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Unpopular Constitutionalism

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Unpopular Constitutionalism

MILA VERSTEEG*

Constitutions are commonly thought to express nations' highest values. They are often proclaimed in the name of "We the People" and are regarded—by scholars and the general public alike—as an expression of the people's views and values. This Article shows empirically that this widely held image of constitutions does not correspond with the reality of constitution making around the world. The Article contrasts the constitutional-rights choices of ninety countries between 1981 and 2010 with data from nearly one-half million survey responses on cultural, religious, and social values conducted over the same period. It finds, surprisingly, that in this period, the link between nations' specific constitutional choices and their citizens' values has generally been weak or nonexistent. The Article presents additional evidence from an original survey that reveals that, overwhelmingly, people want to enshrine their values in their constitution. Together, these findings suggest that the world's constitutions are not meaningfully supported by the people they represent and that the global practice of constitution-making can be characterized as an exercise in "unpopular constitutionalism."

The Article attributes this finding to a dilemma that lies at the heart of constitutional design. When constitutions serve as unique and defining statements of national ideals and popular values, they may flout universal human rights norms or well-established principles of constitutional design. On the other hand, when constitutional rules merely reflect sound constitutional design and universal right norms, they may be remote from the people's values and traditions and therefore fail in practice. The findings suggest that constitution-makers have largely resolved this dilemma in favor of universal rights and ready-made constitutional models, which explains the disconnect from popular values.

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INTRODUCTION

Constitutional values are often at odds with popular values. When South Africa's 1996 post-apartheid constitution was written, 88% of all South Africans considered homosexuality to be morally unacceptable,¹ but the new constitution nonetheless guaranteed equal protection regardless of sexual orientation.² By contrast, the Netherlands, where only 22% of the population opposes homosexuality, has never protected gay rights in its constitution.³ In Morocco, a recent opinion poll revealed that 95% of the population would not go on a legal strike under any circumstance,⁴ even though its constitution proclaims that the right to strike is one of the nation's highest values.⁵ By contrast, 99% of the British population was willing to go on strike, but the right to strike lacks constitutional status in British law.⁶ In the Dominican Republic, 86% of the population wanted a

1. World Values Survey Ass'n, *World Values Survey 1981–2008 Official Aggregate v.20090901* (2009), <http://www.wvsevsdb.com/wvs/WVSDData.jsp>; see *infra* Table 1 for details on the survey question related to homosexuality.

2. S. AFR. CONST., 1996 § 9(3) (“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”).

3. World Values Survey Ass'n, *supra* note 1.

4. *Id.*; see *infra* Table 1 for details on the survey question related to the right to strike.

5. ROYAUME DU MAROC [CONSTITUTION], Sept. 13, 1996, art. 14 (Morocco) (“The right of strike shall be guaranteed.”).

6. The overwhelming majority of countries analyzed in this Article have a written constitution that consists of a single document. The British Constitution is different, however, in that it consists of unwritten conventions and judicial interpretations, as well as legislation that enjoys semi-constitutional status. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915) (defining a constitution as “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state”). For the purpose of the analysis presented in this Article, the following

stronger protection of the natural environment—even at the expense of higher taxes⁷—but the constitutional document is silent on environmental protection. By contrast, a right to a healthy environment is enshrined in the Lithuanian Constitution,⁸ even though no more than 24% of Lithuanians were willing to pay for increased environmental protection.⁹

Such disconnects between constitutional texts and popular values stand in stark contrast with how constitutions are perceived by constitutional scholars and the general public alike. Ever since nations have been writing constitutions, these documents have been conceptualized as social contracts between the people and their government, rooted in the “consent of the governed.”¹⁰ Today, constitutions are commonly proclaimed in the name of “We the People”¹¹ and are often approved by popular referendum.¹² Constitutional scholars routinely claim that one of the leading goals of constitutional law is to articulate, preserve, or construct the highest values of the nation and its people.¹³

documents were considered to be constitutional ones: Magna Carta, 1297, 25 Edw. 1, cc. 1, 9, 29; Habeas Corpus Act, 1640, 16 Car. 1, c. 10; Habeas Corpus Act, 1679, 31 Car. 2, c. 2; Bill of Rights, 1689, 1 W. & M., c. 2; Parliament Act, 1911, 1 & 2 Geo. 5, c. 13; Human Rights Act, 1998, c. 42; Freedom of Information Act, 2000, c. 36. The right to strike is not enshrined in any of these documents, nor does it enjoy constitutional status through judicial law making or conventions. See Federico Fabbrini, *Europe in Need of a New Deal: On Federalism, Free Market, and the Right to Strike*, 43 GEO. J. INT’L L. 1175, 1191–94 (2012) (describing the U.K. government’s refusal to recognize the strike as a right, instead of treating it as a statutory freedom).

7. World Values Survey Ass’n, *supra* note 1; see *infra* Table 1 for details on the survey question related to environmental values.

8. LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONSTITUTION], Oct. 25, 1992, art. 53 (Lith.) (“The State and each person must protect the environment from harmful influences.”); *id.* art. 54 (“The State shall take care of the protection of the natural environment, wildlife and plants, individual objects of nature and areas of particular value and shall supervise a sustainable use of natural resources, their restoration and increase.”).

9. World Values Survey Ass’n, *supra* note 1.

10. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident . . . That . . . [g]overnments . . . deriv[e] their just powers from the consent of the governed . . .”).

11. Denis J. Galligan, *The Sovereignty Deficit in Modern Constitutions*, 33 OXFORD J. LEGAL STUD. 702, 707 (2013) (showing that a majority of democratic constitutions are proclaimed in the name of the people).

12. See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. LAW & SOC. SCI. 201, 207 fig.1 (2009) (documenting, empirically, that over 40% of all constitutions today require approval by popular referendum).

13. See, e.g., BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 5 (2009) (noting that the primary function of constitutions is to “imagine and then help to realize a shared collective existence”); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 38 (2009) (noting that a “function that constitutions serve is the symbolic one of defining the nation and its goals”); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 155 (2009) (describing constitutions as “forms of national self-expression, providing the framework for the working out within a particular ‘nomos’ of its contests, commitments, and identity” (citation omitted)); GARY JACOBSON, CONSTITUTIONAL IDENTITY 3 (2010) (arguing that one

Most contemporary constitutional theorists—including both popular constitutionalists and judicial supremacists—believe that constitutions ought to enjoy larger democratic legitimacy than ordinary legislation. Popular constitutionalists see constitutions as documents created both by the people and for the people.¹⁴ They argue not only that constitutions should reflect popular values,¹⁵ but also that “the people themselves” should interpret and implement them.¹⁶ While popular interpretation and implementation might be controversial, the view that constitutions should reflect popular values is not.¹⁷ Even defenders of judicial supremacy think that constitutions should reflect the people’s highest values. These theorists build on the normative claim that, in order to solve the counter-majoritarian difficulty inherent in constitutional adjudication, constitutions ought to be more democratic than ordinary legislation.¹⁸ They claim that constitutions should be made in special moments of “higher lawmaking,” in which the people come together, transcend their ordinary short-sighted interests, and articulate their highest aspirations and most deeply held values.¹⁹ Under this logic, constitutions represent reasoned deliberation by the people, while ordinary legislation represents the short-sighted bargaining, fears, and passions of elected representatives.²⁰ The invalidation of ordinary legislation that contradicts the

of the core functions of constitutional law is to articulate the nation’s distinct identity); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 14 (2008) (“Expressivism suggests that a nation *has* a (single) self-understanding that its constitution expresses.” (emphasis in original)); Geoffrey Brennan & Alan Hamlin, *Constitutions as Expressive Documents*, in *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* 329, 333–38 (Barry Weingast & Donald A. Wittman eds., 2006) (emphasizing that written constitutions express national self-understanding); Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 648–50 (1999) (suggesting that, amongst other things, constitutions serve to express national identity); H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 65, 65–66 (Douglas Greenberg et al. eds., 1993) (noting that constitutions are inextricably linked to sovereignty and proclaim the nation’s highest values).

14. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW passim* (2004) (suggesting that “popular constitutionalism” entails a continuous involvement of the people in the writing, interpretation, and implementation of the constitutional document).

15. *See id.* at 7 (describing the Constitution as “fundamentally, an act of popular will: the people’s charter, made by the people”).

16. *Id.* at 7–8 (suggesting that for most of American history “the people themselves’ . . . were responsible for seeing that [the Constitution] was properly interpreted and implemented”).

17. *See, e.g.*, Laurence H. Tribe, *The People’s Court*, N.Y. TIMES, Oct. 24, 2004, at A32 (suggesting that giving people the last word over the constitution is “taking the law out of constitutional law” and “if constitutional law were but a vessel into which the people could pour whatever they wanted it to contain at any given moment” the whole point of framing a constitution will be lost).

18. *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE* 6 (1991).

19. *Id.*

20. *Id.* (emphasizing that constitutions are written by the people, while ordinary legislation is written by the people’s elected representatives); *see also* JOHN FINN,

constitution, while undemocratic at face value, merely channels the true will of the people.²¹ With a constitution, “Peter sober binds Peter drunk,” so the story goes.²² Thus, the one idea that unites otherwise divided schools of constitutional thought is that a nation’s highest document should reflect the will of the people.

The general public also commonly perceives the constitution as an articulation of its ideals and values. To illustrate, the American Tea Party movement claims that the Constitution reflects America’s highest values, and it has mobilized to protect those values from what it considers to be an intrusive Congress.²³ Similar claims permeate the constitutional discourse of other countries. From a wave of recent radical populist constitutions in Latin America,²⁴ to the 2011 Hungarian constitution, to the newly written Egyptian constitution, claims of popular values and identity often surround the adoption of new constitutional documents.²⁵

This Article suggests that these widely held images of the nature of constitutional law do not correspond with the reality of constitution-making around the world. Drawing on an original dataset that spans the right-related contents of all national constitutions, the Article shows that constitutions do not usually align with popular opinion. Specifically, the Article contrasts countries’ choices on constitutional rights between 1981 and 2010 with data from nearly one-half million household surveys on people’s cultural, religious, and social values in ninety countries from the same period. The analysis reveals that there is generally no connection between specific constitutional choices and popular opinion.²⁶ For instance, popular opinion on homosexuality does not correlate with constitutional protection of gay rights, popular opinion on abortion does not correlate with

CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 5 (1991) (quoting John Potter Stockton’s position in debates over the Ku Klux Klan Act of 1871: “[c]onstitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy” (citation omitted)); Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME 35, 35–45 (George Loewenstein & Jon Elster eds., 1992) (conceptualizing constitutional commitment as a time inconsistency problem whereby rational pre-commitments enshrined in the constitution are to govern later moments of fear and passion).

21. ACKERMAN, *supra* note 18, at 6 (noting that a normal electoral victory does not give politicians the “mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People”).

22. STEPHEN HOLMES, PASSION AND CONSTRAINT: ON THE THEORY OF LIBERAL GOVERNMENT 135 (1995) (suggesting that the constitution represents “Peter sober” while ordinary legislation represents “Peter drunk”).

23. See Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288, 292 (2011) (“The Tea Party movement locates the fundamental principles that form the American character in the Constitution, and it argues that only a revival of these principles can save the nation from ruin.” (citation omitted)).

24. See Phoebe King, *Neo-Bolivarian Constitutional Design*, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 366, 367 (Denis Galligan & Mila Versteeg eds., 2013) (describing the recent constitutions of Venezuela, Ecuador, and Bolivia as radical populist documents).

25. See *infra* Part VI.C (describing claims of national identity and popular values context of the new Hungarian and Egyptian constitutions).

26. See *infra* Part III.

constitutional protection of the unborn, and popular opinion on the environment does not correlate with constitutional protection of the environment.

What is more, it turns out that most people do not want their constitution to be disconnected from their values. This Article presents additional findings from an original survey developed by the author and circulated among over a thousand respondents from different countries. Although the sample size is too small to draw any definite conclusions, the survey reveals that people generally do prefer their constitution do reflect their values. This finding therefore suggests that a significant discrepancy exists between what people want from their constitution and what the document actually provides. The global practice of constitution-making, this Article suggests, is characterized by *unpopular constitutionalism*.

This Article attributes this finding to a dilemma that lies at the heart of constitutional design.²⁷ Constitutional theory notwithstanding, for those writing a constitution, the constitution is not only a forum to express popular values, but also an instrument to articulate and protect universal human rights norms, and a tool to design the nation. In several ways, these different objectives can be inconsistent with each other. When constitutions serve as unique and defining statements of national ideals and values, they may flout universal human rights norms or well-established principles of constitutional design. At the same time, where constitutional rules merely reflect sound constitutional design and universal values, they may be remote from the people's values and traditions and fail in practice. The empirical data presented in this Article suggest that constitution-makers have resolved the dilemma in favor of universal rights and ready-made constitutional models, which explains constitutions' disconnect from popular values.

The remainder of this Article proceeds as follows. Part I conceptualizes how popular values are reflected in national constitutions. It draws attention to preambles, participatory procedures, and bills of rights as modes to express a commitment to popular views and values, and it explains why the focus of this Article is on how constitutional-rights choices reflect popular values.

Part II introduces the data used to examine the connection between popular opinion and constitutions. Part III.A and Part III.B explore whether countries whose people deeply hold certain values are more likely to enshrine those values in their constitutions. This Part's main finding is that cross-country differences in popular values do not explain cross-country differences in constitutional rights. Part IV explores to what extent each national constitution aligns with popular values. Part IV.A calculates, for each country in each year, the degree to which that country's constitution aligns with popular values and ranks the world's constitutions according to their populist nature. Part IV.B reveals that constitutional populism is not random, but that some types of countries are more likely to possess unpopular constitutions than others. Specifically, it finds that younger constitutions and more comprehensive constitutions are more likely to align with popular opinion than constitutions that are old or sparse. It also finds that constitutional populism has an aspirational character: countries in which constitutional commitments remain unfulfilled are most likely to possess populist constitutions.

27. See *infra* Part VI.C (introducing the dilemma).

Part V presents an original survey of over one thousand people from eleven countries and explores whether people prefer to enshrine their values in their constitution. The survey suggests that the overwhelming majority of respondents do want their constitution to represent their values, which suggests that the disconnect between constitutional choices and popular values implies an unpopular constitutionalism, whereby a substantial portion of the world's constitutions do not enshrine the values of the people they are supposed to represent. Part V.B focuses on American respondents only and how they perceive their constitution. It shows that, unlike their foreign counterparts, Americans are more reluctant to demand rights of a socioeconomic nature, even when those rights align with their values. Based on this insight, this Part reassesses how popular the U.S. Constitution actually is.

Part VI sets forth possible explanations for unpopular constitutionalism. It suggests that real-world constitution-makers are not merely concerned with writing documents that reflect popular values, but also face competing considerations. Functionalism and universalism are two such competing considerations that may steer constitution-makers away from popular self-expression. This Article concludes by reflecting on the implications of its core findings for contemporary constitutional theory.

I. CONSTITUTIONS AS POPULIST DOCUMENTS

Even though constitutions are commonly conceptualized as expressions of popular views and values, different scholars use the idea of popular self-expression to mean substantially different things. Indeed, the literature is characterized by a variety of claims, ranging from the notion that constitutions substantively reflect national values or identity,²⁸ to procedural accounts of popular involvement,²⁹ to theories of judicial interpretation that emphasize that courts should interpret the constitution in line with popular values.³⁰ This Part will distinguish and conceptualize three different ways in which constitutional texts themselves can demonstrate fidelity to popular values: (1) they can proclaim popular values and national character in the preamble; (2) they can demand popular involvement in the drafting or ratification of the constitution; and (3) they can adopt rights and rights-related policies that substantively reflect popular opinion. The remainder of this Part will discuss each of these in turn and explain why this Article focuses primarily on the third method; that is, how constitutional choices substantively reflect popular values.

28. See, e.g., JACOBSON, *supra* note 13.

29. See, e.g., Ginsburg et al., *supra* note 12 (describing popular involvement in constitution-making).

30. See, e.g., Robert Post, *Theories of Interpretation*, 30 REPRESENTATIONS 13, 29 (2009) (describing all of U.S. constitutional interpretation as a “characterization of the national ethos”); see also Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. (forthcoming 2014).

A. Preambles

Perhaps the easiest way for a constitution to express popular values is by proclaiming such values in the preamble. While the Preamble to the U.S. Constitution merely makes a relatively brief statement on behalf of “We the People,”³¹ a number of constitutions contain elaborate expressions of the people’s highest values, the triumph of popular rule, the glories of the nation’s leader, and a range of aspects of the nation’s past.³² Preambles, according to one commentator, are like “mission statements”: they set out the nation’s goals for the future in light of the experience of its past.³³ Perhaps more than any other part of the constitution, the preamble offers the perfect opportunity to express what is distinctive about the nation and its people.³⁴

Examples of preambles that narrate the nation’s past and envision its future are plentiful. The Preamble to the newly written 2011 Hungarian Constitution, which is almost two pages long, declares the constitution to be “a covenant among Hungarians past, present and future” that “expresses the nation’s will and the form in which we want to live,” references “with pride” “king Saint Stephen” who “built the Hungarian state . . . one thousand years ago,” recognizes “the role of Christianity in preserving nationhood,” and commits to “safeguarding our heritage, our unique language, [and] Hungarian culture,” amongst other things.³⁵

Likewise, the Polish Constitution of 1997 references how Poland “recovered, in 1989, the possibility of a sovereign and democratic of its fate” and expresses gratitude “to our ancestors for their labours, their struggle for independence achieved at great sacrifice” and “for our culture rooted in the Christian heritage of the Nation and in universal human values.”³⁶ Perhaps more radically, the Preamble of the 1979 Constitution of Iran proclaims “the cultural, social, political, and economic institutions of Iranian society . . . which represent the earnest aspiration

31. U.S. CONST. pmbl.

32. *See infra* Figure 1.

33. Jeff King, *Constitutions as Mission Statements*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 73, 81 (suggesting that constitutions are like “mission statements” that articulate the “core, constitutive political commitments of the community” and “express the political ideas that animate the constitution and polity more broadly, including . . . the values it seeks to respect in its state planning”).

34. *See, e.g.*, JACKSON, *supra* note 13, at 18 (“Preambles are a particular location of these kinds of national specificities.”); Kevin L. Cope, *South Sudan’s Dualistic Constitution*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 295, 314 (noting that the preamble is the part where the new South Sudanese Constitution expresses constitutional identity); Denis Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 3, 10 (identifying preambles as a forum to express national values); Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 67, 79 (Sujit Choudhry ed., 2006) (“Preambles to constitutions may be particularly useful for an expressivist.”).

35. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], pmbl.

36. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, pmbl. (Pol.).

of the Islamic Ummah” and references “the great Islamic Revolution of Iran,” and “the awakened conscience of the nation, under the leadership of the eminent *marji’ al-taqlīd*, Ayatullāh al-‘Uzmā Imam Khumaynī, [which] came to perceive the necessity of pursuing an authentically Islamic and ideological line in its struggles.”³⁷ In another ideological blend, the 1978 Constitution of the People’s Republic of China contains a six-page preamble that celebrates the achievements of the “great leader” Mao Zedong, the “Great Proletarian Cultural Revolution,” as well as socialism in general.³⁸

A growing number of countries use constitutional preambles to make statements of popular values and national identity. According to my own coding of all of the world’s written constitutions since 1946, about 25% of all constitutions today contain preambles that do so.³⁹ Figure 1 depicts both the percentage of constitutions that contain a preamble, as well as the percentage of constitutions that contain a preamble that expresses popular values or narrates the nation’s history. Figure 1 shows that such references to identity and values have grown more common over time. At the end of the Second World War, only 5% of all constitutions contained preambles that made statements of national identity, while today that number is 25%. Not all preambles make such references: some preambles contain more universalist claims, defining the nation’s relationship to the world community or to particular foreign states.⁴⁰ But with growing frequency, constitutional designers are using preambles to express the highest values of the nation and its people.

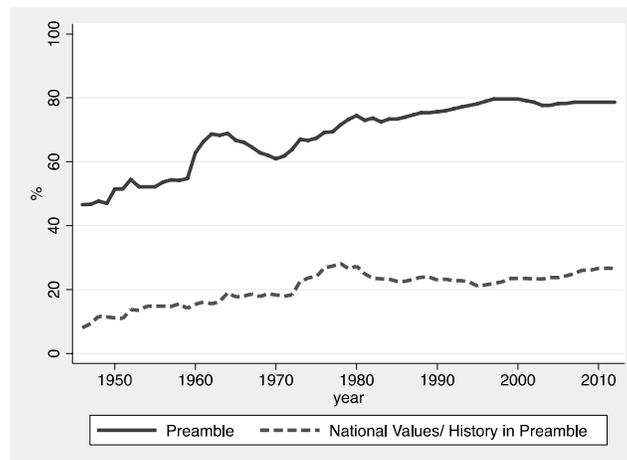


Figure 1. Percentage of constitutions with a preamble and percentage of constitutions that refer to national values or national history.

37. QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], pmb1.

38. XIANFA pmb1. (1978) (China).

39. The full dataset and coding methodology will be introduced in Part III.

40. See Tom Ginsburg, Nick Foti & Daniel Rockmore, “We the Peoples”: The Global Origins of Constitutional Preambles 1, 7 (2012) (unpublished manuscript) (on file with author) (finding that preambles do not only express national values, but also contain more internationalist statements).

Although preambles can articulate national identity, their commitment to popular values is ultimately merely rhetorical. Preambles are not usually justiciable—that is, they cannot be enforced in court.⁴¹ That does not mean they are meaningless: statements of national character can serve an important unifying function for the nation. By appealing to the nation’s past, preambles can help to overcome divisions of the present and the future.⁴² Their symbolic significance notwithstanding, preambles do not usually produce actual bodies of constitutional law that are justiciable, and that preserve and safeguard popular values from future law-making activity.

B. Participatory Procedures

Like preambles, participatory procedures (that require popular involvement in the drafting or promulgation of the constitution) signal intent to respect popular values; but, like preambles, they also do not necessarily translate into actual constitutional laws that reflect popular values.

There are different ways in which people can participate in the making of their constitution. A growing number of constitutions require ratification by popular referendum. Figure 2 shows that today 34% of all constitutions require ratification by popular referendum, while in 1950 only 7% did.⁴³ In some countries, citizens not only ratify the final constitution but also are actively involved in the drafting stage. One mode of more active involvement in constitution-making is through the direct election of a constitutional assembly.⁴⁴ For example, the assembly that wrote the draft 2011 Icelandic Constitution resulted from a nation-wide election, in which “[t]ruck drivers, university professors, lawyers, journalists and computer geeks

41. See NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 11 (2002) (noting that “lengthy sections describing the basic goals, ideology, or the program of the state,” as in preambles, “may be sincere when issued but are too vaguely worded to bear much legal weight; they are not designed to limit the government”); Ginsburg, *supra* note 40, at 4 (surveying preambles in the world’s constitutions and finding that most preambles are not justiciable). The notable exception is the preamble of the 1958 Constitution of France. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44 DC, July 16, 1971, J.O. 7114 (Fr.) (declaring the French Declaration of the Rights of Man and the preamble of the 1946 Constitution of France to be part of the 1958 preamble, and declaring the preamble to be justiciable).

42. For example, the preamble of the 1999 Venezuelan Constitution deliberately invokes “the historic example of our liberator Simon Bolívar and the heroism and sacrifice of our aboriginal ancestors,” because constitution-makers recognized that “popular sentiment that distinguishes [Bolívar] as a symbol of national unity.” See King, *supra* note 24, at 373 (citing the Expositcion de Motivos [Explanation of Motives] for the Constitution as published in *Gaceta Oficial* 5453, Mar. 24 2000).

43. This data comes from the COMPARATIVE CONSTITUTIONS PROJECT, comparativeconstitutionsproject.org. See Ginsburg et al., *supra* note 12, at 207 (introducing and summarizing the empirical data on the prevalence of constitutions that require ratification by popular referendum).

44. See *id.* at 208 (describing modes of participation whereby the citizens provide direct input into the writing of the constitutional document).

[were] all among the candidates.”⁴⁵ In another mode of active involvement, the citizens of South Africa, Brazil, Uganda, and Eritrea, as well as others, offered direct input into the drafting of their nations’ new founding documents.⁴⁶ In South Africa, the constitutional assembly went to towns and villages to deliberate about the document, while the Icelandic constitutional assembly used social media, such as Twitter and Facebook, to seek popular input.⁴⁷ In general, there has been a strong trend toward participatory procedures in constitution-making and there exists a growing consensus that such participation is the wave of the future.⁴⁸

45. Alda Sigmundsdottir, *Iceland Elects Ordinary Folk to Draft Constitution*, BOSTON.COM, Nov. 26, 2010, http://www.boston.com/news/world/europe/articles/2010/11/26/iceland_elects_ordinary_folk_to_draft_constitution/. See generally Jennifer Widner, *Constitution Writing & Conflict Resolution: Data & Summaries*, PRINCETON U. (Aug. 2005), <http://www.princeton.edu/~pcwcr/about/index.html> (describing the importance of directly elected constitutional assemblies).

46. See Ginsburg et al., *supra* note 12, at 208 (describing modes of participation whereby citizens provide direct input into the writing of the constitutional document); Erik Martinez Kuhonta, *The Paradox of Thailand’s 1997 “People’s Constitution”: Be Careful What You Wish For*, 48 ASIAN SURV. 373 (2008) (describing the process of adopting Thailand’s “People’s Constitution”); Bereket Habte Selassie, *Constitution Making in Eritrea: A Process-Driven Approach*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 57, 61–65 (Laurel E. Miller ed., 2010) (describing the widespread popular involvement in the drafting of the 1997 Eritrea constitution); Aili Mari Tripp, *The Politics of Constitution Making in Uganda*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra*, at 158, 165–69 (describing the substantial involvement of an elected “constituent assembly” in the writing of the 1995 Ugandan constitution).

47. See Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South African: Constitution Making After Apartheid*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 46, at 111, 133–39 (recounting the widespread popular participation in the making of the 1994 South African Constitution, which was “distinguishing . . . and from comparative constitutionalist perspective, precedent-setting”); Anne Meuwese, *Popular Constitution-Making: The Case of Iceland*, in THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 24, at 469, 476–89 (describing the widespread popular involvement in the writing of the Iceland Constitution, from the involvement of 1000 randomly elected citizens, to the elected constitutional assembly and the use of Facebook and Twitter to get popular input).

48. As Richard Solomon, President of the U.S. Institute of Peace, summarizes the new prevailing wisdom: “[t]here are no one-size-fits-all formulas or models[.]” but “well-conducted processes can . . . contribute to building stable, peaceful states, whereas poorly conducted processes most certainly undercut such efforts.” See Richard H. Solomon, *Foreword* to FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 46, at xi, xi; see also Louis Aucoin, *Introduction* to FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 46, at xiii, xiii (suggesting that there exists “an emerging international norm that constitution-making processes should be democratic, transparent, and participatory”); Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 46, at 3, 8 (suggesting the existence of a “new approach” to constitution making that started in Africa in the 1990s and “emphasizes participation and puts great premium on dialogue, debate, consultation, and participation”); Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 46, at 20, 20 (suggesting that “[t]raditionally, negotiating a constitution was the province of

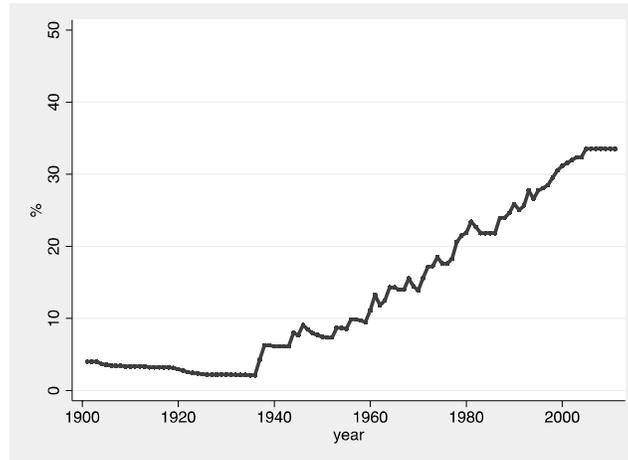


Figure 2. Percentage of constitutions that require ratification by popular referendum.

Yet popular involvement does not automatically translate into constitutional texts that also substantively reflect popular opinion. Referendums, for example, do not allow for any substantive popular input; they merely present the people with a yes-or-no decision.⁴⁹ Referendums are not usually held on a right-by-right basis; they require a single vote on an entire document or a whole package of amendments. The result may be an affirmative vote for the constitution even when a citizen does not agree with all of its individual provisions. Indeed, there are numerous instances in which authoritarian leaders were able to extend their term limits through popular referenda that required citizens to vote for a series of constitutional reforms that offered attractive rights and simultaneously extended executive power.⁵⁰ Perhaps most famously, Napoleon Bonaparte used a popular referendum to proclaim himself the emperor of France.⁵¹

Even popular input in the drafting stage does not ensure that the resulting documents reflect popular opinion. According to one commentator, the highly inclusive constitution-making process in Iceland became, in part, a “borrowing exercise[,]” whereby the constitutional assembly consulted foreign constitutions and social science research by Professors Persson and Tabellini.⁵² Likewise, the

political leaders who held power” while “[d]rafting the constitutional text was expert work” but that there has been a “significant change” toward more popular participation).

49. See Ginsburg et al., *supra* note 12, at 207–08 (noting that a referendum is “only an up or down vote over a package of provisions”).

50. Daniel Lansberg-Rodriguez, *Wiki-Constitutionalism*, NEW REPUBLIC (May 25, 2010, 12:00 AM), <http://www.tnr.com/article/politics/75150/wiki-constitutionalism> (“Latin American leaders have discovered that, by packaging ever-longer lists of promises and rights alongside greater executive functions, they can make a new constitution appealing enough to the masses that they will vote for it in a referendum.”).

51. PETER EMERSON, *DEFINING DEMOCRACY* 144 (2d ed. 2012) (noting that, “just to make it all democratic,” a referendum was introduced in 1804 to approve Napoleon as emperor).

52. Meuwese, *supra* note 47, at 485.

South African Constitution, for all its popular involvement, has been described as a product of universal norms and values.⁵³ According to Professor Klug, it was “the emergence of a thin, yet significant, international political culture” that explains why South Africa adopted a powerful constitutional court even though the judiciary had served as a tool of repression for the apartheid regime in the past.⁵⁴ The same international culture also led the South African constitution-makers to heavily rely on international treaties when drafting their bill of rights.⁵⁵

Conversely, constitutions written without any popular input can nonetheless closely resemble popular opinion. The Japanese Constitution of 1946 offers a striking example. Although drafted covertly by General McArthur and imposed unilaterally by the World War II victors, its choices closely corresponded with the values of the Japanese people.⁵⁶ For example, historical opinion poll data reveals that the Japanese people supported limits on the emperor’s power and favored more rights, even though the local political elites did not.⁵⁷ Thus, while there likely exists a correlation between popular participation and a constitution’s reflection of substantive popular values, these anecdotes show how the two are distinct concepts. For this reason, the focus of this Article is on substantive constitutional choices, not on procedure.

C. Bills of Rights

A commitment to respect popular values is likely to be more than a mere rhetorical or procedural commitment when it is contained in a bill of rights. The bill of rights represents a set of substantive choices that are typically judicially enforceable and that can reveal certain views and values that are widely held in a nation. Even though rights are often considered to be universal as a normative matter, the empirical record suggests otherwise. Rights are often culturally contested, not just between the West and the Global South or between Western and Asian values, for instance, but also between and within liberal democracies.⁵⁸

53. See HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION* 7 (2000).

54. *Id.*

55. See Richard Cameron Blake, *The Frequent Irrelevance of US Judicial Decisions in South Africa*, 15 S. AFR. J. HUM. RTS. 192, 198 (1999) (describing the South African constitution of 1996 as a “product of other nations’ constitutions . . . and contemporary human rights conventions” (citation omitted)).

56. David S. Law, *The Myth of the Imposed Constitution*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 239, 263 (suggesting, based on historical opinion poll data, that the Japanese Constitution closely resembles popular values, but not the values of the ruling elites at the time).

57. *Id.* at 263 (describing the historical opinion poll data).

58. For an introduction to the cultural relativism debate, compare *infra* Part VI.B, with Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309, 322–29 (1987) (describing an “African worldview” and how it shapes African conceptions of rights that are more communitarian in character), and Bilahari Kausikan, *Asia’s Different Standard*, 92 FOREIGN POL’Y 24, 34–40 (1993) (suggesting that human rights are merely Western rights and articulating a distinct Asian perspective on rights that emphasizes socioeconomic rights over civil and political freedoms).

In September 2012, a YouTube video mocking the Prophet Muhammad set off a wave of protests in the Arab world. In no fewer than twenty countries, protesters took to the streets, carrying signs that read “Shut Up America” and demanding that President Obama apologize.⁵⁹ The protests resemble those from 2006, when a series of Danish cartoons of the Prophet Mohammed sparked violent protests around the world.⁶⁰ At the heart of these episodes is a clash between those who value free speech first and foremost and those who consider their religious values to be paramount. President Obama responded to the most recent protests with a passionate defense of freedom of expression in the U.N. General Assembly,⁶¹ but democratic nations continue to stand divided on the extent and nature of the right to free expression. Egypt’s then newly elected president, Mohamed Morsi, in the same U.N. General Assembly meeting, responded directly to President Obama by saying that Egypt only supports “freedom of expression that is not used to incite hatred against anyone.”⁶² Mr. Morsi’s view resembles those of European nations, which do not extend the freedom of expression to hate speech,⁶³ Holocaust denial,⁶⁴ or even the selling of Nazi paraphernalia on Yahoo and eBay.⁶⁵

Like the freedom of expression, religious freedom also divides democratic nations. Consider, for example, the debate over the wearing of the Islamic burqa. In Belgium, France, and the Netherlands, there is broad popular and legislative support for a burqa ban, which prohibits women from wearing a face-covering veil in public.⁶⁶ Their main concern is that the burqa violates women’s rights. Burqas,

59. David D. Kirkpatrick, *Cultural Clash Fuels Muslims Raging at Film*, N.Y. TIMES, Sept. 17, 2012, at A1 (describing the widespread protests as a clash of values between the freedom of expression in the “individualistic West” and religious values in the Arab world).

60. *Mutual Incomprehension, Mutual Outrage*, ECONOMIST, Feb. 11, 2006, at 26 (describing the violent protests that followed publication of these cartoons in a Danish newspaper).

61. See Editorial, *President Obama at the U.N.*, N.Y. TIMES, Sept. 26, 2012, at A26 (noting that President Obama contended that “the strongest weapon against hateful speech is not repression; it is more speech”).

62. Neil MacFarquhar, *At U.N., Egypt and Yemen Urge Curbs on Free Speech*, N.Y. TIMES, Sept. 27, 2012, at A10.

63. See VENICE COMMISSION, *BLASPHEMY, INSULT AND HATRED: FINDING ANSWERS IN A DEMOCRATIC SOCIETY* 11 (2010) (describing how the freedom of expression under the European Convention on Human Rights does not extend to hate speech).

64. See Ronald Sokol, Op-Ed., *Is It a Crime or an Idiocy?: Holocaust Denial*, INT’L HERALD TRIB., Jan. 20, 2007, at 5, available at <http://www.nytimes.com/2007/01/19/opinion/19iht-edsokol.4264282.html> (describing how Holocaust denial is a criminal offense in most European countries, and noting how the United States takes a different position).

65. Sean Dodson, *The Very Long Arm of the Law*, GUARDIAN (Nov. 9, 2001, 1:15 PM), <http://www.theguardian.com/technology/2001/nov/09/internetnews> (describing how Yahoo was prohibited from selling Nazi paraphernalia in France and how eBay followed Yahoo’s lead in removing items from its website). See generally Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 31 (Michael Ignatieff ed., 2005) (describing the United States as an outlier in its protection of free speech, and noting that “much of the rest of the developed democratic world” has after careful consideration “deliberately chosen a different course”).

66. See *The Islamic Veil Across Europe*, BBC NEWS (Sept. 22, 2011, 5:20 PM),

in French Prime Minister Sarkozy's view, "imprison[] women" and are an affront to "national values of dignity and equality."⁶⁷ But British and American lawmakers and officials largely disagree. Former U.K. immigration minister Damian Green dismissed the ban as "rather un-British."⁶⁸ And U.S. State Department officials issued an outright condemnation of the French measure, calling it an undue restriction of religious freedom.⁶⁹ Interestingly, opinion polls found that 70% of U.S. citizens oppose the ban, compared to a mere 17% in France.⁷⁰

It would seem that such differences in national values could affect the specific menu of rights in a country's constitution. For example, the 1937 Irish Constitution, a deeply religious document enacted "in the Name of the Most Holy Trinity,"⁷¹ explicitly recognizes "the right to life of the unborn."⁷² Most other European nations, however, reject the prohibition of abortion and express support for organizations like Women on Waves, which, in an attempt to secure the rights of Irish women, offers abortion services just outside Irish borders.⁷³ These nations' constitutions protect life, but they do not extend protections to the unborn. Most of the Latin American countries side with the Irish, however, and also extend constitutional protection to fetuses.⁷⁴ In these countries, seemingly widely held popular values are reflected in the constitution.

The constitutional status of socioeconomic rights provides another example of divergent views on the place of human rights values in constitutions. Most constitutions today not only contain traditional liberty rights but also include a set of positive social welfare rights, ranging from a right of access to education to a

<http://www.bbc.co.uk/news/world-europe-13038095> (reporting that legislation has been passed in France and Belgium that prohibits women from wearing a full-face Islamic veil); Bruno Waterfield, *Netherlands to Ban the Burka*, TELEGRAPH (Sept. 15, 2011, 5:40 PM), <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/8765673/Netherlands-to-ban-the-burka.html> (describing similar legislation in the Netherlands).

67. Mark McGivern, *Two Women Arrested in Paris for Defying Ban on Islamic Veils*, DAILY REC. (Apr. 12, 2011), <http://www.dailyrecord.co.uk/news/uk-world-news/two-women-arrested-in-paris-for-defying-1100115>.

68. David Mitchell, Op-Ed., *If Britain Decides to Ban the Burqa Then I Might Just Start Wearing One*, OBSERVER, July 25, 2010, <http://www.guardian.co.uk/commentisfree/2010/jul/25/david-mitchell-burqa-ban-tattoos>.

69. *See US Reiterates Disappointment over French Burqa Ban*, FRANCE 24, July 15, 2010, <http://www.france24.com/en/20100715-usa-tells-france-not-ban-burqa-senate-bill-washington>.

70. *French Senate Approves Burqa Ban*, CNN (Sept. 15, 2010, 5:17 AM), http://articles.cnn.com/2010-09-14/world/france.burqa.ban_1_burqa-overt-religious-symbols-ban-last-year?_s=PM:WORLD (citing opinion poll data).

71. IR. CONST., 1937, pmbl.

72. *Id.* art. 40(3) ("The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.").

73. *See Who Are We*, WOMEN ON WAVES, <http://www.womenonwaves.org/en/page/650/who-are-we>.

74. According to my own coding of all written constitutions, fourteen constitutions protect the right to life for the unborn, six of which are located in Latin America. The Latin American countries that contain a right to life for the unborn in their constitutions are Guatemala, Honduras, El Salvador, Ecuador, Paraguay, and Chile.

right to food.⁷⁵ In Portugal, for example, an elaborate catalogue of socioeconomic rights was enshrined after the fall of the right-wing dictatorial regime and in response to widespread popular demands for such rights.⁷⁶ Yet some other countries are remarkably resilient to this trend. The U.S. Constitution not only omits social welfare rights altogether, but is devoid of positive entitlements generally.⁷⁷ In the absence of state action, there exist no constitutional entitlements.⁷⁸ It has been noted that this approach reflects a long-standing constitutional tradition that “began with Locke and . . . stayed with Locke” and is an intrinsic part of the cultural heritage of the United States.⁷⁹ Other nations, too, have constitutions of a distinctly libertarian character.⁸⁰ It is these types of substantive constitutional choices that distinguish nations from each other and that this Article seeks to explore.⁸¹

II. MEASURING CONSTITUTIONAL POPULISM

Empirical analysis of the relationship between popular values and constitutional choices demands data on both the content of the world’s constitutions and popular opinion related to that content. To capture the rights-related content of the world’s constitutions, I draw on data that I collected based on the hand-coding of every national constitution written since 1946.⁸² Specifically, this original data set spans a

75. According to my coding of all written constitutions, 83% of all constitutions today enshrine socioeconomic rights in some form. *See infra* Part II (introducing the constitutions data).

76. *See* Pedro C. Magalhães, *Explaining the Constitutionalization of Social Rights: Portuguese Hypotheses and a Cross-National Test*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 432, 443–49 (describing the origins of Portugal’s elaborate socioeconomic rights provisions and attributing them to “the Portuguese legal tradition” and deeply held “values of social Catholicism”).

77. *See* Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in *EUROPEAN AND US CONSTITUTIONALISM* 131, 134 (Georg Nolte ed., 2005) (contrasting the state action doctrine in the United States with notions of protective duties in Europe).

78. *See* *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (setting forth the state action doctrine in U.S. constitutional law).

79. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 6 (2d ed. 1991).

80. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1221–26 (2011) (finding that some constitutions are distinctly libertarian in character, while others are more statist in nature).

81. *See* John Boli, *Human Rights or State Expansion? Cross-National Definitions of Constitutional Rights, 1870–1970*, in *INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL* 133, 138 (George M. Thomas et al. eds., 1987) (arguing that, for constitutions, “there is considerable uniformity in their structure” but that “[t]here is much less uniformity in their content”).

82. This data was first introduced in Benedikt Goderis & Mila Versteeg, *The Transnational Origins of Constitutions: An Empirical Analysis*, Sixth Annual Conference on Empirical Legal Studies (Nov. 4, 2011) (unpublished manuscript) (on file with the authors), available at <http://ssrn.com/abstract=1865724>, and subsequently analyzed in Law & Versteeg, *supra* note 80, at 1187–89. The 2006–2012 portion of the data was collected and introduced by David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863 (2013).

total of 751 constitutions adopted by 186 different countries from 1946 to 2012. For each constitution, the text of the entire document was analyzed, and information on 237 variables regarding both substantive rights and rights-enforcement mechanisms was collected. This process is documented in greater detail in my earlier work.⁸³

From the larger dataset, I selected twelve rights-related constitutional provisions. These provisions represent specific choices of the kind that different nations may make differently, depending on their values. The twelve substantive constitutional choices included in the analysis are (1) the protection of family life; (2) the right to rest/leisure; (3) the right to work; (4) the protection of the environment; (5) the protection of marriage; (6) the right to petition; (7) the right to assembly; (8) the right to strike; (9) the protection of equality regardless of sexual orientation; (10) a prohibition of abortion (through protection of the unborn); (11) gender equality in labor relations; and (12) the protection of motherhood. These rights represent a mixture of first-generation negative liberty rights (petition, assembly, and gender equality), second-generation socioeconomic rights (rest, leisure, work, and strike), as well as some more recent rights relating to the family and traditional values (marriage, abortion, the family, and homosexuality).⁸⁴ All of these rights are commonly found in the world's constitutions. While the first-generation rights are almost universally embraced in constitutions globally, the other two categories are more contested. It is possible, therefore, that cross-country differences in values are more strongly reflected in the latter two, and especially the third, categories of rights. The sampling of these rights provisions was further guided and constrained by the necessity of choosing constitutional provisions for which corresponding popular opinion data could be found. The resulting list of twelve constitutional provisions can be found in the left-hand column of Table 1.

I contrast these twelve specific constitutional choices with data from the World Values Survey (WVS).⁸⁵ The World Values Survey represents opinion data from different countries, collected by a worldwide network of social scientists.⁸⁶ As of today, the World Values Survey has conducted standardized surveys in ninety countries, covering about 88% of the world's population.⁸⁷ The surveys have been conducted in six waves, between 1981 and 2010, surveying a total of nearly half a million households.⁸⁸ Most countries are surveyed in more than one wave, thereby

83. See Goderis & Versteeg, *supra* note 82, at pt. VI; Law & Versteeg, *supra* note 80, at 1187–90 & nn.103–16.

84. Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225, 1231 (Mathias Reimann & Reinhard Zimmermann eds., 2007) (distinguishing first-generation “classical rights to civil and political participation, and to equality,” from “second generation” social and economic rights for individuals).

85. For documentation and online analysis of the World Values Survey data, see WORLD VALUES SURVEY (2012), <http://www.worldvaluessurvey.org/>.

86. See Ronald Inglehart, *Foreword* to VALUES CHANGE THE WORLD (2008) (describing the infrastructure of the World Values Survey).

87. *Id.*

88. I integrated the World Values Survey data with data from the European Values Study that conducted the exact same survey in an additional set of European countries. For a full overview of all countries, see INTEGRATED EVS/WVS 1981–2008 DATAFILE,

allowing for a comparison over time. The World Values Survey is designed to capture what people's beliefs and values are. In each wave, a representative sample of each country's public is interviewed, using a standardized questionnaire that is intended to capture "values concerning religion, gender roles, work motivations, democracy, good governance, social capital, political participation, tolerance of other groups, environmental protection and subjective wellbeing."⁸⁹

From the World Values Survey, I selected twelve items from the standardized questionnaire that correspond to the twelve constitutional provisions listed in the left-hand column of Table 1. These twelve questionnaire items are listed in the right-hand column of Table 1. On most items, and with some variations, respondents are asked to rate a certain aspect or dimension of life (such as "work" or "leisure time") as "very important," "rather important," "not very important," or "not at all important."

Where possible, I selected the more specific questions. For example, instead of assessing whether people find their family "important" or "very important," I picked a more specific question that enquires about family values (and specifically whether the respondent believes that a child, in order to grow up happily, needs a home with both a father and a mother). Likewise, instead of assessing whether people value their natural environment, I selected a question that asks whether people would be willing to spend money to protect the environment. And instead of simply asking whether people value gender equality in the abstract, I selected an item that asks people whether, in time of job scarcity, they believe that men are more entitled to jobs than women.⁹⁰ The choice to use these more specific questions was guided by a desire to gauge how deeply certain values are held in a nation.

For the purpose of my analysis, I calculated the proportion of respondents in each country that gave each of these answers, and I grouped together those who value each right and those who do not. The underlined responses in the right-hand column of Table 1 indicate which respondents were grouped together. The highlighted constitutional provisions in the left-hand side of Table 1 indicate which provisions they will be linked to in the empirical analysis.⁹¹

<http://www.wvsevsdb.com/wvs/WVSIntegratedEVSWVS.jsp?Idioma=I>. Combined, these two surveys cover ninety countries, conducted in six waves, in the periods from 1981–1984, 1989–1993, 1994–1999, 1999–2004, 2005–2006, and 2008–2010.

89. Inglehart, *supra* note 86, at 1.

90. The results do not depend on this selection. Specifically, if I replace some of the more specific questions with more general ones, the results presented in subsequent Parts of this Article remain the same.

91. I also experimented with alternative classifications of the respondents, but I did not find that this affected the findings presented in subsequent Parts.

Table 1. Constitutional provisions and corresponding questions in World Values Survey (WVS)

| | Constitutional provision | Popular opinion (WVS) |
|--|---|--|
| 1. Family (found in 66% of all constitutions in 2010) | Does the constitution provide protection for rights for the family? 1 Yes 2 No | <i>Traditional family values.</i> Do you think that a child needs a home with both a father and a mother to grow up happily? 0 Tend to disagree 1 Tend to agree |
| 2. Rest/Leisure (found in 42% of all constitutions in 2010) | Does the constitution contain a right to rest and leisure or a goal for the government to protect and/or (gradually) provide rest and leisure? 1 Yes 2 No | How important is <i>leisure time</i> in your life? 1 Very important 2 Rather important 3 Not very important 4 Not at all important |
| 3. Work (found in 81% of all constitutions in 2010) | Does the constitution contain a right to work or a goal for the government to protect and/or (gradually) provide work? 1 Yes 2 No | How important is <i>work</i> in your life? 1 Very important 2 Rather important 3 Not very important 4 Not at all important |
| 4. Environment (found in 65% of all constitutions in 2010) | Does the constitution contain a right to a clean or healthy environment for citizens, or a goal for the government to protect and/or (gradually) provide this right? 1 Yes 2 No | I would agree to an increase in taxes if the extra money were used to prevent environmental pollution. 1 Strongly agree 2 Agree 3 Disagree 4 Strongly disagree |

Table 1 (continued)

| | Constitutional provision | Popular opinion (WVS) |
|--|---|---|
| 5. Marriage (found in 36% of all constitutions in 2010) | Does the constitution provide a right to get married, or a special protection of marriage? | Do you agree or disagree with the following statement? "Marriage is an outdated institution." |
| | 1 Yes 2 No | 0 Disagree 1 Agree 2 Other answer |
| 6. Petition (found in 50% of all constitutions in 2010) | Does the constitution contain a right to petition, or a right to file complaints against, or requests with, the government? | Did you ever sign a petition, do you think you might do so in the future, or would you never under any circumstance sign a petition? |
| | 1 Yes 2 No | 1 Have done 2 Might do 3 Would never do |
| 7. Assembly (found in 93% of all constitutions in 2010) | Does the constitution provide for a right to assembly? | Did you ever attend a lawful/peaceful demonstration, do you think you might do so in the future, or would you never under any circumstance attend a lawful demonstration? |
| | 1 Yes 2 No | 1 Have done 2 Might do 3 Would never do |
| 8. Strike (found in 45% of all constitutions in 2010) | Does the constitution contain a right to strike? | Did you ever attend an official strike, do you think you might do so in the future, or would you never under any circumstance attend an official strike? |
| | 1 Yes 2 No | 1 Have done 2 Might do 3 Would never do |

Table 1 (continued)

| | Constitutional provision | Popular opinion (WVS) |
|---|--|--|
| 9. Homosexuality (found in 4% of all constitutions in 2010) | Does the constitution protect equality regardless of sexual orientation? | Please tell me whether you think homosexuality can always be justified, never be justified, or something in between, using this scoring: |
| | 1 Yes | 1 Never justifiable |
| | 2 No | 2 |
| | | 3 |
| | | 4 |
| | | 5 |
| | | 6 |
| | | 7 |
| | | 8 |
| | | 9 |
| | | 10 Always justifiable |
| 10. Abortion (found in 8% of all constitutions in 2010) | Does the constitution (implicitly) prohibit abortion, by protecting life of “the unborn,” by stating that the right to life should be protected from the moment of conception onwards, or explicitly prohibiting abortion? | Please tell me for whether you think abortion can always be justified, never be justified, or something in between, using this scoring? |
| | 1 Yes | 1 Never justifiable |
| | 2 No | 2 |
| | | 3 |
| | | 4 |
| | | 5 |
| | | 6 |
| | | 7 |
| | | 8 |
| | | 9 |
| | | 10 Always justifiable |
| 11. Gender equality in labor (found in 20% of all constitutions in 2010) | Does the constitution contain equality for women in labor relations, e.g., women should receive equal pay for equal work? | Do you think that, when jobs are scarce, men should have more right to a job than women? |
| | 1 Yes | 1 Agree |
| | 2 No | 2 Disagree |
| | | 3 Neither |

Table 1 (continued)

| | Constitutional provision | Popular opinion (WVS) |
|---|---|---|
| 12. Motherhood (found in 43% of all constitutions in 2010) | Does the constitution provide special protection for mothers? | Do you think that a woman has to have children in order to be fulfilled or is this not necessary? |
| | 1 Yes 2 No | 0 Not necessary 1 Needs children |

Some of the questions listed in Table 1 explicitly inquire about people's values. They ask people about their position on homosexuality, abortion, marriage, and how much they value work or leisure time, for example. The more specific questions on whether women need children to be fulfilled, whether children need both a father and a mother, whether men have more right to a job than women, or whether people are willing to pay for increased environmental protection are also all questions about values. By contrast, the questions on whether people would be willing to strike, assemble, or petition less obviously capture values, but rather appear to capture cultural attitudes on whether people are willing to exercise these rights. Both popular values and cultural attitudes, however, potentially reveal important cross-country differences in national character that might be reflected in a country's bill of rights. Both are therefore included in the analysis.

In the empirical analysis that follows, the survey responses from the right column of Table 1 are in various ways linked to the corresponding rights from the left column of Table 1. To establish whether rights are connected to or disconnected from popular values, the analysis assesses (1) whether the rights that are included in the constitution indeed represent popular values and (2) whether the rights that are *not* included represent unpopular values. It is possible, however, that the inclusion and omission of rights are not valued in the same way by the people governed by a constitution. At least in theory, it is possible that someone deeply values the environment but does not want to enshrine a right to a healthy environment in the constitution. The questions from the World Values Survey do not capture this difference, as none of these questions explicitly enquire whether people would want to enshrine their values in their constitution. The possibility that the omission of important popular values from the constitution might nonetheless enjoy popular support will be explored in Part V, which presents the results from over a thousand survey responses that ask people whether they want their values enshrined in the constitution. The results from the survey suggest that people do generally want to enshrine their values in the constitution.

III. EMPIRICAL EXPLORATION OF THE RELATIONSHIP BETWEEN CONSTITUTIONAL RIGHTS AND POPULAR VALUES

Contrasting data on constitutional rights protection with data from the World Values Survey reveals that there exists only a weak relationship between constitutional choices and popular values. This statement finds support both in

simple descriptive explorations of how certain rights connect to popular values⁹² and in multivariate regression analysis.⁹³

A. Cross-Country Descriptive Exploration

A first glance at the data immediately reveals that constitutional choices are often divorced from popular views and values.⁹⁴ For some constitutional rights, the connection appears illusive: countries whose people deeply value a right fail to adopt it, whereas countries whose people do not value the same right do adopt it. For other rights, the values they represent are almost universally endorsed across countries, but only some countries actually enshrine these rights in their constitutions.

To illustrate a scenario where there is no apparent link between constitutional choices and popular values, consider the right to strike. In 2010, about 45% of the world's constitutions included a right to strike. However, the inclusion of the right to strike often does not match the importance that people in these countries attach to this right. The constitutions of Morocco, Hungary, Romania, El Salvador, Belarus, Slovak Republic, Venezuela, Kyrgyz Republic, and the Philippines each contain a right to strike, although over 90% of the their populations (ranging from 96% in Morocco to 91% in the Philippines) claimed that they would never, under any circumstance, participate in a legal strike. At the opposite extreme is the United Kingdom, where almost 100% of people surveyed are willing to engage in a legal strike, even though this right lacks constitutional status in British law.⁹⁵ Other constitutions also omit the right, even though it is highly valued by the people. In South Korea, Sweden, and Denmark, over half of the population is willing to participate in a legal strike, but the right is omitted from the constitutional document. The left two columns in Table 2 list the five countries whose people's values are most and least in line with the nation's decision to include the right to strike in the constitution, while the right two columns list the five countries whose people's values are most and least in line with the decision to omit the right from the nation's founding document.

92. *See* Part III.A

93. *See* Part III.B

94. The World Values Survey data presented in this Part is based on the latest value for each country. For fifty-seven (out of ninety) countries, this data was collected in the last wave of data collection that took place between 2008 and 2010, while for the other countries it is based on the last available wave before 2008.

95. *See supra* note 6.

Table 2. The right to strike and popular values in 2010

| Right to strike <i>included</i> in constitution | | | | Right to strike <i>not included</i> in constitution | | | |
|---|-----|--|----|---|-----|---|-----|
| Highest agreement (% that would go on a legal strike) | | Lowest agreement (% that would go on a legal strike) | | Highest agreement (% that would <i>never</i> go on a legal strike) | | Lowest agreement (% that would <i>never</i> go on a legal strike) | |
| Macedonia | 55% | Morocco | 4% | Pakistan | 98% | United Kingdom | 0% |
| Croatia | 50% | Hungary | 6% | Egypt | 97% | Korea | 36% |
| Peru | 45% | Romania | 7% | Cyprus | 97% | Sweden | 48% |
| France | 45% | El Salvador | 8% | Jordan | 96% | Denmark | 49% |
| Azerbaijan | 41% | Belarus | 8% | Indonesia | 92% | Bosnia & Herzegovina | 56% |

As another example, consider the protection of the natural environment, which, in some form, is enshrined in about two-thirds of all constitutions in force today. In some countries, the natural environment receives constitutional protection even though the largest part of the population is not willing to pay for increased environmental protection. To illustrate, in Lithuania, Germany, Egypt, Estonia, Hungary, and others, more than two-thirds of the population oppose a tax increase to protect the environment, even though a healthy environment is enshrined in the constitution as one of the nation's highest values. Conversely, the constitutions of the Dominican Republic, Bangladesh, Tanzania, and Bosnia and Herzegovina omit the right, even though over two-thirds of the population values the environment so much that they would be willing to increase their taxes to protect it. Table 3 summarizes the highest and lowest discrepancy between popular values and the right to a healthy environment among nations that include and exclude the right, respectively.

Table 3. The right to a healthy environment and popular values in 2010

| Environmental protection <i>included</i> in constitution | | | | Environmental protection <i>not included</i> in constitution | | | |
|---|-----|--|-----|--|-----|---|-----|
| Highest Agreement (% willing to increase tax to protect environment) | | Lowest Agreement (% willing to increase tax to protect environment) | | Highest Agreement (% <i>not</i> willing to increase tax to protect environment) | | Lowest Agreement (% <i>not</i> willing to increase tax to protect environment) | |
| Vietnam | 91% | Lithuania | 23% | Austria | 63% | Dominican Republic | 14% |
| El Salvador | 84% | Germany | 26% | Morocco | 61% | Bangladesh | 24% |
| Turkey | 78% | Egypt | 31% | Ireland | 60% | Tanzania | 25% |
| Mali | 77% | Estonia | 33% | Jordan | 55% | Bosnia & Herzegovina | 30% |
| Iran | 77% | Hungary | 33% | Singapore | 55% | Denmark | 34% |

For a few constitutional provisions, the values they represent are almost universally endorsed across all countries. When such near-universally endorsed values make it into the constitution, the constitution aligns with popular opinion.

Yet in many cases, the constitution omits the relevant protections, thereby creating a dissonance between the written document and popular opinion. To illustrate, consider the right to get married. In 2010, about one-third of all constitutions protected marriage. In all these cases, more than two-thirds of the population disagreed with the statement that “marriage is an outdated institution,” revealing overwhelming popular support for the institution of marriage. Yet the same overwhelming support for marriage is also present in countries where the constitution omits protection. In the United States, for example, 88% of the population disagrees that marriage is outdated, yet marriage does not appear in the constitution. In fact, in every single country where the protection of marriage was omitted from the constitution, over half of the population continues to value this institution.

Table 4. The right to get married and popular values in 2010

| Right to get married <i>included</i> in constitution | | | | Right to get married <i>not included</i> in constitution | | | |
|--|-----|---|-----|--|-----|--|----|
| Highest Agreement (% that believes that marriage is not outdated) | | Lowest Agreement (% that believes that marriage is not outdated) | | Highest Agreement (% that believes that marriage is not outdated) | | Lowest Agreement (% that believes that marriage is outdated) | |
| Indonesia | 96% | Spain | 68% | Luxem- bourg | 38% | Pakistan | 1% |
| Vietnam | 92% | Germany | 71% | France | 35% | Georgia | 4% |
| Ethiopia | 90% | Switzerland | 72% | Kyrgyz Republic | 32% | Egypt | 4% |
| Dominican Republic | 89% | United Kingdom | 73% | Belgium | 31% | Turkey | 5% |
| Slovakia | 88% | Bulgaria | 73% | Austria | 31% | Bangladesh | 5% |

The opposite scenario occurs for the right to equality regardless of sexual orientation. With only a few exceptions (notably, Sweden, the Netherlands, Norway, Iceland, Denmark, Switzerland, Luxembourg, Spain, Finland, Australia, and Germany), the majority of citizens in each country claims that homosexuality is unacceptable. Such disapproval is generally reflected in written constitutions, which only rarely protect homosexuality. In South Africa, which is one of the few countries to constitutionally protect homosexuality, the approval rate is very low: according to the World Values Survey, 82% of all South Africans deem homosexuality unacceptable today, while 88% deemed it unacceptable at the time the constitution was written.⁹⁶ Conversely, the constitutions of the countries most accepting of homosexuality (the Netherlands and Sweden) do not actually include the right (although the Dutch parliament has recently been debating its inclusion).⁹⁷

96. World Values Survey Ass'n, *supra* note 1.

97. *Kamer Voor Seksuele Geaardheid in Artikel 1 Grondwet [Dutch Parliament Supports Inclusion of Equality Regardless of Sexual Orientation in Article 1 Constitution]*, TROUW, (Mar. 8, 2012, 11:30 AM), <http://www.trouw.nl/tr/nl/4492/Nederland/articledetail/3295998/2012/08/03/Kamer-voor-seksuele-geaardheid-in-artikel-1-grondwet.dhtml>.

In most cases, constitutional omission of a protection for homosexuality is actually reflective of popular views and values.

B. Regression Analysis

To explore more systematically the seemingly weak relationship between popular values and constitutional choices, this Part turns to regression analysis. Regression analysis enables an exploration of whether, in comparative perspective, countries that attach a strong importance to certain values are more likely to enshrine those in their constitution than countries that attach lower importance to the same values. Of course, causal questions on the determinants of constitutional rights adoption in comparative perspectives are notoriously complex and difficult to resolve using common cross-country statistical techniques.⁹⁸ To know that popular opinion affects the adoption of particular rights does not necessarily tell us whether popular opinion actually influences adoption or is merely correlated with it. For example, it is possible that popular opinion does not only affect constitution-making, but that the constitution also affects popular opinion in turn.⁹⁹ My research design does not account for the possibility of reversed causality, and all results should be interpreted with some caution. Nevertheless, even correlations can shed light upon the plausibility of certain hypotheses and inform subsequent interpretations as to why countries adopt certain rights.¹⁰⁰ Conversely, the absence of any correlation between popular opinion and constitutional rights suggests that it is unlikely that they are related.

To explore how popular values relate to constitutional choices, I estimate twelve regressions; one for each of the twelve values and corresponding rights described in the previous section. Specifically, I test (1) whether countries in which people adhere to traditional family values are more likely to protect the nuclear family in their constitution; (2) whether countries in which people consider leisure time important are more likely to adopt a right to leisure in their constitution; (3) whether countries in which people consider work to be very important are more likely to adopt a right to work in their constitution; (4) whether countries in which people value the environment even at the expense of their own income are more likely to protect the environment in their constitution; (5) whether countries in which people disagree that marriage is an outdated institution are more likely to enshrine a right to get married in their constitution; (6) whether countries in which people are willing to sign a petition are more likely to adopt the right to petition in their constitution; (7) whether countries in which people are more willing to lawfully assemble are more willing to enshrine a right to assembly in their

98. See Law & Versteeg, *supra* note 82, at 919; Anne Meuwese & Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law*, in PRACTICE AND THEORY IN COMPARATIVE LAW 230, 233 (Maurice Adams & Jacco Bomhoff eds., 2012) (discussing the difficulty of distinguishing correlation from causation).

99. See Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (suggesting that, in theory, constitutional law may change popular opinion, but finding little empirical support for such a hypothesis in the United States).

100. See Law & Versteeg, *supra* note 82, at 919.

constitution; (8) whether countries in which people are more willing to participate in a legal strike are more likely to enshrine a right to strike in their constitution; (9) whether countries in which people think homosexuality is justifiable are more likely to protect equality regardless of sexual orientation; (10) whether countries in which people agree that abortion is never justifiable are more likely to protect the right to life from the moment of conception; (11) whether countries in which people disagree that men are more entitled to jobs than women in times of job scarcity are more likely to enshrine gender equality in labor relations in their constitution; and (12) whether countries in which people believe that women need children to be fulfilled are more likely to protect motherhood.

These relationships are explored in twelve separate probit regressions in which the presence of the relevant provision in the world's constitutions is the dependent variable,¹⁰¹ and which each include the same control variables: (1) the country's level of democracy, as measured numerically in the political science literature;¹⁰² (2) the natural log of a country's level of GDP per capita;¹⁰³ (3) the comprehensiveness of the constitutional text, as measured by its total number of articles;¹⁰⁴ (4) whether a country possesses a common law jurisdiction;¹⁰⁵ (5) a set

101. Because constitutions tend to change infrequently, and the surveys that capture popular values are conducted only every few years, each model predicts constitutional rights adoption not from year to year, but from wave to wave of survey data collection, using the last year of each of the six waves of data collection that took place. Specifically, each of the twelve regression models combine the cross-sections for the years 1984, 1993, 1999, 2004, 2006, and 2010, and calculate robust standard errors clustered at the country level, so that observations are allowed to be correlated over time. See *The Integrated EVS/WVS 1981–2008 Datafile*, WORLD VALUES ASS'N, <http://www.wvsevsvdb.com/wvs/WVSIIntegratedEVS/WVS.jsp?Idioma=I> (describing when each of the waves of data collection took place). As a robustness check, I also repeated the same model when observing each country at five-year intervals in 1981, 1986, 1991, 1996, 2001, 2006, and 2010. When doing so, the results are almost the same as those reported below.

To further explore whether my findings depend on model specification, I repeated all the specifications reported in Table 6 when adding (1) a lagged version of the dependent variable as a predictor variable, and again repeated them when adding (2) a series of binary variables that control for unobserved heterogeneity across countries, also known as “fixed effects,” while estimating a linear probability model instead of a probit model. For both these models, the results are largely similar to those reported in Table 6. Moreover, I estimated a set of cross-sectional regressions for the years 1990, 2000, and 2010. When doing so, results were again largely similar to those reported in Table 6.

102. My measure of a country's level of democracy is the “polity2” variable from the Polity IV data set, which is widely used by political scientists. This variable ranges from +10 (strongly democratic) to -10 (strongly autocratic). See Monty G. Marshall & Keith Jaggers, *Polity IV Project: Dataset User's Manual* (Oct. 24, 2007), http://home.bi.no/a0110709/PolityIV_manual.pdf.

103. My measure of gross domestic product (GDP) per capita comes from WORLD BANK, WORLD DEVELOPMENT INDICATORS 2011 (2011).

104. The measure of the total number of articles in the constitution is based on my own coding of all written constitutions. See *supra* Part III (describing the constitutions data).

105. I adopted the definition of “common law” countries used by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999).

of binary variables for each period in which people were polled about their opinion, also known as time fixed-effects; and, finally, (6) three regional variables, capturing whether a country is located in Africa, Western Europe and North America, or in Asia, respectively.¹⁰⁶

Each of these variables has been theorized as important predictors of constitutional design choices in the existing literature. Existing research suggests that democracy is correlated with the adoption of negative liberty and judicial process rights.¹⁰⁷ Economic wealth, by contrast, might plausibly predict whether countries adopt expensive socioeconomic rights, such as the right to work or the right to leisure. Intuitively, wealthier countries would seem more likely to adopt socioeconomic rights because they possess the resources to uphold them in practice. Yet the opposite scenario is also possible: poorer countries may adopt such rights as aspirations for the future.¹⁰⁸ The specificity of the constitutional text may determine whether constitutional designers grant certain values constitutional status in the first place. Specifically, it turns out that there exist important differences in how ambitious any given constitution is: some merely enshrine a bare minimum of rights, while others set out elaborate policies.¹⁰⁹ The common law system may also affect whether certain rights are adopted in the first place. Specifically, the common law system has traditionally been associated with a tradition of a small state, which may increase the propensity of common law systems to adopt negative liberty rights and to omit positive socioeconomic rights.¹¹⁰ Finally, the probability of adopting rights is likely to increase with time, as there has been a global trend toward “rights creep”; that is, a growing number of countries adopting a growing number of rights.¹¹¹

106. The region of Latin America and the Caribbean is omitted because it serves as the reference category for interpretation.

107. See Law & Versteeg, *supra* note 80, at 1226 (documenting a positive correlation between democracy and a libertarian constitutional ideology).

108. See David L. Cingranelli & David L. Richards, *Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark*, in ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES 214, 215 (Shareen Hertel & Lanse Minkler eds., 2007) (observing that it is difficult for countries to improve their performance in the areas of economic and social rights in a measurable way without “getting richer”).

109. See Law & Versteeg, *supra* note 80, at 1213–21 (describing constitutional comprehensiveness as one of the main dimensions along which constitutions vary).

110. See 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* 94 (1978) (noting that negative liberties “have flourished chiefly among people where, at least for long periods, judge-made law predominated”); Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 506 (2001) (finding empirical evidence of a positive relationship between use of a common law system and economic growth, and attributing this relationship at least partly to the “greater judicial protection of property and contract rights from executive interference” that characterizes common law systems); La Porta et al., *supra* note 105 (finding that common law countries exhibit greater respect for political rights than countries of other legal origins).

111. Law & Versteeg, *supra* note 80, at 1194 (documenting the phenomenon of “rights creep”).

Table 5 presents the regression outputs. The overarching impression from the regressions is that there exists generally no connection between popular values and constitutional choices. In most cases, the marginal effects for popular values are close to zero, while in other cases, they are even negative. In all but one case, they are statistically insignificant. The sole exception is the values on abortion, which are positively correlated with the constitutional protection of the unborn, albeit only statistically significant at the 10% confidence level.

The lack of connection between popular values and the constitution raises the question of what factors—if not values—explain cross-country differences in constitutional choices. As it turns out, some of the control variables are statistically significantly correlated with constitutional choices, although their impact depends on the constitutional right at issue. As expected, a common law tradition is negatively correlated with socioeconomic and group rights; countries within this tradition are less likely to protect the family, rest, work, a healthy environment, strike, gender equality in labor relationships, and motherhood.¹¹² It is also no surprise that the comprehensiveness of a constitution is correlated with some rights that are relatively uncommon in the world's constitutions, such as the protection of the environment, the freedom of petition, gender equality in labor relationships, and a protection of motherhood.¹¹³ Thus, in these cases, it is the wide-ranging scope of the document as a whole that explains the adoption of these rights, not popular opinion. More counterintuitive is that democracy is positively correlated with the constitutional adoption of the right to rest, the protection of the environment, the protection of the unborn, but not with any other rights. Finally, economic wealth is negatively correlated with constitutional protection of the right to rest and petition, as well as the protection of the family, environment, and motherhood. This suggests that these rights are at least partly aspirational, as good working hours, a healthy environment, and the protection of the family and motherhood often remain elusive in poorer countries. While none of these findings should be interpreted as causal relationships, the overall impression from the regressions is that any given country's constitutional choices are more a function of its regime type, its legal system, and the constitution's overarching drafting style than the specific preferences and values of its people.

112. Contrary to expectations, the common law tradition is also negatively correlated with the freedom of petition.

113. This finding is broadly consistent with findings from my earlier work, which singled out some of these rights as “esoteric rights,” which only appear in ambitious constitutions that protect a large number of rights. Law & Versteeg, *supra* note 80, at 1217 tbl.3.

Table 5. The Relationship Between Popular Values and Constitutional Choices

| | Protection of Family | Right to Rest | Right to Work | Right to Environment | Protection of Marriage | Right to Petition | Right to Assembly | Right to Strike | Gay Rights | Rights for Unborn | Gender Equality | Protection of Motherhood |
|--------------------|----------------------|---------------|---------------|----------------------|------------------------|-------------------|-------------------|-----------------|------------|-------------------|-----------------|--------------------------|
| Popular Values | 0.979 | 0.525 | 0.00 | -0.093 | 0.47 | -0.481 | 0.00 | 0.265 | 0.00 | -0.19* | 0.161 | -0.128 |
| Democracy | -0.016 | -0.023* | 0.00 | 0.026*** | -0.014 | 0.017 | 0.00 | 0.018 | 0.00 | 0.006** | -0.012 | -0.014 |
| Wealth | -0.108* | -0.163** | 0.00 | -0.175* | -0.086 | 0.130* | 0.00 | -0.174 | 0.00 | -0.01 | -0.056 | -0.169** |
| Specificity | 0.00 | 0.001 | 0.00 | 0.002*** | 0.001 | 0.002** | 0.00 | 0.001 | 0.00 | 0.00 | 0.002*** | 0.002** |
| Common Law | -0.456*** | -0.448*** | -0.343** | -0.928*** | -0.154 | -0.756*** | 0.00 | -0.772*** | 0.00 | 0.011 | -0.165*** | -0.478*** |
| Regional Variables | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y |
| Year Variables | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y | Y |
| (pseudo)R-squared | 0.40 | 0.36 | 0.80 | 0.55 | 0.17 | 0.41 | 0.61 | 0.42 | 0.39 | 0.19 | 0.21 | 0.36 |
| N | 333 | 315 | 315 | 293 | 333 | 323 | 322 | 307 | 293 | 333 | 315 | 323 |

Note: Marginal effects from probit regressions with robust standard errors, clustered at the country level. To calculate marginal effects, all variables were evaluated at the sample mean. *** denotes statistical significance at the 1% confidence level, ** at the 5% confidence level, and * at the 10% confidence level.

IV. WHICH COUNTRIES HAVE POPULIST CONSTITUTIONS?

In comparative perspective, there appears to be little evidence that nations that deeply value certain rights are more likely to enshrine these rights in their constitutions than countries whose people attach less value to these same rights. The preceding analysis, however, provides little insight into the degree to which any given constitution reflects popular values. Even when cross-country differences in values do not explain cross-country differences in constitutional choices, some constitutions could still enjoy high levels of domestic support. This Part therefore explores to what degree each constitution aligns with popular values, and singles out the world's most populist constitutions.

A. A Ranking of Populist Constitutions

To gauge whether written constitutions are generally reflective of popular values on the aforementioned twelve dimensions, I created a numerical *populist constitution index* that captures to what extent the constitutional choices of any given country reflect the values of its people. Specifically, the index captures the percentage of people in a country whose values align with how their constitution deals (or does not deal) with an issue, and then calculates the average country score across all twelve issues. When the constitution enshrines a right, the index captures the percentage of people who value this right, and when the constitution omits the right, the index captures the percentage of people who do not value this right.¹¹⁴ The resulting index captures constitutional populism; that is, the extent to which any given constitution aligns with public opinion. To illustrate how the index is constructed, Table 6 lists its different components for South Africa in 2010. The South African Constitution, Table 6 suggests, is not very populist: on average across twelve issues its values align with the opinion of only 36% of the population.

114. In constructing this index, the cut-offs to separate different groups of respondents from each other are the same as indicated in Table 1.

Table 6. Populist Constitution Score for South Africa in 2010

| Constitutional right | Included in constitution? | Corresponding value | Populism score |
|---|---------------------------|--|----------------|
| Freedom of petition | Yes | Percentage of people who would be willing to petition their government: 51% | 51% |
| Right to assembly | Yes | Percentage of people who want to participate in a legal assembly: 50% | 50% |
| Right to work | Yes | Percentage of people that consider work very important: 93% | 93% |
| Protection of the environment | Yes | Percentage of people willing to pay for increased environmental protection: 46% | 46% |
| Right to strike | Yes | Percentage of people willing to go on a legal strike: 18% | 18% |
| Equality regardless of sexual orientation | Yes | Percentage of people who think homosexuality is acceptable: 18% | 18% |
| Right to get married | No | Percentage of people who disagree that marriage is an outdated institution: 78% | 22% |
| Protection of motherhood | No | Percentage of people that believe that women need to have children in order to be fulfilled: 47% | 53% |
| Right to life for the unborn (prohibition of abortion) | No | Percentage of people that consider abortion unacceptable: 84% | 16% |
| Gender equality in labor (e.g., equal pay for equal work) | No | Percentage of people who believe that in times of job scarcity, men have more right to a job than a woman: 35% | 35% |
| Protection of family life | No | Percentage of people with traditional family values (child needs both father and mother): 90% | 10% |
| Right to rest | No | Percentage of people that consider leisure time to be very important: 78% | 22% |
| Populist Constitution Score | | | 36% |

Table 7 lists the same scores for all countries in the years 2000 and 2010. The first and third columns list the countries in which popular support for the menu of rights in the constitutional document falls short of a majority; that is, the average popular agreement across the twelve issues falls short of 51%. In 2010, 44% of all countries fall in this category, including Australia, Singapore, Malaysia, New Zealand, Canada, and the United States. The second and fourth columns of Table 7 list the countries whose constitution *does* reflect the values of more than half of the population. In 2010, this was the case for 56% of all countries, including, but not limited to, the constitutions of China, Russia, and Sweden.

Constitutional scholars commonly believe that for a constitution to carry strong democratic legitimacy, it needs to be more democratic than ordinary legislation and needs support from a supermajority of all people.¹¹⁵ Figure 3 and Table 7 reveal that, among the world's constitutions today, only in the constitutions of Macedonia, Guatemala, Italy, El Salvador, Uganda, Poland, and Ethiopia does the average right reflect the values of more than two-thirds of the population. Considering the alleged democratic legitimacy of constitutional texts,¹¹⁶ these numbers seem surprisingly low.

Table 7. Populist Constitution Scores in 2000 and 2010

| 2000 | | | | 2010 | | | |
|--------------------------------|----|--------------------------------|----|--------------------------------|----|--------------------------------|----|
| Less than 51% of population | | More than 51% of population | | Less than 51% of population | | More than 51% of population | |
| Country | % | Country | % | Country | % | Country | % |
| New Zealand | 34 | Argentina | 52 | Singapore | 32 | Argentina | 52 |
| South Africa | 35 | Columbia | 52 | Trinidad & Tobago | 33 | Finland | 52 |
| Australia | 35 | Hungary | 52 | Malaysia | 33 | Chile | 52 |
| Canada | 36 | Finland | 53 | Australia | 34 | Zambia | 53 |
| Denmark | 37 | France | 54 | South Africa | 36 | Sweden | 54 |
| Iceland | 41 | Czech Republic | 54 | Canada | 37 | Romania | 54 |
| Norway | 41 | Ireland | 54 | New Zealand | 37 | South Korea | 54 |
| United States | 44 | Egypt | 54 | Morocco | 37 | Egypt | 54 |
| Estonia | 44 | Slovenia | 54 | Denmark | 37 | Algeria | 54 |
| United Kingdom | 44 | Latvia | 54 | Zimbabwe | 38 | Georgia | 55 |
| Taiwan | 45 | Uruguay | 55 | Norway | 42 | Dominican Republic | 55 |
| Japan | 45 | Dominican Republic | 55 | Cyprus | 42 | Mali | 55 |
| Bosnia & Herzegovina | 46 | Lithuania | 55 | Iceland | 42 | Belarus | 55 |
| Sweden | 46 | Chile | 55 | Japan | 43 | Germany | 56 |
| Bangladesh | 48 | Georgia | 56 | Estonia | 44 | Latvia | 56 |
| India | 48 | Philippines | 57 | Taiwan | 44 | Mexico | 56 |

115. See Karim Fahim & Mayy El Sheikh, *First Round of Voting Spurs Dispute in Egypt*, N.Y. TIMES, Dec. 17, 2012, at A13 (quoting one of the members of the Constitutional Assembly as saying that the new Egyptian Constitution would need a two-thirds majority to be legitimate).

116. See *supra* notes 26–29 and accompanying text.

Table 7 (continued)

| 2000 | | | | 2010 | | | |
|--------------------------------|----|--------------------------------|----|--------------------------------|----|--------------------------------|----|
| Less than 51% of population | | More than 51% of population | | Less than 51% of population | | More than 51% of population | |
| Country | % | Country | % | Country | % | Country | % |
| Switzerland | 49 | Peru | 57 | Bosnia & Herzegovina | 44 | Saudi Arabia | 56 |
| Mexico | 50 | Spain | 58 | India | 44 | Ukraine | 57 |
| Malta | 50 | Ukraine | 58 | Bangladesh | 45 | Moldova | 57 |
| Austria | 50 | Romania | 58 | United States | 45 | Philippines | 57 |
| Belgium | 50 | Germany | 60 | Tanzania | 46 | Spain | 57 |
| Netherlands | 51 | Moldova | 60 | Jordan | 46 | Turkey | 58 |
| Nigeria | 51 | South Korea | 60 | United Kingdom | 46 | Iraq | 58 |
| — | — | Portugal | 60 | Thailand | 48 | Greece | 59 |
| — | — | Brazil | 61 | Netherlands | 49 | Slovak Republic | 59 |
| — | — | Armenia | 61 | Czech Republic | 49 | Russian Federation | 59 |
| — | — | Russian Federation | 61 | Austria | 49 | Croatia | 59 |
| — | — | Turkey | 62 | France | 49 | Bulgaria | 60 |
| — | — | Belarus | 62 | Rwanda | 49 | Kyrgyz Republic | 61 |
| — | — | Croatia | 62 | Malta | 50 | Albania | 61 |
| — | — | Azerbaijan | 62 | Portugal | 50 | Peru | 62 |
| — | — | Iran | 62 | Belgium | 50 | Luxembourg | 62 |
| — | — | Luxembourg | 63 | Colombia | 50 | Burkina Faso | 62 |
| — | — | Venezuela | 63 | Ireland | 50 | Pakistan | 62 |
| — | — | Bulgaria | 63 | Hungary | 51 | Indonesia | 62 |
| — | — | Macedonia | 64 | Uruguay | 51 | China | 62 |
| — | — | Slovak Republic | 64 | Slovenia | 51 | Armenia | 63 |
| — | — | Italy | 66 | Lithuania | 51 | Venezuela | 63 |
| — | — | <i>Poland</i> | 67 | Nigeria | 51 | Ghana | 63 |
| — | — | <i>Greece</i> | 68 | Switzerland | 51 | Brazil | 65 |
| — | — | <i>El Salvador</i> | 68 | — | — | Vietnam | 66 |
| — | — | <i>Pakistan</i> | 69 | — | — | Azerbaijan | 66 |
| — | — | <i>Albania</i> | 70 | — | — | Iran | 66 |
| — | — | <i>China</i> | 73 | — | — | <i>Macedonia</i> | 67 |
| — | — | — | — | — | — | <i>Guatemala</i> | 67 |
| — | — | — | — | — | — | <i>Italy</i> | 67 |
| — | — | — | — | — | — | <i>El Salvador</i> | 68 |
| — | — | — | — | — | — | <i>Uganda</i> | 69 |
| — | — | — | — | — | — | <i>Poland</i> | 69 |
| — | — | — | — | — | — | <i>Ethiopia</i> | 76 |

Note: The italicization denotes countries whose constitutional approval rating is higher than 66%.

B. Predictors of Constitutional Populism

In 2010, the average Singaporean constitutional right accorded with the values of a mere 32% of Singaporeans, while the Ethiopian constitution's rights provisions reflected, on average, the values of no fewer than 76% of Ethiopians. Why do some constitutions demonstrate fidelity to popular values while others do not? This sub-Part will provide an initial exploration of this question.

Possible explanations for such cross-country variation may relate to (1) features of the constitution and (2) features of the nation. There are a number of *constitutional features* that are likely to relate to constitutional populism. First, the age of the constitution may affect the degree to which a constitution is connected to popular values. Specifically, older constitutions might be disconnected from popular values because they have failed to keep pace with evolving popular opinions over time. This is particularly intuitive for the United States, where, over its two-century history, the Constitution has seen relatively few formal amendments.¹¹⁷ Indeed, the relatively low populism score for the U.S. Constitution (of 45%) is likely the result of the document's old age. At the same time, it is also possible that a constitution's age is a less important predictor of its popularity than the U.S. experience would suggest. Foreign constitutions tend to be substantially younger than the venerable U.S. Constitution.¹¹⁸ Around the world, the average national constitution lasts only nineteen years before it is replaced altogether and is amended frequently in between.¹¹⁹ Indeed, it is striking that constitutions have lasted exactly as long as Thomas Jefferson said they should last when he famously argued that because "the earth belongs to the living," the constitution should be updated every generation, which he defined as nineteen years.¹²⁰ Because so many of the world's constitutions were written or amended within the current generation, their disconnect from popular values is unlikely to be a product of their age alone.

Second, it seems that constitutions adopted in a process involving popular participation are more likely to reflect substantive popular opinion. Where people are actively involved in constitution-making, they are likely to push for their own views and values.¹²¹ On the other hand, as hypothesized in Part II, procedural involvement does not automatically guarantee that constitutions will track popular

117. See David S. Law & Mila Versteeg, *The Declining Influence of the U.S. Constitution*, 87 N.Y.U. L. REV. 763, 765 (2012) (describing how the U.S. Constitution is unusual from a global perspective).

118. See ELKINS ET AL., *supra* note 13, at 129 (reporting that the "median survival time" of a constitution is nineteen years).

119. *Id.* at 129.

120. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd ed., 1958); (stating the self-evident proposition that "the earth belongs in usufruct to the living"); *id.* at 393–94 (calculating that 18.8 years is the age of a generation, and concluding that "19 years is the term beyond which neither the representatives of a nation, nor even the whole nation itself assembled, can validly extend a debt"); *id.* at 396 ("Every constitution, then, and every law, naturally expires at the end of 19[] years. If it be enforced longer, it is an act of force and not of right.").

121. See *supra* Part I (discussing the relationship between popular participation and constitutions that substantively reflect popular values).

opinion, especially when popular involvement is limited to a yes-or-no vote in a referendum. Third, it seems plausible that if a constitution proclaims fidelity to popular values by enshrining the rhetoric of national identity and values in its preamble, its menu of rights might also match popular opinion.¹²² In that case, a genuine commitment to popular values is reflected both in the preamble and the bill of rights. Fourth, it is possible that constitutions that contain relatively few rights will enjoy lower levels of popular support than a constitution that contains numerous rights, because people generally favor an expansive catalogue of rights.¹²³

Country characteristics may also be associated with constitutional populism. First, it is possible that democratic countries produce constitutions that better reflect popular opinion. Second, perhaps economic welfare affects the degree to which constitutions are connected to popular values. Specifically, wealthier countries could be inherently more capable of honoring constitutional obligations, and their propensity to deliver those rights might make them more likely to promise them in the first place.¹²⁴ Finally, the degree to which a country is willing and able to uphold its constitutional promises may affect the degree to which the constitution is connected to popular values. In particular, it is possible that constitutions that are closely connected to popular values are aspirational in nature; that is, they represent unfulfilled hopes for the future rather than rights that are upheld here and now.¹²⁵ Likewise, regimes that have no intention of ever upholding the rights they promise might write documents that appeal to popular sentiments and, yet, are utterly meaningless in practice.¹²⁶ In both cases, populist constitutions are most likely to be found among nations that do not uphold their constitutional promises in practice.

Empirical exploration of what explains populist constitutions lends support to only some of these hypotheses.¹²⁷ I used regression analysis to explore which variables correlate with constitutional populism. The predictor variables included in this regression are (1) the age of the constitution, measured by the number of years

122. See *supra* Part I (discussing how nations may pay fidelity to popular values by adopting a preamble packed with rhetoric on national values and identity).

123. See *supra* note 50 and accompanying text (discussing how people usually vote in favor of more rights).

124. The empirical literature has repeatedly found that wealthy countries tend to possess superior human rights practices. See Gerald L. Blasi & David Louis Cingranelli, *Do Constitutions and Institutions Help Protect Human Rights?*, in HUMAN RIGHTS AND DEVELOPING COUNTRIES 223, 225–26 (Stuart S. Nagel & David Louis Cingranelli eds., 1996) (summarizing the relevant literature).

125. See Michael Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1632 (2009) (describing the concept of an “aspirational constitution”).

126. See Law & Versteeg, *supra* note 82, at 898–900 (documenting empirically that a substantial portion of the world’s constitutions are sham constitutions).

127. To be specific, I estimated an ordinary least squares regression model. To address serial correlation of the error terms, the model includes a lagged dependent variable and calculates robust standard errors clustered at the country level. I also re-estimated the same model when including country fixed-effects while excluding the lagged dependent variable, and the results are largely similar to those presented in Table 11.

since it was last revised or adopted;¹²⁸ (2) whether or not the constitution was drafted with popular input, and specifically, whether it was ratified through a popular referendum;¹²⁹ (3) whether a constitution signals populist commitments in its preamble by referring to the nation's past;¹³⁰ (4) whether a constitutional bill of rights is comprehensive and contains an expansive menu of rights;¹³¹ (5) whether a country is democratic;¹³² (6) the economic welfare of a country as measured by the natural log of its GDP per capita;¹³³ and (7) the degree to which a constitution upholds its commitments.¹³⁴ Table 8 summarizes the results from this empirical model.

Given the difficulties surrounding causal inference in a cross-country setting, results from this analysis should not be interpreted as causal relationships. Nonetheless, the analysis reveals some interesting correlations. First, it appears that younger constitutions are more likely to be connected to popular values. Thus, when constitutions have not been amended for a while, they fall out of step with evolving popular opinion. Second, the sheer number of constitutional rights is also a statistically significant predictor of constitutional populism, which lends some credibility to the hypothesis that people typically favor including a comprehensive catalogue of rights. Thus, the more rights a document contains, the more closely it usually tracks popular opinion. Third, constitutional performance is also correlated with how populist constitutions are. Specifically, the more constitutional rights are upheld in reality, the less likely that the document will be populist in nature. This finding suggests that populist constitutions are mostly aspirational in character. Eritrea, for example, is the most populist constitution as of 2010, and yet, it only upholds a small fraction of its promises in practice.¹³⁵ Finally, the analysis reveals a relationship between economic welfare and constitutional populism, specifically, that wealthier countries possess more populist constitutions.

The other variables are not statistically significant predictors of constitutional populism. As it turns out, democracy is not statistically significantly correlated

128. By measuring constitutional age as the number of years since a constitution was last amended in any way (in the case of constitutions that have never been amended, the number of years since initial adoption), I seek to avoid the difficulties involved in attempting to distinguish between amendments that effectively rewrite a constitution and amendments that are relatively insubstantial. See Law & Versteeg *supra* note 80 (describing the difficulties in drawing such distinctions).

129. This variable is taken from the Comparative Constitutions Project. See *supra* note 43 (introducing the data). I thank Justin Blount, Tom Ginsburg, and James Melton for sharing this data.

130. This variable is based on my own coding of all of the world's written constitutions. See *supra* Part I.A for an introduction and graphical representation.

131. This variable was taken from Law & Versteeg, *supra* note 80, at 1266–68 (describing how this variable was constructed from the constitutions of 188 countries written between 1946 and 2006).

132. See *supra* note 102 (describing the polity2 democracy variable).

133. See *supra* note 103 (describing the GDP variable).

134. Law & Versteeg, *supra* note 82, at 886 (introducing a numerical measure that captures the degree to which any government honors its constitutional commitments).

135. *Id.* at 898 (singling out the Eritrean Constitution as the second most “sham” constitution in 2010).

with constitutional populism. Thus, constitutions created by democracies are no more likely to substantively reflect popular values than are those created by autocracies. Populist rhetoric in the preamble is not statistically significantly related to constitutional populism in the bill of rights either. Perhaps most surprising is the finding that popular referendums do not produce more populist constitutions. Presumably this finding reflects that referendums allow only for limited popular input: a mere yes-or-no vote on the full package of proposed revisions.¹³⁶ Procedural involvement, thus, is no guarantee that constitutions will substantively track popular views and values. At the same time, it is still possible that other types of involvement in the drafting stage do result in constitutions that substantively reflect popular values. Further research is required to explore the connection between procedural involvement and the content of the constitution itself.

Table 8. Predictors of Constitutional Populism

| | |
|-----------------------------------|-----------|
| Age of the constitution | -0.011*** |
| Constitutional underperformance | -1.376*** |
| Comprehensiveness of constitution | -0.442* |
| Adopted by referendum | 0.023 |
| References to history in preamble | 0.258 |
| Democracy | -0.004 |
| GDP per capita (natural log) | 0.194** |
| Lagged dependent variable | 0.880*** |
| <i>R</i> ² | 0.97 |
| <i>N</i> | 913 |

Note: Coefficients from OLS regression with lagged dependent variable *** denotes statistical significance at the 1% confidence level, ** denotes statistical significance at the 5% confidence level, and * denotes statistical significance at the 10% confidence level.

V. DO PEOPLE WANT THEIR CONSTITUTION TO BE POPULIST?

The disconnect between constitutional choices and popular values is not in and of itself indicative of an unpopular constitutionalism. It is possible that people do not always want their constitutions to reflect all the principles that they value in life. For instance, perhaps some people who deeply value the environment do not want to enshrine a right to a healthy environment in their constitution; they might worry, for instance, that doing so would unduly increase the size of the government and would delegate too much power to the judiciary. The remainder of this Part will explore this possibility.

136. See *supra* Part I.B (describing the limited participation in a popular referendum).

A. Unpopular Constitutionalism

An exploration of whether people want their constitution to reflect their values requires new survey data. None of the World Values Survey questions inquire about the people's views on their constitution, and to my knowledge, no such survey exists. To gauge whether what people want from life corresponds with what they want from their constitution, I designed my own survey on Amazon's Mechanical Turk. Mechanical Turk is an "online crowdsourcing system that allows users to distribute work to a large number of online respondents."¹³⁷ This work is broken down into simple one-time tasks for which respondents are paid to complete. Mechanical Turk is used for a wide variety of tasks, which increasingly includes survey research by social scientists.¹³⁸

The survey was available online from January 30 to April 15, 2013, and was completed by 1029 respondents from eleven countries, about half of whom were from the United States.¹³⁹ The survey exactly replicated the questions from the World Values Survey,¹⁴⁰ but for each question about values, it asked a follow-up question on whether the respondent would want to enshrine the same values in the constitution. For example, after asking whether the respondent finds homosexuality justifiable (using the same scoring as in the World Values Survey),¹⁴¹ the respondent would be asked whether he or she wants to include a protection of equality regardless of sexual orientation in the constitution.¹⁴² Mechanical Turk workers tend to fairly closely approximate a random sample of the population, but female workers and younger workers are somewhat overrepresented.¹⁴³ For that reason, the survey also included questions that ask for the respondent's age, gender, and political ideology, so that these features can be controlled for in the subsequent analysis.

137. Joel Ross, Andrew Zaldivar, Lilly Irani, Bill Tomlinson & M. Six Silberman, *Who Are the Crowdworkers? Shifting Demographics in Mechanical Turk*, in CHI '10 EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 2863, 2863–64 (2010) (describing the basic principles of Amazon's crowd-sourced virtual workplace).

138. See, e.g., Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk, A New Source of Inexpensive Yet High-Quality Data?*, 6 PERSP. ON PSYCHOL. SCI. 1, 3 (2011) (suggesting that Mechanical Turk yields inexpensive but high-quality data for psychology researchers that is more demographically diverse than most internet surveys).

139. Specifically, the survey was taken by 522 people from the United States, 399 people from India, 51 people from Canada, 20 people from Pakistan, 12 from Germany, 10 from Australia, 5 from France, 4 from South Africa, 3 from Croatia, 2 from the Netherlands, and 1 from Kenya. Depending on the country, respondents were paid between twenty-five cents and one dollar to complete the survey.

140. See *supra* Table 1.

141. See *supra* Table 1.

142. On average, people spent 3.8 minutes on the survey. Respondents that took less than 60 seconds to complete the survey were omitted from the analysis.

143. Ross et al., *supra* note 137, at 2865 (suggesting that the workers on Mechanical Turk are diverse and closely resemble the population as a whole, but that the workforce is disproportionately made up of female and younger people).

Of course, the survey does not provide a fully accurate description on the constitutional opinions of the world population at large. Even if the sample were fully random, the sample size is not large enough to draw such inferences. Sampling the world population at large would require an undertaking of the magnitude of the World Values Survey, with a global network of social scientists.¹⁴⁴ The purpose of the survey presented in this sub-Part is more modest. Its goal is merely to provide a first sense of whether people typically want their values enshrined in their constitution, or whether they are reluctant to demand some of the rights that they value in the abstract. Further research will be required to provide a more definite answer to this question.

The main impression from the surveys is that, overwhelmingly, people do want to enshrine their values in the constitution. Table 9 lists for each survey question the percentage of respondents that deeply value a certain right, as well as the percentage of respondents that deeply value the right *and* want to enshrine it in their constitution. The table reveals that, in most cases, people who value a right also want to enshrine it in their constitution: 90% of those who hold traditional family values want to protect the family in their constitution; 91% of those who value gender equality want the constitution to protect gender equality in labor; 84% of those who value the environment want environmental protection in their constitution; 92% of those willing to engage in a legal assembly want to enshrine a right to assembly in their constitution; 88% of those who think homosexuality is justifiable want gay rights included in their constitution; and 89% of those who value motherhood want to enshrine a protection of motherhood in the constitution. The smallest congruity lies in the right to rest; only 54% of those who believe that leisure time is important think that a right to rest should be constitutionalized.

144. *See supra* Part III (describing the World Values Survey data).

Table 9. Proportion of people that value a right and also want to enshrine it in the constitution

| Right | Percentage of respondents that value the right | Percentage who values the right <i>and</i> want to enshrine it in their constitution |
|--|--|--|
| Protection of the family (percentage of respondents with traditional family values) | 679/1007 (67%) | 608/679 (90%) |
| Right to rest (percentage of respondents that considers leisure time to be very important) | 945/1014 (93%) | 519/954 (54%) |
| Right to work (percentage of people that considers work very important) | 902/1013 (89%) | 664/902 (74%) |
| Right to healthy environment (percentage of people willing to pay for increased environmental protection) | 683/1008 (68%) | 576/683 (84%) |
| Right to get married (percentage of people who disagree that marriage is an outdated institution) | 748/1015 (74%) | 535/748 (72%) |
| Right to petition (percentage of people who would be willing to petition their government) | 910/1017 (89%) | 776/910 (85%) |
| Right to assembly (percentage of people who want to participate in a legal assembly) | 860/1016 (85%) | 788/860 (92%) |
| Right to strike (percentage of people willing to go on a legal strike) | 675/1014 (67%) | 545/675 (81%) |
| Equality regardless of sexual orientation (percentage of people who thinks homosexuality is acceptable) | 564/1013 (56%) | 499/564 (88%) |
| Right to life for unborn (percentage of people that considers abortion unacceptable) | 525/1025 (51%) | 376/525 (72%) |
| Gender equality in labor (percentage of people who <i>do not</i> believe that in times of job scarcity, men have more right to a job than women) | 778/1018 (76%) | 705/778 (91%) |
| Protection of motherhood (percentage of people that believe that women need to have children in order to be fulfilled) | 349/1009 (35%) | 309/349 (89%) |

When exploring these same relationships in twelve separate regressions—in which respondents' willingness to enshrine each of the twelve rights in their constitution are the dependent variables—a similar impression emerges. Each of these regressions include the following predictor variables: (1) whether the respondent finds the values that correspond with the right very important; (2) the respondent's age; (3) the respondent's gender; (4) the respondent's self-proclaimed political ideology (progressive or conservative); and (5) whether the respondent was

based in the United States.¹⁴⁵ The results (presented in Table 10) reveal that, with the sole exception of gender equality in labor relations, people who deeply value a right also prefer that their constitution protects that right. These findings are statistically significant even when controlling for attributes like age, gender, political ideology, and geographical location. When combined with the findings from the previous Part, these findings suggest that constitutions are not only detached from popular values, but that this disconnect is unsupported by popular opinion. As a result, the global practice of constitution-making appears to be characterized by unpopular constitutionalism.

Of course, the surveys were not completed under the conditions of a constitutional moment, in which the people transcend their ordinary shortsighted self-interest and pay fidelity to the common good.¹⁴⁶ In theory, it is possible that respondents would feel differently when they are actually writing a constitution, in such a constitutional moment of heightened deliberation. Indeed, in theory, this could even explain why constitutions ratified through popular referendum do not reflect popular values: because the people change their values when writing a constitution. Though the constitutional moment is a powerful construct in constitutional theory, there is little evidence that real-world constitutions are written under such conditions.¹⁴⁷ In fact, the prevailing evidence suggests the opposite: constitutions are commonly written by experts, self-interested elites,¹⁴⁸ imposed by outsiders,¹⁴⁹ and copied and pasted from elsewhere.¹⁵⁰ Even in the rare cases in which constitutional moments occur, it is unlikely that people will set aside their values on contested moral issues such as abortion or gay rights. In the absence of any evidence that people change their views at times of constitution-making, the survey data presented in this Article suggests that the global practice of constitution-making is characterized by an *unpopular constitutionalism*.

145. Specifically, I estimated an ordinary least squares regression with robust standard errors clustered at the country level.

146. See *supra* notes 18–22 and accompanying text.

147. See Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments* 44 STAN. L. REV. 759, 764, 776–92 (1992) (noting that “Ackerman assumes rather than demonstrates the existence of constitutional moments” and showing, based on historical research, the American Founding was not free of political self-interest); András Sajó, *Constitution without the Constitutional Moment: View from the New Member States*, 3 INT’L J. CONST. L. 243, 243 (2005) (noting that the constitutions of the United States, Belgium, and maybe post-apartheid South Africa were written during a constitutional moment, but that the “overwhelming majority” of constitutions were not).

148. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM passim* (2004) (describing constitution-making as a product of “self-preservation” by hegemonic elites).

149. See generally Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139 (2008).

150. See Goderis & Versteeg, *supra* note 82 (describing constitutional imposition in over thirty former British colonies in Africa and the Caribbean as well as in Japan, Micronesia, Germany, Afghanistan, Iraq, and others).

Table 10. Predictors of Whether People Want a Constitutional Right in Their Constitution

| | Protection of Family | Right to Rest | Right to Work | Right to Environment | Protection of Marriage | Right to Petition | Right to Assembly | Right to Strike | Gay Rights | Rights for unborn | Gender Equality | Protection of motherhood |
|-------------------|----------------------|---------------|---------------|----------------------|------------------------|-------------------|-------------------|-----------------|------------|-------------------|-----------------|--------------------------|
| Individual Values | 0.24*** | 0.15*** | 0.14*** | 0.21*** | 0.23*** | 0.18*** | 0.10*** | 0.29*** | 0.45*** | 0.36*** | 0.09 | 0.21*** |
| Female | 0.01 | 0.04 | 0.08*** | 0.06*** | 0.12*** | 0.00 | -0.03** | 0.03 | -0.02 | 0.00 | 0.06** | 0.04*** |
| Age | 0.00 | -0.00*** | -0.00*** | -0.00*** | -0.01** | -0.00*** | 0.00** | -0.00* | -0.00** | 0.00 | 0.00 | -0.00*** |
| Progressive | -0.09*** | 0.03 | 0.07* | 0.07* | -0.05* | 0.01 | 0.03 | 0.10*** | 0.07 | -0.17*** | 0.07* | -0.06*** |
| United States | -0.10*** | -0.35*** | -0.25*** | -0.25*** | -0.18*** | -0.02 | 0.04*** | 0.01 | 0.07 | -0.28*** | -0.06*** | -0.19** |
| (pseudo)r-squared | 0.15 | 0.12 | 0.11 | 0.18 | 0.10 | 0.03 | 0.04 | 0.09 | 0.23 | 0.21 | 0.05 | 0.13 |
| N | 987 | 1001 | 1000 | 994 | 1003 | 1003 | 1003 | 1001 | 999 | 1011 | 1004 | 997 |

Note: Marginal effects from probit regressions with robust standard errors clustered at the country level. To calculate marginal effects, all variables were evaluated at the sample mean. *** denotes statistical significance at the 1% confidence level, ** at the 5% confidence level, and * at the 10% confidence level.

B. An Unpopular U.S. Constitution?

Americans might be different. The survey responses reveal a striking difference between respondents in the United States and those in other countries. Unlike their foreign counterparts, Americans tend *not* to want all of their personal values constitutionalized, specifically those that are positive or socioeconomic in nature. While much has been said about American exceptionalism in the constitutional realm,¹⁵¹ the survey results tentatively suggest that one of the most exceptional traits of U.S. constitutional law—the distinctly libertarian character of the Federal U.S. Constitution¹⁵²—in fact appears to be supported by popular opinion.¹⁵³

This contrast between Americans and foreign respondents is apparent from the regression results reported in Table 10. Specifically, compared with foreign respondents—and controlling for attributes like age, gender, ideology as well as how much respondents value each right in the abstract—Americans are systematically less likely to demand constitutional protections for the family, a right to rest, a right to work, a right to a healthy environment, a protection of marriage, rights for the unborn, gender equality in labor relations, and a protection of motherhood.

The finding raises the possibility that Americans do not want to constitutionalize all of their values, and invites a reconsideration of the populist constitution score for the U.S. Constitution presented in Part V.A of this Article. Specifically, to gauge the true popularity of the U.S. Constitution, it might be more insightful to consider which rights Americans actually want in their constitution, rather than to what extent each right aligns with their personal beliefs. In other words, we will have to consider Americans' *constitutional* values rather than their personal values. To facilitate such an analysis, Table 11 presents, for each right included in the analysis, (1) the percentage of Americans that values the right and (2) the percentage of Americans that actually want the right in their constitution. These numbers are based on the Mechanical Turk survey

151. See generally AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 65 (describing how the United States is a global outlier in free speech, the death penalty, and socioeconomic rights, amongst other things).

152. See HARTZ, *supra* note 79, at 6 (explaining the distinctly libertarian constitutional tradition of the United States); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 12 (2013) (noting that the conventional wisdom about the American constitutional tradition is that "protective and redistributive policies are questions of majoritarian choice, not matters of constitutional duty"); Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 46 (Michael Ignatieff ed., 2005) ("American distrust of government is a contributing factor to a strongly libertarian approach to constitutional rights. The Constitution of the United States is a strongly negative constitution, and viewing the constitution as the vehicle for social rights, community rights, or positive citizen entitlements of any kind is . . . highly disfavored."); Dieter Grimm, *The Protective Function of the State*, in EUROPEAN AND U.S. CONSTITUTIONALISM, *supra* note 77, at 119 (noting that negative rights characterize the U.S. constitutional tradition and attributing this to America's lack of feudalism).

153. Cf. Mila Versteeg & Emily Zackin, American Constitutional Exceptionalism Revisited (2014) (unpublished manuscript) (on file with author) (showing empirically that many U.S. state constitutions do include socioeconomic rights).

conducted by the author, while the World Values Survey numbers are listed for comparison.¹⁵⁴

The table reveals that there exists some discrepancy between the degree to which Americans value rights in the abstract, and whether they want to enshrine these in the Constitution. To illustrate, 90% and 87% of American respondents value leisure time and work, respectively, but only 35% of all Americans want a right to rest or leisure in the Constitution and only 57% would want a constitutional right to work.¹⁵⁵ When recalculating the U.S. populism score based on Americans' constitutional values rather than their personal values (the percentage of people that want or do not want each right in the Constitution, rather than the percentage that value or do not value the right in the abstract), the average support for the menu of rights enshrined in the U.S. Constitution increases somewhat: 48% of Americans get the rights they wanted.

Even though Americans agree with the omission of some rights from the Constitution, they disagree with the omission of others. Specifically, the survey reveals that there are high levels of popular support for some rights that are omitted from the text of the U.S. Constitution¹⁵⁶. Specifically, 88% of respondents want to enshrine a protection for gender equality in labor relations; 77% want to enshrine gay rights; 70% of respondents want a right to strike in the constitution; and 62% would want a constitutional right to a healthy environment. It is these types of omissions that decrease the popularity of the U.S. Constitution and make the average provision included in the analysis fall short of a majority.

Another difference between the United States and foreign countries is that many rights that are protected under U.S. constitutional law are not explicitly enshrined in the

154. In general, the results from the Mechanical Turk survey are fairly similar to the results from the World Values Survey. Note that with a fully random sample, and a survey size of 522 American respondents, there would have been a margin of error of 4.3%. *See Sample Size Calculator*, SURV. SYS., <http://www.surveysystem.com/sscalc.htm>. As can be seen, for a number of rights, the difference between the Mechanical Turk Survey and the WVS survey data falls within the margin of error, but for others, it does not. One possible cause for the discrepancy is that the last wave of WVS data collection in the United States took place in 2006, and values might have changed since then. Another possible cause is that my sample of Mechanical Turk workers is not fully random; this is why the regression analysis controls for attributes such as ideology age and gender. To illustrate how both of these effects might be at work, consider the data on gay rights, for which the discrepancy between the WVS findings and the finding from my survey is largest. According to the World Values Survey, 70% of Americans think that homosexuality is unacceptable, while according to the Mechanical Turk survey only 27% thinks that homosexuality is unacceptable. This difference may reflect a sample selection bias, since the younger Mechanical Turk workers are more likely to be supportive of gay rights. Yet it is also possible that the discrepancy results from rapidly changing values on gay rights in America. *See* David A. Fahrenthold & Jon Cohen, *Record Support for Gay Marriage*, WASH. POST, March 19, 2013, at A1 (documenting that 41% of Americans supported gay marriage in 2004, 36% supported gay marriage in 2006, and 58% supported gay marriage in 2013). In fact, the 73% support measured in my survey is larger than both the 58% in the *Washington Post* survey and the 30% support measured by the World Values Survey in 2006.

155. Among the 90% of Americans that deeply value leisure time, 36% want to enshrine a right to leisure in the Constitution; among the 82% of Americans that deeply value work, 59% wants to enshrine a right to work in the Constitution.

156. *See* Table 10.

Constitution itself but have been created through judicial interpretations. The U.S. Constitution has seen relatively few formal amendments, but it is updated almost daily through judicial interpretation.¹⁵⁷ In contrast with the venerable U.S. Constitution, foreign constitutions tend to be both younger and substantially more detailed,¹⁵⁸ thereby leaving less time and discretion for foreign courts to update their constitutional documents. As a result, most countries' constitutional texts are more important to their respective systems than is the United States'. Indeed, the gap between the written "large-C" constitution and the broader body of constitutional law—or the nation's "small-c" constitution—is larger in the United States than in any other foreign country.¹⁵⁹

Three of the rights that feature in the analysis have arguably been recognized by the Supreme Court, even though they are not explicitly enshrined in the Constitution. These are the right to get married, the protection of gender equality in labor relations, and, as of very recently, gay rights.¹⁶⁰ In these cases, the Supreme Court has updated the Constitution to more closely conform to popular opinion. Indeed, according to some commentators, constitutional interpretation is never immune from popular opinion.¹⁶¹ Professor Leider, for example, has shown that the Supreme Court's Second Amendment jurisprudence has always tracked evolving popular opinion and reflects a desire on the part of the court to "accommodate a population divided between those believing in the right and those seeking stronger restrictions on weapons."¹⁶² The recent overturning of the Defense of Marriage Act might reflect a similar desire. According to the Mechanical Turk survey, which was conducted right before the Supreme Court decided *United States v. Windsor*,¹⁶³ 78% of Americans support a constitutional protection of equality regardless of sexual orientation.¹⁶⁴ By deciding the case the way it did, the Supreme Court thus brought the Constitution further in line with popular values.

When taking into account that these rights are in fact protected in the larger body of constitutional law, the popularity score of the U.S. Constitution changes from 48% to 60%. In other words, between the constitutional text and judicial interpretations, U.S. constitutional law grants a majority of 60% of Americans the rights they want. Thus, when considering Americans' distinct constitutional values as well as the interpretations by the Supreme Court, the U.S. constitutional system is closer to popular opinion than it appears at first sight.

157. See ELKINS ET AL., *supra* note 13, at 129 (reporting that the median survival time of the world's constitutions is nineteen years).

158. See Versteeg & Zackin, *supra* note 153 (describing empirically how the U.S. constitution is unusually brief and stable by global standards).

159. *Id.* at 25 (noting that the U.S. Constitution is the oldest national constitution in the world, and among the four briefest democratic constitutions in existence, and observing that this entails an unusual delegation of constitution-making authority to the judiciary).

160. To determine whether each of the twelve rights covered in my analysis are recognized in constitutional law, I rely on the quantitative coding by Kevin L. Cope, who coded the presence of 112 rights in U.S. constitutional law. See Kevin L. Cope, *The Global Relevance of U.S. Constitutional Law* (2012) (unpublished manuscript) (on file with author) (describing the cases in which the Supreme Court recognized a protection of marriage and a prohibition of gender discrimination in labor by the government).

161. See *supra* note 30.

162. Leider, *supra* note 30, at 3.

163. 133 S. Ct. 2675 (2013).

164. See *supra* note 154 (discussing potential selection bias in my survey).

Table 11. Personal and Constitutional Values for American Respondents

| | Right Included | |
|--------------------------|---|--|
| | Right corresponds with personal values | Right corresponds with constitutional values |
| Right to Petition | People who would be willing to petition their government: 94% (95% WVS) | People who want a right to petition in their constitution: 83% |
| Right to Assembly | People who want to participate in a legal assembly: 83% (69% WVS) | People who want a right to assembly in their constitution: 92% |
| | Right Not Included | |
| | Right <i>does not</i> correspond with personal values | Right <i>does not</i> correspond with constitutional values |
| Protection of Family | People who do <i>not</i> have traditional family values: 52% (36% WVS) | People who do <i>not</i> want a right a protection of family life in the constitution: 33% |
| Right to Rest | People who do <i>not</i> consider leisure time to be very important: 10% (11% WVS) | People who do <i>not</i> want a right to rest in the constitution: 65% |
| Right to Work | People who do <i>not</i> consider work very important: 17 % (20% WVS) | People who do <i>not</i> want a right to work in the constitution: 43% |
| Right to Environment | People who do <i>not</i> value the environment : 39% (49% WVS) | People who do <i>not</i> want a right to healthy environment in the constitution: 38% |
| <i>Right to Marriage</i> | People who agree that marriage is an outdated institution: 30% (12% WVS) | People who do <i>not</i> want a right to get married in the constitution: 45% |
| Right to Strike | People who are <i>not</i> willing to go on a legal strike: 33% (56% WVS) | People who do <i>not</i> want a right to strike in the constitution: 30% |
| <i>Gay Rights</i> | People who do <i>not</i> think homosexuality is acceptable: 27% (70% WVS) | People who do <i>not</i> want gay rights in the constitution: 23% |
| Rights for Unborn | People that consider abortion acceptable: 58% (31% WVS) | People who do <i>not</i> want a right to life for unborn in the constitution: 65% |
| <i>Gender equality</i> | People who do <i>not</i> value gender equality in labor : 5% (7% WVS) | People who do <i>not</i> want a right to gender equality in labor relations in the constitution: 12% |
| Protection of motherhood | People who do <i>not</i> believe that women need to have children in order to be fulfilled: 92% (86% WVS) | People who do <i>not</i> want a protection of motherhood in the constitution: 48% |
| <i>Total</i> | Americans whose personal values align with constitution: 44% (45% WVS) | Americans whose constitutional values align with constitution: 48% |

N = 522

Note: The *italicization* in the first column denotes the rights not explicitly enumerated in the Constitution, but that are nonetheless protected under U.S. constitutional law.

VI. POSSIBLE CAUSES OF UNPOPULAR CONSTITUTIONALISM

In constitutional theory, as well as popular imagination, constitutions are widely regarded as distinct expressions of popular views and values.¹⁶⁵ The findings from this Article suggest that it might be necessary to re-evaluate this idea. Although the findings should be interpreted with some caution, all the available evidence suggests that constitutions are mostly disconnected from popular values, even in democratic countries and in countries where the document was ratified through a popular referendum. This Part sets forth a possible explanation for why unpopular constitutionalism appears to prevail in so many countries around the world.

To understand the disconnect, it is important to note that constitutions are not usually written by the people as a whole. Most of the time, they tend to be drafted by small groups of experts who are consulted by international organizations as well as special interest groups, mainly in the form of national and international nongovernmental organizations.¹⁶⁶ Only after a draft has been agreed upon, it is deliberated by democratically elected bodies and/or put to the people for ratification. Moreover, in the majority of cases, popular approval is still not sought at all.¹⁶⁷ Thus, the experts that write the constitutions often do so in relative insulation from democratic pressures. And in designing the nation's highest document, these experts do not merely consider majoritarian sentiments but balance these against a host of competing considerations that might contradict the goal of popular self-expression.

Assuming that the constitution-drafters do not simply seek to enshrine their own preferences and values but think about the greater good, there exist two important considerations compete with the desire to express popular views and values. These competing considerations are functionalism and universalism. Universalism holds that all constitutions should enshrine certain universal values—most notably relating to rights—regardless of the wishes of the majority. Universalist considerations caution constitutional designers against popular self-expression because populist constitutions potentially undermine universal human rights norms.¹⁶⁸ Functionalism counsels against populist constitutions because those documents are more likely to be technically unsound: for example, they often enshrine an overly broad catalogue of rights.¹⁶⁹ Both functionalism and universalism, then, are possible causes of unpopular constitutionalism.

A. Functionalism

For real-world constitution-makers, constitutions are not merely forums to express popular values; they also represent an opportunity to design the nation and

165. *See supra* notes 13–17 and accompanying text.

166. *See supra* notes 147–50 and accompanying text.

167. *See supra* Part II.B (describing the recent trend towards popular participation, and noting that 34% of constitutions currently in force require ratification through a popular referendum).

168. *See infra* Part VI.B.

169. *See infra* Part VI.A.

to strategically achieve certain goals.¹⁷⁰ From a functionalist perspective, the constitution is less the “soul of the nation” than it is the country’s operating system.¹⁷¹ To perform well, both a country and a computer need a technically superior operating system. Constitutions, then, are ideally like Windows 8 or Apple’s Mountain Lion, and constitution-makers are engineers with the technical expertise to find optimal constitutional solutions.¹⁷² Through constitutional design, constitutions can promote desirable goals such as economic welfare,¹⁷³ a lasting respect for rights and liberty,¹⁷⁴ stable democracy,¹⁷⁵ and the mitigation of conflict in divided societies.¹⁷⁶

Under the logic of functional constitutional design, constitutionalism implies a set of substantive constitutional principles to which designers must adhere if they are to achieve a well-functioning government. Such principles tend to be standardized and do not usually depend on context.¹⁷⁷ As Professor Tom Ginsburg explains, constitution-making often starts with “boilerplate” constitutional provisions that represent easily available and technically sound solutions for constitutional design.¹⁷⁸ Instead of starting from scratch, constitution-makers draw on available boilerplates. To return to the computer analogy, it might be foolish to design a new operating system from whole cloth if Windows 8 or Apple’s Mountain Lion were already available.

170. See, e.g., Tushnet, *supra* note 34, at 68, 72 (suggesting that a functionalist approach is promoted by political scientists who seek to identify the best constitutional solutions). See generally ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000).

171. E.g., Kreimer, *supra* note 13, at 641–44 (contrasting the notion that the constitution is “the soul of the nation” with the idea that constitutions serve as nations’ operating systems).

172. On the “science” of constitutional design, see DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* (2006); Ran Hirschl, *The “Design Sciences” and Constitutional “Success,”* 87 *TEX. L. REV.* 1339 (2009).

173. For the view that constitutions promote economic welfare, see, for example, COOTER, *supra* note 170; TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2003).

174. For the view that bills of rights promote liberty, see, for example, *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* (Philip Alston ed., 1999).

175. For the view that constitutions can design democracy, see, for example, CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001).

176. For the view that constitutions can mitigate conflict in divided societies, see, for example, *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETY: INTEGRATION OR ACCOMMODATION?* (Sujit Choudhrey ed., 2008); Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 *WM. & MARY L. REV.* 1213 (2008); Arend Lijphart, *Constitutional Design for Divided Societies*, 15 *J. DEMOCRACY* 96 (2004).

177. See Peter C. Ordeshook, *Are ‘Western’ Constitutions Relevant to Anything Other than the Countries They Serve?*, 13 *CONST. POL. ECON.* 3, 3 (2002) (“There necessarily exists universal principles of democratic constitutional design, even if those principles remain largely undiscovered.”).

178. Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 182, 196 (describing boilerplate constitutional provisions).

Functionalism appears to be a common sentiment in constitution-making.¹⁷⁹ The U.S. Constitution, for example, was carefully engineered by its drafters, who had extensively studied the available insights from political science and constitutional experiences elsewhere. In the same spirit, the drafters of the 1922 Irish Free State Constitution did a “diligent search” of numerous foreign constitutions, which were carefully studied to get new insights on how to best “engineer” Irish society.¹⁸⁰ Most recently, the 2011 South Sudanese Constitution was written under the auspices of a cadre of foreign consultants who advised the South Sudanese drafters on the wisdom of their proposed choices.¹⁸¹ Functional constitutional design is thus akin to a science, as part of which experts prescribe optimal constitutional solutions to each nation.¹⁸² Such functional recipes for constitutional design, however, are likely to be disconnected from popular opinion.

B. Universalism

Real-world constitution-makers do not merely balance the demands of democratic constitutional theory against functional considerations, but also against universalism: the belief that some values are so important that they should be enshrined in constitutions everywhere.¹⁸³ From a universalist viewpoint, all constitutions are to contain certain universal rights norms, regardless of popular opinion.¹⁸⁴

A body of sociological research has demonstrated that the international community is increasingly characterized by standardized models of statehood.¹⁸⁵

179. Benedikt Goderis & Mila Versteeg, *Transnational Constitutionalism: A Conceptual Framework*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 103 (documenting widespread borrowing in constitution-making around the globe, from nineteenth century Latin America, to post-colonial Africa, to Iceland, and South Sudan today).

180. Paul Brady, *Social, Political and Philosophical Foundations of the Irish Constitutional Order*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 269, 274.

181. *See* Cope, *supra* note 34, at 304 (describing the cadre of foreign experts involved in the drafting of the 2011 South Sudanese Transitional Constitution, ranging from the National Democratic Institute, the Max Planck Institute, to the American law firm Latham & Watkins).

182. *See, e.g.*, JACKSON, *supra* note 13, at 265 (noting that constitution-making involves “consultations with (if not management by) international actors (governmental and nongovernmental organizations), concerning constitutional design (including voting systems), constitutional rights, and constitutional enforcement mechanisms”); Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1992–93 (2004) (describing the prevalence of “international constitutions” that are primarily drafted by foreign consultants).

183. Tushnet, *supra* note 34, at 67, 69 (describing normative universalism as the idea that the same universal values apply everywhere).

184. *Id.* at 69 (“Normative universalism emerges primarily from the dialogue between those who study comparative constitutional law and those who study international human rights.”).

185. *See* John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World*

Especially in the area of human rights, there now exists an internationally defined human rights paradigm that has equipped the international community with explicit formal standards against which states can be evaluated.¹⁸⁶ States that view themselves as members of the international community will self-consciously conform to those standards to gain international legitimacy.

This international paradigm is most prominently enshrined in the core United Nations human rights treaties. As a normative matter, the very premise of the international human rights regime is that some rights are universal, no matter where you are born.¹⁸⁷ Since the Second World War, a growing number of rights are protected by international law.¹⁸⁸ These treaties are widely ratified by, and thus legally binding upon, the largest majority of states. Many of these rights have achieved the status of customary international law, making them legally binding even upon states that did not ratify these treaties.¹⁸⁹ In addition to their legal status, human rights treaties have strong normative appeal because they represent a global consensus among nation states. By design, international human rights treaties seek to articulate and advance a global consensus on human rights.¹⁹⁰ States that want to signal good intentions to the international community, and self-consciously aim to be part of that community, are therefore likely to conform to the standardized constitutional models enshrined in international human rights treaties.¹⁹¹

Society and the Nation-State, 103 AM. J. SOC. 144, 144–45 (1997) (“Many features of the contemporary nation-state derive from worldwide models constructed and propagated through global cultural and associational processes.”).

186. David S. Law & Mila Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 165, 170 (Tom Ginsburg & Alberto Simpser eds., 2014).

187. *E.g.*, LOUIS HENKIN, *THE AGE OF RIGHTS* 2 (1990) (“Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development.”).

188. *See, e.g.*, TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* 4 (2005) (“[E]ven the most optimistic observers in 1948 could not have imagined the subsequent growth and influence of human rights discourse and doctrine. . . .” (citation omitted)); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 36 (2009) (“The most striking fact about the international law of human rights is its nearly complete absence prior to the end of World War II.”).

189. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (“A state violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination or (g) a consistent pattern of gross violations of internationally recognized human rights.”).

190. Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 488 (2001) (“The treaty system has largely defined the international consensus on human rights norms . . .”).

191. *See, e.g.*, GRAHAM HASSALL & CHERYL SAUNDERS, *ASIA-PACIFIC CONSTITUTIONAL SYSTEMS* 1 (2002) (“The [Universal] Declaration of Human Rights . . . must surely have had more impact on thinking about law, constitutionalism and governance than any other document produced in the last century.”); JACKSON, *supra* note 13, at 40 (“[M]any foreign constitutions drafted since World War II rely on international human rights instruments (or on other constitutions that relied on these instruments) as archetypes, leading to parallel

While rooted in different logics, functionalism and universalism both produce standardized documents,¹⁹² rather than distinct statements of national values that serve to differentiate nations from one another. And in practice, they often blend together, presenting constitutional designers with a limited number of standardized models, and limiting designers' discretion to express any popular values that would deviate from these models.¹⁹³

C. The Dilemma for Constitutional Design

Functionalism and universalism may, at times, contradict the ideal of popular self-expression. At first blush, it may seem that the expression of national values, the articulation of universal norms, and the functional design of certain objectives can all be achieved with the same instrument.¹⁹⁴ For example, the preamble could proclaim the nation's values, the bill of rights could enshrine a standardized package of universal rights, and state-of-the-art principles of constitutional design could be brought to bear on the structural part of the constitution. Yet where national values are more than rhetorical statements and permeate the substantive portion of the constitution, a tension can emerge. Popular values can clash both with functionalism's recipes for constitutional design and with universalism's notion that a core set of rights should be adopted everywhere.

To illustrate the former, consider the example of socioeconomic rights. In developing countries, as elsewhere, the people value deeply the right to food, the right to housing, and the right to an adequate standard of living. In fact, alleviating poverty and malnutrition may be a leading goal for the future.¹⁹⁵ But when the government is incapable of fulfilling these rights, there exists a risk that including them will relegate the entire constitution to a merely aspirational document. That is, if the government routinely violates the right to food, for example, it will come as less of a surprise when it does the same for the prohibition of torture.¹⁹⁶ As a result, functionalism counsels against popular self-expression on socioeconomic rights.

rights-protecting provisions.”); Heyns & Viljoen, *supra* note 190, at 500 (noting, based on case-study research, that the human rights instruments promulgated by the United Nations have strongly influenced constitution-making in various countries).

192. See Tushnet, *supra* note 34, at 67, 74 (noting that both functionalists and universalists look for universal principles).

193. Law & Versteeg, *supra* note 80, at 1163–64 (finding that ninety percent of all variation in the world's constitutions is explained by two underlying dimensions: (1) the general tendency of a country to include few or many rights and (2) whether the document is more statist or libertarian in nature).

194. See, e.g., Kreimer, *supra* note 13, at 648–50 (conceptualizing constitutions as national identity and contrasting it with constitutions as operating systems); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269–74 (1999) (conceptualizing the “expressive” function of constitutions and contrasting it with more functionalist perspectives on constitutions).

195. See Law & Versteeg, *supra* note 82, at 868 (noting that Chad's constitution promises free and universal education, even though only one third of the population is literate, and Afghanistan's constitution promises universal healthcare, even though it has the lowest life expectancy rate in the world).

196. See, e.g., Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 65, at

Perhaps even more importantly, fidelity to popular values may produce documents that are overly elaborate, in that they turn all potentially appealing values into constitutional ones. To illustrate, the 2008 Constitution of Ecuador—written with widespread popular input¹⁹⁷—enshrines rights to locally-produced nutritious food, rights for breastfeeding mothers, a right to clean city air, along with a sweeping range of other goals.¹⁹⁸ A number of other recent documents in Latin America are made of similar cloth.¹⁹⁹ Such documents are likely to be popular, as people are typically in favor of enshrining a wide range of appealing goals into their constitution.²⁰⁰ For the functionalist, however, such documents raise concerns about the enforceability of these goals, as well as about the appropriate role for the judiciary in a democratic society.²⁰¹ Thus, functionalism suggests caution against an overly broad catalogue of constitutional rights.

Popular self-expression can also undermine international human rights norms. In the name of tradition and deeply held cultural values, some nations have permitted genital mutilation, even though the practice violates core principles of women's equality, as defined under international law.²⁰² In the name of culture,

90, 101–02 (expressing doubt on “whether the many constitutions containing social and economic rights have made any difference at all ‘on the ground’”).

197. Stephan Küffner & Joshua Partlow, *Voters in Ecuador Approve Constitution: New Document Would Enhance Presidential Powers, Allow Consecutive Terms*, WASH. POST, Sept. 29, 2008, at A14 (noting that “at least 65 percent of Ecuadorans voted for the constitution” in a public referendum); Carlo Ruiz Giraldo, *Social Participation and Prior Consultation Rights in Ecuador: An Unfinished Dream?*, CONSTITUTIONNET (Aug. 28, 2013), <http://www.constitutionnet.org/news/social-participation-and-prior-consultation-rights-ecuador-unfinished-dream> (“[S]ocial participation was . . . a key feature of Ecuador’s constitutional project both in terms of content and process.”).

198. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR art. 13 (declaring the right to safe and permanent access to “healthy, sufficient and nutritional food” that is “preferably produced locally and in keeping with their various identities and cultural traditions”); *id.* art. 43 (guaranteeing pregnant women and breastfeeding mothers the right to (1) not be discriminated against on the basis of pregnancy in school, public, and work, (2) free and maternal healthcare services, (3) priority protection and care for their health and life from pregnancy to postpartum, and (4) healthcare facilities for post-pregnancy recovery and breastfeeding); *id.* art. 276(4) (mandating the state to promote environmental conservation and restoration in order to guarantee the permanent and quality access to air).

199. *See* King, *supra* note 24, at 81, 190–201 (describing how the constitutions of Venezuela, Ecuador and Bolivia enshrine a radical list of values).

200. *See* Part IV.B (finding that constitutions with more comprehensive bills of rights enjoy larger popular support); *see also* Ginsburg et al., *supra* note 12, at 218 (finding empirically that constitutions produced through popular referendum “are more likely to have virtually every category of right”); Lansberg-Rodriguez, *supra* note 50 (noting that an extensive package of rights usually receives an affirmative vote in popular referenda).

201. *See, e.g.*, Cass Sunstein, *Social and Economic Rights? Lessons from South Africa* 1, 3 (The Law Sch. of the Univ. of Chi., John M. Olin Law & Economics Paper Series No. 124, 2001) (noting that many critics of social and economic rights worry that these rights are beyond judicial capabilities, and put the judiciary in charge of overseeing large-scale bureaucratic institutions).

202. *See* General Recommendation No. 14: Female Circumcision, Comm. on the Elimination of Discrimination Against Women, 9th Sess., Jan. 22–Feb. 2, 1990, U.N. Doc. A/45/38, at 80 (June 6, 1990) (recommending that states eradicate the practice of female

some constitutions have proclaimed group rights over individual rights²⁰³ and reinstated traditional institutions.²⁰⁴ In the name of certain religious values, women's rights have been curtailed, and women's ability to have an abortion has been restricted.²⁰⁵ Likewise, calling upon the people's desire for economic growth, some leaders have prioritized socioeconomic rights over civil liberties.²⁰⁶ More generally, the minority rights protected by international human rights law are easily flouted by the wishes of the majority.

To illustrate how popular values can clash with universal rights norms, consider the new Hungarian Constitution. Written in 2011, the document has the explicit goal of becoming a "source of patriotism and common creed" for the Hungarian nation.²⁰⁷ Not only does the document have a lengthy preamble, its substantive part is also made short and accessible to lay readers, compared with its lengthy and technical predecessor.²⁰⁸ Unlike the previous document, it protects the life of fetuses from the moment of conception and restricts marriage to partners of opposite sexes.²⁰⁹ It moreover restricts the power of the judiciary to overturn

circumcision); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 2(a), U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49, at 217 (Dec. 20, 1993) (stating that female genital mutilation is a form of violence against women).

203. See Cobbah, *supra* note 58, at 322, 323, 328 (describing the "African worldview" as emphasizing "group solidarity and collective responsibility" and noting that African Constitutions "have been everything but African").

204. See, e.g., PROCLAMATION BY HIS MAJESTY KING SOBHUZA II [CONSTITUTION] Apr. 12, 1973 (Swaz.) (noting "that the [1968 Independence] constitution has permitted the importation into our country of highly undesirable political practices alien to, and incompatible with the way of life in our society . . . increasingly this element engenders hostility, bitterness and unrest in our peaceful society"). The 1973 Proclamation abolished parliament and reinstated the traditional institution of the Swazi King. *Id.*

205. There is a growing consensus that access to abortion might be required under international human rights law. See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 26: Women Migrant Workers, ¶ 18, 42d Sess., Oct. 20–Nov. 7, 2008, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008) (noting that "[d]iscrimination may be especially acute in relation to pregnancy" and suggesting that access to abortion services is required by Committee on the Elimination of Discrimination against Women (CEDAW)).

206. See Kausikan, *supra* note 58, at 35 (suggesting that "order and stability" are "preconditions for economic growth," while growth is "the necessary foundation" for fulfilling civil and political rights). For an official statement of the "Asian position" on human rights, see World Conference on Human Rights, Mar. 29, 1993–Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights ("Bangkok Declaration")*, ¶ 10, U.N. Doc. A/CONF.157/ASRM/8-A/CONF.157/PC/59 (Apr. 7, 1993).

207. István Stumpf, Judge, Constitutional Court of Hung., The Birth of a New Fundamental Law of Hungary, Keynote Address at the Heritage Foundation (Oct. 11, 2012), <http://www.heritage.org/research/lecture/2013/05/model-resource-or-outlier-what-effect-has-the-us-constitution-had-on-the-recently-adopted-constitutions-of-other-nations>.

208. *Id.* ("[O]ne of the main objectives of drafting a shorter . . . and easier to understand constitution for Hungary was to make it more accessible and meaningful for average Hungarian citizens.").

209. THE FUNDAMENTAL LAW OF HUNGARY, [CONSTITUTION] art. 2 ("[T]he life of a foetus will be protected from the moment of conception."); *id.* art. L ("Hungary shall protect the institution of marriage as the union of a man and a woman.").

democratic legislation.²¹⁰ While widely condemned by the Council of Europe and the United States for failing to adequately protect rights,²¹¹ this “people’s constitution” enshrines values that are reportedly held by the majority of Hungarian people.²¹²

Likewise, the short-lived 2012 Egyptian constitution was filled with rhetoric of national identity and demonstrated fidelity to the Islamic values held by a majority of Egyptians.²¹³ Yet minority groups—most notably the Coptic community and liberal women’s groups—were worried from the outset that the document would not adequately protect their rights.²¹⁴ Even though the document enjoyed support from a majority of Egyptians and was approved by popular referendum, human rights organizations strongly condemned the document for failing to protect human rights.²¹⁵ The dramatic aftermath of the document, which was abandoned the day the newly elected President Morsi was ousted by the military, shows the danger of documents that are all too majoritarian and fail to protect minority rights.²¹⁶

210. See *Hungary: Constitution Changes Warrant EU Action*, HUM. RTS. WATCH, (Mar. 12, 2013), <http://www.hrw.org/news/2013/03/12/hungary-constitution-changes-warrant-eu-action> (noting that one constitutional amendment adopted in March 2013 “[l]imit[ed] the mandate of the Constitutional Court, preventing it from referring to its own rulings prior to January 1, 2012, when a new constitution came into force, and ending its power to review the substance of amendments to the constitution”).

211. See Kim Lane Scheppele, *Hungary’s Constitutional Revolution*, N.Y. TIMES (Dec. 19, 2011, 10:31 AM), <http://krugman.blogs.nytimes.com/2011/12/19/hungarys-constitutional-revolution> (describing the international criticisms of the new constitution).

212. See Hanneke van den Akker, Rozemarijn van der Ploeg & Peer Scheepers, *Disapproval of Homosexuality: Comparative Research on Individual and National Determinants of Disapproval of Homosexuality in 20 European Countries*, 25 INT’L J. PUB. OPINION RES. 64, 71–72 (2013) (emphasizing that empirical research shows that among twenty European countries studied, Hungary disapproves of homosexuality on a national and an individual level more than most other European countries).

213. See, e.g., David D. Kirkpatrick, *Islamists Rush Through Egyptian Constitution and Prepare to Vote on It*, N.Y. TIMES, Nov. 30, 2012, at A6 (describing the contested provisions in the document that is currently being written).

214. David D. Kirkpatrick, *Thousands of Egyptians Protest Plan for Charter*, N.Y. TIMES, Dec. 5, 2012, at A6 (reporting that “[t]he crowd appeared more affluent than those at the usual Tahir Square protests,” and that there “was an unusually high concentration of women, especially for an event after dark, and very few traditional Islamic headscarves” as well as “a heavy representation from Egypt’s Coptic Christian minority”).

215. See David D. Kirkpatrick & Kareem Fahim, *Egypt Islamists Expect Approval of Constitution*, N.Y. TIMES, Dec. 16, 2012, at A1 (“Many international experts faulted the charter as a missed opportunity, stuffed with broad statements about Egyptian identity but riddled with loopholes regarding the protection of rights.”); *Egypt’s New Constitution Mixed on Support for Rights*, HUM. RTS. WATCH (Nov. 30, 2012), <http://www.hrw.org/news/2012/11/29/egypt-new-constitution-mixed-support-rights>; (providing an overview of problematic articles in the Rights and Freedoms chapter of the draft constitution).

216. Daniel Lansberg-Rodriquez, *An Obituary for the Egyptian Constitution*, Dec. 26, 2012–July 3, 2013, FOREIGN POL’Y, (July 3, 2013, 8:11 PM), http://transitions.foreignpolicy.com/posts/2013/07/03/an_obituary_for_the_egyptian_constitution_dec_26_2012_july_3_2013.

While normatively appealing from an outside perspective, functionalism and universalism come with their own distinct set of problems. They are troubling from the viewpoint of democratic theory when they constrain majorities without the legitimacy of higher law-making.²¹⁷ But there is also a more practical concern with such documents. Where documents lack popular support, they are less likely to work in practice. The experience of post-colonial constitution-making in Africa illustrates this danger. Almost all of Britain's former colonies in Africa, upon independence, received the exact same bill of rights.²¹⁸ These boilerplate bills of rights had a distinctively libertarian character and emphasized negative liberty rights, while omitting socioeconomic rights. They were technical, lawyer-drafted documents with an exhaustive list of limitation clauses within each provision.²¹⁹ In fact, all these bills of rights were modeled after the European Convention on Human Rights and Fundamental Freedoms.²²⁰ But in most cases, they failed to deal with the most pressing issues of the newly established African states: deep ethnic tensions and persistent poverty. Their libertarian principles never functioned in practice.²²¹

This post-colonial experience relates to a long-established truism in comparative law, which is that transplanted laws (i.e., laws exported from one country to another) often remain a dead letter regardless of how desirable they may be on paper.²²² Transplanted laws, it has been found, suffer from a "transplant effect" that renders them ineffective because they are unrelated to local views, traditions, and practices.²²³ Functionalism and universalism in constitutional design potentially

217. See *supra* notes 26–29 and accompanying text.

218. See CHARLES PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION* 1–19 (2007) (describing how it became Britain's policy to require a bill of rights as part of the negotiations for independence).

219. See *id.* at 250–53 (suggesting the bills of rights for the former British colonies were "meticulously drafted" as indicated by elaborate limitation clauses).

220. See A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 844–73 (2004) (describing how the post-colonial bills of rights were modeled on the European Convention on Human Rights and Fundamental Freedoms).

221. See, e.g., Charles O.H. Parkinson, *The Social and Political Foundations of the Nigerian Constitution*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 24, at 532, 533 (noting that the Nigerian independence constitution failed because it was "unable to accommodate the fundamental social and political divisions within Nigerian society"); Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 531 (1999) (noting that the "postcolonial constitutions in Sub-Saharan Africa have largely succumbed to irrelevance and debacle" because they were "not firmly grounded in the cultural mores of the society in which they operate").

222. Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. INT'L COMP. L. 111, 118–20 (1997) (suggesting that "at best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words" and that "[n]o rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed" (emphasis in original)); cf. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 1–24 (1st ed. 1974) (suggesting that legal transplantation is the primary engine of legal change).

223. Compare Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic*

contribute to such a transplant effect, or produce documents that have much to admire on paper, but that fail to work in practice.²²⁴

In sum, where popular self-expression affects substantive constitutional choices, real tensions can take shape. A constitution that expresses popular values may undermine the principles of constitutional functionalism and universalism, just as a universal or functional constitution may undermine popular self-expression. For real-world constitutional designers, the competing logics of popular values on the one hand, and functionalism and universalism on the other, constitute a real dilemma that goes to the very nature of constitutions. The findings from this Article suggest that, when confronted with this dilemma, most real-world constitution-makers have favored functionalism and universalism over popular self-expression.

CONCLUSION

This Article has presented the first comprehensive empirical exploration of the relationship between people's values and their constitutions. Its main finding, that there exists only a weak relationship between constitutional choices and popular values, may come as a surprise to many readers. In a comparative perspective, countries whose people attach importance to the values associated with certain rights are no more likely to enshrine these rights in their constitution than countries whose people do not share those values. Moreover, within any given country, there often exists a considerable gap between constitutional choices and popular values. This gap lacks popular support: in most cases, people do want to enshrine their values in their constitution.

These observations contradict some of the core assumptions of contemporary constitutional theory. As the nation's highest legal documents, constitutions are commonly attributed with strong democratic legitimacy.²²⁵ Especially when the constitution serves as a basis for invalidating ordinary legislation, constitutional theory demands that the constitution be more democratic than ordinary legislation, or else the practice of judicial review would be hard to justify from a democratic perspective. This Article's findings suggest that many of the world's constitutions

Development, Legality, and the Transplant Effect, 47 EUR. ECON. REV. 165, 165 (2003) (describing the negative effects of legal transplantation and characterizing this as "the transplant effect"), with Daron Acemoglu, Davide Cantoni, Simon Johnson & James A. Robinson, *The Consequences of Radical Reform: The French Revolution*, 101 AM. ECON. REV. 3286, 3304 (2011) (suggesting that "big bang" institutional reform may be conducive to economic growth).

224. See Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among Contemporary Sioux and Apache*, 33 ECON. INQUIRY 402, 404 (1995) (studying the Sioux and Apache tribes and suggesting that constitutions unrelated to preexisting institutions are ineffective); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RESEARCH OBSERVER 1, 6 (1998) (noting that transplantation does not work for constitutions because the "effectiveness" of constitutional law "depends on a particularly complex cultural and institutional matrix"); Fredrick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 912 (2005) (speculating that "transplanted" constitutions may be less effective because they are remote from local circumstances).

225. See *supra* notes 14–18 and accompanying text.

fall short of this demand, and thus, that the counter-majoritarian problem remains unresolved. On a whole, there exists little support for the claim that judicial review channels the true will of the people as enshrined in the constitutional document.

The findings from this Article raise the question of whose values constitutions reflect, if not those of popular majorities. On the one hand, it is possible that the experts who draft many constitutions carefully balance popular self-expression against more universalist and functional considerations.²²⁶ On the other hand, constitutions could simply reflect the idiosyncratic preferences of the documents' authors. They could also reflect the values of governing elites, for example, who write the documents to protect their private values not shared by the general population.²²⁷ The quantitative empirical approach in this Article merely offers a bird's-eye view of global constitution-making; it is unable to discern the motivations of constitution drafters. Further research is required to explain the puzzle of unpopular constitutionalism and to establish what kinds of values are enforced in the name of "We the People."

Finally, the findings from this Article also raise the question of how to normatively evaluate the phenomenon of unpopular constitutionalism that appears to characterize the world's constitutions. On the one hand, constitutions that are disconnected from popular opinion may be more prone to failure, as the British colonial experience illustrates. Moreover, such unpopular documents are troubling from the perspective of constitutional theories that hold that constitutions should enjoy larger democratic legitimacy than ordinary legislation. On the other hand, populist constitutions might come with their own set of problems. Most notably, they might fail to protect minority rights and make choices that are undesirable from a universalist or functionalist perspective. The grand failure of Egypt's 2012 constitution illustrates how an overly majoritarian document can fail to protect minority rights, and might even induce widespread civic unrest.²²⁸

Ultimately, the decision of whether to write a populist constitution entails a weighing of the relative costs and benefits of populism versus the costs and benefits of a disconnect from popular values. How these considerations work out likely depends on time and place. To illustrate, countries with deep ethnic or religious divides might consider a gap between the constitution and popular values necessary, because a majoritarian document would fail to protect minority groups. By contrast, more homogeneous societies might be able to reap the benefits of populist constitutions without incurring substantial costs. It is not my goal to develop a wholesale recommendation for all countries. Instead, my goal has been more modest, to highlight the gap between constitutional theory and constitutional practice. But such a modest goal might have far-reaching implications nonetheless. Indeed, while it is still possible for constitutional scholars to argue normatively that constitutions should reflect popular values, they can no longer assume that they actually do.

226. See *supra* Part VI.

227. See HIRSCHL, *supra* note 148 *passim* (suggesting that constitutions reflect the values of hegemonic elites who fear losing power).

228. See Lansberg-Rodriguez, *supra* note 216 (explaining that while Egypt's 2012 constitution was "highly representative" of the "electorally dominant" "Islamist faction," it was undone by its neglect of Egypt's minority groups).