

The Endurance of National Constitutions

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To Jules, Amber, and Linh

[C]onstitutions are *made*, not found. They do not fall miraculously from the sky or grow naturally on the vine. They are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose. Indeed, in this vein one might even want to argue that our constitution is more something we do than something we make: we (re)shape it all the time through our collective activity.

– Hannah Fenichel Pitkin, *The Idea of a Constitution* (1987)

A permanent constitution must be the work of quiet, leisure, much inquiry, and great deliberation.

– Thomas Jefferson to A. Coray (1823)

For if a constitution is to be permanent, all parts of the state must wish that it should exist and the same arrangements be maintained.

– Aristotle, *Politics* IX (350 B.C.E.)

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Preface

This book is the first from the Comparative Constitutions Project, a long-term research initiative we began several years ago with the goal of understanding the origins, characteristics, and consequences of written constitutions for most independent states. As part of this project, we have since identified and collected the texts of nearly all national constitutions from 1789 onward, and we are engaged in a systematic effort to code their contents along a wide range of dimensions. Readers interested in details of the project can find more information at www.comparativeconstitutionsproject.org. Logically prior to the collection of constitutional texts and a coding of their contents comes an accounting of when, exactly, the various documents came to exist and when they were replaced. This sort of census requires comprehensive historical information on the chronologies of national constitutions, including dates of birth, death, and amendment. In seeking genealogical data about, say, the whereabouts of the Ecuadorian constitution of 1830, we frequently came across veritable “obituaries” that reported the circumstances of death. It was not long before we were deeply engaged in questions of the mortality and endurance of these constitutions ourselves.

This book has its origins at the University of Illinois, where Elkins and Ginsburg were colleagues in the Political Science Department and the Law School, respectively, and where Melton received his doctorate. We are especially grateful to Peter Nardulli, Director of the Cline Center for Democracy at the University of Illinois, for his early and continuing support, friendship, and faith in our project, and to Richard Cline for his vision in endowing the Center and our efforts. Various other institutions have supported aspects of our project, and for that we thank Deans Heidi Hurd and Charles Tabb of the University of Illinois College of Law, Dean Saul Levmore of the University of Chicago Law School, Randy Diehl and Gary Freeman of the University

of Texas, Alexander Thier of the United States Institute for Peace, and the National Science Foundation (Awards Nos. SES-0648288 and 0819102).

We have been privileged to have an outstanding group of students at the University of Illinois, University of Chicago, and the University of Texas work with us on the Comparative Constitutions Project over the years. Their assistance in helping to produce the raw materials for this book has been invaluable and we acknowledge each of them individually on the project website. Several students in and outside this group provided helpful research assistance for the book itself, and for that we thank Abby Blass, Justin Blount, Svitlana Chernykh, Adam J. Fleisher, Angelica Ghindar, Zoë Ginsburg, Michael Werner, and Emily Winston. Kalev Leetaru, of the Cline Center, provided inimitable assistance with the electronic archiving of texts and general information processing support.

Many audiences in law schools and political science departments have heard versions of the chapters here, and we are grateful to them all. An incomplete list of people to whom we are indebted for helpful comments includes Robert Barro, Omri Ben-Shahar, David Collier, Rui de Figueiredo, Manuel Delmestro, Rosalind Dixon, Brent Elkins, Nancy Elkins, Brian Gaines, Jacob Gersen, Mark Graber, Gretchen Helmke, Donald Horowitz, Gary Jacobsohn, Jai Kwan Jung, Dan Klerman, Maximo Langer, David Law, James Lindgren, Gabriel Negretto, Eric Posner, Mark Ramseyer, Kal Raustiala, Daria Roithmayr, Adam Samaha, Miguel Schor, Jeff Segal, Neil Siegel, David Strauss, Cass Sunstein, Michael Trebilcock, Tim Waters, Barry Weingast, and reviewers for Cambridge University Press. We are exceptionally indebted to John Carey, Jose Cheibub, and Henry Elkins, who read the entire manuscript and improved it immeasurably. We apologize to the many others whom we have not acknowledged here. Their collective wisdom renders the remaining errors inexcusable, and for those we bear sole responsibility. Finally, our thanks go to John Berger, our editor at Cambridge University Press, for his patience with a project whose life span, unlike most constitutions, lasted longer than it should have.

A new generation of Elkinses, Ginsburgs, and Meltons either came to be or passed major milestones during the process of writing this book. No doubt that they have left their mark on these pages somehow as well. Surely, our spouses – Jules, Amber, and Linh – have done so, through their patience, support, and sense of humor. To them, we give our deepest thanks and dedicate this book.

Introduction

In a series of exchanges with James Madison, Thomas Jefferson argued that constitutions should be rewritten every generation, declaring famously that the “dead should not govern the living.”¹ Jefferson derided those who “look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched.”² He even proposed an expiration date – one of nineteen years, a figure he came to from studying a set of actuarial tables.³ Madison, having only recently shepherded the U.S. document through a sometimes contentious deliberation and ratification process, saw more merit in constitutional longevity. The two carried out their lively debate by mail in two very different contexts: revolutionary France, where Jefferson served as the inaugural U.S. ambassador, and the United States, where Madison was busy putting the new American charter into effect. Although those two countries seemed to be headed in a similar institutional direction as beacons of democracy in the late eighteenth century, their constitutional trajectory would be markedly different. Why is it that the inaugural constitution drafted in Philadelphia in 1789 has survived for 220 years and counting, whereas the French Constitution of 1791 lasted a little more than a year, to be followed in French history by fourteen more constitutions? Indeed, an old joke has it that a man goes into a library and asks for a copy of the French constitution, only to be turned away with the explanation that the library does not stock periodicals.

France, it turns out, is more typical than the United States with respect to constitutional life span. Our data show that most constitutions die young, and only a handful last longer than fifty years. At the extreme, the island of

¹ Thomas Jefferson to James Madison, September 6, 1789. See Hamburger 1989: 280.

² Letter to Samuel Kercheval, July 12, 1816.

³ Thomas Jefferson to James Madison, September 6, 1789; Letter to Samuel Kercheval, July 12, 1816.

Hispaniola, home to the Dominican Republic and Haiti, has been the setting for nearly 7 percent of the world's constitutions and perennial governmental instability. Indeed, the life expectancy of a national constitution in our data is 19 years, precisely the period Jefferson thought optimal!⁴

Investigating national constitutional histories shows a great diversity of patterns, with some countries and regions exhibiting great instability, and others, great stability. These patterns may vary over time within a particular country. The cases present puzzling contrasts. Why, for example, have the Brazilians followed the French pattern, writing seven charters since 1824, whereas the neighboring Argentines have made do with the same constitution since 1853, albeit with significant reforms in 1994? Why has the unwieldy Indian constitution persisted since 1948, whereas its neighbor Pakistan has written three such constitutions, each of which was suspended by military coup? Why, in short, do some constitutions endure, whereas others fail?

DESIGN VERSUS ENVIRONMENT

The answer to these questions seems obvious. Constitutional death, one might think, is epiphenomenal and merely reflects other changes that occur in a country's history. Some countries have led tumultuous lives since their initial constitution – with wars, coups, and crises of all kinds – whereas others have led less “interesting” lives, to use the Chinese euphemism. Surely, then, those historically volatile countries should have more unstable constitutional lives than those whose history is more tranquil. But, are the political, economic, and social histories of the United States, Argentina, and India really less combustible than those of France, Brazil, and Pakistan? How closely is constitutional change really tied to historical “shocks” and the larger environment? Are there other factors associated with the constitution itself that put the constitutional system at greater or lesser risk?

For us, these questions point to a distinction in the explanatory power of *design* versus *environmental* factors, a distinction with highly normative implications. Consider design factors as those having to do with the content and drafting process of the constitution itself and environmental ones as those pertaining to the international and national environments that host the constitution. The design versus environment distinction is roughly comparable to the classic behavioral debate in biology that pits the forces of *nature* versus those

⁴ Calculated from a baseline survival model as the age before which 50 percent of constitutions will have died. See Chapter Six for further details.

of *nurture*. Like design, nature is relatively fixed for any individual organism, whereas nurture varies infinitely. However, the parallel breaks down in one crucial respect: the class of factors that is most malleable is reversed between the two domains. The design, or nature, of the constitution – unlike human DNA – is very much a product of human engineering, whereas the constitution’s environment – unlike biology’s nurture – is the less manipulable of the two sets of factors. This reversal shifts scientific priorities: with respect to both human and constitutional mortality, it is more imperative to understand those conditions we can do something about than those we cannot (the institutional scholar’s version of the “serenity prayer”). So, although health professionals may gravitate toward studying the effects on mortality of remediable human behaviors like exercise and nutrition, and control for genetic predispositions, we do just the opposite. The hardwired genetic code of constitutions is ours (collectively) to engineer and thus worthy of extra attention.

In our theoretical approach, therefore, we are quite consciously open to the possibility that constitutional drafters can affect the durability of their designs. The alternative, perhaps prevailing, view is that constitutions are almost entirely at the mercy of *fortuna*, coming and going only as major world events wash them away. This latter view, it would seem, is based not only on the transformative power of wars, economic crises, and the like, but also on the widespread assumption that institutions are sticky, and constitutions the stickiest of them all. Consequently, many accounts of institutional change, such as those influenced by the concept of *punctuated equilibrium* in evolutionary biology (e.g., Krasner 1984), tend to emphasize environmental shocks over institutional structure. An understandable presumption with respect to constitutional change, then, is that exogenous shocks are a sufficient, perhaps even necessary cause. In his thoughtful book on Canada’s constitutional history, Peter Russell (1993: 106) articulates this notion most emphatically: “No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup.” Such a view, in which constitutional change is merely epiphenomenal, would seem to render constitutional design nearly irrelevant to constitutional mortality.

Nevertheless, our theory (which we introduce later) suggests several risk factors inherent in constitutions themselves that merit investigation. It is possible that the general expectation regarding the power of shocks is just that, an expectation – a highly intuitive one, perhaps, but one that has not yet been empirically validated. Some scholars have suggested as much, arguing that the

literature on institutional change has underestimated the incidence of change unassociated with crisis (Cortell & Peterson 1999; Pierson 2004). In the case of constitutional change, any such error would be fully excusable, as no systematic empirical test of constitutional duration is on record as far as we know, and anecdotal evidence provides some examples that seem to confirm the power of environmental shocks in inducing change. However, linking a precipitating event to the time of death does not constitute a complete autopsy. In retrospect, it is easy to attach too much explanatory power to events simply because of their coincidence. A civil war that seems to have so obviously foretold the end of a constitutional system will seem lethal (to constitutions) only afterwards. Also, some events (e.g., political coups) are likely to result, to some degree, from underlying instability produced by constitutional provisions and, therefore, may be merely mediating factors. These possibilities imply two analytical strategies in assessing cause of death. The first is to identify and measure the effect of all crises, not just events in periods coinciding with constitutional demise. The second is to investigate the underlying structural causes of constitutional instability. These structural risk factors may be aspects of constitutions that render them more or less resilient than others, or some political, social, or economic conditions that render the state more or less hospitable to constitutional survival. The test of our theory follows this more comprehensive analytical approach. We seek, therefore, an opportunity to correct an imbalance in the attention paid to the environment at the expense of design in the study of institutions, of which constitutions constitute an important species.

None of this is to say that the environment is not worthy of study. Indeed, we cannot resist plunging into questions of environmental effects. Among the questions that we investigate: what are the consequences for constitutional change following a shift from democracy to authoritarianism, or vice versa? Are newly installed democrats and new authoritarians equally likely to replace the existing constitution? Does it matter whether the constitution that transitional actors would replace was originally written by democrats or by dictators? What about constitutional change within stable democratic and authoritarian regimes: is the constitution equally stable under these two systems? What also are the various effects of major state events such as a defeat in war, a loss of territory, or a severe economic crisis? Do they all imperil constitutions?

And what of time? Have constitutions become more stable since the early 1800s? If so, which risk factors, if any, have waxed or waned to produce these trends? Does the age of the state matter? Burke, Rousseau, and Hegel were

famously skeptical of the positivist notion that we can implant constitutions in newly formed states, suggesting instead that institutions need to grow organically. Are inorganic constitutions in new states any more brittle than those of countries with more settled institutional customs? Do we observe any effects of birth order, such that a state's second-, third-, and fourth-born constitutions are increasingly more stable? Apart from these questions regarding the age of the international system or its states, are there aging effects with respect to the constitution itself? We know that marriages, to which constitutions might arguably be compared, show a very distinct pattern in the *hazard rate* across time: these unions enjoy an initial honeymoon period of low risk, only to become especially combustible at the age of six years or so, after which they grow increasingly stable (Aalen and Gjessing 2001). Are constitutions like marriages in this sense? Do they exhibit any discernible patterns of decay or crystallization as they age? All of these are intriguing questions in their own right – and we seek to engage them – but they are subsidiary to our central issue regarding the effects of constitutional design on constitutional endurance.

WHAT GOOD IS CONSTITUTIONAL ENDURANCE?

Before exploring the determinants of mortality, we consider the normative question: how long *should* constitutions last in a democracy? Surely, longevity is not desirable as an end in and of itself and, as Jefferson suggested, it may even be pathological. Chapter Two explores the merits of Jefferson's conjecture and Madison's response, as well as other theoretical and practical arguments for and against durable constitutions.

Often, normative discussions of this kind have a rather abstract quality, which sometimes allows would-be Madisons and Jeffersons to talk past one another. We regard many of the claims and assumptions in this particular debate as eminently testable. Chapter Two, therefore, also evaluates empirically a series of hypotheses implied by the various claims. Among other questions, we consider whether endurance is associated with important social and political goods, such as democratic participation, economic development, national unity, and political stability, and whether constitutional replacement can be said to update otherwise anachronistic or outmoded institutions. We also explore empirically the critical question of whether periodic replacement of the constitution impedes its ability to serve as a constraint on ordinary law and practice, a central function of constitutions. Our findings on these questions are mixed, with support for both Madison and Jefferson, and their followers. Nevertheless, we are most struck by a general finding that most of the

purposes that are ascribed to constitutions, such as entrenching fundamental principles or providing normative guidance for the polity, seem to improve with age.

WHAT IS A CONSTITUTION?

Our approach assumes that we can identify a set of laws as the “constitution” in a comparable manner across centuries and continents. Chapter Three grapples with this crucial conceptual question of constitutional definition. For many, constitutions have become shorthand for political institutions more generally. Recently-written constitutions such as Brazil’s 1988 document, which attempt to constitutionalize nearly every aspect of public life, have not helped to circumscribe the definition. Other countries such as Britain, Israel, and Saudi Arabia have unwritten or uncodified constitutions. To add even more confusion, countries such as New Zealand and Canada accumulate a set of important documents over a period of years until, at some point, scholars determine that the collection is too important *not* to be a constitution, whether or not the texts were consecrated as such. Constitutions also evolve through ongoing interpretation, such as by high courts engaging in constitutional review or legislatures interacting with executives. Finally, societies have unwritten norms of political practice that bear an ambiguous relationship with the formal written text. The scope of the unwritten constitution poses daunting challenges to comparative research, and we acknowledge the importance of such norms, but, ultimately, we defend the idea that the written constitution – a product of unique and discrete social practices – is itself an object worthy of study.

Chapter Three also provides a methodological introduction to the data on which this study is based. As noted, our data cover the constitutional history of every independent state from 1789 to 2005, a period that includes 935 different constitutional systems for more than 200 different nation states, both past and present. Defining constitutional life span is not always a straightforward task given the frequency of constitutional amendment – some of which sometimes entail significant revisions – alongside the phenomena of constitutional suspension, reinstatement, and replacement. In introducing our census of constitutions, we are then in a position to engage in a set of empirical tests of the validity of our conceptual approach. These tests include an analysis of the gap between the written text and *de facto* constitutional practice, an assessment of the degree of change in content associated with constitutional replacements versus amendments, and an exploration of the coincidence of constitutional change and regime change, two closely related but empirically distinct concepts. As in Chapter Two, our approach to Chapter Three is to

contribute a set of empirical findings to a persistent debate that mostly operates at an abstract level.

A THEORY OF CONSTITUTIONAL CHANGE

To understand the effect of design on constitutional mortality, one needs to understand what constitutions do and what pressures, exactly, lead to their demise. This book elaborates just such a theory of constitutional formation, adjustment, and endurance. Our theory operates on two very different levels in terms of causal proximity. At its most proximate, our theory describes the process of constitutional crisis and death. This is the constitutional equivalent of a description in a medical textbook of the breakdown of vital organs, complete with detailed micro information about tissue and cells. At a more remote level, however, our theory needs to connect these processes to genetic predispositions, activities, or conditions that might increase the risk of breakdown. It is one thing to describe the physiological details of cancerous cells and their threat, and still another to connect the onset of cancerous tumors to human behavior and genetic code. The same is true of constitutional mortality. We recognize the importance of both levels of theory and devote a full chapter to each.

Chapter Four presents our physiological theory of constitutional change. Because we recognize that constitutional change is a subspecies of institutional change (though a very important subspecies), the discussion is informed by the rationalist tradition in institutional analysis and, in particular, the growing literature on self-enforcing institutions. We assume that constitutions are bargains among elites that are meant – at least by their authors – to be enduring. Unlike normal contracts, however, there is no external guarantor who will enforce the agreement, independent of the parties. A constitution will be maintained only if it makes sense to those who live under its dictates, so a crucial quality of any successful constitution is that it be self-enforcing. This means that those *within* the constitutional bargain must have a stake in the successful implementation of the document for it to endure. Even though constitutional bargains may have relative winners and relative losers, they will endure to the extent that parties believe they are better off within the current constitutional bargain than in taking a chance on, and expending resources in, negotiating a new one.

Our model of endurance also imagines that a political bargain, once adopted, will be stable so long as it is not subject to either endogenous or exogenous shocks, such as financial crises, armed conflict, or the death of a long-serving leader. Such shocks change the calculus of costs and benefits for parties considering whether to remain in the constitutional bargain. In the real world,

however, such shocks are endemic: currencies plunge, invasions occur, and new technologies are invented that empower some actors, but weaken others. The question then becomes whether there are any features of the constitution that can render it more resilient in the face of shifting conditions. We focus on three such features: constitutional flexibility, the inclusiveness of the constitution, and the level of detail and scope of coverage in the constitution, which we call specificity. Chapter Four describes these concepts, how they interact, and how they facilitate endurance. *Flexibility* represents the constitution's ability to adjust to changing circumstances, and is captured in the empirical analysis by the ease of formal and informal amendment. Constitutions can be changed through both formal processes as well as interpretative changes that update the understanding of the text among relevant actors. *Inclusion* captures the degree to which the constitution includes relevant social and political actors, both at the time of drafting and thereafter. Inclusion facilitates both enforcement of the constitution as well as investment in its endurance. *Specificity* refers to the breadth of coverage and level of detail of constitutional provisions, and we explain why it is that detailed documents may be more enduring than general framework documents so celebrated in American constitutional thought. These three features, we believe, are crucial for facilitating constitutional endurance.

Chapter Five develops the behavioral component of our theory. There, we connect the processes of constitutional negotiation and renegotiation to the predispositions of constitutions and the conditions under which they live. These hypotheses regarding factors of design and environment follow directly from our physiological theory, and we develop their connection to constitutional replacement in some depth. A venerable maxim in political science – the rule of three – recommends that analysts restrict the number of explanatory factors to three (Achen 2002). We violate this rule reluctantly by looking at a wide range of factors, but do so with good reason. First, given that our epidemiological analysis forges new ground, our intent is to report the effect of a host of factors that are of interest to us, and, perhaps, to suggest others undeveloped in our account, which may be explored more fully by future researchers. Second, given the prevailing view that environmental factors are fully determinative of constitutional mortality, we are interested in assessing the impact of constitutional design above and beyond a full set of competing environmental hypotheses.

THE EMPIRICAL APPROACH

We take an explicitly multi-method approach to testing the empirical implications of our theory. The central line of attack is an epidemiological one,

set forth in Chapter Six, in which we explore patterns in the mortality of almost the full population of national constitutions since 1789. This analysis provides valuable insights, but is limited in ways we describe shortly. The basis of the epidemiological analysis is a set of original data – the *Comparative Constitutions Project* (CCP) data – which we began collecting in 2005. The data set records a large set of characteristics of each and every constitution written since 1789. The project has entailed considerable investment in unearthing the constitutional chronology of states (e.g., identifying years of constitutional amendment, replacement, suspension, etc.), collecting the texts for each constitutional change, and coding the relevant characteristics of these documents. Our analysis of the endurance of constitutions represents our first comprehensive use of these data. These data provide some important opportunities, not only for its wealth of information regarding constitutional design, but also because of the expansive scope of the sample.

We became more appreciative of these advantages when we stumbled upon the classic study of mortality in ancient Rome by Durand (1960). With an exceptionally clever research design, Durand analyzed data on the dates of birth and death on tombstones found in various Roman ruins. Understandably, Durand was sensitive to issues of selection bias in the sample, particularly with respect to gender and class. Even with this very truncated set of data, Durand was able to tell us a great deal about baseline mortality rates and differences in mortality between different segments of the Roman population.

In our case, we are fortunate to have public records of the birth and death of most of our subjects as well as a wealth of historical information about many of them. Not only that, but we believe that we have identified the complete universe of cases, not just a reasonable sample. We thus take the ambitious step of analyzing constitutional endurance across all cases. We recognize that constitutions are born and die in a wide range of circumstances, and our global approach will fail to account for many individual cases. On balance, however, the global approach allows us to draw broad conclusions about constitutions, which apply across many countries and eras.

In a second line of attack, we devote Chapters Seven and Eight to case studies that explore what we have come to think of as *autopsies* and *family histories*. The autopsies explore very carefully the demise of particular constitutions, whereas the family histories focus on a country's series of constitutions. Much of the evidence we consider in these chapters is in the form of what Brady and Collier (2004) have called *causal process observations* (as opposed to *data set observations*). The focus on a particular case (or series of cases) of constitutional replacement allows us to examine the sequence, timing, and relevance of various risk factors and to assess cause of death more precisely.

In our design of the case study research, we examine two different samples that we draw sequentially using first a “most similar systems” design (Chapter Seven) and then a “most different systems” design (Chapter Eight). We sample countries (not constitutions) and explore both the patterns of constitutional endurance *across* countries as well as the variation in endurance *within* countries. The latter within-country analysis provides added analytical leverage by multiplying instances of constitutional mortality while effectively controlling for a host of environmental and genetic factors. The across-country analysis compares national trajectories and allows us to look more systematically at issues of sequence and legacy. Although we take a rather structured approach to the set-up of the case-oriented material (with an eye towards hypothesis testing), our hope is that the case studies take on a less didactic narrative style with the more general purpose of illuminating the concepts and processes invoked in our theory.

CONCLUSION

Written constitutions are central institutions in the political order and powerful symbols of statehood. As a normative matter, most designers and scholars seem to assume that they should endure. Yet, in many times and places, constitutions are remarkably ephemeral. Establishing an enduring constitutional scheme appears to be quite difficult, particularly in new democracies outside of Western Europe and North America. This instability may have real consequences in an era in which constitutions are centerpieces of political reconstruction (Arjomand 2007) and foreign policy (Elkins, Ginsburg, and Melton 2008; Feldman 2005).

Alas, we have, to date, very little knowledge about how to create more enduring constitutions (Negretto 2008; Ordeshook 1992; Sutter 2003; Weingast 2006). This book is a modest effort to bring the issue of constitutional endurance to the fore. By documenting the phenomenon of constitutional mortality and examining the various environmental and design factors that influence constitutional life span, we hope to answer some questions, but, at the same time, raise others for further analysis in comparative constitutional studies.

Our central point is a simple one: design choices matter. Our evidence confirms that scholars have been right to respect the influence of environmental crises and conditions on constitutional change. However, up to certain thresholds, more flexible constitutions that include a wide range of social actors and provide some amount of detail seem to endure longer than those that do not. These choices may also make constitutions more democratic, although this is not our overriding normative concern. Indeed, as we shall see

in the next chapter, it has been argued that endurance may have some positive consequences independent of the content of constitutions. Regardless, we expect that constitutional designers will continue to struggle for a stable anchor for politics in a world of constant change, and we hope that this book will provide some perspective on this struggle.