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# The Evolution and Ideology of Global Constitutionalism

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*It has become almost universal practice for countries to adopt formal constitutions. Little is known empirically, however, about the evolution of this practice on a global scale. Are constitutions unique and defining statements of national aspiration and identity? Or are they standardized documents that vary only at the margins, in predictable and patterned ways? Are constitutions becoming increasingly similar or dissimilar over time, or is there no discernible overall pattern to their development? Until very recently, scholars have lacked even basic empirical data on the content of the world's*



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*constitutions, much less an understanding of whether there are global patterns to that content.*

*This Article offers the first empirical account of the global evolution of rights constitutionalism. Our analysis of an original data set that spans the rights-related content of all national constitutions over the last six decades confirms the existence of several global constitutional trends. These include the phenomenon of "rights creep," wherein constitutions tend to contain an increasing number of rights over time, and the growth of "generic rights constitutionalism," wherein an increasing proportion of the world's constitutions possess an increasing number of rights in common.*

*Perhaps our most striking discovery is that 90% of all variation in the rights-related content of the world's constitutions can be explained as a function of just two variables. Both of these variables are underlying traits of a constitution that can be measured quantitatively. The first variable is the comprehensiveness of a constitution, which refers simply to the tendency of a constitution to contain a greater or lesser number of rights provisions. The second variable is the ideological character of the constitution. We find empirically that the world's constitutions can be arrayed along a single ideological dimension. At one end of the spectrum, some constitutions can be characterized as relatively libertarian, in the sense that they epitomize a common law constitutional tradition of negative liberty and, more specifically, judicial protection from detention or bodily harm at the hands of the state. At the other end of the spectrum, some constitutions are more statist in character: they both presuppose and enshrine a far-reaching role for the state in a variety of domains by imbuing the state with a broad range of both powers and responsibilities. For every constitution in the world, we calculate a numerical score that measures its position on this ideological spectrum. These scores yield an ideological ranking of the world's constitutions—the first of its kind.*

*Using these scores, we are able to map the ideological evolution of global constitutionalism. We show that the world's constitutions are increasingly dividing themselves into two distinct clusters—one libertarian in character, the other statist. Within each cluster, constitutions are becoming increasingly similar, but the clusters themselves are becoming increasingly distinct from one another. The dynamics of constitutional evolution, in other words, involve a combination of ideological convergence and ideological polarization.*

## INTRODUCTION: THE GLOBALIZATION OF CONSTITUTIONAL LAW

The globalization of constitutional law is a widely acknowledged but poorly understood phenomenon.[1] In recent years, academics and politicians alike have seized upon a particular aspect of constitutional globalization—namely, judicial citation of foreign and international law—as a topic of extensive, if not tiresome, normative debate.[2] It has been observed, and rightly so, that globalization has fostered this type of constitutional comparativism by lowering both natural and man-made barriers to cross-border interaction.[3] The

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1. *See, e.g.*, Mayo Moran, *Inimical to Constitutional Values: Complex Migrations of Constitutional Rights*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 233, 233 (Sujit Choudhry ed., 2007) (dubbing constitutional law "the last stronghold of domestic law," yet one that is nevertheless becoming "increasingly comparative and transnational in scope"); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 650–51 (2002) (criticizing constitutional scholarship for its failure to contemplate the implications of globalization); Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1654 (1994) (questioning "why we constitutional scholars spend our time working over one admittedly interesting Supreme Court opinion rather than devoting time to thinking about what it would mean to have a constitutional democracy in a global economy").

2. *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2009) (arguing that the propriety of citing foreign authority necessarily depends upon the context and manner in which the authority is used); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–66 (2004) (arguing that globalization has facilitated a praiseworthy "active and ongoing dialogue" among judges that has in turn generated an "increasingly global constitutional jurisprudence"); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) (assessing the appropriateness of "constitutional comparativism" against various theories of constitutional interpretation); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 819–27 (1999) (describing the "increasingly cosmopolitan" character of judicial interpretation, a "globalization of the practice of modern constitutionalism," and offering explanations as to why judges consult foreign law); 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) (evaluating the use of foreign and international law by Australian judges); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 727–42 (2005) (contending that the Supreme Court's use of foreign authority is no more troubling from a democratic perspective than the use of treatises, dictionaries, microeconomic theories, "studies of how children play with dolls," "law office history," or any number of other sources to which judges have on occasion resorted); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 359–65 (2004) (suggesting that, at least in some cases, "Scalia may be right" to deem "the practices of the 'world community'" "irrelevant" to interpretation of the U.S. Constitution); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 516–27 (2000) (exploring possible causes of "transnational judicial conversations" and a "common law of human rights"); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142–43 (2006) (arguing that the Condorcet Jury Theorem offers a theoretical framework for determining when it is sensible for courts to consider the practices of other countries); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–90 (2005) (warning against "judicial cosmopolitanism" on the part of American judges); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 72–80 (2004) (developing "rigorous guidelines" for using international human rights materials in the interpretation of constitutional rights).

3. *See, e.g.*, Kirby, *supra* note 2, at 171 (deeming "the increase in dialogue between judges and other lawyers across national boundaries" a "distinctive feature of the present age"); Anne-

burgeoning literature on the cosmopolitanism of judicial citation habits holds little promise, however, of generating a comprehensive understanding of the relationship between globalization and constitutionalism.[4] Scholarly preoccupation with the relatively narrow normative question of whether and under what conditions it is desirable for judges to cite foreign authorities when deciding constitutional cases has gone hand in hand with scholarly neglect of a host of empirical questions about the development of constitutionalism on a global scale.

In particular, although it has become nearly universal practice for countries to adopt formal written constitutions,[5] very little is known empirically about either the evolution of this practice or the content of the constitutions themselves. For what reasons do countries adopt such documents? Does the practice of formal constitutionalism exhibit signs of globalization? Are constitutions unique and defining statements of national aspiration and identity, as legal scholars have often argued?[6] Or are they instead standardized documents that vary only at the margins, in predictable and patterned ways? Do constitutions evolve organically and unpredictably from distinctive historical roots, or do they evolve along well-defined pathways shared by cohorts of likeminded countries? Are constitutions becoming increasingly similar or dissimilar over time, or is there no discernible overall pattern to their development?

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Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192–204 (2003) (describing a "global community of courts" that engages in "constitutional cross-fertilization," and documenting examples of such cross-fertilization).

4. The empirical literature on judicial use of foreign law is vastly outweighed by the normative literature. The relatively few examples include: Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755 (2005) (surveying the Supreme Court's use over the last two centuries and finding "a steady escalation in the citation of foreign law," with the "most striking" references occurring in the contemporary era); and David T. Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 297 (2006) (surveying all reported federal cases over the last sixty years, and concluding that "American courts rarely cite to foreign courts, they do so no more now than they did in the past, and on those few occasions where they do cite to foreign courts, it is usually not to help them interpret domestic law").

5. *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 48–50, 49 n.11 (2009) (noting that "formal constitutions are the norm" for most countries, collecting data on written constitutions for every country in the world from 1789 to 2006 with the sole exception of the United Kingdom, and reporting that 90% of this data was extracted from documents that formally identified themselves as constitutional in character).

6. *See, e.g.*, BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 5 (2009) (arguing that the primary value of constitutions is to "imagine and then help to realize a shared collective existence"); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 912 (2005) (arguing that the relationship between a nation's constitution and its identity deters more extensive forms of constitutional borrowing); Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 1, at 67, 68 [hereinafter Tushnet, *Some Reflections*] (employing the term "expressivism" to describe the widespread view that constitutional ideas are "expressions of a particular nation's self-understanding"); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269–74 (1999) (describing the expressive function of constitutional law).

It is unfortunate, but also unsurprising, that empirical questions about the content and evolution of the world's constitutions have rarely been addressed by legal scholars. This neglect is no doubt attributable in part to the heavy tilt of constitutional law as a discipline in favor of normative as opposed to empirical scholarship.[7] There exists as well a disciplinary bias toward the study of constitutional jurisprudence as opposed to constitution writing,[8] which may in turn reflect a failure to appreciate how dynamic formal constitutionalism happens to be at a global level. Especially in a country where the same constitution has been in force for over two hundred years and constitutional amendment is infamously difficult,[9] it can be easy to lose sight of the worldwide importance and frequency of constitutional revision. Yet the average national constitution lasts only nineteen years[10] and has a 38% likelihood of being amended in any given year.[11] Over the last decade of the twentieth century alone, over half of the world's countries made major amendments to their constitutions; indeed, of this group, 70% adopted entirely new constitutions.[12] In light of their own experience with an unusually static constitution, American legal scholars have naturally focused more upon constitutional adjudication than constitutional drafting.[13] But an understanding

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7. *See, e.g.*, Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 933 (2001) (observing that the "compulsion" of constitutional scholars toward normativity fuels a pathological obsession with the countermajoritarian dilemma); David S. Law, *Constitutions*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 378–79 (Peter Cane & Herbert Kritzer eds., 2010) (describing the current lack of quantitative data or research on the content, development, and consequences of formal or "large-c" constitutions).

8. *See, e.g.*, Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, *in* 2 THEORETICAL INQUIRIES IN LAW 1, 10 (2001) (characterizing the whole of American "constitutional theory" as concerned first and foremost with the self-consciously "scholarly" articulation of "how courts ought to decide the meaning of constitutional rights").

9. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 21, 160 (2006) (lamenting that "no other country—nor, for that matter, any of the fifty American states—makes it so difficult to amend its constitution"); David S. Law & David McGowan, Colloquy, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. 86, 92–93 (2007) (observing that amendments to the U.S. Constitution are "notoriously difficult and costly," to the point that even "welfare-enhancing, supermajority-favored" amendments may take decades or longer to ratify or fail altogether).

10. *See* ELKINS ET AL., *supra* note 5, at 129 (reporting that the "median survival time" for a constitution, or "the age at which one-half of constitutions are expected to have died," is nineteen years).

11. *See id.* at 101 (using a statistical model to estimate the probability of amendment for each of the world's constitutional systems, and reporting a mean "predicted amendment rate" of 0.38 per year).

12. *See* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 12 (2000) (reporting that, from 1989 to 1999, 56% of United Nations member states made "major amendments" to their constitutions); *see also id.* at 8 (noting that, of the 197 "single-document constitutions" that were in force as of 1991, "only about twenty percent predated 1950").

13. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742, 1750 (2007) ("We have lost our ability to write down our new constitutional commitments in the old-fashioned way. . . . [E]very American intuitively recognizes that the modern amendments tell

of global constitutionalism demands attention not only to the way in which constitutions are interpreted, but also to the manner in which their formal content evolves over time.

Some may object that formal constitutions are not worth studying because what is on paper does not necessarily translate into practice. Our findings,[14] along with those of earlier empirical studies,[15] suggest that skepticism about the effectiveness of "parchment barriers"[16] is more than justified. Sometimes, constitutions neither constrain nor even describe the actual operation of the state.[17] But that is all the more reason to study them. To recognize that some constitutions are shams merely begs a host of further questions, none of which can be tackled without a systematic understanding of what the world's constitutions actually say. It is one thing to observe that formal or "large-C" constitutions can diverge from actual or "small-c" constitutional practice;[18] it is another thing to know when and in what ways they diverge.

Not only do constitutional scholars currently lack an empirical understanding of how and why constitutions fail to reflect reality, however, but they also appear reluctant even to attempt to answer such questions empirically.[19] Nor, for that matter, have they offered more than theoretical speculation as to why countries might adopt sham constitutions or what, if anything, is achieved by doing so. Insofar as constitutional scholars have identified any reasons for which countries might choose to adopt with great fanfare constitutions that ultimately ring hollow, they have most often suggested that constitutions perform expressive or aspirational functions.[20] But is this actually

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a very, very small part of the big constitutional story of the twentieth century—and that we have to look elsewhere to understand the rest.").

14. *See infra* note 163 and accompanying text (finding as a statistical matter that the poorer a country's human rights record, the greater the number of rights that its constitution tends to contain, even if one controls for such variables as the country's level of wealth and economic development).

15. *See* Law, *supra* note 7, at 382 (discussing empirical studies that have found, inter alia, that constitutional guarantees of press freedom and habeas corpus "are actually correlated to a statistically significant degree with a *higher* incidence of severe rights abuse," and that "constitutional bans on torture are associated with a higher incidence of torture").

16. THE FEDERALIST NO. 48, at 276 (James Madison) (Clinton Rossiter ed., 1961).

17. *See, e.g.*, Richard Sakwa, *The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism*, 48 STUD. E. EUR. THOUGHT 115, 118 (1996) (suggesting that the Soviet constitutions of 1918, 1924, 1936, and 1977 were examples of "sham constitutionalism"); Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962) (distinguishing between "proper" constitutions, which "restrain the exercise of political power"; "nominal" constitutions, which "describe a system of limitless, unchecked power" but do so "frankly"; and "façade" constitutions, which neither constrain the state nor provide "reliable information about the real governmental process").

18. Law, *supra* note 7, at 380–81.

19. *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 775 (1997) (asserting that "there can be no hope of rigorously quantitative answers" to causal questions about "the successful establishment of written constitutions," and that "[t]here is no way out but an appeal to old-fashioned insight").

20. *See supra* note 6 and accompanying text.

true? And to the extent that it is true, what do these constitutions express? A conception of the state? The character of a nation? Hopes and aspirations that are increasingly common to all mankind? Values that must be recited upon pain of rejection by the international community? Even on the extreme view that constitutions are nothing more than expressive documents, it remains of intrinsic importance how countries choose to identify, advertise, and explain themselves in their constitutions to their own citizens and to the rest of the world.

This Article takes aim at these vast gaps in the literature with an empirical account of the global evolution of formal constitutionalism. The basis of our analysis is a comprehensive new data set covering the rights-related content of all national constitutions in the world over the last six decades. Global constitutionalism, we find, is characterized by striking patterns of both similarity and dissimilarity. Our analysis confirms the existence of several global trends. One such trend is the emergence of a core set of constitutional rights that are generic to the vast majority of national constitutions.[21] Another trend is "rights creep," or the tendency of constitutions to contain an increasing number of rights over time.[22]

Perhaps our most intriguing finding, however, is that the differences that do exist among constitutions are highly systematic. In fact, 90% of the variation in the rights-related content of the world's constitutions can be explained as a function of just two variables, both of which can be measured quantitatively. The first variable is the comprehensiveness or inclusiveness of a constitution: some constitutions are succinct and tend only to contain relatively generic rights, while others also encompass less commonly encountered, relatively esoteric provisions.

The second variable is the ideological character of a constitution. This Article demonstrates empirically that the world's constitutions can be arrayed along a single ideological dimension. Some constitutions can be characterized as relatively libertarian, in the sense that they epitomize a common law tradition of negative liberty and, more specifically, judicial protection from detention or bodily harm at the hands of the state.[23] Other constitutions, by contrast, are more statist in character: they presuppose and enshrine a far-reaching role for the state in all aspects of life by equipping the state with a broad range of both powers and responsibilities.[24]

Our empirical methods enable us to calculate, for every constitution in the world over the last sixty years, a numerical score that measures its position on this ideological spectrum. These scores, in turn, enable us to produce an ideological ranking of the world's constitutions. Together, our numerical measures of constitutional ideology and comprehensiveness account for the rights-related content of the world's constitutions with 90% accuracy.[25]

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21. *See infra* Part III.C.
22. *See infra* Part III.A.
23. *See infra* Part IV.F.
24. *See id.*
25. *See infra* Part IV.C.

No less remarkable, however, are the global patterns of constitutional evolution that are emerging over time. Analysis of the constitutional ideology scores reveals that global constitutionalism is increasingly characterized by an ideological schism that divides the world's constitutions into two increasingly distinct clusters. Within each cluster, constitutions are becoming more similar to each other, but the clusters themselves are becoming more distinct from one another. The overall result at a global level is a combination of convergence and polarization.

This Article begins by setting forth a theoretical basis for understanding and predicting systematic patterns of global constitutional evolution. Part I identifies a number of benefits that countries can incur by emulating—or repudiating—the constitutional models already in use by other countries. The pursuit of these benefits, it has been hypothesized, may lead countries to adopt increasingly similar or dissimilar constitutional provisions, resulting in observable patterns of convergence, divergence, or polarization at the global level. Part II introduces the data and measurement techniques employed in this Article. Part III documents the existence of several trends in global constitutionalism—namely, the increasing number of rights per constitution, the growing popularity of judicial review, and the existence of generic rights.

The heart of our analysis is found in Parts IV, V, and VI. Part IV shows empirically that the rights-related content of constitutions varies in a highly predictable way along two dimensions. Parts IV.B and IV.C explain the statistical methods that we use to identify these dimensions and to assign scores on these dimensions to each constitution. Parts IV.D, IV.E, and IV.F establish that these two dimensions are the comprehensiveness and ideology of a constitution. The development of a quantitative measure of constitutional ideology makes possible an ideological ranking of the world's constitutions according to the extent to which they are libertarian or statist, which Part V provides. Finally, Part VI traces the ideological evolution of global constitutionalism over the last six decades and documents the existence of competing tendencies toward both convergence and polarization—the growth of generic rights constitutionalism, on the one hand, has been accompanied by the emergence of competing ideological strains of constitutionalism, on the other.

## I.
## THEORIES OF GLOBAL CONSTITUTIONAL EVOLUTION

Legal scholars have, for the most part, given woefully little thought to the substantive trajectory of global constitutionalism.[26] To the extent that they have

26. *See* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1279 (2008) (noting that "the subject of globalization has barely penetrated the consciousness of constitutional scholars in this country," with the "notable exception" of "a torrential outpouring of literature on the propriety of judicial citation to foreign law"); Spiro, *supra* note 1, at 650–51 ("[G]lobalization appears barely to have registered on the consciousness of constitutional law scholars. The legal academy appears to be suspended in a sort of splendid isolation, either oblivious to recent developments . . . persuaded that globalization is irrelevant to the study of constitutional law, or ill-equipped to process the implications of the change.").

done so, however, they have often predicted some type or degree of growing global similarity, or convergence.[27] Some of these predictions have stressed the role of transnational judicial dialogue, wherein dialectical learning among globally networked judicial elites advances a common practice and conception of constitutionalism.[28] Theories of judicial dialogue cannot, however, account for changes in the content of the world's written constitutions: whatever power constitutional courts may enjoy, their power does not include the ability to formally amend or rewrite the text of the constitutions that they are charged with interpreting. To understand why the content of written constitutions might exhibit convergence, it is necessary to focus instead upon the range of incentives that countries face to adopt similar constitutional provisions.

Constitutions are not only—and perhaps not even primarily—statements of national identity and aspiration that serve to differentiate countries from one another. They are also written to satisfy and influence diverse audiences, ranging from domestic constituencies whose support is needed to ensure regime stability, to foreign investors who seek assurance that their investments are safe from expropriation, to other countries whose approbation is crucial to securing diplomatic recognition and national security. No less than other forms of law, constitutional law is an instrument of policy that states employ to achieve particular goals, such as competing against other nations for investment capital and skilled labor in the global economy or signaling conformity to the norms and standards of the international community.[29] It should come as no surprise, therefore, if the pursuit of similar goals leads countries to adopt similar policies, including similar constitutions.

Yet there are also reasons to question whether the evolution of global constitutionalism is in fact a straightforward story of convergence. Something more complex, and more unsettling, than convergence is occurring when riots in Karachi and Khartoum over religious caricatures published in Copenhagen prompt dismay in Paris over the failure of American and British political

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27. *See, e.g.*, Ackerman, *supra* note 19, at 771–97 (identifying two scenarios that have "characterized the rise of modern constitutionalism" and led to the emergence of "enduring constitutional structures," and linking these scenarios to different "styles" of judicial review); Law, *supra* note 2, at 659, 662–728 (documenting the existence of "*generic constitutional law*—a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction," and identifying a variety of reasons to expect analytical similarity and doctrinal convergence across countries); Law, *supra* note 26, at 1307–42 (arguing that global competition for investment capital and intellectual capital gives countries an incentive to offer constitutional rights bundles that are attractive to skilled workers and investors); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT.'L L. 985, 987 (2009) (pointing to transnational judicial dialogue and global competition for capital and skilled labor as forces that foster constitutional convergence).

28. *See, e.g.*, Slaughter, *supra* note 3, at 195 (noting that judicial dialogue emerges through "mutual citation, as well as through increasingly direct interaction, both face to face and electronic"); Tushnet, *supra* note 27, at 998 ("Judges of the world's constitutional courts now meet regularly in academic and other conferences, and some serve with others on various transnational bodies.").

29. *See* Law, *supra* note 26, at 1308 (noting that "states have ample incentive to wield constitutional law as an instrument of policy for making credible commitments that will, directly or indirectly, attract and retain capital").

leaders to defend freedom of expression.[30] This globe-spanning chain of events occurred because constitutional norms and values are formulated and contested at a global level. Domestic constitutionalism is, in part, both a locus and a manifestation of geopolitical conflict and rivalry.[31] The growing interdependence and increasingly permeable borders that define globalization only serve to heighten the impact of such conflict on the viability of national constitutional norms. A less utopian vision of the future of global constitutionalism might thus predict the division of the world into rival camps that champion incompatible conceptions of constitutionalism. The possibility of a widening divide between internally cohesive groups is best described not as convergence, or even as divergence, but rather as polarization.[32]

Here, we briefly survey a number of theoretical reasons to expect at least some degree of constitutional convergence. One is constitutional learning: in the course of attempting to learn from one another, countries are likely to imitate one another. A second reason is constitutional competition: the need to attract and retain capital and skilled labor gives countries an incentive to offer similarly generous constitutional guarantees of personal and economic freedom. Third is constitutional conformity: countries face pressures to conform to global constitutional norms in order to win acceptance and support from domestic and international audiences alike. Last is the hypothesis that constitutionalism is characterized by network effects that reward countries for adopting the same type of constitutional regime that others have already adopted.

### *A. Constitutional Learning*

Success breeds imitation, and constitutionalism is no exception. Countries copy legal and constitutional innovations from their most successful rivals in the hope of achieving similar success,[33] and the more this type of imitation

30. *See Mutual Incomprehension, Mutual Outrage*, ECONOMIST, Feb. 10, 2006, at 24 (describing the violent protests and diplomatic squabbling that followed publication of caricatures of Mohammed in a Danish newspaper and the subsequent circulation of those caricatures over the Internet).

31. *See* Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253, 258–61 (Joseph S. Nye & John J. Donahue eds., 2000) (arguing that countries will tend to harmonize their laws with those of the "particular group or community of nations" that they wish to join); *cf.* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 481–85 (2002) (defining the course of history in terms of the rise and fall of different conceptions of statehood or constitutional paradigms, and arguing that the international order is predicated upon the dominance of a particular paradigm); SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 20–21 (1998) (characterizing the structure of contemporary geopolitical conflict as a clash between several blocs of states representing different "civilizations," and that conflict of this nature holds out little hope for mutual reconciliation, much less growing similarity in the form of "Westernization").

32. *Cf.* 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, 998–1001 (2009) (discussing the possibility of "convergence clubs," or policy convergence upon multiple and competing loci).

33. BOBBITT, *supra* note 31, at 482 (observing that other states are "quick to copy" successful legal innovations, "in a process Gibbon called 'creative emulation'"); Beth A.

occurs, the more similar constitutions will become. The notion that countries may improve themselves by learning from the constitutional law and experience of other countries has a long history and lies at the heart of the literature on comparative constitutional law.[34] Likewise, much of the literature on constitutional design assumes, explicitly or otherwise, that the elements of successful constitutionalism can be identified, learned, and replicated across different countries.[35] Of course, learning does not always take the form of borrowing or imitation: other countries have learned from the *Lochner* era, for example, but the lesson that they have drawn has been to avoid, rather than duplicate, that experience.[36] Yet if a consensus emerges on what constitutional models should be avoided—if, for example, other countries agree that *Lochner* was a terrible mistake and consequently choose not to use the U.S. Constitution as a model for their own efforts—the result of such "aversive constitutionalism" will still be a degree of convergence (albeit not on the American model).[37]

Far from being a rational process of fully informed choice, the process of learning from constitutionalism in other countries is characterized by a number of cognitive biases that tend to favor imitation and convergence. Like other policymakers, constitution makers lack both the information and cognitive cap-

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Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 184 (2004) (finding a statistically significant tendency on the part of countries to pursue the same economic policies adopted by high-growth countries).

34. *See, e.g.*, Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (observing that the experience of other countries may "cast an empirical light on the consequences of different solutions to a common legal problem"); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 1 (1987) ("Since controlled experimentation in law is hardly ever possible, legal scholars often use comparative law, just as they sometimes consult history, to see how legal systems of the past or present have dealt with similar problems to ours. The hope is that history and comparison will give us insight into our own situation."); JACKSON, *supra* note 2 (contrasting convergence, resistance, and engagement as competing modes of comparative constitutionalism, and arguing in favor of engagement); Posner & Sunstein, *supra* note 2, at 136 (arguing on the basis of the Condorcet Jury Theorem that the greater the number of states that have adopted a particular practice, the more likely that the practice is the superior or correct one).

35. *See, e.g.*, Peter C. Ordeshook, *Are 'Western' Constitutions Relevant to Anything Other Than the Countries They Serve?*, 13 CONST. POL. ECON. 3, 3–21 (2002) (arguing that there exist "universal principles of democratic constitutional design, even if those principles remain largely undiscovered," and identifying a number of such principles).

36. *See* Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 15–18 (2004) (discussing the extent to which Canadian constitutional law has sought to avoid *Lochner* as an anti-model in Canadian constitutional law); *see also, e.g.*, Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 197–200 (2003) (arguing that institutional design is a product of both "borrowing" and deliberate "nonborrowing"); Heinz Klug, *Model and Anti-Model, the United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597, 604–12 (raising the possibility that the U.S. Constitution may serve as an "Anti-Model"); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 300 (2003) (discussing how constitutions may serve as aversive models, meaning that they are carefully considered but deliberately not emulated).

37. Scheppele, *supra* note 36, at 298 (arguing that rejected alternatives "cast their influence over the whole constitution building effort").

acity to make the best possible choices, and they invariably rely upon a variety of imperfect heuristics as a result.[38] Such heuristics, however, are prone to generate self-reinforcing tendencies toward convergence by predisposing countries to imitate a particular constitution simply because other countries have already imitated it,[39] for example, or because it is particularly well known.[40]

### *B. Constitutional Competition*

Another factor that may encourage a form of constitutional convergence is heightened global competition for scarce resources. Globalization has increased the mobility of financial and human capital, both of which are crucial to economic growth and productivity.[41] In the resulting struggle to attract and retain investment and skilled labor, countries can gain a competitive advantage by offering a legal infrastructure that appeals to these target audiences.[42] Investors, in particular, tend to favor countries that respect not only property rights,[43] but also basic human rights and civil liberties.[44] Thus, all other things

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38. *See* Zachary Elkins & Beth Simmons, *On Waves, Clusters and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 43–44 (2005) (pointing out that policymakers are unlikely to possess both the factual knowledge and cognitive capacity needed to foresee the actual consequences of the choices that they make); Tushnet, *supra* note 6, at 1285–1301 (characterizing constitution making as more akin to "bricolage," wherein constitution makers "reach into the bag and use the first thing that happens to fit the immediate problem they are facing," than to "engineering," wherein constitution makers "sort through the concepts and assemble them into a constitutional design that ma[kes] sense according to some overarching conceptual scheme").

39. *See, e.g.*, Elkins & Simmons, *supra* note 38, at 43 (describing how "information cascades" can lead to convergence upon a particular policy choice, even if the policy is suboptimal); Posner & Sunstein, *supra* note 2, at 160–64 (arguing that, in theory, the accumulated wisdom behind the decisions of other jurisdictions to adopt a particular approach can provide a rational basis for adopting the same approach, but in practice, the tendency of real-life actors to imitate early adopters without exercising their own judgment generates "cascade effects" that unduly magnify the influence of the early adopters, who may themselves have been mistaken).

40. *See* Elkins & Simmons, *supra* note 38, at 44 (noting that the policy choices of "prominent nations" tend to have a disproportionate impact on other countries because information about such choices is "highly available" to policymakers in other countries).

41. *See* Law, *supra* note 26, at 1278–82 (noting that in the face of globalization "capital and skilled labor become increasingly mobile"); Tushnet, *supra* note 27, at 991 (noting that investors choose between nations based on "the likely return to their investments").

42. *See* Law, *supra* note 26, at 1282, 1307–21, 1321–42 (noting that because of globalization, countries face a growing incentive to compete for both capital and skilled labor "by offering bundles of human and economic rights that are attractive to investors and elite workers"); Tushnet, *supra* note 27, at 991 (noting that nations compete for investment by "providing constitutional protections for investment and having them enforced by an independent court"); *cf., e.g.*, Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811, 836–38, 842 (2006) (finding that countries sign bilateral investment treaties—and thereby adopt property and contract rights for investors—when faced with competition from other countries for investment capital); David Leblang et al., *Defying the Law of Gravity: The Political Economy of International Migration*, http://ssrn.com/abstract=1421326 (June 17, 2009) (finding that a host country's political environment and legal policies relating to immigration and citizenship have the effect of encouraging or deterring potential immigrants).

43. *See, e.g.*, Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 953 (2005) (reporting, on the basis of empirical analysis, that countries with greater

being equal, a country that credibly commits to respect such rights will be more attractive to those with financial and intellectual capital, whereas a country that fails to do so will be at a competitive disadvantage.[45] Perhaps the most obvious and credible way for a country to make such commitments, in turn, is to offer guarantees in the form of constitutional rights, backed by a plausible enforcement mechanism such as an independent judiciary.[46] Thus, the competition for highly mobile resources generated by globalization creates the potential for a constitutional "race to the top,"[47] in which countries bid for investors and educated workers by offering bundles of rights with the greatest possible appeal to these constituencies.

Constitutional competition for financial and intellectual capital should not be expected, however, to lead to full constitutional convergence across all countries. First, even if globalization generates a "race to the top" dynamic in the area of constitutional rights, it is likely to do so only for those categories of rights that are of particular interest to investors and skilled workers.[48] For example, the kind of people for whom countries have an incentive to compete—namely, those who already have significant capital or earning power—are likely to place greater value upon traditional civil liberties and equality rights that respect their personal freedoms and protect them from discrimination and expropriation, than upon positive socio-economic rights that purport to guarantee them material necessities that they already possess in abundance.[49]

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protection against expropriation by "politicians and elites" have "substantially higher income per capita[,] . . . higher long-run growth rates[], greater investment rates, . . . and more developed stock markets"); Law, *supra* note 26, at 1308–11 (discussing the relationship between investment levels and respect for property rights).

44. *See, e.g.*, Law, supra note 26, at 1313–17, 1314 n.142 (surveying a large body of empirical research to the effect that, "on the whole, countries that uphold human rights tend to receive more foreign investment than countries that do not"); Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights*, 60 KYKLOS 509, 531–32 (2007) (finding empirically that "basic human rights" have a positive impact on investment levels).

45. *See* Law, *supra* note 26, at 1281 (noting that investors and skilled labor favor countries that respect individual liberty rights); Quan Li, *Democracy, Autocracy, and Tax Incentives to Foreign Direct Investors: A Cross-National Analysis*, 68 J. POL. 62, 71–72 (2006) (finding empirically that autocratic regimes compensate for their lack of strong property rights protection relative to democratic regimes by offering higher levels of incentives and subsidies to foreign investors).

46. *See* Law, *supra* note 26, at 1308 (noting that "states have ample incentive to wield constitutional law as an instrument of policy for making credible commitments that will, directly or indirectly, attract and retain capital"); Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85–94, 98 (2002) (arguing that constitutional commitments to human rights and judicial independence encourage investment by sending a credible signal to investors that a country can be trusted not to expropriate investments).

47. *See* Law, *supra* note 26, *passim*.

48. *See id.* at 1308–11, 1331–21 (describing why foreign investors favor property rights and civil liberties); *id.* at 1321–40 (describing why elite workers favor civil liberties and a favorable political environment); *see also id.* at 1340–42 (anticipating the objection that countries may practice a form of "constitutional apartheid," in the form of extending rights protections only to investors and skilled workers, and explaining why such a strategy is unlikely to prove as effective as one of promising the same rights to everyone).

49. *See id.* at 1282 n.15 (noting that countries may not offer bundles of second generation socio-economic rights "not simply because it is expensive to do so, but also because such a policy

Second, some countries may simply decline or fail to compete globally in industries that demand copious investments of intellectual capital. All other things being equal, such industries are inherently attractive targets for development because they are responsible for an increasing share of global trade and economic growth.[50] Nevertheless, some countries may face relatively little incentive to engage in constitutional competition because they occupy niches in the global economy that demand relatively low amounts of skilled labor.[51]

### *C. Constitutional Conformity*

Another impetus toward constitutional convergence is the degree to which countries experience pressure to conform to global norms. Countries, like people, often face incentives to conform their behavior to that of others. Sometimes, they may do so in order to solve coordination problems of the sort that drivers face when deciding which side of the road to use.[52] Jack Goldsmith and Eric Posner have argued in this vein that much of international law exists for the purpose of "helping states achieve mutually beneficial outcomes by clarifying what counts as cooperation or coordination."[53] In such situations, they suggest, international law amounts to a set of codified expectations that countries observe for their mutual benefit.[54] Conformity can also be the product

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may prove more attractive to indigents and low-skilled workers than to the wealthy and well educated").

50. *See id.* at 1296 ("International trade in natural resources has been eclipsed by movements of intangible assets, intellectual capital, and manufactured goods that owe their existence to tightly integrated multinational supply and production chains."); *id.* at 1325 ("Intellectual capital is responsible for an increasing share of economic growth in the industrialized world."); Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297, 297–98 (1999) (noting that the proportion of the developing world's total export earnings attributable to the sale of primary commodities declined from over 80% in 1970 to less than 35% by 1993).

51. Such might be the case, for example, of countries endowed with natural resources, such as oil, that can be extracted and sold without the help of a substantial, highly educated workforce or even widespread popular support. The well-known thesis that countries that are rich in natural resources are more prone to authoritarianism and repression is, however, the subject of some empirical dispute. *Compare, e.g.*, Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 332, 340–42 (2001) (finding empirically that higher levels of oil and mineral wealth are correlated with lower levels of democracy), *with* Stephen Haber & Victor Menaldo, *Do Natural Resources Fuel Authoritarianism? A Reappraisal of the Resource Curse*, 105 AM. POL. SCI. REV. 1, 25 (2011) (concluding on the basis of a country-by-country empirical analysis that "oil and mineral reliance does not promote dictatorship over the long run" and may in fact inhibit it).

52. The driving scenario is an example of what social scientists call a coordination problem. *See* RUSSELL HARDIN, MORALITY WITHIN THE LIMITS OF REASON 51–52 (1988) (using Sweden's switch from driving on the left to driving on the right as an example of a legal rule that solves a coordination problem); *id.* at 80 (arguing that the point of legal rules is to "constrain individuals' choices of strategy in order to produce a better outcome than would have resulted from unconstrained choices"); David S. Law, *The Paradox of Omnipotence: Courts, Constitutions and Commitments*, 40 GA. L. REV. 407, 431 (2006) (citing several "examples to illustrate why individuals might wish to restrict their own options," including that of committing to drive on a specific side of the road).

53. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13, 32–43 (2005).

54. *See id.*

of acculturation or socialization. States may adopt the same norm not because they are persuaded that the norm is good or because they are rewarded for doing so, but simply because others are behaving the same way.[55]

A more tangible reason to conform, however, is to win the acceptance and approval of others.[56] In everyday life, people shun and mistreat those whom they regard as deviant, and favor those whom they regard as similar to themselves.[57] Likewise, countries reward constitutional conformity on the part of other countries. Indeed, dominant states have been known to impose a constitutional template on weaker states or to demand conformity to such a template as a condition of normal relations.[58] It is thus a rational strategy for weaker states to engage in constitutional conformity as a means of currying favor with dominant states and securing recognition from the international community.[59]

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55. Goodman & Jinks, *supra* note 64, at 642–46 (distinguishing "acculturation" from both "persuasion" and "coercion," and arguing that human rights law spreads transnationally via all three mechanisms).

56. *See* Michel Rosenfeld & András Sajó, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 1, at 142, 169 (noting the impact of the "liberal expectations of the European institutional elite" on constitutional doctrine in Hungary during its transition to democracy); Schauer, *supra* note 31, at 258 (hypothesizing that "[t]he desire of a country to be received or respected or esteemed by a particular group or community of nations" influences both "the degree to which that country will attempt to harmonize its laws with those of the group or community of nations," and "the extent to which the country's laws will eventually resemble the laws of that group or community of nations").

57. *See infra* notes 93–94 and accompanying text (discussing the phenomena of homophily and homogamy).

58. *See, e.g.*, GOLDSMITH & POSNER, *supra* note 53, at 128–30 (noting that, during the nineteenth century, Western powers applied a "standard of civilization" consisting of "basic rights for foreign nationals, a well-organized government with the capacity for international relations, a Western-style legal system, and conformity to international law" in order "to determine whether and to what extent to have relations with non-Western states"); CHARLES PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES 1–19 (2007) (describing Britain's insistence upon the inclusion of a bill of rights modeled after the European Convention on Human Rights in the post-independence constitutions that it drafted for its former African and Caribbean colonies); Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 858–59 (2005) (citing the interim or permanent constitutions of the former Yugoslavia, East Timor, Afghanistan, Iraq, postwar Germany, and postwar Japan as all having been "drafted and adopted in the shadow of the gun"); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 163 (1997) (observing that "[i]n the West since at least the 17th century, nation-states have claimed legitimacy in terms of largely common models" consisting of "similar rationalized identities and purposes"). *But cf.* David S. Law, *The Myth of Imposed Constitutionalism in Japan*, *in* THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis Galligan & Mila Versteeg eds., forthcoming 2012) (arguing that constitutional adoption inevitably entails a degree of imposition, and questioning both the coherence and relevance of the distinction between imposition by domestic political actors and imposition by foreign governments).

59. *See infra* notes 76–80 and accompanying text (discussing the attractiveness to "marginalized states" of a deliberate strategy of conformity); *cf.* Meyer et al., *supra* note 58, at 164 (noting that it is generally the case among nations that "the poor and weak and peripheral copy the rich and strong and central").

Japan's experience in the late nineteenth century illustrates such a strategy in action. The widespread adoption during the Meiji Restoration of Western technology, law, and institutions, including a parliamentary form of government,[60] was motivated in part by a desire to secure "the respect of the Western powers,"[61] and to convince the rest of the world that Japan was a "civilized" state deserving of treatment as a full and equal peer in the society of nation-states.[62] The outcome was precisely as hoped: the Western powers relinquished their extraterritorial privileges and returned full control over tariffs to the Japanese soon after the new constitutional system was introduced.[63]

It remains the case today that countries face powerful incentives to engage in constitutional conformity. States must satisfy certain expectations to secure the recognition and acceptance of the international community, and these expectations are increasingly constitutional in nature. From a sociological perspective, membership in the "world society" of nation-states requires compliance with the norms and standards of "world culture," and countries seek to demonstrate their compliance by incorporating these norms into their constitutions.[64] Entry into this "world society" occurs, quite literally, "via application forms (to the United Nations and other world bodies) on which the applicant must demonstrate appropriately formulated assertions about sovereignty and control over population and territory, along with appropriate aims and purposes."[65] Prominent among the "standardized purposes" and "self-

60. *See* EDWIN O. REISCHAUER, THE JAPANESE TODAY: CHANGE AND CONTINUITY 87 (1988) (discussing Japan's decision in the late 1800s to adopt a national constitution).

61. *Id.* (noting that the Meiji Restoration introduced a Western-style cabinet and parliament in part for the specific purpose of "gaining the respect of the Western powers").

62. D. ELEANOR WESTNEY, IMITATION AND INNOVATION: THE TRANSFER OF WESTERN ORGANIZATIONAL PATTERNS TO MEIJI JAPAN 1, 18–19 (1987) (observing that Japan's Meiji-era emulation of Western institutions and practices was motivated in part by "the desire to make Japan into a modern nation that was the equal of the Western powers, one that would be respected internationally as a modern, 'civilized' society"); *see also, e.g.*, WADE JACOBY, IMITATION AND POLITICS: REDESIGNING MODERN GERMANY 23–24 (2000) ("Elites in Meiji Japan used institutional transfer to strengthen their society against the threat of foreign penetration and the reduction of national sovereignty.").

63. *See* REISCHAUER, *supra* note 60, at 89.

64. Meyer et al., *supra* note 58, at 153 (noting that the goals defined by the world cultural order are often expressed in the form of constitutions that "typically emphasize goals of both national and equitable individual development"); *see also* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 648–50 (2004) (arguing that transnational constitutional isomorphism is in part the product of "acculturation" processes, and discussing cultural and social mechanisms for the spread of constitutional norms among states); David Strang & John W. Meyer, *Institutional Conditions for Diffusion*, 22 THEORY & SOC'Y 487, 491 (1993) (commenting upon "the homogenous cultural construction of contemporary nation-states"). For a skeptical view of the impact of world culture, see Simmons & Elkins, cited above in note 33, who find empirically that countries are significantly more likely to mimic the macroeconomic policies of other countries that share the same dominant religion. They conclude that countries do not "absorb[] global culture willy-nilly," but rather copy the policies of countries that they perceive as belonging to the same cultural reference group. *See id.* at 185, 187.

65. Meyer et al., *supra* note 58, at 158; *see also, e.g.*, B.S. Chimni, *International*

evident goals" of the nation-state, in turn, is the protection of the rights of citizens and individuals.[66] Formal enactment of the "conventionalized" nation-state "script"—which includes the constitutional incantation of various individual rights—qualifies a government for the treatment and status accorded a sovereign state.[67] These pressures toward conformity are only reinforced by the existence of international institutions such as the United Nations and its various agencies, which are designed not simply to facilitate communication among their members, but also "to promote the homogenization of their members around models of progressive policy."[68]

Indeed, countries now face concrete pressures to conform not merely to a world culture, but rather to a world *constitution*.[69] Philip Bobbitt characterizes the society of nation-states as currently possessing a "constitution" in the form of the modern-day "Peace of Paris" that marked the close of the Cold War.[70] At the heart of this "constitution" is the 1990 Charter of Paris, which "more or less explicitly" reaffirms, amends, and extends the Charter of the United Nations.[71] The text of the Charter of Paris 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."[72] The Peace of Paris, suggests Bobbitt, is "the source of an overarching constitutional order that sets the standard to which all national legal and political institutions must conform."[73] In recent years, moreover, adherence to this constitutional order has frequently been backed by more than just moral suasion or socialization. The growing willingness of the international

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*Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 15 (2004) (noting that the United Nations insists upon "formal compliance with the norms of liberal democracy," and arguing that such compliance amounts in practice to the spread throughout the third world of the "neo-liberal state"); Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000*, 18 INT'L SOC. 71, 90 (2003) ("World society dictates that constitutions are necessary for modern statehood, expressing a near hegemony of legal-rational principles for controlling authority and political construction or reconstruction. Written constitutions have become so important for state legitimacy in the world system that some social scientists characterize them as a universal requirement." (internal citation omitted)).

66. Meyer et al., *supra* note 58, at 153; *see also* Strang & Meyer, *supra* note 64, at 491 ("States subscribe to remarkably similar purposes—economic growth, social equality, the political and human rights of the individual.").

67. Meyer et al., *supra* note 58, at 159.

68. Strang & Meyer, *supra* note 64, at 492.

69. *See, e.g.*, BOBBITT, *supra* note 31, at 636–37 (pointing to the existence of a world "constitution" based upon the "Peace of Paris"); Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 51 (2006) (arguing that there exists "an emerging international constitutional order consisting of an international community, an international value system and rudimentary structures for its enforcement").

70. BOBBITT, *supra* note 31, at 636–37.

71. *Id.* at 635–36.

72. Conference on Security and Cooperation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 30 INT'L LEGAL MATERIALS 1993 (Jan. 1991), *quoted in* BOBBITT, *supra* note 31, at 637.

73. BOBBITT, *supra* note 31, at 638.

community to intervene with force in supposedly domestic conflicts on both humanitarian and political grounds illustrates that respect for state sovereignty has become increasingly conditional upon observance of certain basic rights.[74] What held true in Meiji Japan thus holds true today: a state that wishes to ward off threats to its sovereignty and autonomy is wise to mimic those it fears.[75]

A deliberate strategy of constitutional conformity may prove especially attractive to what might be called marginal states, or states that struggle for whatever reason to obtain, maintain, or consolidate the recognition and approval of world society.[76] Contemporary examples of marginal states that have courted foreign approval and enhanced their legitimacy by engaging in constitutional conformity include South Africa, a former pariah nation that has elevated its post-apartheid stature by absorbing constitutional ideas and influences from abroad on a generous and ongoing basis;[77] Israel, which is perpetually beleaguered by diplomatic and legal efforts to undermine its legitimacy as a state,[78] but has sought to publicize and capitalize upon the legitimacy-enhancing work of the Israeli Supreme Court;[79] and Taiwan, which is deprived of regular diplomatic relations with most of the world and has

74. *See, e.g.*, *id.* at 471–74 (noting the difficulty of reconciling the war in Kosovo with the traditional conception of territorial sovereignty embodied in the U.N. Charter); *id.* at 638–39 (observing that the Peace of Paris—"the source of an overarching constitutional order that sets the standard to which all national legal and political institutions must conform"—includes "a change in the definition of sovereignty that allows human rights to become an enforceable part of international law," and invoking the abrogation of Serbian sovereignty in Kosovo as an example); JEREMY A. RABKIN, LAW WITHOUT NATIONS: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 186 (2005) (citing comments made by former UN Secretary General Kofi Annan in the aftermath of NATO's bombing campaign against Serbia). Recent events in Libya and Côte d'Ivoire, in the form of armed international intervention under the auspices of the United Nations to protect civilians and promote democratic regime change, only underscore the increasing conditionality of state sovereignty upon respect for basic constitutional norms. *See* Barack Obama, David Cameron & Nicolas Sarkozy, *Libya's Pathway to Peace*, INT'L HERALD TRIB., Apr. 15, 2011, at 7 (emphasizing that the "international community," Arab League, and United Nations Security Council acted "to protect the people of Libya" from their own government, and that continued NATO intervention is necessary to promote "a genuine transition from dictatorship to an inclusive constitutional process"); Colum Lynch, *U.N. Strikes at Leader's Forces in Ivory Coast*, WASH. POST, Apr. 5, 2011, at A1 (describing the use of United Nations helicopter gunships against the forces of the incumbent president of Côte d'Ivoire, who had refused to leave office after his opponent had been certified by the United Nations as the winner of the presidential election).

75. *See* JACOBY, *supra* note 62, at 23–24 (observing that elites in Meiji Japan pursued a strategy of "becoming more like those they fear" to ward off foreign domination).

76. *See supra* note 59 and accompanying text.

77. *See* Schauer, *supra* note 31, at 259.

78. *See, e.g.*, RABKIN, *supra* note 74, at 152–55 (describing European support for a legal provision that would have defined Jewish habitation in Old Jerusalem as a "war crime"); *id.* at 172–73 (discussing United Nations General Assembly Resolution 3379, which condemned Zionism as a "form of racism" but has since been revoked).

79. *See* Letter from Yariv Ovadia, Consul for Communications and Public Affairs, Consulate General of Israel in Los Angeles, to Professor David S. Law (Mar. 8, 2005) (on file with author) (introducing a mailing of Israeli constitutional case law on the subject of torture to American legal scholars).

responded in part by adopting political and constitutional reforms that it knew would win the approval of a clique of powerful nations.[80]

Constitutional conformity can also help a regime to secure recognition and acceptance from crucial domestic constituencies in a variety of ways.[81] Adoption of constitutional principles that command a broad normative consensus is one way of appeasing both domestic and foreign critics who might otherwise foment opposition to a regime.[82] The international acceptance that comes with the pursuit of conformity is also likely to have a number of positive effects on domestic support for the regime. First, the imprimatur of the international community can be expected to impress or at least mollify some domestic audiences. Second, a government that enjoys international acceptance is less likely to face severe external threats to its survival and can therefore devote greater resources to securing support and consolidating political control. Third, the opportunity to participate in various international and transnational organizations that have assumed importance as mechanisms for collective policymaking and dispute resolution further bolsters a regime's domestic acceptance by enhancing not only its prestige, but also its ability to address important policy issues that have a transnational dimension.[83]

In sum, states face a variety of incentives and pressures to engage in constitutional conformity. In exchange for reciting and adopting a standard constitutional script, they enjoy membership in the international community and all the tangible and intangible benefits that accompany such membership. The very existence of such a script reflects the extent to which global constitutionalism is generic: any norm that a country must adopt in order to gain the acceptance of international and domestic audiences alike is by definition a generic norm. As the sociological literature on global constitutionalism acknowledges, however, the existence of pressures toward conformity with the requirements of "world society" does not necessarily imply full convergence on a single, comprehensive constitutional model but allows for the possibility that cross-cutting, "sub-global" influences—such as religion,

80. *See* David S. Law & Wen-Chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. L. REV. (forthcoming 2011) (quoting a Taiwanese Constitutional Court justice's observation that Taiwan hopes that democratization, respect for human rights, and being on the "frontline of the Freedom House rankings" will enable it to become "less isolated," and documenting, on the basis of confidential interviews with members of the Constitutional Court, that the question of "how this makes us look internationally" is a factor in how the justices decide cases, albeit "a more distant consideration"); Robert A. Madsen, *The Struggle for Sovereignty Between China and Taiwan*, *in* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 141, 174 (Stephen D. Krasner ed., 2001) (noting that Taiwan's leadership grasped that adoption of such reforms as "a French-style system of parliamentary and presidential direct elections" would elicit "more sympathy from Japan, the United States, and the European Union").

81. *See id.* at 181 (noting that international recognition has traditionally conferred three notable advantages upon a state: "embassies and the customary diplomatic privileges, a measure of political acceptance by other governments, and somewhat greater domestic authority").

82. Meyer et al., *supra* note 58, at 160.

83. *See, e.g.*, SLAUGHTER, *supra* note 2, at 135–62 (discussing the rise of "global governance" by transnational and international organizations); Law & Chang, *supra* note 80 (detailing Taiwan's diplomatic isolation and consequent inability to join or participate in official international policymaking organizations such as the United Nations and World Bank).

ideology, and post-colonial struggle—may ultimately generate a combination of convergence and differentiation.[84]

### *D. Constitutional Networks*

A novel theoretical reason to expect convergence is the existence of what might be called "constitutional network effects." Economists have identified a number of settings in which one person's decision to adopt a particular standard has positive consequences for other adopters of the same standard.[85] The value of a particular form of communication or technology—the English language, for example, or the Macintosh computer operating system—increases with the number of people who share that means of communication. The more people who learn a particular language or adopt a given operating system, the more useful that language or operating system becomes. An increase in the number of people who learn the language creates more opportunities for communication, while an increase in the number of people who use the operating system promotes the production of a greater variety of compatible software at lower prices.[86] In both cases, as the size of the network increases, the utility of the network itself increases.[87] These increases in the value of network membership not only confer benefits upon existing users, but also encourage additional users to join, which in turn drives up the value of network membership even further. Markets for goods that are characterized by positive consumption externalities of this type are said to exhibit network effects.[88]

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84. *See* Go, *supra* note 65, at 87–90 (arguing that "subglobal" influences of "empire, religion and ideology" combine with pressures toward conformity with "world society" to generate a combination of both constitutional "convergence" and constitutional "differentiation").

85. *See, e.g.*, Dan L. Burk, *Law as a Network Standard*, 8 YALE J.L. & TECH. 63, 72 (2005) (noting that "network effects" "arise in situations where the value of a system increases as users are added"); Elkins & Simmons, *supra* note 38, at 41 (discussing situations in which an increase in the number of users of a product increases the value of the product to all of its users); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 94 (1994) (identifying two generic situations in which consumers benefit from coordinated consumption of the same good—those involving communication networks, and those falling under a "hardware/software" paradigm).

86. The more people who buy Macintosh computers, for example, the larger the market becomes for Macintosh software and accessories. Increases in the size of the market encourage lower prices, greater variety, and higher quality. The production of computer software is characterized by a combination of high fixed costs and negligible marginal costs: the cost of developing a computer program does not increase with the number of people who use the program. A larger market enables software makers to distribute these fixed costs over a larger number of consumers, which not only lowers the cost per consumer, but also raises the amount that can be spent on further development. *See* Katz & Shapiro, *supra* note 85, at 99, 109.

87. *Id.* at 94, 109 (noting that, in such situations, each user's adoption of the technology or standard has "positive consumption externalities" for other users, meaning that the value of membership in the network of users "is positively affected when another user joins and enlarges the network").

88. Burk, *supra* note 85, at 72 ("Network effects may arise in situations where the value of a system increases as users are added. Purchasers of such goods find the good increasingly valuable as others also purchase the good. Typically, the increased value accrues to subsequent adopters as a positive externality."); Katz & Shapiro, *supra* note 85, at 94 ("Because the value of membership to one user is positively affected when another user joins and enlarges the network,

Shared legal standards, no less than shared technological or linguistic standards, generate network effects that both benefit existing users and encourage adoption by additional users. Users of a widespread and established legal regime can take advantage of accumulated "legal capital": the more that corporations choose to incorporate under Delaware corporate law, for example, the better developed and more predictable that Delaware corporate law becomes.[89] At a macroeconomic level, states also derive considerable benefit from belonging to legal networks that comprise many members, large markets, and needed resources. Common legal rules for the manufacture, sale, and movement of goods benefit producers and consumers alike by lowering barriers to interaction and exchange.[90] Belonging to a given legal network may also attract investment from other network members. Common law countries, for example, are not only more likely to receive foreign direct investment from the United States, but also tend to receive larger quantities of such investment than countries that do not share a common law heritage.[91]

The process of globalization, meanwhile, only adds to the pressure for expansion of legal networks. As technology continues to advance, the importance of natural and physical barriers to movement and exchange will continue to subside, leaving primarily political and legal impediments in their place. To the extent that incompatible legal standards play the role of bottleneck to globalization in other domains—trade, finance, communication, migration—an expanding array of actors will become motivated to achieve legal compatibility.

Constitutional systems, like communications networks and corporate law regimes, are also characterized by the existence of network effects. To adopt a constitutional framework already in widespread use elsewhere is both to access and augment a body of ready-made constitutional jurisprudence that embodies

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such markets are said to exhibit 'network effects' or 'network externalities.'").

89. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 5–6, 40 (1993); Burk, *supra* note 85, at 69 (discussing the advantages conferred by the accumulation of "legal capital"); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 51 VA. L. REV. 757, 774, 842 (1995) (equating a firm's charter with a contractual term, the value of which includes "network benefits" that increase with, inter alia, the number of "judicial rulings" and the development of "common practices" among firms employing the same term); Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects*, 31 HOFSTRA L. REV. 681, 717–26 (2003) (simulating via computer the outcome of state competition for corporate charters in the presence of network effects).

90. *See, e.g.*, DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 250 (1995) (observing that "producers who operate in many markets have a strong interest in making national product standards more similar, in order to reduce their production costs"); Burk, *supra* note 85, at 74 (noting that "legal compatibility allows individuals and entities to invest once in learning the legal system, then apply that investment across multiple jurisdictions," "particularly as capital, goods, and individuals interact or move across borders").

91. *See* Steven Globerman & Daniel Shapiro, *Global Foreign Direct Investment Flows: The Role of Governance Infrastructure*, 30 WORLD DEV. 1899, 1914–16 (2002) (finding that the probability and amount of foreign direct investment in a country is significantly influenced by the quality of its "governance infrastructure," including its legal system).

a wealth of collective experience.[92] Yet the benefits of membership in a constitutional network far exceed convenient access to a pool of legal capital. What is at stake in the expansion of constitutional networks is nothing less than peace and prosperity on a global scale. In everyday life, people are more inclined to interact and partner with others who share the same educational, socioeconomic, religious, or ethnic background.[93] The same principle holds true for countries: members of the same constitutional network, or constitutional kin, enjoy closer and more harmonious ties with fellow family members than with nonmembers.[94]

There is considerable empirical evidence that membership in a thriving constitutional network can favorably influence a country's prospects for both economic prosperity and military security. One can think of the world's democracies and autocracies as constituting two distinct networks. All other things being equal, a liberal democracy is likely to enjoy more peaceful and profitable relations with other liberal democracies than with authoritarian, communist, or fundamentalist regimes: constitutional similarity facilitates mutually beneficial interaction.

First, on the economic front, democracies enjoy closer trade relations with one another.[95] On average, a pair of democratic states engages in 15% to 20%

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92. *Cf.* Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 777 (2002) (noting that courts in new democracies, which tend by definition to suffer from a lack of preexisting home-grown constitutional jurisprudence, are often "active in looking abroad" for inspiration, ideas, doctrines, and practical solutions).

93. *See* EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 19 (5th ed. 2003) (noting that "homophilous communication" among individuals that "belong to the same groups, live or work near each other and share similar interests" is more likely than "heterophilous communication" among individuals who are "different in certain attributes"). This bias in favor of those who are similar to ourselves is true, for example, of our choice of social and marriage partners—a tendency known among sociologists as homogamy. *See, e.g.*, Earnest W. Burgess & Paul Wallin, *Homogamy in Social Characteristics*, 49 AM. J. SOC. 109, 123 (1943) (finding that people engage in "assortative mating" on the basis of such factors as "religious affiliation and behavior, family background, courtship behavior, conceptions of marriage, social participation and family relationships"); Matthijs Kalmijn, *Status Homogamy in the United States*, 97 AM. J. SOC. 496, 496 (1991) (showing that people strongly favor marriage partners of similar educational background); Jan Trost, *Some Data on Mate-Selection: Homogamy and Perceived Homogamy*, 29 J. MARRIAGE & FAM. 739, 739 (1967) (documenting the existence of "perceived homogamy," wherein those who "perceive similarities in each other" favor one another in mate selection).

94. *See* ROBERT AXELROD, THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION 205 (1997) (noting that policymakers "are likely to imitate the practices of nations with whom they share linguistic, religious, historical, or social ties"); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, 12 PHIL. & PUB. AFF. 323, 325–30 (1983) (arguing that liberal states display an "extreme lack of public respect or trust" toward nonliberal states that poisons "relations between liberal and nonliberal societies"); *infra* text accompanying notes 96–102 (discussing the "democratic peace" thesis and the trade benefits of constitutional homogeneity).

95. *See* John R. Oneal & Bruce M. Russett, *The Classical Liberals Were Right: Democracy, Interdependence and Conflict, 1950–1985*, 41 INT'L STUD. Q. 267, 270–71 (1997) (observing that "democracies are inclined to trade with one another," and reasoning that they are also more likely to keep their trade agreements with one another due to the existence of constitutional checks and balances that make repudiation of existing policy more difficult);

more trade with one another than a mixed pair consisting of a democracy and an autocracy,[96] and this pattern is only becoming more pronounced over time.[97] Moreover, the explanation for this pattern does not lie in any innate tendency of democratic regimes to engage in higher levels of trade, as trade flows between autocratic states are not significantly lower than those between democratic states.[98] What appears to make the decisive difference, instead, is whether both states are of a common constitutional type. Thus, the greater the number of states that belong to a constitutional family, the greater the amount of trade that will occur among them. The addition of a new member to the family promises increased trade to the new member and the existing members alike.

Second, and no less importantly, liberal democracies are less likely to wage war against one another than are other types of regimes. In recent years, a scholarly consensus has emerged among political scientists in favor of the "democratic peace" thesis, which holds that democracies tend not to fight one another.[99] This pattern is not attributable to any intrinsic unwillingness or inability of liberal democracies to wage war: liberal states are, as one scholar puts it, "as aggressive and war prone as any other form of government or

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Edward D. Mansfield et al., *Free to Trade: Democracies, Autocracies, and International Trade*, 94 AM. POL. SCI. REV. 305, 318 (2000) (arguing that "aggregate trade barriers will be lower between democracies than between a democracy and an autocracy" and that "trade between democracies tends to be more extensive than commerce within mixed pairs"). *But see* JOANNE GOWA, BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE 14–19 (1999) (expressing doubt as to the existence of "strong and consistent evidence that trade flows are higher between democracies").

96. Mansfield et al., *supra* note 95, at 314, 315 tbl.1.

97. *See id.* at 318 (observing that, by the 1990s, "the average volume of trade between a democracy and an autocracy was roughly 40% less than that of democratic dyads").

98. *See id.* at 314.

99. *See, e.g.*, DAN REITER & ALAN C. STAM, DEMOCRACIES AT WAR 2 (2002) ("[A] consensus formed in the academic community during the early 1990s that democracies almost never fight each other."); Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Peace, 1946–1986*, 87 AM. POL. SCI. REV. 624, 624 (1993) (deeming acceptance of the democratic peace thesis "one of the most significant nontrivial products of the scientific study of world politics"); Oneal & Russett, *supra* note 95, at 269 (characterizing the evidence that democracies rarely fight one another as "powerful").

Some scholars remain skeptical of the democratic peace thesis. *See, e.g.*, Bruce Russett et al., *The Democratic Peace*, 19 INT'L SECURITY 164, 164–75 (1995) (documenting criticism of the "conventional wisdom" of the democratic peace); David E. Spiro, *The Insignificance of the Liberal Peace*, 19 INT'L SECURITY 50, 50 (1994) (contending that "the absence of wars between liberal democracies is not statistically significant except for a brief period during World War I"). Even on the most skeptical of accounts, however, the years since World War II offer significant support for the democratic peace thesis. *See* GOWA, *supra* note 94, at 112 (critiquing the democratic peace thesis at length, but acknowledging as an empirical matter that, since World War II, democracies have been significantly less likely than other types of regimes to engage in war with one another). For a recent empirical argument that attributes the peaceful coexistence of liberal democracies not to the fact that they are democratic, but rather to the fact that they are market states, see Erik Gartzke, *The Capitalist Peace*, 51 AM. J. POL. SCI. 166, 169–73 (2007). Even if correct, however, Gartzke's argument that the so-called "democratic peace" might more accurately be called the "capitalist peace" does not undermine the argument made here that constitutional homogeneity among states produces positive network externalities.

society in their relations with nonliberal states."[100] Rather, as in the case of trade, the explanation for the democratic peace appears to lie at least partly in the affinity that members of a constitutional family or network exhibit toward fellow members.[101] There is evidence to suggest, for example, that autocracies are much less likely to fight one another than to fight democracies.[102] Thus, in matters of security as in matters of trade, network effects attract new members to existing constitutional networks. These network effects ought to manifest themselves in the form of constitutional convergence among the membership of each network.

## II.
## METHODS FOR MEASURING AND COMPARING CONSTITUTIONS

### *A. A New Empirical Data Set on Constitutional Rights*

The raw material of our empirical analysis is a new database of the rights-related provisions of the written constitutions of every country in the world.[103] A threshold question that empirical researchers must address is that of how to define the object of study: when we say that we are analyzing data on the world's constitutions, what do we mean by "constitution"? There is a substantial and long-standing literature on the question of what constitutes a constitution.[104] Consequently, the term can be defined in a number of ways,

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100. Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFFAIRS 205, 225 (1983).

101. *Id.* at 325–30 (arguing that liberal states display an "extreme lack of public respect or trust" toward nonliberal states that poisons "relations between liberal and nonliberal societies").

102. The probability of war between two democracies remains somewhat lower, however, than the probability of war between two autocracies. *See* Oneal & Russett, *supra* note 95, at 288–89 (analyzing data from 1950 through 1985, and reporting a 0.137 probability of military conflict between an autocracy and a democracy, as opposed to a 0.071 probability of conflict between two autocracies and a 0.054 probability of conflict between two democracies).

103. This dataset is first introduced in Benedikt Goderis & Mila Versteeg, The Transnational Origins of Constitutions: An Empirical Analysis, http://ssrn.com/abstract=1906707 (Aug. 8, 2011).

104. *See, e.g.*, ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915) (defining the constitution as "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state"); ANTHONY KING, THE BRITISH CONSTITUTION 3 (2007) (defining the constitution as "the set of the most important rules and common understandings in any given country that regulate the relations among that country's governing institutions and also the relations between that country's governing institutions and the people of that country"); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934) (arguing that the constitution is not a document, "but a living institution built (historically, genetically) in first instance *around* a particular document"); 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) (developing the perspective of "constitutional realism" that "seeks to identify the nature of a constitution through observing its operation in reality"); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411 (2007) (noting that "much—perhaps even *most*—of the 'constitutional' work in our legal system is in fact done by legal norms existing outside what we traditionally think of as 'the Constitution'").

depending upon the context.[105] The fundamental divide is between definitions keyed to formal legal status and definitions keyed 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."[106]

The focus of this Article is on constitutions in a formal and legal sense. Accordingly, our analysis excludes judicial interpretations and unwritten constitutional conventions and practices, even though these may be integral parts of a country's small-c, or de facto, constitution. At the same time, however, we do not limit ourselves strictly to the analysis of formal legal documents that explicitly describe themselves as constitutional. Instead, consistent with other empirical literature on written constitutions and with a functional definition of what counts as "constitutional," we cast our net more broadly to include any legal document (or collection of legal documents) that satisfies either a formal or a functional criterion.[107]

First, any document or set of documents that a country formally designates as its "constitution" was 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 matters such as the basic structure, powers, and limits of the state, were also treated as constitutional. Examples from this category include Israel's Basic Laws,[108] the United Kingdom's 1998 Human Rights Act,[109] and Canada's 1960 Bill of Rights.[110] 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 criterion. Suspension of a constitution was not coded as an amendment to the constitution, unless the suspension was pursuant to another constitutional document that thereby effectively superseded the suspended constitution.

As a general rule, rights had to be mentioned somewhat explicitly in order to be deemed part of the constitution. For example, if a constitution contained an express right to "liberty," this language was not coded as constituting a

105. *See, e.g.*, ELKINS ET AL., *supra* note 5, at 36–40 (distinguishing between "constitution as function" and "constitution as form" and choosing the latter definition for their empirical analysis).

106. *See* Law, *supra* note 7, at 377.

107. *See*, e.g., ELKINS ET AL., *supra* note 5, at 49 (suggesting three criteria to establish which legal documents are constitutional documents); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 366 (1995) (suggesting three criteria for distinguishing constitutions from other legal texts).

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

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

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

prohibition of arbitrary arrest and detention in particular, even if the word "liberty" could be interpreted, or had in fact been interpreted, in such a manner by the courts. Limitation clauses that purport to limit the scope of rights in a constitution, often in a boilerplate or blanket manner, were not coded for a variety of reasons.[111] An exception was made, however, for limitations upon property rights in particular; unlike other types of limitation clauses, these tend to be explicit, specific, and comparable across different constitutions.[112]

Many constitutions contain references to international human rights instruments.[113] In such cases, the question arises whether to deem the human rights instrument part of the constitution itself for coding purposes. The rule we applied was that the provisions of the human rights instrument had to be explicitly enumerated in the constitution itself in order to be counted as part of the constitution; a mere statement purporting to incorporate or otherwise acknowledging a particular instrument was by itself insufficient to cause the instrument to be 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,[114] was coded as including the provisions of the Convention. By contrast, the Constitution of the Republic of Congo, which states in its preamble that "all duly ratified pertinent international texts relating to human rights" form an "integral part" of the constitution,[115] was not coded as including every right found in every ratified human rights treaty.

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111. A typical example of a limitations clause 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." Constitution Act, 1982, § 1. The coding of such provisions would have posed a number of methodological challenges. The scope and effect of a limitations clause can be difficult to ascertain from the text of the clause alone, and it was not feasible to investigate the actual impact of each limitations clause individually. Moreover, the manner in which limitation clauses are framed varies substantially across countries, which makes it even more difficult to determine when such clauses may be coded the same way or must be coded differently from one another.

112. A typical example is article 29 of the Japanese Constitution, which immediately follows its guarantee of the right to property with language that imposes specific limits upon that right:

(1) The right to own or to hold property is inviolable.

(2) Property rights shall be defined by law, in conformity with the public welfare.

(3) Private property may be taken for public use upon just compensation therefor.

NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 29.

113. *See* Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 207–08 (reporting that, out of a sample of 283 constitutions written since 1945, 80 made explicit reference to an international human rights treaty, while 28 purported to incorporate such a treaty).

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

115. *See, e.g.*, CONSTITUTION DE LA REPUBLIQUE DU CONGO 20 JANVIER 2002 pmbl. (declaring the "fundamental principles" (*les principes fondamentaux*) of the U.N. Charter, the Universal Declaration of Human Rights, the African Charter of the Rights of Man and Peoples, and "all duly ratified pertinent international texts relating to human rights" an "integral part" (*partie intégrante*) of the constitution); Ginsburg et al., *supra* note 113, at 207 nn.34–35 (citing additional examples of constitutions that incorporate international human rights treaties by reference).

Ultimately, all of the constitutions of 188 different countries were coded from 1946 through 2006.[116] Allowing for the creation of new states, the replacement of existing constitutions, and so forth, a total of 729 distinct constitutions were coded. For each constitution, information was collected on 237 variables covering a broad range of constitutional rights, policies, and institutional mechanisms. In each case, the text of the entire constitution was analyzed, and rights-related provisions were coded regardless of whether they appeared in a distinct section or a separate document, such as a bill of rights, or were instead intermingled with other types of provisions. The two primary sources of information on the actual content of each constitution were Peaslee's *Constitutions of Nations*[117] and Blaustein and Flanz's *Constitutions of the Countries of the World,* a continuously updated loose-leaf collection.[118]

### *B. The Creation and Components of the Rights Index*

Our next step was to create a standardized, quantitative measure of each constitution's rights-related content. From our initial list of 237 constitutional provisions, we selected a diverse subset of 113 provisions then aggregated and edited this subset into a sixty-variable rights index designed to measure the overall rights content of each constitution.[119] Each variable in the index is binary, meaning that for each constitution in the data, each variable in the index

116. Any constitution that belonged to any of these countries and was in force at any time during this period was coded, but only for the period that it was in force. If a country lacked a constitution at any point during this period—for example, because the country did not yet exist or had not yet adopted a constitution—that country was coded as lacking a constitution during such time as it had no constitution. Our list of 188 countries is based on the World Bank's list of "countries" but excludes "countries" that lack control over their own constitutions and are more accurately considered colonies, such as the Netherlands Antilles. As of 2007, at the end of the period covered by our data, the World Bank identified 208 countries, 20 of which were excluded as colonies. *See Countries and Economies*, WORLD BANK, http://data.worldbank.org/country (last visited July 18, 2011). As a practical matter, one consequence of this approach to defining the universe of "countries" is the exclusion of the present-day Republic of China (Taiwan) from the data set. This decision was made entirely for reasons of methodological consistency and in no way implies that Taiwan is not an actual country, or that constitutionalism in Taiwan is unworthy of study. On the contrary, Taiwanese constitutionalism is highly noteworthy in a variety of respects. *See* Law & Chang, *supra* note 80 (describing how Taiwan's "perplexing" relationship with the People's Republic of China and resulting lack of diplomatic recognition have, inter alia, influenced Taiwanese constitutional development and prevented Taiwan from formally ratifying international human instruments); *supra* note 80 and accompanying text (using Taiwan as an example of a country that engages in constitutional conformity in order to bolster its legitimacy).

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

118. 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 D.G. LAVROFF & G. PEISER, LES CONSTITUTIONS AFRICAINES 1–3 (1961).

119. Our selection of the initial subset of 113 provisions was guided by considerations of both diversity and popularity: we sought to select provisions that represented the full panoply of rights currently in existence while also making room for the types of rights that appear most commonly.

is coded either "yes" (indicating the presence of a particular provision in that constitution) or "no" (indicating the absence of the provision). The result is that each constitution in the data is represented by an index consisting of a string of sixty binary indicators.

Our goal in creating the index was to construct a measure of constitutional content that would capture meaningful substantive variation from one constitution to the next yet ignore differences that amount to matters of drafting style or semantics. For example, we combined a number of conceptually overlapping rights, such as freedom of the press and freedom of expression, into a single variable for purposes of the index. Likewise, we aggregated related variables that might arguably be considered different or more specific versions of the same underlying right—such as secrecy of correspondence, privacy of personal data, privacy of the family, personal privacy, and inviolability of the home—into an overarching right of privacy. All of the components of the resulting index capture variations in the enumeration and enforcement of rights, and the vast majority simply measure the presence or absence of specific substantive rights. The main exceptions are two variables that capture the existence of rights-enforcement mechanisms, in the form of either judicial review or a human rights commission and/or ombudsman.[120]

Table 1 lists every component of the index. Half of the variables in the index measure what scholars have called first-generation rights, or civil and political rights that typically take the form of negative protections against government action.[121] This category includes the rights to life, liberty, and physical integrity, fair trial rights, the right to vote, and the right to form political parties. A smaller portion of the index, encompassing a total of six variables, relates to second-generation rights, or social and economic rights that confer positive entitlements, such as the right to satisfaction of one's basic physical needs, the right to a particular standard of working conditions, and the right to an education. A third category consists of what might be classified as third-generation rights, or rights that attach to groups as opposed to individuals. These include women's rights, minority rights, rights for children and the elderly, rights for the handicapped, and consumer rights.

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120. Two other components of the index measure what might best be described as rights-related policies—namely, the recognition of an official state religion and the existence of explicit restrictions on property rights.

121. *See* WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION 132 (1998) (defining "first generation rights" as "civil-political," not "socioeconomic" in nature); Jeffrey Goldsworthy, *Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 1, at 115, 120 (contrasting judicial enforcement of "'first generation' or 'negative' rights" with that of "socio-economic rights"); Mark Tushnet, *Comparative Constitutional Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225, 1231 (Mathias Reimann & Reinhard Zimmermann eds., 2007) (distinguishing "classical rights to civil and political participation, and to equality," from both "second generation" social and economic rights for individuals and "third generation" rights to "cultural preservation and environmental quality" that are "inherently available only to groups and communities taken as aggregates").

**Table 1: Components of the Rights Index**[122]

| "First-generation" (negative, civil/political) rights |
|---|
| 1. Right to life |
| 2. Freedom of movement |
| 3. Right not to be expelled from home territory |
| 4. Prohibition of arbitrary arrest or detention |
| 5. Right of access to court/impartial tribunal |
| 6. Right to appeal to a higher court |
| 7. Right to a public trial |
| 8. Right to a timely trial |
| 9. Right to counsel |
| 10. Right to present a defense |
| 11. Right against self-incrimination |
| 12. Presumption of innocence |
| 13. Prohibition of double jeopardy |
| 14. Prohibition of ex post facto laws (retroactive laws) |
| 15. Prohibition of death penalty |
| 16. Prohibition of torture |
| 17. Right to privacy (including personal privacy, inviolability of the home, protection of personal data, privacy of family life, and inviolability of communication)* |
| 18. Freedom of religion |
| 19. Freedom of expression and/or freedom of the press* |
| 20. Right to private property |
| 21. Right to vote |
| 22. Right of assembly |
| 23. Right of association |
| 24. Right to form political parties |
| 25. Right to bear arms |
| 26. Guarantee of equality (including both blanket equality provisions and enumerated guarantees of equality without respect to race, place of origin, ethnicity, education, social status, caste, tribe, religion, belief/philosophical conviction, political preference or opinion, economic status or property ownership, ancestry, nationality, disability, age, sexual orientation, language, and/or HIV/AIDS status)* |
| 27. Right to marry |
| 28. Negative right to education (freedom of education, right to establish private schools)* |
| 29. Right to strike and/or form trade unions* |
| 30. Artistic and/or scientific freedom |

122. Variables marked with an asterisk were created by aggregating a number of related or overlapping provisions found in the full data.

| "Second-generation" (positive, socioeconomic) rights |
|---|
| 31. Workers' rights (right to favorable working conditions, right to rest, right to minimum wage) |
| 32. Rights to basic physical needs/physical subsistence rights (right to social security, right to adequate standard of living, right to food, right to housing, right to water, right to health)* |
| 33. Positive right to education (right to receive an education)* |
| 34. Right to a healthy environment (including the duty to protect the environment, (civil or criminal) liability for damaging the environment, right to information about the environment, right to compensation when living environment is damaged, right to participate in environmental planning)* |
| 35. Requirement that the government use natural resources effectively and/or for the benefit of all citizens* |
| 36. Right to information about government |
| **"Third-generation" (community/group) rights** |
| 37. Rights for the elderly (including equality regardless of age)* |
| 38. Rights for the handicapped (including equality regardless of disability)* |
| 39. Women's rights (including gender equality, woman empowerment in labor relations (e.g., equal pay for equal work), equality of husband and wife within the family, special protection of women (e.g., special conditions at work), right to maternity leave, special protection of mothers)* |
| 40. Rights for children (including the prohibition of child labor)* |
| 41. Rights for the family |
| 42. Rights for consumers |
| 43. Minority rights (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)* |
| 44. Rights for victims of crimes |
| 45. Rights for prisoners |
| 46. Affirmative action provision authorizing or requiring compensatory action in favor of disadvantaged groups |
| **Other rights-related provisions** |
| 47. Imposition of affirmative duties upon citizens |
| 48. Proclamation of an official state religion |
| 49. Separation of church and state |
| 50. Prohibition of genocide and/or crimes against humanity* |
| 51. Establishment of substantive principles to be taught in schools (including religious principles, communist principles, nationalist principles, internationalist principles, democratic principles) |

52. Express reference to international human rights treaty obligations
53. Establishment of a human rights commission or ombudsman
54. Establishment of judicial review (judicial invalidation of unconstitutional laws)
55. Right to work (including the freedom to choose one's occupation and freedom of enterprise)*
56. Right to asylum
57. Abortion restrictions and/or protection of fetuses
58. Express limitations on the property right (property may be limited through regulation, substantive limits on property (e.g., property may be limited by its social function); restriction of land rights, mandate of land reform)*
59. Right to resist the government when rights are violated
60. Right to protection of reputation

## III.
## GLOBAL CONSTITUTIONAL TRENDS

Elementary analysis of our data enables us to quantify a number of trends in the global evolution of constitutionalism since World War II. Here, we document three such trends: rights creep, or a tendency to guarantee an increasing number of rights; the spread of judicial review; and the existence of generic rights that can reliably be found in the vast majority of constitutions. Overall, constitutions are increasingly likely to contain a generic set of rights that is growing in scope and backed by the promise of judicial enforcement.

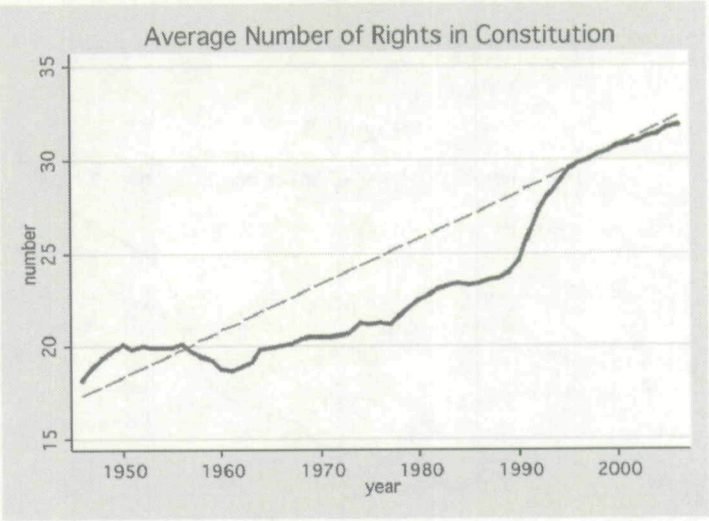
### *A. Rights Creep: The Proliferation of Constitutional Rights*

As many have observed, it has become standard practice for constitutions to include explicit rights provisions, typically in the form of a bill of rights.[123] Yet it is not merely the case that constitutions are becoming more likely to include explicit rights provisions. Rather, the sheer number of rights that they tend to include is also increasing.

123. *See, e.g.*, KLUG, *supra* note 12, at 12 (calculating that, from 1989 to 1999, at least one-quarter of all United Nations member states "introduced bills of rights and some form of constitutional review"); Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, *in* PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1, 3 (Philip Alston ed., 1999) (reporting a rise in the proportion of national constitutions that contain some form of explicit human rights protection, following the adoption of the United Nations Declaration of Human Rights); John Boli, *World Polity Sources of Expanding State Authority and Organization, 1870–1970*, *in* INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL 71, 73 fig.3.1 (George M. Thomas et al. eds., 1987) (finding that, from 1870 to 1970, the extent to which constitutions explicitly enumerated both the rights and duties of citizens increased significantly); George Williams, *Human Rights and Judicial Review in a Nation Without a Bill of Rights: The Australian Experience*, *in* CONSTITUTIONALISM IN THE CHARTER ERA 306, 306 (Grant Huscroft & Ian Brodie eds., 2004) (observing that, once Britain enacted the Human Rights Act 1998, Australia became "the only western nation without any form of Bill of Rights at any level of government").

Prior to World War II, most constitutions enumerated only a handful of rights. Over the last six decades, however, the number of rights in the average constitution has crept upward. Figure 1graphs the number of rights in our index that can be found in the average constitution. In 1946, the average constitution contained only 19 of the 56 substantive rights in our index.[124] By 2006, that fraction had increased to 33 out of 56, an increase of more than 70%. This phenomenon of rights creep at the level of domestic constitutional law parallels the striking growth in the volume and scope of international human rights instruments over the same time period, which warrants suspicion that the two developments may be interrelated, if not symbiotic.[125]

**Figure 1**




The tendency of constitutions to contain an increasing number of rights is not limited to negative or first-generation rights. Figure 2 depicts the average number of civil and political rights, or first-generation rights, that the world's constitutions contained at different points in time. Figure 3 graphs the number of social and economic rights, or second-generation rights, in our index that appear in the average constitution. Finally, Figure 4 does the same for group rights, or third-generation rights. All three categories of rights exhibit the same basic trend.

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124. As discussed previously, the rights index encompasses sixty variables, but not all sixty measure the presence or absence of specific substantive rights. Two variables concern the enforcement of rights mechanisms for the enforcement of rights, and two others involve rights-related policies or rights limitations as opposed to actual substantive rights. *See supra* note 120 and accompanying text. For purposes of calculating the proportion of the "rights" in the index that are found in a given constitution, we exclude these four provisions.

125. *See* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 37 fig.2.6 (2009) (measuring the growth in the number of international human rights instruments in force); *id.* at 61 fig.3.1 (graphing the cumulative number of human rights treaty ratifications).

**Figure 2**

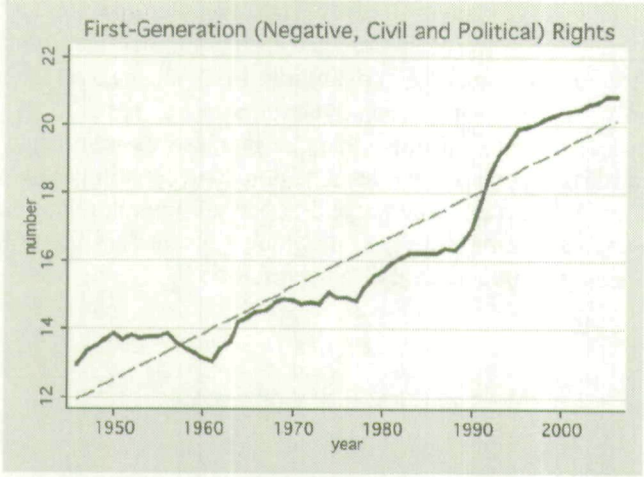



**Figure 3**

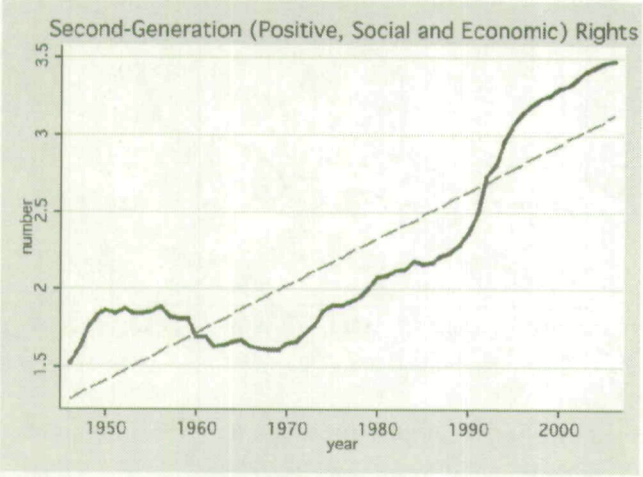
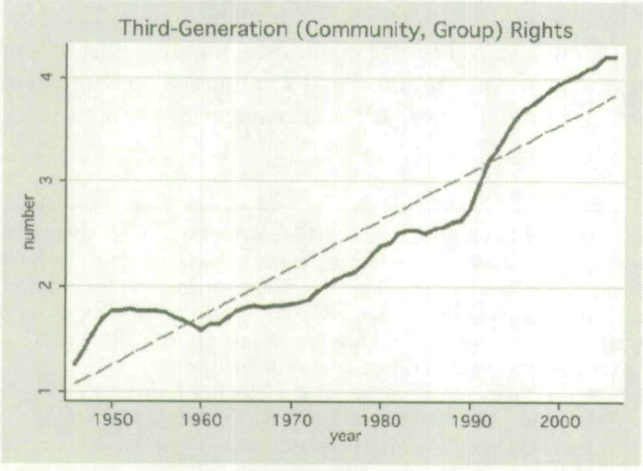


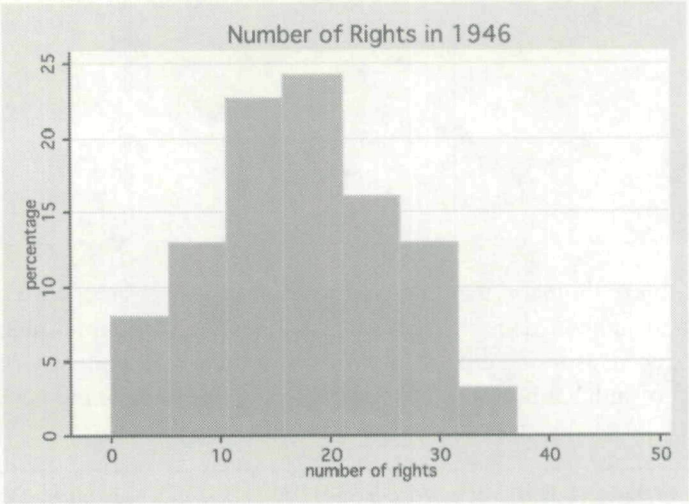

**Figure 4**

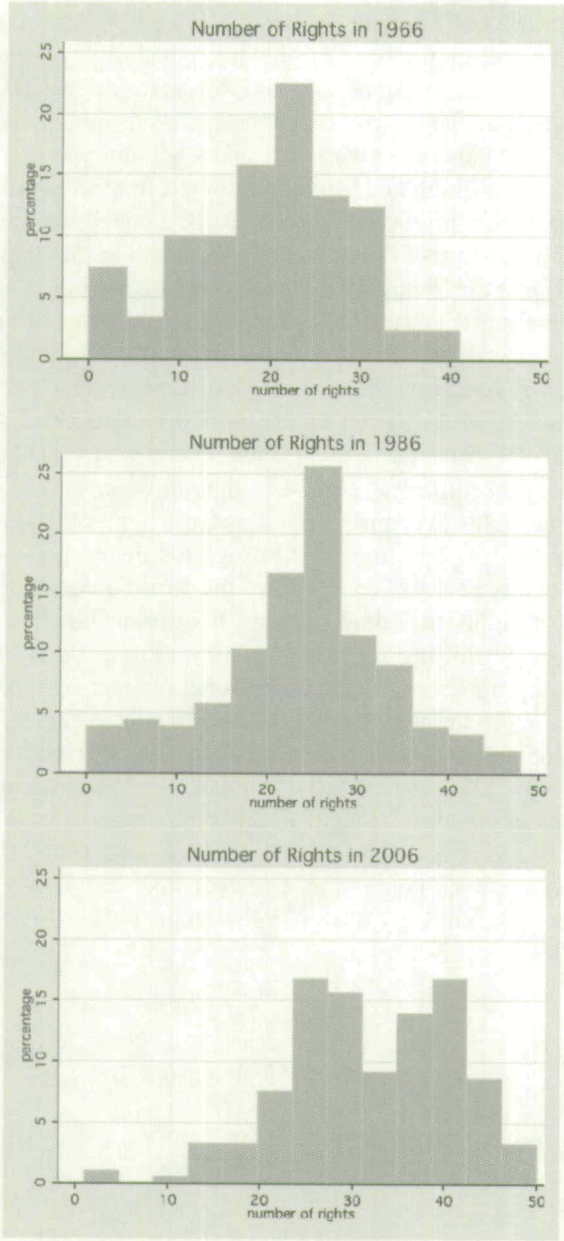


Overall averages of the type depicted in the graphs above can, of course, be misleading. The mean number of rights in a constitution conveys little sense of the distribution of constitutions. It could, for example, conceal the existence of a skewed or multimodal distribution, wherein a substantial portion of constitutions might offer on average a very low and static number of rights while the remainder offers a very high and growing number. In other words, it is possible that rights creep occurs primarily or exclusively among constitutions that contain a relatively high number of rights in the first place. The opposite pattern is also plausible: rights creep might be largely confined to constitutions that start out with a relatively low number of rights. We might expect to observe such a pattern if, for instance, there exists a global trend toward adoption of a generic set of rights that is relatively static in composition. In this case, constitutions would be characterized by rights creep until they contained the benchmark quantum of rights, at which point growth would arrive at a plateau.

Closer analysis confirms, however, that most constitutions are indeed gaining additional rights over time, regardless of whether they are starting from a relatively high or low baseline. The histograms below provide snapshots at twenty-year intervals of the distribution of the world's constitutions according to the number of rights that they contain. It is immediately evident that the entire distribution is shifting upward over time. First, the modal constitution contains a growing number of rights: the modal number of rights increases by about half, from approximately twenty in 1946 to approximately thirty in 2006. Second, both the upper and lower bound of the distribution are creeping upward as well. By 2006, almost 5% of the constitutions contained nearly fifty of the provisions in our rights index, whereas this was the case for only about 2% of all constitutions in 1986 and 0% in 1966 and 1946. By contrast, the number of constitutions containing none of the provisions in our index whatsoever was approximately 8% in 1946, 7% in 1966, 4% in 1986, and less than 1% by 2006.

**Figure 5**






*B. The Spread of Judicial Review*

Even more dramatic than the phenomenon of rights creep is the growing popularity of judicial review. Figure 6 illustrates the substantial increase over the last six decades in the proportion of constitutions that explicitly provide for some form of judicial review.[126] The solid lower line depicts the percentage of

126. All forms of judicial review are included, regardless of whether review is performed

countries with constitutions that provide explicitly for judicial review. In 1946, only 25% of countries had some form of judicial review explicitly entrenched in their respective constitutions; by 2006, that proportion had increased to 82%. This measure excludes countries such as the United States that have adopted judicial review in the absence of an explicit constitutional mandate.[127] Accordingly, we constructed a second variable that captures the existence of judicial review via either explicit constitutional mandate or actual practice. This measure is the uppermost dotted line in Figure 6. 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 both small and diminishing slightly over time, which means that judicial review is generally, and increasingly, established by explicit constitutional provision.

**Figure 6**


*C. Generic Constitutional Rights*

Another characteristic of global constitutionalism that is evident from our data is the existence of generic constitutional rights, or the fact that some rights are so ubiquitous that they can fairly be described as generic.[128] Table 2 shows,

by a court of general jurisdiction (as in the United States) or a specialized constitutional court (as in much of Europe); whether review occurs only in the context of a concrete dispute or instead in the abstract; or whether it is conducted before or after enactment of the legislation.

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

128. *See, e.g.*, Alston, *supra* note 123, at 2 (identifying "a core set of civil and political rights which is reflected almost without fail" in written constitutions); Goldsworthy, *supra* note

decade by decade, what percentage of constitutions contained each of the provisions in the rights index. In other words, Table 2 is a ranking of constitutional rights according to their global popularity. From this ranking, and from the changes in popularity over time, two global trends are immediately evident.

First, 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.[129] 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, privacy rights, the prohibition of arbitrary arrest and detention, the rights to assembly and association, and women's rights are all found in over 90% of the world's constitutions. Indeed, twenty-five of the provisions can now be found in over 70% of all constitutions.

Second, most rights are growing in popularity, with the result that the number of generic rights is increasing over time. In 1946, none of the rights in our index appeared in over 90% of the world's constitutions; by 2006, nine rights did so. Likewise, whereas only sixteen components of the index could be found in at least half of the world's constitutions, there are now thirty-five that meet this threshold of popularity. Women's rights, the presumption of innocence, the right to counsel, and the right to form political parties have enjoyed particularly dramatic surges in popularity since World War II. Among the very few rights that have actually declined in popularity, by contrast, are the right to bear arms, protection for fetuses, and freedom from state-imposed educational requirements or restrictions.

**Table 2: The Most Popular Constitutional Rights, by Decade**

| Rank | Rights-related provision | 1946 | 1956 | 1966 | 1976 | 1986 | 1996 | 2006 |
|---|---|---|---|---|---|---|---|---|
| 1 | Freedom of religion | 81% | 88% | 87% | 88% | 92% | 95% | 97% |
| 2 | Freedom of the press and/or expression | 87% | 88% | 84% | 86% | 87% | 95% | 97% |
| 3 | Equality guarantees | 71% | 77% | 85% | 88% | 92% | 95% | 97% |
| 4 | Right to private property | 81% | 85% | 81% | 83% | 87% | 95% | 97% |
| 5 | Right to privacy | 83% | 83% | 78% | 81% | 83% | 94% | 95% |
| 6 | Prohibition of arbitrary arrest and detention | 76% | 81% | 81% | 79% | 81% | 92% | 94% |
| 7 | Right of assembly | 73% | 77% | 73% | 75% | 81% | 90% | 94% |
| 8 | Right of association | 72% | 74% | 78% | 77% | 80% | 91% | 93% |
| 9 | Women's rights | 35% | 51% | 62% | 70% | 77% | 90% | 91% |
| 10 | Freedom of movement | 50% | 55% | 58% | 58% | 64% | 84% | 88% |

121, at 116 (reviewing the "essential elements" of the "common model" of "liberal democratic constitutionalism"); Law, *supra* note 2, at 659 (documenting the existence of "generic constitutional law," a "skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction"); McCrudden, *supra* note 2, at 501 ("Although most post-Second World War constitutions have specifically laid down elements which set them apart, most also have a common core of human rights provisions that are strikingly similar and this is not merely coincidental.").

129. *See* Law, *supra* note 2, at 662–726 (discussing the theoretical, analytical, and doctrinal components of "generic constitutional law").

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 11 | Right of access to court | 68% | 68% | 64% | 62% | 64% | 85% | 86% |
| 12 | Prohibition of torture | 37% | 37% | 41% | 45% | 56% | 80% | 84% |
| 13 | Right to vote | 63% | 74% | 73% | 69% | 74% | 82% | 84% |
| 14 | Right to work | 55% | 65% | 59% | 67% | 65% | 80% | 82% |
| 15 | Positive right to education at state expense | 65% | 72% | 59% | 65% | 65% | 78% | 82% |
| 16 | Judicial review | 25% | 32% | 53% | 51% | 58% | 80% | 82% |
| 17 | Prohibition of ex post facto laws | 41% | 51% | 57% | 60% | 67% | 77% | 80% |
| 18 | Physical needs rights | 44% | 60% | 52% | 57% | 61% | 75% | 79% |
| 19 | Right to life | 33% | 33% | 38% | 41% | 51% | 71% | 78% |
| 20 | Presumption of innocence | 8% | 12% | 31% | 37% | 49% | 69% | 74% |
| 21 | Right not to be expelled from home territory | 30% | 33% | 38% | 44% | 48% | 70% | 73% |
| 22 | Limits on property rights | 51% | 63% | 58% | 68% | 70% | 69% | 73% |
| 23 | Right to present a defense | 30% | 37% | 52% | 57% | 64% | 69% | 72% |
| 24 | Right to unionize and/or strike | 25% | 35% | 49% | 50% | 50% | 69% | 72% |
| 25 | Right to counsel | 10% | 17% | 31% | 38% | 47% | 66% | 70% |
| 26 | Right to public trial | 43% | 47% | 46% | 48% | 53% | 65% | 69% |
| 27 | Rights for the family | 28% | 28% | 38% | 43% | 46% | 62% | 67% |
| 28 | Right to form political parties | 9% | 16% | 28% | 26% | 31% | 63% | 65% |
| 29 | Children's rights | 25% | 35% | 30% | 35% | 40% | 59% | 65% |
| 30 | Citizen duties | 53% | 62% | 52% | 59% | 56% | 63% | 65% |
| 31 | Right to a healthy environment | 0% | 0% | 1% | 8% | 20% | 52% | 63% |
| 32 | Other workers' rights | 32% | 45% | 38% | 42% | 46% | 57% | 59% |
| 33 | Negative education rights (freedom of education) | 57% | 56% | 44% | 38% | 35% | 52% | 55% |
| 34 | Minority rights | 16% | 24% | 20% | 20% | 26% | 43% | 51% |
| 35 | Prohibition of double jeopardy | 16% | 19% | 26% | 31% | 37% | 46% | 50% |
| 36 | Right to remain silent | 29% | 29% | 32% | 31% | 38% | 47% | 49% |
| 37 | Right to a timely trial | 8% | 11% | 18% | 22% | 31% | 40% | 47% |
| 38 | Artistic freedom | 10% | 16% | 13% | 17% | 23% | 42% | 45% |
| 39 | Rights for handicapped | 0% | 1% | 3% | 5% | 13% | 30% | 43% |
| 40 | Ombudsman or human rights commission | 5% | 5% | 4% | 9% | 15% | 27% | 37% |
| 41 | Right to marry | 18% | 31% | 30% | 28% | 26% | 32% | 35% |
| 42 | Right to asylum | 11% | 21% | 18% | 21% | 21% | 32% | 35% |
| 43 | Reference to international human rights treaties | 0% | 1% | 18% | 17% | 15% | 30% | 35% |
| 44 | Rights for elderly | 3% | 3% | 3% | 7% | 12% | 26% | 34% |
| 45 | Right to information about government | 2% | 4% | 3% | 5% | 8% | 25% | 34% |
| 46 | Separation of church and state | 20% | 25% | 28% | 25% | 25% | 36% | 34% |
| 47 | Right to protection of reputation | 13% | 11% | 8% | 10% | 17% | 29% | 32% |
| 48 | Affirmative action | 3% | 9% | 17% | 20% | 26% | 27% | 30% |
| 49 | Natural resources for benefit of all | 8% | 7% | 8% | 15% | 19% | 27% | 29% |
| 50 | Right to appeal to higher | 8% | 8% | 7% | 7% | 8% | 20% | 25% |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | court | | | | | | | |
| 51 | Prohibition of death penalty | 10% | 9% | 8% | 9% | 12% | 20% | 24% |
| 52 | Official state religion | 39% | 39% | 32% | 27% | 26% | 24% | 22% |
| 53 | Prisoner rights | 10% | 12% | 9% | 12% | 10% | 15% | 18% |
| 54 | Consumer rights | 0% | 0% | 0% | 1% | 6% | 12% | 16% |
| 55 | Right to resist when rights are violated | 8% | 7% | 4% | 4% | 4% | 15% | 16% |
| 56 | Substantive principles for education | 11% | 16% | 10% | 15% | 15% | 14% | 14% |
| 57 | Prohibition of genocide/ crimes against humanity | 0% | 0% | 0% | 1% | 2% | 6% | 12% |
| 58 | Rights for victims of crimes | 0% | 0% | 0% | 0% | 1% | 7% | 10% |
| 59 | Protection of fetuses | 0% | 0% | 1% | 1% | 6% | 7% | 8% |
| 60 | Right to bear arms | 10% | 8% | 5% | 4% | 3% | 3% | 2% |

## IV.
## AN EMPIRICAL MODEL OF CONSTITUTIONAL VARIATION AND CONSTITUTIONAL IDEOLOGY

### *A. The Hunt for Evidence of Constitutional Convergence*

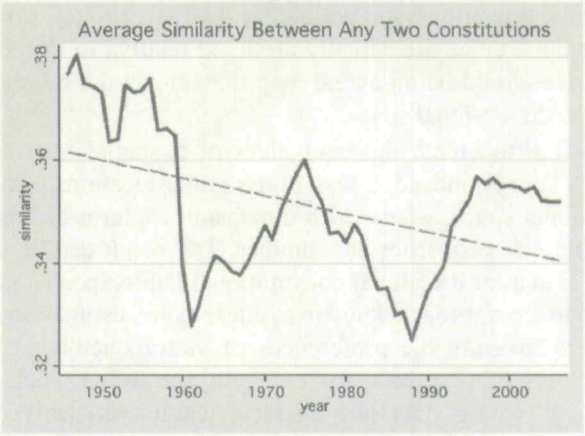
The existence of a core of generic rights, the increasing comprehensiveness of constitutions, and the growing popularity of rights-enforcement mechanisms might all appear to support the same conclusion—namely, that constitutions are, on average, becoming more similar over time. However, initial analysis of the data suggests precisely the opposite trend.

To arrive at an overall measure of constitutional similarity, we first calculated the similarity of every pair of constitutions in the data by comparing their respective rights indices.[130] We then computed the average of all of the resulting similarity scores for each year. Figure 7 is a graph of this average similarity score over time. As the graph shows, some decades saw rises in average similarity, while other decades saw rather steep declines in average similarity. Overall, however, average similarity has decreased over the last six decades, albeit only slightly.[131]

130. The similarity between constitutions A and B is the correlation between the rights index for constitution A and the rights index for constitution B. The measure that we compute is Pearson's phi, which is 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 5, at 25 (using raw percentages in lieu of Pearson's phi as a measure of constitutional similarity). We calculated Pearson's phi for every possible pairing of constitutions over every year of our 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 we computed in this manner range from -0.41 to 1, and the mean score across all country-pairs and years is 0.35.

131. In 1946, the average similarity score was 0.377. As of 2006, it had declined to 0.352.

**Figure 7**




On its face, this graph poses an odd empirical puzzle. The combination of increasing comprehensiveness, on the one hand, and finite variation in the number of possible rights, on the other hand, should yield increasing constitutional similarity. At present, the average constitution contains thirty-four of the sixty provisions in the rights index used to calculate similarity. If there are only a finite number of rights that a country can offer, and every country is offering a greater proportion of these rights over time, then every constitution is offering an increasing proportion of the same menu of rights, and the result should be increasing constitutional similarity. The logical end point, indeed, should be that all constitutions will contain exactly the same rights because all constitutions will contain all possible rights. The conclusion that constitutional similarity ought to increase is only reinforced by our finding that a significant number of rights are generic, and that the popularity of these generic rights is only rising over time.[132] Contrary to expectations, however, the similarity scores that we calculated by correlating the rights index of each constitution with that of every other constitution show that the average similarity between any two constitutions in the world is nominally decreasing, not increasing.

### *B. Empirical Techniques for Mapping the Global Constitutional Landscape*

To understand what lies behind this counterintuitive result demands the use of empirical methods capable of delving deeply into an extensive and complex body of data to produce a more accurate picture of the global constitutional landscape. The average similarity score across all possible pairings of constitutions is, at best, a very crude measure of overall convergence. Such a measurement approach that cannot capture more complex patterns that might be present in the data; nor can it reveal whether convergence might be occurring across a subset of constitutions. Imagine, by way of analogy, that a tourist would like to know where New York, Boston, and Los Angeles are located, but the only information available to her is the

132. *See supra* Table 2.

distance that one travels, on average, in order to move between any two of those three cities. It would be impossible for the tourist to tell from that number alone how the three cities are actually arranged relative to one another. Vastly more informative would be an actual map that shows the relative locations of the cities in two-dimensional space.

Is it possible to create the equivalent of a spatial map of the world's constitutions? There is, indeed, a way of assigning locations to constitutions in a multidimensional space, where each dimension captures an important aspect of how constitutions vary from one another. The result can be understood as, quite literally, a map of the global constitutional landscape. To generate such a map, we turn to an approach known as ideal point estimation, which social scientists use to measure the preferences of various actors in a quantitative manner. In studies of Congress, for example, the use of such techniques to analyze roll call voting data has enabled scholars to arrive at numerical measures of the ideal points, or policy preferences, of different legislators.[133] Likewise, in the context of judicial behavior, the same general approach has been used to model and compare the preferences of Supreme Court justices based upon their voting records.[134]

It may not be initially obvious how the same techniques used to estimate the ideological preferences of legislators and judges can also be used to create a spatial map that shows how constitutions vary from one another, but the basic intuition behind our approach is not difficult to describe. A constitution can be analogized to a legislator in the following sense: whereas a legislator casts a yes-or-no vote on whether to enact or reject various bills, a constitution can be conceptualized as an actor that casts a yes-or-no vote on whether to include or omit various provisions. In both contexts, the goal is to measure a characteristic

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133. Scholars who study Congress typically use the Poole-Rosenthal scores produced by the NOMINATE procedure, which is a multi-dimensional scaling technique that uses a maximum likelihood procedure to produce ideal point estimates. *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 11–26 (1997) (describing how legislative preferences can be mapped along a unidimensional or multidimensional space); KEITH T. POOLE, SPATIAL MODELS OF PARLIAMENTARY VOTING 1 (2005) ("Each legislator is represented by one point and each roll call is represented by two points–one for Yea and one for Nay. On every roll call each legislator votes for the closer outcome point, at least probabilistically. These points form a *spatial map* that summarizes the roll calls."). Other techniques, such as linear factor analysis and Bayesian methods, can also be used to estimate legislative ideal points. *See, e.g.*, Timothy J. Brazill & Bernard Grofman, *Factor Analysis Versus Multi-Dimensional Scaling: Binary Choice Roll-Call Voting and the U.S. Supreme Court*, 24 SOC. NETWORKS 201, 222–26 (2002) (comparing linear factor analysis and multidimensional scaling techniques to produce ideal point estimates); Joshua Clinton et al., *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355, 355–56 (2004) (using Bayesian Markov Chain Monte Carlo techniques to estimate the ideal points of legislators from roll call voting data); 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. S142, S142–46 (1997) (showing that linear factor analysis can be used to analyze binary voting data).

134. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 134–36 (2002) (employing Bayesian methods and a dynamic item response model to estimate the ideal points of Supreme Court Justices).

that cannot be directly observed, or "latent trait," from actions that can be directly observed, such as voting behavior.[135] In the case of a legislator or judge, the "ideal point" that such techniques aim to measure is a set of preferences or underlying disposition that might be characterized as the legislator or judge's ideology.[136] The "ideal point" of a constitution, by contrast, can be conceptualized as the ideological character of a written document, as opposed to the ideological preference of a sentient being. In both cases, however, the underlying logic is the same: if it is possible to locate legislators and judges relative to one another in an ideological space on the basis of how they vote, then it should also be possible to locate constitutions relative to one another in an ideological space on the basis of what provisions they contain.

There are a number of sophisticated statistical techniques available for estimating ideal points, and the question of which technique to choose, and under what circumstances, remains the subject of considerable debate.[137] For technical reasons, this Article employs optimal classification, a nonparametric multidimensional scaling technique developed by Keith Poole that extends the approach underlying the widely used Poole-Rosenthal scores, which measure the policy preferences of members of the United States Congress.[138] Optimal

135. Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 143–45 (2009) (discussing the methodological problems that arise from the fact that judicial ideology is a "latent trait" that cannot be directly observed and, indeed, may not exist in the manner or form assumed by scholars).

136. *See id.*

137. *See* Brazill & Grofman, *supra* note 133, at 202 (noting that both factor analysis and multi-dimensional scaling are commonly used techniques to estimate ideal points and that these techniques have much in common, although there are also differences); *id.* at 213–26 (performing simulated testing to compare linear factor analysis with multi-dimensional scaling and finding that, for two-dimensional data, factor analysis finds at least one bogus dimension). *But see* Heckman & Snyder, *supra* note 133, at S142–46 (arguing that the higher dimensionality of factor analysis makes it the superior method, and that researchers should interpret the additional dimensions); *id.* at S145 (noting that, when the number of dimensions is specified in advance, factor analysis and multidimensional scaling yield similar results).

138. For an introduction to optimal classification, see Keith T. Poole, *Non-Parametric Unfolding of Binary Choice Data*, 8 POL. ANALYSIS 211, 215–35 (2000). With respect to the choice between optimal classification and other ideal-point estimation techniques, optimal classification has advantages and disadvantages that render it better suited for some applications than for others. Both its strengths and its weaknesses flow from the fact that it is a nonparametric method. On the one hand, this type of method does not require the researcher to make any assumptions about the error distribution, where error refers to discrepancies between the actual data and the predictions that a statistical model produces. On the other hand, precisely because optimal classification does not rely upon any assumption about the probability distribution from which the data are drawn, it can only identify a bounded region within which a particular ideal point falls, and it cannot indicate which point within that region constitutes the best estimate of that ideal point. In a unidimensional setting, for example, this means that optimal classification can provide a rank ordering of ideal points but cannot yield an estimate of the distance between those ideal points; it can tell the researcher whether A is to the left or to the right of B, but it cannot tell the researcher how far to the left or right. In a multidimensional setting, by contrast, the nonparametric character of optimal classification means that one cannot identify precise ideal points within a multidimensional region, or polytope. The size of the polytope is a function of the quantity and quality of the available data, but within each polytope, the ideal point estimates that

optimal classification yields are arbitrary. In other words, within the polytope that contains the true ideal point, the optimal classification estimate of that ideal point floats freely and may even vary from year to year for a particular constitution regardless of whether the constitution has changed at all. In the case of our own data, for example, 242 of the changes in ideal points produced by our optimal classification analysis were not associated with any actual constitutional change. Most of these changes were rather small and confined to a particular set of constitutions. The fact that optimal classification makes no assumptions about the error distribution means, moreover, that it is not possible to calculate standard errors (or their equivalent), which at least model the degree of uncertainty. Whether any of this poses a meaningful problem, as a practical matter, depends on the quality and quantity of the data, which will dictate the size of the polytopes. *See* POOLE, *supra* note 133, at 18–46; Howard Rosenthal & Eric Voeten, *Analyzing Roll Calls with Perfect Spatial Voting: France 1946–1958*, 48 AM. J. POL. SCI. 620, 622 (2004).

By contrast, parametric methods for estimating ideal points—including such familiar maximum-likelihood techniques as logit and probit regression—produce not only precise estimates, but also estimates of the uncertainty surrounding those estimates, as in the form of standard errors. That is a great strength of parametric methods. However, they do so only by exploiting an initial assumption on the part of the researcher that the data are drawn from a particular type of probability distribution that renders certain errors more likely than others. *See id.* at 621. Parametric methods arrive at precise estimates by maximizing the incidence of those errors that ought to be most common relative to those errors that ought to be least common, according to the researcher's assumptions about the error distribution. The ability of parametric methods to arrive at precise ideal point estimates, accompanied by estimates of the uncertainty surrounding those estimates, relies on the assumption that errors are distributed in such a way that "some errors are more likely than others": these methods arrive at parameter estimates that yield the errors that ought to be most common given the researcher's initial assumption about how the errors are distributed. *Id.* at 621–22. Accordingly, the viability and accuracy of such methods are highly sensitive both to the researcher's assumptions about the error distribution, and to the existence of "relatively substantial" error. *Id.*

Given the characteristics of our data, the nonparametric character of optimal classification offers a number of advantages. First, because optimal classification is nonparametric, it requires us to make no (potentially erroneous) assumptions about the error distribution. If those assumptions are wrong, then so too will be the resulting estimates. The assumptions that researchers must make in order to employ parametric methods are, in fact, highly questionable in the context of our data: the fact that constitutions are likely to vary in systematically different ways from one another for country-specific reasons defeats some of the assumptions upon which traditional parametric methods rely. Second, optimal classification does not require relatively substantial prediction error in order to operate. In the case of our data, there is in fact very little error for parametric methods to seize upon: as explained below, it turns out that estimation of constitutional ideal points in two dimensions produces estimates with very low error. Under these conditions, the disadvantages of optimal classification are minimized, while the premises underlying traditional parametric methods are shaky.

Ultimately, however, the choice between parametric and nonparametric methods made little practical difference in our case, and to the extent that the two methods did yield different results, those produced by optimal classification were superior. To confirm that our results were not an artifact of our choice of the optimal classification approach, we estimated the same two-dimensional model of constitutional variation using parametric multi-dimensional scaling techniques of the type implemented by Keith Poole and Howard Rosenthal in their W-NOMINATE software package. First, we found that the two methods produced highly similar results: the correlation between the two sets of ideal point estimates was 0.89. Second, the optimal classification approach performed better as measured in terms of goodness-of-fit: the PRE associated with the parametric implementation of the model, although objectively impressive, is still significantly lower than the PRE associated with the optimal classification implementation (0.405 versus 0.602), which strongly suggests that our initial choice of optimal classification over more traditional parametric methods was appropriate and justified. Third, use of the parametric approach did not ameliorate, and indeed aggravated, the extent to which some of the ideal point estimates (specifically, the second-dimension scores) vary arbitrarily from year to year even in the

classification literally maps the preferences of multiple actors—such as legislators or judges—onto a multidimensional space on the basis of how they behave when faced with a series of binary choices.[139] To grasp the intuition behind optimal classification, imagine by way of analogy that we are trying to ascertain where a city's subway stations are located relative to one another. It is possible that the city possesses only one subway line, in which case their locations relative to one another can be represented as points on a single line. In other words, a unidimensional map of the subway system would accurately depict their locations relative to one another. Alternatively, perhaps the city has multiple subway lines, some of which are perpendicular to one another. In this case, a map that showed the relative locations of all stations would need to be two-dimensional, with both a horizontal and vertical axis. Suppose too that we have a particular tool for mapping the locations of the stations: we can draw straight lines on the map of the city, and for each line that we draw, each station reports whether it is above or below (or to the left or right of) the line. The more lines that can be drawn in this manner, the more precisely that each station's location can be triangulated.[140]

The same conceptual framework, and therefore the same kind of analysis, can be applied to constitutions. In this case, the constitutions are the subway stations, and the various provisions that each constitution can contain are the cutting lines. Suppose, for example, that constitutions vary in their content along a single, left-right ideological dimension, like a subway system that consists of a single line. Because the policy space within which constitutions vary is unidimensional, it can be represented as a single line, as illustrated in Figure 8 below. The position of each constitution on this line can be represented as a single point. This point is the constitution's *ideal point*: it reflects how "liberal" or "conservative" the constitution happens to be. There is also a cutting line associated with each provision that a constitution might contain: the point at which this cutting line crosses the ideological spectrum is the *cutpoint* associated with the provision. In each case, all of the constitutions on one side of the cutpoint will include the provision in question, while all of the constitutions on the other side of the cutpoint will reject it. In other words,

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absence of any actual constitutional change. As Poole observes, both approaches yield a "Coombs mesh" characterized by regions or "polytopes" within which ideal point estimates vary arbitrarily. *See* POOLE, *supra* note 133, at 30–37, 208 (defining a "Coombs mesh," and discussing the practical and computational obstacles to identifying precise ideal points within the mesh). Moreover, given that we are estimating ideal points in two dimensions for over eight thousand individual constitutions on the basis of just sixty "votes" or data points per constitution, the likelihood function associated with parametric estimation of the model is very flat and bound to yield imprecise estimates. We are deeply grateful to Keith Poole for revising the W-NOMINATE software so as to enable its use with a data set as large as our own.

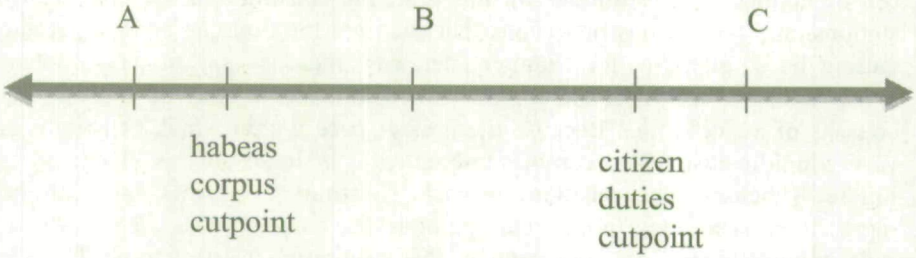
139. To be more technical, optimal classification "is a general nonparametric unfolding technique for maximizing the correct classification of binary preferential choice data." POOLE, *supra* note 133 at 85; *see id.* at 46–87 (discussing optimal classification at greater length and in technical detail). Poole's software implementation of optimal classification is available for download at http://www.voteview.com.

140. *Cf.* POOLE, *supra* note 133, at 1 (likening the optimal classification procedure to drawing a road map).

the cutting line associated with a particular provision literally "cuts" the universe of constitutions into two populations consisting of those that will include the provision and those that will not.

For example, suppose that only relatively liberal countries will adopt a constitutional right of habeas corpus, whereas only relatively conservative countries will impose express constitutional duties on their citizens. This means that constitutions to the left of the habeas corpus cutpoint, such as A, will contain that right, but not any duties; constitutions to the right of the citizen duties cutpoint, such as C, will contain such duties, but not a right to habeas corpus; and constitutions in between the two cutpoints, such as B, will contain neither the right nor the duties. The ideal points and cutpoints formalize in a graphical way the intuition that a given constitutional provision will only be found in constitutions that are more liberal (or more conservative) than some ideological benchmark that represents the provision in question.

**Figure 8: A Hypothetical Example of One-Dimensional Ideal Points and Cutpoints**



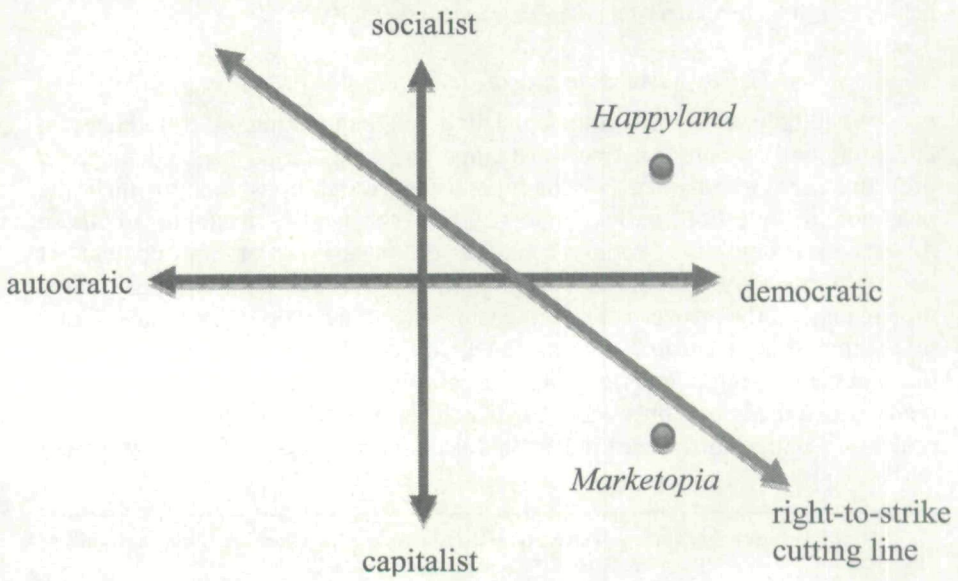

If constitutions vary along two dimensions rather than just one, the analysis is similar. Suppose that constitutions vary in the degree to which they are democratic as opposed to autocratic, and capitalist as opposed to socialist. Indeed, let us assume that all constitutional variation is attributable to variation along these two underlying dimensions. Each constitution possesses a location on each dimension. The combination of these two locations translates into a pair of coordinates, or a specific ideal point, in two-dimensional space. Figure 9 depicts the democratic-autocratic dimension as the horizontal axis, and the capitalist-socialist dimension as the vertical axis. In this figure, a constitution that is both highly democratic and highly capitalist will be situated somewhere in the bottom-right area of the two-dimensional space, whereas another constitution that is equally democratic but highly socialist will have an ideal point directly above, in the top-right area.

In such a world, we might imagine that an autocratic capitalist constitution is least likely to contain a constitutional right to strike, whereas a democratic socialist constitution is most likely to contain such a right. The right to strike can be represented as a *cutting line* that divides constitutions that will offer the right from those that will not. In this case, the line cuts from the upper left (highly socialist, highly autocratic) to the bottom right (highly capitalist, highly

democratic). All constitutions above and to the right of the cutting line (including, in this hypothetical example, the constitution of Happyland, a left-leaning social democracy) will contain the right, whereas all constitutions below and to the left of the cutting line (including, in this example, the constitution of Marketopia, a right-leaning, unabashedly capitalist democracy) will not. If all variation in constitutional content is indeed attributable to variation along these two ideological dimensions, then every constitutional provision operates as a cutting line through this two-dimensional space that divides the universe of constitutions into two populations—those that contain the provision, and those that do not, depending upon which side of the cutting line that a given constitution's ideal point happens to fall.

Whether a constitution will contain any given provision depends upon how the provision literally cuts across the two dimensions. Some provisions, such as the right to strike, may cut across both dimensions, in the form of a diagonal cutting line. Others may effectively cut across only one dimension, in which case the cutting line will be either perfectly horizontal or perfectly vertical. For example, the right to vote may not provide much of a basis for distinguishing between capitalist and socialist constitutions, but it may discriminate perfectly between democratic and autocratic constitutions. If so, the cutting line associated with the right to vote would be vertical: those to the right of the cutting line are those that are democratic enough to contain the right, and those to the left of the cutting line are those that are too autocratic to contain such a provision. The fact that the cutting line is vertical captures the fact that variation along the capitalist-socialist dimension has no effect on whether a constitution will include the right to vote.

**Figure 9: A Hypothetical Example of Two-Dimensional Ideal Points and Cutting Lines**



The same logic would apply if we were to increase the number of dimensions of constitutional variance yet again, from two to three. Although a three-dimensional model is harder to represent on paper, the basic idea is that each constitution would possess an ideal point in three-dimensional space that represents its position along each of the three dimensions, and each constitutional provision would divide the universe of constitutions by operating as a three-dimensional *cutting plane*.

In reality, there is no configuration of ideal points and cutting lines that will correctly classify every constitution with respect to the presence or absence of every provision. Suppose, for example, that we construct a three-dimensional model of constitutional content, but there is actually a fourth dimension along which constitutions vary, or historical idiosyncrasies cause certain constitutions to include provisions that are otherwise wholly out of character. The result will be classification errors: constitutions will be mapped to ideal points that predict, in some cases, the inclusion of provisions that are in fact omitted and, in other cases, the omission of provisions that are in fact included.

What optimal classification does is identify, for a given number of dimensions, the combination of ideal points and cutting lines that minimizes the number of errors. The performance of an optimal classification model can, in turn, be assessed by comparing its error rate against a sensible or conventional benchmark. For example, 84% of constitutions currently contain the right to vote. Simply by guessing that all constitutions contain the right to vote, we would correctly classify 84% of constitutions or, in other words, we would be wrong only 16% of the time. By this standard, a valuable model of constitutional variation would be one that outperforms this sort of guessing by improving upon the 16% error rate. A model that correctly classifies 92% of constitutions according to whether they contain the right to vote cuts the error rate in half, from 16% to 8%. In statistical terms, we would say that the model achieves a 50% *proportional reduction in error* (PRE).[141]

### *C. The Dimensionality of Constitutional Variation*

Whether one is analyzing legislative roll call voting or differences in constitutional content, the two most important steps in any spatial mapping procedure are to identify (1) the number of dimensions along which the behavior in question varies, and (2) the substantive meaning of those dimensions. Does the voting behavior of legislators or the content of constitutions vary along a single dimension? Two dimensions? Five dimensions? If the answer is one dimension, then what would differences along that dimension measure? Would such differences reflect, for example, disagreement along a left-right ideological continuum? And if there is more than one dimension, only one of which is ideological, what would the remaining dimensions measure? In this section, we explain first why a two-

141. Proportional reduction in error, or PRE, is a widely used measure of the performance of statistical models. *See* POOLE & ROSENTHAL, *supra* note 133, at 30–31.

dimensional model of constitutional variation is appropriate before turning to explore the substantive meaning of these two dimensions.

*1. The Accuracy of a Two-Dimensional Model of Constitutional Variation*

The question of the sheer number of relevant dimensions must be addressed first.[142] Adding more dimensions to a spatial model, like adding more predictor variables to a regression, invariably adds to the overall predictive power of a model. That superficial improvement in predictive power may not contribute anything to our substantive understanding, however, and may even detract from it. The additional variables or dimensions may offer little or no genuine explanatory power of their own, while at the same time rendering the model itself difficult to interpret and/or mathematically intractable. For such reasons, social scientists strive for models and theories that are highly efficient in the sense of providing considerable explanatory power at relatively little cost in terms of data and complexity.[143] Likewise, our goal is not to estimate a model of constitutional variation that explains as much of the variation as possible without regard to how complex or data-intensive the model becomes, but rather to employ the lowest possible number of dimensions that suffices as a practical matter to explain most of the meaningful, non-random variation in the data.

A striking feature of models estimated using optimal classification and related spatial mapping techniques is that a low number of dimensions often turn out to be sufficient to account for most voting behavior.[144] One ideological dimension explains almost all congressional voting, with a second dimension related to civil rights issues being only marginally important.[145] Similarly, one or two

142. Much of the methodological debate over the pros and cons of various ideal point estimation techniques has focused on the question of how many dimensions ought to be employed. *See supra* note 137.

143. Some social scientists use the term "parsimony" to describe this goal; others define "parsimony" in less desirable terms but nevertheless support the idea of efficient explanation. *Compare, e.g.*, JOHN GERRING, SOCIAL SCIENCE METHODOLOGY: A CRITERIAL FRAMEWORK 106–07 (2001) ("Like a lever, a good proposition lifts heavy weight with a moderate application of force. It is powerful, and its power derives from its capacity to describe, predict, or explain a lot with a minimal expenditure of verbal energy. Such a proposition is *parsimonious*."), *with* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 20, 104 (1994) (defining the principle of "parsimony" as a "normative preference for theories with fewer parts" that assumes a "simple world" and is "only occasionally appropriate" in social science, and arguing that scholars should instead aim to "maximize leverage" or "attempt to formulate theories that explain as much as possible with as little as possible").

144. *See, e.g.*, Keith Poole & Howard Rosenthal, *Models of Policy Divergence*, *in* PARTISAN POLITICS, DIVIDED GOVERNMENT AND THE ECONOMY 16, 35 (Alberto Alesina & Howard Rosenthal eds., 1995) ("[E]ven though politics is complex and full of nuances and complexities . . . there is now overwhelming evidence that low-dimensional models are appropriate simplifications.").

145. *See* POOLE & ROSENTHAL, *supra* note 133, at 27 (reporting that a two-dimensional model of congressional voting "improves only marginally, albeit significantly, on an even simpler model that is one-dimensional," and concluding that the primary dimension implicates "fundamental economic issues" while the secondary dimension is "regional" and usually racial in character).

dimensions appear sufficient to explain most of the voting behavior of Supreme Court justices.[146] It is increasingly accepted among political scientists that a low number of dimensions is sufficient to explain voting behavior across a range of legislative settings, including not only Congress, but also the U.N. General Assembly,[147] the French Assemblée Nationale,[148] and the European Parliament.[149]

Commonly used diagnostics for ascertaining the number of dimensions required to explain the variation in a particular body of voting data strongly confirm that our data involves variation along just two dimensions.[150] How well does a two-dimensional model perform at explaining constitutional variation? Such a model, it turns out, correctly classifies 89.6% of all constitutional variation measured by our rights index. In other words, if we assume that constitutional content varies along only two dimensions, we are able to account for almost 90% of the variation in the rights content of the world's written constitutions.[151]

As discussed above, another common benchmark for evaluating the performance of a statistical model is the proportional reduction in error, or PRE, that it achieves.[152] The two-dimensional model achieves an impressive PRE of 0.60. These statistics make clear that a two-dimensional model does an

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146. *See, e.g.*, GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963, at 97–157 (1965) (finding that two dimensions, political and economic liberalism, explain Supreme Court voting over the period from 1946 to 1963); Martin & Quinn, *supra* note 134, at 145 (observing that unidimensionality is assumed "in nearly all statistical analyses of Supreme Court behavior," and noting that "for the Burger Court from 1981 to 1985, approximately 93% of cases fall on a single dimension"); *id.* at 149–50 (finding that a unidimensional model performs "exceedingly well" at explaining voting in civil liberties cases, "quite well" in economics cases, and "well" in federalism cases, with the exception of "a few terms around 1970 and throughout the 1990s" that are suggestive of a "second issue dimension" relating to federalism).

147. *See* Erik Voeten, *Clashes in the Assembly*, 54 INT'L ORG. 185, 186 (2000) (finding that only one dimension explains post-Cold War voting in the General Assembly); *cf.* Soo Yeon Kim & Bruce Russett, *The New Politics of Voting Alignments in the United Nations General Assembly*, 50 INT'L ORG. 629, 633 (1996) (adopting a three-dimensional model of post-Cold War voting in the General Assembly).

148. *See* Rosenthal & Voeten, *supra* note 138, at 624 (finding that a two-dimensional model has the best fit to explain voting in the French Assemblée Nationale from 1946 to 1958).

149. *See* Abdul G. Noury, *Ideology, Nationality and Euro-Parliamentarians*, 3 EUR. UNION POL. 33, 33 (2002) (finding that two dimensions explain voting in the European Parliament).

150. Our initial diagnostic was a scree test. *See* POOLE, *supra* note 133, at 141–46 (explaining that the "most practical approach" to identifying the appropriate number of dimensions is to plot "the eigenvalues of the double-centered agreement score matrix and then simply estimate the spatial model in the [number of] dimensions [that corresponds to] an elbow in the plot of eigenvalues"). In other words, the first step is to generate a "scree plot" of the eigenvalues in descending order. *Id.* The appropriate number of dimensions is then equal to the number of observed eigenvalues prior to the last major drop in eigenvalue magnitude, which resembles (and is known as) an "elbow." *Id.* The scree plot for our data reveals that the elbow falls at the second dimension: the eigenvalues are sharply lower, and closely packed, from the third through tenth dimensions.

151. *See* POOLE & ROSENTHAL, *supra* note 133, at 27 (identifying the percentage correctly classified as an appropriate measure of the performance of such models).

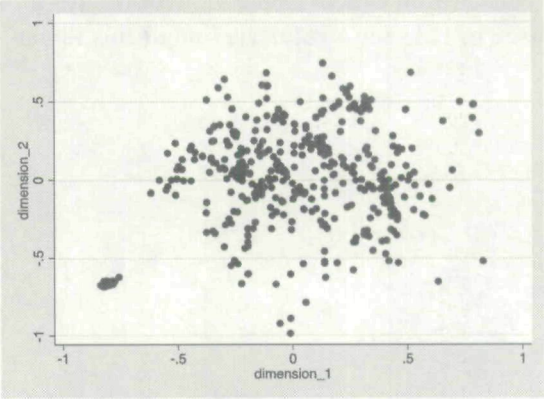
152. *See supra* note 141 and accompanying text.

excellent job of explaining our data. In fact, both the percentage correctly classified and the PRE for our two-dimensional model of constitutional variation are higher than those achieved by two-dimensional models of congressional voting.[153]

*2. The Substantive Meaning of the Two Dimensions*

The next challenge, after identifying the appropriate number of dimensions in which to estimate the ideal points, is to interpret the actual results of the analysis. Figure 10 is a plot of the actual constitutional ideal points that the analysis produces. If we were to label each ideal point by country, this plot would give us a sense of the distance in two dimensions of each constitution from every other constitution. What it does not do, however, is provide us with a sense of what it means in substantive terms for two ideal points to be far from one another, or what it means for constitutions to be separated by horizontal distance as opposed to vertical distance. The spatial map that emerges from optimal classification analysis is harder to interpret than, say, a conventional map that shows the relative locations of different cities in two-dimensional space, or even the results of a multivariate regression. Whereas the results of a regression tell us whether specific variables are correlated with one another in a particular way, the results of optimal classification do not lend themselves to such easy interpretation. Optimal classification produces ideal-point estimates along whatever number of dimensions we request, but it does not tell us what the resulting dimensions represent in the real world. To make sense of the results, we must formulate hypotheses about what the dimensions capture, then find ways of testing those hypotheses.

**Figure 10: Constitutional Ideal Points, in Two Dimensions**

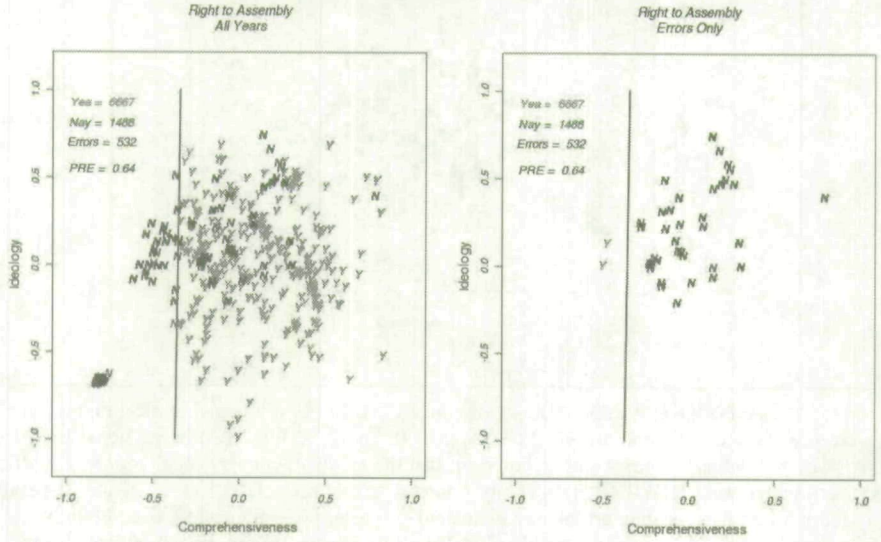



153. *See* POOLE & ROSENTHAL, *supra* note 133, at 28 (reporting a classification percentage between 82% and 84% and an APRE between 0.48 and 0.50 for a two-dimensional model of congressional voting). It bears noting, however, that the model of congressional voting in question was estimated using DW-NOMINATE as opposed to optimal classification, which generally produces fewer classification errors. *See* Rosenthal & Voeten, *supra* note 138, at 624 (finding that the percentage of votes correctly classified is 2% to 3% higher for optimal classification models than for models implemented using D-NOMINATE).

The first step toward formulating hypotheses about what the dimensions capture is to study the cutting lines that correspond to different rights. These cutting lines convey a wealth of information. For each right, the corresponding cutting line tells us whether the fact that a particular constitution has a high or low score on a particular dimension makes it more or less likely that the constitution in question will include that right. We may find that whether a constitution includes or omits a particular right depends primarily, or even entirely, on the constitution's location along one dimension as opposed to the other. Alternatively, the likelihood of a particular right may depend on a constitution's score on both dimensions, such that the right tends to appear only when a constitution has a high score on both dimensions, or a high score on one dimension and a low score on the other.

Consider, for example, the right of assembly. Figure 11 is the cutting-line plot for this particular right. Recall that optimal classification analysis seeks to identify, for each right, the cutting line that optimally classifies the greatest number of constitutions or, in other words, classifies the greatest number of constitutions correctly. The cutting line identified by our optimal classification analysis classifies all constitutions with ideal points to the right of the cutting line as including the right of assembly (or voting "yea" on the right), while all constitutions with ideal points to the left of the cutting line are classified as omitting the right (or voting "nay" on the right). The left side of the plot shows how the cutting line for the right to assembly divides the actual universe of constitutions: 6,667 of the 8,155 constitutions in our data, or 82%, contained this right (or voted "yea"). Those that contained this right are labeled "Y" for "yea," and those that omitted it are labeled "N" for "nay."

**Figure 11: The Cutting Line Associated with the Right to Assembly**
**(see p. 1235 for a color version of this figure)**



A visual inspection of Figure 11 reveals several interesting facts. First, the cutting line does a fairly good job of dividing the "yeas" from the "nays." The right-hand side of Figure 11 plots only the classification errors. The actual number of classification errors is 532 out of 8,155, which means that the optimal classification algorithm is correctly classifying 93.5% of all constitutional "votes" on the right of assembly. By way of a benchmark, this cutting line achieves a 0.64 PRE over a blanket prediction that all constitutions contain this right. In other words, although we can correctly classify 82% of constitutions simply by guessing that every constitution contains the right, the optimal classification algorithm improves significantly upon such guesswork: it makes 64% fewer errors.

What is noteworthy about the right of assembly in particular, and what makes it a useful example for purposes of explanation, is that its cutting line is almost perfectly vertical. The slope of the line conveys important information about how the right to assembly tends to divide constitutions. In this case, the fact that the line is almost perfectly vertical tells us that a constitution's position on the second (or vertical) dimension is largely irrelevant to whether the constitution will include that right. Whether a constitution contains the right of assembly appears to depend on whether the constitution's score on the first dimension lies to the right or left of a particular point on the first dimension, and almost not at all on the constitution's score on the second dimension. It turns out that, of the sixty provisions in our rights index, twenty-five are characterized by highly vertical cutting lines, meaning that their inclusion or omission is driven much more by a constitution's position on the first dimension than by its position on the second dimension.

Now compare the right of assembly with consumer rights, as illustrated in Figure 12. Like the right of assembly, consumer rights divide the world's constitutions along the first dimension and not the second. However, although the cutting line is still close to vertical, the line crosses the x-axis, or first dimension, at a point that is further to the right: the horizontal intercept for this cutting line is approximately 0.4, versus approximately -0.4 for the right of assembly. In substantive terms, this fact tells us that only constitutions with a relatively high score on the first dimension are likely to contain consumer rights.

An example of a rights provision that divides constitutions along the second (or vertical) dimension instead of the first dimension is the prohibition against double jeopardy. As Figure 13 below shows, the cutting line identified by the optimal classification algorithm again does a fairly good job of classifying constitutions correctly according to whether they contain this provision: it classifies over 90% of constitutions correctly and achieves an impressive PRE of 0.73. This time, however, the cutting line associated with this right is nearly horizontal. Just as civil rights legislation and banking regulation both divide legislators but do so along different lines,[154] so too do

154. *See* POOLE & ROSENTHAL, *supra* note 133, at 27 (finding as an empirical matter that congressional voting varies along two dimensions, one of which "almost always" reflects economic issues while the other dimension "usually" captures differences on racial issues).

the right of assembly and double jeopardy both divide constitutions, but along different dimensions. It turns out that only two of the sixty rights in our index—namely, habeas corpus and the prohibition against double jeopardy—are characterized by cutting lines that are nearly horizontal and thus divide constitutions along the second (or vertical) dimension as opposed to the first (or horizontal) dimension.

**Figure 12: The Cutting Line Associated with Consumer Rights**
**(see p. 1235 for a color version of this figure)**

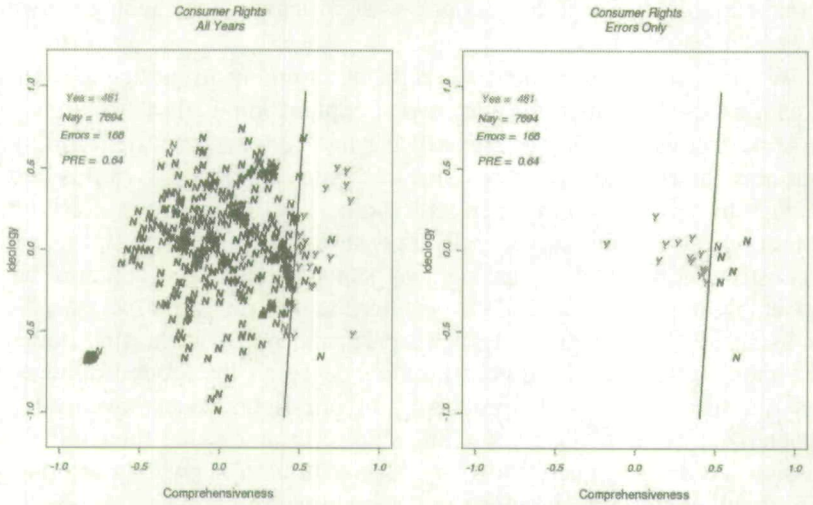
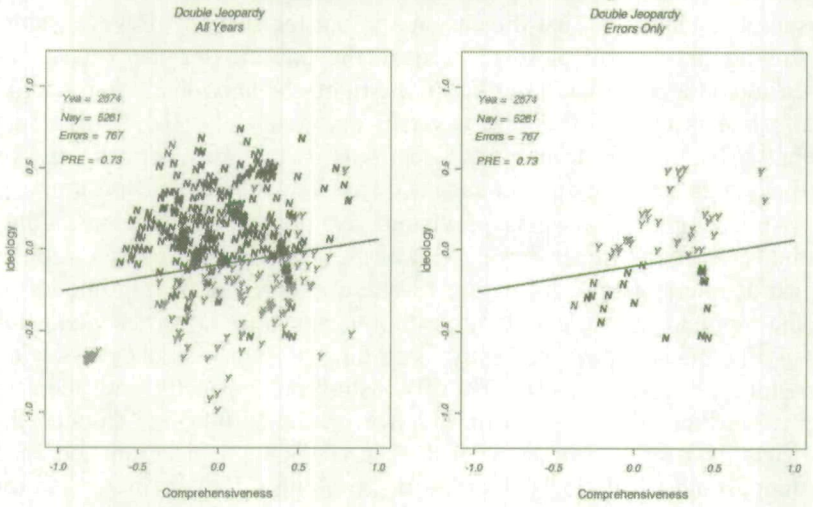



**Figure 13: The Cutting Line Associated with Double Jeopardy**
**(see p. 1235 for a color version of this figure)**




Unlike consumer rights or a rule against double jeopardy, however, a majority of the constitutional characteristics in our index—thirty-three out of sixty—do not correspond to just the first dimension or second dimension but

instead tend to divide the world's constitutions along both dimensions. In both a literal and a figurative sense, these rights cut across both dimensions: it is the interaction between a constitution's position on both dimensions that drives the inclusion or omission of the right.

*D. The First Dimension of Constitutional Variation: Comprehensiveness*

The next step in building a substantive interpretation of the two dimensions is to isolate those provisions that divide constitutions along a given dimension, and to identify what those provisions share in common. Consider first the horizontal dimension in all of our graphs, which for now will be called dimension one. It turns out that constitutions with a high score on this dimension share a very important characteristic in common: all other things being equal, the higher a constitution's score on dimension one, the more rights that it is likely to contain. The specific rights that a constitution is likely to contain even if it has a low score on dimension one include freedom of religion, the right of assembly, the right of association, the right to vote, property rights, equality rights, privacy rights, freedom of expression and of the press, and women's rights. By contrast, provisions that tend to appear only in constitutions that have higher scores on dimension one, include prisoner rights, the protection of honor and reputation, consumer rights, the right to a healthy environment, the right to information, substantive principles governing the education of citizens, prohibition of crimes against humanity and/or genocide, rights for the elderly, and rights for the handicapped. Somewhere in the middle are the right of criminal defendants to mount a defense, the right to establish political parties, minority rights, the right to unionize and/or strike, freedom of education, and limitations on property rights. Table 3 provides a breakdown of the rights that cut primarily across dimension one according to whether they appear only at high levels of dimension one, or at high and low levels alike.

**Table 3: Rights That Are Correlated with a Constitution's Score on Dimension One**

| *Present even at low levels of dimension one* | *Present at low to medium levels of dimension one* | *Present only at high levels of dimension one* |
|---|---|---|
| - Freedom of religion<br>- Right of assembly<br>- Right of association<br>- Right to vote<br>- Property rights<br>- Equality rights<br>- Privacy rights<br>- Freedom of expression and/or press<br>- Women's rights | - Right to mount a defense<br>- Right to establish political parties<br>- Minority rights<br>- Right to unionize and/or strike<br>- Freedom of education<br>- Limitations on property rights | - Prohibition of death penalty<br>- Prisoner rights<br>- Protection of reputation<br>- Consumer rights<br>- Environmental rights<br>- Right to information<br>- Educational principles<br>- Prohibition of crimes against humanity<br>- Rights for the elderly<br>- Rights for the handicapped<br>- Protection of fetuses |

It is immediately evident that the provisions that appear even in constitutions with low scores on dimension one are those rights that tend to be generic to all constitutions. Comparison of Table 3 with Table 2, which lists the constitutional provisions in our rights index in order of how frequently they appear in all constitutions, confirms this impression: all of the provisions that appear at low levels of dimension one—and all but two that appear at low-to-medium levels—are among the twenty-five most generic rights in the world. The strong correlation between the first-dimension score associated with a particular right and the frequency with which the right appears in constitutions suggests that the first dimension simply captures the extent to which a constitution contains only generic rights or also includes more obscure rights.

Empirical testing confirms that a constitution's score on the first dimension is strongly correlated with the sheer quantity of rights that it contains. The raw correlation between the number of rights in a constitution and that constitution's score on dimension one is a remarkable 0.94. Likewise, univariate regression analysis shows that the number of rights in each constitution explains 89% of the variance in first-dimension scores.[155] The conclusion is thus irresistible that the first of the two dimensions along which constitutional rights-content varies can best be described as a measure of "constitutional comprehensiveness." Holding constant a constitution's score on the second (and still unexplained) dimension, constitutions with a negative or low score on this dimension tend to contain fewer rights. Specifically, they tend to include only the most generic rights that tend to be adopted by almost all countries in the world. By contrast, constitutions with high scores on this first dimension tend to contain not only these generic rights, but also a number of rights that we might, by contrast, deem obscure.

### *E. Factors That Predict the Comprehensiveness of a Constitution*

If the first-dimension scores measure constitutional comprehensiveness, it is only natural to wonder what factors predict how comprehensive a constitution will be. Could it be the case, for example, that comprehensiveness is partly a function of a constitution's age? One might plausibly think that newer constitutions tend to opt for a broader menu of rights then older constitutions, as each generation articulates and demands a growing range of rights that expands upon those adopted by previous generations.[156] Or might the fact that a

155. In other words, the r-squared associated with this regression is 0.89.

156. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE, at xi, 12 (1991) (observing that, "[a]ll over the world, political discourse is increasingly imbued with the language of rights," and contending that "the catalog of individual liberties expands without much consideration of ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare"); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 334 (1997) ("When people want to claim things from the legal system, they put their demands into rights language, as they once put them into religious language. . . . [O]ne group after another has defined its struggle for inclusion in the social, economic, and political order as a rational demand for enjoyment of . . . rights[.]"); Go, *supra* note 65, at 79–80 (discussing the impact of increased attention to human rights on post-colonial constitutional reconstruction over the second half of the twentieth century).

constitution contains a broad range of rights reflect a tradition of deep respect for human rights in practice? Does the fact that a country is wealthy enable it to afford, and thus promise, a broader range of rights in its constitution?

To test such explanations, we performed a linear regression analysis[157] to determine if a constitution's first-dimension score is predicted by: (1) the age of the constitution, measured by the number of years since it was last revised or adopted;[158] (2) the extent to which the country that adopted the constitution is democratic;[159] (3) the extent to which the country in question actually respects human rights;[160] and (4) the level of wealth and economic development in the country, as measured by GDP per capita.[161] In addition, we were mindful of the fact that, because constitutions tend to change relatively little from year to year,

157. To be specific, we ran an ordinary least squares regression and computed robust standard errors that were both corrected for problems of heteroscedasticity that are common to panel data, and clustered at the state level to allow for serial correlation over time.

158. By measuring constitutional age as the number of years since a constitution was last amended in any way (or, in the case of constitutions that have never been amended, the number of years since initial adoption), we sought to avoid the difficulties involved in attempting to distinguish between amendments that effectively rewrite a constitution and amendments that are relatively insubstantial. Equally problematic is any effort to rely upon a sharp formalistic distinction between the adoption of a new constitution and the amendment of an existing constitution—under such an approach, it becomes possible to misclassify both cases in which a new constitution is adopted via what is technically merely an amendment to the existing constitution, and cases in which a new constitution technically supersedes a previous constitution but is largely similar to the previous constitution. *See* ELKINS ET AL., *supra* note 5, at 55–59 (discussing the difficulties involved in drawing such distinctions).

159. To measure democracy, we used the polity2 indicator from the Polity IV data project. The polity2 variable ranges from +10 (strongly democratic) to -10 (strongly autocratic). MONTY G. MARSHALL ET AL., POLITY IV PROJECT: DATASET USER'S MANUAL 17 (2010), *available at* http://www.systemicpeace.org/inscr/p4manualv2009.pdf.

160. To measure actual human rights observance, we used the Political Terror Scale, which is based on a quantitative coding of the content of the annual country reports on human rights conditions prepared by the U.S. State Department. It measures, on a scale of one to five, the level of political violence and terror that a given country experienced in a particular year. Countries with a score of one, the best possible score, are those "under a secure rule of law" where "people are not imprisoned for their views, torture is rare or exceptional" and "[p]olitical murders are extremely rare." In countries with a score of five, "[t]error has expanded to the whole population" and "[t]he leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals." Mark Gibney et al., *Political Terror Scale 1976–2009*, POLITICAL TERROR SCALE (PTS) (May 13, 2011), http://www.politicalterrorscale.org/about.php. As of this writing, the Political Terror Scale scores are available for the period from 1976 to 2009, whereas our own data extends back an additional thirty years to 1946. In order to make use of all sixty years of our data, we assigned each country its average Political Terror Scale score in all missing years.

161. We use the variable "rgdpl" (real GDP per capita) from the Penn World Tables. Alan Heston et al., *Penn World Table Version 6.2* (2006), *available at* http://pwt.econ.upenn.edu/php_site/pwt_index.php. Previous empirical studies have found a positive relationship between a country's wealth and the extent to which it actually respects rights in practice. *See, e.g.*, Steven C. Poe & C. Neal Tate, *Repression of the Human Right to Personal Integrity in the 1980s: A Global Analysis*, 88 AM. POL. SCI. REV. 853, 861 tbl.1 (1994); Steven C. Poe et al., *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993*, 43 INT'L STUD. Q. 291, 306 tbl.2 (1999). Our focus here, however, is upon the separate question of whether there is a relationship between a country's level of wealth and the range of rights that it includes in its formal constitution.

a constitution's first-dimension score in any given year is likely to be strongly predicted by its score in the preceding year. To prevent this fact from distorting our results, we also included as a control variable (5) the first-dimension score from the preceding year.[162]

Most of these variables proved to be statistically significant predictors of constitutional comprehensiveness.[163] Not surprisingly, newer and more frequently revised constitutions tend to contain more rights than older and less frequently revised constitutions, while more democratic countries tend to adopt a larger number of constitutional rights than less democratic countries. Controlling for the age of the constitution and the degree of democracy, however, we also find that actual respect for human rights is negatively correlated with the number of rights found in the constitution. If one compares countries with similar levels of democracy and constitutions of similar age, it is the countries with less respect for rights in practice that promise more rights in their constitutions. As disheartening as this finding may seem, it is consistent with a number of previous empirical studies that have cast considerable doubt upon the efficacy of written rights guarantees[164] and serves as a stark reminder that constitutional promises do not necessarily translate into actual practice.

These findings also illustrate the scope of the phenomenon of generic rights.[165] First, generic rights are a feature of written constitutionalism in both democratic and undemocratic countries. Although less democratic countries tend to have less comprehensive constitutions, even the least comprehensive constitutions tend to contain generic rights. Second, the fact that a country has a poor record of protecting human rights in practice does not mean that it is less likely to promise generic rights in its constitution; on the contrary, all other things being equal, such a country is likely to boast more esoteric rights as well. Third, generic rights tend to be older rights, while esoteric rights tend to be

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162. The use of a lagged version of the dependent variable is a standard technique for addressing the problem of serial correlation in time-series data. *See* Nathaniel Beck & Jonathan N. Katz, *Nuisance vs. Substance: Specifying and Estimating Time-Series-Cross-Section Models*, 6 POL. ANALYSIS 1, 8 (1996) (arguing that inclusion of a lagged dependent variable is the best way to deal with serial correlation in time-series data).

163. Constitutional age, level of democracy, and level of actual respect for rights are statistically significant predictors of constitutional comprehensiveness at the $p < 0.01$ level. Revising the model to include a set of dummy variables in order to control for possible differences between geographic regions does not affect these results. Further revision of the model to control for possible differences between countries (by introducing dummy variables that capture "country fixed effects") as well as possible differences between years (by introducing dummy variables that capture "year fixed effects") did lead to slightly different results—once again, age and democracy were once again statistically significant predictors, but GDP per capita also proved statistically significant and was negatively correlated with comprehensiveness. Because most of the variation in actual respect for human rights from country to country is captured by the country fixed effects, this version of the model did not include actual respect for human rights as a predictor variable.

164. *See* Law, *supra* note 7, at 381–82 (surveying the empirical literature on the actual impact of formal constitutional guarantees of various rights and observing that it "paints, on the whole, a discouraging picture of the efficacy of such provisions," and noting specifically that a number of previous studies have actually found a *negative* relationship between formal rights protection and actual rights observance").

165. *See supra* Part III.C.

newer rights. Most of the rights that are generic today were already common constitutional features in 1946 and have merely gained in popularity since then.[166] By contrast, rights that might be described as relatively esoteric, in the sense that they are present only in constitutions with high first-dimension scores, tend to be of more recent vintage; many of these rights appeared for the first time in the post-World War II period.[167]

### *F. The Second Dimension of Constitutional Variation: Ideology*

The second dimension along which constitutions vary is more challenging to interpret in substantive terms. The task of interpretation is complicated somewhat by the fact that there are very few rights that cut primarily across the second dimension. The only two rights that are associated with almost horizontal cutting lines are those for the prohibition against double jeopardy (shown above in Figure 13) and the right to a timely trial: constitutions with a below-average score on dimension two are more likely to contain those two provisions. The fact that only two rights are uniquely associated with dimension two gives us fewer examples from which to draw some kind of substantive inference.

There is much that we can learn, however, by studying the many rights that cut diagonally across both dimensions. Some provisions generate cutting lines that tilt to the right (meaning that they run from the bottom left to the top right), such that only constitutions to the lower right of the line contain the provision. An example is the prohibition against torture, as illustrated in Figure 14 below. The rightward tilt of the cutting lines tells us that, holding comprehensiveness constant, a constitution with a low second-dimension score is more likely to contain these rights than a constitution with a high second-dimension score. Thus, for example, a constitution with a high score on dimension two is unlikely to contain the rights in this category unless it has an overall tendency to contain many rights. Conversely, a constitution with a low score on dimension two remains likely to contain these rights even if it contains relatively few rights in total.

Other provisions, by contrast, generate cutting lines that tilt to the left (meaning that they run from the top left to the bottom right), such that only

166. For example, as of 1946, 81% of constitutions guaranteed freedom of religion, 73% guaranteed the right of assembly, 83% guaranteed some form of privacy rights, and 87% guaranteed freedom of expression or the press. The glaring exception is that of women's rights, which were found in just 35% of constitutions in the immediate aftermath of World War II but gained dramatically in popularity thereafter. *See supra* Table 2.

167. Nearly half of the relatively rare, or esoteric, rights listed in the third column of Table 3 had never appeared in any constitution prior to World War II. The right to a healthy environment, for example, was first adopted by Madagascar in 1959, followed by Guatemala in 1965. Consumer rights were first introduced in 1976 by Portugal, followed in 1978 by Spain and Peru and in 1980 by South Korea. Bangladesh was, in 1973, the first country to adopt a constitutional prohibition against either genocide or crimes against humanity, followed by Peru in 1980, and Guatemala in 1986. Constitutional rights for the handicapped were first adopted by Italy in 1948, followed by Malta and Haiti in 1964. Constitutional protection for fetuses made its debut in Venezuela in 1947, followed only decades later by Ecuador in 1967 and Chile in 1976.

constitutions to the upper right of the line are predicted to contain the provision. This category includes, for example, rights to physical necessities such as food and health, as shown in Figure 15. In these cases, the leftward tilt of the cutting lines tells us that, holding comprehensiveness constant, a constitution with a low second-dimension score is more likely to contain these rights than a constitution with a high second-dimension score.

**Figure 14: The Cutting Line Associated with the Prohibition of Torture (see p. 1238 for a color version of this figure)**

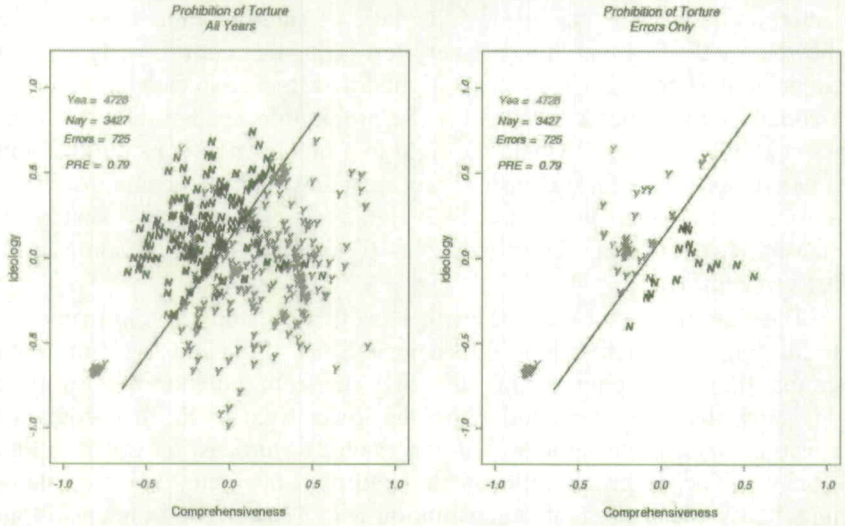


**Figure 15: The Cutting Line Associated with Rights to Physical Necessities (see p. 1238 for a color version of this figure)**

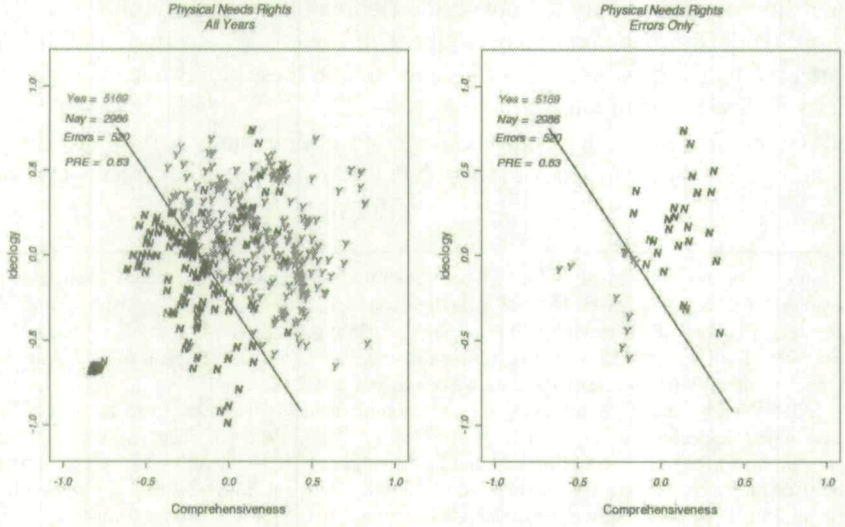


Table 4 isolates two categories of provisions—those that tend to be found in constitutions with low second-dimension scores, and those that tend to

appear in constitutions with high second-dimension scores. It is quickly apparent that the rights associated with low second-dimension scores share much in common, both substantively and historically, and that their common traits distinguish them as a whole from the rights associated with high second-dimension scores. Indeed, the two categories of rights are both sufficiently distinctive from one another yet internally coherent enough that one can easily guess how certain real-world constitutions score on dimension two. One need not consult the Appendix, for example, to discern that the U.S. Constitution has a lower second-dimension score than the constitutions of China and North Korea.[168] Close examination of the two categories suggests that constitutions with low scores on dimension two might be described as more traditional and libertarian in character, whereas those with high scores on this dimension might by contrast be considered more contemporary and statist in character.

**Table 4: Rights That Are Correlated with a Constitution's Score on Dimension Two**[169]

| *Provisions that are more likely to appear at low levels of dimension two (holding comprehensiveness constant)* | *Provisions that are more likely to appear at high levels of dimension two (holding comprehensiveness constant)* |
|---|---|
| - Right to life (not abortion restriction)<br>- Torture prohibition<br>- Prohibition of arbitrary arrest and detention<br>- Freedom of movement<br>- Right not to be expelled<br>- Habeas corpus<br>- Presumption of innocence<br>- Right to appeal<br>- Prohibition of ex post facto laws<br>- Right to public trial<br>- Right to remain silent<br>- Right to counsel<br>- Rights for victims<br>- Affirmative action<br>- Judicial review<br>- Human rights commission/ ombudsman<br>- Prohibition of death penalty | - Right to establish a family<br>- Right to marry<br>- Right to asylum<br>- Artistic freedom<br>- State secularism<br>- Duties for citizens<br>- Children's rights<br>- Right to work<br>- Workers' rights (working conditions, minimum wage)<br>- Physical sustenance rights (social security, food, health)<br>- Right to education<br>- Oil and mineral resources to be held and used for benefit of all citizens<br>- Right to resist the government when rights are violated |

168. *See infra* Table 6 & Table 7 (ranking the world's constitutions according to their second-dimension scores).

169. The inclusion or omission of certain provisions is poorly predicted by either the first-dimension or second-dimension scores. These provisions, which are relatively few in number, have been omitted from Table 4 and are instead listed separately in Table 5. They include the establishment of an official state religion, the right to bear arms, and constitutional references to international human rights obligations.

Consider first the provisions that tend to be found in constitutions with low second-dimension scores. Most of these provisions are of older vintage, if not also Anglo-American in pedigree. Nearly all involve some kind of negative restriction on state power—rather than empowering or obligating the state to provide for the welfare of its citizens, they carve out a zone of private autonomy into which government may not intrude. Above all, the constitutional provisions in this category limit the state's ability to deprive individuals of their physical freedom or to inflict bodily harm. The limits that they impose, meanwhile, are heavily judicial in character: more than one-third of the constitutional provisions in this category involve judicial proceedings and, in particular, criminal procedure. In other words, constitutions with low second-dimension scores are heavily oriented toward protecting an individual's interest in freedom from detention or punishment at the hands of the state, and they further enshrine the judicial process as the primary instrument for providing that protection. As a philosophical or ideological matter, these constitutions are classically liberal in their focus upon limiting or preventing actions against the individual by the state. At the same time, these constitutions also envision a substantial role for the courts that reflects the influence of the common law tradition: the judiciary is not simply a specialized bureaucracy designed primarily to implement state policy, as in some civil law countries, but instead has the power and the responsibility both 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.[170]

By contrast, the provisions that tend to appear in constitutions with higher second-dimension scores share a number of ideological and historical characteristics that set them apart from those found in libertarian constitutions. Whereas many of the rights found in constitutions with low second-dimension scores have deep historical roots in the Anglo-American legal tradition, those found in constitutions with high second-dimension scores are generally of newer vintage[171] and arguably reflect the emergence in the twentieth century of a new normative conception of state power and state responsibility. As John Boli observes:

> By 1900, what a state had to do to behave properly as a state had expanded considerably—mass education, the promotion of scientific

170. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 10–11, 16–46, 88–96 (1986) (contrasting "policy-implementing" judicial systems, which tend to be hierarchically organized and are more typical of "Continental" countries, with "conflict-solving" judicial systems, which are more naturally organized along "coordinate" lines and tend to be found in "Anglo-American" countries).

171. The libertarian-flavored rights associated with low second-dimension scores tend to date back to the Enlightenment era and to have made their debut in such landmark eighteenth-century documents as the U.S. Bill of Rights (1791) and the French Declaration of the Rights of Man and of the Citizen (1789). *See* MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO GLOBALIZATION ERA 64–116 (2d ed. 2008). By contrast, the statist-flavored rights associated with high second-dimension scores tend to have emerged during the industrialization of the late nineteenth century, when workers pressed for extension of the franchise and social and economic welfare guarantees. *See id.* at 119–72.

> research, the licensing and regulation of numerous types of professionals, the regulation of labor relations, and public health measures, for example, were all incorporated into the concept [of the state]. By 1980, far more had been added, both in qualitative terms—new areas became state matters, such as housing, care of the elderly, the promotion and regulation of culture and sports, internal family relations, and so on—and in quantitative terms, in that the state came to be defined as bearing ultimate responsibility for *all* activity in numerous domains, squeezing the "private" sector out.[172]

As an ideological matter, constitutions with high scores on dimension two 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, provide citizens with a range of necessities, and discharge other responsibilities. Such constitutions also contemplate a less prominent role for the courts in structuring the relationship between state and citizen. The judiciary is not given the same degree of explicit responsibility for defining and implementing restrictions upon the exercise of state power against individuals. The fact that courts are not assigned this responsibility may, in turn, reflect a more benign conception of the state. Constitutions in this vein depict the state as not simply or even primarily a threat to liberty—as might be said of libertarian constitutions—but also a guarantor of welfare and source of sustenance. The underlying goal is not the liberation of the individual from the tyranny of the state, but rather the pursuit of the welfare of society as a whole, with responsibility for the achievement of this goal shared between the state and its citizens.[173] The language of constitutionalism, in turn, allocates this responsibility both to the state in the form of positive rights, and to citizens in the form of explicit duties.

Statism, in other words, is an overarching theme of constitutions in this category. It is explicit, for example, in provisions that obligate the state to manage natural resources for the collective good and satisfy the physical and developmental needs of its citizens. Yet statism can also be discerned even in provisions that, on their face, purport merely to limit the power of the state. To place limits upon state power in a particular domain is to acknowledge that state power reaches into that domain in the first place. The inclusion in a constitution of the right to marry and establish a family, for example, confirms that the reach of the state extends into the realm of the family. Indeed, statist constitutionalism not only permits, but demands government regulation of the family: the manner in which the prototypical constitution combines the right to marry and procreate with children's rights does not carve out a domestic sphere into which the state cannot intrude, but instead requires the state to intervene in order to strike a balance between the two sets of rights. The broad range of

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172. *See* Boli, *supra* note 123, at 77–78.

173. *Cf.* GLENDON, *supra* note 156, at 13 (contrasting the "Anglo-American rights tradition with the more nuanced dialect of rights and responsibility associated with the Romano-Germanic legal traditions"); *id.* at 76–144 (criticizing the inattentiveness of American constitutionalism to "responsibility" and "sociality").

rights found in a statist constitution thus corresponds to, and is intertwined with, a broad conception of the state.

Empirical analysis supports the conclusion that dimension two measures a blend of ideological and historical differences among constitutions. Using the same approach as we employed in Part IV.E to identify potential causes of constitutional comprehensiveness, we performed a linear regression analysis to determine what factors correlate with a constitution's score on the second dimension.[174] As before, we included in our regression the following predictor variables: (1) the constitution's age, measured by the number of years since it was last revised or adopted;[175] (2) the country's level of democracy;[176] (3) the country's level of actual respect for human rights;[177] and (4) the country's level of wealth and economic development, as measured by GDP per capita.[178] Once again, we addressed technical issues arising from the relatively static character of constitutions by including (5) a lagged version of the dependent variable, in the form of the second-dimension score from the preceding year.[179]

On this occasion, however, we included two additional variables to test the hypothesis that constitutions with high second-dimension scores belong to countries of a particular historical, ideological, or geopolitical character. These variables were binary indicators of (6) whether the country in question has a common law tradition;[180] and (7) whether the country is geopolitically and militarily aligned with the United States and United Kingdom, as measured by NATO membership.[181] The results of the regression confirm that constitutions with low second-dimension scores are characteristic of both democratic regimes and countries with a common law tradition, whereas constitutions with high second-dimension scores are more typical of undemocratic regimes and countries with a civil law tradition.[182] By contrast, constitutional age, economic development, actual respect for human rights, and geopolitical and military alignment are not statistically significant predictors of a constitution's second-dimension score.[183]

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174. As in Part IV.E, we employed an ordinary least squares regression with Hubert-White standard errors to correct for problems of heteroscedasticity that are common to panel data, and we clustered standard errors at the country level to allow for serial correlation over time.

175. *See supra* note 158.

176. *See* Marshall et al., *supra* note 159.

177. *See supra* note 160.

178. *See supra* note 161.

179. *See supra* note 162.

180. Our measure of whether a country has a common law legal tradition is a binary variable taken from Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999).

181. Our binary measure of NATO membership is taken from Douglas M. Gibler & Meredith Sarkees, *Measuring Alliances: The Correlates of War Formal Interstate Alliance Dataset, 1816–2000*, 40 J. PEACE RES. 211, 211–19 (2004).

182. The common law and democracy variables are statistically significant predictors of a constitution's comprehensiveness at the $p < 0.01$ level. The correlation between our measure of democracy and the second-dimension scores is -0.28, meaning that higher levels of democracy are correlated with lower second-dimension scores. The correlation between the common law tradition variable and the second-dimension scores is an even more impressive -0.59.

183. The common law and democracy variables are statistically significant predictors of a constitution's comprehensiveness at the $p < 0.01$ level. NATO membership, GDP per capita, and

*G. Constitutional Provisions That Are Poorly Explained by the Model*

There were a handful of constitutional provisions whose inclusion or omission was not accurately predicted by any linear combination of comprehensiveness and ideology. The proportional reduction in error achieved by the cutting lines for the provisions listed in Table 5 was very low, which means that our two-dimensional optimal classification model did a poor job of predicting which constitutions would contain these provisions. For example, the cutting line associated with the right to bear arms achieved a paltry 0.01 PRE: were we simply to assume that no constitution in the world contains the right to bear arms, we would explain almost as much of the actual variation as we would by relying upon our optimal classification model. In this particular case, PRE is a potentially misleading measure of explanatory power, as the optimal classification analysis correctly predicts whether a constitution contains the right to bear arms over 96% of the time. The problem is that the right to bear arms is so rare that there is little room for any statistical model to improve upon the predictions generated by the null hypothesis: one can correctly predict over 96% of cases simply by assuming that no constitution contains the right. Nevertheless, visual inspection of the cutting line plot confirms that the "yeas" and "nays" are thoroughly intermingled in the two-dimensional space.

Initial examination of this list reveals no obvious common theme running through these provisions that would explain why the inclusion of this particular group is poorly predicted by the optimal classification model. It may be that one or more of these rights divide the world's constitutions along some additional dimension(s) not included in our two-dimensional model. Another possibility is that there is simply no global pattern at all to the inclusion of these provisions. On the whole, however, the two-dimensional ideal points produced by our optimal classification analysis do a remarkably good job of explaining the vast majority of the variation in the rights-related content of the world's written constitutions.

**Table 5: Constitutional Provisions Whose Inclusion or Omission Is Poorly Predicted by the Two-Dimensional Model**

| ***Type of Provision*** | ***PRE*** |
|---|---|
| Right to bear arms | 0.01 |
| Establishment of state religion | 0.02 |
| References to obligations under international human rights treaties | 0.10 |
| Educational principles | 0.12 |
| Natural resources to be used for benefit of all | 0.13 |
| Prohibition of abortion | 0.14 |
| Prohibition of death penalty | 0.16 |
| Right to appeal | 0.18 |

the age of the constitution are statistically insignificant. Revision of the model to include a set of dummy variables in order to control for possible differences between geographic regions did not change the results.

## V.
## AN IDEOLOGICAL RANKING OF THE WORLD'S CONSTITUTIONS

The fact that a two-dimensional model can explain most of the variation in the rights content of the world's written constitutions, and that only one of those two dimensions is ideological in character, has a number of important implications. One implication is that we have devised a relatively simple measure of constitutional ideology: a constitution's score on the second dimension measures its position on an ideological continuum that ranges from traditional and libertarian at one end to modern and statist at the other. This means, in turn, that it is possible to provide an ideological ranking of the world's constitutions. A complete ranking of all constitutions on both dimensions, along with the ideal point estimates for each constitution, can be found in the appendices.[184] For now, however, we focus on identifying what constitutions have, over time, occupied the two extremes. Table 6 lists the twenty-five constitutions with the highest scores on dimension two for each of the last seven decades; Table 7 does the same for the twenty-five most modern-statist constitutions.

**Table 6: The 25 Most "Statist" Constitutions (Highest Scores on Dimension Two), by Decade**

| | 1946-1949 | 1950s | 1960s | 1970s | 1980s | 1990s | 2000-2006 |
|---|---|---|---|---|---|---|---|
| 1 | Brazil | Brazil | Gabon | Gabon | Gabon | N. Korea | Togo |
| 2 | N. Korea | Poland | Congo | N. Korea | N. Korea | Congo | N. Korea |
| 3 | Romania | N. Korea | N. Korea | Congo | Albania | China | China |
| 4 | Albania | Bulgaria | Poland | Poland | Benin | Togo | Guinea |
| 5 | U.S.S.R. | U.S.S.R. | Bulgaria | Bulgaria | China | Gabon | Chad |
| 6 | France | El Salvador | U.S.S.R. | Mozambique | Bulgaria | Guinea | Luxembourg |
| 7 | Cuba | Nicaragua | El Salvador | U.S.S.R. | Mozambique | Luxembourg | Indonesia |
| 8 | Bulgaria | France | Senegal | El Salvador | Poland | Bulgaria | Saudi Arabia |
| 9 | Poland | Cuba | Cuba | Senegal | U.S.S.R. | Mozambique | Germany |
| 10 | Germany | Romania | France | Albania | Portugal | Senegal | Bulgaria |
| 11 | Denmark | Italy | Brazil | Italy | Senegal | Hungary | Congo |
| 12 | Iceland | Hungary | China | Romania | Congo | Germany | Madagascar |
| 13 | Indonesia | Guinea | Italy | Hungary | Italy | Italy | Timor-Leste |
| 14 | Mongolia | Luxembourg | Hungary | Guinea | Guinea | Chad | Gabon |
| 15 | Italy | Albania | Guinea | Mongolia | Romania | Cuba | Mozambique |
| 16 | Colombia | Germany | Mongolia | China | Hungary | Madagascar | Senegal |
| 17 | Nepal | Iceland | Romania | France | Cape Verde | France | Tunisia |
| 18 | Panama | Mongolia | Germany | Burkina Faso | Mongolia | Saudi Arab | Hungary |
| 19 | Thailand | Denmark | Iceland | Cuba | France | Tunisia | France |
| 20 | Honduras | Nepal | Luxembourg | Germany | Germany | Uzbekistan | Italy |
| 21 | Venezuela | Colombia | Indonesia | Iceland | Luxembourg | Burundi | Côte d'Ivoire |
| 22 | Luxembourg | Ghana | Albania | Luxembourg | Iceland | Indonesia | Burundi |
| 23 | Nicaragua | China | Nicaragua | Indonesia | Indonesia | Poland | Cuba |
| 24 | Peru | Panama | Libya | Qatar | C.Afr.Rep. | Qatar | Argentina |
| 25 | Spain | Honduras | C.Afr.Rep. | Brazil | Mali | Portugal | Uzbekistan |

184. For technical reasons previously discussed, both the relative rankings of the world's constitutions and the ideal point estimates upon which they are based are prone to a certain degree of random error. *See supra* note 138 and accompanying text. Thus, it is possible, for example, that the constitution with the third highest score on comprehensiveness is actually fourth, and vice versa. Although all techniques for estimating ideal points are prone to a degree of error and uncertainty, optimal classification does not yield any estimate of the uncertainty surrounding the ideal point estimate itself. The extent to which the ideal point estimate is arbitrary, however, is itself limited. *See id.*

The list of the constitutions with the highest scores on dimension two is relatively unsurprising and tends only to confirm our interpretation of dimension two as measuring an ideological tendency toward statism, or more extensive state power and responsibility across a broad range of spheres. The top constitutions on this dimension are a mixture of autocratic regimes, socialist and communist systems, and European social welfare states. North Korea and the Democratic Republic of the Congo consistently score high on this dimension. China, Gabon, Togo, and Cuba are also regular members of the club; so too are a number of former Soviet satellite states such as Poland, Bulgaria, Hungary, and Albania. The Soviet Union itself was high on the list, but its successor state, the Russian Federation, fails to crack the top twenty-five.

Prominently interspersed among these overtly socialist, communist, and authoritarian constitutions are those of the western European social welfare states. For example, Italy and Germany are consistently on the list in each decade; indeed, Germany is currently among the top ten. Other European welfare states in the top twenty-five include France, Iceland, Luxembourg, Spain, and Denmark. It may seem odd to find as an empirical matter that countries such as Luxembourg and Switzerland, both rather small and extremely wealthy European democracies known for their prominence in global banking, belong in some sense to the same constitutional family as North Korea and China. Yet if one actually compares the rights provisions of the constitutions of Luxembourg and North Korea, for example, similarities are immediately evident. Both documents guarantee not only the right to work,[185] but also the right of workers to rest,[186] compulsory state-funded primary and secondary education,[187] free vocational training,[188] and, of course, the right to private property.[189] The fact that such radically different countries can belong to the

185. *Compare* LUXEMBOURG CONST. art. 11(4) ("The law guarantees the right to work and assures to every citizen the exercise of this right."), *with* N. KOREA CONST. art. 29 ("The state shall make the labor of our working people, who do not experience unemployment, more joyful and worthwhile[.]"), *and id.* art. 31 ("[C]itizens shall begin to work from the age of 16.").

186. *Compare* LUXEMBOURG CONST. art. 11(5) (providing, in a section entitled "Basic Rights," that "[t]he law organizes the social security, health protection, and rest of workers"), *with* N. KOREA CONST. art. 30 ("The daily working hours of the working people shall be eight hours. The state shall shorten the daily working hours for certain labor, according to the level of difficulty and special conditions.").

187. *Compare* LUXEMBOURG CONST. art. 23(1), 23(2) ("The State ensures that every Luxembourger receives primary education which is compulsory and provided free of charge. . . . The State sets up secondary educational establishments and the necessary courses of higher education."), *with* N. KOREA CONST. art. 45 ("The state shall develop universal 11-year compulsory education, including one-year compulsory preschool education[.]"), *and id.* art. 49 ("The state shall raise children of preschool age at nurseries and kindergartens at the expense of the state and society.").

188. *Compare* LUXEMBOURG CONST. art. 23(2) ("The State . . . establishes free vocational training courses."), *with* N. KOREA CONST. art. 47 ("The state shall educate all students free of charge and give scholarships to students of universities and technical schools.").

189. *Compare* LUXEMBOURG CONST. art. 16 ("No one may be deprived of his property except on grounds of public interest in cases and in the manner laid down by the law and in consideration of prior and just compensation."), *and id.* art. 17 ("Confiscation of property as a penalty may not be instituted."), *with* N. KOREA CONST. art. 24 ("The products of individual sideline activities, . . . and the income derived from other legal economic activities shall . . .

same constitutional family need not come as a surprise if one bears in mind two simple facts. First, a considerable number of rights, such as the right to private property, are so ubiquitous that they can only be described as generic. Second, countries need not be equally likely to make good upon their constitutional commitments in order to make the same commitments in the first place.[190]

**Table 7: The 25 Most "Libertarian" Constitutions (Lowest Scores on Dimension Two), by Decade**

| | 1946-1949 | 1950s | 1960s | 1970s | 1980s | 1990s | 2000-2006 |
|---|---|---|---|---|---|---|---|
| 1 | U.K. | U.K. | Samoa | Fiji | Antigua & B | New Zealand | New Zealand |
| 2 | U.S.A. | U.S.A. | U.K. | U.K. | Fiji | Antigua B | Antigua B |
| 3 | Liberia | Liberia | Guyana | Kiribati | Kiribati | Fiji | Kiribati |
| 4 | Domin. Rep. | Philippines | Kenya | Samoa | Samoa | Vanuatu | Samoa |
| 5 | Philippines | Domin. Rep. | Swaziland | Guyana | U.K. | Kiribati | Solomon Isl. |
| 6 | Iraq | Iraq | Zambia | Solomon Isl. | Solomon Isl. | Solomon Isl. | Zimbabwe |
| 7 | Japan | Greece | Botswana | Zimbabwe | Zimbabwe | Zimbabwe | Botswana |
| 8 | Tonga | Japan | Gambia | Grenada | Grenada | Grenada | Grenada |
| 9 | Greece | Tonga | Lesotho | Kenya | Kenya | Marshall Isl. | Marshall Isl. |
| 10 | Sweden | Venezuela | Nigeria | Zambia | Zambia | U.K. | Fiji |
| 11 | Austria | Sweden | Sierra Leone | Marshall Isl. | Marshall Isl. | Kenya | Dominica |
| 12 | Mexico | Malaysia | Uganda | Botswana | Vanuatu | Samoa | Palau |
| 13 | New Zealand | Austria | Barbados | Dominica | Sierra Leone | Botswana | St. Vincent |
| 14 | Belgium | Mexico | Trinidad & T. | Gambia | Botswana | Dominica | Kenya |
| 15 | Cambodia | Israel | U.S.A. | Sierra Leone | Dominica | Palau | St. Kitts & N. |
| 16 | Portugal | New Zealand | Liberia | St. Vincent | Gambia | St. Vincent | Trinidad & T. |
| 17 | Ecuador | Belgium | Jamaica | Uganda | Palau | St. Kitts & N. | Switzerland |
| 18 | Uruguay | Cambodia | Mauritius | Bahamas | St. Vincent | Trinidad & T. | Bahamas |
| 19 | South Korea | Portugal | Philippines | Barbados | Uganda | Bahamas | Barbados |
| 20 | Paraguay | Ecuador | Iraq | Nigeria | St. Kitts & N. | Barbados | Ecuador |
| 21 | Iran | Pakistan | Malta | Trinidad & T. | Trinidad & T. | Canada | Finland |
| 22 | Netherlands | Paraguay | Greece | St. Lucia | Bahamas | St. Lucia | Canada |
| 23 | Canada | Iran | Singapore | Papua N.G. | Barbados | U.S.A. | Vanuatu |
| 24 | Saudi Arabia | Netherlands | Japan | Seychelles | St. Lucia | Sierra Leone | St. Lucia |
| 25 | South Africa | Ireland | Tonga | Liberia | Canada | Papua N.G. | South Africa |

The list of constitutions with the lowest scores on dimension two, by contrast, is overwhelmingly dominated by countries with a common law heritage. As with the list of the most statist constitutions, which reflects a significant degree of Soviet influence, traces of constitutional imperialism are unmistakable. For several decades, the list was topped by the United Kingdom itself (which counts among its "constitutional" provisions the Magna Carta,[191] the Bill of Rights 1689,[192] and the Human Rights Act 1998[193]), followed closely by one of its most influential heirs, the United States. In more recent decades, the rankings have been heavily populated by former British colonies, many of which received generic post-colonial, ready-made bills of rights from their former mother country upon gaining independence in the 1940s and

belong to private property. The state shall protect private property and guarantee the right to its inheritance by law.").

190. *See supra* note 164 and accompanying text (discussing empirical evidence of the divergence between the range of constitutional promises that countries make and the extent to which they actually fulfil those promises in practice).

191. Magna Carta, 1297, 25 Edw. I, c. 9 (Eng.).

192. An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (Bill of Rights), 1688, 1 W. & M., c. 2 (Eng.).

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

1950s. Although the United States lacks the same number of constitutional offspring as the United Kingdom, the constitutions of Japan, Liberia, and the Philippines all bear a heavy American imprint and were among the top twenty-five highest scorers on dimension two until they were displaced by an onslaught of newly independent Commonwealth nations in Africa and the Caribbean that inherited rights provisions modeled by the British on the European Convention on Human Rights.[194]

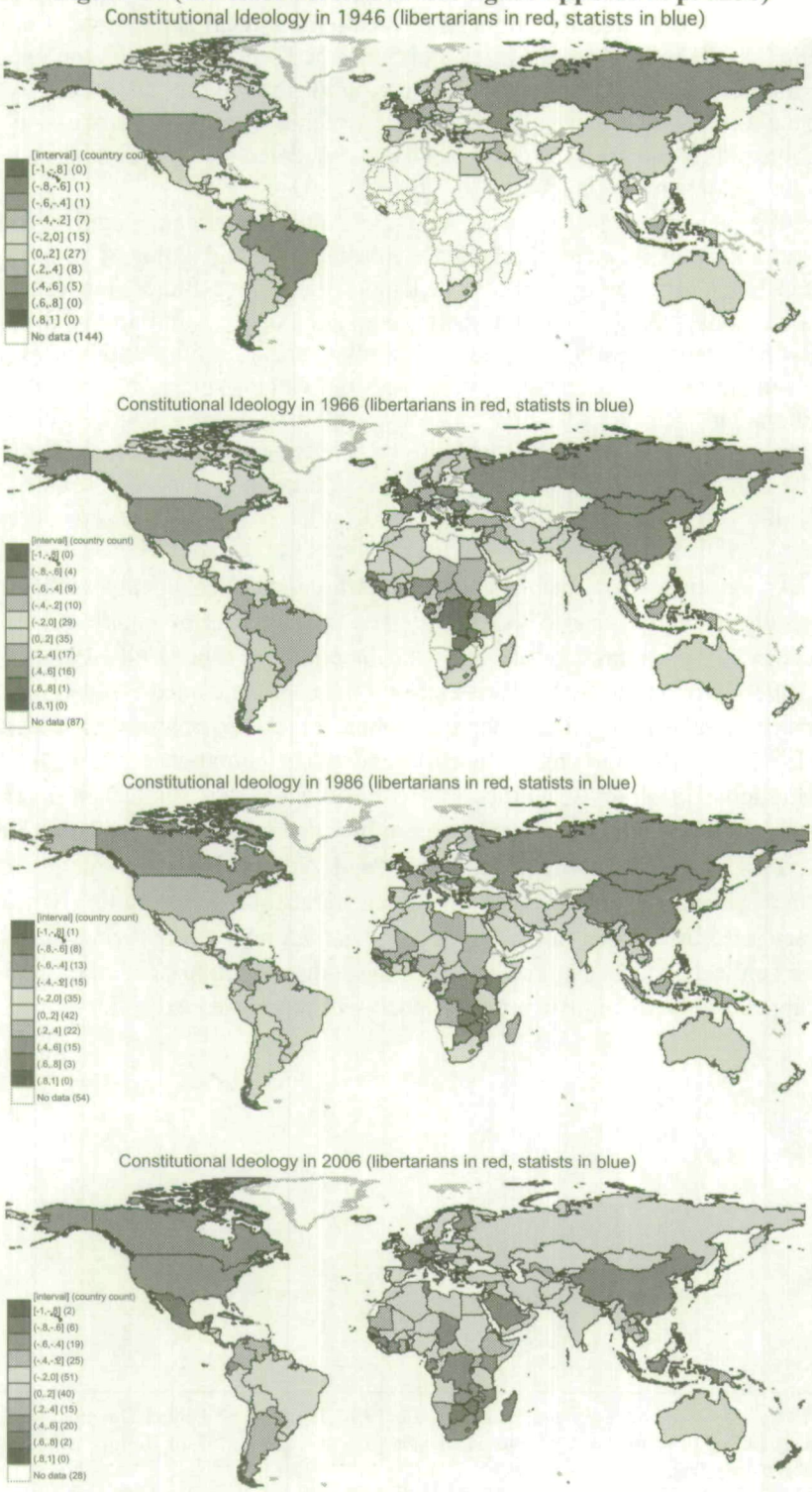
It is equally clear, however, that the Anglo-American model of rights constitutionalism is increasingly led neither by the old colonial power, the United Kingdom, nor by the new hegemon, the United States, but rather by former colonies that have forged their own path. Countries initially in Britain's orbit that subsequently devised their own constitutions without British involvement did not necessarily break with the Anglo-American constitutional tradition but, instead, became its new standard-bearers. New Zealand's adoption of the 1990 Bill of Rights did not represent a turn toward statism but, on the contrary, elevated New Zealand's constitution to the very front of the pack; likewise, Canada's adoption of the Charter of Rights and Freedoms in 1982 placed Canada back in the top twenty-five after decades of absence.

An intuitive way to map changes in constitutional ideology at a global level is literally to draw a map of the world. The color-coding of Figure 16 depicts differences in constitutional ideology at four points in time: 1946, 1966, 1986, and 2006.[195] In the same manner as electoral maps of the United States divide the country into red states and blue states to denote their partisan affinity, these maps divide the world into red countries and blue countries to denote their constitutional ideology. Countries that either did not exist or lacked a formal constitution as of the year in question are depicted as colorless and outlined in grey. Two areas exhibit noticeable trends. Both North and South America have, on the whole, moved in the libertarian direction. Meanwhile, Africa is characterized by an emerging division between north and south: the northern part of the continent shows signs of a shift in the statist direction, while the southern part appears to be trending libertarian, albeit with significant exceptions.

194. *See* PARKINSON, *supra* note 58, at 1–19 (describing the United Kingdom's role in drafting the rights provisions of the independence constitutions of its former African and Caribbean colonies).

195. Figure 16 is printed as a color insert that can be found at p. 1236 of this Article.

**Figure 16 (the color version of this figure appears at p. 1236)**



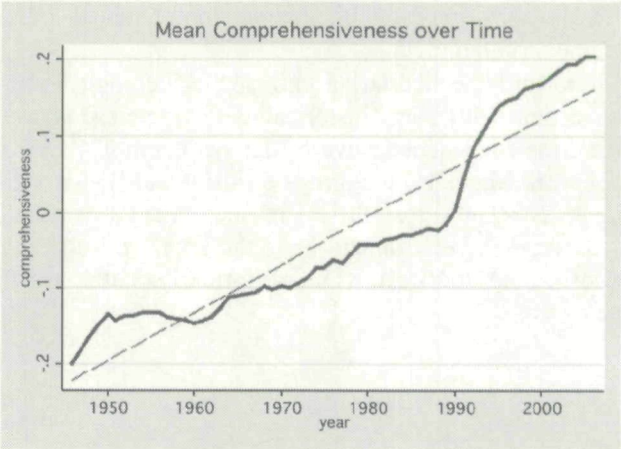
## VI.
## THE EVOLUTIONARY PATH OF GLOBAL CONSTITUTIONALISM

### *A. Generic Constitutionalism Versus Constitutional Polarization*

Thus far, we have shown that variation along just two dimensions—constitutional ideology and constitutional comprehensiveness—explains 90% of all constitutional differences captured by our rights index over a sixty-year period. Every constitution in the world—and, indeed, every international and regional human rights instrument—can be assigned an ideal point in two-dimensional space that predicts its rights-related content with considerable accuracy. This development of an empirically valid measure of constitutional ideology makes it possible, in turn, to trace the dynamics of the ideological evolution of global constitutionalism over more than half a century.

We begin by examining how the average scores on both dimensions have evolved over time. Figure 17 below graphs the average comprehensiveness score over all constitutions over time. In substantive terms, the increase in the average score on this dimension means that the number of rights that are generic to most constitutions has grown. Historically, an average constitution was one that included only the most generic rights, meaning those rights that constitutions tend to include even when they score low on the comprehensiveness dimension, such as the right of assembly.[196] Over time, however, constitutions have not only added more rights, but also share an increasing number of the same rights. An across-the-board increase in comprehensiveness over time has rendered generic such constitutional provisions as the right to present a defense, the right to establish political parties, minority rights, the right to unionize and/or strike, freedom of education, and express limitations on property rights. This growth in the scope and depth of generic constitutionalism can fairly be characterized as a form of constitutional convergence.

**Figure 17**




196. *See supra* Figure 11 and accompanying text.

**Figure 18**

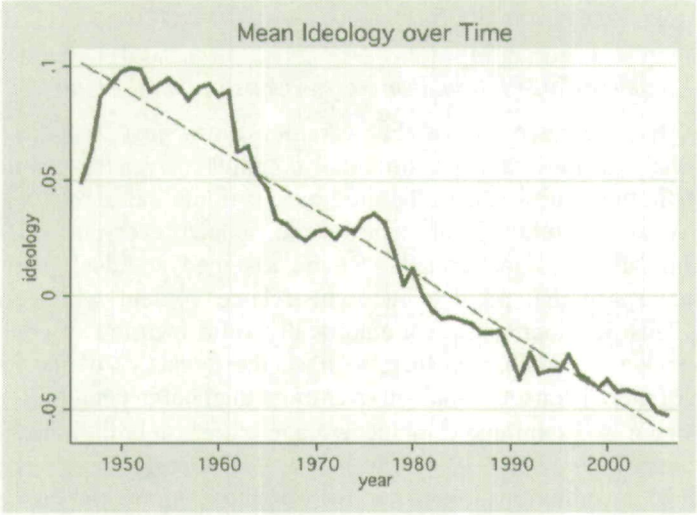



Figure 18 illustrates that the average ideological score has shifted significantly over time toward the Anglo-American, libertarian end of the scale. At first glance, this trend appears to imply not only that constitutional convergence is occurring, but that it is occurring with respect to constitutional provisions that have historically proved ideologically divisive. In other words, it appears that the "average" constitution is becoming both more libertarian and more comprehensive in scope. Figure 19 illustrates both of these trends. Each numbered point on this graph corresponds to the average ideal point in a particular year. The points labeled 1 track the position of the average ideal over the first decade of the data (1946 through 1955), those numbered 2 track its position over the second decade (1956 through 1965), and so on for all six decades covered by the data. The rightward and downward trajectory of the average ideal point can be interpreted as movement on the part of the "average" constitution in the direction of both greater comprehensiveness and greater affinity with the libertarian model.

This shift toward the libertarian end of the ideological spectrum seems intuitively consistent with such historical developments as the collapse of communism and the subsequent wave of democratization.[197] What remains to be seen, however, is whether the aggregate shift toward what we have labeled libertarianism reflects an across-the-board movement toward libertarianism, increasingly extreme libertarianism on the part of already libertarian constitutions, or actual transformation of formerly statist constitutions into libertarian ones.

197. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 3–13 (1991) (defining "the third wave" of democracy); Elster, *supra* note 107, at 369 (documenting a wave of constitution making in the 1990s).

**Figure 11: The Cutting Line Associated with the Right to Assembly**

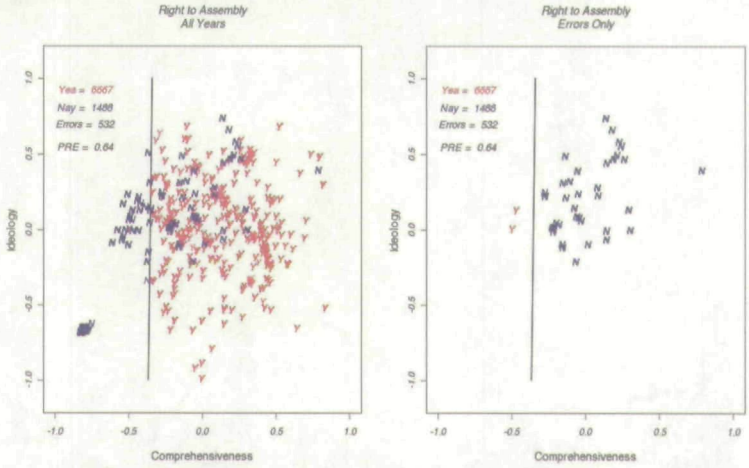



**Figure 12: The Cutting Line Associated with Consumer Rights**

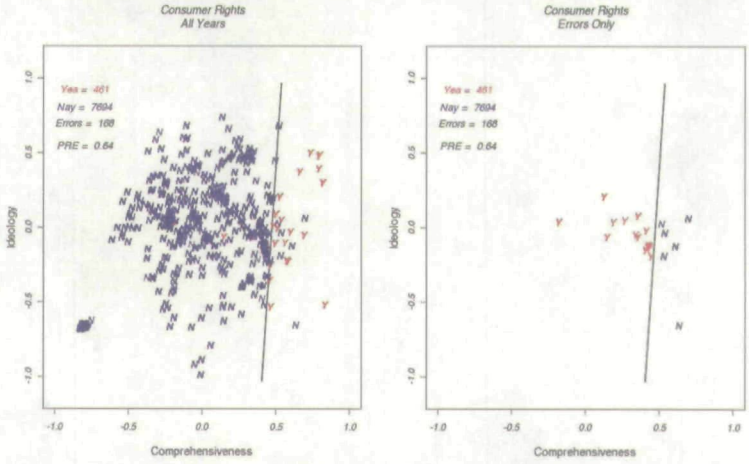



**Figure 13: The Cutting Line Associated with Double Jeopardy**

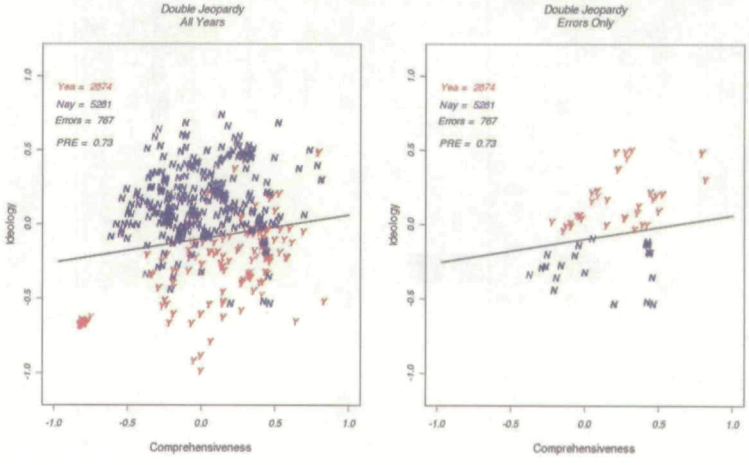


**Figure 16**

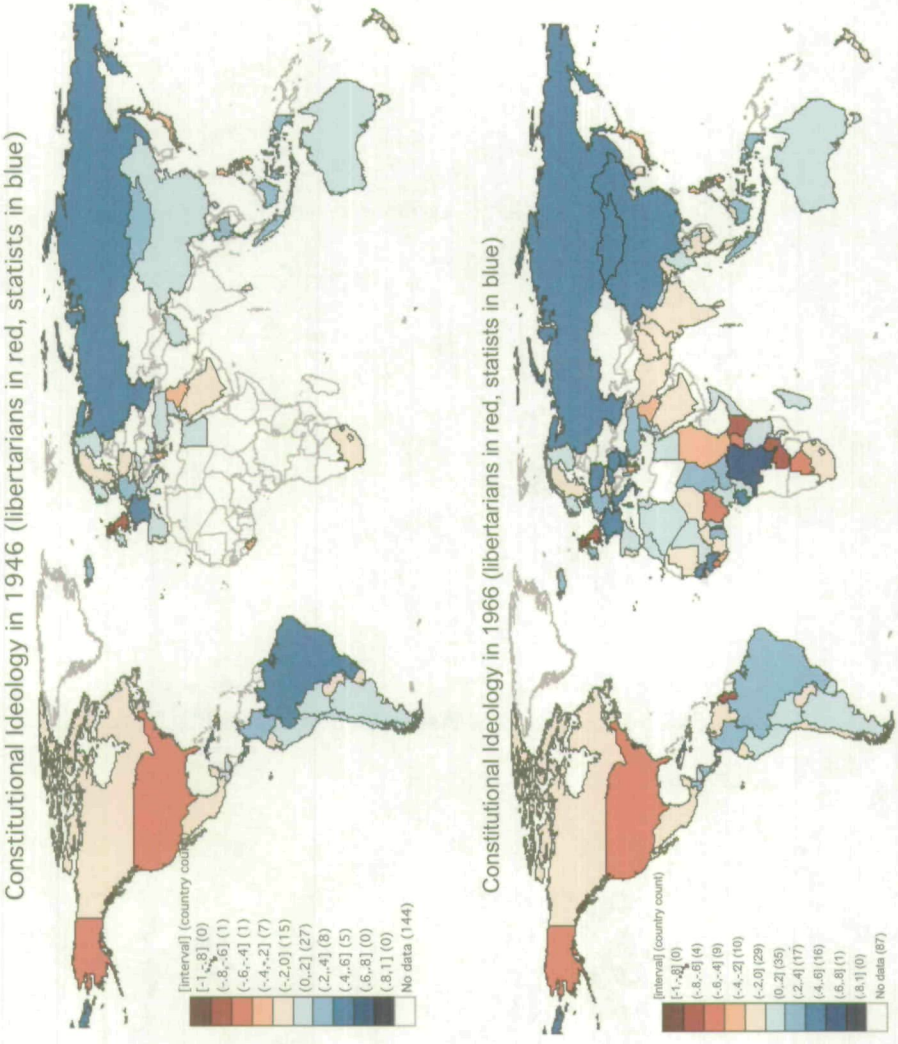

Constitutional Ideology in 1946 (libertarians in red, statists in blue)
[interval] (country count)
[-1,-.8] (0)
(-.8,-.6] (1)
(-.6,-.4] (1)
(-.4,-.2] (7)
(-.2,0] (15)
(0,.2] (27)
(.2,.4] (8)
(.4,.6] (5)
(.6,.8] (0)
(.8,1] (0)
No data (144)
Constitutional Ideology in 1966 (libertarians in red, statists in blue)
[interval] (country count)
[-1,-.8] (0)
(-.8,-.6] (4)
(-.6,-.4] (9)
(-.4,-.2] (10)
(-.2,0] (29)
(0,.2] (35)
(.2,.4] (17)
(.4,.6] (16)
(.6,.8] (1)
(.8,1] (0)
No data (87)

**Figure 16 (continued)**

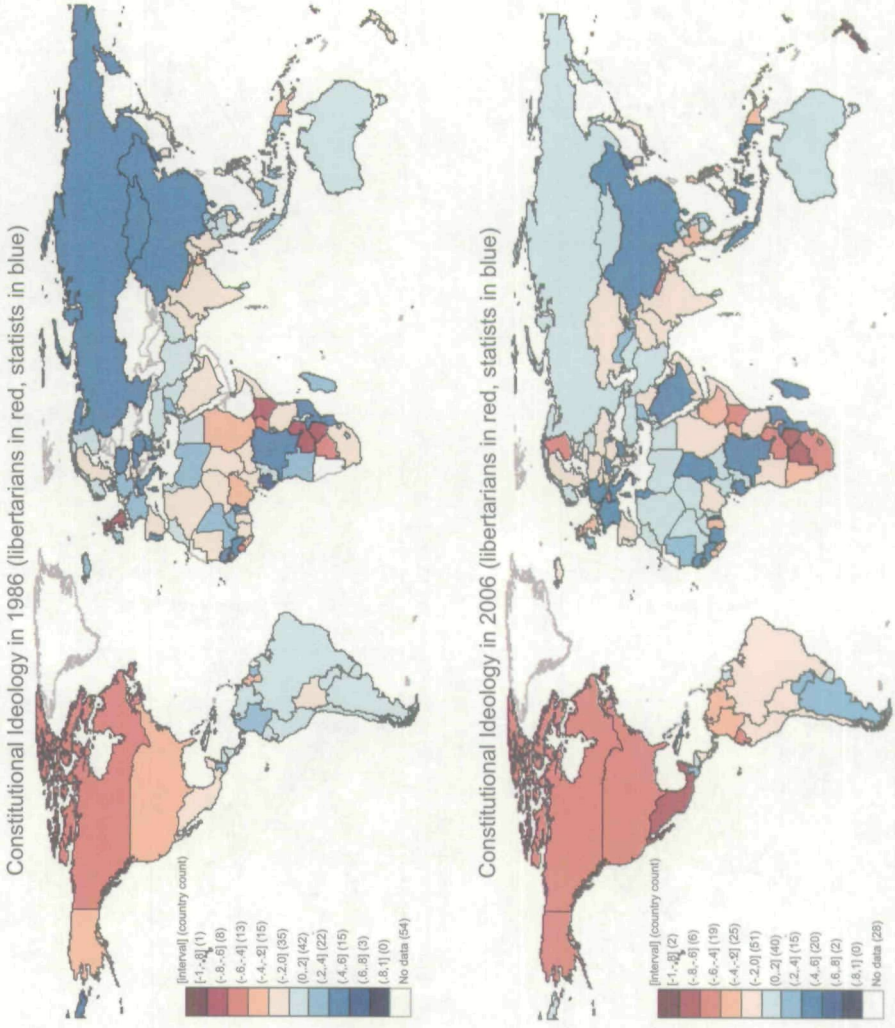


**Figure 14: The Cutting Line Associated with the Prohibition of Torture**

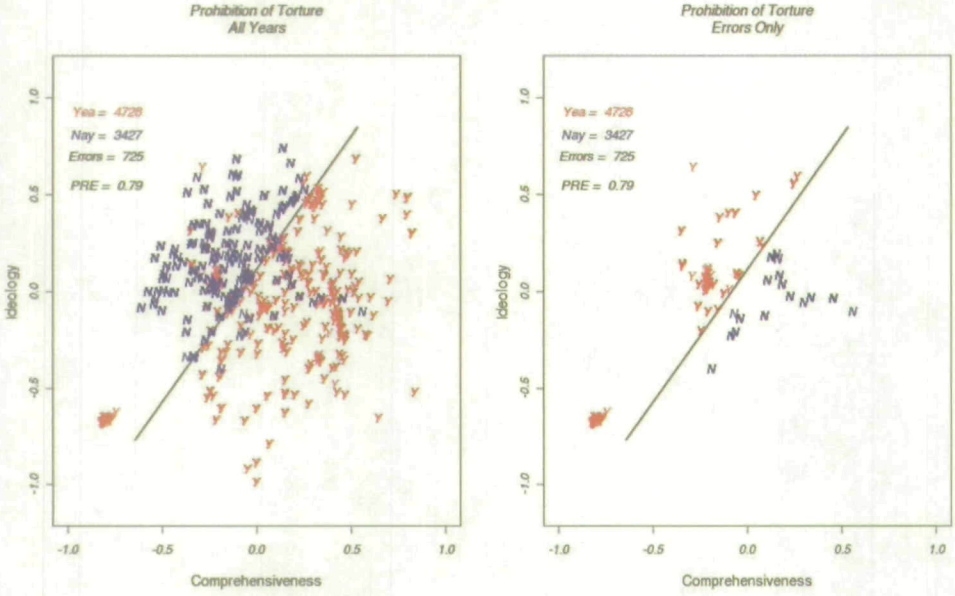



**Figure 15: The Cutting Line Associated with Rights to Physical Necessities**

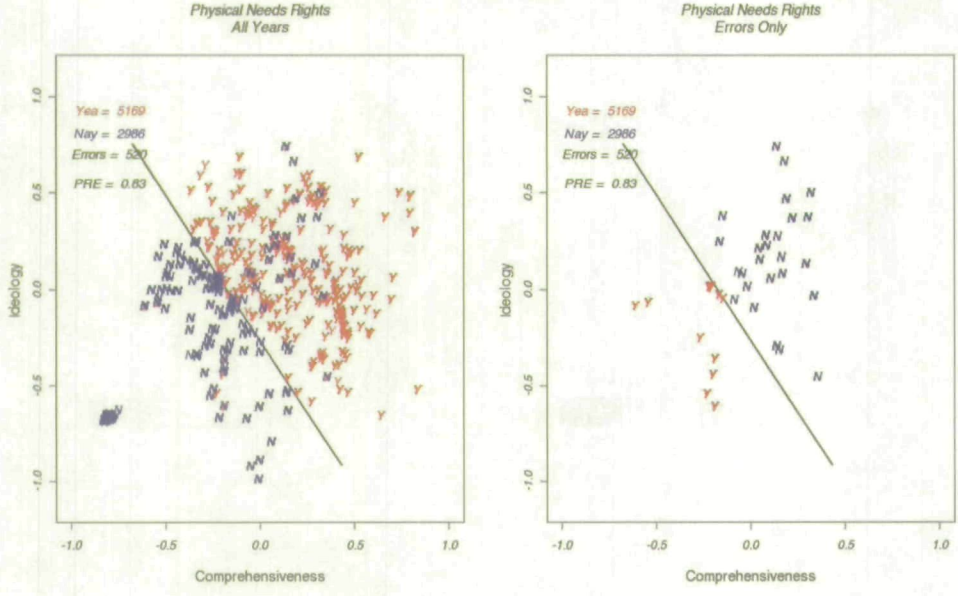
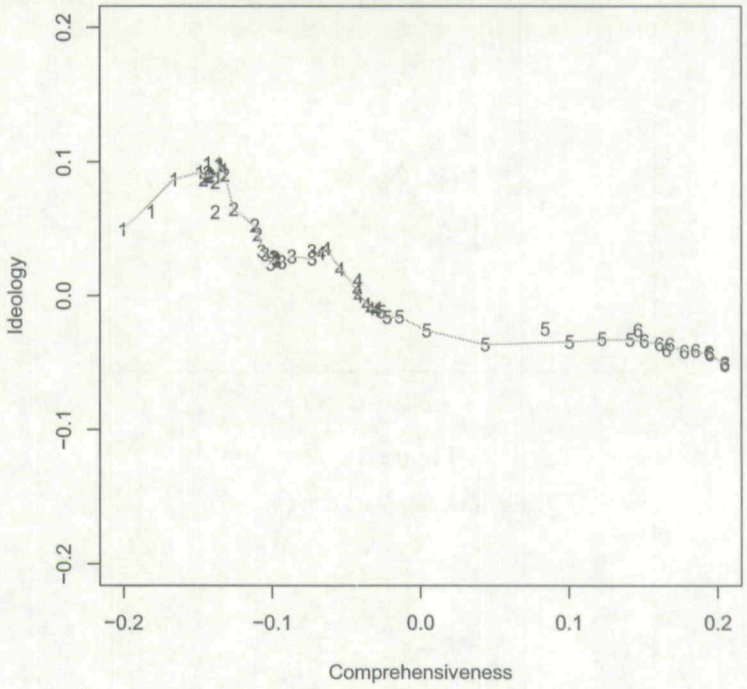


**Figure 19: Movement of the "Average" Constitution Toward Greater Comprehensiveness and Libertarianism**




The answer appears to be that a dense cluster of constitutions is, in fact, resisting the shift toward libertarianism. The three figures below are snapshots of the constitutional universe taken at thirty-year intervals that enable us to see how the constitutional universe has shifted over time. Figure 20, Figure 21, and Figure 22 plot all constitutional ideal points in 1946, 1976, and 2006, respectively. Looking at these figures, we again see a clear move toward greater comprehensiveness—from one period to the next, the ideal points shift higher on the comprehensiveness dimension. But the picture with respect to constitutional ideology is much less clear. The plot does not give the impression of across-the-board movement toward the libertarian end of the ideological (or vertical) axis. Instead, we see the emergence of dense constitutional clusters (circled in Figure 22) that are ideologically distinct from one another: one consists of constitutions with ideology scores ranging from 0 to -0.3, while the other is centered tightly at an ideology score of approximately 0.5. In other words, these figures suggest not a straightforward dynamic of constitutional convergence, but rather a process of constitutional polarization that encompasses elements of both convergence and divergence.

**Figure 20**

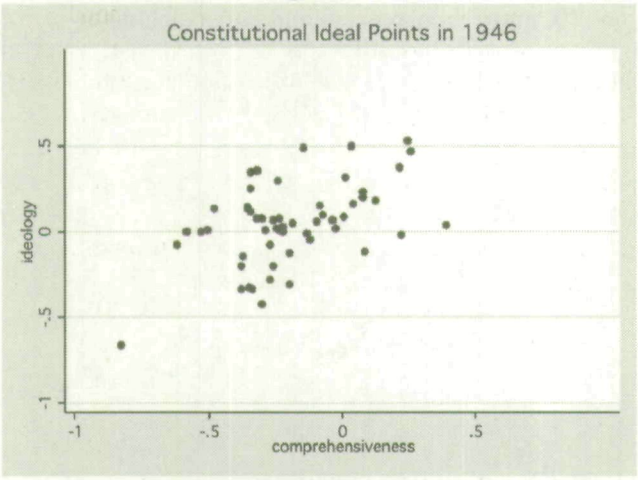



**Figure 21**

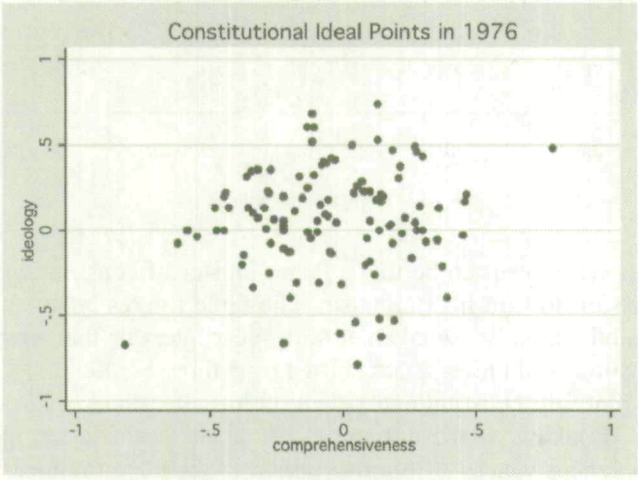
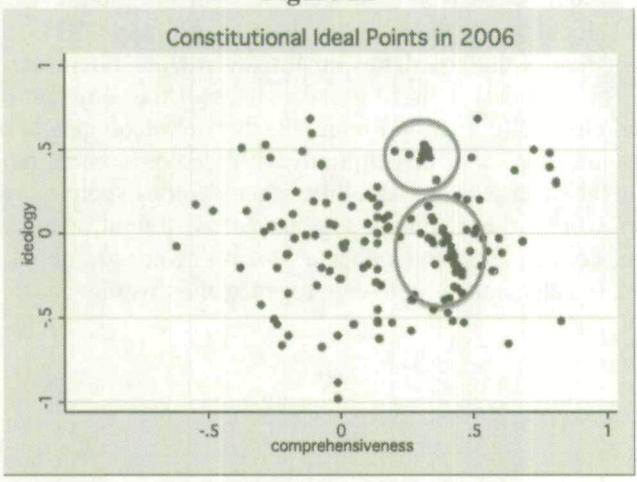



**Figure 22**



Ideological polarization is even more clearly evident from Figure 23 through Figure 26 below. These histograms offer snapshots of the ideological distribution of the world's constitutions at twenty-year intervals. The first histogram shows that in 1946 more than 40% of all constitutions were clustered in the middle, with an ideology score of approximately zero. The proportion of ideologically moderate constitutions had dropped slightly below 30% by 1966, only to decline further to about 25% by 1986, and yet again to 20% by 2006. Meanwhile, clusters of relatively extreme constitutions centered at second-dimension scores of approximately -0.5 (in the libertarian direction of the scale) and 0.5 (in the statist direction) have grown over time. In 1946, there were practically no constitutions at either of these points. By 1966, about 7% of all constitutions were at -0.5, and another 5% were at 0.5. By 1986, about 11% of all constitutions were in the -0.5 range, while the proportion at 0.5 held steady. Between 1986 and 2006, the number of constitutions at -0.5 dropped by about 4%, to 7%. In their place, however, a cluster of extremely libertarian constitutions with a score of almost -1 has developed, while the shrinking middle cluster has both flattened and shifted slightly in the libertarian direction. All of these developments are consistent with the movement of the *mean* ideology score in the libertarian direction. But this movement in the mean conceals increasing polarization in both directions, including the emergence of a robust cluster of libertarian constitutions and a smaller but relatively extreme cluster of statist constitutions.

**Figure 23**

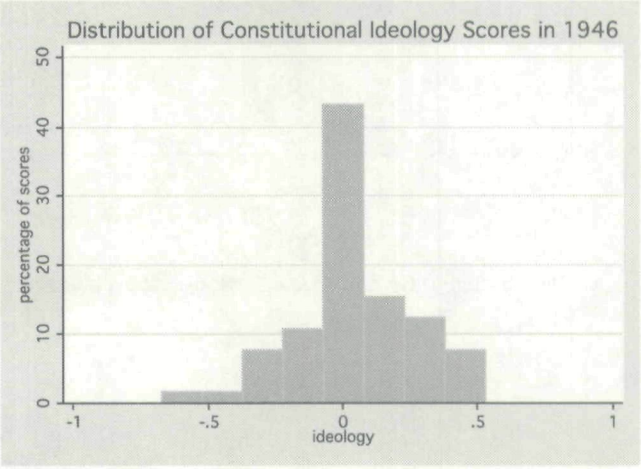


**Figure 24**

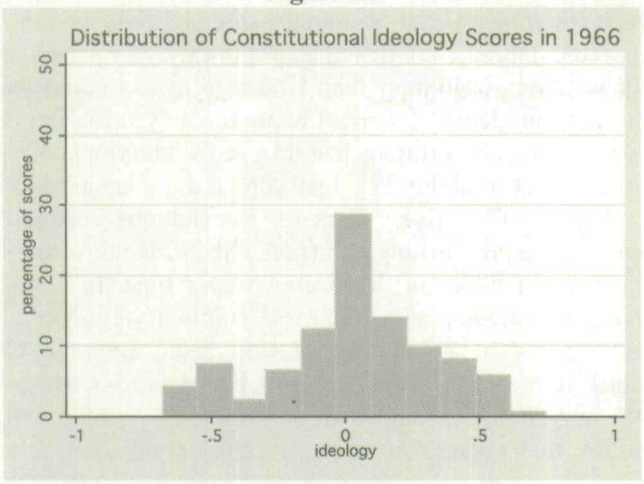



**Figure 25**

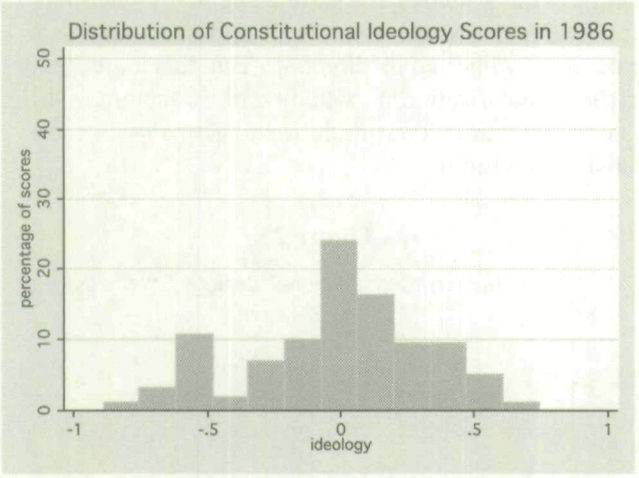
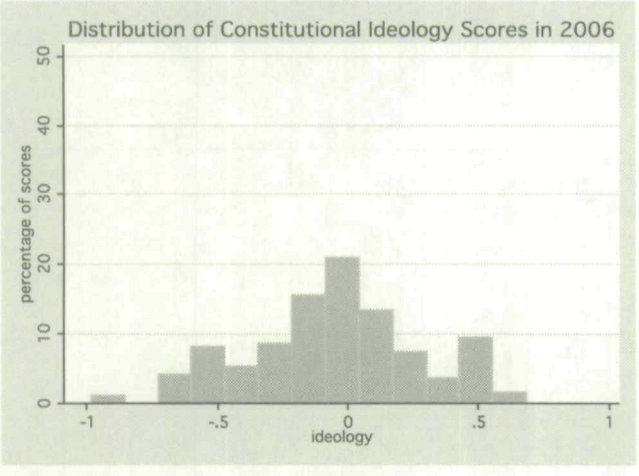



**Figure 26**



To summarize these patterns, the dynamics of global constitutional evolution involve a complex mix of convergence and polarization. On the one hand, global constitutionalism has a strong and growing generic component. The vast majority of constitutions have converged upon a generic core of rights-related provisions that is gaining in both popularity and scope over time. Even constitutions that contain relatively few rights tend to contain the most generic rights. Moreover, the phenomenon of rights creep is fueling the growth of generic constitutionalism: when constitutions add more rights, they often inspire imitators. The result is an expanding list of generic rights.

On the other hand, there is also an ideological and historical dimension to global constitutionalism that divides the universe of constitutions. Some provisions, such as a right against self-incrimination or a right to marry, are more likely to be found in constitutions that possess a particular substantive character.[198] Many constitutions hew increasingly toward a libertarian model of rights constitutionalism, which is defined in philosophical terms by its conception of the state as a threat to individual liberty that must be restrained, and in historical terms by strong adherence among countries steeped in the common law tradition. This constitutional ideology manifests itself in the form of negative rights against the state and the judicial enforcement of restrictions upon the state's ability to physically harm or restrain individuals.

A smaller but apparently robust cluster of constitutions, by contrast, exhibits an affinity for a statist model of constitutionalism that emphasizes both the power and the responsibility of government to improve society. Constitutions in this vein presuppose and confirm the reach of the state into a broad range of domains, and they impose affirmative obligations to improve social welfare in the form of positive rights against the state and citizen duties. Within the two clusters, constitutions are becoming increasingly similar to one another, but the clusters themselves remain highly distinct from one another.

### *B. Theoretical Implications of the Empirical Findings*

Our finding that constitutions share a substantial and growing generic component and vary along a single ideological dimension casts doubt upon the notion that constitutions are unique statements of national identity and values.[199] If it is true that a constitution expresses "a particular nation's self-understanding,"[200] that self-understanding should presumably be reflected in the rights and duties that define the relationship between state and citizen. In practice, however, the way in which constitutions define this relationship is

198. *See supra* Table 4 (contrasting the rights that tend to be found in constitutions with low second-dimension scores, such as the right against self-incrimination, with those that tend to be found in constitutions with high second-dimension scores, such as the right to marry, controlling for the constitution's score on the first dimension).

199. *See supra* note 6 and accompanying text.

200. Tushnet, *Some Reflections*, *supra* note 6, at 68.

highly generic. Moreover, to the extent that constitutions do define this relationship differently, the differences tend to follow well-defined and predictable patterns. It may be that constitutions may serve an expressive function, but if so, what they express is hardly unique. Perhaps they should be considered expressions not of national identity, but of membership in the global community or a constitutional family. Alternatively, to the extent that constitutions are in fact statements of national identity, the strong similarities and patterns that they exhibit raise the possibility that national identity is itself becoming increasingly globalized and less distinctive.

By contrast, theories that predict constitutional convergence remain relatively robust in the face of our empirical findings. All four theories of convergence discussed in Part I—constitutional learning, competition, conformity, and network effects—are clearly consistent with the growth of generic rights constitutionalism because generic constitutionalism is itself a form of convergence. Yet with relatively little modification, these theories can also account for the evidence of ideological polarization that we observe.

The argument that states engage in constitutional conformity in order to win acceptance from the international community,[201] for example, might seem inconsistent with our finding of polarization along ideological lines. One can rehabilitate the argument, however, simply by postulating that states face cross-cutting pressures to conform to two sets of norms—one that is truly global in character and contains all of the generic rights, and another that belongs to a more narrowly defined peer group of nations and contains the ideologically polarizing rights.[202] Likewise, the argument that countries learn from one another[203] can be readily modified to allow for the simultaneous existence of convergence and polarization. It could be argued that countries look to the global community for inspiration with respect to policies that seem likely to succeed regardless of where they are adopted, but in other cases look to a "reference group" of countries that are more similar to themselves in relevant respects and thus appear to offer more appropriate or useful examples for imitation.[204]

The hypothesis of constitutional competition is also broadly consistent with our findings.[205] Both the phenomenon of rights creep and the existence of a slight overall drift in the direction of increasing libertarianism mesh especially well with the hypothesis that countries adopt rights as a way of

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201. *See supra* Part I.C.

202. *See* Go, *supra* note 65, at 73, 90 (deeming it "misleading" to argue that theories that emphasize conformity to "world society" predict "full homogenization" of constitutional norms, and documenting both "sub-global scales of influence" and "contrapun[t]al tendencies of homogenization *and* heterogeneity" in the framing of post-colonial constitutions).

203. *See supra* Part I.A.

204. Elkins & Simmons, *supra* note 38, at 45; *see id.* at 42–45 (describing different processes by which policy diffusion can occur via learning, and noting that such learning often involves imitation of a "reference group" of countries that are similar in obvious ways to the imitating country).

205. *See supra* Part I.B (describing the hypothesis that countries engage in "constitutional competition" by offering bundles of rights that are designed to attract investors and skilled workers).

competing for human and financial capital. The fact that an increasing number of rights are common to nearly all constitutions can be explained as the straightforward result of a competitive dynamic in which countries must not only match, but indeed surpass, one another in order to attract a greater share of investment capital and skilled labor. Likewise, competition theory can account for the fact that the center of gravity of the constitutional universe is drifting slightly in the direction of libertarianism: it is plausible that countries cater to a systematic bias on the part of multinational corporations and relatively affluent knowledge workers in favor of constitutions that emphasize freedom from state intervention over, say, the pursuit of social or distributive justice.

At the same time, competition theory can also accommodate a degree of constitutional polarization. Countries may pursue constitutional strategies that are fundamentally similar, in the sense that they entail self-conscious competition for capital and skilled labor, yet also diverge at the margins in ways that reflect structural differences between different types of market economies. A distinction can be drawn between "organized market economies," which are characterized by proactive state planning of the economy and higher levels of long-term investment in specialized forms of human capital, and "liberal market economies," which reflect a laissez-faire approach to economic planning, highly fluid labor markets, and relatively shallow investment in specialized skills.[206] The success of a liberal market economy that relies upon global leadership in the financial services sector, for example, may demand the pursuit of a more libertarian flavor of constitutionalism than the success of an organized market economy that rests upon excellence in precision manufacturing, which may by contrast be compatible with a more statist approach to constitutionalism. The practical result of such strategic differentiation could be the very combination of convergence and polarization that we actually observe: although global competition for scarce resources may encourage all countries to offer a generic package of rights that satisfies the basic demands of all investors and skilled workers, it may simultaneously lead countries to pursue specialized constitutional strategies, above and beyond the generic package, that are adapted to their individual competencies and priorities.

Last but not least, the notion that constitutionalism is characterized by network effects seems especially well suited to explaining the particular combination of convergence and polarization that we observe.[207] The existence of network effects gives states an incentive to join a thriving constitutional network instead of remaining stubbornly independent, but it does not preclude the possibility of competing networks. If multiple networks do exist—as in the

206. Peter Gourevitch, *Corporate Governance: Global Markets, National Politics*, *in* GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 305, 326–27 (Miles Kahler & David A. Lake eds., 2003); *cf.* BOBBITT, *supra* note 31, at 669–70 (distinguishing between the "Entrepreneurial Model" and "Managerial Model" of capitalist "market-states," where the latter is characterized by, inter alia, more extensive state direction and planning of the economy).

207. *See supra* Part I.D.

form of a libertarian constitutional family and a statist constitutional family—we would expect to observe the following patterns. First, states will face an incentive to join one of the two networks, which means that the proportion of states that belongs to neither network will diminish. Second, states that do join a network will become constitutionally more similar to one another because they have adopted the standards and practices of the network; that is, within each network, constitutional convergence will occur. Third, although individual states will converge upon one of the two networks, the networks themselves will not necessarily converge upon one another. This prediction of polarization around, and convergence upon, two competing constitutional paradigms is consistent with what we do in fact observe: states appear to be converging upon one of two competing constitutional paradigms, yet at the same time, the paradigms themselves are not converging upon one another.

Like the other theories of convergence, this explanation of our results also has its flaws. In particular, it is problematic to assume that countries belong to a common network simply because they possess similar formal constitutions. In reality, countries with similar formal constitutions may not share the same actual constitutional standards or interact in mutually beneficial ways. To revisit an earlier example, the constitutions of North Korea and Luxembourg share a number of striking similarities that garner them similar ideology scores,[208] yet it strains credulity to suggest that the two countries give one another preferential treatment. In this case, the problem may lie not with the idea of constitutional network effects, but rather with the manner in which the relevant networks are defined. Countries with formally similar constitutions may belong to functionally distinct constitutional networks. Thus, for example, the statist cluster of constitutions may need to be disaggregated into a network of social welfare democracies such as Luxembourg, Germany, and France, on the one hand, and a network of authoritarian regimes such as North Korea, China, and Chad, on the other. In other words, accurate identification of network membership may demand examination of more than what is found in formal constitutions.

## CONCLUSION: THE CASE FOR EMPIRICAL CONSTITUTIONAL STUDIES

The field of empirical constitutional studies is in the process of invention. Anecdotal conjecture about the creation, evolution, and impact of constitutions at a global level is only now beginning to give way to systematic exploration and explanation. The emergence of this genre of scholarship on constitutions has been made possible by the recent creation and statistical analysis of large-scale data sets on the world's constitutions.[209] Consequently, the potential for

208. *See supra* text accompanying notes 185–190 (describing a number of prominent textual similarities between the constitutions of North Korea and Luxembourg).

209. *See* ELKINS ET AL., *supra* note 5, *passim* (analyzing a newly constructed data set on the world's constitutions, documenting the extent to which the world's constitutions are subject to change and upheaval with surprising frequency, and identifying various factors that predict

groundbreaking empirical work on global constitutionalism has never been greater. Even the most rudimentary analysis of our data, which covers the rights-related content of all national constitutions over the last six decades, yields valuable insights into the content and development of constitutionalism on a global scale. One phenomenon that can easily be documented, for example, is rights creep, or the fact that the number of rights found in the average constitution is increasing over time. A related phenomenon is that of generic rights constitutionalism: a growing set of rights is common, or generic, to nearly all constitutions.

With the help of more sophisticated empirical techniques, we are also able to identify the variables that explain constitutional variation, and to map the ideological evolution of global constitutionalism over time. Using the methodological framework of ideal point estimation, we discover that the rights-related content of the world's constitutions varies almost entirely along just two underlying dimensions—namely, those of comprehensiveness and ideology. By assigning every constitution in the world a numerical score along these two dimensions, we can explain 90% of all the differences in constitutional content captured by our rights index. It turns out, moreover, that ideology assumes a distinct meaning in the constitutional context. At one end of the ideological spectrum are what might be called libertarian constitutions, which are heavily influenced by the common law tradition and are defined in substantive terms by an emphasis on judicial protection from deprivation of the core interests of life and physical liberty. At the other end are what might be called statist constitutions, which presuppose and emphasize the power and responsibility of the state across a broad range of social, economic, political, and cultural domains.

The ability to measure constitutional ideology enables us not only to create an ideological ranking of the world's constitutions, but also to follow changes in the balance of power over time between the libertarian and statist conceptions of constitutionalism. The spread of generic constitutionalism and generic rights necessarily entails a degree of constitutional convergence. Yet constitutional evolution at a global level is also characterized by a degree of polarization between two competing paradigms or strains of rights constitutionalism—one libertarian in orientation, the other statist. Over time, constitutions are tending to gravitate toward one paradigm or the other. The result is the depopulation of the ideological middle ground and the formation of two competing clusters or families: within each family, constitutions are becoming more similar to one another, but the families themselves are increasingly distinct from each other. The center of gravity, or balance of power, appears to be gradually shifting in favor of the libertarian paradigm, but there is little indication at present that the two paradigms are converging upon one another.

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constitutional longevity); Law, *supra* note 7, at 378–79 (surveying the empirical literature on constitutions, and heralding the recent "growth of quantitative empiricism," but noting also the ongoing need for "collection of thorough cross-national time-series data" on how constitutions are interpreted).

Needless to say, these findings raise as many questions as they answer. If it is true, for example, that constitutions vary along an ideological dimension that ranges from libertarianism at one end to statism at the other, then why are some constitutions more libertarian, or statist, than others? What, if anything, do countries with libertarian (or statist) constitutions share in common, apart from the obvious historical connection between libertarian constitutionalism and the common law tradition? What is the political or economic impact, if any, of adopting one type of constitution as opposed to the other? A single article can only begin to tell the story of the evolution and ideology of global constitutionalism. Simply to learn what questions need to be asked, however, is itself an indispensable step toward the development of a comprehensive empirical account.

It is clear that the idea of conducting statistical analysis of the content of the world's constitutions goes against the grain of existing constitutional scholarship. The literature is instead overwhelmingly normative, hermeneutic, and theoretical in orientation, and much of the theory that is produced rests upon questionable factual premises.[210] This is, in many ways, a sorry state of affairs. Constitutionalism is a multifaceted phenomenon that calls for a variety of scholarly approaches, ranging from statistical analysis of the content of formal constitutions at one end to sociological observation of how government officials behave on an everyday basis. Methodological pluralism is healthy for any academic discipline, and constitutional law is no exception.

The use of empirical methods promises to yield new insight into familiar questions and to breathe new life into the research agenda for constitutional scholars. Consider, again, the daunting question of why some constitutions fail to govern actual behavior.[211] As our own empirical analysis illustrates, governments do not always act in accordance with constitutional dictates.[212] Yet there remains a lack of systematic knowledge about which constitutions are ineffective, to what extent, and for what reasons. Quantitative research methods can generate such knowledge by identifying variables that predict the degree to which actual practice departs from constitutional requirements. The demands of such an approach are far from trivial. We must first possess the conceptual

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210. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 727–30 (2009) (observing that "the factual premise that judicial review is countermajoritarian" is "the foundation upon which contemporary American constitutional theory rests" but "has come under sustained empirical attack from multiple directions," and reviewing various bodies of empirical scholarship to the effect that judicial review is not, in fact, countermajoritarian); *supra* notes 7–8 and accompanying text.

211. *See supra* notes 14–17 and accompanying text (discussing earlier studies that have found a negative correlation in some cases between formal rights protection and actual rights observance, and noting the phenomenon of "sham constitutions"); *supra* note 19 (citing a prominent scholar's glum conclusion that that "there can be no hope of rigorously quantitative answers" to empirical questions about "the successful establishment of written constitutions").

212. *See supra* note 164 and accompanying text (finding that the breadth of a country's formal commitment to rights is negatively correlated with the extent of its actual respect for rights).

framework, the methodological tools, and the raw data to assess the content of the world's constitutions before we can begin to determine how and why some of those constitutions amount to dead letters. But these challenges are finally being met, and the knowledge to be gained by meeting them is immense. The time for empirical constitutional studies is now.

APPENDIX I: COMPREHENSIVENESS SCORES FOR ALL CONSTITUTIONS AS OF 2006

| *Country* | *Comprehensiveness* |
|---|---|
| Ecuador | 0.83 |
| Paraguay | 0.81 |
| Guatemala | 0.81 |
| Timor-Leste | 0.79 |
| Argentina | 0.78 |
| Bulgaria | 0.73 |
| Portugal | 0.69 |
| Armenia | 0.69 |
| Uzbekistan | 0.66 |
| Mexico | 0.63 |
| Nicaragua | 0.61 |
| Cape Verde | 0.59 |
| Venezuela | 0.58 |
| Colombia | 0.57 |
| Panama | 0.56 |
| Albania | 0.53 |
| Serbia and Montenegro | 0.53 |
| El Salvador | 0.52 |
| Togo | 0.52 |
| Congo, Dem. Rep. | 0.51 |
| Spain | 0.50 |
| Brazil | 0.50 |
| Burundi | 0.49 |
| Peru | 0.49 |
| Honduras | 0.48 |
| Turkey | 0.47 |
| Switzerland | 0.46 |
| Philippines | 0.46 |
| Ethiopia | 0.46 |
| Thailand | 0.45 |
| Greece | 0.44 |
| Seychelles | 0.44 |
| Tajikistan | 0.44 |
| Moldova | 0.44 |
| Swaziland | 0.44 |
| Gambia | 0.43 |
| Namibia | 0.43 |

| | |
|---|---|
| Uganda | 0.43 |
| Ghana | 0.43 |
| Macedonia | 0.43 |
| Malawi | 0.43 |
| Bolivia | 0.43 |
| Poland | 0.43 |
| Slovak Republic | 0.42 |
| Estonia | 0.42 |
| Finland | 0.42 |
| Kazakhstan | 0.42 |
| Lithuania | 0.42 |
| Kyrgyz Republic | 0.41 |
| Ukraine | 0.41 |
| Croatia | 0.41 |
| Slovenia | 0.41 |
| Nepal | 0.41 |
| Iraq | 0.40 |
| Costa Rica | 0.40 |
| Sudan | 0.40 |
| Eritrea | 0.40 |
| Romania | 0.40 |
| Papua New Guinea | 0.39 |
| Haiti | 0.38 |
| Iran | 0.38 |
| Belarus | 0.38 |
| Russian Federation | 0.38 |
| Czech Republic | 0.38 |
| Rwanda | 0.36 |
| Nigeria | 0.35 |
| North Korea | 0.35 |
| South Africa | 0.35 |
| Turkmenistan | 0.35 |
| Georgia | 0.35 |
| Azerbaijan | 0.35 |
| Chile | 0.34 |
| Mongolia | 0.34 |
| Hungary | 0.34 |
| Latvia | 0.33 |
| Mali | 0.33 |
| Equatorial Guinea | 0.33 |
| Sao Tome and Principe | 0.33 |
| Burkina Faso | 0.33 |
| Indonesia | 0.33 |
| Mozambique | 0.33 |
| Guinea | 0.32 |
| Chad | 0.32 |
| Germany | 0.31 |

| | |
|---|---|
| Congo, Rep. | 0.31 |
| Senegal | 0.31 |
| Libya | 0.30 |
| Italy | 0.30 |
| Sierra Leone | 0.28 |
| Zambia | 0.27 |
| Egypt | 0.27 |
| Lesotho | 0.27 |
| Fiji | 0.26 |
| Gabon | 0.26 |
| Afghanistan | 0.22 |
| Madagascar | 0.20 |
| Trinidad and Tobago | 0.19 |
| Central African Republic | 0.18 |
| Suriname | 0.18 |
| Bahrain | 0.18 |
| Benin | 0.16 |
| Comoros | 0.16 |
| Belize | 0.15 |
| Malta | 0.15 |
| Algeria | 0.14 |
| Solomon Islands | 0.14 |
| Zimbabwe | 0.14 |
| Niger | 0.14 |
| Guyana | 0.14 |
| Yemen | 0.14 |
| Bahamas | 0.14 |
| Barbados | 0.14 |
| Kenya | 0.14 |
| St. Lucia | 0.14 |
| Angola | 0.14 |
| Pakistan | 0.14 |
| St. Kitts and Nevis | 0.14 |
| Cambodia | 0.14 |
| Guinea-Bissau | 0.14 |
| Liberia | 0.13 |
| Vietnam | 0.12 |
| Japan | 0.10 |
| Sri Lanka | 0.10 |
| Kuwait | 0.10 |
| Qatar | 0.10 |
| Syrian Arab Republic | 0.10 |
| Somalia | 0.09 |
| United Arab Emirates | 0.09 |
| Oman | 0.09 |
| Bangladesh | 0.09 |
| Dominica | 0.05 |

| | |
|---|---|
| St. Vincent and the Grenadines | 0.05 |
| Cameroon | 0.04 |
| Tanzania | 0.02 |
| Djibouti | 0.01 |
| Iceland | 0.01 |
| Belgium | 0.01 |
| Jamaica | 0.00 |
| Cyprus | 0.00 |
| Botswana | -0.01 |
| Antigua and Barbuda | -0.01 |
| Grenada | -0.01 |
| New Zealand | -0.01 |
| Dominican Republic | -0.03 |
| United Kingdom | -0.04 |
| Liechtenstein | -0.04 |
| Sweden | -0.05 |
| Uruguay | -0.05 |
| Maldives | -0.07 |
| Cuba | -0.07 |
| Côte d'Ivoire | -0.07 |
| Kiribati | -0.07 |
| Mauritius | -0.09 |
| India | -0.10 |
| Lao PDR | -0.10 |
| China | -0.11 |
| South Korea | -0.11 |
| Myanmar | -0.13 |
| France | -0.15 |
| Ireland | -0.17 |
| Mauritania | -0.17 |
| Netherlands | -0.18 |
| Jordan | -0.18 |
| Micronesia | -0.20 |
| Marshall Islands | -0.20 |
| Austria | -0.20 |
| Malaysia | -0.20 |
| Morocco | -0.22 |
| Samoa | -0.22 |
| Palau | -0.24 |
| Singapore | -0.24 |
| Canada | -0.25 |
| Vanuatu | -0.25 |
| Tunisia | -0.26 |
| Bosnia and Herzegovina | -0.26 |
| Denmark | -0.28 |
| Luxembourg | -0.28 |
| Lebanon | -0.29 |

| | |
|---|---|
| United States | -0.30 |
| Norway | -0.36 |
| Saudi Arabia | -0.37 |
| Tonga | -0.38 |
| Australia | -0.48 |
| Brunei | -0.54 |
| Israel | -0.62 |

APPENDIX II: IDEOLOGY SCORES FOR ALL CONSTITUTIONS AS OF 2006

| *Country* | *Ideology* |
|---|---|
| Togo | 0.68 |
| North Korea | 0.68 |
| China | 0.60 |
| Chad | 0.53 |
| Guinea | 0.53 |
| Luxembourg | 0.53 |
| Saudi Arabia | 0.51 |
| Indonesia | 0.50 |
| Germany | 0.50 |
| Bulgaria | 0.50 |
| France | 0.49 |
| Madagascar | 0.48 |
| Timor-Leste | 0.48 |
| Mozambique | 0.48 |
| Senegal | 0.47 |
| Gabon | 0.47 |
| Congo, Rep. | 0.45 |
| Tunisia | 0.45 |
| Hungary | 0.45 |
| Burundi | 0.45 |
| Italy | 0.43 |
| Côte d'Ivoire | 0.41 |
| Cuba | 0.40 |
| Argentina | 0.40 |
| Uzbekistan | 0.38 |
| Rwanda | 0.31 |
| Paraguay | 0.30 |
| Guatemala | 0.30 |
| Guinea-Bissau | 0.28 |
| Ireland | 0.25 |
| Mauritania | 0.25 |
| Syrian Arab Republic | 0.23 |
| Denmark | 0.22 |
| Belgium | 0.22 |
| Tajikistan | 0.22 |

| | |
|---|---|
| Moldova | 0.22 |
| Vietnam | 0.21 |
| El Salvador | 0.20 |
| Honduras | 0.20 |
| Lao PDR | 0.19 |
| Uruguay | 0.18 |
| Brunei | 0.17 |
| Algeria | 0.17 |
| Mali | 0.16 |
| Sao Tome and Principe | 0.16 |
| Latvia | 0.16 |
| Burkina Faso | 0.16 |
| Cameroon | 0.16 |
| Niger | 0.16 |
| Australia | 0.13 |
| Norway | 0.13 |
| Jordan | 0.12 |
| Central African Republic | 0.10 |
| Cambodia | 0.09 |
| Mongolia | 0.09 |
| Egypt | 0.09 |
| Comoros | 0.08 |
| Benin | 0.08 |
| Azerbaijan | 0.08 |
| Turkmenistan | 0.08 |
| Georgia | 0.08 |
| Sri Lanka | 0.06 |
| Qatar | 0.06 |
| Kuwait | 0.06 |
| Liechtenstein | 0.05 |
| Morocco | 0.05 |
| Dominican Republic | 0.04 |
| Bosnia and Herzegovina | 0.04 |
| Suriname | 0.04 |
| Bahrain | 0.03 |
| Haiti | 0.03 |
| Congo, Dem. Rep. | 0.03 |
| Turkey | 0.01 |
| Lebanon | 0.01 |
| Belarus | 0.00 |
| Iran | 0.00 |
| Russian Federation | 0.00 |
| Libya | 0.00 |
| Brazil | 0.00 |
| Pakistan | 0.00 |
| Angola | 0.00 |
| Spain | 0.00 |

| | |
|---|---|
| Myanmar | -0.01 |
| India | -0.01 |
| Afghanistan | -0.02 |
| Sudan | -0.02 |
| Romania | -0.03 |
| Eritrea | -0.03 |
| Netherlands | -0.03 |
| Cape Verde | -0.03 |
| Equatorial Guinea | -0.03 |
| Albania | -0.04 |
| Chile | -0.04 |
| Iraq | -0.05 |
| Somalia | -0.05 |
| United Arab Emirates | -0.05 |
| Oman | -0.05 |
| Armenia | -0.05 |
| Portugal | -0.05 |
| Czech Republic | -0.06 |
| South Korea | -0.06 |
| Yemen | -0.06 |
| Tanzania | -0.06 |
| Iceland | -0.07 |
| Croatia | -0.08 |
| Israel | -0.08 |
| Djibouti | -0.09 |
| Ukraine | -0.11 |
| Kyrgyz Republic | -0.11 |
| Panama | -0.11 |
| Peru | -0.11 |
| Nicaragua | -0.12 |
| Estonia | -0.12 |
| Kazakhstan | -0.13 |
| Lithuania | -0.13 |
| Austria | -0.13 |
| Malaysia | -0.13 |
| Sweden | -0.13 |
| Poland | -0.14 |
| Costa Rica | -0.15 |
| Macedonia | -0.15 |
| Slovak Republic | -0.16 |
| Nigeria | -0.18 |
| Gambia | -0.18 |
| Japan | -0.18 |
| Bolivia | -0.19 |
| Swaziland | -0.19 |
| Serbia and Montenegro | -0.19 |
| Greece | -0.19 |

| | |
|---|---|
| Bangladesh | -0.20 |
| Singapore | -0.20 |
| Maldives | -0.21 |
| Tonga | -0.21 |
| Guyana | -0.22 |
| Ethiopia | -0.22 |
| Colombia | -0.22 |
| United Kingdom | -0.22 |
| Uganda | -0.23 |
| Venezuela | -0.23 |
| Namibia | -0.23 |
| Philippines | -0.26 |
| Cyprus | -0.27 |
| Jamaica | -0.27 |
| Liberia | -0.29 |
| Belize | -0.31 |
| Malta | -0.31 |
| Mauritius | -0.31 |
| Malawi | -0.32 |
| Ghana | -0.32 |
| Seychelles | -0.33 |
| Thailand | -0.35 |
| Micronesia | -0.36 |
| Sierra Leone | -0.37 |
| Slovenia | -0.39 |
| Papua New Guinea | -0.39 |
| Zambia | -0.40 |
| Lesotho | -0.40 |
| United States | -0.43 |
| South Africa | -0.45 |
| St. Lucia | -0.46 |
| Nepal | -0.48 |
| Vanuatu | -0.52 |
| Canada | -0.52 |
| Finland | -0.52 |
| Ecuador | -0.52 |
| Bahamas | -0.52 |
| Barbados | -0.52 |
| Switzerland | -0.53 |
| Trinidad and Tobago | -0.53 |
| Kenya | -0.54 |
| St. Kitts and Nevis | -0.54 |
| St. Vincent and the Grenadines | -0.54 |
| Dominica | -0.54 |
| Palau | -0.54 |
| Fiji | -0.58 |
| Marshall Islands | -0.61 |

| | |
|---|---|
| Botswana | -0.61 |
| Grenada | -0.61 |
| Zimbabwe | -0.63 |
| Solomon Islands | -0.63 |
| Mexico | -0.65 |
| Samoa | -0.67 |
| Kiribati | -0.67 |
| Antigua and Barbuda | -0.89 |
| New Zealand | -0.99 |