Constitutional Bargaining
Revisited

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Abstract

The drafting of a new constitution has special importance after conflicts or during transitions. This article applies the insight from the model of roving and stationary bandits of Olson to the constraints faced by constitution-makers in different settings. Within the process of constitution-making, two main conflicts can be identified; the first between the drafters and the citizens with regard to the level of government constraints and the second among the drafters about the division of political rents. The model highlights that referendums for ratification can successfully constrain drafters, but do fail in situations when they are most needed. Furthermore, it is shown that significantly different bargaining powers among the veto players in the constitutional assembly can be beneficial for the long-term focus of the constitutional draft.

Keywords: Constitutional Assembly, Constitutional Choice, Bargaining, Referendum, Transition

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1 Introduction

Drafting a constitution is one of the cornerstones in state building. The new constitution has important symbolic value, but also serves as the basic set of rules for the legal regime in place and has, furthermore, important economic effects. Recent years have seen a great deal of research on the (economic) effects of constitutions, but less focus has been given to the drafting process itself. In the literature, agreeing on a set of basic rules has been described as being similar to a bargaining process (Heckathorn and Maser, 1987; Elster, 1995, 2000; Voigt, 1999). While some articles in legal journals focusing on the process of constitution-making exist (see for example Banks, 2008; Jackson, 2008; Tushnet, 2008; Barnett, 2009; Partlett, 2012; Landau, 2012, 2013), the literature in constitutional economics has been remarkably quiet on the topic. To my knowledge, no attempt to formalise the constitution-making process while incorporating the institutional details that constrain the process has been made. This article uses the findings of legal and political scholars with regards to the constraints involved in the process of drafting a new constitution to inform the model’s setup.

For this venture, it is important to first clarify the view of constitutions and their functions employed in this article. Following Buchanan (1975), one of the key functions a constitution fulfils is to set up what he calls a protective state. The protective state functions as an impartial arbiter to enforce contractual relationships between the citizens. However, the ability to enforce property rights and sanctions due to breaches of contracts require a government powerful enough to fulfil this task. This government has at the same time, by definition, enough power to expropriate its citizens for its own benefits. This situation has been coined the dilemma of the strong state (Dreher and Voigt, 2011). Citizens might reconsider investing their income if they are aware that the government can expropriate them at any given time. Therefore, politicians have an incentive to bind themselves to the constitution’s rules and a constitution can be argued to be a two-sided mechanism, enabling and constraining the government at the same time. It enables the government by defining the basic government structure, setting

\[^1\text{See Voigt (2011) for an overview}\]
up the necessary institutions as well as laying out the legal system’s most basic layer. The constraining function is based on the idea that the rule of law should also apply to the government and citizens can benefit from a constitution that provides checks and balances as well as focal points to react when the government transgresses against them (Weingast, 1993).

The idea that a government might be willing to constrain itself due to the long-term benefits is similar in nature to the idea of "stationary bandits’ of Mancur Olson (Olson, 1993). An autocratic ruler can enjoy more benefits if he can convince his citizens that their property will not be taken from them. If he maintains some property protection and thus increases long-term investment by the citizens, he is better off due to the growth generated by this behaviour. While he enjoys a percentage-wise smaller piece of the pie in terms of his income from expropriations and takings, he is still better off due to the increased pie. One mechanism for an autocrat to credibly commit to a long-term perspective is a new constitution.  

Another situation where politicians need credible commitment is a regime change. New constitutions are often drafted after a crisis as well as during a transition period. More than 200 constitutions in the past 40 years have been drafted under a threat of violence (Widner, 2007); furthermore several countries such as Egypt, Tunisia and Libya recently started drafting new constitutions after the Arab spring transitions. Whenever the transitions are democratic in nature, the constitution-making process has additional veto players compared to a situations in an autocracy. First, the constitutional assembly often features different groups with veto power. Second, ratification by public referendum is increasingly becoming the gold standard in constitution-making. Thus, the additional veto players and the uncertain nature of these situations are another motivation for this paper, asking how the constitution-making process is affected by the veto players and the increased uncertainty.

For the process of constitution-making, one can identify two key conflicts, namely one between the drafters and the citizens and another one amongst the drafters. The

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2Nevertheless, even autocrats not interested in committing themselves might use a sham constitution. Thus, precedence in following the constitution is a key element to make the commitment credible.
first conflict relates directly to the constraining function of the constitution. Citizens would prefer a government that is not able to expropriate them, while politicians have to weigh the costs and benefits of binding themselves. The benefits are the improved long-term growth prospects of the society, which will also increase the politicians’ future income. The costs can be argued to be the foregone benefits of extracting short-term rents from expropriation. The critical factor for the politicians cost-benefit analysis is whether or not he expects to be part of the political elite in the future and whether he expects the constitutional draft to survive for sufficiently long.

The second conflict relates to the political benefits’ distribution in-between the drafters. Here, we assume that the same group that drafts the constitution will also form the political class in the post-constitutional setting and reap the political rents, which can stem from regular politicians income as well as expropriations, if allowed by the constitution. This assumption deviates from the classical idea of a veil of ignorance involved in constitution-making and is motivated by the empirical observation that 50% of all constitution-making processes involve the standing legislature and/or executive (Ginsburg et al., 2009), thereby clearly lifting the veil. The question which factors determine the drafters’ relative bargaining power for this distributional question during constitution-making is the key question for the analysis in this paper. The results highlight that the status quo, the relative proportions of the factions within the assembly, the discount rates of the factions and the threat of a breakdown of the negotiations are the key determinants of the bargaining game.

The analysis highlights that effective constraints on the drafters depend on potential intra-elite conflicts, uncertainty’s influence on expected future benefits and whether or not the procedural rules require a referendum. These variables also interact among each other, where strong uncertainty mitigates the influence of referendums and intra-elite conflicts.

The next section will provide a literature overview discussing the constraints faced by the drafters. Following this step, a constitutional choice model based on the insights from the literature review applied to the decision problem of constitutional drafters
is presented. To support the assumptions made in the modelling section, the next section presents some simple logit and OLS regressions to test the relationship between uncertainty and yes-votes. Finally, a short discussion and concluding remarks are given.

2 Literature Review

The times of constitution-making and the process itself have been subject to a large theoretical discussion, starting two decades ago with the seminal contributions of Ackerman (1991) and Elster (1993, 1995, 2000). Ackerman distinguishes times of normal politics and constitutional moments. While times of normal politics are dominated by the short-term interest of politicians left unchecked by citizens that pay little attention to the political process, constitutional moments feature politicians mainly concerned with the greater good and citizens attentively following the political developments. Elster argues for a similar point and distinguishes two modes of constitution making, namely arguing and bargaining. Bargaining is driven by interest, while the stage of arguing allows for deliberative reasoning without the constraints of self-interest. In a sense, both authors see deliberation as the fitting mode for constitution-making as compared to bargaining. However, it appears doubtful that self-interest miraculously evaporates in constitution-making and this article will rather employ a rational-choice perspective of drafters, who act under constraints which will be discussed below.

The strand of literature started by Ackerman and Elster has also discussed two different kinds of constraints, namely upstream and downstream constraints (Elster, 1995, p.373). Upstream constrains are those related to the creation of the constitution-making body, as for example a president calling a constitutional assembly and through the selection of delegates constraining their actions. Downstream constraints are related to the ratification of the constitution, as for example a referendum which constrains the set of constitutions that would be ratified. However, this distinction does not provide a complete description of relevant constraints to the constitution-making body. The vot-

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3Beard (1913) was the first to look at the (economic) motives of constitutional drafters, but did not focus on the process itself.
ing rules within the constitutional assembly or time constraints also affect the outcome. Therefore, a different taxonomy of constraints is more useful for the purpose of this article. One can distinguish constraints due to procedural rules of constitution-making (including what Elster defined as upstream constraints), constraints due to popular participation, and time constraints. The literature on these three sets of constraints will be reviewed in sequence.

2.1 Procedural rules

The process of constitution-making is organized according to a set of procedural rules. These rules are one of the key factors in constraining the drafters of the constitution. Furthermore, it has been argued that the design of the process determines the outcome of the process (Landau, 2012). The rules include, among others, the selection of members of the constitution-making body, the voting rules within the constitution-making body, and the mode of ratification.

How the members of the constitution-making body are selected directly influences the composition of the constitution-making body and has thereby strong effects on the final outcome. The main selection methods are members drawn from the existing executive or legislative or a specifically elected constitutional assembly. It has been argued that a constitution-making body based on the existing legislative or executive will be biased in favour of their own branch and generally more drawn towards short-term interest considerations (cf. Elster, 1995; Voigt, 2004). These considerations led Elster to the belief that a specifically elected constitutional assembly would be beneficial, since the drafters would not be driven by the future interest of their own position in one of the branches. On the other hand, electing an assembly takes time and time is often scarce in moments of constitution-making. Furthermore, a better knowledge of the preferences and ideology of other members of the constitution-making body allows them to reach a more stable agreement (cf. Mnookin, 2003). This knowledge is generally higher in an

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4This claim would only hold if the drafters are taken from a different pool of politicians than the future government. Given the large number of constitution-making bodies which consist of executives or legislatives, this claim appears doubtful.
existing body than in a specifically elected one.

From an empirical point of view, the claims that executives and legislatives behave self-serving if they compose the constitution-making body have only received partial support. While Ginsburg et al. (2009) confirm the hypothesis for executive-centered processes, they do not find support for the hypothesis with regard to legislative-centered processes. Altogether, the literature highlights that the decision for a certain selection mechanism is not as clear-cut as Elster presented it. Both mechanisms have advantages and drawbacks and the decision involves a trade-off between a more democratic, potentially less self-interest driven specifically elected assembly and the lower costs in terms of time and information that an assembly based on members of the legislative or executive offers.

The voting rules are not only important for the selection of the drafters, but also during the drafting process itself. The polar cases are a simple majority requirement and the requirement of unanimous consent within the constitution-making body. These two cases suffer from different drawbacks. A simple majority rule increases the risk of a unilateral actor dominating the constitution-making process (for a detailed discussion of the risk of a single dominating actors, see Landau, 2013); the unanimity requirement creates opportunities for strategic bargaining and increases the risk of a holdout problem (Mnookin, 2003). Between the two polar cases, there is a large set of other voting rules. Qualified majorities are the typical example and aim to overcome the holdout problem while still maintaining some veto power for the minority actors. To sum up, the decision for a set of voting rules needs to balance between a fast, yet potentially single-handedly dominated process and a more inclusive, yet more time-consuming and risky one. In practice, qualified majority requirements have dominated the picture in recent years (Democracy Reporting International, 2011).

Finally, the mode of ratification adds further constraints for the constitution-makers. A constitutional bargain that fails to be ratified is worthless for the drafters. Hence, the expected interests of the actors ratifying the constitution are already relevant for the process of constitution-making itself. Ratification through the executive or legislative requires taking the preferences and interests of the executive respectively legislative
into account when drafting the constitution, but the more interesting case is the direct participation of the public through a referendum. This case will be considered in the next subsection, which discusses public participation in general.

2.2 Public participation

Public participation has been of growing importance in constitution making in the past 50 years. As found by Ginsburg et al. (2009), using data from 480 constitutions adopted between 1789 and 2005, around 44% of all constitutions require a popular referendum as a mean of ratification. Examples such as the extremely participative process in South Africa in the 1990s further indicate the relevance of constraints through direct involvement of the general public. Public participation could also take place indirectly. One example of this would be the involvement of democratically elected veto players into the process of constitution-making (cf. Carey, 2009). Ackerman (1991) argued, based on the particular attentiveness of the citizens, that a broad public involvement is beneficial for the constitution-making process.

However, the empirical evidence on the effect of referendums for ratification is mixed. Ginsburg et al. (2009) have found a positive effect of referenda on the longevity of constitutions, while Carey (2009) found that the mere existence of a referendum does not increase the constraints placed on the future government. Carey puts the emphasis on the importance of legitimized institutional actors and thereby indirect participation. One of the problems with referendums is the increased uncertainty for constitution-makers and thereby the larger risk of failure of the negotiations (cf. Banks, 2008; Ginsburg et al., 2009). Altogether, referendums by themselves are not always able to sufficiently constrain the drafters.\(^5\)

\(^5\)With regards to policy implications, one could consider to adopt the majority requirements of referendums. Michel and Cofone (2015) provide an analysis of the arguments for and against qualified majorities in constitutional referendums.
2.3 Time constraints

Timing is an essential part of the constitution-making process. The bargaining power in the constitution-making body heavily rely on the relative political strength at the moment in time when the process starts. The same consideration applies for the relative (im)patience of the drafters. These considerations are especially relevant after a drastic regime change or a violent conflict. Put differently, ' [...] the moment for constitution-drafting is not always, or even usually, an entirely autochthonous choice in post-conflict settings.' (Jackson, 2008, p.1291). Jackson further argues that time pressure was one of the key factors leading to the failure of the Iraqi constitution-making process in 2005.

Assuming that constitution-making actually suffers from time pressure (the main example are the actors facing a high discount rate on the future due to an unacceptable status quo as well as due to uncertainty about the longevity of the new constitution), three main problems arise. First, complete negotiations get more costly and actors might decide for an incomplete bargaining, leaving important issues unresolved in the constitution (cf. Brown, 2008). Second, if the actors in the constitution-making body face different discount rates, the bargaining result might be unstable in the long run (cf. Vanberg and Buchanan, 1989; Negretto, 1999). Third, if the citizens also face time pressure, they might agree in the referendum to a constitution that is unstable in the long run due to the high costs of saying no and waiting for a new constitution to be drafted.

3 Theoretical model

Having discussed the constraints faced by constitution-makers, the next step is to set up the formal model. There are three kinds of actors in this setting, namely politicians from two different groups in the constitution-making body and the voters. The politicians are drafting the new constitution and derive their utility from the political benefits obtainable to the political class. The citizens act only if there is a required referendum. Citizens derive utility from having a new constitution that forms the basis of a protective
state and from a constrained government that is unable to expropriate them. The main conflict is about political rent creation, where both political factions have a joint interest in rent maximization. The only direct influence of the citizens is through a referendum for ratification, while they cannot directly influence the outcome if the referendum is not part of the process. In the second case, the drafters might nevertheless be constrained by an intra-elite conflict among them regarding the division of the rents.

3.1 Intra-elite conflict

The politicians, whom act jointly in political rent creation, are divided into two factions with different interests when it comes to the division of rents. This conflict can be seen as a type of intra-elite conflict. Throughout this section, a two-player bargaining scenario is used to for simplification. It is assumed that both players enjoy veto power for the division of the rents. Given the typical voting rules in assemblies discussed in the literature review, a qualified majority requirement makes it likely that (at least) two groups with veto power emerge.

It is useful to delineate the most important features in bargaining models and highlight the link to the constitution-making process. Bargaining situations are generally characterized by two players who both benefit from reaching agreement, but face conflict over the exact agreement to be chosen from the set of beneficial outcomes. Bargaining theory aims to explain the rational outcome in this kind of situation. For simultaneous bargaining, Nash (1950, 1953) has proposed his famous bargaining solution, which can be, with some simplification, summarized to the rule "share the profits proportionally to the bargaining power of the players".

Rubinstein (1982) popularized sequential move games in bargaining theory. In this model, the first player (the proposer) offers the second player (the responder) a surplus division, which the responder can accept or reject. In case he rejects, the roles switch and the second player acts in the next round as the proposer. It has been argued that procedural rules can be modelled using sequential games (Shepsle, 1989), which makes

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6 An n-player setting can converge into a two-player setting if coalitions are allowed to form.
this bargaining protocol better suited to model negotiations in a political assembly. However, if one faction has a clear majority, it is unlikely that both sides will take turns in proposing. Baron and Ferejohn (1989) have used a random-proposer model to discuss bargaining in ordinary legislatures. The difference to the Rubinstein model is that in each round, the proposer is drawn randomly instead of sequentially changing roles. Using the seats obtained in the constitutional assembly as the probabilities for the draw, one can easily model the choice of the proposer in the constitutional assembly in a more realistic way.

The question whether or not the bargaining game will be repeated is an important determinant. If games are played more regularly, factors like reputation start to play a role. However, constitutional bargaining can be considered a one-shot game. Constitutions are generally made to achieve longevity and the average life expectancy of a constitution is 19 years (Ginsburg et al., 2009, p.2). Taking this evidence into account, it seems unlikely that the same drafters will ever face each other twice and thus the conceptualization as a one-shot game can be justified.

Once the bargaining game’s rules are spelled out, discount factors are another important feature to determine the outcome. If a player discounts future benefits less heavily than the other player, he is able to use this patience to increase his bargaining power. For constitutional assemblies, the discount factors of all actors are influenced by the general political situation in the country. In times of crisis, players are more uncertain about the future and thus will discount possible future benefits more heavily. This effect is driven by the risk that a successful constitutional bargaining can become obsolete if the crisis turns into violence. However, it is possible that the players are affected in different ways by these developments and thus have diverging discount factors. In this case, discount rates can have a substantial effect on the bargaining outcome.

The players’ outside options are another important determinant in bargaining theory. If a player has better options in the case that the negotiations break down, he can use this option as a leverage in the negotiations and thereby increases his bargaining power. However, for constitution-making, outside options lose importance. It is difficult
to imagine a situation where the drafters decide not to write a constitution and employ a different solution for all the tasks the constitution is made for. This view relates to Hardin (1989) and Ordeshook (1992) and their conceptualization of constitution-making as a coordination game. Having any constitution is superior to a state of no constitution at all and thus the drafters have no incentives to revert to an outside option.

One might argue that the *status quo*, e.g. the old or interim constitution that is in place during the negotiations, could be seen as an outside option. However, this argument fails to recognize that this rather resembles an inside option. In bargaining theory, inside options describe the utility derived during the negotiations while the players are still in disagreement. This description fits well with the *status quo* during the constitution-making process and highlights the importance it has on the outcome. If one player is having a better inside option, his costs to disagree and continue the negotiations are lower. He can use this advantage as increased bargaining power and thereby obtain a larger share.

An external risk of breakdown of the negotiations is yet another impact factor to the bargaining outcome. As long as the players’ risk aversion is identical, the effect works through the possible bargaining game’s end without any benefits for anybody. When a party has to decide whether to reject an offer or not, it is more likely to agree if the risk of breakdown increases. Thereby, a high risk of breakdown favours the first proposer’s position. The risk of breakdown can stem from two sources. One is within the negotiations, namely one player becoming angry and leaving the table as an impulsive action. The other risk is through external causes, such as third parties intervening in the process or the rules of the game changing. While the first case is relatively unlikely in constitution-making due to the large stakes that are involved, the second case is possible. The Polish case, where the constitutional assembly changed following a general election, is an example for this. Another risk could be citizen protests or an uprising during the negotiations.

A mandatory referendum for ratification is not a factor directly influencing either side’s bargaining power. It takes place after the ratification through the assembly and
no side can credibly commit to campaign against a constitutional draft which provides mutual gains. As long as the new constitution provides an improvement compared to the status quo, the referendum is not affecting the bargaining outcome. To sum up, the relevant elements are the probability of being the proposer, the drafters’ inside options, the discount factors and the risk of breakdown. The first three elements combined are a measuring the respective group’s power. A group with better inside options, more seats in the assembly and a lower discount factor has a much better bargaining position. The risk of breakdown can increase this power, given that the strong party is most likely the first proposer. Now that the bargaining between the parties has been discussed, the attention can be focused on the stage deciding on the executive constraints in the constitution.

3.2 Creating the rents

At this stage, both groups of politicians have a shared interest, namely maximising the amount of political rents available for distribution. However, the minority group is generally speaking less interested in short-term rents, since they are aware that they are less likely to end up in government and enjoy the short-term benefits. The weaker their bargaining power, the lower will be their interest in short-term rents. It is assumed that all factions that are strong enough to be veto players for the constitution-making process act behind a veil of uncertainty with regard to which faction will end up in government in the long-run. The model’s timing is as follows. First, the drafters decide on the constitution, while in a second step the citizens have to ratify the constitution if the procedural rules require so. The drafters draw utility from two different kinds of political rent, one short-term and one long-term. While the short-term rent can be seen as government fund extraction, the long-term rent is derived from the benefits of staying in office and increasing compensation due to a higher growth rate. The constitution’s key element to be modelled here is the ability to constrain the government from abusing its power. The better the constitution works in this dimension, the better the property rights are protected and thus long-term rents for the government increase. On the other

\[\text{These benefits include the regular salaries of the government members.}\]
hand, a better property rights’ protection limits the ability to extract rents. Different constitutions either increase short-term or long-term rents, but not both at the same time. In the following subsections, the constraints discussed in the literature review are introduced step by step. The first setting is similar to the choice faced by a stationary bandit in the Olson model.

3.2.1 Constitution-making in an autocracy

The baseline to be modelled would be a constitution-making process without public participation and veto players in the assembly, as typically found in autocracies. This model is similar to the stationary bandit’s problem as discussed by Olson (1993). The politicians’ maximisation problem is as follows:

$$\max_c U_p(c) = r_s(c) + \rho \cdot r_l(c)$$

(1)

where $\rho$ captures the uncertainty in the model and is considered exogenous.\(^8\) $r_s(c)$ and $r_l(c)$ are the rents politicians can obtain from the chosen constitution ($c$). Formally, the constitution-making body chooses a constitution along a single dimension which can take values from $0 - 1$.\(^9\) A situation where $c = 0$ is a constitution which does not constrain the government at all and equivalent to a situation with no constitution at all. Furthermore, this situation offers no long-term political rents. At the other extreme, $c = 1$, the constitution binds the government completely with regard to the extraction of funds. Therefore, short-term political rents are zero in this case. The draft can take any value between 0 and 1. Thus, both rents are functions of the constitutional choice.

It is assumed that both functions have a concave shape, which is represented by the

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\(^8\)Since constitution-making is often triggered by a crisis or conflict, uncertainty can be assumed to be derived from the general situation and not from the constitution-making process itself, thus making uncertainty an exogenous variable. See Widner (2007) for a more detailed discussion of post-conflict constitution-making.

\(^9\)It is important to note that the model presented here highly simplifies the situation of constitutional choice. Reducing the complex construct of a constitution to a single dimension is a daring venture. The reason for this decision is to highlight the conflict between politicians’ ability to (ab-)use their power in the short run and the positive long-term effects of binding their hands.
negative second order derivative.

\[ r_s(1) = 0, \quad \frac{\partial r_s}{\partial c} < 0, \quad \frac{\partial^2 r_s}{\partial c^2} < 0 \quad (2) \]

\[ r_l(0) = 0, \quad \frac{\partial r_l}{\partial c} > 0, \quad \frac{\partial^2 r_l}{\partial c^2} < 0 \quad (3) \]

If the constitutional assembly can choose the constitution unconstrained, they simply set \( c \) to maximise their utility. To solve this maximisation problem, the first order conditions need to be derived.

\[ \frac{\partial U(c)}{\partial c} = \frac{\partial r_s(c)}{\partial c} + \rho \cdot \frac{\partial r_l(c)}{\partial c} \quad (4) \]

Setting this equal to zero and using some algebraic manipulations gives the following equation

\[ \rho = -\frac{\frac{\partial r_s(c)}{\partial c}}{\frac{\partial r_l(c)}{\partial c}} \quad (5) \]

In a baseline situation without uncertainty, \( \rho = 1 \), and with only one dominating faction\(^{10}\), \( \alpha = 1 \), the marginal changes of long-term and short-term rents must be equal for this condition to hold. The drafters thus need to balance the benefits of committing to property rights in the long run with the loss of discretionary power in the short run, based on the countries’ characteristics.

It is also possible that the marginal change for the long-term benefits is always larger compared to the one of the short-term benefits if the difference in the maximum of both kinds of rents is sufficiently large. In a situation like this, the drafter will choose a constitution that completely binds them out of pure self-interest.

However, if an autocrat faces uncertainty about his future position, the analysis’ results change. Formally, for a value of \( \rho \) lower than 1, future benefits are discounted against short-term rents. Hence, an external shock leading to a decrease in \( \rho \) prior to

\(^{10}\)The same result holds for two factions of equal bargaining power.
the drafting will cause a decrease in \( c \) compared to the situation without the shock.\(^{11}\) This relation represents the conjecture that constitution-making during crisis will lead to constitutions which are less effective at binding the government. Since citizens prefer a constitution that binds the government, it is useful to consider procedural rules that lead the drafters to choose more binding constitutions. One example for such a procedural rule is a democratically elected constitutional assembly combined with a qualified majority requirement. This combination is very likely to produce multiple factions with veto power in the process.

3.3 Constitution-making by a democratically elected assembly

A key change to the analysis happens when one considers a democratic assembly with multiple veto players. The politicians’ maximisation problem changes to:

\[
\max_c U_p(c) = \alpha \cdot r_s(c) + \rho \cdot r_l(c)
\]

where \( \alpha \) is the minority faction’s relative strength during the bargaining stage. A higher \( \alpha \) simply means that the factions have more equal bargaining power.

Setting this equal to zero and using some algebraic manipulations gives the following equation

\[
\frac{\rho}{\alpha} = -\frac{\partial r_s(c)}{\partial c} \frac{\partial c}{\partial r_l(c)}
\]

While the results with regard to the degree of uncertainty remain the same, the multiple veto players have an effect on the short-term benefits’ valuation. For a value of \( \alpha \) lower than 1, short-term benefits are discounted since the minority party will oppose them. The more unequal the two factions are, the lower is the weight put on short-term rents. This assumption can be explained by their knowledge of the weak situation they

\(^{11}\)As long as the long-term benefits are large enough, a change in \( p \) may not affect the choice of \( c = 1 \). However, the focus here is on the more interesting case where the choice of constitution is conditional on the risk factor.
are facing right now, therefore encouraging a more long-term oriented view. Note that as soon as a single party can dominate the assembly without other veto players, \( \alpha \) is by definition equal to 1 and the analysis becomes the same as in an autocracy.

As discussed in the literature review, many democracies further constrain their drafters through a referendum for ratification. Whether the referendum is able to fulfil this task is modelled in the next section.

### 3.3.1 Constitution-making with required referendum

Another potential solution to further constrain drafters and achieve constitutions that actually bind the government are mandatory referendums for ratification of the constitution. Recall the finding that 44% of all constitutions required a referendum for ratification (Ginsburg et al., 2009). It is necessary to introduce the maximization problem for the citizens in the referendum stage.\(^{12}\) To start with, the citizens’ utility function is as follows

\[
U_v(c) = g - r_s(c) + \rho \cdot r_l(c)
\]

The citizens profit from the constitution’s functioning, \( g \), as well as from the prospects of long-term growth discounted by the risk of constitutional failure. However, since they will be the victims of future expropriations, they receive a negative utility from a constitution that allows the government to abuse their power. They will vote yes if the utility from accepting the draft now is larger or equal compared to the expected utility from waiting one period for another draft. It is assumed that the referendum requires a simple majority to succeed, thus the median voter decides. Heterogeneity within the population does not matter for the referendum as long as one group has a majority. The citizens will vote yes if the following condition holds:

\[
U_v(c) \geq \delta_v \cdot U_v(\bar{c})
\]

\(^{12}\)Citizens are assumed to fully know the constraints to the government that the draft is providing.
Here, $U_v(c)$ represents the citizens’ utility from the proposed level of constraints in the draft. This function increases in $c$, since citizens prefer a constitution that binds the politicians. $\bar{c}$ represents the expectations of the citizens with regard to the average proposal of a constitutional assembly, whereas $\delta_c$ is the discount factor of the citizens that is occurred if they wait for another period. As in the case for politicians, a higher uncertainty reduces the discount factor. The two discount factors are allowed to differ, but it is assumed that they move in the same direction when uncertainty changes.

The introduction of this constraint changes the maximisation problem of the drafters.

$$\max_c U = \alpha \cdot r_s(c) + \rho \cdot r_l(c) \quad s.t. \quad \frac{U_v(c)}{U_v(\bar{c})} \geq \delta_v$$

It is assumed that a negative vote leads to a 0 pay-off for the drafters, which can be thought of as a change in the constitutional assembly’s composition after a failed constitutional referendum. Thus, the drafters will not risk a failed referendum and are constrained by the citizens’ vote.\(^{13}\)

The referendum constraint is only meaningful if the citizens’ voting decision is affected by the choice of $c$. One can derive the threshold point at which even a draft with no constraints on the government (i.e. $c = 0$) will be accepted. The utility for citizens in this case, $U_v(0)$, can be spelled out as $g - r_s(0)$. In this situation, citizens can only obtain benefits from the basic functions of government ($g$) and face the maximum risk of the government using expropriation. If

$$\frac{U_v(0)}{U_v(\bar{c})} \geq \delta_v$$

holds, citizens will prefer to ratify the constitution even if it provides no constraints on the drafters.

On the one hand, this case becomes more likely when uncertainty is high (i.e. a low $\delta_c$),

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\(^{13}\)In this article, it is assumed that politicians can perfectly predict the outcome of a referendum conditional on their chosen level of $c$. Cases like the failed referendum on the EU constitution highlight that this assumption does not necessarily hold in practice. Releasing this assumption is an opportunity for future research, but not dealt with in this article.
the value of having a constitution \((g)\) goes up or citizens expect that the proposal in the next period will feature weak constraints \((\bar{c})\). On the other hand, this condition never holds if there is no uncertainty \((\delta_v = 1)\) or if constraining the government is the only thing that matters for the citizens (i.e. \(g = 0\)). Thus, a referendum works particularly well if citizens care about the constraints on the government and if uncertainty is low. Arguably, constitution-making often happens in more turbulent times and it appears likely that the constraint loses power when constitution-making after crisis or during transitions is considered.

4 Empirics

The model presented in the last section hinges critically on the effect of a crisis on property rights and voting behaviour of the citizens. To test these assumptions, this section will present some simple regression models based on cross-country evidence. In a perfect world, one could randomly assign constitution-making processes with and without referendums to countries with and without crisis which would otherwise be identical. However, especially in constitutional economics, the data often does not allow for stringent causal analysis. In the case of this section, the presented results should be interpreted cautiously and only as indicative evidence.

4.1 Data

The data on constitutional referendums is drawn from the C2D project (citation) and includes the results of all constitutional referendums from 1945 until 2012(XXX). To measure domestic conflict, the aggregated domestic conflict variable from the CNTS dataset is employed. (citation) This variable is used as a proxy for domestic conflict that would cause uncertainty among the citizens. Literacy rates, which serve as controls in some of the specifications, are also taken from the CNTS dataset. With regards to the political system, the Polity IV indicator is used (citation).
4.2 Estimation approach

Following the reasoning of the model presented above, the empirical model aims to test whether domestic conflict has an effect on the percentage of yes-votes in constitutional referendums. So far, few articles have looked at the determinants of the outcomes of constitutional referendums. One contribution (citation) argues that ethnic fractionalization is one of the key determinants. XXX WHY. Furthermore, it can be argued that more educated citizens are more likely to cast an informed vote based on the draft presented. Thus, one would expect a negative effect of education on yes-votes. With regards to the democracy in the country staging the referendum, it can be argued that more democratic country are less likely to hold sham elections and/or rig the results. Thus, a higher degree of democracy should also lead to fewer yes-votes compared to a more authoritarian system. Another reasons for this hypothesis is the argument that following a transition from an autocracy, citizens will be more willing to accept a new constitution as long as it breaks with the authoritarian past. Thus, having lived in an autocracy would again be expected to raise the percentage of yes-votes. Finally, it can be argued that constitution-making depends heavily on the historical context in which it took place. Thus, dummies for the different waves of constitution-making as discussed by Elster (1995) are used to control for this effect.

The complete model can be spelled out as follows:

\[\text{yes}_{i,t} = \alpha + \beta \cdot \text{conflict}_{i,t} + \gamma \cdot X_{i,t} + \epsilon\]

where the subscript \(i\) indicates each country and the subscript \(t\) relates to the year of the observation. As argued above, the empirical results in this part are likely to suffer from omitted variable bias, since the data is drawn from a long time-span and across many countries. Since countries too rarely rewrite their entire constitution, a panel-approach to overcome this problem is not viable in this case. Thus, the results should be taken only as indicative evidence and a more robust estimation strategy to identify causal relationships offers an interesting opportunity for future research.
Table 1: Effect of conflicts on referendum results

<table>
<thead>
<tr>
<th></th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
<th>(6)</th>
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<tbody>
<tr>
<td></td>
<td>Yes % (Logit)</td>
<td>Yes % (OLS)</td>
<td>Yes % (Logit)</td>
<td>Yes % (OLS)</td>
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<td>Yes % (OLS)</td>
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<tr>
<td>Conflict</td>
<td>0.0000675*</td>
<td>0.00000806**</td>
<td>0.000140*</td>
<td>0.000134**</td>
<td>0.000140*</td>
<td>0.000136***</td>
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<tr>
<td></td>
<td>(1.88)</td>
<td>(2.23)</td>
<td>(1.82)</td>
<td>(2.54)</td>
<td>(1.76)</td>
<td>(2.48)</td>
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<tr>
<td>L.Polity IV</td>
<td>-0.0996***</td>
<td>-0.0144***</td>
<td>-0.0730***</td>
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<td>(-4.34)</td>
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<td>Literacy rate</td>
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<td>-0.00215***</td>
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<td>(-6.10)</td>
<td>(-6.67)</td>
<td>(-5.63)</td>
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<td>-0.337</td>
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<td>(-0.42)</td>
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<td></td>
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<td>-0.0582</td>
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<td></td>
<td>(2.52)</td>
<td>(0.81)</td>
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<td>dummy 1974-1988</td>
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<td>0.00430</td>
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<td>(0.34)</td>
<td>(0.08)</td>
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<tr>
<td>dummy 1989-2000</td>
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<td>-0.0306</td>
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<td></td>
<td>(-0.22)</td>
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<td>Constant</td>
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<td>0.802***</td>
<td>2.620***</td>
<td>0.937***</td>
<td>2.898***</td>
<td>0.958***</td>
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<td>0.275</td>
<td>0.427</td>
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</table>

$t$ statistics in parentheses

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

The results, as shown ??, indicate that the degree of domestic crisis has a positive effect on the percentage of yes-votes in constitutional referendums. Across all specifications in the OLS models, the conflict variable is statistically significant at the 5% level. When using a logit model, the conflict variable is still significant, but only at the 10% level. This result gives some indications that the claim that voters will tend to vote yes in times of crisis is indeed true.

The signs of the control variables take the expected form as well. Voters in a more democratic society and better educated voters are more likely to punish their drafters with a no-vote. Both of these variables are highly significant across all specifications. Ethnic fractionalization is statistically insignificant across the specifications, which casts some doubts on the claims of the importance of fractionalization for constitutional referendums. When looking at the time dummies, those are only significant for constitutions made in the waves after World War II as well as the newly independent former colonies in the 1960s. It could be argued that for the voters in the newly independent states, having a constitution as a sign of independence had a very high value and thus the positive effect of this time dummy could be explained.

5 Discussion

This analysis’ aim is not to explain how every constitutional feature comes about, but rather to get a better understanding of the constitution-making process. The results, as they stand, present a positive result. They explain which constraints influence the constitution-making process under different settings. This article has argued that the effective constraints on the drafters depend on potential intra-elite conflicts, uncertainty’s influence on expected future benefits and whether or not the procedural rules require a referendum. These variables also interact among each other, where strong uncertainty mitigates the influence of referendums and intra-elite conflicts. Looking at the empirical results, the effect of uncertainty (as proxied by domestic conflict) on the referendum
result takes the expected positive sign and gives further indication that referendums work worst when they are needed the most to constrain drafters.

Returning to the article’s motivation, one can see that the roving and stationary bandits concept fits quite well for constitution-making. If rulers are uncertain about their long-term perspective, they are more likely to opt for expropriationary powers. While referendums also lose effectiveness from uncertainty, intra-elite conflicts can mitigate the short-term perspective to a degree. Translating this result into procedural rules, a democratically elected assembly with a qualified majority requirement is more likely to act as an effective constraint than a popular referendum. This result favours indirect popular participation as a constraining mechanism.
References


