

THE CONSTITUTIONAL FALLACY OF INTELLECTUAL PROPERTY CLAUSES

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ABSTRACT

For over 200 years, constitutions have recognized intellectual property as a fundamental human right, relevant to the creation of a historical national script of values and commitments. But this phenomenon has been absent from scholarly discourse. This Article aims to remedy this lack of awareness and offers the first empirical account of the universal evolution of intellectual property rights constitutionalism. Its findings will expose the inherent conflicts between international harmonization and unbalanced trade powers in intellectual property. In the process, this Article also reveals the levels of hypocrisy and political manipulation that characterize international intellectual property affairs. The Article rejects prevalent arguments on and presents concrete consequences for the regulation of intellectual property. It introduces a new layer to contemporary discourse on the design process of effective intellectual property regimes. The analysis is based on an original data set that spans intellectual property clauses in all national constitutions since 1801—the first time a constitution adopted intellectual property as a fundamental human right. The data exposes the untold constitutional fallacy embedded in the adoption of intellectual property as a basic constitutional right. This fallacy serves objectives and interests alien to the adopting countries. This inquiry into intellectual property constitutional clauses empirically disproves the misguided belief that rights recognized in formal constitutional texts signal actual legal awareness, protection, and enforcement of these rights.

DOI: <https://doi.org/10.15779/Z388C9R473>

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I. INTRODUCTION: AN UNTOLD FALLACY

For over 200 years, countries have adopted intellectual property protection in their constitutions, identifying the right to own intellectual property as part of the “highest normative act of the state”¹ and relevant to the creation of “a

1. TOM GINSBURG & ALBERTO SIMPSE, *Introduction, in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 25 (Tom Ginsburg & Alberto Simpser eds., 2013); *see also* Benedikt Goderis & Mila Versteeg, *Transnational Constitutions, in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 103, 120 (Denis J. Galligan & Mila Versteeg eds., 2013) [hereinafter Goderis & Versteeg 2013]. Goderis and Versteeg state:

Constitutions are widely acknowledged to have both an instrumental and a more symbolic function. On the one hand, constitutions are functional instruments to design desirable traits like democracy, rule of law, or wealth On the other hand, they are also expressive documents that reflect the nation’s highest ideals and values.

historical legacy.”² These countries adopted these rights into their constitutions based on the presumption that constitutional laws “send a message about the priority of particular policies,”³ and that “[c]onstitutional commitments are potentially credible ones and send a strong signal to potential buyers and investors.”⁴

This Article offers the first empirical account of the universal evolution of intellectual property rights constitutionalism. In doing so, it joins the ranks of contemporary research on transnational and comparative constitutionalism that has grounded the ubiquitous practice of countries including a detailed list of rights in their formal constitutions, while helping to explain the absence of intellectual property from these lists.⁵ The Article examines all national constitutions in the world throughout history that have an intellectual property

Id.; see also JORIS LARIK, FOREIGN POLICY OBJECTIVES IN EUROPEAN CONSTITUTIONAL LAW 7 (2016) (stating that constitutions are the “highest laws of a polity”); Ran Hirschl, *The Political Economy of Constitutionalism in a Non-Secularist World*, in COMPARATIVE CONSTITUTIONAL DESIGN 164, 174 (Tom Ginsburg ed., 2012) (“[C]onstitutional supremacy means that the constitution is the highest law of the land.”); Stephen Gardbaum, *Decoupling Judicial Review from Judicial Supremacy*, in DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM 94 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016) (“‘[C]onstitutional supremacy’ means that the constitution is the highest type or source of law in a legal system, higher on the normative scale than legislation, and it prevails over all other types of law in cases of conflict.”); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 85 (2009) (“The constitutional text is reserved, in principle if not always in practice, for matters whose combined probability and significance are such that the highest legal document ought to address them.”); *id.* at 45 (“We see constitutions as not only being higher law (a characteristic that they may share with organic acts and other rules), but as *highest* law.”); Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1136 (2014) (“[C]onstitutions should reflect the people’s highest values [C]onstitutions should be made in special moments of ‘higher lawmaking’, in which the people come together, transcend their ordinary short-sighted interests, and articulate their highest aspirations and most deeply held values.”).

2. Ginsburg & Simpser, *supra* note 1, at 25.

3. Zachary Elkins, Tom Ginsburg & Beth Simmons, Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice, 54 HARV. INT’L L.J. 61, 81 (2013).

4. Goderis & Versteeg 2013, *supra* note 1, at 114; see also Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85–94, 98 (2002).

5. See, e.g., Goderis & Versteeg 2013, *supra* note 1; Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 I•CON 606 (2015); David Landau, Yaniv Roznai & Rosalind Dixon, *Term Limits and the Unconstitutional Amendment Doctrine: Lessons from Latin America* (Politics of Presidential Term Limits Pub. Law, Research Paper No. 887), <https://ssrn.com/abstract=3208187> [<https://perma.cc/S3AJ-RUX2>]; Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013).

clause and challenges the standard account of intellectual property constitutionalism developed by generations of scholars. These scholars have narrowed their arguments to primarily defining the states' powers "to promote the Progress of Science and useful Arts"⁶ and the tension between free speech and ownership of intellectual expressions.⁷ This Article builds on, but also departs from, these accounts by focusing on intellectual property as a right guaranteed by formal constitutions.

The findings of this Article further expose the inherent conflicts between the politics of international legal harmonization and unbalanced trade powers in intellectual property. In doing so, the Article reveals the levels of hypocrisy and legal manipulation that characterize international intellectual property affairs. These findings add a new layer to contemporary discourse on the design processes of effective intellectual property regimes, rejecting prevalent arguments on the regulation of intellectual property in the process.

Constitutions are "uniquely national products"⁸ and "the last stronghold of domestic law"⁹ embedded with commitments to preserving a "shared collective existence."¹⁰ In recent decades, we have increasingly witnessed that, similar to other "legal norms that are exported and imported across borders,"¹¹ constitutions are becoming "increasingly comparative and transnational in scope,"¹² blending imported norms with national values to dilute the

6. U.S. Const., art. I, § 8, cl. 8. *See, e.g.*, DOTAN OLIAR, *EMPIRICAL STUDIES OF COPYRIGHT REGISTRATION* (2017).

7. *See, e.g.*, NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008); Alexandra Couto, *Copyright and Freedom of Expression: A Philosophical Map*, in *INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE* (Axel Gosseries, Alain Marciano & Alain Strowel eds., 2008); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697 (2003).

8. Benedikt Goderis & Mila Versteeg, *The Diffusion with Constitutional Rights*, 39 *INT'L REV. L. & ECON.* 1, 1 (2014).

9. Mayo Moran, *Inimical to Constitutional Values: Complex Migrations of Constitutional Rights*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 233, 233 (Sujit Choudhry ed., 2006).

10. BEAU BRESLIN, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY* 5 (2009).

11. Gregory Shaffer, *Transnational Legal Process and State Change*, 37 *L. & SOC. INQUIRY* 229, 233 (2012).

12. Moran, *supra* note 9, at 233; *but see* Goderis & Versteeg 2013, *supra* note 1, at 104 (noting that there is evidence to suggest that modern constitutions are transnational in nature); *see also* Tom Ginsburg, *Comparative Foreign Relations Law: A National Constitutions Perspective*, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* 63, 69–70 (Curtis A. Bradley ed., 2019). Law has shown that constitutional courts borrow foreign norms and standards and interpret them in light of domestic values and traditions. *See* David S. Law, *The Myth of the Imposed Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239, 252 (Denis J. Galligan & Mila Versteeg eds., 2013). There is not much knowledge on how

constitutions' nature as unique, cultural scripts. This "rise of world constitutionalism"¹³ and "transnational constitutionalism"¹⁴—where "striking similarities"¹⁵ seem to dismantle traditional boundaries¹⁶ of constitutionalism—has affected whether constitutions are "forms of national self-expression."¹⁷ It also feeds more recent theories on global constitutionalism,¹⁸ which aim to "reshape a variety of boundaries and determine their nature and level of permeability"¹⁹ and "transfer the model of the national constitution to the context of world society."²⁰ This process challenges the nature of a constitution as an embodiment of "the story of a nation's development"²¹ and turns that constitution into a "nationalist myth."²² In other words, the findings of this Article reinvigorate the recent claim that "[s]ometimes, constitutions lie"²³ and fail to represent the actual, nationalist reality.

This conclusion results in a rejection of the belief that intellectual property as a constitutional guarantee ensures optimal protection for local and foreign authors, inventors, and other rights-holders. It highlights how constitutional intellectual property rights exemplify the paradoxical consequences of the global constitutionalism process, and further demonstrates how bills of rights

the transnational features in national constitutions affect their operation in practice. See Goderis & Versteeg 2013, *supra* note 1, at 126. This Article provides some tentative insights into this issue.

13. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997).

14. Goderis & Versteeg 2013, *supra* note 1, at 123.

15. Robert E. Goodin, *Designing Constitutions: The Political Constitution of a Mixed Commonwealth*, 44 POL. STUD. 635, 642 (1996).

16. Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84 (Sujit Choudhry ed., 2006).

17. VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 155 (2010).

18. See, e.g., Richard A. Falk, Robert C. Johansen & Samuel S. Kim, *Global Constitutionalism and World Order*, in *THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE* 3 (Richard A. Falk, Robert C. Johansen & Samuel S. Kim eds., 1993).

19. Eyal Benvenisti & Mila Versteeg, *The External Dimensions of Constitutions*, 57 VA. J. INT'L L. 516, 518 (2018).

20. Lars Viellechner, *Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law*, 6 TRANSNAT'L LEGAL THEORY 312, 313 (2015).

21. Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering*, in *CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER* 3 (Tom Ginsburg, Terence C. Halliday & Gregory Shaffer eds., 2019) (internal citation omitted).

22. *Id.*

23. David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 865 (2013).

are, as defined by James Madison, mere “parchment barriers”²⁴ and therefore unreliable to some extent.

Various intentional and unintentional motivations explain the reasons behind constitutionalizing intellectual property as a fundamental right. These motivations relate to material and immaterial incentives that the adopting countries seek to obtain from others, by both signaling that they value stronger trade relations and meeting the economic and legal conditions of actual or potential trade partners.²⁵ These motivations impact the traditional conceptions of constitutional autonomy and the preservation of global cultural diversity, undermining the assumption that constitutional protection of a particular right will secure actual protection of that same right on the ground.²⁶

Recent empirical research has dealt with this proposition, finding (1) that “the poorer a country’s human rights record, the greater the number of rights that its constitution tends to contain”²⁷ and (2) that there is a negative correlation between constitutionally recognized rights and the actual level of protection of those rights.²⁸ For example, David S. Law found that “constitutional bans on torture are associated with a higher incidence of torture,”²⁹ and Frank B. Cross found that the presence of a formal constitutional prohibition against unreasonable search and seizure has no significant impact on actual practice.³⁰

24. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

25. *Infra* Part IV; see also Goderis & Versteeg, *supra* note 8.

26. G.E.R. LLOYD, DISCIPLINES IN THE MAKING: CROSS-CULTURAL PERSPECTIVES ON ELITES, LEARNING, AND INNOVATION 111 (2009). Lloyd states:

We do not expect laws to be the same everywhere. The question of the extent to which it can be claimed that there are or should be objective universal moral principles is, of course, another matter But in respect of cultural diversity, law is more like art than it is like mathematics.

Id.

27. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1169 n.14 (2011).

28. See *id.* at 1248 n.211, n.212; see also Adi Leibovitch, Alexander Stremitzer & Mila Versteeg, *Aspirational Rules*, KIT 15, <http://micro.econ.kit.edu/downloads/Stremitzer,%20Leibovitch,%20Versteeg%20-%20Aspirational%20Rules.pdf> (describing the tendency of constitutions containing large numbers of rights to become aspirational, rather than enforceable).

29. David S. Law, *Constitutions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 382 (Peter Cane & Herbert M. Kritzer eds., 2010).

30. See Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT’L REV. L. & ECON. 87, 96–97 (1999); see also Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1–4 (Philip Alston ed., 1999) (providing that even the most tyrannical regimes

Catharine Mackinnon recently applied this claim to the inclusion of the concept of gender equality in formal constitutions.³¹ In her article, Mackinnon compared measures of “sex equality” in constitutions. She found that “Norway has no equality provisions in its constitution and Australia has no formal written constitution at all,” even though they are the two highest ranking countries for sex equality.³² In contrast, many countries with the lowest equality rankings in the world have strongly worded provisions in their constitutions that guarantee general equality and, in particular, gender equality. Malawi, for example, “has one of the most detailed constitutional provisions for equality of the sexes in the world.”³³ They guarantee equal protection for women, invalidate laws that discriminate based on gender, and require legislation be passed to eliminate discriminatory customs and practices such as “sexual abuse, harassment and violence”³⁴ as well as “discrimination at work and in property.”³⁵ Yet, Malawi ranks No. 153 in sex equality out of the 169 nations that were ranked.³⁶ The same question was examined recently in relation to the freedom of expression;³⁷ freedom of movement;³⁸ prohibition of torture;³⁹ and rights to education,⁴⁰ association and assembly,⁴¹ religion,⁴²

recite in their formal constitutions a list of constitutional rights to please the most ardent idealist).

31. Catharine A. Mackinnon, *Gender in Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 398 (Michel Rosenfeld & András Sajó eds., 2012).

32. *Id.* at 401.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See generally Linda Camp Keith, *Constitutional Provisions for Individual Human Rights (1977–1996): Are They More Than Mere “Window Dressing?”*, 55 POL. RES. Q. 111 (2002); Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016).

38. See generally Chilton & Versteeg, *supra* note 37.

39. See generally Adam S. Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. LEGAL STUD. 417 (2015) (finding no evidence that constitutional torture prohibitions have reduced rates of torture in a statistically or substantially meaningful way); Adam S. Chilton & Mila Versteeg, *International Law, Constitutional Law, and Public Support for Torture*, (Coase-Sandor Working Paper Series in Law and Economics No. 733, 2016).

40. See generally Adam Chilton & Mila Versteeg, *Rights without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J.L. & ECON. 713 (2017).

41. See generally Camp Keith, *supra* note 37. Some constitutional rights do meaningfully improve enjoyment of these rights in practice. See Chilton & Versteeg, *supra* note 37, 575–76 (focusing on (1) the right to unionize, (2) the right to form political parties, and (3) the freedom of religion).

42. See generally John M. Finnis, *Does Free Exercise of Religion Deserve Constitutional Mention?*, 54 AM. J. JURIS. 41 (2009).

private property,⁴³ and health.⁴⁴ An example of a right to health is found in the Constitution of Afghanistan, which commits the state to “provid[ing] free preventative healthcare and treatment of diseases as well as medical facilities to all citizens in accordance with the provisions of law.”⁴⁵ Despite this commitment, Afghanistan has the seventh lowest life expectancy in the world.⁴⁶

The use of intellectual property clauses in constitutions follows the same trend, further undermining the common assumption that including such clauses results in greater protection and guarantee of the described right. This Article examines this assumption and provides theoretical and empirical support for the above claim. For example, Venezuela, which has one of the most detailed intellectual property provisions in its constitution, was ranked last among the 128 nations in the 2016 International Property Rights Index.⁴⁷ And Haiti, which has the oldest intellectual property provision in the world,⁴⁸ dating back to 1801, and which has redrafted its working constitution in 2012,⁴⁹

43. See generally Mila Versteeg, *The Politics of Takings Clauses*, 109 NW. U.L. REV. 695 (2015).

44. See generally Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT’L L.J. 285, 287 (2004) (concluding that “the national commitment to health and health care is not highly related to whether or not a nation’s constitution specifically addresses health or health care”).

45. CONSTITUTION OF AFGHANISTAN Jan. 26, 2004, art. 52.

46. See Law & Versteeg, *supra* note 23, at 869.

47. Sary Levy-Carciente, *International Property Rights Index—Executive Summary*, PROPERTY RIGHTS ALLIANCE 4 (2016), <http://www.indiapropertyrights.org/2016-International-Property-Rights-Index.pdf>. The text from the Constitution of Venezuela reads as follows:

Cultural creation is free. This freedom includes the right to invest in, produce and disseminate the creative, scientific, technical and humanistic work, as well as legal protection of the author’s rights in his works. The State recognizes and protects intellectual property rights in scientific, literary and artistic works, inventions, innovations, trade names, patents, trademarks and slogans, in accordance with the conditions and exceptions established by law and the international treaties executed and ratified by the Republic in this field.

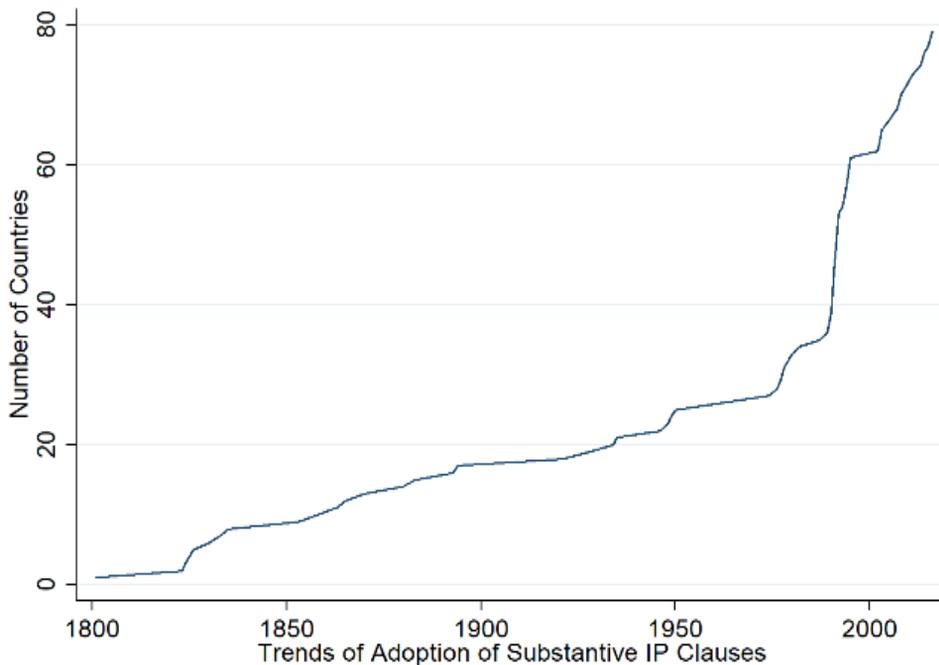
CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA Mar. 24, 2000, No. 5.453 Ext, art. 98 (Venez.)

48. See CONSTITUTION DE SAINT-DOMINGUE DE 1801 (HAITIAN CONSTITUTION OF 1801) July 8, 1801, art. 70 (Haiti) (“The law provides for to the recompense of inventors of rural machinery, or the maintenance of the exclusive property in their discoveries.”). As will be clear later, the United States does not have the oldest intellectual property provision by this measure, because the fact that the U.S. Constitution delegates the Congress to legislate in regard to intellectual property shows that the U.S. Constitution does not treat intellectual property as a fundamental right.

49. The new version of the intellectual property (IP) clause: “Scientific, literary and artistic property is protected by law.” LOI CONSTITUTIONNELLE DE 2012 PORTANT

is ranked third from last.⁵⁰ To quote Mackinnon: “often the reasons for the gap between guarantee and reality . . . lie elsewhere than in constitutions.”⁵¹ Despite the misleading nature of the assumption, the prevalence of intellectual property clauses in national constitutions has increased steeply over the past few decades, as Figure 1 shows below.

Figure 1: Growth of Adoption of Intellectual Property Clauses



Despite this steep increase, scholarship on comparative constitutionalism hardly discusses intellectual property, and scholars have rarely inquired into whether intellectual property as a constitutional guarantee actually reduces infringement and provides better protection for authors and inventors. Only a handful of scholars in the field of comparative constitutionalism have briefly mentioned intellectual property.⁵² This Article aims to remedy this lack of

AMENDEMENT DE LA CONSTITUTION DE 1987 (Haiti's Constitution of 1987 with Amendments through 2012) June 20, 2012, art. 38 (Haiti).

50. See Levy-Carciente, *supra* note 47, at 4.

51. See MacKinnon, *supra* note 31, at 402.

52. See, e.g., Goderis & Versteeg, *The Diffusion of Constitutional Rights*, *supra* note 8, at 7 (listing intellectual property as one of many rights analyzed); Christophe Geiger, “Constitutionalizing” Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual*

awareness and advance understanding of the politics of intellectual property constitutionalism, focusing on the evolution of intellectual property as a constitutionally guaranteed right that has little bearing on the enforcement of that right.

Following the Introduction, Part II presents the organizing principle of this research, the value of formal constitutions, and the methods employed in collecting and analyzing constitutional data on intellectual property. Part III highlights the theoretical contribution of the Article to contemporary discourses. It also examines two neglected misconceptions of transnational intellectual property. It first rejects the claim that the political, international regulation of intellectual property is a successful project that proves the viability of a society of states, which collectively consents to certain values and protects the interests of all member countries. Then, Part III challenges the lack of awareness of the correlation between the adoption of intellectual property clauses in formal constitutions and its real effects, which has traditionally narrowed constitutional research on intellectual property to the power of legislatures to regulate this field of law. Part IV identifies and evaluates a set of intentional and unintentional motivations underlying the adoption of intellectual property as a constitutionally guaranteed right. Part V introduces and empirically analyzes the collected data, offering “in principle” and “in practice” examinations of the dataset. The “in principle” examination provides a descriptive account of the dataset, documents how intellectual property constitutionalism has proliferated around the world, and further examines the geographical patterns of global intellectual property constitutionalism. The “in practice” examination unveils the fallacy—the belief that adopting intellectual property rights in a constitution guarantees their protection and enforcement in practice. Finally, Part VI concludes by demonstrating how constitutions aiming to project certain ideals will not be able to provide the anticipated results.⁵³

This Article provides the first intersection between two fields of research—comparative constitutionalism and intellectual property—which were previously considered unrelated but are, in fact, strongly symbiotic. This is the first attempt to document and analyze constitutions that protect intellectual property as a fundamental socioeconomic right. The results confirm that the

Property in the European Union, 37 IIC 371 (2006). For further resources, see Section III.B. below.

53. See Law & Versteeg, *supra* note 23, at 865–70 (discussing examples of constitutions that lack the ability to apply).

“naïve assumption that ideological adherence in constitutions has automatic and immediate effects”⁵⁴ is, in fact, naïve.

II. MEASURING INTELLECTUAL PROPERTY CLAUSES

Measuring the effect of intellectual property as a constitutional right required collecting data from national constitutions all over the world. In order to do so, this Article relies on a comprehensive and original dataset, which we created for this study. The dataset covers all constitutional intellectual property provisions since 1801, the first time a constitution adopted intellectual property as a fundamental right.⁵⁵ Compiling the dataset involved a range of methodological choices.

In order to obtain the most accurate and available information, this Article focused on formal, written constitutions.⁵⁶ This methodological choice was not bereft of limits. Arguably, “formal constitutions are not worth studying because what is on paper does not necessarily translate into practice.”⁵⁷ Still, formal constitutions remain important and deserving of study. Henc van Maarseveen and Ger van der Tang recognized that some people distrust the written constitution as “merely a piece of paper” whose written declarations do not provide insight into “their practical worth in the particular political situation.”⁵⁸ However, they dismissed as “incorrect” the conclusion that formal constitutions were “therefore unsuitable for study.”⁵⁹ The two were the first to realize that formal constitutions remain important and deserving of study despite their inability to reflect their implementation.⁶⁰

This distrust nevertheless explains the tension between those who accept, in the words of Bruce Ackerman, “the [e]nlightenment hope [of] written constitutions”⁶¹ and those who reject it—between scholars who proclaim that “constitutions do matter”⁶² and those who define them as “no more than

54. John Boli-Bennett & John W. Meyer, *Constitutions as Ideology*, 45 AM. SOC. REV. 525, 526 (1980).

55. See HAITIAN CONSTITUTION OF 1801, *supra* note 48.

56. The dataset refers to documents explicitly labeled as constitutions, whereas past datasets included “formal legal documents that are not explicitly labeled ‘constitutional,’ but nevertheless govern functionally constitutional matters.” Law & Versteeg, *The Evolution and Ideology of Global Constitutionalism*, *supra* note 27, at 1188.

57. *Id.* at 1169.

58. HENC VAN MAARSEVEEN & GER VAN DER TANG, WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY 11 (1978).

59. *Id.*

60. *Id.*

61. Ackerman, *supra* note 13, at 772.

62. Christian A. Davenport, “Constitutional Promises” and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties Are Suppressed, 58 J. POL. 627, 648 (1996).

legalistic ‘window dressing’ i.e., they look good but they do nothing.”⁶³ For the latter group, constitutional principles are grounded in doctrines that expand the textual framework of a constitutional right,⁶⁴ and studies on formal constitutions neglect to fully account for the gap between “law in books” and “law in action.”⁶⁵ In contrast, for the former group, formal constitutions have much to tell us. As Zachary Elkins remarked: “a focus on the text pays extraordinary dividends both in terms of analytic leverage and in understanding change in the broader constitutional order.”⁶⁶ In other words, “constitutions do matter in that they provide a clear indication of government willingness to follow ‘guiding principles’ across time, space and context.”⁶⁷

An important distinction between large and small constitutions employed by comparative constitutionalists clarifies the important role of formal constitutions. Inquiries on the structure and text of formal “large-C” constitutions provide insights into the role of constitutions in general and differ from inquiries into “small-c,” or constitutional, practice. “The fundamental divide is between definitions keyed to formal legal status and definitions keyed to actual practice.”⁶⁸ To study a country’s *de jure* or “large-C” constitution means to study the formal legal texts that purport to be authoritative on foundational matters.⁶⁹ To study the *de facto* or “small-c” constitution means to study “the body of rules, practices, and understandings

63. *Id.* at 630.

64. See Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1313, 1314 (Michel Rosenfeld & András Sajó eds., 2012) (arguing that there is a gap between constitutional text and constitutional practice). Specifically, Perju contended that “an exclusive focus on constitutional text glosses over the difference between constitutional text and constitutional practice[, and] [t]he necessity of looking behind text is perhaps greater with constitutional norms than with rules of private law.” *Id.*

65. Morton J. Horwitz, *Constitutional Transplants*, 10 THEORETICAL INQUIRIES L. 535, 536 (2009). Horwitz also contended: “The gap between a formal constitution and the practice under its aegis is perhaps greater than with ordinary law because constitutions often perform symbolic or aspirational functions that have little relationship to the ways in which constitutional law actually operates.” *Id.*

66. ELKINS, GINSBURG & MELTON, *supra* note 1, at 36.

67. Christian A. Davenport, *supra* note 62, at 648. As Alon Harel explained:

[T]he value of binding constitutionalism is grounded not in its likely contingent effects or consequences, e.g., better protection of rights; but rather in the fact that constitutional entrenchment of rights constitutes public recognition that the protection of rights is the state’s *duty* rather than a mere discretionary gesture on its part.

ALON HAREL, WHY LAW MATTERS 7 (2014) (emphasis in original).

68. Law & Versteeg, *The Evolution and Ideology of Global Constitutionalism*, *supra* note 27, at 1188.

69. *See id.*

that actually determines who holds what kind of power, under what conditions, and subject to what limits.”⁷⁰ “Large-C” constitutions “reflect the people’s highest values,”⁷¹ or the “nation’s fundamental identity and defining ideals,”⁷² and facilitates the imagining and realization of “a shared collective existence.”⁷³ David Law recently explained why studies on formal constitutions matter: they both shape and are shaped by “political, economic, and social life.”⁷⁴ Assuming that “large-C” constitutions actually affect whether a nation can achieve “such mammoth and elusive goals as peace and prosperity,” there is a lot to be gained though empirically studying “large-C” constitutions.⁷⁵

Countries adopt intellectual property as a fundamental right in their “large-C” constitutions for many reasons. Part IV examines the intentional motivations—such as learning and acculturation—and the unintentional motivations—such as coercion and manipulation—behind the presence of intellectual property rights in constitutions. These reasons make the present inquiry extremely relevant because it explains why the inclusion of intellectual property rights in “large-C” constitutional documents will not necessarily yield the anticipated results in protection and enforcement of those rights. A “large-C” inclusion, in fact, hides the paradox between what exists in a constitution and its effectiveness.

This paradox is a result of many conflicting influences coming together in the drafting processes of certain constitutions. One of these influences, which is central to the depth of the paradox, concerns the incorporation of international legal norms in “large-C” constitutions. In a recent study, Tom Ginsburg, Elkins, and Beth Simmons confirmed the complementary relationship between treaty ratification and domestic constitutional norms, and suggested that one important channel of treaty efficacy may be through domestic constitutions.⁷⁶ Their conclusion is worth quoting in full:

[O]ne way in which international norms work is *through* adoption in national constitutional texts. This result is consistent with a theory that constitutions and international treaties supplement each other in terms of enforcement mechanisms. Adoption of a norm at both levels increases the probability that the norm will actually be

70. *Id.*

71. Benvenisti & Versteeg, *supra* note 19, at 517.

72. David S. Law, *Imposed Constitutions and Romantic Constitutions*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS* 34, 37 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2018).

73. Breslin, *supra* note 10, at 5.

74. Law, *supra* note 29, at 380.

75. *Id.*

76. *See generally* Ginsburg, Elkins & Simmons, *supra* note 3.

enforced, probably—in our view—because it provides multiple monitors and alternative fora in which to challenge government behavior. One implication is that proponents of international human rights regimes should encourage adoption of core norms into domestic constitutions, so as to increase the probability of effective enforcement.⁷⁷

Encouraging countries in this way to adopt norms is to impose on them a commitment to protecting certain rights, irrespective of their ability to honor that commitment or to settle it with the existing local, cultural, and legal traditions. As this Article will show, encouraging countries to adopt unsuitable norms of trade and cultural ownership is misleading. Comparative constitutional scholars have debated the fundamental flaws of this process and found that in many cases states are unable to translate these adopted constitutional ideologies into practice, regardless of whether they were deliberately chosen or imposed. This further creates “a gap between the state as envisioned by a country’s formal or ‘large-C’ constitution, and the state that actually exists pursuant to the body of rules, understandings, and practices that make up the informal or ‘small-c’ constitution.”⁷⁸ The dataset created for this Article captures written, “large-C” constitutions only. It refrains from evaluating “small-c” constitutional practices, such as judicial interpretations and unwritten constitutional conventions, due to the lack of access to this information and language constraints.⁷⁹

We experience a world where technological, economic, and political innovations “have drastically reduced the barriers to economic, political and

77. *Id.* at 92.

78. Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 868. See Law, *supra* note 29, at 377 (“[L]arge-C” constitutions refer to “de jure, written, codified, or formal constitutions” and “small-c” constitutions refer to “de facto, unwritten, uncoded, or informal constitutions.”); see also Law & Versteeg, *The Evolution and Ideology of Global Constitutionalism*, *supra* note 27, at 1188.

79. While the vast majority of countries have codified constitutions, there are a few countries that either do not have a written constitution or have a series of constitutional laws, rather than a single text. This Article identified and coded those documents or laws that are considered “constitutions” and single texts only. Therefore, it does not include, for example, the United Kingdom’s 1998 Human Rights Act, Canada’s 1960 Bill of Right, or the series of Basic Laws in Israel, although it is claimed that these laws did create a formal constitution. See, e.g., AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 20 n.4 (2009). Constitutions that do not explicitly mention intellectual property, or related words, were not included in this Article, regardless of whether courts in those countries interpreted “property” so broadly as to include intellectual property as well. As Allen explained: “A number of constitutions protect ‘property,’ without further qualification or explanation. Courts have stated that a simple reference to ‘property’ ‘must receive the widest interpretation and must be held to refer to property of every kind, including . . . intellectual property.’” TOM ALLEN, *THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS* 122 (2000).

cultural exchange.”⁸⁰ Indubitably, these global processes include harmonization of constitutional norms and models. This is why, in the words of Mila Versteeg and Law, “an understanding of global constitutionalism demands attention not only to the way in which constitutions are interpreted, but also to the manner in which their formal content evolves over time.”⁸¹ This becomes more important when facing the “emergence of new normative conflicts between intellectual property and human rights, such as the right to public health,”⁸² that relates to the “adoption of maximalist intellectual property protection standards and robust enforcement mechanisms.”⁸³ If constitutions are shaped by international and foreign influences in order to make the adopting countries receptive to a range of competing interests and increase the probability of enforcement of constitutional rights, does the practice of formal constitutionalism tell us something about how intellectual property—the corpus of laws and policies entrusted with the task of protecting cultural and innovative expressions and national sentiments—is protected on the ground? This Article aims to offer the beginning of an answer to this question.

I compiled a first-in-time dataset of constitutionally-protected intellectual property rights over a decade for this inquiry, which includes all constitutions of the world that have at present, or had in the past, an intellectual property clause. This Article presents and analyzes constitutions with an existing clause only.

The large dataset provides evidence that connects the influence of political and economic changes to the inclusion or deletion of an intellectual property rights guarantee in constitutions throughout the world. For example, there are cases where countries eliminated an existing intellectual property clause, reintroduced it, eliminated it again, and so on. One such country is Bolivia, where the Bolivian Constitution of 1851 included a substantive clause anchoring intellectual property⁸⁴ which disappeared in 1861. Instead, the 1861

80. David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U.L. REV. 1277, 1278 (2008) (internal citation omitted).

81. Law & Versteeg, *The Evolution and Ideology of Global Constitutionalism*, *supra* note 27, at 1168–69.

82. Daniel J. Gervais, *Intellectual Property and Human Right: Learning to Live Together*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: LEARNING TO LIVE TOGETHER 6 (Paul L. C. Torremans ed., 2008).

83. Laurence R. Helfer, *Mapping the Interface Between Human Rights and Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 7 (Christophe Geiger ed., 2015).

84. CONSTITUCIÓN DE 1851, art. 20 (Bol.) (“XX. The author of any useful invention in any branch of industry, he who improves it, and he who imports it into Bolivia, are the

Constitution only included an authoritative provision that empowered the legislature to intervene in intellectual property matters but did not promise substantial protection of such property.⁸⁵ In 2009, the substantive clause was reinstated.⁸⁶ The Ecuadorian Constitution of 1835 also included a substantive intellectual property clause.⁸⁷ The clause disappeared from the Constitution in 1843 and reappeared in 1852.⁸⁸ The section was retained, though numbered and worded slightly differently, until 1978 when it disappeared again and did not reappear until 2008.⁸⁹

In order to provide the most complete database of intellectual property clauses, a search was conducted in numerous databases using key words pertaining to intellectual property rights.⁹⁰ This information was used in order to examine common textual preferences in intellectual property clauses. In the event that key words relating to intellectual property rights were found, all constitutional documents of the relevant country and their various amendments were examined in order to obtain the first year in which constitutional protection of intellectual property was introduced and to identify the changes made thereafter. The findings were cross-referenced with the database constructed by the World Intellectual Property Organization

proprietors of their invention, improvement, or importation. The law assures to them an exclusive privilege for a time, or an indemnification in case the secret of the invention, improvement, or importation be taught.”); *id.* at art. 21 (“XXI. The law acknowledges the property in writings of all kinds, and guarantees it during the life of their author.”).

85. CONSTITUCIÓN DE 1861, art. 54(22) (Bol.).

86. CONSTITUCIÓN DE 2009, art. 30(II) (Bol.) (“In the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights . . . To collective ownership of the intellectual property in their knowledge, sciences and learning, as well as to its evaluation, use, promotion and development.”); *id.* art. 42(II) (“The promotion of traditional medicine shall include . . . protection of their knowledge as intellectual, historic, cultural property”); *id.* at art. 100(II) (“The State shall protect this wisdom and knowledge through the registration of the intellectual property that safeguards the intangible rights of the nations and rural native indigenous peoples and of the intercultural and Afro-Bolivian communities.”); *id.* at art. 102 (“The State shall register and protect individual and collective intellectual property in the works and discoveries of authors, artists, composers, inventors and scientists, under the conditions determined by law.”).

87. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 1835, art. 99 (When translated, the clauses read approximately as: The author or inventor will have exclusive ownership of its discovery or production, by the time it granted by the law, and if this would require publication, give the inventor compensation.).

88. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 1852, art. 117.

89. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008, art. 322.

90. Examples of search key words include: intellectual, patent, invention, authors, copyright, moral rights, trademarks, science, culture, and traditional knowledge.

(WIPO).⁹¹ During the past decade, in which the dataset was compiled, a cross-reference verification was performed in the event that a constitutional document lacked an official or professional translation. The verification was performed using constitutional documents published in additional key resources: the Comparative Constitutions Project,⁹² Constitution Finder (a database constructed by the University of Richmond School of Law),⁹³ Oxford Constitutions of the World,⁹⁴ HeinOnline, and Constitutions of Nations (the first compilation of the constitutions of nations throughout the world in English, compiled by Amos Peaslee).⁹⁵

Drawing conclusions from this research required coding these findings into a dataset. In order to measure the practical effect of including intellectual property as a constitutional right, the data included information gathered from sources such as the U.S. Trade Representative (USTR), which publishes a yearly report on the protection of intellectual property in designated countries.⁹⁶ This Article used two indices to evaluate the level of de facto intellectual property protection given by the relevant country: the Intellectual Property Rights (IPR) Index (henceforth “IPR Index” or “IPR”) constructed by the Property Rights Alliance⁹⁷ and the U.S. Chamber of Commerce’s Global Intellectual Property Center (GIPC) International Intellectual Property Index (henceforth “GIPC Index” or “GIPC”).⁹⁸ This Article also utilized WIPO

91. Available for each country at WIPO LEX, <http://www.wipo.int/wipolex/en/>.

92. COMPARATIVE CONSTITUTION PROJECT, <http://comparativeconstitutionsproject.org/about-constitute/> (last visited Mar. 23, 2020). This database is commonly used in the general field of comparative constitutional scholarship. *See, e.g.,* Zachary Elkins, Tom Ginsburg & James Melton, *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 141–42 (Tom Ginsburg & Alberto Simpser eds., 2013); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 600 (2013).

93. CONSTITUTE PROJECT, <https://www.constituteproject.org/search?lang=en> (last visited Mar. 23, 2020).

94. OXFORD CONSTITUTIONAL LAW: OXFORD CONSTITUTIONS OF THE WORLD, <https://oxcon.ouplaw.com/home/OCW> (last visited Mar. 23, 2020).

95. AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS VOL. 1–3 (1950).

96. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (USMCA) <https://ustr.gov> (last visited Mar. 23, 2020).

97. The IPR Index is the flagship publication of Property Rights Alliance. The IPR Index scores the underlining institutions of a strong property rights regime: the legal and political environment, physical property rights, and intellectual property rights. It is entirely dedicated to the measurement of intellectual and physical property rights. INTERNATIONAL PROPERTY RIGHTS INDEX 2018, <https://www.internationalpropertyrightsindex.org/about>.

98. The GIPC Index maps the level of intellectual property protection in 38 countries, which collectively account for nearly 85% of GDP. The cumulative overall score is based upon 30 indicators extended across six categories—Patents, Copyrights, Trademarks, Trade Secrets,

records, which summarize the contracting parties for each applicable treaty as well as the date of accession and ratification, to analyze membership to intellectual property treaties.⁹⁹ Information regarding membership to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”) was gathered from World Trade Organization (WTO) membership records.¹⁰⁰ The level of a country’s economic development was evaluated according to the commonly used Human Development Index.¹⁰¹ In addition, this Article utilized five governance indices constructed by the World Bank with respect to quality of governance and regulation.¹⁰²

The data collected for this Article deals with intellectual property as a fundamental right, but it does not thoroughly evaluate provisions referring to intellectual property as a legislative empowerment clause. The dataset used in the preparation of this Article was updated as of January 2017.

III. TWO MISCONCEPTIONS

A. A SOCIETY OF STATES

The international phase of intellectual property, which marked the early days of the migration of intellectual property norms between countries, formally began in the 1880s with the signing of the two bedrock treaties, the 1883 Paris Convention and the 1886 Berne Convention.¹⁰³ They established an international society of intellectual property—a society of states consenting and belonging to a global construction of ties and sharing a minimalist approach to international relations. This society of states signaled to non-members that its main advantage was the improvement of the protection afforded to nationals of signatory states. The nature of intellectual property as

Enforcement, and International Treaties. U.S. CHAMBER INTERNATIONAL IP INDEX, <https://www.uschamber.com/report/us-chamber-international-ip-index> (last visited Mar. 23, 2020).

99. WIPO-ADMINISTERED TREATIES, <http://www.wipo.int/treaties/en/> (last visited Mar. 21, 2020).

100. *Members and Observers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Last visited Sept. 20, 2019).

101. *Human Development Index (HDI)*, UNITED NATIONS DEVELOPMENT REPORTS, <http://hdr.undp.org/en/content/human-development-index-hdi> (last visited Sept. 20, 2019).

102. *Worldwide Governance Indicators*, WORLD BANK, <https://info.worldbank.org/governance/wgi/> (last visited July 23, 2019). These indices are voice and accountability, government effectiveness, rule of law, regulatory quality, political stability, and control of corruption.

103. Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 14 SING. J. INT’L COMP. L. 315, 315 (2003) (stating that problems with the reach of IP has been problematic since “the genesis of the international system in the nineteenth century”).

“a residue of legal exclusivity for special cases”¹⁰⁴ and its transnational mobility required the establishment of such a society. However, the values and principles protected by international conventions predominantly mirrored those of their powerful founding member countries. Consequently, there was not much room, or willingness, left to align the adopted international text with the values of other countries. In this process, norms were unilaterally imposed on certain weaker countries, such as duties to change their local laws, policies, and constitutional commitments and rights.

Furthermore, the establishment of the international society of states in intellectual property created a political environment where ties between countries could proliferate in the form of bilateral and regional agreements. Similar to international conventions, many of these agreements result in unbalanced relationships that “transplant laws from the more powerful signatories to the less powerful ones.”¹⁰⁵ These transplants reach beyond the multilateral minimum standards of international treaties; ignore “local needs, national interests, technological capabilities, institutional capacities, and public health conditions”;¹⁰⁶ and cover both secondary laws and constitutional documents. This is the first misconception.

Although this misconception is not salient, existing literature is limited with regards to a theoretical basis stemming from international relations theory. The leading English school of international relations, so far absent in discourses on intellectual property, provides the necessary theoretical underpinnings for that matter. As will be discussed later in this Part, the English school substantially supports the claim that transnational intellectual property, as well as the constitutionalization of intellectual property rights, does not comport to the rules of an international society of states collectively consenting to certain values and principles that protect the interests of all its member countries.

104. W. R. Cornish, *The International Relations of Intellectual Property*, 52 CAMBRIDGE L.J. 46, 63 (1993).

105. Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 955, 955 (2011); *see also* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 867 (2007), which provides:

The principal negotiating objectives of the United States regarding trade-related intellectual property are . . . to further promote adequate and effective protection of intellectual property rights, including through . . . ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered by the United States reflect a standard of protection similar to that found in United States law.

Id. at 867 n.200 (citing The U.S. Trade Act of 2002, 19 U.S.C. § 3802(b)(4)(A)(i)(II) (2006)).

106. Yu, *Sinic Trade Agreements*, *supra* note 105, at 955.

Traditionally, thinking about an ethically balanced international society beyond the autonomy of the state has not been the forte of intellectual property politics. In the early days of international intellectual property and the emergence of solid transnational relations, the sovereign state had the exclusive autonomy to regulate social and cultural worlds and their defined categories of property and symbols. The outer world was defined as a realm of conflicts, power, strategic interplays, and fierce competition. To announce the existence of an international society beyond the autonomy of the state was to engage in dangerous idealism. An element of shared civilization could not be neglected, however, and it affected the definition of the sovereign state. One process that helped change the definition of sovereignty was the formation of an international society in intellectual property, which was driven by international harmonization of intellectual property laws and the growing concern in certain countries for the reciprocal protection of their intangible assets. But this process did not equally affect all member states of this international society. Certain members enjoyed a more powerful place in the decision-making process, which defined the present and future boundaries of the society. Other members were required to comply and follow rules incommensurate with their interests and their legal and cultural histories.

The constitutionalization of intellectual property by these less powerful countries is a striking example of such conflicts of interest. As discussed in the introduction to this Article, the rise of transnational constitutionalism fundamentally changed traditional legal boundaries, transforming constitutions from that which reflected national values and distinct cultures to internationally negotiated documents. Constitutionalizing intellectual property as a fundamental right, regardless of the ability of countries to protect that right, is a direct result of these power relations. The international society and its consequential power relations can, therefore, be understood as a phenomenon of international relations and transnational bonds.

An intuitive and inclusive definition of an “international society” would combine the elements of international societies, world societies, and international systems into a single holistic account of world politics. The former component in this definitional blend would denote “a form of association of the men and women of the world.”¹⁰⁷ International relations

107. Richard McKeon, *Economic, Political, and Moral Communities in the World Society*, 57 *Ethics* 79, 84 (1947). The international society is not a socially informed construction such as nations, religions, or other forms of collectivities. Its realm is governments and official institutions. At the opposite side, there is the less explored world society that sees states as only one segment of the international order. The concept of common humanity and the role of non-state actors are treated as foundational elements in its paradigm. The idea of a world

theorists portray the international society as a distinctive society within the global political order—a composition of states consenting and belonging to a global construction of ties. These states share a minimalist approach to international relations, only preserving international order as opposed to undertaking any other ambitious project that may aim to achieve and maintain justice.¹⁰⁸ The international society revolves around the norms that constitute and regulate relationships between states. States exist and collaborate because they mutually acknowledge conceptions of sovereignty embedded in their understanding of territoriality, domestic supremacy, and international autonomy. This approach was developed by and is associated with the “underexploited”¹⁰⁹ English School theorists of international relations¹¹⁰

society is the existence of shared norms and values at the individual level, transcending the state. *See generally* MARTIN WIGHT, *INTERNATIONAL THEORY: THE THREE TRADITIONS* (Gabriele Wight & Brian Porter eds., 1992).

108. The emergence of the international society dates back to the sixteenth and seventeenth-century Europe and in particular to the Peace of Westphalia of 1648, which brought an end to the wars of religion in Europe. An international society is thought to have existed for several centuries, at least since the sixteenth or seventeenth century in relation to the commercial, cultural, and religious ties formed among European countries. *See* EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* 13 (2002) (explaining that the idea of a “states-system” originated out of the desire to contain the French Revolution and to undermine the Napoleonic imperial system). In other words, “there has always, from the beginning of history, been an international society. There has always been a community of knowledge, of aspiration, of achievement, among men of different race or political allegiance.” P.J. NOEL BAKER, *The Growth of International Society*, 12 *ECONOMICA* 262, 263 (1924).

109. Barry Buzan, *The English School: an Underexploited Resource in IR*, 27 *REV. INT’L STUD.* 471, 472 (2001).

110. The English School of international relations has gained accelerating growth of interest in recent decades and situated itself at the forefront of debates on international relations. *See generally*, ANDREW LINKLATER & HIDEKI SUGANAMI, *THE ENGLISH SCHOOL OF INTERNATIONAL RELATIONS: A CONTEMPORARY REASSESSMENT* (2006); *see also* INTERNATIONAL ORDER IN A GLOBALIZING WORLD 2–6 (Yannis A. Stivachtis ed., 2016); Christian Cantir, *The Allied Punishment and Attempted Socialisation of the Bolsheviks (1917–1924): An English School Approach*, 37 *REV. INT’L STUD.* 1967, 1968 (2011) (showing the contribution of the English School to the understanding of the socialization and punishment processes because of the theory’s emphasis on great powers as “custodians” of the society of states). The international attractiveness of the English School as a theory is grounded in its examination of the interplay between contrasting elements of the international system and offering a distinctive interpretive site for understanding the culture of international relations. EDWARD KEENE, *International Society as an Ideal Type*, in *THEORIZING INTERNATIONAL SOCIETY: ENGLISH SCHOOL METHODS* 104 (Cornelia Navari, ed., 2009); *see also* Alex J. Bellamy, *Introduction: International Society and The English School*, in ALEX J. BELLAMY, *INTERNATIONAL SOCIETY AND ITS CRITICS* 1, 3 (Alex J. Bellamy ed., 2004) (“[The English School] combines a concept of international society that captures elements of conflict and cooperation in world politics and the tension between the pursuit of order and the promotion

headed by Hedley Bull.¹¹¹ For Bull, a “society of states (or international society) exists when a group of states conscious of certain common interests and common values” agree to have their relationships governed by the same set of rules “and share in the working of common institutions.”¹¹² This often-quoted definition was later extended to:

a group of states (or, more generally, a group of independent political communities) which not merely form a system . . . but also have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognize their common interest in maintaining these arrangements.¹¹³

A divide in international relations theory, relevant to this Article’s core argument, exists between the pluralist and solidarist approaches to international relations.¹¹⁴ The argument that propelled the disagreement between the two approaches revolves around the skepticism about universal moralities in a morally diverse world. Classical pluralists such as Bull and Robert Jackson, who belong to the English School of international relations, advocate for the limited practical nature of the society, bound by a strong sense of sovereignty.¹¹⁵ Solidarists allow “more ambitious purposive endeavours, resulting from an intensification of shared values.”¹¹⁶ The two approaches

of justice.”); Richard Falk, *(Re)Imagining the Governance of Globalization*, in INTERNATIONAL SOCIETY AND ITS CRITICS 195 (Alex J. Bellamy ed., 2004) (“It was the English School that most effectively conceptualized the dual assertions of the anarchical structure of the world political system and of a normative order based on international law, diplomatic prudence, and informal linkages of comity.”); Roy E. Jones, *The English School of International Relations: A Case for Closure*, 7 REV. INT’L STUD. 1, 1 (1981).

111. For English School theorists, the institutional establishments of the international society—the Great Powers, the balance of power, international law, diplomacy, and war—mark it as a distinctive society. See HEDLEY BULL, *THE ANARCHICAL SOCIETY* 12–13 (1977); IAN CLARK, *INTERNATIONAL LEGITIMACY AND WORLD SOCIETY* 13 (2007).

112. BULL, *supra* note 111, at 13.

113. *THE EXPANSION OF INTERNATIONAL SOCIETY* 1 (Hedley Bull & Adam Watson eds., 1984) (internal citation omitted). One famous eighteenth-century theorist put the matter aptly: “[A]ll the States of Europe have necessary ties and commerces one with another, which makes them to be looked upon as members of one and the same Commonwealth.” FRANÇOIS DE CALLIÈRES, *THE ART OF DIPLOMACY* 68 (H.M.A. Keens-Soper & Karl W. Schweizer eds., 1983).

114. See generally Nicholas J. Wheeler, *Pluralist or Solidarist Conceptions of International Society: Bull and Vincent on Humanitarian Intervention*, 21 MILLENNIUM: J. INT’L STUD. 463 (1992); see also BARRY BUZAN, *FROM INTERNATIONAL TO WORLD SOCIETY? ENGLISH SCHOOL THEORY AND THE SOCIAL STRUCTURE OF GLOBALIZATION* 45–60, 139–60 (2004).

115. See Bull, *supra* note 111, at 12–13; see also ROBERT JACKSON, *THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES* (2000); JAMES MAYALL, *WORLD POLITICS: PROGRESS AND ITS LIMITS* (2000).

116. CLARK, *supra* note 111, at 6.

differ in their conception of the international society, despite agreeing that the states system is actually a society of states that adhere to some commonly recognized values, rules, interests, and institutions.

The pluralists view the international society as a construction built on a plurality of states in an anarchical system, in which each state elaborates on and exercises its own conception of justice. The logic is simple: a degree of reciprocal recognition of state sovereignty is necessary in order for states to be able to develop their own conception of “the good political life” and justice. These conceptions are created and nurtured by separate communities and are therefore likely to conflict with each other. Because there is a risk of perpetual conflicts, which would prohibit states from exercising their power and providing the basic foundations of social life, it will be necessary to recognize basic needs and rights of states. For Bull, these basic features include life, truth, and property. They resemble John Locke’s three basic natural rights to life, liberty, and property and the causes for the departure from the State of Nature—the pre-political state of mankind in which “every one . . . has the Executive Power of the Law of Nature.”¹¹⁷ For Bull, his conception of the international society was necessary in order to allow states to develop their own conception of this triangle of rights and to recognize each other’s sovereign power.

Moreover, non-intervention and sovereignty are sacrosanct principles for pluralists. Key contemporary pluralists proclaim that a humanitarian intervention will imperil the international society, the existence of which secures international order, because interventions may bring about the collapse of the rules that protect international order from an anarchic situation in the name of justice for individuals.¹¹⁸ The only viable mechanism is a set of practical rules, crafted in a way that maintains the interaction between the components of the international society.¹¹⁹ Given the lack of a consensus regarding the superiority of one ethical system, the only possible outcome is to agree to disagree. The international society, then, operates as a *modus vivendi* between diverse states. Because universal ethics is culturally biased and hence impossible, external intervention in domestic situations threatens the basis of order amongst states—the keeping of which is the goal of the international society. Therefore, the normative content of the pluralist conception of international society “is limited to a mutual interest in the continued existence of the units comprising the society. This is manifested in the reciprocal recognition of state sovereignty and the norm of non-

117. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 293 (Peter Laslett ed., 1967).

118. See JACKSON, *supra* note 115, at 249–93.

119. *Id.*

intervention.”¹²⁰ According to this approach, there can be no universal agreement on morals and values, human rights, or redistributive justice.

On the contrary, solidarists argue that a set of universal moral standards exists, and that the international society has moral agency to protect these standards. In other words, they defend moral universalism. In this conception of the international society, states display a degree of solidarity in developing and enforcing international law.¹²¹ Solidarists confidently use terms such as the values of humankind and moral universalism. They ground their argument in the fundamentality of human rights, which are recognizable as universal social norms. They therefore consider individuals, not states, as the appropriate moral referent. For example, they often proclaim a norm of humanitarian intervention in cases of emergency.¹²² One such intervention was directed by U.N. Security Council Resolution 688,¹²³ which condemned the repression of the Iraqi civilian population, required that humanitarian organizations gain access to all people in need and protect Kurdish refugees, and prompted a no-fly zone in northern Iraq.¹²⁴ Although Resolution 688 is an exceptional example, solidarists consider it a lawful and justified breach of sovereignty,¹²⁵ such as in Rwanda and Bosnia, in the name of a “responsibility to protect.”¹²⁶

Based on the above discussion, the normative content of state sovereignty, as defined by pluralists, poses a paradox. On one hand, they claim that states are inherently moral because their objective is to secure and maintain human welfare and security. On the other hand, however, their hostility towards the non-intervention principle protects the state even when it puts its citizens under humanitarian or security risks. While for pluralists the non-intervention principle protects the states, for solidarists it protects people as well. Solidarists claim that the state is not ontologically above humankind and that a universal solidarity exists among humans. In a solidarist version of the world, more

120. Bellamy, *supra* note 110, at 10; *see also* ANDREW LINKLATER, *THE TRANSFORMATION OF POLITICAL COMMUNITY: ETHICAL FOUNDATIONS OF THE POST-WESTPHALIAN ERA* 59 (1998) (stating that the pluralist approach believes in establishing “a legal and moral framework which allows national communities to promote their diverse ends with the minimal of outside interference”).

121. *See* BUZAN, *supra* note 114.

122. *See, e.g.*, Alex J. Bellamy, *Humanitarian Responsibilities and Interventionist Claims in International Society*, 29 *REV. INT’L STUD.* 321, 324 (2003).

123. *See* S.C. Res. 688 ¶ 1 (Apr. 5, 1991) (adopted ten to three, with Cuba, Yemen, and Zimbabwe against, and China and India abstaining).

124. *See generally* Jarat Chopra & Thomas G. Weiss, *Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 *ETHICS & INT’L AFFAIRS* 95 (1992).

125. *See id.*

126. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 1158 (6th ed. 2008).

demanding ethical standards are impressed on the international society than the situational ethics standards of the pluralists.

Sovereignty, non-intervention, human welfare and security, and moral universalism are concepts that—although they have different meanings—work to ensure that states maintain a political atmosphere, or realm, where their political and cultural identities are undisturbed. Constitutions—as the highest law of a nation—and intellectual property clauses—as the set of rules that protect the nation’s cultural and creative innovations and expressions—are defining elements of this realm. Explaining Bull’s vision, Tim Dunne and Christian Reus-Smit recently observed:

[t]he principal good international society distributes is membership. Recognized sovereign states have a bundle of basic rights: rights that constitute them as particular kinds of polities, and rights that give them legitimate social and political powers. Polities denied recognition lack these rights, depriving them of the ontological status of sovereign statehood, and circumscribing their realm of legitimate political action.¹²⁷

In the formation of the international society in intellectual property, certain players enjoy a stronger stance while other players are constantly pressured to comply with norms unsuitable to their legal cultures. As many scholars proclaim, this process was and remains hypocritical, favoring protection of the interests of certain powerful players¹²⁸ and interfering with the rights of weaker states—“rights that constitute them as particular kinds of polities.”¹²⁹

The harmonization process in intellectual property has created a neo-federal system of norms, especially in the guise of the TRIPs Agreement,¹³⁰ which caused a radical transformation of norms regarding sovereignty and territoriality. The decision of developing countries, which lacked the necessary knowledge and political standing, to sign multilateral agreements such as the TRIPs Agreement was influenced by both powerful states and powerful

127. TIM DUNNE & CHRISTIAN REUS-SMIT, *THE GLOBALIZATION OF THE INTERNATIONAL SOCIETY* 36 (2017).

128. *See, e.g.*, Andrew Linklater, *The International Society of ‘Civilized States’*, in *THE ANARCHICAL SOCIETY AT 40: CONTEMPORARY CHALLENGES AND PROSPECTS* 286, 291 (Hidemi Suganami, Madeline Carr & Adam Humphreys eds., 2017) (discussing the dominance of the European standard of civilization).

129. *Id.*

130. *See generally* GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, *A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME* (2012).

leaders of multinational corporations.¹³¹ This speaks to the essence of the first misconception: an international society can only exist if it employs some solidarist conceptions of the common good and equality, because a lack of solidarist understanding feeds imbalanced relations and substantiates “the formation and rigidification of a set of rules crafted by and for the largest intellectual property holders.”¹³²

As Part IV will discuss, the constitutionalization of intellectual property—as either a fundamental right or an empowerment clause—is the ultimate example of how certain actors in the international society of states impose on other states certain duties or expectations to protect intellectual property rights. Such duties or expectations are often not cognizant of the unique cultural and social features of the adopting country.

B. CONSTITUTIONS AND INTELLECTUAL PROPERTY

The standard account of intellectual property constitutionalism, developed by generations of scholars, is predominantly concerned with examining congressional power to regulate intellectual property and the effect of this power on the balance between free speech and ownership of intangible commodities.¹³³ According to this standard, using constitutional parameters to define intellectual property rights may strengthen the status of intellectual property as a fundamental right and allow continuous recalling of its effects on society.¹³⁴ Christophe Geiger remarked that “more frequent recourse to

131. See SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 94 (2003); see also PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 191 (2002). The role of private industries in the design of intellectual property laws is not new. In fact, the conventional wisdom that patent laws were designed to overcome technological needs should be supplemented by the fact that powerful industries were pushing law reform in order to protect their economic interests, not the least, at the expense of the public interest. See GRAHAM DUTFIELD, INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: A TWENTIETH CENTURY HISTORY 25 (2016).

132. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 113 (1997).

133. See, e.g., Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) (examining “whether Congress can avoid the restrictions on its intellectual property power . . . by resorting instead to other Article I powers, most notably the commerce power”); David Lange, *Sensing the Constitution in Feist*, 17 U. DAYTON L. REV. 367 (1992) (examining constitutional harmonization in the field of intellectual property in America through the *Feist* case); Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J. L. & TECH. 87 (1999) (exploring the relationship of the intellectual property clause to the general welfare clause and, specifically, whether the intellectual property clause can be read to limit the authority of the federal government to fund education and research and development).

134. See Geiger, *supra* note 52, at 386–89.

constitutional rights in litigation related to intellectual property” should be celebrated rather than feared because it can help “prevent a rupture between law and society, which would irrevocably lead to the entire system being called into question.”¹³⁵

The leading example of the standard account is the way scholars have addressed the U.S. constitutional clause, which empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹³⁶ The clause, serving as the constitutional basis for U.S. copyright and patent law, has been subjected to a vast amount of commentary and judicial interpretation. However, as Dotan Oliar noted, “[t]o date, courts have failed to come up with a judicial test to determine whether an intellectual property enactment promote[s] progress of science and useful arts.”¹³⁷ Still, this clause and its interpretation have reached beyond the U.S. system. For example, in *Feist Publications, Incorporated v. Rural Telephone Service Company*,¹³⁸ the Supreme Court explicitly adopted a utilitarian jurisprudential point of view, holding that “the primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, . . . copyright assures authors the right to their original expression.”¹³⁹ This approach was cited verbatim and adopted by many jurisdictions, including Israel¹⁴⁰ and Canada.¹⁴¹

Here lies the second misconception. The above standard account of intellectual property constitutionalism ignores, and hence does not benefit

135. Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INDUS. INTERNET CONSORTIUM 268, 280 (2004); see also TUOMAS MYLLY, CONSTITUTIONAL FUNCTIONS OF THE EU’S INTELLECTUAL PROPERTY TREATIES, IN EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE? 241 (Josef Drexler, Henning, Grosse Ruse-Khan & Souheir Nadde-Phlix eds., 2014).

136. U.S. CONST. art. I, § 8, cl. 8.

137. Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1845 (2006). The clause has been the subject of key case law in the Supreme Court, especially due to controversial Amendments being legislated by Congress, which raised public and scholarly concerns and criticism. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003); *Golan v. Holder*, 565 U.S. 302 (2012); see also Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065–67 (2001).

138. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) [hereinafter *Feist*].

139. *Id.* at 349–50.

140. See CA 513/89 Interlego A/S v. Exin-Line Bros. SA 48(4) IsrSC 133, 161 (1994) (Isr.) [in Hebrew].

141. See *CCH Canadian Ltd. v. Law Soc’y of Upper Can.* (2004), 1 S.C.R. 339, 354–55 (Can.) (rejecting the “sweat of the brow” doctrine without requiring any minimal degree of creativity, unlike the United States).

from, a two-century-old phenomenon of countries protecting intellectual property as a socioeconomic constitutional right alongside the right to health, work, education, housing, and private property.¹⁴² The presence of intellectual property in bills of rights has much to tell about the nature of the right, its constitutional status in different countries and geographical regions, and the constitutional and cultural ideologies underlying the decision to adopt the right.¹⁴³

The shortcomings caused by this second misconception further highlight the benefits of learning from other systems. The rich history of intellectual property protection allows for a better view of intellectual property as a system of rules that protects cultural diversity and the universality of human rights. In the words of Justice Kennedy, “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”¹⁴⁴

The first national constitution to refer to intellectual property as a fundamental right was the 1801 constitution of Haiti, which declared the right to benefit from inventions in rural machinery.¹⁴⁵ According to Article 70 of the 1801 constitution, “[t]he law provides for the recompense of inventors of rural machinery, or the maintenance of the exclusive property in their discoveries.”¹⁴⁶ Two of the youngest countries in the world, South Sudan and Kosovo, have made intellectual property part of their constitutions. The 2011 constitution of South Sudan includes “intellectual property rights” in the list of “national powers.”¹⁴⁷ Kosovo’s constitution deals, in Article 46, with the right to own property and its limits, while stating that “intellectual property is protected by law.”¹⁴⁸ Only a few scholars in the field of comparative constitutionalism have referred to this phenomenon of including intellectual property as part of the list of fundamental rights. And these inquiries only briefly mentioned intellectual property.

142. See Goderis & Versteeg, *The Diffusion of Constitutional Rights*, *supra* note 8, at 7 (Table 1 illustrates the fact that the right to intellectual property has been treated by countries as a socio-economic constitutional right since 1946).

143. See, e.g., Fabrício Bertini Pasquot Polido & Mônica Steffen Guise Rosina, *The Emergence and Development of Intellectual Property Law in South America*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 431, 444–47 (Rochelle Dreyfuss & Justine Pila eds., 2018) (providing examples of constitutions in South America that include and intellectual property clause as a fundamental right).

144. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

145. See HAITIAN CONSTITUTION OF 1801, *supra* note 48, at art. 70.

146. *Id.*

147. SOUTH SUDAN’S CONSTITUTION OF 2011, Schedule (A)24.

148. KUSHTETUTA E REPUBLIKËS SË KOSOVËS, art. 46, para. 5 [Constitution of the Republic of Kosovo].

For example, in their *tour de force* on the diffusion of global constitutional rights, Versteeg and Benedikt Goderis constructed a dataset of 108 constitutional rights enshrined in the written constitutions of 188 countries over the period of 1946 to 2006.¹⁴⁹ Over this period of time, they found an increase of 8% in the adoption of intellectual property as a socioeconomic right. In 1946, 24% of the countries with a constitution had an intellectual property clause compared to 32% in 2006.¹⁵⁰ Elkins, Ginsburg, and Simmons referred to intellectual property and provided a few more details in the context of Treaty Ratification and Constitutional Convergence.¹⁵¹ They explained that, even though the number of different kinds of rights available to constitution drafters continues to expand, most rights become more widely adopted over time, and “intellectual property rights” were one of only four kinds of rights to “show anything close to a negative or flat trajectory over time after having enjoyed some popularity in the nineteenth century.”¹⁵² When a country decides to incorporate or omit intellectual property into its constitution, it engages in a constitutional process that, as Elkins contends, transcends “the basic contours of a particular political and historical environment”¹⁵³ and, as such, requires scholars to “look at the factors that predict that design.”¹⁵⁴

IV. COMPETING MOTIVATIONS

A. INTENTIONAL

1. *States as Plural Subjects*

Constitutions, as integrative documents,¹⁵⁵ provide “unique analytic benefits.”¹⁵⁶ They must record, at the very least, the intentions of constitutional reformers (especially “democratic reformers”),¹⁵⁷ the “society’s fundamental value system and aspirations,”¹⁵⁸ and how “the society perceives that its

149. Goderis & Versteeg, *The Diffusion of Constitutional Rights*, *supra* note 8, at 7.

150. *Id.*

151. See Elkins, Ginsburg & Simmons, *supra* note 3, at 72; see also Ginsburg, Halliday & Shaffer, *supra* note 21, at 10–11 (explaining that constitution-making is a contest of norms, including “substantive norms” or rights, and that categorization of norms as “core” or “peripheral” change over time).

152. Elkins, Ginsburg & Simmons, *supra* note 3, at 72.

153. Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 COMP. POL. STUD. 969, 977 (2010).

154. *Id.*

155. See Dieter Grimm, *Integration by Constitution*, 3 INT’L J. CONST. L. 193, 194–95 (2005).

156. Elkins, *supra* note 153, at 976.

157. *Id.*

158. Grimm, *supra* note 155, at 199; see also J. H. H. Weiler, *On the Power of the Word: Europe’s Constitutional Iconography*, 3 INT’L J. CONST. L. 173, 199 (2005).

constitution reflects precisely those values with which it identifies.”¹⁵⁹ This means that a constitution is a reflection of the collective intention of the people, as a social group, to protect the constitutional identity¹⁶⁰ of the state.¹⁶¹ Still, the textual expression of these factors and intentions in formal constitutions is not bereft of external influences. Countries often find themselves negotiating a text that results from asymmetrical power relations between them and other countries, forcing them to adopt constitutional rights and duties incommensurate with their constitutional identity. Contemporary constitutional comparativists distinguish between channels of constitutional diffusion and channels of external influences.¹⁶² Examples of such channels include competition, learning and acculturation, and coercion.

As mentioned above, this Article rearranges these motivations and proposes a distinction between intentional and unintentional motivations. This distinction emphasizes the nature and meaning of the state as a plural subject. Using the term “intention” and “plural subject” to denote the actual constitutional process is fundamental, because when adopting a formal constitution or signing an international treaty, a state acts on behalf of a plural subject—the people *en masse*—and expresses the intention of the collective to respect and commit to that set of rules.¹⁶³

Margaret Gilbert recognizes the principle of “society-wide convention”¹⁶⁴ and broadly defines “plural subject” as “any set of jointly committed persons, whatever the content of the particular joint commitment in question.”¹⁶⁵

159. Grimm, *supra* note 155, at 199.

160. See generally GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 108 (2010) (asserting that constitutional identity evolves and is formulated through “dialogical enterprises” comprising “interpretive and political activity” occurring in public and private domains).

161. These intentions include restrictions on the amenability of the constitution if these conflict with the “principles that grants it its identity.” YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 228–29 (2017).

162. See Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 907–12 (analyzing constitutional performance by geographic region and noting that regional patterns are consistent with “policy diffusion”).

163. In this Article, the notion of “intention” is different from predominant arguments in constitutional law using the term to denote the intention of the framers of the constitution. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 547 (2006); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U.L. REV. 703, 709–11 (2009).

164. Margaret Gilbert, *The Structure of the Social Atom: Joint Commitment as the Foundation of Human Social Behavior*, in SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY 43 (Frederick F. Schmitt ed., 2003).

165. *Id.* at 55; see also MARGARET GILBERT, RIGHTS AND DEMANDS: A FOUNDATIONAL INQUIRY 180–81 (2018).

Gilbert's definition includes collectives such as union armies. Gilbert also refers to "social rules and conventions, group languages, everyday agreements, collective beliefs and values, and genuinely collective emotions."¹⁶⁶ Formal constitutions aim to legally ground these collective beliefs, values, and emotions, and to transform them into "rules of governance."¹⁶⁷ Gilbert provided that "people become jointly committed by mutually expressing their willingness to be jointly committed, in conditions of common knowledge."¹⁶⁸ Because people live in a particular political and social structure, they will recognize themselves as a social group or a plural subject and acknowledge the rights and obligations that their joint commitment imposes on them.

Gilbert's ideal applies at a more general level, suggesting the existence of super agents. Gilbert asserts that there is no reason to not treat large populations as having joint commitments.¹⁶⁹ In these situations, the parties "express their readiness to be jointly committed with certain others described in general terms, such as 'people living on this island,' 'women,' and so on."¹⁷⁰ If large populations such as these can display "common knowledge of the openness of these expressions, the conditions for the creation of a joint commitment can be fulfilled. Hence the parties to a given joint commitment need not know each other or even know of each other as individuals."¹⁷¹

On this account, the general public is a plural subject that unites individuals and creates a bond between them to perform certain acts and preserve certain values and interests, as would a single individual. It does not necessarily mean that we all must fully consent to every given act. We can create a commitment that binds us all as long as we commit ourselves to the preservation of some peace, social stability, and cultural development. Constitutions act as storehouses of these bonds and commitments. If we, for example, collectively create and use language and certain cultural and social symbols, we work as a plural subject. Although Gilbert requires that people express their willingness to submit to the commitment, there are social activities that do not require express agreement. We share a "collective will" to preserve certain social norms by virtue of living in a democratic polity.

This line of reasoning is advocated by Raimo Tuomela, who defines a group-collective intentionality by reference to an authority system—a group-

166. Gilbert, *supra* note 164, at 55.

167. MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* 213 (2006).

168. MARGARET GILBERT, *LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION* 349 (1996) (emphasis omitted).

169. *See* Gilbert, *supra* note 164, at 55.

170. *Id.*

171. *Id.*

will formation system. To form collective intention, we have to believe in one common will: “‘Groupness’ means the existence of ‘one will’, as it were, and it is shared group-intentions that make one will out of many wills.”¹⁷² There exists the capacity for “transforming the group members’ wills into a group will,” and this allows us to move “from a multitude of ‘I’s’ to ‘we.’”¹⁷³ In this way an authority system is created, and individuals transfer their wills to the group.

Transference of will is not enough to Tuomela, who emphasises the centrality of the principle of acceptance. Collective intentionality presupposes acceptance of social norms, rules, and institutions such as money, law, and the constitution.¹⁷⁴ For example, we share a “collective will”—one will to preserve social stability, unique political and cultural identities, and regulation of property rights. In his recent account, Tuomela reminded us that collective intention is “directed to a collective goal”¹⁷⁵ and that “collective acceptance can be based on external power as long as the participants still act as intentional agents.”¹⁷⁶ If formal constitutions are reflections of a “we” component of a given plural subject, then—as the following Parts will argue—external influences in the design of a constitution can amount to unilateral intervention with that society’s collective intention to preserve its fundamental value system.

People accept social and cultural institutions by virtue of expressing their collective wills through democratic processes. The outcomes of these processes bind everyone in our community collectively. The existence of these wills also explains why nations adopt and favor certain political policies that fit local needs and preferences as a result of economic or civil instability, or the preservation of tradition and cultural structures. On this account, states cannot permit limitless influences inflicted upon them by external political powers that sometimes aim to enclose cultural properties, languages, and other types of social institutions through, for example, intellectual property laws. If it is our joint commitment to preserve our fundamental value system, and these powers

172. RAIMO TUOMELA, *THE IMPORTANCE OF US: A PHILOSOPHICAL STUDY OF BASIC SOCIAL NOTIONS* 175 (1995); *see also* Raimo Tuomela, *We Will Do It: An Analysis of Group-Intentions*, 11 *PHIL. PHENOMENOLOGY RES.* 249 (1991).

173. TUOMELA, *THE IMPORTANCE OF US*, *supra* note 172, at 177.

174. Raimo Tuomela, *Collective Acceptance, Social Institutions, and Social Reality*, 62 *AM. J. ECON. SOC.* 123, 146 (2013) (noting that “an institution is created and, especially, maintained by our collective acceptance”); *see also* TUOMELA, *THE IMPORTANCE OF US*, *supra* note 172, at 314–16; Lior Zemer, “*We-Intention*” and the Limits of Copyright, 24 *CARDOZO ARTS & ENT. L.J.* 99 (2006).

175. RAIMO TUOMELA, *SOCIAL ONTOLOGY: COLLECTIVE INTENTIONALITY AND GROUP AGENTS* 62 (2013).

176. *Id.* at 129.

must not interfere with such a commitment. This commitment means that we act “as a body”¹⁷⁷ in a specified way, where “acting” is taken in a broad sense.¹⁷⁸

This is analogous to Gilbert’s principle of background understanding, according to which “many people reasonably develop expectations that the joint activity in which they are participating will reach an appropriate conclusion,” and these expectations create reliance among the participants.¹⁷⁹ In stable regimes, formal constitutions are one example of this “appropriate conclusion.”¹⁸⁰ They are scripts projecting the collective will to preserve the common culture, state symbols and social stability, and cultural and social realities, including their building blocks—elements that we share and own as a collective. If this is correct, then as a plural subject, we share a collective commitment—an intentional will—to preserving and nurturing our social and political structure, which includes each country’s unique cultural building blocks, like the constitutional list of rights and liberties.

2. *Competition and Rivalry for Material Benefits*

In order for states to play a role in a global economy, they must appear and remain attractive to investors by offering a stable constitutional environment and competing for both material and social benefits. One intentional diffusion mechanism is constitutional competition.¹⁸¹ As Mark Tushnet observed, “[w]hen considering where to place their capital [between nations], investors will consider the likely returns on their investments.”¹⁸² Competition is defined as the rivalry between two or more states for material benefits.¹⁸³ Countries may design a set of rules and establish institutions to signal to investors and buyers that the local market can accommodate their interests, limit economic risks, and provide stability. Examples of economic competition, such as trade

177. Gilbert, *supra* note 164, at 46.

178. If we decline to accept and fulfil our joint commitment, we may create a situation where we will share “collective moral responsibility or—in its negative form—collective moral guilt.” *Id.* at 57.

179. *See id.* at 45–46.

180. *Id.*

181. *See* Law & Versteeg, *supra* note 27, at 1175–77.

182. Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L. L. 985, 991–92 (2009) (“Investors value political stability generally, and there is reason to think that governments can reassure investors worried about stability by providing some threshold level of civil rights and liberties to residents.”).

183. *See* Law, *supra* note 80, at 1307–11 (describing the relations between competition and capital investment and constitutional protection of human rights and asserting that “[s]tates have ample incentive to wield constitutional law as an instrument of policy for making credible commitments that will, directly or indirectly, attract and retain capital”).

liberalization¹⁸⁴ and signing bilateral investment treaties,¹⁸⁵ show that “if a given country adopts a particular policy or institution, its competitors are likely to follow, so as to safeguard their position in export and international capital markets.”¹⁸⁶ The logic behind competition suggests that states strategically imitate foreign constitutions in order to attract foreign capital. In the words of Versteeg and Law, constitutions are, among other reasons, “written to satisfy and influence diverse audiences, ranging from domestic constituencies . . . to foreign investors who seek assurance that their investments are safe.”¹⁸⁷

Constitutional documents and their lists of fundamental rights act as one of the ultimate sources of positive signals for concerned foreign investors. Contemporaneous observers have found that a high level of protection to basic human rights renders countries more attractive to foreign investment.¹⁸⁸ Investors believe that “regimes with strong human rights records are typically stable ones,”¹⁸⁹ and that public reception will be better if their company gains a reputation of promoting fair trade and avoiding investment into countries where child labor exists or basic income is unavailable. Thus, when governments offer a strong and detailed list of rights in a constitution, they do so because they believe it may attract economic benefits to their country.¹⁹⁰

184. See Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 182, 187 (2004) (concluding that “[t]he relationship between competition for capital and policy diffusion is so empirically strong and theoretically plausible in these tests that it should be a high priority for future research” based on the empirical finding that “[t]he most pronounced effect on policy transition comes from economic competition, most notably competition for global capital. Governments clearly tend to liberalize when their competitors do”); see also Leonardo Bartolini & Allan Drazen, *Capital-Account Liberalization as a Signal*, 87 AM. ECON. REV. 138, 139 (1997) (“Specially, we suggest that, besides providing greater flexibility for current allocation of capital, a regime of free capital mobility may signal that imposition of controls is less likely to occur in the future and, more generally, that future policies are likely to be more favorable to investment.”).

185. See Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT’L ORG. 811, 812 (2006) (“The diffusion of [bilateral investment treaties] is associated with competitive economic pressures among developing countries to capture a share of foreign investment.”); see also Amnon LeHAVI & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT’L L. 115 (2011).

186. Goderis & Versteeg 2013, *supra* note 1, at 112.

187. Law & Versteeg, *supra* note 27, at 1172.

188. See generally Matthias Busse & Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment*, 23 EUR. J. POL. ECON. 397 (2007).

189. Goderis & Versteeg 2013, *supra* note 1, at 113. *But cf.* Leibovitch, Stremitzer & Versteeg, *Aspirational Rules*, *supra* note 28, at 15 (cautioning against “setting of aspiration rules” and explaining that “when it comes to constitutional rights, less might be more”).

190. Goderis & Versteeg 2013, *supra* note 1, at 114.

The contention that property and intellectual property as constitutional human rights carry significant implications for foreign investors has historical roots. Inquiries into Seventeenth-Century public choice confirm that it is important for countries to constitutionally commit to property rights systems as a necessary condition for investment and economic growth.¹⁹¹ This perhaps provides an additional explanation for the fact that the right to property is one of the four most popular global constitutional rights—alongside with freedom of religion, freedom of the press and expression, and equality.¹⁹² In this regard, Law has observed:

as capital and skilled labor become increasingly mobile, countries will face a growing incentive to compete for both by offering bundles of human and economic rights that are attractive to investors and elite workers.¹⁹³ Such people are likely to favor jurisdictions that respect “first generation” individual rights—namely, civil liberties and property rights of the type found in the U.S. Constitution.¹⁹⁴

Hence, in order to increase long-term investment of foreign capital, countries will embrace the right to private property and, in many cases, intellectual property as part of their lists of fundamental rights. For example, the African National Congress embraced the constitutional protection of property rights in order “to prevent capital flight and to attract foreign investment.”¹⁹⁵ In Article 175 of its 1991 Constitution, Honduras explicitly mentions protection for foreign authors that can “contribute to national development.”¹⁹⁶ Finally,

191. See generally Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, in *THE ORIGINS OF LIBERTY: POLITICAL AND ECONOMIC LIBERALIZATION IN THE MODERN World* 16 (Paul W. Drake & Mathew D. McCubbins eds., 1998) (discussing the possible link between the economic history of England and the protection or curtailment of property rights).

192. Law & Versteeg, *The Evolution and Ideology of Global Constitutionalism*, *supra* note 27, at 1200; see also Versteeg, *supra* note 43, at 713 (“Today, no less than 94% of all constitutions include a takings clause.”).

193. Constitutional scholars have long argued that constitutions play an important role in protecting private property from arbitrary expropriation. See, e.g., Farber, *supra* note 4 (arguing that protection to private property attracts foreign investments); John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 *TEX. L. REV.* 1929, 1929 (2003) (noting that every “government that is constitutionally barred from expropriating property is thereby better able to attract capital”); see also Versteeg, *supra* note 43, at 700–01 (providing that it is “for most societies, the long-term economic benefits that are associated with secure property rights will far outweigh the short-term gains of expropriation”).

194. Law, *supra* note 80, at 1282.

195. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 96 (2004).

196. HONDURAS CONSTITUTION, art. 175 (1991).

Article 62(2) of the 2013 Vietnamese Constitution requires the State to generally “prioritize investment” for scientific research and development.¹⁹⁷

Protection of intellectual property worldwide has been at the forefront of governments’ and industries’ concerns. As a field of law that defies national borders,¹⁹⁸ protection for intellectual properties affects investors’ decisions on where to invest.¹⁹⁹ Lack of protection carries the risk of economic isolation and unilateral actions resulting in economic or other sanctions, such as being identified as counterfeiting countries. The U.S. Trade Representative (USTR) Special 301 Report,²⁰⁰ which the next Part will discuss,²⁰¹ is an example where a government empowers its trade representatives to unilaterally test the level of protection of intellectual property in other countries. The yearly report also warns foreign investors of states that lack “protection of basic civil liberties,”²⁰² curtails their rights in their intangible assets, and signals “negative reputational effects for foreign buyers and investors.”²⁰³

When a state constitutionalizes intellectual property rights in its highest formal legal script, it offers an invitation for investors to recognize the state’s commitment to protecting their rights. Enhancing protection for intellectual property rights is key to “spurring investment”²⁰⁴ and contributes to the eventual strategic shift from “static competition” to “dynamic competition,”²⁰⁵

197. VIETNAM CONSTITUTION, art. 62(2) (2013).

198. *See generally* AMNON LEHAVI, PROPERTY LAW IN A GLOBALIZED WORLD 172–77 (2019) (detailing how intellectual property is sold on international markets and cross-border protection is consequently the priority of many companies).

199. *See generally* SAM F. HALABI, INTELLECTUAL PROPERTY AND THE NEW INTERNATIONAL ECONOMIC ORDER: OLIGOPOLY, REGULATION, AND WEALTH REDISTRIBUTION IN THE GLOBAL KNOWLEDGE ECONOMY 41–60 (2018) (examining the relationship between intellectual property, investment, and trade); *see also* Douglas Lippoldt, *Can Stronger Intellectual Property Rights Boost Trade, Foreign Direct Investment and Licensing in Developing Countries?*, in THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY 44, 44–61 (Meir Perez Pugatch ed., 2006) (discussing whether stronger intellectual property rights might encourage foreign rights holders to trade, invest directly, or license intellectual property in developing countries); *see also* SHAHID ALIKHAN, SOCIO-ECONOMIC BENEFITS OF INTELLECTUAL PROPERTY PROTECTION IN DEVELOPING COUNTRIES 3 (2000) (“Attracting investment in a world of hyper competition will become harder wherever intellectual property protection is not strong or is ineffective.”).

200. *Special Rep.* 301, Office of the U.S. Trade Representative (1989–2015), <https://ustr.gov/issue-areas/intellectual-property/Special-301> [hereinafter “USTR SPECIAL REP. 301”].

201. *See infra* Part V.

202. *See* Goderis & Versteeg 2013, *supra* note 1, at 113 (confirming that investors do ask which states protect basic liberties).

203. *See id.*

204. Dinwoodie & Dreyfuss, *supra* note 130, at 35.

205. *See* Lippoldt, *supra* note 199, at 58.

both within the country and against other countries' economic policies. It further creates constitutional competition among states²⁰⁶ in other areas, such as, as Law remarked, "constitutional competition for human talent,"²⁰⁷ which can be "a good thing."²⁰⁸ If this is correct, the logic of competition as a diffusion mechanism and the adoption of intellectual property in world constitutions further highlights one of the perplexing findings of this Article: many developing countries provide constitutional protection for intellectual property rights.

These developing countries compete with one another, invest significant resources, and adopt various measures in order to be the best destination for foreign investment. These measures:

include tax incentives, upgraded infrastructures, and/or streamlined bureaucracies to handle investment regulations. Laws are often amended to make the situation more amenable to the investing company, by means such as easing restrictions on foreign ownership and repatriation of capital, profits, and dividends.²⁰⁹

Despite these measures and their understanding that intellectual property is a fundamental factor for foreign investors, the actual protection that developing countries afford intellectual property rights conflicts with what their constitution proclaims.²¹⁰ Amending the laws and offering constitutional guarantees may signal the country's commitment to protecting the rights, which strengthens its competitive message. However, analyzing the level of actual protection reveals that this message is merely lip service for those more powerful countries that request constitutional protection of intellectual property rights.

3. *Learning and Rivalry for Social Benefits*

"Learning," in the context of this Article, refers to the phenomenon of "countries borrow[ing] each other's constitutional provisions because the constitutional choices of others have altered their preexisting beliefs: they adopt certain arrangements only when they are convinced that these will be

206. Goderis & Versteeg 2013, *supra* note 1, at 114 (holding that "[i]f constitutional protection of rights attracts foreign investors and buyers, this phenomenon may induce constitutional competition among states").

207. Law, *supra* note 29, at 348.

208. *See id.*

209. David Hindman, *The Effect of Intellectual Property Regimes on Foreign Investments in Developing Economies*, 23 ARIZ. J. INT'L. & COMP. L. 467, 467 (2006).

210. *See* MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 13 (2010) (noting how the state can barely control the property right once created because it eventually becomes governed by multinational investment treaties instead).

beneficial.”²¹¹ The logic behind learning is twofold. The first rationale is premised on “Bayesian learning”,²¹² countries search for information and make rational choices in light of the information available.²¹³ Countries will alter their constitutional choices and embrace foreign constitutional rights if consistent information shows that a large number of countries have adopted a particular right. In other words, if so many countries have adopted this right, it must be beneficial.

A common application of Bayesian learning is the Condorcet Jury Theorem.²¹⁴ In *On Learning from Others*, Eric Posner and Cass Sunstein pose the question of “whether one state should consult the law of other states.”²¹⁵ In particular, they defend the U.S. Supreme Court’s frequent practice of relying on foreign law in its efforts to provide novel interpretations of the U.S. Constitution.²¹⁶ Applying the Condorcet Jury Theorem, they argue that “if many people have (independently) decided that *X* is true, or that *Y* is good,” then the theory “gives us reason, under identifiable conditions, to believe that *X* is true and that *Y* is good.”²¹⁷ Another example of this application is the reminding of courts that better solutions exist elsewhere²¹⁸ or the acknowledging of the normative value of foreign laws. As Justice Kennedy remarked: “The opinion of the world community, while not controlling our outcome, does provide respected and significant conformation for our conclusions.”²¹⁹

The second rationale is that learning can affect countries’ constitutional choices by allowing countries to consult each other’s social experiences. Countries interact in the international polity and influence each other’s choice-

211. Goderis & Versteeg 2013, *supra* note 1, at 115; *see also* Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 201 U. ILL. L. REV. 202, 229 (2008) (“The basic hypothesis is that the enactment of a provision in one constitution (particularly one in a neighboring or otherwise proximate country) increases the probability of the enactment of the provision in another.”).

212. Beth A. Simmons, Frank Dobbin & Geoffrey Garrett, *Introduction: The International Diffusion of Liberalism*, 60 INT’L ORG. 781, 795 (2006).

213. *See* Eric A. Posner & Cass R. Sunstein, *On Learning from Others*, 59 STAN. L. REV. 1309, 1309–10 (2006).

214. *Id.*

215. *Id.* at 1314.

216. *See id.* at 1310–11.

217. *Id.*; *see also* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 132, 138–46 (2006) (elaborating on the application of the theorem).

218. *See generally* Mark Tushnet, *The Possibilities of Comparative Law*, 108 YALE L.J. 1225 (1999) (proposing a systematic method for analyzing constitutional experiences in other countries to guide interpretation of the U.S. Constitution).

219. *Roper*, 543 U.S. at 578.

making through normative claims that become “powerful and prevail by being persuasive.”²²⁰ Because information is unavailable, insufficient, or imperfect, learning is nurtured through social networks.²²¹ Persuaded actors in this process, as Ryan Goodman and Derek Jinks wrote, “redefine their interests and identities accordingly.”²²² This is how, for example, judges decide to rely on and cite foreign laws after being persuaded that learning from the experience of another country is suitable, precise, and beneficial.²²³

The design process of a formal constitution involves both aspects of learning. States might be influenced to either adopt the same constitutional rule that a large number of states have by randomly selecting from existing foreign constitutional norms,²²⁴ or adopt constitutional rights by mimicking the norms from systems with which they share “preexisting similarities,”²²⁵ such as the same legal origin.²²⁶ Then, they may question the social legitimacy of that rule, inquire into and study its status in other systems, and learn from those experiences prior to embracing the rule. The questions are how countries will decide which system to follow, which rule to choose from that system, and how much to invest in learning the constitutional ideology of that system and its inspirational suitability. In a global constitutional environment that suffers from imperfect information, those decisions are affected by factors such as familiarity with the other system and the existence of a “common ideological basis,” in the words of the President of the Israeli Supreme Court, Justice Aharon Barak.²²⁷ Historical and present examples of this common basis include “the reception of Roman law in Europe, the enactment of the Chinese codes in other parts of Asia, [and] the transfer of Spanish and Portuguese law to Latin America.”²²⁸

220. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 141 (1996). See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 635–38 (2004) (detailing various forms of persuasion and illustrating their effect on global politics).

221. See Goderis & Versteeg 2013, *supra* note 1, at 116.

222. Goodman & Jinks, *supra* note 220, at 635.

223. See Goderis & Versteeg 2013, *supra* note 1, at 116.

224. See Tushnet, *supra* note 218, at 1285–1300.

225. Goderis & Versteeg 2013, *supra* note 1, at 104–05.

226. *Id.*

227. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 111 (2002).

228. Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 163, 168 (2003); see also Barak, *supra* note 227, at 114 (noting that while the United States does not use comparative law, many other democratic countries learn from each other’s legal history—including that of the United States).

Particularly, learning raises interesting issues with regard to intellectual property laws. Countries are open to learning from foreign sources, mainly because “the new global obligations for the treatment of intellectual property are transmitted from the international to the national level.”²²⁹ Intellectual property rights

have gained increased prominence on the international economic agenda, rich and poor countries alike have responded by reforming their copyright, patent, and trademark regimes, introducing new legislation, and creating new administrative and judicial institutions to facilitate the enforcement of these rights. In so doing, most countries have brought their IPR systems into conformity with—and at times exceeded—the standards required by TRIPs.²³⁰

A notable example of this is the adoption of intellectual property as a fundamental right in national constitutions. However, in line with the main argument of this Article, even where learning occurred and local laws were changed, “countries with similar laws and institutions can—and do—continue to demonstrate remarkably different practices with regard to IPRs . . . [and] new international obligations and external pressures may usher in reforms that have little to do with day-to-day practices.”²³¹

A recent report by the European Commission on the protection and enforcement of intellectual property in third countries confirms this assertion on learning and its practical effects.²³² If so many countries have adopted certain versions of intellectual property laws, then these laws must be good laws and third countries ought to learn from these experiences. But once learning is accomplished and laws are enacted, it does not guarantee implementation. For example, the report found that “over the last years, China has made continued efforts to review and update its [intellectual property] legislation and, in that context, has given external stakeholders, such as the EU, the possibility to comment on draft legislation during public consultations.”²³³ In its report, the Commission examined the level of

229. Kenneth C. Shadlen, Andrew Schrank & Marcus J. Kurtz, *The Political Economy of Intellectual Property Protection: The Case of Software*, 49 INT. STUD. Q., 45, 46 (2005).

230. *Id.*

231. *Id.*

232. European Comm’n, Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries, SWD 47 (2018).

233. *Id.* at 7; *see also id.* (“China has launched several legislative amendments, in particular in the areas of patents, service inventions, copyright, unfair competition and e-commerce law. However, with the exception of the trademarks law of 2014, none of these reviews, including the long awaited amendments of the patent and copyright laws, have been completed.”) (internal citation omitted).

protection in fourteen countries divided into three categories of priority.²³⁴ Half of these countries—Argentina, Russia, Turkey, Ukraine, Brazil, Ecuador, and the Philippines—protect intellectual property as a constitutional human right.²³⁵ However, the level of protection they afford these rights on the ground confirms the paradox underlying the core argument in this Article—that is, there is a gap between what these countries offer in their constitutions and the actual translation of this protection in practice.²³⁶

4. *Acculturation and Conformity with Global Scripts*

In general, “states respond to cultural forces”²³⁷ and, in doing so, often emulate a foreign constitutional template irrespective of its content and their ability to apply it locally. This diffusion mechanism is defined as acculturation, which Goodman and Jinks explained as “the general process of adopting the beliefs and behavioral patterns of the surrounding culture.”²³⁸ When acculturation is at work, “constitution-makers emulate foreign models to obtain social rewards, even when there are no apparent material benefits and they are not persuaded by the content of these models.”²³⁹ In this regard, acculturation is different from coercion or competition because it explains how states act in order to reap social benefits that extend beyond apparent economic rewards.

The logic behind acculturation is premised on organizational sociology, implying that organizations adopt models “not because of their functional utility but because of their legitimacy and the social relationships they represent.”²⁴⁰ According to this, socialization processes will lead organizations towards increasing “isomorphism”—similarity and homogenization²⁴¹—but this will not necessarily “reflect actual practices or their effects on the ground.”²⁴² On the contrary, “official purposes and formal structure are disconnected from functional demands.”²⁴³ This practice leads states to sign international human rights agreements and adopt environmental policies and

234. *See id.* at 5–6 (stating the following priorities: “Priority 1: China; Priority 2: Argentina, India, Indonesia, Russia, Turkey and Ukraine; Priority 3: Brazil, Ecuador, Malaysia, Mexico, Philippines, Thailand, and the United States”).

235. *See infra* Part V.

236. *See generally* European Comm’n, *supra* note 232, at 7–57 (outlining the current practices in each country).

237. Goodman & Jinks, *supra* note 220, at 654.

238. *Id.* at 638.

239. Goderis & Versteeg 2013, *supra* note 1, at 119.

240. *Id.*

241. *See* Goodman & Jinks, *supra* note 220, at 647.

242. *Id.* at 649.

243. *Id.*

other trade treaties without intending to comply with their stipulations.²⁴⁴ For example, as provided in Part I, the number of constitutions that include provisions on gender equality is increasing; however, as MacKinnon has found, the existence of such a provision is disconnected from its practical applicability.²⁴⁵

Constitutions are prone to processes of acculturation as countries may adopt bills of rights “for reasons of external legitimacy, to express international values and to signal conformity to the norms of the international community, not to reflect internal practices.”²⁴⁶ This attests to the correctness of John Boli-Bennett and John Meyer’s finding that “[n]ational constitutions do not simply reflect processes of internal development,”²⁴⁷ but rather “reflect legitimating ideas dominant in the world system at the time of their creation.”²⁴⁸ Thus, commitments to protection of certain human rights do not predict their actual protection. Countries “copy an internationally legitimated model that does not fit their local needs”²⁴⁹ because such a model has become a “universal authority”—a kind of a global script for states despite its ineffectiveness in some local systems.²⁵⁰

244. See, e.g., *id.* at 629 (asserting that some states want to “violate human rights when it is convenient to do so” and that other states have no incentive to enforce human rights agreements beyond their own borders).

245. See MacKinnon, *supra* note 31, at 402 (finding that international laws and national statutes have the greater effect on gender equality, whereas mentioning it in constitutions “may as much indicate a problem to be solved as provide a tool for its solution”).

246. Goderis & Versteeg 2013, *supra* note 1, at 120.

247. John Boli-Bennett & John W. Meyer, *The Ideology of Childhood and the State: Rules Distinguishing Children in National Constitutions, 1870–1970*, 43 AM. SOC. REV. 797, 805 (1978); see also Francisco O. Ramirez, Yasemin Soysal & Suzanne Shanahan, *The Changing Logic of Political Citizenship: Cross-National Acquisition of Women’s Suffrage Rights, 1890 to 1990*, 62 AM. SOC. REV. 735, 742 (1997) (“Countries apparently are affected much less strongly by internal factors and much more strongly by shifts in the international logic of political citizenship.”).

248. Boli-Bennett & Meyer, *supra* note 247, at 805.

249. Goodman & Jinks, *supra* note 220, at 651.

250. In order to overcome these situations, scholars suggest that countries will be invited to join international human rights treaties on the basis of their ability to offer protection on the ground. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2024 (2002) (“Countries might, for example, be required to demonstrate compliance with certain human rights standards before being allowed to join a human rights treaty Or treaties could include provisions for removing countries that are habitually found in violation of the terms of the treaty from membership in the treaty regime.”); see also Anne F. Bayefsky, *Making the Human Rights Treaties Work*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 229, 264 (Louis Henkin & John Lawrence Hargrove eds., 1994) (contemplating “[p]ut[ting] in place written rules for expelling from the treaty regime those states that do not adhere to a set of minimum requirements drawn from the treaty’s implementation provisions”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of*

What states achieve through acculturation—irrespective of whether the global script may produce effective results on the ground—is an option to signal to domestic and international audiences that they value integration into the world society and comply with its cultural norms. For example, post-communist constitutional reforms provide evidence that these reforms were made according to the logic behind acculturation. Another example is that Romania chose a particular model in order to make their intentions of “building a democratic polity” appear credible,²⁵¹ furthering Romania’s interest in joining the Council of Europe and becoming a member of the European Union. The text was adopted instrumentally in order to be “accepted by their ‘betters,’ ” by signaling to the world community that they would accommodate democratic ideals.²⁵²

In fact, acculturation has been a defining component of contemporary intellectual property policy discourses. Acculturation predominantly relates to intellectual property protection for indigenous cultures and native communities,²⁵³ fusion of cultures,²⁵⁴ and tension between preserving ancient languages and cultural assimilation.²⁵⁵ Moreover, acculturation also speaks to the danger for “[g]enerations of experience . . . [that] have contributed to a very broad base of knowledge of individual plant species and properties which have been perceived as useful [to be] encroached upon by market demands and acculturation.”²⁵⁶

Effective Supranational Adjudication, 107 YALE L.J. 273, 362 (1997) (“One of the essential characteristics of a global human rights regime is that any nation may seek to join and adhere to the regime’s substantive obligations and enforcement procedures.”).

251. Christina Parau, *The Transnational Constitution: Eastern Elites in Search of a Western Ideal*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 514–15 (Denis Galligan & Mila Versteeg eds., Cambridge University Press 2013).

252. *Id.* at 515.

253. See, e.g., Julie Hollowell, *Intellectual Property Protection and the Market for Alaska Native Arts and Crafts*, in INDIGENOUS INTELLECTUAL PROPERTY RIGHTS: LEGAL OBSTACLES AND INNOVATIVE SOLUTIONS 55, 71 (Mary Riley ed., 2004) (“In the 1950s and 1960s, government agencies had assumed that, once the acculturation of Alaska’s Native population was complete, Native arts and crafts would die out as other ‘more viable’ economic pursuits took their place.”) (internal citation omitted).

254. See, e.g., SHARON LE GALL, *INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND CULTURAL PROPERTY PROTECTION: CULTURAL SIGNIFIERS IN THE CARIBBEAN AND THE AMERICAS* (2014).

255. Esther Almeida, *Traditional Knowledge: An Analysis of the Current International Debate Applied to the Ecuadorian Amazon Context*, in HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS TENSIONS AND CONVERGENCES 209, 215 (Mpsasi Sinjela ed., 2007).

256. Jennie Wood Sheldon & Michael J. Balick, *Ethnobotany and the Search for Balance Between Use and Conservation*, in INTELLECTUAL PROPERTY RIGHTS AND BIODIVERSITY CONSERVATION: AN INTERDISCIPLINARY ANALYSIS OF THE VALUES OF MEDICINAL PLANTS

In particular, the gradual acculturation of indigenous cultures “ha[s] already eroded biodiversity and cultural diversity.”²⁵⁷ As opposed to acculturation in constitutional law where there is a gap in what has been constitutionally adopted and its actual protection, acculturation in the sense of indigenous cultures and native communities in intellectual property carries a devastating result. It achieves assimilation and homogenization of cultures, and conformity with “the general process of adopting the beliefs and behavioral patterns of the surrounding culture,”²⁵⁸ while bringing about a great cultural loss. Arguably, when countries with large native communities adopt a right to intellectual property in their constitutions, they implicitly agree to follow the “patterns of the surrounding culture,”²⁵⁹ which also affect such native communities. This is further demonstrated by the fact that only three developing countries—Bolivia,²⁶⁰ Venezuela,²⁶¹ and Kenya²⁶²—include indigenous people as part of their intellectual property constitutional right clauses, whereas similar notions did not materialize in developed countries that have indigenous communities.

B. UNINTENTIONAL: COERCION AND SUBTLE INCENTIVES

Countries are often coerced to embed values alien to their national identity into their legal system. Coercion is an unintentional diffusion mechanism, in contrast to intentional motivations that define how countries socialize in the international society of states. It ignores the constitutional autonomy of a country and its cultural and legal histories.²⁶³ Coercion in this context means pressure from foreign partner states to adopt a particular norm or principles

45, 45 (Timothy M. Swanson ed., 1998); *see also Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)*, WIPO 214, WIPO doc. 768 (Apr. 5, 2001), https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf (“A serious problem is the reluctance of the younger generation to learn the ‘old ways.’ . . . Either through acculturation or diffusion, many traditional practices are lost.”).

257. JOSEPHINE R. AXT, M. LYNNE CORN, MARGARET LEE & DAVID M. ACKERMAN, *BIOTECHNOLOGY, INDIGENOUS PEOPLES, AND INTELLECTUAL PROPERTY RIGHTS* 20 (1993); *see also* Hollowell, *supra* note 253, at 71.

258. Goodman & Jinks, *supra* note 220, at 638.

259. *Id.*

260. *See* CONSTITUCIÓN POLÍTICA DEL ESTADO DE PLURINACIONAL DE BOLIVIA, título 2, capítulo 4, art. 30(II) (Bol.); *id.* at título 2, capítulo 6, art. 100(II) (2009) (Bol.).

261. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, título 3, capítulo 8, art. 124 (Venez.); *see also id.* at título 3, capítulo 6, art. 98 (2009) (Venez.) (listing the types of works that fall under “creación cultural”).

262. *See* CONSTITUTION art. 69(1)(c) (2010) (Kenya).

263. *See generally* Law, *supra* note 72 (discussing the difference between imposed and unimposed formal constitutions).

in a constitution “not driven by sophisticated ideational platforms but by political necessities.”²⁶⁴ Under the logic of coercion, as “weaker states will converge upon the models provided by stronger states,”²⁶⁵ weaker states will unintentionally adopt the norms inflicted upon them by other states. As such, coercion “is always possible in world politics.”²⁶⁶ This concept “belongs to a family of ‘power’ or ‘influence’ concepts”²⁶⁷ and appears where “states and institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through material rewards and punishments.”²⁶⁸

Unintentional motivations discount the state as a plural subject capable of holding collective intent to preserve its cultural and historical identities. As a diffusion mechanism, coercion violates not only the state’s autonomy and the preferences of the country’s respective polity, but also the fundamental right of the people to collectively design the constitution as their binding cultural script. Constitutions adopted under coercive circumstances enlist fundamental rights that the adopting country cannot fully protect. Therefore, Ginsburg was correct in remarking that while constitutions are expected to provide stability, prosperity, efficacy, and the resolution of conflicts, “[i]n the real world . . . most constitutions fail.”²⁶⁹ Scholarship on comparative constitutionalism refers to coercion as one of a number of explanations for a country’s particular constitutional language.²⁷⁰ This unintentional nature of the adoption of constitutional language under coercion highlights the fallacy behind the asymmetrical power relations that push countries to adopt a particular constitutional text and provisions regarding, for example, intellectual property.

Coercion is often performed unilaterally by powerful countries to overcome weak countries’ resistance to sign international treaties,²⁷¹ respect international norms, and join multilateral institutions. It can also provide a

264. RAN HIRSCHL, *THE STRATEGIC FOUNDATIONS OF CONSTITUTIONS*, IN *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 157, 164 (Denis J. Galligan & Mila Versteeg eds., 2013).

265. Goderis & Versteeg 2013, *supra* note 1, at 123.

266. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 46 (1984).

267. See Alan P. Wertheimer, *Political Political Coercion and Obligation*, in *COERCION* 221 (John W. Chapman & J. Roland Pennock eds., 2009) (1972).

268. Goodman & Jinks, *supra* note 220, at 633.

269. Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 219 (2009).

270. See Goderis & Versteeg 2013, *supra* note 1, at 107–08.

271. See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1978 (2004).

mechanism to assist countries in a process of nation-building.²⁷² For example, the United States, under the Foreign Assistance Act, denies foreign assistance to states “engag[ing] in a consistent pattern of gross violations of internationally recognized human rights.”²⁷³ In matters of trade, the United States occasionally acts unilaterally²⁷⁴ through the Special 301 procedure that allows a trade representative to examine whether the level of protection afforded to intellectual property in a particular country is insufficient and detrimental to the American economy and industries.²⁷⁵ When a state is coerced to change its laws, it does so by understanding the “cost-benefit calculations” of not changing its laws, not by reorienting its preferences.²⁷⁶ These coercive acts, as Isaiah Berlin put it, aim to impose legal reform and replace a state’s freedom of choice with freedom from choice.²⁷⁷

Coercion is not an alien concept in contemporary intellectual property discourses, and its presence in unilateral and multilateral measures is alarming. From a multilateral perspective, critics of the TRIPs Agreement have argued that “there were elements of coercion, and questionable trade-offs may have been made between market access for commodities and intellectual property protection.”²⁷⁸ The aggressive imposition of intellectual property norms in developing countries has become associated with concepts such as

272. See generally Constance Grewe & Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, 15 MAX PLANCK Y.B. UNITED NATIONS L. ONLINE 1 (2011) (documenting the nation-building process of Kosovo and Bosnia-Herzegovina, including the role of coercion in each).

273. 22 U.S.C. § 2304(a)(2) (2000).

274. Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1, 41 (1997) (explaining that the Helms-Burton Act of 1996 which strengthened the U.S. embargo against Cuba is “another example of America’s annoying tendency to act unilaterally in the world trading system, and a reflection of American naivete about the efficacy of trade sanctions to achieve political aims”).

275. See USTR SPECIAL REP. 301, *supra* note 200 (outlining the various areas of interest to the trade representative in their report).

276. Goodman & Jinks, *supra* note 220, at 634; Goderis & Versteeg 2013, *supra* note 1, at 106.

277. See ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* 29 (1958) (rejecting the idea that men yield some of their freedom to a larger group in order to free themselves from “the burden of freedom”) (internal citation omitted).

278. Dinwoodie & Dreyfuss, *supra* note 130, at 41.

“recolonization,”²⁷⁹ “economic imperialism,”²⁸⁰ and “threats.”²⁸¹ Susan Sell,²⁸² Peter Drahos,²⁸³ Ruth Okediji,²⁸⁴ Hennig Grosse Rus-Kahn,²⁸⁵ and Jerome Reichman²⁸⁶ heavily criticized the imbalance in the global harmonization process of intellectual property laws. As Graeme Dinwoodie and Rochelle Dreyfuss put it, “the North had the South over a barrel”²⁸⁷ and “developing countries absolutely needed wider markets to prosper, and they would do whatever was necessary to obtain access to them.”²⁸⁸ The future implications of the TRIPs negotiations, as Drahos explained, concern not only U.S. trade unilateralism but also the fact that “the US was able to build circles of consensus around the need to link intellectual property and trade.”²⁸⁹ This consensus incentivizes countries to fear coercion and continuously adopt culturally unsuitable intellectual property laws.²⁹⁰ From a unilateral perspective, coercion has become a matter of trade policy for intellectual property. The USTR Special 301 reigns supreme as the major unilateral measure imposed on countries that do not adequately protect intellectual property.²⁹¹ As Robert C. Bird noted, the United States has “repeatedly” used punitive measures, such as Special 301, to threaten “countries that do not sufficiently protect the

279. Peter Drahos, *Global Property Rights in Information*, 13 PROMETHEUS 6, 9 (1995).

280. SAM F. HALABI, *INTELLECTUAL PROPERTY AND THE NEW INTERNATIONAL ECONOMIC ORDER: OLIGOPOLY, REGULATION, AND WEALTH REDISTRIBUTION IN THE GLOBAL KNOWLEDGE ECONOMY* 53 (2018).

281. CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 161 (2009).

282. SELL, *supra* note 131, at 75–95 (2003).

283. *See, e.g.*, Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 161, 161–82 (Ruth Mayne & Peter Drahos eds., 2002); *see also* Peter Drahos, *The Intellectual Property Regime: Are There Lessons for Climate Change Negotiations*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE* 92, 99–102 (Joshua D. Sarnoff ed., 2016).

284. *See, e.g.*, Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125 (2003).

285. *See, e.g.*, HENNING GROSSE RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW* (2016).

286. *See, e.g.*, Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279 (2004) (asserting that the benefits of such globalization will be unevenly distributed and may impede progress towards other public goals).

287. Dinwoodie & Dreyfuss, *supra* note 130, at 33.

288. *Id.*

289. Drahos, *The Intellectual Property Regime*, *supra* note 283, at 101.

290. *See id.* at 101–02.

291. *See* USTR SPECIAL REP. 301, *supra* note 200.

intellectual property rights of American products and processes.”²⁹² Those punitive measures can be severe enough to force “[m]ost developing countries, including the BRICs [(i.e., Brazil, Russia, India, and China)], . . . to relent.”²⁹³

In history, brute force, extermination, and fear were common tools used by those who held power to make others comply with their constitutional preferences.²⁹⁴ In modern international legal realities, especially in situations of nation-building and democratization, physical coercion is predominantly replaced by a new version of “imposed constitutionalism,”²⁹⁵ a term which refers to “a constitution foisted by outsiders upon a particular community.”²⁹⁶ Imposed constitutions focus on material rewards, incentives, and political sanctions²⁹⁷ that mount pressure on constitutional negotiations.²⁹⁸ Examples of constitutional coercion through material incentives, or carrots and sticks, include foreign aid and foreign assistance,²⁹⁹ and the promise of joining a unique club of countries such as the European Union, the Council of Europe, or other international organizations.³⁰⁰ Achieving membership in these clubs often overrides domestic constitutional objectives and leads countries to make fundamental changes to their constitutions.³⁰¹

292. Robert C. Bird, *The Impact of Coercion on Protecting US Intellectual Property in the BRIC Economies*, in EMERGING ECONOMIES AND THE TRANSFORMATION OF INTERNATIONAL BUSINESS 431, 443 (Subhash C. Jain ed., 2006).

293. *Id.*

294. See Goderis & Versteeg 2013, *supra* note 1, at 107–08 (distinguishing between different levels of constitutional coercion—for example, constitutions that result from postcolonial histories or in the context of occupation).

295. See generally Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005).

296. Law, *supra* note 72, at 35 (emphasis omitted).

297. There are exceptions to this, such as constitutional imposition through “hard coercion” that can be found in the context of occupation, including temporary foreign occupation, and post-conflict situations as in the cases of Iraq, Afghanistan, East Timor, and Kosovo. See generally NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (2004); Stanley Nider Katz, *Democratic Constitutionalism after Military Occupation: Reflections on the United States’ Experience in Japan, Germany, Afghanistan, and Iraq*, 12 COMMON KNOWLEDGE 181 (2006); Feldman, *supra* note 295, at 858; Goderis & Versteeg 2013, *supra* note 1, at 108. On Kosovo, see generally Grewe & Riegner, *supra* note 272.

298. Feldman, *supra* note 295, at 877.

299. See, e.g., Goderis & Versteeg 2013, *supra* note 1, at 109–10.

300. *Id.* at 108.

301. For example, despite protests by the local population, up to thirty constitutional amendments were made to the Mexican 1917 Constitution in its run-up to North Atlantic Free Trade Agreement (NAFTA). See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 L. & SOC. INQUIRY 757, 766 (2000). This was necessary, *inter alia*, in order to comply with the treaty’s U.S.-style investment rules. *Id.* at 761.

Economists studying prosperity and development agree that “institutional quality holds the key to prevailing patterns of prosperity around the world.”³⁰² Dani Roderik explains that “[i]nstitutions that provide dependable property rights, manage conflict, maintain law and order and align economic incentives with social costs and benefits are the foundation of long-term growth.”³⁰³ Institutional quality and stability in this sense embrace a commitment to ideologically following principles of liberal democracy as the prevalent political construction of the state. Because “trade barriers will be lower between democracies,”³⁰⁴ this process enlarges the number of democracies able to provide stability and security necessary to participate in global trade. Protection of private property³⁰⁵ and its inclusion in formal constitutional texts are one of the main elements in this process. It improves a country’s economic efficiency and growth and makes it attractive to foreign trade and investment.³⁰⁶

Although trade, economic growth, and efficiency are major advantages, they may require unsuitable formal constitutional amendments. As the World Bank has remarked, global standards of formal law might be incompatible with certain legal cultures and “counterproductive for economic, institutional, and political development.”³⁰⁷ For some legal cultures, “informal mechanisms would be more effective and efficient.”³⁰⁸

The adoption of intellectual property rights in a constitution of a country that cannot provide the anticipated protection often results from coercion by other powerful countries. Kenya’s experience in 2010 provides a good example for Law’s definition of an “unromantic” constitution.³⁰⁹ Amelia Andersdotter, a member of the European Parliament, asked why the European Union requested Kenya to adopt intellectual property in its constitution, and she

302. DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 184 (2008).

303. DANI RODRIK, IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH 10 (2003).

304. Edward D. Mansfield, Helen V. Milner & B. Peter Rosendorff, *Free to Trade: Democracies, Autocracies, and International Trade*, 94 AM. POL. SCI. REV. 305, 318 (2000); see also DOUGLAS A. IRVIN, FREE TRADE UNDER FIRE 61 (4th ed. 2015).

305. See Leif Wenar, *Coercion in Cross-Border Property Rights*, 32 SOC. PHIL. & POL’Y 171, 191 (2015) (“A state’s choice of effectiveness aligns its laws with other states’, which is an essential condition for its transnational trade.”).

306. LAURA GRENFELL, PROMOTING THE RULE OF LAW IN POST-CONFLICT STATES 25–26 (2013).

307. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 91 (David M. Trubek & Alvaro Santos eds., 2006) (citing World Bank, Legal Institutions of a Global Economy Homepage, <http://www1.worldbank.org/publicsector/legal/index.htm>).

308. *Id.*

309. Law, *supra* note 72, at 38.

remarked that “[m]oving the Kenyan legislation towards the European will shift power from Kenyan entrepreneurs to European big business.”³¹⁰ Andersdotter remarked that because intellectual property laws are shaped globally, “reform in one part of the world does not go without consequences in other parts, but . . . the effects are rarely beneficial to either party.”³¹¹ She further noted that requesting Kenya to constitutionally protect intellectual property would affect more states in the East-African region, and would “become part of a global web that will lock in East-Africa, Europe and the Americas in an information policy of law suits and power concentration, harmful to creativity as well as innovation.”³¹² The Kenyan experience tells us that, in reality, developing countries will rarely have a powerful response “to the aggressive erosion of their capacity to regulate intellectual property rights for domestic interests.”³¹³

An interesting question posed by Goodman and Jinks is “whether states, like other organizational forms, respond to and are in significant part reflections of their wider institutional environment.”³¹⁴ As an entity able to present collective intentions, an individual state is committed to reflect the will of the people it represents as a collective. However, because the desire is to become a member of a certain club of states, this commitment is not always maintained. States choose to adopt constitutional norms coercively imposed on them by other states in order to maximize their international status,³¹⁵ regardless of whether these norms conform to the people’s collective intentions or whether their adoption would win the state material and social rewards.³¹⁶

V. CONSTITUTIONAL DIMENSIONS

In contrast to other socioeconomic rights, little is known at a global, empirical level about the extent to which countries that take part in contemporary constitutional “rights creep”³¹⁷ fall short of their intellectual

310. Amelia Andersdotter, *Why Kenya’s Attempt to Put Intellectual Property Rights in Its Constitution is a Mistake*, TECHDIRT (July 8, 2010, 10:26 PM), <https://www.techdirt.com/articles/20100706/23322610092.shtml>.

311. *Id.*

312. *Id.*

313. Okediji, *supra* note 284, at 139.

314. Goodman & Jinks, *supra* note 220, at 647.

315. See generally H. Peyton Young, *Innovation Diffusion in Heterogeneous Populations: Contagion, Social Influence, and Social Learning*, 99 AM. ECON. ASS’N 1899 (2009).

316. See generally John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997).

317. Law & Versteeg, *supra* note 27, at 1194.

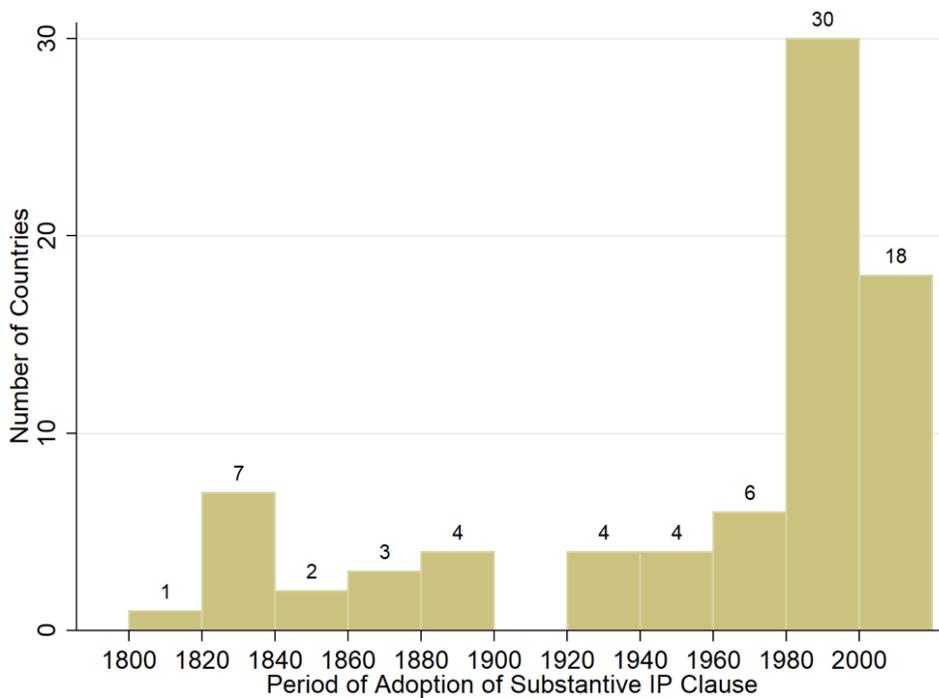
property constitutional guarantees. Using the dataset compiled for this Article, this Part documents the global prevalence and severity of constitutional noncompliance in countries that have adopted intellectual property as a constitutional right. This Part begins with an “in principle” analysis illustrating the number and geographical spread of intellectual property clauses. It then continues to an “in practice” analysis calculating numerical scores that capture and translate the extent to which countries violate intellectual property rights, despite their constitutional standard.

A. IN PRINCIPLE

Haiti was the first country to adopt intellectual property as a fundamental constitutional right in 1801.³¹⁸ Colonial histories determined the structure of constitutional design, and our collected dataset indeed shows that states in South and Central America were the first to adopt an intellectual property clause as a fundamental right in the 19th Century, except Portugal, which did so in 1826. Between 1895 and 1973, only nine countries adopted an intellectual property clause in its constitution. Since the early 20th Century, countries, including many developing countries, adopting intellectual property in bills of rights have become more common. Sixteen countries have adopted an intellectual property clause in the 2000s, twenty-five in the 1990s—eighteen of which were developing countries. Nepal was the most recent country to adopt such a provision in 2015. The number of countries adopting intellectual property as a fundamental constitutional right has risen throughout the years. As shown in Figure 2 below, the rapid growth began shortly after 1974, when Sweden adopted intellectual property in its formal constitution. Since then, fifty-one countries have followed suit.

318. HAITIAN CONSTITUTION OF 1801, *supra* note 48. In addition, Haiti has been found to be the first to adopt the right to free public education in its national constitution. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1688 (2014).

Figure 2: Period of Adoption of Substantive Intellectual Property Clauses



Countries refer to intellectual property in their constitutions in two different ways. First, they refer to it as an authoritative/empowerment clause, namely a commitment vested on the state to legislate and regulate in the field. Second, states refer to intellectual property in a more substantive way—as a fundamental socioeconomic right and a part of their bill of rights. Some countries refer to intellectual property rights in both ways.

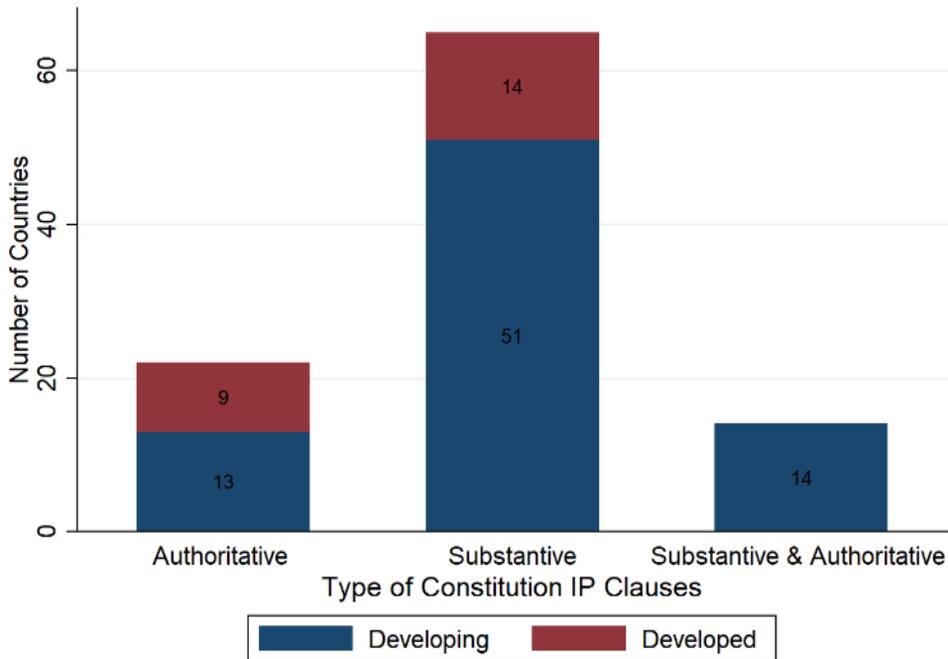
As illustrated in Figure 3 below, twenty-two countries (thirteen of which are developing countries) adopted only an authoritative/empowerment clause,³¹⁹ while sixty-five countries adopted a substantive clause (fifty-one of which are considered developing countries).³²⁰ Fourteen others—all of which

319. Australia, Austria, Belize, Canada, Germany, Hungary, India, Italy, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Palau, Papua New Guinea, South Sudan, Spain, Sri Lanka, Sudan, Thailand, Uganda, United Arab Emirates, and the United States of America.

320. Partial list: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Belarus, Bhutan, Brazil, Bulgaria, Burkina Faso, Burundi, Cape Verde, Chad, Chile, Republic of the Congo (Congo-Brazzaville), Croatia, Czech Republic, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Guatemala, Guinea-Bissau, Haiti, Democratic People's Republic of Korea (North Korea), South Korea, Kosovo, Kyrgyzstan, Lao, Latvia, Lesotho, Libya, Liechtenstein, Lithuania, Macedonia, Madagascar, Moldova, Mongolia, Montenegro,

are developing countries—adopted an authoritative *and* a substantive clause.³²¹ It is safe to assume that the status of a country as developed or developing will impact the way by which that country adopts such a clause.

Figure 3: Types of Constitutional Intellectual Property Clauses



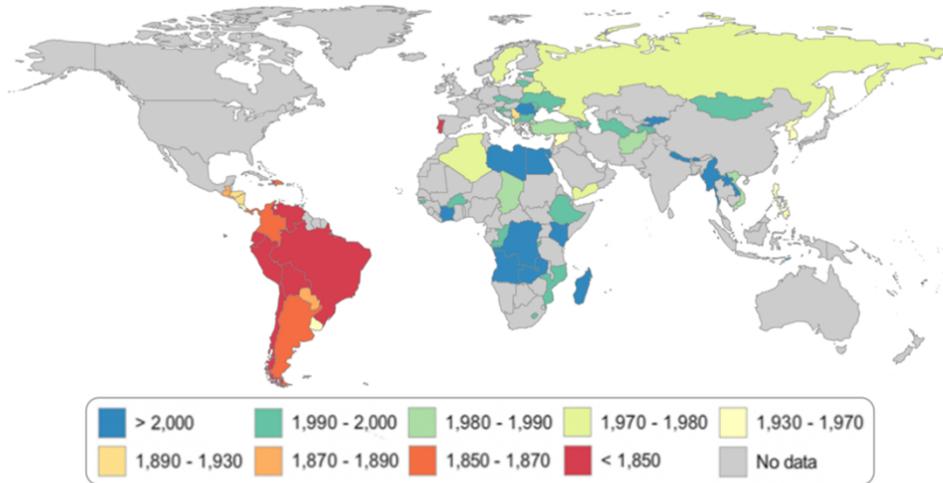
The geographical spread of intellectual property clauses illustrates arguments favored by comparative constitutionalists regarding the reasons for countries to adopt any particular right or choose a certain language in its constitution: border-sharing and geographical proximity, similar constitutional history, or cultural preferences. As evident in the following Figure 4, countries in South America, plus Portugal, were the first to adopt substantive clauses prior to the 1850s. From the 1970s, a rising trend of adoption is apparent, reaching its peak around the 1990s. This spread of countries as shown in Figure 4 confirms that “diffusion through colonial ties also suggests coercive

Mozambique, Nicaragua, Panama, Paraguay, Peru, Philippines, Portugal, Romania, Sao Tome and Principe, Serbia, Slovak Republic, Slovenia, Sweden, Syrian Arab Republic, Taiwan, Tajikistan, East Timor, Tunisia, Turkey, Turkmenistan, Ukraine, Uruguay, Vietnam, and Yemen.

321. Argentina, Azerbaijan, Bolivia, Colombia, Democratic Republic of Congo (Kinshasa), Costa Rica, Ethiopia, Georgia, Honduras, Kenya, Myanmar (Burma), Russian Federation, and Venezuela.

power³²² and that colonial channels “are substantially stronger during years in which a country adopts its first constitution,”³²³ leaving a “strong constitutional legacy³²⁴ in these former colonies.

Figure 4: First Year of Adopting a Substantive Clause



Next, Figure 5 illustrates the spread of countries that have adopted intellectual property, according to the type of clause, as either an empowerment or a fundamental right. It further provides which countries, mainly in Asia and Africa, do not mention intellectual property in their constitutions. Figure 5 presents regional patterns as well as “considerable heterogeneity within those regions.”³²⁵ While Latin America seems to exhibit a tendency towards substantive intellectual property clauses, African and Asian countries reflect a more flexible combination of substantive, empowerment, and no clause at all.

322. Goderis & Versteeg, *The Diffusion of Constitutional Rights*, *supra* note 8, at 17.

323. *Id.*

324. *Id.* at 3.

325. Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 911.

Figure 5: Type of Constitutional IP Clause

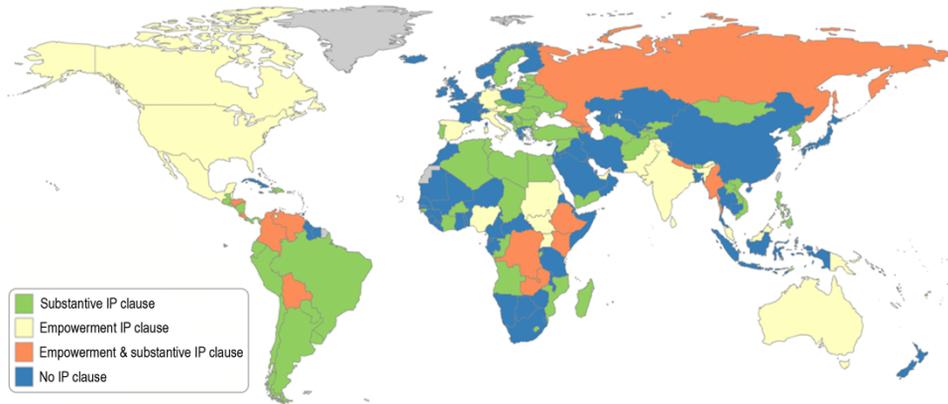
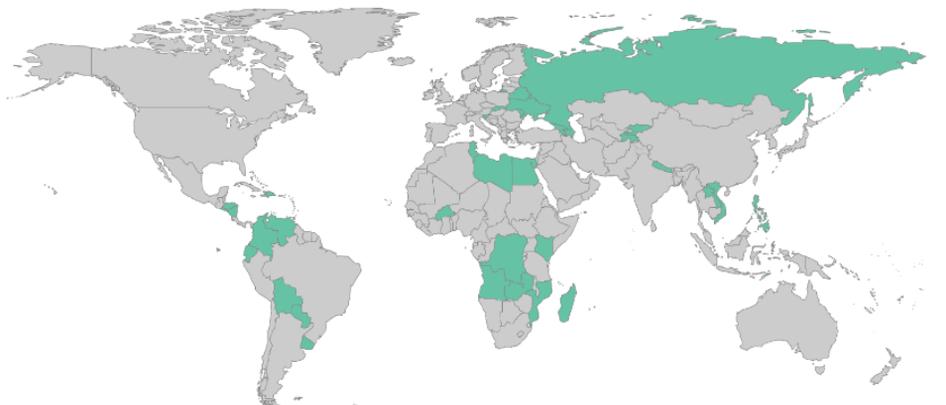


Figure 6 below shows the countries whose constitutions include the specific term “intellectual property” in their constitutions. Interestingly, the term “intellectual property” does not receive wide recognition in constitutional texts. As seen in Figure 6, except for in the Russian Federation and a few African and Asian countries, not many constitutions refer to the exact term “intellectual property.” Arguably, using the general term “intellectual property” in a constitution is advantageous for many reasons. One of them is its ability to send a message to local and foreign entities that the potential normative applicability of intellectual property and the term’s definitional boundaries within that country are open for interpretation. Keeping intellectual property an open principle would, according to Pierre Bourdieu, allow countries to treat legal disputes as “interpretive struggles” over the control of legal text,³²⁶ by facilitating purposive interpretation when needed and when particular local laws do not provide adequate protection.

The term “intellectual property” appears forty times in intellectual property clauses of different constitutions, and certain constitutions refer to intellectual property more than once. In addition, Figure 6 highlights one of the main parameters, namely border sharing and geographical proximity, that influence countries’ choices in what particular right or language to adopt in their constitutions.

326. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Judicial Field*, 38 HASTINGS L.J. 805, 818 (1987).

Figure 6: Constitutions Including the Term “Intellectual Property”



B. IN PRACTICE

Including intellectual property rights protection in constitutional bills of rights does not translate into actual protection and enforcement of these rights in practice. This speaks to the organizing principle that the mere existence of the right in a constitution can sometimes amount to a false signal, and such “[f]alse [signals] can be detected by a conspicuous absence of real enforcement mechanisms.”³²⁷ Applied to the present argument, the adoption of intellectual property clauses sends a false signal if it lacks the forcible enforceability. This Part offers an empirical answer to this assumption.

Moreover, this Section will explore the relations between the scope of de jure constitutional protection for intellectual property in a country, as measured by the Textual Ranking Index³²⁸ created for this Article, and the level of de facto protection for intellectual property in the applicable country, as measured by two available comparative data indices commonly used in relevant literature.³²⁹

327. Versteeg, *supra* note 43, at 707.

328. *See* Table 1.

329. For an application of the indices in literature, see Lehavi & Licht, *supra* note 185, at 163–66; *see also* Benjamin Balsmeier & Julie Delanote, *Employment Growth Heterogeneity under Varying Intellectual Property Rights Regimes in European Transition Economies: Young vs. Mature Innovators*, 43 J. COMP. ECON. 1069, 1072 (2015) (utilizing the IPR Index to study employment growth patterns in various IP protection regime, claiming the index is “is arguably one of the best available measures directly related to IP,” and explaining why it provides “a more objective and complete view on the strength of a particular IPR regime” than another commonly used index, the Ginarte-ParkIndex Index); Antonio Della Malva & Enrico Santarelli, *Intellectual Property Rights, Distance to the Frontier, and R&D: Evidence from Microdata*, 6

1. *Textual Ranking and Enforcement*

Table 1 below provides the scores that various intellectual property clauses were assigned:

Table 1: Textual Ranking Index

| Where the Constitutional Clause | Score |
|---|-------|
| Explicitly provides “IP shall be protected” and mentions specifically all 3 of the 3 main IP branches/elements (author/Copyright, inventor/Patent, invention, Trademark) and additional principles such as moral rights | 9 |
| Explicitly provides “IP shall be protected” and mentions specifically all 3 of the 3 main IP branches/elements (author/Copyright, inventor/Patent/invention, Trademark). | 8 |
| <i>Note:</i> when the clause’s text provides “and other rights”—the score that was given was 8 | |
| Explicitly provides “IP shall be protected” and mentions specifically 2 of the 3 main IP branches/elements (author/Copyright, inventor/Patent/invention, Trademark) | 7 |
| Explicitly provides “IP shall be protected” and mentions specifically 1 of the 3 main IP branches/elements (author/Copyright, inventor/Patent/invention, Trademark) | 6 |
| Explicitly provides “IP shall be protected” | 5 |
| No explicit mentioning of IP but refers to 3 out of the 3 additional elements/branches (author/Copyright, inventor/Patent/invention, Trademark) | 4 |
| No explicit mentioning of IP but refers to 2 out of the 3 additional elements/branches (author/Copyright, inventor/Patent/invention, Trademark) | 3 |
| No explicit mentioning of IP but refers to 1 out of the 3 additional elements/branches (author/Copyright, inventor/Patent/invention, Trademark) | 2 |
| Special cases with weak reference to intellectual property | 1 |

EURASIAN BUS. REV. 1, 7–9 (2016) (using the index to measure the intersection between the strength of intellectual property rights and incentives for innovation at various stages of technological frontiers); George Geronikolaou & Ioannis Mourmouris, *On the Effect of Technological Gap on International Patenting: A Multi-Criteria Approach*, 6 BRITISH J. ECON., MGMT. & TRADE 256, 257 (2015); Roger Smeets & Albert de Vaal, *Intellectual Property Rights and the Productivity Effects of MNE Affiliates on Host-Country Firms*, 25 INT’L BUS. REV. 419, 424 (2016).

We then applied the scores in Table 1 to the data gathered from two particular indices that this Article utilized. One is the IPR Index, which was constructed by the Property Rights Alliance, an advocacy group inspired and led by Hernando de Soto.³³⁰ The other is the GIPC Index.³³¹ Figures 7 and 8 illustrate the relationship between the applicable country's textual ranking and the IPR and GIPC intellectual property overall protection scores, respectively. Each of the dots represents the specific country observation, and the correlation line represents the relationship between each pair of variables. The linear prediction corresponds with the negative association found in the correlative relations between the textual ranking index and the overall intellectual property protection indices (IPR at (-0.134); GIPC at (-1.585)).

330. Celebrating a decade to its operation, the IPR Index is a comprehensive index used for the measurement of the level of intellectual property protection in 128 countries as of 2016, covering to date 98.26% of the world GDP and 92.92% of the world population. It is a part of a more extensive effort to measure property rights protection. The cumulative overall intellectual property score is comprised of three indices: protection of intellectual property rights, patent protection, and copyright piracy. The scoring of the IPR Index, an opinion-based index, is based on an outcome of a survey done with expert participants in each country who were asked to rate their nation's intellectual property protection. The patent protection index is based on five criteria: coverage, membership in international treaties, restrictions on patent rights, enforcement, and duration of protection. The copyright piracy index is based on the BSA Global Software Survey: The Compliance Gap report. See Sary Levy Carciente, *International Property Rights Index 2016*, PROPERTY RIGHTS ALLIANCE 8–9 (2016), <http://s3.amazonaws.com/ipri2016/IPRI+2016+Full+Report.pdf>.

331. The GIPC Index maps the level of intellectual property protection in forty-five countries, which collectively account for nearly 90% of global GDP. The cumulative overall score is based upon thirty indicators extended across six categories: Patents, Copyrights, Trademarks, Trade Secrets, Enforcement, and International Treaties.

Figure 7: Relations Between Textual Ranking Index and GIPC Overall IP Rights Index (U.S. Chamber of Commerce)

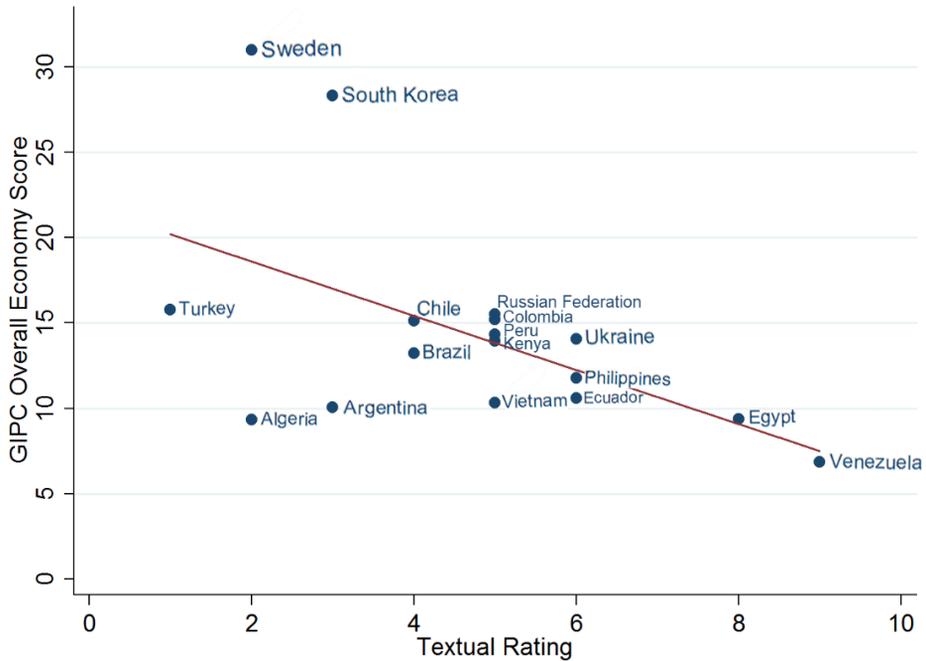
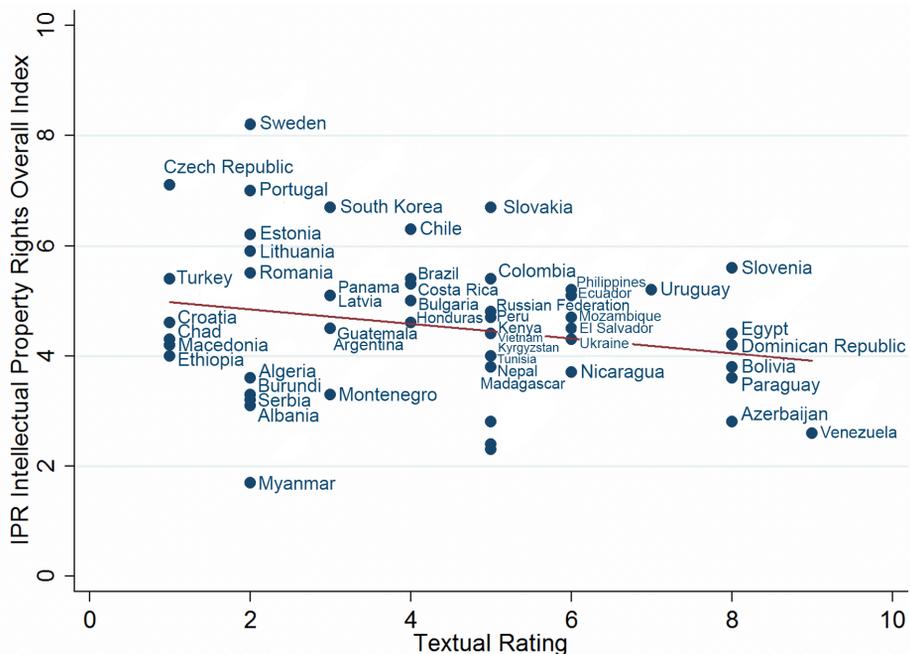


Figure 8: Relations Between Textual Ranking and IP Rights Protection Overall Index (Property Rights Alliance)



These Figures indicate that the more a country's constitution expands the scope of the de jure constitutional protection by explicitly specifying the main branches of intellectual property rights (e.g., trademarks, copyright, and patents) and tries to encompass different intellectual property doctrines, principles (e.g., moral rights), and rightsholders (e.g., indigenous people), the less intellectual property protection is given de facto in the manner captured by the indices. For example, Venezuela, a country whose constitutional language offers broad de jure protection for intellectual property rights,³³² was given a maximum textual ranking of 9. However, Venezuela had the lowest overall GIPC score: 6.88 out of 35. Similarly, Azerbaijan specifically includes in its constitutional language de jure protection for “[c]opyright, patent rights and other rights for intellectual property” and safeguards “the right for intellectual property,”³³³ which awarded it almost the maximum textual ranking score of 8. But it only had a minimal overall IPR score for de facto protection: 2.8 out of 10. Egypt also provides constitutional protection for “all types of intellectual property in all fields,”³³⁴ which rendered it a textual ranking of 8. But it had only low scores for de facto protection: 4.4 out of 10 for overall IPR score and 9.4 out of 35 for overall GIPC score. In contrast, Sweden had a 30.99 overall GIPC score and 8.2 overall IPR score, making it a leading nation in de facto protection for intellectual property, despite having a textual ranking score of only 2 for de jure protection. While there is not enough to prove or disprove a causation—whether a strong de jure constitutional intellectual property protection actually *causes* lower levels of de facto intellectual property protection—these findings portray a paradoxical reality.

Other findings from the dataset uncover the other half of the apparent paradox, where countries with strong de facto protection of intellectual property do not offer broad, explicit protection of intellectual property in their constitutions. The majority of countries with the highest IPR and GIPC

332. Article 98 of the current constitution of Venezuela provides:

The State recognizes and protects intellectual property rights in scientific, literary and artistic works, inventions, innovations, trade names, patents, trademarks and slogans, in accordance with the conditions and exceptions established by law and the international treaties executed and ratified by the Republic in this field.

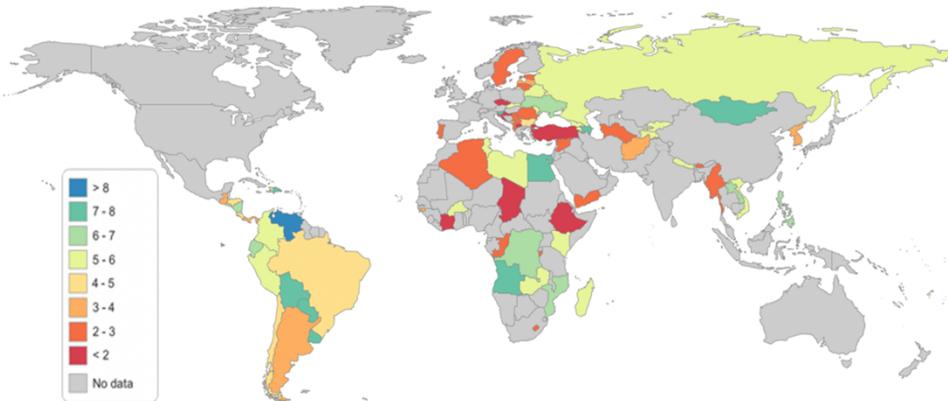
CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA 1999, título 3, capítulo 6, art. 98 (Venez.). Article 124 further grants specific protection to indigenous knowledge and collective intellectual property: “Collective intellectual property rights in the knowledge, technologies and innovations of native peoples are guaranteed and protected.” *Id.* at título 3, capítulo 8, art. 124 (Venez.).

333. THE CONSTITUTION OF THE REPUBLIC OF AZERBAIJAN 1995, art. 30 (Azer.) (1995).

334. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, art. 69 (Egypt).

scores—Singapore, Switzerland, France, Belgium, Denmark, the Netherlands, Finland, Japan, Germany, the United Kingdom, and the United States, with the exception of Sweden—do not refer to intellectual property as a fundamental socioeconomic right in their constitutions. The geographical spread of textual ranking worldwide, illustrated in Figure 9 below, demonstrates the almost inevitable pattern that many countries with the highest Textual Ranking Index scores are developing countries.

Figure 9: Textual Ranking of Constitutional Substantive Intellectual Property Clause



It is important to note that the average textual ranking for developing countries (4.431) is higher than that for developed countries (2.929). This finding suggests that the identified intentional and unintentional motivations are the reasons why countries adopt intellectual property as a fundamental constitutional right. Figure 9 confirms that the regimes that reference intellectual property more often are the ones that have incentives to pay lip service, or send false signals, for the purpose of appeasing the international community, powerful states, and foreign investors. Meanwhile, those countries are also the most likely to lack the ability to honor or enforce these rights due to various reasons, such as political unrest and economic instability.

Arguably, these findings further suggest that a request to only formally comply with certain norms of liberal democracy,³³⁵ “world society,” and

335. See, e.g., B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 15 (2004) (observing that the United Nations requests “formal compliance with the norms of liberal democracy”).

“world culture”³³⁶ by incorporating certain norms into constitutional documents is a “cynical exercise,”³³⁷ illegitimately motivated by both the international community as a whole and its dominant actors.³³⁸ This is another way to explain the constitutional paradox portrayed in this Article.

2. *Compliance and World Bank Governance Indices*

A country’s levels of democracy and governance “might be expected to affect its propensity for constitutional compliance.”³³⁹ Table 2 illustrates the relationship between the de jure constitutional protection, as measured by the Textual Ranking Index,³⁴⁰ and six different Worldwide Governance Indicators (WGI) constructed by the World Bank.³⁴¹ These indicators are commonly used in the literature to demonstrate governance-related characteristics in different countries.³⁴² As shown in Figure 10 below, the indicators used are: voice and accountability, control of corruption, rule of law, regulatory quality, political stability and absence of violence, and government effectiveness.³⁴³

336. Law & Versteeg, *supra* note 27, at 1179 (providing that certain countries are under pressure to comply with the norms of “world culture” and “world society” by making these norms part of their constitutions); *see also* John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144, 153 (1997) (arguing that formal compliance with norms of “world culture” drives countries in order to become members of the international society).

337. Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 919.

338. *See* WORLD SOCIETY: THE WRITINGS OF JOHN W. MEYER 222 (Georg Krücken & Gili S. Drori eds., 2009).

339. Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 919.

340. *See* Table 2.

341. *Worldwide Governance Indicators 1996–2017*, THE WORLD BANK (2018), <http://data.worldbank.org/data-catalog/worldwide-governance-indicators>.

342. *See, e.g.*, Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 L. & SOC. INQUIRY 100, 106 (2017) (noting that the “[t]he World Bank RoL Index is probably the most well-known and most commonly used in social science research” but that it is “heavily criticized”); *see also* CHRISTOPHER POLLITT & GEERT BOUCKAERT, PUBLIC MANAGEMENT REFORM: A COMPARATIVE ANALYSIS—INTO THE AGE OF AUSTERITY 129–37 (2017); Jeswald W. Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 HARV. INT’L L.J. 127, 171–74 (2017); Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409, 434–37 (2014); Srividya Jandhyala, *Property Rights and International Investment in Information Technology Services*, 34 STRATEGY MGMT. J. 877, 881 (2013); Bonnie Gai Buchanan, Quan Vu Le & Meenakshi Rishi, *Foreign Direct Investment and Institutional Quality: Some Empirical Evidence*, 21 INT’L REV. FIN. ANALYSIS 81, 83–85 (2012); André Broome & Joel Quirk, *The Politics of Numbers: The Normative Agendas of Global Benchmarking*, 41 REV. INT’L STUD. 813, 814–15 (2015).

343. As per the description provided by the World Bank, the Government Effectiveness Index captures, inter alia, the degree of the country’s independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government’s commitment to such policies. The Voice and Accountability Index captures, inter alia, the

As Table 2 further demonstrates, the Textual Ranking Index has a statistically significant negative correlation with the control of corruption and rule of law, and a clear negative correlation was found between the Textual Rating Index and the different WGI. These relations generally suggest that countries that have expanded their de jure constitutional protection for intellectual property rights actually have lower standards for governance.

Table 2: Relations Between the Textual Ranking Index and Six World Bank Governance Indicators

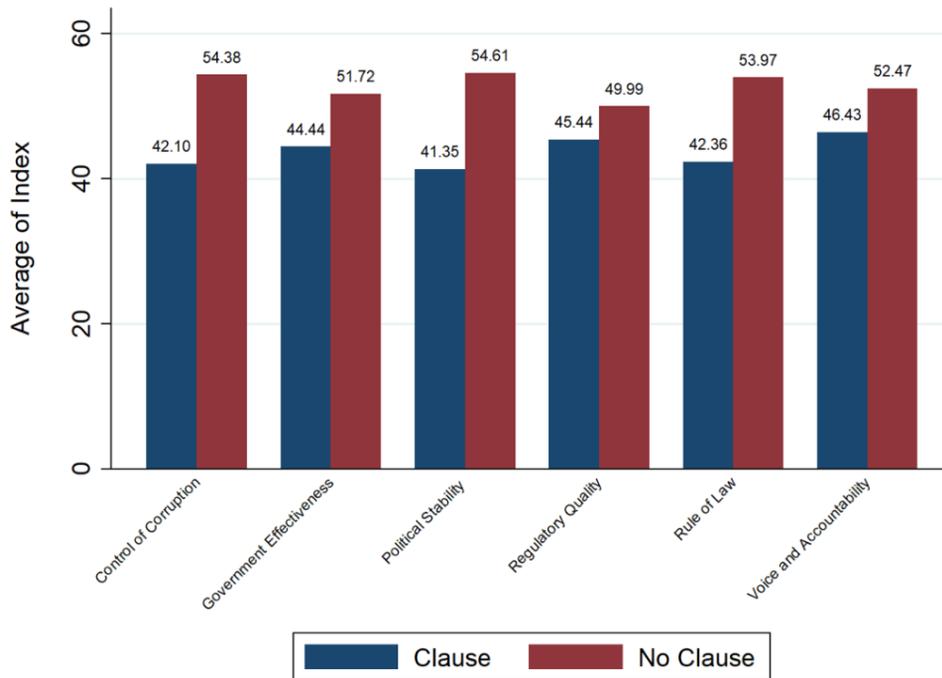
| | (1) | (2) | (3) | (4) | (5) | (6) |
|------------------------------|--------------------------|-----------------------------|------------------------|-----------------------|----------------------|-----------------------------|
| | Control of Corruption | Government Effectiveness | Political Stability | Regulatory Quality | Rule of Law | Voice and Accountability |
| Textual Ranking Rating | -3.158** (1.342) | -2.671* (1.358) | -1.295 (1.301) | -2.205 (1.395) | -3.085** (1.354) | -1.624 (1.307) |
| Constant | 52.515*** (6.275) | 52.210*** (6.350) | 44.661*** (6.115) | 51.949*** (6.546) | 51.565*** (6.332) | 50.081*** (6.143) |
| Observations | 79 | 79 | 78 | 78 | 79 | 78 |

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

perceptions of the extent to which the country's citizens are able to participate in selecting their government. The Rule of Law Index captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. This index can shed light on the level of de facto protection given to intellectual property rights in the relevant countries, for which we used the GIPC and IPR indices. The Regulatory Quality Index captures perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development. The Political Stability Index measures the likelihood of destabilization of the government by unconstitutional or violent means, including terrorism. Finally, the Control of Corruption Index captures perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.

Figure 10: Averages of Six World Bank Indicators of Governance Indicators in Countries With/Without an IP Clause



A country's ability to respect its constitutional commitments can be "partly a function of how ambitious the constitution itself happens to be."³⁴⁴ If this is correct, what differences with regards to the six WGI would one expect to find between constitutions that protect intellectual property rights and those that do not? Figure 10 illustrates that all six governance indices are on average significantly lower in countries with any type of intellectual property clause in their constitutions whether authoritative, substantive, or both. A well-functioning market order is expected to be stable and to recognize the importance of these six indicators, and a lack of recognition is harmful to a country's economic growth.³⁴⁵

344. Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 924.

345. See, e.g., Philip Keefer & Stephen Knack, *Polarization, Politics and Property Rights: Links Between Inequality and Growth*, 111 PUB. CHOICE 127 (arguing that polarization causes a deterioration in the security of property rights and there is a link between polarization and economic growth); László Bruszt, *Market Making as State Making: Constitutions and Economic Development in Post-communist Eastern Europe*, 13 CONST. POL. ECON. 53, 60 ("[M]oderate wage demands accepted by labor can raise profitability thereby increasing the level of investment and securing government revenues, to be used for upgrading infrastructure and investment in human capital, leading to stabilization of employment and increases in wages in the framework of stable economic growth.") (internal citation omitted).

A state that is attentive to these indicators protects economic actors' freedom to safely transact with each other without the fear of being deprived of their private properties by either economic predators or arbitrary state intervention. Formal constitutions tend to protect private property, but this does not necessarily guarantee de facto protection on the ground³⁴⁶—intellectual property is no different. The unfit inclusion of intellectual property in certain countries' constitutions will not create the expected practical results.

3. *Textual Ranking and Diffusion*

When legal norms diffuse from one country to another, legislatures are expected to transplant them adequately so that they can effectuate the anticipated legal change. As frequently mentioned in this Article, a successful policy diffusion—or legal transplant³⁴⁷ process or migration of norms—albeit asymmetrical power relations, may not carry the anticipated practical results. In their attempt to answer the question of “[w]hy . . . some countries adopt exogenous rules into their domestic law when those rules contravene their specific interests,”³⁴⁸ Jean-Frederic Morin and Edward Richard Gold developed “an original index of IP protection in 121 developing countries over more than [fourteen] years” called the Intellectual Property Transplant Index.³⁴⁹ Their Index measures the adoption of intellectual property rules that are not required under the TRIPs Agreement and are specific to the United

346. See generally Versteeg, *supra* note 43; see also Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1592 (2010).

347. Legal transplantation denotes processes where legal norms are “imported and exported not only because of their intrinsic worthiness, but also because the process of transplantation is conducive to sending various types of signals to various types of audiences.” See Assaf Likhovski, *Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling*, 10 THEORETICAL INQUIRIES L. 619, 621 (2009). On legal transplants, see generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 441 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3 (1994); see also Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1074–77 (2011) (discussing copyright as a judicial legal transplant); Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 924.

348. Jean-Frédéric Morin & Edward Richard Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries*, 58 INT’L STUD. Q. 781, 781 (2014).

349. *Id.*

States' demands for increased intellectual property protection.³⁵⁰ This index ranks countries on a 0–9 scale.³⁵¹

The dataset reveals that “[t]he higher a country scores, the more it has aligned its [intellectual property] rules with those of the US.”³⁵² As shown in Figure 11 below, there is a negative correlation between the Textual Ranking Index and the Intellectual Property Transplant Index introduced by Morin and Gold.³⁵³ Together, these two findings suggest that countries with extended de jure constitutional protection for intellectual property adopt intellectual property legislation that is *less* aligned with U.S. intellectual property laws. This can be explained through the United States' emphasis on influencing the enactment of secondary legislation in other countries that can textually fit their own. In contrast, constitutional text adopted by developing countries cannot be similar to that of the United States because the U.S. Constitution lacks a provision protecting intellectual property as a socioeconomic fundamental right.³⁵⁴

350. *Id.* at 785.

351. *Id.*

352. *Id.*

353. *Id.*; see, e.g., Jean-Frédéric Morin, Kevin Daley & E. Richard Gold, *Having Faith in IP: Empirical Evidence of IP Conversions*, 3 WIPO J. 93, 94–97 (2011) (explaining the role of socialization as a significant force in the export and import of intellectual property rules); E. Richard Gold, Jean-Frédéric Morin & Erica Shadeed, *Does Intellectual Property Leads to Economic Growth? Insights from a Novel IP Dataset*, 13 REG. GOV. 107 (2019) (introducing an index that evaluates the strength of intellectual property in 124 developing countries for the years 1995 to 2011 and empirically examining other aspects relevant to basic assumptions that intellectual property leads to greater levels of technology transfer and increases inventive activity).

354. See U.S. CONST. art. I, § 8.

legislation to U.S. intellectual property rules. Second, the Intellectual Property Clause Period refers to the years that have lapsed since the year the country first introduced a substantive intellectual property clause into its constitution. For example, Haiti, with a formal intellectual property clause adopted in 1801, has an Intellectual Property Clause Period index of 216. Finally, the Sum Treaties Index summarizes the amount of selected Intellectual Property, WIPO, and WTO international treaties signed and ratified by the applicable country.³⁵⁶

An analysis of the data exhibits a statistically significant negative correlation between the Textual Ranking Index and the IPR Overall Index and the GIPC Overall Index, and a statistically significant positive correlation between the Textual Ranking Index and the Sum WL, Sum Total WL, and Intellectual Property Clause Period indices. This underlines the fallacy of de jure constitutional intellectual property protection, whereby a *broader* intellectual property clause, in terms of textual protection (as measured by the textual ranking), is associated with (1) *lower* intellectual property de facto indices and (2) a *higher* number of appearances on the WL.³⁵⁷

Moreover, countries with broader textual constitutional intellectual property protection also exhibit a longer period of adoption, meaning not only that their intellectual property clauses are more extensive, but also that substantive intellectual property clauses have been in their constitutions for a longer period of time. Yet, as discussed, higher textual ranking, although correlated with longer periods of de jure protection, are negatively associated with de facto protection. This is further demonstrated by Figures 12 and 13.

Figures 12 and 13 illustrate the relationship between the total appearances of a specific country in the WL and PWL, respectively, and the first year it introduced a substantive intellectual property clause in its constitution. Countries that were first to adopt an intellectual property clause as a fundamental constitutional socioeconomic right around the early to mid-1800s, paradoxically also appear more frequently, almost permanently, in the

356. This index included the following international intellectual property treaties: Berne Convention, TRIPS Agreement, The Patent Cooperation Treaty (PCT), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization, Hague Agreement Concerning the International Registration of Industrial Designs, Madrid Agreement Concerning the International Registration of Marks, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT), and Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

357. The relationship between the Textual Ranking Index and the WL indices is further illustrated in Figure 13.

WL and PWL. For example, Venezuela, with twenty-seven appearances, adopted an intellectual property right clause in 1830, while Argentina, Colombia, and Chile, with twenty-six appearances each, adopted such a clause in similar times. Interestingly, two-thirds (sixteen out of twenty-five) of the countries that appear eighteen times or more on either the WL or PWL have adopted and recognized intellectual property as a fundamental socioeconomic right in their constitutions.

Table 3: Relations Between the Textual Ranking Index and the Main Indices Explored

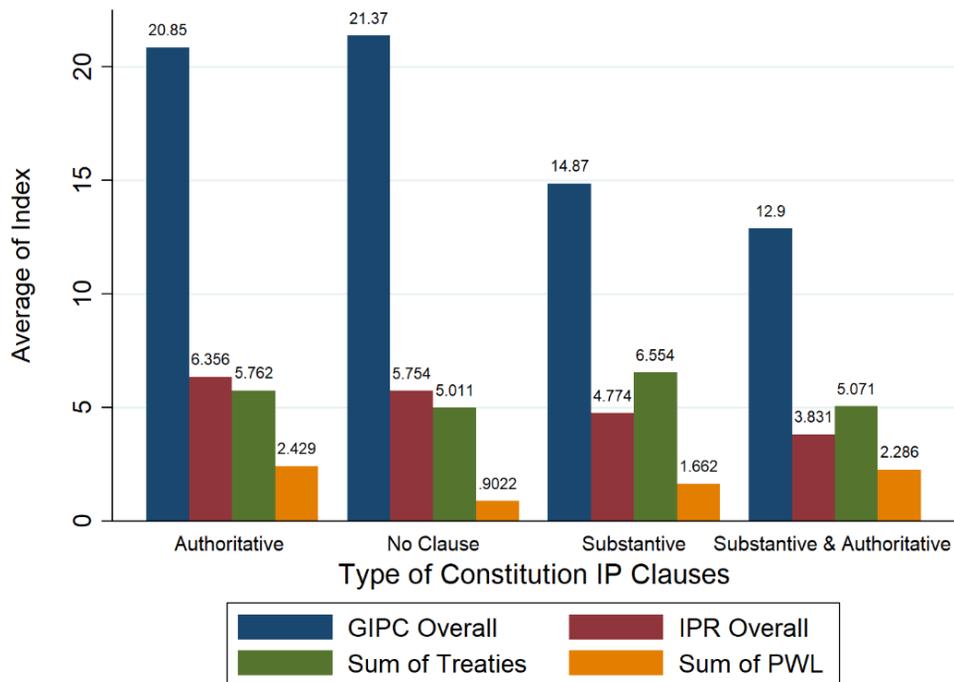
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
|----------------|-------------|--------------|---------|---------|--------------|--------------|--------------------|------------------|
| | IPR Overall | GIPC Overall | Sum WL | Sum PWL | Sum Total WL | Sum Treaties | Morin et al. Index | IP Clause Period |
| Textual Rating | -0.134* | -1.585** | 0.698* | 0.204 | 0.902* | -0.072 | -0.173 | 5.502* |
| | (0.076) | (0.665) | (0.378) | (0.224) | (0.494) | (0.129) | (0.124) | (3.217) |
| Constant | 5.117*** | 21.772*** | 2.246 | 0.921 | 3.166 | 6.592*** | 3.968*** | 35.806** |
| | (0.359) | (3.371) | (1.767) | (1.049) | (2.310) | (0.605) | (0.600) | (15.043) |
| Observations | 56 | 17 | 79 | 79 | 79 | 79 | 64 | 79 |

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The linear regression findings correspond with the general findings arising from Figure 12, which illustrates the averages of the de facto intellectual property protection indices (GIPC and IPR), number of appearances in the priority watch list, and the number of intellectual property treaties signed by each country, grouped by the intellectual property clause type. Countries with no de jure constitutional protection for intellectual property exhibit on average the highest level of de facto intellectual property protection according to the GIPC index (21.37) and the lowest number of appearances in the PWL (0.9022). They also signed fewer intellectual property treaties on average (5.011). Countries with both substantive and authoritative clauses exhibit the lowest level of de facto intellectual property protection—with an average GIPC score of 12.9 and IPR score of 3.831—and the second highest average of appearances in the PWL (2.286).

Figure 12: Averages of the GIPC Overall Index, IPR Overall Index, Sum of Treaties, and Sum of PWL per Constitutional IP Clause



5. *Intellectual Property Clause Period Index*

It would be intuitive to assume that a country with a longer constitutional history in a particular field would better protect the rights associated with that field. However, when comparing the total number of WL and PWL appearances with the first year of adoption of a substantive intellectual property clause, the opposite trend emerges. Figure 13 below shows that countries with the most historical constitutional intellectual property clause appear more often on both the WL and PWL.

Table 4: Relations Between the Intellectual Property Clause Period Index and the Main Indices Explored

| | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
|------------------|---------------------|----------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| | IPR Overall | GIPC Overall | Sum WL | Sum PWL | Sum Total WL | Sum Agreements | Morin et al. Index | Textual Rating |
| IP Clause Period | 0.002 (0.003) | -0.018 (0.021) | 0.052*** (0.012) | 0.021*** (0.007) | 0.072*** (0.015) | 0.001 (0.005) | -0.001 (0.004) | 0.007* (0.004) |
| Constant | 4.408*** (0.249) | 16.156*** (2.570) | 2.105** (1.022) | 0.567 (0.634) | 2.671** (1.312) | 6.241*** (0.382) | 3.287*** (0.373) | 3.774*** (0.330) |
| Observations | 56 | 17 | 79 | 79 | 79 | 79 | 64 | 79 |

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 4 above illustrates the relations—found by calculating the linear regression—between the Intellectual Property Clause Period and the IPR, GIPC, and six WGI.

As Tables 3 and 4 demonstrate, there is a statistically significant positive correlation between the Intellectual Property Clause Period Index and Sum WL, Sum PWL, Sum Total WL, and Textual Rating Index, as well as a statistically significant positive correlation with the Voice and Accountability Index. In other words, a longer period of substantive constitutional protection is associated with more appearances in both the WL and PWL, which indicates weaker de facto intellectual property protection, as well as a higher textual ranking, which indicates broader de jure constitutional protection.

VI. CONCLUSION

“[T]he enlightenment hope of written constitutions”³⁵⁸ is grounded in the presumption that “constitutional commitments are potentially credible ones and send a strong signal to potential buyers and investors.”³⁵⁹ Inquiries into formal constitutions are invaluable for understanding change in the broader constitutional order. At the same time, these inquiries reveal fallacies that question the meaning and strength of constitutional rights. One of these

358. Ackerman, *supra* note 13, at 772.

359. Goderis & Versteeg 2013, *supra* note 1, at 114; *see also* Farber, *supra* note 4, at 85–94, 98.

fallacies is a two-century-old phenomenon that has been absent from scholarly discourse—the belief that constitutionalizing intellectual property as a fundamental right will “send a message about the priority of particular policies,”³⁶⁰ thereby ensuring protection to authors, inventors, and other rightsholders. This Article provided modest theoretical and empirical findings which confirmed this fallacy. The findings here are consistent with empirical studies that have found a negative correlation between formal rights and the actual respect of other socioeconomic rights.³⁶¹ The case of intellectual property provides further evidence to the argument that the “poorest nations by definition lack the resources to honor the kinds of positive socioeconomic rights that have grown increasingly popular in recent decades.”³⁶²

This Article highlights the neglected value of constitutional intellectual property rights as an exemplar of the paradoxical consequences that global constitutionalism processes introduce and often unilaterally impose on certain countries. It demonstrates that there are rights that do not deserve constitutional mention³⁶³ and illustrates how bills of rights can be, as defined by Madison, mere “parchment barriers”³⁶⁴ and, therefore, unreliable to some extent.

Baron de Montesquieu argued that “[laws] should be so specific to the people for whom they are made, that it is a great coincidence if those of one nation can suit another.”³⁶⁵ Empirical evidence has shown that “stronger intellectual property rights protection corresponds to higher economic growth rates in a cross-country sample.”³⁶⁶ In order to be economically attractive and signal local stability, countries will adopt rights that do not fit the people for whom they are made.³⁶⁷

There are good arguments for countries, especially developing countries, to choose to constitutionalize intellectual property rights. On one hand, strong intellectual property rights encourage and “support technology transfer by reducing the risks to establish multinational corporations operations in

360. Elkins, Ginsburg & Simmons, *supra* note 3, at 81.

361. *See* Law & Versteeg, *Sham Constitutions*, *supra* note 23, at 868–69.

362. *Id.*

363. *See* Finnis, *supra* note 42, at 44.

364. *See* THE FEDERALIST NO. 48, *supra* note 24, at 256.

365. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 295 (David Wallace Carrithers ed., 1977) (1748).

366. David M. Gould & William C. Gruben, *The Role of Intellectual Property Rights in Economic Growth*, 48 J. DEV. ECON. 323, 345 (1996).

367. MONTESQUIEU, *supra* note 365.

developing countries.”³⁶⁸ On the other hand, arguments against reinforcing intellectual property rights are motivated by enforcement challenges and “welfare losses due to market power pricing, the costs of closing down infringing activities, higher imitation costs and other risks related to parenting indigenous knowledge.”³⁶⁹

In many cases, imposing a duty on countries to protect intellectual property rights in their constitutions ignore the cultural history and social needs of these countries, leaving them unable to meet their constitutional commitments. These “unromantic”³⁷⁰ constitutional elements, dictated by powerful external actors, are mainly written for an international audience. One of the main consequences of this “unromantic”³⁷¹ process is a widening of the gap between de jure and de facto protection of constitutional rights.³⁷² Various intentional and unintentional motivations fuel this process and provide the theoretical basis that reveals the fallacy behind making intellectual property a fundamental constitutional right.

As plural subjects, states share a collective commitment to preserve their social and political structure, including unique cultural building blocks such as their own constitutional list of rights and liberties. A constitution is “the last stronghold of domestic law”³⁷³ and the unique cultural script of a nation’s collective will. And intellectual property regulates ownership of intangibles that represent the cultural and innovative progress of that nation. The constitutionalization process of intellectual property as socioeconomic fundamental rights must, therefore, be tailored to fit the people for whom they are made.³⁷⁴

368. See Fabio Montobbio, Annalisa Primi & Valerio Strezi, *IPRs and International Knowledge Flows: Evidence from Six Large Emerging Countries*, 106 J. ECON. SOC. GEOGRAPHY 187, 188 (2015).

369. *Id.*

370. Law, *supra* note 72, at 38.

371. *Id.*

372. See Goderis & Versteeg 2013, *supra* note 1, at 126.

373. Moran, *supra* note 9, at 233–55.

374. MONTESQUIEU, *supra* note 365.