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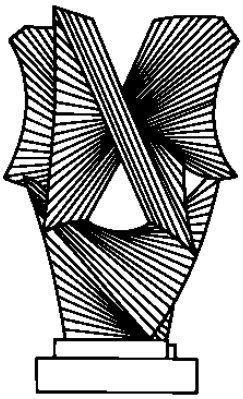

DECIDING NOT TO DECIDE: DEFERRAL IN CONSTITUTIONAL DESIGN

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Deciding not to decide: Deferral in constitutional design

Rosalind Dixon and Tom Ginsburg*

In designing constitutions, constitutional drafters often face constraints that cause them to leave things "undecided"—or to defer decision-making on certain constitutional issues to the future. They do this both through adopting vague constitutional language, and through specific language that explicitly delegates issues to future legislators (i.e. "by law" clauses). The aim of this article is to deepen our understanding of this second, to date largely un-examined, tool of constitutional design. We do so by exploring: (1) the rationale for constitutional deferral generally; (2) the potential alternatives to "by law" clauses as a means of addressing concerns about constitutional "error" and "decision" costs: (3) the disadvantages, as well as advantages, to such clauses: (4) the likely and actual prevalence of such mechanisms in national constitutions; and (5) the optimal use of such clauses. The paper draws on both the empirical dataset created by the Comparative Constitutions Project and case material from Australia, Brazil, Iraq, Kenya, South Africa, Taiwan, and the U.S. involving instances of arguably "successful" and "unsuccessful" constitutional deferral.

1. Introduction

Constitution-making is usually characterized as an attempt to regulate the future on behalf of the past, an act of "temporal imperialism" in which today's drafters constrain future citizens.[1] Drafters acting at T1 limit the choice of legislators and government agents at T2 in order to achieve some higher purpose for the polity. This conception of constitution-making as inter-temporal control is shared both by normative advocates of constitutionalism as well as critics. Without effective inter-temporal control, constitutions cannot serve as effective pre-commitment devices, in which government

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[1] Anne Norton, Republic of Signs 124 (1993).

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promises become credible.[2] The fact of inter-temporal control is also precisely what animates many critiques of constitutionalism. As Noah Webster put it two centuries ago, "[t]he very attempt to make *perpetual* constitutions is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia."[3]

Despite this understanding of constitutions as attempts to regulate the future, it is often the case that constitution-makers self-consciously choose *not* to bind their successors. Instead, they often draft constitutional provisions in such vague language that they do not bind their successors at all. Alternatively, they choose to defer decision-making to the future by adopting "by law" clauses that explicitly delegate certain constitutional questions to future legislatures. This is the opposite of temporal imperialism: rather than controlling the future based on past preferences, both these strategies allow the future to control itself based on contemporary preferences.

This article considers this decision by constitutional designers "not to decide." Specifically, it asks why constitution-makers might decide to adopt "by law" clauses that explicitly deem a subject constitutional, but then defer almost all substantive decision-making on the subject to future decision-makers. Unlike many decision-makers who choose to delegate, constitution-makers generally have limited opportunity to monitor those to whom they delegate: they may be formally prohibited from standing for legislative office in the short-term; they may be technocrats with little or no chance of attaining high political office; or they may be highly uncertain about their own chances of gaining political office, post-constitution making.[4] Without monitoring, it is unlikely that future decision-makers will act as faithful agents for current decision-makers. Why then would current decision-makers risk losing influence in this way?

One potential explanation is that constitution-makers are simply lazy and wish to minimize the overall amount of work they are required to do at T1.[5] A related

[2] Jon Elster, *Intertemporal Choice and Political Thought*, *in* Choice over Time 35 (George Loewenstein & Jon Elster eds., 1992); Cass Sunstein, Designing Democracy: What Constitutions Do 241 (2001); see also F.A. Hayek, The Constitution of Liberty 179 (1960).

[3] *See* Gordon S. Wood, The Creation of the American Republic, 1776-1787 379 (1983) (quoting Webster); see also French Declaration of Rights of Men and Citizens art. 28 ("A people have always the right of revising, amending and changing their Constitution. One generation cannot subject to its laws future generations.").

[4] On veil of ignorance rules in constitutional design, see Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. Pa. J. Const. L. 345, 374-75 (2000); see also Const. of Thailand art. 30 (2006) ("members of the Constitution Drafting Assembly shall not be able to run for a post as members of the Parliament or senators during a period of two years after the expiration of their office in the Constitution Drafting Assembly.").

[5] This would accord with a classic principal-agent understanding of the drafting process. *See*, e.g., Eric Posner, *Agency Models in Law and Economics* (John M. Olin Law & Economics Working Paper No. 92, 2nd Series, 2000). For evidence of self-interest on the part of drafters, see Robert McGuire & Robert Ohsfeldt, *Public Choice Analysis and the Ratification of the Constitution*, *in* The Federalist Papers and the New Institutionalism 175 (Bernard Grofman & Donald Wittman eds., 1989) (using statistical analysis to evaluate the voting behavior of the delegates to the U.S. constitutional convention and subsequent state ratification processes, and find some support for public choice hypotheses of economic self-interest among participants); Robert McGuire & Robert Ohsfeldt, *Self-Interest, Agency Theory, and Political Voting Behavior: The Ratification of the United States Constitution*, 79 Am. Econ. Rev. 219 (1989).

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explanation might be that constitution-makers are subject to a distinct form of moral hazard, whereby they are more interested in being *seen* to adopt a successful constitution than actually adopting one: if this were the case, they might well prefer to defer all difficult decisions to future decision-makers, and take the credit for all the apparent success of the constitution at T1.[6] This pure agency-based account, however, seems at odds with what we conventionally believe about the type of people who are generally selected to be constitution makers: history tells us that, in many democratic or democratizing contexts, they are generally men and women with a strong interest in influencing the long-term constitutional direction of their country.[7] Overall, constitution-makers are usually believed to be genuinely committed to producing high-quality, enduring institutions within a set of political constraints, rather than trying to conclude a particular constitutional convention, assembly or committee drafting assignment as quickly as possible. From the perspective of constitution makers of this sort—i.e. long-term constitutional "optimizers"—it is much less obvious why they would choose to defer various constitutional issues to future decision-makers and risk losing control over the future direction of constitutional meaning.

The article offers a number of explanations for this particular form of decision by constitution makers not to decide. One explanation is that informational asymmetries, incentives for hold-out and constitutional "passions" on the part of parties to constitutional negotiations can make the "decision costs" of reaching agreement on constitutional issues disproportionately high.[8] Such bargaining problems may be especially intense when, as is often the case, constitutional decision-makers face significant time constraints on constitution-making. Another explanation is that limits on the information available to constitutional decision makers, and the potential for downstream uncertainties about the optimality of particular constitutional provisions, mean that constitutional decision-making involves the potential for serious "error costs" in which decisions adopted earlier turn out to be the wrong ones.[9]

Constitutional deferral helps minimize both these forms of design cost. When it comes to decision costs, deferral helps promote constitutional agreement by both increasing the generality at which issues are debated, and decreasing the stakes of any actual decisions made at T1. When it comes to error costs, it helps reduce such costs by both increasing opportunities for information revelation prior to decision-making, and reducing formal barriers to legislative reversal relative to constitutionalization. In many cases, constitutional deferral will also have a greater capacity to minimize relevant costs than potential alternative design strategies, such as constitutional vagueness, the adoption of flexible amendment thresholds, mandatory constitutional review requirements or constitutional "sunset" provisions.

[6] Compare David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers (1999).

[7] *See*, e.g., Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 377-78 (2005).

[8] On this distinction, see, e.g., Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399 (1973); Adam M. Samaha, *Undue Process*, 59 Stan. L. Rev. 601 (2006).

[9] *Id.*

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These beneficial effects of deferral, we show, are particularly relevant in areas involving both high and low stakes constitutional issues. Even though decision costs will generally be directly proportionate to the stakes involved, error costs are particularly relevant in both high and low stakes contexts. When the stakes are high, there is naturally some reluctance to making the wrong decision too early; when stakes are low but the probability of error is high, deferral also makes sense as a strategy.

Of course, deferral will also involve potential risks or downsides, in addition to the potential it creates for agency costs. One such danger is that deferral may ultimately overburden the decision-making capacities of legislatures in a way that undermines their ability to perform other key functions. Another danger is that deferral may lead to troubling gaps in the coverage of the constitution, because downstream legislatures may simply fail to prioritize the decision-making tasks deferred by the constitution. Both of these are dangers that can affect the expected endurance, as well as optimality, of constitutions.[10] Accordingly, they must clearly be considered very carefully by constitution makers as part of any rational design calculus.

The paper is organized into six further sections. Section 2 sets out in more detail the basic features of "by law" clauses as a mechanism for constitutional deferral, and the prevalence of such mechanisms in constitutions for which data is available from the Comparative Constitutions Project (CCP), which records the characteristics of all national constitutions since 1789.[11] Section 3 sets out the various sources of decision costs and error costs in constitution-making processes. Section 4 considers how constitutional deferral is able to minimize both kinds of cost, relative to potential alternative design strategies, such as flexible amendment thresholds and mandatory constitutional review requirements. Section 5 then examines the circumstances in which actual constitutional deferral will be most likely, and the types of deferral that are also most likely to occur in various circumstances. Section 6 considers dangers associated with deferral and offers preliminary suggestions on the optimal use by constitution-makers of by-law clauses. Section 7 concludes. In developing these arguments, the paper draws not only on large-n data from the CCP, but also on case material drawn from constitution-making processes in Australia, Brazil, Iraq, Kenya, South Africa, Taiwan, and the United States.

2. "By law" clauses as a mechanism of constitutional deferral

At one level, of course, any rule not specified in the constitution is implicitly delegated to future legislatures, at least within their domain of relevant competence.[12] We are focused, however, on issues that are *explicitly* delegated. This is because when constitution-makers explicitly delegate we know that they in fact wish to constitutionalize

[10] *See* Zachary Elkins, Tom Ginsburg & James Melton, The Endurance of National Constitutions (2009).

[11] Comparative Constitutions Project, http://www.comparativeconstitutionsproject.org (last visited Mar. 22, 2011).

[12] In federal systems, of course, constitutional silence can raise complex questions as to whether national or rather state or local legislature have power to act in a particular context.

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an issue in some way, rather than simply leave it to ordinary law.[13] Complete silence in a particular area is inherently ambiguous from a constitutional perspective: it could mean that constitution-makers are implicitly delegating an issue to future decision-makers, but equally, that they simply did not anticipate the issue, or have no views on who is to decide it.[14] Alternatively, constitutional silence may reflect implicit endorsement of existing unwritten constitutional norms.

The clearest means by which constitution-makers can choose to delegate constitutional decision-making to the future, therefore, is through the use of "by law" clauses, which either *require* the legislature to decide certain constitutional issues in the future, or else explicitly *empower* the legislature to decide such issues. While the first type of by law clause is weaker than the second, in terms of conferring discretion to downstream decision-makers, both forms of clause represent an explicit delegation to future decision-makers to decide the question of *how* to regulate a particular topic.[15] Clauses that *empower* the legislature defer both the question of how to regulate and the question of *whether* to regulate at all.

To identify the prevalence of such "by law" clauses in national constitutions, we examined the set of constitutions in the CCP database, and specifically a subset of 120 questions (out of a total of 667) in the CCP survey instrument that asked whether an issue was explicitly left to ordinary law in a particular constitution. (A list of these questions is included in the appendix, and they are drawn from various aspects of the CCP survey.) This generated a sample of 981 constitutions, of which 579 (59%) delegated at least one of our issues to ordinary law.

For these constitutions, as Table 1 shows, there was an average of 2.29 left to law clauses per constitution, and 3.88 such clauses among those constitutions that contained at least one such clause. We found some regional and temporal variance in the distribution of such clauses. Legislative deferral is particularly common in the Middle East, Africa and South Asia, while rarer in Latin America, and East Asia.[16] We also observe that leaving things to ordinary law is a particularly modern drafting technique, being more prevalent after World War II than before.[17]

[13] On the different ways of drawing this line, see, e.g., Rosalind Dixon & Eric A. Posner, *On the Limits of Constitutional Convergence*, 11 Chicago J. Int'l L. 399, 406-408 (2011).

[14] This, for example, is often the case with constitutional vagueness: sometimes vague constitutional language may indicate a decision to delegate decision-making on a constitutional question to future decision-makers, but in other cases, it may equally be evidence of a (more or less conscious) decision by constitution-makers not to address a particular issue. *See infra* notes 55–60.

[15] For some "by law" clauses, there is the possibility that the topic they address would not otherwise in fact be included in the constitution. In such cases, the constitutional decision to include the topic but leave it to law does involve deferral, but is not constitutional deferral in the fullest sense of postponing a clearly constitutional decision to the future. We nonetheless treat such clauses as within the scope of our analysis, because it is almost impossible to separate out, without detailed knowledge of a particular constitutional context, which clauses fall into this category.

[16] Mean numbers of by law clauses by region are 5.15 for the Middle East/North Africa Region, 3.95 for Sub-Saharan Africa, 3.93 for South Asia, 2.53 for Eastern Europe, 2.49 for Western Europe, 2.21 for East Asia and 1.68 for Latin America.

[17] For constitutions put into force before 1919, the mean is 1.56; for the interwar period it is 2.21, and for the postwar period it is 3.50.

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Table 1 Frequency of legislative deferral over 120 dimensions in national constitutions (n=981)

Number of left to law clauses	Frequency (number of constitutions)	% of cases
0	404	41.18
1	120	12.23
2	105	10.70
3	90	9.17
4	83	8.46
5	43	4.38
6	39	3.98
7	31	3.16
8	25	2.55
9	18	1.83
10	5	0.51
11	2	0.20
12	6	0.61
13	3	0.31
14	4	0.41
15	2	0.20
18	1	0.10

Top constitutions: El Salvador 1944 (18); Senegal 1959; CAR 1964 (15); Greece 1975; Comoros 1996; CAR 1959; Iraq 1970 (14).

3. Explaining deferral: Decision costs and error costs

What accounts for the prevalence of "by law" clauses as a mechanism for constitutional deferral? The answer, we suggest in this section, is that constitutional drafting, like other forms of legal drafting, is essentially a problem of constrained optimization. If drafters were completely unconstrained, they would draft a *complete* constitution that addressed all contingencies and spelled out how they are to be resolved. But drafters are not unconstrained. Instead they face various limitations, including those of limited consensus, time, and information, all of which can lead to significant "decision" and "error" costs.[18]

3.1. Decision costs

As with contracts, most constitutions must be negotiated.[19] Negotiation is costly and requires political and technical resources. It also involves overcoming a number of

[18] As Professor Samaha pithily summarizes, "[d]ecision costs are associated with reaching a decision; error costs are a possible consequence of that decision." *See* Samaha, *supra* note 8, at 616.

[19] Some models of constitution-making admittedly involve more negotiation than others; see, e.g., discussion in Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community 288-308 (2010) (discussing six models of constitution-making, among which at least three—i.e. the "revolution", "invisible" and "war"-based models—will tend to involve little negotiation among different domestic parties).

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barriers to agreement. Decision costs are essentially a form of transaction costs—the costs of deliberating, negotiating and finalizing an agreement. There are also myriad factors that contribute to such costs, familiar to readers from the literature on contractual negotiation.

One factor will be asymmetric information among parties to a constitutional negotiation process, which can lead to a failure to reveal the basis for a bargain. Another problem is that constitutional bargaining often occurs amongst groups that have little in common, and may even be in open conflict, but who are thrown together by historical circumstance into a nation, where there is little possibility of divorce. This can lead to a problem of bilateral monopoly, or efforts to "hold-out" for a better agreement.

Another source of trouble is what has been identified as constitutional "passion."[20] Unlike contracts, constitutions involve issues of historical weight, sometimes including grievance and mistrust between the parties. This forms another barrier to agreement. While some passion is necessary to motivate interest in constitution-making, too much passion can lead to failures to reach pareto-improving agreements. In short, some constitutional choices will be relatively uncontroversial, but for many others, agreement will be difficult to reach because of local histories, passions and interests.[21]

Consensus depends in part on the structure of the bargaining process. Jon Elster has speculated that transparency of the process is a key variable here. Open constituent assemblies, he notes, are conducive to arguing, while closed-door assemblies are more conducive to bargaining.[22] Other institutional rules, such as those on the formation and proceeding of the drafting committee, can have a significant impact on consensus. Supermajority rules and larger committees will, *ceteris paribus,* tend to raise the costs of decision (even as they decrease error costs). The more costly decision-making is, in turn, the more difficult it will be for constitution-makers to decide all relevant issues at the time of constitutional drafting.

This is particularly so given time-constraints that often apply to processes of constitution-making. Sometimes time pressures are externally imposed. In the recent case of Afghanistan, the pre-constitutional Bonn Agreement laid out the country's transition path in a few days time, and required the constitution-making process to be completed within two years, a challenge given the preceding 25 years of civil war.[23] The United Nations set the agenda for constitution-making in East Timor, and rushed the pro-

[20] Elster, *supra* note 7, at 364.

[21] The degree to which various constitutional choices are understood as more or less settled or uncontroversial will depend, in part, on the reasons a new constitution is being adopted. Where a constitution is adopted as part of an attempt to transform a particular political system, for example, there will often be quite limited background agreement. Compare David Fontana, *Revolutionary and Reorganizational Constitutions* (Working Paper 2011) (distinguishing between revolutionary versus more 'reorganizational', forms of constitutional change); Karl Klare, *Legal Culture & Transformative Constitutionalism*, 14 S. Afr. J. Hum. Rts. 146 (1998) (distinguishing between transformative and more conservative forms of constitutionalism).

[22] Elster, *supra* note 7, at 345.

[23] J. Alexander Thier, *Big Tent, Small Tent: The Making of a Constitution in Afghanistan*, *in* Framing the State in Times of Transition: Case Studies in Constitution Making 535, 558 (Laurel Miller ed., 2010).

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cess by forcing drafting in a 90-day period.[24] The United States occupation policy in Iraq pushed for a completed constitution by a date specified in the U.S.-authored Transitional Administrative Law, notwithstanding that no agreement had been reached among the major factions by that time, that Iraqi leaders favored an extension, and that Sunni parties had boycotted the prior election and so had no voice in the process.[25] The American insistence on quick production of a constitution arguably hurried Iraq's descent into civil war.[26]

Time constraints may also be self-imposed, or the result of prior political agreements that stipulate a time limit for constitution drafting, as part of an attempt to resolve particular forms of domestic political crisis, such as that occur following the breakup of a country, or a downfall of a regime.[27] The recently ratified Constitution of Kenya, for example, was drafted under the authority of a parliamentary statute that established the drafting committee, structured the process, and provided for time limits.[28] Similar approaches have also been used in the Nepalese process, which is ongoing.

While the binding nature of such constraints inevitably varies across cases,[29] their effect is invariably to increase the difficulty of reaching agreement on any given constitutional issue. This, in turn, imposes pressure on constitution-makers *not* to decide all issues at the time of constitutional drafting, but instead to leave at least some issues to the future.

3.2. Error costs

Error costs involve the gap between the expected outcome of a policy and its actual outcome. Admittedly, not every constitutional provision has this same potential to involve error costs. For some constitutional provisions, as David Strauss notes, it will be far "more important that [it] . . . be settled than that they be settled right".[30] This is because such provisions are designed to address a form of pure "coordination game," or cooperative game with multiple equilibria, in which parties are ultimately indifferent between two different strategies, but the pay-off to each is much greater if they can match that strategy with that of another player.[31] However, in most cases parties to a constitutional negotiation *will* have some clear preference about the substance

[24] Louis Aucoin & Michele Brandt, *East Timor's Constitutional Passage to Independence*, *in* Framing the State in Times of Transition: Case Studies in Constitution Making 245, 254 (Laurel Miller ed., 2010).

[25] Jonathan Morrow, *Deconstituting Mesopotamia: Cutting a Deal on the Regionalization of Iraq*, *in* Framing the State in Times of Transition: Case Studies in Constitution Making 563, 571-75 (Laurel Miller ed., 2010).

[26] *Id.*

[27] *See* Elkins et al., *supra* note 10, at 128–43.

[28] Const. of Kenya Review Bill (2008).

[29] *See* Laurel Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, *in* Framing the State in Times of Transition: Case Studies in Constitution Making 601, 638-41 (Laurel Miller ed., 2010) (discussing a range of cases with shorter and longer processes).

[30] David Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 907 (1996).

[31] Strauss, *supra* note 30, at 910.

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of particular constitutional norms,[32] so that there will be a clear potential for downstream error costs to arise.

As with decision costs, error costs will be affected by a number of factors, including the level of information available to the drafters about likely consequences of their decisions and the rate of exogenous social and economic change, which may put pressure on institutional configurations adopted at earlier junctures.

Even if the parties are able to agree on all contentious issues within the limited time that is available, their bargain will be subject to the vagaries of downstream change. At the time of negotiation, constitutional drafters do not have complete information about the structure of payoffs down the road. Payoffs may be contingent on states of the world that are only revealed with the passage of time.[33] The optimality of particular constitutional provisions may also vary along with social and economic conditions, which may move in unpredictable ways.

A good example of this involves the decision by southern delegates to the Federal Convention in the United States to agree to broad powers for Congress over interstate commerce under simple majority vote (as opposed to a two-thirds majority) in exchange for a twenty-year limit on the ability of the Federal Congress to interfere with the slave trade.[34] Some argue that the southern delegates took this stance because they anticipated that population growth would expand to the southwest and this would expand their power in the government, so that they could control outcomes when the twenty year period expired.[35] Instead, population growth went to the northwest. The southern delegates also failed to understand that their successful demand for a prohibition on export tariffs was nullified by the decision to allow federal import tariffs, which modern economics has shown have similar effects to export tariffs.[36] Altogether, the negotiation turned out to be a bad deal for the south—an illustration of how limited information about future states of the world (and future discoveries in social science) produced a suboptimal deal from the perspective of one faction.

Another potential source of error costs is that designers may not understand the full consequences of their choices, or the way in which particular choices interact with other, apparently distinct constitutional choices. Designers are hardly alone here. Social science scholarship on the consequences of constitutional design choices is not

[32] In this sense, the design problem will tend in most cases far more closely to resemble a "battle of the sexes" game, than a pure coordination game; see Rosalind Dixon, *Updating Constitutional Rules*, 2009 Sup. Ct. Rev. 319. For exploration of the structure of the two different games, see also Douglas Baird, Robert Gertner & Randal Picker, Game Theory and the Law (1994).

[33] *See*, e.g., Foundations of Contract Law (Richard Craswell & Alan Schwartz eds., 1994).

[34] U.S. Const. art. I, § 9, cl. 1. This is an example of a transitional clause used to secure the constitutional bargain. Other examples include the Interim Constitution of South Africa, which contained a provision entrenching a grand coalition government for five years after the first democratic election. Heinz Klug, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction 115 (2000).

[35] *See generally*, Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996); Barry Weingast, *Designing Constitutional Stability*, *in* Democratic Constitutional Design and Public Policy: Analysis and Evidence (Roger D. Congleton & Birgitta Swedenborg eds., 2006).

[36] Ben Baack et al., *Constitutional Agreement During the Drafting of the Constitution: A New Interpretation*, 38 J. Leg. Stud. 533, 536-39 (2009).

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well developed, and is undertaken at a fairly high level of abstraction.[37] It is also the case that comparative institutional scholarship tends to focus on single institutions in isolation—federalism, presidentialism v. parliamentarism, judicial review—without investigating the complex interactions and tradeoffs among institutional choices.

A good example of such bounded rationality comes from the negotiated transition to democracy in Taiwan in the 1990s. The Constitution of the Republic of China, drafted on the mainland many decades earlier, remained the nominal constitution for Taiwan, and had been the basis for strongman presidentialist rule under Chiang Kai-shek. A series of constitutional amendments in the 1990s transformed the political system into a semi-presidential one. The opposition Democratic Progressive Party (DPP) had pushed for constraints on presidential power, believing that they had an advantage in parliamentary elections. In 2000, however, the DPP won the presidency and found itself hampered by parliamentary controls that it itself had called for. In this case, the source of the information deficit was simply uncertainty, not exogenous shocks.[38]

In many cases, downstream error costs of this kind will also have a direct impact on the likelihood that a particular constitution will endure over time. All else being equal, constitutions which embody high aggregate error costs will tend to enjoy lower popular support than constitutions with a less costly set of errors. The lower the level of popular support for a constitution, the more vulnerable a constitution will also be to whole-scale replacement, as opposed to amendment. As section 4 notes, all forms of constitutional amendment carry some political costs for legislators and, therefore, the greater the number of amendments that are perceived to be necessary, the more likely it is that legislators will see constitutional replacement as an attractive alternative to amendment. An error-ridden constitution that decides too many issues in the face of uncertainty may be vulnerable to early replacement.

The salience of concerns about constitutional endurance will, of course, vary from one constitutional context to the next: drafters of newly autocratic constitutions, for example, may be less concerned about endurance than are drafters of democratic constitutions. This implicates what economists call the discount rate: the rate at which one discounts the future relative to the present. Discount rates in the constitution-making process may also vary from one democratic constitutional decision-making context to the next. In countries where there is a recent history of internal conflict or political unrest, for example, constitution-makers may have a quite high discount rate, because unless a new constitution can settle certain political conflicts in the near term, those conflicts may escalate in a way that threatens the very survival of the country as a whole. Democratic transitions may also be associated with high discount rates, since for many citizens there will be significant positive returns to replacing a prior autocratic constitution, but there will also be uncertainty as to the duration of those conditions favoring such a transition.

[37] *See*, e.g., Tortsen Persson & Guido Tabellini, The Economic Effects of Constitutions (2003).

[38] Tom Ginsburg, *Constitutional Engineering*, *in* Taiwan: The Implications of Global Trends (2005).

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In most contexts, however, concerns about endurance will play at least some role in encouraging deferral. A constitution that is expected to last for a long time will lengthen the period over which information can be revealed to address errors; it also increases the stakes involved in getting a decision wrong. From an error costs perspective, the incentive to defer goes up with the prospective endurance of the constitution. And prospective endurance can increase decision costs as well.

4. Responding to decision & error costs through deferral

Our theory is that, as a mechanism of constitutional deferral, "by law" clauses will help constitution-makers minimize decision and error costs, both in an absolute sense, and also, in many cases, relative to potential design substitutes, such as deliberate forms of constitutional vagueness, flexible amendment thresholds, mandatory periods of constitutional review and constitutional sunset clauses.

4.1. Reducing decision & error costs

"By law" clauses can potentially help reduce decision costs in two ways: first, by increasing the potential area of agreement among parties to constitutional negotiations; and second, by decreasing the costs to 'losing' parties of making specific constitutional concessions.

When it comes to decision costs, for example, it is surely easier for parties to a constitutional negotiation to agree that certain issues should be regulated by the constitution than to agree on how they should be regulated. It was certainly the case in the drafting of the U.S. Constitution that federalists and anti-federalists were able to agree on the decision explicitly to delegate to Congress issues such as whether to establish lower federal courts, even when they could not agree on the actual desirable scope of federal jurisdiction.[39] A similar calculus applied in Australia in the context of parallel provisions in Chapter III of the Australian Constitution concerning the establishment of lower federal courts.[40]

Indeed, in some cases agreement on *whether* to regulate may actually increase with the level of disagreement about *how* to regulate. To illustrate, both pro-life and pro-choice positions in Kenya agreed on the desirability of rules to govern abortion, even if they profoundly disagreed on what the rule ought to be. A promise of future regulation can help mobilize supporters, and can keep an issue alive so that there will be downstream pressures in favor of the desired position.

Delegating to legislatures also makes sense in thinking about error costs. If the issue is one on which the consequences of the policy will not be immediately apparent, then

[39] Richard Fallon et al., The Federal Courts and the Federal System (2003).

[40] John Andrew La Nauze, Making of the Australian Constitution 25 (1974) (noting initial proposal that the constitution itself create lower federal courts), 130-31 (noting small state opposition to new, costly federal institutions and manner in which compromise over "by law" clause was achieved).

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delegating to a future legislature shifts the decision to a body that will have superior information. The constitutional designer can either specify a particular time period within which regulation must occur, if there is an estimate as to when the informational environment will be ripe; or simply leave the timing up to subsequent legislatures, who are best positioned to decide not only on the nature of regulation but its timing.

Leaving an issue to be decided by future legislators also means that the substantive decision will be subject to the legislative majority threshold, rather than the typically higher threshold for constitutional amendment. This can also have a direct capacity to reduce ultimate error costs because any error costs that do occur down the road will therefore be more readily reversed than if they occur at the initial drafting stage.

Take the provisions of the 1996 South African Constitution concerning land redistribution. In the 1994 South African Constitution, the primary obstacle to agreement on the terms of a land clause had been broad disagreement between the National Party (NP) and the African National Congress (ANC) on the question of constitutional property protection: the NP was firmly committed to the protection of existing property rights and thus opposed to any provision for land redistribution other than on market terms; whereas an important faction within the ANC saw land redistribution—and thus weak constitutional protection of property—as fundamental to the transition to constitutional democracy.[41] By 1996, however, the more serious problem facing the Constituent Assembly in this area was the potential for serious error costs. There were new concerns about the capacity for any land reform, or redistribution program, to undermine South Africa's food security, export earnings and broader economic security. Even as early as the late 1980's, the Chair of the ANC's Constitutional Committee, Zola Skweyiya, had expressed concerns about the potential downstream effects of any land reform program on such outcomes in a new democratic South Africa.[42] By 1995-1996, demographic changes in South Africa, together with

[41] This difference between the two parties was well-illustrated by the very different draft constitutional property clauses they initially proposed at Kempton Park. The property clause proposed by the NP government provided that "every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of. . . any form of movable and immovably property" and that property could only be expropriated "for public purposes, subject to the payment within a reasonable time of an agreed compensation, or failing such an agreed compensation, [to] compensation in cash determined by a court of law according to the market value of the property." The ANC, on the other hand, had adopted a draft Bill of Rights, that provided that the government could acquire property in order to achieve the objectives of the Constitution [i.e. racial and economic transformation] and compensation for any such taking should be based on "an equitable balance between the public interest and the interest of those affected;" and requiring that legislation provide "that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure." Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution*, 11 S. Afr. J. Hum. Rts. 222, 224-26 (1995); see also Lungisile Ntsebeza, *Land Distribution in South Africa: The Property Clause Revisited, in* The Land Question in South Africa: The Challenge of Transformation and Redistribution (Lungisile Ntsebeza & Ruth Hall eds., 2007).

[42] Cheryl Walker, *The Limits to Land Reform: Rethinking 'the Land Question,'* 31 J. S. Afr. Stud. 805, 812 (2005).

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increasing uncertainty about the global climate and economic outlook had also substantially increased the level of informational uncertainty.[43]

The members of the South African Constituent Assembly were able to respond to the potential this created for error costs by expressly delegating the issue of land redistribution and restitution to the National Assembly. On the question of land redistribution, for example, the South African Constituent Assembly adopted constitutional language providing that the state *must* "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis;" and on the issue of restitution, it provided that the state *may* provide for legally secure tenure, or comparable redress, to persons "whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices."[44] Since 1996, the fact of this delegation has also meant that there has been broad flexibility for both the National Assembly and relevant Minister to amend the system of land reform, as new evidence has emerged about the viability of different forms of black agricultural ownership. For example, it has allowed for a shift the basis of land redistribution grants from a system that prioritized poor individual landholders to one that gave greater assistance to larger groups of applicants, and also the role of black entrepreneurs in the agricultural sector.[45]

By reducing specific error costs of this kind, constitutional deferral can also help reduce overall error costs, in a way that then helps promote the chances that the constitution as a whole will endure. To test this hypothesis more fully, we used a modified version of the hazard model presented in earlier work by Ginsburg with Elkins and Melton.[46] That work tested several models of constitutional endurance, and for our purposes here, we focus on a model that tests our main variable of interest, "by law" clauses.[47] We include controls for country characteristics, such as the level of ethnic fragmentation, democracy, wealth, and the lifespan of earlier constitutions. We also test the effects of other internal features of the constitution that were significant in the earlier model, such as the predicted amendment rate, judicial review, and the overall scope of topics regulated in the text. The results, presented in Figure 1, show that in general there is a positive relationship between constitutional deferral and endurance—i.e. that the use of "by law" clauses is clearly associated with

[43] *Id.* at 821-23.

[44] Const. of South Africa 1996, § 25.

[45] Compare the Settlement/Land Acquisition Grant (SLAG) program and Land Redistribution for Agricultural Development (LRAD) program, created under the auspices of the Provision of Land and Assistance Act of 1993. *See also* Provision of Certain Land for Settlement Amendment Act 26 of 1998 (amending the 1993 Act). Of course, this shift in 1997 has also attracted significant criticism from many supporters of land reform in South Africa: see, e.g., Edward Lahiff, *'Willing Buyer, Willing Seller': South Africa's Failed Experiment in Market-Led Agrarian Reform*, 28 Third World Q. 1577 (2007).

[46] *See* Elkins et al., *supra* note 10, at 126–33.

[47] Our model leaves out variables focused on shocks to the system that might impact constitutional life. For a description of all the variables, see Elkins et al., *id.*, at chapter six.

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VARIABLES	odds ratio (S.E.)
Amendment_rate	0.0004*** (0.0004)
Amendment_rate_squared	15.19*** (23.55)
Judicial Review	1.16 (0.16)
Scope	0.32* (0.20)
Detail	1.79 (1.59)
Left to Law clauses	0.95** (0.02)
Previous lifespan	0.003*** (0.003)
Democracy	0.65*** (0.09)
Ethnic fragmentation	1.79** (0.45)
Energy use	0.44 (0.86)
Age of State	1.00 (0.0003)
Early (1789-1914)	0.63** (0.11)
Middle (1914-45)	1.21 (0.20)
Observations	8,083

Figure 1. Hazard Model for Risk of Constitutional Death [hazard rates reported]. Note that coefficients under 1 indicate reduced risk of death, while those over 1 indicate increased risk and thus shorter life expectancy.

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a lower hazard ratio for constitutions. This result is statistically significant across alternative specifications of the model.[48]

4.2. Deferral v. alternative design strategies

4.2.1. *Potential alternative strategies*

When responding to decision or error costs, constitutional designers, of course, have the option of using a number of potential alternative constitutional design mechanisms, such as deliberate constitutional vagueness, flexible amendment thresholds, mandatory periods of constitutional review or constitutional sunset clauses, in addressing these problems of decision and error costs.

When it comes to concerns about decision costs, for example, the closest substitute for "by law" clauses, in most constitution making process, will be the deliberate use by constitution-makers of vague constitutional language in the drafting of particular constitutional provisions. Abstraction, as Cass Sunstein notes, can help parties to reach an "overlapping consensus" on particular constitutional issues, without necessarily agreeing on the reasons for that consensus, or how particular abstract principles ought to play out in particular concrete circumstances.[49] The benefit to abstraction, in this context, largely tracks familiar arguments in favor of constitutional standards, as opposed to rules.[50] Because of their relative clarity, rules reduce downstream litigation costs, but they also raise front-end decision costs, as they require more extensive negotiation and articulation. Standards, on the other hand, are more likely to be contested down the road, but economize on front-end decision costs. [51]

Another common strategy will involve the adoption of a flexible amendment threshold in a particular area. Where the amendment threshold is relatively low, the gap between constitutional and legislative decision-making is narrow. For parties to a constitutional design negotiation, this reduces the stakes of agreeing to an explicit form of constitutional compromise. If, at T2, a party gains increased political power, there is a real chance that it will be able to reverse the effects of a concession or

[48] We also examine what we identify below as a substitute method of deferral, constitutional vagueness (as captured in the model by its inverse, *detail*). Constitutional detail shows no statistically significant relationship with a constitution's predicted lifespan. See *infra*, text at note 59–62, for a discussion of vagueness as a potential substitute for deferral and a description of the detail variable. One plausible reason for this non-result, we suggest, is that vagueness tends to be used more frequently to address potential decision costs, which are sunk at the moment of constitutional design, as opposed to error costs, which may increase with time. Explicitly delegating matters to a future legislature can promote endurance because it puts decisions in the hands of the governmental actors best positioned to address error costs. Vagueness, on the other hand, delegates to courts who may be less well-positioned to take into account all relevant information in a particular policy area. We should also note that the full model reported in Elkins et al. found that detail *extended* constitutional life, so our non-result may be an artifact of our reduced model.

[49] Compare Sunstein, *supra* note 2, at 51–61.

[50] *See*, e.g., Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992).

[51] Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 Yale L.J. 848, 883 (2010).

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compromise at T1; whereas under a more entrenched constitution, there will be little chance of recouping a political loss in this way.

A closely related alternative will be for constitution-makers to adopt a requirement of periodic review for certain constitutional provisions, or to impose a "sunset" clause for particularly controversial constitutional articles. The strategy of periodic review, for example, was adopted by the drafters of the 1988 Brazilian Constitution, as well as by the drafters of various recent state-level rights charters in Australia, as described below. The provision in Art. I, §9 of the U.S. Constitution disempowering Congress from regulating slave importation for twenty years is a canonical example of the use of a constitutional sunset-clause.[52] Sunset clauses are also common in state constitutions in the U.S., as well as in many other national constitutions, such as the Australian Constitution of 1901, which originally capped the percentage of customs duties that the Commonwealth could apply to its own purposes for a 10 year period; limited the automatic power of the Commonwealth to grant state aid to a similar period; and allowed one state (Western Australia) to impose special import duties after the imposition of otherwise uniform customs duties, but only for a five year period.[53] Both of these strategies can reduce the expected time-frame for a particular constitutional compromise, and thereby lower the stakes to any losing party at T1 agreeing to such a compromise. This in turn can help reduce decision costs.

A good example of the use of periodic review involves the way in which drafters of the 1988 Brazilian Constitution managed to reach agreement on the adoption of a presidential system of government. The battle between advocates of parliamentarism and presidentialism was one of the central debates in the constitutional negotiation. In order to reduce the stakes of compromise for opponents of presidentialism, the presidentialistas agreed to a clause to allow for review of this choice five years after its adoption. As a result, in 1993, Brazil held a two-stage plebiscite to determine whether it should remain a republic or become a constitutional monarchy, and if a republic, whether it should retain presidentialism or adopt a form of parliamentarianism.[54] The constitution was to be subject to a revision on the basis of the plebiscite, to be implemented through a vote of an absolute majority of the members of the National Congress. That the referendum failed to produce a mandate for change may be attributable to path dependency, to learning on the part of the opponents of presidentialism, or to the status quo bias. But the key point is that the promise of future review facilitated compromise at T1.

[52] U.S. Const., Art. I, § 9, cl. 1. A number of other examples can be found in the Australian Constitution, which capped the percentage of customs duties that the Commonwealth could apply to its own purposes for a 10 year period; limited the automatic power of the Commonwealth to grant state aid to a similar period; and allowed one state (Western Australia) to impose special import duties after the imposition of otherwise uniform customs duties, but only for a five year period: see Const. of Australia 1901, §§ 87, 95.

[53] Const. of Australia 1901, §§ 87, 95.

[54] Javier Martinez-Lara, Building Democracy in Brazil (1996). Afghanistan's Hamid Karzai used the same technique after switching the constitutional structure from parliamentary to presidential, announcing at the Constitutional Loya Jirga that the decision could be revisited in five or ten years. Thier, *supra* note 23, at 554.

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In Australia, a mandatory review requirement played exactly this same kind of role in diffusing opposition to the decision to exclude second-generation rights from relevant rights instruments. In the Australian Capital Territory (ACT), for example, s. 43 of the Human Rights Act 2004 provided that the territory Attorney-General was required to conduct a mandatory "review the first year of operation of the Act" after two years, and specifically to report on whether rights under the International Covenant on Economic, Social and Cultural Rights and environment-related treaties should be included under the Act.[55] In Victoria, ss. 444-45 of the Charter of Rights and Responsibilities 2006 makes even more extensive provision for mandatory forms of review: it requires a review after four years that considers whether an even broader range of second- and third-generation rights should be included in the Charter and a further general review after five to eight years.

Constitutional vagueness, flexible constitutional amendment rules, mandatory review periods and sunset clauses are all potentially valuable mechanisms of reducing error costs. Unlike more rigid requirements for constitutional amendment, flexible constitutional amendment rules allow downstream decision-makers significant scope both to respond to correct any actual 'mistakes' made at T1, and to adjust to changing circumstances: a good illustration of this is the way in which the Lok Sabha, in India, has been able to amend the Indian Constitution in order to correct errors in the original process of constitutional drafting in 1949, such as those made in the context of provisions concerning affirmative action.[56] From an error cost perspective, as Jacob Gersen notes in the context of legislative sunset clauses, mechanisms such as sunset clauses can also provide "windows of opportunity for [decision-makers] to incorporate greater quantity and quality of information into legislative judgments."[57]

When we examined data from the CCP database, we also found empirical evidence to support the idea that these mechanisms do function as at least partial substitutes for the use of "by law" clauses. In other words, the use of "by law" clauses will tend to increase where constitutions are longer, or contain less flexible amendment procedures.

[55] Section 43(2).

[56] One such error was that, in spelling out the scope for positive discrimination in the context of employment under the constitution, the drafters failed to include similar provisions in connection with more general equality guarantees; and while this was almost certainly not intentional, given the desire of the drafters to provide wide-ranging redress to those historically disadvantaged by the caste system, it was read by the Indian Supreme Court as implicitly raising the bar to the government adopting such measures: see State of Madras v. Dorairajan, A.I.R. 1951 S.C. 227 (holding that the omission of these words from Art. 29 "cannot but be regarded as significant"). However, because of the relative ease of amending most provisions of the Indian Constitution, the Lok Sabha was readily able to correct this, by adding additional language clarifying the permissibility of such measures generally (in 1951), and then specifically in the context of education (in 2005): see Constitution (First Amendment) Act, 1951, s. 2; Constitution (Ninety-third Amendment) Act, 2005, s. 2 (w.e.f. 20-1-2006). But see also Burt Neuborne, *The Supreme Court of India*, 1 Int'l J. Const. L. (I·CON) 476 (2003); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Constitutional Perspective*, 4 Int'l J. Const. L. (I·CON) 460 (2006) (on the limits on the power of amendment imposed by the Basic Structure doctrine created by the Supreme Court).

[57] *See* Jacob A. Gersen, *Temporary Legislation,* 74 U. Chi. L. Rev. 247, 248, 267 (2007).

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Constitutional vagueness is, of course, extremely difficult to measure in an aggregate quantitative way. *Deliberate,* as opposed to inadvertent, constitutional vagueness is even more difficult to measure.[58] Nonetheless, we have utilized one imperfect measure of constitutional vagueness using the ratio between the number of words in a constitution and the number of "topics regulated" (defined by selecting 92 major topics of constitutional design from the CCP survey and asking whether or not the constitution contains provisions thereon).[59] For constitutional amendment rules, while again notoriously difficult to calibrate,[60] we constructed a measure of difficulty by using a dummy variable coded 1 if there was any mechanism for constitutional amendment that involved a threshold of 2/3 or less of the legislature.[61]

Using these measures, we then used a simple count model, a Poisson regression, to determine if these various indicators predicted more by-law clauses.[62] The dependent variable in this regression is simply the number of such clauses in the constitution. We included a number of control variables for country characteristics, including time, dummy variables for region (with Western Europe/North America being the omitted category), ethnic fragmentation, and the level of democracy of a country.[63] There are also variables associated with constitutional drafting, namely the presence of a constitutional referendum or public involvement in the drafting process, on the theory that these might tend to raise decision costs for drafters because of external pressure. We ran five separate models: a complete model, subsamples of democracies and autocracies, a model that leaves out drafting process variables and one that leaves out country controls. The results are presented in Figure 2 and are reported as incident rate ratios, in which values over 1 should be interpreted as increasing the probability of left to law clauses, while values under 1 indicate reduced probability. Consistent with our predictions, we found that as the specificity of the constitution increases, there were more left to law clauses, even controlling for the expanded scope. Common law constitutions also have consistently fewer left to law clauses. This may reflect the greater willingness of common law jurisdictions to trust courts with broad interpretive discretion, which would encourage the use of constitutional vagueness as compared to "by law" clauses. The results for constitutions with low amendment thresholds were also consistent with a substitution effect; generally, these constitutions seem to be less likely to leave things to law. Note that we also see a strong effect toward greater use of by law clauses for constitution-making processes that involve public

[58] *See supra* note 14.

[59] This is the measure of specificity used in Elkins et al., *supra* note 10.

[60] Rosalind Dixon, *Constitutional Amendment: a Comparative Perspective*, *in* Comparative Constitutional Law (Rosalind Dixon & Tom Ginsburg eds., 2011).

[61] On this measure, roughly half the constitutions in the sample had flexible procedures.

[62] A negative binomial model produces comparable results.

[63] James D. Fearon, *Ethnic and Cultural Diversity by Country*. 8 J. Econ. Growth 195 (2003). We think of ethnic fragmentation as a rough proxy for the effect of social and political disagreement on deferral. Fearon's fractionalization measure is a continuous one that increases with internal diversity and does not capture the intensity of internal cleavages, and is thus an imperfect measure of constitutional disagreements. For example, it might be the case that a country with three ethnic groups of equal size would be more divided than one with a large number of different small groups (i.e. highly pluralistic societies).

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	VARIABLES	(1) Full Model	(2) Democracies	(3) Autocracies	(4) Country characteristics	(5) Crisis and constitutional characteristics
Time	Year	1.003	1.002	1.005	1.004	
		(0.002)	(0.004)	(0.003)	(0.003)	
Country	Latin America	0.396***	0.378***	0.641	0.589	
Characteristics		(0.063)	(0.087)	(0.359)	(0.309)	
	Eastern Europe	0.454***	0.478***	0.648	0.669	
		(0.071)	(0.109)	(0.368)	(0.351)	
	Africa	0.803	1.033	1.082	0.997	
		(0.133)	(0.250)	(0.616)	(0.531)	
	Middle East	1.214	0.844	1.820	1.588	
		(0.207)	(0.267)	(1.016)	(0.827)	
	South Asia	1.361	1.579*	0.765	0.763	
		(0.292)	(0.432)	(0.584)	(0.561)	
	East Asia	0.432***	0.743	0.553	0.557	
		(0.080)	(0.230)	(0.312)	(0.299)	
	Common Law	0.593***	0.687**	0.639***	0.604***	
		(0.055)	(0.125)	(0.080)	(0.073)	
	Democracy	1.044	1.274*	1.063	0.979	
		(0.059)	(0.165)	(0.129)	(0.115)	
	Ethnic Fragmentation	1.122	0.710	1.351	1.533*	
		(0.199)	(0.232)	(0.316)	(0.347)	
	Domestic Crisis	1.031	0.862	1.039		1.189*
		(0.106)	(0.167)	(0.136)		(0.111)
	Economic Crisis	0.947	0.999	0.873		1.016
		(0.084)	(0.126)	(0.141)		(0.131)
	Democratic Transition	1.146	1.625*	1.207		1.271***
		(0.123)	(0.426)	(0.148)		(0.106)
	Authoritarian Transition	0.943	1.267*	0.830**	0.878	0.958
Constitutional		(0.065)	(0.156)	(0.074)	(0.077)	(0.063)
features	Low amendment threshold	0.764***	0.962	0.678***		0.836**
		(0.077)	(0.164)	(0.092)		(0.071)
	Public drafting process	0.928	1.248	0.802**		1.033
		(0.073)	(0.197)	(0.079)		(0.080)
	Public Promulgation	2.652**	0.593	6.468***	4.960***	11.69***
		(1.226)	(0.519)	(3.822)	(2.838)	(4.390)
	Specificity	5.891***	11.50*	3.474*	3.108	1.104
		(3.565)	(15.40)	(2.576)	(2.282)	(0.580)
	Constant	0.00205	0.0195	5.87e-05	0.000144	0.658
		(0.010)	(0.174)	(0.001)	(0.001)	(0.182)
	Observations	278	102	176	176	323

*** p<0.01, ** p<0.05, * p<0.1

Figure 2. Poisson Model: Determinants of By Law Clauses [i.r.r. ratios reported; standard errors in parentheses]

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promulgation through referendum. Such constitutions may involve higher decision costs because of enhanced attention to the work of drafters.[64]

4.2.2. *The advantages of deferral*

Despite this potential substitution effect, however, we argue that constitutional deferral will still often offer parties a *greater* chance of minimizing overall decision and error costs than alternative design strategies. Constitutional vagueness is by definition an inherently ambiguous constitutional design choice: in some cases, it may be the product of a deliberate decision to delegate to future constitutional decision-makers, but in others, may reflect a decision to leave a particular issue to the sub-constitutional domain, or even simply be an oversight on the part of constitution-makers. Where constitution-makers do choose deliberately to rely on constitutional vagueness as a strategy, they always run some risk that their decisions will be misinterpreted by future actors, as (a more or less deliberate) decision *not* to address a particular constitutional issue. Where this occurs, it may also lead those later decision-makers to treat an issue as less worthy of constitutional-style deliberation and attention than constitution-makers in fact intend.[65]

Another potential disadvantage of constitutional vagueness, relative to "by law" clauses, is that it can involve greater second-order disagreement as to who is the appropriate actor to decide a particular constitutional question. In principle, both courts and legislatures are equally capable of "implementing" vague constitutional standards.[66] While in practice courts are likely to play a major role in interpreting most such provisions,[67] the very ambiguities associated with them may undermine consensus about who is to resolve them. By-law clauses, by contrast, tend quite clearly to identify at least the *primary* forum for future decision-making.[68]

For some, the tendency of vague constitutional provisions to allocate responsibility for future constitutional decision-making to courts, as opposed to legislatures, is also a distinct disadvantage to such provisions compared to "by law" clauses. In particular, the greater representativeness and responsiveness of legislatures compared to courts means that, for many constitution-makers, as well as constitutional theorists, legislatures have clear advantages as constitutional decision-makers from the perspective of democracy.[69]

[64] Jon Elster, *supra* note 7, argues that transparent processes are more conducive to arguing than hard bargaining because the decision-makers will consider their external audiences. In our terms, this would raise decision costs by disincentivizing deal-making.

[65] For an example of the consequences might be of a decision to classify an issue as constitutional, as opposed to sub-constitutional, see, e.g., John Rawls, Political Liberalism (2005) (1971) (arguing that the requirements of "public reason giving" apply to all matters involving "constitutional essentials" but not other background issues).

[66] For this term, see Richard Fallon, Implementing the Constitution (2001). For the argument that legislatures are in fact better, see Adrian Vermeule, Law and the Limits of Reason (2008); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. Legal Analysis 1 (2009).

[67] Compare Ran Hirschl, Toward Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[68] Courts, of course, often play a secondary role in delimiting the scope of such decision-making authority, or forcing legislatures to act.

[69] *See*, e.g., Jeremy Waldron, Law and Disagreement (2001).

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Compared to flexible amendment procedures, mandatory review or sunset clauses, "by law" clauses will also have the clear advantage of reducing the danger of constitutional "stickiness" at T2.[70] When it comes to constitutional amendment, for example, there will often be much higher *informal* political hurdles to legislatures passing an amendment than to simply deciding an issue for the first time. Stickiness can come from political path dependency, or cognitive biases in favor of the status quo. This can mean that constitutional losers face a far lower chance of ultimately recouping their 'losses', if they rely on flexible amendment rather than on explicit delegation to the future. Stickiness also means that amendment is far riskier strategy, from an error costs perspective.

The more squarely a particular political choice is regarded as constitutional, as Stephen Griffin notes, the more costly it often is, politically, for legislators to propose changes to that instrument.[71] This makes it less likely that legislators will enact measures designed to reverse error costs, made at T1, when those decisions are understood to have a constitutional rather than purely legislative character.

The practical difficulty of correcting errors at T2 may be particularly acute with regard to issues that involve either very low or very high stakes. In low stakes cases, the potential gains from correcting particular constitutional "errors" will be sufficiently small that, in many cases, they simply do not outweigh the informal political costs involved for legislators, and cannot generate sufficient interest among voters to lead to popular, or direct, constitutional change. (A good example of this involves provisions in many U.S. state constitutions governing the mandatory retirement age for state judges: while such ages are often agreed to be too low given demographic changes since the time of their enactment, few legislatures have been willing to expend the political capital necessary to propose amendments to such provisions, and no such change has passed by popular initiative.[72])

In "high stakes" cases, the potential partisan dimension to the issue can also make amendment extremely difficult in practice. Major political parties often benefit from maintaining a distinct position that is noticeably different from those of rival parties on core constitutional questions. There will in such cases be clear disincentives to individual legislators voting against their party—or "crossing the floor"—on such issues. By itself, partisanship can be sufficient to defeat any realistic chance of constitutional amendment in many high stakes areas[73] because few democratic constitutions have

[70] "Stickiness," of course, may also have some benefits, given the importance of some basic level of overall constitutional stability or settlements. (On the benefits of stability, or constitutional settlement, see, e.g., Holmes, *infra* at note 101 and Eisgruber, *infra* at note 102). From the perspective of specific constitutional issues, however, stickiness that is unrelated to support for a particular constitutional norm seems more problematic.

[71] Stephen M. Griffin, *The Nominee Is . . . Article V*, *in* Constitutional Stupidities, Constitutional Tragedies 51 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). Griffin makes this argument most specifically in the context of the U.S. Constitution, but others have made similar arguments in a comparative context. *See*, e.g., Janet L. Hiebert, Limiting Rights: The Dilemma of Judicial Review (1996).

[72] *See* Christopher McFadden, *Judicial Independence, Age-Based BFOQS, and the Perils of Mandatory Retirement Policies for Appointed State Judges,* 52 S. Carolina L. Rev. 81 (2000); G. Alan Tarr, *Designing an Appointive System: The Key Issues,* 34 Fordham Urban L. J. 291 (2007).

[73] In the U.S., see, e.g., Jane J. Mansbridge, Why We Lost the ERA (1986).

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amendment rules that practically speaking will allow a *single* governing party to pass major constitutional amendments.[74] A similar analysis applies to related constitutional design solutions, such as those involving a system of periodic review of the constitution.

In the case of mandatory review periods, if the process of review occurs at a very early stage after the adoption of a constitution, as for example in the ACT in Australia, it is quite possible that there will be limited political will to revisit the particular issue—the relevant actors will simply be too exhausted, in terms of energy and resources, to contemplate another major constitutional battle. Furthermore, the political cleavages that motivated deferral in the first place may still be intact. Something like this seems to have occurred in Iraq, in which the Constitution called for a Constitutional Review Committee to be constituted immediately and to propose a package of amendments within four months.[75] It took nearly a year to form the Committee and much longer to generate proposals, which, at this writing, are bottled up in parliament. This example illustrates that short-term review can simply shift decision costs from T1 to T2, without allowing sufficient time to allow political conflict to resolve.

If, on the other hand, review occurs long after the initial adoption of a constitution, the entire constitution may by then have assumed a sufficiently hallowed public status that it is extremely difficult, as a practical matter, to amend even provisions that at T1 were extremely controversial in the eyes of many. A good example of this involves s. 33 of the Canadian *Charter of Rights and Responsibilities* 1982, or the so-called "notwithstanding clause," which was extremely controversial at the time it was adopted,[76] but which by 2006 was so widely viewed as integral to the Charter framework that proposals by liberal leader Paul Martin to prevent its use were met with little public or elite support.[77]

One potential response to the problem of stickiness, under a flexible amendment or mandatory review requirement, is for a constitution-maker to adopt a constitutional "sunset clause" as described in section 4.2.1. From a decision cost perspective, such a clause clearly has even greater potential than a flexible amendment rule, or mandatory review requirement, to lower the stakes to any losing party at T1 of agreeing to a particular constitutional compromise. The problem with such clauses in a constitutional context in particular, however, is that a default of *zero* constitutional regulation may also introduce significant new decision costs associated with uncertainty over which governmental bodies, if any, have authority to regulate. These costs are also likely to be particularly high where (unlike what many of the U.S. framers believed in relation to slavery)[78] a constitutional controversy is likely to remain live well

[74] India is, of course, one clear exception to this, though it is likely not an exception that was contemplated by the framers of the 1950 Indian Constitution. South Africa has also come close to becoming an exception in this regard in recent years.

[75] Const. of Iraq, Art. 142.

[76] *See* Hiebert, *supra* note 71, at 4–5.

[77] CBC News, *Martin wraps campaign in constitutional pledge*, available at http://www.cbc.ca/story/canadavotes2006/national/2006/01/09/elxn-debates-look.html (last visited Mar. 22, 2011).

[78] *See*, e.g., Rakove, *supra* note 35, at 87-88.

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beyond the initial sunset clause period. For this reason, constitutional sunset clauses are likely to be far closer to a complement to, rather than substitute for, constitutional deferral.[79]

In sum, deliberate constitutional vagueness, low amendment thresholds, review periods and sunset clauses may help to address problems of decision costs and error costs. But in many instances deferral will offer the design solution that is best able, from the perspective of rational decision makers, to minimize all of these expected costs at T1.

5. Contexts for and types of deferral

Given the benefits of "by law" clauses relative to the various alternatives, this section considers when it is most likely that constitution-makers will in fact utilize "by law" clauses of different kinds as a response to decision and error costs. It also presents data from the CCP on the use of these clauses.

5.1. Specific subjects of deferral

What issues are most frequently the subject of decisions to defer? If constitution-makers are concerned about decision costs, deferral seems most likely in the context of issues that are either very high or low stakes. In the face of various constitutional disagreements, in the first instance at least, constitution-makers may often choose to spend time and political resources addressing the highest stakes disagreements. They will then often face significant time-constraints in dealing with many lower-stakes issues. When they succeed in reaching agreement on the high stakes issues, they may feel a commitment to preserving these gains in a way that reduces the risks—or costs—of continued disagreement on lower stakes issues, leading to deferral of the latter.

A good example of this kind of process at work occurred in Australia in the 1890's during the drafting of the federal constitution. A key cleavage, as in the U.S. a century beforehand, was between large and small states. The most important and controversial issue for the drafters of the constitution was the issue of whether the Senate would have control over money bills.[80] Having reached a compromise on that question in 1891, thereafter most representatives from small *and* large states were reluctant to risk derailing constitutional negotiations by continuing to air disagreements over questions of more moderate stakes, such as the constitutional regulation of state tariff levels or the distribution of surplus federal revenue.[81] Instead, subject to certain

[79] *See*, e.g., Const. of Australia, Ch. IV (adopting various sunset clauses, in combination with interim default arrangements, in the context of controversies over federal tariffs, customs duties and the appointment of federal revenue).

[80] John Andrew La Nauze, The Making of the Australian Constitution 41, 43, 71-72 (1972).

[81] *Id.* at 72 (discussing 1891 deliberations on the issue of the apportionment of federal revenue); 181 (discussing 1897 deliberations on the issue of state solvency and the distribution of federal revenue); 212-215 (discussing 1898 deliberations on the approach to state tariffs). A similar willingness to compromise was evident, though more between liberal and conservatives, on the method of electing members to the house of representatives: *id.* at 72, 80-81.

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transitional provisions, they chose explicitly to defer decision-making on these issues to future legislators.[82]

In a smaller number of cases, constitution-makers may also choose to defer issues that are clearly high stakes in nature—simply because these are issues on which it is impossible to reach any concrete agreement. Often, the failure to reach agreement on these issues can be enough to defeat the entire constitution-making process, thus making decision costs in the particular area disproportionately high.

The danger of *not* leaving such high-stakes issues undecided is well-illustrated by recent experience in Kenya. In 2010, constitution-makers in Kenya were being pressured to include a provision on abortion. Christian groups wanted an absolute ban on abortion, but the prior constitution had been silent on it, and the initial draft remained so.[83] Members of parliament, in reviewing the draft, inserted quite strict language prohibiting abortion.[84] The Committee of Experts charged with drafting the document, however, amended this to allow significantly broader access to abortion on therapeutic grounds.[85] This in turn led to mobilization of church groups to urge a "no" vote in the referendum. It also led to controversy in the United States, where members of Congress challenged U.S. government support for the drafting process on the grounds that it constituted illegal lobbying for abortion rights.[86] Combined, the pressure over the abortion issue was itself almost sufficient to defeat the entire constitution-making enterprise. It was the single biggest topic of public debate, and, with vocal church-based opposition, many observers in the spring of 2010 feared that the constitution would not pass. In the end, it did pass, with a healthy margin of 67% in favor.[87] But the vote was arguably much closer than it would have been had the constitution remained silent on abortion.[88]

By contrast, from the perspective of a concern about error costs, decisions about deferral seem likely to depend on a stronger combination of the stakes involved and also the anticipated actual likelihood of error.

We are able to draw on data from the CCP to provide some insight into these conjectures. Table 2 provides some detail on the nature of the clauses in question. The most common issue specifically left to ordinary law concerns citizenship. Perhaps unsurprisingly, many of the rules governing the legislature itself are left to ordinary law, as

[82] *See* Const. of Australia, Ch IV.

[83] Harmonized Draft Const. of Kenya, 17th November, 2009, Art. 35.

[84] Revised Harmonized Draft Constitution of Kenya, 29 January 2010, Art. 25(4) ("Abortion is not permitted unless in the opinion of a registered medical practitioner, the life of the mother is in danger.").

[85] Proposed draft Constitution of Kenya, 23 February 2010, Art. 26(4) ("Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.").

[86] LifeSiteNews.com, *More U.S. Taxpayer Funds for Pro-Abortion Kenyan Constitution: Rep. Smith*, available at http://www.lifesitenews.com/ldn/2010/may/10052606.html (last visited Feb. 4, 2011).

[87] Jeffrey Gettleman, *Kenyans Approve New Constitution,* N.Y. Times, August 5, 2010, at A7.

[88] *Id.*

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Table 2: Most frequent issues left to law (n=577 constitutions that defer at least one provision)

Topic	# Constitutions (%)
Qualifications of citizenship	144 (.25)
Legislator qualifications	126 (.22)
Naturalization conditions	110 (.19)
Legislator salaries	100 (.17)
Eligibility for voting	90 (.16)
Replacement of legislators	68 (.12)
Removal of judges	63 (.11)
Judicial selection	62 (.11)
Level of compensation for expropriation	59 (.10)
Outside employment of legislators	54 (.09)
Judicial qualifications	52 (.09)
Election system for legislature	46 (.08)
System for local elections	42 (.07)
Qualifications for head of state	41 (.07)
Retirement age for judge	39 (.07)
Conditions for state of emergency	36 (.06)
Right to marriage	24 (.04)
Exemption from military service for conscientious objectors	23 (.04)
Extradition	22 (.04)
Electoral system for head of state	20 (.03)

are rules about selecting and removing judges. The level of compensation for expropriation is another area typically left to ordinary law.

This list is also entirely consistent with the idea that constitutional deferral is most likely in areas where there is *either* a very high chance of error costs (even if the stakes involved are relatively low) *or* moderate to high decision costs. Constitutional provisions involving numerical cut-offs (such as dollar amounts or ages), for example, are frequently deferred. (Examples in this category included constitutional provisions dealing with the compensation of legislators, or appointment and retirement age of judges.) If constitutionalized (which, historically, has frequently been done), these are also all rules that, given long-run patterns regarding inflation and population change, are almost certain to involve error costs if wholly fixed at T1.[89]

Another area in which we found the use of "by law" clauses to be common concerns the rules governing the qualification of electors or citizens, or the method of electing and replacing legislators. Both areas are also quite clearly ones involving potentially high stakes. For countries or territories such as Israel or Hong Kong, for example, debates over citizenship affect not only the allocation of various social, economic and political benefits, but also core definitions of national or collective

[89] *See* Dixon, *Updating Constitutional Rules, supra* note 32.

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identity.[90] Similarly, as the Iraqi experience discussed in the next part makes clear, debates over electoral regulation can affect not only who governs but also whether there is in fact any government *at all* in a new constitutional democracy.

5.2. Modalities of deferral

What factors influence the kinds of "by law" clause used in various different constitutional contexts? There are, as noted at the outset, two potential classes of "by law" clause: those that that explicitly empower the legislature to decide certain issues, and thus represent a *strong* form of deferral about both whether and how to regulate on a particular constitutional topic; and those that *require* the legislature to decide certain constitutional issues, and thus represent a *weaker* form of deferral in terms of how much discretion they leave downstream decisionmakers.

Clauses may also differ in how *broadly* they delegate discretion to future decision-makers on how to regulate particular constitutional issues. Some "by law" clauses, for example, give extremely broad discretion to future legislators as to how to approach a particular constitutional issue, and also decline to regulate how constitutional arrangements must operate in the interim. Other clauses contain both substantive and procedural limits on how future decision-makers may approach particular constitutional issues, and also interim constitutional arrangements, all of which can combine to make the relevant delegation much narrower.

To illustrate the four different kinds of "by law" clause, we can look at examples of constitutional provisions involving the regulation of qualifications for voting. A good example of a clause that is both weak and narrow in this context, for example, is Art. 44 of El Salvador's 1883 constitution, which simply states that "(a)ll Salvadoran citizens possess the right of suffrage [and] the exercise of this right *will be* regulated by a Law." This clause requires the legislature to regulate the exercise of the franchise, while simultaneously prohibiting it from imposing any substantive limit on universal access (by citizens) to the franchise.[91] A similar, though more complex, example was the clause in Haiti's 1950 Constitution that required the legislature to pass a law regulating access to the franchise, but also limited the breadth of this delegation in two key ways: first, by providing that women were entitled to vote in

[90] Consider, e.g., the controversy over the decision of the Hong Kong Court of Final Appeal in Ng Ka Ling v. Director of Immigration, 1 H.K.L.R.D. 315 (1999). *See* discussion in Frank Shihong Hong, Ng Ka Ling v. Director of Immigration. *2 HKCFAR 4. Court of Final Appeal of the Hong Kong Special Administrative Region, January 29, 1999. Lau Kong Yung v. Director of Immigration*, 94 Am. J. Int'l L. 167, 167-71, 170-71 (2000). For controversy over the issue prior to 1999, see also Robin M. White, *Nationality and Hong Kong: A Tragedy in Five Acts?*, 6 Asia Pacific L. Rev. 23 (1998). On Israel, see Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8 Theoretical Inq. L. 603 (2007); Daphne Barak-Erez, Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights, 6 Int'l J. Const. L. (I·CON) 184-192 (2008); see also *Adalah v. Minister of the Interior*, [2006] HCJ 7052/03 (Isr.) (family unification of Israeli Arab citizens and Palestinian spouses).

[91] Art. 44. (our emphasis).

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municipal elections pending such legislation, and second, by requiring that the legislature continue to enfranchise women in whatever such legislation it passed.[92]

An example of a clause that is both strong and broad, by contrast, is Art. 44 of China's 1978 Constitution, which provides that "[a]ll citizens who have reached the age of eighteen have the right to vote and to stand for election" but also that the legislature *may* make "exceptions" to this right by law. This gives the National People's Congress the discretion whether to regulate and how to do so.

For examples of more hybrid cases involving clauses that are either weak and broad, or strong and narrow, consider the 1962 Burundi and 1959 Nepalese constitutions. The Burundi document provides that "[t]he status of Murundi [citizen] *shall* be acquired, retained and lost in accordance with rules established by law". This provision does not allow the legislature discretion in *whether* to regulate, but does provide broad discretion in how to do so. Contrast the 1959 Constitution of Nepal, which provides that "every citizen of Nepal, male or female who has attained the age of twenty-one years shall be entitled to one vote in one electoral district" subject only to "any law relating to the periods of residence, qualifying dates, or other matters incidental to the preparation of electoral rolls, and disqualification on grounds of insanity, or crime or corrupt or illegal practice".[93] Here the legislature is given discretion as to whether to regulate, but only on certain topics.

There are likely to be a number of different factors that affect both the strength and breadth of constitutional delegation. The most relevant factor in incentivizing strong delegation is likely to be decision costs. Where error costs are the most pressing reason for not fully deciding a constitutional issue at T1, there will often be far less need to defer the question of *whether* to regulate a particular constitutional issue: there will be quite clear agreement among decision-makers that future attention to an issue is both necessary and appropriate. On the other hand, where decision costs are more pressing, there is a greater chance that constitutional decision-makers will disagree both about how and whether to regulate, so that delegation will also often tend to be much stronger.

As to the breadth of delegation, the most relevant factor is likely to be the absolute magnitude of both error and decision costs. Where both potential error and decision costs are (or are likely to be) relatively low, for example, constitution-makers seem unlikely to delegate broadly: they have little reason in such a context to sacrifice such broad control over the substance of future constitutional decision-making. Where either form of cost is high, by contrast, the scope of delegation may be quite broad—because constitution-makers are either unwilling *or* unable to impose significant constraints on future decision-makers. In more intermediate cases, the scope of delegation may be more moderate and constrained.

Overall, this analysis suggests three broad patterns of delegation: delegation that is weak and narrow, and explained by the existence of concern over error costs with relatively moderate decision costs; delegation that is both strong and broad, and associated

[92] Const. Haiti, art. 4 (1950).

[93] Art 22(4).

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with high error *and* decision costs; and delegation that is either strong and narrow, or weak and broad, and consistent with more mixed, or moderate, combinations of high and low cost across the two different dimensions.

To examine these hypotheses empirically, we looked at a sub-sample of "by law" clauses involving the regulation of qualifications for voting, as involving one of the issues most frequently delegated to future decision-makers.[94] In a sample of eighty-one constitutional provisions, we found, first of all, that there examples of each of the four different kinds of "by law" clause; and, second, that constitution-makers tended to favor weaker and narrower forms delegation that somewhat constrained subsequent legislatures over forms of delegation that were more open-ended.[95] Fifty-eight out of the eighty-one provisions we examined *required* subsequent legislative action rather than merely permitting it, and sixty-four had some sort of substantive limitation on subsequent legislative action. In our account, *requiring* subsequent legislative action is consistent with weak delegation and imposing substantive limits is consistent with narrow delegation. This suggests that for the issue of voting qualifications, concern over error costs is particularly important. Constitutional designers seem to recognize that ideas about suffrage may change over time, and that there is a need for legislatures to be able to adjust qualifications in response to changing circumstances. At the same time, they frequently cabin this authority within narrow confines, perhaps to ensure core principles of equality.

6. Dangers and an optimal level of constitutional deferral?

Whatever the general benefits, and prevalence, of "by law" clauses as a design strategy, it is also important to recognize that such a mechanism will also inevitably have potential costs. This section describes some of the risks and considers whether there is an optimal level of constitutional deferral.

As a practical matter, some issues are ones regarding which it would make no conceptual sense to delegate down the road. As Professor Vermeule points out, for example, the legislature is incapable of deciding some issues for itself, such as the date of its first meeting, or its initial quorum and voting rules.[96] At the very least, these are issues that, if the constitution-makers were to delegate to the legislature, would very likely involve significant decision costs for the first legislature.

For other issues, delegation will also carry a range of other potential dangers, in addition to the problem of reduced constitutional influence for constitution makers noted at the outset. Perhaps most important, if over-used, "by law" clauses may

[94] Despite the size of the CCP database, the numbers of "by law" clause for any given topic and the lack of data coverage for the independent variables analyzed in Figure 2 meant that it was not possible to conduct any meaningful multivariate analyses on this question.

[95] Table 2 refers to 90 constitutions that defer this issue. Our sample is 81. The remaining nine clauses in the full sample were not examined yet because of translation issues.

[96] *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 Univ. Chicago L. Rev. 361 (2004) (identifying rationales for constitutionalizing issues that might be left to the legislature, including a comparative advantage in information, might be free of cognitive biases, and might act in a more public spirited manner).

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overburden the institutional capacities of future legislatures in ways that may not only threaten the success of specific instances of constitutional deferral, but also the success of the whole enterprise of constitution-making.[97]

Constitutions are required to perform a complex mix of functions. One key role of constitutions in many countries, for example, is to provide a mechanism for *unsettling* prior political practices and assumptions.[98] Without the pressure constitutions can create to re-examine such choices, there will often be little impetus for a polity to make progress toward realizing goals of liberal constitutional legitimacy.[99]

At the same time, if a constitution does not *settle* at least certain basic procedural questions, it will generally be impossible for democratic institutions to function effectively. As Stephen Holmes notes, "a collectivity cannot formulate coherent purposes apart from all decision-making procedures"; and thus, unless citizens "tie their own hands, with the help of their predecessors, 'the people' will be unable to deliberate effectively and consistently."[100] Similarly, if a constitution does not settle, even temporarily, the most controversial and divisive political controversies, legislatures and executive bodies may be unable to perform even the most basic government functions.[101] As Christopher Eisgruber suggests, "[i]f a polity is consumed with endless debates about how to structure its basic political institutions, it will be unable to formulate policy about foreign affairs, the economy, the environment and so on."[102]

As a mechanism for addressing decision costs, delegating to future legislatures can therefore carry clear risks, as well as benefits. This will particularly be so where the issues involved are high rather than low stakes questions. It may be tempting to delegate high stakes issues, precisely because decision costs are likely to be higher at the time of drafting. But delegating brings a risk that the issue will never be addressed at all. To give one example, the 1964 Afghan constitution allowed for creation of new political parties, but the implementing legislation was never passed. This failure deprived the country of a crucial mechanism for institutionalizing democracy.[103] This had feedback effects, deepening legislative gridlock and paving the way for a coup nine years later.[104]

Another example concerns Iraq, and the decision by constitutional drafters in Iraq expressly to delegate numerous high stakes issues—such as the design of the electoral process and much of the scheme for national oil revenue sharing—to future legislators. There were clearly good reasons for these decisions, given the extraordinary

[97] Constitutional vagueness may, of course, also carry similar dangers. The degree to which this is the case will likely depend on the degree to which courts have discretion to control their docket: the more such discretion they have, the less likely it is they will be overburdened by the fact of delegation, but conversely, the more scope there is for them to avoid addressing core constitutional questions.

[98] Compare Louis Michael Seidman, Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review (2001).

[99] Compare Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986).

[100] Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 167 (1997).

[101] Christopher L. Eisgruber, Constitutional Self-Government (2001).

[102] *Id.* at 13.

[103] Thier, *supra* note 23, at 537.

[104] *Id.* Indeed, some would argue that the continued failure to develop political parties ensures that this iteration of Afghan democracy will also fail.

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timetable being applied to the constitution-making process, and the sharp divisions within the Iraqi polity on these questions in 2004. However, these decisions also imposed severe strain on the capacities of the new Iraqi parliament: a basic election law was not passed by the parliament until 2009;[105] and no national oil law has yet been passed, at the time of writing.[106] A perverse consequence of the decision to delegate was also arguably to make the stakes of future government formation disproportionately high: this fact itself may be one reason why Iraq took nine months to form a government after the most recent parliamentary election.

If constitution-makers decide to defer truly high stakes constitutional issues it may be desirable for them to combine this strategy with the adoption of certain interim default constitutional arrangements, which govern unless and until subsequent legislation is actually passed. This, for example, was the approach adopted by the drafters of the Australian Constitution in respect of various moderate-stakes issues governing qualifications and procedures for voting in federal elections.[107] The result was that there was no practical consequence to the fact that legislation was passed in the first case only one year after federation, but in the latter case, only after seventeen years.[108]

Even where delegation occurs with regard to lower stakes issues, there is a danger that the effectiveness of particular constitutional constraints or requirements will be undermined by the failure of legislatures to prioritize the need to legislate in areas where they are explicitly permitted, or even *required* to do so.[109]

The dangers of failed delegation can be addressed somewhat through a judicial enforcement mechanism. On occasion, constitutional courts *have* been willing to demand that legislatures pass particular rules in response to constitutional and legislative lacuna.[110] Furthermore, the presence of a provision in the constitution can produce political pressure on the downstream legislature to regulate. However, in many cases inertia in the legislative process will be sufficiently powerful that neither of these sources of pressure will be sufficient to ensure that legislatures in fact pass any form of regulation in response to a particular area.[111]

[105] BBC News, *New Iraqi Election Law Approved*, http://news.bbc.co.uk/2/hi/8398377.stm (last visited Mar. 22, 2011).

[106] *See* Briefing by U.S. Ambassador to Iraq, Christopher R. Hill, Washington DC, August 17, 2010.

[107] *See* Const. of Australia, §§ 30, 31.

[108] Compare Commonwealth Franchise Act 1902 and Commonwealth Electoral Act 1918.

[109] One arguable example of this, though it involves what is clearly a qualified form of mandatory obligation, involves Art 44 of the Indian Constitution, and the obligation of the state "to endeavour to secure for the citizens a uniform civil code throughout the territory of India." See, e.g., Maharishi Avadesh v. Union of India, [1994] 1 Supp S.C.C. 713 (India) (dismissing petition seeking a writ of *mandamus* against the Government of India with respect to implementation of a common civil code, taking the view that this was a matter for the legislature). *See also* Pannalal Bansilal Patil v. State of Andhra Pradesh, [1996] 2 S.C.C. 498 (India) (observing that a uniform law for all persons might be highly desirable, but its enactment in one go might be counter-productive for the unity of the nation).

[110] Massachusetts v. EPA, 549 U.S. 497 (2007); Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Tom Ginsburg, Judicial Review in New Democracies (2003).

[111] On burdens of inertia in the legislative process, see, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35 (1993); William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 87-95

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A good example of this occurred in Brazil, in the context of many of the "by law" clauses adopted in the 1988 Constitution. The Brazilian Congress was itself responsible for drafting the constitution, and the unwieldy process of drafting the document, which involved a very large body of several hundred legislators, dozens of subcommittees, and a process of popular initiative that generated a large number of proposals. This process facilitated a good deal of detail in the constitution, as interest groups argued for their various pet provisions, and obtained 122 amendments to the draft. Some of these were incredibly detailed, such as a promise that education would receive 18% of the national budget as a constitutional matter, and establishment of a maximum interest rate of 12%. But on many other issues, high decision costs led the drafters to delegate to the future. One observer calculated that the Constitution would require 314 new laws and 56 complementary legislative acts to be implemented.[112]

Subsequent elections, which have used the open-list proportional representation system, have produced highly splintered congresses and a good deal of legislative inertia. Open-list PR features votes for individual candidates in a general pool, whose vote shares are then aggregated by their party. It weakens party affiliation, and since 1988, no political party in Brazil has ever won an outright majority in Congress; indeed, only once has a single party garnered more than 20% of the seats.[113] As of this writing, former President Lula's Workers' Party is the largest in the Congress, with only 15% of seats in the lower house. Instead of an effective legislative body, Brazil has developed an executive-led political system, with the courts playing a major role.[114] This has compensated for legislative weakness and inertia, but has also led to the failure to "complete the pass" thrown to Congress in 1988. The overall result was that leaving issues to ordinary law was to leave them permanently undecided, or resolved by other actors (e.g., the executive, the courts, state governments) against the intention of the drafters.

If constitutional deferral leads to the failure of legislators or courts to decide key constitutional questions, or indeed to fail in performing their basic democratic functions, this will also have clear implications for the endurance, as well as optimality, of a constitution. It will tend directly to undermine popular support for the existing constitutional system in a way that also increases support for efforts to create new governmental arrangements by extra-constitutional means. It may also create a legal vacuum that creates a breeding-ground for private forms of 'regulation' and policing that undermine popular support for constitutional norms governing the use of force. (This, for example, is arguably exactly what has happened in the Kurdish region of Iraq, as a result the failure to pass a national oil law in Iraq.[115])

(1994); Rosalind Dixon, *A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue & Deference*, 47 Osgoode Hall L. J. 235 (2009).

[112] Martinez-Lara, *supra* note 54, at 120.

[113] Political Database of the Americas, http://pdba.georgetown.edu/ (last visited Mar. 22, 2011).

[114] Matthew Taylor, Judging Policy: Courts and Policy Reform in Democratic Brazil (2008).

[115] The failure led to the assertion by the region of authority to pass its own law, with a correspondent loss of popular authority for the national government: see *Iraq's Economy: Oil's Not Well in Iraq*, The Economist, April 20, 2007.

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All this suggests that there may in fact be a complex relationship between constitutional "optimality"—when judged from the perspective of both constitutional substance and endurance—and the overall level of deferral by constitution makers.[116] If constitution makers engage in little or no deferral, constitutions will frequently involve significant error costs from the perspective of subsequent decision makers, and because of this, be subject to significant pressures for whole-scale constitutional replacement, as opposed to amendment. This can also affect the likelihood that a particular constitution will endure, over time.[117] On the other hand, if constitutions involve extremely *high* levels of deferral, they may also be less likely to endure.

7. Conclusion

We tend to view constitution-making efforts as moments of high politics, when foundational principles are decided to govern more mundane political decision-making. But it is frequently the case that constitution-makers decide *not* to decide the substance of a particular matter but instead explicitly to delegate it to future legislatures. This can be a response to the inevitable scarcity of drafting time and political agreement, which we identify as sources of decision costs. It can also make good sense when the likelihood that deciding the issue too early will risk error costs. Consistent with this prediction, we also find that various predictors of decision costs, and concerns about error costs, bear some empirical relationship with the frequency with which "by law" clauses are used.

Various alternative mechanisms have the potential to be partial substitutes, and we find that there is an inverse relationship between the use of "by law" clauses and alternative strategies such as (deliberate) constitutional vagueness and flexible amendment procedures. One reason for this, we suggest, is that "by law" clauses will often do better in addressing both decision and error costs of this kind. A common law judiciary also forms a kind of institutional substitute to leaving things to the legislature.

Compared to deliberate constitutional vagueness, "by law" clauses increase the likelihood that key constitutional issues will in fact be decided by future decision-makers in an appropriately reasoned, deliberative manner. For many, "by law" clauses will also enjoy important additional democratic advantages, in terms of the relative power they allocate to legislatures as compared to courts.

Compared to flexible amendment procedures, "by law" clauses will often do better at creating true flexibility to respond, over time, to new information or circumstances bearing on relevant constitutional choices. A similar contrast also applies to mandatory review and sunset clauses in constitutions: in their typical form, such mechanisms

[116] Constitutional endurance, of course, is not the only value that constitution-makers should consider in the process of constitutional design. The substance of a constitution, in particular its ability to promote social and political stability, and reliable minority rights protection, are clearly also of central importance. At the same time, without *some* level of endurance, on the part of a constitution, both of these substantive ideals will largely be unrealizable.

[117] *See* Figure 1.

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will often be too weak to ensure that any compromises, or errors, made at T1 are actually reversed at T2, and if made stronger, such mechanisms can also create significant new decision costs.

Leaving things to the future is an important part of the arsenal of constitutional design. The genius of constitutional design, in the end, is not only in figuring out which decisions should be taken off the table of ordinary politics, but also in identifying which should be laid out on the table as well. At the same time, we recognize that in some contexts the decision to adopt "by law" clauses carries dangers for constitution-makers. It can lead both to the over-burdening of key constitutional institutions and to significant gaps in constitutional coverage.

Appendix:

Constitutional Clauses possibly left to ordinary law [n=120]

(Question titles refer to CCP question variable names.)

v89. [HOSELECT]-How is the Head of State selected?

v90. [HOSELSYS]-Which of these best categorizes the electoral system for the Head of State?

v93. [HOSTERML]-What restrictions are in place regarding the number of terms the Head of State may serve?

v94. [HOSAGE]-What is the minimum age limit for becoming the Head of State?

v95. [HOSREST] What additional restrictions does the constitution place on becoming the Head of State?

v97. [HOSDCOND] Under what grounds can the Head of State be dismissed?

v111. [HOSSUCC]-Should the head of state need to be replaced before the normally scheduled replacement process, what is the process of replacement?

v115. [HOSDECIM]-Which arrangement describes the implementation procedure for Head of State decrees?

v122. [HOGELECT]-How is the Head of Government selected?

v128. [HOGAGE]-What is the minimum age limit for becoming the Head of Government?

v130. [HOGREST] What additional restrictions does the constitution place on becoming the Head of Government?

v147. [HOGSUCC]-Should the head of government need to be replaced before the normally scheduled replacement process, what is the process of replacement?

v148. [HOGIMM]-Is the Head of Government provided with immunity from prosecution?

v150. [HOGDECIM]-Which arrangement describes the implementation procedure for Head of Government decrees?

v160. [DEPNOM] Who is involved in the nomination of the deputy executive?

v167. [CABDISS] Who has the authority to dismiss the cabinet/ministers?v171. What additional restrictions does the constitution place on the eligibility to serve as a member of the cabinet?

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v174. [ATGEN]-Does the constitution provide for an attorney general or public prosecutor responsible for representing the government in criminal or civil cases?

v183. [EMAPPR]-Who can approve a state of emergency?

v186. [EMCOND] Under which of the following circumstances can a state of emergency be called?

v196. [LEGJOINT]-Does the constitution specify that the legislative chambers should meet jointly for any reason?

v198. [LHLEAD]-Who presides over the first (or only) chamber?

v202. [LHSELECT] How are members of the first (or only) chamber of the Legislature selected?

v220. [LHAGE]-What is the minimum age limit for eligibility to serve as a member of the first (or only) chamber of the Legislature

v221. [LHREST] What additional restrictions does the constitution place on the eligibility to serve as a member of the first (or only) chamber of the Legislature?

v222. [LHTERM]-What is the maximum term length for members of the first (or only) chamber of the Legislature?

v223. [LHTRMLIM]-What restrictions are in place regarding the number of terms members of the first (or only) chamber may serve?

v255. [LEGDISS]-Who, if anybody, can dismiss the legislature?

v259. [LEGREP]-What provisions are there for replacing individual legislators who have been removed, resign, or die?

v260. [IMMUNITY]-Does the constitution provide for immunity for the members of the Legislature under some conditions?

v261. [INTEXEC]-Does the legislature have the power to interpellate members of the executive branch, or similarly, is the executive responsible for reporting its activities to the legislature on a regular basis?

v266. [DIVHOUSE]-Which of the following characterizes the division of labor between the houses for general legislation?

v269. [DELIB]-Does the constitution prescribe a certain minimum or maximum time that the legislature must consider legislation before it can be passed?

v270. [LEGAPP]-Who has the power to approve/reject legislation once it has been passed by the legislature (not including reviews for constitutionality)?

v271. [LEGAPPDF]-Which of the following describes the default mode for the approval of legislation?

v272. [LEGAPPPT]-Does the approving/vetoing actor have the power to approve/reject parts of the bill, the bill in its entirety, or both?

v275. [OVERPCT]-What proportion of the vote is needed to override a veto?

v295. [ATTEND]-What provisions does the constitution make regarding attendance by legislators?

v298. [PROFLEG]-Does the Constitution require that legislators give up any other profession (i.e. work exclusively as legislators)?

v300. [INCOME] Who is involved in the determination of legislator's compensation?

v301. [PUBMEET]-Does the constitution prescribe whether or not the meetings of the Legislature are (generally) held in public?

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v303. [RECVOTE]-Are votes in the legislature a matter of public record, secret, or both (depending on the topic)?

v308. [LEVJUD]-Does the court system provide for any of the following?

v307. [HOCCJ]-Is the selection process specified for the chief justice or the other justices of the Highest Ordinary Court?

v322. [CHFTRMNM]-What restrictions are in place regarding the number of terms for the Chief Justice of the Highest Ordinary Court?

v323. [CHFAGE]-What is the minimum age limit for eligibility to serve as a the Chief Justice of the Highest Ordinary Court?

v326. [SUPNOM] Who is involved in the nomination of judges to the highest ordinary court?

v327. [SUPAP] Who is involved in the approval of nominations to the highest ordinary court?

v330. [SUPTERMN]-What restrictions are in place regarding the number of terms of members of the highest ordinary court may serve?

v331. [SUPAGE]-What is the minimum age limit for eligibility to serve as a member of the highest ordinary court?

v332. [SUPRES]What additional restrictions does the constitution place on the eligibility to serve as a member of the highest ordinary court?

v334. [ORDNOM] Who is involved in the nomination of judges to ordinary courts?

v338. [ORDTERML]-What restrictions are in place regarding the number of terms members of the ordinary court may serve?

v339. [ORDAGE]-What is the minimum age limit for eligibility to serve as a member of ordinary courts?

v362. [INTERP] To whom does the constitution assign the responsibility for the interpretation of the constitution?

v363. [UNCONPER]-What proportion of the vote of the court is required to find legislation unconstitutional?

v364. [CHALLEG] Who has standing to initiate challenge to the constitutionality of legislation?

v368. [CHALSTAG]-At what stage of the legislative process can bills be reviewed for constitutionality?

v371. [JREM]-Are there provisions for dismissing judges?

v383. [JUDRETIR]-Is there a mandatory retirement age for judges?

v389. [SECCESS]-Are there provisions for the secession or withdrawal of parts of the state?

v402. [SUBEXEL]-How are subsidiary unit executives selected?

v404. [SUBLEGEL]-How are members of subsidiary unit legislatures selected?

v410. [MUNELE]-Are any members of local/municipal government elected by popular election?

v411. [INDPOLGR] Are any of the following political rights/benefits specifically granted to indigenous groups?

v417. [PARTPRH]-Does the constitution prohibit one or more political parties

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v419. Who is given the power to make determinations of unconstitutional political parties?

v422. [INITIATP] What are the prerequisites for an initiative to be considered

v424. [REFERENP]-Who can propose a referendum on the ballot

v427. [VOTEMIN]-What is the minimum age limit for voting?

v429. [VOTELIM]-Besides age limits, which additional restrictions does the constitution place on voting?

v443. [DISTRICT]-Who controls the size and shape of electoral districts?]

v450. [CENSUS]-Does the constitution specify a census

v452. [OMBNOM] Who nominates the Ombudsman?

v455. [OMBLIM]-What restrictions are in place regarding the number of terms the ombudsman may serve?

v456. [OMBPOW]What are the ombudsman's powers and duties?

v458. [BANKNOM]Who nominates the chief of the central bank?

v464. [BANKGOAL]-What are the policy goals of the central bank?

v488. [WAR] Who has the power to declare war?

v491. [TREATINI]-Who has the power to initiate treaties?

v492. [TREATAP]-Who has the power to approve treaties?

v493. [TREATRVK]-Who has the power to revoke or withdraw from treaties?

v497. [TREATST]-What is the status of treaties vis a vis ordinary legislation?

v512. [EXCRIM]-Does the constitution provide for the extradition of suspected or convicted criminals to other countries?

v519. [CAPPUN]-How does the constitution treat the use of capital punishment?

v520. [CORPPUN]-How does the constitution treat the use of corporal punishment?

v522. [EXAMWIT]-Does the constitution provide for the right to examine evidence or confront all witnesses?

v539. [CITNEC] Which of the following are necessary conditions for birthright (automatic) citizenship?

v541. [NATNEC]Which of the following are necessary conditions for being a national of the state?

v544. [NATCITD] Which of the following are necessary conditions for naturalization (granting citizenship to a foreigner)?

v549. [RESENEX]-Does the constitution restrict entry or exit of the states borders?

v553.[EQUALGR] Which of the following groups does the constitution protect from discrimination/provide for equality for (check all that apply)?

v554. [SOCCLAS] Does the constitution have any of the following provisions with respect to social class?

v556. [RIGHTRES]-Does the constitution specifically restrict the rights of any of the following groups?

v560. [INFOACCW]-To which kinds of documents does the constitution direct that individuals should have access?

v562. [OFFREL]-Does the constitution contain provisions concerning a national or official religion or a national or official church?

v565. [RIGHTREL]-What is the status of religious law?

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v570. [EXPRCOMP]-What is the specified level of compensation for expropriation of private property?

v571. [EXPCOND]-Under what conditions or for what purposes can the state expropriate private property?

v572. [EXPLIM]-What limits/conditions are placed on the ability of the government to expropriate private property?

v575. [JOINTRDE]-Does the constitution provide for the right to form or to join trade unions?

v576. [STRIKE]-Does the constitution provide for a right to strike?

v582. [INTPROP] Does the constitution mention any of the following intellectual property rights?

v586.[FINSUP] Does the constitution provide for either general or financial support by the government for any of the following groups?

v587. [PROPRGHT]-Does the constitution provide for a right to own property?

v591. [SAFEWORK]-Does the constitution mention the right to safe/healthy working conditions?

v592. [CHILDWRK]-Does the constitution place limits on child employment?

v594. [MARRIAGE]-Does the constitution provide for the right to marry?

v605. [SLAVE]-Does the constitution prohibit slavery, servitude, or forced labor?

v606. [TORTURE]-Does the constitution prohibit torture?

v607. [CRUELTY]-Does the constitution prohibit cruel, inhuman, or degrading treatment?

v615. [PRESS]-Does the constitution provide for freedom of the press?

v622. [NOMIL]-Is there a right to exemption from military service for conscientous objectors to war or other groups?

v627. [ENV] How does the constitution refer to the environment?

v628. [ENVREF] Which specific parts of the environment does the constitution refer

v630. [ENVPART] Which specific natural resources does the constitution refer to?

v632. [ARTSPEC]How does the constitution refer to artists

v637. [GOVMED]-How does the constitution address the state operation of print or electronic media?

v641.[COMAP] Is any body required to authorize or approve military actions of the commander and chief?

v643. [CIVILMIL]-Are there any restrictions on the minister of defense?

v645. [MILREST]Are there any specific restrictions on the armed forces?

v655. [LANG]-Does the constitution specify either an official or national language?

v661. [EDCOMPL]-To what level (or year of age) does the constitution make education compulsory?

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