



The Relevance of Law in Human Rights Protection

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Relatively little empirical research on the protection of human rights considers the significance of legal rules and institutions. This article examines the effects of legal institutions on the general protection of political rights and on the protection of one discrete right—freedom from unreasonable search and seizure. A cross-sectional analysis reveals that legal institutions, and in particular judicial independence, are significant in protecting human rights. The significance remains even when extralegal variables, such as wealth, are considered. The presence of an explicit constitutional protection against unreasonable search and seizure does not have an independently significant effect on human rights but does affect the manner in which rights are protected. © 1999 by Elsevier Science Inc.

I. Introduction

Various efforts have been made over the years to ascertain the determinants of human rights protection, yet these studies have almost uniformly ignored the role of law and legal institutions in the protection of human rights.¹ This fact seems remarkable insofar as the concept of “rights” itself is a legal notion.² Yet researchers have consistently focused on such factors as national wealth and civil unrest as the keys to human rights and have generally “ignored” the “particular effect of law and more specifically national constitutions.”³ This pattern is consistent with Dahl’s claim that for “developing and

¹A recent survey article extensively reviews the research yet scarcely mentions the law as a possible determinant. See Patrick Regan, “The Systematic Study of the Causes of Political Repression,” 30 *Australian Journal of Political Science* 137 (1995). The body of this article will cite a number of the most prominent articles on determinants of human rights that lack any independent legal variables. One early study did in fact contain a variable on the content of constitutional promises and found that the constitutional protection was inversely correlated with the protection of human rights. Kathleen Pritchard, “Comparative Human Rights: An Integrative Explanation,” 15 *Policy Studies Journal* 110 (1986). The precise nature of the author’s independent variables, however, were somewhat vague and it seems that she did not match the specific constitutional protection with the specific right to be protected.

²See Bruno Leoni, *Freedom and the Law*, p. 2 (1961) Princeton, NJ: Van Nostrand (observing that “freedom is . . . above all, a legal concept”).

³Christian Davenport, “Constitutional Promises and Repressive Reality: A Cross-National Time-Series Investigation

maintaining democratic political institutions, constitutional arrangements are less important than the existence of certain favorable conditions.”⁴ When a legal variable is considered, it is that of a broad system (such as democracy) rather than the specific substance of law.⁵ In this study, I seek to shed light on the more particular legal determinants of human rights protection.

Prior researchers have generally not explained why they failed to consider legal factors, but various explanations are readily fathomable. Perhaps the law was deemed meaningless, a formality absent the cultural or economic incentives to implement and enforce the law.⁶ Or perhaps the law was considered highly malleable and endogenous. In this view, the state of the law would correlate with human rights protection only because the same third factor produced both. Although the latter position is plausible, it is by no means self-evident and could even be reversed. The law and legal institutions might explain the measures of economic human welfare and/or unrest that have been correlated with human rights protections. Economists increasingly emphasize the important role of legal institutions in economic growth, so it is surely reasonable to believe that such institutions could affect human rights. Those who bother to draft constitutions obviously consider the documents important, as does the plenitude of constitutional law scholars inhabiting law schools.

In seeking legal determinants, this study proceeds in two parts. First, I search for which aspects of the law may affect human rights. Because few studies of rights have considered any legal variable, there is accordingly little evidence regarding which aspect of the law might be important. In addition to the straightforward issue (is right χ legally protected?), one might also consider legal institutions that could influence human rights. I test for a variety of these effects. Second, after identifying salient legal influences on human rights protection, I incorporate the findings about the relevant variables into a broader study that also incorporates wealth and other nonlegal determinants of human rights.

The study’s approach, like that of most preceding analyses, is a cross-national analysis of human rights protections. For this article, human rights is used in its traditional sense of individual rights of freedom from government restraint, such as free speech and due process protection. Various legal constructs are employed as independent variables.

of Why Political and Civil Liberties are Suppressed,” 58 *Journal of Politics* 627, 628 (1996). The typical variables are system type, political conflict and economic development. *Id.* Davenport’s study takes seriously some constitutional provisions, such as freedom of speech, but his research is not aimed at the effectiveness of particular legal provisions. See *id.* at 636 note 17 (distinguishing his study from Pritchard’s as not focused on “legalistic matters”).

⁴Robert A. Dahl, “Thinking About Democratic Constitutions: Conclusions from Democratic Experience,” 38 *Nomos* 175, 178 (1996).

⁵See Christian Davenport, “The Weight of the Past: Exploring Lagged Determinants of Political Repression,” 49 *Political Research Quarterly* 377 (1996).

⁶See, e.g., Giovanni Sartori, *Comparative Constitutional Engineering*, p. 27 (1994) (noting that a majority of scholars have contended that different electoral systems should not be considered an independent variable but regarded as an endogenous consequence of sociological determinants). Sartori disputes this by asking why reformers and other politicians would fight so bitterly over the nature of electoral systems if they had no independent significance. *Id.* See also at 199–200 (“[o]ver the last decades we have been told that constitutions do not matter, that free societies result from societal pluralism far more than from constitutional contrivance”). Nevertheless, many consider constitutions to be “no more than legalistic ‘window-dressing’.” Davenport, *supra* note 3, at 630.

II. Exploring the Legal Determinants

One can hypothesize a number of legal factors that could be associated with human rights protection. This study considers the following five—(1) substantive protection of a given right; (2) the independence of the country's judiciary; (3) the presence of federalism; (4) the separation of executive and legislative power; and (5) the number of lawyers relative to GNP.⁷ I first review the basis for consideration of these variables and then empirically consider the significance of the factors as predictive of rights protection in a nation.

Theoretical Basis for Legal Determinants of Rights

This section explains how the legal factors that I have selected might logically affect the protection of human rights. The case for each variable as protective of human rights generally reflects one of two themes—(1) that the judiciary and legal system protect human rights⁸ or (2) that institutional structures complicating affirmative government action protect human rights.⁹ The executive and legislative branches are thus presumed to be the enemy of human rights, even in a democracy.¹⁰ Testing the specific variables will shed some light on these basic presumptions.

Substantive Protection. The most obvious potential legal determinant of human rights protection might seem to be whether the particular right received constitutional protection in a country.¹¹ Some might argue that this was a necessary condition—if a right is not legally protected, how is it to be ensured? The association between constitutional protection and actual protection of human rights is not certain, however. Critical legal scholars and others have demonstrated that language is indeterminate, at least to a degree. The Soviet Constitution was notorious for promising individual rights that were never delivered.¹² The converse may also be true. A given right may exist notwithstanding the lack of explicit constitutional protection. The U.S. Constitution does not

⁷This list requires some judgment and is not exhaustive. For example, I do not consider trial by jury, separation of church and state, number of legislative houses, or civilian control of the military. Others undoubtedly could think of additional relevant factors worthy of empirical testing.

⁸See Louis Henkin, Introduction, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, New York: Columbia University Press, p. 15 (Louis Henkin and Albert Rosenthal eds. 1990) (observing that the “role of courts in maintaining constitutional limitations was seen as the hallmark of U.S. constitutionalism and was credited with the stability of U.S. institutions and the security of individual rights”).

⁹Justice Brandeis suggested that structures such as the separation of powers protected individual freedom through the governmental inefficiency it introduces. See Henkin (1990) *supra* note 8, at 386.

¹⁰This traditional theory is not universally accepted. See, e.g., Stephen M. Griffin, *American Constitutionalism: From Theory to Politics*, Princeton, NJ: Princeton University Press, pp. 115–118 (1996) (indicating that democratically elected branches may have better record of civil rights protection than Supreme Court).

¹¹The focus on constitutional protection is based on the traditional belief that “constitutions are only the state forms in which (as Rousseau said) we are free because we are governed by laws and not by other men”). Sartori, *supra* note 6, at 198.

¹²Both the Stalinist and Brezhnevian constitutions “offered a panoply of constitutional rights as detailed and expansive as anything set to paper in the West.” Peter Ordeshook, *Constitutions for New Democracies: Reflections of Turmoil or Agents of Stability?*, IRIS Working Paper No. 162 (May 1995) at 2. Less well known but also interesting is the fact that the “cloning” of America’s constitution “did not effectively protect the Philippines from a dictatorship.” Andrzej Rapaczynski, “Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad,” in *Constitutionalism and Rights*, *supra* note 8, at 441.

specifically mention abortion, yet such a right is constitutionally recognized. Social norms may transcend the importance of legal language.¹³

The coding is only for *constitutional* guarantees and does not consider statutory or other legal protection of the right. This is because virtually every country in the sample has some legal protection against search and seizure; countries without constitutional protection typically have statutory protection. Hence, this variable does not measure legal protections but merely distinguishes between those lodged in a constitution and those contained in statutes or judicial precedents.

Judicial Independence. An independent judiciary may be considered by some to be a crucial attribute of rights protection. A common vision is that the judiciary halts repressive efforts by legislative or executive officers. An independent judiciary, particularly one with life tenure, is presumed to be more interested in the preservation of individual rights.¹⁴ The presumption of the importance of an independent judiciary may also be questioned, as the presumption that executive and legislative officials are unconcerned with individual rights is empirically uncertain. In the United States, many civil rights have been protected by statute, not court decision. When the U.S. Supreme Court strikes down legislative redistricting aimed at increasing minority representation, some may conclude that the independent judiciary is frustrating rather than advancing human rights.¹⁵

Federalism. The relative weakening of the central government in federalist systems is thought to reduce repressive measures. Federalism is another institutional separation of central government power to prevent undesirable action. James Madison argued that federalism gave a “double security” to the rights of the people.¹⁶ Yet the human rights virtues of federalism are uncertain—for some time in this country, federalism enabled the denial of fundamental rights to blacks. Thus, just as federalism may slow central government action denying rights, the structure may also slow government action extending or enforcing human rights.¹⁷

Separation of Legislative and Executive Power. The U.S. Constitution emphasized the separation of legislative and executive power in large part because of a belief that it would better protect individual rights. Such separation may add an additional veto to proscribe political efforts to compromise rights. A president may veto repressive legislative action, and vice versa. The separation of legislative and executive power may also indirectly enhance rights via judicial protection. Robert Cooter has preliminary results that suggest that judges are more activist in such circumstances. He theorizes that the

¹³See, e.g., Richard H. Pildes, “The Destruction of Social Capital Through Law,” 144 *University of Pennsylvania Law Review* 2055 (1996).

¹⁴See, e.g., Pritchard, *supra* note 1, at 112 (observing that “the existence and proper functioning of an independent judiciary are frequently cited as essential conditions for the respect and protection of human rights under the law”).

¹⁵Dahl looks at American history and observes that “in exercising judicial review the Supreme Court has sometimes been a major factor in depriving persons of the most fundamental human and political rights,” *supra* note 4, at 194.

¹⁶*The Federalist Papers*, No. 51.

¹⁷See Richard Briffault, “What About the ‘Is’? Normative and Formal Concerns in Contemporary Federalism,” 47 *Vanderbilt Law Review* 1303, 1325 (1994) (suggesting that history does not support the argument “that there is a causal connection that runs from federalism to freedom” and contending that any connection between the concepts “probably runs the other way”).

separation of power may functionally enhance formal judicial independence.¹⁸ Judges may have less fear of retribution or reversal when the other branches are divided.

Relative Number of Lawyers. The relative number of lawyers in a country is employed as a proxy variable to represent the country's devotion to enforcing the rule of law. Economists have used lawyer numbers as a proxy for the scope of the role of law in a society. Although these studies have generally criticized the economic effects of lawyers in undermining market efficiency, those lawyers might have more positive political effects. One study has already found an association between lawyer numbers and human rights protection.¹⁹

Data and Methods

Testing for human rights protection is inevitably trickier than measuring economic variables, given the lack of a common currency. Certain quantitative measures of human rights are increasingly accepted, however, and are used in this study. One independent variable is "political rights," a broad measure of democracy commonly used in the existing literature on rights protection. Second, and in contrast to earlier research, I focus on a discrete specific legally identifiable right—the protection of homes from unreasonable search and seizure (as in the Fourth Amendment to the U.S. Constitution).²⁰

The measure of political democratic rights is the ratings for political rights by Gastil averaged over the decade of the 1980s.²¹ For each country, such rights are assessed on a scale of one to seven per year. Any attempt to quantify political democracy raises obvious problems of measurement, but the Gastil ratings are widely accepted and used by other researchers.²² The measure of actual protection from unreasonable search and seizure is drawn from a survey by Charles Humana.²³ Humana rates the actual measure of protection from search and seizure in four ascending categories.

¹⁸See Robert D. Cooter and Tom Ginsburg, "Comparative Judicial Discretion: An Empirical Test of Economic Models," 16 *International Review of Law and Economics* (1996).

¹⁹See Frank B. Cross, "The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System," 70 *Texas Law Review* 645, 676–678 (1992). The study found a statistically significant association between lawyer numbers and both civil liberties and democracy, though lawyers did not explain a high percentage of the variance in these outcomes.

²⁰An effective empirical test requires use of a right that many nations expressly recognize and many do not, plus a significant diversity in the actual degree of protection of the right among these nations. Preliminary investigation suggested that freedom from unreasonable search and seizure best met these criteria.

²¹See R.D. Gastil, *Freedom in the World: Political Rights and Civil Liberties for Various Years*, Westport, CT: Greenwood Press.

²²The Gastil ratings have been criticized on a number of grounds but have considerable reliability when compared to other estimates of political rights. See Kenneth A. Bollen, "Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984," 8 *Human Rights Quarterly* 567 (1986). In practice, "the Gastil freedom measures have gained widespread acceptance among scholars." See Scully, *supra* note Constitutional Environments and Economic Growth (1992), Princeton, NJ: Princeton University Press, at 116.

²³Charles Humana, *World Human Rights Guide* (1992) New York: Oxford University Press. The Humana ratings are subjective, like the Gastil ratings. They are based on a number of sources that include Amnesty International reports, State Department reports, United Nations reports, and major periodicals, including the *New York Times*, *Economist*, and *Washington Post*. The author takes basic information from a variety of sources for each country, consults with international human rights organizations, and assigns a score to the country.

Although they do not have the objective verifiability of many economic variables, these data seem the best available for empirical research of this type. The United Nations Development Programme has deemed Humana's human rights ratings the most reliable available, and uses the data in construction of the U.N. human rights indices. *Id.* at 7. See also

The independent variables also required categorization. Some judgment was required in determining whether a nation's constitution expressly protected homes from unreasonable search and seizure.²⁴ Once this was ascertained, the protection was coded as a dummy variable, "1" if guaranteed, otherwise "0." The nations included and the coding for this variable are included in the Appendices to this article. The measure of judicial independence, coded on a four-point scale, came from the *World Human Rights Guide*.²⁵ Separation of powers and federalism were dummy variables, with the constitutional presence of the concept coded as "1."²⁶ The number of lawyers per country is taken from the Euromoney estimates.²⁷ The analysis is cross-sectional. Limited availability of historic data for some variables precludes a time-series analysis.²⁸ Limited availability of even current data for some variables limited the sample, but it remained greater than 50 nations.²⁹

Results

Table 1 displays a simple correlation matrix showing the interrelationship between all the variables considered. An asterisk accompanies any associations that were significant at the 0.05 level. The hypothesized signs are all positive.³⁰

The results are roughly as hypothesized. The variables tend to be positively intercorrelated, though separation of powers has no significant relationship save for a curious significant negative correlation with judicial independence. Judicial independence and

3 *Law & Politics Book Review* 87 (August 1993) (noting that Humana has some advantages over other human rights indices).

²⁴I use constitution in the narrow sense of a unitary integrated organic document. Although England is often said to have a constitution, the nation has parliamentary supremacy and does not have a specific overriding constitutional text like that of the United States and was coded as not providing constitutional protection for the right. Protection of the right in a legislative enactment was not considered a constitutional protection. Countries were coded as offering protection if they had a constitutional text that mentioned protection for search and seizure and placed some textual limit on the practice. The limit could be either substantive or procedural (e.g., requiring judicial preapproval). The sources for my coding are Albert P. Blaustein and Gisbert H. Flanz, *Constitutions of the Countries of the World*, 27 vols. (1987), Dobbs Ferry, NY: Oceana Publications double-checked when possible by the internet site, <http://www.uni-wuerzburg.de/law/index.html>.

²⁵See Humana, *supra* note 23. Humana provides no clear general definition of judicial independence but includes brief comments for each country. Countries with the top rating have little comment. A country with the second rating, Japan, receives the comment that there is "[a]dministrative pressures on individual judges to conform." *Id.* at 173. A country with the fourth (lowest) rating, such as Ghana, receives the comment that "government retains the power to dismiss judges arbitrarily" and that "public tribunals sometimes try political and security cases." The coding for all countries in the sample is listed in Appendix B.

²⁶The source for this coding is Robert L. Maddex, *Constitutions of the World* (1995) Washington, D.C.: Congressional Quarterly Press. This coding is obviously oversimplified to a degree. Most federalist nations do not have the same degree of federalism as does the United States (e.g., a federalist judiciary).

²⁷Definitions of lawyer vary from country to country, but there seems to be at least rough agreement regarding the relative number of lawyers among the nations of the world. The data for this study come from Euromoney Publications, P.L.C., *The International Financial Law Review* 1000 (1993) London: Euromoney Publications, plc.

²⁸A number of studies in the area have used time series analysis, but they may overemphasize small short term trends, while a cross-sectional analysis can "reflect more faithfully the long-term trends that seem to matter most." Michael Coppedge, "Modernization and Thresholds of Democracy: Evidence for a Common Path and Process" (presented at the 1996 meeting of the American Political Science Association) at 6. Coppedge suggests that some studies have captured short term trends that lead to erroneous results.

²⁹This coverage is broader than some previous studies in the area. See, e.g., *Constitutional Promises*, *supra* note 3 (39 countries).

³⁰The original scales for judicial independence and political rights had lower numbers as meaning greater independence and rights. These were converted to corresponding positive numbers for ease of understanding.

TABLE 1. Intercorrelation matrix for legal variables

	<i>Federalism</i>	<i>Separation of Powers</i>	<i>Judicial Independence</i>	<i>Number of Lawyers</i>	<i>Constitutional Provision</i>	<i>Political Rights</i>
Federalism	—	0.00	0.15	0.40*	-0.10	0.28*
Separation of powers	0.00	—	-0.29*	0.16	-0.02	-0.20
Judicial independence	0.15	-0.29*	—	0.36*	0.21	0.74*
Number of lawyers	0.40*	0.16	0.36*	—	0.05	0.48*
Constitutional provision	-0.10	-0.02	0.21	0.05	—	0.19
Political rights	0.28*	-0.20	0.74*	0.48*	0.19	—

*Significance at the 0.05 level.

the number of lawyers were significantly associated with greater political freedom, suggesting a prominent role for the law and courts in the protection of freedom.

Table 2 shows the results of multiple regressions on these variables, with t-terms in parentheses. The first column shows the effect of all the variables, plus the measure of political rights on actual protection from search and seizure. Political rights is included as a test for how a degree of democracy may help protect individual rights such as search and seizure protection. The second column shows the results of the applicable variables on political rights themselves. Some preliminary conclusions can be drawn. Judicial independence clearly seems related to human rights protection, as it was significant at the 0.05 level for both variables. Equally clearly, federalism and separation of powers have no demonstrable significant association with either freedom measure. For search and seizure protection, the presence of a constitutional guarantee seems to have no real-world significance. Countries with constitutional protection were scarcely more likely to offer this protection than were other countries. Lawyer numbers are associated with greater political rights but have no independent effect on protection from unreasonable search and seizure (except indirectly through protection of political rights).

TABLE 2. Legal determinants of rights

	<i>Search & Seizure</i>	<i>Political Rights</i>
Federalism	-0.02 (0.23)	0.10 (0.97)
Separation of powers	0.02 (0.14)	-0.06 (0.60)
Judicial independence	0.38* (2.2)	0.61* (5.6)
Number of lawyers	-0.05 (0.37)	0.23* (2.0)
Constitutional provision	0.02 (0.20)	—
Political rights	0.31* (1.8)	—
	n = 53	n = 58
	R ² = 0.38	R ² = 0.56

*Significance at the 0.05 level.

The R^2 are reasonably high for such cross-national research.³¹ A parsimonious legal model for search and seizure would include judicial independence and political rights. For political rights themselves, the legal model would include judicial independence and number of lawyers.

II. The Effect of Extralegal Determinants of Human Rights

The apparent association of legal variables with rights protection may be explained by a third nonlegal variable, not considered in the above regressions. Considerable research exists on the role of such nonlegal variables in human rights. This section reviews the primary nonlegal determinants that seem to be associated with human rights and integrates them with the legal variables.

Evidence on Extralegal Determinants

There is already a considerable literature on determinants of human rights. One branch of this literature emphasizes national wealth as an important factor in the protection of individual rights. According to Maslovian hierarchy, the pursuit of at least some initial level of wealth would precede the human quest for individual rights.³² Poorer countries may be more inclined to the sort of rebellion that prompts crackdowns on rights.³³ Various studies have seemed to confirm the association between gross national product and differing national levels of human rights.³⁴

A second theory suggests that human rights are culture bound. Traditional rights of freedom from government intrusion are largely a Western construct. A preliminary study shows that Western nations have a higher level of such human rights, even after controlling for GDP and other factors.³⁵

The third primary theory of individual rights centers on threat perceptions. Governments repress individual rights when they perceive a threat to their existence.³⁶ Although this claim may seem to beg the question, social scientists have defined particular threats that are perceived seriously and yield denial of rights.³⁷ Thus, a prominent

³¹A vast number of immeasurable variables affects the relationships investigated. Dahl has urged generally that constitutional arrangements must be adapted to the "special conditions of a country." Thinking about Democratic Constitutions, *supra* note 4, at 195. Given the many varying features of nations about the globe, the predictive power of the equation seems moderately high. The R^2 terms are comparable or greater than those in previous research in the area. See, e.g., "Constitutional Promises," *supra* note 3, and The Weight of the Past, *supra* note 5.

³²Abraham H. Maslow, *Motivation and Personality*, 35–46 (2d ed., 1970), New York: Harper and Row (regarding primacy of physiological needs).

³³See T.R. Gurr, "On the Political Consequence of Scarcity and Economic Decline," 29 *International Studies Quarterly* 51 (1985).

³⁴See, e.g., Partha Dasgupta and Martin Weale, "On Measuring the Quality of Life," 20 *World Development* 119 (1992); Neil J. Mitchell and James M. McCormick, "Economic and Political Explanations of Human Rights Violations," 40 *World Politics* 476 (1988).

³⁵See Frank B. Cross, "International Determinants of Human Rights and Welfare: Law, Wealth, or Culture," *Indiana International & Comparative Law Review* (1997).

³⁶See Christian Davenport, "Multi-Dimensional Threat Perception and State Repression: An Inquiry Into Why States Apply Negative Sanctions," 39 *American Journal of Political Science* 683 (1995).

³⁷There is, unfortunately, considerable disagreement among researchers about precisely which threat characteristics are important. See *id.* at 693 (describing the variety of inconsistent independent variables used in a number of studies).

recent study found that involvement in either an international or civil war was closely correlated with repression.³⁸

There is a considerable body of research on the various extralegal factors influencing the protection of human rights. These studies have typically contained no legal control variables, however. Hence, it is possible that the results are explained or substantially affected by the presence of other, legal variables. I attempt to test for this possibility below.

Data and Methods

Wealth is operationalized as *per capita* gross domestic product (GDP), a continuous variable taken from World Bank data.³⁹ Involvement in war or a similar conflict was coded as a dichotomous variable for those countries that were involved in civil or international war in 1970 or later.⁴⁰ Western culture was coded as a dummy variable for the nations of Western Europe, Canada, the United States, Australia, and New Zealand. In addition to these variables, I entered as regressors the legal system variables that showed some significance in the above tests and the presence of an express constitutional guarantee. Perhaps the consideration of extralegal control variables would demonstrate the practical significance of the constitutional text.

Results

The hypothesis is that conflict should have a negative sign, as more frequent wars interfere with either the desire or ability to protect individual liberties. GDP, Western culture, and the legal variables should all have positive signs. Results are displayed in Table 3.

The presence of an express constitutional protection still has no significant effect on the actual protection of constitutional rights. For search and seizure protection, judicial independence remains significant, as are the extralegal variables of conflict and Western cultural heritage. For political rights, legal variables remain significant even after considering extralegal factors. The lack of any association with GDP (and of association of conflict and political rights) is contrary to existing research, but prior studies did not incorporate legal control variables. Legal factors apparently do matter, and judicial independence seems central to both human rights variables.

III. An Effect for Substantive Constitutional Protection

The above results might suggest that constitutional protections are little more than formalistic window dressing. Before concluding that express constitutional protections

³⁸See Steven C. Poe and C. Neal Tate, "Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis," 88 *American Political Science Review* 853 (1994).

³⁹I tried using a log of *per capita* GDP as the independent variable, but the results were not materially changed, and the equations lost some predictive power as opposed to a straight measure of GDP.

⁴⁰Coding based on the mere presence of a conflict, rather than its intensity, is consistent with the prior research that has found an association. See Poe and Tate, *supra* and Davenport, *supra*. While most of the other variables are based upon data from 1990 plus or minus 2 years, Poe and Tate established a lagged effect for involvement in wars. See Poe and Tate, *supra* note 38, at 862. The effect on reduced democracy steadily increased for several years and appeared to level off after about ten years. The effects of war presumably dissipate at some point, though the authors present no data for this. Data on the existence of civil and international wars are taken from Ruth Leger Sivard, *World Military and Social Expenditures* 1991, 22–24; Melvin Small and J. David Singer, *Resort to Arms*, 89–94, 222 (1982); and Patrick Brogan, *The Fighting Never Stopped*, 568–572 (1990).

TABLE 3. Legal and extralegal determinants of rights

	<i>Search & Seizure</i>	<i>Political Rights</i>
Judicial independence	0.32* (2.3)	0.47* (4.4)
Constitutional provision	0.02 (0.26)	—
Political rights	0.03 (0.22)	—
Number of lawyers	—	0.23* (2.7)
Conflict	-0.22* (1.9)	0.03 (0.33)
Western	0.48* (3.1)	0.20* (1.7)
GDP	-0.13 (0.87)	0.17 (1.4)
	n = 54	n = 58
	R ² = 0.58	R ² = 0.67

*Significance at the 0.05 level.

are utterly irrelevant to human rights protection, one should look more closely. I separated the countries into two groups, according to whether they had constitutional language protection for search and seizure. Then I applied the legal and extralegal variables to the groups. The results are displayed in Table 4.

These results are rather surprising. Judicial independence loses statistical significance in nations with a protective constitutional provision but seems central to protection against search and seizure in nations with no such express constitutional provision. A truly independent judiciary apparently will impose legal protection against unreasonable search and seizure, even in the absence of a textual basis. The independent judiciary seems to be operating as if the protection were a fundamental human right, through what might be considered judicial activism.⁴¹ By contrast, when constitutional text exists, the independent judiciary has no significance. Perhaps the text emboldens even a dependent judiciary to provide rights protection, and the political cost of violating a constitutional guarantee may be too high for elected officials.

The presence of a substantial constitutional provision certainly does not guarantee

⁴¹Of course, it is possible that the judges in countries without constitutional provisions are simply enforcing some sort of statutory protection, but this seems an unlikely explanation for my results. There is no reason why judicial independence would be more necessary for statutory than constitutional protections, and political rights logically should be more significant for such statutory protections.

TABLE 4. Judicial independence and constitutional protection

	<i>Constitutional Provision</i>	<i>No Constitutional Provision</i>
Judicial independence	0.03 (0.21)	0.88* (3.5)
Political rights	0.22 (1.3)	0.54 (1.7)
Conflict	-0.43* (2.9)	-0.12 (0.68)
Western	0.39* (2.2)	0.74* (2.4)
GDP	-0.10 (0.54)	0.29 (1.0)
	n = 34	n = 20
	R ² = 0.61	R ² = 0.70

*Significance at the 0.05 level.

protection of the right; when a national threat exists (such as a conflict), the freedom will be compromised even in the presence of a constitutional textual guarantee. If textual protection exists, its enforcement becomes contingent upon political variables. Some might expect a constitutional guarantee and judicial independence to work in tandem, but the reverse appears to be the case. Textual constitutional protection has an effect, but it is a subtle one.

IV. Conclusions

My results suggest that certain legal variables are important determinants of human rights protection and should therefore be incorporated into future models. Certain aspects of the legal system seem to protect rights independent of at least the most obvious extralegal factors. Some skeptics might point to other, unidentified third variables, perhaps involving national cultures or attitudes. At the present time, however, the case for legal variables should be at least strong enough to merit consideration. Equally important, the introduction of legal variables has cast doubt on some of the variables traditionally believed to be important, such as GDP.

Some institutional variables, such as federalism and the separation of legislative and executive power, proved insignificant in all my tests. This result should not necessarily be read as minimizing the meaning of those institutions, however. The comparative results for political rights and protection from search and seizure demonstrate that different factors seem to explain different types of rights. It seems erroneous to search for one overriding determinant of all types of human rights. Federalism, separation of powers, and other institutions may prove significant for rights that I did not consider. For the rights under consideration, other legal aspects are significant. These results also suggest that majoritarian institutions are not necessarily hostile to individual rights but may even promote those rights under some circumstances.

As with all cross-sectional research, there is some question about the directionality of the relationship. However, the case that judicial independence furthers protection against search and seizure seems more plausible than the case that protection against search and seizure furthers judicial independence. In reality, there is probably a cybernetic effect operating, in which the national attitudes affect the law, which in turn serves to reinforce those attitudes. Such an effect does not entirely demean the significance of the law.

Finally, the results leave many questions as to the mechanisms by which the law furthers rights. The relative role of the independent judiciary in nations with and without constitutional provisions is surely intriguing. By highlighting the significance of legal factors, I hope to provide some encouragement to additional research into the role of those factors for human rights protection.

Appendix A: Constitutional Protection for Search and Seizure

Argentina—No	France—No	Kuwait—Yes	Senegal—Yes
Australia—No	Germany—Yes	Malaysia—No	Singapore—No
Bangladesh—Yes	Ghana—No	Mexico—No	Spain—Yes
Belgium—Yes	Greece—Yes	Netherlands—Yes	Sri Lanka—No
Canada—Yes	India—No	Nigeria—No	Sweden—Yes

Chile—No	Indonesia—No	Norway—Yes	Switzerland—No
China—No	Iran—No	Panama—No	Thailand—No
Colombia—Yes	Ireland—No	Paraguay—Yes	Trinidad
Denmark—Yes	Israel—No	Peru—Yes	Turkey—Yes
Ecuador—Yes	Italy—Yes	Philippines—Yes	United States—Yes
Egypt—Yes	Jamaica—Yes	Poland—Yes	Venezuela—Yes
England—No	Japan—Yes	Portugal—Yes	Zambia—Yes
Finland—Yes	Kenya—Yes	South Africa—No	Zimbabwe—Yes

Appendix B: Judicial Independence Ratings

Rating 1

Argentina	France	Kuwait	Senegal
Australia	Germany	Netherlands	Spain
Belgium	Greece	Norway	Sweden
Canada	Ireland	New Zealand	Switzerland
Denmark	Israel	Peru	United States
England	Italy	Portugal	Venezuela
Finland	Jamaica		

Rating 2

Austria	India	Malaysia
Bangladesh	Japan	Singapore
Brazil	Kenya	Sri Lanka
Dominican Rep.	Korea	Thailand
Ecuador	Malaysia	Zambia
Egypt	Panama	Zimbabwe

Rating 3

Bulgaria	Mexico
Chile	Paraguay
China	Philippines
Hungary	Taiwan
Indonesia	

Rating 4

Columbia	Nigeria
Ghana	Pakistan
Haiti	Turkey
Iran	
