

A Critical Review of *The Endurance of National Constitutions* by Zachary Elkins, Tom Ginsburg, and James Melton

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The Endurance of National Constitutions makes an invaluable contribution to the comparative study of constitutions. The book is the first to leverage data from the Comparative Constitutions Project (CCP), a joint venture by Zachary Elkins and Tom Ginsburg which begun in 2005 after they ‘found’ each other as newly-hired faculty at the University of Illinois (where James Melton was a Ph.D. student), despite having both attended the University of California at Berkeley for graduate school in the late 1990s. In the book, the authors seek to answer the critical and underexplored question of what makes constitutions endure. Along the way, the authors discuss a series of ancillary but crucial issues, including the Jefferson-Madison debate about how long constitutions should endure, as well as the challenges inherent in the conceptualization and measurement of constitutions and their provisions. This critical review provides a brief summary of the theory and empirical findings of the book and concludes by discussing three areas for improvement.

The authors argue that although environmental factors – such as political and economic crises – are likely to impact constitutional endurance, it is more important to study “those conditions we can do something about” – namely the effect of various constitutional designs (pg. 3). Indeed, the book seeks to prove that constitutional change is not “merely epiphenomenal,” in that constitution makers have the ability to shape the destinies of their products just as much as, if not more than, structural factors outside of their control (ibid). The authors advance a general “theory of renegotiation” (pg. 65) positing that three factors determine constitutional endurance (pg. 8):

- 1) **Flexibility**, or “the constitution’s ability to adjust to changing circumstances [...] captured in the empirical analysis by the ease of formal and informal amendment” (pg. 8). Flexibility matters because when a constitution is difficult to amend, either informally via constitutional construction by the courts or via formal amendment procedures by the legislature, the cost of intra-constitutional modification may surpass the cost of constitutional replacement, incentivizing extra-constitutional paths to constitutional change (pg. 76).
- 2) **Inclusiveness**, which “captures the degree to which the constitution includes relevant social and political actors, both at the time of drafting and thereafter” (pg. 8). Inclusiveness matters because “by bringing in a larger number of groups” one can “help to extend the life of the constitution because more groups will have a stake in its endurance” (pg. 81). Note that inclusiveness can be augmented by increasing the visibility of the constitution-making process and the document itself as well as by

increasing the number of stakeholders in the document via its substantive provisions (ibid).

- 3) **Specificity**, or “the breadth of coverage and level of detail of constitutional provisions” (pg. 8). Specificity promotes constitutional longevity for three reasons. First, it alleviates problems of hidden information by forcing counterparties to consider future shocks and scenarios, minimizing problems of strategic behavior post-promulgation. Second, specificity increases the transaction costs of the constitution-making process, and in so doing augments the sunk costs that would accompany the switch to a new design. Finally, specificity incentivizes frequent incremental revisions as parties seek to keep the text current, inducing greater participation in constitutional politics (pg. 86).

The authors conduct analysis using CCP data spanning from 1789 through 2006, which includes 935 constitutional systems (i.e. written constitutions), 746 of which have been replaced or suspended and 189 of which remain in force as of 2006 (pg. 51). They find that the average constitution lasts 19 years – “precisely the period Jefferson thought optimal!” (pg. 2). Survival analysis corroborates the theory outlined in the book: inclusiveness,¹ flexibility,² and specificity³ all significantly contribute to constitutional longevity (pgs. 132-135). Specifically, the life expectancy of the least inclusive constitution is a full 55 years less than the most inclusive constitution (14 years vs. 69 years); the life expectancy of the most inflexible constitution is 11 years shorter than its most flexible counterpart (14 years vs. 25 years); and the life expectancy of the most generic constitution is a whopping 69 years briefer than that containing the right amount of detail⁴ (14 years vs. 83 years) (ibid). The authors find that the “optimal” constitution – containing the right mix of inclusiveness, flexibility, and specificity – can be expected to last well over 200 years, whereas the “suboptimal constitution” – exclusive, rigid, and generic – has a life expectancy of just nine years (pg. 142). Surprisingly, the authors find that many of the exogenous, environmental factors that many assume determine the fate of constitutions (such as the loss of territory/defeat in a war, the presence of a domestic political/economic crisis, and ethnic heterogeneity) do not have a statistically significant impact on constitutional endurance (ibid). However, legacies of endurance

¹ Inclusiveness is measured, first, by whether the constitution-drafting process was conducted by a publicly elected body and results in a product that requires ratification via public referendum; second, by whether the public elects the head of state and first chamber of the legislature (pg. 98).

² Flexibility is measured by both the observed amendment rate as well as an analysis of the formal amendment procedures of each constitution (pg. 100).

³ Specificity is measured by dividing the word length of the constitutional text by the number of scope items (from a possible group of 92 topics that emerged by coding the universe of constitutions between 1789 and 2006) included in the document (pg. 105).

⁴ The authors find a curvilinear relationship between constitutional endurance and constitutional detail – namely, although more detail contributes to constitutional longevity, excessive amounts of detail then increase the hazard ratios of the document (pgs. 132-135).

have an important positive effect: every additional ten years of duration of a previous constitution reduces the probability of constitutional replacement by twelve percent (pg. 139); and regime transitions – particularly democratization episodes – have a significant negative effect on constitutional durability (pg. 137).

Despite the invaluable contribution that *The Endurance of National Constitutions* makes, there remain areas of improvement. Here, I will discuss three, namely: a) the presence of a potentially critical omitted variable, b) the presence of two undertheorized empirical phenomena, and c) the presence a conceptual blind-spot within the core theory.

First, it is surprising to see that the authors do not directly assess the role that political fragmentation has on constitutional endurance. This is particularly curious given that political fragmentation is the central explanatory variable in Ginsburg’s book, *Judicial Review in New Democracies*.⁵ In the book, Ginsburg argues that political fragmentation generates uncertainty about future electoral outcomes and thus incentivizes the parties to the constitutional bargain (who expect to be out of power for at least some of the foreseeable future) to promote judicial review by counter-majoritarian courts as a form of political insurance. It is unclear why constitutions could not serve a similar function, particularly given the authors’ recognition that one of the core functions of constitutions is to “limit the behavior of government” (pg. 38). Further, as political fragmentation increases it becomes more difficult to amend the constitution or to agree to an alternative text, thereby ossifying the status quo and extending the constitution’s shelf life. One way to measure political fragmentation could be to derive a measure from the CCP data modeled along the lines of George Tsebelis (2002)’s veto player theory.⁶ In short, we may expect to find a positive correlation between the number of veto players within a constitutional system and constitutional endurance.

Moving to a discussion of undertheorized empirical phenomena, the first concerns the important role played by what may be termed “shadow” or “informal” constitutions. For example, the authors note that despite frequent constitutional replacement in modern French history, the French Code Civil of 1805 has endured unaltered “[w]hether the French government has been imperial, republican, or fascist,” and may thus possess an “unwritten constitutional status” (pg. 171). Indeed, the Code Civil constructed a “private sphere distinct and largely autonomous from public governance,” established the jurisdictional basis of the Conseil d’Etat, and contributed to the emergence of the French civil service that has displayed “a good deal of autonomy and

⁵ Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York, NY: Cambridge University Press.

⁶ Tsebelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton, NJ: Princeton University Press.

professionalism” (ibid). Similarly, behind modern Thailand’s constitutional instability lies an “unwritten constitution around the role of the monarchy,” where the Thai King, Bhumibol Adulyadej (who has ruled since 1946), has acted as an “external enforcer of the unwritten norms, intervening sometimes to topple written constitutions” (pg. 192). The monarch’s unwritten constitutional authority is thus a *de facto* stabilizing force – he is “highly respected and will limit his interventions in the political sphere. However, on the occasions when he exercises his power, he will be respected” (pg. 190). The authors may well concern themselves with the presence of written constitutions – but these “shadow” constitutions appear to have some effect on constitutional longevity. One source of inspiration may be from federalism theory, particularly the theory of “compensatory federalism” forwarded by Barry Rabe (2004)⁷ and Martha Derthick (2010),⁸ whereby states take on active roles in certain spheres of policymaking in lieu of federal action. Here, an informal constitution serves as a source of constitutionalism and political stability, compensating for formal constitutional turbulence and uncertainty. This, in turn, decreases the incentive for political elites to ensure formal constitutional endurance given the presence of an alternative source of stabilizing constitutionalism.

A second theoretical discussion derived from the authors’ empirical analysis that could have been developed further is to distinguish the interaction between durable constitutions and democratic regimes from those between durable constitutions and authoritarian regimes. The case study of Mexico’s 1917 Constitution, which was maintained during the PRI’s multi-decade period of hegemonic party rule, highlights the normative and theoretical stakes in this discussion. The authors argue that, *inter alia*, the PRI benefitted from constitutional endurance because the document served the function of political co-optation: “The PRI was subject to challenge from various social forces during its long rule. A typical response was to provide a constitutional amendment embodying the demands of the group” (pg. 195). This argument contributes to the burgeoning literature arguing that political institutions in authoritarian regimes play an important causal role in regime endurance (see Magaloni 2008;⁹ Svobik 2012¹⁰). If this is true, then the normative undertone that permeates the book – that constitutional endurance is generally desirable – may need to be qualified. Namely, if constitutional endurance contributes to regime stability, it

⁷ Rabe, Barry. 2004. *Statehouse and Greenhouse: The Emerging Politics of American Climate Change Policy*. Washington, DC: Brookings Institution Press.

⁸ Derthick, Martha. 2010. “Compensatory Federalism.” In *Greenhouse Governance: Addressing Climate Change in America*. Washington, DC: Brookings Institution Press.

⁹ Magaloni, Beatriz. 2006. *Voting for Autocracy: Hegemonic Party Survival and its Demise in Mexico*. New York, NY: Cambridge University Press.

¹⁰ Svobik, Milan. 2012. *The Politics of Authoritarian Rule*. New York, NY: Cambridge University Press.

becomes crucial to normatively evaluate whether the regime is a worthy benefactor. The case of constitutional endurance in authoritarian regimes may thus reveal a ‘dark side’ to the functions served by durable constitutions – namely the prolongation of authoritarian rule.

Finally, a conceptual blind-spot raises concerns regarding the validity of the authors’ core theory. In particular, two of the constitutional qualities that the authors advocate for – inclusiveness and specificity – may exacerbate transaction costs in the Constituent Assemblies responsible for constitution-making. For example, Jon Elster (1995: 395)¹¹ argues that the presence of lawyers in Constituent Assemblies should be avoided, for “[l]awyers will tend to resist the technically flawed and deliberately ambiguous formulations that may be necessary to achieve consensus.” In other words, ambiguity helps minimize transaction costs and facilitates agreement, whereas specificity (and advocates for it) can render agreement impossible. In a related article contrasting the constitution making process in the 1787 American Constitutional Convention and the 1789 French Assemblée Constituante, Elster (2000: 411)¹² also argues that inclusiveness, in the form of a public constitution-making process, can be detrimental: “In the Assemblée Constituante, the debates were not only open to the public, but constantly interrupted by the public,” and consequently the debate was “heavily tainted by rhetoric, demagoguery and overbidding.” Conversely, in the American Constitutional Convention, which negotiated in secret, debates were “of high quality: remarkably free from cant and remarkably grounded in rational argument” (ibid). In other words, while specificity and inclusiveness may contribute to constitutional longevity, they can also abort the constitution-making process itself. The authors briefly acknowledge this possibility: “in some cases,” they note, “it will be impossible to produce the detailed and inclusive agreements of the kind that have tended to flourish” (pg. 208). Nevertheless, this point is not elaborated, nor are its implications taken seriously. For the constitutional graveyard may well be replete not just with constitutions that lacked specificity and were drafted in secret, but also with would-be constitutions that were stillborn precisely because the reverse was true.

¹¹ Elster, Jon. 1995. “Forces and Mechanisms in the Constitution-Making Process.” *Duke Law Journal* 45(2): 364-396.

¹² Elster, Jon. 2000. “Arguing and Bargaining in Two Constituent Assemblies.” *University of Pennsylvania Journal of Constitutional Law* 2: 345-421.