Do Constitutional Rights Matter? The Relationship between *De Jure* and *De Facto* Human Rights Protection*

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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, in some cases, do so with the intention of limiting their subsequent behavior. At least some, then, appear to view constitutions as more than merely parchment. 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. This finding suggests that the relationship between constitutional promises and actual practice is stronger than generally assumed.

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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

[1]Numerous other examples exist. Take the North Korean constitution, for example, which guarantees the North Korean Constitution contains 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 186^{th} out of 187 nations rated by the Human Development Index.

[2]I 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.

are not (Pritchard 1986; Fruhling 1993; Blasi and Cingranelli 1996; Davenport 1996; Cross 1999; Camp Keith 2002*a*,*b*; Keith, Tate and Poe 2009). 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. 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 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

[3]Davenport (1996) is the only exception to this critique. He assesses whether the effect of certain *de jure* attributes is conditional on the level of democracy or the presence of political conflict.

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 three contextual factors – judicial independence, regime type, and political conflict – 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. 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, under certain conditions, entrenchment of human rights can lead to improvement in the behavior of governments on the ground. Nonetheless, the effect is differentiated, with some *de jure* rights 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 probably often 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 currently being 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 incentive 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 Effectiveness

The literature on state repression provides a general framework for understanding governments' decisions to violate individuals' rights. Following standard rational choice theory, this 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 monitor and to punish those who exercise their rights), and the expected cost of punishment is a

function of the cost of being punished and the probability that punishment will be incurred. The key insight from this literature is that government will only repress the rights of its citizens when the benefits of repression outweigh the expected costs.

The role of *de jure* rights in leaders' calculus is to increase the expected cost of punishment. To be specific, since *de jure* rights explicitly prohibit repression, if those rights are effective, one would expect governments limited by them to face a higher probability of being punished for committing acts of repression. However, this requires that the constitution be enforced, enforcement increases the probability of punishment, and punishment deters repression. 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. 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, and if it is the only actor charged with enforcing the constitution, then it will face little (if any) resistance when acting on this incentive.[4] 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.

[4]The anti-terrorist legislation adopted in many established democracies in the wake of 9/11 (e.g. the Patriot Act in the United States) is a good example of the government justifying the transgression of constitutional rights with concerns about national security (Davenport 2007*b*).

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 through constitutional amendment, 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 2011) –, *de jure* rights should increase the probability that transgressions of those rights are punished. As a result, *de jure* rights will be self-enforcing because governments that fear being punished by the judiciary will abide by the rights set forth in the constitution (Weingast 1997). Self-enforcement creates a positive relationship between *de jure* and *de facto* rights.

Judicial enforcement is not the conventional mechanism for generating self-enforcement. Traditionally, government's incentive to abide by the "rules of the game" stems from fear that other actors – either groups of elites or citizens – will coordinate to punish violations of those rules (Weingast 1997). The role of the constitution, according to this mechanism, is to facilitate coordination by creating a focal point, which generates shared understandings about what constitutes a violation of that right and how such violations are to be punished (Carey 2000; Elkins, Ginsburg and Melton 2009). Still, judicial enforcement is consistent with the logic of self-enforcement, which merely requires that government abide by the "rules of the games" out of self-interest, and it seems like a more plausible mechanism of self-enforcement than collective action by individual actors.[5] Some have even suggested that

[5]The coordination problem facing non-government actors is daunting, and even when the opposition has proven it can solve the collective action problem preventing coordination, governments seem to discount the probability of such action. For instance, in Kyrgyzstan, protests over alleged electoral fraud forced President Askar Akayev to leave office and flee the country in early 2005. Just five years later, citizens took to the streets again to end the reign of President Kurmanbek Bakiyev, who, like President Akayev, was perceived as corrupt and disrespectful of basic democratic rights (e.g. freedom of the press). Therefore, despite the potential for coordination during President Bakiyev's tenure, he was not deterred from taking the same missteps as President Akayev. One can tell a similar story about the events

judicial independence can help actors solve the coordination problem that prevents them from punishing those who transgress the "rules of the game" (Vanberg 2008).[6]

Even though judicial independence is not typically associated with self-enforcement, it is commonly considered critical for the rule of law (Chavez 2008). The benefits of this relationship are well documented in the literature. 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). However, I have been unable to identify any research that explicitly assesses the conditional effect of judicial independence on the effectiveness of constitutional rights, and there is little scholarship on the conditions when judicial independence creates self-enforcement.[7]

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. In other words, one can only infer a causal relationship between *de jure* and *de facto* rights in contexts where *de fact* 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,

that have unfolded in Egypt over the last two years.

[6]Vanberg (2008) argues that actors can simplify their coordination problem by deferring to the judiciary to enforce the "rules of the game" and focusing all of their effort on monitoring and punishing violations of judicial independence. Scholarship that finds a strong relationship between public support for the judiciary and judicial independence provides some evidence for this argument (Vanberg 2000; Staton 2004).

[7]For one such study, see Epp (1998).

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; Wedeen 1999). In such an environment and without an alternate mechanism to control 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.[8] 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.

[8]Davenport (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.

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.[9] As a result, a focal point is probably unnecessary for their enforcement.

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 is 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.

Thus far, I have assumed that government only represses rights when it does not expect to be punished for such acts. However, government may benefit from repression even if the probability of punishment is high. For instance, it is conceivable that the cost of being ousted by either an election or political protest is the same as the cost of being punished for repressing individuals' rights: removal from office. In such a situation, if government anticipates that an election or protests will force it from office, then its benefit from repression will be greater than or equal to the cost of repressing individuals' rights, increasing the likelihood of repression. Similarly, a dictator might encounter a situation when the opposition seeks his execution; in which case, he could only be deterred from using repression if he expected to receive the same fate for repression. In these situations, there is nothing to lose

[9]In 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 determination) will have a larger effect than entrenchment of the rights analyzed here.

from repression.

This might explain why, even in democracies, repression is significantly more likely during periods of political conflict (Davenport 2007*a*,*b*). Since the primary benefit of repression is to create political stability by stifling dissent, the benefits of repression are highest when political conflict creates a tangible threat to stability. In such situations, the probability of punishment needs to be very high to deter the government from repressing individuals' rights, and if conflict is severe enough, the government may repress *de facto* rights even if it is certain to be punished for doing so.

For the present study, this has two implications. First, if *de jure* rights are effective in democracies, then I am most likely to observe that effect during periods of crisis. In democracies, political conflict tends to be less severe because it is eventually channeled into the electoral process, and since there are more checks on the power of government and more uncertainty about how long the government will remain in power, the expected benefit of remaining in office tends to be less in democratic regimes. For both of these reasons, it is unlikely that the benefits of repression will be sufficiently high to make repression inevitable in democracies during periods of political conflict. Furthermore, electoral enforcement will break down during periods of conflict if the majority is willing to condone repression when its security is threatened. As a result, *de jure* rights might be able to deter repression by providing minorities, whose rights are most likely to be repressed during periods of conflict, the grounds to challenge acts of repression before the courts.

During periods of conflict, the relationship between *de jure* and *de facto* rights protection is more uncertain in authoritarian regimes. On the one hand, the benefits of remaining in office are often great in authoritarian regimes. Authoritarian governments often hold office much longer than democratic governments, and while in office, the members of government can enrich themselves and insulate themselves from punishment. Upon being removed from office, members of authoritarian governments risk not only losing the personal wealth they accumulated while in office, but also risk being punished (perhaps severely) for

any atrocities they committed. Since removal from office will be very costly to authoritarian governments, they might be undeterred by the threat of punishment when there is an explicit challenge to their tenure, making *de jure* rights completely ineffective. On the other hand, conflict in an authoritarian regime might be a sign of weakness. Fearing that its tenure is coming to an end, government might be more concerned about being punished, and sensing weakness, other actors might be more willing to attempt to punish the government (Helmke 2002). Consequently, it is difficult to predict whether *de jure* rights will be more effective during periods of tranquility or conflict in authoritarian regimes.

Summary

In sum, the 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 when the constitution is enforced by an independent judiciary, but only in democratic regimes during periods of conflict and in authoritarian regimes. In the latter, I have no prediction about whether this relationship is more likely during periods of tranquility or conflict. Given the very limited set of conditions in which I expect *de jure* rights to be effective in changing behavior, 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).

I realize one might argue that the theory above is not particularly novel. There is, after all, a literature on the efficacy of international human rights treaties that suggests judicial independence, regime type, and political conflict condition the effectiveness of international human rights treaties (Simmons 2009; Powell and Staton 2009; Hafner-Burton, Helfer and Fariss 2011). One might also argue that the conditions set forth here are so narrow that, even if I find evidence to support them, constitutional rights will continue to be virtually meaningless. To these criticisms, I have three responses. First, even though the same factors

elaborated here are thought to condition the effectiveness of international law, I would argue that applying these insights to domestic constitutional law is an important contribution to the field. Moreover, I know of no study in the international relations literature that combines the conditional effects of judicial independence, regime type, and political conflict into a single unified theory. Second, the conditions set forth above are both important and counterintuitive. They suggest that constitutional entrenchment is effective when repression is the most likely and constitutions are be expected to be least effective – in authoritarian regimes and in democracies during periods of conflict. Third, and lastly, by reframing the debate about the effectiveness of parchment barriers to focus on the conditions in which such barriers are effective, I hope that future research will reveal a broader set of conditions.

Research Design

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

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

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 0.5 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, I interact *de jure* rights protection with the level of judicial independence and

stratifying the sample by regime type and the presence of political conflict in the analysis below.

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 (McCleary and Barro 2006), 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:

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

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, can even allow an unbiased estimate of the effect of an endogenous independent variable (Ho et al. 2007). Full details on the matching procedure are available in the online appendix.

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 Rights Dataset (CIRI) (Cingranelli and Richards 2010), and Hathaway's (2002; 2007) 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. 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).[10] 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

[10]More information about the CCP is available at http://www.comparativeconstitutionsproject.org/.

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 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

[11] In 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.

[12] See tables A1-A3 and figure A1.

recommended by Carter and Signorino (2010).

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). Hence, I created ten imputed 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 11.

The Effect of Constitutional Entrenchment

Figure 1 provides a simple descriptive analysis of the probability of *de facto* rights protection. The probability of *de facto* protection of each right is divided into eight groups based on the presence of the *de jure* right, regime type, and the presence of political conflict. In the figure, the light grey bars indicate the probability that the *de facto* right is protected when the right is not entrenched in the constitution and the dark grey bar indicates that same probability when the right is entrenched in the constitution. Recall that the *de facto* rights variables are coded one when the right is observed in a given year, so the probability that a *de facto* right is observed is inversely related to the probability of repression.

The most notable difference in the figure is that between democratic and authoritarian regimes. Democratic regimes are much less likely to repress all of the rights analyzed than authoritarian regimes. Another important difference in figure 1 is that both democratic and authoritarian regimes are generally more likely to repress rights during periods of

conflict, although repression increases more during periods of conflict in democratic than in authoritarian regimes. These two differences corroborate the findings from the literature on state repression and reinforce my expectation that one is more likely to observe a relationship between *de jure* and *de facto* rights in authoritarian regimes and in democratic regimes during periods of conflict.

This expectation is partially affirmed by figure 1. In half of the situations assessed in figure 1, *de facto* rights are less likely to be repressed when protected by the constitution, and of these twelve situations, eight occur in authoritarian regimes. Of the four that occur in democratic regimes, freedom of association and religion are better protected in countries with *de jure* protection during periods of conflict and freedom of association and expression are better protected in countries with *de jure* protection during periods of tranquility.

The specific rights where *de jure* protection appears to enhance *de facto* protection the most are freedom of association and freedom of religion, while *de jure* protection appears to have the opposite effect for freedom of the press and the prohibition against torture. The one right that really seems to benefit from constitutional entrenchment is freedom of association. Regardless of regime type or the level of conflict, countries with *de jure* freedom of association always have better *de facto* protection of this right than countries without *de jure* protection. 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, figures 2 and 3 illustrates the effect of *de jure*

[13]Although 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, and even then, there are some models where the effect of *de jure* rights cannot be estimated because it is a perfect predictor.

rights on *de facto* rights using the estimates from a random-effects probit model. Starting with the former, figure 2 assesses the conditional effects of judicial independence and regime type on the effectiveness of *de jure* rights. 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 model where the level of judicial independence is interacted with *de jure* rights protection. 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 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 some 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, constitutional entrenchment does not have a statistically significant effect in democratic regimes for any of the rights analyzed. The only right where entrenchment comes close to significant is freedom of expression, which is nearly significant at the 0.1 level at low levels of judicial independence. In authoritarian regimes, on the other hand, entrenchment of three of the six rights analyzed has a statistically significant effect

[14] An 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.

[15] 0.16 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).

on countries' practices of those rights: freedom of association, expression, and movement. For each of these rights, the effect of *de jure* protection increases the probability of *de facto* protection once a certain level of judicial independence is reached and the increase in probability gets dramatically larger the higher the level of judicial independence.

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 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 is the large effect of these three rights. At low levels of judicial independence, the increased probability of *de facto* protection from *de jure* freedom of association, expression, and movement is 0.01, 0.03, and 0.10, respectively, but these effects increase to 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]

Figure 3 further assesses the effect of *de jure* rights by also conditioning their effect on the presence of political conflict. Recall that I hypothesized *de jure* rights should be more effective in democracies during periods of conflict but made no prediction about the impact

[16]Similar examples include Botswana in the 1980's, Hungary circa 1989, and South Africa at the end of the apartheid.

of conflict in authoritarian regimes. The plots in figure 3 are similar to those in figure 2, but now, the sample is also split by political conflict prior to estimating the models. Political conflict is coded one if a country experienced an interstate war, civil war, guerilla warfare, or riots in a given country-year, the same coding rule used by Davenport (2007*b*). Thus, for each right, four models were estimated. The top two rows of plots report the estimates from models using observations from authoritarian regimes during periods of tranquility (row 1) and conflict (row 2). The bottom two rows of plots report the estimates from models using observations from democratic regimes during periods of tranquility (row 3) and conflict (row 4).

The results in figure 3 are very similar to those in figure 2. There is generally not much of a relationship between *de jure* and *de facto* rights in democratic regimes, but constitutional entrenchment does seem to improve the *de facto* protection of some rights in authoritarian regimes. The one exception to this general rule is freedom of expression. During periods of conflict, constitutional entrenchment decreases the probability that democratic governments will repress freedom of expression by around 0.10 when the level of judicial independence is between 0.55 and 0.80. Although this result corroborates the argument that I am mostly likely to observe a relationship between *de jure* and *de facto* rights in democracies during periods of conflict, one should not place too much weight on this finding. Not only is the effect of *de jure* freedom of expression small and the level of judicial independence where this effect is observed narrow, but the effect is not consistent across the other rights analyzed.

In authoritarian regimes, *de jure* freedom of association, expression, and movement continue to have a positive effect on their *de facto* counterparts. When stratifying by conflict, though, *de jure* freedom of association and expression only have an effect on countries' practices of those rights in the absence of political conflict. During such periods, freedom of association becomes significant at the 0.1 level when the level of judicial independence is between 0.25 and 0.85, and both freedom of expression and movement become significant at the 0.1 level once the level of judicial independence is above 0.5. An independent judiciary

seems able to induce self-enforcement by authoritarian governments, but during periods of conflict, the benefits of transgression are simply too great for fear of punishment to be a deterrent.

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, then entrenchment will be endogenous to countries' rights practices, and the relationship between *de jure* and *de facto* rights illustrated in figures 2-3 will be biased. Although the decisions of constitutional drafters are 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 terms in equation 2. Thus, an omitted time-variant covariate is most likely to affect the estimates of the models upon which figures 2-3 are based, but since such a variable is unlikely to be correlated with *de jure* rights, its omission should not affect the estimated effect of *de jure* rights.

To further reduce the likelihood that endogeneity is driving the results above, I re-estimated the models upon which figure 3 is based after pre-processing the data with

matching. Figure 4 illustrates the results from these models. Two of the results from figure 3 are replicated in figure 4. The effect of *de jure* freedom of movement in authoritarian regimes during periods of conflict is almost identical between the two figures, and the effect of *de jure* freedom of expression in democratic regimes during periods of conflict remains significant at high levels of judicial independence. Actually, the effect of *de jure* freedom of expression is much more pronounced in figure 4 than in figure 3, with the effect becoming significant at the 0.1 or better whenever judicial independence is higher than 0.15 and having a much stronger effect.

Aside from these two similarities, there are several notable differences between the two figures. Perhaps the most noticeable difference is the fact that the models could not be estimated for freedom of association when either of the authoritarian sub-samples of data were used or for freedom of movement when observations coded as authoritarian and non-conflictual were used in the estimation. The data points which drive those estimates in figure 3 were trimmed from the data during matching, presumably because those observations had unique combinations of the covariates being matching on. This implies that there simply is not enough information in the data to determine if the correlations reported in figure 3 for these situations are valid. Of course, given the descriptive analysis in figure 1, one probably already suspected that the effect of *de jure* freedom of association in authoritarian regimes was based on a few, unique observations.

Another difference is the effects of *de jure* freedom of religion and freedom of torture in authoritarian regimes during periods of tranquility. In figure 3, *de jure* freedom of religion in such a setting had literally no effect on *de facto* freedom of religion, and *de jure* freedom of torture had a positive but highly insignificant effect at high levels of judicial independence. After matching, the effects of both of these *de jure* rights increase as judicial review increases. Moreover, the effect of *de jure* freedom of religion becomes statistically significant when judicial independence is between 0.25 and 0.35, and the effect of a *de jure* prohibition of torture is nearly statistically significant at high levels of judicial independence. The near

statistical significance of *de jure* freedom of expression and these other two *de jure* rights adds some support to the notion that, when enforced, constitutional entrenchment can reduce repression in authoritarian regimes during periods of tranquility.

The final major difference between figures 3 and 4 is the effect of *de jure* rights in democracies during periods of conflict. This is the only situation when I expected to observe a relationship between *de jure* and *de facto* rights, and after matching, several of the *de jure* rights analyzed here have a statistically significant effect. I already noted the effect of *de jure* freedom of expression. In addition, both *de jure* freedom of movement and freedom of the press significantly increase the likelihood of their *de facto* counterparts at high levels of judicial independence, above 0.95 and 0.85, respectively. One might question the importance of this result given the fact that constitutional entrenchment only has an effect at very high levels of judicial independence for these rights, but this is largely driven by the fact that most democracies score very highly on the measure of judicial independence used here.

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 religion, freedom of the press, and the prohibition of torture had any positive effect. In fact, there is even evidence that, in certain situations, entrenchment might increase violations of these rights. For the remaining three 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, and movement.

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, neither regime type nor political conflict seem to alter the effectiveness of this *de jure* freedom of association. 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, the easiest way to improve countries' rights practices might be to create independent judiciaries that can enforce the *de jure* rights already in countries' constitutions. Consequently, research on how to create independent judiciaries is vital for improving countries' rights practices.

Aside from judicial independence, regime type and political conflict were also important intervening variables. The most likely scenario for a relationship between *de jure* and *de facto* rights is in authoritarian regimes during periods of tranquility. When there is not an explicit threat to stability, the threat of punishment is sufficient to deter authoritarian government from repressing most of the rights analyzed. Authoritarian governments appear willing to abide by the constitution when it is enforced and it is convenient to do so, but even a constitution enforced by an independent judiciary cannot deter repression when the stakes are high.

The opposite is true of democratic governments. During periods of tranquility, *de jure*

rights appear to be redundant in democracies. This could be due to ceiling effects in the probability model or a breakdown of constitutional enforcement; it is impossible to tell in the present analysis. Conversely, during periods of conflict, there is a positive, statistically significant relationship between *de jure* and *de facto* rights for several of the rights analyzed. Even though the relationship was only observed after pre-processing the data with matching and only in countries with very high levels of judicial independence, the results still indicate that some democratic governments are deterred from transgressing individuals' constitutional rights out of fear of being punished for doing so.

One limitation of the present study is that it cannot explain which *de jure* rights leaders choose to transgress. Even when the conditions for enforcement are ripe, some *de jure* rights 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. For instance, 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 is does not expect to be punished for repressing freedom of expression. Similarly, government might decide to repress rights not entrenched in the constitution if it expects to be punished for violating constitutional rights. The results above do not rule out this sort of substitution, but if it occurs, countries overall rights practices are unlikely to be affected by constitutional rights provisions. Future research should investigate this possibility.

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 democracies during periods of conflict and 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

***De Facto* Rights Protection**		***De Jure* Rights Protection: No**	***De Jure* Rights Protection: Yes**
	Yes	Over-Performers	Rights Protectors
	No	Rights Repressors	Under-Performers

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

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

Figure 1: Probability of *De Facto* Rights Protection by *De Jure* Rights Protection, Regime Type, and Political Conflict

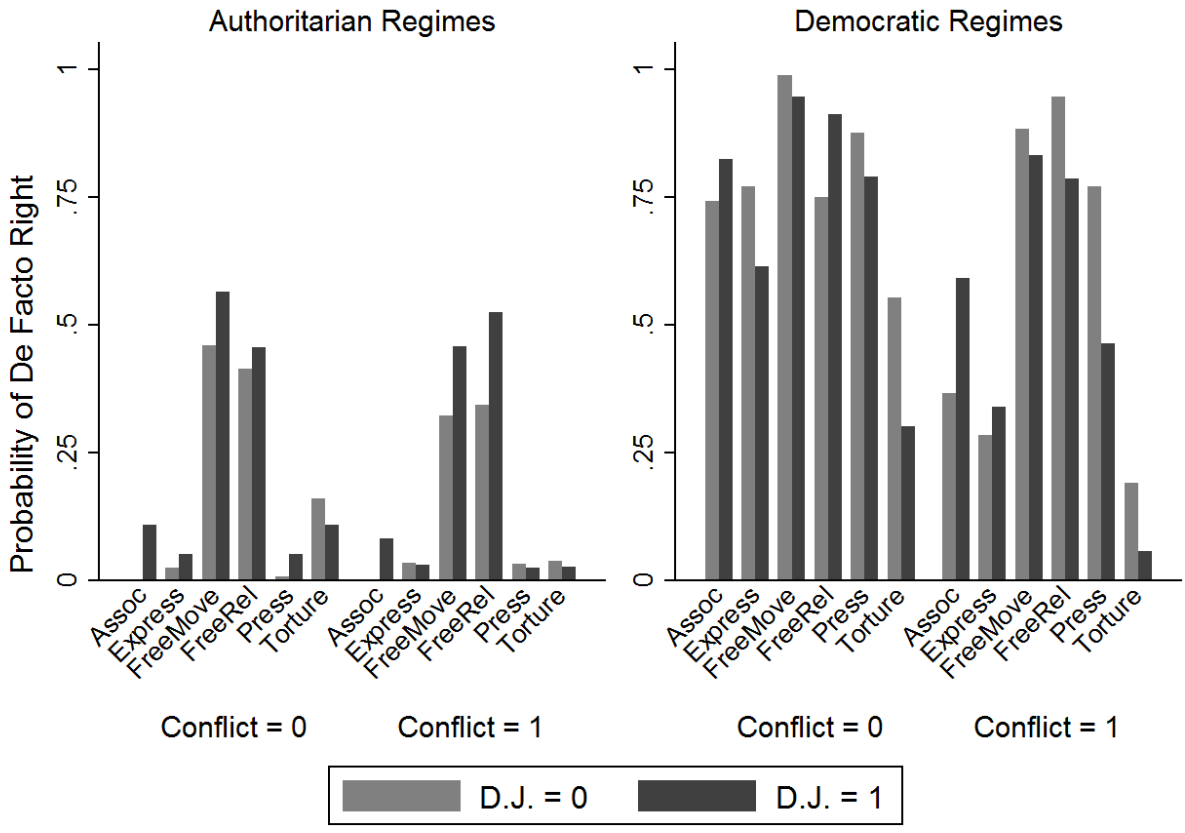
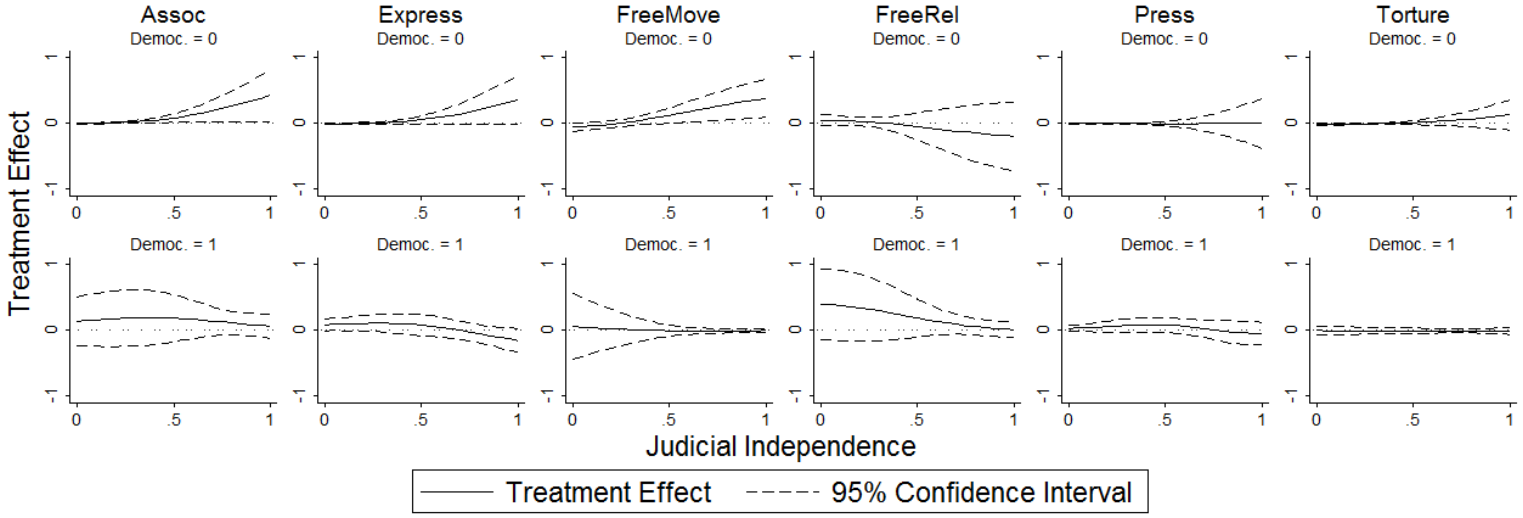
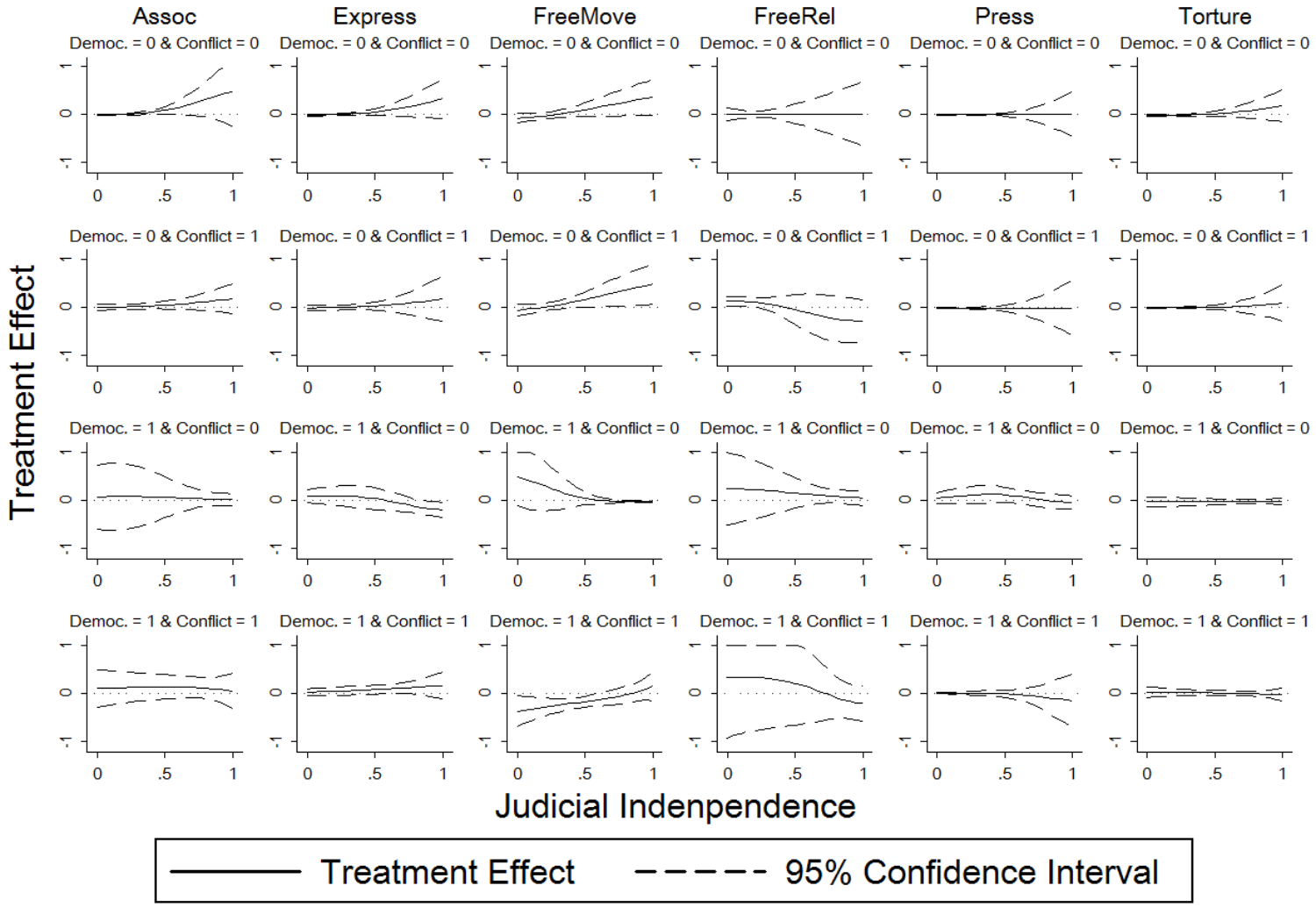


Figure 2: Effect of *De Jure* Rights Protection by Judicial Independence and Regime Type



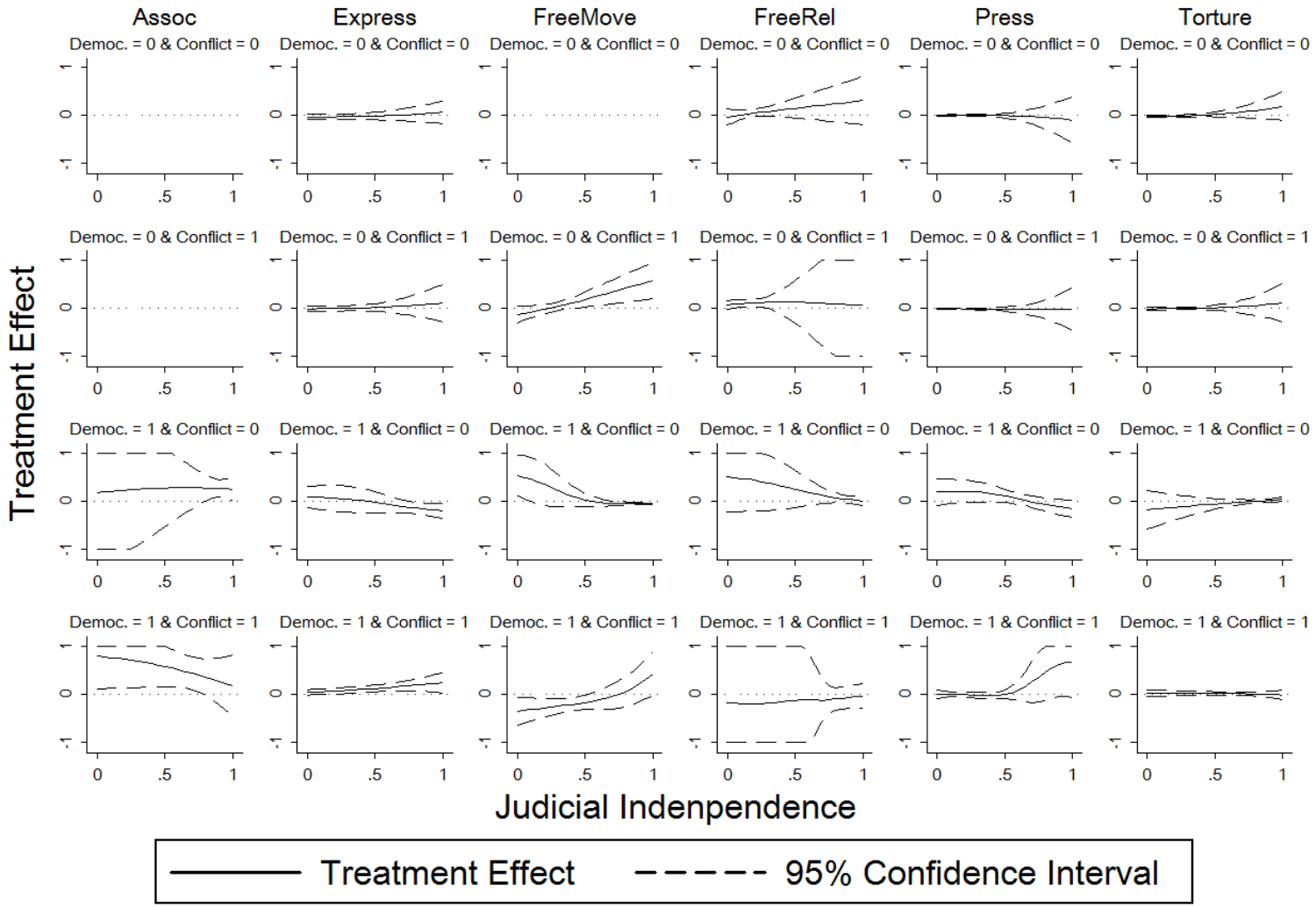
Notes: The probability estimates in the figure are from twelve probit models with random effects. The 95% confidence intervals are based on clustered, robust standard errors. The full results from these models are available in the online appendix, tables A5-A6.

Figure 3: Effect of *De Jure* Rights Protection by Judicial Independence, Regime Type, and Conflict



Notes: The probability estimates in the figure are from twenty-four probit models with random effects. The 95% confidence intervals are based on clustered, robust standard errors. The full results from these models are available in the online appendix, tables A7-A10.

Figure 4: Replication of Figure 3 when Pre-Processing with Matching



Notes: The probability estimates in the figure are from twenty-four probit models. The 95% confidence intervals are based on robust standard errors. The full results from these models are available in the online appendix, tables A11-A14.