# Innovation in Constitutional Rights

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*Note to participants:* This is an early, somewhat forensic paper that is part of a book project on the origins and spread of rights in national constitutions. It follows an introductory chapter on historiographic debates about rights, in which we make the claim that analysis of national-level constitutional texts is an important complement to the extensive scholarship on international human rights. We look forward to your suggestions for the broader project.

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*Abstract:* This paper examines innovation in constitutional rights around the world. A popular periodization divides rights into three "generations", implying waves of innovation. We show that (1) constitutional innovation in rights is relatively rare, and many rights were already apparent in the initial few constitutions adopted in the late 18th century; (2) "innovator" constitutions differ from others, and seem to be associated with political turmoil; and (3) there are at least four generations of constitutional rights, as measured by popularity in national constitutions.

*Introduction*

The high jump is one of the main track and field events in the Olympics, in which contestants hurl their bodies over a bar from a running jump. Dating back to ancient Greece, high jumpers used a couple of alternative techniques, including the so-called scissors technique requiring the jumper to throw both legs over the bar in sequence. In the 1968 Olympics, a jumper named Dick Fosbury won the Gold Medal using a completely different technique. Instead of approaching the bar head on, he jumped over the bar backwards, head first, so that he landed on his back. The "Fosbury Flop", as it became known, soon became standard and is now the most popular technique in high jumping.

Not all innovations have such success. Rick Barry, a forward for the Golden State Warriors, became famous for his novel technique of free throw shooting. Instead of shooting the ball from over his head toward the basket, Barry would shoot free throws underhanded. This was actually a retroactive innovation: some players had used the technique before the 1940s. Barry was phenomenally successful: he had the second highest career free throw percentage, shooting 90% over

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the course of his career. Yet no modern player has followed his technique (including three of Barry's sons who played in the NBA). The problem is that modern players believe that it looks funny. Shaquille O'Neal apparently said "I would shoot negative percentage before I shot like that." (Basketball fans who have seen O'Neal shoot free throws might think that he would have been well-advised to try Barry's technique.)

Why is it that the Fosbury flop took off while the underhanded free throw did not? And what led Fosbury to innovate in the way that he did? These are the questions of innovation and diffusion. They occur in many fields: technology, policy, fashion. But there are relatively few studies of innovation in law, and diffusion studies are only slightly more numerous (see Linos 2013 for a superb recent example.)

In this paper we seek to understand patterns of innovation and diffusion in constitutional rights. There has, to date, been some work on diffusion patterns (Goderis and Versteeg n.d.; Elkins 2008) but virtually nothing on innovation, which is a crucial, prior requirement for diffusion to take place. After all, a constitutional right cannot diffuse if it was never previously entrenched. Rights are also a particularly ripe area for exploration because there is an accepted narrative about the pattern of innovation. A common periodization and conceptualization scheme, sometimes attributed to Karel Vasak (1977), describes a first generation of civil and political liberties (negative rights) taking root in early British jurisprudence and the US and French constitutions. With the rise of industrial society, a second generation of social and economic rights (or positive rights) began to emerge. After World War II, in reaction to Nazi horrors, the international community articulated an expansive set of rights in the Universal Declaration of Human Rights (UDHR), a document that included both first and second generation rights as well as collective rights such as those to self-determination. These collective rights enjoyed by groups are sometimes characterized as third generation rights.[1]

In determining patterns of innovation and subsequent diffusion we will examine this periodization. We draw on data from the Comparative Constitutions Project, a multi-year effort in which we have sought to catalogue the contents of written constitutions for independent nation states since 1789. We begin our analysis with the Constitution of the United States and have identified several hundred new constitutions adopted in 220 independent states since 1789, as well as more than 2500 amendments thereof. For this analysis, we include a number of documents that predate the era of consolidated national constitutions, such as the Magna Carta, the English Bill of Rights and other key United Kingdom statutes.[2] In this particular version of the paper, we do not yet include the bills of rights from American states, though we recognize that the Virginia Bill of Rights of 1776 was particularly influential and will be included in subsequent versions.

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[1] We recognize that some identify a "fourth generation" rights which are sometimes said to inhere in future generations: an example is the right to sustainable development. These rights are quite contested.

[2] We rely on selection criteria developed by the Constitution Unit at University College London.

*The Problem: Low-Powered Incentives to Innovate*

Market settings provide one answer to understanding innovation, and many have drawn from them in analyzing constitutions (e.g. Law 2008). In a market for products, the innovator may be rewarded with supercompetitive profits, and so has some incentive to come up with the proverbial better mousetrap. Even in market settings, though, many analysts believe that there may be insufficient incentives to innovate. The innovator generates an "information externality" for others, who can learn (for free) from the success or failure of the innovation. Even failed innovations can provide information to other producers, and the risk-taking first mover rarely captures any of this benefit. Indeed, one of the reasons that we have intellectual property rights is to encourage certain kinds of innovation. By giving the first mover a temporary monopoly on production, we help slow the rate of copying and hence enhance the rate of innovation. Much of the debate in intellectual property law concerns how to calibrate this process toward a social optimum, avoiding social waste in the race to capture the first-mover advantage.

Producers of law—whether legislators, constitution-makers or judges—are not able to capture the benefits of this kind of revenue stream. They have no pecuniary interest in the products they produce.[3] Nor can they claim a property right if they innovate or control subsequent "use". It might be that any incentives to innovate have to come from public-regarding motivations on the part of decision-makers.

To some degree, of course, there may be reputational benefits that can "compensate" the innovator. A great judge, for example, may live on in history for his role in inventing a new doctrine. Judge Learned Hand, for example, lives on in the so-called Hand Formula taught to first year law students. Judge Roger Traynor of California—whose obituary called him "one of the greatest judicial talents never to sit on the United States Supreme Court" – is known to lawyers for his role in forming modern product liability law and a host of other innovative decisions. Legislators may live on in the names of legislation: the Financial Reform and Consumer Protection Act, for example, is usually referred to as the Dodd-Frank Act; the Sarbanes-Oxley Public Accounting Reform and Investor Protection Act is another eponymous piece of legislation well known in financial circles.

What of constitutional drafters? It is true that drafters may be interested in gaining fame as a founding father or mother, but few members of constitutional drafting commissions go on to the fame of a James Madison or Alexander Hamilton. Does anyone remember Daniel of St. Thomas Jenifer, a Maryland delegate to the constitutional convention? Or Jared Ingersoll of Pennsylvania? In short, most countries' constitution-makers are lost to obscurity, which provides them little incentive to be invested in doing the hard work of innovation.

[3] Note that, following Beard's (1913) classic argument, McGuire and Ohsfeldt (1986, 1989a and 1989b) use statistical analysis to evaluate the voting behavior of the delegates to the U.S. constitutional convention and find some support for public choice hypotheses of self-interest among drafters.

Furthermore, the very fragility of constitutions means that drafters may not have much incentive to create new institutions. Although, on average, a new constitution can be expected to last 19 years, most new constitutions last less than a decade and around 10% perish within just 1 year of being put into force (Elkins et al 2009). Constitution-makers have little incentive to invest *any* political energy into the project of making a new draft if they live in a country with a history of serial, short-lived documents, which, of course, may help explain why subsequent documents do not last. If no one expects a constitution to last, it may produce a self-fulfilling equilibrium. Such contexts provide little incentive to invent new institutions.

What other incentives to innovate may be present? In some areas of law, we think that the market forces of competition may operate to some degree. One of the oft-noted virtues of federalism is that it induces competition among jurisdictions. In a world of mobile population and capital, states will compete with each other to provide good law and will be rewarded if they do so. Local governments provide different packages of public goods, allowing what is known as Teibout sorting (Tiebout 1956; see also Fennell 2009). States in the United States, for example, are the primary regulators of corporate law, and commentators have noted that this may induce a "race to the top" in which good regulations crowd out bad ones. Others note that this could lead to a "race to the bottom" in which states will forego regulation to attract business. Whatever ones perspective, the idea is that jurisdictional competition affects law.

Although some have proposed that a similar dynamic affects national constitutions (Law 2008), we are somewhat skeptical. In a world of territorially defined nation states, populations are not able to "vote with their feet", emigrating freely to jurisdictions offering attractive rights packages. Nor is capital likely to be affected by a set of rights primarily directed at national publics. While one might think that the right to freely repatriate capital would be of value to firms in a global economy, such rights are relatively rare in national constitutions (only 20 constitutions of more than 900 in our data even mention foreign capital). There is, crucially, an excellent "substitute product" available to provide capital with protection: international treaty instruments. In recent decades, bilateral investment treaties (known as BITs) have spread around the world (Elkins, Guzman and Simmons 2007), and these typically provide important protection for foreign capital. Adjudication of violations occurs *outside* the host state, so that foreigners can have confidence they will be treated fairly. Many trade agreements, such as the European Union Treaty or the North American Free Trade Agreement, also provide investor protection (Baccini and Urpelainen 2013). With these substitutes easily available, why would investors care much about a national constitution? In short, we doubt there is either a race to the top, or a race to bottom in constitution-making. Quality improvements, if any, must come from another source than jurisdictional competition.

Another challenge for constitutional innovation is that of knowledge. Most constitution-makers have never engaged in the project before and will never do so again. Furthermore, in the constitutional context, it is enormously difficult to identify whether a particular institution is likely to be effective or not, as success depends on a complex interaction between institution and context. Social science has not generated very many "best practices" for constitution-makers, even if policy makers and academics

continue to search for them. Issues like how to deal with ethnic conflict, the merits of presidentialism and parliamentaraism, and design of constitutional adjudication have not been definitively resolved.

There is, thus, incomplete information on the impact of choices. Evaluating success or failure is itself a difficult task, to which whole subfields of social science are devoted, but profound challenges remain. It is difficult to find measures of success. As a result, we simply do not know the effects of many institutions. Even an issue such as the relative merits of presidentialism and parliamentarism, which absorbed much attention in the field of comparative politics for two decades, has not generated much prescriptive guidance (Cheibub 2007).

One of the lessons of this literature is that context matters, and drafting a national constitution involves making choices about institutions for a particular context. Whether a particular institution works will depend in part on the institution, but in part on the context. For example, a bicameral legislature might be a good idea for the United States, but be less appropriate for Tonga or Tuvalu, which have much smaller populations and, hence, may be less able to afford a large legislature. A right to herd reindeer makes sense in Sweden but not in Swaziland. If a drafter adopts an institution and observes failure, it is hard to know whether that failure is because of the institution and its inherent properties; because of the context, in which any plausible alternative would also have failed; or some interaction between the two. There is a lack of usable social science knowledge available; indeed one motive for our broader project is to facilitate greater learning about the consequences of constitutional choices.

In short, there are few best practices or universal rules in constitution-making, creating a kind of epistemic problem for designing institutions. There is slim possibility for the kind of experimentalism that has been celebrated in other areas of public law, in which there is a regular interaction between courts, litigants, and legislators (Sabel and Simon 2004).

A further challenge for innovation is the scarcity of time. Drawing on work by Elkins et al. (2009), we note that national constitutions are often negotiated in complex, contentious processes that involve political struggle. Writing is costly in time and negotiation, and creating something new is especially costly. The problems associated with scarcity of time are exacerbated by the fact that most constitutional drafting efforts have tight deadlines. Most constitutions are not drafted for 20 years, like Myanmar's constitution. Egypt's experience is more typical, where President Morsi required the constituent assembly to finish drafting the constitution in one overnight session. Of the 86 constitutions for which we have data on the duration of the drafting process, half were drafted in eight months or less, and more than 25% were drafted in less than 4 months (Ginsburg et al 2009). One cannot expect to observe much innovation when drafters are not given the time to innovate.

Constrained by time and political pressure, lacking experience, and without much useful social science knowledge to draw on, the constitutional drafter is in a difficult position. In such a circumstance, there are few incentives to innovate, and we are likely to get under-production of new institutions. The far safer, and quicker, course is to look around to other countries' experience and to borrow institutions. For example, Professor Karol Soltan of the University of Maryland was advising the Kurds in the

constitutional negotiations in Iraq. He suggested a modified version of the Belgian constitutional court as a possible institution. The drafters responded by asking him what country used the particular proposed model, and Soltan had had to reply that none did. That was the end of the discussion. Even without risk aversion, boilerplate provisions drawn from powerful models may be particularly attractive when negotiating time and resources are scarce. Drafters are likely to choose provisions perceived as "fitting" from the menu of available options provided by other countries' constitutions (Weyland 2005).

What institutions are likely to be available for off the shelf inclusion in a constitution? There are two primary sources of material for constitution-makers: national history and international institutions. We expect that there will be a good deal of inertia in the drafting of constitutions, and national patterns of institutions are likely to be retained across serial constitutions in a country's history. If a constitutional drafting commission decides to look outside the inherited text, they will tend to look abroad.

In general, constitutions within a single country do exhibit a good deal of serial similarity across time. The set of institutions adopted in the very first constitution in a country's history tends to be very sticky; indeed, in one recent paper, we find that the initial set of institutions is a better predictor of institutional structure than whether the regime adopting the constitution is authoritarian or democratic (Elkins, Ginsburg and Melton, forthcoming). This is consistent with the notion that constitution-makers have little incentive to experiment.

Another very important source of information is the international community. While constitutions have always been written in transnational contexts, this is especially true in a global era, when a plethora of international organizations, bilateral donors, non-governmental organizations, academics and civil society groups may wish to weigh in on the contents of a national constitution. Some organizations, such as the Venice Commission set up in the aftermath of the fall of the Soviet Union, provide regular commentary on the drafting of new constitutions, constitutional amendments, and judicial decisions (Venice Commission 2010). International organizations also help interpret national documents (Dixon and Jackson 2012), in turn informing other efforts at constitutional design. Outsiders subsidize the accumulation of information, which may lead to borrowing or migration (Choudhry 2008).

All this is not to say that innovation or experimentation never occurs in constitution-making. But it will require significant pressure, either from within the elites bargaining over the constitution or from social forces outside of it. Significant domestic political pressure will have to come from social movements or from elite bargains. In short, politics matter for innovation.

The constitutionalization of new rights, which we call rights innovation, occurs when current social arrangements are so unstable as to merit inclusion of a new provision in the formal constitutional text. This is a political decision that reflects either the demand for new forms of protection by mobilized groups in society or the supply of symbolic protections by political elites. For instance, there is significant anecdotal evidence that "new" constitutional rights are introduced in response to domestic social movements. Consider the women's movement that mobilized around passage of the right to vote in the 19th amendment in the United States; the "sanitarista" movement in Brazil that pushed for the

constitutionalization of the right to health in the country's 1988 constitution (Weyland 1995); or the environmental groups in Bolivia that pushed for the environmental rights in the country's 2009 Constitution. Given the inertia of the constitutional status quo, we do not expect this to be common without significant effort from powerful interest groups. The inclusion of new rights also, typically, accompanies critical breaks in a country's history. Without the entry of women into the labor force in World War I in the United States, the end of authoritarian rule in the 1980's in Brazil, or the rise of populism in recent years in Bolivia, we might not have observed the constitutionalization of any of the rights in the examples above. Rights, after all, do not have a determinate or fixed meaning, but are claims invoked in particular times and places by those seeking to advance ide as of justice or liberty.

Technological change is important too, both for creating new social demands and new means of channeling political activity. Consider the novel drafting of the (unadopted) constitution of Iceland in 2010. A group of 25 citizens, elected by the national public, formed a constitutional drafting commission. They sought to solicit public input, and set up a Facebook page, iterating drafts and incorporating comments on a weekly basis (Gylafson 2012). Technology thus facilitated public mobilization and input, and the result was a modest degree of innovation in the form of a new right never before found in national constitutions: citizens cannot be prevented from using the internet (Art. 14 of the draft).

Existing accounts fit into this general framework. Writing about established industrial democracies in the British tradition, David Erdos (2010) articulates a postmaterialist trigger thesis, which argues that a triggering event is necessary to spark political elites into adopting a bill of rights. Thus, in Canada, a bill of rights for all Canadians became an important project in the aftermath of the struggle for Quebec independence. In Australia, in contrast, political stability meant that there was never a real consensus on the need for a bill of rights and so one was never adopted. Rights adoption follows significant social pressures.

Gabriel Negretto's recent study of constitution-making in Latin America is also consistent (2013). Negretto provides what he calls a two-level theory of constitution making as involving both cooperation and distribution. All parties would like to have a constitution that provides public goods and generates functioning government. This is the level on which there is agreement about basic institutions, and in Negretto's view explains why there is a good deal of serial dependence in constitution, unless there is a major crisis in governance. But constitutions are also made by politicians who will seek to secure partisan advantage. We thus see political competition over the distribution of power in constitutional design. Negretto considers this a second level of constitutional design, and it explains why there is not perfect path dependency. Rights, in his view, have no distributive consequences. While this seems overstated, it makes sense that there would be a good deal of inertia from one constitution to another.

In short, we believe that constitution-makers have relatively few incentives to innovate and there will be a good deal of continuity from one constitution to another in a country's history. We expect that when innovations occur, they will either occur early in countries' constitutional histories or around periods of major political change, in which political forces mobilize around particular innovations.

*Methodological Considerations*

Our focus is squarely on constitutional texts. We recognize that innovation also occurs in the interpretation of texts; in adjudicative techniques; in the design of interpretive bodies; and in the inclusion of limitation clauses that may reduce the scope of a right. But our immediate focus is on constitutional drafters and their adoption of discrete formal rights.

In the analysis below, we use a set of 117 rights identified through the Comparative Constitutions Project. The complete list of rights is found in the Appendix. Our selection criteria are related to those for our broader project, and combined inductive and deductive methods. We first generated a list of variables that we had found in an earlier survey of national constitutions (van Maarseveen and van der Tang 1978); we then consulted several prominent constitutions and consulted with our international advisory board to expand the list. We note that virtually all constitutons do include *some* rights.[4] However, not every right in our broader survey was actually found in a constitution: we had imagined that there might be a national constitution with a right to same-sex marriage but did not find any. Some rights, such as Peru's grant of a right to indigenous citizens to be free of taxes, are only found in historical texts.

For purposes of this paper, we have coded a number of United Kingdom statutes that predate the development of modern constitutionalism, beginning with the Magna Carta (1215). We rely on a list of statutes generated and maintained by the Constitution Unit at the University College London to select these documents. Because our primary interest is the modern era, our focus is on innovations beginning in 1789.

We should make clear that the use of the term innovation is not meant to indicate that constitutional drafters themselves "invent" new rights. 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. In this regard, a particularly informative line of inquiry concerns rights that *could* have been constitutionalized but were not.

For our limited purposes, an innovation occurs the first time a right is constitutionalized. Given this definition, it is perhaps not surprising that a good deal of innovation occurs in the early years of the period of modern constitutions. For some rights, there was latent demand for constitutionalization in the late 18th century but no modern constitution to satisfy that demand. The creation of the modern constitution in the United States and other countries provided an opportunity to constitutionalize a number of rights that would have been previously entrenched had there been an instrument to do so.

[4] There are a small number of exceptions that failed to include any rights: France's 1875 constitution, Haiti's 1811 constitution, Latvia's 1922 constitution, Lesotho's 1983 constitution, Malawi's 1966 constitution, Mauritania's 1985 constitution, Poland's 1992 constitution, the Soviet Union's 1924 constitution, South Africa's 1961 constitution, and Thailand's 1976 constitution

We leave unarticulated rights out of the analysis for practical and theoretical reasons. The practical problem is identifying that which is not written down. Theoretically, we must make clear that it is not our intent to identify the set of rights actually in operation in any particular context. There may be non-enumerated rights in any constitutional order that are so widely understood and accepted, there is no need to write them down. However, the object of our study is the texts themselves, which we view as acts of purposive institutional design. Elaborating a right in a constitutional text indicates, we think, a certain level of importance or salience to the drafters of the constitution. We are, thus, less interested in the "true" set of rights enjoyed in any particular context so much as what the enumerated set is.

This point also dovetails with the fact that listings of rights are plural. Any particular constitution-making exercise will incorporate only some of a broad menu of potential rights; no constitution incorporates all of the rights included in our survey. Where does the menu come from? As a general matter the list comes from the rights provisions in other countries' constitutions, court cases, international treaties, and in some cases even the ideas of academics and social entrepeneurs. If these rights interact in distinctive ways, one might think of innovation as the adoption of new, distinctive combinations of rights, not found in other countries. By analogy, a diner who combines items from a buffet in a unique way might be considered an innovator in some sense. But this definition risks making innovation nearly universal, and consequently uninteresting.

Our focus on rights that cross the threshold of formal constitutionalization leads to the possibility of type II error, as we will miss rights that fail to make it into the formal constitution. As an example, consider the Equal Rights Amendment in the United States, which failed to pass the threshold of 38 state ratifications by 1982. It had originally been proposed in 1923, finally passed both houses of Congress by a 2/3 majority in 1972 and had been ratified by 30 states by 1982. It enjoyed, by this measure, overwhelming political support. Yet some opponents argued that it was unnecessary because the rights were already protected under the Constitution. The US Constitution is coded in our survey as having no general guarantee of equality based on gender, though in some sense the 19th amendment—giving women the right to vote—can be seen as launching a much broader anti-subordination agenda that changed the small-c constitutional understandings of gender (Siegel 2009). Consider also the ill-fated Child Labor Amendment to the US Constitution, approved by Congress in 1924 as a reaction to Supreme Court rulings that upheld child labor. It almost achieved the required 2/3 majority of states, but lost momentum with the passage of the Fair Labor Standards Act, that accomplished many of the desired reforms.[5] In each of these cases, political proponents of constitutionalization of rights got much of what they desired through subconstitutional change or new interpretations of existing rights.

[5] Two other amendments came within a single vote of passing the US Senate: the Flag Desecration Amendment in 2006, which sought to overrule Texas v. Johnson; and the Bricker Amendment in 1954, which sought to limit the ability of the government to enter into foreign human rights treaties.

Although there is certainly a possibility of type II errors, these will place few practical limits on the analysis conducted below. After all, we still observe a tremendous amount of variation in adoption rates of the formal rights that are included in our analysis. Some rights are included in the vast majority of constitutions written since 1789 (e.g. freedom of expression), while others are included in only a handful (e.g. the right to bear arms). Perhaps the most important limitation is that we cannot infer anything about why some rights eventually get constitutionalized and others do not, but that is not our emphasis below. Instead, we focus on why some constitutions are innovative and others are not, which we hope will provide some insight into the conditions under which constitutional innovations occur.

*When Do Rights Emerge?*

Table A1 in the Appendix presents the 116 rights that are subject to our inquiry and notes the national constitutional document in which they made their first appearance. Several things stand out. Many rights, approximately 45% (55 out of 116) make their first appearance in an early UK statute, the US Constitution or Bill of Rights, or the French Declaration of the Rights of Man, either in its original or 1793 version.[6] These foundational documents were, by definition, highly innovative. Nearly half of all rights ever "invented" in constitutional texts appear before 1795 (See figure 1). While the initial constitutions were, by definition, the only available models for those that came immediately thereafter, the substantial changes in the social and political environment since the 18th century might lead to an expectation of somewhat more innovation. However, as illustrated in figure 1, innovation tapered off dramatically after 1850. 75% of the rights in our survey (89 of the 116) were first observed in a national constitution written before 1850. Of the remaining 29 rights, half (15) first appeared during the interwar period (1917-1940). There have only been four rights that first emerge after since World War II: equality regardless of sexual orientation (Brazil's constitution of 1988), the indigenous right to participate in certain acts illegal for the non-indigenous population (1986 amendment to India's constitution of 1949), a specific indigenous right to form political parties (Bolivia's constitution of 2009), and the right to enjoy the benefits of science (Poland's constitution of 1952). This itself is interesting given the widespread perception that the second half of the 20th century is the era of rights (Henkin 1990).

Another interesting observation is the spatial variance in innovation. We already noted the importance of the early French, UK, and US constitutional instruments. Other constitutions that created multiple constitutional rights are Haiti's 1816 constitution (eight rights), Switzerland's 1848 constitution (four rights), Costa Rica's 1844 constitution (three rights), and Finland's 1919 constitution (three rights). In addition, a number of constitutions added two rights to the international menu: Spain's 1808 constitution, France's 1814 constitution, Chile's 1822 constitution, France's 1848 constitution, Austria-Hungary's 1849 constitution, Germany's 1919 constitution, Czechoslovakia's 1920 constitution, and Peru's 1933 constitution. In all, 88 of the 116 rights in our survey were first constitutionalized in just 17 constitutions. Two things are notable about these 17 constitutions. First, five of them are from France.

[6] The Polish Constitution of 1791 contained very few rights provisions, and all were directed at the nobility.

20% of the rights in our survey were first constitutionalized in France. It appears that France is indeed a wellspring of *liberté* and *egalité*. Second, several of the constitutions listed above were produced in the global periphery, including Haiti's 1816 constitution, Chile's 1822 constitution, Costa Rica's 1844 constitution, and Peru's 1933 constitution. Bolivia's recent grant of rights to nature itself follows this trend.

Another important point is that most rights first appear as national rights. Only one right—that to free scientific inquiry—first appeared in an international instrument: the Universal Declaration of Human Rights in 1948. That right was not first constitutionalized until it was entrenched in Poland's 1952 constitution. Rights are, initially at least, a national practice, rising up to the international level later. Yet we also observe that international human rights instruments have had a profound effect on the choices made by national constitution makers. Ginsburg, Elkins and Simmons (2013) show that those rights included in the international bill of rights (the Universal Declaration, the International Covenants of Civil and Political Rights and Economic and Social Rights) had a powerful focal effect on national drafters who adopted constitutions thereafter.

Our immediate concern is the sources of innovation. What are the determinants of innovation in constitutional rights? We use a sample of 689 constitutions, of which 45 are "innovators". (We exclude from the analysis a small number of constitutions that we have not yet coded.) Table 2 provides some descriptive statistics. Innovation is slightly more likely to occur in a country's first constitution. But it does not seem to matter whether the innovative constitution is replacing a short-lived or long-lived one.

Recall our expectation that innovation will be the exception, and will follow significant political change or turmoil. We examine two indicators of political conflict. One is an indicator of regime change. To measure regime change, we use data from the Unified Democracy Scores, a new meta-indicator aggregating the various indicators of democracy (Pemstein et al. 2010). Perhaps intuitively, transitions to democracy sometimes result in innovation, but transitions to autocracy never do. As we show in another recent paper, authoritarian constitutions tend to converge towards democratic constitutions over time (Elkins et al. 2013). We speculate that this indicates a continual process of lagged adaptation by authoritarians, who seek to model their texts on those of their democratic counterparts. Democrats innovate in the formal constitution, while dictators tend to imitate formal democratic institutions, saving their innovations for the informal realm.

The other indicator of political conflict measures the extent of domestic political conflict in a given year. Here we use data from Banks (2010), which captures whether or not there were any assassinations, general strikes, instances of guerrilla warfare, government crises, purges, riots, or revolutions in the previous year. The data are only available from 1919-2010, a period when few rights were first constitutionalized. However, of the innovative constitutions written during this period, most (8 out of 14) were written after periods of domestic political turmoil. Furthermore, the three constitutions not correlated with Banks' measure of domestic political conflict are all associated with political conflict more broadly defined. The Estonian Constitution of 1920 is associated with its war for

independence; the Brazilian constitution of 1988 is associated with the regime change that took place in the early 1980's; and the Bolivian constitution of 2009 is associated with the populist revolution that swept through Latin America in recent years (King 2013).

We also derive cut-points to mark the different eras. We see that most of the innovators occurred between 1826 and 1925, but that the probability of innovation was higher in the earlier era, hardly a surprise because of our definition of innovation. Regionally, most innovators are found in Latin America, though Western European and North American constitutions (which tend to be more stable and so are fewer in number) are more likely to innovate.

One feature not included in the table is the duration of the drafting process. As noted previously, we have data on the duration of drafting for 86 constitutions, but due to data limitations, only 6 of these constitutions are rights "innovators." As a result, it is hard to say anything definitive about the effect of drafting duration on innovation, though intuition might expect that the more time devoted to drafting, the likelier that genuine innovation might occur. That said, each of the six innovators for which we have data on drafting duration took more than six months to produce. This is some evidence that longer drafting processes are more conducive to innovation, but more data on constitutional drafting is necessary to corroborate this evidence. In this regard, future research should also look into whether features of the drafting process—for example, the levels of public participation, or the type of constituent body--affect the likelihood of innovation. Perhaps certain groups are more likely to take the time to innovate or are less wedded to the status quo (e.g. ordinary citizens) than other groups (e.g. the legislature).

To summarize table 1, innovation in constitutional rights is primarily associated with two factors: the point it appears in a country's constitutional history and the presence of political conflict. Notably, the numbers in table 1 understate the importance of these factors because the analysis takes place at the level of the constitution, rather than the level of the right. However, all of the most innovative constitutions are associated with political conflict. The UK Bill of Rights is associated with the Glorious Revolution; the US Constitution and Bill of Rights are associated with the American Revolution; the French Declaration of Rights and early constitutions are associated with the French Revolution; and the Haitian 1816 constitution is associated with a social revolution that extended rights to minority and indigenous groups. (Admittedly, virtually *any* period in Haitian history is associated with political conflict.) Not only were these constitutions associated with conflict, but the US and French constitutions were among each country's first. This is true of a number of other innovative constitutions mentioned in as well (e.g. Spain's 1808 constitution, Estonia's 1920 constitution, etc.).

*The Spread of Constitutional Rights*

We have already observed that most rights were first constitutionalized near the start of the modern constitutional era in the late 18th and early 19th centuries. However, this tells us little about when non-innovator countries first adopted these rights. It turns out that there is little relationship

between when a right was first constitutionalized and its prevalence in national constitutions today. For instance, of the rights first constitutionalized prior to 1800, some are in more than 90% of the world's constitutions today while others are in only a few. This section attempts to explain how we arrived at the current distribution.

Let us begin with the conventional narrative identified in the Introduction. Traditionally, the spread of rights is thought to have occurred in three waves or generations (Vasak 1979). All of the "popular" rights are thought to be associated with one of these three waves (Marks 1981, p. 440), and each wave corresponds to a different revolutionary movement. The first is associated with the American and French revolutions in the late 18th and early 19th centuries. These revolutions lead to the constitutions of the American states, the United States Declaration of Independence (1776) and Bill of Rights (1791), as well as the French Declaration of the Rights of Man (1789 and 1793). These documents entrenched a number of negative civil and political rights in the domestic law of the United States and France and established a precedent that other countries soon followed. By the end of the 19th century, most independent countries had written constitutions where they entrenched numerous civil and political rights.

The second generation of rights is associated with the social revolutions that occurred in Europe (and elsewhere) in the late 19th and early 20th centuries (Marks 1981, p. 440). The rights popularized during this period were informed by Marxist writings. They were formalized in positive terms and are often referred to as socioeconomic rights, such as the rights to education, health care, social security, etc. Constitutions written during this period, like Mexico's 1917 constitution or Russia's 1936 constitution, included numerous socioeconomic rights and set a precedent used by many subsequent constitutions.

The third generation of rights is associated with the anti-colonialist revolutions that occurred in much of the developing world in the wake of World War II. These revolutions led to the creation of a large number of new states in the immediate post-war period. A major concern for these nations was self-determination and nondiscrimination. Not only were the declarations of independence made by these nations situated in the language of self-determination, but the countries created during this period were highly heterogeneous, often including both indigenous groups and former-colonizers. The challenge of integrating a diverse population into a nation-state that faced these newly formed countries put a spotlight on the issues of equality and nondiscrimination at a global level. The result was the recognition of equality and nondiscrimination as universal norms. South Africa's constitution of 1996 is a classic example of a constitution with explicit protection of different groups in society.

The three generations of rights reflect changes in the status of these rights. Each generation marks an increase in the awareness of a particular class of rights, with a different class of rights entering the international dialogue at each new generation, and is intimately tied to a particular revolutionary movement. The victors of each movement wrote constitutions to commemorate their achievements. The rights entrenched in these iconic constitutions not only helped resolve the conflicts that prompted those revolutions, but they set a precedent for the rights that *should* be included in future constitutions written in other countries.

The "generation of rights" hypothesis implies that there were systematic changes in the acceptance of certain rights at three key points in time: 1) the early 1800s, 2) the early 1900s, and 3) the 1960s. If this hypothesis is correct, then we should observe systematic changes in the entrenchment of certain rights in national constitutions during those same time periods. We test this hypothesis using a change point model to identify breaks in the adoption rate of constitutional rights over time. A change point model estimates if there is a point ($\tau$) at which the statistical properties of a sequence of observations change (Killick and Eckley 2011). Here, the sequence of data is the "accepted" rights in the international rights dialogue in each year from 1800 to 2010, denoted as $R_t = (R_{1800}, R_{1801}, \ldots, R_{2010})$. Estimating a change point model involves testing the likelihood that some statistical property (e.g. the mean or the variance) is different between the sets $(R_{1800}, \ldots R_\tau)$ and $(R_{\tau+1}, \ldots R_{2010})$. The model first tests if there are one (or more) $\tau$ in the sequence using a likelihood-ratio test and, if there are one (or more) points where the statistical properties of the sequence change; it then identifies the point(s) in the sequence where that (those) change(s) is most likely to take place. Thus, the presence of, number, and location of any change points are all treated as unknown quantities and detected by the model.

We use the *changepoint* package in the statistical program R to test for changes in the mean number of rights "accepted" by the international community.[7] The only input in the change point model estimated below is the number of rights "accepted" by the international community in each year from 1800 – 2010. We consider a right "accepted" by the international community if it is constitutionalized half of the constitutions in force in a given year. We refer to this as the "median" constitution, which we identify in each year under analysis. The median constitution changes dramatically between 1800 and 2010. The only right included in the median in 1810 is freedom of press, but by 2010, the median consisted of 46 rights.

Of course, one might argue that calling a right "accepted" once it is entrenched in 50% of constitutions is arbitrary. Why not use 40% or 60% or an even more extreme percentage? To test the robustness of our results to this decision, we also look at the number of rights in the "average" constitution in force in each year. We calculate the average constitution by determining the number of rights in each constitution in force in a year and calculating the mean of that distribution. Like the size of the median constitution, the number of rights in the average constitution has also increased dramatically over the last 200 years, from around 10 in 1800 to about 48 in 2010. The advantage of looking at the average constitution is that rights do not need to surpass any threshold to be included; it is just a measure of the number of rights in a constitution. The disadvantage is that the average constitution fails to identify agreed upon rights; instead, it is a combination of agreed upon rights and more peripheral rights that are country-specific. As a result, the average constitution tends to include a few more rights than the median constitution, and the size of the average constitution tends to lead the size of the median constitution. Although we prefer the median constitution as an analytic construct,

[7] Specifically, we estimate a model that looks for changes in the mean ***and*** variance using the binary segmentation method to identify the optimal number of change points. We allow for a maximum of ten change points (i.e. we allow the model to identify up to eleven generations of rights) and reject all change points where the probability that the difference in means and variances equals zero is less than 0.000001.

we provide the estimates change points from both measures in the analysis below to demonstrate the robustness of our results.

Figure 2 illustrates the number of rights included in the median and average constitution from 1810 to 2010. In the figure, the dashed, vertical reference lines indicate the breaks identified by the change point model, and the solid, horizontal lines indicate the mean number of rights associated with each period, or generation. Contrary to the conventional literature, our data indicates that there have been four generations of rights. Looking first at the panel on the right, that panel illustrates the four change points in the median constitution. The first occurred between 1800 and 1867 and is associated with consensus on about 8 rights. The second occurred between 1868 and either 1962 and is associated with consensus on about 15 rights. The third occurred between 1963 and 1989 and is associated with consensus on about 19 rights. The fourth occurred between 1990 and 2010 and is associated with consensus on about 38 rights.

Notably, the four generations identified by the median constitution are almost identical to the four generations identified by the average constitution in the left panel of figure 2. There are two main differences. First, the number of rights associated with each generation by the average constitution is larger than the number identified by the median constitution. This is to be expected because the average constitution is a more liberal measure of the number of rights accepted by the international community. Also, as noted above, it is a leading indicator because it contains both well accepted rights and rights that are not yet widely recognized by the international community. The second difference is that the second change point occurs in 1963 in the estimates based on the median constitution and in 1945 in the estimates based on the average constitution. Our interpretation of this difference relates to the fact that the average constitution is a leading indicator of accepted rights. There was a large increase in the number of rights included in constitutions after World War II, but it took some time, and the creation of dozens of independence constitutions in southern Asia and Africa, before the new consensus generated by the Universal Declaration of Human Rights become apparent in the median constitution.

The results in figure 2 suggest that rights expanded in four waves, not three. The first two expansions took place in the 19th century, and the second two took place in the second half of the 20th century. Contrary to existing scholarship, we find little evidence of an expansion surrounding the socialist revolutions or World War I in the early 20th century. There is a slight increase in the number of rights included in the average constitution around 1918, which is identified by the model if we were to use a slightly less stringent criterion for rejecting change points. However, if we allow that change point to exist, the expansion associated with the 1945 wave (right panel) decreases dramatically, to only two additional rights. Moreover, the expansion in 1918 is not really associated with social and economic rights, as most social and economic rights found in the 2010 median constitution had already appeared in constitutions in earlier waves. Lastly, and perhaps most importantly, regardless of how we estimate the model, all rights expansions prior to 1990 are relatively modest, at least in comparison to the expansion at the end of the Cold War, which doubled the number of rights in the median constitution and increased the number of rights in the average constitution by 50%.

Of course, the three generations of rights hypothesis is as much about expansions in the different categories of rights as it is about the timings of those expansions. This is something that we lose by lumping all 116 rights in our sample into one aggregate measure. One could argue that such an approach biases our analysis against finding the conventional three generations of rights. To alleviate this concern, we recalculated the median and average constitutions, stratifying by the type of right: civil and political rights (35 rights), legal process rights (22 rights), social and economic rights (32 rights), and minority rights (28 rights).[8] This yielded a median constitution and average constitution for each set of rights, and we reestimated our change point model for all eight measures.

The results of the change point models estimated on each category of rights are illustrated in figure 3. As in figure 2, the results in figure 3 provide some evidence of the three generations hypothesis. We find the most evidence for the first generation of civil and political rights. The top two panels illustrate a consistent expansion in the number of civil and political rights found in constitutions between 1810 and 1867, more than doubling the average number of such rights from 4 in the earliest constitutions to 9 by 1867.

There is also some evidence for an expansion in minority rights immediately after World War 2. The bottom two panels in figure 3 identify a change point just after World War 2. However, the magnitude of the change differs between the left and rights panels. The median constitution suggests there is a small change in the number of minority rights around 1959, increasing the number of such rights in the median from 1 to 3, with further expansion near the end of the Cold War. The average constitution suggests there is a change in the number of minority rights found in constitutions in 1945, at which point the average number of minority rights doubles from under 3 to 6. The differences in the magnitude of the expansion in minority rights between the two measures indicates that minority rights started to expand after World War 2 but that it was not until the end of the Cold War that there was convergence on which minority rights should be entrenched in constitutions. Most minority rights in our sample are generates of equality/anti-discrimination for different groups, so it makes some sense that it would take time to figure out which groups deserve universal protection.

There is the least evidence for the second generation of rights expansion. The second generation of rights is associated with the perceived expansion of social and economic rights in the early 20th century. The change points in social and economic rights are illustrated in the third row of panels in figure 3. There are five change points identified when the model is estimated on the median constitution and four when it is estimated on the average constitution. Although there are change points identified in the early 20th century, the magnitude of the expansion in both measures is small. For the median constitution, the number of social and economic rights expands by one in both 1904 and 1918. For the average constitution, the number of social and economic rights increases by one right in 1918. The small expansion in social and economic rights during this period explains why there is no change point identified in the early 20th century in figure 2. We would argue that the evidence presented in figures 2 and 3 provide ground to reject the hypothesis that there was a large expansion in

[8] We combined physical integrity rights into civil and political rights for this part of the analysis.

social and economic rights in the early 20th century. Instead, it appears that social and economic rights did not become popular in constitutions until after the end of the Cold War in the early 1990s. [9]

One advantage of using our concept of the median constitution to identify accepted rights is that we can be very precise about which rights are accepted by the international community. We do this in table 2, which lists the rights include in each expansion by the category each right is included in. Recall that, traditionally, the civil and political rights are associated with the first wave, socioeconomic rights are associated with the second, and group rights are associated with the third. This differentiation is only partially supported by table 2. Although it is true that most of the rights agreed upon in the 19th century expansions are civil and political rights, general guarantees of equality, a group right, has always been common in constitutions, and free education, a social right, became a common feature of constitutions around 1868. The differentiation between civil and political, socioeconomic, and group rights breaks down even further in the two latter periods of expansion. In each, there is a mix of all three categories of rights.

This analysis seems to defy traditional explanations of rights expansion. Not only do rights expand in constitutions at different points in history than suggested by the three generations thesis, but multiple categories of rights are associated with each expansion. Does this mean that the three generations thesis is wrong? It is hard to say. Rights expansions necessarily occur during periods of great constitutional change. As a result, the internationally accepted set of rights could have changed long before we witness those rights gain prominence in constitutions, in which case the years of the breaks revealed in figure 2 would come after the point in time when international norms changed. One might also suspect that constitutions are not representative of international human rights norms because they are purely domestic instruments. In any case, the results illustrated in figures 2 and 3 at least raise doubts about the traditional theory, which subsequent work in this broader project will explore.

One element of the traditional story is that the period after World War II marked a sharp break in the *internationalization* of rights (Henkin 1990). One way to understand why our data might be consistent with this particular bit of the traditional account is to think about internationalization as involving a shift in the *level* of regulation because of decolonization. Previous to decolonization, the number of political entities in the world was much smaller. Consider then, the possibility that the set of rights governing a given citizen did not change between say, 1930 and 1960, but the probability of that citizen living in a new state was much higher. If former colonies borrowed from their erstwhile masters (Parkinson 2007), then we would observe continuity at the national level, a spread in the number of entities and thus popularity of rights, and *also* increased demand for international instruments to regulate rights. International treaties can be used to help organize external monitoring of national practice, and to facilitate precommitment by national governments (Moravcsik 2000).

[9] The other set of rights included in figure 3 are legal process rights. The change points in legal process rights are noted in the second row of figure 3. Convergence in legal process rights has occurred relatively recently, with large expansions in the number of such rights in the median constitutions in 1978 and 1989.

The rights present in the median constitution are interesting in a number of respects. First, the rights in the median tell us something about why some rights are popular and others are not. For instance, of the 43 rights in the median constitution in 2010, two-thirds were first constitutionalized prior to 1800. This further highlights the importance of those early constitutional documents in establishing a template for future constitution-makers. The French Declaration of Rights was a particularly influential. 80% (13) of the rights included in the French Declaration of Rights are in the median constitution in 2010. This increases to 90% for rights that are *also* included in the US Constitution or Bill of Rights. Conversely, only 53% and 25% of those rights included in the US Bill of Rights or early UK statutes, respectively, but excluded from the French Declaration of Rights, are in the median constitution in 2010. The French Declaration can indeed lay claim to being the most influential rights-text in influencing national constitution-makers.

Second, the rights in the median tell us something about the importance of international instruments. Most of the rights in the median constitution after World War II found their way into either the Universal Declaration of Human Rights, one of the international human rights treaties, or both. In fact, there are only three rights that did not: the prohibition of censorship, freedom of the press, and regulation of evidence collection. Notably, these are three of the five rights that no longer formed part of the median constitution after the expansion in 1965, and the prohibition of censorship is the only right to exit the median constitution and never re-enter. Furthermore, of the 86 rights included in the Universal Declaration of Human Rights or one of the international human rights treaties, 27 entered the median constitution between 1946 and 2010, while only 2 of the 32 rights not in the median in 1946 entered the median by 2010. Inclusion in the international human rights instruments created after World War II did not guarantee a right would become popular, and exclusion did not necessarily doom a right to the periphery. However, the odds were in the favor of those rights included in one of those instruments. This corroborates the analysis reported by in Elkins, Ginsburg and Simmons (2013).

The third, and final, insight from figure 2 is that we may be undergoing another expansion of rights. Notice that in 2008 the number of rights in the median constitution expanded from 39 to 44. Several protections for the accused and one group right entered the median in this year: the prohibition of double jeopardy, protection from self-incrimination, the right to appeal judicial decisions, the right to a fair trial, and financial support for children. These are rights to look for in constitutions written over the next few years to determine if they are firmly situated in the median or simply a short-term fad.

Our finding that the menu of rights has been subject to a recent wave of innovation may have tangential relevance to the revisionist account of Samuel Moyn (201) on the history of international human rights. Moyn's account takes issue with the traditional narrative that the international human rights movement is a product of the postwar era: he argues that did not gain force until the 1970s, after the decline of utopian political projects associated with decolonization and communism. While activists depict human rights as being of ancient vintage, Moyn argues that they are in fact recent. One potential implication of Moyn's account is that one would expect to see acceleration in the articulation of rights beginning in the 1970s. While the change point we identify occurs later, it does seem that there is an accelerating expansion in rights adoption in national constitutions, by our measure. In fact, according to our analysis, the end of the Cold War seems to be a watershed moment in the entrenchment of

constitutional rights. The number of rights in both the median and average constitution expanded dramatically at this critical juncture in history.

*Conclusion*

Few constitution-makers are as bold as Dick Fosbury. The vast majority of drafters are in a position in which they have little incentive to innovate. Most drafters tend to follow constitutional patterns already established in the country's history, or to adopt choices from earlier models and menus (Elkins, Ginsburg and Simmons 2013). Using a sample of 116 constitutional rights, we have shown that a significant plurality first become constitutionalized in the late 18th century. Subsequent constitutional innovation seems to be associated, loosely, with political turmoil, in our preliminary analysis, and is confined to a handful of countries and constitutions.

A separate question concerns the subsequent borrowing and diffusion of rights. Using a metric of constitutionalization by 50% of countries, we observe four different "generations" of rights, and seem to be in the midst of a significant expansion. One example of contemporary innovation is Ecuador's decision to grant, in Articles 10 and 71-74, rights to mother nature herself. Ecuador now provides standing to citizens to petition the government on behalf of ecosystems, and mandates a government duty to remedy violations. Whether this is a harbinger or blip, the story of rights has clearly not ended.

**FIGURES AND TABLES**

Figure 1 – Histogram of Year in which Rights First Constitutionalized

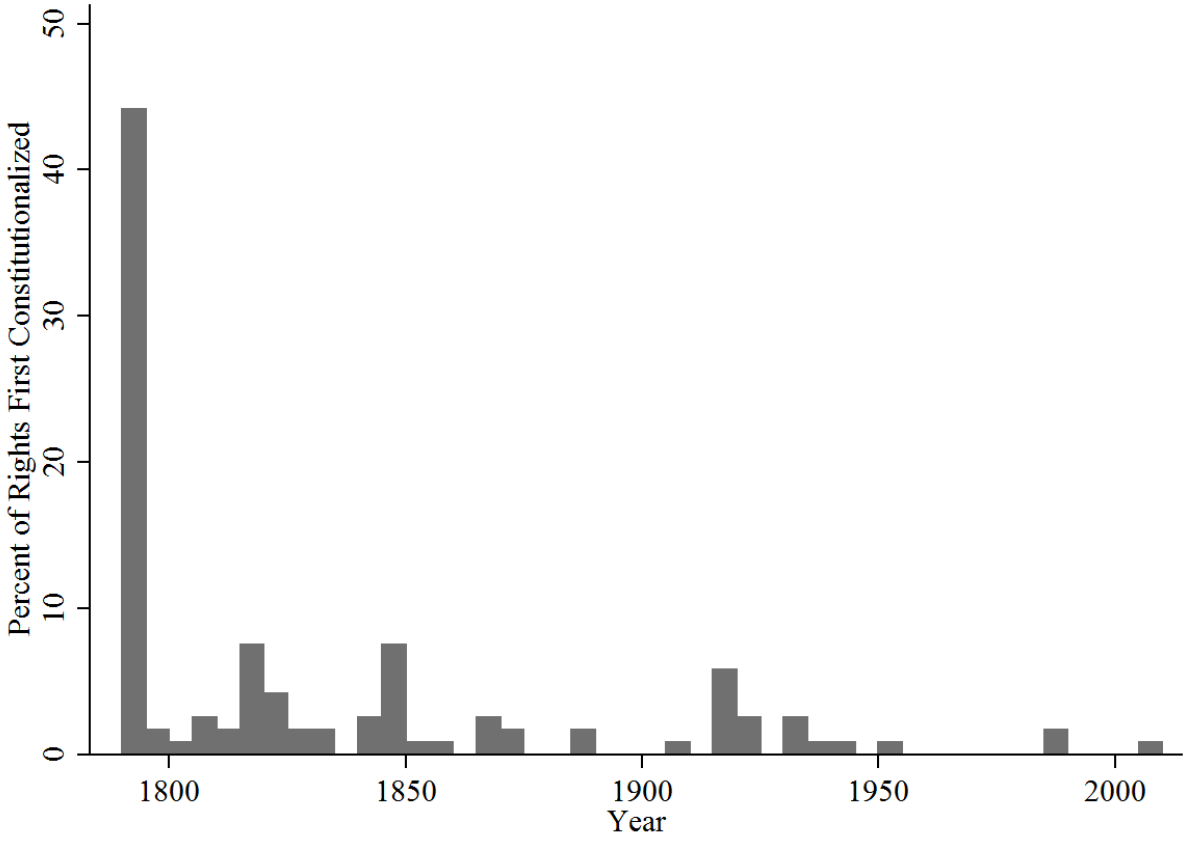

Table 1 – Conditions Supportive of Rights Innovation

| Condition | No Rights Innovation | Rights Innovation |
|---|---|---|
| Total | 644 | 45 |
| | (93%) | (7%) |
| Constitution Number | | |
| First | 174 | 15 |
| | (92%) | (8%) |
| All Later Constitutions | 470 | 30 |
| | (94%) | (6%) |
| Life Span of Prev. Constitution ≤ 6 | 238 | 15 |
| | (94%) | (6%) |
| Life Span of Prev. Constitution > 6 | 232 | 15 |
| | (94%) | (6%) |
| Regime Transition | | |
| No Transition | 596 | 36 |
| | (94%) | (6%) |
| Autocratic Transition | 9 | 0 |
| | (100%) | (0%) |
| Democratic Transition | 29 | 4 |
| | (88%) | (12%) |
| Domestic Conflict (1919-2010) | | |
| Absent | 270 | 3 |
| | (99%) | (1%) |
| Present | 173 | 8 |
| | (96%) | (4%) |
| Era | | |
| Prior to 1825 | 14 | 13 |
| | (52%) | (48%) |
| 1826-1925 | 164 | 24 |
| | (87%) | (13%) |
| 1926 or After | 466 | 8 |
| | (98%) | (2%) |
| Region | | |
| Latin America | 221 | 22 |
| | (91%) | (9%) |
| Western Europe, the U.S., and Canada | 56 | 14 |
| | (80%) | (20%) |
| Eastern Europe and Post-Soviet | 84 | 8 |
| | (91%) | (9%) |
| Africa and the Middle East | 199 | 0 |
| | (100%) | (0%) |
| Asia and Oceania | 83 | 1 |
| | (99%) | (1%) |

Figure 2 – Change Points in the Distribution of Rights from 1810-2010

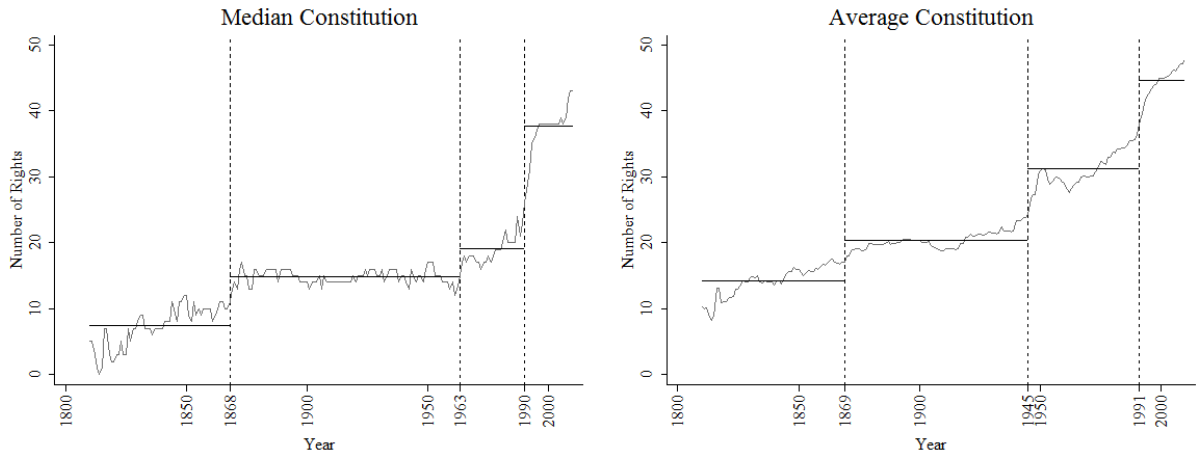

Figure 3: Change Points in the Distribution of Rights from 1810-2010 by Category of Rights

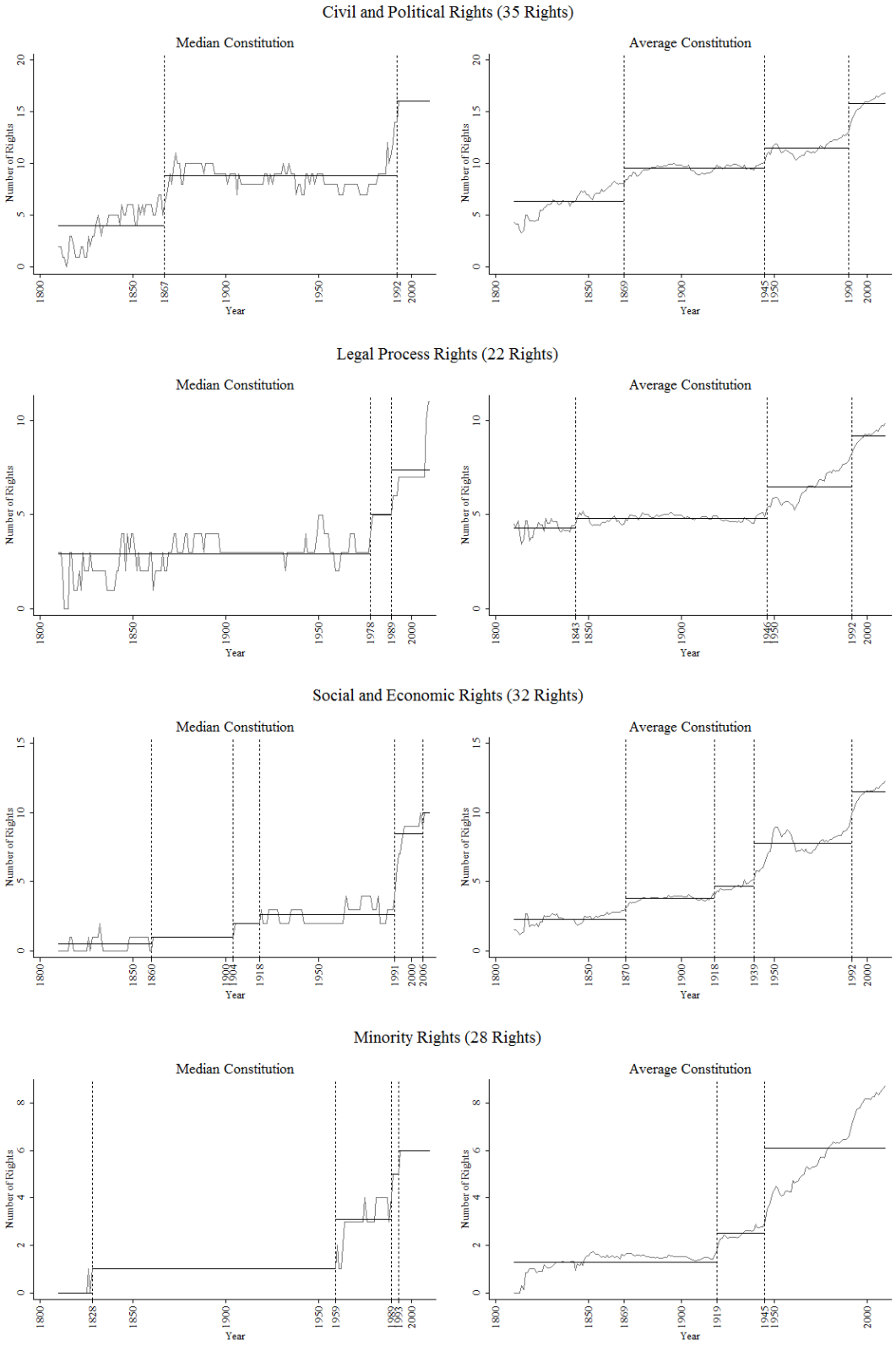

Table 2 – Rights Added to the "Median Constitution" in Each Period

| Period | Civil and Political | Legal Process | Social and Economic | Minority |
|---|---|---|---|---|
| 1810-1867 | - Freedom of opinion<br>- Prohibition of censorship<br>- Freedom of expression<br>- Right to petition government<br>- Right to privacy<br>- Freedom of press | - Protection from unjustified restraint<br>- Principle of 'no punishment without law' | | - General guarantee of equality |
| 1868-1962 | - Freedom of movement<br>- Freedom of association<br>- Freedom of assembly<br>- Freedom of religion | - Regulation of evidence collection | - Right to free education<br>- Right to own property | |
| 1963-1989 | - Right to universal suffrage | - Right to counsel<br>- Right to public trials<br>- Punishment from ex post facto laws prohibited | - Protection from expropriation<br>- Right to join trade unions | - Equality regardless of gender<br>- Equality regardless of race |
| 1990-2010 | - Prohibition of slavery<br>- Prohibition of cruel punishment<br>- Right to life<br>- Right to dignity<br>- Prohibition of torture<br>- Right to form political parties | - Presumption of innocence in trials | - Support for the elderly<br>- Support for the disabled<br>- Right to health<br>- Right to choose one's occupation | - Right to culture<br>- Equality regardless of religion<br>- Equality regardless of country of origin<br>- Right to the environment |

Notes: Only five rights – prohibition of censorship, freedom of press, freedom of opinion, right to free education and regulation of evidence collection – enter the median and then leave. The first, freedom of censorship, never reentered the median. Freedom of opinion exited in the 1868-1962 period and re-entered in the 1963-1989 period. Freedom of Press, the right to free education, and regulation of evidence collection all exited the median during the 1963-1989 period and reentered in the 1990-2010 period.

**Appendix**

Table A1 – List of 116 Constitutional Rights

| Description | Innovator | Year of Innovation | % with Right in 2010 |
|---|---|---|---|
| General guarantee of equality | France | 1791 | 97.4 |
| Freedom of expression | United States | 1791 | 93.7 |
| Freedom of assembly | United States | 1791 | 92.6 |
| Freedom of association | France | 1814 | 92.6 |
| Freedom of religion | United States | 1791 | 91.5 |
| Right to own property | United States | 1791 | 86.2 |
| Freedom of movement | United Kingdom | 1215 | 85.2 |
| Right to privacy | United States | 1791 | 85.2 |
| Equality regardless of gender | Netherlands | 1848 | 83.6 |
| Freedom of opinion | France | 1791 | 81.0 |
| Punishment from ex post facto laws prohibited | United States | 1789 | 80.4 |
| Prohibition of cruel or degrading treatment | United Kingdom | 1689 | 77.2 |
| Protection from unjustified restraint | United States | 1789 | 76.2 |
| Right to life | United States | 1791 | 75.7 |
| Prohibition of torture | Spain | 1808 | 75.1 |
| Equality regardless of race | Haiti | 1816 | 74.1 |
| Presumption of innocence in trials | France | 1791 | 74.1 |
| Right to counsel | United States | 1791 | 74.1 |
| Right to join trade unions | France | 1848 | 74.1 |
| Right to human dignity | France | 1791 | 72.5 |
| Right to the environment | Norway | 1814 | 66.7 |
| Prohibition of slavery | France | 1793 | 66.1 |
| Protection from expropriation | United States | 1789 | 65.6 |
| Right to public trial | United States | 1791 | 65.6 |
| Principle of 'no punishment without law' | United Kingdom | 1215 | 65.1 |
| Right to free education | Haiti | 1816 | 64.6 |
| Equality regardless of religion | Brazil | 1824 | 64.0 |
| Freedom of the press | United States | 1791 | 63.5 |
| State duty to protect culture | Norway | 1814 | 63.5 |
| Universal suffrage | Chile | 1823 | 62.4 |
| Support for the disabled | France | 1791 | 61.9 |
| Regulation of evidence collection | United States | 1791 | 60.3 |
| Right to health care | Germany | 1919 | 59.8 |
| Support for the elderly | France | 1791 | 59.3 |
| Right to form political parties | Cuba | 1940 | 57.7 |
| Right of petition | United Kingdom | 1628 | 55.6 |
| Right to choose one's occupation | France | 1793 | 54.5 |
| Equality regardless of country of origin | Haiti | 1816 | 52.4 |
| Prohibition of double jeopardy | United States | 1791 | 50.8 |
| Protection from self-incrimination | United States | 1791 | 50.8 |
| Right of government to deport citizens | Mexico | 1824 | 50.3 |
| Right to appeal judicial decisions | France | 1791 | 50.3 |

| Description | Innovator | Year of Innovation | % with Right in 2010 |
|---|---|---|---|
| Right to fair trial | United States | 1791 | 50.3 |
| Support for children | France | 1791 | 50.3 |
| Right to equal pay for work | France | 1791 | 48.1 |
| General guarantee of social security | France | 1791 | 47.6 |
| Protection of non-official languages | Norway | 1814 | 46.6 |
| Right to strike | Haiti | 1816 | 46.6 |
| Right to speedy trial | United Kingdom | 1215 | 46.0 |
| Equality regardless of creed or belief | Bolivia | 1851 | 45.5 |
| Protection of stateless persons | Haiti | 1816 | 44.4 |
| Rights of children guaranteed | Haiti | 1816 | 41.8 |
| Equality regardless of social status | France | 1814 | 40.2 |
| Prohibition of censorship | France | 1795 | 40.2 |
| Equality regardless of language | Austria-Hungary | 1849 | 39.7 |
| Right to rest and leisure | France | 1791 | 39.2 |
| Right to establish a business | Chile | 1822 | 38.6 |
| Right to safe work environment | Colombia | 1886 | 37.6 |
| Trial in native language of accused | Finland | 1919 | 37.0 |
| Equality regardless of skin color | United States | 1870 | 35.4 |
| Freedom to view government information | Uruguay | 1830 | 34.4 |
| Right to extradition | Mexico | 1857 | 34.4 |
| Protection from false imprisonment | United Kingdom | 1542 | 33.9 |
| Equality regardless of political party | Spain | 1931 | 33.3 |
| Limits in the employment of children | Mexico | 1917 | 33.3 |
| Prohibition of capital punishment | Ecuador | 1830 | 33.3 |
| Right to academic freedom | France | 1795 | 32.8 |
| Provision for matrimonial equality | Germany | 1919 | 31.7 |
| Support for the unemployed | Haiti | 1816 | 31.7 |
| Right to examine evidence/witnesses | United States | 1791 | 31.2 |
| Right to found a family | Germany | 1919 | 30.2 |
| Right to protect one's reputation | France | 1791 | 30.2 |
| Rights of artists mentioned | Costa Rica | 1844 | 30.2 |
| Right to inheritance | United Kingdom | 1215 | 29.6 |
| Right to pre-trial release | United Kingdom | 1542 | 29.6 |
| Separation of church and state | United States | 1791 | 28.6 |
| Right to shelter | Haiti | 1867 | 27.0 |
| Equal access to higher education guaranteed | El Salvador | 1872 | 24.9 |
| Right to renounce citizenship | Bavaria | 1818 | 24.9 |
| Provision for copyrights | United States | 1789 | 24.3 |
| Equality regardless of nationality | Switzerland | 1848 | 22.8 |
| Jus soli citizenship | France | 1791 | 22.8 |
| Protection of consumers | Switzerland | 1848 | 22.8 |
| Equality regardless of financial status | Argentina | 1826 | 21.7 |
| Right to competitive marketplace | Haiti | 1805 | 21.2 |
| Right to conscientious objection | Ecuador | 1869 | 20.1 |
| Right to reasonable standard of living | Estonia | 1920 | 20.1 |
| General protection of intellectual property | France | 1791 | 18.5 |

| Description | Innovator | Year of Innovation | % with Right in 2010 |
|---|---|---|---|
| Right to marry | Haiti | 1801 | 18.5 |
| Rights of debtors | United States | 1789 | 18.5 |
| Guarantee of due process in criminal proceedings | United Kingdom | 1628 | 17.5 |
| Jury trials required | United States | 1789 | 17.5 |
| Provision for patents | United States | 1789 | 17.5 |
| Right to transfer property | United Kingdom | 1542 | 16.4 |
| Right to self-development | Montenegro | 1905 | 15.3 |
| Equality for persons with disabilities | Costa Rica | 1844 | 14.3 |
| Right to self determination | Russia | 1918 | 13.8 |
| Special privileges for juveniles in criminal process | Chile | 1822 | 13.2 |
| Equality regardless of parentage | Switzerland | 1848 | 12.2 |
| Right to enjoy the benefits of science | Poland | 1952 | 11.6 |
| Equality regardless of age | Finland | 1919 | 11.1 |
| Protection of victim's rights | Poland | 1935 | 10.1 |
| Right to amparo | El Salvador | 1886 | 9.0 |
| Provision for civil marriage | France | 1791 | 8.5 |
| Provision for trademarks | Austria-Hungary | 1867 | 7.9 |
| Right of testate | France | 1791 | 7.9 |
| Equality regardless of tribe or clan | Haiti | 1816 | 7.4 |
| Right to work | France | 1848 | 6.9 |
| Indigenous right to internal governance | Czechoslovakia | 1920 | 6.3 |
| Right to overthrow government | Costa Rica | 1844 | 5.8 |
| Indigenous right to representation | Czechoslovakia | 1920 | 3.7 |
| Prohibition of corporal punishment | Spain | 1808 | 3.7 |
| Equality regardless of sexual orientation | Brazil | 1988 | 3.2 |
| Indigenous right to vote | Peru | 1933 | 2.6 |
| Right to bear arms | United States | 1791 | 1.6 |
| Indigenous right to form political parties | Bolivia | 2009 | 0.5 |
| Indigenous right not to pay taxes | Peru | 1933 | 0.0 |
| Indigenous right to certain illegal activities | India | 1986 | 0.0 |

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