

Do Constitutional Rights Matter?*

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September 16, 2014

Abstract

The critique of constitutions as mere parchment barriers is as old as the practice of writing them down. Yet states put a good deal of energy into drafting constitutions and some, inevitably, do so with the intention of abiding by their provisions. The purpose of the following article is to explore this possibility. I develop a theory of constitutional enforcement and test it using data spanning 189 countries from 1981 to 2008. The results suggest that entrenching a human right in the constitution can, under certain circumstances, significantly improve the odds that a country will observe that right in practice. To be specific, I find that constitutional rights are most effective in authoritarian contexts when there is at least a modest level of judicial independence. This finding suggests that the relationship between constitutional promises and actual practice is stronger than generally assumed.

*Special thanks to Tom Ginsburg for commenting on numerous drafts of this article. I also thank Justin Blount, Daniel Brinks, Christian Davenport, Zachary Elkins, Milan Svolik, Mila Versteeg, and Matthew Winters for helpful and thought-provoking comments.

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“What is the difference,” went an old joke in the Soviet Union, “between the Soviet and American Constitutions?” The answer was that the glorious Soviet constitution guaranteed freedom of speech, while the American Constitution guaranteed freedom after speech (Draitser 1989). The joke captures common intuitions about constitutions in authoritarian regimes as not being worth the paper on which they are printed.¹

The problem is hardly confined to faux constitutions or authoritarian regimes. The critique of constitutions as mere parchment barriers is as old as the practice of writing them down. Yet, states continue to write constitutions, and virtually all of these documents place limits on the power of government, either through the presence of institutional checks and balances, by enumerating long lists of constitutional rights – i.e. *de jure* rights –, or both.² Some of these constitutions are surely meant to limit the power of government. Even if drafters never have this intention, though, one still wonders if parchment barriers have unintended consequences.

A small empirical literature does address the effectiveness of constitutional limits. It primarily focuses on the effect of constitutional provisions on countries’ rights practices and suggests that structural barriers to government action (e.g. those pertaining to judicial independence or states of emergency) are effective, while the rights provisions themselves are

¹Numerous other examples exist. Take the North Korean constitution, for example, which guarantees rights to free speech, assembly, and association (Article 67). Consider also the Constitution of Niger, which guarantees each citizen the right to health and education (Article 11), notwithstanding the fact that, in 2011, the country ranked 186th out of 187 nations rated by the Human Development Index.

²I use the terms constitutional rights and *de jure* rights synonymously. Although, technically, *de jure* rights can be established by either a constitution or ordinary law, for the purposes of this paper, I ignore those established by ordinary law. The reason is that constitutional rights are better known and harder to change than rights established by statute, which should make them more effective.

not (Pritchard 1986; Fruhling 1993; Blasi and Cingranelli 1996; Davenport 1996; Cross 1999; Camp Keith 2002*a,b*; Keith, Tate and Poe 2009; Camp Keith 2011). For instance, Camp Keith (2002*a*; 2002*b*) compares the provision of rights, both substantive and procedural, and actual human rights protection. She finds that provisions for judicial independence improve human rights protection, as do due process provisions such as guarantees of public and fair trials. Cross (1999) comes to a similar conclusion. Davenport's (1996) more comprehensive analysis covers 39 countries over a 35 year period and finds that countries with a state of emergency clause or with *de jure* freedom of the press have lower levels of repression. Most recently, Camp Keith, Tate, and Poe (2009) confirmed many of the findings from this literature using a longer time period and larger sample of countries, and in a review of the literature on state repression, Hill and Jones (2014) find evidence that *de jure* guarantees of fair trial improve *de facto* rights protection. At first glance, then, the extant literature supports the Madisonian argument that the path to protect rights is through institutional safeguards, not entrenched constitutional rights. A result that supports the critique that *de jure* rights are merely parchment barriers.

The problem with this literature is its focus. Virtually all of these studies assess if constitutional provisions are, on average, effective.³ In doing so, the literature assumes that the effect of constitutional entrenchment on countries' rights practices is homogenous. This is like assuming that, during the Cold War, the United States and the Soviet Union were equally likely to enforce constitutional rights. As highlighted by the joke above, though, most people (rightly) believe that constitutional rights were better enforced in the United States' during the Cold War than in the Soviet Union. Similarly, according to the homogeneity assumption, one would predict that the effect of adopting a bill of rights in Australia, the only commonwealth country without one, would be the same as adopting a bill of rights

³Davenport (1996) and Camp Keith (2011) are the only exceptions to this critique. Both of which assesses whether the effect of certain *de jure* have a conditional effect, but unlike this article, neither deals with the potential endogeneity of that effect.

in Libya. However, since *de facto* rights protection is already high in Australia, one might expect that adopting a bill of rights in Libya will have a greater effect on rights practices because there is more room for improvement in Libya than in Australia. Failure to account for these sources of heterogeneity leads to the false conclusion that *de jure* rights are ineffective and misses an opportunity to identify the conditions under which *de jure* rights are enforced.

The following article relaxes the homogeneity assumption in an effort to shift the focus of the literature on the efficacy of constitutional rights from one of averages to one of conditional effects. Such a shift has already taken place in the literature on the efficacy of international law. That literature is now squarely focused on the conditions under which international human rights treaties are enforced by domestic actors (see, for example Simmons 2009; Powell and Staton 2009; Hafner-Burton, Helfer and Fariss 2011). Here, I use the insights from that literature to understand the conditions under which constitutional rights are effective. In doing so, this article argues that two contextual factors – judicial independence and regime type – affect political elites’ decisions to comply with constitutional rights.

The next section provides further evidence that the effect of *de jure* rights is heterogeneous. I then identify the conditions under which one would theoretically expect to observe a relationship between *de jure* and *de facto* rights. To be specific, I argue that constitutional rights are most effective when enforced by the judiciary and in authoritarian regimes. These conditions are tested using data on the *de jure* and *de facto* protection of six civil and political liberties – freedom of association, freedom of expression, freedom of movement, freedom of religion, freedom of press, and the prohibition of torture – spanning 189 countries from 1981-2008. The results demonstrate that the entrenchment of human rights in constitutions is most likely to lead to improvement in the behavior of governments on the ground in authoritarian countries when there is a modest level of judicial independence. However, this effect is differentiated, with some *de jure* rights always having a neutral or potentially negative association with their practice.

Evidence of a Conditional Effect

In its simplest form, the relationship between *de jure* and *de facto* rights can be represented as a two-by-two table, as in table 1. In the table, columns represent the presence, or not, of a *de jure* right and rows represent the presence, or not, of a *de facto* right. According to this typology, countries are classified as follows: 1) rights repressors have neither *de jure* nor *de facto* protection of a right, 2) over-performers lack a *de jure* right but protect that *de facto* right, 3) rights protectors have both *de jure* and *de facto* protection of a right, and 4) under-performers have a *de jure* right but do not protect that *de facto* right.

When investigating the causal relationship between *de jure* and *de facto* rights, one is most interested in the difference between rights repressors and rights protectors. The goal is to understand if the difference between these two groups is caused by the presence of the *de jure* right or some other factor. The problem facing researchers who study the relationship between *de jure* and *de facto* rights is ruling out other factors that might drive this relationship. The possibility of under- and over-performance makes ruling out alternative explanations difficult.

Countries that under-perform are those that have a right entrenched in their constitution but repress that right in practice. Under-performance most likely stems from a lack of enforcement, but it may be that the threat of punishment does not deter some leaders from transgressing the constitution. In either case, *de jure* rights protection is insufficient for *de facto* rights protection. Examples of under-performers abound. For instance, in the data described below, there are twenty-five countries that, in 2008, had *de jure* protection of all six rights analyzed here and *de facto* protection for none. Some are authoritarian countries, like Azerbaijan, Cameroon, Eritrea, Iraq, and Uzbekistan, but others are considered by many to be at least minimally democratic, like Sri Lanka and Turkey.

Over-performance is equally problematic. Countries that over-perform are those that observe a right in practice, even though they do not have that right in their constitution. Over-performance creates the possibility that a factor other than *de jure* rights is causing *de*

facto rights protection. At least in some countries, then, *de jure* rights are unnecessary for rights to be observed in practice, suggesting the possibility that *de jure* rights are sometimes redundant. Although over-performance is not as prevalent as under-performance in the data analyzed below, two examples stand out: Australia and New Zealand. Australia is one of only a few countries in the world without a bill of rights and the only commonwealth country without one, and New Zealand only promulgated its first bill of rights in 1990. Nevertheless, in the data analyzed below, both countries have an excellent record of *de facto* rights protection. Given the high level of *de facto* rights protection in both of these countries, once New Zealand adopted its bill of rights or if Australia adopts one (a topic frequently debated there), it seems unlikely that changes in *de jure* rights protection will lead to substantial improvement in *de facto* rights protection in either country.

Together, the presence of under- and over-performance suggests that *de jure* rights are neither a necessary nor a sufficient condition for *de facto* rights protection. This does not mean that a relationship between *de jure* and *de facto* rights does not exist, but it does mean that *de jure* rights alone are unlikely to spur such a relationship. Furthermore, detecting a relationship between *de jure* and *de facto* rights will be difficult because some rights protectors might be over-performers if they did not have a *de jure* right, while others might be under-performers if given an opportunity to transgress *de jure* rights. Therefore, if constitutional entrenchment improves countries' rights practices, one will only observe that effect in certain contexts. Studies that fail to consider this fact and simply estimate the average effect of *de jure* rights will be misleading, underestimating the effect of *de jure* rights in some countries and overestimating it in others.

A Conditional Theory of Constitutional Efficacy

One of the primary purposes of constitutions is to limit the power of government (Hardin 1989; Breslin 2009), and one of the primary tools that drafters have at their disposal for

establishing these limits are constitutional rights, which explicitly prohibit the repression of certain rights. Importantly, the limits set forth in constitutions should be more effective than limitations set forth in ordinary law because, in most countries, constitutional rights are entrenched, meaning that they require more than a simple majority in the legislature to be changed or removed (Lutz 1994; Lorenz 2005; Elkins, Ginsburg and Melton 2009). As a result, when deciding whether or not to use repression, governments must take the implications of constitutional prohibitions of such actions into account in their decision-making processes because removing those prohibitions is rarely an option.⁴

The literature on state repression provides a general framework for understanding governments' decisions to violate individuals' rights. Although this literature does not state precisely how constitutional rights figure into government's decision making processes, it provides a general framework that helps elucidate the role that constitutional limits play in those decisions. Following standard rational choice theory, the state repression literature argues that governments repress rights when the benefits of repression outweigh the costs (see, for example, Davenport 2007*b*). The benefit of repression is the reduction in dissent and enhanced stability that is created by such acts. The costs are twofold. A fixed cost stems from the act of repression (e.g. the cost to pay the military or police to commit acts of repression). The expected cost of punishment is variable and is a function of the probability that the government will be punished for using repression on its citizens and the cost of that punishment.

Given the calculus of repression described in the previous paragraph, the most likely parameter affected by constitutional rights is the expected cost of punishment. By defining

⁴Some governments, especially those operating in authoritarian regimes, may have the requisite majorities to change or remove constitutional rights through the amendment procedure set forth in the constitution. However, even if this is possible, the onerous amendment procedures set forth in most constitutions require a significant amount of time, making the removal of inconvenient constitutional rights unfeasible in the short-run.

what acts of repression are illegal and the punishment for committing such acts, constitutions make it more likely that leaders who commit acts of repression will be punished (Ordeshook 1992; Weingast 1997; Carey 2000; Elkins, Ginsburg and Melton 2009). In doing so, constitutional rights raise the probability that government will be punished for using certain acts of repression, increasing the expected cost of repression. Assuming that constitutional rights do not simultaneously increase the benefits of repression, this increase in cost will make acts of repression prohibited by the constitution less likely. However, in order to observe a reduction in repression that results from constitutional rights, the constitution must be enforced and enforcement must increase the probability of punishment. The remainder of this section outlines when I expect these conditions to be met.

Where Are Constitutional Rights Enforced?

Skepticism about the effectiveness of constitutions largely stems from doubts about their enforcement (Brown 2001; Murphy 2006). Any government with sufficient power to punish those who violate the constitution will also have both the power and, often, the incentive to violate it. For instance, in times of national emergency – e.g. a war or economic crisis –, government (and its supporters) might feel that the security of the nation is more important than the protection of constitutional rights. This creates an incentive for government to transgress the constitution, which it can easily do if it is the only actor charged with enforcing the constitution's edicts. Although government may be completely justified in transgressing the constitution to protect national security, the problem is that government faces a similar incentive when its tenure in office is threatened. It is this situation that most threatens the effectiveness of *de jure* rights and gives rise to skepticism about their effectiveness.

Enforcement requires an actor that does not have an incentive to transgress the constitution and is powerful enough to prevent the government from transgressing the constitution out of self-interest. The most obvious actor in this regard is the judiciary. The judiciary can effectively enforce the constitution when 1) individuals contest actions that they believe

violate their rights in court and 2) the judiciary is able to provide an impartial ruling that both parties abide by. Constitutional entrenchment facilitates this process by clearly identifying the rights that are grounds for judicial action and providing a basis for the courts to punish actors who violate those rights. If this mechanism functions properly, I expect that those who violate constitutionally protected rights will be brought to court and punished.

Despite its promise, there are a number of challenges to judicial enforcement. First, the judiciary may not be impartial. The judiciary is more likely to be impartial than any other government actor because it is typically removed from both the law-making and law enforcement processes. Still, the judiciary is subject to the same potential biases as the other branches. If judges are at risk of losing their office or the office itself is at risk of being pressured, then the decisions made by the judiciary might lack impartiality. Most often such threats come from the other branches of government who have control over judicial appointments, judges' salaries, and even the tenure of sitting judges. The executive and legislative branches can use this authority to coerce the judiciary to rule in their favor.

Another threat to judicial enforcement is lack of power. The judiciary has no means to enforce its decisions. As a result, there is always a risk that its decisions will be ignored. This threat seems particularly likely when its rulings are against one of the other branches of government. The individuals who control those branches face the same incentives to ignore judicial decisions as they do to ignore the constitution. The enforcement of judicial rulings, then, seems just as tenuous as the enforcement of the constitution. Furthermore, if the judiciary can anticipate that its decision will be ignored, then it may simply decide not to rule against the government (Cooter and Ginsburg 1996). In either case, I would not expect judicial enforcement to create effective constitutional rights.

Nevertheless, when the judiciary is autonomous and powerful enough to persuade other actors to comply with its rulings – i.e. when it is independent (Linzer and Staton 2012, see also Rios-Figueroa and Staton 2013; Staton and Moore 2011) –, *de jure* rights should increase the probability that transgressions of those rights are punished. In other

words, a judiciary willing to rule against the government will increase the expected cost of punishment, decreasing the likelihood that government represses those rights guaranteed in the constitution. Importantly, this mechanism does *not* suggest that we will observe governments frequently being punished by the judiciary. Instead, we should observe governments that avoid repressing rights protected by the constitution for fear of being punished by the judiciary. In other words, when the judiciary is independent, one would expect constitutional rights to be self-enforcing (Ordeshook 1992; Weingast 1997; Elkins, Ginsburg and Melton 2009).

The theory of enforcement detailed in the previous paragraph is necessarily probabilistic. After all, there are plenty of examples of governments that punished the judiciary for attempting to uphold constitutional rights (Moustafa and Ginsburg 2008) and judiciaries that deferred to the executive during periods of political crisis (Fallon 2010). However, most of the time government will avoid confrontations with the judiciary because it is beneficial for the judiciary to be perceived as independent.⁵ Economically, independent judiciaries are thought to improve economic performance by enhancing the credibility of government's promises to protect property rights (Feld and Voigt 2003; Clague et al. 1999). Politically, Vanberg (2008) argues that political actors can use the judiciary to enforce the 'rules of the game', reducing the costs of such enforcement, and Moustafa and Ginsburg (2008) argue that authoritarian leaders use independent judiciaries for a variety of reasons, including enhancing claims of legal legitimacy and ensuring bureaucrats comply with the regime's rules. Therefore, although even the most independent judiciaries will occasionally face pressure from the other branches of government, most of the time the executive and legislative branches will avoid confrontations with the judiciary out of fear of losing the benefits they derive from maintaining an independent judiciary.

There is a large academic literature that evaluates the benefits for judicial indepen-

⁵For a review of explanations for judicial empowerment, see (Helmke and Rosenbluth 2009).

dence. One of the key findings in this literature is that an independence judiciary is critical for the rule of law (Chavez 2008). From this relationship, many other benefits follow. For instance, there is a strong correlation between judicial independence and positive economic outcomes (for a review, see Haggard, MacIntyre and Tiede 2008), and in the literature on human rights, numerous studies have shown that (*de jure*) judicial independence improves *de facto* rights protection (Cross 1999; Camp Keith 2002*a,b*; Keith, Tate and Poe 2009). There is even some cross-national evidence that judicial independence increases the likelihood that the law is enforced (Ginsburg 2003; Conrad 2012). Despite this large literature, I have been unable to identify any empirical research that explicitly assesses the conditional effect of judicial independence on the effectiveness of constitutional rights.⁶

Where Can Enforcement Be Inferred?

To state that *de jure* rights cause *de facto* rights, implies that countries with *de jure* rights protection would have lacked *de facto* rights protection if that *de jure* protection did not exist. Thus, one can only infer a causal relationship between *de jure* and *de facto* rights in contexts where *de facto* rights are expected to be repressed. This is the problem posed by over-performers. The presence of such countries indicates that, at least in some countries, other factors are causing *de facto* rights protection, which makes any *de jure* protection redundant. One cannot infer a relationship between *de jure* and *de facto* rights without first identifying these factors.

The most obvious explanation for over-performance is regime type. Democracies are consistently less likely to repress human rights than authoritarian regimes (Davenport 2007*a*). Authoritarian regimes are inherently unstable, and authoritarian governments are in constant fear of insurrection (Wintrobe 1998). In such an environment and with limited

⁶For an example of such scholarship, see Epp (1998). There is also a large literature on the general conditions under which judges and other institutional actors are able to enforce the ‘rules of the game’ (Shepsle 1989; Knight and Epstein 1996; Carey 2000; Knight 2001).

alternatives for controlling the population (Davenport 2007*b*), the benefits of repression are great. Democracies, on the other hand, channel discontent with the current government into elections. This substantially reduces the odds of insurrection by providing an outlet for discontent, while creating the possibility of electoral enforcement, a virtually costless mechanism for citizens to punish politicians who repress their rights (Davenport 2007*b*). Since democratic governments have less incentive to repress rights and a high probability of being voted out of office for acts of repression, once a certain level of democracy is reached, the probability of repression decreases precipitously (Davenport and Armstrong 2004).

The relationship between democracy and repression might inhibit the effect of *de jure* rights for several reasons. Electoral enforcement might replace the mechanisms through which *de jure* rights are enforced. Turning out to vote is significantly less costly than suing the government, which (at least) requires a lawyer and time to sit in court during the trial. Hence, if both options are available, citizens should opt for electoral enforcement.⁷ Minorities' rights might be at risk if electoral enforcement is the only viable mechanism of preventing repression, but since judicial decisions seem to be fairly responsive to shifts in public opinion (Mishler and Sheehan 1996; Flemming and Wood 1997), judicial enforcement potentially suffers from the same problem.

Constitutional entrenchment might still enhance governments' rights practices if it improves the likelihood that electoral enforcement will take place, but this seems doubtful. Although an explicit statement of the rights government cannot repress might help coordinate citizens to vote against incumbents that repress those rights, the rights analyzed here are widely accepted and several are almost synonymous with democracy.⁸ As a result, a focal point is probably unnecessary for their enforcement.

⁷Davenport (2007*b*) provides some circumstantial evidence for this preference. He finds that electoral accountability is more likely to reduce repression during periods of political conflict than checks and balances. See also Camp Keith (2011)

⁸In democratic settings, one might expect constitutional entrenchment of rights that are less common and less closely associated with democracy (e.g. the rights of asylum or self

Even if *de jure* rights enhance electoral enforcement or judicial enforcement functions in democratic regimes, though, the high probability of *de facto* rights protection in democracies may prevent one from identifying that effect. The reason is that both democracy and *de jure* rights affect the likelihood of repression by increasing the probability that government is punished for such acts. If the probability of punishment is near one even without *de jure* protection, constitutional entrenchment simply cannot increase that probability and becomes redundant. Therefore, regardless of the level of judicial independence, one should not observe a relationship between *de jure* and *de facto* human rights in democratic regimes.

Summary

Constitutional rights should be expected to improve countries' rights practices under a very limited set of conditions. I hypothesize a positive relationship between *de jure* and *de facto* rights in authoritarian regimes when the constitution is enforced by an independent judiciary. These conditions are similar to those that have been found to condition the effectiveness of international human rights treaties (Simmons 2009; Powell and Staton 2009; Hafner-Burton, Helfer and Fariss 2011). Still, they are slightly counterintuitive because they suggest that constitutional entrenchment is most effective in authoritarian settings, where repression is the most likely and constitutions are traditionally expected to be least effective. The conditions set forth in the above hypothesis helps explain why the existing literature finds that constitutional rights have little effect on countries' rights practices. Given the very limited set of conditions in which *de jure* rights are expected to change the behavior of government, it is unsurprising that, when looking for the average effect of *de jure* rights, prior studies found no relationship between *de jure* and *de facto* rights (Pritchard 1986; Fruhling 1993; Blasi and Cingranelli 1996; Cross 1999; Camp Keith 2002*a,b*; Keith, Tate and Poe 2009).

determination) will have a larger effect than entrenchment of the rights analyzed here.

Research Design

Empirical models of *de jure* rights effectiveness typically take the following form:

$$df_{it}^* = \gamma dj_{it} + \beta x_{it} + u_{it} \quad (1)$$

where df_{it}^* is a latent variable that represents country i 's underlying propensity to practice a right in year t , dj_{it} is a binary variable indicating the presence of that right in country i 's constitution, x_{it} represents the covariates thought to affect countries' rights practices, and u_{it} is an error term. One cannot observe df_{it}^* directly; instead, one observes that countries' practice a right in a given country year (i.e. $df_{it} = 1$) if df_{it}^* is greater than 0 and repress the right if not (i.e. $df_{it} = 0$). In equation 1, the parameter of interest is γ . Unfortunately, there are two potential problems with this equation that might lead estimates of γ to be misleading.

The first is that equation 1, like all strictly additive models, assumes unit homogeneity. In other words, it assumes that the effect of constitutional rights is the same across all of the observations under analysis. However, the theory specified above explicitly contradicts this assumption, which will make the estimates of γ from equation 1 misleading. To relax this assumption, in the analysis below, I interact *de jure* rights protection with the level of judicial independence and stratify the sample by regime type.

The second potential problem with equation 1 is that it assumes the effect of *de jure* rights is exogenous. Since *de jure* rights are not randomly chosen, even if there is a correlation between *de jure* and *de facto* rights protection, establishing the causality of that relationship is difficult because the effect of entrenchment might be endogenous. Endogeneity is a particularly prominent concern when studying constitutional rights because both the structural provisions in constitutions and the ratification of international human rights instruments are commonly viewed as endogenous (Persson and Tabellini 2003; Simmons 2009; Hill 2010). One might, therefore, expect that leaders' motivations for adopting human rights provisions in constitutions will be correlated with the practice of those rights, biasing the

observed effect of *de jure* rights. This possibility is almost completely ignored in the extant literature on the effectiveness of constitutional rights.

Below, I address the potential for endogeneity in a couple of ways. First, in the main analysis, I shift to a random effects framework, so rather than estimating equation 1, I estimate the following equation:

$$df_{it}^* = \gamma dj_{it} + \beta x_{it} + \sigma_i + u_{it} \quad (2)$$

where σ_i is a random intercept. The random intercept in equation 3 absorbs unexplained between-country variance and reduces the possibility of endogeneity created by an omitted, time-invariant covariate. Of course, endogeneity might still arise as a result of either reverse causation or an omitted, time-variant covariate. To reduce this possibility, as a robustness check, I pre-process the data using matching. Matching decreases model dependence and, assuming there are no covariates correlated with both the assignment of the treatment and the outcome omitted from the matching (an admittedly strong assumption), can even allow an unbiased estimate of the effect of an endogenous independent variable (Ho et al. 2007).⁹ The remaining parts of this section describe the operationalization of the variables used in the analysis.

Operationalizing *De Jure* and *De Facto* Human Rights

When choosing which rights to analyze, my goal was to identify data on *de facto* rights that could be matched to a single *de jure* right. I focused on political and civil rights rather than socio-economic rights because the latter are not the focus of the extant literature on constitutional effectiveness, are often not justiciable, and raise a number of thorny measurement issues. During my search, I identified several data sets that provide cross-national data on countries' rights practices at the level of the individual right, including the Freedom House's assessment of freedom of the press (Freedom House 2010), the Cingranelli-Richards Human

⁹Full details on the matching procedure are available in the online appendix.

Rights Dataset (CIRI) (Cingranelli and Richards 2010), and Hathaway’s (2002) data on criminal procedures. I tried to be as inclusive as possible in terms of the rights from these data sets included in the analysis. Still, I had to exclude some *de facto* indicators in which the relevant constitutional rights are not apparent (e.g. extrajudicial killings and electoral self-determination from CIRI), in which multiple constitutional rights are invoked with unknown weights (e.g. worker’s rights from CIRI), or which are missing a significant amount of data (e.g. the criminal procedures coded by Hathaway (2002)). After these exclusions, I am left with data on the practice of six human rights. These six rights are listed in table 2 along with the sources and country-years spanned for each. I rescaled these indicators to be binary, with a score of one indicating no violations in a given year.¹⁰ Since the dependent variable is binary, I estimate the effect of entrenchment using probit models.

For each dependent variable, I identified the relevant right(s) in each country’s constitution using data from the Comparative Constitutions Project (CCP) (Elkins, Ginsburg and Melton 2010). The CCP surveys a wide range of topics contained in countries’ formal constitutions, including questions about nearly 100 rights. For most *de facto* indicators in table 2, I was able to identify one variable in the CCP survey instrument that describes the constitutional status of that right in each country. The only exception is freedom of association; two highly correlated variables from the CCP describe this right well. In this case, I included both variables and coded affirmative answers for either as a one. The variables from the CCP survey instrument corresponding to each *de facto* right are listed in table 2. Each of these variables was recoded to be binary such that mentions of each right are coded

¹⁰I rescaled the dependent variables for both theoretical and empirical reasons. Theoretically, I am interested in whether or not constitutionally entrenching a rights stops government from violating that right, not whether such entrenchment affects the magnitude of repression. These are two, subtly, different research questions. Empirically, all of the dependent variables needed to be on the same scale in order to compare the substantive effect of *de jure* rights across the rights included in the analysis.

one.¹¹ Given the coding of *de jure* and *de facto* rights, for *de jure* rights to be effective, the relationship between entrenchment and practice for each right should be positive.

Covariates

I borrow the covariates in the analysis from Poe et al. (1999), Camp Keith et al. (2009), and Hill (2010). These are the most recent studies that identify the determinants of *de facto* rights, and they use a comprehensive, albeit not overlapping, set of covariates in their statistical models. The covariates used in those articles represent commonly accepted alternative explanations of *de facto* rights protection, and I refer the reader to those articles for the theoretical rationale for the inclusion of each of these variables. The full set of covariates includes the following: ratification of a relevant human rights treaty, number of NGOs, level of democracy, independence of the judiciary, the presence of political conflict, size of the economy, population, and a spatial lag of region for *de facto* rights protection. A description of these variables as well as summary statistics for each are available in the online appendix.¹² Aside from these covariates, I also include cubic polynomials of the number of years since the last state change to account for any time dependence in *de facto* rights protection, as recommended by Carter and Signorino (2010).

¹¹In general, the rights questions from the CCP survey instrument provide one “yes” option and several “no” options, making the transformation of these questions easy. There was only one right for which this was not the case. The question about torture provides several “yes” options – “universally prohibited,” “prohibited except in the case of war,” or “prohibited for the purpose of extracting confessions.” Only the first of these options is coded as indicating the prohibition of torture.

¹²See tables A1-A3.

Missing Data

A number of variables have missing data. The number of missing observations varies significantly across variables. Time-invariant variables and those from the CCP are missing few or no observations, and time-variant variables are missing far more. The variable with the most missing observations is the number of NGOs, which is missing data for more than one-third of the observations. In general, it is advisable to impute the missing values because, unless few observations are missing or the data are missing completely at random, listwise deletion can generate severely biased estimates (King et al. 2001). To alleviate this concern, I imputed ten data sets using the Amelia II program (Honaker, King and Blackwell 2009). The analyses reported below were performed on each of these data sets, and the results pooled using the `mi estimate` command in Stata 12.

The Efficacy of Constitutional Entrenchment

Figure 1 provides a simple descriptive analysis of the probability of *de facto* rights protection. The probability of *de facto* protection for each right is divided into eight groups based on the presence of the *de jure* right and regime type. In the figure, the light grey bars indicate the probability that the *de facto* right is protected (i.e. not repressed) when the right is absent from the constitution and the dark grey bars indicate that same probability when the right is entrenched in the constitution.

The most notable difference in the figure is that between democratic and authoritarian regimes. Democratic regimes have much higher levels of *de facto* rights protection than authoritarian regimes. This corroborates the research on state repression that finds significantly lower levels of repression in democracies. In addition, figure 1 provides preliminary evidence that one is more likely to observe a relationship between *de jure* and *de facto* rights in authoritarian regimes. In half of the situations assessed in figure 1, levels of *de facto* rights protection are higher when the right is protected by the constitution, and of these six

situations, four occur in authoritarian regimes.

The specific rights that seem to benefit most from *de jure* protection are freedom of association and freedom of religion. Regardless of regime type, countries with *de jure* freedom of association and freedom of religion always have better *de facto* protection of those rights than countries without *de jure* protection. The effect of *de jure* freedom of association seems to be particularly strong. In fact, in authoritarian regimes, countries only observe freedom of association in practice if that right is entrenched in the constitution. There are literally no instances of countries coded as authoritarian that lack *de jure* freedom of association and have *de facto* freedom of association.¹³

Of course, the patterns illustrated in figure 1 might be driven by the bivariate nature of the analysis. To rule out this possibility, figure 2 illustrates the effect of *de jure* rights on *de facto* rights, conditioning on the level of judicial independence and regime type. In each plot, the solid line denotes the estimated treatment effect for a different *de jure* right as the level of judicial independence increases, and the dashed lines denote the 95% confidence interval around that effect. This prediction is made based on a random-effects probit model where the level of judicial independence is interacted with *de jure* rights protection. Underlying the lines in each figure is a histogram illustrating the number of observations (in 100s) that correspond to each level of judicial independence.

To account for the conditional effect of regime type, I stratified the sample by regime type and estimated each model separately on the two sub-samples.¹⁴ Countries scoring above

¹³Although this is true in the raw data, it is not in the imputed data. Thus, for freedom of association, I am only able to estimate the models below that stratify by regime type on the imputed data.

¹⁴An alternative strategy would be to create a three-way interaction between *de jure* rights protection, regime type, and judicial independence. However, since I expect that the process through which *de facto* rights protection occurs is radically different across regime type, I felt that splitting the sample was a more appropriate solution.

0.16 on the Unified Democracy Scores (UDS) were coded as democratic and those below this cut-point as authoritarian.¹⁵ In figure 2, the top row of plots indicate the treatment effect when the model is estimated using country-years coded as authoritarian and the bottom row of plots indicate the treatment effect when the model is estimated using country-years coded as democratic.

The results in figure 2 provide significant evidence in support of the hypothesis that *de jure* rights are effective in authoritarian regimes and ineffective in democratic regimes. Regardless of the level judicial independence, in democratic regimes, constitutional entrenchment does not have a positive, statistically significant effect for any of the rights analyzed. In fact, for several rights, the effect of *de jure* rights protection actually decreases as the level of judicial independence increases. In authoritarian regimes, on the other hand, for four of the six rights analyzed, constitutional entrenchment has a positive effect on the probability of *de facto* rights protection, that increases as the level of judicial independence increases. This is just as hypothesized above. For three of these rights – freedom of association, expression, and movement –, the effect of constitutional entrenchment is statistically significant at some level of judicial independence. In other words, for these three rights, the effect of *de jure* protection is expected to significantly increase the probability of *de facto* protection, once a certain level of judicial independence is reached, and that increase in probability gets substantially larger as the level of judicial independence increases.

There are two surprising aspects to the results in figure 2. First, the level of judicial independence necessary to create a relationship between *de jure* and *de facto* rights protection is relatively low. The effect of *de jure* freedom of association becomes significant at the 0.1

¹⁵0.16 is chosen as the cut-point because this is where the cut-point for Cheibub et al.’s (2010) dichotomous measure of democracy falls on the UDS (Pemstein, Meserve and Melton 2010). Such a cut-point effectively divides the world into countries with competitive elections and countries that lack competitive elections, which corresponds well with the theoretical relationship between democracy and repression elaborated above.

level once the level of judicial independence reaches about 0.25, and the effects of *de jure* freedom of expression and movement become significant at the 0.1 level once the level of judicial independence reaches about 0.40. The fact that enforcement occurs at such low levels of judicial independence indicates the effectiveness of judicial enforcement.

Also unexpected are the large effects of these three constitutional rights. At low levels of judicial independence, the increased probability of *de facto* protection from *de jure* freedom of association, expression, and movement is about 0.01, 0.03, and 0.10, respectively, but these effects increase to about 0.43, 0.36, and 0.39 when the level of judicial independence is at its maximum. Thus, the effect of constitutional entrenchment is both statistically and substantively significant. For instance, in a country like Lesotho in the late 1990's that has around a 0.75 level of judicial independence, the probability of *de facto* freedom of association, freedom of expression, and freedom of movement are expected to increase by 0.22, 0.18, and 0.26, respectively, as a result of constitutional entrenchment. Given these large effects, Lesotho would be predicted to repress both freedom of association and expression in practice if it did not have those rights entrenched in its constitution.¹⁶

Matching as a Robustness Check

Perhaps the greatest threat to the validity of the results above is endogeneity. If constitutional drafters are motivated to entrench any of the rights analyzed above due to either countries' histories of *de facto* rights protection or some factor that is correlated with *de facto* rights protection but omitted from the statistical model, then entrenchment will be endogenous to countries' rights practices and the relationship between *de jure* and *de facto* rights illustrated in figure 2 will be biased. Although the decisions of constitutional drafters are

¹⁶Similar examples include Botswana in the 1980's, Hungary circa 1989, and South Africa at the end of the apartheid. Of course, most authoritarian regimes do not possess such high levels of judicial independence; this is why it is so important that the effect of constitutional entrenchment becomes significant at such low levels of judicial independence.

commonly viewed as endogenous (Persson and Tabellini 2003), there are reasons to believe that the threat of endogeneity is less in the present setting.

In most countries, the civil and political rights analyzed here have been entrenched in the constitution for decades, so present leaders had no say in the entrenchment of those rights. This makes it unlikely that drafters motivations for adopting *de jure* rights are driving current *de facto* rights protection. The finding that *de jure* rights are most effective in authoritarian regimes also makes endogeneity unlikely because authoritarian rulers seem unlikely to have *de facto* rights protection in mind when contemplating whether or not to criminalize repression (see, for example, Hollyer and Rosendorf 2011). Moreover, most of the variance in *de jure* rights protection is at the country-level, and this is exactly the variance that is absorbed by the random-effects term in equation 2.

To further reduce the likelihood that endogeneity is driving the results above, I re-estimated the models upon which figure 2 is based after pre-processing the data with matching. Figure 3 illustrates the results from these models. The results are very similar to those reported in figure 2. In democratic regimes, there is no relationship between *de jure* and *de facto* rights protection for five of the six rights analyzed, and for several rights, the observed effect is decreases as the level of judicial independence increases. Only *de jure* freedom of association has a statistically significant effect and only for very high levels of judicial independence.

In authoritarian regimes, after matching, the effect of five of the six *de jure* rights increases as the level of judicial independence increases. Only the effect of freedom of press is not as predicted in the hypotheses above. Of these five rights, the effect of three – freedom of association, movement, and religion – is statistically significant at some level of judicial independence. The effect of freedom of association is statistically significant at the 0.1 level (or higher) when judicial independence is between 0.05 and 0.35. The effect of freedom of movement is statistically significant at the 0.1 level (or higher) when judicial independence is greater than 0.5. Lastly, the effect of freedom of religion is statistically significant at the

0.1 level (or higher) when judicial independence is between 0.1 and 0.4. Importantly, the magnitude of the effect for the latter two rights is quite large when entrenchment has a statistically significant effect.

Summary

Based on figures 2 and 3, there is relatively strong evidence that *de jure* rights are effective in authoritarian regimes. In both figures, authoritarian leaders are more likely to observe freedom of association and freedom of movement in practice if these rights are entrenched in the constitution and there is at least some degree of judicial independence. The same is true of freedom of expression and freedom of religion, although the statistical significance of the effect is inconsistent across the two figures. For democratic countries, on the other hand, there is little evidence that constitutional entrenchment has any effect on *de facto* rights protection.

Discussion and Conclusions

One of the central roles of the constitution is to limit government. Yet, most scholars are skeptical about the ability of the constitution to fulfill this role, recalling James Madison's famous view of bills of rights as mere parchment barriers. I assessed this claim by testing the effectiveness of constitutional entrenchment for several civil and political rights. For some rights, skeptics of constitutional limits are well justified in their belief. I found very little evidence that freedom of the press and the prohibition of torture had any positive effect. For the remaining rights, though, the results indicate that constitutions are more than parchment. Under a variety of conditions, constitutional entrenchment significantly improved the protection of freedom of association, expression, movement, and religion.

Based on the results, the most crucial right for constitutional designers to entrench is freedom of association. Once entrenched, freedom of association is much more likely to be

practiced. The effect is mostly felt in countries with high levels of judicial independence, but once this basic criteria is met, *de jure* freedom of association is highly effective. Freedom of association is a crucial right in that it can lead to long run mobilization for the improvement of other rights, so this is a normatively important finding. Tracing the interaction between this right and others requires further examination in future research.

Perhaps more interesting than the specific rights that benefit from entrenchment are the conditions under which entrenchment improves countries rights practices. In this regard, judicial independence is critical. For virtually every model where I found a positive, statistically significant relationship between *de jure* and *de facto* rights, that relationship only existed at sufficiently high levels of judicial independence. The moderating effect of judicial independence highlights the fact that constitutions are only effective if enforced and suggests that an independent judiciary is crucial for enforcement. Since the vast majority of in force constitutions enumerate a long list of rights, one feasible way to improve countries' rights practices might be to create independent judiciaries that can enforce the *de jure* rights already in countries' constitutions. Thus, research on how the determinants of judicial independence is vital for improving countries' rights practices.

Aside from judicial independence, regime type was also an important intervening variables. I only found evidence for a relationship between *de jure* and *de facto* rights in authoritarian regimes. Authoritarian governments appear willing to abide by the constitution when it is enforced. In democratic contexts, I found little evidence for a relationship between *de jure* and *de facto* rights. This does not necessarily mean that democrats do not abide by the constitution; it is equally likely that the effect of *de jure* rights is simply hidden by the high levels of *de facto* rights protection typically found in democracies.

The fact the constitutional rights seem to be more effective in some contexts than others will hopefully spur future research on the conditions under which they improve countries' rights practices. The contexts identified here are, admittedly, quite limited, but there are almost certainly other conditions that enhance the enforcement of constitutional rights. For

instance, in order for a constitution to be enforced, citizens and judges must have knowledge of its contents (Elkins, Ginsburg and Melton 2009, 2012). Since constitutional knowledge is likely to be correlated with age, it is possible that older constitutions are more likely to be enforced. In addition, constitutional enforcement requires civil society organizations (e.g. NGOs) with the time and resources to monitor compliance with constitutional rights and to bring cases before the judiciary when compliance is lacking (Epp 1998), so one might expect enforcement to be stronger in contexts with a vibrant civil society. Lastly, and perhaps most importantly, enforcement of the constitution is probably less likely to deter repression when the government's tenure is threatened during periods of dissent (Davenport 2007*b*). Dissent greatly increases the benefits of repression and, as a result, may increase the likelihood that government ignores whatever rights are entrenched in the constitution. Although all of these factors are included as covariates in the models reported above, data limitations prevent me from assessing whether any of them condition the probability of constitutional enforcement. Future studies should consider these and other potential determinants of constitutional enforcement.

Another promising avenue for future research is to explore why some constitutional rights are more effective than others. Even when the conditions for enforcement are ripe, some *de jure* rights – e.g. freedom of press and the prohibition of torture – are still repressed in practice. This result suggests that there is variance in the effectiveness of *de jure* rights. One possible explanation for this variance is that governments might be substituting which rights are repressed. It is possible that government expects to benefit equally from repressing freedom of association and freedom of expression and chooses to repress the latter because it has a lower probability of being punished for repressing freedom of expression. The probability of being punished might vary across rights for a variety of reasons. For instance, Lupu (2013) argues that evidentiary standards vary across rights, which makes some rights harder to enforce in court than others. This is one of many possible hypotheses for the variance observed between rights in this study. Perhaps future research can help us better understand

this variance.

Substitution of rights brings up another possibility as well: government might decide to repress rights not entrenched in the constitution. If government expects to be punished for violating constitutional rights, then it may decide to repress rights not protected by the constitution. The results above do not rule out this sort of substitution, but if it occurs, countries overall rights practices might not be affected, or at least not affected much, by constitutional rights. Such substitution might explain why previous studies – e.g. Keith, Tate and Poe (2009) – that use an omnibus measure of *de facto* rights protection, like the Physical Integrity Index, have been unable to identify a relationship between *de jure* and *de facto* rights. This is yet another potential area of future research on constitutional rights.

Contrary to the existing literature, this study has demonstrated that, when enforced, constitutional entrenchment can effectively limit government practices. Perhaps surprisingly, the results reported here indicate that constitutional limits are the most effective in authoritarian regimes. While these findings alone may not dispel hundreds of years of skepticism towards the effectiveness of constitutional limits, they should at least provoke more careful inquiry before constitutions are dismissed as mere parchment barriers.

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Table 1: Typology of *De Jure* and *De Facto* Rights Protection

<i>De Facto</i> Rights Protection	Yes	Over-Performers	Rights Protectors
	No	Rights Repressors	Under-Performers
		No	Yes
		<i>De Jure</i> Rights Protection	

Table 2: Description of *De Jure* and *De Facto* Rights Data

Variable Name	Right	Countries	Years	CCP Variable	<i>De Facto</i> Data Source
Assoc	Freedom of Association	140-189	1981-2008	ASSOC; ASSEM	Cingramelli and Richards (2010)
Express	Freedom of Expression	140-189	1981-2008	EXPRESS	Cingramelli and Richards (2010)
FreeMove	Freedom of Movement	140-189	1981-2008	FREEMOVE	Cingramelli and Richards (2010)
FreeRel	Freedom of Religion	140-189	1981-2008	FREEREL	Cingramelli and Richards (2010)
Press	Freedom of Press	172-189	1981-2008	PRESS	Freedom House (2010)
Torture	Prohibition of Torture	140-189	1981-2008	TORTURE	Cingramelli and Richards (2010)

Figure 1: *De Facto* Rights Protection by *De Jure* Rights Protection and Regime Type

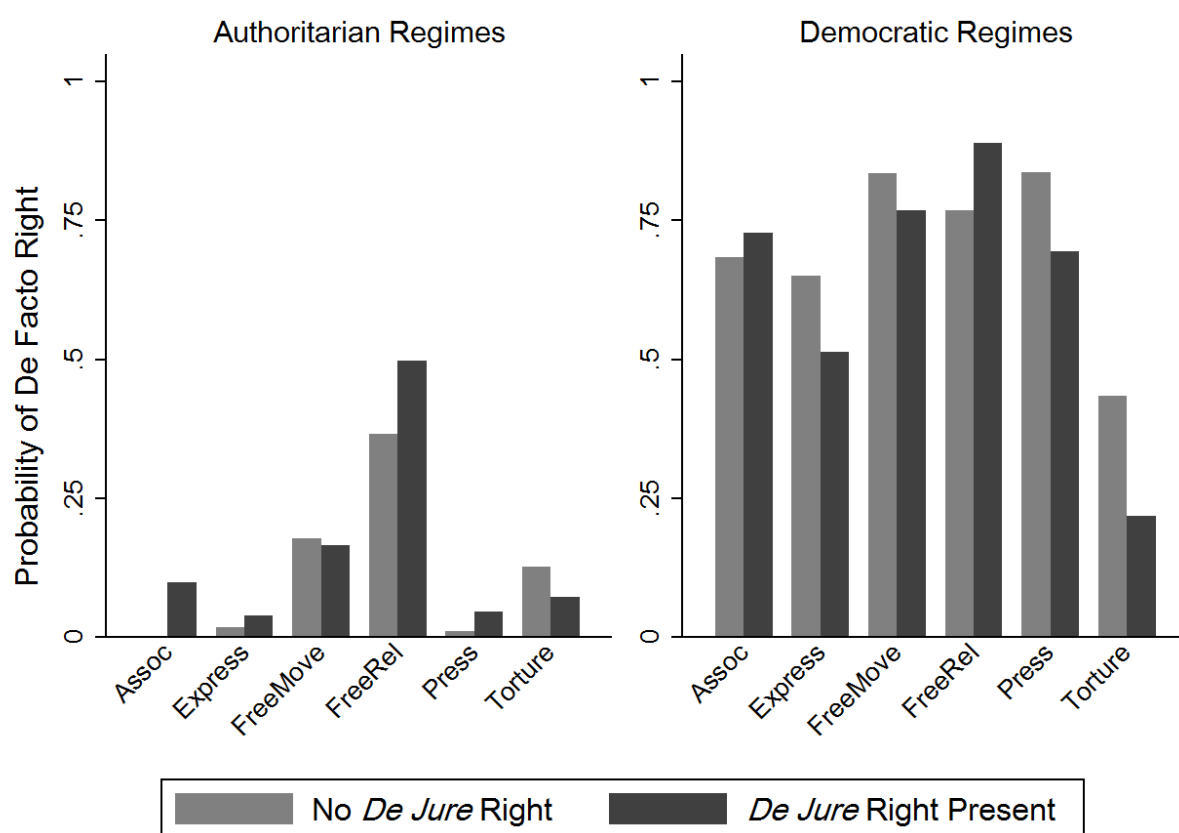
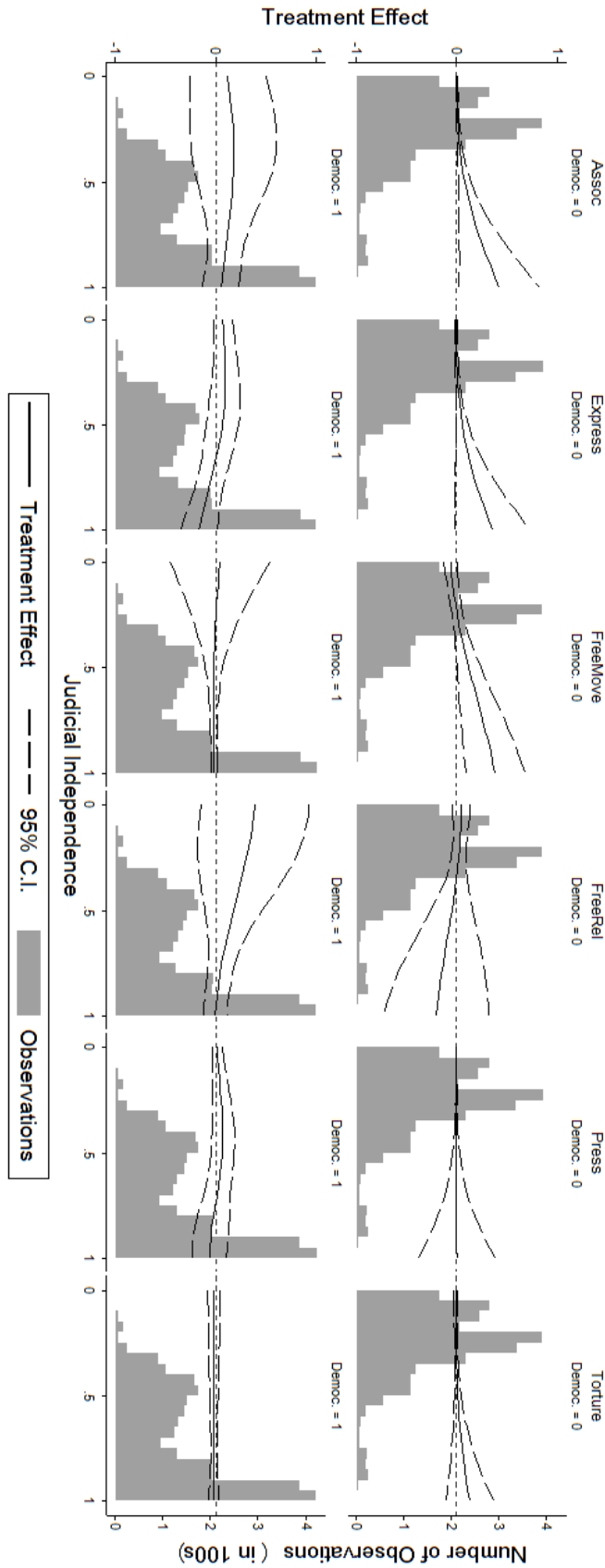
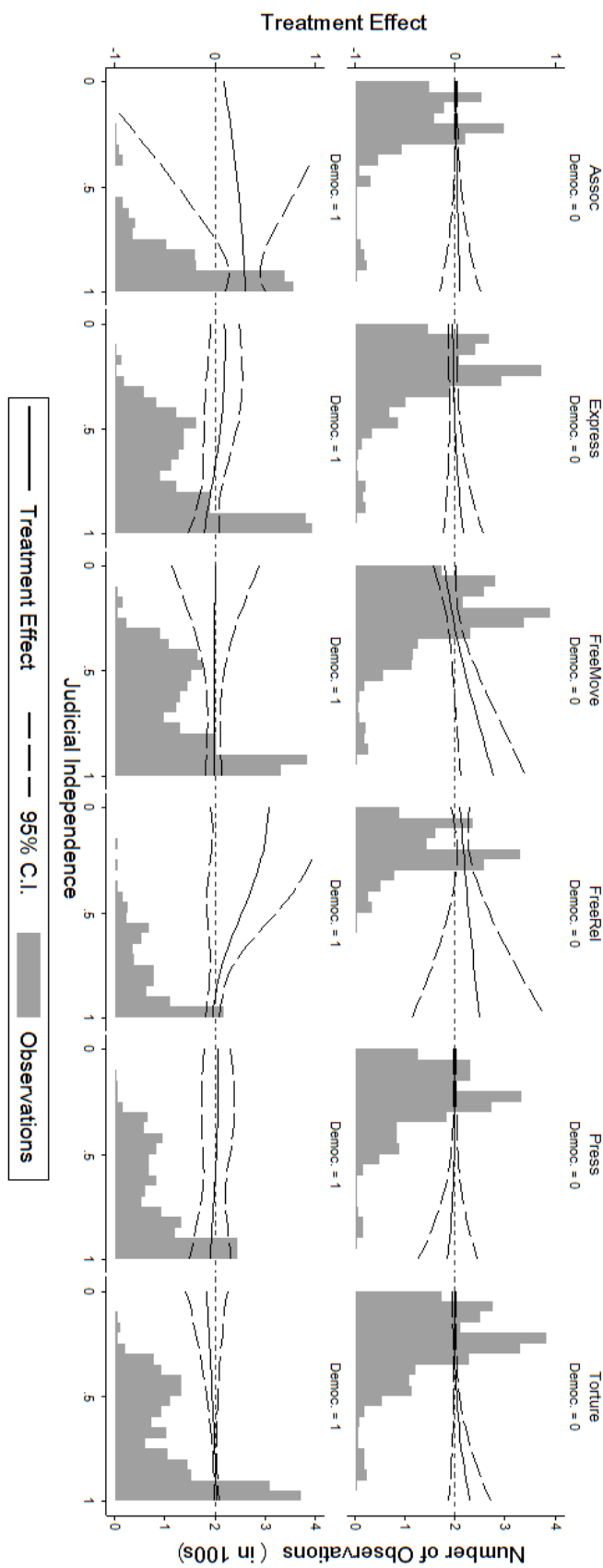


Figure 2: Effect of *De Jure* Rights Protection by Judicial Independence and Regime Type



Notes: The probability estimates in the figure are from twelve probit models with random effects. The 95% confidence intervals are based on clustered, robust standard errors. Full results are available in the online appendix, tables A5-A6.

Figure 3: Replication of Figure 2 when Pre-Processing with Matching



Notes: The probability estimates in the figure are from twelve probit models. The 95% confidence intervals are based on robust standard errors. Full results are available in the online appendix, tables A7-A8.