

# Ulysses' bonds: Are constitution-makers constrained by mandatory referendums?

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## Abstract

The drafting of a new constitution has special importance after conflicts or during transitions. One of the main conflicts in constitution-making is between the drafters and the citizens with regard to the level of future government constraints. The use of referendums for ratification has been proposed as a tool to constrain drafters and increase the inclusiveness of constitution-making. The model presented here highlights that referendums for ratification can successfully constrain drafters, but do fail in exactly those situations characterized by uncertainty when they are most needed. To support this theoretical result, domestic conflict indicator as a proxy for uncertainty is regressed on constitutional referendum results. The empirical results give some indicative support for the predictions of the model, especially when looking more closely at the failed referendums.

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

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## 1 Introduction

Drafting a constitution is one of the cornerstones of state building. The new constitution has important symbolic value, it provides the basic set of rules for the legal regime in power, and also has important economic implications. There has been a great deal of research in recent years on the economic effects of constitutions,<sup>1</sup> but less focus has been given to the actual drafting process. 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 there are some articles in legal journals that focus on the process of constitution-making (see for example Banks, 2008; Jackson, 2008; Tushnet, 2008; Barnett, 2009; Partlett, 2012; Landau, 2012, 2013), the literature concerned with constitutional economics has been remarkably quiet on the topic. To my knowledge, no attempt has been made to formalize the constitution-making process while incorporating the institutional details that constrain the process. In this vein, the attempt of this article is closely related to the research program of law & economics. This program often relies on three pillars to organize the method of research. The first pillar is the selection of a legal topic as the subject of interest, the second pillar is the use of an economic methodology, and the third pillar is drawing on institutional knowledge to strengthen the analysis. Following this approach, 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 formal model's setup.

For this venture, it is important to first clarify how constitutions and their functions are viewed in this article. According to Buchanan (1975), one of the key functions of a constitution is to establish 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 contracts (or employ sanctions due to breaches of contracts) requires a government powerful enough to accomplish this task. If a government has enough power to enforce contracts, it also has, by definition, enough power to expropriate its citizens for its own benefits. This situation has been coined the dilemma of the

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<sup>1</sup>See Voigt (2011) for an overview

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 up the necessary institutions and 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). This article focuses mainly on the constraining function of constitutions.

One can argue that the key conflict in the process of constitution-making is between the drafters and the citizens. This 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.<sup>2</sup> The benefits are the improved long-term growth prospects of the society, which in turn increase the politicians' future income. It can be argued that the costs are the lost benefits of extracting short-term rents, e.g. from expropriation. If the prospects of long-term growth benefits outweigh the lost short-term rent collections, politicians might voluntarily bind themselves.

The idea that a government might be willing to constrain itself due to long-term benefits is similar in nature to the idea of "stationary bandits" of Mancur Olson (Olson, 1993). An autocratic ruler might 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 behavior. While the autocrat receives a smaller percentage of the pie when compared to his percentage received from expropriations and takings, he is still better off because the pie is much bigger. . One mechanism for an autocrat to

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<sup>2</sup>With regards to expropriation, it is assumed that politicians are not able to utilize targeted transfers to citizens as a policy tool. Thus, citizens will always oppose expropriations in general.

credibly commit to a long-term perspective is a new constitution.<sup>3</sup>

Another reason why politicians draft a new constitution is regime change. More than 200 constitutions in the past 40 years have been drafted under a threat of violence (Widner, 2008); furthermore several countries such as Egypt, Tunisia and Libya recently started drafting new constitutions after the Arab Spring transitions. The conditions under which these countries are working on their new constitutions are characterized by uncertainty about future developments and a need for the constitution to be quickly enacted, thereby marking a step on the way back to normal times. Nevertheless, the drafters and citizens still face the same conflict of interest as discussed above.

The key question for this dissertation is how the constitution-making process affects the creation of the drafted constitution, especially the constraints this constitution places on future governments. For instance, do the procedural rules of requiring democratically elected assemblies or public referendums lead to more constrained governments? How do the circumstances of constitution-making affect the working of these procedural rules? The transmission channel proposed here is that these procedures place additional constraints on the drafters, but are themselves also affected by uncertainty. The analysis highlights that effective constraints on the drafters increase with intra-elite conflicts and a required referendum, but decrease with uncertainty. These variables also interact with each other, where uncertainty mitigates the impact of referendums and intra-elite conflicts. In other words, in situations fraught with uncertainty, which is often the case for constitution-making, drafters are least constraint by procedural rules.

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

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<sup>3</sup>Nevertheless, even autocrats not interested in committing themselves might use a sham constitution. Thus, precedent in following the constitution is a key element to make the commitment credible.

## 2 Constraints on constitution drafters

An extensive theoretical discussion, which focused on moments of constitution-making and the process itself, began two decades ago with the seminal contributions of Ackerman (1991) and Elster (1993, 1995, 2000).<sup>4</sup> Ackerman draws a distinction between times of normal politics and constitutional moments. While times of normal politics are characterized by the short-term interests of politicians left unchecked by citizens who 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 self-interest, while 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 dissertation will rather employ a rational-choice perspective of self-interested drafters, who act under constraints.

The strand of literature generated by Ackerman and Elster's contributions discusses two different kinds of constraints, namely upstream and downstream constraints (Elster, 1995, p.373). Upstream constraints 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 the assembly's delegates constrains their actions. Downstream constraints are related to the ratification of the constitution. A referendum which constrains the set of constitutional drafts that would be ratified is an example for a downstream constraint. The categories provided by these two constraints do not, however, offer a complete description of relevant constraints that apply to the constitution-making process. Consider how the voting rules within the constitutional assembly, or time constraints brought to bear in times of crisis, might also constrain constitution-making. Therefore, a different taxonomy of constraints will be used for the purposes of this dissertation. One can distinguish constraints due to procedural rules of constitution-making

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<sup>4</sup>Beard (1913) was the first to look at the economic motives of constitutional drafters, but did not focus on the process itself.

(including what Elster defined as upstream constraints), constraints due to popular participation, and time constraints. The literature on these three sets of constraints is reviewed in turn.

## 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. Landau (2012) has argued that the design of the process determines the outcome of the process. 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 existing executive or legislative bodies or a specifically elected constitutional assembly. It has been argued that a constitution-making body created from members of the existing legislative or executive branches of government will be biased in favor of their own branch and generally more inclined 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.<sup>5</sup> Electing an assembly takes time, however, and time is often scarce in moments of constitution-making. It has also been argued that a better knowledge of the preferences and ideologies of other members of the constitution-making body allows the members to reach a more stable agreement (and a more stable constitution) (cf. Mnookin, 2003). This knowledge is generally higher among members of an existing body than in a specifically elected one.

Empirical evidence only partially supports the claim that constitution-making bod-

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<sup>5</sup>This 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 executive or legislative bodies, this claim appears doubtful.

ies created from members of the executive or legislative branches tend to behave in a self-serving manner. While Ginsburg et al. (2009) confirm this self-serving hypothesis for executive-centered processes, they do not find support for this hypothesis with regard to legislative-centered processes. This finding seems to indicate that executive-centered processes are more self-serving. Another possible explanation for this finding lies in the empirical method. Since Ginsburg et al. (2009) compare executive- and legislative-centered processes to the ones with specifically elected assemblies, a bias within these elected assemblies can also drive the results. Individuals involved in a specifically elected assembly recognize that it is unlikely that they will obtain executive branch offices after the ratification of a new constitution and are, therefore, unlikely to give additional power to the executive. Conversely, these drafters are more likely to obtain a position within the legislative body after ratification and, therefore, are more likely to pursue provisions that are biased towards the legislative. Unfortunately, the analysis of Ginsburg et al. (2009) does not allow to evaluate this explanation.

The literature indicates that the case for opting for a certain selection mechanism is not as clear-cut as suggested by Elster. Both mechanisms have advantages and drawbacks and the decision involves a trade-off between a more democratic specifically elected assembly and the lower costs in terms of time and information offered by an assembly based on members of the legislative or executive.

While voting rules play a certain role in the process of selecting the drafters of a constitution, they play a more important role during the drafting and ratification process. Voting rules governing the constitution-making body that require a simple majority are the polar opposite of voting rules that require unanimous consent. 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 possible voting rules. Qualified



majorities are the typical example and aim to overcome the holdout problem while still maintaining some veto power for minority actors. The decision for choosing a particular set of voting rules needs to weigh the costs and benefits between a fast, yet potentially one-sided process, and a more inclusive, yet more time-consuming and risky process. In practice, some form of a qualified majority requirement has dominated the picture in recent years (Democracy Reporting International, 2011).

The manner in which a constitution is ratified 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 these bodies into account when drafting the constitution. The more interesting case, however 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. Using data from 480 constitutions adopted between 1789 and 2005, Ginsburg et al. (2009) found that 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.<sup>6</sup> Carey puts the emphasis on the importance of legitimized institutional actors and thereby indirect participation. One of the problems with referendums is an increased uncertainty for constitution-makers causing the greater risk of failure of the negotiations (cf. Banks, 2008; Ginsburg et al., 2009).

### 2.3 Time constraints

Timing is an essential part of the constitution-making process. The bargaining power of specific members or groups in the constitution-making body is based on their 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. (Jackson, 2008, p.1291) writes "[...] the moment for constitution-drafting is not always, or even usually, an entirely autochthonous choice in post-conflict settings.". 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 become more costly and actors might accept 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. To sum up, time pressures can force the ratification of a constitution that otherwise

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<sup>6</sup>With regards to policy implications, one might consider adopting the majority requirements of referendums. Michel and Cofone (2015) provides an analysis of the arguments for and against qualified majorities in constitutional referendums.

would not have been chosen.

The literature stresses several constraints faced by the constitutional drafters. While public participation and procedural rules can substantially limit the options available to drafters, these constraints themselves might falter under certain conditions. Drafting a new constitution under severe time pressure is one typical example for these "unconstraining" conditions. To sum up, while procedural rules have received attention in the literature, they have so far not been formally used as determinants of constitutional choice. The next section sets up a formal model to fill this gap.

### 3 Theoretical model

#### 3.1 Basic assumptions

There are three types of actors in this setting, two types of politicians from different groups in the constitution-making body and the voters. The politicians are the new constitution's drafters and derive their utility from the political benefits available to the political class. In the light of the empirical literature on the self-interest of drafters discussed above and following rational-choice theory, the model assumes that politicians are motivated by their own self-interests. The citizens act only if there is a rule-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. These constraints on the government do not mean that redistribution should be prohibited, but rather that the use of government funds for the private benefit of government members is not allowed. Thus, a law allowing eminent domain with full compensation could be in the interest of the citizens if they favor an active government. These redistributive considerations, albeit interesting, are not modeled. The main conflict of interest here is political rent creation, where both political factions have a joint interest in rent maximization and citizens are generally opposed to those rents. In cases where referendums (and thus citizen input) are not required, the drafters might nevertheless be constrained by motives of self-binding or an intra-elite conflict regarding

the division of the rents.

An important assumption throughout this model is the binding force of constitutional provisions. Drafters and voters alike are assumed to expect the constitution to bind future governments, given that constraints are put in place. The issue of enforcing a constitution has been extensively discussed in the literature emphasizing the crucial problem related to the lack of external enforcement of a constitution. Thus, a constitution needs to be self-enforcing if it is to effectively bind future rulers (see for example: Hardin, 1989; Ordeshook, 1992; Voigt, 2004; Weingast, 2005; Mittal and Weingast, 2013). Weingast (1995) provides a possible illustration of how a constitution might work in this way. He argues that transgressions by the government are easier to identify and punish when the citizens use the constitution as a focal point to create a joint understanding of a government action that is a violation of the rules spelled out by the constitution. In this way, it can be argued that a government that breaks the rules established by the constitution increases the risk of an uprising by the citizens, which can be seen as one reason why the politicians *ex ante* assume that they are bound by the constitution.<sup>7</sup>

### 3.2 Setup

The model's timing is as follows. First, the drafters decide on the constitution. In a second step, the citizens have to ratify the constitution if the procedural rules so require. The drafters draw utility from two types 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.<sup>8</sup> The constitution's key function being analyzed in this model is its ability to constrain the government from abusing power. The better the constitution works in this dimension, long-term rents for the government increase based on better protection for property rights. When property rights' are fully protected, however, limits are placed on the ability of politicians to extract (short-term) rents.

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<sup>7</sup>It is nevertheless possible that the costs of breaking the constitution are lower at some future moment in time than adhering to the document. In this paper, it is assumed that this special case does not affect the decisions of the drafters.

<sup>8</sup>These benefits include the regular salaries of the government members.

Different constitutions increase either short-term or long-term rents, but never both at the same time. In the following subsections, the constraints discussed in the literature review are introduced step by step.

### 3.2.1 Constitution-making in an autocracy

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

$$\max_c U_p(c) = r_s(c) + \rho \cdot r_l(c) \quad (1)$$

where  $\rho$  captures the uncertainty in the model and is considered exogenous.<sup>9</sup>  $r_s(c)$  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.<sup>10</sup> A situation where  $c = 0$  is a constitution which does not constrain the government at all. For the citizens, this case provides the same level of protection for their property as if there was no constitution at all. This situation offers no incentives for long-term investment and 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 of the constitution can take any value between 0 and 1. Thus, both rents are functions of the constitutional choice. It is further assumed that both functions have a concave shape, which is represented by the negative second order derivative. The conditions faced the drafters with respect to the utility from long-term and short-term rents can

<sup>9</sup>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 (2008) for a more detailed discussion of post-conflict constitution-making.

<sup>10</sup>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.

be formally written as follows:

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

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

If the members of the constitutional assembly are unconstrained in their constitutional choice, they simply set  $c$  to maximize their utility. To solve this maximization problem, the first order condition needs 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<sup>11</sup>, the marginal changes of long-term and short-term rents must be equal for this condition to hold. Thus, based on the countries' characteristics, the drafters must balance the benefits of committing to property rights in the long-run with the loss of discretionary power in the short-run.

It is also possible that the marginal change in long-term benefits is always larger when compared to the change of short-term benefits if the of both kinds of rents is sufficiently large. In a situation like this, the drafters will, out of pure self-interest, choose a constitution that completely binds them. However, in all but the extreme cases, drafters choose a constitution that is located somewhere between full constraints and no constraints at all.

When an autocrat faces uncertainty about his future position, the results of the anal-

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<sup>11</sup>The same result holds for two factions of equal bargaining power.

ysis change. Formally, for a value of  $\rho$  lower than 1, long-term benefits are discounted against short-term rents. When compared to a situation without the shock, an external shock leading to more uncertainty (i.e. a decrease in  $\rho$ ) prior to the drafting will cause a decrease in  $c$ .<sup>12</sup> This relation represents the conjecture that constitution-making during a crisis leads 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 especially during times of crisis. 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 a process that has multiple factions with veto power.

### 3.2.2 Constitution-making by a democratically elected assembly

A key change in the analysis occurs when one considers an assembly with multiple veto players. A specifically and democratically elected assembly would be an example of this, given that no party has enough votes to dominate the assembly. Both groups of politicians have a shared interest, namely maximizing 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 these short-term benefits. Their interest in short-term rents will decrease in accordance with the weakness of their bargaining power.<sup>13</sup> 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 as to which faction will end up in government in the long-run. The politicians' maximization problem changes to:

$$\max_c U_p(c) = \alpha \cdot r_s(c) + \rho \cdot r_l(c) \quad (6)$$

<sup>12</sup>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.

<sup>13</sup>A more detailed analysis of bargaining within the constitutional assembly would go beyond the aim of the model presented here. A general discussion of this bargaining is provided in the appendix.

where  $\alpha$  is the minority faction's relative strength during the bargaining stage. A higher  $\alpha$  simply means that the minority faction is relatively stronger, i.e. that the factions have more equal bargaining power.

Setting the first order condition equal zero, and using some algebraic manipulations gives the following equation

$$\frac{\rho}{\alpha} = -\frac{\frac{\partial r_s(c)}{\partial c}}{\frac{\partial r_l(c)}{\partial c}} \quad (7)$$

While the results with regard to the degree of uncertainty remain the same, the multiple veto players have an effect on the valuation of short-term benefits. For a value of  $\alpha$  lower than 1, short-term benefits are discounted since the minority party will oppose them. As the inequality of the two factions increases, less weight is put on short-term rents. This assumption can be explained by the minority party recognizing their weakness in the given situation encouraging them to take a more long-term oriented view. As soon as a single party dominates the assembly and there are no 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 fulfill this task is discussed in the next section.

### 3.2.3 Constitution-making with required referendum

Another potential way of placing further constraints on 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.<sup>14</sup> We begin by modeling the citizens' utility function as follows:

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<sup>14</sup>Citizens are assumed to fully know the constraints to the government that the draft is providing.



$$U_v(c) = g - \frac{p}{n} \cdot r_s(c) + \frac{p}{n} \cdot \rho \cdot r_l(c) \quad (8)$$

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,  $\rho \cdot r_l(c)$ . However, since they will be the victims of future expropriations, they receive negative utility from a constitution that allows the government to abuse their power. The term  $\frac{p}{n}$  gives the proportion of politicians to citizens. While this ratio affects the levels of the rents, it leaves the results otherwise unchanged. 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. Given this setting, 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:

$$U_v(c) \geq \delta_v \cdot U_v(\bar{c}) \quad (9)$$

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.  $\bar{c}$  stands for 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 maximization problem of the drafters.

$$\max_c U = \alpha \cdot r_s(c) + \rho \cdot r_l(c) \quad s.t. \quad \frac{U_v(c)}{U_v(\bar{c})} \geq \delta_v \quad (10)$$

It is assumed that a negative vote leads to a zero 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 dare not risk a failed referendum and are constrained by the citizens' vote.<sup>15</sup>

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

$$\frac{U_v(0)}{U_v(\bar{c})} \geq \delta_v \quad (11)$$

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  $\delta_v$ ), the value of having a constitution ( $g$ ) goes up, or citizens expect that the proposal in the next period will feature weak constraints (low  $\bar{c}$ ). The first two of these conditions can be typically found in times of crisis and especially during domestic conflict. When facing an ongoing conflict, the focus is on immediate concerns and uncertainty about the benefit of future developments is high. Looking at the value of having a constitution, it can be argued that constitutions are devices to mitigate or end conflicts and as such they entail a larger benefit in times of crisis.<sup>16</sup>

On the other hand, the 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. Ironically, these are the same settings where drafters experience low levels uncertainty, are generally attracted to long-term benefits

<sup>15</sup>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.

<sup>16</sup>For a detailed discussion of the conditions for constitutions to act as conflict-resolution tools, see Grossman (2004)

and more amenable to drafting a binding constitution.

To sum up, referendums provide the strongest effect in situations where citizens face a relatively stable setting and put a lot of emphasis on government constraints. Arguably, constitution-making often happens in more turbulent times and it appears likely that the constraint of a referendum loses power when constitution-making occurs after crisis or during transitions. The model presented in this section hinges critically on the effect of a crisis on property rights and the voting behavior of citizens. To test these links, the next section will present some regression models based on cross-country evidence.

## 4 Empirics

### 4.1 Theory

Following the reasoning of the theoretical model presented above, the empirical model aims to test whether domestic conflict has a positive effect on the percentage of yes-votes in constitutional referendums. In brief, the argument here is that domestic conflict fuels uncertainty and the need for a new constitution, thereby making voters agree to a larger set of constitutional drafts.

Hypothesis 1: *Domestic conflict has a positive effect on yes-votes in constitutional referendums*

One could argue that the result of the referendum would also affect the level of domestic conflict in a given year, i.e. a problem of reversed causality. To mitigate this problem, the lagged domestic conflict variable is used as a robustness check. To control for differences in the content of the draft, executive constraints are included. One would expect that voters are more likely to say yes to a draft that offers more constraints.

To this date, only a few articles have looked at the determinants of the outcomes of constitutional referendums. One contribution, analyzing the Kenyan constitutional referendum of 2005, argues that ethnic fractionalization is one of the key determinants (Kimenyi and Shughart II, 2010). Based on their findings, one would expect the share

of yes-votes to decline with increased fractionalization.

It can also be argued that more democratic countries 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 less democratic system. Another reason 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. Furthermore, it can be argued that education and per capita income can be used as proxies of the development of the given country.

## 4.2 Estimation Approach

To test the hypothesis, we use an Ordinary Least Squares (OLS) estimation with robust standard errors. The dependent variable is the percentage of yes-votes in the constitutional referendum, whereas domestic conflict, fractionalization and the other control variables serve as independent variables. The baseline model includes only the referendum results, the domestic conflict index, ethnic fractionalization and democracy as well as a linear time trend. To take care of the effect of mandatory referendums and potential transition effects, dummies for a mandatory referendum and for a recent transition are added in the second specification. Finally, the content of the draft is incorporated through a measure of executive constraints in the final three specifications. The difference between these specifications are different proxies for executive constraints in the constitution.

We are aware that the OLS approach suffers from several problems. First, since the yes-percentage is bound between 0 and 100, an OLS estimation might be problematic. As a robustness check, a fractional logit model is estimated using the same specifications as the OLS.<sup>17</sup> Second, the result might be driven by outliers. A robust regression estimation automatically gives lower weights to outliers and thereby mitigates this issue. Huber (1973) on the theoretical underpinnings and Li (1985) on the details of the method

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<sup>17</sup>Only one of the three specifications for executive constraints is used for the robustness checks. The results would not have been different if another of the three measures had been used.

are the seminal articles for this method. As another robustness check, this estimation technique is employed by using the stata command *rreg*.

In a perfect world, one could randomly assign constitutional referendums to countries with and without crisis which would otherwise be identical. This randomization would allow for a test of the causal relationship between crises and referendum results. However, especially when dealing with constitutions as dependent variables, the data often does not allow for stringent causal analysis. The reason for this claim is the stylized fact that constitutions have an average lifetime of 19 years. Thus, on average there will be nearly two decades of missing data between two observations. Another problem with the data used for the analysis here is that one would like to focus on mandatory referendums. However, due to the low number of mandatory referendums, all referendums used to ratify new constitutions are included in the analysis. Whether or not a referendum was mandatory is added as a control variable.

### 4.3 Data

The data on constitutional referendums includes the results of all constitutional referendums from 1945 until 2012 (Centre for Research on Direct Democracy (c2d), 2015). The dataset contains not only whether or not the referendum was successful, but also the exact date, the vote shares, whether the referendum was mandatory or not, and the topical areas of the referendums. This detailed coverage allows us to focus on new constitutions and exclude amendments.

To measure domestic conflict, the aggregated domestic conflict variable from the Cross-National Times Series (CNTS) dataset is employed (Databanks International, 2011). It aggregates information on assassinations, general strikes, guerilla warfare, government crises, purges, riots, revolutions and anti-government demonstrations into a weighted indicator. This indicator is created from the reports published in The New York Times. As such, this indicator is not purely objective because it is dependent on what is reported. It is possible that articles published in The New York Times may have a bias against certain regions. However, the depth and breadth of the coverage in The New York

Times alleviates potential issues that may arise from gathering data based on newspaper reports. This variable is used as a proxy for the level of uncertainty caused by violence among the citizens.

To control for the political system, the democracy dummy variable from Cheibub et al. (2010) is used. Education is measured by average years of schooling in a country and is taken from Barro and Lee (2013). The GDP per capita data is taken from the Penn World Tables (Feenstra et al., 2015). The analysis incorporates the ethno-linguistic fractionalization data from Roeder (2001)<sup>18</sup> As an additional control, the transition data from Cheibub et al. (2010) is used to see whether or not a transition prior to the new constitution has an effect on the outcome. The transition dummy takes a value of 1 if a transition has taken place in the same year or the 3 years prior to the referendum.

According to the theoretical model, the results of the referendum should depend on the constraints offered by the constitution. Data on executive constraints is taken from the *xconst* variable of the Polity IV dataset created by Marshall and Jaggers (2002). However, one could argue that this variable measures the *de facto* constraints on the government and not the constraints in the constitution on which citizens cast a vote. To take care of this issue, an indicator of government constraints in the constitutional text is required. As a proxy for these constraints, a *de jure* property rights index from Voigt and Gutmann (2013) can be used. However, the indicator of Voigt and Gutmann has much fewer observations than the Polity IV variable. To mitigate this problem, another property rights indicator has been constructed for this article from the dataset of Goderis and Versteeg (2014). Table 1 presents the summary statistics of the data used in the subsequent analysis. It is interesting to see that most referendums do succeed with a high average share of yes-votes. This result is not surprising, since drafters are expected to take the referendum into account when preparing the draft. Nevertheless, there is some variation which allows for an econometric analysis. In terms of domestic conflict, there is a lot of variation to draw from.

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<sup>18</sup>This indicator offers a broader coverage compared to the more popular one constructed by Easterly and Levine. The use of the indicator by Easterly and Levine would not change the results, but significantly reduce the number of observations.

Table 1: Summary statistics

Variable	Mean	Std. Dev.	Min.	Max.	N
Yes-votes [%]	83.036	18.343	4.78	99.990	136
mandatory	0.243	0.43	0	1	136
Domestic conflict indicator	913.989	1982.509	0	51625	9159
Democracy	0.438	0.496	0	1	9112
Fractionalization	0.441	0.28	0	0.984	9148
ln GDP per capita	8.355	1.185	5.219	11.806	8220
Education	5.43	1.503	3.669	8.135	13667
Democracy	0.438	0.496	0	1	9112
Transition	0.09	0.287	0	1	8379
Executive constraints	4.108	2.345	1	7	8793
Transition	0.09	0.287	0	1	8379
De jure property rights (Voigt/Gutmann)	0.437	0.17	0.048	0.976	5798
De jure property rights (Goderis/Versteeg)	0.452	0.194	0	1	8513

#### 4.4 Results

We are interested in whether conflicts affect the final outcome of a referendum, i.e. the percentage of yes-votes.<sup>19</sup> The results indicate that the degree of domestic crisis has a positive effect on the yes-votes, but this effect is not robust to different estimation techniques and models.

The conflict variable is positive across estimations, thus following the expected path. However, statistical significance can only be found in some of the OLS and fractional logit specifications. The statistical significance of domestic conflict vanishes when government constraints in the draft are taken into account. This effect could be a first indication that failed referendums play a key role for the significant result in the first specifications, since they need to be excluded when property rights indicators are taken into account.<sup>20</sup>

Fractionalization is insignificant across all specifications, thereby putting some doubt on the general applicability of the results of Kimenyi and Shughart II (2010). Democracy and Education (indicators of the development of a country) are significantly negative across all specifications. While this result could be a sign that people in more developed countries are less likely to vote yes, it might simply be an artifact of rigged elections

<sup>19</sup>While it would be interesting to use a success dummy variable as the dependent variable, the extremely low number of failed referendums weakens the explanatory power of such an approach due to low variation.

<sup>20</sup>A failed referendum would not change government constraints in the future.

in less developed countries. The issue of rigged election results is a serious concern for this analysis, but a pure focus on countries that have been coded as democratic by Cheibub would leave the analysis with 18 observations making any meaningful regression impossible. The time trend variable is significant and positive across all specifications. Surprisingly, whether there was a transition prior to the referendum and whether a constitutional referendum was mandatory does not have any statistically significant effect.

Finally, the most surprising result is the negative and significant sign of government constraints. One would assume that citizens prefer their government to be constrained, thus the result is striking. One reason could lie in the nature of the proxy, namely that it measures *de facto* constraints. The additional control of *de jure* property rights hints at this explanation, since the coefficient is insufficient for both property rights measures.

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With regards to our variable of interest, namely domestic violence, the results from the robust regression technique have highlighted that outliers are a main driver for the significant results in the OLS and fractional Logit specifications. This finding and the small number of failed referendums makes a closer look at these failed referendums in light of the theory proposed in the main part of this paper a viable option.



Table 2: Effect of domestic conflict on referendum (OLS)

	(1)	(2)	(3)	(4)	(5)
	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]
Domestic conflict indicator	0.000871 (1.61)	0.00105* (1.93)	0.000983 (1.35)	0.000551 (1.10)	0.0000183 (0.03)
Fractionalization	-0.937 (-0.16)	1.401 (0.22)	-2.908 (-0.52)	-1.900 (-0.33)	2.544 (0.32)
ln GDP per capita	-5.584** (-2.02)	-5.802* (-1.86)	-4.505* (-1.83)	-3.675 (-1.33)	-3.763 (-1.25)
Education	-18.33*** (-2.80)	-16.63** (-2.39)	-14.99** (-2.20)	-18.48*** (-2.73)	-37.36 (-1.34)
Democracy	-7.116 (-1.34)	-8.493 (-1.46)	0.843 (0.17)	-3.021 (-0.57)	-1.380 (-0.24)
t	1.552** (2.56)	1.344** (2.15)	1.346** (2.12)	1.594** (2.57)	3.736 (1.23)
mandatory		3.147 (0.75)	-0.728 (-0.19)	-1.061 (-0.24)	-3.153 (-0.69)
Transition		-0.0666 (-0.02)	1.089 (0.26)	-2.369 (-0.59)	-1.574 (-0.29)
F.Executive constraints			-2.763*** (-3.31)		
F.De jure property rights (Goderis/Versteeg)				-13.03 (-1.16)	
F.De jure property rights (Voigt/Gutmann)					-8.905 (-0.63)
Constant	170.1*** (6.38)	168.4*** (5.33)	160.9*** (6.56)	163.7*** (6.05)	179.2*** (4.05)
Observations	88	79	72	74	49
$R^2$	0.290	0.305	0.374	0.317	0.260

*t* statistics in parentheses

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

Table 3: Effect of domestic conflict on referendum (Frac. Logit)

	(1)	(2)	(3)
	yes	yes	yes
yes			
Domestic conflict indicator	0.0000568 (1.16)	0.0000777 (1.43)	0.0000385 (0.84)
Fractionalization	-0.0526 (-0.11)	0.146 (0.30)	-0.0474 (-0.10)
ln GDP per capita	-0.369** (-2.02)	-0.383* (-1.91)	-0.245 (-1.34)
Education	-1.295*** (-2.75)	-1.173** (-2.35)	-1.432*** (-2.95)
Democracy	-0.461 (-1.45)	-0.517 (-1.59)	-0.163 (-0.52)
t	0.106*** (2.59)	0.0915** (2.23)	0.116*** (2.97)
mandatory		0.230 (0.82)	-0.0186 (-0.06)
Transition		-0.124 (-0.46)	-0.352 (-1.27)
F.De jure property rights (Goderis/Versteeg)			-1.431 (-1.63)
Constant	7.821*** (4.19)	7.673*** (3.51)	8.159*** (4.13)
Observations	88	79	74

*t* statistics in parentheses

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

Table 4: Effect of domestic conflict on referendum (Robust regression)

	(1)	(2)	(3)
	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]
Domestic conflict indicator	0.000907 (1.42)	0.00111 (1.59)	0.000127 (0.26)
Fractionalization	-1.343 (-0.23)	-0.899 (-0.13)	-0.516 (-0.11)
ln GDP per capita	-6.974*** (-3.96)	-7.459*** (-3.87)	-0.540 (-0.36)
Education	-19.39*** (-2.78)	-19.39** (-2.40)	-16.51*** (-2.94)
Democracy	-5.918 (-1.42)	-6.535 (-1.30)	-8.010** (-2.13)
t	1.601** (2.45)	1.580** (2.03)	1.522*** (2.84)
mandatory		2.218 (0.48)	-7.149** (-2.11)
Transition		-0.0140 (-0.00)	0.283 (0.09)
F.De jure property rights (Goderis/Versteeg)			-2.710 (-0.31)
Constant	186.1*** (9.20)	188.7*** (8.29)	131.6*** (8.29)
Observations	88	79	74
$R^2$	0.344	0.349	0.398

*t* statistics in parentheses

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

## 5 Conclusion

The purpose of this analysis 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, are able to explain which constraints influence the constitution-making process under different settings. This article has argued 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 with 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 are least effective in situations when constraining drafters is of utmost importance. While the statistical significance is not robust to different specifications, a closer look at the few cases of failed referendums is supportive of the claims made in the model.

When rulers are uncertain about their long-term perspective, the model predicts that they are more likely to opt for expropriatory powers. This illustrates that the concept of roving and stationary bandits fits quite well in an analysis of constitution-making. Unfortunately, testing for this relationship through a largen study suffers from data problems. While a *de jure* indicator of expropriatory powers in a constitution has been constructed by Voigt and Gutmann (2013) and can be expanded with the data gathered by Goderis and Versteeg (2014), the relative preferences of drafters for short-term and long-term rents cannot be easily observed or proxied. To properly take these preferences into account, a set of detailed case studies would be necessary. While those are beyond the scope of this article, they offer an interesting opportunity for future research.

The key learning of this article has been that constitutional referendums constrain in situations that are not typically found during constitution-making. This finding can be interpreted in two ways. First, constitutional referendums could be an ineffective tool to constrain drafter *per se*. Second, the underlying cause for this lack of constraining

effect could be that almost all constitutional referendums only require a simple majority for ratification. A companion paper analyzes the optimal majority requirement for constitutional referendums (Michel and Cofone, 2015).

## 6 Appendix

### 6.1 Bargaining and constitution-making

Whereas the main part of this article focused on the conflict between drafters and citizens, the conflict among drafters with regards to the distribution of rents is the focus of this appendix. As soon as multiple factions are involved reaching a decision, one can look at the process itself as a bargaining situation. The conceptualization of the constitution-making process as a bargaining game is well established within the literature (Heckathorn and Maser, 1987; Elster, 1995, 2000; Voigt, 1999). However, so far no attempt has been made to include constraints as a variable which might influence the bargaining process. Game theory, and especially bargaining theory, is appealing to model this scenario, since "[...] context can be incorporated within formal models as part of the constraints that the actors are subject to." (Voigt, 2004, p.33). This appendix uses bargaining theory and the literature on the constitution-making process to provide a theoretical overview in which constraints are relevant for a model of constitutional bargaining. Throughout this section, a two-player bargaining scenario is used for simplification.<sup>21</sup> It is assumed that both players enjoy veto power for the division of the rents. Given the typical voting rules in assemblies, 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 an agreement, but face conflict over which outcome will be chosen from the set of possible beneficial outcomes. Bargaining theory aims to explain the rational outcome in this kind of situation. For

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<sup>21</sup>An n-player setting can converge into a two-player setting if coalitions are allowed to form.

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. If 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 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 between the Rubinstein model and the random-proposer 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.

Whether or not the bargaining game features repeated opportunities for bargaining is an important determinant of outcomes. 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 face each other again, justifying the notion that constitutional bargaining is a one-shot game.

Once the bargaining game's rules are spelled out, discount factors are another important feature to determine the outcome. If one 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. A player who has better options if negotiations break down, can increase his bargaining power by using this option as leverage during the negotiations. 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 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 has 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.

Another impact factor to the bargaining outcome is an external risk of breakdown in negotiations. When a party has to decide whether or not to accept an offer, the party is more likely to accept if the risk of breakdown seems imminent. Thereby, a high risk of breakdown favors 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. A referendum occurs after ratification by 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 does not affect 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.

The findings of the theoretical model presented in this article provide some indication of the source of the minority's bargaining power. Whenever one faction is clearly stronger than the other one along the dimensions discussed here, the constraining effect of the veto power in the assembly increases. This counter-intuitive result is related to the expectations for the near future of the two groups. The factors determining the bargaining power (e.g. the number of seats in the constitutional assembly) are also good proxies for prospects in the first election under the new constitution and the minority group will be less interested in short-term rents if they are out of office. All in all, the internal constraints on the drafters are reduced when the bargaining power of the factions in the constitutional assembly is equal.

## 6.2 Robustness Checks

As mentioned in the empirical section, the very act of requiring a ratification referendum might result in increased domestic violence in the year the referendum is held. Thus, a



lagged domestic conflict variable can be used as a robustness check. The drawback of this check is missing out on domestic conflict which intensifies in the same year as the referendum. The results of this test are in line with the main section, thus strengthening the argument that reverse causality is not the key problem.

Table 5: Robustness: Lagged domestic conflict on referendum

	(1)	(2)	(3)
	Yes-votes [%]	Yes-votes [%]	Yes-votes [%]
L.Domestic conflict indicator	0.00130*	0.00131*	0.000691
	(1.72)	(1.83)	(1.06)
Fractionalization	2.175	3.914	1.224
	(0.38)	(0.62)	(0.21)
ln GDP per capita	-5.984**	-5.705*	-3.344
	(-2.08)	(-1.87)	(-1.24)
Democracy	-11.59**	-11.11*	-5.651
	(-2.24)	(-1.92)	(-1.04)
t	-0.198	-0.196	-0.108
	(-1.59)	(-1.24)	(-0.71)
mandatory		0.990	-3.821
		(0.21)	(-0.78)
Transition		-0.847	-2.462
		(-0.18)	(-0.56)
F.De jure property rights (Goderis/Versteeg)			-12.73
			(-1.02)
Constant	137.8***	134.1***	123.2***
	(6.10)	(5.43)	(6.20)
Observations	82	77	72
$R^2$	0.272	0.254	0.237

*t* statistics in parentheses

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

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