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# What Can We Learn from Written Constitutions?

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## Abstract

This article responds to a set of well-known challenges to empirical research on formal institutions in comparative politics. We focus on the case of written constitutions and discuss the scholarly utility of studying such documents in the face of four analytic and theoretical challenges. Each of these challenges, in turn, implies a set of empirical questions, for which we invoke original data to sketch a broad-brushed set of answers. The data analysis and accompanying discussion suggest a set of guidelines for how written constitutions should be deployed in comparative research designs on topics that involve political institutions.

## INTRODUCTION

The written constitution has been experiencing something of a moment in recent years. Long the bread and butter of early twentieth-century comparativists (e.g., Quigley 1924, Shepard 1920), constitutions began—in the latter half of the century—to represent only a small sliver of the wide array of political phenomena that could be observed and studied rigorously. The renewed attention to constitutions might have a prescriptive basis; for those seeking to reshape societies and the way they are governed, there is nothing quite like the concreteness of rewriting higher law. This temptation has led to the increased appreciation of constitutions as key institutions underpinning governance. Constitutions are potentially crucial devices for providing political stability, protecting democracy, and undergirding economic performance (e.g., North & Weingast 1989). Constitutions have also become a centerpiece of foreign policy, with international efforts focused on their role in rebuilding shattered societies (Arato 2009, Miller 2010). Indeed, the pace of constitutional reform may surprise some. In any given year, it is estimated that four countries will be engaged in drafting a new constitutional text and many more will consider smaller revisions (Elkins et al. 2009). Drafters in these contexts are squarely focused on texts as instruments of institutional transformation.

Despite this central role in scholarship and practice, there is some confusion about the precise role played by written constitutions. The late Walter Murphy (2007, p. 193), one of our most distinguished scholars of public law, frequently insisted that we avoid conflating the term constitution with the written text, lest one neglect the other elements of higher law. Others have elaborated Murphy's point that the written text is not perfectly contiguous with the larger constitutional order of a country, an order that might include superstatutes, decisions of judges and agencies, and even informal institutions. Indeed, there has been somewhat of a parallel boom in studies examining the unwritten or extratextual constitution, with some according almost equal importance to sources outside the formal text as to the text itself (Amar 2012, Rubenfeld 2001, Tribe 2008, Young 2007; but see Grey 1975).

Murphy's point is but one of several potential limitations to the explanatory and descriptive power of written constitutions. In this article, we engage four real challenges to a focus on written constitutions and, for that matter, on formal institutions more generally: (*a*) that written constitutions underrepresent (and perhaps misrepresent) the larger sense of higher law in a given country (Murphy's point about constitutions as partial instruments); (*b*) that written constitutions are so heterogeneous as to be analytically incomparable across settings (the issue of comparability); (*c*) that constitutions are largely out of step with actual political practice (the issue of compliance); and (*d*) that even when constitutions do map onto political practice, they do not have causal efficacy but rather serve simply as devices for leaders to document current practice (constitutions as epiphenomenal).

Our approach to these challenges begins with a reconceptualization of written constitutions and the various other elements of what we might think of as the constitutional order, the larger set of constitutional elements that Murphy (2007) envisions. We suggest that a useful way to think about the constituent parts of the constitutional order is to distinguish constitutional form from constitutional function. We develop an inventory of the elements of the constitutional order, one intended to contextualize and sharpen our understanding of the role of the written constitution. We then consider each of the four challenges identified above. These challenges, one will notice, double as a set of empirical questions, which we treat as such by invoking an original set of data on written constitutions that speaks to each. Our approach is not to present exhaustive evidence on these questions (some of which represent entire research programs in their own right) but rather to suggest how one might engage these questions and to illuminate the principal strengths and weaknesses of a focus on written constitutions.

On the one hand, these analyses themselves suggest the value of studying the written constitution inasmuch as the four challenges cannot be addressed without carefully cataloging and studying the content of written constitutions. On the other hand, our analysis also highlights the theoretical and methodological limits associated with analyzing the written constitution. These boundaries imply a set of guidelines for the use of written constitutions in empirical research. We stress four central points derived from the analysis. First, we present comprehensive evidence about when, and on which topics, written constitutions are audible or silent. This leads to a classification of areas of higher law into those that are at the core of written constitutions and those at its periphery. Clearly, written constitutions will be less useful to scholars focused on peripheral areas of the written text. Second, we show that written constitutions vary enormously in their levels of compliance, both across constitutions and, more importantly, across substantive domains of the constitution. These illustrative findings should give researchers a much better sense of the causal bite of written charters. Third, we show that the pronounced degree of interdependence in the design of constitutions presents a distinct counternarrative to accounts of constitutions as mere reflections of decisions or norms available elsewhere. Such interdependence may even provide researchers with the opportunity to treat episodes of constitutional design as natural experiments in studies of the impact of constitutional provisions. Finally, our discussion of the comparability of written constitutions across contexts makes clear that a focus on the written constitution is most appropriate for only some research designs and some research questions. For some studies, a focus on the larger constitutional order makes more sense. On balance, we are bullish on the analytic prospects of written constitutions, but with a clear set of reservations regarding how they are deployed in research designs.

## THE WRITTEN CONSTITUTION: ITS ORIGINS AND, NOW, UBIQUITY

Written constitutions are nearly universal among modern states, and in most cases, it is a fairly simple matter to identify them. These two qualities provide considerable analytic leverage for a good many (but not all) research questions. Consider the matter of identifying a state's constitution. One operational definition is employed as part of the Comparative Constitutions Project (CCP), in which we invoke a set of three conditions to assess a law's status as a constitution.[1] The first condition is sufficient to qualify the document(s) as a constitution, whereas the second and third conditions are applied as supplementary tests if the first is not met. Constitutions consist of those documents that either are identified explicitly as the constitution, fundamental law, or basic law of a country (condition 1); or contain explicit provisions that establish the documents as highest law, through either entrenchment or limits on future law (condition 2); or define the basic pattern of authority by establishing or suspending an executive or legislative branch of government (condition 3).[2] The United Kingdom is excluded from the sample entirely because

[1]For more information on the project, see **https://comparativeconstitutionsproject.org/**.

[2]This set of conditions is similar to criteria used by Elster (1995, p. 364). These criteria are principally nominal but admittedly include some broadly functional elements as secondary and tertiary considerations. In the Israeli case, for example, we define the constitution as the series of basic laws (per condition 1), even though not all are superior to ordinary legislation and thus do not meet condition 2, and few of them meet condition 3. The functional criteria of highest law and establishing basic authorities help us resolve problematic cases such as Canada, New Zealand, and Saudi Arabia (Palmer 2006). In the case of Saudi Arabia, the holy Qur'an is the highest law and there is no formal constitution; however, we treat the three 1992 royal decrees establishing the basic system of government, provinces, and the consultative majlis (assembly) as constituting the government (Aba-Namay 1993). This is a case that meets condition 3 but not condition 1 or 2. Fortunately,

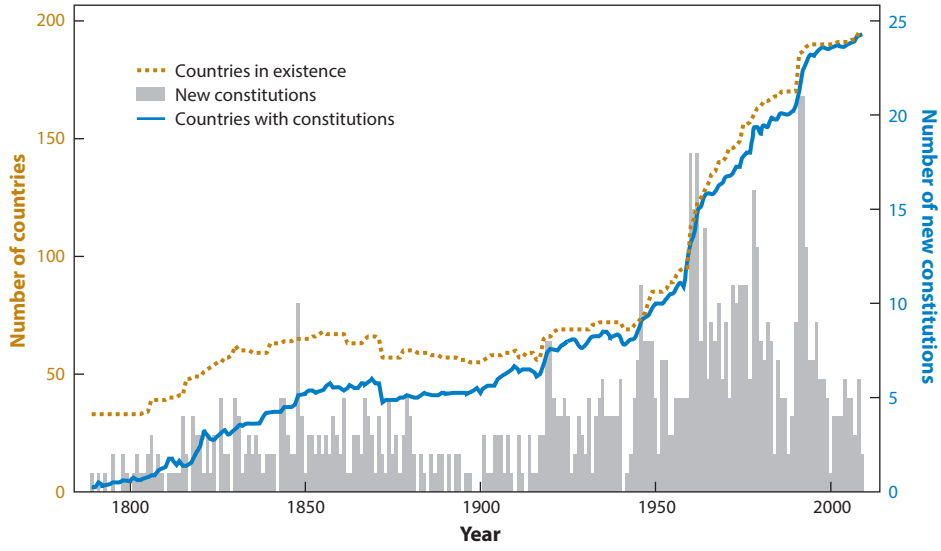


**Figure 1**

Universe of states and constitutions (1789–2010). The graph uses data from the Comparative Constitutions Project (Elkins et al. 2021; see **https://comparativeconstitutionsproject.org/**) to chart the prevalence of written constitutions and the number of new constitutions in a given year.

its constitution is uncodified (King 2007), though some experimental efforts at codification are under way, including our own on the website Constitute (**https://www.constituteproject.org/**).

Constitutions, by this definition, have been around for some time but have become common only in the last 200 years. The idea of the modern written constitution is thought to have taken shape alongside the practice of the American states, beginning with the colonial charters.[3] When the people of Virginia issued a Declaration of Rights and a Constitution in 1776, they amplified the idea that men had inherent rights, which were to be articulated by a group of freely chosen representatives in a written document to limit government (Dippel 2005). The initial charter of the United States, the Articles of Confederation, took the form of an interstate compact or treaty and followed norms of international law requiring unanimous consent among the constituent units. The US Constitution promulgated in 1789 is regarded as the first national constitution of the modern era and was followed quickly by short-lived constitutions in France (1791, 1793, 1795, and 1799), the Netherlands (1798), Poland (1791), and Switzerland (1798). More than 20 years elapsed between when the US Constitution was written and when the first enduring constitutions were written in Europe—specifically, those of Sweden (1809), Norway (1814), and the Netherlands (1814).

After these early constitutions were drafted, later constitution making has primarily occurred in waves surrounding major world events and booms of state births. These waves are illustrated in **Figure 1**, which charts both the prevalence of written constitutions and the number of new

at least for analytic purposes, formal constitutions are the norm and defining a state's constitution is largely straightforward. Roughly 90% of the constitutional materials in the sample qualify on the basis of condition 1. The other 10% qualify on the basis of condition 2 or 3.

[3]There was also the short-lived constitution of Corsica, adopted in 1755 as part of an ultimately unsuccessful attempt at gaining independence (Carrington 1973).

constitutions in a given year. The first wave of national constitutions is associated with the independence movements in Latin America in the 1820s. Like some other elements of the nation-state, constitutions were initially a phenomenon of North and South America (Anderson 2006). In newly created states, such as the former colonies in the New World, constitution making marked a vehicle for crafting national identity and for proclaiming sovereignty on the world stage. Consequently, during the Latin American independence movement, more than 25 constitutions were written in the region, leaving virtually every Latin American state with a written constitution. Gargarella (2013) is a useful reference point for a characterization of historical constitutional development in the region.

Only with the spread of the democratic revolutions in the mid-nineteenth century were constitutions adopted widely on the European continent. For states that had functioned well enough without a constitution for years, to follow fashion and write such a document might have seemed unnecessary. Over time, however, new states were increasingly likely to adopt constitutions as one of their first acts. Hence, future waves of constitution making were associated with waves of state creation. For instance, the four major periods of constitution making in the twentieth century coincided with periods of state birth: one after each World War, one during decolonization, and another at the end of the Cold War. Most recently, Kosovo adopted its constitution only months after declaring its independence from Serbia in 2008, as did East Timor in 2002, and South Sudan in 2011.[4]

As the last paragraph suggests, we observe systematic differences in constitution making between those states in existence as of 1789 and those that come into existence thereafter. Constitution making in the latter group might be characterized as neonatal, while constitutions in the former group were adopted in an adolescent or even mid-life phase of the nation-state. This systematic difference is explored in more detail by Elkins et al. (2009, pp. 41–43). They find that of states that formed prior to 1789, 50% went over 300 years without a formal constitution. Although there was a concerted shift to constitutionalization following the adoption of the US, French, and Polish documents at the turn of the century, a fair percentage of states in existence prior to 1789 (roughly 40%) remained without a constitution through the end of the nineteenth century. Prominent examples include China, Thailand, and Iran. In Europe, the adoption rate was much higher than for other pre-1789 states; only two states in Europe that existed prior to 1789 adopted constitutions later than 1850—Monaco in 1911 and Andorra in 1993. Conversely, states that became independent after 1789 almost immediately adopted constitutions following state birth. In fact, by the second year of life a full 83% of these states had adopted a constitution, and after five years of life almost 95% of them had such instruments (Elkins et al. 2009). Constitution making evidently has become an essential symbol of the modern state (Breslin 2009, Corwin 1936).

In sum, the development of a norm of constitution writing was quick and comprehensive. In the space of 50 years or so in the early nineteenth century, constitutions had become a thoroughly necessary element in the script of newly independent states (Go 2003, Krucken & Drori 2009). By the middle of the twentieth century, even older states had adopted the practice. Today, discrete texts identified as written constitutions are nearly, though not completely, universal. Since the US Constitution was written in 1789, some 790 discrete constitutions have been written and promulgated in 215 independent states, as of January 2021. This spread of the constitutional form captures a central political practice common across contexts: national elites self-consciously articulating an institutional design for national governance. Notwithstanding the wide range of

[4]One contribution of the Comparative Constitutions Project (CCP) has been the documentation of each constitutional reform across the world since 1789. A graph of the chronology is available at **https://comparativeconstitutionsproject.org/chronology/**.

circumstances in which constitutions are drafted, and the myriad procedures used to produce them, most (though probably not all) instances of constitution making have this feature in common (Ginsburg et al. 2009). This ubiquity of the written constitution suggests that the instrument may serve as an observable and presumably comparable instrument of fundamental importance to political communities of the last 200 years. Still, the spread of the constitutional form does not resolve all questions of conceptual and measurement comparability. We need to assess whether our understanding of the constitution of a particular country, and the empirical criteria that we use to identify it, travels well across time and space. In other words, we need to know whether we can obtain comparable answers to the question, "What is the written constitution of country X in year Y?" across cases spanning the range of X and Y. We return to this analytic quandary in some detail below. Our first step is conceptual, in which we unpack the role of the written constitution in the larger constitutional order.

## CONSTITUTION-AS-FUNCTION VERSUS CONSTITUTION-AS-FORM

One way to approach the debate over the term constitution is to distinguish references to either certain functions or a certain form. The first idea emphasizes the constitutional role in society, which may or may not be played by a written document; the second idea emphasizes the formal written charter. One very broad functional definition comes from the venerable British constitutional scholar Albert Venn Dicey (1960, p. 23): "Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state." Breslin (2009) identifies several core functions of constitutions, including creating a citizenry, structuring the institutions of government, regulating conflict, and limiting power. This last function, commonly termed constitutionalism, is vital to the functioning of democracy. By reducing the stakes of electoral loss, constitutions can assure minorities that their core interests will not be violated, making rotation in office possible (Mittal & Weingast 2013).

Another set of functions are symbolic. Preambles, for example, can define the nation and its goals (Frosini 2012, Voermans et al. 2017). King (2013, p. 73) adds that constitutions also embody aspirations and values, acting as "mission statements." By providing a "statement of core values and commitments," he argues, constitutions can play a symbolic and legitimating role for the nation and its goals (p. 73). In this conception, the constitution functions not so much as a set of rules as an ongoing set of practices that define the political unit, facilitating, under some circumstances, the emergence of constitutional identity (Jacobsohn 2010). These functions are only some of those ascribed to constitutions. Depending on their analytic and normative purposes, scholars may adopt thicker or thinner functional definitions. We tend to favor three: limiting government, defining the nation and its goals, and defining patterns of authority. But whatever functions are ascribed to constitutions, it is clear that the role can be played by norms, rules, and institutions outside the four corners of the constitutional text. More circumscribed definitions limit the term constitution to the founding charter—that is, the constitution-as-form—regardless of whether it actually plays the roles expected of it.

Murphy (2007, p. 13) provides an example of a functional definition:

> I shall use *constitution* [italics in original] interchangeably with what the Basic Law of the Federal Republic of Germany and the Constitutional Court refer to as the "constitutional order": the nation's constitutional text, its dominant political theories, the traditions and aspirations that reflect those values, and the principal interpretations of this larger constitution.

Murphy's notion of the constitutional order here is a useful synonym for constitution-as-function, denoting the larger set of constitutional elements. The written text is a part of this order but not its entirety. In the functional definition, the constitution equals the constitutional order; in

the formal definition, the Constitution constitutes only one element, albeit a very central element, of the larger constitutional order. Another way to capture this idea is to refer to the big-C and small-c versions of the word, in which the proper noun Constitution is reserved for the text and the lowercase spelling refers to the broader constitutional order (Brennan & Pardo 1991, Harris 1993, Michelman 1998). While ordinary citizens might instinctively be drawn to the more formal big-C conception, scholars tend to use more functional, small-c definitions.

For example, Persson & Tabellini's (2003) classic book *The Economic Effects of Constitutions* assumes a functional understanding of constitutions. The authors focus considerable attention on electoral systems, which are surely part of the functional set of rules regulating the interactions between state and citizen but are not typically laid out in written constitutions. Indeed, only 30% of written constitutions since 1789 have specified the details of the electoral system for the lower house of the legislature (Elkins et al. 2009, p. 40).[5]

## ELEMENTS OF THE CONSTITUTIONAL ORDER

If not all that is constitutional is in the constitution, where might these rules be found if not in the text? This section evaluates the various other elements of the constitutional order. In particular, we assess the role that other documents and non-textual instruments play in the larger constitutional order.

### Other Texts

Excessive focus on the formal written charter might lead us to ignore other important laws that are seemingly constitutional. In many legal systems, for example, there exists a set of organic laws or institutional acts that serve a constitutive or organizational function. Indeed, in some cases, these statutes are required by the formal charter itself, and they may be subject to special, more rigorous procedures than used in ordinary legislation. Their passage or revision may require supermajorities and they can be practically, if not formally, unamendable. Administrative law systems are another example; their procedural laws define the relationship between citizen and state. In other words, non-constitutional documents can play constitutional functions and thus might be treated as part of the constitutional order under a functionalist definition. In the United States, for example, some might include superstatutes that are for all practical purposes entrenched, such as the Civil Rights Act of 1964, as well as legal decisions of the US Supreme Court (Eskridge & Ferejohn 2001, Young 2007). American judges freely cite documents such as the Federalist Papers and occasionally treat them as decisive on certain constitutional questions.[6] In other countries, including France and Israel, constitutional courts have given declarations of independence constitutional status.

One might object that such quasi-constitutional documents differ from the formal constitution. Although some statutes can play a constitutional function in defining patterns of authority and establishing institutions, they lack some of the qualities of formal constitutions. For example, these laws are usually not adopted in the formal and deliberate manner that typically characterizes the process of constitution making, which often relies on specially designated assemblies (Elster et al. 2018). More importantly, the level of entrenchment of organic laws is usually less than that of a constitution. Entrenchment provides a law with a status of being more enduring and stable, making it a form of higher law; but we see constitutions not only as higher law (a characteristic that they may share with organic acts and other rules) but as highest law.

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[5]Data from the LHELSYS variable from the CCP, available for download at **https://comparativeconstitutionsproject.org/download-data/**.

[6]*Printz v. U.S.*, 521 U.S. 898, 971 (1997), J. Souter dissenting opinion: "it is the Federalist that finally determines my position."

## Nontextual Instruments

In any constitutional system, the language of constitutional text is modified and interpreted by political actors, judges, and citizens. Interpretation has the power of transforming the original, and even very explicit, textual understandings, sometimes radically. In the United States, for example, the courts have updated the vague eighteenth-century document to make it suitable for modern life (Strauss 2010). In other countries, political practices may evolve and be accepted as constitutional even if never written into law. These norms are sometimes called constitutional conventions or unwritten constitutional rules (Barber 2009, Elster 2014; see also Doyle 2017; Horwill 1925, p. 21; Krishnamurthy 2009; Llewellyn 1934; Munro 1930; Tiedeman 1890). Many of the rules around constitutional monarchies, such as that found in Great Britain, are unwritten, such as the convention that a monarch must sign bills that pass both houses of parliament, a norm that has not been violated since 1708.

Unwritten constitutional norms can serve to supplement the written text. For example, nothing in the US Constitution requires or allows courts to exercise the power of judicial review in the United States. Similarly, the Nineteenth Amendment provides women only with the right to vote, yet many believe that its effect was to guarantee equality in many other domains as well (Siegel 2020). Other constitutional norms explicitly conflict with the written text. For example, in Australia, the governor-general as the representative of the Queen has the nominal power to dismiss the prime minister, but convention dictated that this power not be used. However, in 1975, Governor-General Sir John Kerr confronted a situation in which a Labour government could not secure a budget from the opposition-controlled Senate. The Governor-General dismissed the Labour Prime Minister, without giving him a final chance to resolve the gridlock, and installed the Leader of the Opposition in his place. This modified the constitutional understanding, even though it was perfectly consistent with the written text.[7] Similarly, in France in 1962, President Charles de Gaulle proposed and achieved a successful amendment of the constitution by referendum, even though the Constitution of 1958 lacked a provision for this. This amendment thus changed the constitution in a formal sense (as the referendum introduced direct election of the president) and in an informal sense (by setting a precedent for amendment through referendum). Unwritten rules and conventions modify and supplement the formal text, often in significant ways that make the original text a poor guide to present understandings. In such situations, the written constitution becomes a kind of semiotic for the actual, unwritten constitution.

The invisible constitution poses a significant challenge to comparative research, one that scholars are just beginning to tackle (Dixon & Stone 2018). It is difficult enough to determine exactly what norms ought to be included in the constitutional order in only one country; doing the same for multiple countries across time and space, while maintaining comparability, could be a Herculean task. The main problem is that, in contrast with formally adopted laws, conventions and norms lack a rule of recognition (Hart 1960). This means that even if a behavioral regularity is clear, it is not certain whether it represents the existence of a norm or simply a contingent practice that is subject to change. One famous example that illustrates the difficulties involved is the long-standing practice in the United States of limiting the president to two terms.[8] The 1787 Constitution was silent on this matter, even though it was debated during the convention. But George

[7] The Labour Party was also punished in the polls, confirming for some the modification of the constitutional convention.

[8] One might alternatively consider the norm against packing the Supreme Court, which was assumed by some to have a constitutional quality during and after the New Deal, even though it had been utilized by President Grant earlier in American history (Ackerman 2005, pp. 1796–97).

Washington, tired from the rigors of office, declined to run for a third term, setting a clear precedent followed by each of his successors. When President Ulysses Grant considered running for a third term, some argued that Washington's precedent amounted to an unwritten law (Horwill 1925, p. 22). Later, President Grover Cleveland's Democratic Party asserted that the two-term limit was law, so as to ensure intraparty rotation of candidates. That a major political party set aside its own best candidate in an election it proceeded to lose provides powerful evidence that a constitutional norm existed.

Theodore Roosevelt was the next president in a position to validate the norm. Roosevelt became president after the death of William McKinley and won election in 1904. After stepping down, Roosevelt sought to win another term in 1912 by running on his independent Bull Moose ticket. While campaigning, Roosevelt was shot by a man who justified his actions "as a warning that men must not try to have more than two terms as President" (Horwill 1925, p. 26). Roosevelt finished his speech that day but was ultimately defeated. When his cousin Franklin Delano Roosevelt (FDR) won election to a third term in 1940, it provoked a widespread debate and ultimately a constitutional amendment to reinstate the norm of two terms. But the earlier history raises questions: Did Theodore Roosevelt's defeat establish the existence of the convention? Or is the fact that he gathered millions of votes evidence that the convention did not exist? If the convention was extant, when was it established? By Washington, Grant, or Cleveland? By the shooter of Roosevelt? Even if one believes that such a convention existed, would it include a nonconsecutive third term? And did it include an implied wartime exception so that FDR acted within the scope of the convention? The only thing we can say for certain is that the norm was constitutional once Alabama ratified the Twenty-second Amendment in 1951, completing a rapid process of state ratification. This clarity helps justify a focus on written documents and formal processes.

## COMPARABILITY AND THE PROBLEM OF CONCEPTUAL STRETCHING

The question of term limits in the pre-FDR United States suggests that parsing the meaning of the small-c constitution is challenging in a single country. Tribe's (2008) description of the invisible constitution evocatively captures the observational difficulties. One can only imagine the perils of comparing the operationalization of this broader concept across a large number of countries and across historical periods. But, of course, the same sort of methodological challenge confronts the study of written constitutions across contexts. Is it really appropriate to compare documents written in different centuries or on different continents? This is a concern about excessive heterogeneity in the sample. Can we reliably compare the Spanish Constitution written in Cádiz in 1812 with that written in South Sudan in 2011? Is it appropriate to use the same term to describe constitutions in democracies and those in dictatorships, which Murphy (1993, p. 8; and see Law & Versteeg 2013) calls "shams"?

Surely, the contents of constitutional documents, their place in society, and their impact will differ across contexts. For example, scholars, including Murphy, often dismiss constitutions such as those of the Soviet Union as not mattering (Billias 2009; but see Brown 2008). But the existence of a gap between textual promise and actual practice does not necessarily condemn the scholarly enterprise. In important respects, it depends what the research question is. For example, Jacobsohn (2010) emphasizes that a gap can help motivate improvements and form constitutional identities. Elkins et al. (2009) argue that the conceptual differences among constitutions (and the degree of compliance to them) are important explanatory factors in the endurance of constitutions, not threats to comparability. That work focuses on a particular form, regardless of whether it plays the same functions or takes on the same meaning across cultures. In that sense, one might welcome

significant variation in the meaning of constitutions across contexts, as this variance is exactly what one might profitably seek to explain or use to explain variation in other concepts.

Written constitutions may also be helpful to scholars who focus on the origins of ideas and the process of constitution making. Written constitutions are products of discrete exercises of intentional institutional design, and as such, they provide insight into the intentions of drafters. The comparative study of constitution-making processes—a relatively underexplored topic—surely assumes a degree of comparability in the final product, even if it is not the direct target of analysis (Landau & Lerner 2019, Miller 2010). Written constitutions are thus helpful as evidence of processes that are usually unobservable.

For other research questions, an exclusive focus on the written constitution can be inappropriate and even misleading. Consider a simple descriptive endeavor in which one wanted to know what the applied law of the land is in two countries, one in which the constitution is enforced and another in which the constitution is ignored and informal norms govern. The problem with a single-minded focus on the written constitution in this context is one that comparativists will recognize as conceptual stretching (Sartori 1970), the problem in which a concept that is highly relevant in one context may be irrelevant in another. Following Sartori, the solution would be to ascend the ladder of abstraction (or ladder of generality, as some prefer) by comparing a broader concept—in this case, the constitutional order—rather than a narrower one across contexts. In that way, countries that make use of different instruments or forms of lawmaking to accomplish the same end (say, written charters versus organic statutes) can be more usefully compared.

On a practical level, an upward shift to the concept of constitutional order has implications with respect to research design. The broader constitutional order consists of not just the text but "a complex superstructure of rules, doctrines, standards, legal tests, judicial precedents, legislative and executive practices, and cultural and social traditions" (Tribe 2008, p. 10). Determining the elements of this list is a conceptual challenge, and if that could be resolved, there is the empirical challenge of identifying and locating the particular elements that compose it. These hurdles weigh against treating the small-c constitution as an analytic unit for large-*n* studies. By contrast, the deliberate, public, and discrete character of the big-C Constitution provides an identifiable, objective historical record of activity across a wide set of cases. So, in a three-country study of, say, executive power, it would seem inappropriate to focus exclusively on the written constitution. But if one's design called for a broader perspective, perhaps to analyze trends in executive power or its statistical association with democratic stability, a focus on the written constitution might make sense.[9]

One way to approach the comparability of written constitutions is to ask whether they contain roughly the same content across contexts. For some research designs, similar content across constitutions would appear to be a necessary, albeit minimal, condition for comparability, though we reiterate that some research questions do not require similar content and may even employ variation in content as an important variable. But for many research questions, if constitutions written in different contexts (e.g., time periods, regimes, cultures) contain systematically different content, then comparisons between the documents written in those contexts would (arguably) be incomparable, or at least unproductive, because there would be little to compare. In some sense, the diffusion of constitutional provisions, which we discuss in greater detail below, assures that constitutions address similar issues across contexts. As further evidence of this pattern, **Figure 2** compares the content of constitutions across time periods, regime types, legal tradition,

[9]The latter study, of course, would need to acknowledge such possible nonequivalence in the measure of executive power across contexts.

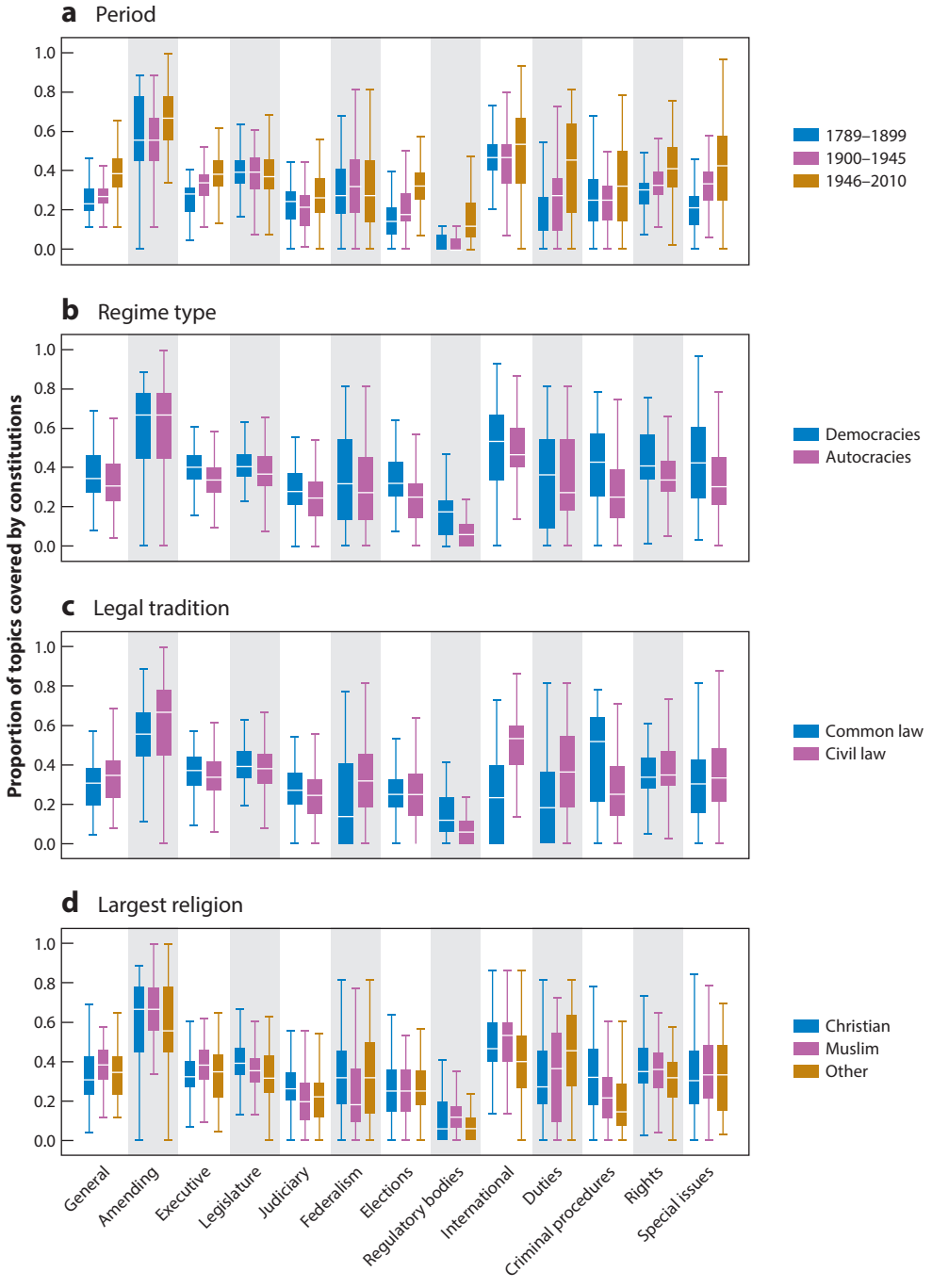


**Figure 2**

Constitutional specificity across contexts: time periods (*a*), regime types (*b*), legal traditions (*c*), and largest religions (*d*). Nonresponses to questions in the Comparative Constitutions Project survey (**https://www.comparativeconstitutionsproject.org/files/surveyinstrument.pdf**) indicate that the constitution is silent on that particular matter. Specificity, the quantity plotted on the *y*-axis, is the inverse of this nonresponse rate.

and predominant religious tradition.[10] Our measure of content here is one measure of specificity based on patterns of nonresponse to the survey instrument of the CCP. Recall that CCP analysts record over 600 characteristics of each of the world's constitutions written since 1789. For each constitution, we calculate the proportion of valid responses across a set of questions for each topic area. A nonresponse to a question in the CCP survey indicates that the constitution under analysis does not contain any information on that particular topic. Thus, the quieter a constitution is on a particular topic, the lower its specificity score, both overall and for that topic in particular, will be. **Figure 2** plots the distribution of these scores for various groups and for various topics.[11] The overlap in the coverage of constitutions across topics is remarkable. The interquartile ranges fail to overlap in only two instances across the 52 comparisons in the four panels: the regulatory bodies topic in **Figure 2*a*** and the international topic in **Figure 2*c***. We observe other differences across contexts, such as an overall increase in the specificity of constitutions over time and a general lack of specificity in civil law constitutions, but for the vast majority of issues addressed in constitutional texts, the degree of specificity is extremely similar across the four contexts assessed in **Figure 2**. This pattern is particularly apparent for the sections detailing the structure of government.

Although similar content may be a necessary condition for constitutions to be comparable, it is certainly not sufficient. Within the issue areas denoted in **Figure 2**, there could be a great deal of variability in the content of constitutions, with constitutions that either deal with different aspects of the issue areas or address the same aspects of the issue areas very differently. In some instances, such differences might make comparisons between constitutions seem silly, e.g., comparing the federalism provisions of a constitution that provides for subsidiary units with law-making power with those of a constitution that does not provide for such units but may go into great depth about municipal governance in one city. In other instances, these differences are potentially fruitful avenues of research. For example, one might expect that the provisions related to the executive branch would contain very different content between presidential and parliamentary constitutions. Parliamentary systems would, at the very least, need constitutional provisions detailing the procedures through which the head of government is held accountable by the legislature. Yet recent research suggests not only that, historically, the constitutions of these two systems of government are more similar than one might expect but also that hybridization of the executive over time has greatly reduced any meaningful distinction between the two systems (Cheibub et al. 2014). Such research helps us understand the differences in constitutions across institutional and cultural contexts as well as how those differences have evolved over time.

Another real challenge to the comparability of written constitutions across contexts concerns their interpretation. Certainly, understanding any text presupposes a shared understanding of language, whose terms and syntax might be highly context dependent. Can analysts reliably interpret constitutions written across different periods, regions, and cultures? The methodology of the CCP provides at least one response to this question. In the protocol for that project, the investigators provided for two independent codings of a given constitution as well as a reconciliation procedure that reviews any discrepancies between the two codings. The degree of intercoder agreement on the set of survey questions for any given constitution may be taken as an indicator of the degree of error associated with the interpretation of that constitution. Strikingly, when the investigators analyze the variance in intercoder agreement, they find that it does not vary with respect to the region, period, or language in which the constitution was drafted (Melton et al. 2013). Apparently,

[10] For a definition of specificity and its components (i.e., scope and detail), see Elkins et al. (2009).

[11] The questions assessed are the 502 substantive, close-ended questions. All open-ended questions and close-ended questions about the structure of the constitution are excluded.

modern coders residing in North America have the same difficulty reading and interpreting a constitution regardless of the context of its drafting.

## ISSUES OF COMPLETENESS AND REPRESENTATIVENESS OF THE WRITTEN CHARTER

As the analysis above suggests, the concern of comparability is directly related to another question, What is the exact relationship of the written constitution to the larger constitutional order? In theory, it could be that the written charter and the functional constitution are identical. However, because the content of written constitutions can vary significantly, it is possible that many written constitutions fail to specify essential elements of the constitutional order. One way to examine this question is to identify those issues addressed in most constitutions, which might be thought of as the core features of written texts, and those that are more peripheral. With data from the CCP, **Tables 1** and **2** list constitutional features that are either core or peripheral based on their prevalence in constitutions. We classify features as core if they appeared in at least 80% of constitutions that were in force in 2006 and as peripheral if they appeared in fewer than 20%. We also report the prevalence of these features over time and highlight any topics whose prevalence has changed appreciably across eras.

Given the variation in constitutional coverage across topics, it seems to us that any claim about the utility of the written constitution should be conditional on the constitutional topic under consideration. To begin, recall the functions of the constitution mentioned above: limiting government, defining the nation and its goals, and defining patterns of authority. Modern written constitutions do a good job of at least addressing these topics. The primary limitation on government in the constitution is a set of rights, and of the 193 constitutions in force in 2018, only 2 did not contain any rights provisions.[12] For those countries that did have rights provisions in their constitutions, we estimate that, on average, 16% of the constitution was dedicated to the specification of these rights. Certain rights—the classic negative liberties like freedom of religion and speech—are so ubiquitous as to be nearly universal.

Similarly, patterns of authority are well specified in constitutions. As of 2018, provisions establishing the structure of the executive and legislative branches exist in some form in all countries' constitutions. Furthermore, the vast majority of constitutions contain provisions about either the structure or the function of the branches of government. Likewise, 90% (169) of constitutions in force had provisions detailing the procedures by which states of emergency can be called, 89% (168) had a power of executive pardon and at least some provisions specifying the procedure through which legislation is passed, 81% (154) also detailed the procedure through which the budget is passed, and 89% (165) clearly stated who was responsible for interpreting the constitution (these statistics use the sample from 2006). The goals of the state are generally defined in the preamble of constitutions, and preambles were included in 81% (152) of the constitutions in force.

Still, some omissions from most texts are readily apparent when one examines the peripheral elements. Judicial age limits, term limits for legislators, legislative quotas, and campaign finance are not generally regulated. One might also expect that written constitutions would frequently describe such crucial issues as the electoral system for the legislature, which generates important incentives for temporal majorities to manipulate the rules. Instead, most constitutions either

[12]The two countries lacking rights provisions in their constitutions are Brunei and Saudi Arabia. The Saudi constitution in our account is a series of statutes that compose the government (see Elkins et al. 2009, p. 49).

**Table 1 Core constitutional elements**[a]

| Element | Percent of constitutions with element | | | |
|---|---|---|---|---|
| | 1789–1899 | 1900–1945 | 1946–1999 | 2000–2020 |
| **General** | | | | |
| Reference to democracy | 26 | 61 | 93 | 89 |
| Reference to sovereignty | 77 | 72 | 88 | 88 |
| Reference to foreign or international trade | 100 | 100 | 100 | 100 |
| Presence of oath for office holders | 82 | 87 | 79 | 86 |
| **Amending** | | | | |
| Specifies final approver for amendments | 74 | 77 | 88 | 90 |
| Provides a procedure for constitutional amendment | 89 | 93 | 96 | 98 |
| Specifies bodies that approve amendments | 86 | 87 | 91 | 95 |
| Specifies bodies that propose amendments | 81 | 82 | 80 | 83 |
| **Executive** | | | | |
| Head of state has power to pardon | 73 | 84 | 90 | 89 |
| Specifies emergency procedures | 73 | 76 | 89 | 90 |
| Specifies a cabinet | 93 | 99 | 98 | 98 |
| Presence of dismissal procedure for the head of state | 66 | 60 | 70 | 78 |
| Specifies selection process for the head of state | 93 | 96 | 96 | 98 |
| Specifies replacement procedure for the head of state | 84 | 86 | 84 | 89 |
| Specifies additional powers for the head of state | 88 | 88 | 87 | 79 |
| Specifies restrictions on eligibility to serve as the head of state | 82 | 76 | 74 | 83 |
| **Legislature** | | | | |
| Specifies leader of the first chamber | 41 | 62 | 88 | 90 |
| Mentions legislative committees | 31 | 42 | 71 | 78 |
| Specifies at least one category of special legislation | 63 | 91 | 93 | 97 |
| Specifies selection procedure for the first chamber | 89 | 88 | 92 | 94 |
| Presence of legislature | 98 | 99 | 99 | 99 |
| Specifies term length for the first chamber | 92 | 89 | 89 | 88 |
| Specifies bodies that may initiate legislation | 90 | 89 | 87 | 89 |
| Immunity for legislators | 85 | 86 | 82 | 84 |
| Specifies bodies that may call an extraordinary legislatorial session | 90 | 90 | 84 | 82 |
| Specifies bodies that approve legislation passed by the legislature | 83 | 77 | 77 | 85 |
| **Judiciary** | | | | |
| Declares an independent judiciary | 38 | 63 | 77 | 77 |
| Specifies bodies responsible for interpreting the constitution | 46 | 67 | 83 | 86 |
| Specifies selection method for the highest ordinary court | 78 | 65 | 77 | 81 |
| **Federalism** | | | | |
| Recognizes subnational governments | 92 | 92 | 86 | 86 |

(*Continued*)

**Table 1 (*Continued*)**

| Element | Percent of constitutions with element | | | |
|---|---|---|---|---|
| | 1789–1899 | 1900–1945 | 1946–1999 | 2000–2020 |
| **Elections** | | | | |
| References to political parties | 3 | 29 | 79 | 82 |
| Restrictions on who may vote | 78 | 82 | 86 | 87 |
| **International** | | | | |
| Provisions concerning international law | 76 | 64 | 71 | 78 |
| Mention of treaties | 95 | 99 | 87 | 90 |
| **Criminal procedures** | | | | |
| Prohibits punishment by ex post facto laws | 59 | 55 | 69 | 79 |
| **Rights** | | | | |
| Specific groups protected from discrimination | 26 | 52 | 85 | 86 |
| Freedom of association | 41 | 85 | 89 | 91 |
| Freedom of religion | 52 | 90 | 90 | 93 |
| Freedom of assembly | 48 | 88 | 86 | 92 |
| Status of cruel or inhuman treatment | 27 | 37 | 58 | 78 |
| Freedom of opinion or conscience | 50 | 71 | 76 | 81 |
| Freedom of movement | 50 | 62 | 73 | 86 |
| Right to own property | 61 | 75 | 81 | 85 |
| Mention of equality before the law | 75 | 81 | 94 | 97 |
| Freedom of expression or speech | 71 | 85 | 89 | 93 |
| Right to privacy | 63 | 74 | 78 | 84 |
| Mentions citizens or nationals | 97 | 97 | 99 | 98 |
| Possibility of expropriation | 90 | 92 | 84 | 90 |
| **Special issues** | | | | |
| Mention of education | 80 | 89 | 87 | 90 |
| Mention of the military | 98 | 95 | 95 | 92 |
| Number of coded constitutions (sample) | 153 | 97 | 385 | 188 |
| Number of constitutions (population) | 234 | 134 | 437 | 190 |

[a]Gray shading indicates significant change over time.

specifically leave the design of electoral systems to ordinary law (33% of constitutional texts do so for the lower house, or only house, since 1789) and the drawing of districts (12% since 1789), or do not mention election law issues of either kind at all (45% and 69%, respectively, since 1789).[13] Only 21% of constitutions in our study mention central banks, whose constitutionally protected independence is increasingly considered essential to macroeconomic stability, and media and human rights commissions remain peripheral.[14] If a researcher is concerned with the structure and workings of these very important institutions, an exclusive focus on the written constitution is inappropriate.

Some of the elements have gained or lost popularity over time. The US Constitution mentions bankruptcy, as did nearly 20% of constitutions through the nineteenth century. But only approximately 6% of constitutions mention it today, meaning that it has become truly

[13]Data from the LHELSYS and DISTRICT variables are from the CCP (Elkins et al. 2021).
[14]Data from the BANK variable are from the CCP (Elkins et al. 2021).

**Table 2 Peripheral constitutional elements[a]**

| Element | Percent of constitutions with element | | | |
|---|---|---|---|---|
| | 1789–1899 | 1900–1945 | 1946–1999 | 2000–2020 |
| **General** | | | | |
| Mention of the national motto | 11 | 7 | 30 | 20 |
| Reference to free market or capitalism | 4 | 9 | 18 | 18 |
| Prospect of territorial expansion | 19 | 15 | 20 | 19 |
| Presence of a truth and reconciliation commission | 0 | 0 | 1 | 4 |
| Reference to geographic borders | 34 | 21 | 15 | 16 |
| **Legislature** | | | | |
| Presence of a quota for the first chamber | 5 | 8 | 15 | 17 |
| Presence of a quota for the second chamber | 3 | 5 | 9 | 9 |
| Requires earnings disclosure of legislators | 5 | 2 | 9 | 9 |
| Requires legislatorial votes to be public record | 15 | 15 | 12 | 14 |
| Term limit for the members of the second chamber | 33 | 9 | 9 | 10 |
| Term limit for the members of the first chamber | 54 | 22 | 16 | 15 |
| **Judiciary** | | | | |
| Requirement that higher court's actions take precedent | 3 | 5 | 16 | 13 |
| Specifies necessary number of votes to find legislation unconstitutional | 3 | 8 | 11 | 12 |
| Right to petition for amparo | 4 | 8 | 6 | 9 |
| Opinions allowed for the highest ordinary court | 18 | 9 | 11 | 11 |
| Term limit for ordinary court judges | 29 | 24 | 15 | 19 |
| Minimum age for ordinary court judges | 54 | 35 | 15 | 12 |
| **Federalism** | | | | |
| Revenue sharing with municipal governments | 3 | 6 | 14 | 16 |
| Federal review of subnational legislation allowed | 16 | 22 | 21 | 20 |
| Rights granted to indigenous groups | 0 | 1 | 4 | 6 |
| Provisions for accession | 15 | 11 | 17 | 16 |
| **Elections** | | | | |
| Public financing of campaigns | 0 | 0 | 6 | 11 |
| Compulsory voting | 8 | 15 | 12 | 8 |
| Limits on money used for campaigns | 0 | 0 | 3 | 6 |
| Arrangements for scheduling elections | 18 | 21 | 15 | 13 |
| **Regulatory bodies** | | | | |
| Presence of a media commission | 2 | 2 | 11 | 16 |
| Specifies meritocratic recruitment of civil servants | 10 | 16 | 17 | 14 |
| Presence of a corruption commission | 1 | 0 | 6 | 7 |
| Presence of a human rights commission | 1 | 0 | 6 | 14 |
| **Criminal procedures** | | | | |
| Juveniles given special rights or status | 1 | 4 | 11 | 14 |
| Protection of victims' rights | 1 | 0 | 4 | 9 |
| Forbids detention of debtors | 17 | 30 | 15 | 14 |
| Mentions bankruptcy law | 19 | 3 | 6 | 6 |
| Specifies status of corporal punishment | 47 | 32 | 10 | 9 |

(*Continued*)

**Table 2 (*Continued*)**

| Element | Percent of constitutions with element | | | |
|---|---|---|---|---|
| | 1789–1899 | 1900–1945 | 1946–1999 | 2000–2020 |
| **Rights** | | | | |
| Incorporation of rights treaties | 3 | 0 | 18 | 18 |
| Right to enjoy the benefits of scientific progress | 3 | 0 | 15 | 13 |
| Mention of consumer rights or protection | 1 | 1 | 10 | 20 |
| Specifies who is bound by rights provisions | 5 | 4 | 13 | 17 |
| Provisions for civil marriage | 7 | 6 | 12 | 12 |
| Right to overthrow government | 2 | 2 | 5 | 6 |
| Declares status of law contrary to religion | 1 | 1 | 4 | 4 |
| Declares status of religious law | 10 | 8 | 12 | 11 |
| Right to testate | 10 | 11 | 11 | 8 |
| Right to bear arms | 11 | 6 | 2 | 3 |
| Right to transfer property freely | 28 | 20 | 18 | 19 |
| Contains provisions related to social class | 39 | 32 | 24 | 19 |
| **Special issues** | | | | |
| Mention of economic plans | 1 | 5 | 32 | 19 |
| Specifies role of the state in the operation of electronic media | 3 | 5 | 19 | 18 |
| Declares obligations to transfer wealth to particular groups | 3 | 9 | 15 | 13 |
| Provides for integration of ethnic communities | 6 | 6 | 17 | 20 |
| Number of coded constitutions (sample) | 153 | 97 | 385 | 188 |
| Number of constitutions (population) | 234 | 134 | 437 | 190 |

[a]Gray shading indicates significant change over time.

peripheral. Nineteenth-century constitutions were more likely to directly address social class, while twentieth- and twenty-first-century constitutions tend to focus on equality and mention specific groups to be protected from discrimination. Political parties, by contrast, were rarely addressed in nineteenth-century constitutions but are now core elements of constitutional design (82% of constitutions in force address them).

In sum, if our understanding of the function of a constitution is to define core institutions and set out key principles, we might be surprised to see what is left in and left out of various constitutions (Strauss 2001). However, there is a standard core to constitutional texts that has become conventional across a very diverse set of polities. And any variation in the topics that texts attend to might be worthy of analysis in itself. None of this gives us any reason to think that scholars should shy away from analyzing the genre.

## CORRESPONDENCE BETWEEN TEXT AND PRACTICE

A common objection to the study of the written constitution is the observation that there is often, perhaps always, a gap between the text and actual political practice. A complete evaluation of the relationship between formal constitutional provisions and constitutional practice is an enormous enterprise (Chilton & Versteeg 2020). However, we provide some suggestive evidence here. We assess the relationship between the formal charter and the functional practice in two substantive domains: the power of the legislature and the protection of rights.

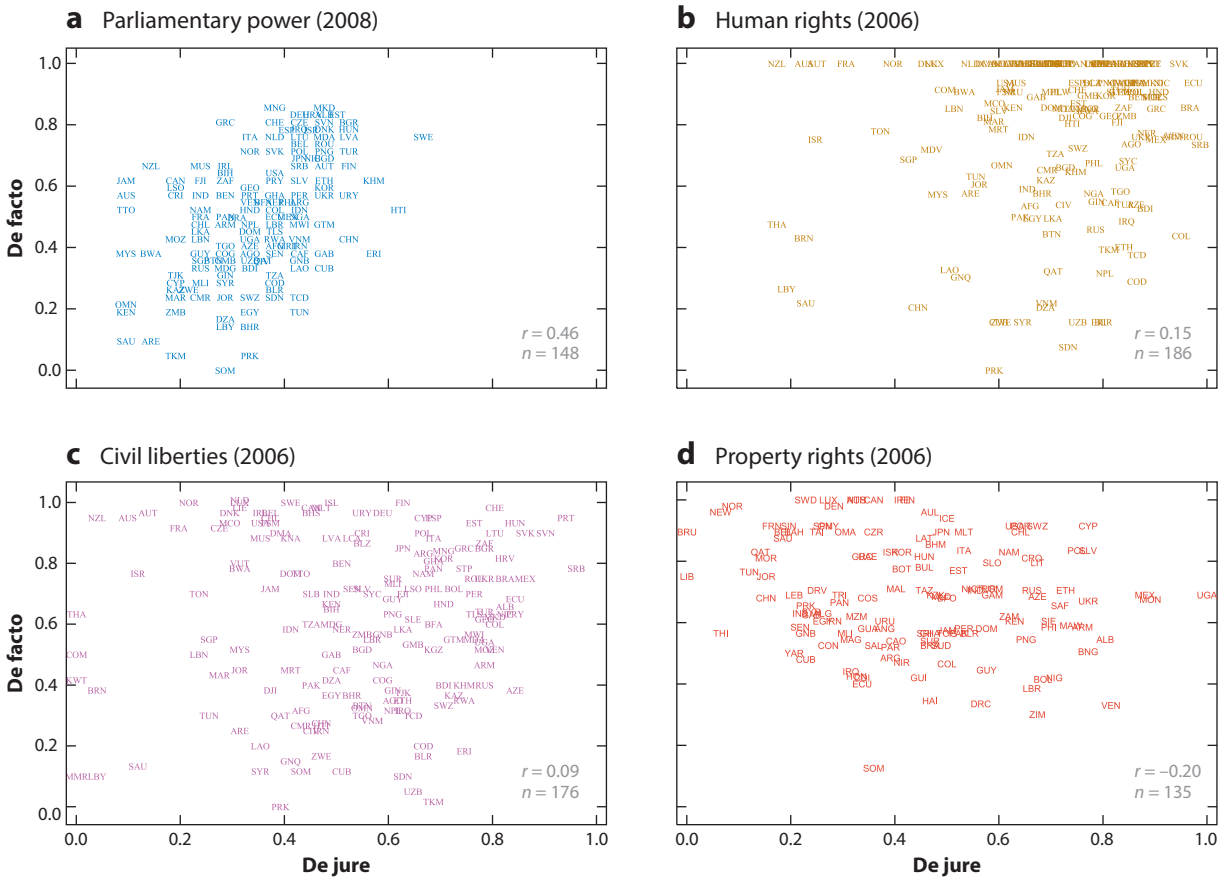


**Figure 3**

De jure and de facto constitutional law across four areas: (*a*) parliamentary power, (*b*) human rights, (*c*) civil liberties, and (*d*) property rights. De jure data are from the Comparative Constitutions Project (Elkins et al. 2021). De facto data are from (*a*) Fish & Kroenig (2009), (*b*) Cingranelli & Richards (2010), (*c*) Freedom House, and (*d*) Gwartney et al. (2009).

**Figure 3** plots de jure constitutional provisions of parliamentary power, human rights, civil liberties, and property rights against the de facto practice for the countries in our sample in 2006. To measure parliamentary power, we rely on the index developed by Fish & Kroenig (2009) based on a set of 32 items scored by country experts circa 2008. Because experts are presumably versed in the operation of legislative power as it is manifest (hence the advantage of surveying country experts), we can treat this as a de facto measure. For human rights, we use the CIRI human rights data set created by Cingranelli & Richards (2010). The CIRI data use State Department reports to measure countries' rights practices. We use these data to create a de facto index covering a broad spectrum of civil, economic, and political rights. We also break down this omnibus rights measure into its civil and economic components. For civil liberties, we rely on a 2008 index of de facto protection created by Freedom House, and for property rights, we rely on an index of de facto protection created by the Fraser Institute (Gwartney et al. 2009). For each de facto index, we created a comparable de jure index using data from the CCP.

Although there is a fair amount of variation in all four graphs in **Figure 3**, the constitutional provisions regarding parliamentary power describe the reality in these countries much better than

do the constitutional provisions about rights. The correlation between the de jure and de facto measures of parliamentary power is a moderately strong 0.46, whereas the de jure and de facto measures of rights correlate at only 0.15. Aside from variance between parliamentary power and rights, the figure demonstrates that there is a significant degree of variation between the different sets of rights. The correlation between the de jure and de facto indices is lower for both civil liberties and property rights than for the omnibus human rights index. The correlation is even negative in the case of property rights. The de jure/de facto relationship in **Figure 3** demonstrates the more general finding in our data that the functioning of important political institutions is described fairly accurately in constitutions but the extent to which rights provisions are implemented in practice varies dramatically across countries, with some countries promising more than they deliver and others delivering more than they promise. Nonetheless, the figure highlights the great degree of variation both among provisions and among countries in the relationship between de jure and de facto constitutional provisions. From a research perspective, explaining this variation poses interesting challenges, and the inquiry is likely to have profound policy implications. Importantly, these findings contribute to the persistent theme of this article, that the utility of analyzing written constitutions depends very crucially on which part of the constitution one is analyzing.

## CONSTITUTIONS AS EPIPHENOMENA OR AS EXOGENOUS SHOCKS?

One critical view of constitutions—and one associated especially with those texts whose provisions accord with de facto law—is that the documents are merely epiphenomenal. The allegation is that constitutions may simply reflect the current practice, or will, of political actors. In one scenario, drafters who intend to respect political and civil liberties will provide for such rights in their constitution as matter of course; those who do not intend to respect such rights leave them out. Alternatively, but also in this line of thinking, one may even think of constitutions merely as reports that do nothing more than document the extant customs and practices of political actors and citizens—customs and practices that have evolved in some Burkean fashion. In either of these accounts, the rights do not structure politics or constrain actors but simply describe how political actors already behave (or will behave). Should these actors decide to operate otherwise, they would presumably simply replace the constitution to match their behavior. For scholars dedicated to understanding the impact of constitutional provisions, such a charge presents an important analytic challenge—specifically, a problem of endogeneity.

But this narrative of epiphenomenality runs counter to another narrative, perhaps more widely held, that constitutions have their origins outside the polity. According to this counternarrative, constitutions are the product of all sorts of mechanisms of diffusion and outright imposition. So, constitutions may be imposed by occupying forces (Arato 2009); drafted by vagabond consultants (Perry 1991); or virtually plagiarized by indigenous and conflicted drafters with limited time, resources, or inclination to bargain with one another (Elkins 2009). It is not hard to find examples of constitutional borrowing, and a growing literature is dedicated to examining the mechanisms behind it (e.g., Law & Versteeg 2011).

Any number of historical examples make the point, at least illustratively, of constitutions as exogeneous imports. For example, the US solution to the problem of nonhereditary executive, a president selected independently of the legislature, is one that took root quite firmly in Latin America. Certainly, different varieties of presidentialism developed in Latin America (see Cheibub et al. 2014), but a certain inter-American interdependence in the crafting of executive-legislative relations is evident. Consider some of the more mundane trappings of the executive and legislative offices, for which the evidence of diffusion is especially manifest. How old should one have to be, to be eligible for the presidency or, for that matter, for the lower house and upper house of the

legislature? Almost any number between majority and seniority is defensible. But, when applicable, 25%, 45%, and 43% of the 141 Latin American constitutions written in the 1800s followed the US precedent with respect to the presidency (35 years), lower house (25 years), and upper house (30 years), respectively [data are from the CCP (Elkins et al. 2021)]. The same is true for the length of terms. When applicable, 57%, 20%, and 30% of nineteenth-century Latin American constitutions settled on four-, two-, and six-year terms for these three offices, according with US precedent (again, data are from Elkins et al. 2021).

One could go on. Indeed, one of the principal research objectives of the CCP is to document the patterns and extent of diffusion. The general point, however, is that many important (and, admittedly, unimportant) aspects of constitutions are not entirely autochthonous products (cf. Billias 2009). This realization alters the agenda for scholars of written constitutions (and democracy) in fundamental ways. The analytic implication is that constitutions can sometimes—but not always—be treated as exogenous in analyses of their impact. We are not asserting that all constitutions are exogenous, just as not all constitutions are epiphenomenal. The critical analytic move is to identify those aspects or provisions of constitutions that are indigenous and those that are imported. In econometric terms, one needs to identify a set of instrumental variables with which one can predict the degree of importation. Some promising instruments include the spatial lags that diffusion scholars use in their models. Spatial lag terms capture the characteristics of constitutions that are written by neighbors; members of the same generational cohort; or perhaps those in the same cultural, political, or economic network. It is often difficult to find suitable instruments for use in overcoming endogeneity problems. The analyst needs variables that can predict the independent variable but not the outcome variable under examination. In this sense, spatial lags—since they are, in some cases, quite literally exogenous—appear particularly promising as instruments.[15]

This analytic challenge, not surprisingly, doubles as a research question. Just as some might want to identify indigenous as opposed to exogenous constitutions in order to isolate the impact of constitutions, others will want to identify these factors in order to test historical theories about the origins of constitutional ideas. Automated text analysis of constitutions provides one methodological angle, among others (Rutherford et al. 2018; Law 2016, 2019; Law & Whalen 2020; Rockmore et al. 2018). But the broader point is that this set of historical questions is, in an important sense, central to the study of democratization and autocratization, arguably the most enduring research program in comparative politics. If constitutions do have some impact on the structure and performance of government, then it makes sense to investigate the sources of constitutional ideas, some of which appear to be the very diffusion variables that served as powerful instrumental variables.

## CONCLUSION

Written constitutions and their study are quite understandably the source of considerable skepticism among scholars. To the extent that the texts are trumpeted as the institutional bedrock of societies, that they fall spectacularly short of this function in some cases can leave the documents open to derision. It would seem wise, then, for scholars to exercise caution before incorporating the written constitution in empirical research; but how much caution really? We identify four areas of concern. First, how can researchers reliably and validly compare the meaning of constitutional documents written in vastly different temporal, geographic, political, and cultural contexts? Second, to what degree do written constitutions represent the larger constitutional order? Third, to what degree are these texts actually meaningful to the political actors whose behavior

[15] We note with interest that Betz et al. (2018) caution against using such instruments without proper testing.

the documents purportedly govern? Fourth, to what degree are constitutions mere reflections of the political will and authority, as opposed to exogenous sources of law? Our answers to these questions are intended to provide some useful empirical benchmarks and to suggest how scholars might profitably engage the written constitution in empirical research.

One central insight from our analyses is that the utility of written constitutions varies significantly according to the substantive domain in question. So, our study of the historical inventory of constitutions suggests a core set of provisions that are common to nearly all written constitutions and another set of provisions that are clearly more elective, or discretionary. For example, if scholars are curious about individual rights and the relationship between executives and legislatures, a study of written constitutions will yield a fairly complete account of a country's formal commitments. In other substantive domains—for example, the details of electoral systems for legislatures—it is clear that constitutions provide only a partial account. One contribution of our analysis, then, is an accounting of which substantive domains are at the core of constitutions and which are at the periphery. This information tells us quite a bit about the potential comparability of written constitutions in empirical research. That is, comparability will depend to a large extent on the substantive domain in question and—as we note further—the particular research question at hand. With respect to the issue of compliance, our evidence is similarly domain contingent: The association between the provisions of the written constitutions and the de facto rules in play will differ across countries and across substantive domains. Rules about executive-legislative relations, for example, seem to have much more bite than do rights provisions.

In a larger sense, these findings reinforce some common sense regarding the understanding of formal institutions. Surely no one would assert that written constitutions always matter or are always fully informative. Sometimes, or at least on some topics, they most assuredly do not matter, which in our opinion should be part of their allure for scholars. Depending upon one's taste, works of fiction can sometimes be more interesting than works of nonfiction.

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## LITERATURE CITED

Aba-Namay R. 1993. The recent constitutional reform in Saudi Arabia. *Int. Comp. Law Q.* 42(3):295–331

Ackerman B. 2005. *The Failure of the Founding Fathers: Jefferson, Marshall and the Rise of Presidential Democracy*. Cambridge, MA: Harvard Univ. Press

Amar A. 2012. *America's Unwritten Constitution: The Precedents and Principles We Live By*. New York: Basic Books

Anderson B. 2006. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso. Revis. ed.

Arato A. 2009. *Constitution-Making Under Occupation: The Case of Iraq*. New York: Columbia Univ. Press

Barber NW. 2009. Laws and constitutional conventions. *Law Q. Rev.* 294:125

Betz T, Cook SJ, Hollenbach FM. 2018. On the use and abuse of spatial instruments. *Political Anal.* 26(4):474–79

Billias GGA. 2009. *American Constitutionalism Heard Round the World, 1776–1989: A Global Perspective*. New York: NYU Press
Brennan G, Pardo GC. 1991. A reading of the Spanish Constitution 1978. *Const. Political Econ.* 2(1):53–79
Breslin B. 2009. *From Words to Worlds: Exploring Constitutional Functionality*. Baltimore, MD: Johns Hopkins Univ. Press
Brown N. 2008. Reason, interest, rationality, and passion in constitution drafting. *Perspect. Politics* 6(4):675–89
Carrington D. 1973. The Corsican Constitution of Pasquale Paoli (1755–1769). *Engl. Hist. Rev.* 88:481–503
Cheibub J, Elkins Z, Ginsburg T. 2014. Beyond presidentialism and parliamentarism. *Br. J. Political Sci.* 43:515–44
Chilton A, Versteeg M. 2020. *How Constitutional Rights Matter*. New York: Oxford Univ. Press
Cingranelli D, Richards D. 2010. The Cingranelli and Richards (CIRI) Human Rights Data Project. *Human Rights Q.* 32(2):401–24
Corwin ES. 1936. The constitution as instrument and as symbol. *Am. Political Sci. Rev.* 30(6):1071–85
Dicey AV. 1960. *Introduction to the Study of the Law of the Constitution*. London: MacMillan
Dippel H. 2005. Modern constitutionalism, An introduction to a history in the need of writing. *Tijdschrift Rechtsgeschiedenis* 73:153–70
Dixon R, Stone A, eds. 2018. *The Invisible Constitution in Comparative Perspective*. Cambridge, UK: Cambridge Univ. Press
Doyle O. 2017. Informal constitutional change. *Buffalo Law Rev*. 61:1021–38
Elkins Z. 2009. Constitutional networks. In *Networked Politics: Agency, Power, and Governance*, ed. M Kahler, pp. 43–66. Ithaca, NY: Cornell Univ. Press
Elkins Z, Ginsburg T, Melton J. 2009. *The Endurance of National Constitutions*. Cambridge, UK: Cambridge Univ. Press
Elkins Z, Ginsburg T, Melton J. 2021. Comparative Constitutions Project. Characteristics of National Constitutions [v.3.0]. **https://comparativeconstitutionsproject.org/download-data/**
Elster J. 1995. Forces and mechanisms in the constitution-making process. *Duke Law Rev*. 45:364–96
Elster J. 2014. Political norms. *Iyyun Jerusalem Philos. Q.* 63:4759
Elster J, Gargarella R, Naresh V, Rasch BE, eds. 2018. *Constituent Assemblies*. Cambridge, UK: Cambridge Univ. Press
Eskridge W, Ferejohn J. 2001. Super-statutes. *Duke Law J.* 50(5):1215–76
Fish MS, Kroenig M. 2009. *The Handbook of National Legislatures: A Global Survey*. New York: Cambridge Univ. Press
Frosini JO. 2012. *Constitutional Preambles at a Crossroads Between Politics and Law*. Santarcangelo di Romagna, Italy: Maggioli Ed.
Gargarella R. 2013. *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution*. Oxford, UK: Oxford Univ. Press
Ginsburg T, Blount J, Elkins Z. 2009. Does the process of constitution-making matter? *Annu. Rev. Law Soc. Sci.* 5:201–24
Go J. 2003. A globalizing constitutionalism? Views from the postcolony. *Int. Sociol.* 18(1):71–95
Grey T. 1975. Do we have an unwritten constitution? *Stanford Law Rev*. 27:703–18
Gwartney J, Lawson R, Hall JC, Grubel H, de Haan J, et al. 2009. *Economic Freedom of the World: 2009 Annual Report*. Vancouver, BC: Frasier Inst. **https://www.fraserinstitute.org/sites/default/files/EconomicFreedomoftheWorld2009.pdf**
Harris WF II. 1993. *The Interpretable Constitution*. Baltimore, MD: Johns Hopkins Univ. Press
Hart HLA. 1960. *The Concept of Law*. Oxford, UK: Clarendon Press
Horwill HW. 1925. *The Usages of the American Constitution*. London: Oxford Univ. Press
Jacobsohn GJ. 2010. *Constitutional Identity*. Cambridge, MA: Harvard Univ. Press
King A. 2007. *The British Constitution*. New York: Oxford Univ. Press
King J. 2013. Constitutions as mission statements. In *Social and Political Foundations of Constitutions*, ed. DJ Galligan, M Versteeg, pp. 73–102. Cambridge, UK: Cambridge Univ. Press
Krishnamurthy V. 2009. Colonial cousins: explaining India and Canada's unwritten constitutional principles. *Yale J. Int. Law* 34:174–239

Krucken G, Drori GS, eds. 2009. *World Society: The Writings of John W. Meyer*. New York: Oxford Univ. Press
Landau D, Lerner H, eds. 2019. *Comparative Constitution-Making*. Cheltenham, UK: Edward Elgar
Law DS. 2016. Constitutional archetypes. *Texas Law Rev*. 95:153–253
Law DS. 2019. Constitutional dialects: the language of transnational legal orders. In *Constitution-Making and Transnational Legal Order*, ed. G Shaffer, T Ginsburg, T Halliday, pp. 110–55. New York: Cambridge Univ. Press
Law DS, Versteeg M. 2011. The evolution and ideology of global constitutionalism. *Calif. Law Rev.* 99(5):1163–257
Law DS, Versteeg M. 2013. Sham constitutions. *Calif. Law Rev.* 101(4):863–952
Law DS, Whalen R. 2020. Constitutional amendments versus constitutional replacements: an empirical perspective. In *Routledge Handbook of Comparative Constitutional Change*, ed. X Contiades, A Fotiadou, pp. 74–100. Abingdon, UK: Routledge
Llewellyn K. 1934. The constitution as an institution. *Columbia Law Rev*. 34:1–40
Melton J, Elkins Z, Ginsburg T, Leetaru K. 2013. On the interpretability of law: lessons from the decoding of national constitutions. *Br. J. Political Sci.* 43(2):399–423
Michelman F. 1998. Constitutional authorship. In *Constitutionalism: Philosophical Foundations*, ed. L Alexander, pp. 64–98. New York: Cambridge Univ. Press
Miller L, ed. 2010. *Framing the State in Times of Transition: Case Studies in Constitution-Making*. Washington, DC: US Inst. Peace Press
Mittal S, Weingast B. 2013. Self-enforcing constitutions: with an application to democratic stability in America's first century. *J. Law Econ. Organ.* 29(2):278–302
Munro WB. 1930. *The Makers of the Unwritten Constitution*. New York: Macmillan
Murphy WF. 1993. Constitutions, constitutionalism and democracy. In *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. D Greenberg, SN Katz, SC Wheatley, pp. 3–25. New York: Oxford Univ. Press
Murphy WF. 2007. *Constitutional Democracy: Creating and Maintaining a Just Political Order*. Baltimore, MD: Johns Hopkins Univ. Press
North DC, Weingast BR. 1989. Constitutions and commitment: the evolution of institutions governing public choice in seventeenth-century England. *J. Econ. Hist.* 49(4):803–32
Palmer M. 2006. What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders. *Public Law Rev*. 17:133–62
Perry B. 1991. Constitutional Johnny Appleseeds: American consultants and the drafting of foreign constitutions. *Albany Law Rev*. 55:767–92
Persson T, Tabellini G. 2003. *The Economic Effects of Constitutions*. Boston: MIT Press
Quigley H. 1924. The constitution of China. *Am. Political Sci. Rev.* 18(2):346–50
Rockmore DN, Fang C, Foti NJ, Ginsburg T, Krakauer DC. 2018. The cultural evolution of national constitutions. *J. Assoc. Inform. Sci. Technol.* 69(3):483–94
Rubenfeld J. 2001. The new unwritten constitution. *Duke Law J.* 51:289–305
Rutherford A, Lupu Y, Cebrian M, Rahwan I, LeVeck B, Garcia-Herranz M. 2018. Inferring mechanisms for global constitutional progress. *Nat. Hum. Behav.* 2:592–99
Sartori G. 1970. Concept misformation in comparative politics. *Am. Political Sci. Rev.* 64:1033–53
Shepard WJ. 1920. The new German constitution. *Am. Political Sci. Rev.* 14(1):34–52
Siegel R. 2020. The nineteenth amendment and the democratization of the family. *Yale Law J. Forum* 129:450–95
Strauss D. 2001. The irrelevance of constitutional amendments. *Harvard Law Rev*. 114(5):1457–505
Strauss D. 2010. *The Living Constitution*. New York: Oxford Univ. Press
Tiedeman CG. 1890. *The Unwritten Constitution of the United States*. New York: G.P. Putnam's Sons
Tribe LH. 2008. *The Invisible Constitution*. New York: Oxford Univ. Press
Voermans W, Stremler M, Cliteur P. 2017. *Constitutional Preambles: A Comparative Analysis*. Cheltenham, UK: Edward Elgar
Young EA. 2007. The constitution outside the Constitution. *Yale Law J.* 117:408–73