

The Rise of the Constitutional Protection of Future Generations

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ABSTRACT

Many comparative constitutional law scholars have listed constitutional rights and studied their historical development. However, as new waves of constitution-making arise, new rights emerge too. This article argues that future generations are a new holder of legal interest in constitutions worldwide, a consequential phenomenon that has been overlooked by the literature thus far. By looking at all national written constitutions, historical and contemporary, we present a chronology of the constitutionalization of future generations and show how they went from a handful to 41% of all constitutions as of 2021 (81 out of 196). Through content analysis, we show how they have gradually become part of a modern, universalist language of constitution-making and have reframed older rights from abstraction into the protection of people in the future. We also assess the strength of these provisions, analyzing their *de jure* intensity and *de facto* repercussions, the latter through case studies from all over the globe.

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INTRODUCTION

The history of humanity's morality has been described as an expanding circle.¹ Over thousands of years, humans have gone from recognizing only their family and members of their small tribes as worthy of moral consideration to acknowledging the moral relevance of humans beyond their immediate social circle, the whole of humanity, animals, and even more abstract beings, such as the environment and future generations—a process that is still on-going.² This moral circle expansion has been reflected in institutions worldwide. For example, countries such as Austria, Brazil, Egypt, Germany, India, Luxembourg, Slovenia, and Switzerland have enacted constitutional provisions directly protecting the interests of animals.³ The European Union has recognized animal sentience explicitly in several pieces of their legislation, most notably in Article 13 of the Treaty on the Functioning of the European Union. This movement has also been noted in the domestic law of European countries such as Finland, France, Greece, Lithuania, Norway, Poland, and Switzerland.⁴ The Ecuadorian constitution of 2008 was the first to recognize the

¹ See, e.g., W. E. H. LECKY, *HISTORY OF EUROPEAN MORALS FROM AUGUSTUS TO CHARLEMAGNE* (1869); PETER SINGER, *THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY* (1st ed. 1981).

² See, e.g., Simon M. Laham, *Expanding the moral circle: Inclusion and exclusion mindsets and the circle of moral regard*, 45 *JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY* 250–253 (2009); Jesse Graham et al., *Centripetal and centrifugal forces in the moral circle: Competing constraints on moral learning*, 167 *COGNITION* 58–65 (2017); Adam Waytz et al., *Ideological differences in the expanse of the moral circle*, 10 *NATURE COMMUNICATIONS* 4389 (2019).

³ Jessica Eisen, *Animals in the constitutional state*, 15 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 909–954, 911 (2017). See also Kristen A. Stilt, *Constitutional Innovation and Animal Protection in Egypt*, 43 *LAW & SOCIAL INQUIRY* 1364–1390 (2018).

⁴ Charlotte E. Blattner, *The Recognition of Animal Sentience by the Law*, 9 *JOURNAL OF ANIMAL ETHICS* 121–136 (2019). Another example of on-going debate about the moral expanding circle within the law is the United States, where litigants have argued for the expansion of legal personhood beyond humans, such as to animals (*Nonhuman Rights Project v. Lavery*, as described by K ANDREWS ET AL., *CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF* [2018]) and ecosystems (*Colorado River Ecosystem v. Colorado*, as described by Laura Spitz & Eduardo Moises Penalver, *Nature's Personhood and Property's Virtues*, 45 *HARVARD ENVIRONMENTAL LAW REVIEW* 67–97 (2021)).

rights of nature,⁵ followed by Bolivia with its *Ley de la Madre Tierra*.⁶ In New Zealand and India, rivers were granted legal personhood in 2017.⁷

This article investigates another frontier of moral expansion within the law that has become increasingly prevalent and relevant yet has received little attention: the global constitutional protection of future generations. Future generations have gradually become more prevalent in constitutions in recent decades. As of 2021, 41% of constitutions worldwide reference future generations (81 out of 196),⁸ a substantial growth considering that from 1789 to the late 1960s, less than ten did so. Why do so many constitutions increasingly refer to future generations? We argue that the rise in the constitutional protection of future generations is not exclusively a product of the growth in more comprehensive constitutionalism⁹ but rather represents a new way of constitutions to frame rights.

To substantiate our argument, we provide an empirical assessment of all Large-C constitutions that have ever referred to future generations.¹⁰ The data we employ

⁵ Erin Daly, *The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature Case Note*, 21 REV. EUR. COMP. & INT'L ENVTL. L. 63–66 (2012).

⁶ Paola Villavicencio Calzadilla & Louis J. Kotzé, *Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia*, 7 TRANSNATIONAL ENVIRONMENTAL LAW 397–424 (2018).

⁷ Erin L. O'Donnell & Julia Talbot-Jones, *Creating legal rights for rivers: lessons from Australia, New Zealand, and India*, 23 ECOLOGY AND SOCIETY (2018).

⁸ We include the 193 UN member states, Kosovo, Palestine, and Taiwan. We preferred to be over-inclusive regarding these contested countries considering how exploratory our research object is. Palestine, for example, protects future generations in its constitution. Missing these data points would be detrimental to painting a complete picture of the constitutionalization of future generations.

⁹ Researchers found this movement not only related to rights in general, but also within each generation of rights: first (negative, civil/political rights), second (positive, socio-economic rights), and third (collective rights). See David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIFORNIA LAW REVIEW 1163–1257, 1247 (2011). Such expansion has been noted for decades, such as by John Boli, *World Polity Sources of Expanding State Authority and Organization, 1870-1970*, in INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL (George Thomas et al. eds., 1987), and; Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (Philip Alston ed., 1999). For one of the most recent works touching on the theme, see ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (2020).

¹⁰ Since we already had a large N of Large-C constitutions and provisions to analyze, we decided to defer the investigation of the protection of future generations in small-c constitutions for future research and focus on Large-C constitutions for the purpose of this article. Besides, since we investigated all constitutions across the world, we do not have reason to believe that our sample would lack validity considering that “Large-C

was collected from the Comparative Constitutions Project database,¹¹ one of the most comprehensive databases of constitutional texts.¹² We considered constitutional provisions mentioning future generations to be those that explicitly refer to a group of individuals who will live in the future whose interests should be taken into account.¹³ In total, we collected 157 constitutional provisions.¹⁴ The two authors then reviewed and coded all provisions separately, reading the original constitutions of their spoken languages whenever possible.¹⁵ In subsequent meetings, all codes were rediscussed and adjusted by consensus.

Through content analysis of such provisions, we show how constitutions shifted the context in which they protect future generations. Even though future generations have been present since the dawn of national written constitutionalism in 1789, constitutions moved away from associating them with traditionally liberal values, typically in preambles, to assigning them legal interest via establishing rights and state duties in different contexts, such as environmental and economic rights. This transformation seems to indicate that some traditional rights have been updated to include future generations as the holders of legal interest in what were previously

constitutions offer a fairly accurate picture of constitutional rights protection globally” (Chilton & Versteeg, *supra* note 10, at 96).

¹¹ We used data publicly available at Zachary Elkins, Tom Ginsburg & James Melton, *Constitute: The World’s Constitutions to Read, Search, and Compare*. (2021), www.constituteproject.org for contemporary constitutions and were granted access to the project’s internal database for historical constitutions. We are grateful to Zachary Elkins for granting us access to that database and to the whole team of the project for their outstanding work.

¹² For more about Constitute’s reliability, see Zachary Elkins et al., *Constitute: The world’s constitutions to read, search, and compare*, 27–28 *Journal of Web Semantics* 10–18 (2014).

¹³ More specifically, we searched into all historical and contemporary constitutions for “generation” and included variations of “future generations,” such as “all/following/subsequent/succeeding generations,” mentions of “inter-generational” values, and “posterity.” “Posterity,” the odd one out, was included as in all constitutions that use that term we found a similar meaning to “future generations”: a group of people located in the future whose interests should be taken into account. Even though we attempted to be exhaustive, we acknowledge that there may be references to other synonyms that have not been included in our search—we welcome feedback in this regard. Throughout this article, when we refer to constitutional provisions protecting “future generations,” we mean all of these synonyms.

¹⁴ Our dataset is publicly available at: <https://github.com/araujore/constitutionsfg>.

¹⁵ Constitutions in the following languages were read in their originals by at least one author: English, French, German, Portuguese, and Spanish. Of the 81 constitutions protecting future generations, 50 (62%) were read in their original language by at least one author.

merely abstract provisions. Such linguistic and substantive turn appears to be associated with the increased similarity of constitutional language to international human rights treaties,¹⁶ which has favored provisions assigning generic, broad duties and goals to the state that often goes beyond the jurisdiction's borders—part of which future generations increasingly are.

Nevertheless, has this phenomenon been followed by any relevant, *de facto* repercussions? Through theoretically informed sampling,¹⁷ we turn to case studies to argue that the growing constitutionalization of future generations is a relevant research object not only due to the rising significance of the *de jure* protection of future generations in constitutions but also because of the impact of this phenomenon has been experienced by various countries. We use Hungary, Germany, Brazil, Niger, South Sudan, and Tunisia as case studies to investigate how different provisions on future generations led to *de facto* outcomes to varying degrees. Countries vary in the strength of their *de jure* and *de facto* protections. Hungary is an example of strong *de jure* constitutional provisions with a robust institutional framework, even after Orbán's ascension to power. Germany and Brazil are cases where constitutional courts have recently used relatively weak *de jure* provisions on future generations to enforce pioneering measures to protect them. Niger and South Sudan have not experienced *de facto* outcomes yet, despite having strong *de jure* provisions that establish funds for future generations. Tunisia, which comparative constitutionalists have previously studied due to its enforcement of constitutional organizational rights,¹⁸ has become increasingly promising as civil society pressures the government to establish the constitutionally enshrined Commission for Sustainable Development and the Rights of Future Generations. These varied *de*

¹⁶ See David Law, *Constitutional Archetypes*, 96 TEXAS LAW REVIEW 153–243, 176 (2016) (noting the growing interdependence and similarity between international and constitutional law in the post-Cold War legal order globally); VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 262 (2010) (pointing to the increased interlock and overlap between international and constitutional law and how they often “address similar subjects”); Markus Böckenförde & Daniel Sabsay, *Supranational Organizations and Their Impact on National Constitutions*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 469 (Mark Tushnet, Thomas Fleiner, & Cheryl Saunders eds., 2013).

¹⁷ Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 American Journal of International Law 475, 479 (2015) (“(...) theoretically informed sampling, requires the researcher to choose cases in light of some knowledge of the underlying population of cases (...) Theoretically informed sampling is thus both more difficult to carry out than random sampling and more likely to allow the researcher to introduce some biases, perhaps inadvertently. At the same time, it is the preferred technique for comparative researchers as it is likely the strongest of available alternatives.”)

¹⁸ See Chilton & Versteeg, *supra* note 10, at 282.

jure and *de facto* levels of protection of future generations steaming from constitutions illustrate how relevant the phenomenon is across the world.

Despite their prevalence and relevance, relatively little has been written about the constitutionalization of future generations. Within comparative constitutional law, not even some of the most comprehensive studies in constitutional rights refer to future generations.¹⁹ The closest related literature is environmental constitutionalism, which accounts for some of the constitutional provisions referring to future generations but has not yet delved into them as a research object in itself.²⁰ On the other hand, scholars in related fields have already devoted attention to how institutions have protected future generations. There has been considerable scholarship on the design of institutions to protect future generations²¹ and on the legal protection of future generations more generally.²² There has also been research on constitutions and future generations, but with limited scope and not empirically.²³ This article aims at addressing that gap by providing an empirical analysis of this phenomenon.

Accordingly, this article is situated within and draws from the broader literature that studies the expansion of constitutional rights and their *de facto* repercussions.

¹⁹ See, e.g., the 60 constitutional rights analyzed by Law & Versteeg, *supra* note 10, and the 108 constitutional rights analyzed by Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 *International Review of Law and Economics* 1–19 (2014), neither of which mention future generations.

²⁰ See, e.g., Lael Weis, *Environmental constitutionalism: Aspiration or transformation?*, 16 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 836–870 (2018); Roderic O’Gorman, *Environmental Constitutionalism: A Comparative Study*, 6 *TRANSNATIONAL ENVIRONMENTAL LAW* 435–462, 436 (2017).

²¹ See, e.g., INIGO GONZALEZ-RICOY & AXEL GOSSERIES, *INSTITUTIONS FOR FUTURE GENERATIONS* (2016); MICHAEL ROSE, *ZUKÜNFTIGE GENERATIONEN IN DER HEUTIGEN DEMOKRATIE: THEORIE UND PRAXIS DER PROXY-REPRÄSENTATION* (2018); Tyler John & William MacAskill, *Longtermist Institutional Reform* (2020), <https://globalprioritiesinstitute.org/wp-content/uploads/Tyler-M-John-and-William-MacAskill-Longtermist-institutional-reform.pdf> (last visited Jul 16, 2021).

²² See, e.g., Wilfred Beckerman & Joanna Pasek, *The Rights of Future Generations, in JUSTICE, POSTERITY, AND THE ENVIRONMENT* (2001); Axel P. Gosseries, *Constitutions and Future Generations*, 17 *THE GOOD SOCIETY* 32–37 (2008); H. S. Cho & O. W. Pedersen, *Environmental Rights and Future Generations, in HANDBOOK OF CONSTITUTIONAL LAW* (Mark Tushnet, Thomas Fleiner, & Cheryl Saunders eds., 2013); 119 VISA KURKI, *LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN* (2017), <http://doi.org/10.1007/978-3-319-53462-6>.

²³ See, e.g., Inigo Gonzalez-Ricoy, *Constitutionalising Intergenerational Provisions, in INSTITUTIONS FOR FUTURE GENERATIONS* (Inigo Gonzalez-Ricoy & Axel Gosseries eds., 2016), <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198746959.01.0001/acprof-9780198746959-chapter-10>.

The question of why specific provisions are included in constitutions and others are not has puzzled legal scholars investigating the worldwide expansion of constitutionalism in recent decades.²⁴ Building on the hypothesis that constitutions reflect the values of their respective nations, some scholars have argued that the primary function of constitutions is to define and broadcast the identity and aspirations of a country rather than instrumentalize ends.²⁵ This theoretical perspective emphasizes the uniqueness of constitutional texts and hints at the unpredictability of constitution-making as a general phenomenon. On the other hand, empirical research on global constitutionalism has shown that, while constitutions do broadcast ideological aspirations, many are mostly standardized documents that vary only at the margin.²⁶ Since the first national written constitution in 1789 to this day, these researchers have found that constitution-making worldwide often follows predictable patterns that often do not aim at reflecting the people's values but rather converge toward universal rights and ready-made constitutional models.²⁷

While arguing that every constitution-making process equates to copy-pasting from a universal template is too radical, it is noticeable that a considerable extent of constitutionalism has been gradually standardized.²⁸ In that case, what has that

²⁴ See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VIRGINIA LAW REVIEW 771–797 (1997); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907–920 (2004); Mila Versteeg, *Unpopular Constitutionalism*, 89 INDIANA LAW JOURNAL 1133–1190 (2014); Chilton & Versteeg, *supra* note 10.

²⁵ See ALON HAREL, *WHY LAW MATTERS* (2014); Mark Tushnet, *Constitution-Making: An Introduction*, 91 Texas Law Review 1983 (2013); BEAU BRESLIN, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY* (2009); Mark Tushnet, *Some reflections on method in comparative constitutional law*, in *The Migration of Constitutional Ideas* 67–83 (Sujit Choudhry ed., 2007).

²⁶ See Law & Versteeg, *supra* note 10; Chilton & Versteeg, *supra* note 10.

²⁷ See Versteeg, *supra* note 26, at 1181 (noting the “functionalist” aspect of constitutions, i.e., how constitution-makers typically do not limit themselves to the aspiration of the people, but rather optimize their work adhering to principles proven to have achieved “a well-functioning government”); Tom Ginsburg, *Constitutional Advice and Transnational Legal Order*, in *CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER* 26, 28 (Gregory Shaffer, Tom Ginsburg, & Terence Halliday eds., 2019) (observing how constitutions are often drafted under suboptimal circumstances, leading to the adoption of “a common set of core institutions” related to the “perceived demands of the international community.”); Yash Ghai, *A Journey around Constitutions: Reflections on Contemporary Constitutions*, 122 South African Law Journal 804–831, 826 (2005) (describing his own experience as a constitution-maker in several countries and the similarities among constitutions of the same generation—“Constitutions are losing their national specificity”).

²⁸ See Hanna Lerner & David Landau, *Introduction to Comparative Constitution Making: The state of the field*, in *COMPARATIVE CONSTITUTION MAKING* 1, 16 (DAVID LANDAU &

empirical literature found on why such a movement is happening? While establishing clear-cut causation is considered nearly unachievable in comparative law,²⁹ the literature has pointed to many significant factors that have driven constitutional convergence. First, there is the transnational migration of constitutional ideas³⁰ and the convenience of reusing constitutional designs proven to be effective by other countries—the functional aspect of constitution-making.³¹ Particularly in times of political distress, adopting templates from abroad can be much easier than developing a constitutional framework from scratch.³² Second, countries regularly request advice from foreign constitutional drafters voluntarily.³³ This action signals their willingness to conform to and participate in the international community while simultaneously ensuring they are in tune with modern practices in constitution-making.³⁴ Third, there are various mechanisms through which international actors coerce constitution-makers to conform to their intentions, such as linking financial aid or political support to determined, aligned constitutional designs.³⁵ Lastly, constitution-making inevitably inherits the historical and political legacy of nations. A country's colonial history, its previous constitutions, and the era and region when a constitution is drafted are predictors of what will be included in it.³⁶

Moreover, what has such a convergence led to in terms of constitutional design? Since many of the influential factors of that trend are internationalist in nature, such as the importation of ideas, the call for advisers from abroad, and foreign

HANNA LERNER eds., 2019).

²⁹ See Andrew Keane Woods, *Discounting Rights*, 50 *New York University Journal of International Law and Politics* 509 (2018); Holger Spamann, *Empirical Comparative Law*, 11 *Ann. Rev. L. & Soc. Sci.* 131, 138 (2015). Even researchers who pursue causal mechanisms acknowledge the inevitable methodological limitations of that endeavor. See, e.g., Chilton & Versteeg, *supra* note 10, at 102 (emphasizing the importance of their research question, even considering methodological challenges).

³⁰ See Schauer, *supra* note 26.

³¹ See Versteeg, *supra* note 26.

³² See Ginsburg, *supra* note 29.

³³ See Ghai, *supra* note 29; Maartje de Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 *American Journal of Comparative Law* 963–1008 (2015).

³⁴ See Law & Versteeg, *supra* note 10, at 1177.

³⁵ See Cheryl Saunders, *International involvement in constitution making*, in *COMPARATIVE CONSTITUTION MAKING* 69 (DAVID LANDAU & HANNA LERNER eds., 2019); Goderis & Versteeg, *supra* note 21.

³⁶ See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

coercion, the standard core of constitutions also favors the global rather than the domestic. Through text analysis, it has been found that (Large-C) constitutional texts can be grouped in ideological clusters that employ similar language and concepts.³⁷ Rising to prevalence is the “universalist” model, which draws largely from international law to associate a nation’s aspirations with transnational values, such as human rights, and determine and structure state participation in the international community. This deeper connection and similarity between international and constitutional law in many jurisdictions worldwide has become a defining characteristic of modern constitution-making.³⁸

As we will argue in this article, future generations seem to be a significant part of the core of a modern, universalist language of constitution-making. In the upcoming sections, we will explore the evidence that supports that argument. In Section 2, we explore the constitutionalization of future generations on national written constitution-making. Section 2.1 presents a chronology of the rise of future generations in constitutions, showing how they grew from a handful of mentions to 41% of all constitutions as of 2021 (81 out of 196). Our historical analysis also shows how the wording surrounding future generations evolved into a more precise and prescriptive form. In Section 2.2, we analyze the content of the provisions currently in force, identifying common themes and showing the reframing of old rights as a protection of the interests of future generations. Section 2.3 explores the strength of *de jure* protection of future generations, categorizing them as principles, duties, or rights and showing how this protection has potentially become stronger over time. Section 2.4 investigates the geopolitics of the phenomenon, spotting regional trends. In Section 3, we turn to the *de facto* repercussions of the constitutionalization of future generations. Section 3.1 discusses the methodological challenges of such an endeavor. Section 3.2 presents our analysis of six case studies: Hungary, Germany, Brazil, South Sudan, Niger, and Tunisia. Diving deeper into the different outcomes of the phenomenon, we hope to provide a solid understanding of how consequential and relevant the rise of future generations in constitutions is.

I. THE RISE OF FUTURE GENERATIONS IN CONSTITUTIONS

In this section, we will present the data to support our claim that future generations have become a significant part of the core of a modern, universalist language of constitution-making relatively recently. Using historical data from the Comparative Constitutions Project, we build a chronology of the rise and investigate the shifts in

³⁷ See Law & Versteeg, *supra* note 10; Law, *supra* note 17.

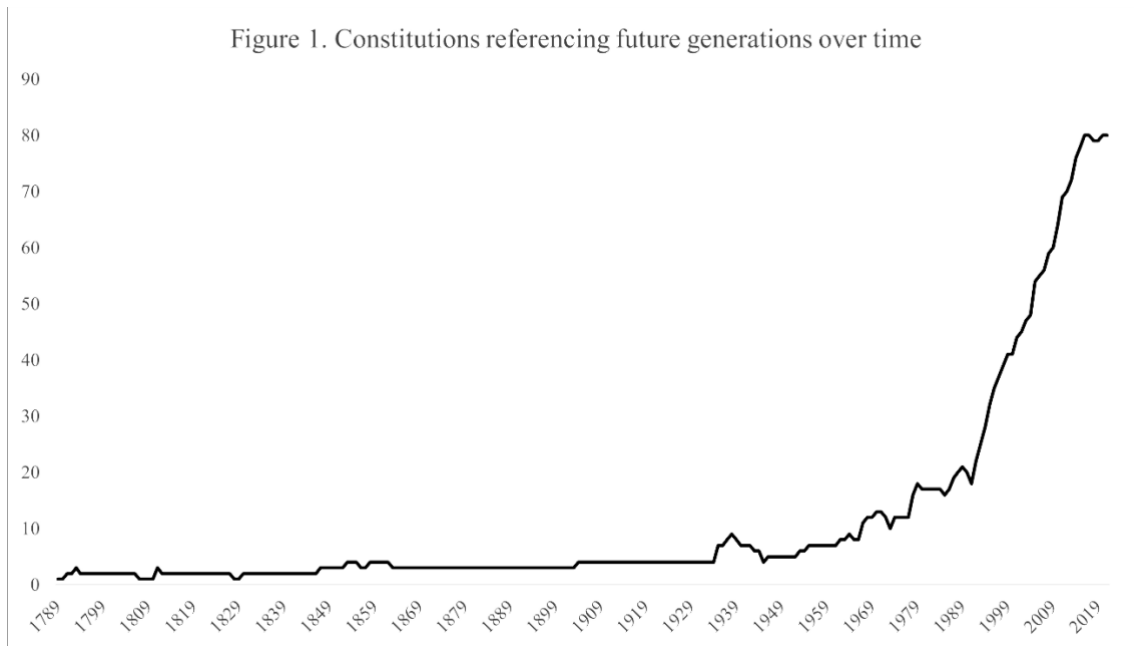
³⁸ See, e.g., CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 3 (GREGORY SHAFFER, TOM GINSBURG, & TERENCE HALLIDAY eds., 2019) (on “the nationalist myth and transnational reality of constitution-making”)

wording and context in which future generations have been mentioned in constitutions over time. Through content analysis, we identify common themes and show how old rights have been reframed to protect the interests of future generations. This has been done so through gradually stronger provisions, as we will show when exploring the *de jure* strength of the constitutionalization. Lastly, we turn to the geopolitics of the phenomenon to spot patterns and explanations for the rise, showing how novel the phenomenon is and how connected it is to a universalist form of constitution-making.

A. History of the Rise

The first country to mention future generations in its constitution was the United States in 1789, referring to “posterity” in its preamble. Since then, as of 2021, 81 out of the 196 constitutions in force (41%) mention future generations explicitly in their constitutions. Figure 1 shows this evolution over time in absolute terms. Noticeably, despite only taking off in the early 1990s, future generations have been referenced in constitutions since the dawn of constitutionalism by at least a handful of countries.³⁹

³⁹ The United Kingdom was purposefully left out of this graph as its constitutional reference to future generations is the 1706 “Act for an Union of the Two Kingdoms of England and Scotland.” However, the notion of a constitution itself was only created by the 1789 US constitution, which we use as the starting point of our timeline. For more on the particularities of British constitutionalism, see, for example: T. R. S. Allan, *Questions of legality and legitimacy: Form and substance in British constitutionalism*, 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 155–162 (2011); Mark Elliott, *United Kingdom: Bicameralism, sovereignty, and the unwritten Constitution*, 5 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 370–379 (2007).



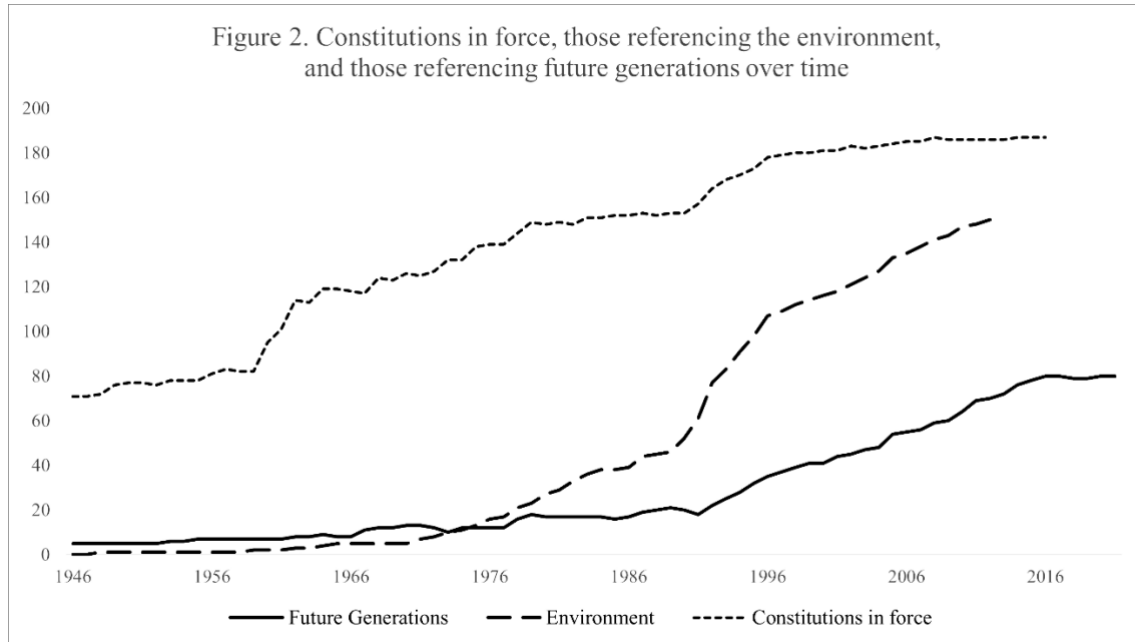
For context, Figure 2 compares the total number of constitutions in force, those mentioning future generations, and those with environmental provisions.⁴⁰ The novelty of the constitutionalization of future generations is clear when contrasted with the other two lines. Employing the data collected by Boyd,⁴¹ we use environmental constitutionalism as a reference for the newest rights since it is considered one of the most recent trends in constitutionalism for which there is substantial data.⁴² This comparison makes it clear that future generations are part of an even more novel constitutional trend. Besides the later take-off point, the slope of each curve also shows how future generations continue to be an increasingly

⁴⁰ For the historical data on constitutions, we used data from Zachary Elkins, Tom Ginsburg & James Melton, *Chronology of Constitutional Events, Version 1.3* (2020), <http://www.comparativeconstitutionsproject.org>. For data on environmental constitutionalism, we drew from DAVID BOYD, *The Status of Constitutional Protection for the Environment in Other Nations* (2014), David Suzuki Foundation Paper No. 4, <https://david Suzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf> (last visited Aug 15, 2021).

⁴¹ See Boyd, *supra* note 42.

⁴² See Goderis & Versteeg, *supra* note 21, at 15 (showing how the right to a healthy environment came more swiftly and lately even than other ‘new rights’); O’Gorman, *supra* note 22, at 836 (“Since Italy made reference to the protection of natural landscapes in its 1947 Constitution, the trend has grown, gradually at first, but gathering significant momentum in the last couple of decades.”); Weis, *supra* note 22, at 837 (“Since the early 1970s there has been a remarkable global trend in the constitutional entrenchment of environmental provisions—a phenomenon that I will refer to as “environmental constitutionalism” for short. The environment was an uncommon topic for constitutional law four decades ago.”)

prevalent novelty in constitutional texts even after the number of constitutions started to plateau. Additionally, combined with Figure 1, it is clear that the vast majority of references to future generations were included from the early 1990s onwards. All of these factors show how recent the constitutionalization of future generations is.



However, constitutional references to future generations have not taken the same shape throughout history. The words used to refer to people in the future and the context in which future generations are mentioned have both changed considerably. Through an analysis of the most common words in our dataset of constitutional provisions referencing future generations throughout history ($N = 157$, Figure 3), this thematic shift is evident.

The word cloud of the provisions until 1989 revolves around values such as “liberty,” “justice,” and “order,” and words related to religion (“god,” “blessings,” “church”) are still among the most frequently used. This is a product of the fact that most of the provisions from that era are located in constitutional preambles amidst generic, declaratory guidelines. Besides that, the most frequently mentioned subjects besides future generations are “people” (more frequently used even than “generations”), “government,” “ourselves,” and “posterity,” and a myriad of ways of referring to the holders of legal interest. “Environment” is mentioned frequently enough to show up, but not as much. Lastly, “present” and “future” are cited as many times as each other.

Figure 3. Word frequency in constitutional provisions referencing future generations included until 1989 (N = 54), on the left, and from 1990 onwards (N = 103), on the right.



In stark contrast, the provisions included from 1990 onwards revolve around much more concrete words. First, constitutions seem to have settled on “future generations” as the bearers of legal interest, with words such as “state,” “right*,” “responsibility” gaining prominence. “Environment” is the most frequently cited word right after, along with “natural” and “resources.” More prescriptive values are present in the cloud, such as “development,” “preserv*,” and “protect*.” The change from expressive to prescriptive is also noted when we compare where the provisions from each era are located, in preambles or in the main constitutional text. The provisions until 1989 are much more frequently located in preambles (72%) compared to the ones from 1990 onwards (35%). Relatedly to the development of constitutionalism over the centuries, the earlier way of referencing future generations resembles the traditionally nationalistic form of constitution-writing, while the latter is in tune with the internationalized, “universalist” model. In that sense, future generations are well-suited to be holders of legal interest in modern rights, such as environmental provisions, and with state duties that speak to a broader sense of community that goes beyond the jurisdiction.⁴³

In sum, future generations have been present in constitutions since the dawn of constitutionalism in 1789 but shifted in prevalence, form, and substance considerably over time. Until the 1970s, no more than a dozen constitutions referenced them. This changed with the spike of new constitutions in the late 20th century, culminating in a growth peaking at 81 (41%) national constitutions referencing future generations. Regarding form and substance, future generations used to be referenced frequently as “posterity” and, not uncommonly, after following terms such as “ourselves” and “present generations.” Contemporarily, the context in

⁴³ See, e.g., Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 85 (GREGORY SHAFFER, TOM GINSBURG, & TERENCE HALLIDAY eds., 2019).

which future generations have been mentioned in constitutions changed dramatically. New rights, such as environmental rights, frequently employ future generations as holders of legal interest, in contrast to the traditionally liberal values employed in the past. Future generations fit neatly in modern constitution-making practices that speak to a notion of transnational legal order.

B. Content Analysis of Provisions Referencing Future Generations Currently in Force

To investigate how future generations fit into contemporary constitutions, we performed a content analysis of the constitutional provisions in the 81 constitutions in force as of 2021 that refer to future generations. We identified five main, recurring themes and coded each constitution for the primary and secondary, if there was any, theme of their provision(s) referring to future generations, as shown by Table 1.

Table 1. Themes of constitutional provisions mentioning future generations (2021)

Environment	Natural resources	Future generations (stricto sensu)	Societal values	Public finance
50	28	18	17	4
62%	35%	22%	21%	5%

Note. Values exceed 100% as some constitutional provisions were coded twice for their primary and secondary themes.

The first clear result is the prevalence of environmental constitutionalism,⁴⁴ with most constitutions in our sample having at least one provision mentioning future generations in the context of the environment. However, as previously shown,⁴⁵ the rise of constitutional references to the environment precedes mentions of future generations by decades. This indicates that even though the constitutionalization of future generations is evidently linked to environmentalism,⁴⁶ at the same time, it also constitutes a new way of speaking about the environment. Instead of enshrining provisions protecting the environment *per se*, constitutions seem to have started to

⁴⁴ See Cho & Pedersen, *supra* note 24; Christopher Jeffords, *Constitutional Environmental Human Rights: a Descriptive Analysis of 142 National Constitutions*, in *THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW* 329–364 (2013); Joshua Gellers, *Explaining the emergence of constitutional environmental rights: a global quantitative analysis*, 6 *JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT* 75–97 (2015); O’Gorman, *supra* note 22.

⁴⁵ See Figure 2.

⁴⁶ This link between environmentalism and future generations is obvious beyond constitutionalism. The Brundtland Report famously defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” See World Commission on Environment and Development, *Our Common Future* 54 (1987).

justify this protection in terms of a personified group of interest, i.e., humans in the future.

Enacted in the aftermath of the Stockholm Convention of 1972, the progressive Swedish constitution of 1974 was the first to frame the right to a healthy environment in the context of protection toward future generations.⁴⁷ Its influence can be noted in other countries over the decades. Many constitutions refer to both present and future generations when outlining the state duty to protect the environment, such as the Brazilian constitution of 1988 and the 2010 constitution of Niger. Some countries decided to go a step further and be more specific about the particular threats they wanted to prevent, such as the 2016 constitution of Côte d'Ivoire, which refers to climate change in its preamble.⁴⁸

Following the environment, we find “natural resources” has the second place among the most common themes. Even though “natural resources” is often directly related to environmental conservation, it goes beyond it to refer to the exploitation of public goods that will be instrumental for future generations. This can be done vaguely, referring to “natural resources” in general or explicitly listing which resources ought to be protected. Interestingly, 22 out of 24 countries (92%) with provisions mentioning future generations in the context of “natural resources” are developing economies.⁴⁹ For example, many African countries employ a similar phrasing that lists resources from the land, the air, and waters, with the oldest reference to such a formula coming from the Pacific, in Papua New Guinea’s preamble of 1975.⁵⁰

⁴⁷ See Olof Petersson, *Constitutional History*, in THE OXFORD HANDBOOK OF SWEDISH POLITICS (JON PIERRE ed., 2015); Government of Sweden, *Kungörelse (1974:152) om beslutad ny regeringsform (RF)* (2021), <https://lagen.nu/1974:152?diff=true&from=2002%3A905> (last visited Jul 17, 2021).

⁴⁸ All translations to English cited henceforth were extracted from Zachary Elkins, Tom Ginsburg & James Melton, *Constitute: The World’s Constitutions to Read, Search, and Compare*. (2021), <https://www.constituteproject.org/constitutions?lang=en>. (last visited Jul 19, 2021). See SWEDEN [CONSTITUTION], 1974, art. 2 (“The public institutions shall promote sustainable development leading to a good environment for present and future generations.”); BRAZIL [CONSTITUTION], 1988, art. 255 (“The Government and the community have a duty to defend and to preserve the environment for present and future generations.”); NIGER [CONSTITUTION], 2010, art. 35 (“The State has the obligation to protect the environment in the interest of present and future generations.”); CÔTE D’IVOIRE [CONSTITUTION], 2016, preamble (“Express our commitment to: (...) contributing to climate protection and to maintaining a healthy environment for future generations.”)

⁴⁹ As defined by United Nations, *World Economic Situation and Prospects 2020* (2020), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf (last visited Jul 5, 2021).

⁵⁰ Compare these excerpts, for example: PAPUA NEW GUINEA [CONSTITUTION], 1975, preamble (“WE ACCORDINGLY CALL FOR- 1. wise use to be made of our natural

The two exceptional developed countries referring to future generations in the context of natural resources are Hungary and Norway. Hungary's inclusion results not from a history related to natural resources themselves but rather to the particularly favorable political context of the time. In 2011, Hungary implemented one of the broadest and most relevant constitutional reforms protecting future generations. Due to its importance, we will dive deeper into it as a case study in the last section of this article. Norway,⁵¹ in its turn, relies heavily on oil extraction and has been well-known for progressive policies aimed at sharing the economic benefits of such activity.⁵² Norway has a fund to manage its oil wealth—the largest public fund globally—and the slogan read on its website is: “We work to safeguard and build financial wealth for future generations.”⁵³ However, despite having created such a forward-looking fund in 1990,⁵⁴ Norway only constitutionalized future generations in 2014, in the context of a reform whose goal was to revitalize constitutional thinking in the country⁵⁵—an interesting sign of how future generations are part of a modern constitutional language.

resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations”); UGANDA [CONSTITUTION], 1995, preamble (“The State shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.”); ERITREA [CONSTITUTION], 1997, preamble (“In the interest of present and future generations, the State shall be responsible for managing all land, water, air and natural resources and for ensuring their management in a balanced and sustainable manner; and for creating the right conditions to secure the participation of the people in safeguarding the environment.”) For source, see Elkins et al., *supra* note 50.

⁵¹ NORWAY [CONSTITUTION], 2014, art. 112 (“Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.”). For source, see Elkins et al., *supra* note 50.

⁵² See Ola Listhaug, *Oil wealth dissatisfaction and political trust in Norway: A resource curse?*, 28 *West European Politics* 834–851 (2005).

⁵³ Norges Bank Investment Management, *The fund* (2021), <https://www.nbim.no/> (last visited Jul 5, 2021).

⁵⁴ Norges Bank Investment Management, *About the fund* (2021), <https://www.nbim.no/en/the-fund/about-the-fund/> (last visited Jul 5, 2021).

⁵⁵ As described by Steven Verbanck, *Developments in Norwegian Constitutional Law: The Year 2016 in Review*, I·CONnect (2017), <http://www.iconnectblog.com/2017/11/developments-in-norwegian-constitutional-law-the-year-2016-in-review/> (last visited Mar 12, 2021), (“While aiming “only” to constitutionalize rights already well established in Norwegian law, its revitalization of constitutional thinking in a country traditionally satisfied with a rather pragmatic approach to the Constitution presents a number of legal methodological challenges—and

Next, we have “future generations (*stricto sensu*)”⁵⁶ as the third most common theme. A pattern arose in these specific provisions: 10 of the 16 (62%) were from former communist countries that used slight variations of the same model preamble “the people of (...), being aware of their responsibility toward the present and the future generations” (Azerbaijan, Czech Republic, Hungary, Kazakhstan, Latvia, Moldova, Russia, Tajikistan, Ukraine, Uzbekistan). We could not pinpoint the origin of this pattern, although we note that the first provisions date back to 1992, in Uzbekistan,⁵⁷ and 1993, in Russia.⁵⁸

Other cases are vague or generic mentions of future generations that do not fit into any particular theme due to their genericness. However, a notable case is that of Japan, which displays one of the strongest wordings among all constitutions referring to future generations.⁵⁹ The origin of the Japanese constitution of 1946 is the source of substantial scholarly debate, particularly considering the influence of the United States in its conception.⁶⁰ Even though it is argued that the Japanese

opportunities”). See also Eirik Bjorge, *Revision of the Norwegian Constitution of 1814 and Incorporation of Human Rights Conventions*, 23 *European Public Law* 699–703 (2017).

⁵⁶ Future generations, *stricto sensu*, relates to provisions that do not fit into any specific theme, simply mentioning the relevance of future generations by themselves.

⁵⁷ UZBEQUISTAN [CONSTITUTION], 1992, preamble (“(...) being aware of their ultimate responsibility to the present and the future generations, (...)”). For source, see Elkins et al., *supra* note 50.

⁵⁸ RUSSIA [CONSTITUTION], 1993, preamble (“(...) proceeding from the responsibility for our Fatherland before present and future generations, (...)”). For source, see Elkins et al., *supra* note 50.

⁵⁹ JAPAN [CONSTITUTION], 1946, art. 11 (“These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”); *id.*, art. 97 (“The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.”) For source, see Elkins et al., *supra* note 50.

⁶⁰ See Charles L. Kades, *The American Role in Revising Japan’s Imperial Constitution*, 104 *Political Science Quarterly* 215–247 (1989); Koseki Shōichi, *The Birth of Japan’s Postwar Constitution* (1997), <https://www.taylorfrancis.com/books/birth-japan-postwar-constitution-koseki-shōichi-ray-moore/10.4324/9780429496806> (last visited Mar 13, 2021); Hiroshi Oda, *Japanese Law* (2009), <http://doi.org/10.1093/acprof:oso/9780199232185.001.1> (last visited Mar 12, 2021); Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (2010), <https://www.bloomsbury.com/in/the-constitution-of-japan-9781847316110/>; David Law, *The Myth of the Imposed Constitution*, in *Social and Political Foundations of Constitutions* 239–268 (Denis J. Galligan & Mila Versteeg eds., 2013); Chaihark Hahm & Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar*

constitution was a product of direct American imposition, detailed historical analysis and the fact that Japan never amended the original text of its constitution indicate that, at least to some extent, the constitution reflects some of the nation's values and aspirations on a practical level.⁶¹ Add that to the considerable difference in wording between the American listing of generic values to be left to "our posterity" and the Japanese assignment of "eternal and inviolate rights" to future generations by the Japanese, and one can see how the Japanese constitution is uniquely strong when referring to future generations.⁶²

The fourth most common theme among constitutions referring to future generations is "societal values." Most of the provisions under this theme relate to generic values, such as honoring a society's millenary heritage⁶³ or ensuring the health and well-being of future generations.⁶⁴ Many are variations of the American constitution of 1789 that seek to "secure the Blessings of Liberty to ourselves and our Posterity".⁶⁵ One unique and interesting example is the constitution of Libya,⁶⁶

Japan and South Korea (2015).

⁶¹ See Law, *supra* note 62, at 264 ("But the notion that the Kenpō exemplifies a phenomenon called "imposed constitutionalism" is vulnerable to conceptual as well as historical attack. To say that one constitution was "imposed" while another was not implies a false dichotomy between "imposed" and "unimposed" constitutions. Constitution-making routinely implicates multiple authors, constituencies, and narratives in a process that is part negotiation, part dialectic, and part coercion. This multiplicity of participants and processes makes it difficult to say with conviction what is an "imposed" constitution and what is not. On the one hand, even an ostensibly imposed constitution can reflect a considerable measure of local input and influence. The history of the Kenpō demonstrates as much").

⁶² Which does not entail *de facto* effects, as will be seen in the next section.

⁶³ For example, see: POLAND [CONSTITUTION], 1997, preamble ("Obliged to bequeath to future generations all that is valuable from our over one thousand years' heritage, (...)"). For source, see Elkins et al., *supra* note 50.

⁶⁴ For example, see: LESOTHO, 1993, art. 36 ("Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.") For source, see Elkins et al., *supra* note 50.

⁶⁵ See, for example, the constitutions of Ghana, Liberia, Philippines, and Seychelles, each of them going further than the other in the list of values, with Seychelles listing "the blessings of truth, liberty, fraternity, equality of opportunity, justice, peace, stability and prosperity". For source, see Elkins et al., *supra* note 50.

⁶⁶ LIBYA [CONSTITUTION], 2011, preamble ("Based on the legitimacy of this revolution, and in response to the desire of the Libyan people and their aspirations for achieving democracy and promoting the principles of political pluralism and statehood based on institutions, and aspiring to a society enjoying stability, tranquility and justice which develop through science and culture, achieves prosperity and sanitary well-being and

which is much more specific in its aspiration for a society that “works on educating the future generations in the spirit of Islam”—which seems to be related to the growing presence of Islamic values in constitution-making.⁶⁷

Lastly, we have “public finance” as the fifth most common theme, present in three constitutions (Bhutan, Kenya, and Zimbabwe), with Kenya’s and Zimbabwe’s being identical.⁶⁸ The insertion of future generations in the Kenyan constitution and beyond is associated with constitutional reforms led by Yash Ghai, an internationally renowned constitutional law professor who played an essential role in constitution-making in several countries of East Africa and the Pacific.⁶⁹ Ghai played a crucial role in revitalizing constitutional orders and placing them into the contemporary global order, often as representative of the United Nations in those countries⁷⁰—contributing to their alignment with the universalist constitutional language.

In conclusion, the vast majority of provisions analyzed in this article speak about themes that have been present in constitutions for centuries. The novelty resides not in the themes themselves but in how they are presented: under the framing of protecting future generations. This shift toward such a framing is relevant to comparative constitutional law as it indicates the rise of a new holder of legal interest to whom constitutions are assigning all sorts of protections. Future generations are increasingly more entitled to a healthy environment, to abundant or sufficient natural resources, to an organized, virtuous social landscape, to responsible public management, and beyond. Such reframing indicates how future generations are rising to reframe a part of the global constitutional language.

works on educating the future generations in the spirit of Islam and love of the good and of the country (...). For source, see Elkins et al., *supra* note 50.

⁶⁷ Dawood Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 *Virginia Journal of International Law* 615–695 (2014).

⁶⁸ BHUTAN [CONSTITUTION], 2008, art. 14, 5 (“The Government shall exercise proper management of the monetary system and public finance. It shall ensure that the servicing of public debt will not place an undue burden on future generations.”); KENYA [CONSTITUTION], 2010, art. 201 (“The following principles shall guide all aspects of public finance in the Republic- (...) c. the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;”); ZIMBABWE [CONSTITUTION], 2013, art. 298, 1 (“The following principles must guide all aspects of public finance in Zimbabwe-- (...) c. the burdens and benefits of the use of resources must be shared equitably between present and future generations”). For source, see Elkins et al., *supra* note 50.

⁶⁹ Coel Kirkby, *Commonwealth Constitution-Maker: The Life of Yash Ghai*, in *COMMONWEALTH HISTORY IN THE TWENTY-FIRST CENTURY* 61–80 (Saul Dubow & Richard Drayton eds., 2020).

⁷⁰ Sue Onslow et al., *Interview with Yash Ghai: Commonwealth Oral History Project*, Institute of Commonwealth Studies (2016).

C. Strength of *De jure* Protection of Future Generations in Constitutions

If future generations are becoming increasingly more relevant in global constitution-making, how strong is such legal protection? Determining the *de facto* legal protection of future generations requires overcoming empirical challenges that will be discussed in the next section. However, investigating the *de jure* protection that constitutions assign is also insightful in itself, even if they differ from their legal practice. We looked into the strength of each constitution's protection of future generations and categorized them according to the strongest protection present. From weakest to strongest: principle, civic duty, state duty, and right (Table 2).⁷¹

Table 2. Strength of *de jure* protection of future generations in constitutions (2021)

Principle	Civic duty	State duty	Right
22	5	28	15
31%	7%	40%	21%

Principle is the weakest form of legal protection of future generations, defined as generic guidelines for societal action. All of the 22 constitutions that exclusively list principles exclusively do so in their preambles, showing how weak such provisions are. Half of them are from the former communist nations that employ the previously mentioned, similar, generic template acknowledging the nation's responsibility toward future generations.⁷² Another six employ the American template of referring to "our posterity" linked to a list of societal values.⁷³ The rest do so mostly in the context of the environment.⁷⁴ Even though some of these constitutions proceed to outline quite consequential provisions, such as France's Charter for the Environment, they do not do so by referring explicitly to future generations.

In its turn, duty is the most common type of constitutional legal protection of future generations, reflected in 32 constitutions. We identified two kinds of duties:

⁷¹ We employed the categories laid out by O'Gorman, *supra* note 22, at 440–441 (on the distinction between principle, duty, and right in the context of environmental constitutionalism), and by Weis, *supra* note 22, at 844–845 (on the definition of civic duty, also in the context of environmental constitutionalism).

⁷² See *supra* notes 59–60 for examples.

⁷³ See *supra* note 67 for examples.

⁷⁴ See, for example: FRANCE [CONSTITUTION], 2005, preamble of Charter for the Environment ("In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs, (...)"); MADAGASCAR [CONSTITUTION], 1992, preamble ("Persuaded of the exceptional importance of the wealth of the fauna, of the flora and of the mining resources of high specificities with which nature has provided Madagascar, and that it is important to preserve it for the future generations, (...)"). For source, see Elkins et al., *supra* note 50.

those imposed on individuals or society (civic)⁷⁵ and those imposed on the state. Only a handful of constitutions impose a future generations-related civic duty, with two of them dating back to 1980 and 1975.⁷⁶ By comparison, 28 impose a duty to protect future generations upon the state. The oldest in the state duty group is Brazil's constitution of 1988, which does so in the context of an environmental provision.⁷⁷ The remaining 27 constitutions inserted a state duty related to future generations from the 1990s onwards. Again, this might indicate that future generations are part of a recent development in the conception of state duties.

Lastly, over a fifth of constitutions referring to future generations assign them some right. Japan's constitution of 1946 was the first to do so,⁷⁸ with the second one being the Iranian constitution of 1979.⁷⁹ After these two, Malawi assigned such a right in 1994,⁸⁰ followed by South Africa in 1997.⁸¹ The other 11 constitutions did so

⁷⁵ Based on the classification by Weis, *supra* note 22.

⁷⁶ Papua New Guinea (1975), Vanuatu (1980), Argentina (1994), Senegal (2001), and Timor Leste (2002). *See, e.g.*, SENEGAL [CONSTITUTION], 2001, article 25-3 ("Every citizen has the duty to preserve the natural resources and the environment of the country and to work for sustainable development for the benefit of the present and future generations."); VANUATU [CONSTITUTION], 1980, art. 7 ("Every person has the following fundamental duties to himself and his descendants and to others- d. to protect the Republic of Vanuatu and to safeguard the national wealth, resources and environment in the interests of the present generation and of future generations; (..."); ARGENTINA [CONSTITUTION], 1994, art. 41 ("All inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations, and have the duty to preserve the environment. Environmental damage shall generate as a priority the obligation to repair it under the terms that the law shall establish.") For source, *see* Elkins et al., *supra* note 50.

⁷⁷ *See supra* note 50.

⁷⁸ *See supra* note 61.

⁷⁹ IRAN [CONSTITUTION], 1979, art. 50 ("The preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence, is regarded as a public duty in the Islamic Republic.") For source, *see* Elkins et al., *supra* note 50.

⁸⁰ MALAWI [CONSTITUTION], 1994, art. 13 ("The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—d. To manage the environment responsibly in order to— iii. accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; (..."). For source, *see* Elkins et al., *supra* note 50.

⁸¹ SOUTH AFRICA [CONSTITUTION], 1997, art. 24 ("Everyone has the right- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (..."). For source, *see* Elkins et al., *supra* note 50.

in the 2000s, which indicates that creating rights for future generations is an even more recent legal development in constitution-making.

In short, it seems that constitutions have been speaking more about future generations and assigning them stronger *de jure* protections over time. Moving past the traditional vague principles present in preambles, constitutions recently started to impose duties upon the state and, largely in the 1990s onward, gradually recognize the rights of future generations more.

In conclusion, our analysis of the strength of constitutional provisions protecting future generations has shown how their strength has changed to become even stronger over time potentially. Even though many provisions only refer to future generations within principles in their preambles, most have imposed duties on the state to protect them or even assigned them rights—particularly after the 1990s and 2000s respectively. These two conclusions seem to be related to the universalist language of constitution-making in that the mentioning of future generations moves beyond the traditional nationalistically limited description of duties and rights toward a more global, humanistic legal protection (sometimes generic, too). In short, future generations seem to be gradually becoming relevant holders of legal interest in constitution-making worldwide.

D. Geopolitics of the Constitutionalization of Future Generations

Having explored the constitutionalization of future generations, we turn to the geopolitics of the phenomenon. We coded all 196 countries in our sample for their geopolitical region and the presence or absence of future generations in their national written constitutions (Table 3). We considered the former communist countries as their own geopolitical group (Eastern Europe & Central Asia) due to their particular constitutional development, distinctively influenced by the Soviet Union’s socialist legal order.⁸²

Table 3. Regions vs. presence of future generations in constitution (2021)

	No future generations in constitution	Future generations in constitution
Africa	26	29
Americas	24	11
Asia & the Pacific	37	14
Eastern Europe & Central Asia	15	17
Western Europe	13	10

⁸² See William Partlett, *Post-Soviet constitution making*, in *COMPARATIVE CONSTITUTION MAKING* 539, 565 (DAVID LANDAU & HANNAH LERNER EDS., eds., 2019). (arguing that the region is “an important constitutional space that should be understood as a distinctive constitutional region from both Europe as well as Asia.”)

These descriptive statistics provide some crude insights. It is apparent that countries in Africa and in Eastern Europe & Central Asia have constitutionalized future generations to a notable extent. These are two regions where direct foreign influence initially played a decisive role in the constitution-making, considering the influence of colonial legacies,⁸³ the pressure of convoluted political transformation,⁸⁴ and the absence of experience in independent constitution-making.⁸⁵ Despite that, they are also places where many countries enacted subsequent constitutions that aimed at moving away from such an influence toward a more active dialogue with the globalized community.⁸⁶

In Africa, late 20th-century constitution-making was perceived by many countries as an opportunity to craft new constitutions that moved away from the influence of their former colonizers.⁸⁷ These countries often turned to the language of human rights in international treaties to enshrine values that, while somewhat generic, contrasted with the constitutional style of the countries that ruled over them in the past. Additionally, a constitution aligned with the transnational legal order has the benefit of broadcasting a message of allegiance with the international community without necessarily committing to either the right or left end of the political spectrum.⁸⁸ However, in some cases, direct international coercion did the job: international donors played a crucial role in imposing institutional demands on

⁸³ See Elkins et al., *supra* note 38.

⁸⁴ See Ginsburg, *supra* note 29.

⁸⁵ See Versteeg, *supra* note 26; Saunders, *supra* note 37.

⁸⁶ See Francois Venter, *Voluntary infusion of constitutionalism in Anglophone African constitutions*, in *COMPARATIVE CONSTITUTION MAKING* 510, 511 (DAVID LANDAU & HANNAH LERNER EDS., eds., 2019) (describing four phases in Anglophone African constitutionalism, from the imposition of British constitutional design to the “complete overhaul of constitutional texts, systems and structures following the collapse of Communism and heightened levels of globalization since the 1990s”); See Partlett, *supra* note 84, at 566 (describing how post-Soviet constitutionalism has been torn between divided and centralized state constitutional ideas, where the former is associated with a government-restraining, Westernized institutional framework, and the latter with the traditional strong state institutional landscape of the region).

⁸⁷ See Venter, *supra* note 89; see also Akira Iriye & Petra Goedde, *Introduction: Human Rights as History*, in *THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY* (Akira Iriye, Petra Goedde, & William Hitchcock eds., 2012) (describing how the constitutionalization of human rights, such as self-determination, was of utmost symbolic relevance for many African countries).

⁸⁸ Law, *supra* note 17, at 210 (“In post-communist Eastern Europe as in post-colonial Africa, universalism presented itself as an innocuous and increasingly popular alternative.”)

constitution-making,⁸⁹ sometimes requiring countries to create dedicated funds to future generations, as was the case with Niger.⁹⁰

Many former communist countries also turned to constitutions that spoke to the international legal order in light of the post-communist era. While the liberal constitutional tradition did not suit the national values of many countries in Eastern Europe and Central Asia, and radical constitutional statism was sometimes repudiated by many due to its resemblance to the communist regime, universalism presented a viable alternative by being sufficiently vague with the additional benefit of transmitting a message of renewal to the international community.⁹¹ The downside, as described by Partlett, is that such universalism is embedded with the Western standpoint to constitutionalism, while traditional Eastern European statism, or centralized state constitutionalism as he frames it, “provides familiar answers to state crises.”⁹² In that context, former communist nations have adhered to a universalist model of constitution-making to different extents. The countries that have mostly embraced the globalized approach to constitutionalism are the three Baltic states, two of which constitutionalized future generations. Following them, there are five countries that have adopted a mix of traditional and Westernized constitutionalism: Ukraine, Kyrgyzstan, Moldova, Georgia, and Armenia.⁹³ Five of those, with Kyrgyzstan being the exception, have constitutionalized future generations. Another evidence of alignment with the international community comes from the close relationship of former communist

⁸⁹ See Tukumbi Lumumba-Kasongo, *The Origin of African Constitutions, Elusive Constitutionalism, and the Crisis of Liberal Democracy*, in DEMOCRATIC RENEWAL IN AFRICA: TRENDS AND DISCOURSES 63–96 (Said Adejumo ed., 2015), https://doi.org/10.1057/9781137484345_4.

⁹⁰ Africa Radio, *Le FMI conseille au Niger de créer un fonds pour “les générations futures”* [FMI advises Niger to create a fund “for future generations”], AFRICA RADIO, December 22, 2011, <https://www.africaradio.com/news/le-fmi-conseille-au-niger-de-creer-un-fonds-pour-les-generations-futures-44176> (last visited Jul 16, 2021).

⁹¹ See, e.g., Kim Scheppele, *Autocratic Legalism*, 85 UNIVERSITY OF CHICAGO LAW REVIEW 545, 575 (2018) (pointing to how regimes with authoritarian tendencies rely on the respect of constitutional rules that speak to the international community to secure legitimacy with their electorate and foreign nations); Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 THE AMERICAN JOURNAL OF COMPARATIVE LAW 1043, 1071 (2012) (arguing that “wholesale transplants from one legal system seemed more dangerous to one’s identity and autonomy than a combination of numerous foreign sources”); .

⁹² See Partlett, *supra* note 84, at 565.

⁹³ *Id.*, at 566.

countries and the Venice Commission, be it voluntarily or by requirement (such as to join the European Union).⁹⁴

In any case, we have to make sure not to overstate our conclusions. As previously shown,⁹⁵ most of the former communist countries that have referred to future generations in their constitutions have done so merely as principles in their preambles. Even if it sounds appealing to conclude that the former communist countries that lean the most to a universalist approach of constitution-making are the ones that are more likely to protect future generations constitutionally, any such conclusion must be taken with a grain of salt—especially considering how seemingly-progressive constitutionalism can be employed by leaders with authoritarian tendencies to secure legitimacy.⁹⁶

What about the other geopolitical regions? In the Americas, post-independence constitution-making occurred mostly in the 19th and early 20th centuries. Many countries have kept the constitutional framework of those centuries, such as the 12 countries in the Commonwealth Caribbean, of which only two have constitutionalized future generations.⁹⁷ On the other hand, efforts to modernize and innovate in constitution-making have flourished further south. A wave of constitutional reform took the Andean countries of Bolivia, Ecuador, and Venezuela in the late 2000s, which led to new constitutions with a “reputation for novelty”⁹⁸—all of which constitutionalized future generations. In the Southern Cone, Brazil, Argentina, and Uruguay have also constitutionalized future generations in late 20th

⁹⁴ On the Venice Commission’s influence, see Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 156 (Gregory Shaffer, Tom Ginsburg, & Terence Halliday eds., 2019).

⁹⁵ See *supra* Section 2.2 “Content analysis of provisions referencing future generations currently in force.”

⁹⁶ See Scheppele, *supra* note 93, at 582 (“They carefully preserve the shell of the prior liberal state—the same institutions, the same ceremonies, an overall appearance of rights protection—but in the meantime they hollow out its moral core.”)

⁹⁷ See Derek O’Brien, *Developments in the Commonwealth Caribbean: The year 2016 in review*, 15 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 506–514, 514 (2017) (noting how anachronistic provisions, such as those criminalizing homosexuality, have endured for centuries as a product of “saving clauses included in a number of the region’s independence constitutions which immunize existing laws against constitutional challenge.”) See also Derek O’Brien, *Formal Amendment Rules and Constitutional Endurance The Strange Case of the Commonwealth Caribbean*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 293 (Richard Albert, Xenophon Contiades, & Alkmene Fotiadou eds., 2017),

⁹⁸ See Zachary Elkins, *Constitutional Revolution in the Andes?*, in COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA 106, 109 (Rosalind Dixon & Tom Ginsburg eds., 2017).

century reforms that overtly intended to connect the countries with the transnational, democratic legal order after decades of dictatorial rule.⁹⁹ Chile is undergoing a constitutional reform as of 2021, and there is the desire to constitutionalize future generations among some constitution-makers.¹⁰⁰ It is impossible to pinpoint the exact causes for countries in the region to have constitutionalized or not future generations, and caution is needed to avoid over-claiming apparent patterns, especially considering outstanding outliers such as the United States mention to posterity in its 1789 preamble. However, to some extent, the trope of constitutional modernization and dialogue with the international community seems to be again present in the Americas regarding the constitutionalization of future generations.

Asia & the Pacific is the geopolitical region that probably most resembles the constitutional processes previously described regarding Africa and the former communist countries. Post-independence constitution-making also generally took place during the late 20th century there, and international oversight and influence were constantly present.¹⁰¹ Therefore, it might come across as puzzling that the region has constitutionalized future generations relatively little if they are indeed a part of the new trend in globalized constitution-making. In that regard, it is truly a puzzling finding, and reflections on why that is the case are mostly speculative. The

⁹⁹ Raúl Zaffaroni, *Prólogo*, in *CONSTITUCIONES ARGENTINAS: COMPILACIÓN HISTÓRICA Y ANÁLISIS DOCTRINARIO, X–XI* (Argentina Argentina Ministerio de Justicia y Derechos Humanos de ed., 2015) (noting that the Argentinian constitutional history is linked with the broader Latin American constitutionalism inaugurated by Salvador Allende in Chile and represented by the new, vanguardist constitutions of Ecuador and Bolivia, which recognize the rights of nature and the plurinationality of decolonization. This excerpt shows the transnational, universalist aspirations of Argentinian constitution-making); Antonio Herman Benjamin, *O Meio Ambiente a Constituição Federal De 1988*, 19 *INFORMATIVO JURÍDICO DA BIBLIOTECA MINISTRO OSCAR SARAIVA* 37, 44 (2008) (noting that the Brazilian constitution of 1988, even though quite innovative in environmental issues, also drew heavily from the constitutionalization of the environment in other countries' constitutions, particularly Portugal and Spain). More generally, see David Landau, *Constituent power and constitution making in Latin America*, in *COMPARATIVE CONSTITUTION MAKING* 567 (DAVID LANDAU & HANNAH LERNER eds., 2019) (describing how a considerable portion of Latin American constitutionalism has occurred in the aftermath of democratic transitions from dictatorships in the 1990s).

¹⁰⁰ Meeting between first author and Ricardo Montero, Chilean constituyente. (Jun. 28 2021) (notes on file with author).

¹⁰¹ See, e.g., Dixon Rosalind & Tom Ginsburg, *Introduction*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 1, 5 (Rosalind Dixon & Tom Ginsburg eds., 2014) (“One reason for this pattern in Asia undoubtedly has to do with constitutional “borrowing” in Asia, or the direct influence of North American, and European (i.e. primarily British and German) constitutional ideas on the design and interpretation of Asian constitutions.”)

14 countries that have constitutionalized future generations¹⁰² are scattered all over the huge extension of the region, and not even some apparent pattern seems to be discernible. Perhaps when delving into the particular constitutional history behind each provision mentioning future generations, some clearer answer is present. For example, Yash Ghai has advised six out of the 14 countries,¹⁰³ which might show these countries' susceptibility to adopting international practices of constitution-making, the extent of his personal influence in these processes, or both. Nevertheless, any conclusions seem too hasty at this point.

Lastly, Western Europe does not appear to have constitutionalized future generations to a great extent yet—despite being extensively referred to as one of the regions that has influenced global constitutionalism the most and, therefore, used in the crafting of our understanding of the constitutionalization of future generations. Some of the countries that led colonial rule in the past have constitutionalized future generations (France, Germany, Portugal, the United Kingdom) while others have not (the Netherlands, Italy, Spain). On the one hand, it is arguable that the most influential legal systems have been those from France, Germany, and the United Kingdom,¹⁰⁴ which have included future generations in their Large-C texts. From that perspective, these countries might have been able to establish stronger influence on countries outside Europe, particularly those who somewhat benefit from the transnational legal order that they contribute to maintaining.¹⁰⁵

Reiterating a caveat is relevant, however. We focus our study on the Large-C constitutionalization of future generations, but several countries have protected them in their small-c constitutions. The *Urgenda* case in the Netherlands is one of the most emblematic examples.¹⁰⁶ Further research that investigates the small-c

¹⁰² Bhutan, Fiji, Iran, Japan, Maldives, Marshall Islands, Nepal, Palestine, Papua New Guinea, Philippines, Qatar, South Korea, Sri Lanka, and Timor Leste.

¹⁰³ See Ghai, *supra* note 29, at 804.

¹⁰⁴ See Pargendler, *supra* note 93, at 1051 (describing the several theorists of legal families, from which it is notable that they are centred around these four countries' legal traditions).

¹⁰⁵ See Craig, *supra* note 96, at 185 (noting the international influence of the Venice Commission in constitution-making, who “has been asked for advice outside the traditional European arena, in Africa, Asia, and Latin America,” which “attests to the salience of the principles it espouses, notwithstanding differences in traditions and values in different parts of the world.”)

¹⁰⁶ *Urgenda Foundation v. Kingdom of the Netherlands* (2015). The Dutch Supreme Court confirmed the decision on Dec. 20, 2019. See Julio Ponce, *A Landmark Dutch Supreme Court Ruling Obliges the State to Reduce Greenhouse Gas Emissions by 20%*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW BLOG (2020), http://www.icconnectblog.com/2020/01/a-landmark-dutch-supreme-court-ruling-obliges-the-state-to-reduce-greenhouse-gas-emissions-by-20% (last visited Aug 18, 2021).

constitutionalization of future generations might find surprising patterns beyond our description in this article.

In sum, in Section 2, we aimed at providing the data that sustains our main argument: future generations have gradually become a new holder of legal interest in constitutions worldwide, a consequential shift in the modern language of global constitution-making. We showed how constitutional mentions to future generations grew from a handful to 41% of all constitutions as of 2021, rising alongside a shift in the way that constitutions talked about people in the future. Through content analysis of the provisions currently in force, we showed how future generations have contributed to a reframing of old rights, such as environmental rights. The *de jure* strength of these provisions has also evolved, becoming potentially stronger over time. All of these trends seem to be related to specific geopolitical patterns, particularly in Africa and the former communist bloc, where countries have strived to signal their willingness to partake in the international community.

II. THE EFFECTS OF THE CONSTITUTIONALIZATION OF FUTURE GENERATIONS

Our analysis so far has focused on the rise of future generations in written constitutions on paper. However, the gap between constitutional discourse and practice is well-known. What happens after the constitutional provision enters into force? In this section, we discuss the effects of the constitutionalization of future generations. First, we discuss ways to assess how effective the constitutionalization of future generations might be and turn to existing literature that empirically measures the impact of constitutional provisions. Then, we present relevant case studies where consequences of such provisions have been clear or where strong provisions have not been successful in bringing about *de facto* change, illustrating how the constitutionalization of future generations can lead to different outcomes.

A. How do we Measure the Effects of the Constitutionalization of Future Generations?

There is a rising body of literature analyzing the effects of legal provisions comparatively or in an international context. These researchers employ different methods to assess how effective constitutional rights, human rights treaties, and other legal mechanisms have been across and within countries worldwide. Some critical scholars have argued that measuring the effects of legal instruments such as constitutions is an impossible or a misguided endeavor, arguing that rights are too entangled with other variables to be assessed independently or do not have the

primary function of shaping societal or government behavior on their own.¹⁰⁷ However, researchers pursuing empirical ways to assess the effectiveness of rights do not deny these methodological challenges. On the contrary, they acknowledge them and make a case for the relevance of the question “do rights matter?” with some labeling their pursuit as “problem-driven” rather than “methods-driven” research.¹⁰⁸

In that context, we raise the issue of measuring the impact of constitutional provisions protecting future generations. As we will show below, this particular type of legal mechanism faces not only the usual problems that the impact assessment of rights encounters but also additional methodological issues due to the fact that the object of their protection inevitably lies in the future. Let us start with the existing literature on the measurement of constitutional rights’ impact.

First, scholars have argued that a relevant facet of constitutionalism is its expressive dimension. One of the main functions of a constitution is to signal to the international order that a nation will adhere to desired practices and norms.¹⁰⁹ However, these signals are unreliable predictors of real-world practices, particularly for socioeconomic and collective rights—constitutions that contain dozens of such rights but fail to enforce them have been deemed “sham constitutions.”¹¹⁰ Moreover, when looking into socioeconomic characteristics of countries, it has been found that developing countries in Africa and Asia are less likely to uphold the many rights they included in their constitutions, which constitute “a substantial majority of the world’s sham constitutions.”¹¹¹ When turning to constitutional provisions protecting future generations, we found that countries with strong provisions that extensively referenced future generations were more likely to come from developing regions.¹¹²

¹⁰⁷ See Woods, *supra* note 29; Spamman, *supra* note 31.

¹⁰⁸ Chilton & Versteeg, *supra* note 10, at 102 (“Although we agree that these problems are real, we also believe that the effectiveness of constitutional rights is too important a question to ignore.” and, in a footnote, “In this sense, ours is an example of problem-driven research, not methods-driven research. See Rich Nielsen, Why Are All the Interesting Questions Hard to Answer?, 1 (2015) <http://www.mit.edu/~rnielsen/interesting.pdf>.”)

¹⁰⁹ See Law & Versteeg, *supra* note 10, at 1172.

¹¹⁰ See David Law & Mila Versteeg, *Sham Constitutions*, 101 *California Law Review* 863–952, 864 (2013) (“On average, socioeconomic and group rights are somewhat less likely to be upheld than the other two varieties of rights, but the performance gap among the categories is narrowing over time. (...) Constitutional compliance also exhibits strong geographical patterns. Countries in Africa and Asia tend to promise a wide range of rights in their constitutions but vary greatly in the degree to which they satisfy those self-imposed obligations, with the result that the two continents are home to a substantial majority of the world’s sham constitutions”).

¹¹¹ *Id.*, at 863.

¹¹² See Section 2, “The rise of future generations in constitutions.”

However, as we will see in the case studies in the next subsection, countries with such strong *de jure* protection, such as Niger, South Sudan, and Tunisia, have not been successful in enforcing them as of 2021.

Second, it is crucial to emphasize the methodological difficulty of assessing the *de facto* impact of constitutional rights.¹¹³ A relevant issue is confounding factors, i.e., “factors that influence both the decision to constitutionally incorporate the right and the later protection of that right.”¹¹⁴ Furthermore, as constitutional provisions are usually broad prescriptions instead of specific procedural or institutional mechanisms, their impact is evaluated indirectly through proxies. An example of a more direct proxy commonly used by empirical human rights researchers¹¹⁵ is the “CIRI” dataset,¹¹⁶ which provides disaggregated quantitative measurements of

¹¹³ See Woods, *supra* note 31; Spamman, *supra* note 31; Jonathan Klick, *Shleifer’s Failure*, 91 Tex. L. Rev. 899 (2013); Implementing Environmental Constitutionalism: Current Global Challenges, (Erin Daly & James R. May eds., 2018); Rike Krämer-Hoppe, *Implementing Environmental Constitutionalism—Current Global Challenges.*, 18 International Journal of Constitutional Law 308–310, 310 (2020) (“Overall, this book lays important groundwork for further implementation studies of environmental constitutionalism as well as environmental policy more general. One question the book leaves mainly unanswered is what implementation exactly means and when we should assume it to be successful. Is it already successful, as Dantas assumes, when environmental constitutionalism makes “people aware of its importance” (p. 129)? Or do we require more than that; for example, an increase in environmental performance? Or, should we understand it in more procedural terms and thus focus on NGOs’ rights to participate in certain planning processes? What are the differences between implementation and enforcement?”).

¹¹⁴ See Chilton & Versteeg 2016, *supra* note 10, at 580. Although the authors refer to this as selection bias, we believe confounding factors to be a more accurate term to describe this limitation. The distinction is relevant because each problem is treated differently: selection bias affects internal validity, asking for a more representative sample, while confounding variables compromise external validity, requiring a different treatment (which is the discussion the authors raise). For a more in-depth discussion, see Sebastien Haneuse, *Distinguishing selection bias and confounding bias in comparative effectiveness research*, 54 Med Care e23–e29 (2016). We thank Suzanne Van Arsdale for bringing this point to our attention.

¹¹⁵ See Daniel W. Hill, *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 The Journal of Politics 1161–1174 (2010); Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 67 International Organization 469–503 (2013); Yonatan Lupu, *The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects*, 57 American Journal of Political Science 912–925 (2013); Yonatan Lupu, *Legislative Veto Players and the Effects of International Human Rights Agreements*, 59 American Journal of Political Science 578–594 (2015).

¹¹⁶ See David L. Cingranelli & David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 Human Rights Quarterly 401–424 (2010).

human rights violations worldwide. The Polity IV scale used to measure *de facto* civil liberties is an example of a less direct proxy (since it provides aggregated values) that has been employed to study the effects of the constitutionalization of individual rights.¹¹⁷ To attenuate these limitations, researchers have used strategies such as Heckman selection models,¹¹⁸ instrumental variable regressions,¹¹⁹ matching,¹²⁰ or a mixed-methods approach that triangulates many of these methods (and others) in order to combine their strengths and reduce their limitations.¹²¹

What proxy could be used to measure *de facto* compliance in relation to the protection of future generations, which by its very nature cannot be measured by success in the present? One partial solution might be turning to environmental protection measures since there is considerable overlap between the two. Through an analysis of variance, it has been found that countries that have enshrined constitutional environmental provisions have smaller ecological footprints than those that have not.¹²² Other researchers have also found a positive association between the presence and strength of constitutional environmental provisions and environmental outcomes,¹²³ as measured by Yale's Environmental Performance Index.¹²⁴ Although still present, the confounding nature of enabling conditions was mitigated by these researchers through the use of instrumental variables. Still, these studies do not address the specific effects of explicitly mentioning future generations in a constitutional provision. For future research on the theme, it might be interesting to employ these methods to compare the effects of environmental constitutional provisions that mention future generations with those which do not. In any case, they still do not encompass all of the possible, specific effects particularly related to future generations provisions.

¹¹⁷ See Chilton & Versteeg 2016, *supra* note 10.

¹¹⁸ Linda Camp Keith, *Political Repression* (2012).

¹¹⁹ BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

¹²⁰ Beth Simmons & Daniel Hopkins, *The Constraining Power of International Treaties: Theory and Methods*, 99 *American Political Science Review* 623–631 (2005).

¹²¹ Chilton & Versteeg, *supra* note 10.

¹²² See David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012). Boyd draws the definition of “ecological footprints” from Brad Erwing et al., *Ecological Footprint Atlas 2010* (2010).

¹²³ Chris Jeffords & Lanse Minkler, *Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes*, 69 *Kyklos* 294–335 (2016).

¹²⁴ J Emerson et al., *Environmental Performance Index and Pilot Trend Environmental Performance Index* (2012).

Other proxies directly related to the constitutionalization of future generations might be more promising. An example might be the impact of such provisions in infra-constitutional legislation and in case law, such as their use by constitutional and higher courts. A similar approach has been applied to environmental constitutionalism: in an analysis of 92 countries, Boyd found that 78 had strengthened environmental laws, and 44 had seen an increase in environmental litigation after the issuing of constitutional protection of the environment.¹²⁵ In that study, however, confounding factors were not addressed explicitly, which raises the question of the actual impact of each constitutional provision. For this article, we searched for “future generations” and synonyms¹²⁶ on the website of the constitutional court of each country that had constitutionalized future generations. However, many jurisdictions did not have a website for their constitutional court, and those who did often had unusable search engines. In many countries, the most effective search engine for case law is not an official platform but rather a third-party one. Similarly, delving into the small-c constitutions and the infra-constitutional framework of 81 countries was beyond the scope of this article, and we ultimately decided to focus on specific case studies rather than try to generalize based on anecdotes. Further research taking on these avenues of investigation seems promising.

B. Case studies

Even though the challenges mentioned above pose difficulties in evaluating the de facto effects of the constitutionalization of future generations across countries, we can still gain valuable insights by looking at particularly relevant case studies. For case selection, we used theoretically informed sampling,¹²⁷ considering that we first acquired knowledge about our broad population of cases and could decide which examples in the sample were the most informative. Also, when selecting cases, we intended to show examples that were diverse in outcomes related to the object of our study,¹²⁸ the protection of future generations, and geographical and economic traits.¹²⁹

Regarding the diversity in outcomes, we selected case studies employing two criteria: (1) the de jure strength of the constitutional provision and (2) the clarity of

¹²⁵ See Boyd, *supra* note 124, at 97.

¹²⁶ See *supra* note 14 for more details on the keywords used.

¹²⁷ See Linos, *supra* note 18.

¹²⁸ See Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 *The University of Chicago Law Review* 213–238 (2017).

¹²⁹ See Linos, *supra* note 130, at 479-480.

the *de facto* protection that resulted from the constitutional provision. Through these two criteria, four categories of case studies arise (Table 4): strong *de jure* and clear *de facto* protection, strong *de jure* and unclear *de facto* protection, weak *de jure* and clear *de facto* protection, and weak *de jure* and unclear *de facto* protection. The last category is not of interest to us, as weak *de jure* protections leading to unclear *de facto* effects do not tell us much about protecting future generations through constitutions.¹³⁰ Let us turn to the other three categories of case studies instead.¹³¹

Table 4. Categories of case studies on the constitutional protection of future generations

<i>De jure protection</i>	<i>De facto protection</i>	
	Clear	Unclear
Strong	Ideal	Under-performance
Weak	Over-performance	Uninteresting

1. Hungary

Let us start with the first category, the ideal cases, where both *de jure* protection is strong, and *de facto* effects are clear. Hungary is a bittersweet example because, despite having both *de jure* and *de facto* protections for future generations, the link between them has been affected by the complexity of politics in the country. The country included its constitutional provisions protecting future generations in 2011, amidst one of the most substantial reforms regarding the legal protection of future generations worldwide. That reform led to five constitutional provisions mentioning future generations in all sorts of contexts.¹³² Among these, we find the most specific,

¹³⁰ Considering the novelty of the phenomenon, we believe these case studies exemplify the best in-depth analysis possible as of 2021, but they might be still insufficient in light of future developments. Further research to contrast our findings with the legal protection of future generations of these countries in the future, when such protection will have matured more, would be welcome.

¹³¹ We are thankful to Daniel Bertram for suggesting the use of over/under-performance as labels.

¹³² See, HUNGARY [CONSTITUTION], 2011, preamble (“WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following: (...) We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.”); *id.*, art. P, cl. 1 (“Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to

practical constitutional provision protecting future generations in history: Hungary's attribution to the Commissioner for Fundamental Rights to protect the interests of future generations, constitutionalizing the responsibilities of the Parliamentary Commissioner for Future Generations, created in 2008.¹³³

Even if such constitutionalization is uniquely progressive in the international context, domestically, it was a step back. Before the reform, Hungary was already a bellwether for future generations' protection, with a dedicated Parliamentary Commissioner for Future Generations. The Commissioner's reports¹³⁴ list several legislative initiatives proposing environmental regulations, petitions to the

protect and maintain them, and to preserve them for future generations.”); *id.*, art. 30, cl. 3 (“The Commissioner for Fundamental Rights and his or her deputies shall be elected for six years with the votes of two-thirds of the Members of the National Assembly. The deputies shall protect the interests of future generations and the rights of nationalities living in Hungary. The Commissioner for Fundamental Rights and his or her deputies may not be members of political parties or engage in political activities.”); *id.*, art. 38, cl. 1 (“The property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations. The requirements for preserving and protecting national assets, and for the responsible management of national assets shall be laid down in a cardinal Act.”); *id.*, Closing and Miscellaneous Provisions, cl. 16 (“As of the entry into force of the Fundamental Law, the designation for the office of the Parliamentary Commissioner for Citizens' Rights shall be Commissioner for Fundamental Rights. The legal successor of the Parliamentary Commissioner for Citizens' Rights, the Parliamentary Commissioner for National and Ethnic Minority Rights and the Parliamentary Commissioner for Future Generations shall be the Commissioner for Fundamental Rights. As of the entry into force of the Fundamental Law, the Parliamentary Commissioner for National and Ethnic Minority Rights in office shall become Deputy of the Commissioner for Fundamental Rights responsible for the protection of the rights of nationalities living in Hungary; as of the entry into force of the Fundamental Law, the Parliamentary Commissioner for Future Generations in office shall become Deputy of the Commissioner for Fundamental Rights responsible for the protection of the interests of future generations; their mandates shall terminate upon the termination of the mandate of the Commissioner for Fundamental Rights.”) For source, see Elkins et al., *supra* note 50.

¹³³ Office of the Parliamentary Commissioners of Hungary, *Comprehensive Summary of the Report Of The Parliamentary Commissioner for Future Generations Of Hungary 2008–2009* (2010), http://www.jno.hu/en/pdf/Comprehensive_Summary_2009.pdf.

¹³⁴ Office of the Parliamentary Commissioners of Hungary, *supra* note 135; Office of the Parliamentary Commissioners of Hungary, *Comprehensive Summary of the Report Of The Parliamentary Commissioner for Future Generations Of Hungary 2010* (2011), http://jno.hu/report2010/jno_report_2010.pdf; Office of the Parliamentary Commissioners of Hungary, *Comprehensive Summary of the Report Of The Parliamentary Commissioner for Future Generations Of Hungary 2011* (2012), http://jno.hu/report2011/jno_report_2011.pdf.

constitutional court, domestic and international policy engagement, oversight of proceedings related to the environment, urban planning, and transportation. However, the constitutional reform was led by Viktor Orbán in his return as prime minister leading a conservative coalition. His mandate sought a u-turn from previous progressive policy and united four previously independent institutions¹³⁵ under a general commissioner for fundamental rights. Over time, the already inflated commissioner was gradually assigned more competencies¹³⁶ and lost focus on the specific protection of future generations, even if it remained symbolically relevant.¹³⁷ Therefore, despite a powerful and vanguardist constitution and a robust institutional framework protecting future generations, the constitutional reform was

¹³⁵ See HUNGARY, *supra* note 134, Closing and Miscellaneous Provisions, cl. 16; and Office of the Commissioner for Fundamental Rights of Hungary, *Office of the Commissioner for Fundamental Rights of Hungary*, EQUINET, EUROPEAN NETWORK OF EQUALITY BODIES (2021), https://equineteurope.org/author/hungary_commissioner/ (last visited Jul 14, 2021), (“The Hungarian Ombudsman institution was set up in 1995, as a parliamentary institution, comprising three (from 2007 on four) independent ombudspersons responsible for the protection of specific fundamental rights. The Parliamentary Commissioner for Civil Rights, Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Parliamentary Commissioner for Future Generations, Parliamentary Commissioner for Data Protection and Freedom of Information worked independently in a joint office until 2012.”)

¹³⁶ See Office of the Parliamentary Commissioners of Hungary, *supra* note 135 (“Since the establishment of the institution of the Commissioner for Fundamental Rights in 2012, its powers and competences continuously expanded: from 2014 it’s an accredited A-status national human rights institution and became a whistleblower’s protection body; in 2015 it has become National Preventive Mechanism pursuant to Article 3 of the Optional Protocol of the Convention against Torture and other Inhuman or Degrading Treatment or Punishment and also achieved the mandate to examine the ordering and conduct of the review procedure of national security vettings; from February 2020 the Independent Police Complaints Board merged into the institution, thus the CFR has an additional mandate for the independent investigation of complaints against the Police; and most recently, from 2021 the Equal Treatment Authority was also merged into the CFR, with the CFR taking over all its previous responsibilities and functions, including its authority competences.”)

¹³⁷ See Ludvig Beckman & Fredrik Ugglå, *An Ombudsman for Future Generations: Legitimate and Effective?*, in INSTITUTIONS FOR FUTURE GENERATIONS (Inigo González-Ricoy & Axel Gosseries eds., 2016), <http://doi.org/10.1093/acprof:oso/9780198746959.003.0007> (last visited Mar 21, 2021); MICHAEL ROSE, ZUKÜNFTIGE GENERATIONEN IN DER HEUTI-GEN DEMOKRATIE: THEORIE UND PRAXIS DER PROXY-REPRÄSENTATION (2018), <https://doi.org/10.1007/978-3-658-18846-7>; Tyler John, *Longtermist Institutional Design and Policy: A Literature Review* (unpublished), The Forethought Foundation for Global Priorities Research.

the foundation of a general deterioration of the human rights landscape in Hungary that led to a gradually weaker overall protection of future generations.¹³⁸

2. Germany

Next, we turn to the cases of over-performance, Germany and Brazil, in which not particularly strong constitutional provisions have led to clear *de facto* results in the protection of future generations. Let us begin with Germany. Germany's constitutional reference to future generations is limited to an article protecting the environment, Article 20a.¹³⁹ Inserted through an amendment in 1994, the committee that discussed its inclusion debated whether the provision should list a right for individuals to a healthy environment (and therefore allow individuals to claim its enforcement in court) or simply a state duty, ultimately deciding for the latter in order to form the necessary majority backing the amendment.¹⁴⁰ Since it was written as a state duty, the article had little impact beyond government-related decisions about specific environmental disputes, such as the regularity of construction and waste disposal sites.¹⁴¹

This changed in 2021 when the Federal Constitutional Court ruled that Article 20a is, in fact, justiciable. The decision, which became known as Klima-Beschluss, or Climate Decision, ruled parts of the Federal Climate Change Act unconstitutional as it did not specify the measures to reduce emissions from 2020 onwards, accepting the claim made by plaintiffs based on Articles 2(2) and 20a.¹⁴² In doing so, the

¹³⁸ See Stefánia Kapronczay & Anna Kertész, *The crackdown on NGOs as an opportunity to reinforce Human Rights Values: A hungarian case study*, in RISING TO THE POPULIST CHALLENGE: A NEW PLAYBOOK FOR HUMAN RIGHTS ACTORS 57–68 (César Garavito & Krizna Gomez eds., 2018); John Shattuck, *The New Global Landscape: Illiberal Regimes and Movements*, 71 JOURNAL OF INTERNATIONAL AFFAIRS 15–22 (2018).

¹³⁹ GERMANY [CONSTITUTION], 1949, art. 20a (“Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”) For source, see Elkins et al., *supra* note 50.

¹⁴⁰ Sandra Schmid, *Deutscher Bundestag - Wie Umwelt- und Tierschutz ins Grundgesetz kamen*, DEUTSCHER BUNDESTAG (2013), https://www.bundestag.de/dokumente/textarchiv/2013/47447610_kw49_grundgesetz_20a-213840 (last visited Jul 14, 2021).

¹⁴¹ See Erich Gassner, *Art. 20 a GG im Lichte des Art. 115 GG [Article 20 a German Basic Law in the light of Article 115 German Basic Law]*, 37 Neue Zeitschrift für Verwaltungsrecht 1112 (2018); Andreas Voßkuhle, *Umweltschutz und Grundgesetz [Environmental protection and the German Basic Law]*, 32 Neue Zeitschrift für Verwaltungsrecht 1 (2013).

¹⁴² German decision numbers: 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20. For

German highest court also extended the right to life and health to future generations.

The German decision has been impactful in several ways.¹⁴³ First, it directly affects infra-constitutional law and policymaking in regard to climate change and the environment. Second, it changes case law by allowing litigation based on Article 20a and will be consequential for how the German Judiciary handles similar cases. Thirdly, it signals to other jurisdictions that environmental litigation has been successful in one of the most relevant countries globally, promising to impact other pending cases in countries like the United Kingdom.¹⁴⁴ Lastly, and most importantly, it acknowledges that Germany's current actions implicate future generations' rights, specifically to life and health, and Germany is obligated to enforce a *de facto* protection of their interests. This impact is positively surprising as it means that the existence of a constitutional provision, even if weak and mostly symbolic for years, leaves the door open for decision-makers to implement changes in favor of future generations.

3. Brazil

Now, let us turn to the case of Brazil. Brazil's 1988 constitution is particularly strong regarding the protection of the environment, but it mentions future generations only in passing in its Article 225.¹⁴⁵ As the country is home to many ecosystems crucially relevant for the world, it would be no surprise if the environmental provisions in the

an official brief of the decision, in English, see Bundesverfassungsgericht Press, *Constitutional complaints against the Federal Climate Change Act partially successful* (2021),

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html> (last visited Jul 19, 2021). For the fully English-translated decision, see Bundesverfassungsgericht, *1 BvR 2656/18* (2021), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html%3Bjsessionid=C12C51CDBEE4826112D6C61305A48F5F.1_cid386 (last visited Jul 19, 2021).

¹⁴³ See Leonie Koessler & Renan Araújo, *A Novel German Precedent for Protecting Future Generations*, UK CONSTITUTIONAL LAW ASSOCIATION (2021), <https://ukconstitutionallaw.org/2021/05/12/leonie-koessler-and-renan-araujo-a-novel-german-precedent-for-protecting-future-generations/> (last visited Jul 14, 2021); Pranav Ganesan, *Climate Change and Fundamental Freedoms: The German Constitutional Court Orders Legislature to Rectify Climate Change Law*, OXFORD HUMAN RIGHTS HUB BLOG (2021), <https://ohrh.law.ox.ac.uk/climate-change-and-fundamental-freedoms-the-german-constitutional-court-orders-legislature-to-rectify-climate-change-law/> (last visited Jul 14, 2021).

¹⁴⁴ See Koessler & Araújo, *supra* note 145.

¹⁴⁵ See BRAZIL, *supra* note 50.

country's constitutions were applied exclusively to cases concerned with present-time protection, especially because there is no particularly strong *de jure* protection of future generations in Brazil's constitution.

Despite that, Brazilian courts have been especially innovative in the application of an environmental law principle popular in some other Latin American countries: *in dubio pro natura*. *In dubio pro natura* is an interpretive tool to guide decision-makers when choosing between similar options and states that, when in doubt, choose the option that protects the environment the most. Its first appearance is credited to the Constitutional Court of Costa Rica in 1995, which ruled that such a principle was crucial to provide the necessary, proactive protection that the environment requires.¹⁴⁶ The Costa Rican Court might have drawn inspiration from the application of another principle, *in dubio pro homine*, established by the Inter-American Court of Human Rights.¹⁴⁷ Since then, other Latin American countries have adopted the principle, such as Chile and Ecuador,¹⁴⁸ the latter of which even constitutionalized the principle's idea in 2008.¹⁴⁹

The Brazilian case, however, sets itself apart precisely due to its link to future generations as justification for the principle's application. The highest infra-constitutional court of the country, the Superior Tribunal of Justice, has been applying *in dubio pro natura* since 2010 when it ruled that the burden of proof should be transferred to the party interested in intervening in the environment, who should prove that their activities are not going to be environmentally harmful in advance. The Court ruled that this exceptional shift in the burden of proof was necessary "to safeguard the interests of uncountable absent individuals, often the whole of

¹⁴⁶ See Delgado and Solano v. Costa Rica, Case no. 5893-95, Direct Unconstitutionality Action, (Constitutional Court of Costa Rica, Oct. 27, 1995), (in a free translation from the original in Spanish: "In the protection of our natural resources, there ought to be a preventive attitude, i.e., if the degradation and deterioration ought to be minimized, it is necessary that precaution and prevention are dominant principles, which makes it necessary to plant the principle "in dubio pro natura," drawn analogically from other fields of Law and that is, overall, related to nature"). For further detail on the decision's historical context, see Alberto Olivares et al., *Contenido y desarrollo del principio in dubio pro natura . Hacia la protección integral del medio ambiente*, 24 IUS ET PRAXIS 619–650 (2018).

¹⁴⁷ See Olivares, *supra* note 148, at 629.

¹⁴⁸ *Id.*, at 637-639.

¹⁴⁹ ECUADOR [CONSTITUTION], 2008, art. 395, 4 ("In the event of doubt about the scope of legal provisions for environmental issues, it is the most favorable interpretation of their effective force for the protection of nature that shall prevail.") See Ecuador 2008 (rev. 2015) Constitution, (Constitute Project tran., 2021), https://www.constituteproject.org/constitution/Ecuador_2015?lang=en (last visited Jul 15, 2021).

humanity and the future generations,” citing Article 225 as a legal basis.¹⁵⁰ Since then, *in dubio pro natura* has also been employed to justify compensation of collective moral damages and the cumulation of reparation and compensation in environmental cases, in recognition of the “supra-individual” and “inter-generational” dimensions of environmental damage, which are “tied to the present and future generations.”¹⁵¹ These decisions are in close connection with and expand on the explicit mention of future generations by Article 225, which allows Brazilian courts to treat future generations as a determined body of holders of legal interest.

4. Niger and South Sudan

The final category we investigate is cases of under-performance, where strong constitutional provisions did not lead to clear *de facto* consequences. For these cases, we turn to African countries: Niger, South Sudan, and Tunisia. As previously seen, Africa has constitutionalized future generations more than expected. Such over-constitutionalization is closely linked to the fact that many African countries have used their newly-enacted constitutions to signal their willingness to integrate the international community and replicate mainstream best practices in institutional design.¹⁵² Part of this process often involves employing a constitutional language similar to the most widespread model that reflects sufficient shared values while being flexible enough for each country’s particularities.¹⁵³ This is the case with the universalist model of constitution-making, of which we have argued that explicit references of future generations are part.

However, some African countries not only replicated universalist prescriptions (supra-nationality of values, placement of the state in the international order, generic and broad goals) but went a step further to outline institutional steps toward their implementation. This is true of our next case studies, all of which describe specific institutions to bring about change aimed at protecting future generations.

¹⁵⁰ Case No. REsp 883.656/RS, Collegiate Decision on Special Appeal (Superior Tribunal of Justice of Brazil Mar. 9, 2010). *See*, for a detailed brief of decisions employing the *in dubio pro natura* principle by that court: Superior Tribunal de Justiça, *In dubio pro natura: mais proteção judicial ao meio ambiente*, SUPERIOR TRIBUNAL DE JUSTIÇA DO BRASIL (2019), <https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/In-dubio-pro-natura-mais-protecao-judicial-ao-meio-ambiente.aspx> (last visited Jul 15, 2021).

¹⁵¹ *See* Superior Tribunal de Justiça, *supra* note 152.

¹⁵² *See* Law, *supra* note 17, at 210 (“In post-communist Eastern Europe as in post-colonial Africa, universalism presented itself as an innocuous and increasingly popular alternative.”)

¹⁵³ *See* Beck et al., *supra* note 45.

In their constitutions, Niger¹⁵⁴ and South Sudan¹⁵⁵ establish funds dedicated to future generations. South Sudan even specifies the source of the funding as a “share of net oil revenue,” possibly inspired by the successful case of Norway.¹⁵⁶ The origins of these provisions can be traced to the influence of international organizations’ advice, particularly large donors such as the International Monetary Fund,¹⁵⁷ who pushed the countries toward the sustainable use of financial and natural resources.

However, despite these prescriptive and specific constitutional provisions, neither country experienced *de facto* protection of future generations. Niger has not created the fund at all as of 2021, despite the pressure of civil society organizations that ask for a small percentage from the profits of oil and gold extraction to be dedicated to the fund.¹⁵⁸ South Sudan established two funds through the Petroleum Revenue Management Act of 2013: one called the Oil Revenue Stabilization Account, which should receive 10% of oil revenue with the purpose of buffering oil price volatility, and another called Future Generations Fund, to receive 15% of oil revenue and set it aside for the future, as suggested by international organizations. Neither of the two has received any funding as of 2020.¹⁵⁹

Niger and South Sudan show how pronounced the gap between *de jure* and *de facto* protection of future generations can be. The general institutional instability makes it hard for any constitutional right to be enforced, even if it is emphasized by international actors, civil society, and the country’s own political goals. In these

¹⁵⁴ NIGER [CONSTITUTION], 2010, art. 153 (“The State sees to invest in the priority domains, notably agriculture, animal husbandry, health and education, and to the creation of a fund for future generations.”). For source, see Elkins et al., *supra* note 50.

¹⁵⁵ SOUTH SUDAN [CONSTITUTION], 2011, art. 178, 3 (“The National Government shall establish a Future Generation Fund from its share of net oil revenue.”) For source, see Elkins et al., *supra* note 50.

¹⁵⁶ Norges Bank Investment Management, *supra* note 55.

¹⁵⁷ See Africa Radio, *supra* note 92.

¹⁵⁸ See Réseau des Organisations pour la Transparence et L’analyse Budgétaire Niger (Rotab-Niger), *Le ROTAB plaide pour la création du fonds pour les générations futures au Niger*, PUBLISH WHAT YOU PAY (2015), <https://www.pwyp.org/fr/pwyp-news/le-rotab-plaide-pour-la-creation-du-fonds-pour-les-generations-futures-au-niger/> (last visited Jul 16, 2021); RESEAU DES ORGANISATIONS POUR LA TRANSPARENCE ET L’ANALYSE BUDGETAIRE NIGER (ROTAB-NIGER), *Rotab-Niger: Fond des Générations Futures* (2019), <https://www.youtube.com/watch?v=q26e5XFfy-E> (last visited Jul 16, 2021), a short film produced by a Nigerien NGO describing the efforts from civil society to advance the creation of the Future Generations Fund in the 10 years that passed since the enactment of Niger’s constitution, including conferences, international engagement, and political pressure with allied parliamentarians.

¹⁵⁹ See US Department of State, *2020 Investment Climate Statements: South Sudan* (2020), <https://www.state.gov/reports/2020-investment-climate-statements/south-sudan/> (last visited Jul 16, 2021).

cases, the expressive dimension of constitutionalizing future generations is clear-cut: the countries try to reap the benefits of signaling that they are willing to meet the international standards of institutional design through a set of constitutional provisions but indefinitely postpone their actual implementation.

5. Tunisia

Our last case study, within the examples of under-performance, is Tunisia. The Tunisian constitution of 2014 references future generations three times: in its preamble, in an article on the right to culture, and in a provision creating a Commission for Sustainable Development and the Rights of Future Generations.¹⁶⁰ On the latter, it specifies the scope of the commission (which should be consulted on draft laws related to economic, social, and environmental issues) and its composition (“members with competence and integrity, who undertake their tasks for a single six-year term”). This is a powerful institutional provision protecting future generations, with the only provision potentially as strong being Hungary’s.

In contrast to Hungary, Tunisia has experienced less *de facto* protection of future generations. Since 2014, substantial pressure has been exerted by civil society to advance the regulation of the constitutional provision, with NGOs contributing to the draft of the law.¹⁶¹ In 2019, the Tunisian parliament finally issued an organic law establishing the Commission, but no members have been elected to it as of 2021.¹⁶² There has also been international oversight in the implementation of this provision, such as by the Venice Commission, albeit a lighter oversight compared with the pressure exerted by donor organizations in Niger and South Sudan.¹⁶³ In

¹⁶⁰ TUNISIA [CONSTITUTION], 2014, preamble (“Being aware of the necessity of contributing to the preservation of a healthy environment that guarantees the sustainability of our natural resources and bequeathing a secure life to future generations, (...)”); *id.*, art. 42 (“(...) The state shall protect cultural heritage and guarantees it for future generations.”); *id.*, art. 129 (“ The Commission for Sustainable Development and the Rights of Future Generations shall be consulted on draft laws related to economic, social and environmental issues, as well as development plans. The Commission may give its opinion on issues falling within its areas of responsibility. The Commission shall be composed of members with competence and integrity, who undertake their tasks for a single six-year term.”). For source, see Elkins et al., *supra* note 50.

¹⁶¹ See Wahid Ferchichi, *The New Tunisian Constitution: A Reading into the Rights of Future Generations*, HEINRICH-BÖLL-STIFTUNG (2017), <https://tn.boell.org/en/2017/07/27/new-tunisian-constitution-reading-rights-future-generations> (last visited Jul 16, 2021).

¹⁶² See Manel Derbali, *Droits des générations futures: Pas prioritaires selon le Parlement tunisien*, NAWAAT (2021), <https://nawaat.org/2021/02/10/droits-des-generations-futures-pas-prioritaires-selon-le-parlement-tunisien/> (last visited Jul 16, 2021).

¹⁶³ See European Commission for Democracy Through Law, *Tunisie avis sur projet de loi*

their report analyzing the organic law, the Venice Commission praises the initiative and focuses on aspects of the practical implementation of the Commission for Sustainable Development and the Rights of Future Generations.¹⁶⁴

The Tunisian case is particularly interesting because, despite currently being an example of lack of implementation of *de facto* protection of future generations, it is the most promising country to become an ideal case. While Hungary is a bittersweet example due to the backward steps following the constitutionalization of an institution dedicated to future generations, Tunisia is on its way to becoming a case where the constitutionalization of future generations provided the legal substrate to civil society and the international community to push for reform and *de facto* protection. In fact, the activism of organizations in Tunisia, which have even won a Nobel Peace Prize for their contribution to the Jasmine Revolution of 2011,¹⁶⁵ has been associated with the enforcement of constitutional rights.¹⁶⁶ If such reform does take place, other countries with the necessary underlying institutional conditions might be inspired to push for future generations' protection or constitutionalization in their jurisdictions as well.

In conclusion, in this section, we have delved into the effects of the constitutionalization of future generations and learned how it can lead to different outcomes. We went through several challenges inherent to measuring the impact of these constitutional provisions, from confounding effects to the nature of the impact of such legal protection itself, which lies in the future. We then turned to case studies that represented the contrasting outcomes of constitutionalizing future generations. Hungary is a bittersweet example of one of the most progressive constitutionalizations of future generations that, in practice, turned out to be a backward step from pre-existing institutions. Germany recently became one of the best examples of how a relatively weak and unused constitutional provision might become relevant decades later by providing the legal basis for the Judiciary to protect

organique relative a l'instance du developpement durable et des droits des generations futures (2019), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)013-f](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)013-f).

¹⁶⁴ European Commission for Democracy Through Law, *Opinion on the Draft of Organic Law on the Authority for Sustainable Development and the Rights of Future Generations* (2019), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)013-e) (last visited Aug 15, 2021).

¹⁶⁵ Prize won in 2015 by the Tunisian National Dialogue Quartet. See The Nobel Peace Prize Committee, *The Nobel Peace Prize 2015*, NobelPrize.org, <https://www.nobelprize.org/prizes/peace/2015/press-release/> (last visited Aug 15, 2021).

¹⁶⁶ See Chilton & Versteeg, *supra* note 10, at 282. Also, more generally, at 10 ("the constitution can be a powerful instrument when used strategically by dedicated organizations").

future generations. Brazil also shows how innovative judicial use of a not particularly strong future generations provision can enshrine them as the holders of legal interest in environmental law cases. In their turn, Niger and South Sudan have strong constitutional provisions establishing funds for future generations but have lacked the necessary underlying institutional framework to enforce them as of 2021. Finally, even though Tunisia has failed to enforce its provision on a commission for future generations as of 2021, it shows great promise as civil society organizations and the international community pressure the government to advance its enforcement and might become one of the best examples of constitutionalization of future generations in the near future. This great variety in outcomes shows how, despite the difficulty in assessing the exact effects of the phenomenon as a whole or in all jurisdictions, the presence of future generations in a country's constitution creates the long-term potential for substantial, positive change, even if decades after their constitutionalization.

CONCLUSION

In conclusion, the rise of future generations in constitutions is a phenomenon that speaks to how contemporary constitution-making has updated its framing of traditional rights. Constitutions are becoming more concerned with their impact on the future, and future generations seem to be the go-to holders of legal interest to embody this shift. For this reason, constitutions have referred to future generations gradually more over time, especially since the 1980s, while also strengthening their *de jure* protection through moving future generations from preambles to their main texts, where state duties and rights are established in their favor. While it is still too early to assess *de facto* effects accurately, some jurisdictions such as Germany and Brazil have shown that such a rise has the potential to be rather consequential, especially as litigation against climate change and other threats to the future of humanity grows. In this article, we hope to have provided the reader with relevant data and insights to motivate further research that will contribute to unveiling how we, as a society, will protect the future of our descendants.