

Researching LAW

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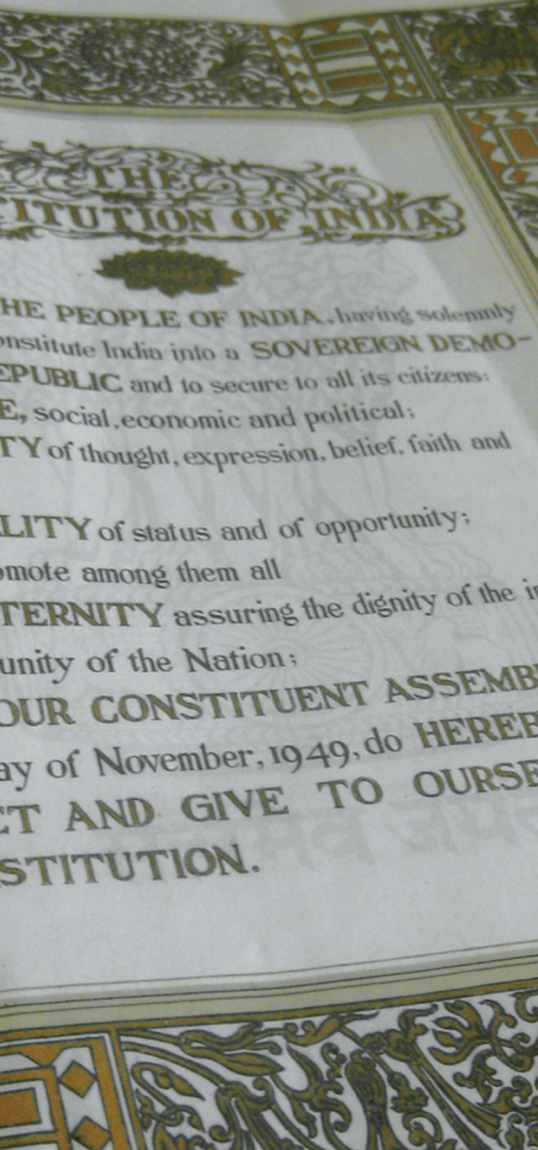
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INSTITUT

'S CONSTITUTIONS TO READ, SEARCH AND
COMPARE

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The Comparative Constitutions Project

The Comparative

A glance at two world maps, one produced before and the other after World War II, reveals great changes in the geo-political order. While the number of independent countries before the war numbered sixty, the post-war period, with the break up of empires and the formation of new states, has raised the number to the point where we now can count 196. Most of these countries have a written constitution as well, and many have a series of previous constitutions, since revised or discarded. The result is a huge body of texts, each ostensibly containing the fundamental (if in not all cases the actual) law of a nation or state. And constitutions continue to be written, by one recent count, at an average rate of ten per year.

Until recently, however, scholars as well as constitutional drafters have lacked comprehensive, systematic information about what is in these documents. ABF Research Professor Tom Ginsburg, who holds a joint appointment at the University of Chicago Law School and who joined the ABF faculty in the fall of 2012, has made the comparative study of constitutions and their design a central part of his research agenda for the last seven or eight years. He has focused on world constitutions and their texts, examining them empirically with an open-ended curiosity. To facilitate this research Ginsburg and colleagues are engaged in a long-term data-driven endeavor, The Comparative Constitutions Project (www.comparativeconstitutionsproject.org), which, to date, has identified and catalogued 900 national constitutions.

The Comparative Constitutions Project (CCP) was conceived by Ginsburg and fellow political scientist Zachary Elkins when both were on the faculty of the University of Illinois at Urbana-Champaign (Elkins is now in the Political Science Department at the University of Texas at Austin.) A third investigator

is their former graduate student James Melton, now at University College London. Both Ginsburg and Elkins had an interest in constitutions, but realized that they lacked comprehensive data on their content. With funding from the National Science Foundation, they were able to begin to gather and code information on constitutions, eventually deciding to make the database comprehensive to include all countries and constitutions since the creation of the United States Constitution (which is generally perceived to be the first written national constitution) in 1789.

According to the CCP website, another inspiration for the project came from the authors' realization, as evidenced by the problems political scientists and legal scholars had in advising constitutional reformers in Iraq and Afghanistan, that advisors "are not adequately equipped to advise constitutional assemblies about how to craft documents that solve important problems of governance. External consultants and indigenous constitutional framers alike lack even the most basic information: a systematic catalog of constitutional provisions in other countries, past and present...A full menu

of constitutional options is something that should be on hand at constitutional assemblies, and it is even more important that such systematic data inform the analysis of comparative legal scholars long before they provide advice to constitution-drafters." Thus, the CCP aims to create a database that enables research on "the sources and consequences of constitutional choices."

The database consists of three main parts—1) a constitutional chronology, which documents all constitutional "events" (the writing, amendment, or replacement of a constitution) since 1789; 2) a repository of constitutional texts for every constitutional event; and 3)—the most crucial element—the coding of each constitutional event. The coding allows for the identification of concepts and indicators in each event. To that end, the researchers developed a survey instrument, whose 667 questions, which center around various concepts including, but not limited to, for example, judicial review, presidentialism versus parliamentarianism, methods of executive and legislative selection, and federalism, are "asked" of each constitutional event.

Constitutions Project

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Writing Rights

Ginsburg has spun several smaller research projects off of the CCP. One of the latest is titled “Writing Rights: Innovation and Diffusion in National Constitutions.”

With funding from the ABF and in collaboration with Melton, this project will examine the origins and diffusion of rights in national constitutions from 1789 to the present, drawing on data from the CCP. The core question of the research will be to understand why national constitution-makers choose to include the particular rights they do in their products. At the same time, Ginsburg and Melton will ask where rights come from—are they a fabrication of nation-states, who create citizens out of rights, or are rights universal in character, arising from outside the nation state? Ginsburg and Melton theorize that all rights originate in national constitutions, from which they spread around the world, and some of which are included in international treaties (which, in turn, can influence national constitutions). Consequently, the researchers, again turning to the CCP database for possible answers, hope to identify which rights were adopted in international treaties from the menu of national rights, and how the rights in international treaties were, in turn, adopted by drafters of national constitutions. They argue that, in contrast to much of the existing literature which emphasizes international factors in the spread of rights around the world,

domestic political factors and country histories and traditions are very important in understanding the development and spread of rights.

Ginsburg and Melton will focus their study on a set of 116 historical rights. The rights in the set range from those that are very popular and central, found in over 90% of constitutions (such as the right to property), to rights that are quite rare (such as the right to bear arms). The majority of these rights have increased in popularity over time. Their analysis of the rights under study will be framed by three concepts: innovation, diffusion, and models.

In examining constitutional innovation, Ginsburg and Melton will be looking closely at the process by which new rights are adopted. They will look at the local historical context surrounding the initial inclusion of a right, focusing specifically on domestic political movements. Of the study of innovation Ginsburg says, “Clearly constitution-writers are not operating on blank slates. Rights originate in court cases, popular documents and statutory legislation before they ever enter the universe of constitutional design. In some sense, our question about innovation is really a question about which rights-claims gain sufficient force to cross the threshold of constitutionalization.”

Rights tend to diffuse across constitutions through various well-established channels

such as spatial proximity between countries, common language, religion, colonial history, or legal tradition, the researchers note. By subjecting a subset of constitutions in the database to regression analysis, Ginsburg and Melton expect to be able to identify which of these channels help to explain the global spread of constitutional rights, as well as the role of time in the spread of rights.

Finally, the research team wants to explore whether there are particular constitutional models that have been particularly influential in the spread of rights. Many other scholars have already studied the U.S. Constitution as a model, but the researchers want to subject the information they’ve gathered on other national constitutions to rigorous analysis. They will use existing methodologies, such as using a simple metric to calculate the degree of similarity across a series of rights. However, they also plan to analyze constitutions using new methods, such as computational linguistics, to identify textual patterns, and thus likely connections between constitutions. Though computational linguistics has not been used much in the study of law, according to Ginsburg and Melton it has the potential “to identify latent or previously unrecognized connections across time and space.”

In addition to the scholarly contribution this project (the results of which will be

On average, countries are richer, more democratic, more politically stable, and experience fewer crises, as their constitution ages.

published as a book) can make, Ginsburg and Melton expect that their study of the diffusion of rights may also be beneficial to contemporary constitutional designers. As they note, “by identifying the key historical models, we can generate a critical perspective among drafters so that their choices may be less conditioned by ingrained patterns, and more determined to focus on local conditions. To be sure, the normative implications of our positive analysis are not straightforward, and may depend on the particular findings. But there certainly is an important policy audience for our findings, made up of constitutional drafters and the various international organizations that support them.”

The Endurance of National Constitutions

In an earlier phase of the CCP research, Ginsburg, Elkins and Melton conducted an in-depth study of constitutional endurance. The resulting book, *The Endurance of National Constitutions* (Cambridge, 2009), won the best book award from the Comparative Democratization Section of the American Political Science Association. It was the first book to come out of the CCP.

The authors start by conceptualizing all constitutions as “bargains that embody agreement among the relevant parties. Whether the parties sustain these bargains depends, in basic terms, on (a) whether the parties feel that they would be better off under different terms; (b) the expected sanctions for breaching the agreement; and (c) whether the existing agreement can be amended easily or otherwise accommodate changes.” As has happened many times in history, constitutions can “die” as a result

of environmental shocks such as war, financial crisis, the death of a long-serving leader, etc. Most of the scholarly literature on constitutional endurance has focused on the power of these events to upset the constitutional order.

While Ginsburg, Elkins and Melton freely acknowledge the de-stabilizing power of environmental shocks, they see their book as a corrective to an overemphasis on these factors. Instead, they draw on a wealth of data from the CCP to focus on design features of constitutions that may contribute to or be associated with endurance, even in the face of social and political upheavals. “Design choices matter,” they argue. While they are well-versed in, and cite freely, the literature of political science, history and law, the authors’ main and unique contribution here is their interrogation of the CCP database for what it can tell us about constitutional design and endurance.

Why Endure?

But, is endurance always a good thing? Should all constitutions endure as long as possible? As the authors note, this question has been debated for a long time. Famously, founding father Thomas Jefferson argued that constitutions should die young, that the “dead should not govern the living.” Nineteen years was the ideal lifespan of a constitution, according to Jefferson.

James Madison, on the other hand, felt that a long-enduring constitution contributed to stability and citizens’ attachment to and investment in the state. As the authors theorize, constitutional stability creates an environment that supports the stability of other institutions.

In a modern democracy, many of the “collateral” institutions that support democracy, such as political parties, a free press and an independent judiciary, are not specifically mentioned in the constitutional text. In this context, too much change in the fundamental institutions too frequently can lead to great disruption. Additionally, negotiating a new constitution is a very costly undertaking. Given these factors, endurance can be a good thing.

The authors have tested this line of reasoning, interrogating their database to see which characteristics of a given country are associated with—if not caused by—an enduring constitution. They have plotted “the average per capita Gross Domestic Product (GDP), democracy, political stability, and crisis propensity for all constitutions (current and historical) in the n th year of their life.” Findings suggest that “endurance is positively associated with GDP per capita, democracy, and political stability and negatively (albeit moderately) with crisis propensity... On average, countries are richer, more democratic, more politically stable, and experience fewer crises, as their constitution ages,” the authors state. They are quick to point out, however, that they do not claim that enduring constitutions cause these beneficial effects. Rather, the situation is probably one of reciprocal causation: a more democratic society will contribute to constitutional stability, and constitutional stability will reinforce democracy. Nevertheless, the authors state, the correlation between constitutional endurance and more prosperous, democratic and stable countries is suggestive, and worthy of more inquiry.

Design Matters: Inclusion, Flexibility, and Specificity

Given the positive association between endurance, prosperity, democracy and stability, the authors are keen to determine if there are any particular design elements that contribute to the longevity of constitutions. Again plumbing the

CCP database, they have identified three elements that appear to contribute to endurance, even in the face of exogenous shocks, such as war, the death of a long-serving leader, economic crisis, to name a few. The three design elements, which tend to be mutually reinforcing, are: inclusion, flexibility, and specificity. As the authors claim, “Although constitutions exist in a world of constant change, these design features lower the risk of replacement.”

Inclusion, as the authors define it, “refers to the breadth of participation in formulating the constitutional agreement and in the ongoing enforcement of it.” The inclusion of a broad sector of society in the development and ongoing life of a constitution is important, especially during the drafting and approval process. “In cases in which important factions are excluded...citizen attachment [to the constitution] is severely compromised,” the authors state. They hold up Brazil as an example of extreme inclusion, on the other hand. The Brazilian constitutional convention of 1987–88 was extraordinarily public, generating over 30,000 citizen proposals for the document. The resulting constitution, though extremely long and unwieldy, is a highly public one, that has “endured significantly longer than the typical Latin American constitution,” the authors note.

Similarly, inclusion during the approval process also seems to support endurance. As the authors note, “Ratification by a non-rubber-stamping public or by an elected body that is inclusive and representative of the public likely breeds attachment and common knowledge.”

Though some political scientists are wary of interest groups’ involvement in constitutional design and approval, the authors are of the opinion that interest groups can contribute to constitutional endurance if they are included in the design process. As they state, “it is important that interest groups have a stake in constitutional endurance...Constitutions that have established increasing streams

Flexibility allows the constitution to adjust to the emergence of new social and political forces.

of political benefit to groups may be better able to withstand pressures that arise...Over time, actors may develop an increasing stake in constitutional viability. This stake further increases the public’s familiarity with and attachment to the founding document over time, making it more likely that they will enforce the bargain.” As the authors summarize, “inclusive drafting processes and inclusive constitutional provisions increase the possibility of enforcement in two ways: (1) by increasing the visibility of the document and demonstrating societal consent; and (2) by increasing the stake that citizens have in the document and their attachment to it.”

In addition to inclusion, the authors identify flexibility as another feature that enhances constitutional endurance. The data gathered for the CCP suggest that a more flexible constitution is better able to endure in the face of the inevitable societal shocks that will occur. Events such as war and economic crisis can change the parameters of the “costs and benefits to the parties to a constitutional bargain,” the authors note. A more flexible constitution creates mechanisms for adjustment to these changes, and can forestall the prospect of total constitutional replacement. At the same time, “flexibility allows the constitution to adjust to the emergence of new social and political forces. It is thus related to the concept of inclusion.”

Finally, the authors find that the greater the specificity of the constitution, that is, the greater the level of detail and scope of topics included in a constitution, the longer it will tend to endure. According to the authors, specificity helps constitutions to endure for three reasons. “First,” they state, “to the extent that specificity at the time of constitutional drafting

anticipates and addresses relevant sources of downstream pressure on the constitutional text, it may be particularly helpful with regard to solving problems of hidden information among the bargainers. By forcing counterparties to consider various possible future shocks and scenarios, the drafters can minimize problems of strategic behavior and delays once the constitution comes into effect.” Second, according to the authors’ theory, “specificity facilitates endurance precisely because it is costly. Interest groups may seek to imbed their preferred policies in the constitution, making the document more specific...The greater the investment in a particular constitutional bargain, the less willing parties will be to deviate from it by switching to a new bargain.” Finally, the authors state, “specificity provides an incentive for parties to invest resources in



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Specificity facilitates endurance precisely because it is costly. Interest groups may seek to imbed their preferred policies in the constitution, making the document more specific...The greater the investment in a particular constitutional bargain, the less willing parties will be to deviate from it by switching to a new bargain.

keeping the constitutional text current... Specificity incentivizes ongoing investments in the constitutional text, be they through formal amendment procedures or informal processes such as constitutional interpretation.”

What about the US Constitution?

Readers familiar with the US Constitution may wonder how it fits with Ginsburg, Elkins and Melton’s model of endurance, given that it is generally perceived to be neither particularly flexible, inclusive, or specific. And yet, at 224 years and counting, it is by far the longest-lived constitution of any that have existed.

Ginsburg and colleagues have found that the US Constitution, rather than being an ideal model, is more of an exception that proves the rule. The CCP data show that, on average, constitutions that are more flexible, inclusive and specific last longer, resembling, for example, the current constitutions of Mexico (96 years) and India (64 years).

In the case of the United States, some of these characteristics can be found in extra-constitutional institutions and processes, and these factors may help account for its endurance. For example, though initial levels of inclusion were low, the interests of wider swaths of society have been accommodated, if slowly and

sometimes painfully, through amendment or judicial decisions (e.g. *Brown v. Board of Education*). Judicial review as well has provided a mechanism for updating the Constitution, allowing for some flexibility. Regarding specificity, the vagueness of the US Constitution, often described as a “framework” constitution, “has forced the Supreme Court to articulate the boundaries of the Constitution, sometimes well beyond the four corners of the text. Specificity has been provided by the courts and the political process, rather than the text,” the authors state. 🎓

To learn more about the Comparative Constitutions Project, please visit <http://comparativeconstitutionsproject.org/>.

If you are interested in supporting research on comparative constitutionalism or other important ABF initiatives, please contact Lucinda Underwood at 312.988.6573



Tom Ginsburg is Research Professor and Co-Director of the Center on Law and Globalization at the American Bar Foundation, and Leo Spitz Professor of International Law at the University of Chicago, where he also holds an appointment in the Political Science Department. He holds B.A., J.D. and Ph.D. degrees from the University of California at Berkeley. He currently co-directs the Comparative

Constitutions Project, a NSF-funded data set cataloging the world’s constitutions since 1789. His co-authored book, *The*

Endurance of National Constitutions (2009), won the best book award from the Comparative Democratization Section of the American Political Science Association. His other books include *Judicial Review in New Democracies* (2003), *Administrative Law and Governance in Asia* (2008), *Rule By Law: The Politics of Courts in Authoritarian Regimes* (with Tamir Moustafa, 2008), and *Comparative Constitutional Law* (with Rosalind Dixon, 2011). He has served as a visiting professor at the University of Tokyo, Kyushu University, Seoul National University, the Interdisciplinary Center, Herzliya, the University of Pennsylvania, and the University of Trento. Before entering academia, he served as a legal advisor at the Iran-U.S. Claims Tribunal, The Hague, Netherlands, and he has consulted with numerous international development agencies and governments on legal and constitutional reform. Ginsburg was elected to the American Academy of Arts and Sciences in April of 2013

2013 Summer Research Diversity Undergraduate Fellows

The 2013 Summer Research Diversity Undergraduate Fellows arrived at ABF on June 3 to begin their eight-week residencies, studying law and social science. Chosen from a very competitive field of 200 undergraduates from across the US, the four finalists spent their summer working on research projects with ABF faculty, participating in an integrative seminar, and going on field trips to Chicago law offices, judges' chambers, the criminal courts and other real world venues that were the object of their studies.

Now in its 26th year, the program introduces a select group of talented undergraduates from diverse backgrounds to the rewards and demands of a research-oriented career in the field of law and social science. Most of the over 100 alumni to date have graduated from law school and gone on to successful careers in law, academia, government and business.

For its financial support of the program in 2013, ABF gratefully acknowledges AT&T. ABF is also grateful to receive funding from the Kenneth F. and Harle G. Montgomery Foundation, the Solon E. Summerfield Foundation, and the National Science Foundation in support of the program.

The four Summer Diversity Fellows for 2013 were:

Diana Lee, native of Albany, NY, is a senior at Bowdoin College, majoring in History with a minor in Government and Legal Studies. Diana worked this summer with Research Professor Dylan Penningroth.



From left, Kimberly Quick, Kelsey Mollura, Ayesha Akbar, and Diana Lee.

Ayesha Akbar is a senior at The University of Texas at Austin, majoring in Government, Psychology, Arabic Language and Literature, and an interdisciplinary honors major titled Islam, Politics, and South Asian Development. Ayesha worked with Research Professor John Hagan this summer.

Kelsey Mollura is a junior at Cornell University majoring in Psychology and minoring in Law & Society. She is originally from Chino Hills, CA. She worked this summer with Research Professor and ABF Director Robert Nelson.

Kimberly Quick, a native of Richmond, VA, is a senior at Wake Forest University, majoring in Politics and International Affairs, with minors in English and American Ethnic Studies. Kimberly worked with Research Professor John Hagan and Visiting Professor Erika George this summer.

Constitute: A Collaboration with Google Ideas

On September 23, 2013 Google Ideas (www.google.com/ideas), a “think/do tank” organized within Google’s Business Operations and Strategy area, partnered with the Comparative Constitutions Project to launch a new website, “Constitute” that offers users a searchable, digitized database of most every national constitution in force. According to Tom Ginsburg, Google Ideas approached the Comparative Constitutions Project with the idea of partnering to make a searchable constitutions database widely accessible. According to the Official Google Blog, “Our aim is to arm drafters with a better tool for constitution design and writing. We also hope citizens will use Constitute to learn more about their own constitutions, and those of countries around the world.”

To learn more about “Constitute,” please visit <https://www.constituteproject.org/#/>

Google Ideas was founded in 2010, and is directed by former US State Department staffer and current Adjunct Senior Fellow at the

Council on Foreign Relations, Jared Cohen. As the Google Ideas website explains:

Google Ideas is a think/do tank that explores how technology can enable people to confront threats in the face of conflict, instability or repression. We connect users, experts and engineers to research and seed new technology-driven initiatives.

Google Ideas was founded on the principle that the next five billion to come online will face far greater human challenges than the first two billion. Many of these challenges are thorny and difficult to address, and include violent extremism and fragile states, among others...

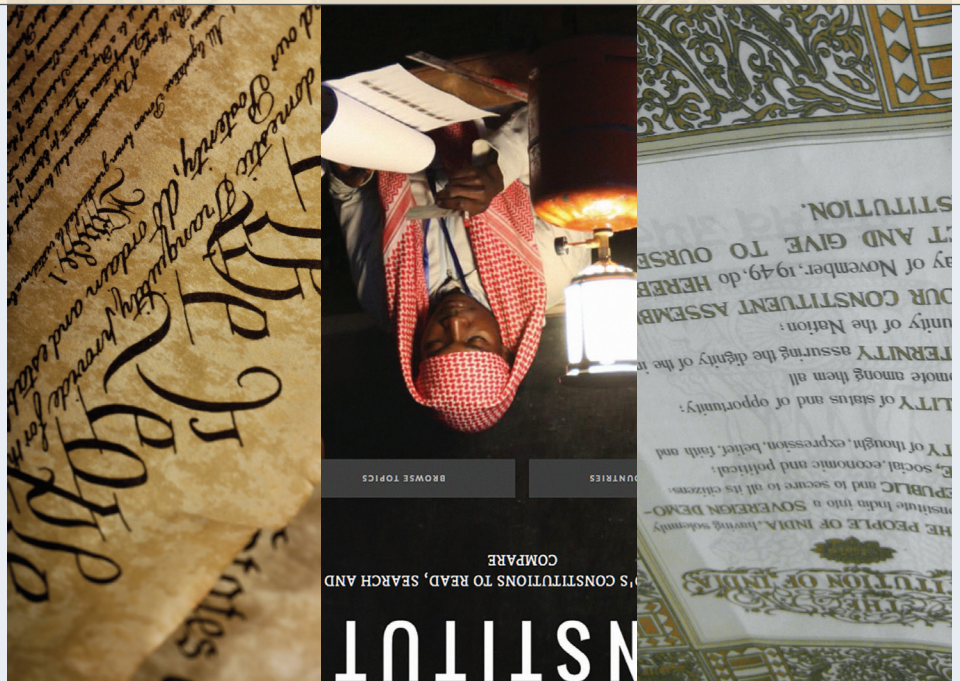
We find new ways that connected technologies can offer solutions to people caught in these circumstances, use research to provide fresh insights and develop interactive data visualizations to bring information to life. Wherever possible we make the source code of our projects available for use by others under an open-source license.

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Cover left photo: Preamble to the Constitution of India by Tracy Fung.
Cover center image from the homepage of Constitute, a collaboration between Google Ideas and the Comparative Constitutions Project (<https://www.constituteproject.org/#/>). Election officials check voter rolls for Kenya's constitutional referendum (2010).

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