

Constitutions in Authoritarian Regimes

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Introduction

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An old Soviet joke has it that a man goes into a restaurant and surveys the menu. “I’ll have the chicken,” he says, only to be told by the waiter that the restaurant is out of chicken. He asks for the beef, only to be told the same thing. Working his way through the menu, he is repeatedly told that the restaurant is out of the selected dish, until he gets upset and says, “I thought this was a menu, not a constitution.” The joke captures the usual perception of dictatorial constitutions as meaningless pieces of paper, without any function other than to give the illusion of legitimacy to the regime.

But this view raises a puzzle. Formal written constitutions are ubiquitous features of modern nation-states, and are found as often in autocracies as in democracies. Furthermore, they are costly to adopt, consuming significant political energy and time. Stalin, along with many Soviet elites, played a direct role in drafting the 1936 Constitution and took the process quite seriously (Getty 1991: 22). The seventeen years required to draft the recent constitution of Myanmar may have been exceptional, but there is no doubt that some authoritarians spend political effort on constitution making. Why would they bother to do so if the documents are meaningless? The standard answer that the constitution is a legitimating device begs the question: How can an obvious sham document generate any legitimacy?

This volume of essays begins to attack this puzzle. Authoritarian regimes have been the subject of a burgeoning literature in recent years, as scholars have recognized that dictatorship is an internally heterogeneous category (Levitsky and Way 2002; Schedler 2006). This work has produced a wealth of insights into particular institutions, such as legislatures, courts, and elections; into regime practices such as co-optation and repression; and into nondemocratic sources of accountability. Yet there has, to date, been relatively little work on authoritarian constitutions per se outside of individual country case studies (e.g., Barros 2002). We have very little understanding of the logics and dynamics of constitutional design and practice in countries that have “constitutions without constitutionalism” (Murphy 1993;

Okoth-Okendo 1993). Such countries have the form of a constitution, but without fully articulated institutions of limited government. It is our hope that an exploration into constitutions in these countries can not only provide insights into the regime practices of authoritarians but also generate broader insights into the study of constitutions and their functions more generally. The chapters here, which utilize a wide range of methods and focus on a broad set of cases representing many different types of authoritarian regimes, provide a good deal of material for this inquiry.

This introductory chapter advances and unpacks the idea that authoritarian constitutions cannot be dismissed – that they matter. With this goal in mind, we consider three overlapping questions: What do authoritarian constitutions do? How do they work? And why are they adopted in the first place? Consider the first question: What are the functions of authoritarian constitutions? In other words, what problems do such constitutions solve? Generic problems of governing seem to be paramount. We devote a section of this introduction to the role of authoritarian constitutions in mitigating such problems, and in incentivizing different parties to do what authoritarian rulers wish them to do.

Three important subcategories of problems include the challenges of coordinating multiple actors, controlling subordinates, and eliciting cooperation from subjects. As the literature has suggested, constitutions can help authoritarian rulers meet these challenges, in some cases by increasing the ruler's control and in others by tying the ruler's hands. Somewhat more generally, as the contributions in this volume suggest, authoritarian constitutions perform a variety of functions that can be grouped into four categories that we designate as operating manual, billboard, blueprint, and window dressing. We devote a section of this chapter to elaborating on these functions.

The claim that authoritarian constitutions matter raises the question of why they are efficacious, and this is the second question we consider in this introduction: If authoritarian rulers are above the law, why and how can constitutions make a difference? We explore several mechanisms. First, authoritarian constitutions can help oligarchic actors to work together by establishing focal points, procedures, and institutions, thereby addressing problems of coordination and problems of commitment. Second, constitutions may have normative properties that confer upon them a certain independent force, even in the context of authoritarian rule. Constitutions may function as “hallowed vessels,” meaning that their contents, by virtue of being part of a document called the “constitution,” enjoy special public visibility and a privileged normative status. Such status, we argue, becomes especially important during moments of intra-elite conflict or of regime crisis. Authoritarian constitutions also influence the contours of permissible and impermissible discourse. Finally, as Albert Hirschman (1986) suggested about the law in general, constitutions can influence the values of citizens over time.

But understanding the functions of authoritarian constitutions and the mechanisms underpinning them does not suffice to explain why such constitutions are

written or changed, or to account for the specific provisions that are adopted. Even when constitutional framers are strategic, they are not omniscient. Moreover, even authoritarian constitutions often reflect processes of collective choice among elites with divergent interests. Therefore, despite the fact that authoritarian rulers enjoy more discretion than their democratic counterparts in deciding when and how to draft a constitution, it may be incorrect to assume that authoritarian constitutions reflect optimizing behavior on the part of a unitary ruler. Thus, it is necessary to entertain the possibility that the reasons that constitutions are adopted may frequently differ from the roles that constitutions play, especially over the long run. Why, then, are authoritarian constitutions written? A variety of motivations exist. In some cases, the process of constitution making may be valued in itself, independent of any short-term or long-term consequences that specific constitutional provisions may have. We return to these issues in the penultimate subsection of this chapter. We end the chapter with a brief discussion of the lessons about authoritarian constitutions that derive from the chapters of this volume and of directions for further research.

CONSTITUTIONS AS SOLUTIONS TO PROBLEMS OF GOVERNING

Constitutions have a wide array of functions, and some of these functions are likely to be shared across both authoritarian and democratic regimes. A very central function of formal rules including constitutions is simple coordination. All regimes need institutions and need to coordinate on what institutions will play what role. Laying out the structures of government facilitates their operation because it prevents continuous renegotiation. A written constitutional text can thus minimize conflict over basic institutions for any regime. Furthermore, we know that certain institutions can facilitate coordination within the core of the governing elite itself. Robert Barro's (2002) study of the Chilean constitution under Augusto Pinochet documents how the constitution, especially the Constitutional Tribunal, facilitated coordination among the various military branches that composed the junta. Coordination, then, is a ubiquitous need of government that can be facilitated by formal written constitutions, facilitating elite cohesion.

Authoritarian constitutions also can facilitate coordination by *democrats* at crucial moments of transition. When Zine el Abidine Ben-Ali of Tunisia fled his country in the Arab Spring of 2011, his prime minister briefly took over as president in defiance of the constitution. After several hours, it was decided that the formal provisions of constitutional succession should be followed, leading to the president of the Chamber of Deputies, Fouad Mebazza, taking office as a caretaker before elections could be organized. This simple coordination function can become extremely important at the end of authoritarian regimes, preventing conflict from spiraling out of control over basic institutions.

Other "standard" constitutional functions may also operate in both dictatorships and democracies. We know, for example, that constitutions help address problems

of intertemporal credibility by making commitments endure across time. While authoritarians and democrats may differ in the precise character of the commitments they wish to undertake, the basic modality of entrenching certain policies to enhance credibility may be useful to all leaders. Military authoritarians, in particular, may use the opportunity of a constitution to set a timeline for a return to civilian rule, as well as the terms under which such a return may take place. Announcing such a project will raise the costs of violating the text of the constitution, and may also facilitate a period of “legitimate” authoritarian rule.

Constitutions may also be useful to set up institutions to control lower-level agents. All regimes need mechanisms to control agents, and the problem of gathering information on the activities of agents is an enduring one. There are many standard solutions to the problem: hiring a second agent to monitor the first (or otherwise improving detection and increasing punishment), selecting agents for loyalty and affinity, structuring systems of hierarchical appeal to higher-level agents, and creating a powerful ideology that is internalized by the agents themselves so that they self-monitor. Historical examples of government solutions to the agency problem include the imperial Chinese institution of the censorate, a separate branch of government to monitor the bureaucracy. This solution, however, creates the standard problem of “who guards the guardians?.” Imperial China was also an early pioneer in the hierarchical approach to the agency problem, utilizing what eventually became known as a Weberian bureaucracy with higher levels supervising those lower down. Max Weber celebrated it as the most technically efficient of government structures, but it is costly and creates its own problems of information flow. It also requires careful *ex ante* screening of potential agents to ensure loyalty. Ideology is another tool to enhance loyalty, and it is favored by some mass political parties and religious institutions such as the Catholic Church. It is difficult to sustain, though very effective when it is in high operation.

Jean Bodin, in *The Six Books of the Republic* (1576), was one of the first to explore how constitutions can help to resolve principal–agent problems via institutional design. Bodin notes that the French king adopted a solution of parliamentary immunity to help generate information about lower-level agents. The parliamentary representatives had an absolute right to bring complaints about provincial agents of the king without fear of punishment. This was central to generating important information to provide more effective monarchical governance, a kind of early version of the “fire alarm” model of administrative law (McNollGast 1989; Root 1989).

Constitutional solutions to the agency problems also include institutions whereby a ruler ties his own hands. Doing so can be a means for enabling the powerful to enter into credible commitments (e.g., Root 1989). Roger Myerson’s work is also important in understanding the emergence of constitutionalism generally and the utility of constitutional logic to authoritarians. In his study of the foundations of the constitutional state, Myerson provides a model in which, in equilibrium, it is in the autocrat’s interest to create a court of notables with the ability to remove him from

power. “Without such an institutionalized check on the leader,” Myerson writes, “he could not credibly raise the support he needs to compete for power” (2008a: 130). In a related model, Myerson (2008b) focuses on the agency problem facing powerful rulers. In the model, a prince faces the possibility that his agents, the governors, could be corrupt or rebel against him. To prevent this, the prince must credibly assure governors that he will not unfairly cheat them. Myerson suggests that the prince can attain this goal by punishing a governor only after a trial and by inviting other governors to observe all trials. Under this arrangement, should the prince cheat a governor, the others would lose faith in the prince (Myerson 2008b: 18). As Myerson observes, the early kings of England needed mechanisms to ensure that taxes were collected and that agents were properly motivated to do so. But agents would not be thus motivated unless they could trust that the king would refrain from arbitrary punishment. The Court of the Exchequer, in Myerson’s account, provides a constitutional solution to the problem. In the Exchequer, a panel of leading figures of the realm witnessed legal and financial transactions between the king’s Treasurer and the sheriffs who governed the provinces of England in the king’s name. Thus the Exchequer established common knowledge among the agents of the king about any question of whether a provincial sheriff might deserve punishment. Common knowledge and the constitutional commitment by the king to punish only those agents whose malfeasance was publicly verified helped to assure appropriate incentives for the king’s principal agents and thus made government more effective. This simple constitutional setup solved agency and commitment problems on the part of the monarch.

James Fearon’s (2011) work points to another way in which constitutions might be beneficial to autocrats. Autocrats face the problem that the public cannot trust them to refrain from shirking or stealing, and therefore will periodically choose to rebel against the ruler. One way to address this problem is to adopt a constitution that provides for fair elections to be held regularly. Because the results of such elections aggregate and make public the citizens’ private information about the ruler’s performance, they make it possible for the ruler to be rewarded by the citizenry for governing well.¹ This model again elaborates the common need for regimes – both democratic and autocratic – to facilitate information flows.

OPERATING MANUALS, BILLBOARDS, BLUEPRINTS, AND WINDOW DRESSING

Coordination, precommitment, and agency control are all essential governmental functions that can be played by various institutions, but constitutions are particularly good solutions that have become standard in the modern era. When a written

¹ Simpson (2013) points to a different, more perverse side of information flows associated with electoral institutions, whereby a ruler utilizes electoral manipulation in order to appear powerful to the public and enhance his control over allies and rivals.

constitution describes actual political practice, it is serving as what Adam Przeworski in his essay here (see Chapter 2) characterizes as an *operating manual*. The constitutional text describes how government is to function, allowing various players to cooperate by following its instructions. Przeworski's particular puzzle is why the 1952 Polish constitution, framed at the apex of Communist power in Poland, accorded de jure authority to the government and not to the Communist Party. Przeworski shows that, in so doing, the Communist Party framers chose to "rule against rules," creating unnecessary difficulties for themselves. Przeworski's discussion suggests that, in their role as operating manuals, constitutions provide some genuine constraints on leaders. Consistent with this, Jennifer Gandhi's essay (Chapter 9) argues that authoritarian constitutions influence possibilities, in electoral authoritarian regimes, for opposition parties to join efforts in order to beat an autocrat at the polls. Opposition parties, she argues, will enter into a coalition with each other insofar as they can trust that, should their coalition win the election, whichever party is installed in the presidency will honor its promises to the other coalition partners. Gandhi's key point is that constitutions determine the degree and kind of power associated with control of the presidency. The greater the power of the presidency as set out in the constitution, the less credible it is, ex ante, that promises to coalition partners who do not control the presidency will be fulfilled in the future.

Beyond serving as operating manuals, constitutions can play several other roles that we characterize as *billboards*, *blueprints*, and *window dressing*.² The *billboard* role is common to both dictatorships and democracies.³ Constitutions are advertisements; they seek to provide information to potential and actual users of their provisions. As authoritative statements of policy, constitutions can also play a role in signaling the intentions of leaders within the regime to those outside of it. These audiences might be international – from the very beginning, written constitutions have been adopted in part to signal capacity to engage on the international plane (Golove and Hulsebosch 2010). Or the audiences may be domestic, consisting of the population that will be subject to the constitution.

Consider as an example the contemporary constitution of the People's Republic of China, discussed by Xin He in this volume (see Chapter 11). Since 1979, the People's Republic of China has pursued a program based in part on the promise of socialist legality, which is contrasted with the disorder and lawlessness of the Cultural Revolution. The adoption of the 1982 constitution, with its references to legality, was part of this program.

The 1982 constitution is not itself judicially enforceable, and judges who attempted to introduce it as a binding source of legal norms during the 2000s were unsuccessful.

² Thanks to Dan Slater for helping us to crystalize this framework.

³ With apologies to Adrienne Rich, whose acceptance speech for the 2006 Medal For Distinguished Contribution To American Letters noted that poetry is neither a "blueprint, nor an instruction manual, nor a billboard." See <http://www.nationalbook.org/nba2006-deal-arich.html#.T3fc4qvCWf4>. Andras Sajó, however, has noted that the operation of constitutions has poetic qualities (Sajó 2011).

As Donald Clarke (2003) once said, the constitution may be the least important document in the Chinese legal system, but this does not imply that it has no political importance. Since 1982, the Chinese Communist Party has amended the document four times, each time to provide signals of ideological legitimacy to particular voices within the party. For example, in 2004, the constitution was modified to include the “Three Represents” theory of Jiang Zemin, including explicit mention of the “advanced productive forces” in society, a euphemism for capitalists. The party of the people now represents the rich too. Such symbolic changes may simply confirm policy developments that have already taken place, but their elevation to the level of the constitution signals their authoritative victory within the ideological debates of the party. The meaning for international audiences is that China is open for business; for domestic audiences, it signals that getting rich is not only glorious, as Deng Xiaoping said, but politically acceptable as well.

Sometimes, of course, the promises in constitutions are not accurate signals of policy, but pure fictions. This *window dressing* role of constitutions, aptly captured in the Soviet-era joke at the beginning of the chapter, is one in which the text is designed to obfuscate actual political practice. To use another Chinese example, the constitution promises its citizens’ freedom of speech and demonstration (Art. 35), freedom of religion (Art. 36), and the right to criticize the government (Art. 41). But these things are routinely violated in practice. North Korea’s constitution may be seen as a pure sham for guaranteeing its citizens “democratic rights and liberties” (Art. 64), though its list of rights is actually relatively limited compared to many other communist texts (see Law and Versteeg, Chapter 8, this volume). The point is that the extensive list of rights found in many totalitarian constitutions is hardly meant to provide for meaningful constraint on the state, or to signal government intents, but is instead a kind of “cheap talk” that adopts the mere language of rights without any corresponding institutions. This may respond to a sense that the constitution needs to *look* complete and to fit in the global scripts that define the basic formal elements, but without risk of costly constraints. Cheap talk is window dressing.⁴

The term “window dressing” might be taken to imply hiding actual practices from external scrutiny. At the margin, it might be that gullible outsiders believe that the practice is actually implemented. But this is unlikely to be effective as a general matter, as Przeworski points out in Chapter 2. Why then do authoritarians put up window dressing? One possibility is that the goal might be not so much to keep outsiders from seeing in, but to keep those inside the country from seeing out. When Stalin included his list of rights in the 1936 constitutional text, he was debasing the very currency of rights and suggesting to his information-starved citizenry that

⁴ Our usage of the term “cheap talk” differs from its use in game theory. In game theory, cheap talk refers to information that does not directly affect payoffs. Game theoretic cheap talk may nevertheless affect payoffs indirectly – for example, by contributing to coordination.

rights *everywhere* were meaningless promises.⁵ Constitutional window dressing has this two-faced quality.

Dictators may also use the gap between promise and reality to demoralize internal opponents: the false promise is a costly signal of one's intent to crush opponents. We draw here from an idea developed by Peter Rosendorff in the context of the Convention Against Torture, in which accession to the convention is accompanied by an *increase* in the level of torture, at least for certain countries. Rosendorff notes that the accession serves as a costly signal of the intention to repress: the dictator is asserting that he can abuse human rights *even with increased costs* (Hollyer and Rosendorff 2011). One might imagine that this was part of the intention behind Stalin's famous constitution, which inspired jokes like the one at the outset of this chapter. Another way in which authoritarian rulers routinely abuse the gap between constitutional promises and actual practice in order to demoralize would-be opponents is by holding elections but manipulating them excessively and blatantly, even when victory is assured (Simpser 2013). The mere fact, however, that rights are not observed in practice does not mean that the constitution is playing a window-dressing function. Gaps between promises and their actual observance are ubiquitous in law, even in countries that might be considered to be fully operational constitutionalist regimes (see Law and Versteeg, Chapter 8, this volume). This is in part because constitutions also operate as a kind of *blueprint*, describing things not as they are but as they might be. Constitutions are aspirational documents that can serve to motivate people to build a future society.

Indeed, looking at the long history of rights, one observes that authoritarian regimes may be particularly likely to treat constitutions as blueprints. Mexico's 1917 constitution was particularly innovative with regard to economic and social rights, promising land, education, and labor to the citizenry. These provisions might not have been mere window dressing for a totalitarian party, as might be said of equivalent promises in Stalin's constitution of 1936, but instead could be understood as aspirations. The land reform promises articulated in the Mexican constitution might be understood as a blueprint that influenced land policy over the decades that followed, during which a large proportion of farmland was redistributed. In short, we see that the same type of provision can be a blueprint in one regime and window dressing in another. This highlights that the particular mix of roles – *operating manual*, *billboard*, *blueprint*, or *window dressing* – will vary across time and space, and even across different provisions of the same constitution.

Individual provisions within constitutions can play multiple roles. Kristen Stil's description of constitutional amendments in Egypt (Chapter 6 in this volume) provides a nice example. When Hosni Mubarak was confronted with external pressure to liberalize the Egyptian political system in 2005, he modified the article of the constitution dealing with presidential elections. The new scheme was detailed and

⁵ Thanks to Scott Gehlbach for this point.

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complex, providing that nominees could only come from political parties that had been in existence for five years and had 5 percent of the seats in each house of parliament. Only Mubarak's party met the threshold, but other legal parties (which did not include the Muslim Brotherhood) were allowed to nominate candidates for the first election. The provision served as a complex operating manual, laying out a scheme that could be followed to the letter while maintaining Mubarak's rule. But it also served as window dressing, providing just enough democratic veneer to forestall further U.S. pressure.

More generally, the literature on competitive or electoral authoritarian regimes – those that hold regular, multiparty elections but on a notoriously uneven playing field – has noted that their democratic-like constitutions may in fact help extend regime survival (Gandhi 2008; Levitsky and Way 2002). Albertus and Menaldo's study in this volume (Chapter 4) argues that constitutions contribute to regime endurance by facilitating the consolidation of political power and the internal coordination of the governing coalition. Constitutional commitments can also facilitate investment and growth, which in turn may extend the lives of regimes. Drawing on large-*N* data on Latin American dictatorships from 1950 to 2002, they find empirical support for the proposition that authoritarian constitutions significantly extend the life expectancy of dictatorships and enhance investment and economic growth.

The categories of operating manuals, billboards, blueprints, and window dressing cover a great deal of terrain, but they do not exhaust the functions of constitutions. The provisions of authoritarian constitutions, for example, can provide resources for the regime's endgame. A paradigmatic example, well documented by Barros (2002), is the Chilean transition, which was laid out in a constitutional document enacted by the military junta in 1988. This called for a plebiscite in 1988, in which General Augusto Pinochet ran alone and lost. But under the terms of the constitution, he remained commander in chief for another ten years, and the military was able to appoint a certain number of "institutional" senators. The constitutional framework remained basically intact even after the transition to democracy, lasting until a comprehensive reform in 2005. A contemporary example is provided by ongoing events in Myanmar: while most observers thought that the product of the seventeen-year effort of writing the constitution was a mere fig leaf for continued authoritarian rule, it has provided a modest opening for the return to politics of the National League of Democracy and its charismatic leader Aung San Suu Kyi. The text provides a coordinated and orderly process of inclusion, with the potential to lead to true transformation down the road.

Henry Hale's contribution in this volume (Chapter 10) shows how constitutions matter for politics in hybrid regimes, not simply because of formal institutions, but through their effect on informal political arrangements. He shows how presidentialist constitutions encourage clientelism around a single power structure, whereas semipresidentialist constitutions promote more elite competition. He highlights the downstream effects of these institutional choices in his study of the

Ukrainian, Kyrgyz, and Moldovan democratic episodes in the early twenty-first century.

FUNDAMENTAL PROBLEMS OF AUTHORITARIAN CONSTITUTIONS: MECHANISMS OF EFFICACY

The study of constitutions in authoritarian regimes must contend with a set of fundamental questions that do not plague democratic constitutions (or do not plague them to the same degree). Our second question is: How do authoritarian constitutions work? More specifically, what is the source of an authoritarian constitution's force when the authoritarian ruler is above the law and there is no third-party enforcer? When a judicial enforcement apparatus is in place, constitutional provisions evidently make a difference. Because they will be enforced, they raise the costs to certain activities and lower the costs of others. Not so under authoritarian regimes, where enforcement tends to be at the pleasure of the ruler. Therefore, if one is to argue that authoritarian constitutions matter, it is imperative to delve into the basic mechanisms that grant such constitutions force. Mark Tushnet's contribution to this volume (Chapter 3) wrestles with this issue elegantly, concluding that authoritarian constitutionalism is indeed possible.

We have already suggested various mechanisms underpinning the possibility for authoritarian constitutionalism. One important mechanism is the role of constitutions in *coordination*, which is closely associated with their function as operating manuals. Coordination is a powerful source of constitutional force. Once a self-enforcing system is in place, deviations are costly to any party, even without a formal apparatus of judicial enforcement. Weingast (1997), for example, argues that the cost for a ruler of transgressing the constitution (off the path of play) is popular rebellion. The prior discussion of billboards and window dressing points to a second mechanism behind the force of authoritarian constitutions, namely their *information-related properties*. The role of information in making it possible for authoritarian rulers to credibly commit to future courses of action is well illustrated by Myerson's and Fearon's arguments discussed earlier: by establishing procedures to divulge information that could potentially be used against them, rulers make themselves vulnerable and, in consequence, enhance their credibility. In other cases, authoritarian constitutions may serve to obscure information about the true intentions of a ruler or about the actual practices of a regime, as discussed earlier in this chapter. And, as argued previously, constitutions can enable certain kinds of costly signaling that rulers can harness in order to discipline opponents, subordinates, and allies.

Another reason authoritarian constitutions have force is that they can, and often do, function as *hallowed vessels*. The document called "constitution" often enjoys a privileged normative status in the minds of the public, independent of the content of such document. Whether or not judicial enforcement is available, the very idea that a particular proposition is enshrined in the constitution carries normative force

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in arguments and in behavior. Striking examples of the power of constitutions as hallowed vessels can be found in contemporary dictatorships such as Vietnam and China. Authoritarian constitutions generally call our attention away from the U.S. fetish with judicial enforcement. As Balme and Dowdle (2009: 2) point out, “even in the most effective constitutional system, significant aspects of constitutional structure are invariably nonjusticiable.” In countries such as Vietnam and China, a vigorous constitutional debate has emerged without a constitutional adjudication system.

In Vietnam, this involves frequent invocation of the constitution by legislative and executive bodies to overturn policies and on the basis of the constitutional rights. For example, in 2003, the Hanoi People’s Council tried to limit traffic congestion by issuing a directive limiting people to owning a single motorbike, and the policy was subsequently adopted by the national Ministry of Public Security (Bui 2011). But responding to public pressure, the Law Committee of the National People’s Assembly argued that the law violated property rights protected by Art. 58 of the constitution. The national prohibition was withdrawn by the Public Security Ministry. Since then, the Ministry of Justice has repeatedly invoked the constitution to oppose policies of other ministries. Constitutional reform is, at this writing, a major issue in Vietnamese politics.

The famous 2003 Sun Zhigang case in China, discussed by Xin He in Chapter 11 in this volume, presents a similar story. Sun was a student in Wuhan who was arrested in Guangzhou for failure to have his registration documents. He was brought into custody in a system known euphemistically as “shelter and repatriation,” in which those found outside their location of residency are internally deported back home. Sun, as an educated young man, may have protested his treatment, and he was killed in custody. This led to a national outcry among intellectuals, who argued that the shelter-and-repatriation detention system should be abolished. Legal scholars called it unconstitutional and called for the standing committee of the National People’s Congress (which is the only institution with the power of constitutional review in China) to reform the system. These efforts were mooted when the State Council, China’s highest executive authority, repealed the system. As in Vietnam, this example evidences a vigorous constitutional politics that occasionally operates in a way that enhances liberty.⁶

Looking at these stories through the lens of legal enforcement would miss the point. In neither the Vietnamese or Chinese case was a government agency formally required to repeal its policies because they were illegal or unconstitutional. But in

⁶ In other cases, constitutional politics may be harnessed for the purpose of silencing rivals without subverting formal institutional channels. The intense constitutional politics in contemporary Iran provide a number of examples: The constitutional order features a Guardian Council that uses constitutional power to check candidates for the elected offices in the system, a Supreme Leader with power to control the judiciary, media, and military, and a political system that is often subject to tinkering. Indeed, there is occasional discussion of switching to a parliamentary system to enhance the power of the Supreme Leader.

both cases, the outcome was the same. The mechanism for constitutional protection was political, although the language was legal, and the constitution served as a basis for mobilization within inter-elite politics.

A final reason authoritarian constitutions have force is that they can shape social norms and public preferences. As Albert Hirschman put it, “a principal purpose of publically proclaimed laws and regulations is to stigmatize antisocial behavior and thereby to influence citizens’ values” (1986: 146; see also Sunstein 1993). A monarchical constitution, for example, could potentially buttress the social acceptability of kingly rule, while a constitution that protects free speech might, over time, foster an attitude or norm of tolerance for diversity of opinion. Of course, this need not always be the case: as the idea of constitutions as window dressing suggests, constitutions can also ring hollow to the public, especially when regime practices are sharply at odds with them.

WHY WRITE? PRODUCT AND PROCESS

The final fundamental question with which the study of authoritarian constitutions must grapple is: Why are constitutions written? Several of the arguments that we have offered thus far are excellent explanations of the *functions* of constitutions understood as sets of rules but are silent about the reasons such rules might be collected in a written document. To underline this point, note that Myerson (2008a) refers to such sets of rules among notables as “personal constitutions,” suggesting a distinction from written constitutions. Self-enforcing elite pacts can be informal. Mexican presidents, for example, were for decades chosen by the informal practice of *dedazo*, whereby the outgoing president would handpick his successor. At the same time, presidential term limits were formally coded in the law. Both term limits and the *dedazo* were recognized by the Mexican public as the prevailing *modus operandi* (Langston 2006), and both institutions were uniformly and stably applied over a period of time longer than the lifetime of many constitutions in other countries (Elkins, Ginsburg, and Melton 2009). Nevertheless, term limits were formalized while the *dedazo* was not.

Why then do authoritarian rulers write or retain a constitution? In addressing this question, it is necessary to draw a distinction between the choice to write a constitution (or to retain a preexisting one), on the one hand, and the constitution’s function, on the other. We have described a range of possible functions or roles played by constitutions. But can we infer the reasons for the adoption of a constitution on the basis of the constitution’s functions? We must at least entertain the possibility that framers might have had as much of a difficult time as contemporary scholars at predicting the downstream effects of adopting a constitution and of particular provisions within it. For one thing, laws, regulations, and formal institutions are known to elicit offsetting behavior (Peltzman 1975). Negretto’s study of constitution making by Latin American militaries illustrates the point (see Chapter 5). He argues that militaries choose to write constitutions to facilitate their long-term objectives

of political, social, and economic transformation and to enhance their influence over post-transition democratic governments. But crucially, militaries are not always successful in these endeavors, and Negretto argues that the key variable is whether they can mobilize partisan support for their institutional innovations. The point is that dictators, like democrats, do not have perfect foresight as institutional designers.

Another possibility is that sometimes the *process* of writing the constitution serves a political purpose. It allows the regime to be seen as engaged in an important project. This seems consistent with the idea that authoritarians, as compared with leaders in democracies, may be more insulated from social forces in choosing the timing and process of constitution making. In the Maldives, for example, the constitution allowed the creation of a special *majlis*, composed of a mix of elected and appointed persons, to undertake the process of constitutional reform. President Maumoon Gayoom, who held office from 1978 to 2008, set up a special *majlis* soon after taking office. The constitution-making project took some seventeen years, leading to a new document that quite clearly enshrined presidential rule in 1998. The process of constitution making was itself a discrete political project with its own logic: it allowed Gayoom a set of governmental positions that facilitated patronage as well as an ability to gain information on new political talent through the electoral process. The point of the process was not necessarily the final product, which could have been produced much more quickly.

The processes of authoritarian constitution making are often hidden to us, and, as Przeworski notes here, this prevents us from understanding the internal conflicts and motives of drafters (see also Barros 2012). No doubt there is more than meets the eye. For example, recent archival research into the drafting and early implementation of the 1936 Soviet constitution has revealed that party officials were organizing contested elections within the constitutional framework, only to reverse themselves in favor of single-party elections just before the 1937 elections (Getty 1991: 29). We can only speculate about the internal decision making, but it seems plausible that the drafters intended that some of the provisions be more than window dressing.

It also appears that there was an important component of information-gathering in the process, as Moscow demanded that local and party officials initiate broad discussions of the document. Soviet citizens contributed many thousands of comments (as did their Polish counterparts in 1952 in Przeworski's account). Many of the Soviet comments complained about the constitutional guarantee of free social benefits to workers but not peasants (Getty 1991: 24–7). The regime was thus able to gauge what issues were important to the public, even if it chose to ignore them in the final analysis.

We have been implicitly assuming through much of the discussion that the interests of authoritarians are the dominant motives at play. Interests are easy enough to identify through the kind of ex post reconstruction we have been conducting on the basis of the final texts. In some circumstances, however, it seems plausible that authoritarian constitution making will involve a mixture of “reason, passions and

interests,” as do democratic constitution-making exercises (Elster 1995). While the proportions among these factors may be different across regime type, we should not discount the role of reason and passion.

Reason is analogous to public-regarding constitutional design. We observe it in the examples in which the leader constrains herself, for example, through institutions to protect property rights (in which case there may be a confluence of reason and interest). Passion is also apparent, particularly in constitutional preambles. North Korea’s Great leader Comrade Kim Il Sung, for example, is “the sun of the nation and the lodestar of the reunification of the fatherland.” Constitutional production with such exhortatory language shows also that constitutional production can also be a “consumption activity” for rulers.

BEYOND SHAMS: THE LESSONS OF AUTHORITARIAN CONSTITUTIONS

We conclude this introduction with some thoughts on the lessons of authoritarian constitutions as well as some open questions that beg further inquiry. The lessons can be divided into those for the study of authoritarian regimes and those for the study of constitutions generally.

The first lesson is that rules matter, even when there is a lot of discretion at the top. No single person rules absolutely, and therefore there is a need for intra-elite coordination, as well as for devices to control subordinates. In some circumstances, constitutions serve to meet these functional needs. Furthermore, *some* authoritarians seek to commit themselves to limit particular courses of action. Tushnet’s essay on the normative possibilities of authoritarian constitutionalism (Chapter 3) seems to suggest that this is not only possible but also desirable.

Authoritarian constitutions – and the processes of making them – also provide important clues into regime practices. They structure authoritative discourse and provide a political idiom, whether it be of a “socialist market economy” or blessing the family and civil society (as did Chile’s 1980 constitution). By setting the terms of political discourse, constitutions can define what are acceptable as opposed to unacceptable speech acts, legitimating one set and delegitimizing another.

Still, there are many outstanding questions that remain. The large-*N* studies here by Law and Versteeg as well as Elkins, Ginsburg, and Melton begin the project of unpacking the constitutional practices of different subtypes of authoritarians. Law and Versteeg (Chapter 8) examine the different categories drawn from the literature in terms of their “sham” quality, or deviation from practice. Elkins, Ginsburg, and Melton (Chapter 7) identify a subcategory of authoritarian constitutions that seem closer to democratic ones in form and that lead to democratic rule. Further case-study exploration will be needed to confirm this finding and to see whether it maps onto the conventional categories in the literature of different types of authoritarian regimes. There is at least the possibility that we might use the constitutional forms to

typologize authoritarian regimes and predict which are more favorable toward their citizenry in terms of providing public goods. This project would connect nicely with Tushnet's normative suggestion that certain forms of helpful authoritarian constitutionalism are possible.

Our framework of considering the roles of constitutional provisions as *operating manuals*, *billboards*, *blueprints*, and *window dressing* may generalize beyond authoritarian regimes. After all, no constitution is perfectly implemented, and each contains elements of advertising, aspiration, and even obfuscation. Comparing the balances among these functions across regime types may provide further insights and help to generate new typologies.

Finally, there is great utility in longitudinal analysis of constitutional sequences in individual countries. As the highest normative act of the state, constitutions mark an exercise of power and create a historical legacy. We observe that constitutions in dictatorships are often replaced or amended by new leaders who come to power. To understand these documents, one needs to read them in light of the predecessor documents, as the sequence of documents will provide clues over the particular leaders' political concerns and predilections. Constitutions have an "afterlife" (Ginsburg 2009). The legacies – of democratic constitutions on authoritarian rulers and of authoritarian constitutions on democratic ones – may shape behavior and idiom long after those who promulgate formal documents are gone.

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7

The Content of Authoritarian Constitutions

Zachary Elkins, Tom Ginsburg, and James Melton

“What is the difference,” went an old joke in the Soviet Union, “between the Soviet and U.S. constitutions? The Soviet constitution guarantees freedom of speech; the U.S. constitution guarantees freedom *after* speech.” The joke captures the common intuition about the function (or *dysfunction*, rather) of constitutions in authoritarian regimes. Many other examples abound: citizens of North Korea might be surprised to learn that they are guaranteed rights to free speech, assembly, and association,¹ while the constitution of Niger guarantees each citizen the right to health and education, notwithstanding the fact that the country ranks 182nd out of 182 countries rated by the Human Development Index.²

If we are to generalize from these phenomena, we might expect that there is little difference between constitutions written by dictators and those written by democrats. There is certainly anecdotal evidence to support this expectation. The entrenchment of human rights in constitutions has been nearly universal, with both authoritarian and democratic constitutions incorporating an increasing number of rights. Similarly, the vast majority of constitutions at least mention the word “democracy” (approximately 90 percent of those in force in 2006). We are not the first to note the commonality between institutions in authoritarian and democratic regimes. An entire literature in comparative politics has evolved to understand why dictators adopt multiparty legislatures (Gandhi and Przeworski 2007), elections (Schedler 2006), and relatively autonomous judiciaries (Ginsburg and Moustafa 2008). In general, it is thought that such institutions provide information that is used by dictators to prolong their tenure.

It seems that, on paper, dictatorship looks remarkably similar to democracy, at least that is the presumption in much of the scholarly literature (for an exception, see Brown 2002). Still, a casual inspection of authoritarian constitutions reveals some

¹ Art. 67, “Citizens shall have freedom of speech, press, assembly, demonstration, and association.”

² Art. 11. Human Development Index 2009.

very apparent and very important differences. For instance, the Soviet constitutions left little doubt that the communist party was the “leading and guiding force of Soviet society” (1977 constitution; Brown 2002: 6). The preamble of North Korea’s constitution declares Kim Il-Sung’s genius, a reflection of the personality cult of politics in that country. Coup makers routinely adopt interim constitutions that explicitly suspend the regular operations of government institutions and instead agglomerate power to a junta or revolutionary council. Each of these examples suggests a concentration of (executive) power, a key indicator of authoritarian rule. Is this a general feature of constitutions written by dictators or a stereotype based on a few well-known examples (e.g., the Soviet Union and North Korea)? One cannot answer this question without a systematic, cross-national investigation of the content of authoritarian constitutions.

This inquiry is relevant not only to our understanding of the regime practices of authoritarianism and of institutional convergence but also to our understanding of the conditions under which formal constitutions correspond with reality. The Soviet joke highlights the common assumption that law only “matters” if it matches reality. However, this assumption is too simplistic. Most would probably describe the constitutions of North Korea or the USSR as *façades* or “window dressing” because each guaranteed the protection of human rights that were later repressed by public officials. However, as those examples illustrate, even facade constitutions can give some clues as to actual political practice. Take the 1936 constitution of the Soviet Union, for instance. The rights guaranteed in that constitution were oppressed, often brutally, but the institutional provisions – the “operating manual” – were taken seriously in some moments (Getty 1991). In short, it is readily apparent that some parts of authoritarian constitutions match reality while others are meaningless. Understanding where differences between authoritarian and democratic constitutions exist can give some indication about which sections are likely to match practice and which do not.

In this chapter, we examine the formal characteristics of constitutions and use the Comparative Constitutions Project (CCP) database to engage some basic comparisons of authoritarian and democratic constitutions. The CCP records data on more than 600 different features of constitutions, including government structure, rights, and form. If the Soviet joke is correct, we should see no systematic differences between constitutions in authoritarian and democratic regimes. Alternatively, we might find that there are systematic differences across regime type, controlling for other factors that are determinative of the contents of constitutional text, such as region, era, and colonial heritage (Elkins, Ginsburg, and Melton 2009). One way to summarize these intuitions is as follows: if all provisions in constitutions were operating manuals, we would expect that democratic and authoritarian constitutions would diverge. If all provisions were window dressing, we might expect convergence. Oddly, if we find that constitutional *texts* are similar across regime type, it implies that the *practices* of constitution making may be playing very different functions.

The same terms may be genuine promises in democracies and mere obfuscation or window dressing in the authoritarian context.

This chapter is organized as follows. We first develop the concept of the authoritarian constitution. We then provide our theory, which is that authoritarian constitutions will differ from democratic ones with regard to institutional structures but not necessarily with regard to rights provisions. Our expectation is of selective or partial convergence. We next examine the empirical evidence, finding that there are very few statistically significant differences between authoritarian and democratic constitutions when controlling for other factors. In addition, the magnitude of the observed differences is small: an authoritarian constitution will have only marginally fewer rights, specificity, or judicial independence than will a democratic constitution. We find, somewhat surprisingly, that there is less formal executive power in authoritarian constitutions. Moreover, we find evidence that authoritarian constitutions tend to converge toward democratic constitutions over time. We speculate that this indicates a continual process of lagged adaptation by authoritarians, who seek to model their texts on those of their democratic counterparts. Democrats innovate in the formal constitution, while dictators tend to imitate formal democratic institutions, saving their innovations for the informal realm. Our findings provide evidence that regime type is a relatively minor determinant of the form of constitutions relative to region, era, and the constitutional legacy of the country.

WHAT IS AN “AUTHORITARIAN” CONSTITUTION?

The concept of an authoritarian constitution is not self-defining. To begin, it should be obvious by now – though it is worth emphasizing – that we do not classify authoritarian constitutions as such based on what they say; on the contrary, understanding what they say is our very goal. Rather, we mean the term to refer to constitutions drafted by dictators, but even then, a number of conceptual challenges lurk beyond that seemingly straightforward idea. One important challenge is that of timing, inasmuch as the characterization of drafters during a constitutional moment may not be representative of their true colors. Rather than a snapshot, we might look for a *pattern* of behavior over time in order to distinguish a consolidated dictatorship from episodes of authoritarian behavior (i.e., an authoritarian “situation” [O’Donnell et al. 1986]). In that sense, a look further back in a ruler’s track record might provide a better sense of regime type, but so too would looking forward at his future behavior, which at least in a retrospective study we have the luxury to do. But if a constitution lasts long enough such that its stewards display both authoritarian and democratic traits, interesting classification problems arise. If a “dictatorship” eventually transforms itself into a “democracy” (e.g., drafters of Mexico’s 1917 constitution), was it truly a dictatorship (say, such as Libya’s Gadhafi), or would it make more sense to recognize the regime’s dynamic character? Thus, one might identify the initial stewards of Mexico’s 1917 document as dictators with democratic ambitions – a

distinction that might have dramatic differences for what the leaders might have written into their formal constitution. Conversely, if seemingly democratic actors draft a constitution and then reveal themselves to be decidedly more authoritarian, how should we label their product? The Venezuelan constitution of 1999, written by Chavez during a comparably more democratic time, might be such an example.

Another way to think about the challenges of timing with respect to regimes and constitutions is to recognize that democrats and authoritarians, even after an abrupt regime change, sometimes share the same constitution. That democrats and authoritarians work under the same institutional framework may simply be an interesting phenomenon, but it may also alter the way we characterize the constitution and its authors. Consider the 1980 constitution of Chile, drafted by the Pinochet government. Few would suggest that the Pinochet regime was anything less than authoritarian across most dimensions. Still, compelling accounts of the Pinochet-authored constitution and its implementation suggest that the document was designed *not* to perpetuate that rule but to provide for an orderly transition to democracy by entrenching a downstream veto point for the military (e.g., Barros 2002). In fact, the constitution oversaw the return to democracy and continues to govern Chile, albeit with significant amendments. Is a constitution “authoritarian” if it began its life under an authoritarian situation but evolved to reflect, ultimately, many of the document’s democratic promises?

Of course, related to the difficulty in fixing the character of an evolving regime are the well-known challenges that come with the conceptualization and measurement of the root concepts themselves. It is very likely that each of the two categories includes cases with considerable variation across important dimensions. The literature on the conceptualization and measurement of democracy and authoritarianism makes this variation abundantly clear (e.g., Collier and Adcock 1999; Collier and Levitsky 1997; Linz 1978; Munck and Verkuilen 2002). The within-class variation is manifest, among other dimensions, in the level of competitiveness or inclusion, as well as in the architecture of formal structures, such as whether the central power takes the form of a political party, a monarch, or a junta.

To fix ideas, we treat regime type as a binary concept and measure it using the Unified Democracy Scores (UDS) (Pemstein et al. 2010).³ Conceptualizing

³ We use the UDS because constitutions are often promulgated during periods of political transition, when individual measures of democracy are most likely to give divergent estimates about the level of democracy. The UDS gives a more reliable estimate of the level of democracy during these periods because it utilizes information from multiple measures, weighting those measures based on their reliability. In choosing to use the UDS, we had two important measurement decisions to make: (1) the cut-point to use for transforming the continuous UDS into a binary measure and (2) whether and (if so) how to impute the UDS for the time period from 1789 to 1946.

For the former decision, we use a cut-point of 0.16 because this is the point where Przeworski et al.’s (2000) measure of democracy falls on the UDS. Thus, country-years with a UDS score greater than or equal to 0.16 are coded as democratic, and country-years with a UDS score less than 0.16 are coded as authoritarian.

democracy as binary allows us to demarcate clearly the periods of authoritarian rule and regime transition and facilitates a simple operational definition of an authoritarian constitution: *an authoritarian [democratic] constitution is one that was promulgated in a year in which its country was coded as authoritarian [democratic]*.

Each constitutional system is examined in the year it was adopted, ignoring subsequent amendments to and shifting interpretations of the system.⁴ Focusing on the inaugural draft, of course, ignores the fluid nature of constitutional systems, which often grow by accretion and could be argued to be written and rewritten constantly. Still, a focus on the constitutional system's inaugural draft ensures that we match the writing with its authors. Admittedly, even inaugural drafts will contain many ideas not conceived by the authors (constitutions are heavily borrowed instruments, after all). Still, an inaugural draft is arguably the document most associated with the actors in power, who, at a minimum, have the ability to pick and choose what they borrow from other constitutions.

An alternative conceptualization of "the constitution" might entail some sort of country-year analysis, in which one would connect the constitution in force with the regime type in any given year. In that sense, the Mexican constitution would have been an authoritarian one in 1993 but a democratic one in 1995. This sort of approach is too fluid; it assumes that leaders reevaluate their constitution regularly and ignores the costs associated with constitutional change (see Elkins et al. 2009). Constitutions are quite sticky (i.e., they exhibit a high degree of serial correlation), so evaluating the initial version makes sense with respect to the analytical issues associated with time dependence. Otherwise, long-lived constitutional systems would flood the analysis with observations dependent on one another.

Defining a constitution as we do, we find that a vast majority of them since 1789 could be considered authoritarian: a whopping 695 of the 846 constitutional systems for which we have data on regime type.⁵ Not surprisingly, the share of constitutions "born democratic" at any given time has increased with the rise of democracy itself over this period (see Figure 7.1). As of 2008, 44 percent (79) of the world's constitutions in force are categorized as democratic and the remaining

For the imputation decision, we decided to impute the UDS. To do so, we used Amelia II (King et al. 2001) to impute ten data sets using the three measures of democracy that span back to 1800 (i.e., Boix and Rosato [2012], Polity [Marshall et al. 2011], and VanHanan [2002]), year, and all possible interactions between these variables as covariates in the imputation. We assessed the reliability of the imputed data by comparing the imputed data to Boix and Rosato's (2012) measure of regime type and a binary version of Polity (Marshall et al. 2011) – using a cut-point of 6. Of the 310 constitutions promulgated from 1800 to 1946, the three measures only categorize the regime type of fourteen constitutions differently (~5%). The decision to use the UDS over other measures of democracy matters much more in the 1946 through 2008 time period. During the later time period, 57 out of 434 (~13%) constitutions are not classified the same by all three measures.

⁴ We follow Elkins et al.'s (2009) in our definition of a constitutional system. Thus, a new "system" incorporates an original draft as well as any amendments and nontextual modifications.

⁵ The universe of constitutional systems from 1789 to 2008 numbers 911; we have regime type data for 846 of these.

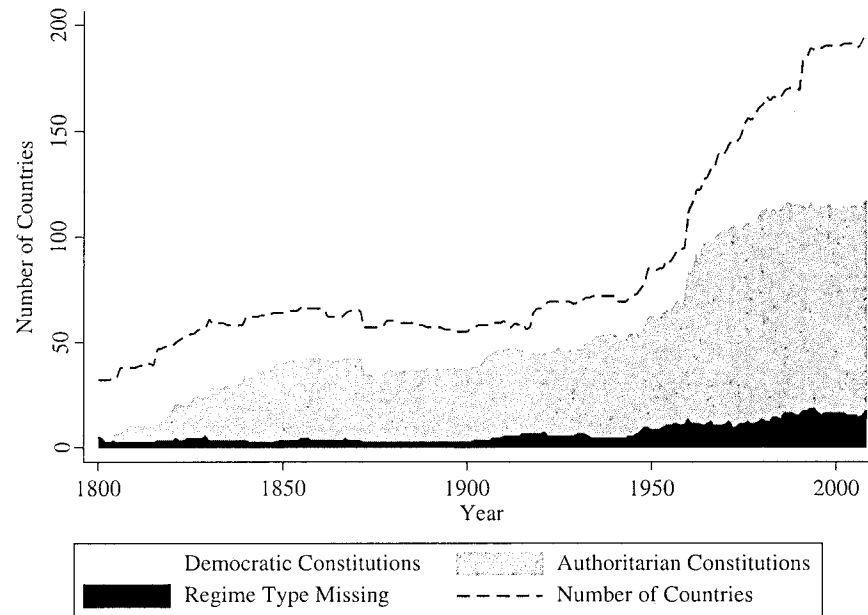


FIGURE 7.1. Number of Constitutions Born Authoritarian or Democratic. *Universe: 907 constitutions promulgated in independent states from 1800–2008.*

56 percent (99) categorized as authoritarian.⁶ Even in an indisputably democratic moment, almost three fifths of constitutions in force are “authoritarian.” Hardly an exotic species, “authoritarians” are apparently the garden-variety constitution.

On its face, there is something profoundly alarming about this balance. In part, the skewed distribution may stem from a preponderance of authoritarian regime-years in the sample (that is, in statistical terms, an issue of increased exposure). Today, fewer than half of the world’s countries are considered authoritarian, but for most of the modern constitutional era, authoritarian regimes were the norm. Before the third wave of democracy, roughly 80 percent of countries were considered authoritarian, and throughout much of the nineteenth century, when the first modern constitutions were written, more than 90 percent of independent countries were considered authoritarian.

However, the prevalence of authoritarian regimes over the last 225 years is only part of the story. The large number of authoritarian constitutions also reflects differences in fertility across regime types. Authoritarians tend to exhibit a stronger appetite for constitutional replacement than do democrats. Indeed, authoritarians are not only more likely to rewrite a *democratic* constitution but they are also more

⁶ Fifteen constitutions are uncategorized because of missing data on regime type.

likely to rewrite their own – that is, one drafted by themselves or another authoritarian leader. A democratic constitution has a 0.14 probability of being replaced by an authoritarian leader in any given country-year, compared to a 0.05 probability that a democratic leader will replace an authoritarian constitution. Looking within regimes, authoritarian leaders replace authoritarian constitutions with a probability of 0.05, while the probability that a democratic leader will replace a democratically written constitution is only 0.01.

The probabilities in the previous paragraph corroborate our earlier work on the repudiation or retention of constitutions drafted by the *other* regime (Elkins et al. 2009). In a highly specified model that assesses the effect of regime change on replacement within two years of the change, we estimate a replacement rate of about 0.03 for constitutions following a regime change in either direction, but they find that democratic transitions trigger replacement slightly more frequently than do authoritarian ones. It is important to revisit this subtopic here, if only because it serves as another criterion by which to narrow the broad field of authoritarians to hardline – or at least nontransplantable – authoritarians. One would expect, perhaps, that a truly authoritarian product is one that would *not* be retained and reused by a subsequent democratic group, though of course there are reasons other than content that might lead democrats – through negotiation or duress – to retain authoritarian products (again, the Pinochet constitution provides an example). Figure 7.2 provides some sense of the distribution of constitutions based on these criteria over time. The large dark-gray area in the middle represents what we might think of as the “intolerable” authoritarian documents – that is, those that were born authoritarian and did not survive the transition to democracy (i.e., they were repudiated by the new democrats). The smaller light-gray area below “intolerable” authoritarian constitutions represents those constitutions that were written by authoritarian leaders but survived a transition to democracy at some point in their life span. Although this smaller group makes up only 10 percent of historical constitutions, nearly 20 percent of constitutions in force today are of this variety.

These data contain many potentially interesting digressions, but let us recap and refocus. We discover that a large percentage of historical constitutions is, by the measure discussed, authoritarian. One analytic implication of this large population is that it may be worth analyzing and describing subtypes. In particular, in an effort to maximize differences between democratic and authoritarian constitutions, it may be useful to isolate (and study) “hardline” authoritarian constitutions. We can define this category as containing constitutions that were born authoritarian and either subsequently replaced by democrats who assume control after a regime transition or are still in force today. Such constitutions are, arguably, more obviously the work of authoritarians if the behavior of democrats is any guide.⁷

⁷ We combine democratic constitutions that experience a regime transition and those that do not into one category because there are so few that survive a regime transition (only two in force in 2008).

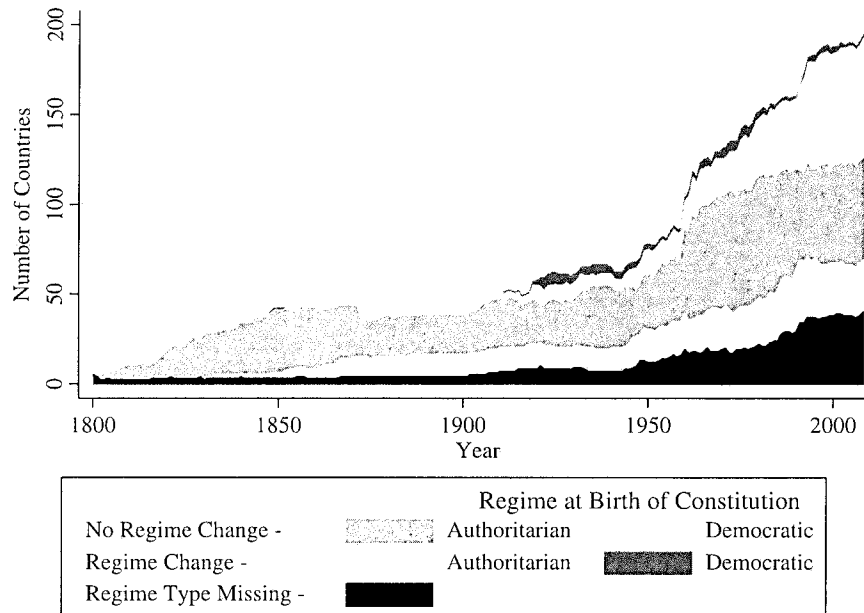


FIGURE 7.2. Number of Constitutions Born Authoritarian or Democratic by Subsequent Regime Change. *Universe: 907 constitutions promulgated in independent states from 1800–2008.* Illustration: Constitutions that are “born democratic with no regime change” are those that were promulgated in a democratic setting and spent their entire history in a democratic setting. Those “born democratic with regime change” were promulgated in a democracy but lived under authoritarianism as well. And so on.

THEORY: WHY (AND HOW) MIGHT AUTHORITARIAN CONSTITUTIONS BE DIFFERENT?

Scholars and practitioners alike have come to associate constitutions with democracy. For these individuals, the idea of an authoritarian constitution may sound farcical. However, as we describe shortly, *some* of the basic objectives of constitution making do not vary appreciably across regime type. Most writing on constitutions ascribes a relatively small number of functions to them. A central one is precommitment: “becoming committed, bound or obligated to some course of action or inaction or to some constraint on future action . . . to influence someone else’s choices” (Schelling 2006: 1). While authoritarians, at least those with long time horizons, may have less need for formal precommitment devices than would democrats who are certain to be replaced (at least by other democrats) at some point, they still need to make credible promises to their supporters, and constitutions might be one mechanism for doing so.

Written constitutions are also symbolically costly and, as a result, can serve as signals of the actual intentions of the rulers. Beyond their role in establishing

institutions, constitutions are “billboards” that can emit communicative signals of government policy (Yu 2010). They play this function because they are politically encumbering. Constitutions are typically, though not always, more entrenched than ordinary law, which means they are also more costly to change. Even if not manifestly entrenched (because of capricious decision making by authoritarians), constitutions are “hallowed vessels” and adorned with political and ceremonial weight. Drafting a constitution consumes significant political energy on the part of the governing elite and provides a repository of regime rhetoric. The costly nature of constitution making supports the idea that a constitution can be a credible signal of political intentions, even for autocrats.

Another purpose of constitutions in authoritarian regimes is to serve as a simple coordination device among the elites within the regime (Barros 2002). In any political system, the relevant subjects of the constitution need to coordinate among themselves about the prerogatives and limits of power. The subjects may have strong shared intuitions about these matters, but they may not have intersubjective agreement on the precise definitions of what counts as an abuse or on procedures for identifying and punishing violations. A written constitution can provide a focal point to generate this intersubjective understanding (Carey 2000; Hardin 1989; Ordeshook 1992; Przeworski 1991; Weingast 1997). Intersubjective understanding is a necessary, though not sufficient, condition for the enforcement of constitutional terms.

These functions of precommitment, signaling, and coordination suggest where we might observe differences in formal constitutions across regime type. Consider first the distinction between, on the one hand, constitutional rules that describe and empower institutions and on the other, rights provisions and limitations on government. Some autocracies might adopt rights as “cheap talk,” but on balance, we should expect that autocracies would be less willing to adopt formal limitations on government power, such as judicial checks. However, even autocracies need established rules to coordinate the ruling elite. We thus might expect that there will be a greater congruence between text and practice in the authoritarian setting with regard to governmental institutions. This might lead us to expect that authoritarian regimes would have more executive power and less judicial power than democracies. We also might expect less formal power of the legislature, which is generally associated with democratic rule.

The intuition is consistent with the idea that constitutions matter in terms of setting up institutions that will then be able to act in their own defense, but constitutions cannot serve to protect rights any more than the “people themselves” demand. A related argument is that the text matters by initiating basic institutions and reducing decision costs for choices that do not matter very much (Strauss 2003). One might call this the *institutional priority* thesis. Every regime needs to have institutions, and even the worst dictator may want to establish formal bodies that match conventional categories: an executive, a legislature, courts. Rights provisions, on the other hand,

may be more a matter of fashion and whim, in which cheap talk might be a dominant motivation for dictators.

The expectation that constitutions matter more for institutional design than rights accords with the Madisonian point that institutional structures are themselves important instruments for the protection of liberty. All regimes, whether democratic or autocratic, must rely on a coalition of supporters, but the size of this group varies from country to country (Bueno de Mesquita et al. 2003). Winning coalitions need to coordinate their own expectations internally about the mechanisms of rule, and constitutions can play an important role in aligning such expectations. But the importance of different constitutional mechanisms may vary across regime type. Rights limitations may only be important when the winning coalition is large (i.e., in democracies), because small winning coalitions have less trouble solving the collective action problem and punishing executives that violate the bargain. Institutional limits, on the other hand, may be important everywhere, since every winning coalition needs some rules to restrain the leader.

For many, civil and political rights constitute a central dimension of the concept of democracy. Certainly, some scholars adopt a narrower, procedural definition that excludes rights, but even these scholars will likely admit to a strong elective affinity between rights and democracy, if not a definitional one. We therefore expect authoritarian constitutions – almost by definition – to include fewer rights. Although we are mindful of the conditional hypothesis that it is precisely this area of the constitution (rights) in which authoritarians are likely to misrepresent themselves, we believe the expected probability that constitutional rights will be enforced at some future point in is greater than zero, regardless of regime type. As a result, even authoritarian regimes face an expected cost from the entrenching rights in their constitutions and will do so only sparingly and when there is an expected benefit (e.g., signaling a commitment to human rights to international audiences).

Consider another variable: constitutional specificity (Elkins et al. 2009). We use this concept to capture the breadth and depth of constitutional language; we refer to these as scope and detail, respectively. We assume that specifying details in the constitution is costly and so is only undertaken in response to real needs of some kind. One of the major determinants of constitutional specificity is audience heterogeneity (Ginsburg 2010). If all subjects of the constitution share a set of baseline and unwritten understandings about politics, there is less need to articulate details in the formal text. On the other hand, when audiences are heterogeneous, we should expect that there will be a greater need for formal mechanisms of coordination. *Ceteris paribus*, democratic constitutions have more heterogeneous audiences than do autocratic constitutions: the winning coalition is larger and less bound by shared ideological or normative commitments. One would thus expect that there would be higher levels of constitutional specificity in democratic constitutions.

To summarize, we expect authoritarian constitutions to be less specific, protect fewer rights, give the executive more power and the legislature less power, and

provide for less judicial independence. Since we expect that the fit between text and practice will be tighter in the institutional arena as opposed to the rights arena, we expect that any differences between regimes in the latter category will be more muted.

OPERATIONALIZING CONSTITUTIONAL ATTRIBUTES

We operationalize many of the concepts discussed previously using indices developed by the principal investigators of the Comparative Constitutions Project (CCP). For instance, to measure executive power, we use a measure developed in an earlier paper (2011), in which we create an additive index that captures how many of the following powers are granted to the executive: initiate legislation, issue decrees, declare states of emergency, propose amendments to the constitution, veto legislation, challenge the constitutionality of legislation, and dissolve the legislature.⁸ In addition, we use a measure of judicial independence created by Ginsburg and Melton (2013). The measure is additive and captures the number of aspects of the constitution that are generally thought to enhance the autonomy of the judiciary: an explicit declaration of independence, selection and removal procedures that involve multiple bodies, whether the conditions on which judges can be removed from office are explicitly mentioned, life tenure for judges, and protection of judges' salaries. Lastly, we use two measures of specificity developed in our earlier book. The first measure is scope, which is the percentage of topics addressed in the constitution out of a set of fifty-eight key topics from the CCP's survey instrument; the second measure is detail, which is the number of scope topics addressed in the constitution divided by the length (in words) of the constitution.

In addition to the measures created by Elkins, Ginsburg, and Melton, we create two new measures of constitutional rights. The CCP's survey instrument asks about the presence of 116 constitutional rights. Recall that we expect dictators to only adopt rights when there is some benefit from doing so. One such benefit is to signal their commitment to international human rights norms. Thus, we suspect that authoritarian leaders can signal this commitment by adopting rights that are commonly agreed on by the international community. As a result, they are more likely to incorporate rights commonly found in other countries' constitutions and are less likely to incorporate rights found only rarely in other countries' constitutions. To test this hypothesis, we need measures of "common" rights and "rare" rights. We consider a right "common" if it is incorporated into half or more of the constitutions in force at the time a constitution is drafted. We consider a right "rare" if it is incorporated into fewer than half of the constitutions in force at the time a constitution is drafted.

⁸ The measure of executive power described in Elkins et al.'s (2011) aggregates the subcomponents of the measure using weights derived inductively from a regression model. Here, we adopt an unweighted version of that measure, because the sample in this paper is drastically different from that elaborated in Elkins et al.'s (2011).

We then measure the percentage of common and rare rights incorporated each constitution. Notably, the number of common and rare rights (the denominator when calculating this percentage) depends on when the constitution is promulgated. For instance, in 1850, only 10 of the 116 rights recorded by the CCP are counted as common, but by 2008, the number of common rights had increased to 40, a fourfold increase.

These indices, six in total, constitute the set of dependent variables for the analyses conducted below. Each is rescaled to range from 0 to 1, with higher values indicating more of the titular dimension. The summary statistics for each are provided in Table 7.1. The middle columns in the table provide the summary statistics for authoritarian constitutions, and the columns on the right provide the summary statistics for democratic constitutions. Looking at the means in Table 7.1, there are already a few notable differences between authoritarian and democratic constitutions. The largest differences are related to judicial independence and rare rights, where the means differ by about 0.11. The smallest difference between the means is for executive power, where the means differ by only 0.03. This initial look at the data suggests that executives are granted about the same amount of power regardless of regime type but that there are fewer explicit limits on their power in authoritarian constitutions. This is preliminary evidence to support the hypotheses presented above. In the next section, we use regression analysis to assess if the differences in means reported in Table 7.1 are robust to conditioning on the effect of several factors typically associated with the contents of constitutions (e.g., region, period, and constitutional history).

REGRESSION MODELS

We assess the validity of the hypotheses by regressing the six *de jure* indices listed in Table 7.1 on the regime type of the constitution. The unit of analysis in the models below is the constitution. Each model includes an indicator of the constitution's regime type and some control variables to account for other factors we associate with the contents of constitutions.

We use two measures of regime type, both of which were discussed previously. Our primary measure is binary and coded 1 if the country is coded as authoritarian in the year the constitution was promulgated. The secondary measure captures differences between authoritarian constitutions that experience a transition to democracy and those that do not. We include two binary variables to capture the difference between these two types of authoritarian constitutions. For all of the models estimated in the following discussion, the reference category for the authoritarian constitution variable(s) is constitutions promulgated in democratic country-years.

We include several variables to control for factors that we generally associated with the contents of constitutions. Region is associated with a number of variables that one might suspect affect the contents of constitutions (e.g., colonial heritage, legal

TABLE 7.1. *Summary statistics for constitutional attributes*

Constitutional attribute	Authoritarian constitutions				Democratic constitutions			
	Mean	S.D.	Range	Obs.	Mean	S.D.	Range	Obs.
Executive Power	0.53	0.24	0.00–1.00	546	0.56	0.24	0.00–1.00	136
Judicial Independence	0.26	0.21	0.00–1.00	546	0.37	0.25	0.00–1.00	136
Common Rights	0.72	0.22	0.00–1.00	546	0.77	0.22	0.03–1.00	136
Rare Rights	0.16	0.11	0.00–0.59	546	0.27	0.14	0.00–0.62	136
Scope	0.49	0.11	0.09–0.74	546	0.55	0.10	0.23–0.80	136
Detail	0.09	0.07	0.01–0.65	537	0.16	0.11	0.03–0.51	135

origin, religion, etc.). We include a series of binary variables for different regions (Latin America is the reference category) to help control for all of these factors while saving as many degrees of freedom as possible. Countries' constitutional histories also have a strong influence on the content of their present constitutions. Constitutional provisions tend to favor some individuals' interests over others, so once an attribute is entrenched, it often exhibits a high degree of path dependence, as those who are benefited by a provision fight for its continued inclusion. To control for this path dependence, we include the value of the dependent variable from the countries' previous constitutions as an independent variable.⁹ Yet another factor associated with a constitution's contents is the time period in which it is written. Certain constitutional provisions are fashionable in some time periods and not others. Take constitutional rights, for instance. We already noted that many more rights are included in constitutions today than were included in constitutions 200 years ago. To control for period effects, we include year fixed effects in many of the estimates reported below. Lastly, we include country random effects and robust standard errors clustered on country to account for unobserved heterogeneity between countries in the constitutional attributes.¹⁰

Tables 7.2 through 7.5 report the results of the regression models. In general, we estimate three models for each constitutional attribute. The first reports the results when only a binary variable for authoritarian constitutions is included in the model, the second adds covariates to the model, and the third breaks authoritarian constitutions into those that experience a transition and those that do not. The next four sections describe the results of these models for the different constitutional attributes.

Executive Power

Table 7.2 assesses if executive power is affected by a constitution's regime type. Only in model 1 are authoritarian constitutions significantly different from democratic

⁹ The lagged dependent variable is missing for each country's first constitution. Rather than omitting all of these observations because of listwise deletion, we substitute our best estimate of the expected level of the dependent variable for countries' first constitutions: the mean level of the dependent variable from all other constitutions in force the year prior to promulgation of the first constitution. To illustrate, Brazil's first constitution was written in 1824, so the lagged value of executive power is missing for Brazil's constitution of 1824. To ensure this constitution is included in the analysis, we replace the missing value for executive power with 0.29, which is the mean level of executive power in all constitutions in force in 1823.

¹⁰ Typically, one does not include country random effects and a lagged dependent variable in the same model because the lagged dependent variable is presumed to be correlated with the random effect in the error term, which can introduce bias into the coefficient estimates. Recent research finds that, although such estimators are not unbiased, they are consistent (Ashley 2010). Thus, we include a random-effects term in our main model because we have a relatively large sample and want to control for unobserved heterogeneity between countries without the inefficiency associated with fixed effects.

TABLE 7.2. *Effect of regime-type at drafting on executive power (1800–2008)*

Variables	(1)	(2)	(3)
Authoritarian constitution	−0.05 [*] (0.03)	0.01 (0.03)	
Auth. Const. (w/ Transition)			0.05 (0.05)
Auth. Const. (No Transition)			0.01 (0.03)
Executive Power _(t-1)		0.19 ^{***} (0.06)	0.21 ^{***} (0.06)
Western Europe		0.10 ^{**} (0.05)	0.10 [*] (0.05)
Eastern Europe		0.06 (0.04)	0.07 [*] (0.04)
Sub-Saharan Africa		0.04 (0.05)	0.05 (0.05)
Middle East/N. Africa		0.16 [*] (0.08)	0.17 ^{**} (0.08)
South Asia		−0.07 (0.07)	−0.07 (0.07)
East Asia		−0.12 [*] (0.06)	−0.12 [*] (0.06)
Oceania		−0.18 ^{***} (0.07)	−0.17 ^{**} (0.07)
ρ	0.19	0.30	0.26
R ²	0.01	0.43	0.45
Year FE		Y	Y
Countries	189	173	169
Observations	682	526	515

Notes: Coefficient estimates are from ordinary least squares models with country random-effects. Clustered, robust standard errors are in parentheses. Statistical significance is denoted as follows: $p < 0.1 = *$; $p < 0.05 = **$; $p < 0.01 = ***$.

constitutions. Perhaps surprisingly, the coefficient estimate in model 1 is negative, which suggests that dictators might provide themselves slightly less constitutional power (on average) than democratic leaders. However, this effect is small and not robust. When covariates are included in models 2 and 3, authoritarian constitutions are expected to include more executive power than democratic constitutions, but this effect is not statistically significant. Thus, there is little evidence that executive power varies much between constitutions written by dictators and those written by democrats. Factors like the level of executive power in a country's past constitutions, region, and period are far better predictors of executive power than regime type.

TABLE 7.3. *Effect of regime-type at drafting on judicial independence (1800–2008)*

Variables	(4)	(5)	(6)
Authoritarian Constitution	−0.13 ^{***} (0.02)	−0.10 ^{***} (0.04)	
Auth. Const. (w/ Transition)			0.00 (0.05)
Auth. Const. (No Transition)			−0.17 ^{***} (0.04)
Judicial Independence _(t-1)		0.23 ^{***} (0.06)	0.23 ^{***} (0.07)
Western Europe		−0.03 (0.05)	0.03 (0.07)
Eastern Europe		0.03 (0.05)	0.09 (0.06)
Sub-Saharan Africa		0.06 (0.05)	0.11 ^{**} (0.05)
Middle East/N. Africa		0.04 (0.06)	0.15 ^{**} (0.07)
South Asia		0.23 ^{***} (0.09)	0.27 ^{***} (0.08)
East Asia		−0.04 (0.05)	0.03 (0.05)
Oceania		0.13 (0.10)	0.13 (0.09)
ρ	0.19	0.25	0.31
R ²	0.03	0.43	0.39
Year FE		Y	Y
Countries	189	173	151
Observations	682	526	318

Notes: Coefficient estimates are from ordinary least squares models with country random-effects. Clustered, robust standard errors are in parentheses. Statistical significance is denoted as follows: $p < 0.1 = *$; $p < 0.05 = **$; $p < 0.01 = ***$.

Judicial Independence

Table 7.3 assesses how the autonomy of the judiciary is affected by a constitution's regime type. Judiciaries are granted far less autonomy in authoritarian constitutions than in democratic constitutions. This effect is consistent across models 4 and 5. Model 6 suggests that this effect is only present in constitutions that never experience a transition to democracy. Authoritarian constitutions that never experience a transition to democracy score −0.17 less than democratic constitutions on the measure of judicial independence used here. In other words, hardline dictators include (on average) one fewer protection of judicial autonomy than democrats in their constitutions. This leaves hardline dictators a gap in the judiciary's protection that,

TABLE 7.4. *Effect of regime-type at drafting on rights (1800–2008)*

Variables	Common rights ($\geq 50\%$ of consts.)			Rare rights ($< 50\%$ of consts.)		
	(7)	(8)	(9)	(10)	(11)	(12)
Authoritarian Constitution	−0.05 ^{**} (0.02)	−0.02 (0.03)		−0.12 ^{***} (0.02)	−0.04 ^{***} (0.02)	
Auth. Const. (w/ Transition)			0.04 (0.03)			0.03 (0.02)
Auth. Const. (No Transition)			−0.05 (0.04)			−0.07 ^{***} (0.02)
Common Rights _(t-1)		−0.01 (0.06)	−0.01 (0.06)		0.20 ^{***} (0.07)	0.20 ^{***} (0.07)
Western Europe		−0.07 (0.06)	−0.08 (0.06)		−0.03 (0.03)	−0.02 (0.03)
Eastern Europe		−0.09 ^{**} (0.04)	−0.08 ^{**} (0.04)		−0.03 (0.03)	−0.02 (0.03)
Sub-Saharan Africa		−0.13 ^{***} (0.03)	−0.13 ^{***} (0.03)		−0.10 ^{***} (0.02)	−0.09 ^{***} (0.02)
Middle East/N. Africa		−0.01 (0.05)	0.00 (0.05)		−0.09 ^{**} (0.03)	−0.07 ^{**} (0.03)
South Asia		−0.17 ^{***} (0.06)	−0.17 ^{***} (0.06)		−0.10 ^{***} (0.03)	−0.10 ^{***} (0.03)
East Asia		−0.19 ^{***} (0.05)	−0.19 ^{***} (0.05)		−0.09 ^{***} (0.03)	−0.08 ^{***} (0.03)
Oceania		−0.03 (0.05)	−0.04 (0.05)		−0.07 ^{**} (0.04)	−0.09 ^{***} (0.03)
ρ	0.13	0.00	0.00	0.18	0.08	0.06
R ²	0.01	0.36	0.38	0.11	0.61	0.64
Year F/E		Y	Y		Y	Y
Countries	189	173	169	189	173	169
Observations	682	526	515	682	526	515

Notes: Coefficient estimates are from ordinary least squares models with country random-effects. Clustered, robust standard errors are in parentheses. Statistical significance is denoted as follows: $p < 0.1 = *$; $p < 0.05 = **$; $p < 0.01 = ***$.

if necessary, they can exploit to curtail its independence (Ginsburg and Melton 2013).

Constitutional Rights

Table 7.4 assesses the effect of authoritarian constitutions on constitutional rights. The dependent variable in models 7, 8, and 9 is the proportion of common rights in the constitution, and the dependent variable in models 10, 11, and 12 is the proportion of rare rights in the constitution. There is an interesting asymmetry between common rights and rare rights. The regime type of the constitution seems to have no effect

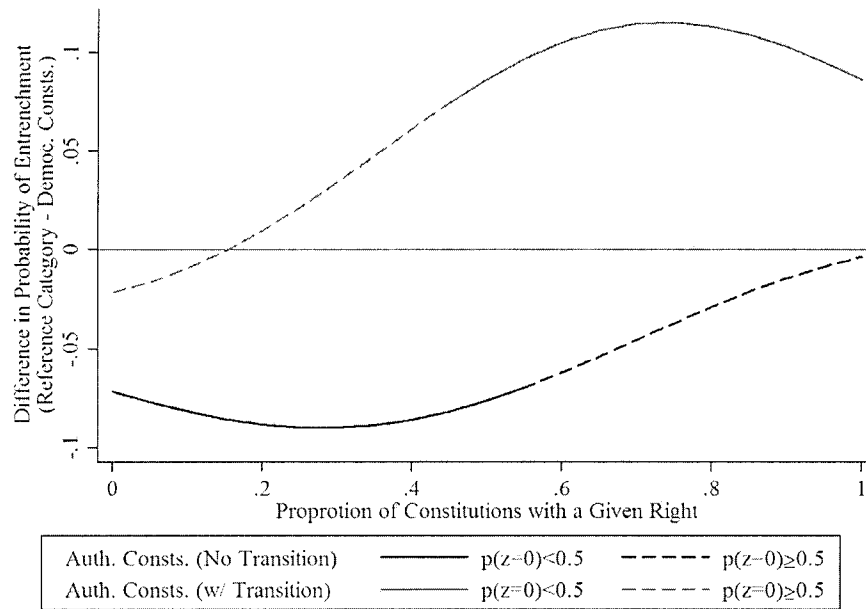


FIGURE 7.3. Effect by Rights and Subsequent Regime Change

on the proportion of common rights included in the constitution. The authoritarian constitution variable only has a statistically significant effect on the proportion of common rights in model 7, when no covariates are included in the model, and even in that model, the effect is small. The regime type of the drafter matters far more for rare rights. Dictators include far fewer rare rights in their constitutions than democrats. This effect is consistent across models 10, 11, and 12. The estimates in model 12 suggest that the proportion of rare rights is the fewest in authoritarian constitutions that do not experience a regime transition. Such constitutions have (on average) between five and seven fewer rare rights than do democratic constitutions.

Figure 7.3 captures the effect graphically. The figure shows the difference in the probability of adopting any given right between democracies and authoritarians that experience transition (in the upper line) and those that do not (the lower line). The x-axis is the general popularity of the right. As one can see, for some very popular rights, authoritarians that experience transition are actually *more* likely to adopt a right than are democracies on average. But stable authoritarians are never more likely to do so.

Specificity

Table 7.5 presents the last set of results. The table contains the estimates of the effect that authoritarian-drafted constitutions have on constitutional specificity. Scope is

TABLE 7.5. *Effect of regime-type at drafting on specificity (1800–2008)*

Variables	Scope			Detail		
	(13)	(14)	(15)	(16)	(17)	(18)
Authoritarian Constitution	−0.06*** (0.01)	−0.03** (0.01)		−0.05*** (0.01)	−0.03*** (0.01)	
Auth. Const. (w/ Transition)			0.02 (0.02)			−0.01 (0.02)
Auth. Const. (No Transition)			−0.04*** (0.01)			−0.05*** (0.01)
Scope _(t-1)		0.15** (0.07)	0.14** (0.07)		0.16** (0.07)	0.19*** (0.07)
Western Europe		−0.02 (0.02)	−0.02 (0.03)		−0.07** (0.03)	−0.07*** (0.03)
Eastern Europe		−0.05** (0.02)	−0.04** (0.02)		−0.11*** (0.02)	−0.10*** (0.02)
Sub-Saharan Africa		−0.06*** (0.02)	−0.06*** (0.02)		−0.04 (0.03)	−0.04 (0.03)
Middle East/N. Africa		−0.01 (0.03)	−0.00 (0.02)		−0.10*** (0.02)	−0.09*** (0.02)
South Asia		−0.04 (0.04)	−0.05 (0.04)		0.01 (0.06)	0.01 (0.06)
East Asia		−0.08*** (0.02)	−0.08*** (0.02)		−0.07* (0.03)	−0.06 (0.03)
Oceania		−0.13*** (0.03)	−0.14*** (0.03)		0.07 (0.05)	0.06 (0.05)
ρ	0.05	0.00	0.00	0.84	0.82	0.79
R ²	0.04	0.50	0.52	0.13	0.37	0.42
Year FE		Y	Y		Y	Y
Countries	189	173	169	188	169	165
Observations	682	526	515	672	511	500

Notes: Coefficient estimates are from ordinary least squares models with country random-effects. Clustered, robust standard errors are in parentheses. Statistical significance is denoted as follows: $p < 0.1 = *$; $p < 0.05 = **$; $p < 0.01 = ***$.

the dependent variable in models 13, 14, and 15, and detail is the dependent variable in models 16, 17, and 18. The results in Table 7.5 are very similar to those presented in Table 7.3, in which judicial independence is the dependent variable, and in Table 7.5 pertaining to rare rights. Authoritarian constitutions are significantly less specific than democratic constitutions. They cover fewer topics, and the topics they cover are addressed in less detail. Once again, the effect of authoritarian constitutions is limited to authoritarian constitutions that do not experience a transition to democracy. Notably, the findings related to specificity correspond to our general impression of constitutions written in authoritarian regimes: they tend to be relatively short.

Robustness Checks

To summarize our findings thus far, authoritarian constitutions are the same as democratic constitutions in terms of the amount of power allocated to the executive and the number of common rights guaranteed. Authoritarian constitutions diverge from democratic constitutions, though, when analyzing the independence of the judiciary, rare rights, and specificity. Importantly, the results suggest that these differences are limited to authoritarian constitutions that never experience a transition to democracy. The results indicate that authoritarian constitutions that do experience a transition to democracy at some point during their life span are no different in substance than constitutions written by democrats, at least in terms of the six constitutional attributes we analyze. Even authoritarian constitutions that do experience a regime transition, though, do not differ too much from democratic constitutions. Our estimates suggest that such constitutions, on average, contain one less feature that protects the autonomy of the judiciary (out of six), guarantee 5 to 7 fewer rare rights (out of between 80 and 110), addresses two fewer scope items (out of fifty-eight) and contain 5 percent fewer words on each topic than democratic constitutions.

In addition to the estimates reported in Tables 7.2 through 7.5, we have estimated a number of additional models to assess the robustness of our results.¹¹ We have estimated models with fixed instead of random effects and with neither fixed nor random effects. We have used the continuous version of the UDS to operationalize the regime type of the constitution, broken up authoritarian constitutions by the type of authoritarian regime (i.e., civilian or military), and used two alternative measures of democracy. We have also restricted the time period under analysis to the post–World War II era, when there is both better data on the level of democracy and more variance in whether constitutions were written by democrats or dictators. With two exceptions, these permutations of the models reported have no substantive effect on the results.

The first exception is when fixed effects are used in the models instead of random effects. When fixed effects are included, the effect of authoritarian constitutions on scope and detail shrinks dramatically and loses statistical significance. The other change relates to executive power. The coefficient for authoritarian constitutions becomes more negative and statistically significant when fixed effects are included in the model, suggesting that authoritarian constitutions provide less power to the executive than democratic constitutions.

The finding that executive power decreases when constitutions are written by dictators seems counterintuitive. If anything, we would expect the opposite: that executives in authoritarian constitutions are given more power. In unreported

¹¹ The full estimates from these models are available from the authors on request.

regressions, we find basically the same pattern with indices of legislative power developed in our earlier work (Elkins, Ginsburg, and Melton 2009). While reduced legislative power accords with intuitions about authoritarian incentives, it might also help explain reduced executive power. Authoritarian constitutions simply seem to specify less power overall: judiciaries are less independent and legislatures less powerful. If residual power in the system is within the control of the executive, there would be less need to specify the explicit powers of the executive, and we would observe lower levels of power relative to democracies. This is consistent with the idea that the source of authoritarian power is, in many cases, informal and extra-constitutional.

The other differences in the results pertain to the analyses focused on constitutions drafted since World War II. Authoritarian constitutions that did not experience a regime transition and that were drafted in the post-World War II period contain two or three fewer common rights than democratic constitutions drafted during this time period. Authoritarian constitutions that experienced a regime transition during this time period had significantly more rare rights (about four or five) and addressed significantly more topics (two or three) than democratic constitutions. In other words, the substantive differences between authoritarian constitutions that experienced a regime transition and those that did not are larger in the post-World War II era than they were prior to World War II. Of course, this could be attributable to the small number of authoritarian constitutions that experienced a regime change from 1800 to 1946.

These period differences are not totally unexpected. It is well known that the contents of constitutions have changed over time. Since the United States's constitution was written in 1787, constitutions have become significantly longer and more detailed (Elkins et al. 2009). In addition, more recent constitutions have a variety of new provisions: for example, many more rights are part of the drafters' menu in 2010 than were contemplated in 1910 or even 1810. Given this variation over time, it is unsurprising that we find authoritarian and democratic constitutions have adapted to modern norms differently.

In summary, we consistently observe important differences between authoritarian constitutions that never experience a transition to democracy and both authoritarian constitutions that do experience a democracy transition and democratic constitutions. The former have less autonomous judiciaries, guarantee fewer rights (especially rare rights), and are less specific. Authoritarian constitutions that survive a regime change, in other words, are closer to democratic constitutions in content than are those authoritarian documents that are not retained. It is unclear whether this is a result of a selection effect, in that authoritarians à la Pinochet are writing more "democratic" documents in preparation for regime transition. Regardless, it does appear that the content of the authoritarian document is related to the new democrats' decision to keep or scrap it.

CONCLUSION

We have demonstrated that there are few systematic differences across the formal constitutions of democracies and dictatorships, but there are some. At the margin, authoritarian constitutions tend to be less specific, protect fewer rights (especially those rights that are less common), and provide for less judicial independence. We do not, however, see higher levels of executive power in authoritarian texts, probably because executive power is residual in authoritarian systems. But none of these differences is very large across the entire set of cases.

Instead, the most important determinants of constitutional form are the era and the region in which the constitution was written and the set of institutions chosen for the first constitution in the country's history. There is a good deal of serial dependence in constitutional texts.

If we assume that authoritarian institutions and rights protections differ systematically from democratic ones, our aggregate result of overall similarity in formal texts calls into question the simple version of what we labeled the institutional priority thesis: that authoritarian constitutions would be more congruent with authoritarian practice as to executive and legislative power and less congruent with regard to rights provisions. Even when we disaggregated the authoritarian constitution into subtypes, there are few observable differences between authoritarian and democratic constitutions. We do find some evidence that staunchly authoritarian constitutions (i.e., those that do not survive a regime change) are different from both democratic constitutions and authoritarian constitutions that survive regime changes. This suggests that one might be able to predict the possibilities of a transition, simply from the constitutional text. Similarly, we observe some differences in authoritarian and democratic constitutions written between 1974 and 1991. However, the end of the Cold War and the ensuing wave of constitution making appear to have eradicated even these minor differences. Constitutions have converged in form, if not in function.

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