A Theory of Self-Enforcement of Constitutional Rights

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Abstract

This article proposes a theory of the self-enforcement of constitutional rights that places primary analytical weight on the textual design of constitutions. In contrast to prevailing approaches that treat constitutions as mere reflections of political bargains whose effectiveness depends on institutional actors, this theory emphasizes how constitutional texts themselves can shape outcomes by reducing the discretion of those tasked with implementing rights. The argument distinguishes between direct and indirect mechanisms of constitutional self-enforcement, depending on whether rights are operationalized through clear, specific obligations or through broader programmatic provisions that require legal mobilization. Based on this framework, the article presents the Constitutional Social Score Model (CSSM), an empirical tool that estimates the self-enforcement potential of social and economic rights across written constitutions. The CSSM analyzes over 500 constitutional documents from 197 countries and assigns scores based on two core dimensions: specificity and universality. The resulting index—the Constitutional Social Score (CSS)—captures how likely constitutional rights are to be realized based solely on their textual formulation. In doing so, the article offers both a conceptual contribution to constitutional theory and a replicable method for comparative constitutional analysis.
Keywords: Constitutional self-enforcement; Social rights; Constitutional design; Legal mobilization; Comparative constitutional analysis.

Introduction

Constitutions, at the moment of their drafting, represent negotiated bargains intended to last—binding not only contemporaries but future generations. Yet for a constitution to produce its intended effects, that is, to operate as an effective precommitment that constrains decision-making discretion (whether of citizens or the state), it must contain mechanisms of self-enforcement.

In this article, I propose a theory of the self-enforcement of constitutional rights, with a focus on the content and design of written constitutions.

The existing literature has primarily focused on the conditions under which constitutional orders endure or collapse. Within that context, "self-enforcement" is typically understood as a constitution's ability to stabilize the political order—that is, to persist and function over time.

My theory addresses something entirely different: the self-enforcing effects of constitutions once they are already in force. This distinction is fundamental. Rather than asking what textual features contribute to constitutional endurance (e.g., (Elkins, Ginsburg, and Melton (2009)), I examine how the specific formulation of constitutional provisions affects the likelihood that the rights they enshrine will be effectively implemented.

This distinction has not only conceptual but also analytical implications. While understanding self-enforcement in terms of constitutional endurance helps us address questions of democratic resilience, understanding self-enforcement as I propose allows us to estimate and compare the capacity of constitutional texts—within stable constitutional orders—to shape outcomes. This is especially relevant when we seek to determine whether, and to what extent, constitutions play a role in the realization of the rights they proclaim.

Many studies assume, in my view incorrectly, that the constitutionalization of rights is a regular phenomenon and that what varies is their degree of implementation (e.g. (Taylor 2023). I pursue the reverse path: beginning by assuming that variation exists in the way rights are constitutionalized (not merely in whether they are), then seeking to understand that variation, and ultimately estimating its effects on the degree of constitutional self-enforcement.

This theoretical argument unfolds in four steps. In the first section, I clarify *why* the constitutional text is the focus of this theory and how it relates to the broader concept of constitutional order. In the second, I define self-enforcement, institutional self-enforcement, and constitutional self-enforcement, arguing that constitutional texts are often overlooked in favor of the behavior of the actors who sustain the constitutional order. My theory seeks to rebalance this relationship. In the third section, I present a model for measuring the level of constitutional self-enforcement, based on the criteria of specificity and universality. I conclude with a brief summary of the model's analytical and empirical contributions.

1. Constitutional Order: Constitutional Text versus Unwritten Norms

Constitutional texts are embedded within a broader framework often referred to as the *constitutional order*. The relationship between text and order is perhaps the most contentious issue when it comes to theorizing constitutional self-enforcement, and it is also the core of the theory I advance here. After all, who or what is responsible for the effects produced by a constitution? Is it the text itself, or rather the ways in which political actors make use of that text in their everyday practices?

This section introduces that debate by clarifying what belongs to the constitutional text and what constitutes everything else—namely, unwritten norms, even when they reference or are derived from the text.

Constitutional texts set forth a series of rules that presuppose the existence of actors subject to them. Detached from the broader constitutional order, the text is merely a legal artifact—normatively inert, lacking real-world subjects. Therefore, the goal is not to consider the text in isolation, but to understand it as one element—arguably the central one—within the broader constitutional order.

Precisely because it is written and delineated, the constitutional text is also the most concrete and observable component of the constitutional order. As Ginsburg 2010, 70), notes, "[...] we cannot observe the unwritten social and political agreement that many argue forms the true locus of a country's constitution. We are forced, it seems, to scour the 'big-C' constitution for clues about the 'small-c' constitution. [1]"

Still, the constitutional text is not always central. It is common to assert that some countries lack written constitutions. Yet, Albert (2023) explains, these are less cases of "unwritten" constitutions and more properly described as *multi-textual systems*—that is, legal systems in which constitutional authority is dispersed across several texts that have, over time, acquired constitutional status. Even in such cases, written sources almost always serve as the normative reference point for constitutionalism. Genuine exceptions are rare and would involve orders grounded entirely in unwritten norms.

[1] The literature on constitutionalism often distinguishes between the constitutional text and the broader constitutional order by using capitalization: "big-C" refers to the written Constitution, while "small-c" denotes the constitutional order as a whole.

For the purposes of this article, I focus on formally written constitutions, though the theory could—with certain adjustments—be extended to multi-textual systems. However, it is not readily applicable to constitutional orders based solely on unwritten norms. In short, the theory I propose presupposes a form of constitutionalism grounded in written norms.

Even among countries with clearly codified constitutions, the role of the text within the constitutional order varies. That is, the written constitution may occupy a more or less central position depending on the country. Understanding the centrality of the constitutional text in relation to other elements of the order requires that we define (1) what constitutes the written constitution, and (2) what comprises the remainder of the constitutional order.

To be clear: the constitutional text *is one component of the constitutional order*. But to define it properly, we must first understand the larger set of institutional arrangements to which it belongs. What, then, is a constitutional order?

1.1 The Elements of the Constitutional Order

Defining constitutional order is a challenging task. The concept tends to be excessively broad: by potentially encompassing virtually any political or institutional element, it risks losing analytical utility. In trying to include everything, it ends up capturing nothing with precision, becoming incapable of abstractly encapsulating empirical reality—a classic case of conceptual stretching, in Sartori (1970) terms.

Another difficulty is that any attempt to define constitutional order must contend with the fact that the elements making up such an order may vary dramatically from one context to another. Therefore, what matters is having an objective criterion by which we can determine, in each case, what belongs—or *to what degree* it belongs—to the constitutional order.

Elkins, Ginsburg, e Melton (2009), following Murphy (2007) functionalist approach, define the constitutional order as the set of legal theories, norms, customs, and shared understandings that form an intersubjective consensus about what constitutes a country's fundamental law. For them,

the extra-textual components of the constitutional order are referred to as unwritten constitutional norms—a term I adopt here as well. These include everything from informal but institutionalized practices (such as the obligation of the British monarch to assent to parliamentary legislation—an unwritten rule that has not been broken since 1708) to constitutional meanings settled through judicial review.

Most definitions of constitutional order are structured around the relative position of the constitutional text vis-à-vis other elements of the order. There is no consensus on the centrality of the text in this broader framework. Elkins, Ginsburg, and Melton (2009), for instance, assume the primacy of the written constitution in most cases, which is a key methodological premise of their empirical work (and of mine). Other approaches, however, assign more weight to extra-textual elements. A representative view is that of Michigan Supreme Court Justice Thomas M. Cooley, who argued that the Constitution "is not the cause, but the consequence of personal and political freedom; it does not confer rights upon the people, but rather is the product of their power" (quoted in Ginsburg 2010, 69–70) [2]. As Ginsburg (2010) observes, this view denies the constitution any autonomous causal efficacy—standing in direct contrast to the notion of textual self-enforcement advanced in this article.

Yet another strand of scholarship interprets the constitutional text as a convention, emphasizing its coordinating function (e.g., (Carey 2000; Hardin 1989)). According to this view, constitutional effectiveness results from the rational decisions of actors who see the constitution as embodying a mutually preferable bargain compared to the counterfactual of no agreement at all. The pact endures as long as it remains advantageous.

As I will argue later, even the standard definition of institutions offered by (North 1990) presumes an arrangement that reduces transaction costs by establishing rules that constrain individual behavior, thus reducing uncertainty in social interactions. While I agree that it is ultimately the actors who organize and sustain the constitutional bargain who are causally responsible for its effects, I maintain that, once established, the constitution produces effects of its own. In other

[2] FOR THE ENGLISH TRANSLATION Most analysts agree that constitutions are not "magic words" that become effective simply through their pronouncement. Rather, constitutional texts may be effective only to the extent that they embody higher-order understandings that actually operate to constrain power. As Edwin Corwin wrote in 1936 (quoting Judge Cooley), the Constitution "is not the cause, but consequence, of personal and political freedom; it grants no rights to the people but is a creature of their power."1 Constitutions in this view have no independent causal efficacy. E. Corwin, The Constitution as Instrument and as Symbol, 30 Am. Pol. Sci. Rev. 1071, at 1071 (1936).

words, once in force, the constitutional text assumes a central role within the constitutional order, constraining the very actors who created it.

Still, convincing the reader of the absolute primacy of the text over the actors who designed it is not essential to the theory I present. What does matter is acknowledging that—even if one views these actors as central—*the text itself also possesses self-enforcing capacities*. In this regard, Ginsburg (2010) argues that although it is ultimately the collective understanding of citizens that gives effect to the constitution, the text plays a crucial role in making this possible: by defining a pact that, once adopted as a decision-making parameter, helps reduce disputes over issues that would otherwise lead to insurmountable deadlocks. The constitution's rules, he writes, "help actors overcome coordination problems by providing a definition of what the constitution requires, thereby offering a focal point for political and enforcement activities" (Ginsburg 2010, 75). The coordinating function of written constitutions derives from their objectivity and predictability, which generate a shared perception that violating the agreed-upon rules will elicit collective repudiation.

In this theory of constitutional self-enforcement, I define constitutional order as the set of formal and informal institutions that operate either in reference to or on the basis of *constitutional rules*—whether written (codified constitutions) or unwritten (norms accepted as constitutional, even if not formally codified).

1.2 Constitutional Rules, Constitutionalism, and Rights

I define constitutional rules as the set of norms that (1) express the principle of constitutionalism and that, typically, (2) are entrenched through mechanisms that make them harder to amend than ordinary legal rules.

Trata-se de um conceito originalmente liberal em sua essência, razão pela qual frequentemente é acompanhado do adjetivo "liberal" – como em *constitucionalismo liberal*.

By *constitutionalism*, I refer to those features of the constitutional order that directly or indirectly constrain state power and, consequently, affirm individual autonomy. This is a concept with liberal roots, which is why it is often accompanied by the qualifier *liberal*—as in *liberal constitutionalism*.

This label is meaningful but potentially misleading when we incorporate social and economic rights into the analysis. In my view, rights are not a necessary condition for the emergence of constitutionalism. What is required is the existence of mechanisms—whatever their form—that establish some degree of power fragmentation or limitation. Still, liberal rights (i.e., civil and political rights) have historically accompanied constitutionalism and served as effective instruments for its realization. After all, if the goal is to limit state power, one way to do so is by establishing precommitments in the form of individual rights—that is, creating a baseline of mutual obligations from which state action and legal relations among individuals must proceed. These rights form part of a constitutional common sense that is (almost always) codified and functions as a formal basis for legal claims. Liberal rights are intimately connected to this framework not because they are "negative" rights—as is often mistakenly argued[3]—but because they directly protect individuals' freedom vis-à-vis the state.

But what about social and economic rights? Are constitutions that enshrine them liberal or social? In my view, they are—or can be—both. These categories are not mutually exclusive. In fact, most so-called "social constitutions" are also liberal in that they continue to include institutional and substantive features that constrain state power—such as civil and political rights—while also embracing social rights.

The relationship between social and economic rights and constitutionalism, by contrast, is more indirect. These rights establish the minimum conditions necessary for individuals to achieve a sufficient degree of autonomy and well-being[4]—core elements of what Fabre (2004) calls a "decent life." Individuals who lack basic material resources are functionally incapable of exercising the liberal rights that, as I have argued, are the primary legal instruments through which

[3] The notion of liberal rights as "negative" and social rights as "positive"—though still prevalent (e.g., (Bui 2022; Charles 2021; Fins 2022))—has been challenged for at least seven decades, beginning with Marshall (1950) argument that the realization of civil and political rights also depends on state structures. In truth, all rights—including civil and political ones—are positive, insofar as they presuppose state action for their enforcement. Property rights, for instance, require a state apparatus capable of protecting property and a judicial system capable of sanctioning violators. For a critique of the positive/negative rights dichotomy, see Holmes and Sunstein (2000).

[4] Fabre (2004) defines autonomy as the ability to construct, revise, and pursue a conception of the good, and well-being as the absence of physical suffering. The combination of these two elements, in turn, defines the minimum threshold for what constitutes a decent life. According to the author, a decent life is a prerequisite for the exercise of civil and political rights—one of her key arguments for classifying social rights as fundamental (and thus eligible for constitutional recognition).

constitutional orders restrain state power. Thus, *ceteris paribus*, social constitutions are not less liberal but, in fact, *more* liberal.

Another defining feature of constitutional rules, beyond their link to constitutionalism (which is frequently, though not necessarily, tied to the existence of rights—particularly liberal ones), is their entrenchment. That is, having constitutional status is rarely a merely rhetorical or symbolic designation; it usually refers to legal norms that are more difficult to amend than ordinary legislation.

This entrenchment can take various forms. Formal amendment procedures, for example, are usually prescribed by the Constitution itself (Albert 2014; Dixon 2011; Elkins, Ginsburg, and Melton 2009). But constitutions can also be altered through informal mechanisms, such as judicial review (Lutz 1994; Strauss 1996), shifts in political practice or convention (Strauss 1996), or what Tushnet (2008) terms "constitutional workarounds" [5]. All of these pertain to what I previously referred to as "other elements" of the constitutional order—or "unwritten norms."

Whether formal or informal, the concept of amendment is intrinsically tied to the principle of entrenchment. Constitutional provisions may be immutable or may require supermajorities—higher thresholds than those required for ordinary statutes—in order to be changed. They may also be modified through informal practices. In any of these cases, amendment rules express a dual logic of "faith and mistrust in political actors" (Albert 2014, 913), insofar as they "authorize political actors to improve the constitution while simultaneously limiting when and how they may do so" (Albert 2014, 913–914). I argue that such limitation—variable in degree—is one of the defining features of constitutional rules. In other words, it is not enough for a legal norm to constrain government action through the distribution of authority; after all, ordinary statutes can do that as well. For a norm to qualify as constitutional, its definition of power constraints must be more difficult to change than comparable non-constitutional norms—it must be entrenched.

1.3 Constitutional Order

[5] According to Mark Tushnet, workarounds can be understood as "a technique of constitutional revision without amending the constitutional text," similar to "other techniques, including judicial interpretation."

As defined in section 1.1, I understand constitutional order as the set of formal or informal institutions that operate in reference to or in function of constitutional rules—whether written (codified constitutions) or unwritten (norms accepted as constitutional, even if not formally codified).

My definition differs by adopting an expressly institutional framework, which is appropriate for the objective of assessing how elements of the constitutional order constrain individual behavior—specifically, in terms of their capacity to produce enforcement. Furthermore, in principle, according to this definition, *everything may belong to the constitutional order*, though some things belong more than others—that is, some elements are more central in relation to constitutional rules, which I take to be the core of the constitutional order. Everything belongs because, in some degree, everything refers to the constitution, whether to what it prescribes or to what it omits.

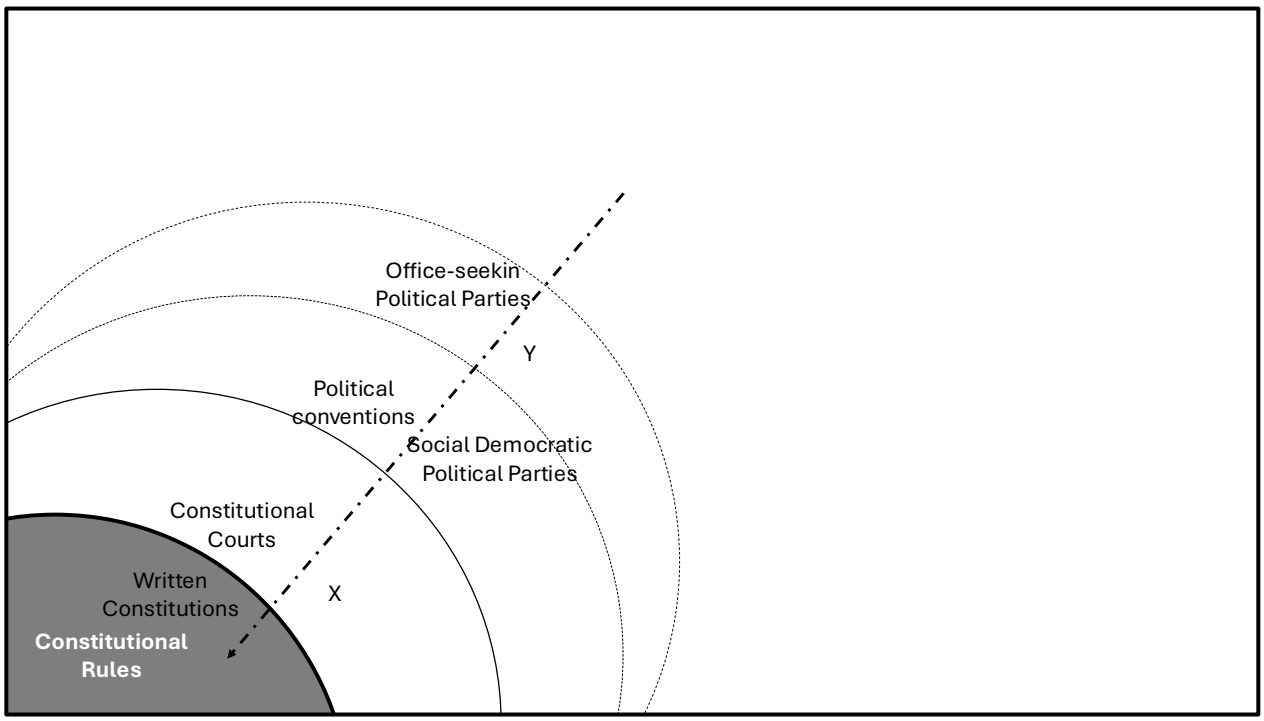
For instance, a conduct that is undertaken because the constitution does not prohibit it still reflects a constitutional reference—albeit by omission. That omission may itself be the result of deliberate strategic choices made during the constitutional bargaining process[6].

Some institutions, however, *belongs more to* (i.e., are more central to) the constitutional order because they not only refer indirectly to constitutional rules but are expressly designed to enforce them in specific cases—to function in light of those rules.

The distinction between institutions that merely refer indirectly to the constitution and those that function directly in reference to it is not always clear-cut. Instead of a rigid dichotomy, I propose thinking in terms of a gradient of centrality with respect to the constitutional core (defined by constitutional rules), as illustrated in Figure 1 below.

[6] Indeed, the decision not to constitutionalize a given matter (or to do so in a highly vague manner) is—or can be—a strategic choice that often reveals as much, or more, than the act of constitutionalizing itself. There is a substantial body of literature addressing the strategic decision to leave certain issues out of the constitution (e.g., (Dixon and Ginsburg 2011; Holmes 1988). Moreover, depending on how a provision is constitutionalized—for instance, when formulated in vague or open-ended terms—its implementation becomes contingent on extensive regulation, thereby requiring the legislature to act as an enforcer agent. Several studies have analyzed the strategic choice of legislators to avoid regulating politically costly issues, effectively shifting the burden of implementation to constitutional courts (e.g., (Hirschl 2008).

Figure 1: Gradient of Centrality in Relation to the Constitutional Core



Source: author's elaboration.

As a general rule, written constitutions are more central to constitutional rules than constitutional courts, which in turn are more central than political conventions. Similarly, even though elements X and Y both belong to the constitutional order, the former is more central than the latter. Centrality here is relational: it depends on the extent to which each element operates in direct reference to constitutional rules.

Accordingly, not all political institutions—even those explicitly provided for in the Constitution—are necessarily central elements of the constitutional order. Whether or to what extent they are central depends on the answer to the following question: do these institutions operate because of and in reference to constitutional rules?

Consider the example of political parties. Are they central to the constitutional order? The fact that they are mentioned in the constitution does not automatically yield a positive answer, since one of the key factors that determines their centrality lies in how they actually operate. One could argue that, almost always—if not always—political parties are, to some extent, part of the constitutional order, if only because they exist to compete for votes in elections in order to hold public office

and, in doing so, implement public policies that, within the bounds of discretion allowed by the constitutional framework, are in some way related to constitutional rules.

In fact, even within the same party system, there may be variation among parties in terms of their degree of centrality within the constitutional order. A political party committed to the realization of constitutional rights—that is, one whose platform aims to regulate and implement public policies that fulfill constitutionally enshrined rights (e.g., social democratic parties advancing welfare agendas)—or, conversely, a party that actively seeks to obstruct the realization of such rights, should be considered more central to the constitutional order than parties whose strategies are more pragmatic, focused on electoral competition and office-seeking.

Typically, after the constitutional text itself, constitutional courts are the most central elements of the constitutional order, as they are responsible for interpreting constitutional rules and giving them concrete effect. In some jurisdictions, courts play such an expansive role that they may even become more central than the text itself. There is substantial literature documenting cases in which constitutional courts exercise a level of judicial activism that, if not outright rewriting the constitutional text, assigns meanings that diverge significantly from a literal reading. Elkins, Ginsburg, and Melton (2009), for example, note that U.S. courts have filled in the gaps of the U.S. Constitution in order to adapt it to modern life.

Lower courts—especially in systems of diffuse review—also play a crucial role in assessing the constitutionality of claims brought before them. Likewise, litigants themselves perform a constitutional function by asserting or contesting constitutional rights. (Epp 1999) for instance, shows that lawyers and civil society organizations establish a support structure that is essential for the enforcement of constitutional rights through what he terms pressure from below, challenging the assumption that courts alone drive constitutional implementation.

This set of interactions—between courts, at various levels, and individuals who legally claim their rights—constitutes a process known as legal mobilization, which I will return to in later sections. I argue that legal mobilization is at the very center of the constitutional order and is key to the realization of constitutional rules.

Without seeking to exhaust the list of institutions that may form part of the constitutional order—which, under my definition, is potentially infinite—I have outlined the basic logic of the relationship between the constitutional text and the broader constitutional framework. In the next

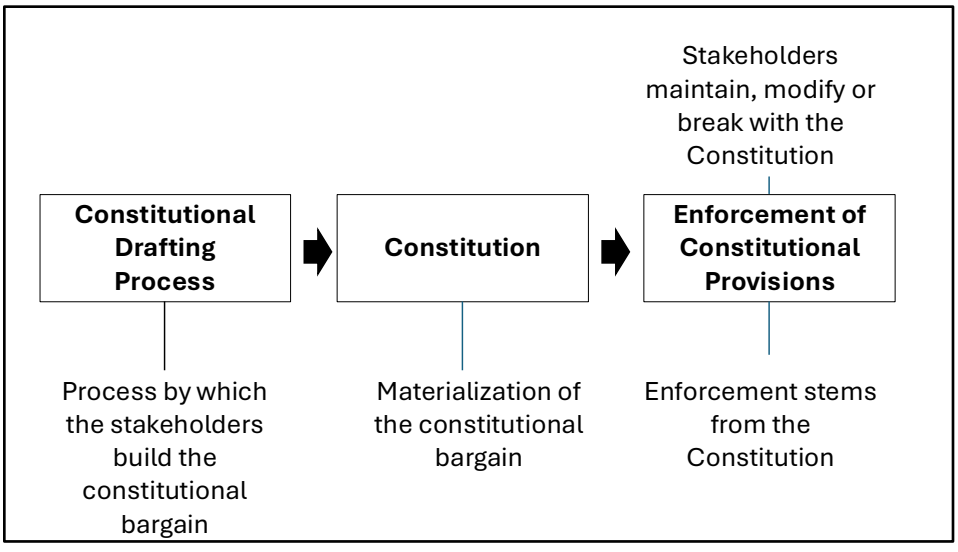
sections, I analyze how the text interacts with other elements and how, and under what circumstances, each contributes to constitutional self-enforcement.

2. Constitutional Self-Enforcement

Before proposing a definition of constitutional self-enforcement, a theoretical caveat is in order. Even if constitutions are self-enforcing—as I argue in this article—this does not mean they are the original *cause* of enforcement. Rather, they are the consequence of a causal chain that begins with a preceding factor: the negotiation of the constitutional bargain itself.

Thus, when I state, for example, that the 1988 Brazilian Constitution is highly self-enforcing with regard to the right to healthcare—given the high degree of specificity in its provisions—I mean that the foundational bargain from which it emerged contains normative commitments that imply enforceability. Once institutionalized, those normative effects acquire relative autonomy. Figure 2 below illustrates the causal relationship described here.

Figure 2: Causal Dynamics of Constitutional Self-Enforcement



Source: author's elaboration.

Ultimately, it is the stakeholders involved in the constitutional drafting process who cause the enforcement, as they are responsible for shaping the foundational bargain. But once the constitution is enacted, it gains its own normative force: its provisions constrain the very actors who created them. Changing these constraints without breaking the constitutional order is possible—but only in a limited and incremental fashion.

We can thus say that the continued enforceability of the constitutional bargain depends on a delicate equilibrium: the affected actors must believe that the benefits of an alternative bargain—one that favors them more than the existing one—do not outweigh the costs and uncertainties involved in pursuing it.

Because enforcement ultimately depends on the actors subject to the constitution, many scholars presume that self-enforcement is a property of those actors, not of the text itself—or at best, that the text serves merely to facilitate coordination among them. As I suggested in the introduction, the divergence between my proposal and the dominant literature is not primarily normative, but conceptual: whereas most scholars define self-enforcement as the capacity of a constitution to remain relevant and effective over time, I ask to what extent this effect derives from the text itself.

Thus, while the durability of a constitutional order does in fact depend on a strategic equilibrium among stakeholders, once in force, a constitution also produces effects on its own. After all, a constitution that produces no effects lacks the institutional properties of a functional constitution. As Lassalle (1933) famously put it, constitutions that do not correspond to the "real factors of power" are mere pieces of paper. What matters to me is understanding the effects of constitutions that go beyond parchment.

2.1 Self-Enforcement and Institutional Self-Enforcement

Before advancing the theory of constitutional self-enforcement, it is important to clarify the broader concept of self-enforcement (SE). I define SE as a property of something that produces the effects expected from it—or for which it exists—without requiring external action to impose or induce those effects. A light bulb, properly connected to the power grid, emits light when switched on not because the people illuminated by it are doing anything to make that happen, but

because emitting light is precisely its self-enforcing function. In other words, SE is observed when something performs its function by virtue of its own internal design.

For present purposes, what matters most is the self-enforcing nature of institutional arrangements. But before addressing those specifically, it is worth recalling what defines an institution, at least as it relates to the broader concept of self-enforcement.

Perhaps the most well-known definition is that of Douglass (North 1990, 3), stated in the opening lines of his book:

> *"Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction."*

For an arrangement to be considered an institution, it must produce constraints that shape human interaction.

In this sense, a self-enforcing institutional arrangement is one that produces effects (i.e., constraints on individual behavior) by virtue of its own existence. That is, it defines rules, bargains, or contracts that are sustained by those affected by them without requiring coercion from third parties. This does not mean that coercion cannot exist as a guarantor of institutional compliance. Rather, the point is that coercion—while possibly a consequence of noncompliance—is not the reason why the arrangement is initially adopted and continually observed. As long as coercion functions as a guarantee rather than a motivating force, the institution can still be considered self-enforcing.

Tax payment, which is fundamental for the enforcement of social constitutions, helps illustrate this logic, even though, at first glance, it may not seem like a case of self-enforcement. No one pays taxes because they want to. From an individual perspective, taxes are paid to avoid state-imposed sanctions. But from a societal perspective, we pay taxes because we tacitly accept a social contract that enables the sociability from which we all benefit—one that necessarily depends on collective financing. As Holmes and Sunstein (2000) argue, rights are not free: their realization depends on state revenue and the collective allocation of resources. The acceptance of this pact is not individual, but collective and institutionalized.

Accordingly, I define *institutional self-enforcement* as the property of institutions to generate effects, that is, constraints on individuals, by virtue of their own structure, independently of external forces acting upon the parties who share in those effects.

Yet this raises the crucial question: *Why*, and under what conditions, do individuals accept the constraints imposed by institutions?

There are many possible answers at different levels of analysis and with different theoretical foundations. My goal is not to review them exhaustively, but rather to trace the conceptual path that will allow us to understand the role of constitutions in this dynamic. The most widely accepted explanation is that individuals voluntarily submit to institutional constraints because doing so is beneficial. Institutions are advantageous for various reasons, but above all, as North (1990) argues, because they create expectations of behavior that reduce the uncertainties inherent in social interaction. Less uncertainty means lower costs, a rationally desirable outcome. Political parties, for example, though not an economic institution, are classic illustrations of this logic: they aggregate interests and reduce the costs of political negotiation that would otherwise be far higher (Aldrich 2011; Alemán and Saiegh 2007; Koger and Lebo 2017).

If, by generating constraints, institutions define a narrower and more predictable range of possible outcomes for human interaction than in the counterfactual scenario where no such institution exists, then it is reasonable to presume that something within the institution *itself* defines those constraints. That is, these constraints are human inventions, created to limit behavior, and they depend on the acceptance of those same individuals in order to be effective. Yet, once accepted, the way they are shaped restricts the very ability of their creators to step away from them.

In other words, institutions, once created, take on a life of their own and escape the control of their designers. The light bulb, once switched on, emits light regardless of whether those in the room want to be illuminated. If institutions did not produce effects beyond individual will, they would not truly be constraining—individuals could simply "ignore the light" and return to darkness. But even if ignored, the light still shines. Hence, the ability to constrain behavior is a defining condition of any institution.

A light bulb is a light bulb because, and only insofar as, when connected, it emits light, regardless of anyone's intention. An institution is an institution because, and only insofar as, when in force, it generates effects, regardless of individual will.

One may wonder, of course: can't someone who dislikes the light just turn the bulb off? Indeed, institutions, like light bulbs, are not eternal. They depend on the continued willingness of actors to sustain the pacts that keep them functioning. The agreement to leave a light on in a couple's bedroom may be temporary or conditional.

Light bulbs can be switched off—or removed altogether—just as institutions can be dismantled or radically altered, extinguishing both the light and their effects. But while they are operational, they produce consequences.

What, then, of institutions whose rules are routinely ignored by the very individuals meant to observe them? If they produce no effects, then by definition, they are not institutions. Therefore, if we want to understand constitutions as institutions, we must presume them to be self-enforcing. That is the subject of the next section.

2.2 Constitutional Self-Enforcement

Thus far, I have defined institutional self-enforcement as the essential property through which institutions generate constraints on individual behavior by virtue of their internal design, rather than by external coercion. I also emphasized that the durability of this self-enforcing effect depends on the stability of the bargain sustained by those subject to such constraints.

The notion of institutional self-enforcement, of which constitutional self-enforcement is a subset, is not new. Institutionalist literature, either explicitly or implicitly, generally presumes that institutions possess some degree of self-enforcing capacity. Constitutional self-enforcement, therefore, is a condition for understanding the constitution as a meaningful institution—one that generates effects and constrains the actions of the actors under its normative authority. This is the premise that underlies the concept of constitutional self-enforcement as developed in this article.

The problem is that, when we analyze constitutions as institutions (i.e., as rules that constrain human behavior), we tend to focus too much on the actors subject to them, especially institutional actors, and too little on the text itself. We ask under what conditions individuals comply with the constraints defined by the constitution, but we overlook the power of subjection that emanates from the text. In fact, when we talk about constitutional self-enforcement, we often mean the order

that emerges from the Constitution—not the text per se. In my view, we need to focus more on the text itself. That is the core of this theory of constitutional self-enforcement.

As a result, it is commonly assumed that constitutional self-enforcement is a phenomenon driven by factors external to the constitutional document. Elkins, Ginsburg, and Melton (2009), for example, treat constitutional self-enforcement as the consequence of a successful bargain. In their view, constitutions are effective only insofar as the actors they govern believe that the costs of exiting the current bargain exceed those of maintaining it:

> "We assume that constitutions are bargains among elites that are meant – at least by their authors – to be enduring. Unlike normal contracts, however, there is no external guarantor who will enforce the agreement, independent of the parties. A constitution will be maintained only if it makes sense to those who live under its dictates, so a crucial quality of any successful constitution is that it be self-enforcing. This means that those within the constitutional bargain must have a stake in the successful implementation of the document for it to endure. Even though constitutional bargains may have relative winners and relative losers, they will endure to the extent that parties believe they are better off within the current constitutional bargain than in taking a chance on, and expending resources in, negotiating a new one." (Elkins, Ginsburg, and Melton 2009, 7)

Without downplaying the relevance of this dimension of constitutional self-enforcement—that is, its continued utility for the actors who sustain the bargain—I shift the focus to another question: once a constitution is in force and relatively stable, what is the capacity of the text itself to produce effects?

2.3 Why—If at All—Are Constitutional Provisions Enforced?

Leaving aside, for the moment, concerns about the stability of constitutional orders, I now turn to a more specific question: what features of constitutional provisions enhance their practical enforceability, that is, their capacity to generate concrete effects based on the text itself?

A constitutional provision may become effective for two reasons:

(1) because it contains a clear and objective *de jure* definition of how it must be operationalized in concrete cases; or

(2) because, even in the absence of a clear *de jure* formulation, its aspirational or programmatic content shapes *de facto* decision-making dynamics—whether in legal or social contexts.

I refer to these two pathways as direct constitutional self-enforcement (or *de jure* self-enforcement) and indirect constitutional self-enforcement (or *de facto* self-enforcement), respectively.

In both cases, the constitution is, to some degree, self-enforcing: either because its provisions directly bind the judiciary (direct self-enforcement), or because they orient the judiciary through processes of legal mobilization that ultimately lead to enforcement (indirect self-enforcement). These two mechanisms are not mutually exclusive; they may occur simultaneously—or fail to occur altogether.

One might object that indirect self-enforcement is not truly self-enforcing, since it depends on an additional process—legal mobilization—to translate constitutional language into enforceable outcomes.

That critique is valid: in strict terms, indirect self-enforcement is not fully self-enforcing. But the same is true for direct self-enforcement. In reality, no legal norm is absolutely self-enforcing—whether it be a custom, an administrative rule, an ordinary statute, or a constitutional provision. Every norm depends, to some degree, on the acceptance of those whom it aims to regulate. Laws are abstract coercions that produce effects only insofar as actors expect concrete coercion to materialize if they disobey.

That is, the effectiveness of any law depends on two conditions:

(1) That individuals accept the legitimacy of the state to impose that law coercively: individuals must feel coerced, that is, they must fear being sanctioned if they fail to comply with the legal obligation imposed upon them. This sense of coercion does not stem from the mere existence of the law, but from the individual's understanding that the state holds legitimate authority to coercively enforce that specific law.

(2) That the state is actually willing and able to do so: once the law exists, the state must act to enforce it, that is, it must impose coercion in the event of noncompliance.

Even when both conditions are met—when individuals recognize the legitimacy of the law and the state intends to enforce it—implementation still depends on how the state interprets the obligations defined in the constitutional text. The clearer the obligation imposed on the state, the greater its capacity to act directly in concrete cases—independent of legal mobilization (direct self-enforcement). Conversely, the more abstract or programmatic the provision, the more it requires intermediating actors (e.g., litigants, legislators, judges) to translate it into practice—thus falling into the realm of indirect self-enforcement.

In short, both mechanisms require legal mobilization to some extent, but indirect self-enforcement relies more heavily on it than direct self-enforcement. Therefore, in this theory, the term self-enforcement refers to the degree to which legal mobilization is necessary to make a constitutional provision effective. The prefix "self" is appropriate insofar as it signals that enforceability derives, at least partially, from the way the constitution itself is written, even if its realization also depends on actors external to the text.

2.4 The Gap Between the Constitution and Its Enforcement

The conclusion from the previous section can be summarized in a single statement: there is always a potential gap between what is written in the constitution and what is actually implemented. The size of that gap is inversely proportional to the clarity with which the constitution defines the obligations it imposes and the means by which those obligations can be fulfilled.

The metaphor of the "telephone game" (a game also known in some regions as "Chinese whispers") helps illustrate this implementation gap. The game consists of whispering a message from one person to the next, through a sequence of players, with the goal of preserving its original meaning as faithfully as possible

Let us suppose the original message is a constitutional obligation. If that message is, for example, "everyone has the right to health," its implementation will depend on how the actors involved in legal mobilization interpret what it means to have such a right. Suppose the drafters' intent was to guarantee a comprehensive, universal, and free public healthcare system, but by the time the provision is interpreted and implemented—whether through legislation or judicial rulings—it results in a policy focused solely on preventive care, excluding the broader guarantees of

universality and comprehensiveness originally envisioned. In that case, the process has introduced noise into the transmission, creating a clear distance between the original constitutional intention and the outcome that is ultimately implemented.

What the "telephone game" reveals is crucial: there are always layers of mediation between the constitutional message and its implementation. What varies is the capacity of these intermediaries—especially legislators and judges, and above all constitutional courts—to reconstruct the original normative intent. And this variation depends on how clearly the constitutional message is expressed, or how clearly it defines the means of its enforcement. I refer to this as the level of constitutional specificity.

This proposition also finds support in Joseph Raz's well-known interest theory of rights (Raz 1986), which I adapt here as follows: X holds a right W if X's interest in W is sufficiently important to justify the imposition of duties on another party, Y.

In other words, rights are held by X, against Y, by virtue of Z—the importance of X's interest in W.

Constitutional self-enforcement increases in proportion to how clearly the obligation that right W imposes on Y is defined. When the obligation is formulated in generic terms (e.g., "health is a right of all"), its content remains inherently open to multiple interpretations. These interpretations may vary depending on how the legislature regulates it, how the executive implements it, or how the judiciary interprets it.

Conversely, when the obligation is clearly specified (e.g., "health, as a right of all, shall be guaranteed through a universal, public, and free healthcare system that provides all forms of medical services"), the range of legitimate implementation options for Y—typically, the state—is considerably narrowed. Both the state directly, and the taxpayers who finance its services indirectly, face a more clearly delineated set of duties. These duties constrain what may count as lawful regulation, acceptable policy implementation, or constitutionally valid judicial interpretation.

2.5 The Purpose of Constitutional Rights' Self-Enforcement

Thus far, I have argued that constitutional provisions are self-enforcing to varying degrees, and that the lower the level of self-enforcement, the greater the implementation gap. The level of self-enforcement corresponds to the extent to which the provision specifies the obligation it imposes as binding.: the more specific it is, the narrower the gap.

When we focus specifically on constitutional rights, a subset of constitutional provisions, another analytical dimension must be added: the *purpose* of the right. I argue that rights enshrined in constitutions are not neutral statements; they carry an expected normative direction – a *presumed purpose*. While the exact content of that direction may vary from one right to another, it generally reflects the utilitarian principle articulated by Jeremy (Bentham 2000): the greatest happiness for the greatest number.

Let us consider two contrasting constitutional formulations of the right to education. The first comes from the 1946 French Constitution, whose preamble—incorporated into the 1958 Constitution—declares: "The Nation guarantees equal access of children and adults to education, vocational training, and culture. The provision of free, secular, public education at all levels is a duty of the State." The second is a hypothetical and deliberately counterfactual provision: "Education shall not be financed through public funds at any level. All education shall be privately funded."

While both provisions are specific and potentially equally self-enforcing, they promote entirely different normative logics. The first aligns with the presumed purpose of the right to education: to expand access to education as widely and deeply as possible. The second subverts that expectation. This example illustrates that even a provision with high specificity may contradict the presumed purpose of the right it enshrines, thereby undermining its substantive realization.

If constitutional rights have a presumed purpose, then estimating their level of self-enforcement must involve not only assessing the clarity of the obligation but also examining how closely the provision aligns with that presumed purpose. In this regard, universality—i.e., the breadth of the population covered by the right—is a key analytical dimension.

In the case of the right to education, for example, the level of education up to which free access is guaranteed can serve as a proxy for both specificity and alignment with the presumed purpose of the right.

Notably, the provision of free access is a crucial marker for several other rights beyond education. It typically reflects a clear obligation imposed on the state to deliver goods or services, thus reducing ambiguity and advancing both specificity and universality. In doing so, it strengthens the self-enforcing potential of the right.

It is within this broader framework that I introduce the concept of universality level. I argue that the more a constitutional provision expands access to a right, the more closely it adheres to that right's presumed purpose.

Also known as the scope level, the universality level indicates the extent of a right's coverage, as set by the constitutional provisions aimed at making it effective. This dimension was included to recognize the different natures of the social pact envisioned by the constitutional documents based on the universality of the public qualified to enjoy the rights set therein.

Perhaps the best example to understand the relevance of the universality level comes from a right of a political nature, namely, the right to vote. There is little doubt that universal suffrage is a minimally necessary, but not sufficient, condition for the recognition of a modern democratic state as such. However, it is undeniable that universal suffrage marks the endpoint of a march of constant expansion of suffrage throughout the history of modern democracies. That is to say, if we were to historically measure democracies around the world, it is uncontroversial that the coverage scope of the right to vote would be a central element in evaluating how democratic each country is. I apply this same logic to social rights. Thus, for example, a healthcare system that is free for everyone effectively substantiates the abstract right to health more than another system in which free health care is only guaranteed for a restricted audience, or a system in which the State partially subsidizes healthcare costs but does not ensure its gratuitousness as a right.

Accordingly, I propose that the level of self-enforcement of a constitutional right be assessed according to two main criteria:

(1) The specificity with which the obligation is defined; and

(2) The alignment with the right's presumed purpose, measured through its level of universality.

This two-dimensional framework constitutes the analytical foundation of the *Constitutional Social Score Model (CSSM)*, which I present in the next section.

3. Estimating the Level of Self-Enforcement: The Constitutional Social Score Model

If we accept that provisions which more clearly define the means of their enforcement are more likely to be effectively implemented, then it becomes theoretically possible to estimate their level of self-enforcement—provided we can translate this into a measurable index.

In the case of constitutional rights, estimating self-enforcement requires not only analyzing normative specificity but also the degree to which a provision aligns with the presumed purpose of the right. The Constitutional Social Score Model (CSSM)—which I have developed—incorporates both of these dimensions, specificity and universality, as core analytical axes.

The technical functioning of the CSSM is presented in greater detail in the Codebook/Guidebook, available online at https://datacons.com.br/cssm-constitutional-social-score-model/ . Here, I limit myself to discussing how the model operationalizes the theory of constitutional self-enforcement developed in this article.

First, it is essential to clarify what the CSSM does not measure: it does not assess the actual implementation of rights. Rather, it is a tool designed to evaluate constitutional texts—that is, to estimate their potential for self-enforcement, assuming all other factors are held constant (*ceteris paribus*).

In other words, variables beyond the constitutional text—such as judicial behavior, political will, and administrative capacity—correspond to the other elements of the constitutional order: the unwritten norms and institutional dynamics that shape political and legal life. As I have argued, higher levels of self-enforcement correspond to more clearly defined constitutional obligations, which in turn reduce the discretion of actors responsible for interpreting or implementing them. Put simply, a higher level of self-enforcement limits the range of resistance to a right's realization.

Given this premise, what does the CSSM aim to capture?

The model systematically searches constitutional texts for provisions that recognize rights associated with what is conventionally called the "second generation" of rights—primarily social and economic rights, as well as related collective claims such as environmental rights, cultural rights, and the rights of indigenous peoples. For the sake of analytical clarity, I refer to this set as post-liberal rights—not to suggest that they replace liberal rights, but simply to indicate that they emerged historically after the codification of civil and political rights. My broader research agenda includes incorporating civil and political rights into the same analytical framework, with the goal of developing a unified model for assessing the self-enforcement of all human rights.

The CSSM operates in two stages:

(1) A qualitative coding of constitutional provisions based on objective criteria related to specificity and universality; and

(2) A scoring process, which translates those criteria into numerical values.

The technical details of this process are outlined in the official Codebook/Guidebook

Currently, the CSSM covers rights grouped into eight categories:
(1) Education;
(2) Healthcare;
(3) Housing;
(4) Environment;
(5) Minorities (children, the elderly, persons with disabilities);
(6) Labor rights;
(7) Consumer rights; and
(8) Indigenous peoples.

Each category (or subcategory) receives a score from 0 to 10. The arithmetic mean of these scores produces an aggregate index, the *Constitutional Social Score (CSS)*, which expresses the overall level of self-enforcement of post-liberal rights in a given constitution.

In the next subsections, I briefly describe how the CSSM is applied to four of these categories.

3.1 Education

The level of self-enforcement of the right to education is measured by assessing the extent to which free education is guaranteed by the constitutional text. While the right to education certainly involves additional dimensions, such as educational quality or the broader civic and democratic purposes of schooling (Dewey 1997; Glaeser, Ponzetto, and Shleifer 2007; Sant 2019), this model deliberately focuses on the most consensual and observable element: free access.

Debates over educational quality often reflect deeply contested ideological positions. For example, some approaches emphasize critical thinking and student autonomy (Giroux 2010; Pithers and Soden 2000), while others stress discipline and social order (Curwin and Mendler 1978; Odenbring 2014), or see education primarily as preparation for the labor market. These visions are not mutually exclusive but may diverge significantly in their normative assumptions. Precisely for this reason, I exclude quality-related variables from the coding scheme and focus instead on a more objective and widely accepted indicator: the extent of free public education guaranteed by the constitution.

This approach operationalizes the level of universality of the right to education: in other words, who is entitled to free education, and up to what level. One of the main barriers to the expansion of educational access is cost; the principal institutional remedy is the provision of free public education. Accordingly, the CSSM codes constitutions based on the degree to which they guarantee tuition-free education.

A constitutional text that mandates free public education for all citizens up to the tertiary level receives the maximum score (10). This is the case, for example, with the constitutions of Cuba (1976) and the United Arab Emirates (1971) [7]. If free education is guaranteed only at the primary

[7] Cuba (1976): Art. 50. **Everyone has the right to education. This right is guaranteed by the extensive and free system of schools, semi-boarding and boarding [schools] and scholarships in all types and levels of education**, and by free school material[s], which provide all children and young people, whatever the economic situation of their family is, with the opportunity to study in accordance with their aptitude, the social demands and the necessities of socioeconomic development. Adult men and women are also guaranteed this right, in the same conditions of free [education] and with the specific facilities that the law regulates, by means of the education of adults, technical and professional education, job training in enterprises and organisms of the State and the courses of higher education for workers.
United Arab Emirates (1971): Art. 17. Education shall be a primary means of social development. It shall be compulsory in its primary stage and **free at all stages within the Union**.

level, a lower score is assigned—for instance, Chile (1980) and Italy (1947)[8]. Intermediate scores are given when gratuity extends through secondary education—e.g., Cambodia (1993) and Costa Rica (1949)[9].

The model also accounts for mixed scenarios, such as constitutions that guarantee free access to public higher education institutions but do not ensure that all individuals will have the opportunity to attend them. This typically applies in systems where access to free higher education is formally guaranteed but limited by admissions caps, entrance exams, or competitive processes. These nuances are reflected in differentiated scoring.

For example, the 1988 Brazilian Constitution guarantees free education for all up to the secondary level and also mandates that public institutions provide tuition-free higher education—though actual access to those institutions is selective. In such cases, the CSSM assigns scores that reflect both the extent of the formal guarantee and the degree to which the universality of access is substantively realized.

3.2 Healthcare

The presumed purpose of the constitutional right to healthcare can be summarized as follows: to guarantee the provision of the widest possible range of health-related services to the greatest number of people. From this perspective, the ideal model for realizing the right to healthcare is a universal and free public system that does not impose substantive limits on the types of services it must provide.

In addition, the funding mechanisms established by the Constitution play a critical role in enhancing self-enforcement. Healthcare is an inherently costly right to implement. In practice, it

[8] Chile (1980): Art. 19. 10. The right to education. The objective of education is the complete development of the individual in the various stages of his life. Parents have the preferential right and duty to educate their children. The State shall provide special protection for the exercise of this right. **Basic education is mandatory; to that effect, the State must finance a gratuitous system designed to assure access thereto by the entire population**.
Italy (1947): Art. 34. Schools are open to all. **Primary education is compulsory and free of charge for at least eight years**.

[9] Cambodia (1993): Art. 68. The **State shall provide free primary and secondary education to all citizens in public schools**.
Costa Rica (1949): Art 78. Primary education is compulsory; this, the pre-school stage, and secondary education are free and supported by the Nation.

is not uncommon for access to treatments to be denied on the grounds of budgetary constraints. When a constitution clearly defines how the healthcare system will be financed, this structural obstacle may be mitigated—though not entirely overcome.

Even Constitutions that score highest under the CSSM criteria—for providing (1) universal and free public healthcare and (2) explicit provisions for budgetary allocations—may still face enforcement failures. For example, in Brazil, despite having one of the most robust constitutional protections for healthcare, it is not unusual for courts to deny access to treatments based on the argument that guaranteeing them would undermine the financial viability of the healthcare system as a whole. This line of reasoning is often justified through the so-called "reserve of the possible" (*reserva do possível*) doctrine (Gloeckner 2013; Sarlet and Figueiredo 2007), which is invoked even in contexts of maximal constitutional protection.

This dynamic illustrates one of the key arguments of this article: a high level of constitutional self-enforcement does not guarantee the actual realization of a right, but it reduces the discretionary space available to intermediary actors—such as legislators, judges, or administrators—to deviate from the right's presumed purpose.

Let us imagine a court case in which a claimant demands access to a medical treatment based on a constitutional right to healthcare. In a country where this right is defined vaguely or programmatically, a court may deny the claim by adopting a restrictive interpretation—without being accused of contravening the constitution, since the text is too vague to impose a concrete obligation. In contrast, in a country like Brazil, where the constitution provides a highly specific and universal guarantee, denial of the claim requires broader, systemic justification—often framed in terms of resource scarcity or systemic sustainability.

This illustrates a core proposition of the theory: constitutional texts with high self-enforcement potential do not eliminate enforcement disputes, but they structure and constrain the range of acceptable arguments that may be used to justify noncompliance.

3.3 Housing

The realization of the constitutional right to housing is tied to its presumed purpose: to ensure access to adequate housing for all. As with healthcare and education, the self-enforcement of this right depends both on the specificity of the constitutional provision and the scope of its coverage.

Accordingly, the CSSM coding for the right to housing proceeds in stages. First, the model checks whether the constitutional text contains any reference to a right to housing. If it does not, the constitution receives a score of zero for this category.

If housing is mentioned, the next step is to assess whether the provision limits its applicability to certain subgroups—such as low-income populations, the elderly, or families with children. If such limitations are present, the constitution receives the lowest possible score among those that do recognize the right—typically a score of 5, based on universality criteria[10].

If the right to housing is guaranteed without such limitations, the analysis then turns to specificity. Three levels are distinguished:

(1) Low specificity: the constitution[11] mentions the right to housing but does not define any mechanisms or instruments[12] for its implementation.

[10] This is the case of the 1997 Constitution of Fiji, which in its Section 44(1) states: "The Parliament must make provision for programs designed to achieve for all groups or categories of persons who are disadvantaged effective equality of access to: (a) education and training; (b) land and housing."

[11] These are the cases, for example, of Slovenia (1991) and Iraq (2005), which respectively define "Art. 78. The state shall create opportunities for citizens to obtain proper housing" and "Art. 30. First. The State shall guarantee to the individual and the family - especially children and women – social and health security, the basic requirements for living a free and decent life, and shall **secure for them suitable income and appropriate housing**. Second. The State shall guarantee social and health security to Iraqis in cases of old age, sickness, employment disability, homelessness, orphanhood, or unemployment, shall work to protect them from ignorance, fear and poverty, and **shall provide them housing** and special programs of care and rehabilitation, and this shall be regulated by law."

[12] The notion of policy instruments derives from Peter Hall (1993) theory, which classifies policies into hierarchical levels of specificity, from the most general to the most specific: overarching goals, instruments, and precise settings. Goals refer to the ends that public policy seeks to achieve. Instruments are the means through which those goals are pursued. Settings, in turn, are the detailed specifications of those instruments.

(2) Moderate specificity: the constitution provides for at least one concrete instrument or policy mechanism aimed at implementing the right to housing[13].

(3) High specificity: the constitution includes three or more distinct provisions aimed at implementing the right to housing. An example is the Portuguese Constitution of 1976, which articulates a broad set of legal and policy tools to give effect to this right[14].

By combining these two dimensions—universality and specificity—the CSSM generates a nuanced score that reflects the extent to which the constitutional text itself fosters the realization of the right to housing, independently of legislative or administrative elaboration.

3.4 Environment

Environmental rights are generally classified as third-generation rights (Domaradzki, Khvostova, and Pupovac 2019; Vasak 1983). They are distinct from social and economic rights and should be referred to in the plural—environmental rights—given their internal diversity. These include both individual rights, such as the right to a healthy environment, and collective duties, such as the obligation to protect nature.

According to May (2005), a key development in the evolution of environmental rights was the recognition that the environment is not only a collective or abstract concern, but also a matter of

[13] Examples include the Constitutions of Azerbaijan (1995) and Costa Rica (1949), which respectively establish "Art. 43. Right to Residence. I. No one can be deprived of his or her residence. II. **The State provides loans for the construction of houses and blocks of apartments, takes measures in order to implement [the] right to residence**" e "Art. 65. The State will promote the construction of popular housing and will create the family patrimony of the worker".

[14] Portugal (1976): "Art. 65. 1. Todas têm direito, para si e para a sua família, a uma habitação de dimensão adequada, em condições; de higiene e conforto e que preserve a intimidade pessoal e a privacidade familiar. 2. Para assegurar o direito à habitação, incumbe ao Estado: a) Programar e executar uma politica de habitação inserida em planos de reordenamento geral do território e apoiada em planos de urbanização que garantam a existência de uma rede adequada de transportes e de equipamento social; b) Incentivar e apoiar as iniciativas das comunidades locais e das populações tendentes a resolver os respectivos problemas habitacionais e fomentar a autoconstrução e a criação de cooperativas de habitação; c) Estimular a construção privada, com subordinação aos interesses gerais. 3. O Estado adoptará uma política tendente a estabelecer um sistema de renda compatível com o rendimento familiar e de acesso à habitação própria. 4. O Estado e as autarquias locais exercerão efectivo controlo do parque imobiliário, procederão à necessária nacionalização ou municipalização dos solos urbanos e definirão o respectivo direito de utilização.
Art. 72. As pessoas idosas têm direito à segurança económica e a condições de habitação e convívio familiar e comunitário que respeitem a sua autonomia pessoal e evitem e superem o isolamento ou a marginalização".

enforceable individual entitlements. In the language of this theory of constitutional self-enforcement, the individualization of environmental rights clarifies who the beneficiaries are and who bears the burden of realizing them. This clarity increases their self-enforcement potential.

In the CSSM, environmental provisions are evaluated according to sixteen distinct codes, which together capture the main variations in both specificity and alignment with the presumed purpose of environmental rights. The first axis—specificity—is assessed based on how detailed a provision is along what Peter Hall (1993) calls the "ladder of specificity": from general goals, to defined instruments, to precise settings. The second axis—alignment with presumed purpose—is reflected in whether the constitution establishes concrete enforcement mechanisms or sanctions for violations of environmental norms.

Thus, the CSSM classification ranges from constitutions that establish a generic obligation to protect the environment—such as the 1987 Constitution of Suriname[15]—to constitutions that contain a true environmental bill of rights, such as the 2008 Constitution of Ecuador.

3.5 Empirical Applications of the CSSM

By coding constitutional texts and assigning them scores, the CSSM generates a dataset that currently includes 570 constitutional documents, both in force and historical (i.e., no longer in force), including original and amended versions. These more than 500 observations include the complete constitutional histories of 100 countries, selected to ensure proportionate regional representation. While the dataset also covers other countries—up to a total of 197—for some of them only partial constitutional data are available. This means that, for the 100 countries with full coverage, it is possible to track all changes over time in the constitutional recognition of post-liberal rights. (as discussed in section 3).

When, for instance, did Brazil first guarantee free primary education in its constitution? When was that guarantee extended to secondary education? How does Brazil compare to other South

[15] Suriname (1987): "Art. 6. The social objectives of the State shall aim at: […] g. Creating and improving the conditions necessary for the protection of nature and for the preservation of the ecological balance."

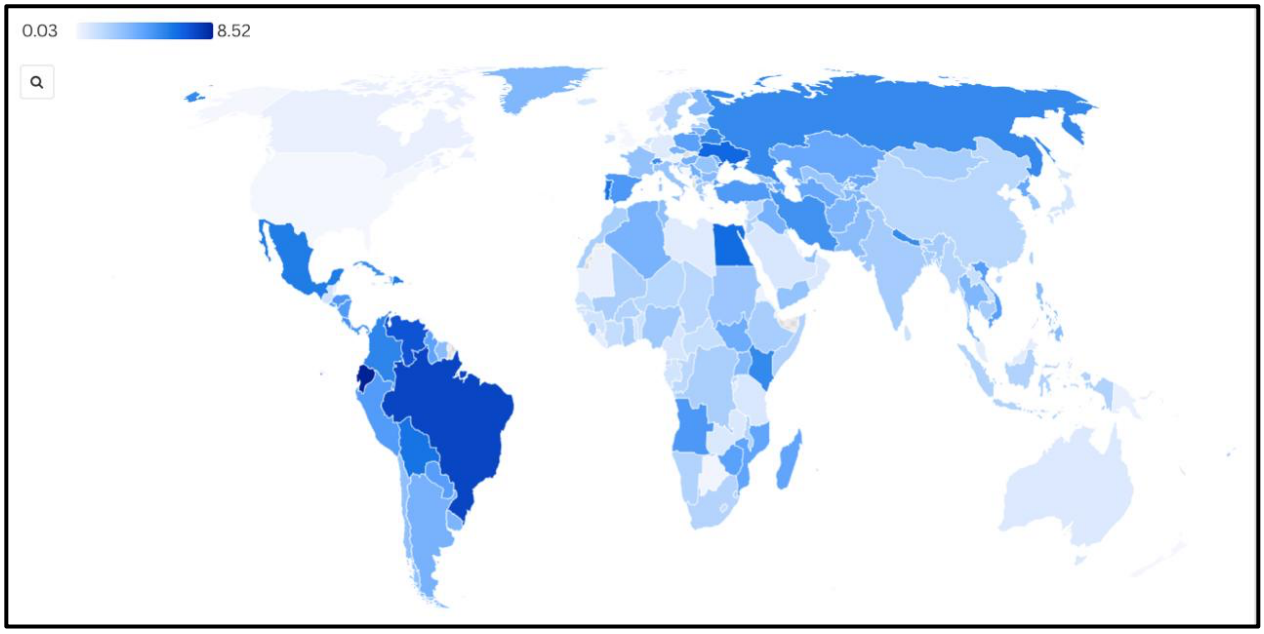
American countries, or to European, African, and Asian cases? How do constitutional processes of rights diffusion unfold over time and space?

The CSSM allows us to answer such questions based solely on the data it produces (see, e.g., (Costa 2025a, 2025b)). Beyond this, however, I am interested in investigating whether the constitutionalization of rights has broader consequences: does it have any impact on the quality of democracy (Costa 2022)? On indicators of social well-being? Does it correlate with changes in public policy implementation?

The data generated by the CSSM can serve as independent variables in empirical studies in which these expected effects function as dependent variables.

But what about the present? How do countries around the world currently compare in terms of their constitutional treatment of post-liberal rights? The map below (Figure 3) illustrates a global heat map based on the most recent data (updated through 2022), showing each country's aggregate Constitutional Social Score (CSS)—the average score across all rights categories.

Figure 3 – CSS Heat Map (2022)



Source: Author's elaboration based on CSSM data.

Conclusion

In this article, I proposed a theory of the self-enforcement of constitutional rights centered on the constitutional text itself, in contrast to dominant approaches that focus almost exclusively on institutional actors as the sole drivers of constitutional effectiveness. My aim was to rebalance a frequently neglected duality: between constitutions understood merely as reflections of political bargains—whose effectiveness depends on the continued support of the actors who sustain them—and constitutions conceived as institutional arrangements capable of generating normative constraints on *their own*.

As I argued, constitutional self-enforcement, as understood here, refers precisely to this latter capacity: the ability of constitutional provisions to generate legal and political effects by virtue of their *textual formulation*.

The first part of the article was dedicated to distinguishing between the constitutional text and the broader constitutional order, emphasizing that although the text is not the only component of the order, it is generally the most concrete and observable—and often the most central. Written constitutions shape expectations, coordinate behavior, and serve as focal points for political action. Even if their effectiveness ultimately depends on actors' willingness to comply, it is in the text that we find the original normative reference that structures interpretive conflict and legal mobilization.

Next, I defined the concept of self-enforcement, distinguishing it from the more general notion of constitutional stability. Drawing from institutional theory, I argued that self-enforcement is the defining property of institutions: they are effective not because of external coercion, but because their internal structure generates predictable constraints on behavior. When applied to constitutions, this idea allows us to differentiate between provisions that require intense mediation to produce effects and those that directly bind political and legal actors, reducing their margin of discretion.

Based on this, I proposed a conceptual distinction between two mechanisms of constitutional self-enforcement:

(1) Direct self-enforcement, which occurs when constitutional provisions are clear, specific, and binding; and

(2) Indirect self-enforcement, when less defined provisions shape behavior through intermediated processes such as legal mobilization.

Although no provision is absolutely self-enforcing, distinguishing between these two mechanisms helps us understand how much each constitutional norm depends on external actors to become effective.

I also showed that, when it comes to rights, the degree of self-enforcement is determined not only by normative specificity, but also by how closely a provision aligns with the presumed purpose of the right it recognizes. Drawing on Joseph Raz's interest theory of rights, I argued that each right carries an implicit social function—particularly in the case of social rights, where that function is often associated with universal, free, and inclusive access to essential goods and services. A constitution that guarantees the right to healthcare through a universal and free public system is, in this view, more aligned with the presumed purpose of the right than one that states the right in abstract terms without specifying its means of realization.

In short, not all rights are created equal—some are born stronger, by design.

Based on this theoretical framework, I developed the *Constitutional Social Score Model (CSSM)*, an analytical tool designed to estimate the self-enforcement potential of constitutional provisions related to social and collective rights. The model operates based on two main criteria—specificity and universality—and enables comparative analysis of constitutional texts across time and space. More than a descriptive index, the CSSM provides a framework for examining the legal, political, and social effects of constitutionalizing rights—shedding new light on the normative force of contemporary constitutions.

By re-centering analysis on the constitutional text, this theory does not deny the importance of institutional and contextual factors. Rather, it affirms that how a right is formulated constitutionally matters—and that its formulation measurably affects its likelihood of being realized. In doing so, it provides a framework for revisiting, in empirically grounded terms, the question that has always preoccupied constitutional scholars: what can we—and what should we—expect from a constitution?

References

Albert, Richard. 2014. “The Structure of Constitutional Amendment Rules.” *Wake Forest Law Review* 49(January): 913. http://www.freedomhouse.org/sites/default/files/FIW%0Ahttp://papers.ssrn.com/abstract=2461507%0Apapers3://publication/uuid/D86946A4-2324-4309-818D-B575D754E1CD.

Albert, Richard. 2023. “Multi-Textual Constiutions.” *Virginia Law Review* 109: 1629–98.

Aldrich, John H. 2011. *Why Parties?: A Second Look*. Chicago: University of Chicago Press.

Alemán, Eduardo, and Sebastian M. Saiegh. 2007. “Legislative Preferences, Political Parties, and Coalition Unity in Chile.” *Comparative Politics* 39(3): 253–72.

Bentham, Jeremy. 2000. *An Introduction to the Principles of Morals and Legislation Batoche Books*. Ontario: Batoche Books.

Bui, Ngoc Son. 2022. “Vietnam’s Mixed Constitution and Human Rights.” *Law and Ethics of Human Rights* 16(2): 295–319. doi:10.1515/lehr-2022-2007.

Carey, John M. 2000. “Parchment, Equilibria, and Institutions.” *Comparative Political Studies* 33(6): 735–61.

Charles, Jacob D. 2021. “Securing Gun Rights By Statute: The Right To Keep and Bear Arms Outside the Constitution.” *Michigan Law Review* 120(4): 581–642. doi:10.36644/mlr.120.4.securing.

Costa, Lucas Nascimento Ferraz. 2022. “Are Social Rights Constitutionalized at the Cost of Liberal Rights?” In *79th Annual MPSA Conference*, Chicago, 1–20.

Costa, Lucas Nascimento Ferraz. 2025a. “Superação Da Cidadania Regulada : A Constitucionalização de Direitos Sociais No Brasil Em Perspectiva Comparada.” *Opinião Pública* 31: 1–38.

Costa, Lucas Nascimento Ferraz. 2025b. “The Constitutional Diffusion of Social Rights.” *International Journal of Constitutional Law* Forthcomin.

Curwin, Ricahrd L., and Allen Mendler. 1978. 9 Middle School Journal *Discipline with Dignity*. Arlington: ASCD. doi:10.1080/00940771.1978.11495422.

Dewey, John. 1997. *Democracy and Education*. New York: Simon & Schuster.

Dixon, Rosalind. 2011. University of Chicago Public Law & Legal Theory Working Paper *Constitutional Amendment Rules: A Comparative Perspective*. Edward Elgar Publishing.

Dixon, Rosalind, and Tom Ginsburg. 2011. “Deciding Not to Decide: Deferral in Constitutional Design.” *International Journal of Constitutional Law* 9(3–4): 636–72. doi:10.1093/icon/mor041.

Domaradzki, Spasimir, Margaryta Khvostova, and David Pupovac. 2019. “Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse.” *Human Rights Review* 20(4): 423–43. doi:10.1007/s12142-019-00565-x.

Elkins, Zachary, Tom Ginsburg, and James Melton. 2009. *The Endurance of National Constitutions*. Cambridge: Cambridge University Press. doi:10.2139/ssrn.2190476.

Epp, Charles R. 1999. 61 The Journal of Politics *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: The Unversity of Chicago Press. doi:10.2307/2647587.

Fabre, Cécile. 2004. Angewandte Chemie International Edition, 6(11), 951–952. *Social Rights Under the Constitutions - Government and the Decent Life*. Oxford: Clarendon Press.

Fins, J. J. 2022. "The Unintended Consequences of Chile's Neurorights Constitutional Reform: Moving beyond Negatuva Rights to Capabilities." *Neuroethics* 15(25).

Ginsburg, Tom. 2010. "Constitutional Specificity , Unwritten Understandings and Constitutional Agreement." In *Constitutional Topography: Values and Constitutions*, eds. A. Sajó and R. Uitz. Hofweg: Eleven International Publishing, 69–93.

Giroux, Henry A. 2010. "Rethinking Education as the Practice of Freedom: Paulo Freire and the Promise of Critical Pedagogy." *Policy Futures in Education* 8(6): 715–21. doi:10.2304/pfie.2010.8.6.715.

Glaeser, Edward L., Giacomo A.M. Ponzetto, and Andrei Shleifer. 2007. "Why Does Democracy Need Education?" *Journal of Economic Growth* 12(2): 77–99.

Gloeckner, Joseane Ledebrum. 2013. "A Reserva Do Possível Como Limite à Efetividade Do Direito Fundamental à Saúde." *Revista de Direito Administrativo & Constitucional* 13(51): 233–50. www.editoraforum.com.br.

Hall, Peter A. 1993. "Policy Paradigms , Social Learning , and the State: The Case of Economic Policymaking in Britain." *Comparative Politics* 25(3): 275–96.

Hardin, Russel. 1989. "Why a Constitution?" In *The Federalits Papers and the New Institutionalism*, New York: Agathon Press, 100–120.

Hirschl, Ran. 2008. "The Judicialization of Mega-Politics and the Rise of Political Courts." *Annual Review of Political Science* 11: 93–118. doi:10.1146/annurev.polisci.11.053006.183906.

Holmes, Stephen. 1988. "Gag Rules or the Politics of Omission." In *Constitutionalism and Democracy*, eds. Jon Elster, Rune Slagstad, and Gudmund Hernes. Cambridge: Cambridge University Press, 19–59.

Holmes, Stephen, and Cass R. Sunstein. 2000. *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W. W. Norton and Co.

Koger, Gregory, and Matthew J. Lebo. 2017. *Strategic Party Government*. Chicago: University of Chicago Press.

Lassalle, Ferdinand. 1933. *Que é Uma Constituição?* São Paulo: Edições e Publicações Brasil.

Lutz, Donald. 1994. "Toward a Theory of Constitutional Amendment." *The American Political Science Review* 88(2): 355–70.

Marshall, T. H. 1950. The British Journal of Sociology *Citizenship and Social Class*. London: Cambridge University Press. doi:10.2307/587460.

May, James R. 2005. "Constituting Fundamental Environmental Rights Worldwide." *Pace Environmental Law Review* 23: 113–82. http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/penv23&section=11.

Murphy, Walter F. 2007. *Constitutional Democracy: Creating and Mantaining a Just Political Order*. Baltimore: John Hopkins University Press.

North, Douglas C. 1990. Individuals, Institutions, and Markets *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press. doi:10.1017/cbo9781139175302.016.
Odenbring, Ylva. 2014. "Gender, Order and Discipline in Early Childhood Education." *International Journal of Early Childhood* 46(3): 345–56. doi:10.1007/s13158-014-0121-x.
Pithers, R. T., and R. Soden. 2000. "Critical Thinking in Education: A Review." *Educational Research* 42(3): 237–49.
Raz, Joseph. 1986. International Philosophical Quarterly *The Morality of Freedom*. Oxford: Clendon Press. doi:10.5840/ipq198929152.
Sant, Edda. 2019. "Democratic Education: A Theoretical Review (2006–2017)." *Review of Educational Research* 89(5): 655–96. doi:10.3102/0034654319862493.
Sarlet, Ingo Wolfgang, and Mariana Filchtiner Figueiredo. 2007. "Reserva Do Possível, Mínimo Existencial e Direito à Saúde." *Revista Brasileira de Direitos Fundamentais & Justiça* 1(1): 171–213. doi:10.30899/dfj.v1i1.590.
Sartori, Giovanni. 1970. "Concept Misformation in Comparative Politics." *American Political Science Review* 64(4): 1033–53. doi:10.2307/1958356.
Strauss, David A. 1996. "Common Law Constitutional Interpretation." *University of Chicago Law Review* 63(3): 877–935. doi:10.4324/9781315193496-12.
Taylor, Whitney. 2023. *The Social Constitution: Embedding Social Rights Through Legal Mobilization*. Cambridge: Cambridge University Press.
Tushnet, Mark. 2008. "Constitutional Workarounds." *Texas Law Review* 87(09): 1499.
Vasak, Karel. 1983. *As Dimensões Internacionais Dos Direitos Do Homem*. Lisboa: Editora Portuguesa.