57 AM. J. COMP. L. 797 (2009).

Of course, with this type of comparison, one will inevitably miss out on some of the nuances and particularities of individual legal systems. By definition, this type of comparison will be more superficial. But, if conducted properly, it allows for a generalization of findings beyond one or two legal systems only. It allows us to identify general trends and patterns around the world. And perhaps more importantly, also with this type of comparison, the typical substantive comparative law enquiries can be addressed. According to David Kennedy, the traditional comparative law enquiry proceeds in four steps.¹⁰⁴ First, “identify interesting differences and similarities among legal phenomena in different legal regimes.” Second, “where there are similarities, deal with the ‘transplant’ hypothesis.” Third, “allocate the similarities and differences with remain variously to cultural and technical factors.” And fourth, “generate a plausible causal account of what you have mapped.” The reader may be surprised to find that this thesis conducts each and every one of these steps, even though it may bear little resemblance to the traditional comparative law enquiry. But large-N constitutional data also allows us to explore a whole new set of questions. With this new data and “new” tools, we can for example start exploring the “effectiveness” of written constitutional rules, or the extent to which constitutional commitments translate into compliance and affect government behavior. In general, large-N constitutional comparison is a new frontier for comparative constitutional law. In that light, the remaining chapters of this thesis are merely a first exploration of this new frontier.

III. THE SPREAD OF CONSTITUTIONAL IDEAS

“Ideas,” Isiah Berlin has said, “are human responses to time, place and circumstance: above all to historical crises.”¹⁰⁵ This, at least, is the case when they first emerge. But ideas also spread. “Ideas,” as another commentator puts it, “cross

¹⁰⁴ David Kennedy, *The Methods and the Politics* in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (Pierre Legrand & Roderick Munday eds., 2002)

¹⁰⁵ Robert Nisbet, *Foreword*, in *THE WORKS OF JOSEPH DE MAISTRE* xi, xi (Jack Lively trans., 1971) (quoting Isiah Berlin).

borders without hindrance of passports or duties.”¹⁰⁶ This, in a nutshell, is the story of constitutional ideas, as told in this chapter.

This chapter, approximately and tentatively, locates the intellectual origins of some core constitutional ideas and describes their subsequent spread among the world’s constitutions. It will do so by presenting some simple descriptive statistics from the constitutions dataset introduced in the previous chapter. In particular, it will present a number of graphs and charts that show the development of important constitutional ideas from the Second World War (WWII) onwards and will depict the different faces of the global constitutional landscape on a set of world maps. These simple descriptive exercises paint a simple picture. Over the past six decades, the constitutional presence of almost all conceivable constitutional ideas has increased steeply. Nearly all of the world’s constitutions have expanded their menu of rights. First-generation negative liberty rights have been complemented with second-generation positive socio-economic rights and “third-generation cultural and group rights. Some of these rights have become universal constitutional building blocks, or “generic rights.” Constitutions, in general, have grown longer and cover an increasing range of topics. Their enforcement is moreover increasingly placed in the hands of the judiciary.

But in order to provide a more complete picture of the evolution of constitutional ideas, the graphs, charts and maps presented in this chapter will be supplemented with a brief historical account of the intellectual origins of these ideas. In particular, this chapter will trace some of these ideas to the Reformation, the English, French and American revolutions, the enlightenment and the industrialization era. None of this is original research. Moreover, it undoubtedly won’t do justice to the all the intricacies of the historical context. It is what historians call “Whig history,” or an exercise of simply drawing lines from one big event to the other.¹⁰⁷ And perhaps it is not even that, as I am jumping back and forth in time, depending on the topic under consideration. It is moreover a highly conventional

¹⁰⁶ GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD 1776-1989: A GLOBAL PERSPECTIVE* 12 (2010).

¹⁰⁷ PAUL D. HALLIDAY, *HABEAS CORPUS, FROM ENGLAND TO EMPIRE* 16 (2010); HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931).

account and admittedly “eurocentric” in nature.¹⁰⁸ As Oscar Wilde has said “any fool can make history, but it takes a genius to write it.” I am certainly not that genius. That being said, it is my belief that an historical account of constitutional ideas provides some essential context to the largely quantitative analysis in this thesis.¹⁰⁹ It makes the twofold point that constitutional ideas, indeed, often emerge in response to deep historical crisis, but that they subsequently spread, and develop into fashionable constitutional attributes. This point seems worth making, also in light of the limited sample period of this study (1946-2006), which starts when some core constitutional ideas had already turned into fashionable constitutional features.

This chapter can be read on its own, as a descriptive and evolutionary account of a wide range of constitutional ideas. Since the constitutional universe is largely unexplored territory, this exercise offers some new insights in its own right. But this chapter also fits within the larger theme of this dissertation. An important goal of this chapter is to set the stage for empirical analysis in the next chapters. The twin finding from chapters IV and V is that the substantive choices in the world’s constitutions are remarkably unrelated to the indigenous features of society. Instead, the content of written constitutions is typically the product of global trends, and constitutional developments elsewhere. These findings, based on more rigorous statistical analysis, fit with the loose impression painted in this chapter, which is that constitutional ideas, once they have emerged, become fashionable constitutional attributes, that diffuse across the globe.

The remainder of this chapter is organized as follows. Part A will start with a brief historical account of some core constitutional ideas. Part B will use the constitutions dataset to trace the development of these constitutional ideas since the WWII. It will show that almost all of these ideas have increased in popularity over the past six decades. Part C will show that the enforcement of these ideas is increasingly placed in the hands of the judiciary. Part D documents the general trend

¹⁰⁸ See e.g., SANKAR MUTHU, ENLIGHTENMENT AGAINST EMPIRE (2003) (warning that linking human rights in linear fashion to enlightenment is a gross simplification).

¹⁰⁹ The early history of constitutionalism and constitutional ideas is not a well-recorded one. See Horst Dippel, *Modern Constitutionalism: An Introduction to a History in Need of Writing*, 73 LEGAL HISTORY REVIEW 153, 153 (2005); Kim Lane Scheppele, *The Agendas of Comparative Constitutionalism*, LAW AND COURTS 5, 6 (2003).

towards more extensive constitutional arrangements and Part E will focus on “waves of constitution-making.” Part F will conclude.

A. A Brief History of Constitutional Rights

Notions of human dignity and human rights are probably as old as mankind itself.¹¹⁰ As historians have pointed out, there exist numerous connections between ancient values and modern human rights law. The Universal Declaration of Human Rights has often been often compared to the “Ten Commandments.”¹¹¹ It has been noted, for example, that “thou shall not kill” might imply a right to life, while “thou shall not steal” is equal to a right to property.¹¹² But others comparisons have been drawn as well. As Micheline Ishay points out: “The Hindu and Buddhist religions offered the earliest defenses of the ecosystem; Confucianism promoted mass education; Hammurabi’s code of ancient Babylon professed the concepts of progressive punishment and justice; the ancient Greek’s and Romans endorsed natural laws and the capacity of every individual to reason.”¹¹³

But despite these early philosophical contributions, the history of modern constitutional rights is usually located by historians in the West, and started with the Enlightenment, and “four great historical crises”: the Reformation, the English, American and French Revolutions.¹¹⁴ To seek the origins of written human rights, one therefore has to turn to the dark days of medieval Europe.

¹¹⁰ To offer a historical narrative, this section draws on various sources, but the most important sources are: GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE* (2009); MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO GLOBALIZATION ERA* (2d ed. 2008); MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 24 (1947); EVE DARIAN-SMITH, *RELIGION, RACE AND RIGHTS: LANDMARKS IN THE MODERN HISTORY OF MODERN ANGLO-AMERICAN LAW* (2010); and Scheppele, *supra* note 109.

¹¹¹ Rene Cassin, *From the Ten Commandments to the Rights of Man* (Unpublished Manuscript, available at <http://www.udhr.org/history/tencomms.htm>). See generally ISHAY, *supra* note 110, at 15-63.

¹¹² *Id.* See also ISHAY, *supra* note 110, at 15-63.

¹¹³ ISHAY, *supra* note 110, at 15-63.

¹¹⁴ *Id.*, at 65. See also BILLIAS, *supra* note 106, at 7; JOHN CHARVET AND ELISA KACZYNSKA-NAY, *THE LIBERAL PROJECT AND HUMAN RIGHTS* 10 (2008).

The very first bills of rights were written as early as the thirteenth century. Yet these early documents, like the Magna Carta in England (1215) and the Golden Bull in Hungary (1222), were not bills of rights in the modern sense of the world. Instead were more like power-sharing arrangements between the King and the nobility.¹¹⁵ At this time, some ruling monarchs had overreached their power and were forced to grant some privileges to the nobility.¹¹⁶ For example, with the Magna Carta, King John of England granted a set of liberties to the nobility, “in exchange for cash and peace”.¹¹⁷ By writing down the bargain in the Magna Carta, the nobility possessed a basis for resisting the monarch, if he were to renege on his promises. These bills of rights thus enhanced the standing of the nobility.¹¹⁸ In exchange, the Monarch could demand taxation and impose trade duties.¹¹⁹ While these documents were for the most part abandoned in the 15th and 16th centuries, which marked the age of absolutism in European monarchy, these first power-sharing arrangements have been described as the “first steps in accountable government and the depersonalization of power.”¹²⁰

Yet the medieval bills of rights did not grant any individual rights in the modern sense of the word. They granted privileges, not rights; or liberties rather than liberty.¹²¹ The first contours of individual rights as we currently know them, developed in the context of the Reformation. In 1517, Martin Luther started the Reformation by pinning his famous “ninety-five theses attacking Catholic practices and beliefs to a church door in Wittenberg,” thereby starting the process that would

¹¹⁵ Scheppele, *supra* note 106, at 7. When I say that these were the *first* written Bills of Rights, I should mention that I exclude sub-national constitutions from this claim (e.g., the constitutions of Italian city states), as well as documents that could be described as constitutional, but do not grant any rights.

¹¹⁶ Scheppele, *supra* note 106, at 7.

¹¹⁷ HALLIDAY, *supra* note 107 at 14.

¹¹⁸ Scheppele, *supra* note 106, at 6-7.

¹¹⁹ *Id.*, at 7; John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870-1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL 133, 135 (George M. Thomas et al, eds., 1987).

¹²⁰ Sheppele, *supra* note 106, at 6-7.

¹²¹ HALLIDAY, *supra* note 107, at 14-15.

lead to the split in the Church in Western Europe.¹²² Throughout the sixteenth and seventeenth centuries, the Reformation would plunge Europe in religious warfare.¹²³ It was against the backdrop of ongoing religious struggle that “philosophers such as Hugo Grotius, Samuel Pufendorf and John Locke first constructed a new secular rights language” that was “aimed at affirming a common humanity that transcended religious conflict, and giving each individual religious freedom.”¹²⁴ This new secular language laid the groundwork for subsequent claims on universal rights to life, freedom of opinion, and property, which would become one of the core features of Enlightenment thought.¹²⁵

It was the Enlightenment that, more than anything else, shaped modern constitutional history. The Enlightenment brought an end to the Middle Ages in Europe and was characterized by scientific discovery and new inventions, the discovery of new worlds, the rise of the nation-state, and the emerge of a middle class.¹²⁶ But, first and foremost, enlightenment was the age of reason, or the age in which a world vision based on revealed truths was replaced by forward-looking and rational thinking. Confident in ongoing progress and optimistic about the future, Enlightenment *philosophes* developed abstract notions of the social contract and of universal rights for all. They believed that, just as there are laws that govern the natural world, there exist similar laws that govern the social world. Through human reason, these laws can be uncovered. And with a constitution, these laws can be put into practice.

It was through revolution that the Enlightenment ideals were first implemented. The puritan and glorious revolutions in England culminated in the 1689

¹²² See EVE DARIAN-SMITH, *supra* note 110, at 21-51.

¹²³ The Reformation is the period in which the absolute reign of the Catholic Church was challenged by Protestant and related movements.

¹²⁴ ISHAY, *supra* note 110, at 8-9; CHARVET & KACZYNSKA-NAY, *supra* note 114, at 30-31.

¹²⁵ Notions of “natural rights” trace back to the Roman political and legal theorists such as Cicero, who wrote about *ius naturale*. Yet, these pre-modern conceptions of natural rights were not individualist but holist. On the holist view, persons possess rights only insofar as they are fulfilling a function in a larger whole. See CHARVET & KACZYNSKA-NAY, *supra* note 114, 30-34.

¹²⁶ For a brief account of the social and political context of the enlightenment era, see e.g., RANDALL LESAFFER, *EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE* 372-384 (2009).

Bill of Rights, which, amongst other things, recognized the rights to life, property and religious freedom. The American Revolution produced the U.S. Constitution,¹²⁷ including its Bill of Rights (1789).¹²⁸ The U.S., in fact, was probably in the best position to translate the Enlightenment ideals into practice, as it never had to deal with conservative institutions like the “monarchy, aristocracy, feudalism, and established churches”.¹²⁹ But also the French revolutionary leaders aimed to shape their world anew, and drafted the Declaration of the Rights of Man and Citizen, which affirmed “liberty, equality and fraternity.” The French Declaration and the American Bill of Rights would become “the two documents most responsible for modern legal formulations of human rights.”¹³⁰ Together with the 1689 English Bill of Rights, they would form, in Athan Billias’ words, “a new constitutional constellation.”¹³¹ They would reportedly influence the writing of the first generation of national constitutions, such as the Spanish Constitution of 1812, the Portuguese Constitution of 1822 and the Belgian Constitution of 1831, as well as the first Latin American constitutions.¹³²

Yet, As Micheline Ishay points out, the great revolutions that produced the first constitutional rights commitments were ultimately revolutions of the upper and middle classes, or the *Bourgeoisies*. While the moments of revolution were revolts of

¹²⁷ Cf. Dippel, *supra* note 109, at 153 (stressing the role of the Virginia Declaration of rights as the first modern human rights document).

¹²⁸ The first ten amendments to the U.S. Constitution were introduced in 1789 and ratified in 1791.

¹²⁹ See BILLIAS, *supra* note 106, at 5.

¹³⁰ ISHAY, *supra* note 110, at 88. The question where exactly constitutional rights were first invented is a subject of debate among legal historians. Jellinek, a German jurist, argued in 1895 that constitutional rights originate in the United States. According to Jellinek, the French Declaration of 1789 was deeply inspired by the American declarations of written rights. By contrast, the Frenchman Emile Doumerque, in response to Jellinek, argued in 1905 that the origins of written rights ought to be located in Europe. As far as I am aware, the debate remains unresolved. For an overview of the debate see: BILLIAS, *supra* note 106, at 89.

¹³¹ BILLIAS, *supra* note 106, at 4.

¹³² On the reception of European Enlightenment ideals in Latin America, see Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights* 25 HUM. R. QUART. 281, 282 (2003). For a comprehensive account on the diffusion of the first written constitutions see BILLIAS, *supra* note 106.

the masses, ultimately, the masses were not empowered after the revolution.¹³³ The puritan revolution in England, carried with broad popular support, ultimately empowered the wealthy only.¹³⁴ Likewise, while all Americans had revolted against the colonial rule of the British, the 1788 U.S. Constitution favored property owners, and only men of property were granted the right to vote.¹³⁵ And while all Frenchman and women had reunited against the *ancient regime*, active voting rights were restricted to male tax payers only.¹³⁶

In the end, the Enlightenment “offered all white man to opportunity to become voting members of society, should they acquire enough property, earn a sufficient income and pay adequate tax.”¹³⁷ However, as Micheline Ishay points out, in reality, the gap between the rich and the working class had grown so large that such opportunities were not easily accessible. The enlightenment promises thus remained incomplete. Enlightenment facilitated the accumulation of capital by the wealthy, but ignored the needs of the poor.

With the rise of industrialization (or the move from agriculture to manufacturing), a new working class emerged that worked in urban factories and that experienced harsh labor conditions and deep poverty. Against the backdrop of industrial poverty and a growing number of urban laborers, a more socialist human rights discourse emerged. Socialist thinkers like Karl Marx and Friedrich Engels started taking on the economic inequalities of the Enlightenment era.¹³⁸ Their ideas found fertile grounds with the working classes, who had been largely denied voting

¹³³ This point is extensively made by ISHAY, *supra* note 110, at 97-98.

¹³⁴ In particular, the revolution was carried with the support of the radical Levellers and the communist Diggers. But after the revolution, the Levellers, a radical group that wanted to abolish the monarchy and aristocracy, were removed from the army and the demands of the “starving peasants,” lead by the Diggers, were simply overlooked. ISHAY, *supra* note 110, at 73.

¹³⁵ See C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

¹³⁶ ISHAY, *supra* note 110, at 97-98.

¹³⁷ ISHAY, *supra* note 110, at 135.

¹³⁸ *Id.*, at 119, 131-35.

and political participation. For them, Enlightenment turned out to be, in Karl Polyani's words, "a satanic mill" of "human degradation."¹³⁹

These socialist ideas were the basis for a sweep of revolutions in the years 1830 and 1848. While the revolutions spread from country to country, and from city to city, the working classes demanded an extension of the suffrage. As Karl Marx stated in 1850, "the carrying of universal suffrage in England would be a far more socialistic measure than anything which has been honored in that name on the continent."¹⁴⁰ And even though most of the 1848 revolutions were ill-fated in the end, rulers feared the revolutionary spirit and granted concessions to the working classes.¹⁴¹ In the wake of the 1848 revolutions, a total of sixty constitutions were written.¹⁴² In many cases, the new constitutions were short-lived. But there were also incidents of lasting constitutional change. For example, the 1848 Constitution of the Netherlands, granted by King Willem II to prevent revolution, established the principles of parliamentary government and ministerial accountability that are still in force today. Also the Swiss constitution of 1848 remained in force until 1994.

The growing concentration of workers in cities also led to the rise of the first labor movements.¹⁴³ In Britain in the 1830s, the Chartist movement became the first political working class movement.¹⁴⁴ In the following decades, similar movements spread across Europe.¹⁴⁵ "Workers of the World, unite" became the socialists rallying cry.¹⁴⁶ At the international level these socialist movements united in the

¹³⁹ See KARL POLYANI, *THE GREAT TRANSFORMATION* 39 (1944).

¹⁴⁰ *Id.*, at 9 (quoting Karl Marx).

¹⁴¹ Daron Acemoglu & James A. Robinson, *Why Did the West Extend the Franchise? Democracy, Inequality, and Growth in Historical Perspective*, 115 *QUART. J. ECON.* 1167 (2000).

¹⁴² Sheppele, *supra* note 106, at 9; Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 371 (1995); Dippel, *supra* note 109, at 165, 167.

¹⁴³ ISHAY, *supra* note 110, at 121.

¹⁴⁴ *Id.*

¹⁴⁵ For example, the Danish and Norwegian Social Democratic Parties were established in the 1870s, the Belgian Labor Party was formed in 1885, the Swedish Socialist movement began in 1889.

¹⁴⁶ ISHAY, *supra* note 110, at 149.

“International Workingman’s Association,” founded in 1864.¹⁴⁷ But while social welfare and worker’s rights were part of their agenda, these early labor movements, first and foremost, fought for an extension of the suffrage.¹⁴⁸ Like the middle classes, they wanted their share of political power. Through political empowerment, they thought they would be able to improving working and living conditions. At the close of the nineteenth century, these ideals were first realized. Universal male suffrage was established in New Zealand (1893), Australia (1902), Finland (1906), England (1918), the Netherlands (1917), Germany (1918) and gradually across the Western world. Extension of the franchise for woman, in most cases, followed shortly thereafter.

The extension of the franchise meant the building of the European social welfare state. Now that the masses could vote, they demanded worker’s rights and social security.¹⁴⁹ Such socio-economic rights became the hallmark of the socialist state ideology, as embodied in the 1918 constitution of the Soviet Union.¹⁵⁰ But also liberal states adopted such social welfare rights. The Bolshevik Revolution in 1917, the Great Depression of 1929, and growing socialist sentiments among the working classes throughout Europe forced liberal governments to embrace the socialist ideals. The old “night watch state” was replaced by a “new liberalism,” which held that individual choice and liberty required a minimum of individual welfare.¹⁵¹ Even in the United States, the homeland of liberal constitutionalism,¹⁵² president Roosevelt enacted his New Deal and famously argued that human freedom does not only encompass not “freedom of religion” “freedom of expression” and “freedom from fear”, but also the “freedom from want.”¹⁵³

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Acemoglu & Robison, *supra* note 141, at 1167.

¹⁵⁰ Said Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 INT’L SOC. 7 (2003).

¹⁵¹ See CHARVET & KACZYNSKA-NAY, *supra* note 114, at 5-7.

¹⁵² LOUIS HARZ, *THE LIBERAL TRADITION IN AMERICA* 6 (2nd edition 1991).

¹⁵³ President Franklin Delano Roosevelt, 1941 State of the Union (“four freedom speech”). *But see* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in

With the building of the social welfare state, social welfare and workers rights received constitutional status throughout industrialized nations, including Latin America. These developments would, for once and for all, establish the dual face of human rights, as both negative and positive government obligations, and an attempt to simultaneously constrain government power and to enhance its mandate.¹⁵⁴

The tale of written human rights that emerges is thus a tale of a growing number of rights for a growing number of people. After the world wars, these rights were consolidated at the international level with the Universal Declaration of Human Rights in 1948 and the adoption of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights in 1966. As Beth Simmons notes, “the most striking fact about the international law of human rights is its near absence prior to the end of the World War II.”¹⁵⁵ Before the WWII, the politics of colonialism prevented efforts to enshrine rights on a universal basis through international law: the very notion of universal human rights was incompatible with the kind of systematic, large-scale exploitation routinely entailed by colonial rule.¹⁵⁶ Principles of state sovereignty and non-interference took precedence over any humanitarian concerns. Yet WWII utterly transformed the global legal landscape. The global outcry that followed the WWII atrocities spurred the establishment of an international human rights regime and machinery.¹⁵⁷ As a result, in 1948 the newly established UN General Assembly, as one of its first acts, adopted the Universal Declaration of Human Rights (UDHR).

AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90, 95-101 (Michael Ignatieff ed., 2005); CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2006).

¹⁵⁴ John Boli, *supra* note 119, at 133-134.

¹⁵⁵ BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 36 (2009).

¹⁵⁶ See ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

¹⁵⁷ ISHAY, *supra* note 110, at 211-25.

The UDHR was drafted by legal experts from around the world and drew upon a wide range of existing constitutional resources.¹⁵⁸ The drafting committee alone was composed of members from eighteen different countries. According to one of its members, the committee consulted a “collection of declarations and constitutions carefully assembled in 1947 by the staff of the U.N. General Secretariat's Social and Economic Division.”¹⁵⁹ In her speech to the U.N. General Assembly, chairwoman of the drafting committee, Eleanor Roosevelt notes that “this Declaration may well become the international Magna Carta of all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people of 1789 and the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries.”¹⁶⁰

But unlike the documents Roosevelt alludes to, the UDHR does not merely enshrine the enlightenment legacy of negative liberty rights, but also includes the social and economic rights from the industrialization era.¹⁶¹ Not only civil and political rights, but also social and economic rights are proclaimed to be universal. Moreover, the UDHR includes a set of rights that, at that time, were (still) largely absent from the world's written constitutions. The provisions on equality regardless of language, social status, belief, political opinion, economic status and nationality, the presumption of innocence, the right to resist, the right to an adequate standard of living, the right to personal privacy and the privacy of the family life were adopted by less than 10% of all constitutions in force. And the rights to food as well as the free

¹⁵⁸ *Id.*, at 219.

¹⁵⁹ See Cassin, *supra* note 111. See generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 483 (2002) (noting that international law is always a product of constitutional law, or the constitutional model of the victors of epochal war).

¹⁶⁰ Eleanor Roosevelt, “Statement by E. Roosevelt, *Department of State Bulletin*, December 19, 1948, 867

¹⁶¹ It has been argued that the socio-and economic rights, as well as family rights were promoted by the Latin American nations in particular. See Carozza, *supra* note 132, at 282.

development of one’s personality, both part of the UDHR, had yet to be invented in constitutional terms.

Table 1 depicts the constitutional prevalence of the rights included in the UDHR in 1946. It suggests that the UDHR consolidates existing consensus but also possibly shapes a new one.¹⁶² Because many of the UDHR rights that were still uncommon in the world’s constitutions, do in fact take off after the WWII.

Table 1: UDHR Rights in National Constitutions in 1946

Right in UDHR	Constitutional prevalence in '46	Right in UDHR	Constitutional prevalence in '46
Right to privacy of the home	81%	Intellectual property	24%
Right to freedom of religion	81%	Right to minimum wage	22%
Freedom of expression	81%	Special protection of mothers	21%
Right to private property	81%	Equality regardless of religion	20%
Prohibition of arbitrary arrest and detention	76%	Right to get married	18%
Freedom of press	76%	Equality regardless of race	17%
Right to assembly	73%	Right to favorable working conditions	17%
Right to association	72%	Right to a remedy when rights are violated	17%
General equality clause	70%	Right to housing	16%
Right of access to court (habeas corpus)	68%	Equality regardless of gender	14%
Right to privacy of communication	67%	Right to protection of one’s reputation or honor	13%
Right to education	64%	Right to culture	13%
Right to vote	63%	Right to asylum	11%
Freedom of movement	50%	Equality regardless of language	8%
Freedom of education	47%	Presumption of innocence	8%
Right to work	46%	Right to resist when rights are violated	8%
Right to public trial	43%	Right to adequate standard of living	6%
Prohibition of ex post facto laws	41%	Equality regardless of social status	5%
Right to social security	41%	Equality regardless of belief/ philosophy	5%
Right to work for the government	40%	Equality regardless of political opinion	5%
Prohibition of Torture	37%	Equality regardless of nationality	5%
Right to life	33%	Right to personal privacy	5%
Prohibition of slavery	32%	Right to privacy of family life	5%
Right not to be expelled from home territory	30%	Equality regardless of economic status	2%
Right to present a defense	30%	Right to ‘fair trial’ (exact phrase)	2%
Rights for the family	28%	Free development of personality	0%
Right to rest	27%	Right to food	0%
Rights for children	24%		
Right to form trade unions	24%		
Right to health	24%		

Thus, the story of constitutional rights does not end here. The story of more rights, for a growing number of people, continues after the Second World War. In this period, a growing number of constitutions embrace the constitutional ideas from Enlightenment and the Industrialization era. In this period, moreover, constitutions invent a new set of rights, including, for example, the right to information, the right to

¹⁶² For the claim that the Universal Declaration of Human Rights affects national constitutions see Zachary Elkins & Tom Ginsburg, *Constitutional Convergence in Human Rights? The Reciprocal Relationship Between Human Rights Treaties and National Constitutions* (2010).

a healthy environment and equal distributions of natural resources (oil and minerals). They moreover extend rights protection to new groups of people, such as handicapped persons, consumers, minorities and even HIV aids infected persons.

B. Post-World War II Evolution

The story of constitutional rights in this thesis starts with the Second World War (WWII).¹⁶³ After the WWII, most constitutions already contained a set of rights. These rights were the product of the enlightenment revolutions as well as the industrialization era, in which the masses fought for better living conditions. Together, these developments had brought a sweeping democratization of power. At the same time, the atrocities of the WWII had shown the utter failure of unconstrained democracy. After all, Adolf Hitler became chancellor of Germany through free elections. And clearly, constitutional rights had done little to prevent any of the horrors of the WWII. The 1919 Weimar constitution had contained a list of constitutional rights, but these were unenforceable and easily suspended by Adolf Hitler. It was at this point in time that judicial review, once described by Alexis de Tocqueville as an American peculiarity, caught on in Europe.¹⁶⁴ Where, at the turn of the century, democratization was completed and the masses had been empowered to vote, post-WWII constitutionalism is characterized by this trend in the reverse. It witnessed the retreat from unconstrained democracy, and a growing belief that, in Fareed Zakaria's words, "there can be too much of a good thing."¹⁶⁵

And thus the story of constitutional rights continues. After the WWII, there has been a strong trend to take power away from the masses and place it into the hands of the judiciary. To world witnessed the rise of the "juristocracy" and a "judicialization" of politics.¹⁶⁶ But at the same time, post WWII constitution-making

¹⁶³ The sample period for this study is 1946-2006.

¹⁶⁴ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73-76 (Richard D. Heffner trans., 2001 ed.) (1835).

¹⁶⁵ See FAREED ZAKARIA, *THE FUTURE OF FREEDOM* 17 (2003).

¹⁶⁶ RAN HIRSCHL, *TOWARDS JURISTOCRACY* 1-10 (2005); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN EAST ASIA* (2003).

also saw a further expansion of the catalogue rights. It saw the birth of new rights and a continuing trend to constitutionalize a larger set of values. Table 2 below shows the rights most prevalent in 1946. In 1946, only 15 rights were adopted by more than 50% of all constitutions in force. And importantly, these rights are all individual liberty rights, part of the Enlightenment promise. This 1946 constitutional consensus includes the freedom of religion, the right to private property, the freedom of expression, the privacy of the home, the prohibition of arbitrary arrest and detention, the freedom of the press, the right to assembly and the right to association.

Table 2: Most Prevalent Rights in 1946

Constitutional Right	Prevalence in 1946
Right to freedom of religion	81%
Right to private property	81%
Freedom of expression	81%
Right to privacy of the home	80%
Prohibition of arbitrary arrest and detention	76%
Freedom of press	76%
Right to assembly	73%
Right to association	72%
General equality clause	70%
Right of access to court (habeas corpus)	68%
Right to privacy of communication	67%
Right to education	64%
Right to petition	64%
Right to vote	63%
Freedom of movement	50%

But most interesting for an account of post-WWII constitutional history are those constitutional ideas that had yet to take off. By 1946, a number of standard constitutional ingredients today were still remarkably absent from the world's constitutions. Notably, a provision on gender equality, that is currently part of 86% of the world's constitutions, was included in a mere 14% of the constitutions of 1946. Though gender equality was proclaimed as early as the French revolution, the real gender revolution still had to take off. Also the right to life, an intrinsic part of the enlightenment agenda and advanced by writers like Hobbes and Locke, was included in only 33% of the 1946 constitutions. By contrast, today, 78% of all constitutions include a right to life. More or less the same is true for the prohibition of torture. The prohibition of torture, too, has its roots in enlightenment thought. But while 84% of all constitutions today embrace the prohibition of torture, only 37% included such a

right in 1946. And some constitutional features simply had not been invented yet. For example, the right to a healthy environment, rights for handicapped people, ethnic equality, the privacy of personal data, the free development of one's personality, consumer rights, the right to food, victim's rights, equality regardless of age or the protection of the right to life for unborn children were not yet part of any of the world's constitutions.

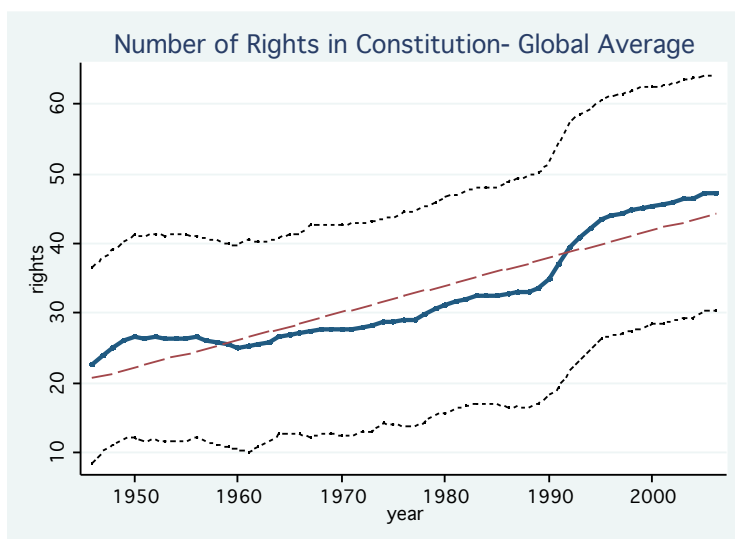
The remainder of this section will trace the development of more specific constitutional ideas in the post-1946 period. It will show that the story of more rights for a larger number of people continues after the Second World War. It will moreover highlight the steep rise of judicial power, or the move from constitutions to constitutionalism. And it will show that constitutions, generally, have grown more extensive over time.

C. Rights Creep: the Increasing Popularity of Constitutional Rights

The most apparent trend in the story of post World War II constitutionalism is the growing popularity of constitutional rights, or a growing average number of rights per constitution. Figure 1 (solid middle line) depicts the average number of constitutional rights over time. It is based on a variable that captures the sum of 108 possible constitutional rights in each constitution and plots the average value across all constitutions against time.¹⁶⁷ Figure 1 clearly suggests that, over time, the number of rights in the average constitution has steadily increased. In 1946, the average constitution contained 22 out of the 108 rights provisions. By contrast, the average constitution in 2006 contained 47 out of the 108 constitutional rights provisions, an increase of more than a 100%. Thus, over time, the Bill of Rights has become more comprehensive, covering a larger range of rights than before. Slowly but surely, rights creep.

¹⁶⁷ These 108 rights are analyzed in Chapter V and VI. Table 1 of chapter V contains a list of all these variables.

Figure 1

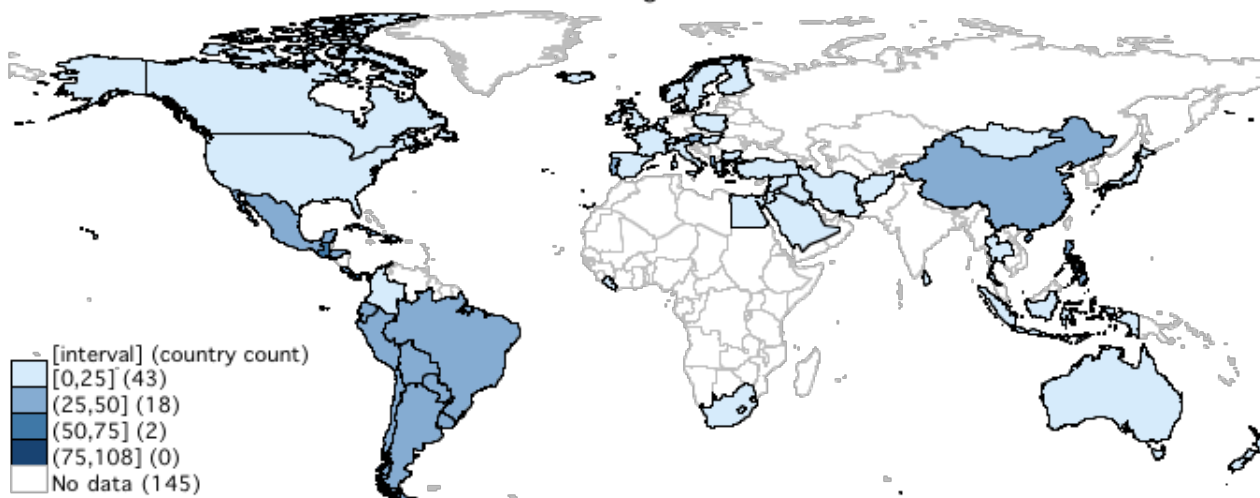


The upper and lower dotted lines capture the variation from the mean. In 1946, the average constitution contained 22 rights, with a standard deviation of 14 rights. Assuming a normal distribution, this suggests that in 1946, 68% of all constitutions contained between 8 and 36 rights. In 2006, the average constitution contained 47 rights while the standard deviation is 17 rights, suggesting that, today, 68% of all constitutions contain between 30 and 64 rights. Thus, while rights have grown more popular, there is also substantial cross-country variation in the number of constitutional rights.

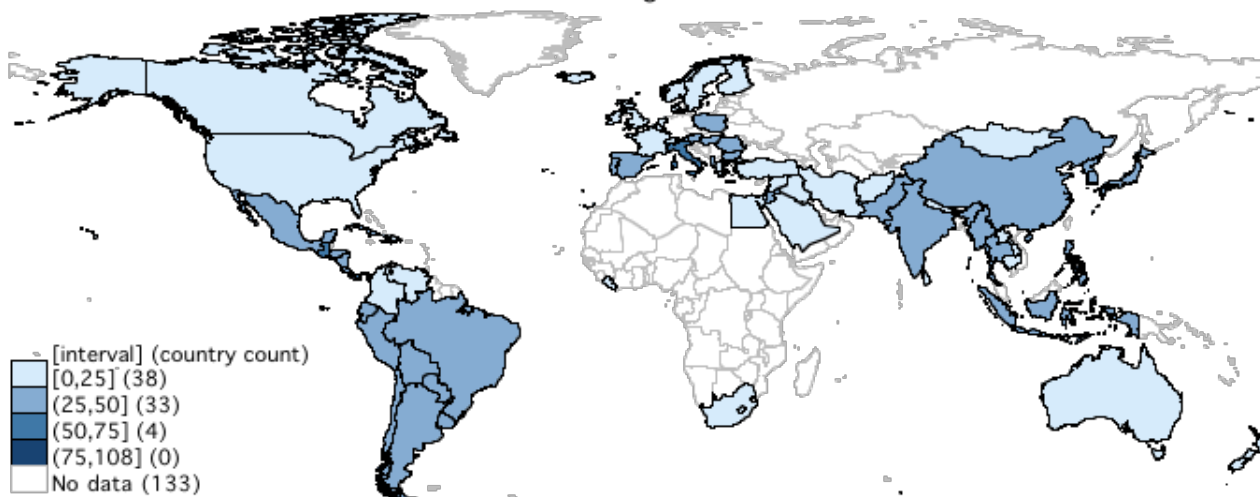
Figure 2 depicts the number of rights on a set of world maps. It shows the number of rights present in the constitution of each country for 1946, '56, '66, '76, '86, '96 and 2006, respectively.

Figure2

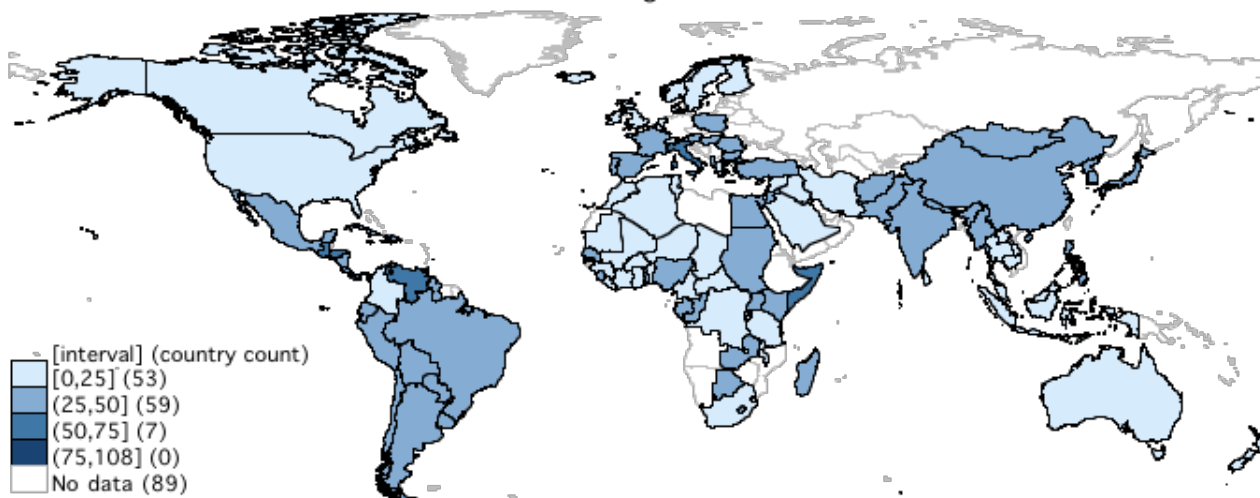
Number of Rights in 1946



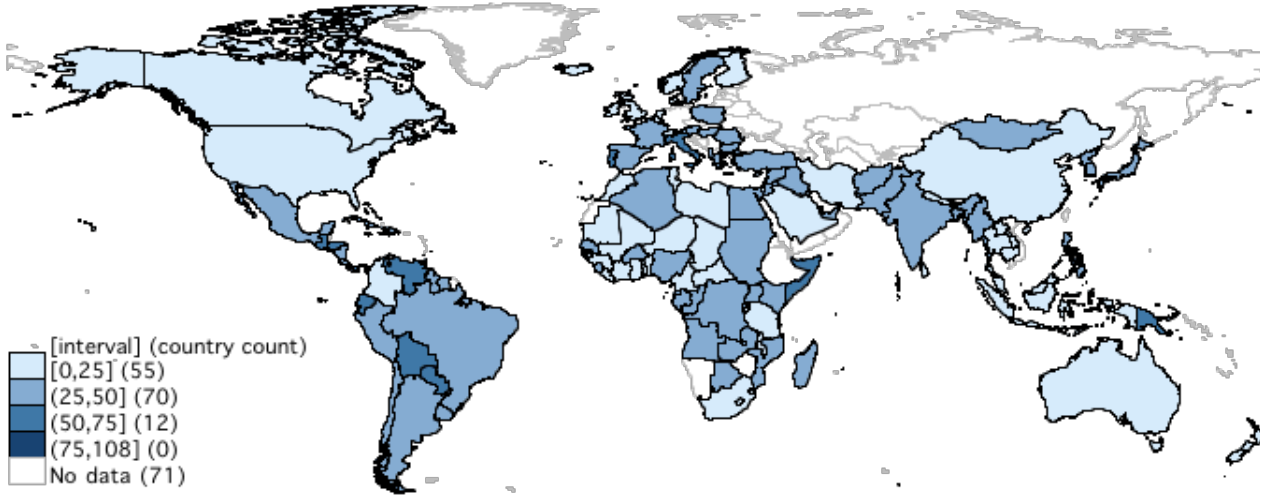
Number of Rights in 1956



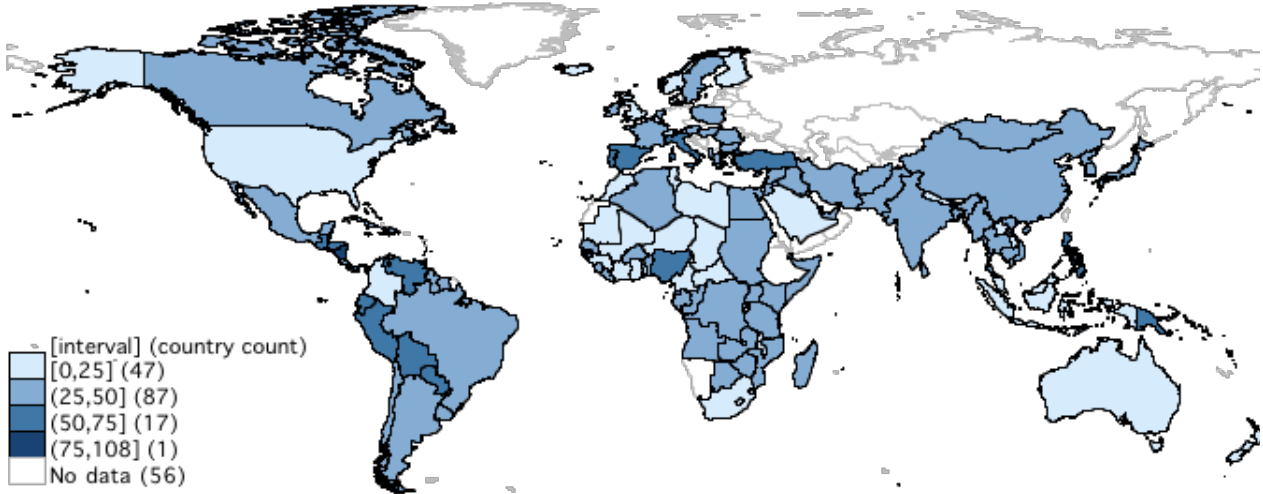
Number of Rights in 1966



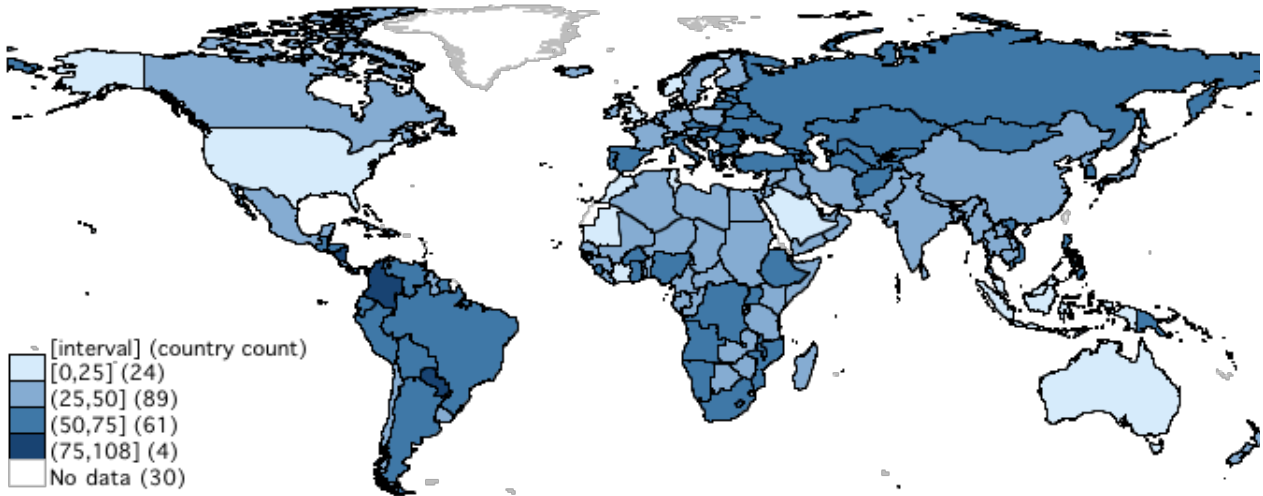
Number of Rights in 1976

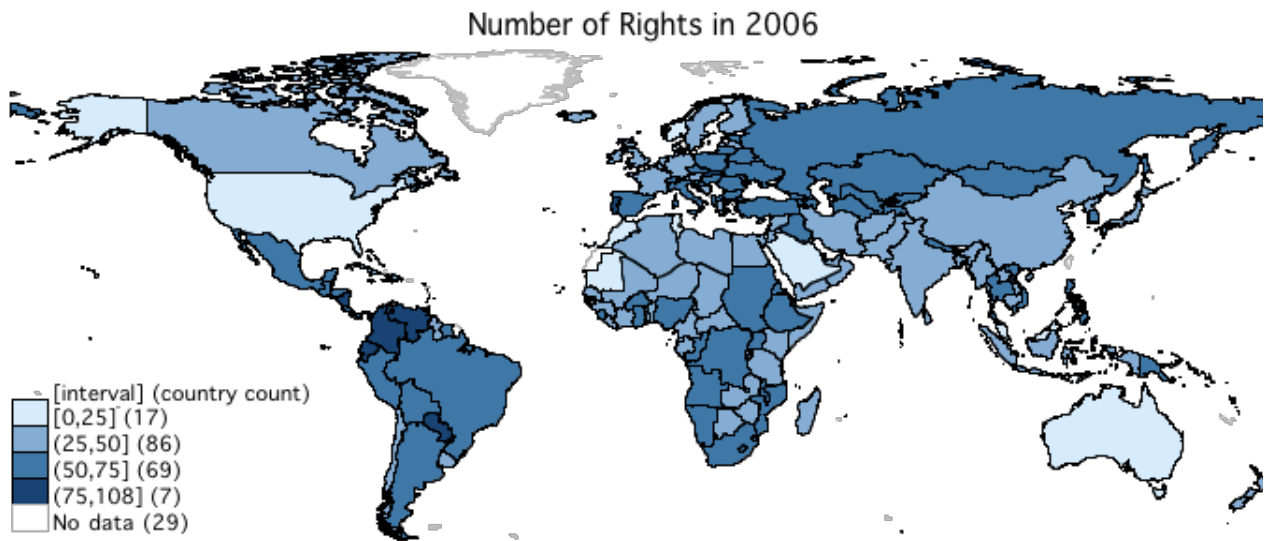


Number of Rights in 1986



Number of Rights in 1996





These world maps can be viewed as global snapshots of the number of constitutional rights. Of course, the total number of rights is a rather coarse measure. Some constitutions may only adopt civil and political rights while others may exclusively embrace socio-economic rights. Constitutions with the same number of rights may be radically different from each other. In fact, there is not a single constitution that adopts all of the 108 rights on which these maps are based.¹⁶⁸ Thus, these maps tell us little about what the global constitutional landscape actually looks like. At the same time, the maps *do* suggest that there is a story to tell. They suggest that there is substantial variation across time as well as across space. Unlike sometimes suggested, not all constitutions embrace the same catalogue of rights.¹⁶⁹ Different constitutions make different choices. And unlike sometimes suggested, constitutions appear to be anything but static.¹⁷⁰

These maps moreover raise the suspicion that rights-inclusiveness may not be the same as actual rights, or that *de jure* and *de facto* rights may diverge. The maps suggest that, judged by their constitutions, the world's human rights champions can

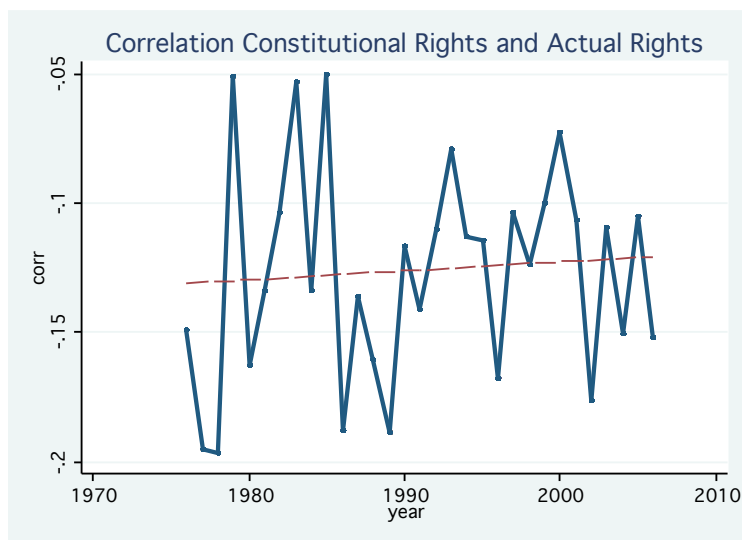
¹⁶⁸ Most inclusive is the 1998 constitution of Ecuador, which adopts 91 out of 108 rights.

¹⁶⁹ See chapter VI *infra* for claims of “constitutional convergence.”

¹⁷⁰ See La Porta et al., *Judicial Checks and Balances*, 112 J. POLIT. ECON. 445 (2004) (suggesting that constitutions are exogenous, or predetermined, and rarely change over time). Cf ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009) (finding empirically that the average constitution has a lifespan of 19 years).

often be found in Latin America, Africa, the former Soviet Republics and places that are not exactly well-known for their strong rights record. In fact, when correlating the number of de jure rights with a measure of actual rights protection, based on the coding of the annual US State Department Country Reports on human rights, the correlation turns out to be negative (-016).¹⁷¹ It suggests that there may be a gap between what constitutions say and what constitutions actually do. Figure 3 shows the correlation between de facto and de jure rights for all constitutions around the world for each year since 1975 (when data on actual rights practices was first available). Even though this correlation fluctuates a little, it has consistently been negative for the last three decades. Or, it is the worst rights offenders that entrench the largest number of constitutional rights.¹⁷²

Figure 3



The concluding chapter of this thesis will further explore this discrepancy between de jure and de facto rights. Let us first continue our story of post-WWII constitutionalism. We have seen that the average number of constitutional rights rose steeply in the past six decades. The remainder of this section will focus on the

¹⁷¹ See Mark Gibney et al., *Political Terror Scale 1976-2006* (2006), available at <http://www.politicalterror scale.org>. For purpose of this chapter, the Political Terror Scale has been re-scaled so that high scores refer to stronger human rights practices.

¹⁷² See also David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIFORNIA L. REV. (forthcoming (2011)) (finding, based on regression analysis, that the worst human rights offenders have the most rights in their constitutions).

development of different types of rights. Which rights took off? Which rights were invented? Which rights fell out of fashion?

1. Freedom of Religion and Expression – Probably the oldest rights in modern history are the freedom of religion and the freedom of expression. They have their roots in the Reformation, and the struggle against the Roman Catholic Church.¹⁷³ The Reformation had plunged Europe in religious warfare. The fighting finally ended with the Treaty of Westphalia, which, according to Micheline Ishay, contained the first quasi-constitutional formulation of something close to religious freedom. It granted, “the privilege of emigration to subjects of such states if they dissented from the religion of their territorial lord.”¹⁷⁴ With this formulation, it did not actually grant an individual right to religious freedom. The best an individual citizen could do to protect his religious freedom was to move from one country to another. But against the backdrop of the religious wars, Enlightenment thinkers articulated a more fully developed notion of individual religious freedom. John Locke’s famous “Letter Concerning Toleration” (1689), argued that the state should only concern itself with “external acts of human beings and not with matters of their soul.”¹⁷⁵ According to Locke, therefore, all individuals have the right to choose their own religion.

The freedom of religion first received constitutional status in the U.S. Constitution and the French Declaration. But since then, the freedom of religion has become a universal ingredient of the world’s constitutions. Today, no less than 97% of all constitutions contain this right. No matter whether one is born in London, Kabul or Teheran, the constitution guarantees the freedom to practice the religion of ones choice.

The freedom of expression developed more or less simultaneously with the freedom of religion.¹⁷⁶ From 1559 onwards, the Roman Catholic Church made

¹⁷³ For a fuller account of these developments see ISHAY, *supra* note 110, at 75-84.

¹⁷⁴ *Id.*, at 78.

¹⁷⁵ JOHN LOCKE, LETTER CONCERNING TOLERATION (J Cockin ed., 1796) (1689).

¹⁷⁶ ISHAY, *supra* note 110, at 65-91.

efforts to suppress the freedom of expression. Its notorious *Index Librorum Prohibitum*, prohibited “immoral” books. At the time, many thought that this lists epitomized the excesses of Roman Catholic power.¹⁷⁷ As a result, the struggles against the Roman Catholic Church not only produced first secular formulations of religious freedom, but also of a freedom of expression.¹⁷⁸ Indeed, the first article of the U.S. Bill of Rights protects the freedom of speech and the freedom of press, while the French Declaration proclaims that “free communications of ideas and opinions is one of the most precious rights of man.” Today, the freedom of expression is near universally embraced by (97% of) the world’s constitutions.

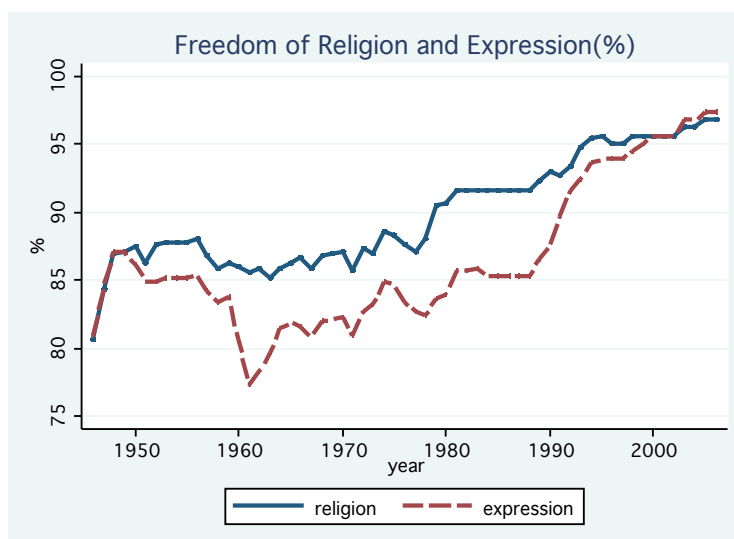
Figure 4 depicts the development of the freedom of religion and expression from 1946 onwards. It shows that, by 1946, freedom of religion and the freedom of expression were already fairly universal constitutional features. By 1946, the battle for the freedom of religion and expression had largely been won.

The early struggles for the freedom of religion and expression laid the groundwork for the development of other negative liberty rights. It was in the era of Enlightenment that a secular language of individual liberty rights came to flourish. Whereas the struggles for the freedom of religion and expression predate Enlightenment, negative liberty rights are first and foremost the product of enlightenment thought. They would also become the main ingredients of the world’s first modern written Bill of Rights: the British Bill of Rights of 1688, the first 10 amendments to the U.S. Constitution and the French Declaration. But only few of the negative liberty rights are as uncontested today as the freedom of religion and expression.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Figure 4



2. Life and Physical Integrity – Modern notions of the right to life and the prohibition of torture developed as part of Enlightenment thought.¹⁷⁹ Hobbes had argued for example that, without a right to life, the social contract would be meaningless. Men would abandon the state of nature, and give up their natural rights, only if they would be able to protect their right to life and their bodily integrity. If not, they would not abandon the state of nature. Around the time of Hobbes writing, England’s Bill of Rights of 1689 was the first to state that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted” while its Habeas Corpus Act of 1679 held that no one could be arbitrarily detained.¹⁸⁰

But despite such proclamations of the right to life and bodily integrity, the Enlightenment did not practice what it preached. The French revolution itself culminated in torture and mass execution. By the end of the 18th century, most Enlightenment thinkers condemned torture as a “barbaric remains of the middle ages.”¹⁸¹ But this sentiment notwithstanding, torture remained a common tool in criminal investigation.

¹⁷⁹ Of course, in most religions, the right to life was sacred. But it was again during the enlightenment that a secular notion of life and physical integrity was constructed, independent of ones religious beliefs.

¹⁸⁰ ISHAY, *supra* note 110, at 84-91.

¹⁸¹ *Id.*, at 88.

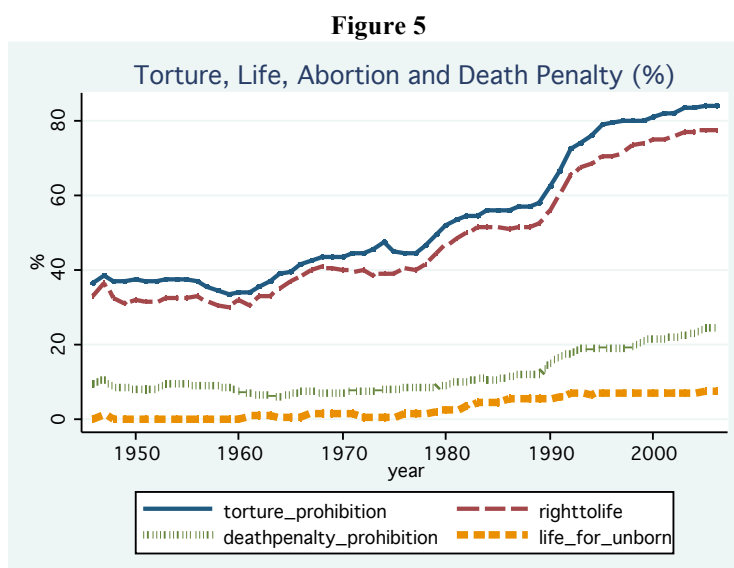
The abolition of the death penalty was possibly even more controversial. Writers like Hobbes, Rousseau and Kant all believed that, in some cases, man deserve to die, and that the death penalty was necessary preserve the society and the social contract.¹⁸² There may be a right to life, but, for most thinkers, such a right is not without limitations.

In light of their contested history, it should not come as a surprise that the right to life and the prohibition of torture, for a long time, did not serve as universal constitutional building blocks. While many negative liberty rights were already paradigmatic by 1946, this was not the case for the rights to life and physical integrity. Figure 5 depicts, for each year, the percentage of constitutions that contain a prohibition of torture (solid top line) and the right to life (dashed line, second from top), respectively. It suggests that their development went hand in hand, with the prohibition of torture being only somewhat more prevalent than the right to life. While a mere 40% of all constitutions in 1946 included these rights, they proliferated strongly in the post-WWII period. But even today, these rights still lag behind on the other negative liberty rights. At the turn of the millennium, both torture and the death penalty remain contested issues, witnessed for example by the vigorous debates over torture in the aftermath of 9/11.¹⁸³

The bottom two lines in Figure 5 depict the development of the (absolute) prohibition of the death penalty (third from top) and the right to life for unborn children (bottom line). These are both extensions of the right to life. And as it turns out, both rarely receive explicit constitutional status. Today fewer than 20% of all constitutions abolish the death penalty for all crimes. And fewer than 10% of all constitutions extend the right to life to unborn children, thus implicitly prohibiting abortion. It again shows that, up till this very day, only few nations are willing to adopt an absolute right to life.

¹⁸² *Id.*, at 88-90.

¹⁸³ See e.g., Benedikt Goderis & Mila Versteeg, *Human Rights After 9/11 and the Role of Constitutional Constraints* 1-5 (Manuscript, 2009).



3. Fair Trial Rights - Many constitutions today contain a number of fair trial rights, such as the right to habeas corpus, a prohibition of ex post facto law, the rights to legal representation and the right not to be tried for the same offense twice. According to legal historians, these rights have their origins in seventeenth century Britain, and gradually emerged as the by-product of a long struggle between King and Parliament.¹⁸⁴ With the growth of the British Empire, fair trial rights became an important part of the common law constitutional tradition. But the proliferation of fair trial rights was more limited in civil law systems, where judges have traditionally been more subordinate to the executive.

The first traces of fair trial rights can be found in the Magna Carta. In thirteenth century England, King John, “in exchange for cash and peace” granted a set of liberties in the Magna Carta.¹⁸⁵ The Magna Carta stated that “no free man shall be arrested or imprisoned...except by the lawful judgment of his peer or the law of the land.” The short-term success of the Magna Carta was limited, as King John died

¹⁸⁴ For a full account see e.g., Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989); FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY*, 143 (1960); Edward L. Glaeser & Andrei Schleifer, *Legal Origins*, 117 Q.J.E., 1193, 1193-97 (2002).

¹⁸⁵ HALLIDAY, *supra* note 107, at 14-18.

shortly after the Magna Carta was written.¹⁸⁶ But the lasting importance of Magna Carta was that it “served as weapon in the struggle for modern liberty.”¹⁸⁷ Over the course of the middle ages, politicians would time and again reinterpret the Magna Carta to serve their own political goals.¹⁸⁸

It was only in the seventeenth century that the Magna Carta’s principles would, gradually, become a reality. At that time, protests against the courts of royal prerogative, which were controlled by the king and used by him both to control political opponents, sparked opposition to the King and mobilized support for an independent judiciary.¹⁸⁹ After a decade long struggle between the King and Parliament, which culminated in the English civil war and the glorious revolution, a number of important institutional changes were made: the Star Chamber was abolished in 1641¹⁹⁰; the powers of royal prerogative were gradually reduced, life-long tenure was granted to the judiciary with the Act of Settlement in 1701, and parliamentary supremacy was established. Indeed, political debate at the time was concerned with the question on how to limit the arbitrary exercise of power by the Monarch, and focused on principles of rule-of-law and judicial process.¹⁹¹ An important principle that emerged, for example, was that laws could not have retroactive effect.¹⁹²

The newly independent courts themselves also played an important role in developing fair trial guarantees. Paul Halliday, in a detailed historical study, shows that in the seventeenth century, English judges expanded their power over other

¹⁸⁶ HALLIDAY, *supra* note 107, at 14-18.

¹⁸⁷ HAYEK, *supra* note 184, 143.

¹⁸⁸ See e.g., JAMES C. HOLT, *MAGNA CARTA* 8-9 (1992); HALLIDAY, *supra* note 107, at 15; HAYEK, *supra* note 184, at 147.

¹⁸⁹ See e.g., North & Weingast, *supra* note 184, 813-21.

¹⁹⁰ The Star Chamber was the court that had the final say in issues concerning the royal prerogative. *Id.*, at 813; HAYEK, *supra* note 187, at 148 (describing the star chamber as “a court of politicians enforcing policy, not a court of judges administering the law”).

¹⁹¹ *Id.*

¹⁹² *Id.*

magisterial institutions by creating a powerful writ of Habeas Corpus.¹⁹³ With the growth of the British Empire, these principles diffused to all corners of the world, thereby establishing judicial process rights as an important feature of common law constitutionalism.

The developments in Britain and its Empire can be contrasted with those in civil law countries. In contrast with Britain, France opted for a professional bureaucratic judiciary that was made subordinate to the executive.¹⁹⁴ The reason for the difference is that, unlike Britain's, France's history was not characterized by the long historical struggle between the King and Nobility. Historians have noted that instead of fighting the King, the French nobility more commonly fought each other.¹⁹⁵ French nobles were "more afraid of each other than of the king" and trusted the King to resolve disputes among them.¹⁹⁶ Indeed, a large literature on "legal origins" has found that, up till this day, civil law systems are characterized by a more limited role for the judiciary, less secure property, and fewer judicial process rights.¹⁹⁷

Figure 6 illustrates this point. It depicts the average number of "fair trial" rights for the world's constitutions at large (middle solid line), common law systems (top line) and civil law system (bottom line), respectively.¹⁹⁸ The graph shows that, over the course of the twentieth century, judicial process rights proliferated. However, it also shows that this proliferation was substantially stronger in common

¹⁹³ HALLIDAY, *supra* note 107.

¹⁹⁴ Glaeser & Schleifer, *supra* note 184, 1193-97.

¹⁹⁵ *Id.*

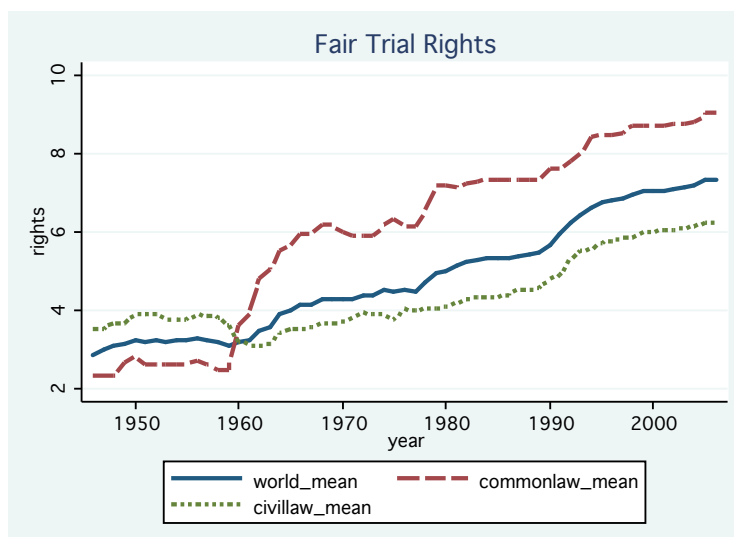
¹⁹⁶ *Id.* See also Dippel, *supra* note 109, at 161.

¹⁹⁷ MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 10-11, 16-46, 88-96 (1986); Rafael La Porta et al., *Legal Determinants of External Finance*, 53 J. FIN. 1131, 1131 (1997); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POLIT. ECON. 445 (2004); Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from American States*, 35 J. LEG. STUD. 399, 399 (2006).

¹⁹⁸ This graph is based on the right to appear before a court; the right to present a defense; the right to be presumed innocent; the right to an appeal; the right to an interpreter; the prohibition of ex post facto criminal laws; the right to a public trial; the right not to be tried for the same offense twice; the right to remain silent; the right to a timely trial; the right to counsel; the right to a 'fair trial'; the right to a 'due process'; the right to be treated humanely in prison.

law systems than in civil law systems.¹⁹⁹ This point is worth highlighting also because subsequent chapters will show that fair trial rights are one of the distinct dividing lines between different constitutional families.

Figure 6



4. Property Rights- Perhaps more than any other right, the right to private property was a product of the Enlightenment. Enlightenment, as noted, had contributed to the rise of a wealthy middle class. This middle class “was the driving force behind the growing capitalist economy.” Moreover, this rising middle class was often called upon to fund the wealth and privileges of the increasingly impoverished ancient regime. Because monarchs had a long history of arbitrary expropriation and often failed to repay loans, the middle classes were now in a position to demand their share in political power and to demand secure property rights.²⁰⁰ In England, the Glorious Revolution of 1689 radically increased the protection of private property.²⁰¹ In France property rights became part of the Declaration of the Rights of Man and Citizen after the French revolution. Its article 7 states that no one “may be deprived of

¹⁹⁹ The initial lagging behind of common law systems is result of lack of written constitutions, up till the 1960s, is probably due to the fact that the notion of a written Bill of Rights had not yet caught on in most common law systems, such as Canada, Australia, New Zealand and the U.K. The notable exception, of course, is the U.S., whose constitution does protect a number of fair trial rights.

²⁰⁰ North & Weingast, *supra* note 184, at 808-812.

²⁰¹ *Id.*, at 816.

property rights unless a legally established necessity requires it and upon conditioning of a just and previous indemnity.”

A central premise of Enlightenment thought was that human liberty would flourish in a free market. According to Immanuel Kant “civil freedom can no longer be easily infringed without disadvantage to commerce.”²⁰² Around the same time, Adam Smith put forth his famous notion of the “invisible hand” that would facilitate all individuals’ pursuit of self-interest.²⁰³ Private property was even regarded as the very basis of the social contract. According to Locke, “at the beginning of times, all goods were common property. But by adding their labor to certain goods, men attained ownership over them. The state was then instituted to protect and enforce the rights of men with regard to their life, liberty and property.”²⁰⁴

But while private property was one of the most important rights victories of the seventeenth and eighteenth centuries, it would become heavily contested in the nineteenth and twentieth centuries. In the industrial era, the working classes revolted against the connection between private property and political power (only the wealthy could vote), and demanded universal male suffrage. And after they were granted the right to vote, the newly empowered working classes demanded a redistribution of wealth, and the constitutionalization of a social welfare agenda. The Bolshevik revolution (1917) and the subsequent 1918 constitution of the Soviet Union culminated in a radical transformation of the capitalist economic structures. And the main tool for this transformation was the reform of private property and land rights.

Even within the framework of the liberal democratic state, property rights were increasingly challenged. The great depression and growing demands from the working classes resulted in the building of the social welfare state. Laissez-fair capitalism was complemented with a social welfare agenda. Such social welfare policies clashed with traditional conceptions of property rights. In the United States, during the so-called *Lochner-era*, the U.S. Supreme Court initially struck down most of President Roosevelt’s social welfare legislation for its alleged incompatibility

²⁰² ISHAY, *supra* note 110, at 145.

²⁰³ *Id.*

²⁰⁴ LESAFFER, *supra* note 126, at 388

with the constitutional right to property.²⁰⁵ Only severe political pressure, and proposals of “court-packing,” made the judges change their mind.²⁰⁶

Similar clashes between private property and social welfare took also place in other liberal constitutional systems. India, too, had its “Lochner era,” which lasted for no less than twenty-five years. During this time, Indian courts consistently struck down proposals for land reform and social welfare legislation for violating the constitutional right to property.²⁰⁷ The legislature responded with various constitutional amendments,²⁰⁸ which then, typically, were defeated by a new doctrinal twist by the judiciary. The conflict was only resolved by the radical removal of the property clause altogether.²⁰⁹

Despite such tensions, the right to private property has been a more or less universal ingredient of the world’s constitutions. Already in 1946, 81% of all constitutions embraced such a right. Today, no less than 97% of all constitutions contain some notion of private property. At the same time, private property was never absolute. From the very beginning, private property could be limited through expropriation. Figure 7 depicts the percentage of constitutions that contain some kind of private property protection as well as the percentage of constitutions that allow for limitations on such private property. It shows that private property rights and expropriation clauses more or less develop simultaneously.

²⁰⁵ See *Lochner vs New York*, 198 U.S. 45 (1905)).

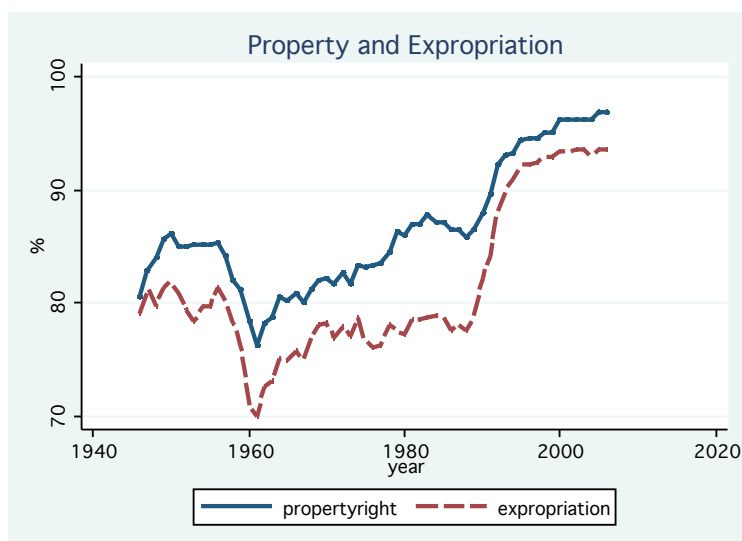
²⁰⁶ With *West Coast Hotel v Parrish*, 300 US 379 (1937) the Locher era ended.

²⁰⁷ For an overview see AJ VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES 192-206 (1999).

²⁰⁸ *Id.*

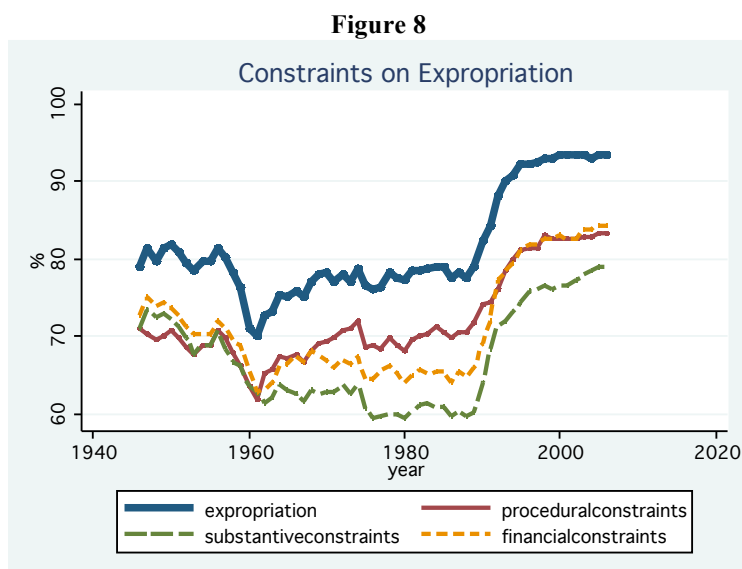
²⁰⁹ After the 1978 amendment, the Supreme Court radically revised its constitutional rights jurisprudence. It “deliberately sets about trying to recreate legitimacy for itself and the rule of law” which resulted in activist protection of citizens’ rights and championing the rights of the underprivileged. *Id.*, at 203.

Figure 7



However, it is important to note that an expropriation clause does not necessarily limit private property. The opposite is more likely to be true. Typically, expropriation clauses serve to define, and limit, expropriation. A government may expropriate, but only under certain well-defined circumstances. In particular, it ought to be able to show that it is acting in the public interest, follow certain procedures and pay compensation. Figure 8 depicts these kinds of constraints on expropriation provided in expropriation clauses and shows the percentage of constitutions with *procedural*, *substantive* and *financial* constraints on expropriation respectively.²¹⁰

²¹⁰ The *procedural* constraint variable captures constitutional provisions that either 1) mandate judicial involvement in expropriation, 2) require that expropriation is based on law, 3) require “due process” or some other type of procedural constraint. The *substantive* constraint variable captures constitutional provisions that require expropriation to serve the “public interest” in some form. The *financial* constraint variable captures whether the constitution requires compensation to be paid (either before or afterwards).



While expropriation may actually protect private property, the second half of the twentieth century also saw the rise of additional constitutional restrictions on private property, and a re-conceptualization of property rights. Communist ideology, for instance, offered alternative conceptualizations of property, including “cooperative”, “communal” and “public property.” Communist constitutions often provided that citizens are entitled to the fruits from their labor, but are not allowed own land. Land rights, instead, are placed in the hands of the cooperative, or the government. Or alternatively, as used to be the case in many Latin American constitutions, the constitution defines a maximum amount of land that can be owned by a single person. But restrictions were not confined to socialist regimes. Also the rise of the social welfare state required a re-conceptualization of private property in liberal democracies. Indeed, many liberal constitutions today contain a clause that allows for the limitation of private property by the government acting in its regulatory capacity. Alternatively, in other cases, they provide that property is limited by its “social function.”

Figure 9 depicts the percentage of constitutions that protect private property along with the percentage of constitutions that place various kinds of restrictions of private property. It shows that more than 70 percent of all constitutions today do not only protect private property, but limit it at the same time.

Figure 10 disaggregates the restrictions depicted in Figure 9. The first (solid) line depicts the percentage of constitutions that allow private property to be limited by the government acting in its regulatory capacity. The second (dotted) line depicts the percentage of constitutions that state that property is limited by its social function, or the public good. The third (dotted) line captures restrictions on land rights.²¹¹ Finally, the fourth (bottom, dotted) line captures the percentage of constitutions that offer alternative conceptualization of property- such as communal or public property. The figure suggests that regulatory limitations, or the restrictions required by the state acting in its regulatory capacity, have increased most strongly, and are also most common. At the same time, alternative conceptualizations of private property, limitations on land rights and limitations by property's social function, all of which were characteristic of socialist constitutions, have been in decline since the end of the cold war in particular.

Figure 9

²¹¹ It captures constitutions that contain either one of the following restrictions: restriction on land or a constitutional mandate for land reform.

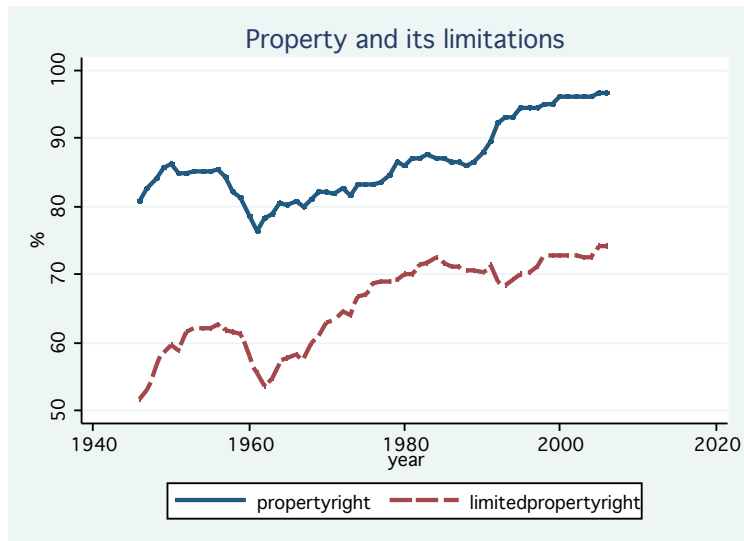
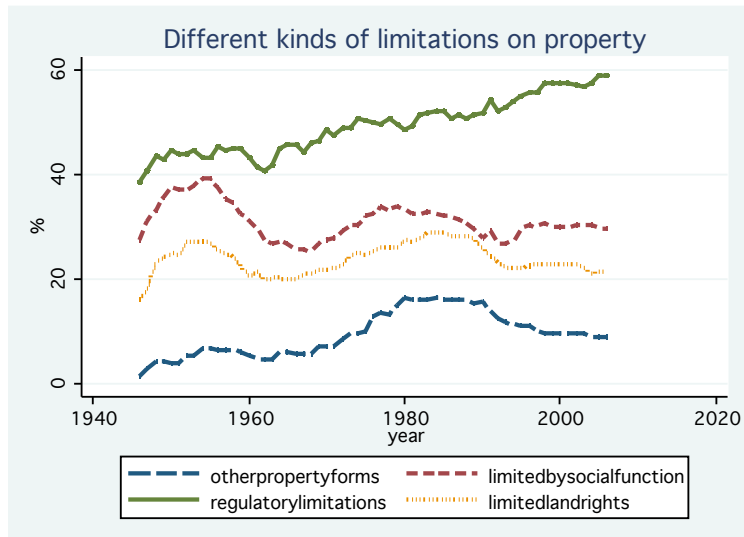


Figure 10



5. **Democratic Rights-** An important product of the Enlightenment was the democratization of power for the middle classes. But while the era of the absolute monarch was over, democratization remained incomplete. Only a small portion of the

population, with a disproportionate share of economic power, was allowed to vote. As Thomas Jefferson put it: “Let every man who fights or pays exercise his just and equal right in their election.”²¹²

It was only during the Industrialization era that most countries would extend the franchise to the entire population- and granted full-fledged democratic rights. It has been noted that it was only in the nineteenth century that Britain, for example, transformed from an “oligarchy run by an elite” into a democracy.²¹³ In Britain, the franchise was extended in 1832, 1867, and 1884, thereby gradually empowering portions of the population that were not previously represented.²¹⁴

Why the ruling elites extended the franchise is an important puzzle of political economy. After all, when extending the franchise, the masses would not only share political power but also demand their share of economic power, through increased taxation and redistribution. Why would elites willingly share their power and increase their taxes? The most common answer to this question is that, given the political circumstances, it was in their best interest of the ruling elites to do so.²¹⁵ The revolutions of 1830 and 1848, in which socialist revolts spread from city to city, had sparked substantial fears among the elites.²¹⁶ When Britain engaged in electoral reform in 1831, Prime Minister Earl Grey has been quoted to say that “there is no-one more decided against annual parliaments, universal suffrage and the ballot, than am I ...The Principal of my reform is to prevent the necessity of revolution ... I am reforming to preserve, not to overthrow.”²¹⁷ Such democratization through hegemonic self-preservation has been documented for a number of countries.²¹⁸ But whatever its exact causes, by 1946, universal (male) suffrage was a common feature in the

²¹² Thomas Jefferson (1816); Available at: <http://etext.virginia.edu/jefferson/quotations/jeff1200.htm>

²¹³ See Acemoglu & Robinson, *supra* note 141, at 1167.

²¹⁴ The franchise was further extended in 1919 and 1928, when women were allowed to vote.

²¹⁵ This argument is developed by Acemoglu & Robinson, *supra* note 141.

²¹⁶ *Id.*, at 1167.

²¹⁷ *Id.*, at 1182.

²¹⁸ *Id.*, at 1182-1186 (documenting how democratization occurred in the face of threats of revolution in England, France, Germany and Sweden alike).

Western world.

Figure 11 depicts the development of democratic rights of rights over time. It includes the right to vote, but also rights like the freedom of assembly and association and the right to form political parties.²¹⁹ It shows that the average number of democratic rights, for a long time, remained rather steady. But from the late 1980s and early 1990s onwards, the average number of democratic rights increases steeply. The 1990s, in fact, was a period of sweeping constitutional reconstruction and democratization alike. It coincided with what Samuel Huntington calls the “third wave” of democracy, in which previously dictatorial regimes converted to democracy.²²⁰ But the 1990s also saw the development a new generation of democratic rights, which can be described as “accountability rights.” Such accountability rights include the right to information about the government, the right to compensation from harmful government action and the right to a judicial remedy when the government violates rights. These rights were spurred by the neo-liberal development agenda and “Washington-consensus,” that sought to promote “good governance” and constraints on government.²²¹ For example, the right to information was first adopted in Guatemala (1946), Sweden (1949) and Costa Rica (1949), followed by the Dominican Republic (1966) and Ecuador (1967). But in the 1990s, this right really takes of. Figure 12 shows the development of the right to information over time. It shows that, by 2006, 33% of all constitutions contain a right to information.

Figure 11

²¹⁹ It is based on the following rights; the right to vote, the right to assembly, the right to association, the right to establish political parties, the right to information, the right to petition, the right to amparo, the right to resist, the right to a remedy when rights are violated and the right to compensation.

²²⁰ SAMUEL HUNTINGTON, *THE THIRD WAVE, DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY*, xiii (1991).

²²¹ See chapter V *infra*.

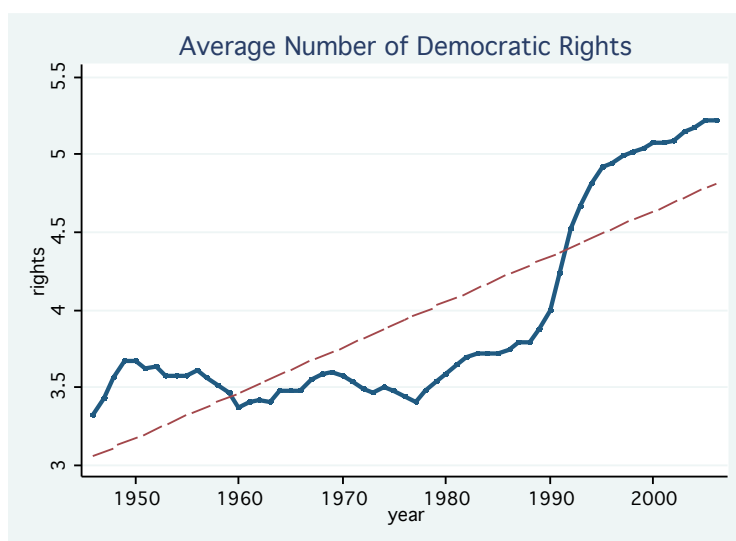
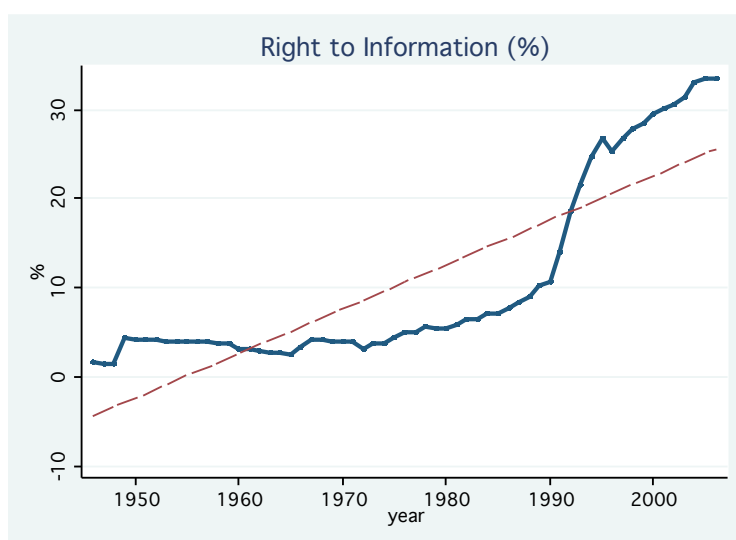


Figure 12



An interesting ingredient in the constitutional menu of democratic rights is the right to resist, that is, the right for the mob to overthrow their government. John Locke had conceptualized the right to resist as part of the social contract. In Locke's conceptualization of the social contract, man did not subject himself completely to the state. Instead, the state only receives a limited mandate, with well-defined powers over well-defined goals. Where the state is not empowered, the people keep a residual of their natural rights. The right to resist is part of this residual. When the state oversteps its mandate, the people have the right to resist their government. In Lockean philosophy, the right to resist, thus, serves as a last resort to constrain state power.

Interestingly, among the world's constitutions, it is often the constitutions of countries with a repressive past that include such a right. Almost all of the constitutions of the former Eastern European countries contain a right to resist, as do the 1995 constitution of Uganda, the 2002 constitution of Timor-Leste, the 1997 constitution of Thailand, the 1992 constitution of Ghana, the 1992 constitution of Angola, the 1996 constitution of Algeria, the 1992 constitution of Cape Verde, the 1993 constitution of Chad, as well as a number of recent Latin American constitutions. The connection between autocracy and the presence of the right to resist raises the possibility that these countries adopted the right as an ultimate safeguard against undemocratic back-sliding. In these constitutions, not the courts, but revolution is the ultimate safeguard against undemocratic rule. Yet it is also possible that undemocratic rulers added the right to resist to the constitution to justify their own coming to power through violent resistance and coup d'états. This second explanation would also be consistent with the presented data.

Figure 13 depicts the percentage of constitutions that have adopted a right to resist. It shows that, by 1946, it was adopted by 8% of the world's constitution. After an initial decline, and a steep increase at the end of the 1980s, 14% of all constitutions contain a right to resist today.

Figure 13

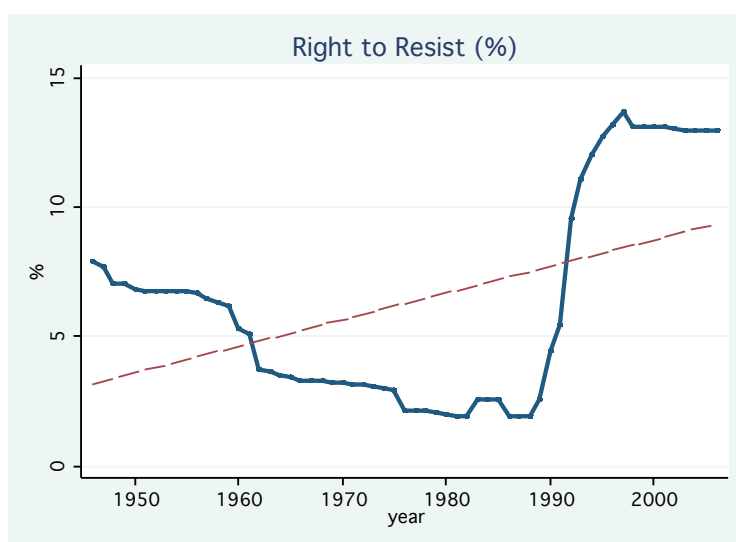
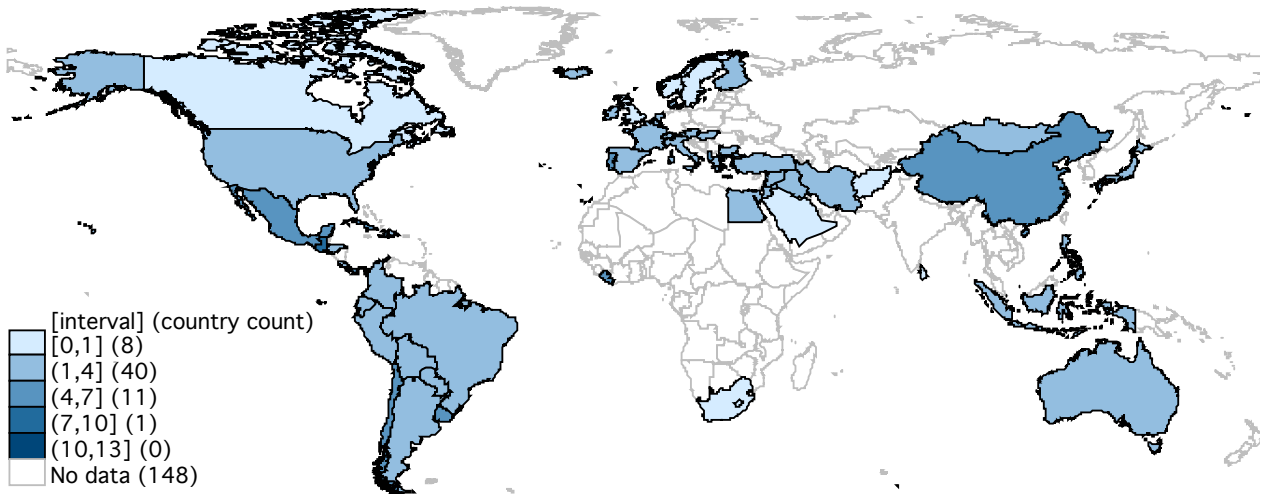


Figure 14 depicts the total number of democratic rights on a set of world maps in 1946, 1976 and 2006, respectively. The maps again show that, over time, democratic rights have proliferated. Today, virtually every constitution commits to a democratic process and accountable government.²²² At the same time, as will be highlighted in Chapter VII, democratic constitutional rights is not the same as actual democracy.

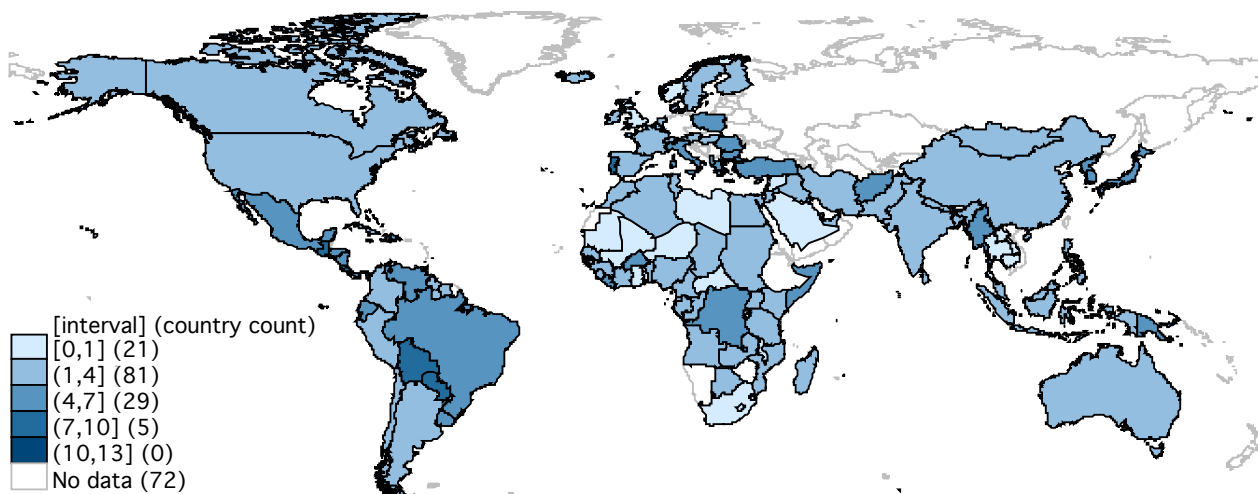
Figure 14

Democratic Rights in 1946

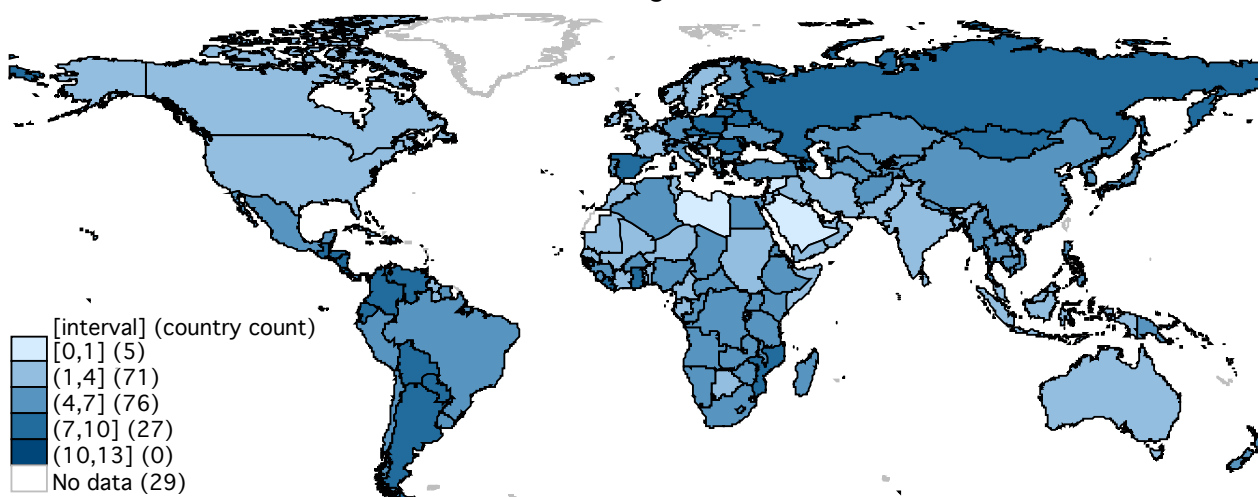


²²² Notable exceptions are the constitutions of Israel, Brunei and Saudi Arabia, which still fall in the lowest category (either one right or none whatsoever).

Democratic Rights in 1976



Democratic Rights in 2006



6. Positive Social Welfare and Workers Rights- Social welfare and workers rights find their origins in the era of industrialization with the struggle of workers for better living conditions. At this time, socialist movements challenged the libertarian human rights discourse that had emerged in the Enlightenment era. Socialist movements proclaimed that all human beings, regardless of wealth, gender or age, were equal, and entitled to both civil and political and socioeconomic rights. To achieve these ends, the 19th century socialist movements first and foremost sought to extend the suffrage. Only through a redistribution of power, they would achieve a redistribution of wealth. And indeed, after the adoption of universal male suffrage in

the early twentieth century, social welfare legislation proliferated and social welfare and workers rights gradually caught on in the world's constitutions.²²³

Yet by 1946, only the right to education had been adopted by more than half (64%) of the constitutions in force. The other socio-economic rights were prevalent in a number of constitutions, but did not meet the 50% threshold. Second-most prevalent was the right to work, adopted by 46% of all constitutions, followed by the right to social security (41%), the right to rest (27%), the right to form trade unions (24%), the right to health (24%), the right to a minimum wage (22%), the right to strike (21%), the right to favorable working conditions (17%), the right to housing (16%) and the right to an adequate standard of living (6%). The right to food and water had yet to be invented.

The right to education, thus, has a somewhat special status among the socio-economic rights. The most likely reason is that it was connected to early action against child labor as well as the struggle for universal suffrage, both of which preceded the building of the social welfare state. As Micheline Ishay points out, progressive forces in the upper classes had always sought to protect children. Child labor was restricted as early as 1802, in the 1802 British Factory Health and Morals Act.²²⁴ The rationale behind this legislation was that children should not work in factories but should go to school instead. But, as Ishay notes, education also became part of the working class struggle for universal suffrage. In response to claims that only literate man should be allowed to vote, the working classes increasingly demanded the right to education. Marx and Engels, in 1840, argued that the future of the working classes depended on the realization of the right education.²²⁵ Thus, across class divisions, there was a consensus that young children ought to go to school, and receive an education. For that reason, the constitutional right to education really took off before the twentieth century social welfare state.

Setting aside education, most social welfare rights and workers rights have their intellectual origins in the Industrialization era. They were intrinsic part of the

²²³ Acemoglu & Robinson, *supra* note 141, at 1167.

²²⁴ ISHAY, *supra* note 110, at 143.

²²⁵ *Id.*

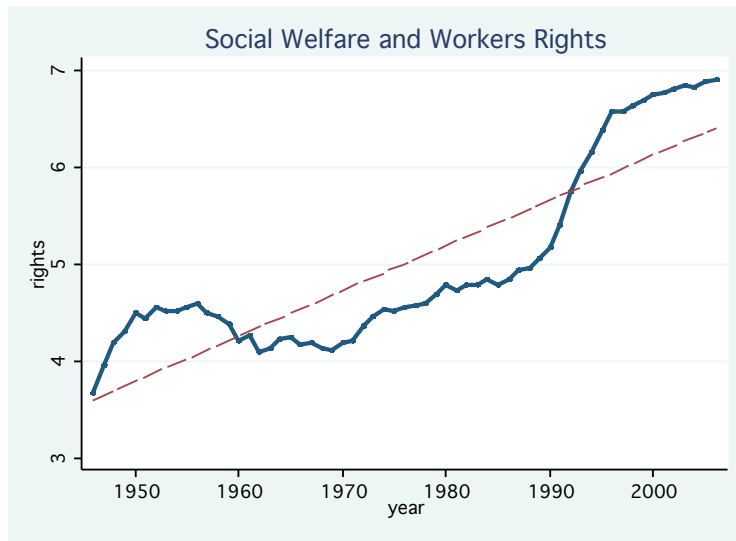
socialist agenda, and find their first constitutional articulations in the early twentieth century. Particularly the Latin American constitutions were among the first to embrace a social welfare agenda. The 1917 constitution of Mexico, for example, adopted a range of social welfare rights, and many other Latin American constitutions followed suit.²²⁶ By contrast, in Europe, these rights really take off in constitutional terms after the WWII. The WWII had left Europe economically devastated. Ruling governments feared that the working classes would vote for the communist parties unless they would honor some of the working classes' demands for social welfare legislation. It is for this reason that many liberal European governments offered additional workers rights and social welfare protections at that time.

Figure 15 depicts the development of worker's rights and social welfare rights over time.²²⁷ It shows that, after the WWII, the spread of social welfare rights continues. Most striking perhaps is the steep increase in the average number of positive rights in the 1990s. Perhaps contrary to common intuition, it is exactly *after* the cold war, and *after* the collapse of socialist state ideology, that social welfare rights increase most in number. It again shows that social welfare rights are not only a feature of communist regimes, but also part of the liberal social welfare state. And, quite possibly, it is because of the collapse of communism these social welfare rights gain additional legitimacy because they are no longer associated with communism.

Figure 15

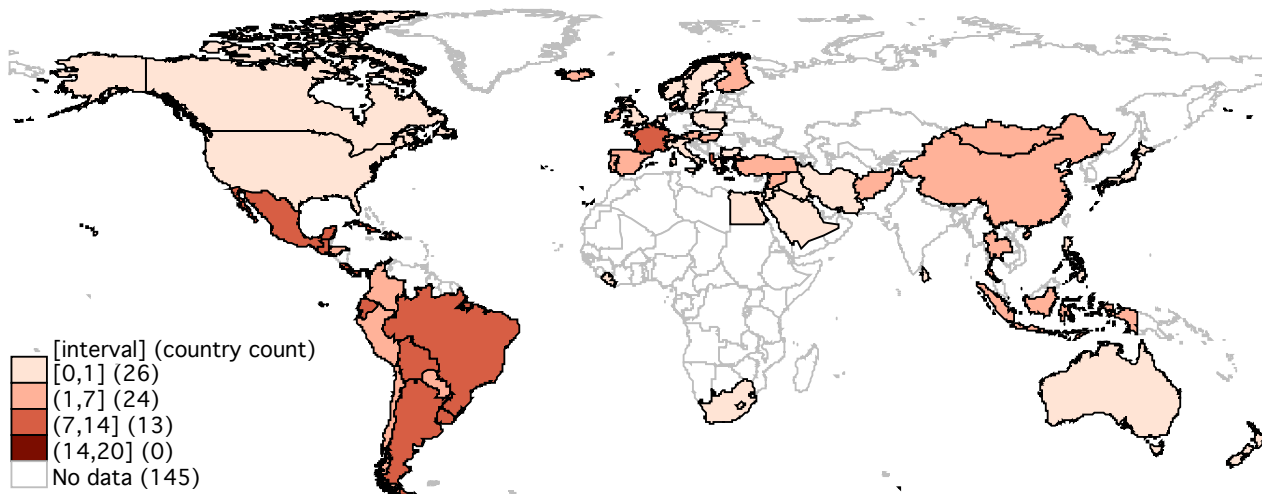
²²⁶ Carozza, *supra* note 132.

²²⁷ It is based on the following rights: the right to work, the right to a minimum wage, the right to establish or belong to trade unions, the right to strike, the right to favorable working conditions, the right to rest, the right to work for the government, the prohibition of child labor, the right to social security, the right to an adequate standard of living, the right to food, the right to housing, the right to water, the right to health, the right to education and the right to sports (or physical education).



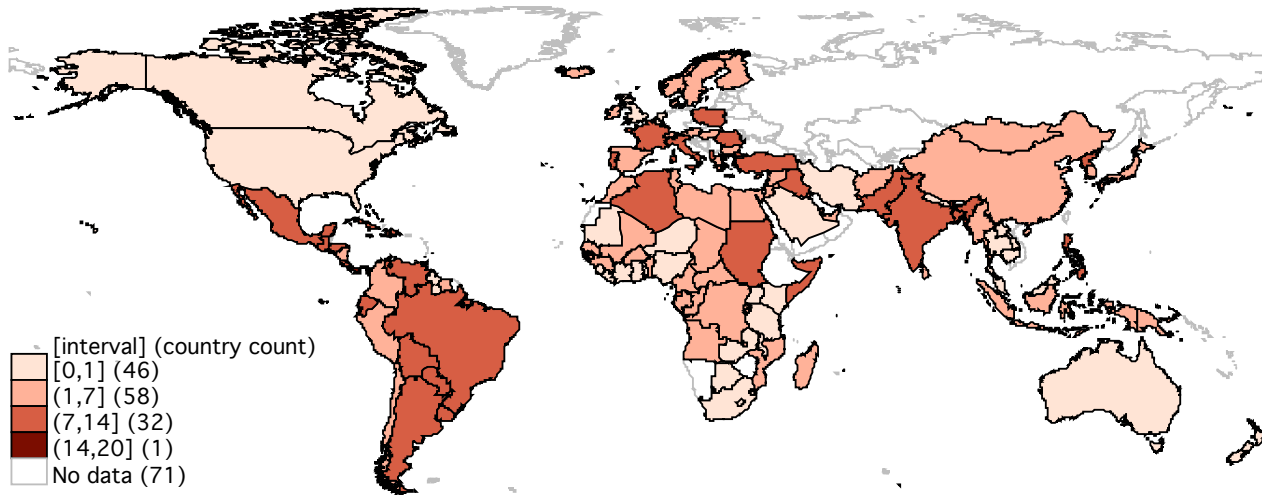
Error! Reference source not found. shows the prevalence of positive social-welfare and workers rights on a world map. The maps show that, from 1946 onwards, socio- and economic rights spread in all directions. This spread was not limited to socialist countries only. Socio- and economic rights were adopted in Africa, Asia and Europe alike. But the maps also suggest that some constitutions are remarkably resilient to these trends. The constitutions of the U.S., Britain, Canada, New Zealand and Australia, amongst others, do not contain a single social welfare right. Generally, the common law constitutional tradition resists social welfare rights.²²⁸

Figure 16
Social Welfare and Workers Rights in 1946

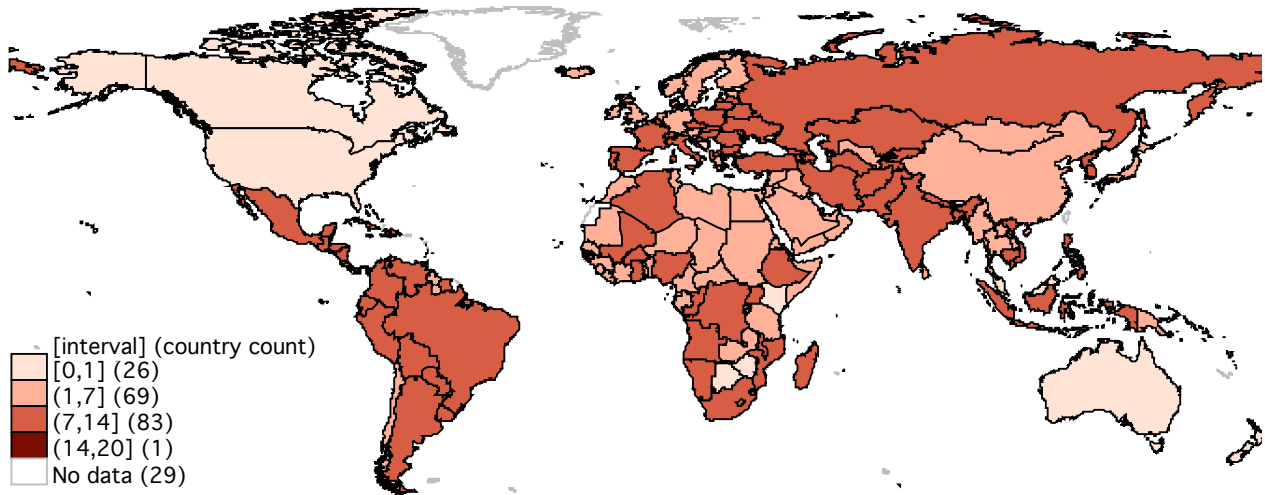


²²⁸ See Chapter 6, section D *infra*.

Social Welfare and Workers Rights in 1976



Social Welfare and Workers Rights in 2006



But while positive social welfare rights have gained a strong foothold in the world's constitutions, they are not uncontroversial. There exists a vigorous debate over the justiciability of these rights. Opponents of justiciable social welfare rights argue that these rights put courts in charge of a domain that is inherently political. A court mandating a government to spend more money on health or education does not fit with the traditional role of courts and goes against the very grain of the separation of powers. And, even worse, it may produce bad policy, as courts are unable to balance all the financial priorities of the government against each other. Or so the argument goes.

But at the same time, courts around the world have actually been enforcing positive rights, and with an increasing frequency. The most famous examples probably come from the South African Constitutional Court and the Indian Supreme Court.²²⁹ But similar social welfare rights activism has been documented in the Tokyo High Court, the Court of Appeal of the Supreme Court of the Republic of Guyana, the Supreme Court of Finland and the Supreme Court of Sri Lanka, just to name a few.²³⁰ According to some, “the era of justiciability of social and economic rights has arrived.”²³¹

But while courts have been enlarging their mandate, constitution-makers have pushed back. Recent decades have seen a strong constitutional trend to not only to protect social welfare rights, but also to make them non-enforceable in court. Some constitutions explicitly state that social welfare rights are not enforceable in courts. In many of those cases, social welfare rights are placed in a chapter on “directive principles” for government behavior, rather than the Bill of Rights. This latter model was first adopted by the Irish constitution of 1922 and reportedly borrowed by the 1946 Indian constitution, as well as various other common law constitutions.²³² Figure 17 depicts the percentage of constitutions with social welfare and workers rights that explicitly make them unenforceable or adopt them as part of a set of “directive principles.”

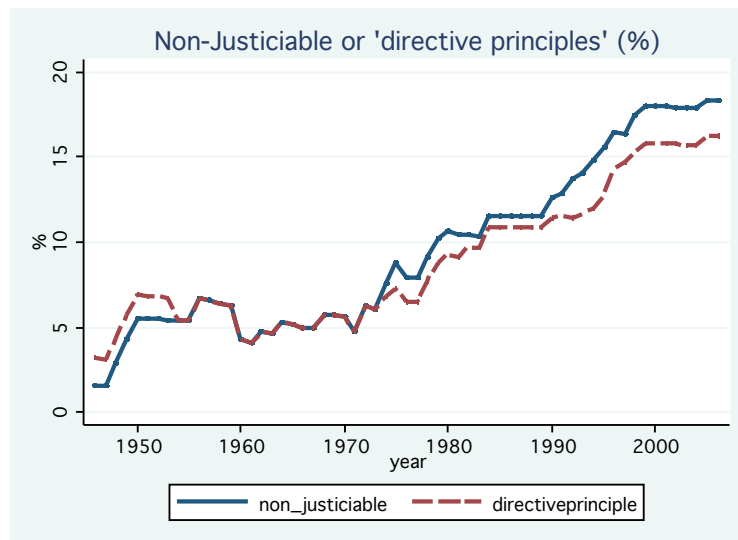
Figure 17

²²⁹ See e.g., *Government of the Republic of South Africa v Grootboom*, 11 BCLR 1169 (CC) (2000); *Treatment Action Campaign & others v Minister of Health & others*, High Court, Transvaal Provincial Division, CN 21182/2001 (2001); *Olga Tellis & Ors. Vs Bombay Municipal Cooperation*, 3 SCC 545 (1985).

²³⁰ BETRAND G. RAMCHARAN, JUDICIAL PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1-3 (2005).

²³¹ *Id.*, at 3.

²³² Chapter VI will show that common law constitutions typically omit social welfare rights. But where they do include them, they are often placed in such a special section on “directive principles.”



7. **Women's Rights.** While enlightenment had produced a sweeping democratization of power, it did not advance the position of women, regardless of their class status. In her famous letter "Remember the Ladies" (1776), Abigail Adams had suggested to her husband John that he ought to empower women too. "Remember that all men would be tyrants if they could", she urged him.²³³ But it was not yet the time or the place. The U.S. constitution ignored the female part of the population. More or less the same thing happened with the French revolution. While the French revolution was carried by the support of women, the French Declaration did not talk of women's rights. In Micheline Ishay's words: "the women that had stormed the Bastille and overthrew the *ancient regime* simply had to go back home, to resume their ancient duties."²³⁴ It would only be in 1944 that the women of France would be granted the right to vote.²³⁵ Thus, while the enlightenment produced rights to property, liberty and political participation for the upper and middle class male population, it did not extend these rights to women. Women, for a long time, remained second-class citizens, unable to hold property, and unable to vote.²³⁶

²³³ see ISHAY, *supra* note 110, at 110.

²³⁴ *Id.*

²³⁵ *Id.*, at 110-11.

²³⁶ *Id.*, at 162.

The emergence of socialism in the context of industrialization contributed to the women's cause. Socialism held that all ought to be equal, regardless of their wealth, race or sex. Yet, working class women faced different problems than those in the upper classes. Upper class women struggled for the opportunity to enter the workforce, while women in the working classes first and foremost needed better working conditions. Working long hours as the cheapest segment of the working population while also raising children, these women needed a safer working environments, minimum wages, and child support. For both groups of women, however, the most important means to achieve their goals would be to extend the suffrage. On voting rights, women's interests transcended class boundaries and were simply universal.

In 1946, the most common constitutional provision relating to women was a constitutional mandate to "protect" mothers (21% in 1946).²³⁷ By contrast, in 1946, only 14 percent of all constitutions contained a general gender equality clause. In general, the post-WWII period has been characterized by two distinct constitutional trends concerning women. First, there has been a trend to *protect* women. Constitutions have offered all sorts of protections, like shorter working days, maternity leave and special rules for mothers. Second, there has been a trend to *empower* women. In this case, constitutions state that women are equal to men, either in a general gender equality clause, or in more specific provisions that proclaim, for example, the equality of spouses, the equality of female laborers, or even the equality in "all spheres of live."

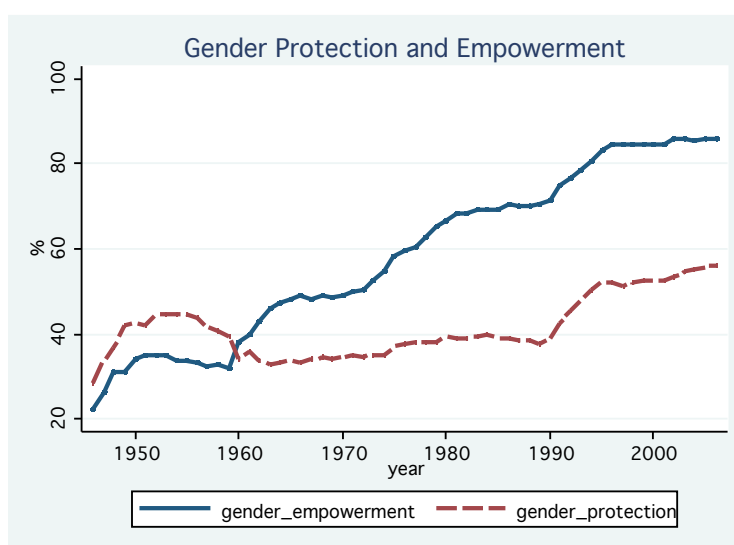
Figure 18 depicts, the percentage of constitutions that "protect" and "empower" women, respectively.²³⁸ It shows that, up till the 1960s, protection was more common than empowerment. From the 1960s onwards this becomes the other way around; women's empowerment overtakes women's protection. From the 1960s

²³⁷ See generally NITZA BERKOVITZ, FROM MOTHERHOOD TO CITIZENSHIP- WOMEN'S RIGHTS AND INTERNATIONAL ORGANIZATIONS (1999).

²³⁸ The *empowerment* variable captures the percentage of constitutions that contain any of the following rights: general gender equality, equal rights for female laborers, equality between husband and wife. The *protection* variable captures the percentage of constitutions that contain any of the following rights: right to maternity leave, right to special protection of women; right to special protection for mothers.

onwards, moreover, the percentage of constitutions that empower women increases steeply.²³⁹ The graph below suggests that women, today, are empowered by more than 80% of all constitutions around the world. They are mentioned by an even larger number, as 91 % of all constitutions today opts to either protect or empower women’s rights.

Figure 18



8. Equality Rights- Much of the history of human and constitutional rights is a history of the gradual extension of equality to a growing number of people. The liberal thinkers from the Enlightenment and the socialist thinkers from the Industrial era both argued for the improvement of equality. The same is true for human rights

²³⁹ See Francisco O. Ramirez, et al., *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990*, 62 AM. SOC. REV. 735 (1997) (arguing that through transnational influences, women’s rights became a “script of modern statehood”).

activists today. And indeed, over the course of the twentieth century, the world's written constitutions have come to include a growing number of explicit equality guarantees.

Equality was central to Enlightenment philosophy. After all, the motto of the French revolution was “Liberty, Equality and Brotherhood.” But equality claims from the Enlightenment era remained incomplete. To use Micheline Ishay's words, “women remained second-class citizens, slavery persisted, indigenous people were exploited and abused in the overseas colonies, homosexuality was considered to be a crime, and the rights of the Jewish population were routinely violated.”²⁴⁰ Even white men needed wealth in order to be able to vote. Equality was thus limited to a lucky few.²⁴¹

With the rise of socialism, equality was further expanded. Particularly, socialism's goal was to strive for equality regardless of wealth and property. Socialists moreover proclaimed gender equality, racial equality and sought to abolish slavery. And undoubtedly, over time, basic rights were extended to a larger part of the population. By the end of the nineteenth century, slavery was abolished, and male suffrage had become universal. Over the course of the twentieth century, women's rights expanded and colonial powers granted their colonies the right to self-determination. But the battle for equality is still ongoing: up till this very day, homosexuals fight for equality, and new minority groups face new inequalities, as witnessed by the treatment of the Romas in France and central Europe or the growing discrimination of Muslim minorities in Western Europe.²⁴²

It is exactly this trend—the gradual expansion of equality to a growing number of groups—that characterizes the development of equality rights in the world's constitutions. By now, 97 percent of all constitutions contain an equality clause of some sort. But these equality clauses typically single out some groups to whom equality is explicitly granted. And over time, more and more groups have been added to this list. Instead of a generic “all men are equal”, constitutions now also

²⁴⁰ ISHAY, *supra* note 110, at 107-16.

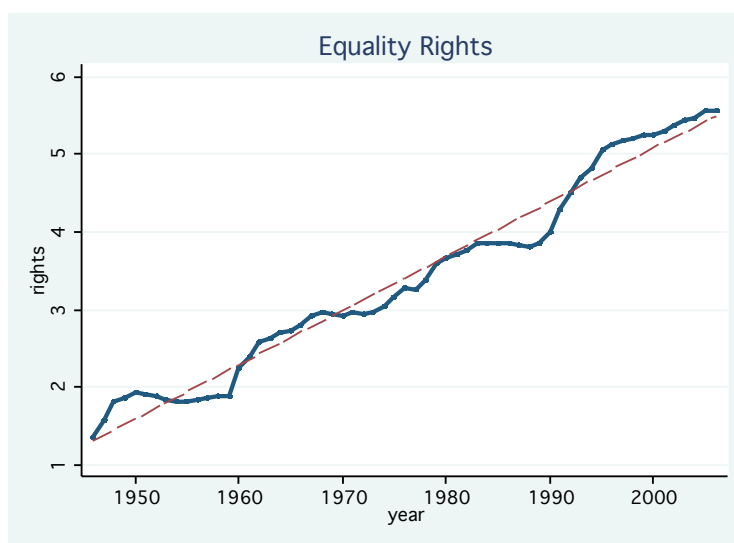
²⁴¹ ISHAY, *supra* note 110, at 107-16.

²⁴² *Id.*, at 155-73.

proclaim “equality regardless of race,” “equality regardless of gender” or “equality regardless of wealth.” Thus, over the course of the 20th century, the net of equality was cast wider and wider. Today, some constitutions even proclaim “equality regardless of sexual orientation” or “equality regardless of HIV Aids.”

Figure 19 depicts the average number of equality rights over time.²⁴³ It shows a steep increase in the average number of groups that receive explicit equality guarantees. To some extent, the explicit mentioning of the different groups could be viewed as mere differences in drafting style. After all, a generic “all are equal” could, in theory, encompass all these possible groups in society. But history teaches us otherwise. As the preceding discussion suggests, each additional equality guarantee often reflects a real historical struggle for the extension of equality to new groups. For centuries, the notion that “all are equal” did not encompass women’s rights, just as today “all are equal” does not encompass gay rights.

Figure 19



²⁴³ It is based on the following provisions: general equality clause (all men are equal); right to equality regardless of sex; right to equality regardless of race; right to equality regardless of place of origin; right to equality regardless of ethnic background; right to equality regardless of education; right to equality regardless of social status; right to equality regardless of caste; right to equality regardless of tribe; right to equality regardless of beliefs; right to equality regardless of political opinion; right to equality regardless of economic status; right to equality regardless of ancestry; right to equality regardless of nationality; right to equality regardless of disability; right to equality regardless of age; right to equality regardless of sexual orientation; right to equality regardless of hiv aids status.

9. Third Generation Rights- At the turn of the millennium, the core human rights ideals from the Enlightenment and Industrialization-era have become common, if not universal, constitutional features. Almost all of the world's constitutions proclaim property, individual liberty, democracy and equality, as well as, more often than not, a set of social welfare guarantees such as health and education. But the twentieth century has also seen the birth of a new set of problems. Issues like trans-border migration, environmental degradation, new information and communication technologies, and the cultural hegemony of the West have induced new challenges and resulted in a new catalogue of human rights, commonly referred to as "third generation rights."²⁴⁴

One of the most important, if not defining, features of the past decades is the ongoing "globalization", or the "cluster of technological, economic, and political innovations that have drastically reduced the barriers to economic, political, and cultural exchange."²⁴⁵ Globalization, it has been noted, is "fraught with possible effects on constitutionalism and constitutional rights."²⁴⁶ Constitutional law itself is globalizing, others have argued.²⁴⁷ And indeed, there are some obvious elements of globalization that are bound to affect the world's constitutions.

In the face of globalization, the world has witnessed the emerge of new and radical information and communication technologies. Mobile phones, cable television, the Internet, SMS and Skype, all make the world a smaller place. But the near-unlimited possibilities in the informational realm also have their downsides. Recent years have seen growing concerns over privacy, as search engines monitor Internet users' every move and social network sites like Facebook put often-intimate private information into the public realm. Though perhaps not as early as 1984, George Orwell's nightmare is one of the possible downsides of the information era.

²⁴⁴ See e.g., Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225, 1231 (Mathias Reimann & Reinhard Zimmermann eds., 2007).

²⁴⁵ David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1307-42 (2008).

²⁴⁶ Frank L. Michelman, *W(h)ither the Constitution?* 21 CARDOZO L. REV. 1063, 1063 (2000).

²⁴⁷ Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT.'L L. 985 (2009); Law, *supra* note 245.

The typical constitutional response to these challenges has been to extend the centuries-old privacy right to encompass personal data. In fact, about 21 percent of the world's constitutions today contain a right to privacy of personal data (while up till to 1966, not a single constitution contained this right). Also associated with the "information age" are the growing calls for freedom of information and transparency. In response, as shown in a previous section, the world's constitutions increasingly include an individual right to request information from the government.

The information revolution has moreover diffused the cultural attraction of Hollywood and, according to some, globalized (or Americanized) local culture. With the growing cultural hegemony of McDonalds, Coca-Cola and Levis Jeans, indigenous cultures and traditions have been marginalized. Just as local coffee shops are replaced by Starbucks, indigenous cultures are challenged, directly or indirectly, by modernization and westernization. This is too complicated a topic to cover in this section. But an increasingly common constitutional response to this phenomenon is to constitutionally entrench the protection of cultural minority rights, such as the right to speak one's traditional language, the right to preserve one's traditions and values, or to right to preserve these traditions and values through special education. After years of cultural repression of indigenous peoples around the world, constitutions are increasingly committed to set the record straight.

Globalization not only revolutionized information, but also produced sweeping economic growth, at least in some parts of the world. But economic growth, too, has possible downsides. Ever since the Industrial Revolution, economic growth has come at the cost of the environment. Air and water pollution, rising sea levels, a loss of natural species, and global warming constitute the downside of the ever-expanding global economy. In response, a growing number of constitutions now incorporate the right to a healthy environment. First adopted in Madagascar in 1959, and Guatemala in 1965, no less than 63 percent of the world's constitutions today contain a right to a healthy environment.

Growing economic welfare has moreover produced an embarrassment of riches in consumer choices. New flashy products, promoted by catchy commercials, are for sale 24/7, not only in shops but also on the Internet. But in their almost unlimited choice of products, consumers increasingly find themselves signing lengthy

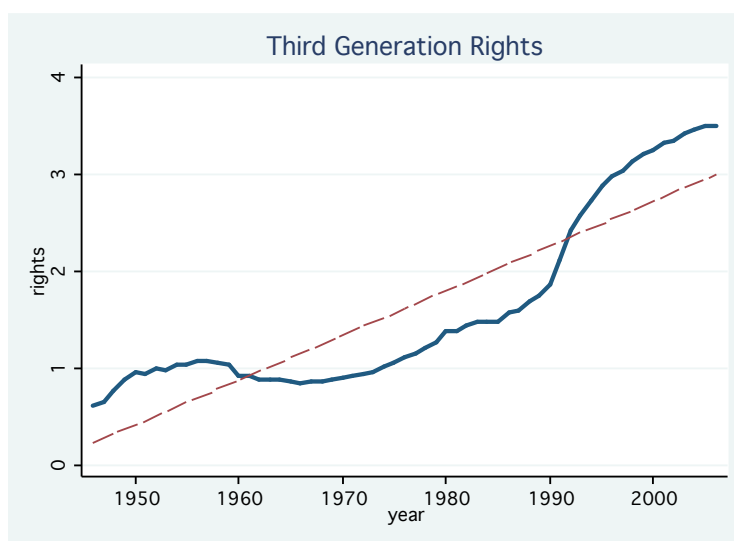
contracts they hardly understand or fall victim to modern loan sharks. In response, a growing number of constitutions now contain consumer rights, and strive to protect consumers from these new challenges.

In addition, globalization has arguably aggravated the divide between developed and developing countries, or the economic inequality between the haves and the have-nots. As a by-product of economic inequalities, there has been substantial economic migration from the developing to the developed world. And even though many developed countries are in fact closing their borders to poor economic migrants, constitutions increasingly grant asylum rights (though mainly in those countries where the net outflow of migrants exceeds the net inflow).

Figure 20 shows the development of the a number of “third generation” rights, including the right to a healthy environment, consumer rights, the right to asylum and minority rights.²⁴⁸ It clearly suggests that these rights have strongly proliferated in the second part of the twentieth century. Even though problems like environmental degradation, global warming, cyber crimes, and international migration are inherently transnational in nature, the world’s constitutions have not been silent on these issues

Figure 20

²⁴⁸ This graph is based on the following rights: the right to asylum (refugee rights), rights for consumers, rights for handicapped people, rights for victims, the right to a healthy environment, the right to national culture, minority rights (general) the right to use one’s native/ minority language, the right to preserve one’s culture and ways of life, the right to establish schools for minority groups, the rights for minorities to be represented in politics, the right of minorities to their indigenous lands, the rights of minorities to have a degree of autonomy.



10. Conclusion: Rights Creep- The previous subsections have provided a brief and admittedly sketchy narrative on the origins and evolution of a number of constitutional rights. The overwhelming impression is that, almost across the board, existing rights have gained in popularity and new rights have been invented. But most of the graphs and figures provided thus far are based on aggregate numbers, like the *average* number of democratic rights, or the *average* number of social welfare and workers rights. The reader, by now, may have wondered about the development of specific constitutional rights. Therefore, table 2 summarizes, decade-by-decade, the popularity of each of the individual right covered in this section. The Table confirms that the evolution of the world’s constitutions entails a story of a growing number of rights for a growing number of people.

It moreover shows that a number of rights, those listed in the top part of the Table, are near-universally adopted by the world’s constitutions, and can be fairly described as “universal,” or “generic” rights, that are part of a shared global practice of constitutionalism.²⁴⁹ These include some of the rights discussed in the previous sub-sections; equality, religion, private property and expression all top the list. In general, a total of 25 rights can be found in over 70% of all constitutions today, while 8 rights are prevalent in more than 90% of the world’s constitutions.

²⁴⁹ David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

Table 3: All Constitutional Rights							
Constitutional Right	1946	1956	1966	1976	1986	1996	2006
1. General equality clause	70%	76%	85%	88%	92%	95%	97%
2. Right to freedom of religion	81%	88%	87%	88%	92%	95%	97%
3. Right to private property	81%	85%	81%	83%	87%	95%	97%
4. Freedom of expression	81%	86%	82%	83%	85%	94%	97%
5. Prohibition of arbitrary arrest and detention	76%	81%	81%	79%	81%	92%	94%
6. Right to privacy of the home	81%	81%	76%	80%	81%	91%	94%
7. Right to assembly	73%	77%	73%	75%	81%	90%	94%
8. Right to association	72%	74%	78%	77%	80%	91%	93%
9. Right to privacy of communication	67%	71%	68%	70%	73%	87%	89%
10. Freedom of movement	50%	55%	58%	58%	64%	84%	88%
11. Equality regardless of gender	14%	28%	45%	59%	71%	85%	86%
12. Right of access to court (habeas corpus)	68%	68%	64%	62%	64%	85%	86%
13. Right to vote	63%	74%	73%	69%	74%	82%	84%
14. Prohibition of Torture	37%	37%	41%	45%	56%	80%	84%
15. Right to education	64%	72%	60%	63%	65%	78%	82%
16. Freedom of press	76%	75%	66%	65%	63%	77%	81%
17. Right to work	46%	56%	56%	65%	63%	78%	80%
18. Prohibition of ex post facto laws	41%	51%	57%	60%	67%	77%	80%
19. Right to life	33%	33%	38%	41%	51%	71%	78%
20. Presumption of innocence	8%	12%	31%	37%	49%	69%	74%
21. Equality regardless of race	17%	25%	49%	55%	63%	70%	73%
22. Right not to be expelled from home territory	30%	33%	38%	44%	48%	70%	73%
23. Right to present a defense	30%	37%	52%	57%	64%	69%	72%
24. Right to form trade unions	24%	35%	49%	48%	48%	67%	71%
25. Right to health	24%	39%	33%	41%	49%	64%	71%
26. Right to counsel	10%	17%	31%	38%	47%	66%	70%
27. Right to public trial	43%	47%	46%	48%	53%	65%	69%
28. Rights for the family	28%	28%	38%	43%	46%	62%	67%
29. Right to social security	41%	53%	46%	52%	52%	64%	65%
30. Freedom to form political parties	9%	16%	28%	26%	31%	63%	65%
31. Prohibition of slavery	32%	35%	40%	41%	46%	59%	64%
32. Rights for children	24%	33%	28%	33%	39%	58%	63%
33. Right to a healthy environment	0%	0%	1%	8%	20%	52%	63%
34. Equality regardless of religion	20%	28%	40%	42%	47%	60%	62%
35. Freedom of enterprise	33%	43%	33%	33%	35%	55%	57%
36. Right to a remedy when rights are violated	17%	20%	27%	28%	35%	49%	53%
37. Right to personal privacy	5%	5%	12%	17%	25%	47%	52%
38. Right to petition	64%	64%	43%	39%	40%	49%	50%
39. Prohibition of double jeopardy	16%	19%	26%	31%	37%	46%	50%
40. Right to remain silent	29%	29%	32%	31%	38%	47%	49%
41. Right to culture	13%	21%	18%	29%	36%	47%	49%
42. Equality regardless of belief/ philosophy	5%	7%	21%	26%	35%	45%	49%
43. Equality regardless of political opinion	5%	4%	18%	22%	29%	45%	47%
44. Right to a timely trial	8%	11%	18%	22%	31%	40%	47%
45. Artistic freedom	10%	16%	13%	17%	23%	42%	45%
46. Special protection of mothers	21%	31%	23%	30%	31%	41%	44%
47. Right to establish private schools	32%	29%	29%	26%	25%	40%	43%
48. Right to rest	27%	40%	33%	35%	33%	42%	42%
49. Right to an interpreter	3%	7%	18%	20%	28%	37%	41%
50. Equality regardless of social status	5%	9%	10%	17%	21%	37%	41%
51. Equality regardless of language	8%	9%	10%	12%	19%	36%	41%
52. Right to minimum wage	22%	25%	22%	23%	23%	36%	38%
53. Right to housing	16%	17%	14%	17%	22%	35%	38%
54. Right to 'fair trial'	2%	3%	16%	19%	25%	32%	38%
55. Protection of minority language	3%	12%	9%	10%	14%	32%	38%

56. Right to work for the government	40%	39%	27%	30%	25%	35%	37%
57. Freedom of education	47%	45%	32%	27%	26%	34%	37%
58. Right to favorable working conditions	17%	24%	17%	18%	24%	34%	37%
59. Right to privacy of family life	5%	4%	10%	13%	19%	31%	36%
60. Right to get married	18%	31%	30%	28%	26%	32%	35%
61. Right to asylum	11%	21%	18%	21%	21%	32%	35%
62. Right to preserve traditional ways	5%	12%	8%	9%	13%	30%	35%
63. Separation of church and state	20%	25%	28%	25%	25%	36%	34%
64. Right to information about government	2%	4%	3%	5%	8%	25%	34%
65. Intellectual property	24%	27%	18%	19%	19%	29%	32%
66. Right to protection of one's reputation or honor	13%	11%	8%	10%	17%	29%	32%
67. Special protection of minorities	10%	16%	11%	12%	15%	28%	32%
68. Rights for handicapped people	0%	1%	3%	5%	12%	25%	32%
69. Affirmative action	3%	9%	17%	20%	26%	27%	30%
70. Equality husband and wife within the family	8%	12%	7%	9%	14%	24%	27%
71. Rights for elderly people	3%	3%	3%	7%	12%	22%	27%
72. Right to sport	8%	12%	7%	7%	16%	24%	26%
73. Right to compensation	8%	12%	11%	13%	14%	23%	26%
74. Equality regardless of economic status	2%	4%	5%	8%	9%	22%	25%
75. Equality regardless of ethnicity	0%	0%	3%	8%	9%	20%	25%
76. Right to appeal to higher court	8%	8%	7%	7%	8%	20%	25%
77. Right to strike	21%	20%	28%	25%	23%	45%	24%
78. Prohibition of death penalty	10%	9%	8%	9%	12%	20%	24%
79. Special protection of women	20%	25%	19%	17%	15%	21%	23%
80. Official state religion	39%	39%	32%	27%	26%	24%	22%
81. Equality regardless of nationality	5%	15%	11%	11%	14%	24%	22%
82. Right to adequate standard of living	6%	11%	16%	18%	22%	23%	22%
83. Equality regardless of place of origin	0%	1%	14%	19%	26%	21%	21%
84. Woman empowerment in labor relations	10%	16%	10%	11%	13%	18%	21%
85. Right to privacy of personal data	0%	0%	0%	1%	3%	16%	21%
86. Right to maternity leave	13%	24%	16%	15%	16%	18%	20%
87. Free development of personality	0%	1%	8%	12%	11%	18%	20%
88. Statement on good governance	6%	7%	4%	7%	7%	13%	19%
89. Rights for prisoners	10%	12%	9%	12%	10%	15%	18%
90. Right to resist when rights are violated	8%	7%	4%	4%	4%	15%	16%
91. Schooling right for minorities	7%	11%	8%	7%	8%	14%	16%
92. Natural resources for benefit of all	6%	5%	4%	6%	10%	13%	16%
93. Rights for consumers	0%	0%	0%	1%	6%	12%	16%
94. Equality regardless of disability	0%	0%	0%	0%	2%	8%	16%
95. Prohibition of confiscation	35%	33%	21%	17%	13%	15%	15%
96. Right to food	0%	4%	3%	6%	11%	14%	15%
97. Prohibition of child labor	9%	12%	8%	8%	7%	13%	15%
98. Prohibition of 'corruption'	2%	1%	1%	3%	7%	12%	15%
99. Land Reform	8%	13%	13%	17%	19%	15%	14%
100. Right to own land	13%	20%	13%	18%	21%	14%	14%
101. Substantive principles for education	11%	16%	10%	15%	15%	14%	14%
102. Right to 'due process'	6%	5%	5%	5%	8%	10%	13%
103. Right to use traditional lands	6%	5%	5%	5%	8%	9%	10%
104. Rights for victims of crimes	0%	0%	0%	0%	1%	7%	10%
105. Equality regardless of age	0%	0%	0%	0%	1%	5%	10%
106. Representation right for minorities	6%	5%	3%	3%	2%	4%	9%
107. Equality regardless of education	0%	1%	1%	4%	5%	8%	8%
108. Equality regardless of tribe	0%	0%	8%	7%	8%	7%	8%
109. Right to a 'petition for amparo'	6%	8%	6%	6%	7%	7%	8%
110. Protection of rights for unborn children	0%	0%	1%	1%	6%	7%	8%
111. Teaching of human rights principles	0%	1%	3%	4%	5%	7%	7%
112. Autonomy for minorities	0%	1%	1%	0%	1%	6%	6%

113. Right to water	0%	0%	0%	1%	1%	4%	6%
114. Equality regardless of ancestry	0%	1%	3%	3%	4%	4%	5%
115. Equality regardless of caste	0%	1%	3%	4%	3%	3%	3%
116. Equality regardless of sexual orientation	0%	0%	0%	0%	0%	1%	3%
117. Right to bear arms	10%	8%	5%	4%	3%	3%	2%
118. Equality regardless of hiv/ aids	0%	0%	0%	0%	0%	0%	1%

Having discussed the overwhelming tendency of the world's constitutions to increase their catalogue of rights, the remainder of this chapter will briefly highlight some other trends: the tendency of constitutions to grow more extensive, the growth of judicial review and the tendency of constitution-making to come in waves.

D. Growing Legalism: Longer Constitutions

Alexander Hamilton, over two centuries ago, argued that constitutions ought to be brief: "Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible change of things."²⁵⁰ Across the Atlantic, we find similar views. In France, Joseph de Maistre had claimed that "the weakness or frailty of a constitution is in direct relationship to the number of written constitutional articles."²⁵¹ And Napoleon Bonaparte has been attributed with the illustrious claim that "a constitution should be short and obscure."²⁵²

But while this may have been the conventional wisdom two hundred years ago, it is no longer true today. Over time, constitutions have grown longer. Since the end of the WWII, the length of constitutions has steadily increased. Constitutions have become more detailed, covering an increased range of subjects. Figure 21 depicts the average number of articles in the world's constitutions over time. It shows that in the last six decades, constitutions have grown more extensive. In 1946, the average constitution had 142 articles. After an initial decline in the early 1960s, the

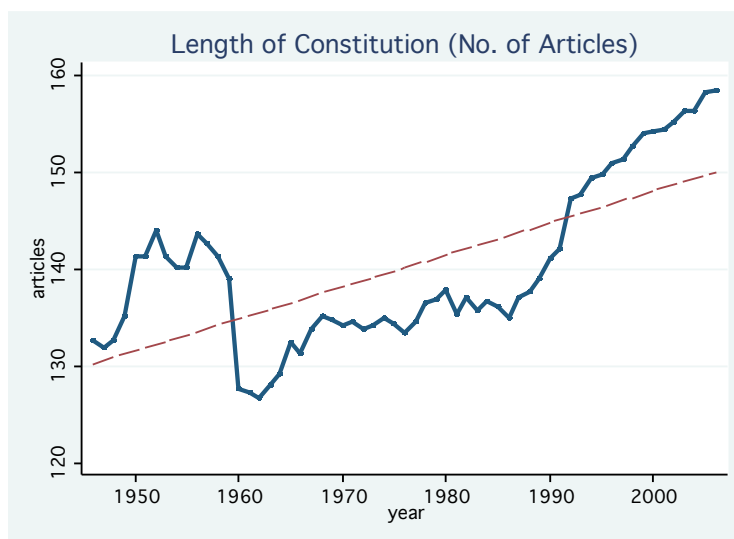
²⁵⁰ 2 THE WORKS OF ALEXANDER HAMILTON 80 (Henry Cabot Lodge, ed., 1971).

²⁵¹ Joseph de Maistre, *Essay on the Generative Principles of Constitutions*, in THE WORKS OF JOSEPH DE MAISTRE IX: 151 (Jack Lively ed., 1971) (1796).

²⁵² Jacques Ziller, *Une Constitution Courte et Obscure ou Claire et Detaillée' Perspectives Pour la Simplification des Traités et la Rationalisation de l'Ordre Juridique de l'Union Européenne*, European University Institute Working Paper No. 2006/31, 1, 10 (2006) (citing Napoleon Bonaparte).

average constitution today contains 159 articles. The world's longest constitution is the Indian constitution, consisting of 395 articles. Second and third come the constitutions of Colombia and Honduras, that count 380 and 379 articles respectively, which is more than twice as long as the average constitution.

Figure 21



E. From Constitution to Constitutionalism: The Rise of Judicial Review

The revolutions in Europe, and the subsequent struggles in the industrial era had gradually reduced the power of the monarchy, the church and the ancient regime. Whether through Rousseau's general will, or Locke's social contract, it was "the people" that took charge. Britain's unwritten constitution famously came to include the notion of "parliamentary sovereignty," or the idea that "parliament had the right to make or unmake any law whatever, and further, that no person or body is recognized by the law of England as having a right to override or set aside legislation of Parliament."²⁵³ Now that the people had freed themselves from their ancient chains, they were not going to embrace a set of new ones. At least not yet.

While the early twentieth century saw the dramatic spread of democracy, it was also confronted with democracy's limitations. The atrocities of the WWII, more than anything else, demonstrated that there could be "too much of a good thing" (with

²⁵³ ALBERT V. DICEY, THE LAW OF THE CONSTITUTION 3-4 (8TH EDITION 1915).

the good thing being democracy). The post-WWII period saw a growing recognition that no government can govern without constraints.²⁵⁴ It saw a growing recognition of something that John Stuart Mill had noted as early as 1859, which is that majority rule is just one step short of a “tyranny of the majority”²⁵⁵

In the wake of the WWII, Bertrand de Jouvenel, in the “first important book on political power published in the post-WWII period,”²⁵⁶ notes the excesses of democracy. “Conceived as the foundation of Liberty, it paves the way for tyranny. Born for the purpose of standing against power, it ends by providing Power with the finest soil it has ever had in which to spread itself over the social field.”²⁵⁷ According to Jouvenel, the only way to constrain the excesses of democracy is through “natural law.” Natural law, after all, by its very nature, is beyond the reach of democratic majorities.

But in the end, the chains on democratic power would take a different form. Rather than reviving the project of natural law, the post-WWII constitution-makers in Western Europe turned to the constitutional experience of the other side of the Atlantic, of written constitutions complemented by judicial review.²⁵⁸ It was the American invention of judicial review that appealed to the constitution-makers in Western Europe.²⁵⁹ Judicial review would become “the fastest-growing American institution abroad.”²⁶⁰ After the WWII, Germany, Italy, Japan and France, all adopted some form of judicial review. And even before that, most Latin American

²⁵⁴ GINSBURG, *supra* note 166, at 2.

²⁵⁵ JOHN STUART MILL, ON LIBERTY (1859).

²⁵⁶ SCOTT GORDON, CONTROLLING THE STATE- CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 13 (1999).

²⁵⁷ BETRAND DE JOUVENEL, POWER, THE NATURAL HISTORY OF ITS GROWTH 204 (1948).

²⁵⁸ See e.g., Jack Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STANF. L. REV. 1031 (1997).

²⁵⁹ GINSBURG, *supra* note 166, at 2.

²⁶⁰ BILLIAS, *supra* note 106, at 321.

constitutions, too, had followed the example of their Northern neighbor, although, more often than not, they had not yet implemented it in practice.²⁶¹

But it was not yet the end of parliamentary sovereignty. Throughout the cold war, the notion of parliamentary sovereignty appealed to not-so-democratic rulers.²⁶² Communism, moreover, offered a competing conceptualization of constitutionalism, one in which the constitution enabled rather than constrained the government.²⁶³ But with the end of the cold-war, and the “third-wave” of democratization, the days of unconstrained democracy came to an end.²⁶⁴ The world witnessed “juridification,” a move “towards juristocracy”²⁶⁵ and a remarkable faith in the judicial branch of government.²⁶⁶ Today, there are only very few countries that do not have judicial review of some sort. Even the traditional bulwarks of parliamentary sovereignty, like Britain, New Zealand and Canada, have adopted Bills of Rights and embraced some form of judicial review, becoming part of what Stephen Gardbaum calls “the new commonwealth model.”²⁶⁷

Figure 22 illustrates how the constitutional presence of judicial review has increased steeply over the past six decades.²⁶⁸ The solid bottom line depicts the proportion of countries with constitutions that *explicitly* provide for judicial review. In 1946, only 25% of all countries had some form of judicial review explicitly

²⁶¹ See e.g., Keith Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 1 (1990).

²⁶² GINSBURG, *supra* note 166, at 3.

²⁶³ See Chapter V *infra*.

²⁶⁴ HUNTINGTON, *supra* note 220.

²⁶⁵ HIRSCHL, *supra* note 166.

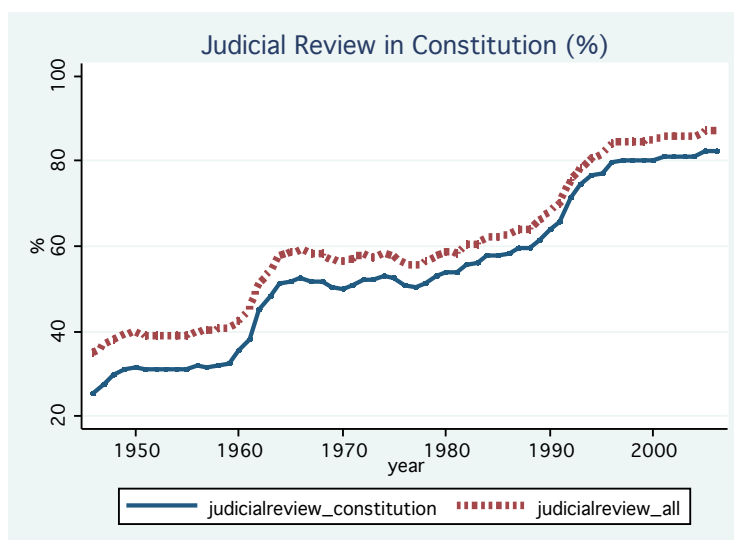
²⁶⁶ HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* 1 (2000).

²⁶⁷ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 709 (2001). See also DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* (2010).

²⁶⁸ All cases where legislation can be invalidated are included, regardless of whether review is performed by a general court (U.S. model) or a special court (as in Germany or France), whether it is abstract (regardless of case) or concrete (in a specific case) or whether it is conducted *a priori* (before adoption of a law) or *a posteriori* (after adoption of a law).

entrenched in their constitutions; by 2006, that proportion had increased to 82%. This measure excludes countries such as the United States that adopted judicial review in the absence of an explicit constitutional mandate.²⁶⁹ Therefore, the dotted upper line in Figure 22 captures the existence of judicial review by dint of either an explicit constitutional mandate *or* actual practice. Not surprisingly, this combined measure of *de jure* and *de facto* judicial review shows sharp growth that roughly parallels that of the exclusively *de jure* measure: in 1946, only 35% of countries had either *de jure* or *de facto* judicial review; by 2006, about 87% did. The difference between the two indicators is generally small and decreasing slightly over time, suggesting that judicial review is generally, and increasingly, established through an explicit constitutional mandate.

Figure 22



But judicial review comes in different flavors. Commentators routinely contrast judicial review that is part of the general judicial hierarchy with review exercised by a specialized constitutional court that stands outside the judicial hierarchy.²⁷⁰ Such a specialized constitutional court may take two different forms. Most commonly, specialized courts are premised on Hans Kelsen's Austrian model,

²⁶⁹ Other countries where judicial review is established in the absence of an explicit constitutional mandate are Australia, Denmark, Finland, Iceland, Israel, Norway, Singapore, Sweden and Tonga.

²⁷⁰ Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEXAS L. REV. 1431, 1434-1434 (2010); GINSBURG, *supra* note 166, at 7-8.

as in the case of German and South African Constitutional Courts.²⁷¹ But another type of special court is the French-type constitutional council. The constitutional council, too, is a centralized court that decides on the constitutionality of law. But in contrast with the Kelsian model, the French-type constitutional council only reviews legislation by the request of government actors and usually only prior to the adoption of a law.

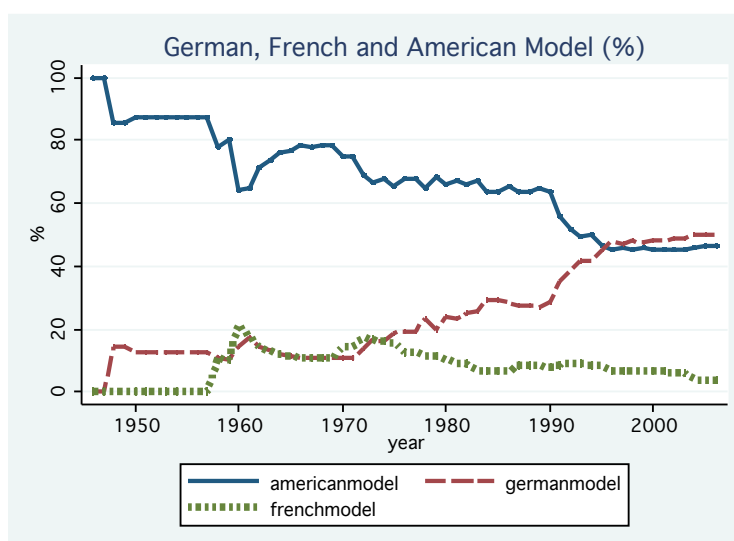
Figure 23 below depicts, for all constitutions *with* judicial review, the percentage of constitutions with American style, German style and French style judicial review, respectively. It shows that after the end of the WWII, the American model was near-hegemonic, but that over the next six decades, the German style constitutional court gained prominence, and, in fact, becomes the most dominant model from the mid 1990s onwards. The specialized courts of German flavor have been particularly popular among newly democratic states, which are often characterized by popular distrust of the existing judicial institutions that are typically still associated with the old regime.²⁷² In these cases, a new and special court may be more successful in (re-)gaining popular trust. Moreover, for all practical purposes, such a court is “easy to craft onto existing institutions.”²⁷³ The French model gained popularity in the 1960s, when most of the newly independent French colonies followed the example of the former mother country. But since then, the French model has been largely in decline and replaced by judicial review of an either American or German flavor.

Figure 23

²⁷¹ GINSBURG, *supra* note 166, at 9.

²⁷² *Id.*, at 9-10.

²⁷³ BILLIAS, *supra* note 106, at 322.



F. Waves of Constitution-Making

The various maps and graphs presented in the previous sections suggest that the adoption of rights and judicial review appears to have surged in the 1960s and the 1990s in particular. Echoing Samuel Huntington's account of multiple waves of democratization,²⁷⁴ Jon Elster hypothesizes the existence of four “waves of constitutionalism” since World War II.²⁷⁵ According to Elster, the first wave was spurred by the atrocities of the WWII itself; gross human rights abuses by democratically elected leaders sparked a belief that anti-democratic constraints might help to prevent such atrocities in the future.²⁷⁶ A second wave of constitutionalism occurred in the 1960s when former colonies wrote their post-independence constitutions. A third wave took place in the 1970s with the fall of dictatorial regimes in Portugal and Spain, and these countries' move towards liberal democracy (in 1982 and 1978 respectively). The last wave of the twentieth century accompanied the fall of the Berlin Wall and the so-called “end of history” in the 1990s.

An examination of the number of countries that experienced a constitutional event in any given year offers further support for the notion of waves of

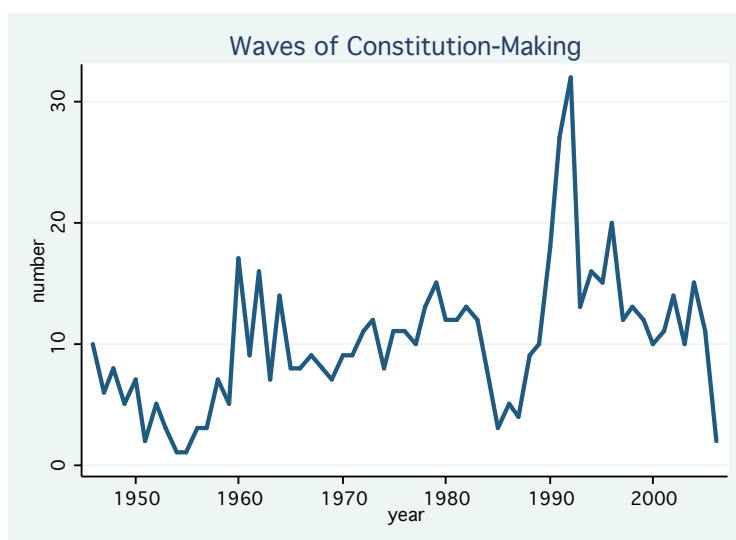
²⁷⁴ HUNTINGTON, *supra* note 220. Cf. Tom Ginsburg, *The Global Spread of Judicial Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington et al eds., 2008).

²⁷⁵ Elster, *supra* note 142, at 368-73.

²⁷⁶ ZAKARIA, *supra* note 165.

constitutionalism. A “constitutional event” is defined for purposes of Figure 24 as the addition or deletion of the constitutional features captured by the variables in the constitutions dataset described in chapter two. It is immediately apparent that the 1990s were, as different scholars have put it, a “period of prolonged constitutional fever,”²⁷⁷ a period in which “constitutional reconstruction reached its high point”²⁷⁸ or “the greatest period of constitution-writing in human history.”²⁷⁹ 1992 was the peak of revision activity, in this year alone, thirty-two countries amended or revised their constitutions. This is consistent with the graphs from the previous section. Lesser but nonetheless noticeable waves of activity can also be discerned in the 1960s and in the end of the 1970s.

Figure 24



G. Conclusion: Constitutional Fads and Fashions

Modern constitutional ideas are often rooted in deep historical crises. Warfare, economic injustice and large-scale exploitation are among the many determinants of modern constitutional ideas. But once these ideas have appeared upon the

²⁷⁷ PHILIP ALSTON, *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* 1 (1999).

²⁷⁸ Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000*, 18 *INT’L SOC.* 71, 78-79 (2003).

²⁷⁹ BILLIAS, *supra* note 106, at 473.

constitutional stage, they tend to diffuse rapidly. The increasing popularity of rights of all varieties suggest that this spread is unlikely to be the product of ongoing historical crisis, but of a rather different phenomenon; which is the borrowing of constitutional ideas invented elsewhere.

The cause of this strong proliferation of constitutional ideas will be the main topic of the next two chapters. It turns out that, indeed, the strong proliferation of almost all conceivable constitutional ideas is the product of constitutional diffusion, or the borrowing from other countries.²⁸⁰ By contrast, there is only very limited evidence that the spread of constitutional ideas relates to domestic developments in the countries in which they are adopted. Constitutional ideas spread through constitutional networks. Ideas, that once reflected deep historical crises, turn into constitutional fads and fashions, which are emulated around the world.

IV. THE DOMESTIC: EXPRESSIVISM AND CONSTITUTIONAL IDENTITY

In the wake of the French revolution of 1789, two Englishmen debated the course of events in France. These Englishmen were Edmund Burke and Thomas Paine.²⁸¹ Their main works, Paine's *Rights of Man* and Burke's *Reflections on the Revolution in France* both addressed the question of what constitutions can do, and what they cannot.²⁸² Paine was a great admirer of the French revolutionary ideals. With a constitution, Paine believed, we can (re)construct society, and change the course of history. For Paine, it did not matter what a country has been like in the past. What matters instead, is what the country aspires to be in the future. With the

²⁸⁰ In early diffusion studies, the kinds of graphs presented in this chapter were often presented as “proof” of diffusion. In such studies, the shape of the adoption curve was studied to say something about the diffusion mechanisms at work. See Peyton H. Young, *Innovation Diffusion in Heterogeneous Populations: Contagion, Social Influence, and Social Learning*, 99 AM. EC. REV., 1899–1924 (2009). But today, a more sophisticated methodological framework is available, and it is this framework that will be used in chapter V to test diffusion.

²⁸¹ For an account of this debate see Francis Canavan, *The Relevance of the Burke-Paine Controversy to American Political Thought*, 49 THE REVIEW OF POLITICS 163, 163 (1987).

²⁸² See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (L.G. Mitchell ed., 1999) (1790); THOMAS PAINE, THE RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS (Mark Philip ed., 2009) (1791).

constitution, a country can start over, and erase its past. Edmund Burke could not disagree more. According to Burke, constitutions ought to be based on historical experience, not on abstract ideals. Burke believed that written constitutions cannot change the course of history, and cannot design liberty or equality. Liberty and equality grow organically through the ages. And the constitution merely reflects pre-existing features of society. The constitution is organic, or indigenous, and expresses what is particular about the nation.

Over time, the debate has largely been resolved in favor of Paine. With the rise of modernism, and the belief in the unlimited possibilities of reason, constitution-makers around the world have taken the constitution as a tool to design, and redesign, society. For most modern constitutions, the “past is another land.” And yet, the Burkean notion of an expressive constitution has lingered in popular imagination. Till this day, scholars describe constitutions as unique and defining expressions of national identity. Even though scholars acknowledge that constitutions are partly functional, and settle the rules of the government game, they believe that they are also expressive documents, which reflect local circumstances, needs and values. There is a persistent sense that constitutions are organically connected to society.²⁸³

To some extent, this persistent notion of the expressive constitution might reflect a growing post-modern awareness of the limits of rational constitutional design.²⁸⁴ But mostly, it simply mistakes the identity of constitutional law. As it turns out, there is little empirical evidence to support this view. Substantive constitutional choices are remarkably unrelated to local needs and values. Using statistical analysis, this chapter first and foremost shows what constitutions are *not*. Constitutions are no symbols of national identity. They do not reflect the unique and defining characteristics of the nation. Constitutions written in the second part of the twentieth century bear little connection to the indigenous features of society. When regressing a wide range of societal features on a range of different constitutional rights, it turns out that they are mostly unrelated. There is no relationship between ethnic fractionalization and minority group rights; no relationship between government

²⁸³ See note 286, *infra* and surrounding text.

²⁸⁴ See section B, 3 *infra*.

repression and civil and political rights; no relationship between women's emancipation and women's rights; no relationship between living conditions and socio-economic rights; no relationship between illiteracy rates and education rights; no relationship between environmental pollution and environmental rights; no relationship between the percentage of people over 65 and rights for the elderly; no relationship between popular opinion on homosexuality and gay rights; no relationship between popular opinion on work and the right to work, and no relationship between popular opinion on marriage and the right to get married. At least where these features are concerned, the notion of the expressive, or indigenous, constitution is no more than a popular myth.

There exist only two exceptions to this rule. First, in ethnically and religiously divided societies, the constitution takes a different shape than in more homogenous ones. In particular, ethnic divides increase constitutional protection against discrimination while religious divides increase constitutional protection of religion. The second link between constitution and society is a more specific one. Popular attitudes against abortion translate into constitutional protection of fetuses, or a constitutional restriction on abortion. Other than that, there are no relationships between constitution and the specific features of society, neither for highly general nor for very specific rights.

The chapter does find however that most rights are positively associated with democracy. This suggests that democracies adopt rights, regardless of their exact "fit" to society. The chapter moreover finds that when constitutional features are first invented, they more likely to be indigenous. But, gradually, as constitutional ideas spread, they lose their indigenous character. This is consistent with the main impression from the previous chapter, which is that constitutional ideas are often rooted in historical crises but subsequently develop into fashionable constitutional attributes, although this chapter considers the constitutional innovations from the second part of the twentieth century.

The remainder of this chapter is organized as follows. Section A and B will provide some theoretical background on how constitutions are supposed to be linked to the indigenous features in society. Section A starts with an often-made distinction in contemporary constitutional law, between the constitution as an expression of

national identity and the constitution as a functional document that organizes the state. Section B will trace these ideas over the course of constitutional history by linking them to two distinct views on how constitutions emerge; from rational design and from organic growth. The theoretical and historical discussion in parts A and B offer some understanding on why, for the most part, constitutions are not actually expressions of national identity. Part C will translate this discussion into testable hypothesis. Part D will present the empirical analysis and core findings. Part E will discuss to which extent the main findings from this chapter can be taken as causal relationships. Part F will conclude.

A. The Two Faces of the Constitution

Contemporary constitutional theory suggests that constitutions have a dual character. On the one hand, constitutions are unique and defining statements of national aspiration and identity. Many contemporary scholars take “constitutional ideas to be an expression of a particular nation’s self understanding.”²⁸⁵ They stress, what is commonly described as the “*expressive*” function of the constitution. According to this view, constitutions reflect the nation’s traditions, values, hopes and aspirations.²⁸⁶ It is this view that declares constitutions to be indigenous to the nation, and a mirror of society. It is this view, moreover, that would lead us to predict that substantive constitutional choices around the world would be linked to the needs and values of the nation.

²⁸⁵ Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 67, 68 (Sujit Choudhry ed. 2007).

²⁸⁶ Contemporary writers that focus primarily on the *expressive* function of the constitution include: BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 5 (2009); Geoffrey Brennan & Alan Hamlin, *Constitutions as Expressive Documents* 329, 333-38 OXFORD HANDBOOK OF POLITICAL ECONOMY (Barry Weingast & Donald A. Wittman eds., 2006); H.W Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Stanley N. Katz et al. eds., 1993); David T. ButleRitchie, *Critiquing Modern Constitutionalism*, 3 APPALACHIAN L. J. 37, 38-39 (2004). Writers that list the *expressive* function as one of the constitutions’ many functions include; Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Judicial Borrowing*, 1 U. PENN. J. OF CONST. L. 640, 648-50 (1999); Fredrick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 912 (2005); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1269-74 (1999); ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 38 (2009).

But this is not all that constitutions are about. Constitutions are not only *expressive*, but are also inherently *functional* documents. Constitutions are to separate powers and create checks and balances.²⁸⁷ And through the adoption of constitutional rights, they are to establish a set of substantive constraints on democratic government.²⁸⁸ This, too, is at the core of contemporary constitutional thought. An important, though often unarticulated, assumption of this functional view is that constitutions are rationally designed.²⁸⁹ Constitutions are functional tools to design liberty, justice and rule of law. As a result, constitution-makers search for technically superior, or “the best” constitutional solutions.²⁹⁰ Through constitutional design, constitutions can promote desirable goals such as economic welfare,²⁹¹ a lasting respect for rights and liberty,²⁹² stable democracy²⁹³ and the mitigation of conflict in divided societies.²⁹⁴ Under the logic of constitutional design, good governance

²⁸⁷ See e.g., RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY* (2003).

²⁸⁸ The notion that constitutions are enforceable constraints on government is developed, amongst others, by: ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* (1999); Jon Elster, *Majority Rule and Individual Rights*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 175* (Stephen Shute and Susan Hurley eds. 1993); Stephen Holmes *Pre-commitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY 195* (Jon Elster and Rune Slagstad eds., 1988); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 *J. ECON. HIST.* 803 (1989).

²⁸⁹ See e.g., Tushnet, *supra* note 285, at 68, 72.

²⁹⁰ See generally e.g., DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* (2006); Ran Hirschl, *The “Design Sciences” and Constitutional “Success”* 87 *TEXAS L. REV.* 1339 (2009).

²⁹¹ The idea that constitutions promote economic welfare is developed, amongst others by: ROBERT COOTER, *THE STRATEGIC CONSTITUTION* (2000); Lorenz Blume & Stefan Voigt, *the Economic Effects of Human Rights*, 60 *KYKLOS* 509 (2007); THORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2004).

²⁹² The idea that constitutions, and particular constitutional rights, actually promote liberty is developed, amongst others, by: PHILIP ALSTON, *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* (1999) and Christian A. Davenport, *Constitutional Promises and Repressive Reality: A Cross-National Time-Series Investigation on why Political and Civil Liberties are Suppressed*, 58 *JOURNAL OF POLITICS* 627 (1996).

²⁹³ The idea that constitutions design democracy is promoted, amongst others, by: CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); J Foweraker & T. Landman, *Constitutional Design and Democratic Performance*, 9 *DEMOCRATIZATION* 44 (2002).

²⁹⁴ The idea that constitutions can be used to mitigate conflict in divided societies is developed amongst others in: *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETY; ACCOMMODATION OR INTEGRATION?* (Sujit Choudhrey ed., 2008); STEPHEN TIERNY, *CONSTITUTIONAL LAW AND NATIONAL*

implies a set of substantive constitutional principles, such as separation of power, protection of individual rights and private property. Sound constitutional design includes such principles, regardless of time and place. As Peter Ordeshook puts it “there necessarily exist universal principles of democratic constitutional design, even if those principles remain largely undiscovered.”²⁹⁵ Thus, while the *expressive* view regards the constitution as “the soul of the nation,”²⁹⁶ the *functional* view rather sees the constitution as the “operating system”²⁹⁷ of the nation instead.

The relationship between these two different functions of constitutional law is not well theorized. Most writers list them as complementary functions of the same document.²⁹⁸ And indeed, at first sight, one may argue that any constitution can be both. Any constitution may include “sound” functional rules of government, while making some references to the nation’s identity and history. A common place for such references is the preamble. In fact, about 25 percent of all constitutions today include a preamble that makes reference to the nation’s past.²⁹⁹

But if the expressive function is to be more than mere rhetoric, and is to affect substantive constitutional choices, then it is less clear that a document can indeed do both. When constitutions mirror society, they may undermine the universal principles of sound constitutional design. In the context of dictatorial regimes for example,

PLURALISM (2004); Sujit Choudhrey, *Managing Linguistic Nationalism Through Constitutional Design: Lessons From South Africa*, 7 INT’L J. CONST. L. 577 (2009); Arend Lijphart, *Constitutional Design for Divided Societies*, 15 JOURNAL OF DEMOCRACY 96 (2004); Donald Horowitz, *Conciliatory Institutions and Constitutional Process in Post-Conflict States* 49 WILLIAM & MARY L. REV. 1213 (2008).

²⁹⁵ Peter C. Ordeshook, *Are ‘Western’ Constitutions Relevant to Anything Other than the Countries they Serve?* 13 CONST. POLIT. ECON. 3, 3-21 (2002).

²⁹⁶ HASSAN IBRAHIM, *THE SOUL OF THE NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1999).

²⁹⁷ For the notion of the constitution as “operating system” see Kreimer, *supra* note 285, at 641-44; David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1287 (2008).

²⁹⁸ See e.g. Mark Tushnet, *supra* note 285, at 68-81 (contrasting a functional approach to constitutional law with the expressivist approach); Kreimer, *supra* note 285, at 640-50 (contrasting the “constitution as operating system” with the “constitution as identity”).

²⁹⁹ This figure is based on my own coding, as described in Chapter II.

culture and tradition have often been invoked to circumvent human rights.³⁰⁰ But when constitutional rules merely reflect sound constitutional design, they may be remote from society, its values and traditions, and fail to work in practice. Sound constitutional principles may be imported from elsewhere, but there is an open question on whether rational constitutional design may not be undermining the very purposes it intends to serve.³⁰¹ In the context of African constitution-making, for example, the wholesale transplantation of constitutional texts arguably rendered these texts a dead letter.³⁰² Chapter VII will explore this possibility. It may be that because of this tension only one view has prevailed over the course of modern constitutional history, which is the functional view on the constitution. Beyond some cursory references to national history in the preamble, the expressive function of the constitution does not affect the substance of the world's written constitutions. This, in fact, is one of the main findings from this chapter.

B. The Fall (and Rise?) of Expressive Constitutionalism

This section will trace the evolution of the notion of an “expressive,” or “organic” constitution that is indigenous to the nation, and tightly coupled with society. It will show that this organic constitution is the constitution of the Ancient Greeks, the Roman Republic and the pre-modern world. It characterizes so-called “unwritten” constitutions that consist of a mixture of laws, practices and conventions. It is moreover the constitution of early conservatives like Edmund Burke and Joseph de Maistre, who respond to a new trend of rational constitutional design, which emerges with Enlightenment thought. And while the organic constitution has largely fallen out of fashion over the course of the 19th and 20th centuries, it is also the constitution that is currently being re-discovered in post-modern constitutional

³⁰⁰ MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO GLOBALIZATION ERA* (2nd ed, 2008).

³⁰¹ See e.g., Schauer, *supra* note 286, at 912; Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among Contemporary Sioux and Apache*. 33 *ECONOMIC INQUIRY* 402 (1995). See chapter VII *infra* for a full exposition of this argument.

³⁰² Ruth Gordon, *Growing Constitutions*, 1 *U. PENN. J. OF CONST. L.* 528, 532-33 (1999).

thought, which is characterized by a growing awareness that there is no such thing as universal constitutional rules.

This section is organized in chronological order. In particular, it distinguishes three historical periods that are important for this view of constitutional law. The first is the pre-modern period, in which countries were governed by actual practices, and the practice of written national constitutions was still to emerge. By construction, these constitutions were an expression of national character. The second period is the modern period, which starts with the adoption of the U.S. constitution and the Enlightenment ideal of written constitutions. This period is characterized by the gradual triumph of the project of rational constitutional design, despite initial opposition to this project from the counter-enlightenment movement. The third is the post-modern period, in which organic, or expressive, constitutions are rediscovered.

1. Pre-Modern Constitutionalism: Constitution With Society

The notion of a constitution that reflects society can be traced back to the ancient Greeks.³⁰³ As Charles McIlwain explains, the ancient Greeks use the notion of constitution, or the *politeia*,³⁰⁴ to describe the state as it is actually is.³⁰⁵ Aristotle, for example, described the constitution as “the imminent organizing principle of the nation, analogous to the soul of an organism.”³⁰⁶ For Aristotle, a constitution was the “the way in which the city state was actually organized, or the way of life of the citizens.”³⁰⁷ In the same vein, Isocrates noted that the constitution is the “soul of the polis”, with “the power over it like that of the mind over the body.”³⁰⁸ Or as Plato wrote in the *Laws* “our whole state is an imitation of our best and noblest life.”³⁰⁹

³⁰³ See CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 24 (1947).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 26.

³⁰⁶ *Id.* at 26.

³⁰⁷ ARISTOTLE, POLITICS, IV.11.1295a40-b1, VII.8.1328b1-2 (R.F. Stalley ed., 1998) (350 B.C.).

³⁰⁸ MCILWAIN, *supra* note 304, at 27.

³⁰⁹ PLATO, LAWS, VII (R.G. Bury trans., 1967) (835 B.C.).

Thus, for the ancient Greeks, the framework of the state was not a written document, but custom, tradition and convention. A similar conception of constitutions existed in the Rome Republic. Also the Roman Republic possessed an unwritten constitution, made up of customs and conventions.³¹⁰

For centuries to come, the constitutions of ancient Athens and Rome would serve as important models “to be recovered through some sort of imitation.”³¹¹ Charles McIlwain calls these “ancient constitutions.” An ancient constitution is “that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed object of the public good, that compose the general system according to which the community hath agreed to be governed.”³¹² It consists of the “substantive principles that can be deduced from a nation’s actual institutions and their development.”³¹³ These “ancient constitutions” persisted throughout the middle ages, where custom was binding because it extends backwards to a time “whereof the memory of man runneth to the contrary.”³¹⁴ Of course, and by construction, such “ancient constitutions” reflected society. They were society.

2. *Modern Constitutionalism: Constitution Without Society*

In the seventeenth and eighteenth centuries, modernity forecasted a new type of constitution, a constitution written by a popular assembly that aimed to reshape the ordering of social and political life. It was the age of enlightenment, the age of human reason, characterized by scientific progress, the discovery of new worlds, and economic growth. According to Enlightenment thought, humans were rational beings and “the whole world was governed by natural laws, which simply ought to be

³¹⁰ See e.g., SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* 86-115 (1999).

³¹¹ Jurgen Habermas, *Modernity vs. Post-Modernity*, 22 *NEW GERMAN CRITIQUE* 3, 4 (1981); F.A HAYEK, *THE CONSTITUTION OF LIBERTY* 143-46 (Routledge Classics, 2009) (1960).

³¹² MCILWAIN, *supra* note 304, at 3 (quoting HENRY ST. JOHN VISCOUNT BOLLINGBROKE, *A DISSERTATION UPON PARTIES* (1733-34)).

³¹³ MCILWAIN, *supra* note 304, at 2.

³¹⁴ *Id.*, at 21.

uncovered through human reason”.³¹⁵ At this time, the notion “of being modern by looking back at the ancients” changed through new beliefs in infinite advance towards moral and social betterment.³¹⁶ Law no longer had to be “found” back in history, but could be “created.”³¹⁷ And with it, man could shape a better world.

It was at this time that “ancient” constitutions were replaced by “modern” ones. One of the core premises of enlightenment thought was that constitutions could construct and reconstruct society.³¹⁸ With a written document, and the appropriate constitutional rules, men could change their destiny. As Thomas Paine put it “a constitution is a thing antecedent to government; and a government is only the creature of a constitution.” And if constitutions can design society, then constitutions have to be designed rationally, *a priori*, based on an ideal of what society ought to become. The constitution was the drawing board to design the state. Through constitutions, men could design freedom.

Yet, early enlightenment thought stood divided on whether constitutions can indeed do such a thing. Friedrich Hayek documents that, at least initially, there were two schools of thought within the broader Enlightenment current. The idea of rational constitutional design fits with the ideas of the French Enlightenment *philosophes*. But there was also a British tradition, which rejected this notion of rational design and emphasized organic growth instead. This British tradition, according to Hayek, “was made explicit mainly by a group of Scottish moral philosophers led by David Hume, Adam Smith and Adam Ferguson, seconded by their English contemporaries Josiah Tucker, Edmund Burke and William Paley, and drawing largely on a tradition rooted in the jurisprudence of the common law.”³¹⁹ This tradition held that the institutions of liberty are “empirical and unsystematic” and “based on an interpretation of tradition

³¹⁵ RANDALL LESAFFER, EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE 372-384 (2009).

³¹⁶ Habermas, *supra* note 311, at 4.

³¹⁷ HAYEK, *supra* note 311, at 143.

³¹⁸ GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD 1776-1989: A GLOBAL PERSPECTIVE 56-57 (2010).

³¹⁹ HAYEK, *supra* note 311, at 50.

and institutions which had spontaneously grown up and were but imperfectly understood.”³²⁰ This tradition is essential empirical and finds “the essence of freedom in spontaneity and the absence and coercion,” developed through “organic and half-conscious growth” and “trial and error.”³²¹ Freedom is “the result of human action but not the execution of human design”.³²²

Hayek notes that “diametrically opposed” to the British tradition is the French tradition, which was “deeply imbued with Cartesian rationalism” of which “the Encyclopedists and Rousseau, the Physiocrats and Condorcet” were the best representatives.³²³ This tradition was not empirical, but theoretical. According to this tradition, the institutions of freedom were designed by human reason. The origin of society was the social contract. The institutions of freedom do not grow organically, but result from “intelligent men coming together for deliberation about how to make the world anew.”³²⁴ Men are not constrained by their own history. The famous words “the past is another land” squarely describe the French tradition.³²⁵

Hayek recognizes that these geographical labels are not entirely correct to describe these two traditions. French writers like Baron de Montesquieu and Alexis de Tocqueville are “nearer” to the British than the French tradition.³²⁶ Montesquieu, for example, propagates the rational mechanics of government, but nonetheless notes that “laws should be so appropriate for the people for whom they are made and it is very unlikely that the laws of one nation can suit another.”³²⁷ In the same fashion, de Tocqueville warned the French not to simply copy American examples: “let us look for instructions rather than models; let us adopt the principles rather than the details

³²⁰ *Id.*, at 49.

³²¹ *Id.*, at 51.

³²² *Id.*, at 51.

³²³ *Id.*, at 50.

³²⁴ *Id.*, at 52.

³²⁵ This phrase comes from, LESLIE POLES HARTLEY, *THE GO BETWEEN* 1 (1953).

³²⁶ HAYEK, *supra* note 311, at 50.

³²⁷ RANDALL LESAFFER, *EUROPEAN LEGAL HISTORY: A CULTURAL AND POLITICAL PERSPECTIVE* 420 (2009) (citing Montesquieu).

of her laws.”³²⁸ And just like some French writers fall within the English tradition, Anglo/American writers like Thomas Paine and Thomas Jefferson “entirely belong” to the French tradition.³²⁹

In fact, it is the controversy between two Englishmen, Edmund Burke and Thomas Paine, that is probably the most famous articulation of the stakes of this debate.³³⁰ Edmund Burke, in his *Reflections on the Revolution in France*, challenged the events in France. The French, according to Burke, relied blindly on theory, thereby preferring abstract rights over established institutions and historical experience.³³¹ For Burke, the British constitution was ideal, as it reflected the accumulated wisdom of the past. Paine, in his *Rights of Men*, responded directly to Burke. According to Paine, constitutions can be made de novo, because they are antecedent to government. According to Paine, “we have it in our power to begin the world over again.”³³² The “Burke-Paine controversy” illustrates the distinction between the old and the new; the pre-modern and the modern.³³³

The Burkean position, representing the English tradition, found fertile ground in what Isaiah Berlin describes as the “counter-enlightenment,” or *Romantic*, movement.³³⁴ The counter-enlightenment movement challenges the strong rationalism of Enlightenment and breaks with its a-historical approach. It “revolts against reason” and challenges the idea that society can be shaped by social contract. In France, one of the first articulate counter-enlightenment thinkers was Joseph de

³²⁸ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Richard D. Heffner trans., 2001 ed.) (1835). Also Jean Jacques Rousseau has been attributed with such contextualism, although this is not the conventional reading of Rousseau. See David T. ButleRitchie, *Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society*, 6 JOURNAL OF LAW IN SOCIETY 36 (2005).

³²⁹ HAYEK, *supra* note 311, at 50-51. In addition, Hayek notes that Thomas Hobbes should in fact be viewed as one of the founders of the French rational tradition. *Id.* at 50. Jeremy Bentham’s utilitarian tradition, too, fits within the rationalistic current of Enlightenment thought.

³³⁰ See BILLIAS, *supra* note 318, at 61-62.

³³¹ *Id.*, at 62.

³³² *Id.*, at 62.

³³³ *Id.*, at 64.

³³⁴ ISIAH BERLIN, *FREEDOM ANT ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY* (Henry Hardin ed., 2003).

Maistre.³³⁵ Like Burke, de Maistre predicted that the new French constitution, designed *a priori*, and *tabula rasa*, would not last. Abstract ideals, human reason and a mere piece of paper cannot change the course of history. A written constitution, at best, can declare anterior rights. It cannot create liberty that a country does not actually have. The constitution can reflect society, but cannot change it. Therefore, according to Maistre's most quoted phrase "a constitution made for all nations is a constitution made for none."³³⁶

This same counter-enlightenment theme was also developed in the historical school of legal thought.³³⁷ Particularly influential is Friedrich Carl Von Savigny, the founding father of the German historical school. Von Savigny, too, argues that law does not rationally be deduced from universal principles, but instead reflects the spirit and history, or the *Volksgeist*, of the nation. Like de Maistre resisted a written constitution for France, Von Savigny resisted the idea of a civil code for Germany. Von Savigny thought that Germany was not yet ready for such a code. Von Savigny likened law to language: like language, law was "developed first by custom and belief of the people, then by legal science—everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of the legislator."³³⁸ Law, Von Savigny argued, like language, "is an integral part of the common consciousness of the nation, organically connected with the ideas and norms reflected in a people's historically developing traditions, including its legal tradition."³³⁹

It has been noted that the counter-enlightenment current, perhaps, for a while "slowed down the appetite for rational constitutional design and universal

³³⁵ STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* 14 (1993).

³³⁶ Joseph de Maistre, *Considerations on France*, in *THE WORKS OF JOSEPH DE MAISTRE VI*: 80 (Jack Liveley trans., 1971) (1792).

³³⁷ See e.g., Harold J. Berman, *The Historical Foundations of Law*, 54 *EMORY L. J.* 13, 16-24 (2005); Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19, 27 (David M. Trubek & Alvaro Santos eds., (2006); J.M KELLY, *A SHORT HISTORY OF MODERN LEGAL THEORY* 320-25 (1992).

³³⁸ FRIEDRICK KARL VON SAVIGNY, *ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 30 (Abraham Hawyard trans., 1975) (1814).

³³⁹ Berman, *supra* note 337, at 16.

constitutional rules.”³⁴⁰ But in the end, it was the other tradition that triumphed. Over the course of the 20th century, notions of expressive or organic constitutions were defeated.³⁴¹ As man gained confidence in his ability to shape and control the social and natural world, the British tradition withered away. The desire for innovation defeated the notion of organic growth. To use Harold Berman’s words, modern law-makers “decide not according to what the law ‘has been’, or ‘is’, but according to what they will it to be – that is, according to what they consider to be sound policy.”³⁴² The historical school of Von Savigny “has been caricatured to death,” “vanished from the academy” and is now “universally rejected”.³⁴³ Instead, it is the French rational tradition that prevailed. As Friedrich Hayek puts it, “it has been the rationalist, plausible and apparently logical argument of the French tradition, with its flattering assumptions about the unlimited powers of human reason that has progressively gained influence, while the less articulate and less explicit tradition of English freedom has been on the decline.”³⁴⁴ The rationalist principles, “aimed at the construction of utopia”³⁴⁵ and “the ideal source for revolutionary politicians in a hurry,”³⁴⁶ became the new *modus operandi*. It was these kind of rational constitutions that came to shape the constitutional world. In the universe of constitutions, Britain became a fading star.³⁴⁷

The 20th century, in particular, became the era of the centralized nation state, with the national legislature as positive lawmaker.³⁴⁸ It moreover saw the rise of the

³⁴⁰ Donald L. Horowitz, *The Federalist Abroad in the World*, in *THE FEDERALIST PAPERS* 502, 509 (Ian Shapiro ed., (2009)).

³⁴¹ Berman, *supra* note 337, at 17.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ HAYEK, *supra* note 311, at 49.

³⁴⁵ *Id.*, at 49.

³⁴⁶ J.S. McLELLAND, *A HISTORY OF WESTERN POLITICAL THOUGHT* 251 (1996).

³⁴⁷ McILWAIN, *supra* note 304, at 15.

³⁴⁸ Berman, *supra* note 337, at 13, 15.

social welfare state and an expanded role of the government, not only as protector of private property and personal security, but also as provider of equal opportunities, economic welfare, and social justice. There was a growing belief that government could engineer society. Law was instrumental to these goals. Law should maximize economic welfare, political power and other social values.³⁴⁹ Law is an instrument in the hands of government, and there exists such a thing as good law, regardless of time and place. Through law, government can engineer society. The 20th century carried the enlightenment project home.³⁵⁰

These modernist winds of change brought the heydays of modern constitution-making. The constitution, more than any other law, can design democracy, set up accountable government and grant rights. New states, from the newly independent African states to former Soviet republics, should be equipped with the right institutional framework. Scholars developed something akin to a “science” of constitutional design³⁵¹ and flew across the world to assist newly democratizing nations to design a constitutional framework. The constitution became the drawing board to design the state.

If the twentieth century witnessed the triumph of the French enlightenment tradition of rational constitutional design, what did it bring in terms of substantive constitutional rules? Thus far, the discussion above has focused on the relationship between constitution and society, or the possibility of domestic roots for substantive constitutional choices, not on the substance of constitutional rules. It deserves mentioning that both schools of thought- constitutional growth and constitutional design- have their roots in liberal constitutional thought.³⁵² Both schools claim to be interested in establishing individual liberty, albeit in different ways. And both schools, in theory, can accommodate a range of constitutional ideas.

³⁴⁹ See e.g., Berman, *supra* note 337, at 18.

³⁵⁰ See Habermas, *supra* note 314, at 4, 7-11 (noting that modernity entails an extension of the rational norms of Enlightenment, and that rejecting the Enlightenment premises entails a rejection of modernity).

³⁵¹ See section A *supra*.

³⁵² HAYEK, *supra* note 311, at 50, 51.

But while the organic growth implies constitutional diversity across different countries, the rationalist school is bound to produce a more universal agenda. So if there exist rational, technically superior, and even morally just, constitutional rules, what do they look like? What is the substance of rational constitutional design? Scholars have often set out to discover universal constitutional principles,³⁵³ or a core of “generic constitutional law.”³⁵⁴ As we have seen in the previous chapter, some rights, like the freedom of religion and expression, are adopted by more than 90 percent of all constitutions today, and can indeed be described as “generic constitutional rights”.

But the project of 20th century rational constitutional design is probably most accurately characterized as a clash of two competing conceptions of constitutionalism. The oldest, and largely triumphant, notion of constitutionalism is a liberal model of constrained government, which protects life, liberty and property. This model has its roots in enlightenment thought, and is characterized by the works of John Locke, for example. In the post WWII period, this model was popularized by the WWII atrocities that had shown that there “can be too much of a good thing” and that democracy needs anti-democratic constraints.³⁵⁵ The same message of limited government was also passed on to the newly independent colonies. With the fall of colonial empires, the (former) colonial powers made an effort to leave their former colonies or protectorates with a “proper” institutional system. Most of the former British colonies, for example, received a constitution from London, the adoption of which was a pre-requisite for independence.³⁵⁶ Each of these constitutions contained a Bill of Rights modeled after the European Convention of Human Rights which

³⁵³ See e.g., T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* vii (2001).

³⁵⁴ David S. Law, *Generic Constitutional Law*, 89 *MINN. L. REV.* 652, 659, 662-728 (2005).

³⁵⁵ FAREED ZAKARIA, *THE FUTURE OF FREEDOM* 161 (2003).

³⁵⁶ See CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES* 1-19 (2007).

included negative liberty rights only. This Bill of Rights was enforceable through individual petitions in court, and, in most cases, the Privy Council in London.³⁵⁷

But in the 1970s and 1980s, this liberal model was increasingly challenged. It was the cold war era and the world was ideologically split. Liberal constitutionalism was promoted by the West, often as an alternative to socialism.³⁵⁸ But liberalism's ideological alternative carried a competing constitutional model.³⁵⁹ This model, that be traced back to the 1918 Soviet constitution, aimed at the radical transformation of society. It contained a range of sweeping socio-economic goals, and aimed to radically transform the capitalist state structure. In order to achieve this transformation, it enabled the government instead of constraining its action. In the name of "the people" it established a strong executive and a weak judiciary.

The rise of this radical transformative model coincided with the break-down of many of the independence constitutions of the former colonies. A number of newly independent countries declared the liberal independence constitutions to be "foreign" to national traditions. The 1973 Swaziland constitution, for example, states that "that the [1968 Independence] constitution has permitted the importation into our country of highly undesirable political practices alien to and incompatible with the way of life in our own society...increasingly this element engenders hostility, bitterness and unrest in our peaceful society." It reinstated the traditional institution of the Swazi King. Even more extreme was the 1976 constitution of the Central African Republic that proclaimed the "Central African Empire" and instated Jean-Bédél Bokassa as "His Imperial Majesty." But in most cases, newly independent governments exchanged the liberal model for the radical socialist one. For many newly independent governments this model was more attractive as it allowed for large and unconstrained government power.

³⁵⁷ Stefan Voigt et al., *Improving Judicial Credibility by Delegating Judicial Competence: The Case of the Judicial Committee of the Privy Council* 82 J. DEV. EC. 384 (2007).

³⁵⁸ Michael Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything So that Everything Would Remain the Same"* 32 ISRAEL L. REV. 250 (1998).

³⁵⁹ Said Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 INT'L SOC. 7 (2003).

This competing constitutional model, too, fits with the Enlightenment philosophy of rational constitutional design. In fact, Hayek suggests that, if anything, the notion of rational constitutional design suggests trust in a big government, and thus opens the way for state socialism. According to the French tradition of rational design, freedom is sought in government and leads to “the highest degree of interference by public power.”³⁶⁰ As a result, according to Hayek, “rationalistic liberalism has long been one of the pacemakers of socialism.”³⁶¹ But importantly, the rationalist notion of constitutional design accommodates both a socialist state ideology as well as a liberal constrained government (and everything in between).

The picture of an ideologically divided world transformed after the fall of the Berlin Wall and after the end of the cold war, with the the so-called “end of history.”³⁶² The decline of communism lead to the victory of the liberal constitutional model. The absence of the communist threat made Western governments more outspoken of human rights abuses abroad. Instead of offering support for ideological reasons— “the enemy of my enemy is my friend”—influential Western countries tried to promote rights, democracy and good governance in the autocratic corners of the world. Humanitarian considerations were no longer trumped by cold war politics. Foreign aid and foreign policy was redirected from preventing socialism to fixing the economy, fighting corruption and improving governance in developing countries. The Washington consensus, which entailed a standardized recipe for economic growth, was supplemented with rule of law reform and financial incentives to establish “good governance.”³⁶³ As David Kennedy notes, neo-liberal voices from the right and human rights activists from the left found each other in a desire to limit government-to promote a free market and human rights at the same time.³⁶⁴ Indeed, according to

³⁶⁰ HAYEK, *supra* note 311, at 50.

³⁶¹ *Id.*, at 344.

³⁶² FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, xi (1992).

³⁶³ See Dani Rodrik, *Second Best Institutions*, 98 AM. EC. REV. 100, 100 (2008) (noting that the “focus of reforms in the developing world has moved from getting prices right to getting institutions right”).

³⁶⁴ David Kennedy, *The “Rule of Law”, Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvarez Santos eds., 2006).

some estimates, in the first half of the 1990s, more than a billion dollars was spent on rule of law projects around the world.³⁶⁵ Indeed, the 1990s was also the period of “prolonged constitutional fever,”³⁶⁶ during which many constitutions were written and re-written.³⁶⁷ So, at least, the argument goes. Chapter VI will refine this discussion and show that while this liberal model of constrained government gained prominence over the past decades, a more moderate version of the competing model is still in place. But for our purposes here, it is sufficient to conclude that the project of rational design may produce a number of different constitutional solutions, which may appeal to different states.

3. *Post-Modern Constitutionalism: Constitution With Society*

There is a further reason to suggest that it may not yet be the end of constitutional history. In recent years, the belief in the Washington consensus and standardized solutions for economic development appears to be fading. The one-size-fits all policy prescriptions that accompanied the Washington consensus and rule of law reform appeared to have failed to deliver economic growth. In development economics, there is a call for more heterogenous institutions unique to local circumstances rather than “one-size-fits-all good governance” and the prescription of “best practices” everywhere.³⁶⁸ To some extent, we see a similar development in constitutional law. Scholars of the “science” of constitutional-design increasingly find themselves estranged from their initial beliefs.³⁶⁹ Despite sound constitutional design, many countries cope with corruption, bad governance and gross human rights abuses.

³⁶⁵ HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 2* (2000).

³⁶⁶ Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1, 1* (Philip Alston ed., 1999).

³⁶⁷ Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 771-75 (1997).

³⁶⁸ See e.g., Rodrik, *supra* note 363, at 100.

³⁶⁹ “Self-estrangement” was a term coined by Trubek and Galanter to describe the state of the law and development effort of the 60s. Their seminal article proclaimed law and development dead. David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflection on the Crisis in Law and Development Studies in the United States*, 1974 WISCONSIN L. REV. 1062 (1974).

Constitutions have been unable to fix these problems. And all too often, they have become instruments of dictatorial regimes, used to legitimize repressive practices in the name of the law. The belief in constitutional design, or any sort of design, has diminished (though certainly not disappeared). Universal human rights are challenged by cultural relativists, who argue that universal rights are in fact Western rights and distinct from Asian or African rights.³⁷⁰

With the rise of modernism, both de Maistre and Von Savigny have “been caricatured to death” as symbols of conservatism and traditionalism.³⁷¹ Yet, in the post-modern age, these early conservatives somehow sound surprisingly modern.³⁷² Perhaps constitutions cannot “fix” society or “create” rights. There may be something, outside the realm of constitutional design, that explains why constitutions work in some places and not others. Indeed, constitutional scholars increasingly emphasize indigenous constitution-making. In a 1994 edited book volume on constitutionalism and identity, scholars like Jon Elster, Fred Schauer and Cass Sunstein agree that “[m]odern constitutionalism cannot be reduced to any particular form or any specific identity or difference” and that “[c]ross-cultural transplantation of constitutional provisions is always dangerous, as an unreflected generalization from experience in a single culture is always likely to be wrong.”³⁷³

Similar voices are often heard from the African continent. In Africa, probably more than anywhere else, newly independent states simply “received” a set of technical constitutional rules that frequently were disconnected from pre-existing local cultures and traditions. Colonial administrators drafted the independence constitutions, so that the transition to independence would be “smooth and

³⁷⁰ See e.g. MAKUA MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002). *But see* Amartya Sen, *Human Rights and Asian Values: What Lee Kuan Yew and Li Peng don't understand about Asia*, *The New Republic*, 33-40 (July 14&21, 1997).

³⁷¹ Berman, *supra* note 337, at 17.

³⁷² “Post-modernism” is a movement in art and philosophy that rejects objective truths and global cultural narratives. See *infra*.

³⁷³ Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES* 1, 35 (Michel Rosenfeld ed., 1994). *See also*: BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3 (1995); STANLY N. KATZ, *CONSTITUTIONALISM IN EASTERN EUROPE: SOME NEGATIVE LESSONS FROM THE AMERICAN EXPERIENCE* (1993).

uneventful.”³⁷⁴ But, according to one commentator, the result is that in most of postcolonial Sub-Saharan Africa, “the absence of a shared sense of nationhood in combination with foreign constitutional ideals produced a set of constitutions that have largely succumbed to irrelevance and debacle.”³⁷⁵ It is perhaps no surprise then that African scholars today call for indigenous African constitution making. As stated in a 1999 report to the Heads of State of the Commonwealth.

“Constitutionality is still promoted in narrow legalistic terms. Short-term experts are sent in the name of good governance to give countries international legitimacy through reform gestures that can at best only scratch the surface of the realities faced by the larger populace”.

What Africa needs instead, the report contends, is “constitution-based governance that broadly reflects, in terms of process and outcome, the will of the people”.³⁷⁶ In the same vein, scholars have argued that developing nations need “home-grown” constitutions.³⁷⁷ As Ruth Gordon explains: “home-grown constitutions are not a call for a return to idealized and romantic preconceptions of culture or what is sometimes termed ‘tradition’... [n]or can we negate the impact of the modern world, where advances in communication and transportation connect communities in heretofore unimaginable ways, or deny cultural adaptations of concepts that have helped societies organize and govern themselves.”³⁷⁸ It is in a modern context that constitutions should be “grown.”

These voices fit within the post-modern tradition in arts and philosophy, which rejects objective truths and global cultural narratives. Post-modernists stress

³⁷⁴ Gordon, *supra* note 302, at 538.

³⁷⁵ *Id.*, at 528-42.

³⁷⁶ Hassan Ebrahim et al., *Promoting a Culture of Constitutionalism and Democracy in Africa* (1999); Okoth-Ogendo, *supra* note 285, at 80; Gordon, *supra* note 302, at 530.

³⁷⁷ Gordon, *supra* note 302.

³⁷⁸ *Id.*, at 531-532.

“human finitude, imperfection”, “limits” and “irrationality.”³⁷⁹ While modernity has been viewed as an extension of the rational norms of Enlightenment, the post-modern tradition, that challenges this rationalism, can be viewed as an extension of the counter-enlightenment movements.³⁸⁰ In this light, the organic constitution of the ancient Greeks, the British tradition and the counter-enlightenment thinkers can be seen as both pre-modern and post-modern at the same time.

And to some extent the notion of an organic constitution has never disappeared. Particularly in the United States the idea has remained influential.³⁸¹ Unlike other countries, the United States is still on its first constitution. While the Founding Fathers were deeply influenced by enlightenment thought and aimed to “construct a rational whole,”³⁸² there is a long tradition of thinking about the “living constitution” that changes when society changes.³⁸³ Constitutional writers on both the left and the right of the political spectrum claim that the US constitution is organically connected to society. Mary Ann Glendon for example asserts that constitutional rights “are legal manifestation of divergent and deeply rooted cultural attitudes toward the state and its functions.”³⁸⁴ But also Mark Tushnet writes that “[o]ne can plausibly contend that ... to be an American is to be attached to the principles of the written constitution. For the United States then, the large-C constitution *does* express our national character.”³⁸⁵ It is exactly this view that explains the outrage by the American legislature to the use of foreign law by some

³⁷⁹ OWEN BRADLEY, *A MODERN DE MAISTRE* xii-xiii (1999).

³⁸⁰ Chantal Mouffe, *Radical Democracy: Modern or Post-Modern?* 21 *SOCIAL TEXT* 31, 38-39 (1989); Habermas, *supra* note 314, at 4.

³⁸¹ Kreimer, *supra* note 285, at 648.

³⁸² CARL J. FRIEDRICH, *AMERICAN CONSTITUTIONALISM ABROAD* 12 (1967); Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1793 (2007).

³⁸³ See e.g., Ackerman, *supra* note 382, at 1793-97; WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 30 (Johns Hopkins Univ. Press 1981) (1885); OLIVER WENDELL HOLMES, JR. *THE COMMON LAW* 1-2 (Transaction Publishers 2005) (1981).

³⁸⁴ Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 *U. CHIC. L. REV.* 519, 524 (1992).

³⁸⁵ Tushnet, *supra* note 286, at 1271; See also MCLWAIN, *supra* note 304, at 16; Kreimer, *supra* note 285, at 648.

Supreme Court judges³⁸⁶ and the radical rejection of foreign law by the more conservative Supreme Court judges.³⁸⁷

What is true for the United States may also be true for some of the older Western democracies. They might also claim that their constitution is organically connected to society. Thus, the rise of rational constitutional design does not mean that all constitutions are disconnected from society. It simply suggests that constitution-makers not merely attempt to write a constitution that mirrors the nation, but might be primarily concerned by rational design, which would explain why national constitutions are disconnected from society.

C. Empirical Footprints

The theoretical discussion from the previous section leads to some empirical predictions on the relationship substantive constitutional choices and local needs and values, or, put simply, the relationship between the constitution and society. This section sums up these predictions.

Where the expressive, or organic, function of the constitution prevails, the constitution is likely to be tightly coupled with the indigenous features of society. In this case, there should be a statistical relationship between substantive constitutional choices and the particular features of society. Expressive constitutions moreover produce a diverse global landscape, as identities and national characters are different in different countries.³⁸⁸ By contrast, where rational constitutional design prevails, we may find structural constitutional similarities across different states. The constitutional landscape would be characterized by “strange multiplicity” or “constitutional isomorphism.”³⁸⁹ But while constitutional rules may be structurally

³⁸⁶ See e.g., Constitution Restoration Act of 2004, S. 2323, 108th Congr. §201 (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Congr. § 201 (2004).

³⁸⁷ See Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 361 (2004).

³⁸⁸ There is a sociological literature that assumes the existence of a “world culture” across states. For a clear statement of this idea see: John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 163 (1997).

³⁸⁹ See e.g., Go, *supra* note 366, at 73; JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 58 (1995).

similar across nations, national identities are not. Rational constitutional design therefore may produce what sociologists call a “structural decoupling” of constitutional rules from society.³⁹⁰ Therefore, the empirical footprint of the functional constitution will be one of both “constitutional isomorphism” and “structural decoupling” at the same time.

Of course, such a by-product of rational constitutional design is a somewhat ironic one, as rational design builds exactly on the premise that constitutional rules shape society, if they are only designed right. Where constitutional design succeeds, constitutions will, at least over time, be linked to society. But there is an open empirical question if constitutional design is indeed able to do so. The empirical evidence, though minimal, is inconclusive at best.³⁹¹ If constitutions do not- or not yet- shape society, than the empirical footprint of rational constitutional design may indeed imply a structural decoupling of constitution from society.

A conceptual clarification is in order. The preceding discussion assumes that an expressive, or organic notion of constitutionalism affects substantive constitutional choices. For example, countries where the largest majority of people oppose abortion will adopt an extended right to life, while countries where the majority of people favor the death penalty will allow for such a death penalty. Yet, it is possible that the expressive constitution is merely a matter of drafting style. A constitution may be entirely functional, but nonetheless include some textual references to a country’s history. The preamble is an obvious place for such references.³⁹² In many cases, the preamble speaks of revolutions, the triumph of popular rule, the glories of the nation’s leader or a range of aspects of a nation’s past. The graph below depicts the percentage of constitutions that make reference to specific events in a nation’s history. It suggests that such references have grown more popular over time. At the end of the WWII, only about 5 percent of all constitutions contained such a reference.

³⁹⁰ See e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 649 (2004).

³⁹¹ See Law, *supra* note 351, at 380-83.

³⁹² See e.g., Tushnet, *supra* note 285, at 79 (noting that “[p]reambles to the constitution may be particularly useful for an expressivist”).

At the height of the cold war, in the 1970s and 80s, this number went up to almost 30 percent. In the 1990s, the number declined again to about 25 percent today.



However, if this is all there is to the expressive function of the constitution, then it means next to nothing. It would only be form, not substance. The remainder of this chapter will explore empirically if, and to what extent, the indigenous features of society do, in fact, affect the substance of the constitution.

D. Estimating the Relationship Between Constitution and Society

In this part of this chapter, I will use regression analysis to empirically examine the link between the constitution and society. In particular, the relationship between constitution and society will be tested using the following regression model:

$$Y_{i,t} = \beta_1 Y_{i,t-1} + \beta_2 X_{i,t} + \beta_3 Z_{i,t} + \varepsilon_{i,t} \quad (1)$$

Where $Y_{i,t}$ is a set of alternative dependent variables that capture the prevalence of different (types of) constitutional rights in country i at time t ; $Y_{i,t-1}$ is the dependent variable in the previous time period; $X_{i,t}$ is a vector of explanatory variables that capture indigenous features of society in country i at time t ; $Z_{i,t}$ is a vector of control variables that capture the general determinants of constitutional rights adoption in country i at time t ; and $\varepsilon_{i,t}$ is the error term. In this equation, t is measured in decades, in order to reduce econometric problems arising from the highly persistent

nature of the dependent variables.³⁹³ I will next discuss each of these variables in turn.

1. Dependent Variables: Constitutional Rights- In order to analyze how local needs and values affect substantive constitutional choices, I use ninety-five of the variables from the dataset introduced in chapter II to create a total of sixteen alternative dependent variables. Each of these sixteen dependent variables captures the presence or strength of substantive constitutional choices relating to the protection of rights. The selection of these sixteen features is primarily driven by data availability on the indigenous features of society (discussed in the next section). Constitutional features for which no matching data on societal features is available, are not analyzed.

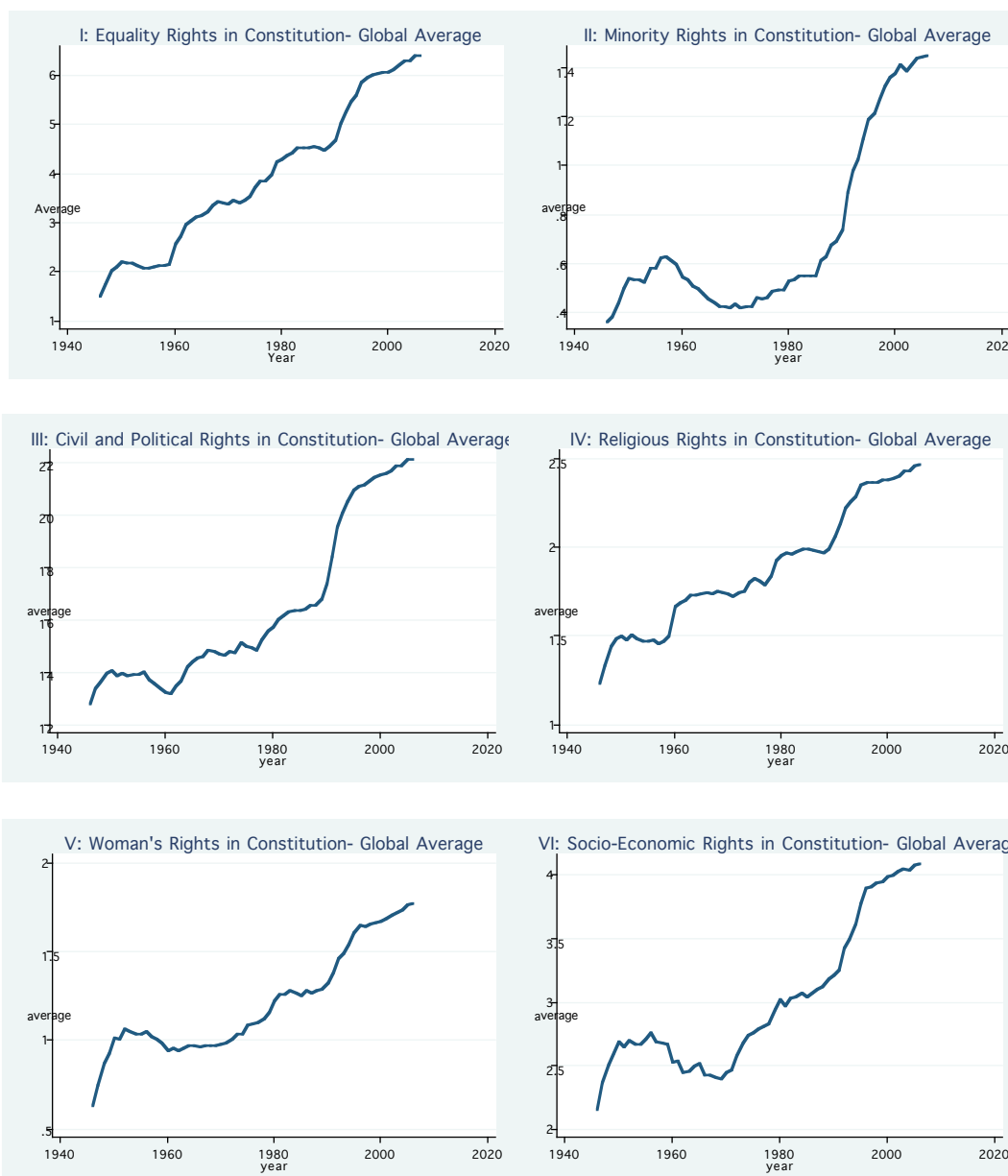
Eight of the sixteen alternative dependent variables are constructed on an ordinal scale and capture the strength of constitutional protection of a general category of rights, such as civil and political rights. These ordinal variables count, for each constitution, the number of individual rights within one category. The resulting measure is based on the assumption that the more rights from one category are present in any given constitution, the stronger the overall constitutional status of this category. The following ordinal dependent variables were created:

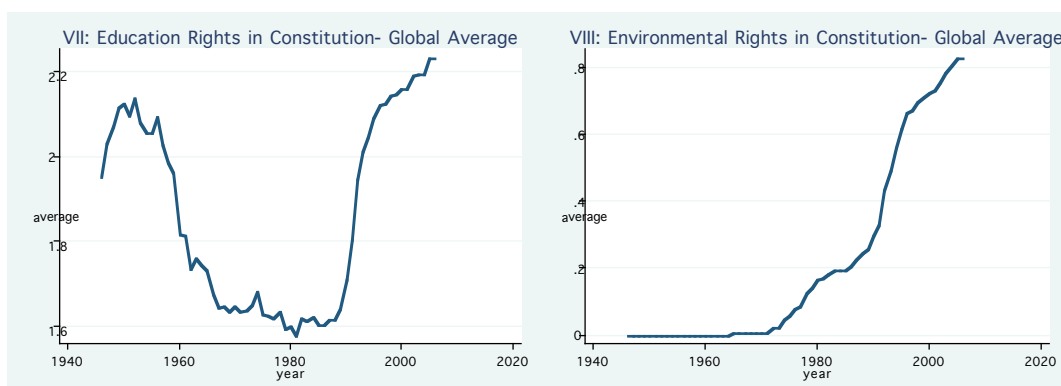
- 1) an indicator on *equality rights* that combines twenty variables on different equality rights;
- 2) an indicator on *minority rights* that combines seven variables on different minority rights;
- 3) an indicator on *civil and political rights* that combines thirty-four variables on a range of civil and political rights;
- 4) an indicator on *religious rights* that combines four variables on constitutional protection of religion;
- 5) an indicator on *woman's rights* that combines five variables on the protection and empowerment of women;
- 6) an indicator on *positive socio-economic rights* that combines eight variables on different socio-economic rights;
- 7) an indicator on *education rights* that combines four variables on education rights; and, finally,

³⁹³ See section D, 4 *infra*.

- 8) an indicator on *environmental rights* that combines five variables on environmental rights.

The graphs below depict the average value of these indicators as a function of time. Table 1 provides summary statistics for each of these indicators and lists the underlying variables on which these indicators are based.

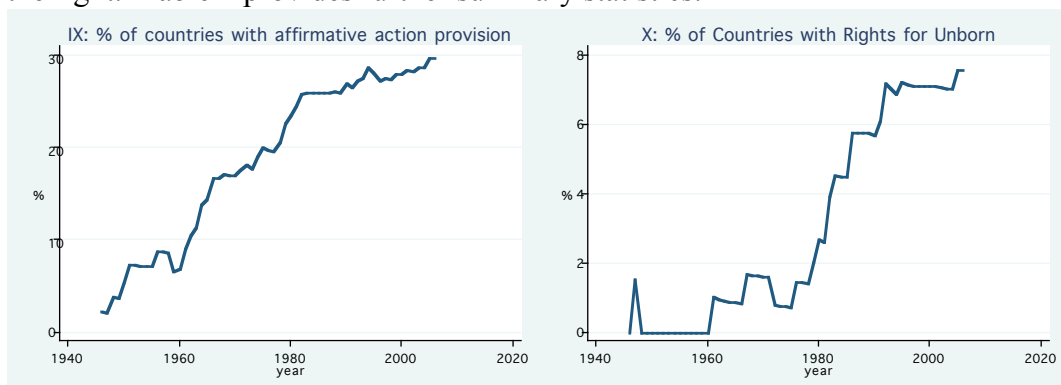




The other eight indicators are binary in nature and capture the presence of one right only. Thus, these binary indicators capture more specific constitutional features than the ordinal ones. The following eight binary indicators were created:

- 1) an indicator that captures if the constitution explicitly allows for *affirmative action*;
- 2) an indicator that captures whether the constitution protects of *unborn children*,
- 3) an indicator on constitutional *rights for the elderly*,
- 4) an indicator on *children's rights*,
- 5) an indicator on the *prohibition of genocide*,
- 6) an indicator that captures whether the constitution prohibits *discrimination based on sexual orientation*
- 7) an indicator on the *right to work*;
- 8) an indicator on the *right to get married*.

The evolutionary path of each of these variables is depicted in the eight graphs below. Each graph depicts the percentage of countries in each year that have adopted the right. Table 1 provides further summary statistics.



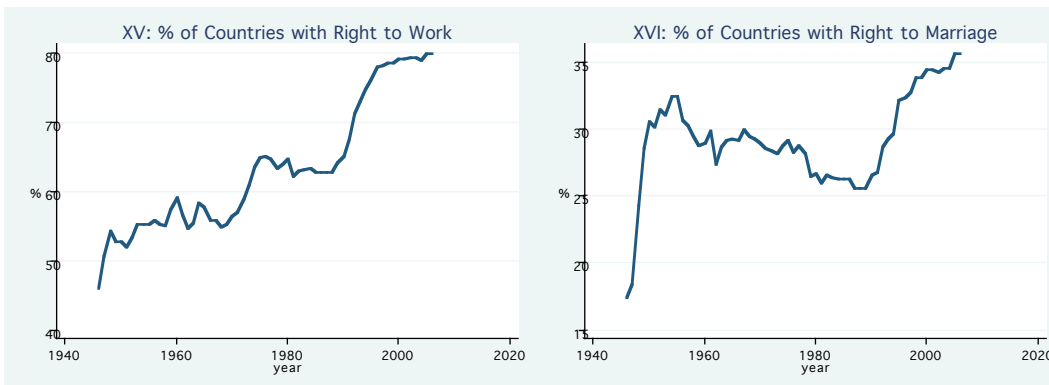
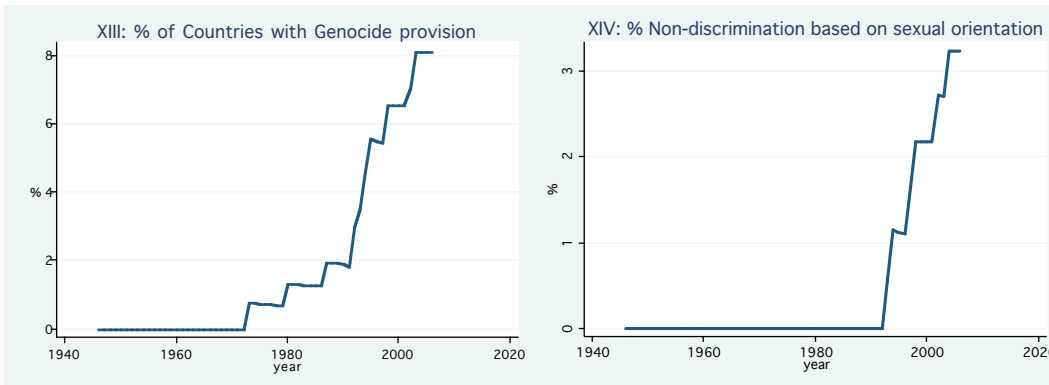
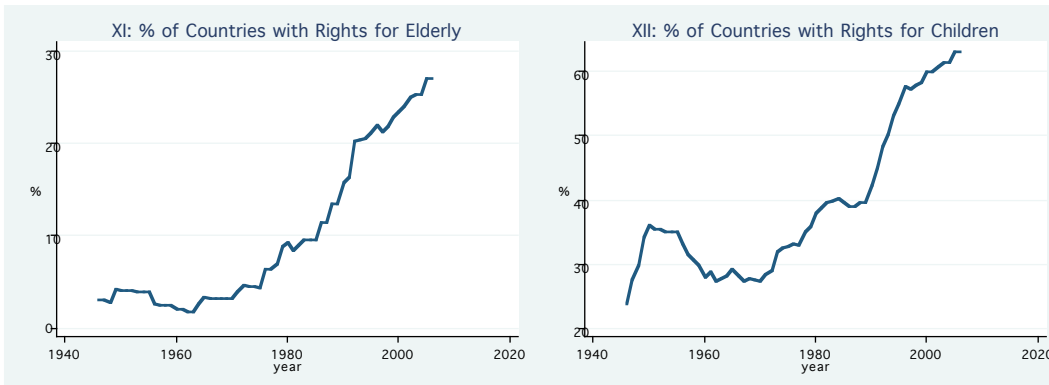


TABLE 1: Summary of Constitutional Rights Indicators

	Obs.	Mean	St. Dev	Min	Max	Composed of
Equality rights	8063	4.4	3.1	0	13	Equality for 'everyone'; prohibition of discrimination based on (or equality regardless of): race, place of origin, ethnic background, education, social status, caste, tribe, beliefs, political opinion, economic status, ancestry, nationality, disability, age, sexual orientation, HIV aids status and gender.
Minority rights	8063	0.8	1.4	0	6	A general protection of minorities, the right to use one's native/ minority language, the right to preserve one's culture and ways of life, the right to establish schools for minority groups, the rights for minorities to be represented in politics, the right of minorities to their indigenous lands, the rights of minorities to have a degree of autonomy
Civil and Political Rights	8063	17.2	7.6	0	31	The right to life, prohibition of death penalty, prohibition of torture, prohibition of slavery, prohibition of arbitrary arrest and detention, freedom of movement, freedom of development of personality, right not to be expelled, right to personal privacy, inviolability of the home, inviolability of communication, freedom of religion, freedom of expression, freedom of press, right to vote, freedom of assembly, freedom of association, right to establish political parties, right to establish trade unions, right to strike, freedom of enterprise, artistic freedom, freedom of education, right to be tried in court, right to present a defense, presumption of innocence, right to an appeal, public trial, double jeopardy, right to remain silent, timely trial, right to council in trial and the right to petition
Religious Rights	8063	2	1.1	0	4	The right to equality regardless of religion, equality regardless of belief, freedom of religion, official state religion, separation of church and state
Woman's Rights	8063	1.3	1.2	0	5	The right to equality regardless of gender, gender equality in labor relations, equality husband and wife, protection of women in labor, maternity leave
Socio-economic Rights	8063	3.2	2.4	0	8	The right to work, right to social security, right to adequate standard of living, right to food, right to housing, right to health, right to education, right to favorable working conditions
Education Rights	8063	1.9	1.4	0	4	The right to education, a right to education free of charge, the freedom of education and teaching, a right to establish schools
Environmental Rights	8063	0.3	0.3	0	3	The right to a healthy environment, right to information about the environment, right to compensation when natural environment is damaged, right to participate in environmental planning, personal liability when damaging the environment
Affirmative action	8063	0.2	0.4	0	1	
Right for unborn children (abortion)	8063	0.0	0.2	0	1	
Rights for elderly people	8063	0.1	0.3	0	1	
Rights for children	8063	0.4	0.5	0	1	
Prohibition of genocide	8063	0.0	0.2	0	1	
Right to work	8063	0.7	0.5	0	1	
Right to get married	8063	0.3	0.5	0	1	
Gay rights	8063	0.001	0.8	0	1	

2. *Explanatory Variables: Indigenous Features of Society-* Having discussed the alternative dependent variables that will be used in estimation, this subsection discusses the explanatory variables that are used to test the relationship between the constitution and society. While it is hard to quantify constitutions, it is possibly even harder to quantify “society.” And yet, there exist a number of cross-country indicators that may be used to capture structural features of society as well as popular values.

Structural societal features of a demographic, political or socio-economic nature, may all influence the menu of rights offered by any given constitution. First, *demographic* features of the nation may translate into rights for particular groups of people. For example, an aging population may produce rights for elderly, while an ethnically divided population may produce equality and minority rights. Second, *social and economic conditions* are also likely to be important. For example, when many people are illiterate, schooling may become mandatory. When living conditions are poor, health rights, social security and the right to food may receive constitutional status, because the constitution aspires to change existing practices. But it may also be the other way around. As a result of a low level of per capita income, a government may be unable to afford such expensive rights. Third, *environmental* conditions may have constitutional implications as well. In the face of environmental problems, environmental rights may be introduced. And finally, the *political history* of a nation, too, may be important. Past government repression or a “tradition of liberty” is likely to affect substantive choices on constitutional liberty rights. Related to these types of structural features of society are popular values, or popular opinion. Popular values, to some extent, will overlap with structural characteristics of the nation, as popular values may be shaped by such characteristics. For example, people may have different viewpoints on social security or health rights in the face of severe poverty. Yet, popular values, too, may shape constitutional rights commitments.

For each of the sixteen alternative dependent variables there exist indicators on structural societal features or popular opinion that match the substantive constitutional choices captured by these indicators. Table 2 provides information on each of these variables. Table 2, column (1) lists which indicators are used. Columns (2)-(6) provide some summary statistics for each of these indicators. Column (7) lists

to which constitutional variables these societal indicators should be linked and column (8) documents the sources of these indicators.

TABLE 2: Indigenous Features of Society: summary and sources

	Obs.	Mean	St. Dev	Min	Max	(Types of) Rights affected	Source
Ethnic Fractionalization	11149	0.4	0.3	0	0.93	Equality rights/ Minority rights	Alesina et al (1)
Religious Fractionalization	11332	0.4	0.2	0	0.86	Equality rights/ Minority rights	Alesina et al (1)
Gini Coefficient (income inequality)*	8906	41.3	9.9	23.5	73.9	Equality rights	Wider University (2)
Government repression	4706	2.4	1.2	1	5	Civil and political rights	Gibney et al (3)
% of religious people	11529	0.92	0.2	0.36	1	Religious rights	Barro and McCleary (4)
% of women in parliament**	5619	8.9	8.5	0	42.7	Woman's rights	Melander (5)
Actual fulfillment of women's political rights*	11346	1.9	0.40	0	3	Woman's rights	Cingranelli and Richards (6)
Actual fulfillment of women's economic rights*	11346	1.33	0.50	0	2.8	Woman's rights	Cingranelli and Richards (6)
Gdp per capita **	7981	7128	8095	171	84694	Socio-economic rights	Penn World Tables (7)
Mortality rates (per 1000 population)**	8342	11.5	5.67	1.32	45	Socio-economic rights	World Development Indicators, WDI (8)
Literacy rates, % of literate people**	6583	63	30.3	1	100	Education rights	Van Hanen (9)
Air quality index*	8845	0.0	0.6	-1.6	2.17	Environmental rights	Esty (10)
CO2 Emissions**	7031	1.1	1.5	0.0	15.8	Environmental rights	WDI (8)
Values on Abortion*	4941	0.44	0.24	0.09	0.92	Rights unborn children	World Value Surveys (11)
Population over sixty-five (%)	9588	5.7	3.8	1.0	20.3	Rights for elderly	WDI (8)
Mortality rates under five (per 1000 population)	10797	88.4	74.8	3.6	318	Children's rights	WDI (8)
Occurrence of genocide since 1955	12688	0.13	0.34	0	1	Prohibition of genocide	Harff (12)
Values on Rest*	4880	0.33	0.12	0.07	0.63	Right to work	World Value Surveys (11)
Values on Work*	4880	0.65	0.14	0.44	0.96	Right to work	World Value Surveys (11)
Values on Marriage*	4819	0.17	0.07	0.01	0.44	Right to get married	World Value Surveys (11)
Democracy score	7373	0.3	7.5	-10	10	All, control variable	Polity IV (13)
Institutional quality**	8479	65	12.4	32	91	All, control variable	PRS Group (14)
I.C. Civil Political Rights- ratification	12688	0.26	0.44	0	1	Civil and political rights	UNHCR (15)
I.C. Children's Rights- ratification	12688	0.22	0.41	0	1	Children's rights	UNHCR (15)
I.C. Economic Social and Cultural Rights-ratification	12688	0.27	0.44	0	1	Socio-economic rights/ right to work	UNHCR (15)
CEDAW (women)- ratification	12688	0.25	0.43	0	1	Women's rights	UNHCR (15)
Length of Constitution, nr. articles	8076	127	82	0	395	All, control variable	Constitutions Database

Summary statistics for (up to) 208 countries from 1946 to 2006

* average value of the variable is used as a result of which the variable does not vary over time

** variable is interpolated as a linear function of time to fill up missing values

1) Alberto Alesina, et al., *Fractionalization*, 8 JOURNAL OF ECONOMIC GROWTH 155 (2003)

2) United Nations University - World Institute for Development Economic Research (UNU- WIDER). 2005. World Income Inequality Database V2.0a – Users Guide and Data Sources. <http://www.wider.unu.edu/wiid/wiid.htm>

3) Mark Gibney, Linda Cornet & Reed Wood, *The Political Terror Scale 1976-2006* (2008)

4) Robert Barro & Rachel M. McCleary, *Which Countries Have State Religions*, QUARTERLY JOURNAL OF ECONOMICS (2005)

5) Erik Melander, *Gender Equality and Intrastate Armed Conflict*, 49 INT'L STUD. Q. 695 (2005)

6) David L. Cingranelli Y David Richard, *The Cingranelli-Richards Human Rights Dataset Version 2008.03.12*

7) Alan Heston, Robert Summers & Bettina Aten, *Penn World Tables*, Center for International Comparison at UPenn (2006)

8) World Development Indicators online, World Bank Group (2008)

9) Tatu Vanhanen, *Democratization and Power Resources 1850-2000*, Finnish Social Data Archive (2003)

<http://www.fsd.uta.fi/english/data/catalogue/FSD1216/meF1216e.html>

10) Daniel C. Esty et al, 2005 Environmental Sustainability Index: Benchmarking National Environmental Stewardship. New Haven: Yale Center for Environmental Law & Policy (2005) <http://www.yale.edu/esi/>

11) World Value Surveys, European and World Values Surveys four-wave integrated data file, 1981-2004, v.20060423, (2006)

12) Barbera Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955*, 97 AM. POL. SC. REV. 57(2003).

- 13) [Polity IV Project](#), Political Regime Characteristics and Transitions, 1800-2008
- 14) PRS Group. 1979-2007. The International Country Risk Guide (ICRG) rating
- 15) Office of the UN High Commissioner on Human Rights: <http://www2.ohchr.org/english/law/>

Most of the indicators listed in Table 2 are commonly used in cross-country analysis. Yet, some of them require some further explanation. The variables that capture popular values are obtained from the World Value Surveys, which are based on household surveys in approximately eighty different countries. In these surveys, conducted in four waves, people are asked about their values and viewpoints and a range of issues. I selected a small number of questions from the hundreds of issues covered in the World Value Surveys. In particular, in order to empirically investigate the relationship between popular values and constitutional rights, I used the World Values Survey to compute the percentage of people in each country 1) that finds abortion “never justifiable,” 2) that finds homosexuality “fully acceptable,” 3) that finds work “very important,” 4) that finds rest “very important” and 5) that finds marriage “an outdated institution.”³⁹⁴

The indicator of government repression is based on the coding of U.S. State Department annual human rights country reports and classifies each country’s rights practices on a five-point scale, ranging from “1: countries are under a secure rule of law, people are not imprisoned for their view and torture rare or exceptional. Political murders extremely rare” to 5: “Terror expanded to the whole population. Leaders place no limits on the means or thoroughness with which they pursue ideological goals.”³⁹⁵ The indicators on women’s rights, too, are based on the coding of U.S. State Department human rights country reports and classify the actual fulfillment of woman’s economic and political rights on a four-point scale. They range from 0: indicating that there are no economic or political rights “for women in law and that systematic discrimination based on sex may have been built into law” to 3: indicating that all or nearly all of women’s economic / political rights “were guaranteed by law

³⁹⁴ For further information on the World Value Surveys, see <http://www.worldvaluessurvey.org/>.

³⁹⁵ For more information on the Political Terror Scale, see Reed M. Wood & Mark Gibney, *The Political Terror Scale (PTS): A Re-Introduction and Comparison to CIRI*, 32 HUMAN RIGHTS QUARTERLY 367 (2010).

and the government fully and vigorously enforces these laws in practice”.³⁹⁶ Finally, the indicators of ethnic and religious fractionalization capture the probability that two randomly selected people from a given country will not belong to the same ethnic or religious group, respectively.³⁹⁷

3. Explanatory Variables: Controls- Having discussed the main variables of interest, I will next discuss the control variables. Each regression includes the same set of control variables. These variables capture factors that affect all constitutional features equally and are not specific to particular (types of) rights. They are features, moreover, that may be correlated with one or more of the variables of interest. This section will discuss the substantive rationale behind each of these control variables. Table 2 lists their sources as well as summary statistics.³⁹⁸

A first control variable captures political processes. Studies on the political determinants of constitution-making have shown that constitutions are crucially affected by the electoral market. When ruling incumbents fear to be voted out of office, they constitutionally entrench their policy agenda, effectively constraining the incoming government.³⁹⁹ Or, in a related account, in the face of sustained political competition, political competitors favor constitutional constraints to moderate the tides of the electoral market.⁴⁰⁰ Most of these electoral market stories relate to constitutional constraints in general and not to some constitutional rights in

³⁹⁶ David L. Cingranelli & David L. Richards, *A Short Description of the Indicators in the Cingranelli-Richards (CIRI) Human Rights Dataset* (Manuscript, 2008).

³⁹⁷ Alberto Alesina, et al., *Fractionalization*, 8 JOURNAL OF ECONOMIC GROWTH 155 (2003).

³⁹⁸ See the bottom 7 rows of Table 2, *supra*.

³⁹⁹ The view of constitutional constraints as “political insurance” is articulated by: RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); JODI FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU AND MEXICO IN THE 1990S* (2004).

⁴⁰⁰ See MARK J. RAMSMEYER, *THE PUZZLING INDEPENDENCE OF COURTS; A COMPARATIVE APPROACH* 23 (1994); Matthew Stephenson, “*When the Devil Turns...*”: *The Political Foundations of Independent Judicial Review* 32 J. LEG. STUD. 59 (2003).

particular.⁴⁰¹ As proxy for the “electoral market” story, each regression includes a variable that captures the level of democracy in each year.

The other control variables are not as strongly grounded in the literature, but are nonetheless plausible determinants of constitutional rights in general. A first such determinant is the general quality of the legal system. Where “good governance” and the “rule of law” prevail, this may increase the prevalence of all rights. Countries with “good institutions” may also have more constitutional rights. To control for this, I use a composite indicator of political, economic and financial risks for investors, which is commonly used as proxy for institutional quality. Second, constitutional rights may simply proliferate over time. The previous chapter, in fact, has shown that constitutional arrangements have become more extensive over time. To control for a general time effect, I include a set of time dummies, one for each period (but omitting the first). Third, constitutions may be path dependent. In particular, they may be formed by a country’s colonial heritage or past foreign influences. Therefore, I include a set of dummies on legal origins, capturing Socialist, English-, German- and Scandinavian legal origins respectively (French legal origin is omitted and serves as reference category for interpretation).⁴⁰² Fourth, I include GDP per capita. Even though perhaps GDP does not affect all constitutional rights in general, it may in fact be correlated with some of the explanatory variables described in the previous section.

The ordinal dependent variables combine information on a number of individual rights. This is based on the assumption that the more rights within a category, the stronger the constitutional status of that category. Yet, some constitutions are simply more extensive than others and may therefore, by definition, contain more rights in each category. To control for the drafting style of the constitutional document, I include a variable that captures the length of the

⁴⁰¹ The only exception is the account by Ran Hirschl who argues that in the face of political competition ruling elites entrench a neo-liberal policy agenda that protects individual liberty, private property and the free market. Though more specific than most other electoral market theories, this account is still more general than the main interest of this chapter. See HIRSCHL, *supra* note 399, *passim*.

⁴⁰² These legal origin variables are taken from Rafael La Porta et al., *The Quality of Government*, 15 J. L. ECON. & ORG. 222, 222 (1999).

constitution. This variable is obtained from the general constitutions database and measures constitutional length as the total number of articles in the constitution.

Finally, constitutional rights may be adopted in response to international human rights treaty obligation. After ratification, states may signal commitment to their treaty obligations by constitutionally incorporating the treaty rights. Therefore, I include variables on the ratification of the “core” international human rights treaties. Which treaty variable is included depends on the rights captured by the dependent variable. Table 2 provides details.

4. Results- This section will estimate the model from equation (1) for each of the alternative dependent variables discussed above. However, estimation of the general model stated in equation (1) is complicated by the highly persistent nature of the constitutions data. Once a particular right is introduced, it is virtually never abolished. In addition, many of the societal features, too, are rather persistent and rarely change over time. To avoid some of the common econometric complications that come with this type of data, the empirical strategy mainly seeks to utilize cross-country rather than within-country variation. In particular, in the various estimations described below, I will either reduce the length of the 60 year time series, or remove the time-dimension altogether.⁴⁰³

The estimation strategy is different for the eight *ordinal* dependent variables and the eight *binary* dependent variables. For each of the *ordinal* dependent variables, I run two regressions in a panel with 192 countries and 7 decades; one ordered probit model and one random effects model. In addition to these two panel regressions, I run seven separate cross-sectional ordered probit regressions for each decade in a seemingly unrelated regression model. For the *binary* dependent variables, I do not use panel data at all, but only estimate cross-sectional probit regressions for each

⁴⁰³ Maddala and Woo panel unit root tests show that the full time series are I(1), that is, non-stationary in levels but stationary in differences. A common solution to this non-stationarity problem is to run a first-differenced model. But in this particular case, most of the variation of interest is in the levels, and not in the differences. Therefore, to reduce concerns over non-stationarity, I substantially shortened the time series by measuring constitutional rights in 10-year intervals. In addition, I will run several cross sectional regressions in a seemingly unrelated regression model, removing the time dimension altogether.

decade in a seemingly unrelated regression model.⁴⁰⁴ Below, I will first discuss the panel regressions for the ordinal dependent variables and will discuss the cross-sectional regressions for both the ordinal and binary dependent variables thereafter.

In all panel regressions, constitutional data are observed at seven points in time, in 1946, 1956, 1966, 1976, 1986, 1996 and 2006, respectively. Time is measured in decades to deal with the highly persistent nature of the yearly constitutional rights data. First, for each of the ordinal dependent variables, I estimate an ordered probit model. While more rights of a particular type suggest a stronger constitutional status of this category, it seems unlikely that the effect of each additional right is the same. For example, three equality rights do not necessarily offer three times as much protection as one equality right. Therefore, I estimate an ordered probit model rather than a linear or count model.⁴⁰⁵ The ordered probit model also includes a lagged dependent variable. Hubert-White standard errors are calculated in order to correct for heteroscedasticity problems common to panel data. Standard errors are moreover clustered on state, in order to correct for serial correlation over time.

One possible disadvantage of the resulting panel regression model is that it does not account for unobserved characteristics that may affect the average level of rights protection in different countries. To take such unobservables into account, I run a second regression for each dependent variable using a random effects estimator.⁴⁰⁶ The random effects estimator excludes the lagged dependent variable, as the

⁴⁰⁴ Constitutional rights, once adopted, are virtually never abolished. In a panel regression with a binary dependent variable, this implies that the dependent variable will be almost fully explained by the lagged dependent variable. One solution to this problem would be to create an “onset model”, where the dependent variable becomes missing after a right has been adopted (see chapter V). Yet, doing so would imply that I can no longer fully exploit cross-country variation (and its link to society) at different points in time. Therefore, I opt for using different cross-sectional regressions instead.

⁴⁰⁵ In the sensitivity analysis in the next section, I will re-estimate all these ordered probit specifications using a poisson model.

⁴⁰⁶ Breusch and Pagan Lagrangian multiplier tests for random effects showed, in all cases, that the country-specific intercepts are not homogenous across states, suggesting that random effects are preferred over pooled OLS. In addition, Hausman tests showed that, in most cases, the differences in intercepts across countries are not systematic, suggesting that a random effects estimator is most efficient. Using a random effects model over the fixed effects model has an important advantage, which is that it allows for the inclusion of non time-varying explanatory variables (which would be picked up- and thus dropped- by the fixed effects in the fixed effects model).

combination of the two produces a well-documented bias.⁴⁰⁷ Standard errors are again corrected for heteroscedasticity and serial correlation.

Table 3, columns (1)-(8), panels A and B, report the results for the eight different ordinal dependent variables. Columns (1), (3), (5) and (7) report the results from the ordered probit model while columns (2), (4), (6) and (8) report results from the random effects model. The general impression that emerges from the results reported in Table 3 is that the link between constitution and society is a weak one. Most of the societal variables of interest enter insignificant. Only two relationships come up significant. First, ethnic divides significantly increase the prevalence of constitutional equality rights. As can be seen from Panel A, columns 1 and 2, the effect of ethnic fractionalization on equality rights is significant at 5% and 1% in the first and second specification respectively. The effect is moreover sizeable. The results from the linear model reported in column 2 indicate that a 1-point increase in ethnic fractionalization (thus moving from a fully homogenous society, where the probability that two random people do not belong to the same ethnic group is 0% to a fully heterogeneous society, where the probability that two random people do not belong to the same ethnic group is 100%) produces approximately 2.9 additional equality rights (out of 21 possible rights).⁴⁰⁸ Second, and related, religious divides significantly increase the prevalence of religious rights. As can be seen from Panel A, columns 7 and 8, the effect of religious fractionalization on religious rights is significant at 1% in both specifications. The linear model in column 8 indicates that a 1-point increase in religious fractionalization (again moving from a fully homogenous society to a fully heterogeneous society) produces approximately 1 additional religious right (out of 5 possible rights).⁴⁰⁹ Thus, while the relationship between

⁴⁰⁷ I use a linear random effects estimator rather than a random-effects ordered probit estimator. The reason is that random effects ordered probit in many cases is unable to converge.

⁴⁰⁸ For the ordered probit results, I computed marginal effects with all variables at their median value. This “median country” has 4 equality rights in its constitution. If ethnic fractionalization moves from 0 to 1, the probability of having 7 rights increases by 4 percentage-points (significant at 10%) while the probability of having 8 rights increases by 5 percentage points (significant at 10%). All the other marginal effects are insignificant.

⁴⁰⁹ For the ordered probit results, I computed marginal effects with all variables at their median value. This “median country” has 2 religious rights. If religious fractionalization increases from 0 to 1, this increases the probability of having 4 rights by 17-percentage points (significant at 5 %). All the other marginal effects are insignificant.

constitution and society is a weak one, it is exactly when society is divided that it has some impact on the constitution, in the form of additional equality and religious rights.

The control variables behave rather consistently across the sixteen different specifications reported in Table 3. Good governance, or institutional quality, is generally unrelated to constitutional rights. Also GDP per capita is unrelated to constitutional rights, including the “expensive” socio-economic rights. And also all of the treaty variables enter insignificant. The indicator that captures the length of the constitution *does* however enter significant in almost all specifications. Where countries have longer constitutions, they also have more constitutional rights. Also democracy enters significant in most, though not all, specifications. The effect is largest and most significant for civil and political rights. But except for woman’s rights and socio-economic rights, democracy affects all other rights. So while there are only weak links between constitutional rights and the particular features of society to which these rights relate, democratic countries *do* have systematically more constitutional rights. This suggests that constitutional rights can be viewed as a trait of democratic societies. Democratic nations adopt a set of constitutional rights, regardless of their exact fit to the more particular features of society.

TABLE 3: Effect of Society on Constitutional Rights

PANEL A	Equality Rights		Minority Rights		Civil and Political		Religious Rights	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Lagged dependent variable	0.41*** (0.04)		0.05 (0.03)		0.17*** (0.02)		1.30*** (0.16)	
Ethnic Fractionalization	0.43** (0.22)	2.86*** (1.02)	0.53 (0.48)	0.24 (0.44)				
Religious Fractionalization	0.03 (0.24)	0.70 (0.93)	-0.32 (0.44)	-0.47 (0.37)			0.65*** (0.25)	0.99*** (0.37)
Religious People (%)							-0.12 (0.25)	0.49 (0.95)
Government Repression					0.05 (0.06)	0.07 (0.27)		
Gini_coefficient	-0.00 (0.00)	-0.02 (0.03)						
Good governance	0.00 (0.00)	-0.02 (0.02)	0.01 (0.01)	0.01 (0.01)	-0.01 (0.01)	-0.07 (0.05)	-0.01 (0.01)	-0.01* (0.01)
Democracy	0.01 (0.01)	0.07** (0.03)	0.03** (0.01)	0.03 (0.02)	0.04*** (0.01)	0.18*** (0.05)	0.02* (0.01)	0.02** (0.01)
Gdp per capita	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)
Length of Constitution	0.00* (0.00)	0.01*** (0.00)	0.00*** (0.00)	0.00** (0.00)	0.00*** (0.00)	0.05*** (0.01)	0.00 (0.00)	0.00 (0.00)
Treaties: CERD/ICCPR	0.16 (0.14)	0.47 (0.35)			0.05 (0.15)	0.79 (0.62)	-0.05 (0.16)	-0.05 (0.16)
Time Dummies	YES	YES	YES	YES	YES	YES	YES	YES
Legal Origin Dummies	YES	YES	YES	YES	YES	YES	YES	YES
Number of Observations	495	582	542	611	394	414	500	630
(pseudo) R-squared	0.24	0.41	0.12	0.31	0.21	0.44	0.37	0.26
PANEL B	Woman's Rights		Socio-Economic		Education Rights		Environmental	
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Lagged dependent variable	1.22*** (0.12)		0.60*** (0.07)		1.12*** (0.14)		1.27*** (0.17)	
Women in Parliament	0.00 (0.01)	0.01 (0.01)						
Woman's Political Rights	0.26 (0.21)	0.29 (0.22)						
Woman's Economic Rights	0.16 (0.21)	0.27 (0.24)						
Death Rates			-0.00 (0.01)	0.00 (0.03)				
Illiteracy Rates					0.00 (0.00)	0.00 (0.00)		
Air quality							-0.17 (0.12)	0.08 (0.10)
Co2 Emissions							-0.05 (0.05)	0.02 (0.03)
Good governance	-0.00 (0.01)	-0.01 (0.01)	-0.02 (0.01)	-0.02 (0.02)	-0.00 (0.01)	-0.00 (0.01)	0.00 (0.01)	-0.00 (0.01)
Democracy	0.00 (0.01)	0.01 (0.01)	0.01 (0.01)	0.01 (0.02)	0.03** (0.01)	0.03*** (0.01)	0.03** (0.01)	0.02*** (0.01)
Gdp per capita	-0.00 (0.01)	-0.00 (0.01)	0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)
Length of Constitution	0.00*** (0.01)	0.01*** (0.00)	0.01*** (0.00)	0.01*** (0.00)	0.01*** (0.00)	0.01*** (0.01)	0.00** (0.00)	0.00** (0.00)
Treaties: CEDAW/ICESCR	0.07 (0.18)	-0.08 (0.01)	-0.01 (0.18)	0.24 (0.22)	0.02 (0.18)	0.08 (0.12)		
Time Dummies	YES	YES	YES	YES	YES	YES	YES	YES
Legal Origin Dummies	YES	YES	YES	YES	YES	YES	YES	YES
Number of Observations	462	500	454	504	516	564	492	542
Goodness-of-Fit	0.42	0.44	0.33	0.45	0.45	0.47	0.46	0.45

For each regressor, I report the estimated coefficient and the robust standard error of the coefficient clustered by country. ***, ** and * denote significance at 1%, 5% and 10%. Columns 1-3-5 and 7 report the ordered probit estimator, while 2-4-6 and 8 report the random effects estimator.

Having discussed the panel results for the ordinal dependent variables, I will next discuss the cross-sectional results for the ordinal dependent variables. While the panel has only seven time periods, it still suffers, in some cases, from non-stationary time series. Such problems are absent in a series of cross-sectional regressions, where the time dimension is removed altogether. But there is also a substantive rationale behind the regressions for each decade, which is that the relationship between constitution and society may be different at different points of time. Therefore, I estimate a cross-sectional ordered probit regression for each of the ordinal dependent variable at seven points in time; 1946, 1956, 1966, 1976, 1986, 1996 and 2006. The cross-sectional regressions are estimated in a seemingly unrelated regression model. In such a model, the error terms are allowed to be correlated across the seven different cross-sectional estimations, thereby improving the efficiency of estimation.⁴¹⁰ Estimation results are reported in Table 4. To save space, I only report the coefficients of interest, which are the coefficients of the indigenous societal variables.

Table 4 shows that the significant results from the panel regressions are not similar across decades. The effect of ethnic fractionalization on equality rights is statistically significant only from the 1990s onwards. Also the effect of religious fractionalization on religious rights is most significant from the 1990s onwards, although it also enters significant (at 10 %) in 1966 and 1986. Thus, even the most important link between constitution and society – between societal divides and constitutional equality and religious freedom- is not a general one. The fact that this link is strongest in later decades may reflect the growing post-modernist awareness that diverse societies may need tailor-made constitutional rules. Moreover, if there is *one* area in which rational constitutional design stresses tailor-made solutions, than this is probably the constitutional accommodation of minority groups in heterogeneous societies. By now, there is a whole literature on constitutional design

⁴¹⁰ Deniz G. Fiebig, *Seemingly Unrelated Regression*, in A COMPANION TO THEORETICAL ECONOMETRICS (Badi H. Baltagi ed., 2003).

in divided societies.⁴¹¹ Past experience has demonstrated the need for such specific design features. In the early 1960s, the British former colonies in Africa all received an off-the-shelf constitution (drafted by the colonial office in London), that largely ignored the deep ethnic divides in African societies, and often with disastrous results.⁴¹² Therefore, today, there are special design solutions for ethnically or religiously divided societies.

The cross-sectional regressions also show some ties between constitution and society that are confined to particular periods only. First, there is a negative relationship between mortality rates and socio-economic rights in the 1970s and the 1980s. Second, in the same period, there is a positive relationship between literacy rates and education rights. In these decades, countries with lower mortality, and thus better living conditions, had more socio-economic rights; while countries with higher literacy had more education rights. Third, the 1980s show a negative relationship between environmental rights and air quality, while the 1990s show a positive relationship between environmental rights and the level of Co2 emissions.

What these cases have in common is that, at these points in time, these rights had not yet strongly proliferated. Environmental rights were only first invented in 1976 (by Guatemala), and were still scarce constitutional goods in the 1980s and 1990s. Thus, in this case, the link between constitution and society is present before the constitutional rights “take off,” or become near universally adopted. Also for socio-economic and education rights, that are connected to society in the 1970s and 1980s, the strongest increase in these rights takes place after this period. It suggests that rights may be organically connected to the societies from which they first emerge, but that once these rights become part of the universal constitutional package, such a link ceases to exist (at least on the global plane). However, it is hard to draw a general conclusion along these lines, as many other rights are disconnected from society also before they “took-off.”

⁴¹¹ See e.g., Sujit Choudhrey, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETY; ACCOMMODATION OR INTEGRATION? (Sujit Choudhrey ed., 2000); UNDP, HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD v (2004). See also note 294 *supra*.

⁴¹² PARKINSON, *supra* note 356, *passim*; Gordon, *supra* note 302.

TABLE 4: Seemingly Unrelated Regressions Per Decade

	Decade 1	Decade 2	Decade 3	Decade 4	Decade 5	Decade 6	Decade 7
Equality Rights							
Ethnic Fractionalization	-1.17 (0.85)	-0.79 (0.82)	0.85 (0.66)	0.41 (0.52)	0.53 (0.48)	1.68*** (0.49)	1.13** (0.49)
Religious Fractionalization	2.59** (1.25)	0.21 (0.92)	0.28 (0.60)	0.11 (0.57)	0.49 (0.46)	0.44 (0.48)	0.13 (0.45)
Gini_coefficient	-0.10** (0.00)	-0.07*** (0.03)	-0.03* (0.02)	0.01 (0.02)	-0.00 (0.02)	-0.01 (0.01)	-0.01 (0.01)
Number of Observations	34	50	78	94	95	117	116
(pseudo) R-squared	0.30	0.20	0.11	0.06	0.07	0.11	0.06
Minority Rights							
Ethnic Fractionalization	0.85 (1.09)	1.78* (0.88)	1.02 (0.90)	-0.10 (0.66)	0.05 (0.61)	0.54 (0.53)	0.50 (0.50)
Religious Fractionalization	0.75 (1.50)	-0.74 (1.27)	-1.74** (0.78)	-0.51 (0.58)	-0.05 (0.53)	0.44 (0.50)	-0.45 (0.49)
Number of Observations	35	51	80	103	104	125	128
(pseudo) R-squared	0.23	0.26	0.20	0.10	0.07	0.11	0.10
Civil and Political Rights							
Government Repression				-0.01 (0.19)	0.09 (0.13)	0.17* (0.09)	-0.01 (0.11)
Number of Observations				66	100	120	128
(pseudo) R-squared				0.10	0.10	0.09	0.09
Religious Rights							
Religious people (%)	-1.81 (1.83)	-2.59 (1.95)	1.38 (1.09)	1.67 (1.51)	1.99 (1.62)	1.13 (1.10)	-0.52 (1.26)
Religious Fractionalization	-0.28 (1.08)	0.25 (1.08)	1.25* (0.69)	0.49 (0.55)	0.89* (0.53)	1.51*** (0.45)	1.58*** (0.46)
Number of Observations	35	51	80	103	104	127	130
(pseudo) R-squared	0.14	0.19	0.10	0.06	0.08	0.10	0.08
Woman's Rights							
Woman in Parliament			0.04* (0.02)	0.07 (0.03)	-0.01 (0.03)	-0.01 (0.02)	-0.02 (0.02)
Woman's Political rights			0.54 (0.49)	0.48 (0.39)	0.23 (0.41)	0.70 (0.48)	0.63* (0.37)
Woman's Economic rights			0.70 (0.54)	0.34 (0.35)	0.26 (0.41)	-0.05 (0.39)	0.28 (0.33)
Number of Observations			68	93	98	118	123
(pseudo) R-squared			0.19	0.22	0.26	0.19	0.15
Socio-economic Rights							
Mortality rate			-0.03 (0.04)	-0.09*** (0.02)	-0.08*** (0.03)	-0.03 (0.03)	-0.03 (0.03)
Gdp per capita			-0.00 (0.00)	0.00** (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Number of Observations			74	95	96	118	121
(pseudo) R-squared			0.16	0.17	0.17	0.13	0.13
Education Rights							
Illiteracy Rates	-0.00 (0.01)	0.00 (0.01)	0.01 (0.01)	0.01** (0.00)	0.02*** (0.01)	0.00 (0.01)	0.00 (0.01)
Number of Observations	54	64	71	96	98	113	131
(pseudo) R-squared	0.22	0.23	0.29	0.25	0.30	0.16	0.14
Environmental Rights							
Air quality				-0.94 (0.61)	-0.70** (0.31)	-0.21 (0.19)	-0.04 (0.19)
Co2 emmissions				-0.43 (0.46)	-0.10 (0.31)	0.16** (0.07)	0.02 (0.09)
Number of Observations				90	100	122	123
(pseudo) R-squared				0.24	0.16	0.17	0.16

Results for seemingly unrelated ordered probit regressions. For each regressor, the estimated coefficient and its robust standard error are reported. . ***, ** and * denote significance at 10%, 5% and 1% respectively.

I next discuss the other eight dependent variables, which are binary in nature. For those variables, I only estimate the cross-sectional regressions in each decade in a seemingly unrelated regression model. This time, the seemingly unrelated regressions are estimated using a probit model (rather than an ordered probit model). As noted before, the eight binary variables capture more specific constitutional features than the ordinal variables. Almost every country today has some civil and political rights, for example. But provisions like a prohibition of genocide or a right for unborn children are much less widely adopted. Are these more idiosyncratic constitutional features more closely linked to society? Table 5 suggests that this, to a limited extent, seems to be the case.

First, societal divides again matter. Where countries are divided along religious lines, they are more likely to adopt an affirmative action clause, thus allowing for positive discrimination of minority groups. There is also a significant relationship between popular values on abortion and a constitutional right for unborn children. Where a large percentage of people think that abortion is “never justifiable,” the constitution is significantly more likely to contain a right for unborn children. Other rights are linked to society in particular decades only. In the 1970s, there is a link between rights for elderly and the percentage of people over 65. In the 1970s and 1980s, there is a link between children’s rights and living conditions for children. Again, these links are present when these rights were first invented, or before they “took off” and proliferated across the globe. But other rights are completely unrelated to society. Constitutional statements on genocide are unrelated to whether or not genocide ever occurred on state territory. Non-discrimination based on sexual orientation is unrelated to popular values on homosexuality. And there is no systematic relationship between popular values on work and rest and the right to work.

The control variables, though not reported here, behave less consistently than for the ordinal variables. A longer constitution is only positively associated with rights for elderly and rights for children but not with any of the other rights. A higher level of democracy is positively associated with affirmative action, children’s rights, genocide provisions and non-discrimination based on sexual orientation, but is

unrelated to rights for unborn children, rights for elderly, the right to work and the right to get married. Institutional quality, the treaty variables and GDP per capita are always insignificant.

TABLE 5: Seemingly Unrelated Regressions Per Decade

	Decade 1	Decade 2	Decade 3	Decade 4	Decade 5	Decade 6	Decade 7
Affirmative Action							
Ethnic Fractionalization			2.21 (1.40)	-0.66 (0.93)	-0.43 (0.81)	-0.70 (0.71)	-0.51 (0.67)
Religious Fractionalization			0.58 (1.13)	1.33* (0.81)	1.29* (0.73)	1.73*** (0.66)	1.38** (0.61)
Gini Coefficient			-0.05 (0.03)	0.03 (0.02)	-0.01 (0.02)	0.03 (0.02)	0.03** (0.01)
Number of Observations			64	83	88	109	112
(pseudo) R-squared			0.37	0.19	0.06	0.15	0.14
Rights for the unborn							
WVS: abortion unacceptable				5.80*** (1.90)	3.35* (1.79)	2.80* (1.47)	2.81** (1.42)
Number of Observations				53	54	71	72
(pseudo) R-squared				0.24	0.32	0.19	0.16
Rights for Elderly							
People over 65		0.16 (0.18)	0.15 (0.14)	0.17** (0.08)	0.08 (0.06)	-0.01 (0.04)	-0.03 (0.03)
Number of Observations		53	80	103	104	127	130
(pseudo) R-squared		0.07	0.12	0.20	0.21	0.18	0.20
Rights for Children							
Child mortality rates	0.00 (0.01)	-0.00 (0.01)	-0.01 (0.00)	-0.01** (0.00)	-0.01** (0.00)	0.00 (0.00)	-0.00 (0.00)
Number of Observations	34	47	74	95	96	118	121
(pseudo) R-squared	0.43	0.35	0.20	0.31	0.23	0.15	0.22
Genocide							
Occurrence of genocide, ever						0.36 (0.49)	0.43 (0.45)
Number of Observations						127	131
(pseudo) R-squared						0.14	0.18
Sexual orientation equal.							
Values: Homosexuality						-1.35 (0.91)	-0.95 (1.07)
Number of Observations						69	70
(pseudo) R-squared						0.18	0.20
Right to work							
Values: Work very imp.	-0.88 (3.40)	-0.05 (3.12)	0.27 (2.25)	0.11 (2.47)	1.47 (2.26)	1.99 (2.99)	1.29 (2.94)
Values: Rest very important.	7.65** (3.51)	2.57 (2.78)	-1.81 (1.90)	-1.46 (2.19)	-1.68 (2.06)	-3.33 (2.30)	-4.28* (2.54)
Number of Observations	29	39	47	52	53	70	71
(pseudo) R-squared	0.31	0.25	0.14	0.15	0.22	0.40	0.40
Right to Marry							
Values: marriage outdated	5.65 (4.09)	2.42 (3.82)	6.20 (3.09)	1.84 (2.39)	1.07 (2.26)	0.03 (2.33)	-1.09 (2.28)
Number of Observations	29	39	47	51	52	69	70
(pseudo) R-squared	0.23	0.21	0.16	0.06	0.09	0.05	0.03
Results for seemingly unrelated probit regressions. For each regressor, the estimated coefficient and its robust standard error are reported. . ***, ** and * denote significance at 10%, 5% and 1% respectively.							

The findings presented thus far suggest that there is only a weak relationship between constitution and society. Yet, it seems plausible that the relationship between constitution and society may be different for democratic and undemocratic countries. In particular, the radical transformative constitution may be associated with undemocratic regimes. This radical model, after all, is an attractive model for dictators who like to govern without constitutional constraints. In order to investigate this possibility, I re-estimated all the panel regressions as reported in Table 3 but with an interaction term between the societal variables of interest and democracy. I also reran all seemingly unrelated regressions in Table 5 with such an interaction term. The exercise produces no systematic evidence of a difference between democratic and undemocratic countries.

The theoretical discussion on constitution and society moreover suggests that the relationship between constitution and society may be stronger in the part of the world that is commonly referred to as “the West”. In order to investigate this possibility, I re-estimated all panel regressions reported in Table 3 as well as the cross-sectional regressions reported in Table 5 for a subsample of countries in Western Europe and North America only.⁴¹³ In most cases, the results for the subsample are similar to that of the full sample. However, in this case, woman’s rights are positively and significantly related to the actual fulfillment of woman’s rights. Overall, it seems that the link between constitution and society is just a little stronger in the West.

E. The Link Between Constitution and Society: Correlation or Causation?

This section will discuss the robustness of the results presented in the previous section as well as the endogeneity of these findings, or the extent to which we can take them to represent a causal relationship, rather than a mere correlation. In order to test the robustness of the findings presented in the previous section, I performed a range of exercises. First, I re-estimated all cross sectional regressions independently, thus not allowing the errors to be correlated across equations in a seemingly unrelated regression model. Instead, for each dependent variable, I simply estimated an ordered

⁴¹³ I do not conduct this exercise for the binary dependent variables because, for these (less common) rights, there is not enough variation within the subsample of “Western” countries.

probit or probit regression for each decade, with robust standard errors to correct for heteroscedasticity. The results are very similar to those reported in tables 4 and 5, although the p-values are typically slightly higher. Next, for the ordinal dependent variables, I re-estimated all the ordered probit panel specifications using a poisson model. As explained in the previous section, I consider the poisson model less appropriate for the ordinal data used in this chapter. Even though the ordinal variables count the number of rights, these variables consist of different kinds of rights, which may not all be equally important. Nonetheless, the results from the poisson model are very similar to the ordered probit model.

Next, for a number of specifications, I use alternative explanatory variables. First, in all specifications, I replaced GDP per capita by its logged value, in order to relax the assumption of a linear effect of GDP per capita on constitutional rights. When using its logged value, there is still no effect of GDP per capita on any of the constitution variables. Second, in the civil and political rights regressions, I replaced the government repression indicator based on the coding of annual U.S. State Department human rights country reports by an alternative indicator based on the coding of the annual Amnesty International human rights country reports.⁴¹⁴ Again, I fail to find a link between government repression and civil and political rights. Third, for all regressions that include the indicators on ethnic and religious fractionalization I replaced these indicators with an alternative indicator by John Fearon that captures the probability that two random people do not belong to the same “ethnoreligious” group.⁴¹⁵ When using “ethnoreligious fractionalization” instead of two separate measures on ethnic fractionalization and religious fractionalization, results are rather similar. “Ethnoreligious” fractionalization enters significant at 10% and 1% in the panel specification on equality rights, and significant at 1% and 5% in the panel specifications on religious rights. But again, it does not affect minority rights.

Next, in a separate exercise, I disaggregate the findings for the ordinal indicators on civil and political rights and socio-economic rights by estimating the

⁴¹⁴ For a detailed description of these variables see Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, (Manuscript, 2009).

⁴¹⁵ J. D Fearon, *Ethnic and Cultural Diversity by Country*, J. ECON. GROWTH 195 (2003).

effect of the relevant societal features on each of their sub-components separately. This exercise is motivated by the fact that these two ordinal indicators are composed of a large number of sub-components (32 and 8 respectively) that are often diverse in nature. In theory, each of these different sub-components may bear a different relationship to society. To investigate this possibility, I disaggregate these indicators and estimate all the different cross-sectional regressions from Table 5 for each of the subcomponents separately. The main finding from this exercise is that the results for the subcomponents, in general, provide a similar picture to the results for the composite indicators in Table 5.⁴¹⁶

Overall, the results from the previous section are fairly robust to the use of alternative models and alternative indicators. I will next discuss endogeneity, or whether the findings from this chapter can be taken as causal relationships or should be viewed as mere correlations. There are two types of endogeneity that may be relevant here: omitted variable bias and reverse causality. Omitted variable bias arises when one of the regressors is correlated with an unobserved factor that drives the dependent variable. Omitted variable bias is a common concern for studies with real world data, where controlled experiments are generally unfeasible. In this study, omitted variable bias arises if one of the explanatory variables on society is correlated with “something else” that also affects constitutional features. For many of the

⁴¹⁶ For civil and political rights, I found little relationship between government repression and the different individual civil or political rights. The civil and political rights indicator consists of 31 subcomponents. When evaluating significance at 5%, one would expect there to be at least one or two instances in which government repression significantly affects the subcomponents. This, in fact, is exactly what I found for 1976, 1986 and 2006. In 1996 however, government repression enters significant for 8 of the subcomponents, mainly the fair trial rights. The effect is positive, suggesting that more government repression actually increases the probability of adopting these civil and political rights. Notably, this finding is consistent with the results in Table 4, where government repression, too, enters positive and significant (at 10%) in 1996. For the socio-economic rights, there is a more systematic pattern in the regressions for the individual subcomponents. In the first three decades, 1966, 1976 and 1986, most of the individual components of the socio-economic rights indicator are negatively related to mortality rates. Thus, where living conditions are better (and mortality rates are lower), the constitution will contain more of the individual socio-economic rights. This is consistent with the findings of Table 4, where mortality rates enter negative and significant at 1% in 1976 and 1986. The next two decades however show a somewhat different pattern, that is different from the results presented in Table 4. In 1996 and 2006 I find that, in some cases, GDP is significant and negative, suggesting that poorer countries adopt more socio-economic rights. This is the case for the right to food, the right to health, the right to favorable working conditions and the right to education. So here, from the 1990s onwards, the link between some of the socio-economic rights and income is in fact negative.

variables on the indigenous features of society, it seems possible to think of such factors. Yet, two of the most important (and most significant) societal variables, those on ethnic and religious fractionalization, are generally considered to be exogenous.⁴¹⁷ Of course, ethnic and religious divides have a deep impact on society in ways that may also affect the constitution. But it is hard to think of factors that are correlated with, but not driven by, ethnic and religious fractionalization and that are also correlated with equality rights, minority rights or religious rights. If true, the findings on ethnic and religious fractionalization are unlikely to be driven by omitted variable bias. Omitted variable bias is more plausible for the other variable that enters significant: popular values on abortion. Popular attitudes, in general, are likely to be affected by societal features, which too, may affect the constitution. For example, religion may explain both popular attitudes on abortion as well as constitutional protection of unborn children. To investigate this possibility, I re-estimate the specifications for the right for unborn children but with religion included. Results are slightly less significant, but rather similar. But while religion can be included, other possible factors cannot. For example, general cultural factors, too, may be correlated with values on abortion and the constitution. Thus, for this finding, I cannot exclude the possibility of omitted variable bias.

But perhaps more importantly, while omitted variable bias could cause me to find a relationship where there is none, it could also lead me to find *no* relationship where there in fact is one. Thus, the finding that the relationship between society and the constitution is a weak one could, in theory, be driven by omitted variable bias. At the same time, there are no obvious candidates of factors that have been excluded from the analysis and are correlated with both the particular features of society and the particular constitutional rights of interest. Nonetheless, the conclusion that there are only weak links between constitution and society should be a cautious one.

A second form of endogeneity is reverse causality. Intuitively, reverse causality means that the dependent variable affects the independent variables rather than the other way around. In this case, this would mean that society does not shape the constitution, but the constitution shapes society. Where I find that ethnic and

⁴¹⁷ Robert J. Barro, *Inequality and Growth in a Panel of Countries*, 5 J. ECON. GROWTH 5 (2000).

religious divides and attitudes on abortion affect constitutional norms, could this be the other way around instead? Does society shape the constitution, or does the constitution shape society? This, in fact, is the million-dollar question. But importantly, beyond anecdotal cases, there is no systematic evidence on the actual effect of constitutional law.⁴¹⁸ So it is not a priori clear whether causality runs both ways. Yet, even if I would assume that the constitution *does* shape society, the societal features of interest in this study are ones that are not easily changed. Factors like ethnic fractionalization, illiteracy rates, mortality rates, the share of people over 65, are not changed overnight, if they change at all. Where societal features only change slowly, newly adopted rights did not yet have time to change society. Put differently, while constitution-makers can take account of society straight away, society “takes account” of the constitution only after a number of years. This suggests that if I would control for all countries that adopted a right a long time ago, my results will be unaffected by reverse causality. Following this strategy, I re-estimate the cross-sectional regression for 2006 for the right for unborn children while controlling for all countries that adopted this right by 1996. When doing so, I find an effect with similar size and sign, though now significant at 10%. If one believes that ethnic and religious fractionalization are exogenous, this exercise is unnecessary for those variables. And indeed, it is hard to see how constitutional rights would affect ethnic and religious fractionalization. Nonetheless, for equality rights, religious rights and the affirmative action provisions, I rerun the cross-sectional regression for 2006 while controlling for all countries that adopted at least one of these rights by 1986.⁴¹⁹ In all cases, effects are similar in terms of sign and size, though significant at 10% only. The latter is not surprising considering that I control for the largest part of all variation. This exercise suggests that the findings are not driven by reverse causality. Thus, in these cases, society shaped the constitution and not the other way around.

⁴¹⁸ See Law, *supra* note 351, at 380-83.

⁴¹⁹ I use 1986, because if I use 1996 I do not have enough variation left for estimation.

F. Conclusion: New Beginnings?

The main finding from this chapter is that substantive constitutional choices are remarkably unrelated to the indigenous features of society. With this finding, this chapter has offered a first part of an answer to the question what drives substantive constitutional choices around the world. Part of the answer is clear: it is not the internal features of the nation that explain these choices. The findings from this chapter moreover hint at the second part of the answer. If constitutions are not organically connected to society, than they may be a product of rational design. And if constitution-makers search for optimal constitutional principles, this search is bound to take them beyond their own borders, and turn their eyes to constitutional development elsewhere. If constitutions are a product of rational design, than the determinants of substantive constitutional choices around the world may be well be transnational in nature. The next chapter will explore this possible implication in some detail. It finds that, indeed, constitutions are mainly a product of various types of transnational influences.

The findings from this chapter may seem cause for worry. From the finding that constitution-makers do not take account of society, one could conclude that society did not take account of constitution-makers either. Or, these findings suggest, very tentatively, that constitutions may not live up to their promises. Perhaps Edmund Burke was right that constitutions cannot be designed *a priori*, without regard of existing arrangements. But, importantly, further research is required to explore this very tentative finding in some detail. The explanatory variables used in this chapter do not capture *facto* constitutional practices, but instead, capture structural features of society. Some of these features are not even meant to be affected by the constitutional document. Moreover, the question if and how constitutions are “effective” poses a range of statistical challenges. It will be the task for a next research project to take up these challenges.

But there could be more bad news. Where “good” or “legitimate” solutions are decoupled from society, it means that they may be foreign to local traditions and practices. Comparative law scholarship has often proclaimed that “imported”, or

“transplanted” laws may suffer from a “transplant-effect.”⁴²⁰ Transplanted laws remain law-on-the-books and do not translate into law-in-action. It is possible that rationally designed constitutional solutions, too, may suffer from such a transplant effect.⁴²¹ If true, rational constitutional design could be undermining the very goals it intends to serve. This, too, is an open question for future research, one that will be only tentatively explored in chapter VII of this thesis.

But there is also a possibility that things may be changing. The growing post-modern insight that local problems need local solutions may, with time, come to alter constitution-making practices. Constitutions may be amended to “respond to imperfection,”⁴²² and may be increasingly tailor-made to local practice. It does not even mean that constitutions, from now on, need to grow organically from society. We don’t have to go all the way back to the organic constitution of Edmund Burke, or to the mystical and irrational features propagated by de Maistre. It could simply mean that, within the general framework of constitutional design, local context affects design choices. In this respect, the finding that ethnic and religious divides does affect substantive constitutional choices may, in fact, be an important one. By now, there is a whole literature on constitutional design for divided societies.⁴²³ And it is possible that some of the insights from this literature have been taken up by constitution-makers in ethnically divided societies.⁴²⁴ It could be an important example of how local context matters also within a rational framework.

⁴²⁰ See Berkowitz et al, *supra* note 301.

⁴²¹ See Schauer, *supra* note 301, at 912.

⁴²² RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Stanford Levinson ed., 1995).

⁴²³ See e.g., note 294, *supra*.

⁴²⁴ In substantive terms, the literature on constitutional design for divided societies suggests that there are two possible design approaches: *accommodation* of minorities or *integration* of minorities. The former facilitates differences, while the latter aims to reduce differences among different parts of the population. In this respect, the finding that ethnic divides increase the prevalence of equality rights but not minority rights suggests that, in terms of real-world constitution-making, the integration approach prevails over the accommodation approach. Equality rights, after all, proclaim that ethnic minorities are equal to all others, while minority rights grant them special privileges.

V. THE TRANSNATIONAL: FOREIGN INFLUENCE AND DIFFUSION

The previous chapter has established that substantive constitutional choices are remarkably unrelated to the internal features of the nation. Constitutions do not serve as statements of national identity and aspiration that serve to differentiate one country from another. They do not mirror society. This chapter conceptualizes, and empirically tests, an alternative hypothesis which is that the content of the constitution is shaped by transnational influences, or diffusion. Constitutions are not indigenous but transnational documents.

This hypothesis is not a novel one. Friedrich Hayek has noted all institutions are “passed on by imitation and learning.”⁴²⁵ Even more radical, Alan Watson has posited the thesis that “all legal change occurs through imitation.”⁴²⁶ But this hypothesis has never been systematically conceptualized, or tested, in the constitutional realm. If anything, conventional constitutional wisdom holds that the expressive nature of constitutions prevents widespread constitutional borrowing.⁴²⁷ While countries may borrow each other’s civil codes, they will not borrow each other’s constitutions. Constitutional transplantation comes with the risk of losing identity and undermining national sovereignty.⁴²⁸ Or so the argument goes. But this often-heard claim does not hold in practice. Using the statistical tools from diffusion studies in the social sciences, this chapter finds that constitutions are crucially affected by constitutional developments elsewhere.

Case studies have often documented that constitution-makers do not start from scratch. Instead, constitution-makers draw up “lists of foreign constitutions worthy of emulation.”⁴²⁹ By now, there is rich anecdotal evidence of constitutional

⁴²⁵ F.A HAYEK, *THE CONSTITUTION OF LIBERTY* 53 (Routledge Classics, 2009) (1960).

⁴²⁶ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

⁴²⁷ See e.g., Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Judicial Borrowing*, 1 U. PA. J. CONST. L. 640, 648-50 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269-74 (1999).

⁴²⁸ Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 912 (2005).

⁴²⁹ A.E Dick Howard, *The Indeterminacy of Constitutions* 31 WAKE FOREST L. REV. 383, 402 (1996). See also Donald L. Horowitz, *Constitutional Design: Proposals versus Process*, in *THE ARCHITECTURE OF DEMOCRACY* 15, 15 (Andrew Reynolds ed., 2002) (noting that “constitution-

borrowings.⁴³⁰ In the nineteenth century, for example, Latin American constitutions borrowed heavily from the U.S. constitution, in what Simon Bolivar dubbed a “craze for imitation.”⁴³¹ Similarly, it has been noted that also the founding fathers of the Australian constitution had a “hypnotic fascination” with the U.S. constitution.⁴³² The drafters of the Irish constitution consciously assembled as many foreign constitutional documents as they could lay their hands on, but ended up borrowing heavily from the U.S.⁴³³ The Indian constitution borrowed its directive principles from Ireland,⁴³⁴ but it, too, was influenced by the U.S. constitution.⁴³⁵ But many of the newly independent colonies in Africa and the Caribbean, in turn, drew inspiration from the Indian experience.⁴³⁶ For example, the drafters of the Nigerian independence constitution borrowed from India, but also “drew up a list of every right protected in a human rights instrument drafted by British lawyers within the previous 30 years.”⁴³⁷ In recent years, the German constitution and the Canadian Charter have been singled out as influential constitutional models. The Canadian Charter been described as “the dominant model behind the drafting of the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of Rights, and the Hong Kong Bill of Rights,”

making has become an international and comparative exercise” and that “a new democracy that excluded foreigners entirely from its constitutional process might stamp itself as decidedly insular, even somewhat suspect”).

⁴³⁰ See e.g. THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007).

⁴³¹ Donald L. Horowitz, *The Federalist Abroad in the World*, in THE FEDERALIST PAPERS 505 (Ian Shapiro ed., (2009); GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE 105 (2009).

⁴³² Horowitz, *supra* note 431, at 509.

⁴³³ Paul Brady, *The Social, Political and Philosophical Foundations of the Irish Constitution* (2010).

⁴³⁴ Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXF. J. LEG. STUD. 499 (2000).

⁴³⁵ P.K. Tripathi, *Perspectives on the American Constitutional Influence on the Constitution of India*, in CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE 72, 89 (Lawrence Ward Beer ed., 1979).

⁴³⁶ See CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN’S OVERSEAS TERRITORIES* (2007).

⁴³⁷ Charles Parkinson, *The Social and Political Foundations of the Nigerian Constitution* (2010).

amongst others.⁴³⁸ And even though the German constitution was written under the auspices of the WWII victors, its constitutional features have been followed by constitution-making in Eastern Europe.⁴³⁹ Post-communist constitution-makers in Eastern Europe, more generally, have followed the examples from the “democratic constitutions of the Western world.”⁴⁴⁰

Such anecdotal evidence lends credibility to the claim that constitutions are also transnational documents. But the existing empirical evidence offers very little insight in the causes of such borrowing. Why did India look at Ireland, while South Africa turned to Canada? And what were the motives behind looking abroad in the first place? Any answer to these questions requires a systematic conceptualization of the causes of transnational influences in constitutional design. Moreover, anecdotal evidence does not reveal the broader patterns behind the migration of constitutional ideas. Looking across the world, and over time, what kinds of countries borrow from each other, and which ones do not? To answer this question, one needs data on the substantive provisions of the world’s constitutions and the statistical tools from the social science. It is only in this fashion that one can systematically map the spread of constitutional ideas.

This chapter will take up both of these challenges. Parts A and B will conceptualize the transnational influences in constitutional design. It builds on the literature on policy diffusion to conceptualize four different mechanisms transnational influence, or diffusion. A first diffusion mechanism is *constitutional competition*. States may use their constitution to attract foreign capital. A second diffusion mechanism is *coercion*. Powerful states, such as former colonizers and aid donors, may use their power to alter constitutional arrangements in less powerful states. A third diffusion mechanism is learning. States may learn from foreign states with whom they share important pre-existing similarities, such as a similar legal system. A

⁴³⁸ Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L.J. 819, 822 (1999).

⁴³⁹ Michael Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOB. LEG. STUD. L. REV. 257, 265 (2008).

⁴⁴⁰ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 303 (2003).

last diffusion mechanism is *acculturation*. States may emulate popular foreign constitutional provisions not because they are convinced by the intrinsic merits of these provisions, but to gain international acceptance and legitimacy.

Parts C-H use the tools from diffusion studies in the social sciences to test whether constitutional documents, in fact, are affected by constitutional developments elsewhere and the circumstances under which this is the case. The main empirical finding from this chapter is that transnational influences are an important determinant of constitutional design. An important causal predictor of whether any given country adopts any given constitutional right is whether other countries previously adopted the same right. At the same time, not all foreign countries are equally influential. Diffusion is not a global process. And some countries matter more than others. In particular, it turns out that constitution-makers borrow from countries with which they share the same legal heritage, from countries with which they share a common aid donor, from countries with which they share a common religion and from countries with which they share colonial ties. By contrast, the constitutions of trade partners, geographic neighbors, and countries with the same language, amongst others, do not affect constitutional design. These patterns suggest that the transnational constitution is primarily a product of constitutional coercion and learning.

A. Mechanisms of Transnational Diffusion

To conceptualize and test the mechanisms of transnational influence in constitution-making, this chapter builds on a rich literature on diffusion, developed in economics, geography, political science, and sociology alike. Diffusion is “the process by which the prior adoption of a trait or practice in a population alters the probability of adoption for the remaining non-adopters.”⁴⁴¹ Put simply, the more actors adopt a particular practice, the more likely that others are to follow. Classical studies document the diffusion of innovations among groups of individuals: hybrid

⁴⁴¹ David Strang, *Adding Social Structure to Diffusion Models: An Event History Framework*, 19 *SOCIOLOGICAL METHODS AND RESEARCH* 324, 325 (1991).

corn at Iowa farms,⁴⁴² telephones in Swedish households⁴⁴³ or HYV cotton in a Southern Indian village.⁴⁴⁴ More recently, a “macro” or “global” literature has emerged that looks at the diffusion of policies or institutional innovations across states.⁴⁴⁵ Examples include the diffusion of democracy,⁴⁴⁶ liberal economic policies or reforms,⁴⁴⁷ central bank independence⁴⁴⁸ and bilateral trade agreements.⁴⁴⁹ Other examples, featuring prominently in the public economics literature on strategic interaction, include the diffusion of environmental policies, tax policies, public services, and infrastructure investments.⁴⁵⁰ Laws and legal institutions, too, have been shown to diffuse although transnational influences in law-making are more commonly studied as “transplantation” in the (small-N) comparative law literature.⁴⁵¹

The diffusion literature has proposed a wide range of mechanisms through which diffusion may take place, “ranging from Bayesian learning to rational competition through hegemonic domination to unthinking emulation of leaders.”⁴⁵²

⁴⁴² B. Ryan & NC Gross, *The Diffusion of Hybrid Corn in two Iowa Communities*, 8 RURAL SOCIOLOGY 5 (1943).

⁴⁴³ TORSTEN HAGERSTRAND, *INNOVATION DIFFUSION AS A SPATIAL PROCESS* (1967).

⁴⁴⁴ Timothy Besley & Ann Case, *Diffusion as a Learning Process: Evidence from HYV Cotton* (Manuscript, 1994).

⁴⁴⁵ David Strang & Sarah A. Soule, *Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills*, 24 ANN. REV. SOC. 265 (1998).

⁴⁴⁶ Kristian Skrede Gleditsch & Michael D. Ward, *Diffusion and the International Context of Democratization*, 60 INT’L ORG. 911 (2006).

⁴⁴⁷ Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171 (2004).

⁴⁴⁸ Simone Pollilo & Mauro F. Guillén, *Globalization Pressures and the State: The Worldwide Spread of Central Bank Independence* 119 AM. J. SOC. 1764 (2005).

⁴⁴⁹ Zachary Elkins, et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties: 1960-2000*, 60 INT’L ORG. 811 (2006).

⁴⁵⁰ See Jan K. Brueckner, *Strategic Interaction Among Governments: An Overview of Empirical Studies* 26 INT’L REG. SC. REV. 175, 175-88 (2003).

⁴⁵¹ William Twining, *Social Science and Diffusion of Law*, 32 J. LAW & SOC. 203, 210-13 (2005). See also Chapter 1, section 3, *supra*.

⁴⁵² Beth A. Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 INT’L ORG. 781 (2006).

Each “mechanism” comes with a distinct logic by which states influence each other. This section conceptualizes how constitutional rights may diffuse through four possible mechanisms: *competition*, *coercion*, *learning* and *acculturation*. It focuses on these four mechanisms because each has been theorized as an important predictor of transnational influence of in the realm human rights.⁴⁵³

All four diffusion mechanisms essentially concern different relationships among “states.” Of course, it should be noted that “the state” is an abstract entity that, in reality, consists of a range of different actors, often with different or even conflicting interests. In general, it is hard to say whether the state is indeed being “coerced,” “learns,” “competes” or “acculturates.”⁴⁵⁴ The same is true for “constitution-makers.” A “constitution-maker,” too, consists of a number of different actors, such as a drafting committee, the legislature and the executive. All these actors may have their own agenda. At the same time, actors within a state (or constitution-maker) also tend to share some overarching purposes, which might facilitate coordinated action to accomplish these shared purposes.

In the discussion below, I will use the term “constitution-makers” and “states” interchangeably. But in both cases, it is impossible to actually look in the mind of the state, or the constitution-maker, to establish whether it is actually learning for example. A constitution is the product of “many minds.”⁴⁵⁵ Therefore, the empirical strategy instead is to link the broad diffusion “mechanisms” to more specific “channels” through which transnational influences manifest themselves. Each channel is indicative of one or more broad diffusion mechanisms. For example, if states borrow constitutional provisions from states with whom they share a common aid donor, this suggest that constitutions are shaped by the carrots and sticks of foreign aid donors. By contrast, if they borrow constitutional provisions from states with the same pre-existing legal background, this suggests that a more functional learning is

⁴⁵³ Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 642-46 (2004); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008).

⁴⁵⁴ Jose Alvarez, *Do States Socialize?* 54 DUKE L.J. 961 (2004).

⁴⁵⁵ CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* (2009).

taking place. Even though the “channels” may not map on to the “mechanisms” perfectly, this approach characterizes most of the diffusion literature.⁴⁵⁶ In the remainder of this section, I will discuss each of the four diffusion mechanisms in turn.

1. Altered Material Pay-offs: Coercion and Competition.

The first two mechanism of transnational influence are a function of rational states and material costs and benefits. They fit with rational choice theory, or the realist school of international law and international relations.⁴⁵⁷ Rational choice scholarship builds on the assumption that states are rational and self-interested actors that “calculate the costs and benefits of alternative courses of actions, and act accordingly.”⁴⁵⁸ States act only when it is in their best interest to do so. Constitutions are strategic instruments, used to achieve strategic goals.⁴⁵⁹ Under this logic, countries borrow from each other’s constitutions for strategic reasons. There are two mechanisms that may shape the constitutional landscape through material costs and benefits. These mechanisms are coercion and competition.

1. Coercion- If coercion is at work, the content of written constitutions is shaped by the carrots and sticks of powerful foreign states. Coercion is the process whereby “states influence the behavior of other states by escalating the benefits of adoption and the costs of non-adoption through material rewards and punishments.”⁴⁶⁰ In international politics, some states are stronger than others.⁴⁶¹ If stronger nations exploit power asymmetries to impose their policy preferences on others, diffusion takes place.⁴⁶² Such a process includes the imposition of

⁴⁵⁶ See e.g. Simmons & Elkins, *supra* note 447, *passim*.

⁴⁵⁷ See Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935, 1944 (2002).

⁴⁵⁸ See e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005).

⁴⁵⁹ For this view of the constitution see ROBERT COOTER, *THE STRATEGIC CONSTITUTION* (2000).

⁴⁶⁰ Goodman & Jinks, *supra* note 453, at 633.

⁴⁶¹ IMMANUEL WALLERSTEIN, *WORLD SYSTEM ANALYSIS: AN INTRODUCTION* (2004).

⁴⁶² Simmons et al., *supra* note 452, at 790.

constitutional rules through force, but also more subtle processes through incentives and sanctions.

The hardest form of constitutional power is the use of bombs and guns, or the constitutional version of “gunboat diplomacy.” Somewhat less hard is the use of carrots and sticks, or the manipulation of material costs and benefits. Even softer is what Joseph Nye calls “soft power,” where states are influential because of the attractiveness of their culture, ideals and policies, even without the use of force or material pressures.⁴⁶³ This chapter will focus on the harder forms of coercion, or on “bombs and guns” as well as “carrots and sticks,” but not on (far less tangible) forms of “soft power.”⁴⁶⁴

There are some well-known examples of the hardest form of constitutional coercion, where constitutions have simply been imposed upon a nation. Probably most paradigmatic for this scenario are the post-colonial constitutions, or the constitutions drafted as part of the decolonization process. For example, the independence constitutions of Britain’s former colonies in Africa and the Caribbean required British consent as a *quit pro quo* for colonial independence. As part of the negotiations for independence, Britain insisted upon the inclusion of a Bill of Rights modeled after the European Convention of Human Rights.⁴⁶⁵ Up till this day, many former British colonies are governed by the exact same Bill of Rights, the one that was once drafted by the Colonial Office in London. In the same fashion, the United States staged the process of constitution-making in the Philippines.⁴⁶⁶ In 1934, the U.S. adopted the McGuffie Act, which granted the Philippines independence from the U.S., but also stated that the new constitution was to include a Bill of Rights and a republican form of government. And indeed, the resulting 1935 constitution bore

⁴⁶³ JOSEPH NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* x (2004); Simmons et al., *supra* note 452, at 791.

⁴⁶⁴ However, acculturation, as described in section A, 3 *infra* could also be simplified to a form of soft coercion.

⁴⁶⁵ See PARKINSON, *supra* note 436, at 1-19.

⁴⁶⁶ BILLIAS, *supra* note 431, at 229-233.

close resemblance to the U.S. Constitution.⁴⁶⁷ The same thing happened with the Micronesian independence constitution that, too, borrowed heavily from the U.S. Constitution.⁴⁶⁸ In the same vein, the constitutions of the former colonies of France were deeply influenced by the constitution of the fifth French Republic.⁴⁶⁹ In general, it has been observed that postcolonial states commonly adopted the constitutional model “of their former imperial master”, thus producing, as one commentator puts it, a constitutional “world of empires.”⁴⁷⁰

Other examples of constitutional imposition can be found in the context of occupation, in the constitutions drafted after war under the influence of the war victors. According to Fred Schauer, the best example of a “truly imposed” constitution is Japanese constitution of 1947, which was drafted under strong influence of American occupiers and has been described as “more the contribution of Douglas MacArthur than of internal Japanese decision.”⁴⁷¹ Probably equally well-known is “imposition” of the German Basic Law of 1949, which was drafted after Germany’s defeat in the WWII, in a process created and managed by the occupying powers. While allowing for local input, the occupying powers insisted upon a veto power over the final constitution.⁴⁷² But even the U.S. constitution, which is often heralded for its truly democratic nature,⁴⁷³ contains traces of this type of coercion. In particular, after the civil war, the Southern states were not allowed representation in Congress up until they had ratified the thirteenth, fourteenth and fifteenth

⁴⁶⁷ *Id.*

⁴⁶⁸ Brian Tamanaha, *The Battle Between Law and Society in Micronesia* (Manuscript, 2010).

⁴⁶⁹ Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000*, 18 INT’L SOC. 71, 74 (2003).

⁴⁷⁰ *Id.*, at 73, 74.

⁴⁷¹ Schauer, *supra* note 428, at 907-908. *But see*: David S. Law, *The Myth of Imposed Constitutionalism in Japan* (2010) (challenging the conventional view that the Japanese constitution was an “imposed constitution”).

⁴⁷² Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, 14 CARDOZO L. REV. 459, 459-60 (1993); Schauer, *supra* note 428, at 908.

⁴⁷³ *See e.g.* Jed Rubenfeld, *Commentary: Unilateralism and Constitutionalism*, 79 NEW YORK U. L. REV. 1971, 1994 (2004).

amendments of the U.S. Constitution.⁴⁷⁴ Most recently, the Bush administration used guns and bombs to overthrow Saddam Hussein and, arguably, to impose democracy upon Iraq. Even though the new constitution of 2005 was drafted with local participation, it was drafted “in the shadow of the gun.”⁴⁷⁵ The same has been said about the new constitution of Afghanistan, the constitutions of the republics of the former Yugoslavia and the constitution of East Timor, which were all drafted in conditions “of de facto or de jure occupation.”⁴⁷⁶

But in an age of widespread commitment to democracy, transnational pressures, in most cases, are likely to be subtler than wholesale “imposition.”⁴⁷⁷ While constitutions, like those in Afghanistan and Iraq, may be drafted in the shadow of the gun, there is also a widespread commitment to democracy and local participation, producing what Noah Feldman calls the “latest, most sophisticated form of imposed constitutionalism.”⁴⁷⁸ More often than not, it is not bombs and guns, but carrots and sticks that produce constitutional coercion. Powerful states offer material benefits, or impose sanctions. One example of constitutional coercion through material incentives, or carrots and sticks, is conditionality in the membership to international organizations. To become a member of the Council of Europe, for example, prospective members must “accept the principles of rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”⁴⁷⁹ Thus, the benefits of membership in the Council of Europe are made conditional upon respect for human rights. Turkey’s Bill of Rights has been described as a product of this logic. According to Paul Mangranella, rights commitments in the Turkish constitution did not result from the traditional values of the governed but

⁴⁷⁴ See Schauer, *supra* note 428, at 908; John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHIC. L. REV. 375, 375 (2001).

⁴⁷⁵ Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 847, 858 (2005); Stanley N. Katz, *Democratic Constitutionalism After Military Occupation; Reflections on the United States’ Experience in Japan, Germany, Afghanistan and Iraq*, 12 COMMON KNOWLEDGE 181, 185 (2006).

⁴⁷⁶ Feldman, *supra* note 475, at 858.

⁴⁷⁷ *Id.*; Schauer, *supra* note 428, at 909.

⁴⁷⁸ Feldman, *supra* note 475, at 858.

⁴⁷⁹ Article 3 Statute of Council of Europe.

were the product of a calculation by the ruling elites who believed that Turkey needed alliances with the West to secure economic growth and to guard itself against possible Soviet aggression. To secure such alliances, Turkish elites had to commit to maintain constitutional democracy, human rights and the rule of law.⁴⁸⁰

In similar fashion, international trade agreements are often tied to human rights. The European Union does not conclude trade agreements without a human rights clause.⁴⁸¹ Through these types of trade agreements, nations may be “forced to be good.”⁴⁸² Empirical evidence indeed suggests that human rights clauses in international trade agreements do in fact improve the human rights records of the treaty partners.⁴⁸³ Such trade agreements, moreover, may result in the constitutional incorporation of free market guarantees.⁴⁸⁴ For example, when Mexico acceded to the North Atlantic Free Trade Agreement (NAFTA), it promulgated up to 30 constitutional amendments to its 1917 constitution, to conform to the investment rules of NAFTA.⁴⁸⁵ Despite widespread popular protest, these amendments resulted in radical amendment of the economic chapter of the constitution, including the repeal of a popular constitutional provision for the redistribution of communal lands.⁴⁸⁶

But perhaps the most important carrots and sticks behind constitutional design come in the form of foreign aid. In the last few decades, there has been a growing consensus among economists that “good institutions” are a crucial engine behind economic growth.⁴⁸⁷ As a result, substantial financial resources have been committed

⁴⁸⁰ Paul J. Mangranella, *The Comparative Constitutional Law Enterprise* 30 WILL. L. REV. 509, 516 (1994).

⁴⁸¹ Paivi Leino, *European Universalism? The EU and Human Rights Conditionality*, 24 YEARBOOK OF EUROPEAN LAW 329 (2005).

⁴⁸² EMILIE HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* (2009).

⁴⁸³ Emilie Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 593 (2005).

⁴⁸⁴ See David Schneiderman, *Investment Rules and the New Constitutionalism* 25 L. & SOC. INQ. 757 (2000).

⁴⁸⁵ *Id.* at 764-67.

⁴⁸⁶ *Id.* at 764-67.

⁴⁸⁷ See e.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC*

to rule-of-law reforms and “getting the institutions right.”⁴⁸⁸ By one estimate, the World Bank has spent 2.9 billion dollars on rule-of-law reforms since the early 1990s.⁴⁸⁹ This type of rule of law assistance often directly affects the constitution.⁴⁹⁰ The constitution, after all, is instrumental in the protection of property and civil liberties, as well as the establishment of an independent judiciary. It is crucial in safeguarding the so-called “rule-of-law.”⁴⁹¹ For that reason, foreign aid donors, and international organizations like the IMF, World Bank and United Nations are often at the forefront of constitutional reform.⁴⁹² In the case of the 2005 Iraqi constitution, for example, it was the representatives of these international organizations, combined with the mixture of neo-liberal advocates of the free market, human rights advocates and the conservative catholic lobbyists that promoted Westernized constitutional rights.⁴⁹³

But not only are “institutions” an important recipe for growth, studies have found that foreign aid is most effective when it is offered to countries with good economic policies⁴⁹⁴ and good human rights.⁴⁹⁵ Such findings have spurred so-called

PERFORMANCE (1990).

⁴⁸⁸ DANI RODRIK, ONE ECONOMICS, MANY RECIPES 184 (2007).

⁴⁸⁹ David M. Trubek, *The Rule of Law in Development Assistance: Past, Present and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 74 (David M. Trubek & Alvaro Santos eds., (2006)).

⁴⁹⁰ See RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 47 (2004).

⁴⁹¹ *But see* Brian Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT’L. L. 470, 476 (1995) (noting that the rule of law “has always consisted more of a bundle of ideals than a specific or necessary set of institutional arrangements”).

⁴⁹² HIRSCHL, *supra* note 490, at 46-47.

⁴⁹³ Feldman, *supra* note 475. See also VICKY C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 265 (2009) (noting that constitution-making is increasingly “transnational,” “involving consultations with (if not management by) international actors (governmental and nongovernmental organizations), concerning constitutional design (including voting mechanisms), constitutional rights and constitutional enforcement mechanisms).

⁴⁹⁴ See e.g., Craig Burnside & David Dollar, *Aid, Policies and Growth*, 90 AM. EC. REV. 847-68 (1997); Paul Collier & David Dollar, *Aid Allocation and Poverty Reduction*, World Bank Policy Research Working paper no. 2041 (1998).

⁴⁹⁵ Jakob Svensson, *Aid, Growth and Democracy*, 11 ECONOMICS AND POLITICS 275, 293 (1999).

“aid conditionality.” Aid conditionality occurs when aid donors set requirements for foreign aid.⁴⁹⁶ Such conditions are sometimes couched in terms of policy content, such as lowering tariffs, privatizing markets, or devaluing the exchange rate (the “Washington consensus” is an example).⁴⁹⁷ Others types of conditionality involve the imitation of institutions that have been successfully established elsewhere, such as the adoption of an independent central bank or an independent court.⁴⁹⁸ Human rights, too, have been part of aid conditionality. In the United States, federal law prohibits the offering of foreign aid to nations that engage in “gross violations of internationally recognized human rights.”⁴⁹⁹ Empirical studies have found that, in general, human rights *do* affect the allocation of aid flows.⁵⁰⁰

If aid donors reward good human rights practices, then aid recipients face incentives to constitutionally commit to human rights. It can moreover induce a process of constitutional competition. If one aid-recipient successfully attracts aid through constitutional reforms, others may follow in what will be a “race to the top.”⁵⁰¹ Bi-lateral aid donors may even resort to “aid tournaments,” explicitly inducing competition among potential aid recipients.⁵⁰²

To some extent, aid donors, and powerful states more generally, may be genuinely interested in improving governance in foreign countries. In these cases, constitutional reforms, as one commentator puts it, are “the gift of freedom from one country and culture to another”⁵⁰³ But it is plausible that self-interest also plays at least some role. At the height of the cold war, the U.S. and the Soviet Union sought to

⁴⁹⁶ WADE JACOBY, *IMITATION AND POLITICS* 29 (2000).

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*, at 29.

⁴⁹⁹ Foreign Assistance Act, 22 U.S.C. par. 2151(a) (2000)

⁵⁰⁰ See e.g., Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?* 5 J. EC. GROWTH 33 (2000); Jakob Svensson, *supra* note 495.

⁵⁰¹ Law, *supra* note 453, at 1281, 1292-93.

⁵⁰² For a description of “aid tournaments” see CLARK C. GIBSON ET AL. *THE SAMARITAN’S DILEMMA: THE POLITICAL ECONOMY OF AID ALLOCATION* 97 (2005); Jakob Svensson, *Why Conditional Aid Does Not Work and What Can Be Done About It?* 70 J. DEV. EC. 381 (2003).

⁵⁰³ Katz, *supra* note 475, at 184.

promote their liberal or socialist constitutional arrangements to secure political alliances. Countries with a socialist constitutions belonged to the Soviet camp, while countries with liberal constitutions fell in the camp of liberal Western nations. Today, powerful states seek to promote liberal democracy and free market economies. Liberal democracy is not only beneficial for the democratizing nation, but arguably has global spill-over effects, in the form of increased global security and trade.⁵⁰⁴ The link between liberal democracy and global security has its basis in Immanuel Kant famous “democratic peace thesis”, which holds that democracies do not fight each other. By now, there exists a substantial body of international relations scholarship that has found empirical support for this thesis.⁵⁰⁵ The implication of the thesis is that it is in powerful states’ interests to increase the number of democracies in the world. The link between liberal democracy and trade has its basis in a related body of international relations literature, which has empirically demonstrated that democracies enjoy stronger trade relationships.⁵⁰⁶ Again, powerful states benefit from increasing the number of democratic regimes around the world. Indeed, it has been noted that these insights constituted a central premise of the “Clinton administration’s foreign policy”, which stressed that “[a]ll of America's strategic interests -from promoting prosperity at home to checking global threats abroad before they threaten our territory- are served by enlarging the community of democratic and free market nations.”⁵⁰⁷

But when powerful states promote certain constitutional features, such as liberal democracy, and constitutional protection of the free market, they do not necessarily promote their own constitutional arrangements. Take the example of the colonial powers. In some cases, colonial powers modeled the post-colonial

⁵⁰⁴ JOANNE GOWA, *BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE* 3 (1999).

⁵⁰⁵ See e.g., Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Peace, 1946-1986*, 87 AM. POL. SCI. REV. 624, 624 (1993).

⁵⁰⁶ See e.g., John R. Oneal & Bruce M. Russett, *The Classic Liberals Were Right: Democracy, Interdependence and Conflict, 1950-1985*, 41 INT’L STUD. Q. 267, 270-71 (1997); Edward D. Mansfield et al., *Free to Trade: Autocracies, Democracies, and International Trade*, 94 AM. POL. SCI. REV. 305, 318 (2000).

⁵⁰⁷ THE WHITE HOUSE, *A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT* 1, 22 (1995). See also DAN REITER & ALAN C. STAM, *DEMOCRACIES AT WAR* 2 (2002).

constitutional landscape after their own, as the U.S. did in the Philippines.⁵⁰⁸ But in other cases, they used some other template, such as the U.K, which imposed a Bill of Rights on its colonies even though it notoriously lacked such a Bill of Rights itself. The same may be true for aid donors. Today, the U.S., for example, may seek to promote rule-of-law and democratization without necessarily imposing the U.S. constitution. The U.S. Constitution after all contains relatively few enumerated rights and includes obscure rights such as “the right to bear arms.” Moreover, there is a growing consensus that a strong presidential system, as embodied by the U.S. Constitution may not be the best constitutional prescription for young democracies, as a strong executive may easily degenerate into a dictatorship.⁵⁰⁹ In sum, coercion has two possible outcomes. Constitutions may come to resemble the constitutions of a powerful state. Yet perhaps more plausibly, through coercion, the constitutions of coerced nations may also come to resemble one another, because they are all products of the same coercive pressures.

At the same time, it should be noted that, in recent years, the wisdom behind one-size-fits all promotion of free market institutions and rigid constitutional constraints is increasingly challenged in development circles.⁵¹⁰ Instead, there is a growing recognition that, as the World Bank has put it, “attempts to transplant formalist rule of law to developing and/or democratizing countries could actually be counter-productive for economic, institutional and political development” and that the “economic impact of a particular set of institutions often depends on context.”⁵¹¹ More generally, as described in the previous chapter, there is a growing post-modernist awareness that constitutions ought to be tailor-made to local circumstances. If this new wisdom catches on, coercive pressures may no longer promote one particular type of model, but may facilitate local solutions instead.

⁵⁰⁸ BILLIAS, *supra* note 431, at 229-233.

⁵⁰⁹ See CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC* (2005).

⁵¹⁰ Trubek, *supra* note 489, at 81-94 (describing “second phase” in development that recognizes “context”).

⁵¹¹ *Id.* at 91 (quoting the World Bank website).

Moreover, it should be noted that the “silver bullet” of rule-of-law reform is not exactly a novel one. It has been argued that the strong focus on the rule-of-law in the 1990s, was in fact a reinvention of an older project, that of the “law-and-development movement.” The law and development movement was “an overwhelmingly American movement, heavily influenced by modernization theory, which believed that the law could speed up social, political and economic convergence of the Third World with the West.”⁵¹² One of its basic premises was that “rules are consciously designed to achieve social purposes or effectuate basic social principles.”⁵¹³ It was particularly prominent in the 1950s and the 1960s. But in the mid 1970s, the founders self-proclaimed the movement to be dead.⁵¹⁴ Today, the agenda that was once carried by the professors at elite American law schools has been reinvented by economists and international development institutions. But when seen together, these two movements have provided a continuous inflow of financial assistance for Western-style constitutional reform, from the 1950s more or less up till this very day (with only the small post-modern current as a possible caveat to this claim).

2. Competition- A second diffusion mechanism is competition. Competition refers to the rivalry among two or more states for material benefits. It is well established that policy choices in one jurisdiction can produce economic externalities in others. When such policy choices affect the flow of economic resources between jurisdictions this induces competition.⁵¹⁵

The idea that nations compete for foreign capital is not a novel one. In 1776, Adam Smith postulated that “the proprietor of stock is properly a citizen of the world, and is not necessarily attached to any particular country. He would be apt to abandon the country in which he was ... assessed to a burdensome tax, and would remove his

⁵¹² Gordon Barron, *The World Bank and Rule of Law Reforms*, LSE Working paper 1, 5 (2005).

⁵¹³ David M. Trubek, & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISCONSIN L. REV. 1062, 1071-72 (1974).

⁵¹⁴ *Id.*

⁵¹⁵ Brueckner, *supra* note 450.

stock to some other country where he could either carry on his business or enjoy his fortune more at his ease.”⁵¹⁶ But also Karl Marx observed that “the intellectual creations of individual nations become common property ... The bourgeoisies, by the rapid improvement of all instruments of production, by the immensely facilitated means of communication, draws all, even the most barbarian, nations into civilization ... It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilization into their midst, i.e. to become bourgeois themselves. In one word, it creates a world after its own image.”⁵¹⁷

Let us consider the logic of constitutional competition for economic resources. Where economic resources move freely across borders, countries will act strategically to attract these resources to their jurisdiction. Thus, countries may compete for foreign capital or exports through the adoption of policies or institutions that are attractive to investors and buyers in international markets.⁵¹⁸ Such economic competition has been shown to take place through trade liberalization,⁵¹⁹ the adoption of welfare policies,⁵²⁰ the adoption of tax policies,⁵²¹ the signing of bilateral investment treaties⁵²² and even the introduction of democracy.⁵²³ In all these cases, the empirical evidence suggests that if one country adopts a particular policy or institution, its competitors are likely to follow so as to safeguard their position in export and international capital markets.

⁵¹⁶ Law, *supra* note x (citing Adam Smith)

⁵¹⁷ JACOBY, *supra* note x, at 4 (citing Karl Marx).

⁵¹⁸ Leonardo Bartolini & Allen Drazen, *Capital Account Liberalization as Signal* 87 AM. EC. REV. 138, 139 (1997).

⁵¹⁹ Simmons & Elkins, *supra* note 447, at 171.

⁵²⁰ David Figlio et al., *Do States Play Welfare Games?* 46 J. URBAN ECONOMICS 437-54 (1999).

⁵²¹ Timothy Besley & Anne Case, *Incumbent behavior: vote-seeking, tax-setting, and yardstick competition*, 85 AM. EC. REV. 25-45 (1995); Charles M. Tiebout, *A Pure Theory of Local Public Expenditures*, 64 J. POL. ECON. 416-24 (1956).

⁵²² Elkins et al., *supra* note 449.

⁵²³ Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment* 57 INT’L ORG. 587 (2003).

But in addition to these economic policies, foreign buyers and investors may also favor a protection of property rights and basic human rights. For instrumental reasons, they value of strong protection of property rights. Foreign investors would not dedicate long-time investments to countries where their property may be expropriated. For example, in a recent (and somewhat controversial) trend, multinational corporations increasingly buy farmland in developing countries, particularly in Sub-Saharan Africa, to produce bio-fuels and increase food supplies.⁵²⁴ But such “land-buying” only occurs in countries where property rights are secure. As one investor puts it: “We only operate in counties where we can have clear land title. If ... we don’t have a 99-year lease from the government then we won’t operate in that country.”⁵²⁵ In general, secure property rights increase long-term investment because they reduce uncertainty and stabilize expectations.⁵²⁶ In the absence of secure property rights, investors will only invest in projects with a short time horizon, or refrain from investment altogether.⁵²⁷ It is for these reasons that development assistance is often conditioned upon the adoption of property rights, such as in the Washington consensus.⁵²⁸

But foreign buyers and investors may also be interested in a more general human rights protection. This claim is perhaps less obvious. There exists a classical view of money-hungry capitalists favoring states with low wages and poor working conditions.⁵²⁹ Child labor, long working days and low wages all lower the cost of production.⁵³⁰ Yet this “classical” view is increasingly challenged by new empirical evidence that suggests that the opposite may be true. Numerous empirical studies suggest that foreign buyers and investors in fact prefer a *protection* of basic human

⁵²⁴ The Economist, *Buying Farmland Abroad: Outsourcing’s Third Wave* (May 21st, 2009).

⁵²⁵ Katie Hunt, *Africa Investment Sparks Land-Grab Fear*, BBC News (August 5th, 2009).

⁵²⁶ NORTH, *supra* note 487, at 52.

⁵²⁷ Eirik Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LIT. 1137, 1139 (1972).

⁵²⁸ JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 73-74 (2002).

⁵²⁹ Law, *supra* note 453, at 1313.

⁵³⁰ *Id.*

rights.⁵³¹ *Ceteris paribus*, they invest in the countries that respect human rights. First, as David Law explains, regimes with strong human rights records are typically stable and transparent ones. Stable regimes enjoy popular support, while repressive regimes are potential grounds for social clashes and popular uprisings.⁵³² Repressive regimes moreover typically control information flows, which makes it hard for investors to anticipate relevant future developments that will affect their activities and make it nearly impossible to calculate the potential returns to their investments.⁵³³ Thus, because of their instrumental attachment to stability and transparency, investors may favor countries with a strong human rights record.⁵³⁴ Second, foreign investors may favor a protection of basic civil liberties, so that they will be able to attract skilled workers, who typically would not want to work in countries where their basic rights are not secure.⁵³⁵ Third, there exist negative reputational effects for foreign buyers and investors who invest in countries with a bad human rights record. Associating with repressive regimes has negative reputational effects. Consumers prefer “fair trade” and reject products manufactured at the expense of human rights. They do not want “blood diamonds”, or clothes manufactured through child labor. For example, when Apple was confronted with a wave of suicides of those who manufacture the “Ipad”, it was quick to increase salaries.⁵³⁶ Bad human rights are bad publicity, and bad publicity is costly. In general, all things equal, foreign buyers and investors may favor those countries with a strong human rights record.

⁵³¹ See e.g., Matthias Busse & Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment* 23 EUR. J. POL. EC. 397, 397-415 (2007); Shannon Lindsey Blanton & Robert G. Blanton, *Human Rights and Foreign Direct Investment* 45 BUSINESS AND SOCIETY 464, 464-85 (2006). See Law, *supra* note 453, at 1314-15 for a comprehensive overview of the empirical literature.

⁵³² See Law, *supra* note 453, at 1317-18.

⁵³³ *Id*

⁵³⁴ *Id*

⁵³⁵ *Id.*, at 1321-42.

⁵³⁶ The Independent, *Concerns Over Human Costs Overshadows Ipad Launch* (May 27th, 2010).

If economic capital indeed favors human rights, the constitution may be used to offer attractive bundles of human rights to foreign buyers and investors.⁵³⁷ The fact that a constitution is typically a highly visible legal document, judicially enforceable and hard to amend, renders it particularly suitable to do so. Constitutional promises are potentially credible ones. Constitutions send a strong signal to potential buyers and investors.⁵³⁸ As a result, the constitution may be employed as a strategic tool to attract economic benefits.⁵³⁹

Thus, by offering attractive bundles of constitutional rights, governments may attract economic benefits. For example, in Egypt, the Sadat regime enshrined property rights in the constitution and established an independent constitutional court to enforce these rights simply to attract foreign investors. Indeed, the Egyptian government has largely respected the independence of the court, even when the court ruled against the government. The Egyptian government thus seems to believe that an independent court that oversees the constitution's anti-expropriation guarantee will help to attract foreign investors and to improve the country's economic position.⁵⁴⁰ Also the New Zealand Bill of Right has been described as a product of a transition to a "neo-liberal economic order" with the goal of facilitating large-scale foreign borrowing.⁵⁴¹ And the South African constitution, too, embraced judicially enforceable constitutional property rights to "prevent capital flight and to attract foreign investment."⁵⁴²

⁵³⁷ Law, *supra* note 453, at 1282, 1307-21, 1321-42. *See also* Tushnet, *supra* note 708, at 991 (noting that nations compete by "providing constitutional protections for investment and having them enforced by an independent court"); Cass Sunstein, *On Property and Constitutionalism*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 383-384 (Michael Rosefeld ed., 1994) ("firm constitutional protection of property rights, combined with an independent judiciary, is an excellent way of encouraging international investment in one's nation"); Howard, *supra* note 429, at 405 ("drafters may also see a constitution as a way of attracting Western trade and investment").

⁵³⁸ Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL. STUD. 83, 85-94, 98 (2002).

⁵³⁹ Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 953 (2005).

⁵⁴⁰ TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT* 67-70, 77-79 (2007).

⁵⁴¹ HIRSCHL, *supra* note 490, at 84-88.

⁵⁴² *Id.*, at 95-96.

If constitutional protection of rights attracts foreign investors and buyers, this may result in a constitutional competition among nation states. If one country reaps economic benefit by strategically offering attractive bundles of constitutional rights, other countries may follow their example, producing a “race to the top.”⁵⁴³ Where governments in the absence of economic competition may have preferred a “low rights-equilibrium,” competitive pressures push them in a different direction.⁵⁴⁴ They give up the human rights policies they favor most and increase the protection of rights. As a result, protective constitutional rights may diffuse among economic competitors.

Economic competitors, for the purpose of this chapter, are the countries that compete for the same foreign direct investment or for the same export markets. In fact, empirical studies have shown that those who invest in a country are usually the same who buy from the country. But it is also possible to conceptualize a competition for foreign aid. Foreign aid, after all, is also a form of economic capital. And like investors, aid donors, too, favor countries that protect human rights by constitutional means. As a result, if one country attracts foreign aid by offering attractive bundles of constitutional rights, then other countries may follow its example. The result is a constitutional competition for foreign aid. However, because this process is spurred by the carrots and sticks of foreign aid donors, this chapter primarily conceptualizes it as a form of coercion, as discussed in the previous section.

2. *Altered Beliefs: Learning.*

A third diffusion mechanism is learning. Like constitutional coercion and constitutional competition, constitutional learning implies that the constitutional choices of one country affect the constitutional choices of others. But the logic behind learning is distinctly different from the logic behind coercion and competition. When coercion or competition is at work, constitutional commitments are altered because of material costs and benefits. Countries borrow each other’s constitutional designs to attract benefits and avoid sanctions. By contrast, when learning is at work, countries

⁵⁴³ See Law, *supra* note 453, at 1317-18.

⁵⁴⁴ *Id.*

borrow each other's constitutional provisions because the constitutional choices of others have altered their pre-existing beliefs. Such learning can work either through new information or through interpersonal interactions.⁵⁴⁵

There are two distinctly different approaches to learning. The first approach stresses information, rational decisions and new truths, while the second approach stresses interpersonal interaction, networks and altered beliefs.⁵⁴⁶ The first approach is epitomized by "Bayesian learning" and is particularly prominent in economics.⁵⁴⁷ According to Bayesian learning, individuals "rationally add new data to their prior knowledge and revise their behavior accordingly."⁵⁴⁸ The more information becomes available, and the more consistent this information, the more likely that the information is "right." A famous application of the Bayesian logic is the "Condorcet Jury Theorem." The more jurors independently decide that a defendant is guilty, the higher that probability that his conviction is right; and with an infinite number of jurors, the probability that they convict the right person is 100 percent.⁵⁴⁹ Eric Posner and Cass Sunstein apply the Condorcet jury theorem to comparative constitutional law. According to Sunstein and Posner, the more countries have independently adopted a certain constitutional principle or practice, the more likely that this principle or practice is "right." Under this logic, constitution-makers should borrow those foreign constitutional rules that have independently been adopted by the largest number of states, because those rules are most likely to be the superior or correct ones.⁵⁵⁰ Thus, the common constitutional denominator provides information on the most successful constitutional rules.

⁵⁴⁵ Simmons et al., *supra* note 452, at 795.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*, at 795-797.

⁵⁴⁸ *Id.*, at 795-796.

⁵⁴⁹ See e.g. Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech and Correlated Votes* 36 AM. J. POL. SCI. 617 (1992).

⁵⁵⁰ Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

Yet, psychologists have shown that the strict Bayesian learning model does not hold in practice.⁵⁵¹ Herbert Simon argued that behavior is characterized by “bounded rationality”, or that actors do not have the capacity to assess all available information when making a decision. Daniel Kahneman added to this that learning is a cognitive process in which actors only learn from the alternatives they are actually familiar with, and decide between them based on principles of fairness, their knowledge of past events, as well as their general aversion to loss.⁵⁵² Actors thus take cognitive shortcuts, called “heuristics,” thereby focusing on readily available success stories, and basing their decisions upon this information. Such “heuristics” may result in “herd behavior” or “cascade effects,” where actors imitate early adopters without exercising their own judgment and thereby unduly magnify the influence of the early adopters, who may themselves have been mistaken. If true, the common constitutional denominator may also be the result of “constitutional cascades”, wherein constitution-makers follow each other without independent rational judgment.⁵⁵³

This is the point where the second approach to learning starts of.⁵⁵⁴ This approach is particularly prominent in sociology and fits with the constructivist tradition in the social sciences. It holds that, in the face of imperfect information, learning may be “channeled” through social networks.⁵⁵⁵ Networks facilitate information flows but also produce social interaction and social relationships. According to sociological theories, social networks may form through memberships in international organizations, or through “political, cultural, or socio-economic reference groups,” which are described as “epistemic communities of shared norms and beliefs.”⁵⁵⁶ Through interaction in such networks, agents not only exchange

⁵⁵¹ Simmons et al., *supra* note 452. Simmons and Elkins, *supra* note xx.

⁵⁵² Daniel Kahneman, *Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice*, Nobel Prize Lecture (2002).

⁵⁵³ Posner & Sunstein, *supra* note 550, at 160-64.

⁵⁵⁴ Simmons et al., *supra* note 452, at 795.

⁵⁵⁵ See e.g., Sarah M. Brooks, *Interdependent and Domestic Foundations of Policy Change: The Diffusion of Pension Privatization Around the World*, 49 INT. STUD. Q. 273 (2005); Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SC. REV. 1174 (1973).

⁵⁵⁶ Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination* 46

information but also “convince” each other. In this respect, sociological approaches tend to view learning as a complex cognitive process rather than a simple “information updating.” Learning does not just generate new truths, but also generates new “beliefs.” This type of learning works through persuasion. Persuasion “requires argument and deliberation in an effort to change the minds of others. Persuaded actors ‘internalize’ new norms and rules of appropriate behavior and redefine their interests and identities accordingly.”⁵⁵⁷ The touchstone of persuasion is that states are “consciously convinced of the truth, validity or appropriateness of a norm, belief or practice.” States actively evaluate the content of a message and “change their minds.”⁵⁵⁸ Such constructivist learning does not have to be a strictly rational process. As Amitai Etzioni explains, “identification with authority figures, group enthusiasm, leadership, mass hysteria, mob rule and propaganda all hold elements of persuasion.”⁵⁵⁹ In this respect, sociological learning is different from Bayesian learning, which assumes that internalization is a rational process.⁵⁶⁰ New information reveals “new truths” that are internalized by “accepting a new reason.”

The notion of learning motivates the very field of comparative constitutional law. It is learning that, allegedly, drives the assembling of foreign texts by constitution-makers. It is learning, and “persuasive authority,” that explains why judges cite foreign law in interpreting the constitution.⁵⁶¹ And it is learning, moreover, that motivates most contemporary comparative constitutional law textbook.⁵⁶² Constitutional comparisons are a “mirror of self-reflection.”⁵⁶³ Through

INT’L. ORG. 1 (1992).

⁵⁵⁷ Goodman & Jinks, *supra* note 453, at 635; Amitai Etzioni, *Social Norms: Internalization, Persuasion and History*, 34 L. & SOC. REV. 157, 169-70 (2000).

⁵⁵⁸ Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* 5-6 (Manuscript, 2009).

⁵⁵⁹ Etzioni, *supra* note 557, at 169-170.

⁵⁶⁰ Simmons et al., *supra* note 452, at 795.

⁵⁶¹ Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003).

⁵⁶² See e.g. VICKY JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

⁵⁶³ Frank I. Michelman, *Reflection*, 82 TEXAS L. REV. 1737, 1737 (2004).

constitutional comparison, the so-called “laboratory of democracy” can be extended to the global plane.⁵⁶⁴ Or, as U.S. Supreme Court Justice Breyer puts it, foreign law “casts an empirical light on the consequences of different legal solutions to a common problem.”⁵⁶⁵

Constitution-making has, at times, been described in such terms. For example, Mario Eindauni describes the writing of the 1948 Italian constitution as an 18-month genuine and deliberative learning process. The drafters of the Italian constitution intellectually engaged with the constitutional classics. “Continuous reference was made in the many thousands of pages of debate to the classical political philosophers from Aristotle to Montesquieu and Rousseau...The communist called in the authority of George Washington and Benjamin Franklin to weaken the argument for a upper chamber, while the Christian Democrats quoted at length the authority of Stalin to support the thesis that the chambers had to be of equal power.”⁵⁶⁶ And the drafters deliberated thoughtfully on foreign practice; “[t]he Bonapartist regimes, the Weimar experiment, and the faith of the French constitutional project of 1946- all were considered.” The resulting document reflected “the influence of many lands.”⁵⁶⁷

However, in most cases, real-world constitutional learning is likely to be limited by imperfect information and cognitive biases that favor the constitutional practices of some countries more than others. Like other policymakers, constitution-makers lack both the information and cognitive capacity to make the best possible choices and invariably rely upon a variety of imperfect heuristics.⁵⁶⁸ According to Mark Tushnet, real-world constitution-making is often akin to “bricolage,” whereby the constitution is “assembled from provisions that a constitution’s drafters selected

⁵⁶⁴ See *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis J., dissenting) (describing the federal system in the U.S. as a “laboratory of democracy”).

⁵⁶⁵ *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). *But see* *Lawrence v Texas*, 539 U.S. 558 (2003) (Scalia Dissent) (arguing that the US has nothing to learn from “foreign fads and fashions”).

⁵⁶⁶ Mario Eindauni, *The Constitution of the Italian Republic*, 4 AM. POL. SC. REV. 661, 662 (1948).

⁵⁶⁷ *Id.*

⁵⁶⁸ Zachary Elkins & Beth Simmons, *On Waves, Clusters and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACADEMY POL. & SOC. SCI. 33, 43-44 (2005).

almost at random from whatever happened to be at hand when the time came to deal with a particular problem.”⁵⁶⁹

Assuming that it is impossible to consider all foreign constitutional practices, whose experiences do constitution-makers draw on? Why did the drafters of the Nigerian constitution draw up a list of all constitutions previously drafted by English lawyers⁵⁷⁰ while the drafters of the 2008 Bhutanese constitution assembled the constitutions of constitutional monarchies? From the theoretical discussion above, it follows that constitution-makers learn from states to which they are somehow “close,” or from sort of constitutional “reference-group.”⁵⁷¹ Proximity implies information availability as well as interaction, both of which facilitate learning.⁵⁷² Moreover, constitution-makers, for functional reasons, may turn to the models of those with whom they share important pre-existing similarities.⁵⁷³ When considering the constitutional practices of foreign states, they are likely to limit themselves to countries that are functionally similar, which, in turn, may also happen to be the countries with whom they interact more and share more information.

Empirically, information availability, interaction and pre-existing similarity are observationally equivalent, as all do imply proximity. Similarly, one cannot say if states actually “internalize” new norms and “change their minds” (as in sociological learning), or whether they merely update their information (as in Bayesian learning). At the same time, diffusion studies commonly assume that when proximity spurs diffusion, learning may be at work. As Israeli Supreme Court Justice Barak puts it, only when “the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source

⁵⁶⁹ See Tushnet, *supra* note 427, at 1285-1301.

⁵⁷⁰ See Parkinson, *supra* note 437.

⁵⁷¹ See EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 18 (5th ed. 2003) (noting that interpersonal communication channels are most efficient in persuading an individual to accept an ideas, especially if individuals share pre-existing socio-economic, or other types of similarity).

⁵⁷² *Id.*, at 18.

⁵⁷³ *Id.*, at 18 (noting that ideas spread faster among individuals that share pre-existing similarities); Elkins & Simmons, *supra* note 568, at 42-45 (discussing reference groups).

of comparison and inspiration.”⁵⁷⁴

There are different types of proximity that may facilitate constitutional learning. The remainder of this sub-section will discuss five potentially relevant types of pre-existing similarities that may facilitate constitutional learning, each of which will be tested in the empirical analysis in section C. First, countries may learn from foreign countries with which they share the same legal system, such as a common law or a civil law system. Even though it is frequently argued that constitutional law transcends the traditional boundaries between common and civil law systems,⁵⁷⁵ there are a number of reasons to believe that constitution-makers consult the constitutional practices of nations with similar legal systems. Constitutional designs borrowed from similar legal systems are likely to “fit” better with existing local legal practice.⁵⁷⁶ In addition, it has long been argued that countries with similar legal systems hold similar values and beliefs on how to constitutionally protect freedom. In particular, as Holger Spaman explains, common law systems have a long tradition of limiting government through a strong judiciary, while civil law systems have a more subordinate judiciary and a tradition to empower the government to fulfill positive rights and equality, rather than to constrain its actions.⁵⁷⁷ But countries with the same legal origins also interact more and exchange more information. Common law countries interact in the Commonwealth, which offers a number of formal opportunities for legal exchanges, most notably the Privy Council.⁵⁷⁸ Commonwealth countries moreover receive legal development assistance from the British Institute of

⁵⁷⁴ Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy* 116 HARV. L. REV. 19, 114 (2002).

⁵⁷⁵ See e.g. Lorreine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 89-90 (Suijt Choudhrey ed., 2007); Tushnet, *supra* note 708, at 985-86.

⁵⁷⁶ Berkowitz et al., *supra* note 487.

⁵⁷⁷ Holger Spaman, *Contemporary Legal Transplants- Legal Families and the Diffusion of (Corporate) Law*, 2009 BRIGHAM YOUNG U. L. REV. 1813 (2010); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEG. STUD. 502 (2001). See also Chapter IV *supra* and Chapter VI *infra*.

⁵⁷⁸ Spaman, *supra* note 568, at 1813. See also Jackson, *supra* note 493, at 40 (describing participation in the British Commonwealth as a source of convergence).

International and Comparative Law (BIICL) and its “commonwealth legal advisory service.”⁵⁷⁹ Moreover, students from commonwealth countries are often trained in England. In the same vein, civil law countries also have a number of forums for legal exchanges. For example, the French National Magistrates School trains about 3000 civil law judges per year and the “Organisation Internationale de la Francophonie” disseminates legal information from civil law systems.⁵⁸⁰ And while students from commonwealth countries become Rhodes scholars in Oxford, civil lawyers traditionally receive their legal education in France.⁵⁸¹ Thus, countries with the same legal origin have a long tradition of exchanging legal materials, which may also facilitate constitutional exchanges.⁵⁸²

Second, countries may learn from foreign countries with which they share trade relationships, through import or exports. Trade partnerships imply information exchanges and interaction. But they also suggest a more specific functional rationale for constitutional borrowing. Countries may “harmonize” their legal system with those with whom they trade, in order to ease cross border transactions.⁵⁸³ Under this logic, for example, the Netherlands may harmonize its constitution with that of Germany, its main trade partner, in order to facilitate imports and exports. And indeed, when the radical right-wing, anti-Islam and anti-immigrant political party of Geert Wilders became the coalition-partner of the new conservative Dutch government, political leaders voiced fears that this would spark disapproval from Germany and would hurt German-Dutch trade relationships. Of course, this example does not involve formal constitutional amendment, but it nonetheless illustrates that trade relationships may in fact shape human rights rhetoric in constitutional questions.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

⁵⁸² *Id.*

⁵⁸³ Posner & Sunstein, *supra* note 550, at 176; Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L. L. 743, 746-49 (1999).

Third, constitution-makers may learn from foreign countries with which they share a common language. A common language removes obstacles for interaction and facilitates information flows. Moreover, a shared language may also be a proxy for other types of similarity, of a cultural and historical nature. Under this logic, countries with the same language will borrow each other's constitutional designs. As an example, Latin American constitutions, which have been described as so similar that they "not only contain the same provisions, but also the same typographical errors," may bear resemblances to each other as a result of learning through linguistic ties.⁵⁸⁴

Fourth, countries may learn from countries with which they share a common religion. Religious views may have functional implications for human rights. Because of religion, countries may extend the right to life to "the unborn," as in the Irish constitution, or curtail women's rights, as in Islamic constitutions. But religious partners may also simply interact more and exchange information. Thus, as an example, if such religious learning is at work, constitution-makers in Islamic countries will consult each other's constitutional arrangements, while a catholic country like Ireland may borrow from Portugal or the Latin American constitutions.

Fifth, constitution-makers may learn from their military allies. Military allies may interact more and exchange more information. But at the same time, military alliances may also be indicative of complex geopolitical relationships and historical conflict, which, in turn, may actually decrease the probability of borrowing. Fred Schauer notes that geopolitical identity politics may explain why "the Irish avoid British models, the Vietnamese avoid French models and the Canadians, worried about being perceived as the 51st state, avoid American models."⁵⁸⁵ Along the same lines, Eric Posner and Cass Sunstein note that Israel avoids Arab constitutional practice, while India avoids Pakistani examples.⁵⁸⁶ But while keen to avoid each other in the constitutional realm, these countries may nonetheless sign peace agreements and military treaties for strategic reasons, and to avoid war. Thus, when controlling

⁵⁸⁴ Zachary Elkins, *Constitutional Networks*, in NETWORKED POLITICS: AGENCY, POWER, AND GOVERNANCE 43, 43 (Miles Kahler ed., 2009).

⁵⁸⁵ Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 253, 260 (Joseph S. Nye & John J. Donahue eds., 2000).

⁵⁸⁶ Posner & Sunstein, *supra* note 550, at 177.

for all types of other similarity, it is not a-priori obvious that military alliances actually facilitate constitutional learning.

Finally, constitution-makers may learn from the constitutional provisions of countries that are geographically close. Countries that are geographic neighbors, too, are likely to interact and exchange information. Constitution-makers often make reference to regional partners in the preamble. For example, Brazil's constitution of 1988 notes that "The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the people of Latin America, with a view toward forming a Latin-American community of nations." At the same time, one may expect that the importance of geography may be limited in a globalized age. In an age where all constitutional documents can be found on the World Wide Web, geographical ties alone may not be the primary link between countries. Other types of similarity, as discussed above, may be more important instead.

Of course, some of these different types of proximity may seem stronger than others. Yet, diffusion studies have shown "the strength of weak ties", or that, in social networks, "acquaintances" may be just as important as "friends."⁵⁸⁷ Moreover, the aforementioned types of proximity often overlap.⁵⁸⁸ Countries with the same language may also share the same religion and be geographically close. Take the example of the Latin American countries. They all speak Spanish, they are all mainly catholic and are all located on the same continent. To tease out which of those (if any) determine constitutional borrowing, the empirical model presented in the next sections will include all these different types as alternative explanatory variables. As a result, one can interpret the causal effect of, let's say religion, while controlling for similarity in language and geographic proximity.

⁵⁸⁷ Mark S. Granovetter, *The Strength of Weak Ties* 78 AM. J. SOC. 1360 (1973); Mark S. Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, SOCIAL THEORY 1 201 (1983).

⁵⁸⁸ See e.g. Spamann, *supra* note 582, at 30.

3. *Social Benefits and Cognitive Pressures: Acculturation.*

A fourth diffusion mechanism is acculturation. Acculturation is “the general process by which actors adopt the behavioral patterns of the surrounding culture.”⁵⁸⁹ The same mechanism has also been described as “emulation”, “mimicry”⁵⁹⁰, “status maximization”, “social influence”⁵⁹¹ or “reputational cascades.”⁵⁹² This mechanism, which I will refer to as “acculturation,” has its roots in the “new institutionalist” school of organizational sociology.⁵⁹³ Organizational sociology has long demonstrated that organizations routinely follow taken-for-granted models regardless of their functional utility.⁵⁹⁴ Models are adopted not because of their utility, but because of their legitimacy, and the social relationships they represent.

These insights have been translated to state behavior by the “world polity school” in sociology (also “Stanford school”).⁵⁹⁵ The core premise of this school of thought is that “many features of the contemporary nation-state derive from worldwide models constructed and propagated through global cultural and associational models.”⁵⁹⁶ States conform to “global blueprints,” not because of functional utility, but because they represent the social “norms” of the international community- or “legitimate scripts of modern statehood.”⁵⁹⁷ Or, as the German

⁵⁸⁹ Goodman & Jinks, *supra* note 453, at 626.

⁵⁹⁰ Meyer & Rowan, *supra* note 593.

⁵⁹¹ Peyton H. Young, *Innovation Diffusion in Heterogeneous Populations: Contagion, Social Influence, and Social Learning*, 99 AM. EC. REV., 1899–1924 (2009).

⁵⁹² Sunstein & Posner, *supra* note 550, at 161.

⁵⁹³ See e.g., John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147-60 (1983).

⁵⁹⁴ Emily M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1382 (2005).

⁵⁹⁵ John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997).

⁵⁹⁶ *Id.*, at 144-45.

⁵⁹⁷ David John Frank et al, *The Nation-State and the Natural Environment Over the Twentieth Century*, 65 AM. SOC. REV. 96 102-03 (2000).

philosopher Friedrich Hegel (1770-1831) noted centuries ago “if a civilized nation lacks in its eyes and the eyes of others a universal and universally valid embodiment in laws, it fails to secure recognition from others.”⁵⁹⁸

Such a process of acculturation is different from coercion and competition in that states copy the constitutional provisions of others not because of material cost and benefits, but because of social rewards and sanctions. To some extent, these social rewards and sanctions are external and result from the behavior of others, who engage in “naming and shaming” or “back-patting.” In this respect, acculturation is sometimes seen as a form of “soft-coercion.”⁵⁹⁹ But unlike coercion, acculturation suggests that states also feel an internal desire to belong to self-identified groups of peers. States conform to the social norms of other states, simply to enhance status and legitimacy on the global plane, even when they cannot ascertain that doing so will be materially in their best interest.⁶⁰⁰

Thus, states conform to global “scripts” or “blueprints”, regardless of the content of these scripts. In general, the content of the adopted script is less important than the social relationship it represents. In this respect, acculturation is also different from learning. Where learning takes place, a message is actively assessed, internalized and accepted, as a result of which beliefs are altered. With acculturation, constitutional provisions are adopted, but their underlying logic, or underlying “norms,” are not internalized. As a result, outward conformance may be detached from internal acceptance.⁶⁰¹ A constitution may change, but state preferences do not. Thus, acculturation may result in outward conformity (adoption) without private acceptance or corresponding changes in behavior (implementation and compliance).⁶⁰² The result is a “structural decoupling” between the adopted scripts

⁵⁹⁸ G.W.F. HEGEL, *PHILOSOPHY OF RIGHT*, PAR 39, 218.

⁵⁹⁹ Rosalind Dixon & Eric Posner, *the Limits of Constitutional Convergence*, *CHIC. J. INT’L L.* (forthcoming 2011).

⁶⁰⁰ Meyer et al., *supra* note 595, at 145.

⁶⁰¹ Goodman & Jinks, *supra* note 453, at 638-56.

⁶⁰² Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law* 19 *EUR. J. INT’L L.* 725, 726 (2008).

and actual practices.⁶⁰³ Sociological studies have documented numerous examples of such structural decoupling; states adopt environmental policies in the absence of environmental problems,⁶⁰⁴ they adopt social welfare policies without a budget for implementation,⁶⁰⁵ they establish states ministries that serve no functional purpose,⁶⁰⁶ or they sign international human rights without intention of compliance.⁶⁰⁷ In the constitutional realm, it implies that states may adopt nice-sounding constitutional rights, without making any efforts towards implementation.

Constitutions are widely acknowledged to have both an instrumental and a more symbolic function. On the one hand, constitutions are functional instruments to design desirable traits like democracy, rule of law or wealth.⁶⁰⁸ On the other hand, they are also expressive documents that express national identities and values. It is generally believed that the expressive function steers towards constitutional diversity, as different countries have different identities.⁶⁰⁹ This, in fact, was the central hypothesis of chapter IV. Yet, Meyer and Boli-Bennet argue exactly the opposite: because constitutions are expressive, they can be used to signal conformance to international norms and standards, or global constitutional blueprints.⁶¹⁰ Constitutions may express identity, but identity is externally shaped. Under the logic of acculturation, constitutions, and constitutional rights, are a “script of modernity”, and

⁶⁰³ Ryan Goodman & Derek Jinks, *Towards an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1760 (2005).

⁶⁰⁴ Frank et al., *supra* note 597, at 96.

⁶⁰⁵ David Strang & Patricia Mei Yin Chang, *The International Labor Organization and the Welfare State: Institutional Effects on National Welfare Spending, 1960-80*, 47 INT’L ORG. 235 (1993).

⁶⁰⁶ Young S. Kim et al., *Structural Expansion and the Costs of Global Isomorphism*, 17 INT’L SOC. REV. 481 (2002).

⁶⁰⁷ Goodman & Jinks, *supra* note 453, at 638-56.

⁶⁰⁸ See e.g., COOTER, *supra* note 459. See generally, Chapter IV, section A, *supra*.

⁶⁰⁹ Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Judicial Borrowing*, 1 U. PA. J. CONST. L. 640, 648-50 (1999); Schauer, *supra* note 428, at 912; Meyer et al. *supra* note 595, at 146.

⁶¹⁰ John Boli-Bennett & John W. Meyer, *Constitutions as Ideology* 45 AM. SOC. REV. 525, 526 (1980).

one of the symbols of modern statehood.⁶¹¹ They are adopted for reasons of external legitimacy, and not to reflect internal practices.⁶¹²

In the constitutional realm, there are a number of possible examples of constitutional acculturation, where countries have amended their constitutions to secure recognition from the international community. For example, in Japan, the Meiji Restoration led to the imitation of Western technology and institutions.⁶¹³ These deliberate acts of imitation reflected a desire on the part of Japan to obtain “the respect of the Western powers,”⁶¹⁴ and to convince the world that it was “a modern nation that was the equal of the Western powers, one that would be respected internationally as a modern, ‘civilized’ society.”⁶¹⁵ As another example, the case of post-apartheid South Africa demonstrates how a former “pariah nation” may enhance its international reputation by borrowing constitutional ideas from abroad.⁶¹⁶ According to Heinz Klug, it was the “the emergence of a thin, yet significant international political culture” that explains why a nation in which “the majority of citizens had suffered years of oppression under a European legal system,” adopted a Western liberal constitutional model with a powerful judiciary.⁶¹⁷ Even though the South African constitution-making process has been praised for its broad and inclusive drafting process, the content of the South African constitution was shaped by international norms, not by local identities. Likewise, the internationally isolated

⁶¹¹ Meyer et al, *supra* note 595, at 148.

⁶¹² JACKSON & TUSHNET, *supra* note 562, at 250 (noting that the constitutions are often adopted to “enhance national stature in the eyes of other nations a) by demonstrating progress towards internationally acceptable legal norms and/or b) by manifesting the full attributes of sovereignty”); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES, 26 (2003) (noting that “judicial review forms part of the ‘script’ of modernity and is adopted for reasons of both external legitimacy and internal political logic”).

⁶¹³ See EDWIN O. REISCHAUER, THE JAPANESE TODAY: CHANGE AND CONTINUITY 87 (1988).

⁶¹⁴ *Id.*

⁶¹⁵ D. ELEANOR WESTNEY, IMITATION AND INNOVATION: THE TRANSFER OF WESTERN ORGANIZATIONAL PATTERNS TO MEIJI JAPAN 1, 18-19 (1987).

⁶¹⁶ Schauer, *supra* note 585, at 259.

⁶¹⁷ HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 7 (2000).

government of Taiwan engaged in constitutional reform to create goodwill from other nations.⁶¹⁸ According to Robert Madsen, Taiwan's political leadership "intentionally altered the constitution so as to harmonize that system with the liberal principles that the West and much of the developing world now considered relevant to a nation's moral status."⁶¹⁹

Processes of acculturation are usually considered to be global. All states are acculturated into what is referred to as "world culture." States conform to "global scripts of modernity" that have been institutionalized by a global "world polity," and that result in "global isomorphism."⁶²⁰ And, in fact, various commentators have suggested that the world possesses something like an "international constitutional order," or global constitutional "norms."⁶²¹ Philip Bobbitt, for example, notes that the society of nation states possess a global "constitution," in the form of the "Peace of Paris".⁶²² The basis for this "constitution" is 1990 Charter of Paris, which "places dramatic emphasis upon democratization and human rights: its core provisions single out the protection and promotion of human rights and fundamental freedoms as the first responsibility of government."⁶²³ Like the Charter of Paris, also international human rights treaties that reflect broad international consensus could be taken to represent this type of global constitutional "norms."

At the same time, transnational influence under the logic of acculturation does not necessarily have to be global. Acculturation suggests that transnational influence follows cultural channels. Sociologists of the world polity school assume that culture is global. Yet, if acculturation entails conformity to the "behavioral pattern of

⁶¹⁸ Robert A. Madsen, *The Struggle for Sovereignty Between China and Taiwan*, in PROBLEMATIC SOVEREIGNTY 141, 169-70, 173-74 (Stephen D. Krasner ed., 2001).

⁶¹⁹ *Id.* at 174. See also Anne-Marie Slaughter, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 278, 290 (Ignatieff ed., 2005).

⁶²⁰ See Goodman & Jinks, *supra* note 603, at 1755, 1758 (describing the features of the "world polity", or a global community of states).

⁶²¹ Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 51 (2006).

⁶²² PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 636-37 (2002).

⁶²³ *Id.*, at 637.

surrounding culture,” constitutional borrowing may also follow more specific cultural channels. Culture, in fact, may differ across countries, and some countries may share more cultural commonalities than others. As a result, transnational influence may also follow more specific cultural traits, such as a common language or a common religion, or some other measures of culture. But, in this case, acculturation would be observationally equivalent to learning, especially since we cannot assess the “mind” of the “state” on whether a particular constitutional message is in fact internalized.

B. Empirical Footprints

The previous section has identified four broad mechanisms through which transnational influence may take place: coercion, competition, learning and acculturation. Constitutional rights are a product of *coercion* when they are promoted through the carrots and sticks of powerful states. Constitutional rights are a product of *competition* when states manage to attract economic capital by adopting the constitutional policies of their economic competitors. Constitutional rights are a product of *learning* when constitution making is informed by the constitutional successes and failures in other states. And finally, constitutional rights are a product of *acculturation* when states accrue social benefits, such as international legitimacy, by emulating the constitutional rights of self-identified peers.

The empirical goal of the remainder of this chapter is to establish 1) if constitutions are shaped through transnational influences, and 2) through which mechanisms these influences take place. From the outset, and as discussed in the previous section, it is important to note it is not possible to identify these mechanisms by looking into the “mind” of the “state.” Nonetheless, the previous section has suggested some more specific channels through which these broad mechanisms may manifest themselves. It turns out that not all foreign states are equally influential, and that which states are most influential depends on the mechanism at work. It is these more specific patterns of influence that are the most important empirical footprints of the four mechanisms explored in the previous section.

In the case of *coercion*, transnational influence will manifest itself through colonial power and through foreign aid. Thus, if countries follow the constitutional

decisions of their (former) colonizer and their foreign aid donors, coercion may be at work. Moreover, if countries with the same aid donor or the same colonizer appear to be following each other, than this, too, is indicative of coercion because, in this case, the constitutional provisions of these states are all shaped by the same coercive pressures.

In the case of *competition*, transnational influences will manifest themselves through economic channels. In particular, countries will borrow the constitutional provisions of economic competitors, where “economic competitors” are the countries that seek to attract the same foreign investors and buyers.⁶²⁴

In the case of constitutional *learning*, transnational influences will manifest themselves through different types of proximity, that are indicative of information exchanges, interactions in networks and functional similarity. In particular, if countries follow peers with the same legal origin, with the same religion, with the same official language, trade partners, military allies or geographic neighbors, constitutional learning may be at work.

Finally, in the case of *acculturation*, constitution-makers may simply follow the majority of states, where all states are equally important. In this case, constitutions are shaped by the global “world polity.” But the cultural transmission channel may also be more specific, with acculturation taking place among countries that share specific cultural traits, such as a common language and common religion. Of course, language and religion also indicate interaction and information exchanges, and may thus point at learning. But, arguably, they may also capture cultural relationships that defeat the functional logic of learning.

Such transnational influences, and their more specific manifestations, in principle, could be traced using a number of different methodological approaches. First, in some cases, the constitutional text itself may refer to particular (groups of) foreign nations. A typical place for such references is the preamble. Chapter IV has documented that about 25 percent of the world’s constitutions today make reference to their national history. But some constitutions may also, or perhaps instead, refer to

⁶²⁴ See e.g., Elkins et al., *supra* note 449, at 830 (“trade competitors are also likely to be competitors for fdi and empirical studies show that the two are strongly correlated” because those who buy products to export them abroad are also those who invest in a country).

foreign nations and use the constitution to define their relationship to others. Such references are commonly made along linguistic, regional or more internationalist lines. As an example of a linguistic reference, the 1992 constitution of Cape Verde states that: “the state of Cape Verde shall maintain special ties of friendship and cooperation with other Portuguese speaking countries and with countries which welcomed Cape Verdian emigrants.” As an example of a regional reference, the 2000 constitution of Cote d’Ivoire states that it is “committed to the promotion of regional and sub-regional integration, in view of the constitution of African Unity.” And along internationalist lines, the 1923 constitution of Egypt states that it wants to “ensure the benefits enjoyed by all free and civilized people” and that “[t]his cannot be attained except through the possession of a constitutional regime similar to all modern and perfected constitutional regimes.” In general, a number of constitutions refer to the “international community,”⁶²⁵ the “world community,”⁶²⁶ “the democratic and progressive forces in the world”⁶²⁷ and the adherence to “values common to all mankind.”⁶²⁸ However, such explicit articulations of international identity politics do not necessarily mean that the constitution was actually assembled through borrowing along these lines. It gives little sense of what the constitution actually looks like, and how the constitution in fact resembles others, or the standards of the world community.

A second, and somewhat less naïve, approach to tracing foreign influences would be to locate the origins of constitutional provisions by studying the constitution, and the processes surrounding its adoption. This approach characterizes the legal transplant literature. Legal transplant studies typically document a “direct one way transfer from country A to country B” of “a statute, a code, or a body of legal doctrine.”⁶²⁹ Berkowitz et al., for example, document for 49 countries how their

⁶²⁵ See e.g., Afghanistan Constitution 2005.

⁶²⁶ See e.g., Kazakhstan Constitution 1995; Tajikistan Constitutions of 1992 and 2002.

⁶²⁷ See e.g., Angola Constitutions 1975, 1980 and 1992.

⁶²⁸ See e.g., Belarus Constitutions of 1994, 1996 and 2002.

⁶²⁹ William Twining, *Diffusion of Law: A Global Perspective*, 1, 2-3 (2004).

formal legal system was transplanted and where from.⁶³⁰ Also the “legal origins” literature epitomizes this approach.⁶³¹ La Porta et al., the founders of this literature, classify the formal legal systems of most countries (up to 129) as deriving from either English, French, German, Scandinavian or Socialist legal origin. In their classification, the world consists of different legal families that all spring from a common source. Within legal families, there are important substantive similarities, particularly in the area of private law. Between legal families, by contrast, there are important differences. However, the methodological approach of transplant studies may be more appropriate in the area of private law than in the constitutional realm. Private law is more technical and, in general, may be easier to transplant across borders. While constitution-makers may frequently turn abroad for inspiration, they would rarely import an entire foreign constitutional order wholesale. Instead, bits and pieces of the constitution may be borrowed from different countries. For example, any given country may borrow its economic provisions from its trade partners, while borrowing religious clauses from its religious partners. Even though “every constitution is a transnational constitution”, there may be few “constitutional transplants” in the comparative law sense of the word.

A third approach to identifying transnational influence actually allows for the flexibility to identify different types of influence in different parts of the constitution. This is the approach of diffusion studies in the social sciences. It is this approach that is the basis for the empirical analysis below. Diffusion studies explain the adoption of a particular “trait or practice” as a function of the previous adoption of the same trait or practice by others. Thus, whether or not a country adopts a particular trait or

⁶³⁰ See Daniel Berkowitz, et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003)

⁶³¹ See e.g., Rafael La Porta et al., *Legal Determinants of External Finance*, 53 J. FIN. 1131, 1131 (1997); Edward L. Glaeser & Andrei Schleifer, *Legal Origins*, 117 QUART. J.ECON. 1193, 1193-97 (2002); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POLIT. ECON. 445 (2004); Simeon Djankov et al., *Private Credit in 129 Countries*, 84 J. FIN. ECON. 299 (2007). In general this literature finds that common law system have stronger investor protection, stronger judicial independence and greater economic freedom. *But see*, Mark J. Roe, *Legal Origins and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006) (finding that modern politics, rather than legal origins is responsible for stockholder protection, property rights, and their supporting legal structures); Holger Spamann, *The Anti-Director Rights Index Revisited*, 23 REV. FIN. STUD. 467 (2010) (finding that the main findings of this literature are an artifact of the coding procedure).

practice is explained by whether or not other countries have previously done the same thing. Or, in case of constitutional diffusion, countries adopt particular constitutional provisions because other countries previously adopted the same provision. This approach allows one to trace transnational influences provision-by-provision, rather than for the constitutional document a whole. It does so large-N, or through regression analysis. In particular, the right-hand side of the regression model includes one of more variables that capture the proportion of other countries that have already adopted the trait or practice. The more countries adopt, the higher the probability that any given country will follow their example. But the right-hand side variables are *weighted*, so that each country receives a weight according to its proximity to others. Which countries are important, and how they are weighted, is a function of ex-ant theory. But in most studies, proximity is “more than just geography,” and countries are weighted not only according to space, but also according to cultural, legal or economic ties. This chapter, too, has conceptualized different types of proximity and has linked them to four broad diffusion mechanisms. In particular, and to sum up, it has generated the following hypotheses, which will be tested in the next sections.

H1: *If rights diffuse through colonial ties or through foreign aid relationships, this suggests that coercion may be at work.*

H2: *If rights diffuse among economic competitors, this suggests that competition may be at work.*

H3: *If rights diffuse through different types of proximity- legal, geographical, military, religious or linguistic- learning may be at work.*

H4: *If rights diffuse through cultural channels (either global or more specific), acculturation may be at work.*

C. *Estimating Constitutional Diffusion*

Empirical studies of diffusion typically estimate models of spatial interdependence, developed in the spatial econometrics literature.⁶³² The main focus of the spatial econometrics literature is on the estimation of *theoretical* models of interdependence in which space is not limited to geography but can relate to social, economic, political, or other connections. In contrast, the related “spatial statistics” literature focuses on the estimation of models that are not based on theory but instead treat spatial dependence as a stochastic process only.⁶³³ In the spatial econometrics literature, interdependence is modeled by the inclusion of spatial lags, the coefficients of which capture the average strengths of interdependence. Since the previous sections have conceptualized a number of dimensions along which rights may diffuse, a higher-order spatial lag model is appropriate. In particular, to test the diffusion of constitutional provisions, the following spatial lag model will be estimated:

$$y_{cit} = \rho^1 \sum_{j \neq i} (\omega_{ijt-1}^1 \times z_{cjt-1}) + \rho^2 \sum_{j \neq i} (\omega_{ijt-1}^2 \times z_{cjt-1}) + \dots + \rho^p \sum_{j \neq i} (\omega_{ijt-1}^p \times z_{cjt-1}) + \alpha_{it} + \delta_{ct} + \varepsilon_{cit} \quad (1)$$

In the above equation, the subscripts $c = 1, \dots, N$, $i = 1, \dots, M$, and $t = 1, \dots, T$ index the constitutional provisions, countries, and years in the panel, respectively. Here, y_{cit} is a dummy variable that captures the adoption of provision c by country i in year t . In particular, letting z_{cit} represent a dummy variable that takes a value of one if a country’s constitution contains a provision and zero if it does not, the dependent variable y_{cit} is constructed as follows:

⁶³² Important early contributions include LUC ANSELIN, *SPATIAL ECONOMETRICS* (1988). For a recent literature review, see Robert J. Franzese, jr. & Jude C Hays, *Empirical Models of Spatial Interdependence*, OXFORD HANDBOOK OF POLITICAL METHODOLOGY 570, 574-75 (2008).

⁶³³ Franzese & Hays, *supra* note 632.

$$y_{cit} = \begin{cases} 1 & \text{if } z_{cit} = 1 \text{ and } z_{cit-1} = 0 \\ 0 & \text{if } z_{cit} = 0 \text{ and } z_{cit-1} = 0 \end{cases} \quad (2)$$

The aim of the empirical analysis is thus to explain the adoption (or “onset”) of a constitutional provision, i.e. the presence of a provision in a country’s constitution conditional on the absence of that provision in the previous year.

The spatial lags $\sum_{j \neq i} (\omega_{ijt-1}^1 \times z_{cjt-1})$, $\sum_{j \neq i} (\omega_{ijt-1}^2 \times z_{cjt-1})$, ... and $\sum_{j \neq i} (\omega_{ijt-1}^p \times z_{cjt-1})$ in equation (1) capture the weighted average incidence of constitutional provisions in other countries, hence in all countries $j \neq i$. The weights ω_{ijt-1}^1 , ω_{ijt-1}^2 , ... and ω_{ijt-1}^p correspond to the relative connectivity from country i to country j in year $t-1$ for each of the p dimensions of space (trade relationships, common language, etc.).⁶³⁴ The variable z_{cjt-1} , instead, captures the presence of provision c in country j in year $t-1$. Expressed in less technical terms, the spatial lags thus capture the presence of constitutional provisions in other countries, while recognizing the potential importance of space by giving higher weights to countries that are in closer proximity. The parameters $p \rho^1, \rho^2, \dots$ and ρ^p in equation (1) are the spatial autoregressive coefficients, reflecting the average strengths of interdependence, or diffusion, across each of the space dimensions in the analysis.

Having discussed the spatial lags, I now turn to the other right-hand side variables in equation (1). The country-year fixed effect α_{it} controls for any observed or unobserved characteristics that may vary across countries and years but do not vary across constitutional provisions, such as regime changes, democratization, political instability, or economic growth. Thus, “insurance policies”⁶³⁵ “hegemonic

⁶³⁴ To address potential problems of non-stationarity, I ‘row-standardize’ the spatial weights matrices (as commonly done in spatial econometrics) by dividing each weight by the sum of weights so that $\sum_{j \neq i} \omega_{ijt-1}^1 = 1$, $\sum_{j \neq i} \omega_{ijt-1}^2 = 1$, ... and $\sum_{j \neq i} \omega_{ijt-1}^p = 1$. As a result, the spatial lags can thus be viewed as weighted averages.

⁶³⁵ GINSBURG, *supra* note 612; JODI FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU AND MEXICO IN THE 1990S (2004).

preservation”⁶³⁶ and other types of constitutional moderation of the electoral tide⁶³⁷ are all captured by the country-year fixed effects. This eliminates potential biases due to country-year varying omitted variables. It also takes away the need to include controls at the country-year level, which does not impose any constraint given the focus of this chapter on the diffusion of individual constitutional provisions. The provision-year fixed effect δ_{ct} controls for any observed or unobserved common shocks that may vary across provisions and years but do not vary across countries, such as policies of international organizations, international conferences, or the entry into force of human rights treaties.⁶³⁸ This eliminates potential biases due to provision-year varying omitted variables. Finally, ϵ_{cit} represents an idiosyncratic error term. To account for heteroskedasticity and the correlation of error terms within each country-year cell, I compute robust standard errors clustered by country-year. This clustering is motivated by the concern that constitutional provisions tend to be adopted jointly instead of individually. A government that cares about social welfare, for example, may decide to adopt several socio-economic rights at the same time. As long as all provisions are affected equally, the correlation of error terms is removed by the inclusion of the country-year fixed effect α_{it} . But if the correlation dies out over space, for example because joint adoption is more likely for provisions of the same type, the error terms will be correlated within each country-year cell. Clustering by country-year corrects the standard errors to account for this correlation. Failure to do so can lead to inconsistent standard errors.⁶³⁹

⁶³⁶ HIRSCHL, *supra* note 490.

⁶³⁷ Matthew Stephenson, “*When the Devil Turns...: The Political Foundations of Independent Judicial Review*” 32 J. LEG. STUD. 59 (2003).

⁶³⁸ The country- year fixed effects also control for a “world polity” effect, where each country is affected by all countries equally. Since each country is excluded from its own group of “all other countries,” this group is not strictly the same for each country. However, given the sample size of up to 208 countries, the groups overlap almost entirely so that any ‘global polity’ effect is indeed likely to be captured by the provision-year fixed effect.

⁶³⁹ Inference issues arising from within-group correlation of error terms, while long recognized, have recently gained attention in economics. In regression models with mixtures of individual and grouped data, the failure to account for the presence of common shocks can lead to estimated standard errors that are biased downwards severely. The analysis presented here does not suffer from this problem due to the inclusion of country-year fixed effects, while any remaining correlation of error terms *over space* is addressed by clustering at country-year. In a related study, Bertrand et al. focus instead on correlation of error terms *over time* and show that such serial correlation, when ignored, can also lead

1. Data: Constitutional Rights- The dependent variable is based on the dataset described in chapter II. The dependent variable is constructed from 108 of the 237 variables of the general dataset. Each of these 108 variables captures an independent constitutional decision. Thus, the analysis does not include variables on constitutional features further down the decision-tree, for example on how to draft a particular right. At the same time, some of these 108 rights are broader than others. For example, the right to property is a broad and general right, while an equality right for handicapped persons is much more specific. Moreover, some of these more specific rights could, in principle, be grouped together as a more general right. For example, provisions on the “inviolability of correspondence”, “privacy of personal data”, “inviolability of the home”, “the right to personal privacy” and “the right to privacy of the family,” could all be collapsed under the heading of a general privacy right. Even more broadly, all civil liberty rights could be collapsed under the heading of “liberty,” while socio-economic rights like the rights to food, housing, social security, an adequate standard of living and favorable working conditions could be collapsed under the heading of “positive rights.” Needless to say that such general categories would make it easier to find constitutional similarities. But in order to be able to trace the specific paths of constitutional influence, it is more appropriate to look at the more specific manifestation of constitutional rights, even if, at the end of the day, they may effectively mean the same thing. For example, while almost all constitutions offer some protection of liberty, some opt for “due process of law,” while others protect “personal privacy.” These specific manifestations of broad constitutional ideas may contain invaluable information on transnational influence.

Table 1 lists each of these 108 rights and divides these rights into eight broad categories of rights. Figure 1 shows the average number of these 108 rights over time. It shows that, over the course of our sample period, there has been a strong proliferation in the number of constitutional rights. The dependent variable as

to severe downward biases in estimated standard errors. Following Bertrand et al., I performed serial correlation tests and, unsurprisingly given the ‘onset’ character of the dependent variable, found no evidence of serial correlation. The estimated standard errors are therefore unlikely to be biased due to correlation of error terms over time. Marianne Bertrand, et al., *How Much Should We Trust Differences-in-Differences Estimates?* 119 QUART. J. ECON. 249 (2004).

expressed in equation (1) is constructed from these 108 variables. Table 2 lists summary statistics from the dependent variable, as it is used in estimation.

Table 1: 108 Constitutional Provisions
Political, Democratic and Accountability Rights
Freedom of religion Freedom of expression Freedom of the press Right to vote Freedom of assembly Freedom of association Right to form political parties Right to information Right to petition Right to amparo Right to resist when rights are violated Right to a remedy when rights are violated Right to compensation when rights are violated
Life, Liberty, Physical integrity and Privacy
Right to life Prohibition of the death penalty Protection of the life of the unborn Prohibition of torture Prohibition of slavery Prohibition of arbitrary arrests and detention Freedom of movement Free development of one’s personality Right to bear arms Right not to be expelled from one’s country Right to privacy Right to the privacy of the home Privacy of data Privacy of family life Privacy of family life Privacy of communication Protection of one’s honor and reputation Freedom of learning and teaching Right to establish private schools Right to artistic freedom
Fair Trial
Right to appear before a court Right to present a defense Right to be presumed innocent Right to an appeal Right to an interpreter Prohibition of ex post facto criminal laws Right to a public trial Right not to be tried for the same offense twice Right to remain silent Right to a timely trial Right to council Right to a ‘fair trial’ Right to a ‘due process’ Rights to be treated humanely in prison
Equality Rights
General equality clause (“everyone is equal”) Equality regardless of race Equality regardless of place of origin Equality regardless of ethnic background Equality regardless of education

<p>Equality regardless of social status Equality regardless of caste Equality regardless of tribe Equality regardless of beliefs Equality regardless of political opinion Equality regardless of economic status Equality regardless of ancestry Equality regardless of nationality Equality regardless of disability Equality regardless of age Equality regardless of sexual orientation Equality regardless of hiv aids status Equality regardless of sex/gender</p>
<p>Social Welfare and Workers Rights</p>
<p>Prohibition of child labor Right to work Right to a minimum wage Right to establish or belong to trade unions Right to strike Right to favorable working conditions Right to rest Right to work for the government Right to social security Right to an adequate standard of living Right to food Right to housing Right to water Right to health Right to education Right to sports Right to property Right not to be confiscated Right to intellectual property rights Freedom of enterprise</p>
<p>Woman, Children and Family</p>
<p>Equality regardless of sex Equal rights for female laborers Equality between husband and wife Right to maternity leave Right to special protection for women Right to special protection for mothers Children's rights Right to establish a family Right to get married Rights for elderly</p>
<p>Minority rights, Environmental Rights and other 'New Rights' (Third Generation Rights)</p>
<p>Minority rights (general) Right to use one's native/ minority language Right to preserve one's culture and ways of life Right to establish schools for minority groups Rights for minorities to be represented in politics Right of minorities to their indigenous lands Rights of minorities to have a degree of autonomy Right to asylum Rights for consumers Rights for handicapped people Rights for victims Right to national culture Right to a healthy environment</p>

2. Spatial lags: the Constitutional Rights of Other States- To capture the influence of foreign constitutions, I construct a set of spatial lags. As discussed above, each spatial lag captures the weighted average incidence of constitutional rights in other countries. What distinguishes the different spatial lags from each other is the weighting; each spatial lag is weighted according to a different dimension of space (e.g. geography, language, culture). This subsection will discuss the data that was used to construct these spatial weights.

To test competition for foreign aid, I used the OECD DAC Database on International Aid Statistics to construct a binary measure that captures whether any two countries have a common dominant donor. The dominant donor is the donor that gives the highest proportion of aid to a country, where aid is expressed as the net disbursements of official development assistance plus official aid. A common dominant donor can be either a country or a multilateral institution. Countries that share a common dominant donor are considered to be aid competitors. To test competition for foreign exports, I used the expanded IMF bilateral trade data to compute, for any two countries in each year, the correlation in their export patterns.⁶⁴⁰ The higher the correlation, the larger the extent to which any two countries export to the same foreign markets, and thus compete with one another.

To test coercion through colonial power I construct two alternative measures. The first is a binary indicator that captures whether any two countries share a common colonizer, while the second is a binary indicator that captures the former colonizer(s) of each nation. Thus, for example, the first measure links all Britain's former colonies to each other, while the second measure links each former colony to Britain.⁶⁴¹ To test coercion through foreign aid I construct a measure that captures bilateral aid flows. For each country, in each year, aid donors are weighted according to their net disbursements of official development assistance plus official aid, while non-donors receive a weight of zero.⁶⁴²

⁶⁴⁰ Kristian Skrede Gleditsch, *Expanded Trade and GDP Data*, 46 J. CONFLICT RES. 712 (2002).

⁶⁴¹ Both indicators are created from the CEPPII Distance Dataset.
<http://www.cepii.fr/anglaisgraph/bdd/distances.htm>

⁶⁴² Data again comes from the OECD DAC database on International Aid Statistics. To construct this measure, aid by multilateral institutions was excluded.

To test learning through shared legal origins, I construct a binary measure that captures whether any two countries share the same legal origins.⁶⁴³ To test learning through trade relationships, I construct two measures on trade flows.⁶⁴⁴ The first captures, for each country in each year, the total exports (in international U.S. dollars) to all each other countries, while the second captures total imports from all other countries. Thus, in both measures, countries are weighted according to their total imports or exports. To test learning (or possibly acculturation) through shared language I construct a binary measure that captures whether any two countries share a common official language.⁶⁴⁵ To test learning (or possibly acculturation) through a shared religion, I construct a binary measure that captures whether any two countries share a common dominant religion.⁶⁴⁶ To test learning through military alliances, I use a measure from the Correlates of War Formal Interstate Alliance Database that captures the number of formal military alliances between any two states in each year.⁶⁴⁷ The more alliances, the higher the weight each country receives, while, in the absence of military alliances, countries receive a weight of zero. To test learning through geographic proximity, I create two alternative measures. The first captures the distance between capital cities, while the second is a binary measure that captures whether any two share common borders.⁶⁴⁸

To test acculturation through cultural transmission channels, I construct a measure that captures the similarity in the “individualist culture” score as developed

⁶⁴³ Rafael La Porta et al., *The Quality of Government*, 15 J. L. ECON. & ORG. 222, 222 (1999).

⁶⁴⁴ The trade data comes from Gleditsch, *supra* note 640.

⁶⁴⁵ Data comes from the CEPPII Distance Dataset.

⁶⁴⁶ I use religion data from Robert J Barro & Rachel M. McCleary, *Which Countries Have State Religions?* 120 QUART. J. ECON. 1331 (2005). The Barro & McCleary dataset contains information on the prevalence of different religions in both 1970 and 2000. For the baseline estimation I use 1970 data, while I use the 2000 data to test the robustness of the results.

⁶⁴⁷ Military alliance data comes from: Douglas M. Gibler & Meredith Sarkees, *Measuring Alliances: The Correlates of War Formal Interstate Alliance Dataset, 1816-2000*, 41 JOURNAL OF PEACE RESEARCH 211 (2004).

⁶⁴⁸ Data for both measures comes from the CEPPII Distance Dataset.

by Hofstede.⁶⁴⁹ To test acculturation through the global world polity, I do not use any spatial weight at all. Instead, the spatial lag that captures the world polity effect is simply the (unweighted) average incidence of constitutional rights. Finally, as a control variable, I construct a measure that links the countries that formerly belonged to same country, such as the countries that formerly made up Yugoslavia or the Soviet Union.⁶⁵⁰

In order to construct the spatial lags, the spatial weights are (where necessary) rescaled so that higher values correspond to closer proximity and so that no country receives a negative weight.⁶⁵¹ Table 2 lists the resulting spatial lags that are used in estimation along with their minimum, maximum, mean and standard deviations.

Table 2: Variables Used in Estimation					
	Obs.	Mean	St. Dev	Min	Max
Competition					
constitutional rights of aid competitors	505348	0.134	0.225	0	1
constitutional rights of export competitors	505348	0.202	0.196	0	1
Coercion					
constitutional rights of former colonizer	505348	0.132	0.317	0	1
constitutional rights of countries with common former colonizer	505348	0.140	0.210	0	1
constitutional rights of aid donor	505348	0.105	0.235	0	1
Learning					
constitutional rights of countries with same legal origins	505348	0.189	0.217	0	1
constitutional rights of trade partners: exports	505348	0.171	0.219	0	1
constitutional rights of countries with common language	505348	0.140	0.225	0	1
constitutional rights of countries with common religion	505348	0.194	0.219	0	1
constitutional rights of military allies	505348	0.114	0.215	0	1
constitutional rights of neighboring countries	505348	0.141	0.268	0	1
Acculturation					
constitutional rights all other countries (world polity)	505348	0.210	0.196	0	0.967
constitutional rights with similar cultural traits: individualism	263952	0.215	0.196	0	0.991
Control					
constitution rights of countries formerly part of the same country	505348	0.076	0.227	0	1

⁶⁴⁹ GEERT HOFSTEDÉ, CULTURE’S CONSEQUENCE: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS (2001).

⁶⁵⁰ Data comes from the CEPPII Distance Dataset.

⁶⁵¹ We rescale the following weights: distance to capital cities (1/distance) and cultural similarity (maximum value similarity score). To ensure that there are no negative values we recode negative aid flows as zero. We also recode negative export correlations as zero, thus assigning a weight of zero to the countries that export to the exact opposite foreign markets.

Dependent Variable adoption of constitutional rights adoption=1	505348 7475	0.025	0.121	0	1
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3. Results: The Diffusion of Constitutional Rights: In Table 3, I report the results of estimating the model in equation (1). I first estimate a benchmark specification without fixed effects.⁶⁵² Column (1) shows the results from a linear probability model, while column (2) shows the results from a probit model.

As can be seen from Table 3, columns (1) and (2), constitutional rights diffuse through a number of channels. In both specifications, the spatial lags that capture constitutional rights of countries with a common colonizer, common legal origin and a common religion enter positive and significant at 1%. The spatial lags that capture the constitutional choices of aid competitors and the former colonizer enter significant at 1% and 5% in the probit model and at 5% and 10% in the linear probability model, respectively. The spatial lag that captures constitutional rights of export partners enters significant at 10% in the linear probability model only. These findings suggest that constitutional rights diffuse. Where countries are connected through their legal origin, religion, colonial past or aid donors, their constitutions are interdependent.

I next consider the size of the effect. The coefficients of the linear probability model reported in column (1) and the marginal effects of the probit model reported in column 2 capture the increase in the probability of adoption (in percentage points) if the spatial lag changes from zero to one. It thus captures what happens to the probability of adopting a constitutional right if all countries with a non-zero weight decide to adopt that right.⁶⁵³

⁶⁵² This specification includes the spatial lags discussed in the previous section, but excludes the spatial lag weighted to cultural similarity by Hofstede (because it drastically reduces our samples size) and the spatial lag weighted according to total imports (because total imports are highly correlated with total exports, and total imports and exports are both proxies for trade relationships).

⁶⁵³ This means that for some spatial lags (e.g. exports), the coefficient captures the effect of the (probably hypothetical) scenario in which all countries in the world adopt a given right, while for other lags it captures the constitutional choices of a select group of countries (e.g. those with whom it shares legal origin) or of a single country only (e.g. the aid donor or the former colonizer).

Table 3, column (1) reports the changes in the probability of adoption for the linear probability model. It shows that for a given country, let's say country A, adoption by partner countries increases the probability of adopting a given right, let's say the right to health, between 0.7 and 4.5 percentage points in each year. Partner countries with a common legal origin are most influential. If all countries with the same legal origin adopt the right to health, the probability that A adopts this right increases by 4.5 percentage points in each year. In similar vein, if all countries with the same former colonizer adopt, this increase is 3.6 percentage points; for countries with a similar religion, aid competitors, trade partners and the former colonizer this increase is 3.3, 1.7, 1.1 and 0.7 percentage points respectively.

To further appreciate the size of these effects, these numbers can be evaluated against a "baseline probability", which is the probability of adoption when all spatial lags are evaluated at their sample mean. The baseline probability for the linear probability model is 1.5% each year.⁶⁵⁴ This means that, in the absence of any further adoption by partner countries, the probability that the average country has adopted the right in twenty years time is $1 - (0.985^{20})$ or 26%. But now suppose that, in addition to the countries that had already adopted, half of the countries with the same legal origin now also adopt. In this case, the probability of adoption increases from 1.5% to $1.5 + 0.5 * 4.5 = 3.7\%$. After twenty years, the probability of adoption is now $1 - (0.963^{20})$ or 53%, an increase of 27 percentage points relative to counterfactual. Or, as another thought experiment, suppose that the former colonizer, let's say the U.K, adopts a particular right. Now the probability of adoption increases to 2.2 %, which after 20 years leads to a probability of adoption of 36%. In this case, the action of one single country, the U.K., increases the probability of similar action by its former colonies by 10 percentage points over a 20-year period. These thought experiments suggest that the diffusion effect is sizeable over time.

For the probit model, the size of the effects is slightly smaller than for the linear probability model. Table 3, column (2), reports marginal effects for the probit regression when all other variables are evaluated at their sample mean. Again, the countries with the same legal origin are most influential. If all countries with the same

⁶⁵⁴ This is the predicted value of adoption when all regressors are evaluated at their sample mean.

legal origin adopt, this increases the probability of adoption by 2 percentage points each year. For countries with a common religion, common colonizer, aid competitors and the former colonizer this increase is 1.5, 1, 0.7 and 0.4 percentage points, respectively.

In both the linear probability model and the probit model, the spatial lag that captures the constitutional choices of military allies enters significant at 1 % but with a negative sign. Though somewhat puzzling at first, this is consistent with Professor Schauer's observation that geopolitical considerations may lead to constitutional anti-models.⁶⁵⁵ It is possible that, after controlling for all other types of proximity, military alliances capture the ties between the countries that are historical enemies and do not otherwise interact. Military treaties are often signed after war. Such geopolitics may explain why adoption by military allies actually decreases the probability of adoption.⁶⁵⁶

I next discuss the results from the linear probability model when adding both country-year and provision-year fixed effects. As discussed in section 3.2, the country-year fixed effects capture all domestic determinants of constitution-making. Democratization, political transition, regime change, amongst other things, are all captured by the country-year fixed effects. The provision-year fixed effects capture common shocks to particular rights that affect all countries equally. For example, the entry into force of an international treaty on children's rights may affect the probability of adopting children's rights in all countries. These kinds of shocks are now captured by the provision-year fixed effects.⁶⁵⁷ The results from the fixed effects model, reported in Table 3, column (3), are largely similar to the results in columns (1) and (2). The spatial lags that capture the constitutional rights of aid competitors, countries with a common colonizer, common legal origin, common religion and the former colonizer all enter positive and significant at 1%, while the lags that captures military allies and export partners enter significant at 5% and 10% respectively. The

⁶⁵⁵ Schauer, *supra* note 585.

⁶⁵⁶ The spatial lag that captures the constitutional choices of aid donors also enters negative and significant at 5% in the probit model, but is not robust to alternative specifications.

⁶⁵⁷ The provision-year fixed effects also pick up the effect of the global "world polity" that is thus dropped from estimation.

size of the effect typically falls in between the estimates from the linear probability and the probit model (in columns (1) and (2) respectively). The effect is largest for countries with the same legal origins (2.6 percentage points), followed by countries with the same religion (2.2), military allies (2.0), the former colonizer (1.7), military allies (-1.0), export partners (0.8) and the former colonizer (0.7). Because domestic determinants and international shocks are likely to be important determinants of constitutional design, I use the fixed effects estimates as our baseline specification in the remainder of this paper. This reduces the possibility of omitted variable bias.

I have thus far excluded the spatial lag weighted according to cultural similarity (individualism) from all estimations, as it is available for a limited number of countries only and reduces the sample size by almost half. Table 3, column (4) reports the results from our fixed effects baseline estimation (reported in Table 3, column (3)) when adding this variable. The individualist culture lag enters positive and significant at 5%. Its effect is moreover sizeable. Adoption by culture partners increases the probability by 4.9 percentage points in each year. It suggests that countries with the same individualistic outlook are likely to adopt each other's constitutional rights.⁶⁵⁸

⁶⁵⁸ In addition to the individualist culture lag, I had also excluded the lag weighted according to import relations, as it is highly correlated with the lag weighted according to export relations. When adding this lag to the baseline specification in Table 3, column (3), it enters insignificant.

Table 3: Estimating Transnational Constitutional Influence

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
	OLS	Probit	FE	FE	OECD	non-OECD	Democrat.	Undemocr.	Old	Young
Aid competitors	0.017** (0.007)	0.007*** (0.002)	0.022*** (0.005)	0.020*** (0.007)	0.039* (0.021)	0.013** (0.005)	0.051*** (0.011)	0.002 (0.005)	0.009** (0.004)	0.009 (0.008)
Export competitors	0.004 (0.028)	-0.001 (0.010)	0.029 (0.020)	-0.003 (0.031)	-0.059 (0.060)	0.043** (0.020)	-0.025 (0.051)	0.008 (0.018)	0.015 (0.009)	0.113** (0.046)
Former colonizer	0.007* (0.004)	0.003** (0.001)	0.007*** (0.002)	0.006 (0.002)	0.006 (0.004)	0.008*** (0.002)	0.013*** (0.003)	0.004** (0.002)	0.001 (0.001)	0.023*** (0.005)
Common colonizer	0.036*** (0.011)	0.010*** (0.003)	0.020*** (0.005)	0.004 (0.006)	-0.001 (0.009)	0.016** (0.006)	0.021** (0.009)	0.018*** (0.007)	-0.002 (0.004)	0.018 (0.014)
Aid donor	-0.007 (0.004)	-0.004** (0.001)	-0.004 (0.003)	0.005 (0.004)	0.024* (0.012)	-0.012*** (0.003)	0.003 (0.006)	-0.009*** (0.003)	0.007*** (0.002)	-0.025*** (0.006)
Common legal origins	0.045*** (0.008)	0.020*** (0.003)	0.026*** (0.004)	0.019*** (0.005)	0.021*** (0.008)	0.031*** (0.006)	0.018*** (0.006)	0.025*** (0.006)	0.013*** (0.004)	0.052*** (0.012)
Trade partnerships: export	0.011* (0.006)	0.004 (0.003)	0.008* (0.004)	-0.003 (0.005)	-0.016 (0.010)	0.011*** (0.004)	0.016* (0.008)	0.006 (0.004)	-0.002 (0.002)	0.006 (0.007)
Common religion	0.033*** (0.006)	0.015*** (0.003)	0.017*** (0.003)	0.014*** (0.004)	0.002 (0.003)	0.022*** (0.005)	0.024*** (0.005)	0.011** (0.005)	0.008** (0.004)	0.028*** (0.007)
Common language	-0.019 (0.012)	-0.003 (0.003)	-0.002 (0.005)	-0.009* (0.005)	-0.005 (0.007)	0.006 (0.007)	-0.016* (0.009)	-0.001 (0.006)	-0.002 (0.004)	-0.003 (0.014)
Military alliances	-0.026*** (0.008)	-0.008*** (0.002)	-0.010** (0.005)	-0.001 (0.005)	0.006 (0.009)	-0.10* (0.006)	-0.028*** (0.008)	0.002 (0.006)	0.004 (0.004)	-0.013 (0.009)
Common border	0.009 (0.006)	0.003 (0.002)	-0.001 (0.003)	0.004 (0.003)	0.006 (0.004)	-0.003 (0.005)	0.004 (0.004)	-0.001 (0.004)	0.005** (0.002)	0.000 (0.008)
World Polity (unweighted)	-0.016 (0.027)	-0.003 (0.009)	-	-	-	-	-	-	-	-
Culture : individualism	-	-	-	0.049** (0.023)	-	-	-	-	-	-
Formerly same country	0.011 (0.008)	0.003 (0.002)	-0.001 (0.003)	0.008 (0.005)	0.10* (0.006)	0.007 (0.006)	0.020** (0.008)	-0.002 (0.005)	0.003 (0.003)	0.010 (0.010)
Country-year fixed effects	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Provision-year fixed effects	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Number of observations	505348	505348	505348	263952	110428	394920	213242	229609	294798	220550
Goodness-of-fit (F-test)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Notes: Columns 1, 3-10 report the coefficients from a linear probability model. Column 2 reports marginal effects from a probit model, where all regressors are evaluated at their sample mean. Robust standard errors are clustered by constitutional provision and are reported in parentheses. ***, **, and * denote significance at the 1%, 5%, and 10% levels, respectively.

4. Results: Patterns of Diffusion: Thus far, I have explored the common diffusion effect across all countries, across all years and across all constitutional provisions. However, one may expect that the assumption that the diffusion channels are the same in all these cases is an unrealistic one. Therefore, this section will investigate whether diffusion patterns vary between different countries, different types of constitutional rights and different time periods.

*4.1 Patterns of Diffusion: Different Countries-*I first explore whether the diffusion effect is different for different groups of countries. On theoretical grounds, one may expect this to be the case. Under the logic of coercion, poorer and (thus) weaker countries are likely to be more susceptible to transnational influence than the rich and powerful ones. If so, diffusion through foreign aid and colonial power will be stronger for poorer countries. But also under the logic of competition, poorer countries may be more susceptible to transnational influence. Foreign buyers and investors may favor the generally secure investment climate of rich countries anyway, so that rich countries do not have to resort to constitutional means to secure their share of export markets. In addition, poorer countries may export raw materials rather than high-tech products, which can more easily be bought elsewhere, thus increasing the power of foreign buyers and investor to demand constitutional guarantees. If so, competition for exports is likely to be stronger in poorer states. By contrast, under the logic of learning, it is not necessarily the poorest, but rather the youngest states that are most likely to be most susceptible to transnational influence. Young states “have more to learn, and old states have more entrenched practices that are harder to change.”¹ If so, the diffusion channels that suggest learning should be stronger for young states. Finally, under the logic of acculturation, non-democratic states may be most likely to embrace modern and legitimate constitutional norms, motivated by a desire to gain international acceptance rather than to actually improve human rights. In the absence of democratic constraints, lip-service to internationally accepted

¹ Posner & Sunstein, *supra* note 550, at 174.

constitutional norms is a cheap way to gain international recognition, possibly producing “sham”, or “façade”, constitutions.⁶⁶⁰ If so, the cultural channels should be stronger for the non-democratic states.

I first explore if diffusion depends on income. To that end, I separate OECD members from the non-OECD members and run the baseline specification from column (3) for each of these samples separately. Table 3, column (5) reports the results for OECD members, while column (6) reports the results for non-OECD members. The results suggest that the constitutions of OECD members are substantially less susceptible to transnational influence than the constitutions of non-OECD members. Other than functional learning from countries with the same legal origin, there is little evidence that the constitutions of OECD countries are shaped by transnational influences.⁶⁶¹ By contrast, there is strong evidence of diffusion in the constitutions of non-OECD members. The coercion channels exclusively work for non-OECD members. Non-OECD members follow the constitutional examples of aid competitors, countries with the same colonizer and the former colonizer itself. But I now also find evidence of competition for foreign exports. Unlike OECD members, non-members *do* compete by constitutional means to secure their share of the export market. I moreover find that non-OECD members model their constitutions after those of their trade partners, possibly to ease cross-border transactions. Like OECD members, non-members also learn from countries with the same legal origin. They moreover follow the example of religious partners. In most cases, the size of the effect is slightly larger than for the baseline specification reported in column (3). Finally, the spatial lag that captures the constitutional rights of aid donors enters with a negative sign. So while non-OECD members compete for foreign aid, they do not directly follow the example of the aid donor. This may be because aid donors have somewhat dated constitutions which may not always (textually) reflect the latest consensus, but it

⁶⁶⁰ Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SC. REV. 853 (1962).

⁶⁶¹ There is some weak evidence of diffusion through the foreign aid channels (significant at 10%), an effect that is probably driven by a handful of OECD members that used to be aid recipients.

may also be the result of geo-political considerations.⁶⁶² The general conclusion that follows it that the degree of constitutional diffusion does differ substantially between OECD and non-OECD members.

I next investigate whether diffusion depends on democracy. Table 3, columns (7) and (8) report the results from estimating the baseline specification from column (3) for two subsamples of democracies and non-democracies respectively.⁶⁶³ The results suggest that the differences between democracies and autocracies are relatively small. Both groups follow the constitutional choices of their former colonizer, countries with the same legal origin, the same religion and the same former colonizer. The most important difference is that autocracies do not compete for foreign aid. If anything, they use the constitution of the aid donors as anti-models, as the spatial lag that captures constitutional rights of aid donors enters negative and significant. Another difference between the two groups is that only democracies are negatively affected by the constitutional rights of military allies.

Finally, I explore if young countries are more susceptible to transnational influence than old countries. To do so, I separate the countries established before 1955 from the countries established after 1955. In this fashion, most of the African continent is considered to be made up of “young” states, while older former colonies, primarily in Asia, are considered to be “old” states.⁶⁶⁴ Table 3, columns (9) and (10), report the results for old and young countries respectively. Both old and young states are influenced by the constitutional provisions of countries with the same legal origin and the same religion. But there are some differences too. Only older countries compete for aid, the younger countries do not. By contrast, younger countries do compete for export markets. They are moreover strongly

⁶⁶² See Schauer, *supra* note 585.

⁶⁶³ I used a democracy variable (“democ”) from the polity IV data project to split the sample according to the median value of the democracy variable.

⁶⁶⁴ I also experimented with using the year 1946 as the cut-off between “old” and “young” states, and results are very similar.

affected by the constitutional choices of former colonizers. But generally, I fail to find a strong systematic difference between young and old countries.

4.2. Patterns of Diffusion: Different Rights- Diffusion may not only work differently for different countries, but also for different rights. Constitution-makers, after all, are likely to borrow bits and pieces from different countries.⁶⁶⁵ Wholesale transplantation of an entire constitutional order is probably a rare phenomenon.⁶⁶⁶ For example, constitution-makers may model property guarantees after that of economic competitors, while they model the right to life provision after that of its religious partners. To explore whether diffusion works different for different rights, I divided the 108 rights into seven different groups: 1) political, democratic and accountability rights, 2) life, liberty and physical integrity rights, 3) fair trial rights, 4) equality rights, 5) socio-economic rights, 6) women, children and family rights and 7) minority rights, environmental rights and other ‘new’ rights. The first four categories can be described as “first-generation” rights, or rights of an older vintage that guarantee individual liberty. The fifth category roughly corresponds to what is often referred to as “second-generation” rights, or rights that set positive goals for the government. Finally, the sixth and seventh categories primarily consist of “third generation” rights, which are group rights and other new rights.⁶⁶⁷ Table 1 lists the rights in each category.

On theoretical grounds, one may expect diffusion channels to work differently for different rights. Under the logic of coercion, one may expect that powerful states mainly seek to promote rights that relate to individual liberty, property, democratization and accountable government. Aid donors often seek to promote free-market policies, as with the “Washington consensus.”⁶⁶⁸ But they also

⁶⁶⁵ Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT’L J. CONST. L. 196, (2003).

⁶⁶⁶ Frederick Schauer, *supra* note 428.

⁶⁶⁷ See Chapter III *supra* for a discussion of these rights.

⁶⁶⁸ STIGLITZ, *supra* note 528.

promote “good governance” and individual liberties. These features are thought to be conducive to liberty and economic prosperity, which, in turn, will not only benefit those governed by the constitution but will also contribute to global security and the global economy.⁶⁶⁹ It is less clear whether aid donors also promote social and economic rights. While aid donors aim for certain social and economic goals, like in the “Millennium Development Goals,” it is unclear whether they would view the constitution as an appropriate tool to achieve these goals. After all, a number of important aid donors, like the U.S. and the U.K, notoriously lack constitutional rights of a socio-economic nature, and believe that these are aspirational in nature and do not belong in a constitution. Under the logic of competition, first-generation rights are likely to be most important. Foreign buyers and investors are likely to care about negative liberty rights, in particular property rights and judicial process rights, as these decrease the costs of doing business.⁶⁷⁰ For learning and acculturation, there is no a priori reason to assume that some types of rights would matter more than others.

I next estimate the baseline specification from Table 3, column (3) for each of the seven types of rights separately. The results for these subsamples are reported in Table 4. For comparison, column (1) again reports the results from the full-sample baseline specification. In general, Table 4 suggests that the main findings from the baseline specification (see column (1)) are remarkably robust across the different sub-samples. The spatial lags that capture constitutional rights of countries with the same legal origin and a common colonizer enter significant in 6 out of the 7 subsamples, while the spatial lags that capture constitutional rights of countries with a common religion, aid competitors and the former colonizer enter significant in 5 out of the 7 subsamples regressions.

More interesting however are the exceptions to this general finding. As expected, aid competition works mainly for first-generation rights (columns (2)-(5)) and does not affect third generation rights (column (7) and (8)). It *does*

⁶⁶⁹ See section A, 1 *supra*.

⁶⁷⁰ Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights*, 60 KYKLOS 509, 531-32 (2007).

however affect socio-economic rights (column (6)). Apparently, aid donors also care about constitutional social welfare guarantees.⁶⁷¹ Coercion through colonial channels also affects first- and second-generation rights only, suggesting that former colonizers and aid donors use their coercive power in similar fashion. While there is no effect of competition for exports in the baseline specification, there *is* an effect in one of the subsamples. As can be seen from column (4), export competition significantly affects the diffusion of fair trial rights. Thus, when constitution-makers compete for export markets, they do so by offering fair judicial process rights. It suggests that foreign buyers may care more about a fair judicial process than about a broad menu of rights, including the traditional liberty rights. Finally, the legal origin lag falls just outside the 10 percent confidence interval for political and democratic rights (column (2)), while the common religion lag enters insignificant for fair trial rights and minority rights (columns (4) and (8)).

4.3. Patterns of Diffusion: Different Time Periods- Having explored differences across different countries and across different types of constitutional provisions, I next explore whether diffusion works differently at different points in time. In particular, one may expect that the colonial channel is strongest in the direct aftermath of decolonization and that colonial influence will be waning over time. By contrast, one may expect that constitutional competition for foreign aid may be strongest in recent decades, when the rule-of-law development agenda came “in vogue.” However, as noted in the previous section, the current rule-of-law agenda can be seen as a continuation of an older project, the so-called Law and Development Movement of the 1960s and 1970s. And if anything, the current consensus among rule-of-law reformers is in favor of heterogeneous institutions, while the earlier law and development movement was a modernization movement,

⁶⁷¹ Our broad category of socio-economic rights includes both economic liberty rights (the right to property, the right to intellectual property, the freedom of enterprise and the right not to be confiscated), as well as positive economic rights, such as worker’s rights and social security provisions. However, I did not find any evidence that diffusion through aid competition works different for these two groups.

promoting rational one-size-fits-all institutions.⁶⁷² So perhaps, competition for aid is not confined to recent decades, and may have even been stronger during the earlier movement, when aid donors were more inclined to issue one-size-fits-all constitutional prescriptions. For acculturation, one may expect that the global cultural channel may have been strongest since the end of the cold war. The post-cold war period has, allegedly, witnessed triumph of a liberal democratic model, or “the end of history.”⁶⁷³ It has been argued that, since the end of the cold war, one global constitutional model has triumphed.⁶⁷⁴ Under the logic of learning, there is no a priori reason to expect there to be any differences for different types of learning over time.

To investigate whether diffusion is different in different periods of time, I distinguish three post-WWII “waves” of constitution-making, as defined by Elster.⁶⁷⁵ A first wave takes place in the context of decolonization. This wave starts in the 1940s with the independence of India and Pakistan, gains momentum in the 1960s and ends in the early 1970s.⁶⁷⁶ A second wave of constitutionalism starts with the fall of dictatorial regimes in Southern Europe in the mid-1970s. This wave ends with the end of the cold war, which marks the beginning of a new wave, in the early 1990s, marked by constitutional reconstruction in former Soviet Republics—and a “prolonged constitutional fever” throughout the globe.⁶⁷⁷ To test if diffusion works differently in these different waves, I run subsamples for each of the time

⁶⁷² See David M. Trubek & Alvaro Santos, *An introduction: the third moment in law and development theory and the emergence of a new critical practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT 1* (David M. Trubek & Alvaro Santos eds., (2006)).

⁶⁷³ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, xi (1992).

⁶⁷⁴ Go, *supra* note 469.

⁶⁷⁵ Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 369 (1995).

⁶⁷⁶ Elster also describes a “wave” connected to constitutional reconstruction of the defeated WWII aggressors, but that wave takes place in the same time period. *Id.*

⁶⁷⁷ Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1*, 1 (Philip Alston ed., 1999).

periods 1946-1973 (first wave), 1974-1988 (second wave) and 1989- 2006 (third wave).

Results are reported in Table 5. Column (1), (2) and (3) report the results for the first, second and third waves respectively. The results suggest that functional learning through legal origins occurs consistently in all three periods. Also (perhaps less functional) learning through religious similarities takes place in all three periods. But Table 5, columns (1), (2) and (3), document important differences as well. As expected, the colonial channels are most important in the earlier periods. Countries follow those with whom they share a common colonizer during the first two waves only. By contrast, the particular actions of the colonizer itself remain influential up till this day (and enters significant in both the first and the third wave). Perhaps somewhat surprisingly, competition for aid is strongest (and significant at 1%) during the first wave, somewhat less strong (significant at 10%) during the second wave and insignificant in the third wave. This suggests that the older rule-of-law agenda, from the 1960s and 1970s, was most effective in promoting constitutional change.⁶⁷⁸ The fact that this channel is not significant during the third wave may result from the growing consensus that while institutions matter, there are no universal recipes for institutional design.⁶⁷⁹ So while aid donors may perhaps promote constitutional reform, they do not prescribe general models. Finally, I find that export competition was significant during the second wave, not during the first or third wave.

The results reported in Table 5 do not include the world polity (unweighted) lag, because this is picked up by the provision-year fixed effects. To investigate whether there is a global diffusion effect during the third wave, I re-run the specifications from Table 4, columns (2), (3) and (4) without the provision-year fixed effects, while adding the unweighted world polity lag. Again, there is no evidence of a global world polity effect. In none of these specifications, the world

⁶⁷⁸ The aid data is available from the 1960s and does not include aid provided as part of the “Marshall Plan” (1947-1951).

⁶⁷⁹ See Chapter IV, section B, 3 *supra*.

polity lag enters positive and significant. It suggests that the world has not yet witnessed the “end of constitutional history” and that diffusion is confined to more specific channels, even in today’s globalized world.

But one may also expect that, in addition to global time trends, there may also be differences at different points of any given country’s constitutional history. In particular, one may expect that transnational influence may be largest when a country adopts its first constitution. When adopting the first constitution, constitution-makers start from scratch. And instead of inventing the constitutional wheel, they may turn abroad for inspiration. By contrast, in subsequent years, they may decide to amend the constitution to “respond to imperfection,”⁶⁸⁰ or to adjust possibly imperfect foreign rules to domestic circumstances.

In order to test whether diffusion is larger in the year the first constitution was adopted, I estimate our baseline specification (Table 3, column (3)) for an unbalanced panel that only includes observations for the years in which a first constitution was adopted, as well as for an unbalanced panel that includes all the other years (thus excluding the first constitution years). Results are reported in Table 6, columns (4) and (5), respectively. In both specifications, the constitutional rights of aid competitors, the former colonizer, countries with common legal origin and a common religion enter statistically significant, suggesting that diffusion is not confined to the first constitution only. Also after adopting their first constitution, constitution-makers look abroad. At the same time, there is an important difference in the size of the effect, which is substantially larger for the year in which the first constitution was adopted. For example, adoption of a right by countries with the same legal origin now increases the probability that constitution-makers will include this right by 38.1 percentage points (as opposed to 1.2 percentage points for the other years). The constitutional rights of aid competitors, countries with the same religion and the former colonizer increase the

⁶⁸⁰ See *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995). Such imperfection may have in fact been caused by the foreign nature of constitutional provisions, which may not fit comfortably with social and political realities.

probability of adoption by 18.4, 12.4 and 10.1 percentage points, respectively. I moreover find that some diffusion channels are confined to the first constitution only. When adopting their first-ever constitution, countries also consider the constitutional provisions of export competitors, export partners and countries with a common language, adoption by whom increases the probability of adoption by 21.7, 13.8 and 18.7 percentage points, respectively.

D. Vertical Diffusion and the Importance of Treaty Rights

Constitutions are not written in a vacuum. Instead, constitution-makers learn from countries with whom they share a common legal origin and a common religion; they follow the models of foreign aid donors and they are affected by their former colonizer and the countries with whom they share this colonizer. But just as constitution-makers may turn to foreign constitutional models, they may also be influenced by the constitutional models offered by international human rights treaties.⁶⁸¹ This can be viewed as a case of vertical diffusion: from international treaties to national constitutions. Particularly under the logic of acculturation, international treaties may be important models of constitutional design. International treaties reflect a global consensus on human rights since they are the product of international deliberation, and have been ratified by the largest majority of states. Moreover, international treaties are also widely and easily available, and may therefore appeal to the constitutional “bricoleur,” or constitution-makers who assemble available provisions in the face of information-constraints.⁶⁸²

From a functional perspective of constitutional design, treaty commitments can be viewed as both “substitutes” and “complements.”⁶⁸³ After ratification of a

⁶⁸¹ See e.g., Stephen Gardbaum, *Human Rights and International Constitutionalism*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 232 (Jeffrey Dunoff & Joel Trachtman eds., 2009); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUMAN RTS. Q. 483 (2001).

⁶⁸² See Tushnet, *supra* note 427, at 1285-1301.

⁶⁸³ Tom Ginsburg & Zachary Elkins, *How Do International Human Rights Treaties Influence National Constitutions* (2010).

treaty, a country may harmonize its constitution with its treaty commitments. For example, the U.K adopted the 1998 Human Rights Act to implement its obligations under the European Convention on Human Rights. In this case, ratification will increase the probability of constitutional adoption of treaty rights. This seems particularly likely in countries that have a dualist system of international law, or where international law only affects the domestic order after implementation. But the opposite may also be true. After ratification, countries may be less likely to constitutionally entrench these rights, as they these would now be redundant. If so, treaty ratification decreases the probability of constitutional adoption.⁶⁸⁴ This may be most likely in a country with a monist system of international law, in which international law trumps domestic legal obligations.

To test whether the ratification of international human rights treaties affects constitutional design, I augment the baseline regression (Table 3, column (3)) with a set of treaty variables. In particular, I consider all the “core” international human rights treaties that include any of the 108 provisions in our analysis.⁶⁸⁵ These are the International Convention of the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant of Civil and Political Rights (ICCPR); the International Covenant of Economic, Social and Cultural Rights (ICESCR); the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention of the Rights of the Child (CRC) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, abolishing of the death penalty (ICCPR-OP2). I moreover consider the most important regional treaties, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR) and the African Charter (AfChart). Each of these treaty variables takes a value of 1 once a country

⁶⁸⁴ *Id.*

⁶⁸⁵ A treaty is designated as “core treaty” by the Office of the High Commissioner for Human Rights when it establishes a “committee of experts to monitor implementation of the treaty provisions by its States parties”. See <http://www2.ohchr.org/english/law/index.htm#core>

has ratified, and 0 otherwise. These treaties are moreover weighted so that they only apply to the constitutional rights that are explicitly mentioned in the treaty. Rights included in the treaty receive a weight of 1; rights not included receive a weight of 0.

Table 5, column (6) reports the result when augmenting our baseline specification (Table 3, column (3)) with the international treaty variables, while Table 5, column (7) reports results when adding both international treaty- and the regional treaty variables. The results suggest that international human rights treaties do not generally affect the adoption of constitutional rights. The only exception to this general rule is the Second Optional Protocol of the ICCPR, aimed at abolition of the death penalty. International commitment to abolish the death penalty translates into a constitutional commitment to abolition. In particular, ratification of the ICCPR-OP2 increases the probability of constitutional abolition by about 2 percentage points in each year (2.0 percentage points, significant at 10% in column (6); 2.4 percentage points, significant at 5% in column (7)). The regional treaties, reported in Column (7) are not generally important either. Ratification of the European Convention and the African Charter does not significantly affect constitutional design. Perhaps somewhat puzzling, the American Convention on Human Rights actually decreases the probability of constitutional adoption of the convention rights. This is surprising considering that Latin American constitutions typically tend to incorporate an extensive list of rights, which stands at odd with a functional logic of treaties as substitutes. Perhaps more plausible is that this treaty, which is focused on traditional liberty rights, reflects North American tradition (the U.S. signed though never ratified) more than it does the Latin American human rights tradition which places substantial emphasis on socio-economic rights and group rights.⁶⁸⁶

But importantly, these findings should not be taken to conclude that international law, in general, does not affect constitutional design. The exercise in

⁶⁸⁶ Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights* 25 HUM. R. QUART. 281 (2003).

this subsection is too general for such a conclusion. In particular, it did not explore whether international law affects constitutional design under some circumstances, but not others. It did not disaggregate the findings for different groups of countries, or different types of rights. Identifying if, how and when international law affects constitutional design, in fact, is an important topic for future research. The question is particularly pressing in light of recent debates on the “effectiveness” of international human rights law. In recent years, a number of empirical studies have concluded that treaty ratification does not actually improve government respect for human rights, and if anything, that the opposite may be true.⁶⁸⁷ But one way international law may matter is through the formation of international norms, which may subsequently be incorporated in domestic law. Or, as Anne Marie Slaughter puts it “the future of international law is domestic.”⁶⁸⁸ In this light, the finding that the optional protocol on the death penalty increases the probability of constitutional abolition of the death penalty may already be an important one. But further research is required to tease out the more precise effect of international law on national constitutions.

⁶⁸⁷ See Linda Camp Keith, *The United Nations International Convention on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?* 36 J. PEACE RES. 95 (1999); Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935 (2002); Emily M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 Am. J. Soc. 1373 (2005); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* 49 J. CONF. RES. 925 (2005).

⁶⁸⁸ Anne Marie Slaughter & William Burke-White, *The Future of International is Domestic (or, The European Way of Life)*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 110, 111-112 (Janne Nijman & André Nollkaemper eds., 2007).

Table 4: Estimating Transnational Constitutional Influence: different rights

	(1) All Rights: baseline	(2) Political & Democratic Rights	(3) Life & Liberty Rights	(4) Fair Trial & Rights	(5) Equality Rights	(6) Socio- Economic Rights	(7) Family, Women & Children	(8) Minority Rights & “New” Rights
Aid competitors	0.022*** (0.005)	0.028*** (0.010)	0.020*** (0.006)	0.022*** (0.006)	0.026*** (0.008)	0.015*** (0.005)	0.005 (0.006)	0.000 (0.005)
Export competitors	0.029 (0.020)	-0.066 (0.050)	-0.00 (0.023)	0.057*** (0.022)	0.056 (0.039)	0.021 (0.016)	0.026 (0.018)	0.063** (0.026)
Former colonizer	0.007*** (0.002)	0.010*** (0.004)	0.010*** (0.002)	0.007*** (0.002)	0.004 (0.004)	0.007** (0.003)	-0.001 (0.002)	0.006* (0.004)
Common colonizer	0.020*** (0.005)	0.040*** (0.010)	0.018*** (0.007)	0.014** (0.006)	0.018** (0.008)	0.022*** (0.007)	0.013 (0.010)	0.016* (0.010)
Aid donor	-0.004 (0.003)	-0.007 (0.006)	0.012*** (0.004)	-0.003 (0.003)	-0.016** (0.006)	-0.012** (0.005)	-0.005 (0.004)	0.005 (0.005)
Common legal origins	0.026*** (0.004)	0.013 (0.010)	0.024*** (0.007)	0.025*** (0.006)	0.030*** (0.008)	0.025*** (0.006)	0.035*** (0.008)	0.041*** (0.009)
Trade partnerships: export	0.008* (0.004)	0.009 (0.011)	-0.002 (0.005)	0.004 (0.004)	0.011 (0.010)	0.018*** (0.006)	0.013** (0.006)	0.005 (0.007)
Common religion	0.017*** (0.003)	0.052*** (0.010)	0.016*** (0.006)	0.007 (0.008)	0.026*** (0.008)	0.011*** (0.004)	0.016*** (0.006)	-0.000 (0.005)
Common language	-0.002 (0.005)	-0.010 (0.010)	0.006 (0.007)	-0.002 (0.006)	-0.005 (0.008)	-0.00 (0.006)	-0.009 (0.007)	-0.012* (0.007)
Military alliances	-0.010** (0.005)	-0.019** (0.008)	-0.007 (0.006)	-0.006 (0.005)	-0.022** (0.009)	-0.001 (0.005)	0.005 (0.006)	-0.012** (0.005)
Common border	-0.001 (0.003)	-0.000 (0.006)	-0.001 (0.005)	-0.004 (0.005)	0.001 (0.007)	-0.001 (0.004)	0.002 (0.004)	0.009** (0.004)
Formerly same country	-0.001 (0.003)	0.006 (0.008)	0.009 (0.006)	0.006 (0.005)	0.017** (0.007)	0.006 (0.005)	0.007 (0.006)	0.004 (0.005)
Country-year fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Provision-year fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Number of observations	505348	45048	82051	61072	106529	89095	45399	76118
Goodness-of-fit (F-test)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Notes: All columns report coefficients from a linear probability model. Robust standard errors are clustered by constitutional provision and are reported in parentheses. ***, **, and * denote significance at the 1%, 5%, and 10% levels, respectively.

Table 5: Estimating Transnational Constitutional Influence

	(1) First Wave	(2) Second Wave	(3) Third Wave	(4) First Const.	(5) Other years	(6) International Treaties	(7) Int. & Reg. Treaties
Aid competitors	0.060*** (0.015)	0.012* (0.007)	0.005 (0.007)	0.184*** (0.064)	0.004* (0.002)	0.022*** (0.005)	0.022*** (0.005)
Export competitors	-0.15 (0.020)	0.103*** (0.043)	0.041 (0.060)	0.217* (0.119)	0.013** (0.007)	0.029 (0.020)	0.030 (0.020)
Former colonizer	0.005** (0.002)	0.003 (0.002)	0.011*** (0.005)	0.101*** (0.037)	0.003*** (0.001)	0.007*** (0.002)	0.007*** (0.002)
Common colonizer	0.025*** (0.008)	0.012* (0.007)	0.018 (0.012)	0.059 (0.052)	-0.001 (0.003)	0.020*** (0.005)	0.019*** (0.005)
Aid donor	-0.011* (0.006)	-0.002 (0.004)	0.000 (0.005)	0.008 (0.055)	0.006 (0.002)	-0.004 (0.003)	-0.004 (0.003)
Common legal origins	0.024*** (0.008)	0.018*** (0.006)	0.031*** (0.009)	0.382*** (0.163)	0.012*** (0.003)	0.026*** (0.004)	0.026*** (0.005)
Trade partnerships: export	0.022*** (0.007)	-0.002 (0.006)	0.003 (0.006)	0.138*** (0.050)	-0.002 (0.002)	0.008* (0.004)	0.007* (0.004)
Common religion	0.018*** (0.006)	0.010** (0.005)	0.028*** (0.006)	0.124* (0.064)	0.008*** (0.002)	0.017*** (0.003)	0.017*** (0.003)
Common language	0.015** (0.007)	0.010 (0.006)	-0.028** (0.012)	0.187*** (0.068)	0.000 (0.003)	-0.002 (0.005)	-0.002 (0.005)
Military alliances	-0.008 (0.007)	-0.002 (0.007)	-0.018** (0.009)	0.050 (0.069)	-0.007** (0.003)	-0.010** (0.005)	-0.010** (0.005)
Common border	-0.014** (0.006)	-0.013** (0.006)	0.022*** (0.005)	0.029 (0.037)	0.004 (0.002)	-0.001 (0.003)	-0.002 (0.004)
Formerly same country	0.002 (0.008)	0.019** (0.009)	0.004 (0.006)	-0.025 (0.038)	0.003** (0.002)	0.009* (0.005)	0.010** (0.005)
ICERD						0.001 (0.002)	0.001 (0.002)
ICCPR						-0.000 (0.002)	0.000 (0.002)
ICESCR						-0.000 (0.002)	-0.001 (0.002)
CEDAW						0.002 (0.002)	0.002 (0.002)
CRC						0.002 (0.007)	0.002 (0.007)
ICCPR-death penalty						0.020* (0.011)	0.024** (0.011)
European Convention							-0.004 (0.003)
American Convention							-0.007** (0.003)
African Charter							0.006 (0.004)
Country-year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Provision-year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes
N	191943	188280	146579	11340	494008	505348	505348
Goodness-of-fit (F-test)	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Notes: All columns report coefficients from a linear probability model. Robust standard errors are clustered by constitutional provision and are reported in parentheses. ***, **, and * denote significance at the 1%, 5%, and 10% levels, respectively.

E. Spatial Correlation or Causation?

Should the main findings from this chapter be taken as causal relationships or are they merely spatial correlations? This section will discuss the basic econometric challenges in distinguishing true spatial interdependence from mere spatial correlations, and will show that the findings from this chapter can, with some degree of certainty, be taken to represent true causal relationships.

One of the main empirical challenges of the spatial econometrics literature is to solve the so-called “Galton’s Problem,” or to distinguish true spatial interdependence from a “parallel evolution” and “common shocks.” The “Galton’s problem” is called after Sir Francis Galton, who, in the late 18th century, criticized a piece of cross-cultural anthropological research on the effect of marriage laws on descent patterns.⁶⁸⁹ Galton raised attention to the possibility that the connection between marriage laws and descent patterns resulted from spatial interdependence, that is, contact between the cultures in the sample.⁶⁹⁰ “It might be”, Galton said, “that some of the tribes had derived descent patterns from a common source, so that they were duplicate copies of the same original.”⁶⁹¹ It has been noted that because of his methodological critique, few anthropologists engaged in large-N cross-cultural research for the next 50 years.⁶⁹²

But unlike Sir Galton, contemporary social scientists *do* possess the tools to analyze spatial interdependence. And yet, a revised version of Galton’s problem still remains.⁶⁹³ The main empirical challenge today is to empirically distinguish true spatial interdependence from mere accidental spatial correlations. Cross-country constitutional similarities do not necessarily imply diffusion. One possible reason for

⁶⁸⁹ The study criticized was Edward E. Tylor, *On a Method for Investigating the Development of Institutions Applied to the Laws of Marriage and Descent*, XVIII Journal of the Royal Anthropological Institute (1889).

⁶⁹⁰ See Marc Howard Ross & Elizabeth Homer, *Galton’s Problem in Cross-National Research*, 29 WORLD POLITICS 1 (1976).

⁶⁹¹ *Id.*

⁶⁹² *Id.*, at 2.

⁶⁹³ See Franzese, & Hays, *supra* note 632, at 574-75.

spatial correlation in the absence of true diffusion is a so-called “parallel evolution.”⁶⁹⁴ A parallel evolution takes place if all states independently invent the same constitutional rules, without looking at each other. According to Jon Elster, for example, the “waves of constitution-making” are not genuinely waves of constitution-making, but are the direct result of democratization. It is only because states moved to democracy that constitutions were written. Democracy may be interdependent, but constitutions are not.⁶⁹⁵ Similarly, Rosalind Dixon and Eric Posner note that constitutional convergence may simply result from the convergence in what they call “superstructures.” Constitutions are the outcomes of deeper social processes, outside the realm of constitution-makers. If superstructures become more similar, constitutions, too, will grow more similar. But, in this case, constitution-makers do not actually follow each other.⁶⁹⁶

This chapter attempts to distinguish true spatial interdependence from a parallel evolution through the use of country-year fixed effects. In this respect, it actually improves upon most of the existing diffusion literature that does not generally use this type of fixed effects. Country-year fixed effects control for all that is particular to a particular country in a particular year. Thus, if constitutional rights are a product of democratization, and different states grow more democratic, then democratization is controlled for by the country-year fixed effects. Or if legal families, such as the common law, have a deep intrinsic impact on menu of constitutional rights independent of the choices of others then this, too, is captured by the fixed effects. As a result, all findings from the baseline regressions capture spatial interdependence *after* controlling for the effect of constitutional superstructures.

However, when a parallel evolution only takes place with respect to some rights, but not with respect to others, the country-year fixed effects fail to capture the (parallel) evolution of the superstructures that affect some rights only. It deserves mentioning that the previous chapter found only a weak relationship between the

⁶⁹⁴ See Simmons et al., *supra* note 452, at 787-89.

⁶⁹⁵ Elster, *supra* note 675.

⁶⁹⁶ Dixon & Posner, *supra* note 599, at 8. See also Spamann, *supra* note 578 (distinguishing diffusion from “structural theories”).

constitution and the indigenous features of society. Thus, it found little evidence to support the claim that constitutions are, at all, driven by “superstructures.” Nonetheless, to address the possibility of a parallel evolution with respect to some rights only, I estimated the baseline regression from Table 3, column (3) when including country-year effects for each of the eight types of rights (as defined in Table 1) separately. When doing so, the results are nearly identical to the original specifications. It suggests that, in general, we can take the findings from this chapter to represent true constitutional interdependence rather than a parallel constitutional evolution.

A second type of spatial correlation that is not true interdependence results from “common shocks.” If all states are affected by a common shock, they may display similar responses to this shock, also without looking at one another. For example, the entry into force of an international human rights treaty may affect each state independently of the others. The main empirical strategy of this chapter to deal with common shocks is to include provision-year fixed effects. The provision-year fixed effects capture common shocks to each constitutional provision in each year that affect all countries equally. However, when a common shock affects one region more than others, the provision-year fixed effects will not capture the additional shock to this region. Therefore, to address this problem, I also ran the baseline regression from Table 3, column (3) when including provision-year effect for each geographic region of the world separately. The results are almost identical to the original. As a result, the findings from this chapter are unlikely to result from common shocks.

From these findings, we can conclude that the main findings from this chapter are neither the result of a parallel evolution nor of common shocks. Instead, they seem to represent a true diffusion effect. But even if the findings represent true spatial interdependence, there is the question of who exactly affects who, or the possibility of so-called “simultaneity bias.” To address simultaneity bias, all spatial lags in the baseline regression were lagged one period back in time. These time lags are necessary because, if country A and B change their constitution at the same time, we cannot say whether A affected B, or whether B affected A, or whether they both affected each other. Only when constitution-making is sequenced in time, we can say

something about who influences who. It is for this reason that all spatial lags were also lagged in time. Thus, if country A changes its constitution at time t , and country B changes its constitution at time $t+1$, the analysis thus far has assumed that, in this case, B may have been affected by A, and not the other way around. But because constitution-making may take several years to complete, and because some countries take longer than others, this assumption may be incorrect. If country A amends its constitution at time t and country B amends at $t+1$, it may still be the case that A was influenced by B. This would be the case if B followed a lengthy drafting process, while country A started after B, but ended before B was finished. To account for this possibility, I estimate the baseline specification from Table 3, column (3) with up to 5 time lags. The results are largely identical to the original, suggesting that the findings are not affected by “simultaneity bias.”

F. Conclusion: The Story Continues?

While the comparative law literature has produced rich anecdotal evidence of constitutional “borrowings,” transnational influences in constitutional design have never been systematically tested. This chapter is the first to do so. It finds that the rights-related content of the world’s constitutions is crucially affected by the constitutional choices of other countries, in particular former colonizers, countries with the same legal origin, the same religion, the same aid donor or the same colonizer. These findings suggest that different diffusion mechanisms may be at work. Diffusion through shared legal origin suggests a functional form of learning, where countries learn from peers with similar legal systems. Diffusion through a shared religion, by contrast, may suggest learning through cultural “reference-groups” but may also point at processes of acculturation that defeat the functional logic of learning. Diffusion through shared aid donors suggests that the carrots and sticks of foreign aid donors are an important force behind constitutional design. Diffusion through colonial ties, too, points at coercive power.

But these general diffusion effects often depend on time, place and the type of constitutional provisions involved. The chapter has documented a number of important differences. Not all constitutions are equally transnational. Most notably,

poorer countries are more susceptible to transnational influence than the richer ones. Rich countries only learn from countries with the same legal origin but are not otherwise subject to transnational influence. Not all types of constitutional provisions are equally affected by diffusion either. In particular, it turns out that the coercive powers of aid donors and former colonizers are directed at first-generation negative liberty rights and second-generation positive socio-economic rights, not at third-generation group rights. Moreover, competition for export markets is limited to fair trial rights only. It suggests that foreign buyers and investors are attracted to a fair judicial process rather than a broad menu of rights. Finally, diffusion works differently in different time periods. For example, the strength of the colonial channels was largest in the 1950s and the 1960s and has been waning thereafter.

But the story of the transnational constitutionalism does not necessarily stop with the constitution. It may continue in court, with the judicial interpretation of “transnational” constitutional provisions. In their interpretation of these provisions, courts may build on judicial interpretations of the country from which the provisions were borrowed in the first place. They may further import foreign constitutional principles. The borrowing of foreign constitutional provisions therefore, at least in theory, may result in the borrowing of a whole body of constitutional law.⁶⁹⁷ This possibility is not merely hypothetical. In recent years, there has been considerable attention for the phenomenon of “judicial borrowing,” or the explicit citation and use of foreign constitutional principles.⁶⁹⁸ This phenomenon is not the main interest of this thesis, as judges, by themselves, hold little leverage over the shape of the constitutional document. But of course, the two phenomena may be related. Where constitutions were borrowed in the first place, courts may further import the body of case law that comes with these provisions. In that case, any potential downsides of the transnational constitution (as discussed in chapter VII) may be aggravated. But the story may also be different. Judges could also interpret the transnational

⁶⁹⁷ See e.g., Tamanaha, *supra* note 468 (documenting how the borrowing of constitutional provisions from the U.S. culminated in the importation of a whole body of case law).

⁶⁹⁸ See e.g., Slaughter, *supra* note 561; The Hon. Justice Michael Kirby AC CMG, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT’L L. 171, 181-88 (2008). For an overview see David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIFORNIA L. REV. __ (forthcoming (2011)).

constitution in such a fashion that it becomes “domesticated,”⁶⁹⁹ and adjusted to local circumstances. Slowly but surely, they could re-connect the constitution to local needs and values. In that case, the “organic” or “expressive” constitution, as discussed in Chapter IV, may be found in the larger body of constitutional law, and not the text. But any serious answer to such questions is beyond the scope of this study.

⁶⁹⁹ See Law, *supra* note 471.

VI. WHITHER CONSTITUTIONAL CONVERGENCE?

The previous chapter has established that constitutional rights diffuse, and spread from constitution to constitution. Rather than a reflection of the indigenous features of the nation, constitutions are more accurately described as transnational documents, that reflect constitutional developments elsewhere. But this does not necessarily mean that all of the world's constitutions bear resemblance to each other, or that such resemblances are increasing over time. It does not automatically mean that the world's constitutions *converge*. Diffusion is not the same as convergence.

This chapter will explore how transnational influences have shaped the global constitutional landscape; whether they have produced standardized features in the world's constitutions and if, and to what extent, the world's constitutions have converged. It turns out that the world's constitutions are at least partly standardized documents. A large number of constitutional choices can be explained by only a small number of underlying, or "latent" variables. And yet, despite sweeping claims to the contrary, there is no evidence of a global constitutional convergence. Even though more constitutions contain more rights, and share more rights in common, the world's constitutions did not converge upon the same model. Beyond a common core of "generic rights," different countries make different constitutional choices. In particular, a substantial part of the variation in the rights-related content of the world's constitutions is a standardized function of whether a country has a civil law or a common law legal system. And it is the constitutions of common law countries that are characterized by a particularly clear trajectory. In the past six decades common law constitutions have converged upon a constitutional model of a distinctly "libertarian" character. By contrast, civil law countries typically embrace a more "statist" constitutional model that not only constrains, but also enables the government. But, overall, this model is less coherent than the libertarian model, and did not grow nearly as much.

Substantial scholarly attention has been devoted to the question of constitutional convergence. A number of scholars have posited the thesis that the world's constitutions are converging. They claim that the world has witnessed "the

rise of world constitutionalism”⁷⁰⁰ which is characterized by “striking similarities,”⁷⁰¹ “a new constitutional paradigm,”⁷⁰² “generic constitutional law,”⁷⁰³ “strange multiplicity” and an “enterprise of uniformity,”⁷⁰⁴ the breaking down of traditional boundaries,⁷⁰⁵ “the global convergence of national constitutions”⁷⁰⁶ and a “world constitution.”⁷⁰⁷ These alleged growing similarities are often linked to “globalization,” or the “cluster of technological, economic, and political innovations that have drastically reduced the barriers to economic, political, and cultural exchange.”⁷⁰⁸ In the face of globalization, constitutional convergence is, in Mark Tushnet’s words, simply “inevitable.”⁷⁰⁹ Globalization increases economic interdependence and fosters constitutional competition.⁷¹⁰ It moreover transforms international politics into a “new world order” where political actors operate in transnational networks.⁷¹¹ Judges fly around the world and meet at international conferences. They developed a “common practice and conception of

⁷⁰⁰ See e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 771-97 (1997).

⁷⁰¹ Robert E. Goodin, *Designing Constitutions: the Political Constitution of a Mixed Commonwealth* in CONSTITUTIONALISM AND TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 223 (Richard Bellamy & Dario Castiglione eds., 1996).

⁷⁰² Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT. ’L L. 985 (2009).

⁷⁰³ David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 659, 662-728 (2005).

⁷⁰⁴ JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 58 (1995).

⁷⁰⁵ Lorreine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 89-90 (Suijt Choudhrey ed., 2007).

⁷⁰⁶ Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, ExpressO 1 (2010).

⁷⁰⁷ PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 481-85 (2002).

⁷⁰⁸ David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1307-42 (2008).

⁷⁰⁹ Tushnet, *supra* note 702.

⁷¹⁰ Law, *supra* note 708.

⁷¹¹ ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005).

constitutionalism, as reflected in the growing judicial citations of foreign law”.⁷¹² And constitution-makers can consult foreign constitutional arrangements simply by searching the world wide web. Or so the argument goes.

Such observations are further reinforced by Fukuyama’s prediction that the world has witnessed “the end of history.” According to Fukuyama, after the end of the cold war, a single liberal model of constitutional democracy has triumphed over all competing models. This model constitutes, in Fukuyama’s words “the end point of mankind’s ideological evolution, and the final form of human government, and as such the end of history.”⁷¹³ But others have challenged these claims.⁷¹⁴ Samuel Huntington famously describes a “class of civilizations.” Instead of the “end of history,” Huntington claims that international politics is characterized by new geopolitical rivalries and clashes between groups of states that represent different “civilizations.” In Huntington’s vision, there is no reason to expect that the world’s constitutions will be converging upon the same model.⁷¹⁵

But thus far, the debate has been characterized by startling claims, bold rhetoric, some caricature, and very little empirical investigation. Many of these claims, in fact, make more sound than sense. This chapter, by contrast, offers an empirical exploration of the evolutionary path of the world’s constitutions. The remainder of this chapter is organized as follows. Part A sets out the theoretical relationship between diffusion and convergence. Part B and C will use a number of descriptive tools to “map” the constitutional universe and explore whether the world’s constitutions have in fact been converging. It will show that there has been a clear convergence among common law constitutions, but that, other than that, there is little evidence that the world’s constitutions have converged.

⁷¹² See e.g., Tushet, *supra* note 702, at 998.

⁷¹³ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, xi (1992); K. Jagers & T. Gunn, *Tracking Democracy’s Third Wave with the Polity Data*, 32 *JOURNAL OF PEACE RESEARCH*, 469, 476 (1995).

⁷¹⁴ See Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, U. CHIC. J. INT’L L. (forthcoming (2011)).

⁷¹⁵ SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 20-21 (1998).

A. *Why Diffusion Is Not Convergence*

Diffusion is not convergence. The notion of “diffusion,” as developed in most of the social science literature and applied in the previous chapter, is used to refer to a *process*. The previous chapter has conceptualized four distinct processes by which states influence each other and constitutional rights diffuse from constitution to constitution: coercion, competition, learning and acculturation. But the *process* of diffusion typically also implies an *outcome*.⁷¹⁶ If constitutional provisions diffuse among a group of states, then the logical end point of that process is that their constitutions become more alike. The outcome of the diffusion process is convergence. But while all four mechanisms (coercion, competition, learning and acculturation) predict some degree of convergence, they do not necessarily imply that convergence is global. Instead, they suggest that different countries may converge upon different models, or may even fail to converge at all.

Under the logic of coercion, weaker states will converge upon the models provided by stronger states. In theory, there may be one constitutional hegemon that coerces all others. But, more likely, different powerful states may promote different constitutional models. During the cold war, the U.S. and Soviet Union both tried to attract countries to their respective constitutional ideologies. Or, as another example, the influence of the colonial powers was limited to their own colonies, and did not extend to the colonies of other states. Britain’s former colonies followed Britain, while France’s former colonies followed France.

Under the logic of competition, constitutional convergence is confined to economic competitors, or states that share the same export markets or compete for the same foreign direct investment. Again, in theory, all states could compete with one another. But in the real world, different countries compete for different types of FDI and for different types of exports. In particular, poor countries with predominantly low-skilled labor will attract different types of FDI than rich countries with mostly high-skilled workers. For example, one may imagine that India and South Africa compete for a clothing factory, while the U.S. and France compete for the Microsoft

⁷¹⁶ Zachary Elkins & Beth Simmons, *On Waves, Clusters and Diffusion: A Conceptual Framework*, ANNALS of the American Academy 33 36-37 (2005).

head office. Similarly, countries that export high-tech luxury goods may face different sorts of competitive pressures than countries that export raw materials, such as crude oil. While some basic set of rights, such as property, and basic civil liberties may be attractive to all types of economic capital, there are likely to be relevant differences as well.⁷¹⁷

Under the logic of constitutional learning, constitutional convergence is likely to be confined to certain “reference groups” of countries that are functionally similar and exchange more information.⁷¹⁸ In world with full and perfect information, learning might have been global, and the successes and failures of all countries might have been equally considered. In that case, countries would have turned to the global community for inspiration with respect to policies that seem likely to succeed, regardless of where they are adopted. However, all the empirical evidence suggest that this type of learning is limited by information constraints, and that states consider the constitutional arrangements they are actually familiar with, or that appear to be particularly relevant.⁷¹⁹

It is only under the logic of acculturation that one would expect constitutional convergence to be global. Even without a genuine learning, states may be acculturated into the constitutional “norms” of “world culture.”⁷²⁰ However, the previous chapter has found no evidence of such global diffusion. But acculturation may also implicate a number of more specific diffusion channels. In particular, it may be the case that constitutional arrangements do not diffuse through world culture, but rather spread through more specific cultural channels. In this case, different cultural groups may convergence on different cultural models.⁷²¹ Alternatively, as Ryan Goodman and Derek Jinks explain, some “outsider” states may fail to be acculturated

⁷¹⁷ See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. __ (forthcoming (2011)).

⁷¹⁸ Elkins & Simmons, *supra* note 716, at 42-45.

⁷¹⁹ See Chapter V, section A-2, *supra*.

⁷²⁰ See Chapter V, section A-3, *supra*.

⁷²¹ See Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945-2000*, 18 INT’L SOCIOLOGY 73, 90 (2003).

into the norms of world culture, and form their own divergent constitutional norms.⁷²² In this case, the majority of states converge upon a global constitutional model, while at the same time, a smaller set of outsider states convergences upon a deviant model.

Thus, in almost all cases, convergence is confined to the groups that borrow from each other, or amongst which diffusion takes place. Given the findings from the previous chapter, we may expect convergence among countries that share the same legal heritage, the same religion, the same colonial heritage and the same aid donors. But even for those groups, diffusion is not necessarily the same as convergence. First, diffusion, as defined and tested in the previous chapter, is in Rosalind Dixon and Eric Posner's words, a "*retail* process".⁷²³ Different provisions may be borrowed from different countries. For example, religious rights may be borrowed from religious partners, while socio- and economic rights may be borrowed from economic competitors. By contrast, the possible outcome of convergence, as tested in this chapter, is a *wholesale* phenomenon.⁷²⁴ This chapter considers the similarity between constitutional texts as a whole and does not capture the nuances of convergence at the level of individual provisions. Thus, if a particular state borrows part of the constitution from its religious partners and part from its economic competitors, its constitution might be dissimilar from both of these groups and convergence may be limited, or even absent altogether.

Second, as a more technical remark, diffusion, as tested in the previous section only captures the cases of borrowing; it does not capture the cases where states do not borrow from each other. By contrast, convergence, as tested in this chapter, is based on comparing the similarity of constitutional texts as a whole. And in calculating the similarity between different constitutions, cases of non-adoption are taken into account. Under this logic, constitutions that do not contain any rights whatsoever are perfectly similar. But from the viewpoint of diffusion, no diffusion took place. No constitutional rights are borrowed and no ideas crossed borders. Moreover, if, at this point in time, one country would start introducing constitutional

⁷²² Goodman and Jinks (2009).

⁷²³ See Dixon & Posner, *supra* note 714.

⁷²⁴ *Id.*

rights and others would gradually follow its example, this would initially produce *divergence* rather than convergence. As long as less than half of all countries adopt a particular provision, constitutions become *less* similar to one another.⁷²⁵ Constitutions that used to be in perfect agreement by not adopting any rights whatsoever have now made different choices. It is only when more than half of all constitutions have adopted these rights, similarity will go up again. And it is only when all constitutions have adopted all rights that they will be back to their old level, and will be perfectly similar again.⁷²⁶

For all these reason, diffusion, or the process of constitutional borrowing, is not the same as constitutional convergence.⁷²⁷ The remainder of this chapter will explore some general trends in the constitutions data. Some of these trends indicate some degree of constitutional convergence. But when calculating the similarity between any two constitution-pairs, it turns out that the average similarity between the world's constitutions is actually *decreasing*. Despite widespread borrowing, not all constitutions are alike.

B. Measuring Convergence: A Black Cat in a Black Room?

Measuring constitutional convergence poses some empirical challenges. Empirical analysis of policy convergence has, in fact, been compared to “chasing a black cat in a black room.”⁷²⁸ For one thing, whether or not one finds convergence will, to a large extent, depend on the degree of detail studied. When looking at highly general statements, there will always be some degree of convergence. For example, countries have more or less universally converged upon the idea that they need a written constitution.⁷²⁹ Similarly, the idea that a written constitution contains a Bill of

⁷²⁵ *Id.*

⁷²⁶ *Id.*

⁷²⁷ *Id.*

⁷²⁸ Thomas Plümper & Christina J. Schneider, *The Analysis of Policy Convergence, or: How to Chase a Black Cat in a Dark Room*, 16 J. EUR. PUB. POL'Y 990 (2009).

⁷²⁹ See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 48-50 & 49 n.11 (2009); Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMPARATIVE POLITICS* 217, 233 (Daniele Caramani ed., 2008).

Rights, too, has become near universally accepted. Today, about 97% of the world's constitutions contain at least one or more rights. At the level of broad principles, these Bills of Rights may moreover be similar; they all allegedly protect rights and serve some broad goals like "human dignity."⁷³⁰ But when looking at the more specific constitutional choices that lie within a Bill of Rights, convergence may be less apparent. One country may protect the right to life while another opts for a prohibition of torture. One country may adopt a right to health, while another refrains from including socio-economic rights altogether. There are moreover bound to be differences in drafting style. Some constitutions may be short and general in nature, while others are long and specific.

Thus, it may be that constitutional convergence is in the eye of the beholder. And it turns out, that in comparative law, the beholder tends to have an eye for broad and general similarities. Indeed, comparativists often tend to search for broad similarities, and explain away differences. One famous comparative law textbook claims that "legal systems give the same or very similar solutions, even as to detail, to the same problems of life" and suggests that "the comparativist can rest content if his researches through all the relevant material has lead to the conclusion that the systems he has compared reach the same or similar practical results."⁷³¹ By contrast, "if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he proposed his original questions were purely functional and whether he spread the net of his researches wide enough."⁷³² Within the same tradition, Alan Watson notes that "all legal change occurs through transplantation," and that the study of comparative law is ultimately a study of legal transplants.⁷³³ Others, however, resist this view. Pierre

⁷³⁰ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008).

⁷³¹ KONRAD ZWEIGERT & HEINZ KOTZ, INTRODUCTION TO COMPARATIVE LAW 39-40 (3d ed, 1988). For an overview of this debate see Sujit Choudhry, *Introduction*, in THE MIGRATION OF CONSTITUTIONAL IDEAS I (Sujit Choudhry ed., 2007)

⁷³² *Id.*

⁷³³ ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

Legrand, in a well-known response to Alan Watson, stresses that laws should always and necessarily be seen in their local context. According to Legrand, “legal transplants are impossible” “at best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words.”⁷³⁴ Legrand therefore claims that, comparativists should not look for similarities, but turn themselves into “difference engineers.”⁷³⁵

These debates imply an obvious methodological remark. When comparing constitutions at a high level of generality, there will always be convergence. By contrast, if one looks close enough, one will always find differences. In this chapter, I seek a middle ground. In particular, I will examine constitutional similarities, or constitutional convergence, at the level of substantive constitutional choices in the Bill of Rights. By contrast, I will ignore mere differences in drafting style or the more detailed characteristics of a particular constitutional provision. But at the same time, I move beyond broad statements of principle and examine a range of more specific constitutional choices. To serve these goals, I will use the same 108 substantive constitutional rights provisions that featured as object of analysis in the previous chapter (see Chapter V, table 2). Using these 108 constitutional variables, I will calculate the similarity between any two constitutions in the dataset. The same 108 variables will moreover be used to explore the general similarities and dissimilarities among the world’s constitutions. Thus, the entire analysis of constitutional convergence rests on the similarities and dissimilarities in these 108 substantive constitutional choices.⁷³⁶

C. Whither Convergence? Global Trends

In this section, I will explore some global trends that, at first sight, may seem point at a global constitutional convergence. First, in virtually all countries the number of rights have increased over time. Second, we have witnessed the emergence

⁷³⁴ Pierre Legrand, *The Same and the Different* in, *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240 (Pierre Legrand & R. Munday eds., 2003).

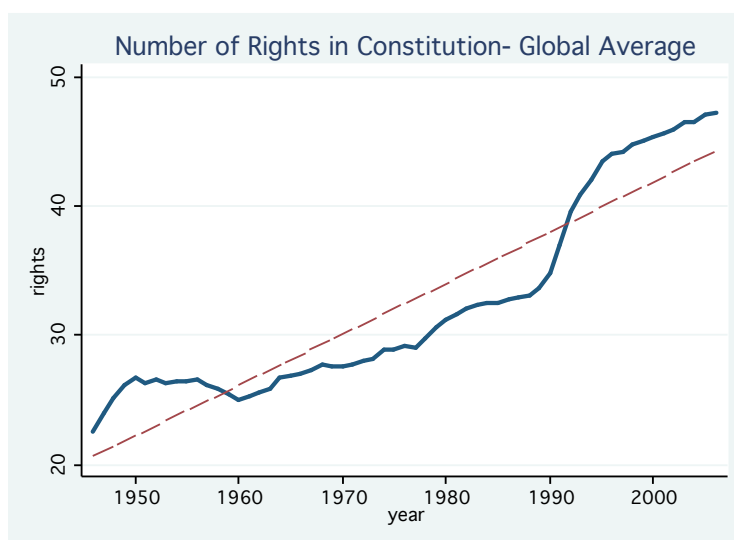
⁷³⁵ *Id.*, at 288.

⁷³⁶ *Cf.* Law & Versteeg, *supra* note 717 (using a more limited list of 60 more general characteristics).

of a common core of constitutional rights, or, in David Law's words, a "generic" set of rights. However, when calculating the similarity (or correlation coefficient) between any two constitutions in the dataset, it turns out that the average similarity between the world's constitutions is in fact *decreasing*. It suggests that despite these trends, there is no such thing as a global constitutional convergence.

1. Rights Creep- An important constitutional trend since the WWII is the "rights creep," or an increasing number of rights in the average constitution. This, in fact, is the main finding from chapter III of this thesis. Prior to WWII, most constitutions enumerated just a handful of rights. Over the last six decades, however, the number of rights in the average constitution has crept upward. Figure 1 graphs how many out of 108 possible rights the average constitution has contained over time. In 1946, the average constitution contained 23 out of the 108 rights provisions in the index. By 2006, that fraction had increased to 48 out of 108, an increase of more than 100%.

Figure 1



2. Generic Constitutional Rights- Another characteristic of global constitutionalism that suggests that constitutions may be converging is the existence of generic constitutional rights, or the fact that some rights are so appealing that they

can fairly be described, in David Law's words, as "generic."⁷³⁷ Table 2 shows, decade by decade, the rights that can be found in over 70% of all of the world's constitutions. This table, which in parts overlaps with table 4 in chapter III, shows that a significant number of constitutional rights are generic: they can be found in the vast majority of the world's constitutions and, in effect, form part of a shared global practice of constitutionalism. Tied for first place are freedom of religion, freedom of expression, the right to private property, and equality guarantees. Each of these rights can be found in no less than 97% of all constitutions in force as of 2006. In addition, the right to privacy of the home, the prohibition of arbitrary arrest and detention, and the rights to assembly and association, are all found in over 90% of the world's constitutions. Indeed, twenty-five rights can now be found in over 70% of all constitutions. The number of rights that can be described as "generic" has moreover increased over time. It suggests that constitutions do not only contain more rights, but also share more rights in common.

Constitutional Right	1946	1956	1966	1976	1986	1996	2006
1. General equality clause	70%	76%	85%	88%	92%	95%	97%
2. Right to freedom of religion	81%	88%	87%	88%	92%	95%	97%
3. Right to private property	81%	85%	81%	83%	87%	95%	97%
4. Freedom of expression	81%	86%	82%	83%	85%	94%	97%
5. Prohibition of arbitrary arrest and detention	76%	81%	81%	79%	81%	92%	94%
6. Right to privacy of the home	81%	81%	76%	80%	81%	91%	94%
7. Right to assembly	73%	77%	73%	75%	81%	90%	94%
8. Right to association	72%	74%	78%	77%	80%	91%	93%
9. Right to privacy of communication	67%	71%	68%	70%	73%	87%	89%
10. Freedom of movement	50%	55%	58%	58%	64%	84%	88%
11. Equality regardless of gender	14%	28%	45%	59%	71%	85%	86%
12. Right of access to court (habeas corpus)	68%	68%	64%	62%	64%	85%	86%
13. Right to vote	63%	74%	73%	69%	74%	82%	84%
14. Prohibition of Torture	37%	37%	41%	45%	56%	80%	84%
15. Right to education	64%	72%	60%	63%	65%	78%	82%
16. Freedom of press	76%	75%	66%	65%	63%	77%	81%
17. Right to work	46%	56%	56%	65%	63%	78%	80%
18. Prohibition of ex post facto laws	41%	51%	57%	60%	67%	77%	80%
19. Right to life	33%	33%	38%	41%	51%	71%	78%
20. Presumption of innocence	8%	12%	31%	37%	49%	69%	74%
21. Equality regardless of race	17%	25%	49%	55%	63%	70%	73%
22. Right not to be expelled from home territory	30%	33%	38%	44%	48%	70%	73%
23. Right to present a defense	30%	37%	52%	57%	64%	69%	72%

⁷³⁷ See, e.g., Jeffrey Goldsworthy, *Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 115, 116 (Sujit Choudhry ed., 2007); Law, *supra* note 703, at 659.

24. Right to form trade unions	24%	35%	49%	48%	48%	67%	71%
25. Right to health	24%	39%	33%	41%	49%	64%	71%

3. Constitutional Similarities- The existence of a core of generic rights in combination with a rights creep would all appear to point toward a particular conclusion—which is that constitutions are becoming more similar to one another over time. However, initial analysis of the full data suggests the opposite.

To analyze whether constitutions around the world are becoming more similar to one another, I calculated the similarity between any two constitutions in the data in each year. The similarity between constitutions A and B is simply the correlation between the series of 108 binary variables that capture the features of constitution A and the series of 108 binary variables that capture the features of constitution B.⁷³⁸ I calculated a correlation coefficient (Pearson's phi) for every possible pairing of constitutions over every year of the data. The result is 648,429 similarity scores, each of which ranges from -1 to 1. A similarity score of -1 means that every variable in the index has the opposite value for constitution A than it does for constitution B: where constitution A contains a given provision, constitution B does not, and vice versa. Conversely, a similarity score of 1 means that the two constitutions have identical indices, or are in perfect agreement. The actual similarity scores that I computed in this manner range from -0.22 to 1, and the mean score across all country-pairs and years is 0.34.

Figure 2 depicts the average of all pair wise similarity scores for each year. As the graph shows, some decades saw rises in average similarity while other decades saw average similarity drop rather steeply. Overall, however, average similarity has decreased over the last six decades, albeit only slightly.⁷³⁹

⁷³⁸ The measure I compute is the *Pearson's phi*, which is simply a correlation coefficient for binary variables. Compare Tom Ginsburg et al., *Baghdad, Tokyo, Kabul: Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1155 (2008) (using Pearson's phi to measure constitutional similarity) with ELKINS ET AL., *supra* note 729, at 25 (using raw percentages in lieu of Pearson's phi as a measure of constitutional similarity).

⁷³⁹ In 1946, the average similarity score was 0.382. As of 2006, it had declined to 0.349.

Figure 2

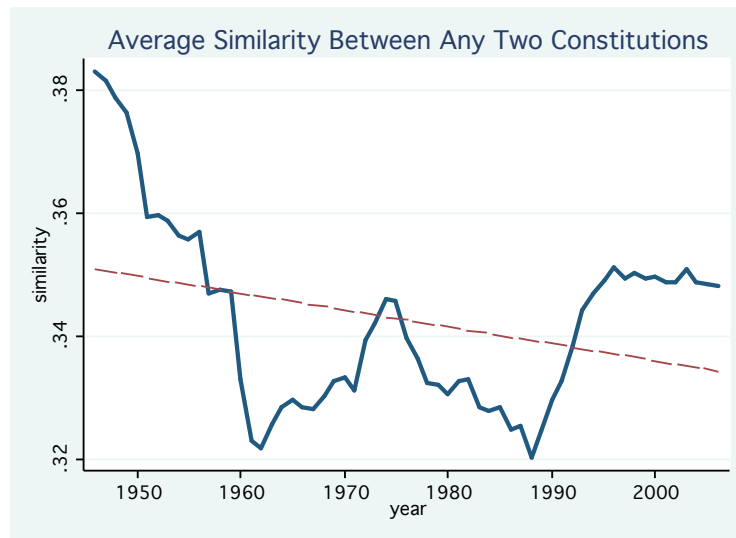


Figure 2 poses an empirical puzzle. At first blush, one would be inclined to think that the combination of increasing comprehensiveness and finite variation in the number of possible rights will yield increasing constitutional similarity. Contrary to such expectations, however, the similarity scores show that the average similarity between any two constitutions in the world is nominally *decreasing*. Beyond a common core of generic rights, different countries must be making different choices. The graph seems to suggest that there is no such thing as a global constitutional convergence.

Of course, this graph may conceal different, and competing, constitutional trends. It may well be true that different countries converge upon different constitutional models. More complex convergence patterns would not be picked up by a simple graph like this. Therefore, the next section will dig deeper into the similarities and dissimilarities in the world's constitutions. It will explore what is behind these declining average similarity scores. In particular, it finds that there is one clear trend towards constitutional convergence, which is a convergence among common law constitutions. Most of the other constitutions belong to a different family, which is different from the common law constitutional tradition, though less distinctive as a whole.

D. Digging Deeper: Common Law Constitutional Convergence

This section will explore what lies behind the somewhat puzzling finding of a *decreasing* average similarity among the world's constitutions. Do different constitutions converge upon different models? And if so, what are these models? To answer these questions, this section will use a range of exploratory tools. First, it will use the main findings from the previous chapter to tentatively explore similarities and dissimilarities among constitutions for which we know they are shaped through various types of transnational influences. Second, it will use factor analysis for a more systematic analysis of the main patterns of similarity and dissimilarity among the world's constitutions. Unlike the regression techniques from the previous chapter, these tools are often more of an art than a science. Nonetheless, from both of these exercises, it appears that there is one strong trend of constitutional convergence, which is a convergence among common law constitutions. There is no indication of a strong convergence among any other types of constitutions. The analysis does however suggest that constitutions are fairly standardized documents. A wide range of constitutional choices can be reduced to a small number of underlying, or "latent" dimensions. Most of the variation in the rights-related content of the world's constitutions, in fact, represents a divide into two distinct constitutional families: one libertarian family that fits with the Anglo-American, or common law tradition and one more statist family that is characteristic of the civil law tradition as well as (former) socialist constitutions.

One of the strongest and most robust findings from the previous chapter is that constitutional provisions diffuse among countries with a shared legal heritage. Regardless of the type of right or the type of country, a shared legal heritage spurs constitutional diffusion. As a result of this type of diffusion, we may have witnessed constitutional convergence among countries with the same legal system. To explore whether this is the case, I use calculate the average constitutional similarity scores among constitutions that belong to the same legal families. To define legal families, I again use the data developed by La Porta et al., who classify the world's legal system as either possessing English legal origin (or a common law system), French legal origin (or a civil law system), German legal origin, Scandinavian legal origin and

Socialist legal origin.⁷⁴⁰ To calculate the average similarity among these families, I again use the similarity scores as described in section C-3. Figure 3 below depicts the average constitutional similarity among the members of the largest three legal families: those with a common law system, a civil law system and, what La Porta et al. call a “socialist law system.”⁷⁴¹ Of course, this graph does not control for similarities other than a shared legal system. Nonetheless, the graph is indicative of one clear pattern in the data: which is a strong convergence among common law constitutions.

Today, common law constitutions, on average, are most similar to one another, with an average similarity score of 0.45. By contrast, in 1946, the average similarity score for common law constitutions was only 0.18. The strongest increase in average similarity among common law constitutions took place in the 1960s, when most of the U.K.’s former colonies became independent and received a ready-made constitution from the Colonial Office in London, which was an almost exact copy of the European Convention on Human Rights.⁷⁴² However, perhaps more surprisingly, convergence among common law constitutions continued up till the mid-nineties. Also the 1983 Canadian Charter, the 1990 New Zealand Bill of Rights and the 1998 U.K. Human Rights Act fall squarely within the common law constitutional tradition, that will be described below.

Unlike the common law constitutions, civil law and socialist law constitutions have seen a slight decline in average similarity over the past six decades. Both started out with higher average constitutional similarity scores in the post WWII period. For a long time, the socialist law constitutions were most coherent as a family, and had the highest average similarity score. But in the early 1990s, this socialist law constitutional family breaks apart and it is overtaken by the common law constitutions. Average similarity among the civil law constitutions declines most strongly in the early 1960, but remains more or less constant for most of the period

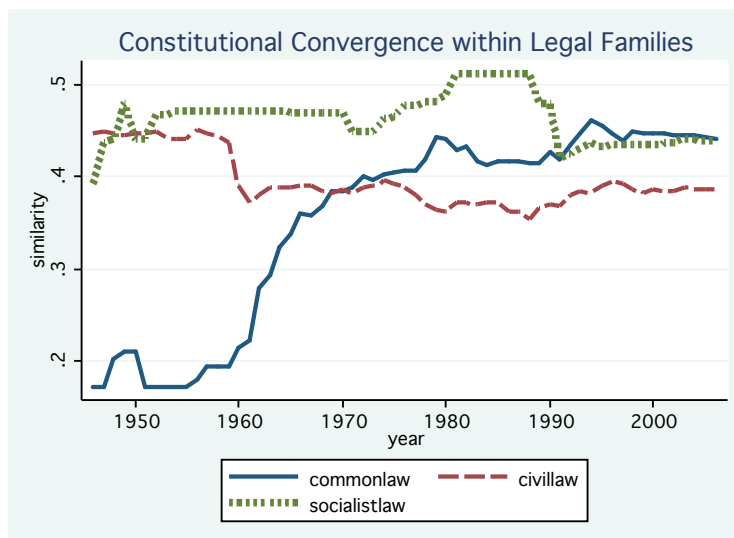
⁷⁴⁰ See chapter VI *supra*.

⁷⁴¹ This is the Soviet Union, and the countries that used to fall under its sphere of influence.

⁷⁴² See CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN’S OVERSEAS TERRITORIES 1-19* (2007).

thereafter. In the 1990s we see a small increase in the coherence of the civil law constitutional family.

Figure 3



The previous chapter did not only find evidence of diffusion through a shared legal heritage, but also found diffusion along colonial and religious lines, for example. These diffusion patterns, too, may produce distinct constitutional families, like the common law constitutional family. However, drawing more pictures of the type presented above (see Figure 3) is problematic, as many of the pre-existing similarities that drive diffusion are correlated with each other. Just to mention one example, countries that have a common law system have typically also been colonized by Britain and, as a result, often inherited the protestant religion. Similarly, countries with a civil law system have typically been colonized by either France or Spain and subsequently inherited the catholic religion. Constitutional similarities among common law systems therefore are, at least in part, also the constitutional similarities among Britain former colonizers and countries with Protestant religions.

To tease out how exactly pre-existing similarities of the type identified in the previous chapter affect similarities in constitutional documents, I could present a regression model, this time to analyze constitutional convergence. But doing so would to a large extent be a repetition of the previous chapter, with the only difference that it would focus on wholesale convergence, rather than retail diffusion. It would result in a good indication of which countries, on a whole, have similar

constitutions. But it would not get to the substance of different, and possibly competing, constitutional models. Therefore, my approach will be a different one. Instead of exploring the data with some predetermined hypothesis in mind, I will let the data speak and explore the general similarities and dissimilarities among the constitutional universe at large. To do so, I will use a simple exploratory technique called *factor analysis*.⁷⁴³

Factor analysis, in a nutshell, seizes upon similarities and dissimilarities in the substantive content of the world's constitutions to uncover some "latent" dimensions that explain the variation in constitutional content around the world. Each constitution can be placed along those dimensions, and subsequently be displayed on a so-called "spatial map." Factor analysis, therefore, is a way to explore systematic similarities and dissimilarities beyond the simple correlations between any two constitutions in the dataset, which I have used thus far. A list of correlations between any two constitutions is like having the distances between all the world's cities without having an actual world map. With such a list, we would know that Amsterdam is close to Brussels and Boston is close to Washington DC, just as we know, for example, that the constitution of Liberia resembles the constitution of the United States while the constitution of Kenya resembles the constitution of Ghana. But we would not know what the world actually looks like, or where Brussels and Amsterdam are located in relation to Boston and Brussels (or how the constitutions of the U.S. and Liberia relate to that of Kenya and Ghana). In case of the cities of the world, we would need an actual world map where the cities are mapped along two dimensions: East-West

⁷⁴³ There is a range of ideal point estimation techniques that I could have used as well, or instead, ranging from Bayesian MCM methods that underlie the Martin-Quinn judicial ideology scores, to the maximum-likelihood based Poole-Rosenthal NOMINATE scores that are commonly used to study congressional voting, to the non-parametric Optimal Classification method, which, too, has been developed in the context of Congressional voting. Which of those techniques is appropriate is the subject of academic debate. For my purpose here, which is to provide a simple picture of the world's constitutions, I use simple linear factor analysis as propagated by Professors Heckman and Snyder. See James J. Heckman & James M. Snyder, *Linear Probability Models of the Demand for Attributes with an Empirical Application to Estimating the Preferences of Legislators*, 28 RAND J. ECON. 142, 142-146 (1997). This, in fact, is the simplest and most intuitive method. In a different paper, co-authored with David Law and using a smaller set of more general variables, I used non-parametric optimal classification. The optimal classification method has a number of technical advantages but is less intuitive and results are harder to interpret. In fact, to create a map of the constitutional universe and to offer a substantive interpretation of this map, we needed about 60 law review pages. Since the substantive understanding turns out to be remarkably similar, I use the simpler method here. For a discussion of the pros and cons of the different ideal point estimation techniques, as well as the substantive application of the optimal classification method, see Law & Versteeg, *supra* note 717.

and North-South. In the case of the world's constitutions, we can use factor analysis to systematically examine constitutional similarities and dissimilarities around the world and thereby uncover one or more underlying, or "latent," dimensions that are the equivalent of East-West and North-South in the constitutional universe. By placing all of the world's constitutions along these dimensions we can then draw, quite literally, a spatial map of the constitutional universe.

I use factor analysis to uncover latent dimensions among the same 108 rights variables that have featured as object of analysis in chapter V. Rights that are highly correlated are likely to be influenced by the same latent dimensions, while the rights that are only weakly related to one another are likely to be influenced by different latent dimensions, or factors. In that sense, factor analysis reduces the 108 substantive constitutional choices to a more limited number of underlying preferences, which are captured by the factors. The constitutional rights variables that cluster together are assigned to the factor. Each of these variables receives a weight in the factor; this is the so-called "factor loading." With these factor loadings, one can moreover compute "factor scores" that weight the rights in each constitution according to the factor loadings, and assign each constitution a numerical score for the factor. To again use the analogy of the world map: the factors are something like North-South and East-West in the constitutional universe, while the factor scores can be compared to coordinates along these dimensions.

To calculate these factor loadings and factor scores, I used simple linear factor analysis. A varimax rotation was carried out, which maximizes the fit on the first dimension and eases interpretation of the results. To determine how many factors should be retained, I performed the "scree-test," which consists of a plotting of the eigenvalues for each factor and retaining the number of factors prior to the last major drop in eigenvalue magnitude. This test suggests that three factors should be retained.⁷⁴⁴ These three factors account for 49 percent of all variation in the data: 22 percent of all variation is accounted for by the first factor, 18 percent by the second factor and 9 percent by the third factor. The factors are mutually uncorrelated. These

⁷⁴⁴ Moreover, and perhaps even more importantly, the other factors lack any meaningful substantive interpretation.

numbers suggest that a substantial part of the constitutional variation is still unaccounted for. However, if I exclude a number of “esoteric” rights, that are rare constitutional features (listed in Table 4 below), then these three factors account for about 70 percent of all variation in the constitutional universe. Overall, this suggests that constitutions are fairly standardized documents.

Table 2 below reports the factor loadings for the variables in the factor. The higher the factor loading, the more characteristic this variable is for the factor as a whole. The table only reports variables with factor loadings higher than 0.4. As can be seen from Table 2, the three factors roughly correspond to the three generations of human rights. The first factor consists primarily of positive and social welfare rights, or “statist” rights. I use the label “statism” because this factor does not only contain positive social welfare rights, but also a number of other rights that extend the domain of the state. Children’s rights and the rights to marry and procreate, for example, extend the reach of the state into the realm of the family. Thus, the statist label refers to a big state, which is not only viewed as a threat to liberty, but also as an essential provider of such liberty.⁷⁴⁵ The second factor is almost entirely made up of negative liberty rights. Over a third of the rights that characterize this factor moreover are judicial process rights, that empower the judiciary to protect the individual from the state. In general, this factor is made up of “libertarian” rather than “statist” rights. The third factor, the explanatory power of which is more limited, largely comprises of third generation rights, or new rights.⁷⁴⁶ Note that the “generic rights”, listed in the previous sub-section are not particularly distinctive for any of these three factors, which is not surprising given that these rights hardly vary from constitution to constitution, and do thus not account for much of the distinctive variation among the world’s constitutions.

⁷⁴⁵ For the philosophical underpinnings of these different notions of liberty see Isiah Berlin, *Two Concepts of Liberty* in *FOUR ESSAYS ON LIBERTY* 1 (1969).

⁷⁴⁶ See chapter III, *infra*.

Table 3: Three Factors of Constitutional Rights

Factor 1: Statist Rights		Factor 2: Libertarian Rights		Factor 3: Third Generation Rights	
Right to education	0.75	Timeliness of trial	0.72	Right to speak minority language	0.61
Right to establish a family	0.74	Right to counsel	0.71	Right to minority culture	0.61
Right to work	0.73	Prohibition of torture	0.69	Environmental rights	0.55
Right to social security	0.73	Prohibition of double jeopardy	0.68	General minority protection	0.47
Right to rest	0.69	Political equality	0.67	Privacy of Data	0.46
Right to health	0.66	Right to life	0.66	Equality regardless of education	0.45
Children's rights	0.65	Fair trial rights	0.66	Gender equality	0.43
Right to minimum wage	0.65	Right to remain silent	0.65	Religious equality	0.43
Protection of mothers	0.64	Prohibition of slavery	0.64	Right to information	0.43
Intellectual property rights	0.62	Prohibition of ex post facto laws	0.62	Protection of handicapped	0.41
Right to petition	0.61	Equality regardless of place of birth	0.62		
Right to strike	0.61	Presumption of innocence	0.62		
Right to marry	0.59	Right to interpreter	0.62		
Right to culture	0.58	Right to remedy	0.61		
Freedom of enterprise	0.58	Freedom of movement	0.61		
Right to housing	0.58	Equality regardless of beliefs	0.60		
Right to asylum	0.54	Right to habeas corpus	0.60		
Right to favorable working conditions	0.53	Right not to be expelled	0.57		
Freedom of education	0.50	Right to assembly	0.53		
Protection of women	0.50	Freedom of expression	0.52		
Maternity leave	0.50	Right to public trial	0.52		
Privacy of the home	0.48	Right to association	0.51		
Right to artistic freedom	0.48	Right to privacy of communication	0.48		
Right to establish schools	0.47	Equality regardless of race	0.47		
Privacy of correspondence	0.47	Prohibition of arbitrary detention	0.47		
Press freedom	0.47	Gender equality	0.46		
Right to sport	0.47	Property rights	0.43		
Prisoners rights	0.46	Freedom of religion	0.43		
Petition for amparo	0.45	Privacy of the home	0.43		
Right to reputation	0.43	Right to form trade union	0.42		
Equality husband and wife	0.43	Right to privacy	0.42		
Freedom of expression	0.41	Right to present a defense	0.41		
Right to establish political parties	0.41		0.40		
Rights for elderly	0.40				

Factor loadings from principal factor analysis, subject to varimax rotation. Only factor loadings of 0.4 or higher are reported.

A number of rights did not “fit” with any of the factors. These rights are uncorrelated with all other rights and can be seen as unique constitutional features. These rights are assigned high “uniqueness scores” by the factor analysis. Table 4 below lists the rights that have uniqueness scores of 0.90 or higher. Most of these rights, in fact, are rare constitutional features, that are adopted by a small proportion of the world’s constitutions only. Interestingly, the protection of unborn children is part of this list, which is one of the few rights that chapter IV found to be “indigenous” to the nations that adopted it.

Table 4: Most “unique” rights
Equality regardless of HIV Aids
Equality regardless of caste
Equality regardless of ancestry
Explicit right to “due process” of law

Right to representation for minority groups Equality regardless of sexual orientation Right to adequate standard of living Right for unborn children Right to bear arms Right to own indigenous lands Equality regardless of education Right to food Right to water

I next calculate “factor scores” that indicate how each constitution is placed along each of these factors. Countries with a high positive score for a particular factor contain many of the rights that characterize the factor, while countries with high but negative scores will largely, or entirely, omit these rights. Table 4 list the top 25 constitutions with the highest scores on each of these factors. As can be seen from Table 4, column (1), the top 25 statist constitutions is mainly made up of Latin American constitutions and constitutions that used to fall under the Soviet sphere of influence. It is these constitutions that embrace the most comprehensive social welfare agenda. The civil law countries that used to be French colonies also have positive scores on the statist dimension, but are placed further down the list. By contrast, the top 25 constitutions with high libertarian scores are all common law systems.⁷⁴⁷ Finally, the constitutions with the strongest emphasis on the third generation rights are the constitutions of former Soviet countries, most of which have fairly new, and generally comprehensive, constitutions. This list of countries suggests that the civil and socialist law constitutional families are not nearly as distinctive as the common law family. After all, the world’s most statist constitutions are a mixture of Latin American countries and former Soviet Republics.

Table 5: Constitutions with the highest scores for each factor

Statist Constitutions	Libertarian Constitutions	Third Generation Rights Constitutions
Guatemala El Salvador Honduras Panama Costa Rica	St. Lucia Antigua and Barbuda St. Kitts and Nevis Dominica Kenya	Serbia and Montenegro Estonia Slovenia Armenia Azerbaijan

⁷⁴⁷ I performed regression analysis to further explore the relationship between libertarian constitutions and the common law tradition as well as the relationship between statist constitutions and the civil law and socialist law traditions. These regression results (not reported here), confirm that a common law system is a positive and significant predictor of libertarian constitutions while both civil law and socialist law systems are a positive and significant predictor of statist constitutions.

Brazil	Zimbabwe	Lithuania
Uruguay	St. Vincent and the Grenadines	Macedonia
Nicaragua	Fiji	Slovak Republic
Belarus	Botswana	Eritrea
Ecuador	Solomon Islands	Ethiopia
Ukraine	Bahamas	Georgia
Timor-Leste	Zambia	Uzbekistan
Argentina	Barbados	Czech Republic
Paraguay	Sierra Leone	Moldova
Venezuela	Grenada	Kazakhstan
Cuba	Kiribati	Croatia
Vietnam	Papua New Guinea	Ukraine
Bolivia	Malta	Albania
Italy	Mauritius	Papua New Guinea
Haiti	Uganda	Kyrgyz Republic
Peru	Belize	Russian Federation
Russian Federation	Jamaica	Palau
Portugal	Nigeria	Hungary
Cape Verde	Guyana	Tajikistan
Lithuania	Gambia	New Zealand

Ranking based on average factor scores for each of the three main factors

The figures below place each of the world’s constitutions along the two most important factors (statism and libertarianism) at four points in time: 1946, 1966, 1986 and 2006. These pictures can be viewed as a “spatial map” of the world’s constitutions, where each constitution is placed along two underlying dimensions. The distances between the dots capture the similarity between the constitutions represented by the dots. Constitutions that are close to one another on this map do contain similar constitutions in practice, while constitutions that are at opposite ends of the map contain very different rights. Studying these four figures gives an impression of the global trajectory of the world’s written constitutions over the course of the last six decades.

The first, and most pronounced, trend that can be discerned from these figures is the movement to the bottom-right side of the graph. This trend suggests that there are a growing number of constitutions with a high score for the libertarian factor and a strong negative score for the statist factor. And this emerging cluster at the bottom-right of the graph is a cluster of common law constitutions (see marking in Figure 7). In fact, each and every constitution that falls within this cluster has a common law system.⁷⁴⁸ Thus, the convergence in the common law constitutional family that was depicted and described in the previous section is apparent in the figures below as well, in the form of a gradual movement to the bottom-right of the graphs, which

⁷⁴⁸ Although all constitutions within this cluster are common law constitutions, not all common law constitutions, in fact, fall within this cluster. Exceptions include the South African and Indian constitutions, that also include socio-economic rights.

consists of constitutions that adopt a large number of libertarian rights and judicial process rights, but that omit the statist rights altogether.

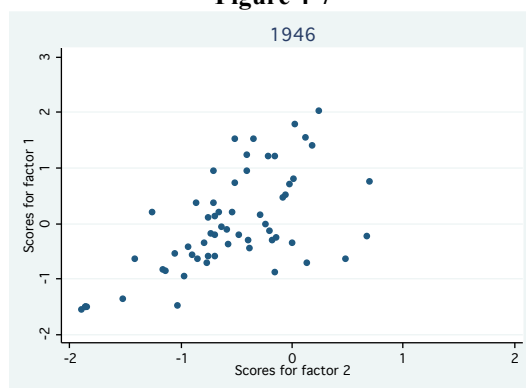
While constitutions are moving to the bottom-right of the graph, they are moving away from the bottom-left. The bottom-left of the graph consists of constitutions that do neither contain distinctively libertarian or distinctively statist rights. Instead, these are constitutions that are largely deprived of any rights altogether (such as the constitutions of Saudi Arabia, Israel or Australia) or constitutions that only contain generic rights. The moving away from the bottom left of the graph is consistent with the overarching finding from chapter III, which is that constitutions have become more comprehensive over time, and that “rights creep.”

Just as there is a move towards the high end of the libertarian factor, there is also a move towards the high end of the statist factor. But while the constitutions with the highest scores on the libertarian dimension tend to have negative scores on the statist dimension, this is not true for the constitution with the highest scores on the statist dimensions. In fact, a second cluster of constitutions can be found somewhere at the top-middle of the graph, and consists of constitutions with an average score on the libertarian dimension but a relatively high score on the statist dimension (see marking in Figure 7). This suggests that the world’s most statist constitutions are also, in part, libertarian constitutions. In this respect, the fact that the top-left corner of the graph is empty is telling. It means that there are simply no constitutions that only adopt statist rights, without also adopting a bare minimum of libertarian rights. It suggests that the statist rights are indeed something like second-generation rights, the presence of which is conditional upon the presence of libertarian rights. And if anything, the constitutions at the top-middle of the graph have moved slightly to the right over time, suggesting that they gradually incorporate a larger range of libertarian rights. But at the same time, the far top-right part of the graph, too, remains empty. It suggests that the countries at the far end of the statist dimensions are not among the most comprehensive libertarian constitutions. The most libertarian constitutions, instead, can be found at the bottom-left of the graph, and are the constitutions that omit statist rights altogether. Overall, we should note that this second cluster of statist constitutions is, on a whole, less distinctive and less coherent than the libertarian cluster. It is more spread out along the horizontal axis, suggesting that the statist

constitutions vary in the degree to which they also embrace libertarian rights. Unlike the libertarian cluster, this statist cluster has largely remained in place over time, with only a small movement to the right of the graph.

To summarize, the distinct shape of Figures 4-7 is tells us something about the characteristics of the constitutional universe. There are only few constitutions with neither libertarian nor statist rights; and those who are, are declining in number. In the same vein, only few constitutions adopt all of the statist and all of the libertarian rights. Instead, the world's constitutions divide in more or less two different camps. The first camp consists of the common law constitutions that adopt almost all of the libertarian rights but completely omit the statist rights. The second camp consists of constitutions that have a high score on the statist dimension and also adopt a fair number of libertarian rights. Between these two camps, the common law constitutions are particularly clear and tightly clustered, while the second cluster is more diverse. In particular, within the statist cluster, there is substantial variation in how many libertarian rights are embraced. Between these two camps, moreover, the libertarian cluster has seen substantial convergence over time, while the statist cluster more or less remained in place. This general picture also explains the trend in Figure 3 above, which only showed a convergence for the common law constitutions but not for any of the other legal families.

Figure 4-7





E. Two Constitutional Families

The exercises from the previous section suggest that there is only one distinct trend of constitutional convergence, which is the convergence among common law constitutions. But it also suggests that, constitutions are fairly standardized documents. In particular, only two underlying “latent” dimensions account for a substantial part of all constitutional variations. And along these two dimensions, the world’s constitutions divide into roughly two broad constitutional families. One of those families is made up of common law constitutions and is distinctively libertarian in character. The other family contains is more statist in nature, although it also

includes a set of negative rights. This second family is primarily made up of “socialist law” and civil law constitutions, including the Latin American constitution. In this section, I will describe the distinct features of these two constitutional families in some detail. Because the common law constitutional family is most distinctive, I will frame the discussion against this model. In particular, I will highlight four general characteristics that separate common law constitutions from most of the other constitutions. This discussion is primarily based on the data presented in the previous section, but also on my own impressions from coding all of the world’s constitutions.⁷⁴⁹

First, common law constitutions emphasize negative liberty rights and omit positive social welfare rights. Rather than empowering the state to provide for the welfare of its citizens, they carve out a zone of private autonomy into which the state may not intrude. They constrain, but do not enable government. In contrast with common law constitutions, statist constitutions *do* place substantial emphasis on positive rights. These constitutions do typically contain a number of negative liberty rights- in particular the “generic rights” that are common to all families- but supplement them with a broad range of social welfare rights and other positive rights. As a whole, these constitutions authorize a larger and more active role for the state, in the form of obligations on the part of the government to bring about certain social and economic conditions, and to provide citizens with a range of basic necessities. The state is not simply seen as a threat to liberty but is first and foremost envisioned as a guarantor of welfare and source of sustenance. These constitutions do not only constrain, but also enable government.

The intellectual origins of these two types of constitutions can be traced back to two different conceptualizations of state power, one of which is characterized by the work of Englishman John Locke and the other characterized by the work of the Frenchman Jean-Jacques Rousseau. According to Locke, a constitution is a social contract by which citizens leave the state of nature and establish a government to protect their life, liberty and property. The government that is established to protect

⁷⁴⁹ In particular, judicial review was not included in the empirical exercises in this chapter, but *does* feature in the discussion below. The same is true for the account of the length of the constitution.

life, liberty and property receives only a limited mandate, with well-defined powers to obtain well-defined objectives.⁷⁵⁰ In contrast with Locke, Rousseau envisioned an all-encompassing social contract that require individuals fully surrender their rights to the government.⁷⁵¹ The government, in turn, is responsible for achieving the common good. Liberty comes from voluntary subjection to the “general will.” But if not voluntary, the community as a whole can force the individual to surrender himself to the common will, or “force him to be free.”⁷⁵² It has often been noted that the Anglo-American constitutional tradition is deeply rooted in Lockean philosophy,⁷⁵³ while both the civil law and socialist constitutional traditions relied heavily on Rousseau’s notion of the social contract.⁷⁵⁴

Between the civil law and socialist constitutions, the socialist constitutions tend to be most radical in providing a social welfare agenda. They do not simply enable the government, but aim for a radical transformation of society. In these constitutions, negative liberties are marginalized. Private property tends to be severely curtailed, and the individual is often explicitly made subordinate to the “public good.” Instead, these constitutions contain a radical set of social and economic goals. In comparison with the socialist constitutions, civil law constitutions are substantially more moderate than their socialist counter-parts. They embrace a social welfare agenda, but typically do so within a framework of liberal and constrained government. It is this difference that probably explains why, within the

⁷⁵⁰ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge University Press 1988) (1689).

⁷⁵¹ LESAFFER, *supra* note 753, at 392.

⁷⁵² JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Penguin Classics, 1968) (1762).

⁷⁵³ LOUIS HARZ, *THE LIBERAL TRADITION IN AMERICA* 6 (2nd edition 1991) (describing that the American constitutional tradition is inherently linked to Lockean thought); RANDALL LESAFFER, *EUROPEAN LEGAL HISTORY*, 400 (2009).

⁷⁵⁴ FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY*, 54-70 (1960) (describing the French and British traditions of liberty, and noting that the French tradition is inspired by Rousseau while the British tradition is inspired by the works of Locke); LESAFFER, *supra* note 753, at 392; Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights* 25 *HUM. R. QUART.* 281, 300 (2003) (noting that the Latin American constitutional tradition is influenced by Rousseau and therefore emphasizes not only liberty but also equality and duties).

statist cluster, statist constitutions are so spread out along the libertarian axis of figures 4-7.

A second feature of the common law constitutional tradition, as opposed to the civil law and socialist (or more “statist”) constitutions, is that it places substantial emphasis on judicial process rights, such as the right to habeas corpus, and various provisions relating a fair, speedy and public trial. In the common law tradition, the judiciary is not simply a specialized bureaucracy designed to implement state policy. Instead, common law judges have been granted the power and the responsibility to make policy and to ensure that the state deprives individuals of life and liberty only in accordance with a variety of substantive and procedural restrictions.⁷⁵⁵ In civil law and socialist law constitutions the judiciary is not nearly given the same degree of discretionary power to develop such restrictions. In these systems, after all, the main aim of the constitution is not so much to constrain, but also to empower the government. Chapter 3 has discussed this difference in some detail.

A third feature of the common law model is that, in many cases, it tends to incorporate American style judicial review by a general court. Of course, this is notoriously untrue for the U.K. as well as Canada and New Zealand, which adopted a weak form of judicial review, commonly referred to as the “New Commonwealth Model.”⁷⁵⁶ But the largest majority of the U.K former colonies adopted American-style judicial review, by a Supreme Court, and, in many cases, the Privy Council. By contrast, many civil law constitutions embraced French-style judicial review by a specialized constitutional council. This is a weaker type of judicial review, as the constitutional council can only act at the request of government actors prior to the adoption of a law.⁷⁵⁷ Rather than a procedural guarantee for the individual, that can be invoked at any time, French-style judicial review is more like an additional step in the law-making process. Moreover, the constitutions within the socialist tradition, for a long time, were deprived of any form of judicial review altogether. But since the

⁷⁵⁵ See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 10-11, 16-46, 88-96 (1986).

⁷⁵⁶ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 709 (2001).

⁷⁵⁷ See chapter III *supra*.

end of the cold war, and the rapid spread of the Kelsian style constitutional court (described in Chapter III), this particular feature of the common law may model may not be nearly as distinctive as it used to be. Today, also most of the more “statist” constitutions are supplemented with some form of judicial review. In these countries, that were thus far unfamiliar with judicial review and a strong judiciary, constitutional enforcement is increasingly placed in the hands of the judiciary, which raises all sorts of new questions on the justiciability of “statist” rights.⁷⁵⁸

A fourth, and last, feature of common law constitutions is that they are typically more specific than the constitutions that fall within the statist traditions. They tend to contain an extensive range of limitation clauses and specify in substantial detail under which circumstances government may, or may not, intrude in individual liberty. By contrast, both the civil law and socialist constitutions tend to be less specific. Even though they may cover a wider range of substantive topics (especially the socialist constitutions, that set out a comprehensive social welfare agenda), they typically use fewer words on each of these topics. As a result, the common law constitutions read as more technical documents. Most probably, the more technical and more specific nature of common law constitutions may be a product of the Anglo-American legal realist tradition and the American experience with judicial review, the combined insight of which is that judicial review is often politics by other means. The technical and specific nature of common law constitutions therefore reflects the idea that, if judges will be enforcing the constitution, it is best to give them a specific mandate. It is an effort to limit the discretion of the judicial branch. For civil law and socialist constitution, there is no need to do the same, as the judicial mandate to enforce the constitution is more limited or absent altogether. This at least, is how it used to be. In the post cold war period, many of the socialist systems in fact drastically strengthened the powers of judicial review. Most former Soviet Republics adopted a strong constitutional court in the 1990s. It fact, it may be that the absence of a legal realist tradition, in combination with a strong form of judicial review, has produced the most activist constitutional courts in the world.

⁷⁵⁸ See chapter III, *supra*.

Which real-world constitutions are most distinctive for the common law constitutions (or libertarian family), on the one hand, and the civil and socialist law constitutions (or “statist” family) on the other hand? To answer this question, I calculated the average similarity score between each constitution and all other constitutions within the same pre-existing legal family, where “family” is along the lines of pre-existing common law, socialist law and civil law systems respectively (as in Figure 3). This score reflects how much each constitution shares in common with all of the others in the same family, and thus whether it epitomizes the tradition of the general constitutional family. This does not necessarily mean that these constitutions actually served as model for others. It only means that they are most characteristic of the family as a whole. If all constitutions within a family form the constitutional universe, then the constitutions with the highest average similarity scores are located in the middle.

Table 2 lists the constitutions that are most characteristic for each family. The left column lists the top-10 constitutions that epitomize the common law constitutional tradition. The top-10 is completely made up of former colonies of the United Kingdom, that all became independent after the 1950s. This top-10 is not so surprising considering that, upon independence, they almost all received the exact same Bill of Rights, which was designed in London and modeled upon the European Convention of Human Rights.⁷⁵⁹ The constitutions in the top-10 are moreover the ones that, as of 2006, had not made any substantial amendments to the off-the-shelf Bill of Rights they received upon independence. Each of these constitutions fit the common law tradition as described above. They only include negative liberty rights and put substantial emphasis on the protection of individual liberty through the judicial process. They include American-style judicial review and go in substantial detail spelling out the particularities of each constitutional provision.

The middle column lists the constitutions that epitomize the civil law constitutional tradition. At the top of the list are the constitutions of Tunisia, Turkey and Luxembourg. Each of these constitutions does not only include negative liberty rights, but also embraces a social welfare agenda. They do not nearly attach as much

⁷⁵⁹ See PARKINSON, *supra* note 742.

importance to judicial process rights as the common law constitutions. They moreover only provide for a limited form of judicial review, by a constitutional council. And they are rather brief constitutions. For example, today, the constitution of Tunisia (which exemplifies the civil law tradition) is made up of 7 123 words, while the constitution of Grenada (which exemplifies the common law tradition) consists of no less than 34 746 words.

The right column lists the top-10 constitutions that epitomize the socialist law tradition. The list is made up of the Russian Federation and the countries that used to fall under its sphere of influence. Each of these countries strongly commit to a broad range of social welfare rights, often at the expense of negative liberty rights. The socialist law constitutions are usually longer than civil law constitutions, but typically not very specific. Their length is more a product of the number of topics covered, rather than constitutional specificity on each topic. The constitution of the Macedonia, for example, consists of 13 442 words. And up till the end of the cold war, the socialist law constitutions typically omitted judicial review altogether.

Table 2: Constitutions that are most characteristic for each family

Common Law		Civil Law		Socialist Law	
Grenada	0.61	Tunisia	0.45	Macedonia, FYR	0.51
Kiribati	0.61	Turkey	0.45	Kyrgyz Republic	0.50
St. Kitts and Nevis	0.61	Luxembourg	0.44	Poland	0.50
Antigua & Barbuda	0.60	Kuwait	0.44	Bulgaria	0.50
St. Vincent & Gren.	0.59	Senegal	0.43	Russian Federation	0.50
Kenya	0.59	Sao Tome and Principe	0.43	Uzbekistan	0.49
St. Lucia	0.59	Morocco	0.43	Albania	0.49
Dominica	0.59	Syrian Arab Republic	0.43	Azerbaijan	0.48
Solomon Islands	0.59	Yemen, Rep.	0.43	Mongolia	0.48
Bahamas, The	0.59	Algeria	0.42	Ukraine	0.48

At this point, it is worth stressing that the central claim of this thesis is that the defining features of each of these three families are a product of diffusion. The different constitutional arrangements do not necessarily reflect intrinsically different views of government and liberty in countries like Grenada, Tunisia and Macedonia. Instead, they reflect historic differences between the core countries where these constitutional models first emerged: France, Britain, the United States and the Soviet Union. But after that, they turned into fashionable constitutional attributes that

diffused along legal family lines.⁷⁶⁰ The features that unite the members within a family and set them apart from others are a product of diffusion, not intrinsically different views on how to provide liberty. Or, despite claims that global constitutionalism has “broken down hitherto impermeable boundaries between... constitutions based on common law and those based on civil law,”⁷⁶¹ it is an ongoing diffusion along the lines of legal families that shapes a substantial part of the constitutional universe.

F. Conclusion: The End of Constitutional History?

Constitutions are fairly standardized documents that vary predictably along a small number of underlying dimensions. And yet, despite sweeping claims of constitutional convergence, it is not yet the end of constitutional history. Surely, a libertarian constitutional model has gained in importance over the past six decades. The most pronounced evidence for this claim is the strong convergence among common law constitutions, that have all embraced a distinctively libertarian model. This constitutional family is to a large extent shaped by Britain and its empire. But it is not only the post-colonial constitutions of the former British colonies that shape this family. Also more recent constitutional developments, such as the 1983 Canadian Charter and the 1990 New Zealand Bill of Rights fall within the common law tradition. But the growing importance of the libertarian constitutional model is also apparent from the gradual trend among the more statist constitutions to embrace an increasingly comprehensive catalogue of libertarian rights.

At the same time, the statist constitutional model has largely remained in place. It may have been complemented with additional libertarian rights, but it has not withered away altogether. If anything, the statist constitutional model, too, has gained in importance, although not without the simultaneous presence of libertarian rights. In addition, and perhaps most importantly, there is a substantial chunk of remaining variation in the constitutional universe does not fit standardized patterns among the

⁷⁶⁰ Cf. Holger Spaman, *Contemporary Legal Transplants- Legal Families and the Diffusion of (Corporate) Law*, 2009 BRIGHAM YOUNG U. L. REV. 1813, 1814 (2010).

⁷⁶¹ Weinrib, *supra* note 705, at 89.

world's constitutions. There are numerous more specific diffusion channels that do not result in wholesale similarities. Constitutions may be inherently transnational documents, but transnational influences are subtle processes, with bits and pieces being borrowed from different countries. In short, it is too soon to proclaim the end of constitutional history.

VII. CONCLUSION: MORE THAN WORDS?

This thesis has studied the determinants of written constitutions. It has offered a descriptive and explanatory account of the world's words of liberty, as proclaimed in national constitutions. Its main finding is that constitutions should not be viewed as unique and defining statements of national identity, as has commonly been argued. Instead, constitutions are inherently transnational documents, that are crucially shaped by constitutional developments elsewhere. Constitutional rights diffuse, and spread from constitution to constitution. But this does not mean that all constitutions are the same, or have grown more similar. There is no such thing as a global constitutional convergence. Instead, the world's constitutions divide into different constitutional families, which all evolve in different ways.

But is this a good or a bad thing? At first sight, one may think that the main findings of this thesis are cause for celebration. Through transnational influences, or diffusion, predominantly liberal models reach illiberal places. Around the world, countries have embraced a number of "generic rights" and strengthened their commitments to human rights in general. Either willingly or unwillingly, they have imported best practices from elsewhere. Even rights-abusing dictators such as Zimbabwe's Robert Mugabe or Egypt's Hosni Mubarak stress their constitutional commitments to rights and appoint judges to their constitutional courts to uphold the constitution. Rather than simply ignoring his rights commitments, Robert Mugabe amended the Zimbabwean Bill of Rights no less than 19 times since independence.⁷⁶² Constitutionalism has become a universal language around the world.

⁷⁶² *Constitutions of the Countries of the World*, electronic database, accessed December 2010.

But there is an inherent danger to the transnational constitution. Its liberal principles, and constraints on the government, are not a product of domestic power struggles, contestation or constitutional rioting, aspects that characterized the writing of the world's first constitutions. While most constitutional ideas emerge in response to deep historical crises, they subsequently evolve into fashionable constitutional attributes. And fashionable legal ideas, borrowed from elsewhere, may fail to deliver. This, in fact, is one of the core insights from the comparative law literature. The comparative law literature has often documented the existence of a "transplant-effect."⁷⁶³ Under this logic, borrowing and transplantation undermines the effectiveness of laws. If laws are simply transplanted, they may be unrelated to the needs and values of society. As a result, the "laws-on-the-books" will diverge from "law-in-action." If true, the world's words of liberty may be nothing but a dead letter.

But not all may be as bad as it seems. While the comparative law literature is skeptical about transplanted laws in general, the logic of the diffusion mechanisms identified in chapter V suggests that whether or not such a "transplant-effect" occurs depends on the diffusion mechanism at work. Diffusion may reflect a genuine learning, where constitution-makers look abroad with good intentions. But diffusion may also result from unthinking emulation of seemingly modern and legitimate norms, or a constitutional imposition on unwilling recipients. In these cases, constitutions are written for an international audience or simply dictated by powerful external actors. It is in these latter cases that the "transplant-effect" is most likely to occur.

This concluding chapter does not purport to offer a definite answer to these questions. Doing so would require a full conceptualization on -and empirical testing of- if, how, when and why constitutions matter. This will be a task for a next research project. It is too important a question to be answered as an afterthought to a story on the origins of constitutional ideas. The goal of this concluding chapter is more modest. The possibility of a constitutional "transplant-effect" is merely conceptualized, not tested. Instead of full testing of the "effects," or even

⁷⁶³ See note 772 & 773 *infra*.

“effectiveness” of written constitutions, it will present some simple descriptive statistics on the difference between de jure and de facto constitutional commitments. This simple descriptive exercise highlights an important point, which is that what constitutions say is not the same as what constitutions do. De jure commitments are not the same as de facto practices. There is only a weak link between large-C and small-c constitutions. And if anything, the relation between de jure and de facto liberty may be negative, with a stronger commitment to rights indicating worse constitutional practice. The size of the gap between de jure and de facto constitutions differs per country. Some constitutions promise more than they deliver, while others deliver more than they promise. As part of this simple empirical exploration, this chapter presents a unique new ranking of which constitutions under-perform and over-perform on their promises, and by how much.

These findings suggest that the determinants of the world’s words of liberty are not necessarily the same as the determinants of actual liberty. Constitutional rights diffuse, but actual respect for human rights does not, or at least not in the same fashion. The world’s words of liberty should be treated with some caution. At least in some cases, they are just “words.” But, importantly, these findings should not be taken to suggest that constitutions, around the world, never make a difference. This chapter does not use the right methodological tools to make such a claim. It merely shows that the origins of written declarations of liberty are not the same as the determinants of actual liberty. Constitutions can be designed, but, perhaps, liberty cannot.

The remainder of this chapter is organized as follows. Part A and B explore how de jure and de facto constitutional commitments relate to one another and will single out which constitutions under-perform and which ones over-perform on their constitutional promises. Part C and D view the gap between de jure and de facto constitutions in the light of the main findings from this thesis, which is that constitutions are a product of different processes of diffusion. Part E concludes this conclusion chapter.

A. From De Jure to De Facto Rights

What constitutions say is not the same as what constitutions do. This is the main impression that emerges from a simple (unconditional, that is, not controlling for any other factors) comparison between de jure constitutions and de facto constitutional practices. When comparing de jure and de facto constitutional rights, they turn out to be largely unrelated. And if anything, the relationship may well be negative, with stronger constitutional rights indicating worse constitutional practices.

To engage in a descriptive, and necessarily tentative, exploration of the relation between large-C and small-c constitutions, I selected four constitutional topics for which data on both de jure constitutional commitments and de facto constitutional practices are available. These topics are 1) *physical integrity rights*, 2) *empowerment rights* (consisting of expression, religion, movement, voting and worker's rights), 3) *democratic rights* and 4) *social welfare rights*. Indicators on de jure commitments in each of these areas are constructed from the constitutions dataset introduced in this thesis. Table 1, column 1, list the components for each of the de jure rights indicators.

The main reason for selecting these four particular topics is the availability of de facto rights indicators. De facto realization of physical integrity rights is captured by the Cingranelli-Richards "physical integrity rights index" that is based on the coding of the annual U.S. State Department and Amnesty International country reports on human rights. De facto realization of empowerment rights is captured by the Cingranelli-Richards "empowerment index" that, too, is based on the quantification of the annual Amnesty International and U.S. State Department country reports on human rights. Both the "physical integrity index" and the "empowerment index" consist of a number of sub-indexes, each of which range from 0 (no government respect for these rights) to 2 (full government respect for these rights). Table 1 provides further information on the individual components of these indexes. While the annual human rights country reports of Amnesty International and the U.S. State Department do report on legal and constitutional commitments, these

indexes exclusively capture actual human rights practices.⁷⁶⁴ It is for this reason that they can be used as *de facto* indicators of constitutional practice. Table 1 provides further information.

To capture the *de facto* realization of democracy, I use the democracy indicator from the polity IV data project. This indicator is widely used in the comparative political literature to capture democratic practices of a country. It ranges from +10 (strongly democratic) to -10 (strongly autocratic). In constructing this democracy index, the Polity IV dataproject considers the competitiveness of executive recruitment and political participation, the openness of executive recruitment and constraints on the executive. In coding it does not consider constitutional, or *de jure* arrangements, but rather the actual functioning of the political system.⁷⁶⁵

To capture the *de facto* realization of social welfare rights, I constructed an indicator that captures government spending on education, health and social security as proportion of the total GDP. Of course, government spending is not the same as the actual fulfillment of social welfare rights. At the same time, social welfare spending may be a better indicator on government compliance with its constitutional commitments than indicators that capture the actual fulfillment of these rights, such as literacy rates or live expectancy. Actual fulfillment, after all, is also a product of many circumstances that are outside the reach of the government.⁷⁶⁶ All the *de facto* indicators are described in more detail in Table 1, column 2.

⁷⁶⁴ For a discussion of these indicators see Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, (Manuscript, 2009).

⁷⁶⁵ For further information, see Polity IV codebook.

⁷⁶⁶ See OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights* 15 U.N. Doc HRI/MC/2008/3 (distinguishing between “structural indicators,” “process indicators” and “outcome indicators” to measure the implementation of human rights commitments).

Table 1: De Jure and De Facto Rights Indicators	
<i>De Jure</i>	<i>De Facto</i>
<p>Physical integrity rights (including procedural guarantees against infringement of physical integrity): Prohibition of torture, prohibition of arbitrary arrest and detention, Prohibition of Slavery, Right to Life, Habeas Corpus Right, Prisoner’s Rights, Right to present a defense, Presumption of Innocence, Right to Appeal, Right to Interpreter, Prohibition of Ex Post Facto Law, Right to Public Trial, Prohibition of Double Jeopardy, Right to Remain Silent, Right to Counsel</p> <p><i>De Jure Physical Integrity Rights is proportion of 16 possible rights</i></p>	<p>Physical integrity rights index, consists of four components, where each component receives a score from 0 (no government respect) to 2 points (full government respect):**</p> <ol style="list-style-type: none"> 1) Disappearances, defined as cases in which people have disappeared, political motivation appears likely, and the victims have not been found 2) Extrajudicial killings, defined as killings by government officials without due process of law. They include murders by private groups if instigated by government. These killings may result from the deliberate, illegal, and excessive use of lethal force by the police, security forces, or other agents of the state whether against criminal suspects, detainees, prisoners, or others. 3) Political imprisonment, defined as the incarceration of people by government officials because of: their speech; their non-violent opposition to government policies or leaders; their religious beliefs; their non-violent religious practices including proselytizing; or their membership in a group, including an ethnic or racial group 4) Torture, defined as the purposeful inflicting of extreme pain, whether mental or physical, by government officials or by private individuals at the instigation of government officials. Torture includes the use of physical and other force by police and prison guards that is cruel, inhuman, or degrading. This also includes deaths in custody due to negligence by government officials. <p><i>De Facto Physical Integrity Rights is proportion of 8 possible points.</i></p>
<p>Constitutional Empowerment Rights: freedom of movement, freedom of expression, press freedom, right to vote, right to establish political parties, freedom of religion, worker’s rights, right to minimum wage, right to form trade unions, right to strike, right to favorable working conditions, right to rest.</p> <p><i>De Jure Empowerment Rights is proportion of 12 possible rights</i></p>	<p>Empowerment Rights Index. Consists of five components, where each component receives a score from 0 (no government respect) to 2 points (full government respect):**</p> <ol style="list-style-type: none"> 1) Freedom of movement, which captures citizens’ freedom to travel within their own country and to leave and return to that country. 2) Freedom of speech, which captures the extent to which freedoms of speech and press are affected by government censorship, including ownership of media outlets. 3) Free and fair elections, which captures to what extent citizens enjoy freedom of political choice and the legal right and ability in practice to change the laws and officials that govern them through free and fair elections. 4) Freedom of religion, which captures the extent to which the freedom of citizens to exercise and practice their religious beliefs is subject to actual government restrictions. Citizens should be able to freely practice their religion and proselytize (attempt to convert) other citizens to their religion as long as such attempts are done in a non-coercive, peaceful manner. 5) Worker’s rights. Workers should have freedom of association at their workplaces and the right to bargain collectively with their employers. This variable indicates the extent to which workers enjoy these and other internationally recognized rights at work, including a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. <p><i>De Facto Empowerment Rights is proportion of 10 possible points</i></p>
<p>De Jure Democratic Rights: Right to vote, right to assembly, right to association, right to form political parties, right to information, right to petition.</p> <p><i>De Jure Democratic Rights is proportion of 6 possible rights</i></p>	<p>De Facto Democracy. Polity IV measure of democracy, consisting of</p> <ol style="list-style-type: none"> 1) Competitiveness of executive recruitment 2) Openness of executive recruitment 3) Constraint on chief executive 4) Competitiveness of political participation <p><i>De Jure Democratic Rights is proportion of 20 possible points</i></p>
<p>Social Welfare rights: right to education, right to</p>	<p>Social welfare spending: Government spending on education, health and social</p>

<p>health, right to housing, right to food, right to water, adequate standard of living, right to social security, right to rest, right to favorable working conditions, right to minimum wage. <i>De Jure Social Welfare Rights is proportion of 10 possible rights.</i></p>	<p>security and welfare, as a proportion of GDP.* <i>De Facto Social Welfare Rights is government spending as proportion of total GDP.</i></p>
<p>* Source: William R Easterly, <i>The Lost Decades: Developing Countries' Stagnation in Spite of Policy Reform 1980-1998</i>, 6 Journal of Economic Growth, 135 (2001) The measure is the sum of three individual indicators, 1) government spending on education, 2) government spending on health and 3) government spending on social security and welfare. ** Source: David L. Cingranelli & David L. Richards, the Cingranelli-Richards Human Rights Dataset Version 2008.03.12 (2008). **Source: Polity IV,</p>	

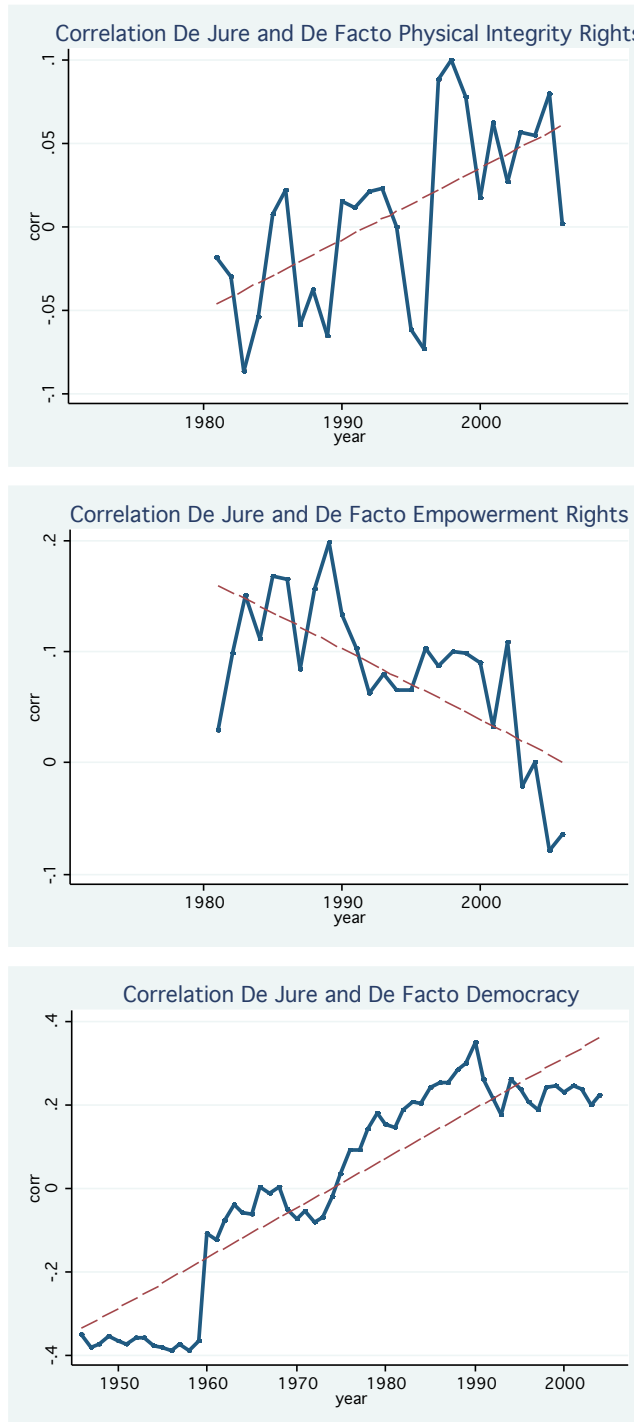
Figures 1-4 show the correlation between the de jure constitutional commitments and the de facto constitutional practices over time. Figure 1 depicts the correlation between de jure and de facto physical integrity rights; figure 2 between de jure and de facto empowerment rights; figure 3 between de jure and de facto democracy and figure 4 between de jure and de facto social welfare rights.

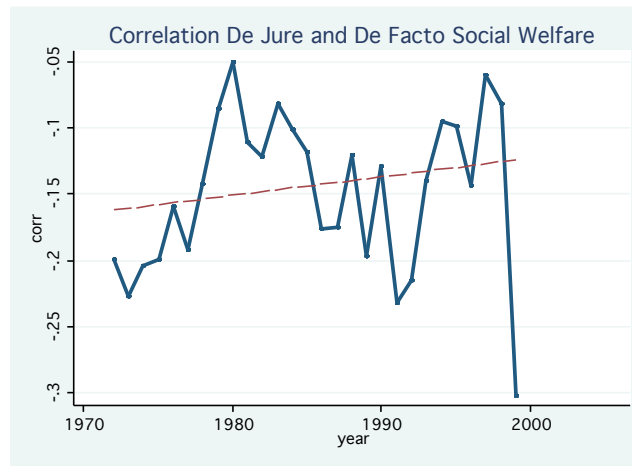
All of these graphs suggest that the correlation between de jure commitments and de facto practice is often close to zero, or even negative. For one thing, the relationship between de jure and de facto social welfare rights has consistently been negative over the past few decades. It suggests that written commitments to social welfare are often aspirational in nature. It is exactly the countries that, probably for a lack of resources, spend the least on health, education and social security that give them the most prominent constitutional status. Up till the mid-1990s, also the relationship between de jure and de facto physical integrity rights was negative. Similarly, up till the early 1970s, the relationship between de jure and de facto democracy, too, was negative. Unlike social welfare, democracy and physical integrity, the correlation between de jure and de facto empowerment rights has mostly been positive, with the notable exception of the last few years, in which the correlation did turn to negative.

But perhaps more importantly, in most cases, the correlation remains either just above or below zero. It indicates that, in general, there is only a weak relationship between de jure commitments and de facto practices. The correlation between de jure and de facto physical integrity rights ranges from between -0.1 to 0.1; the correlation between de jure and de facto empowerment rights ranges from roughly -0.1 to 0.2; the correlation between de jure and de facto democracy ranges from roughly -0.4 to

0.35 and the correlation between de jure and de facto social welfare rights ranges from -0.3 to 0.05. Although chapter IV mainly used data on structural features of society, rather than de facto constitutional practices, it painted a similar impression, which is that written constitutions are remarkably detached from actual practices.

Figure 1-4:





It is important to emphasize that these graphs merely depict correlations. It is quite possible that when controlling for other factors such as the age of the constitution, the frequency of amendment, the type of regime that is in power, or some other factors, the relationship between de jure and de facto constitutions looks rather differently. In fact, the correlation could even change direction, and turn positive. Moreover, adding control variables does not resolve the question of causality; does the constitution affect actual practice or does actual practice affect the constitution? Therefore, the simple graphs presented here should not be taken to conclude that constitutions do not matter. They may. They probably will, at least under some circumstances. This, in fact, is an important topic for future research.

The only thing that the reader can take away from this section is that de jure commitments are not the same as actual practice. This finding is not too surprising for those familiar with the law and society literature, which has often documented a discrepancy between law-in-books and law-in-action.⁷⁶⁷ But it is an important observation nonetheless, especially in a thesis that has exclusively concerned itself with the text of written constitutions.

B. Sham Constitutions

The previous section presented some correlations between de jure commitments and de facto constitutional practices. It has shown that de jure commitments do not

⁷⁶⁷ It is moreover consistent with the findings from chapter IV, even though, the indicators in chapter IV were chosen as indigenous features of society, rather than de facto rights practices.

automatically guarantee de facto rights. But even when this general relationship is taken into account, some constitutions under-perform relative to their commitments, while others in fact over-perform. Some constitutions promise more than they deliver, while others deliver more than they promise.

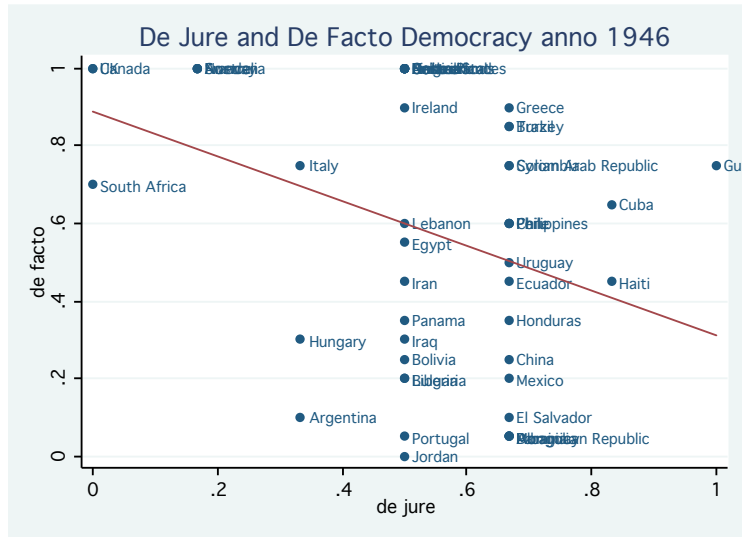
To evaluate the relative performance of different countries, I could simply subtract a country's de jure score from its de facto score, and rank constitutions according to the difference between their de jure and de facto performance.⁷⁶⁸ Such an approach however does not take into account the general relationship between the two variables, or to which extent *other* countries live up to their constitutional promises. Put simply, it would capture absolute, rather than relative, performance. If the general relationship between de jure and de facto rights is weak, or even negative, then a not-so-good performance may still be impressive. Similarly, when the general relationship between de jure and de facto is strong and positive, a seemingly impressive performance may be less impressive than it initially seems. To judge relative performance, I simply regress de facto performance on de jure commitments and analyze how far each constitution lies from its predicted value.

To illustrate this logic, consider the figure 5 below, that depicts the relationship between de jure and de facto democracy in 1946. The trend line captures the predicted values for de facto democracy in a simple regression of de facto on de jure democracy. The various dots on the plots capture the actual de jure and de facto democracy scores for any given constitution. The further a constitution is placed from the regression line, the further away it is from its predicted de facto democracy score. The constitutions that are placed above the regression line over-perform relative to their constitutional promises. That is, they do better than expected for a given level of de jure commitment. By contrast, the constitutions that are placed below the regression line underperform on their constitutional promises. That is, they do worse than expected for a given level of de jure constitutional commitment. Eyeballing figure 5, the constitutions of Jordan, Portugal, the Dominican Republic, El Salvador and Argentina are the “sham constitutions,” that underperform most strongly relative

⁷⁶⁸ For this approach see ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 29-31 (2009).

to expectations in 1946.

Figure 5: De Jure and De Facto Democracy in 1946



In order to judge the performance of each constitution, I calculate the distance of each constitution from the regression line in each year for each of the four constitutional topics identified in the previous section. These are simply the residuals from a linear regression of de facto commitments on de jure commitments. These residuals capture the performance of any given constitution relative to all others. If the residual is close to zero, a country performs as was to be expected considering the general relationship between de jure and de facto rights. Positive residuals suggest that the constitution is under-performing, or promises more than it delivers. The higher the positive residual, the more a constitution can be described as “sham.” These are the constitutions of repressive regimes that violate human rights but nonetheless adopt nice-sounding constitutions. By contrast, negative residuals indicate that a country is over-performing, it delivers more than promised by its written constitution. An example of such an over-performer is the U.K., that, for a long time, had virtually no written commitments to human rights even though it had a strong human rights record in practice.

Table 2 uses these residuals to produce a list of the top-25 “sham constitutions” and their exact opposites in the year 2006, or, alternatively, the last year for which data is available. For social welfare spending this is 1999. Moreover, because of

limited available of welfare spending data (only 48 countries), I list the top-10 rather than the top-25 for social welfare rights.

Most of the list in Table 2 is probably uncontroversial. The top-25 is mainly made up of countries that have nice-sounding constitutions and bad human rights records. By the same token, the bottom-25 is mainly made up of countries without elaborate constitutional promises but with a strong human rights record nonetheless. Eyeballing the list, it seems that the countries that top the list on one topic, also top the list on another topic. The (not so) Democratic Republic of Korea, for example, tops the lists of sham constitutions for physical integrity rights, empowerment rights and democratic rights alike. In fact, the pair-wise correlation between physical integrity and empowerment is 0.55, while the correlation between physical integrity and democracy is 0.48 and the correlation between empowerment and democracy is 0.81. Interestingly, the U.S. Constitution does not show up at either the bottom or the top of the list. In many cases, the U.S. constitution is, in fact, characterized by a relatively close link between de jure and de fact commitments, which is consistent with prevailing beliefs in U.S. Constitutional law scholarship.⁷⁶⁹

Table 2: Sham Constitutions (in most recent year)

Top 25 “Sham” constitutions that promise more than they deliver			
Physical Integrity	Empowerment	Democracy	Social Welfare
Colombia	Syrian Arab Republic	Uzbekistan	Myanmar
Philippines	Qatar	Turkmenistan	Cameroon
Bangladesh	Eritrea	Korea, Dem. Rep.	Indonesia
Pakistan	Iran, Islamic Rep.	Qatar	Tajikistan
India	Korea, Dem. Rep.	Belarus	Singapore
Myanmar	Sudan	Eritrea	Syrian Arab Republic
Korea, Dem. Rep.	Vietnam	Azerbaijan	Burundi
Ethiopia	Cuba	Myanmar	Dominican Republic
Congo, Dem. Rep.	Uzbekistan	Nepal	Thailand
Uganda	Belarus	Kazakhstan	Bahrain
Mexico	Equatorial Guinea	Lao PDR	
Iraq	Zimbabwe	Zimbabwe	
Sudan	Algeria	China	
Burundi	Kuwait	Vietnam	
Nepal	Yemen, Rep.	Bahrain	
Algeria	China	Gambia, The	
China	Afghanistan	Mauritania	
Venezuela, RB	Myanmar	Egypt, Arab Rep.	
Nigeria	Lao PDR	Morocco	
Russian Federation	Egypt, Arab Rep.	Kuwait	
Azerbaijan	Chad	Cuba	
Eritrea	Malaysia	United Arab Emirates	
Brazil	United Arab Emirates	Congo, Rep.	

⁷⁶⁹ See Chapter IV, section B, 3 *supra*.

Sri Lanka	Bahrain	Uganda	
Chad	Sri Lanka	Pakistan	
Top 25 constitutions that deliver more than they promise			
Physical Integrity	Empowerment	Democracy	Social Welfare
Luxembourg	Portugal	Australia	Slovenia
Norway	Hungary	Norway	Poland
Belgium	Spain	United Kingdom	Israel
Denmark	France	France	Slovak Republic
Liechtenstein	Malta	Austria	Uruguay
Netherlands	Belgium	Denmark	Czech Republic
Uruguay	Finland	Mauritius	Sweden
Iceland	Iceland	United States	Latvia
Germany	Sweden	Cyprus	Hungary
Vanuatu	Japan	Ireland	United Kingdom
Japan	Luxembourg	Canada	
Palau	Grenada	Botswana	
Marshall Islands	Antigua and Barbuda	India	
Malta	Canada	Jamaica	
Kiribati	Austria	Netherlands	
St. Kitts and Nevis	Netherlands	Belgium	
Samoa	Denmark	Uruguay	
Solomon Islands	Norway	Finland	
Croatia	United Kingdom	New Zealand	
Seychelles	Ireland	Sweden	
Australia	New Zealand	Japan	
Brunei	Dominica	Trinidad and Tobago	
France	Samoa	Lesotho	
Ireland	Argentina	Indonesia	
Bosnia and Herzegovina	Sao Tome and Principe	Panama	

These scores, that are available for each country in each year, facilitate an exploration the gap between de jure and de facto constitutions. There are a number of variables that may explain the extent to which de jure and de facto constitutions diverge. But one explanatory variable is particularly prominent in the light of the main finding of this thesis. This is the degree to which a constitution is “designed by diffusion” or shaped by transnational influences. The comparative law literature has often documented a “transplant-effect,” or an irrelevance of legal rules that are transplanted rather than a product of indigenous law-making. The next section will explore this claim.

C. A Constitutional Transplant-Effect?

Juan Bautista Alberdi, the alleged author of the 1853 Argentinean constitution, once suggested that all transplanted constitutions must be headed for disaster: “All constitutions change or succumb when they are but children of imitation; the only one

that does not change; the only one which moves and lives with the country, is the constitution which that country has received from the events of its history, that is to say, from those deeds which form the chain of its existence, from the day of its birth. The historical constitution ... survives experiments and floats away from all shipwrecks.”⁷⁷⁰

This claim, seemingly radical at first, fits with the general tenor of the comparative law literature on legal transplantation. In general, the legal transplant literature has documented that transplantation produces some sort of “surface law” that has little to do with actual practice.⁷⁷¹ Transplanted laws may suffer from what has been called a “transplant effect.”⁷⁷² When laws lack indigenous origins and are borrowed from elsewhere, they may be rendered ineffective. They remain law-on-the-books, remote from law-in-action.

It is possible that, like law in general, constitutions, too, may suffer from sort of “transplant-effect.”⁷⁷³ After all, the most important predictor of whether a country adopts a particular constitutional provision is if other countries previously did the same thing. Coupled with the finding that there is only a weak, or even negative, relationship between de jure commitments and de facto constitutional practice, one may suspect that diffusion, perhaps, is not a good thing. The fact that the world’s most libertarian constitutions include constitutions like Zimbabwe and a number of other not-so-democratic regimes further reinforces this suspicion. Through transnational influences, nations may “squeeze themselves into ill-fitting, but fashionable institutions.”⁷⁷⁴ Through diffusion, countries may come to signal

⁷⁷⁰ A.E Dick Howard, *The Indeterminacy of Constitutions* 31 WAKE FOREST L. REV. 383, 403 (1996).

⁷⁷¹ William Twining, *Surface Law* (Manuscript, 2007).

⁷⁷² Daniel Berkowitz et. al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2002). *But see:* Daron Acemoglu et al., *The French Revolution: The Consequences of Radical Reform* (Manuscript, 2010).

⁷⁷³ Fredrick Schauer, *On the Immigration of Constitutional Ideas*, 37 Conn. L. Rev. 907, 912 (2005) (suggesting there may be a ‘transplant’ effect for constitutions); Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among Contemporary Sioux and Apache*. 33 ECONOMIC INQUIRY 402 (1995) (suggesting that constitutions unrelated to preexisting institutions are doomed to fail).

⁷⁷⁴ Zachary Elkins & Beth Simmons, *On Waves Clusters and Diffusion: A Conceptual Framework*,

intentions they don't actually have. However, the logic of the diffusion mechanisms presented in chapter V suggests that whether or not diffusion produces such a "transplant-effect" depends on which diffusion mechanism is at work.⁷⁷⁵ If we follow the logic of these mechanisms, only some diffusion mechanisms are bound to produce a "transplant-effect."

Let's consider each of the diffusion mechanisms from chapter V in turn. When constitutional provisions diffuse through processes of *coercion* or *competition*, the decision to adopt certain provisions is externally induced. The internal preferences of the government do not change. What changes are the external incentives that alter the cost-benefit analysis on whether or not to adopt.⁷⁷⁶ Because internal preferences remain the same, and lay with a lower level of rights protection than what has been constitutionally committed to, a government may try to retain the benefits of adoption without incurring the costs of compliance. Therefore, the effectiveness of constitutional commitments adopted in processes of competition and coercion will crucially turn on monitoring and enforcement. Those who provide incentives for adoption should also provide incentives for compliance.⁷⁷⁷ In the case of competition for capital, foreign investors are likely to provide such incentives. They will only invest, and continue investing, if a government lives up to the promises that attracted them to the country in the first place. If confronted with expropriation or other rights violations, foreign investors will be quick to vote with their feet. By contrast, powerful states (such as aid donors and former colonizers) that pressure for the adoption of constitutional rights, may be more easily satisfied with the symbolic act of ratification and adoption. Often, they are promoting ideologies rather than investing their money. Thus, in the face of constitutional competition and

598 ANNALS 33, 47 (2005).

⁷⁷⁵ Compare with Berkowitz et al, *supra* note 772 (arguing that the effectiveness of transplanted laws depends on the degree of pre-existing familiarity with the transplanted law).

⁷⁷⁶ Ryan Goodman & Derek Jinks, *How to Influence States? Socialization and International Human Rights Law*, 54 DUKE L.J 621, 634 (2004).

⁷⁷⁷ Beth A. Simmons et al., *Introduction: The International Diffusion of Liberalism*, 60 INT'L ORG. 781, 791 (2006).

constitutional coercion, whether or not a transplant-effect occurs depends on subsequent actions of foreign investors and the coercing parties.

When constitutional provisions diffuse through a process of constitutional *learning*, compliance may occur also without monitoring and enforcement. Through learning, constitutional norms are “internalized” and become part of intrinsic state preferences. New constitutional commitments reflect a change in state preferences. Countries that follow the constitutional example of others do so because they are convinced that this is the right thing to do. They are persuaded by the content of the adopted provisions. If this is true, states are likely to will make an effort to comply with these provisions, and to put them into practice, also in the absence of external monitoring and enforcement. In the case of learning, sanctions for non-compliance are internal, like guilt and regret, rather than external, like a loss of benefits or “naming and shaming.”⁷⁷⁸ Thus, in the face of a genuine constitutional learning, there is little cause for worry about a “transplant-effect.”

When constitutional provisions diffuse through *acculturation*, the prospects for compliance look less rosy. In accounts of acculturation, states adopt constitutional provision previously adopted by other states not because they are convinced by the content of these provisions, but because of the social relationship these provisions represent. Their motivation behind adoption is to obtain favorable treatment from others. But in contrast with learning, the underlying constitutional norms are not “internalized.” Internal preferences do not change. And in contrast with coercion and competition, there are no external incentives for either adoption of, or compliance with, a particular constitutional provision. Therefore, acculturation, as Goodman and Jinks explain, results in an outward conformity (adoption) without private acceptance or corresponding changes in behavior (implementation and compliance).⁷⁷⁹ Or, as often documented by the world polity literature, there will be a “structural

⁷⁷⁸ See Amitai Etzioni, *Social Norms: Internalization, Persuasion and History*, 34 L. & SOC. REV. 157, 169-70 (2000).

⁷⁷⁹ Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law* 19 EUR. J. INT'L L. 725, 733-743 (2008) (noting that even though acculturation produces “shallow reforms”, there may also be windows of opportunity to move to real change).

decoupling” of formal institutional characteristics and local practices.⁷⁸⁰ Thus, it is in the face of acculturation that transnational influences of constitutional design are most likely to result in a “transplant-effect.”⁷⁸¹

In the light of these predictions, the strong evidence of constitutional coercion through colonial ties and shared aid donors may seem a cause for worry. Unless aid donors and colonizers are subsequently involved in stimulating implementation and compliance, we may expect the coerced governments to pay little attention to their constitutional commitments. By contrast, the learning through a shared legal system and religious ties are less of a cause for worry.

The predictions from this section could further serve as input for an empirical model that tests if, and by how much, *de jure* and *de facto* constitutions diverge. This empirical model, amongst other things, could include indicators that capture the strength and type of spatial interdependence in each country. Such indicators may be obtained from the regression model in chapter V that could be estimated for each country separately in order to obtain country-specific diffusion coefficients (that capture the strength of each spatial lag in each country). This exercise, however, too, will be left for another research project. If this is to be done properly, it requires a full conceptualization and testing also of all other possible predictors of the gap between large-C and small-c constitutions. It is yet another task for future research on the “effectiveness” of constitutions.

D. Conclusion: The Dawn of Empirical Constitutional Studies.

This thesis has offered the first-ever rigorous exploration of the substantive content of the world’s written constitutions. It has answered a range of questions on the origins and evolution of constitutional ideas. It has generated some new insights for a field that, on a whole, is better at “generating hypothesis than testing them.”⁷⁸² Perhaps most surprising is the finding that constitutions are inherently transnational

⁷⁸⁰ *Id*

⁷⁸¹ *Id*

⁷⁸² See David S. Law, *Constitutions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 379 (Peter Cane & Herbert Kritzer eds., forthcoming 2010).

documents, that are crucially affected by constitutional developments elsewhere. By contrast, and unlike commonly suggested, constitutions are remarkably unrelated to local circumstances. Constitutions do not tell stories about the nation's history. Instead, they tell stories of transnational consensuses, and the transnational migration of popular constitutional ideas.

With these findings, this thesis has raised a whole new set of questions. Are the transnational origins of the world's written constitutions a cause for worry? Are transnational constitutions disconnected from actual practice? Does rational constitutional design undermine the very purposes it intends to serve? These questions have been tentatively explored in this thesis, but still await rigorous examination. For an even larger number of questions, this thesis did not even begin to provide an answer. This thesis did not test the consequences or "effectiveness" of constitutional rules. It did not answer the question under what circumstances do written constitutions matter, or how, when and why do written constitutional commitments affect government behavior. Are constitutions ultimately more than just words? This thesis also set aside the explanations of constitutions as manifestations of power. It did not test the general political circumstances under which self-interested elites constrain themselves by constitutional means. And yet, it would be of much interest to examine how the prevailing theories from the new realist comparative constitutional law tradition hold up to large-N examination.⁷⁸³

In this light, this thesis has merely taken an obvious first step in what is potentially a whole new field of legal research, a field of "empirical constitutional studies." With the type of data presented in this thesis, and the methodological tools from the social sciences, scholars are now in the position to address these remaining questions. Of course, there will be important empirical challenges. Yet, the existing data on politics and society are better than ever. The same is true for our

⁷⁸³ The author does in fact have a draft manuscript that takes up these questions, and that finds that increases in electoral competition increase the probability of adoption of constitutional constraints. It moreover finds that governments in the political middle (as opposed to the right or the left) are most likely to adopt constitutional constraints. To enhance the clarity of the thesis advanced in this manuscript, this work has been omitted from this manuscript.

methodological tools to address these questions. Empirical constitutional studies, therefore, are bound to be the wave of the future.

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