

The Comparative and Dynamic Analysis of Constitutions

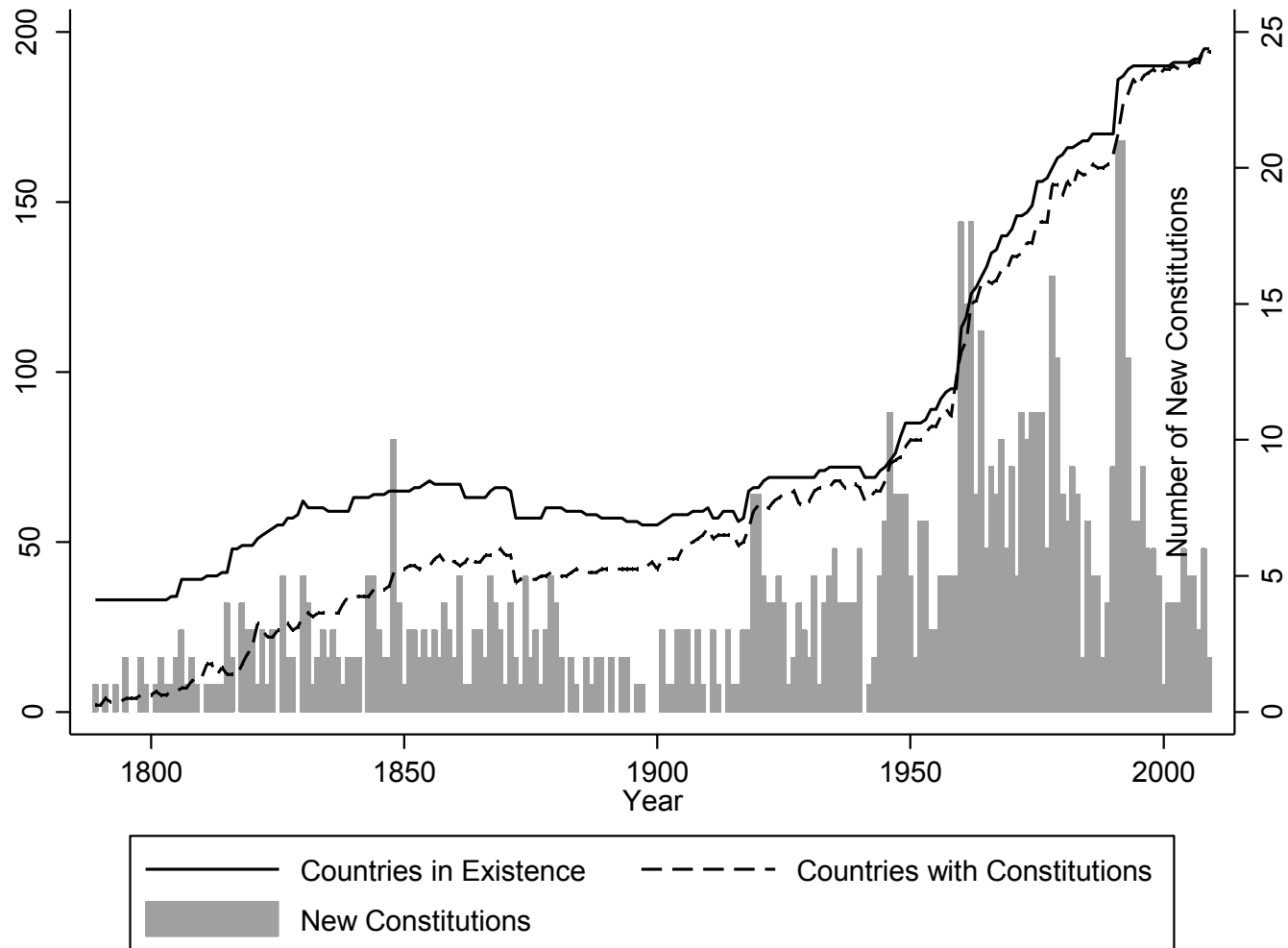
Tom F. Ginsburg, University of Chicago

ESNIE 2011, Cargese France

Introduction: What Do Constitutions Do?

- Traditional perspectives
 - Establish institutions of government
 - Limit government
 - Express fundamental values
- Economic perspectives
 - Rules about rules (Buchanan and Tullock 1962)
 - Provide political-economic stability and allow pre-commitment (e.g. North and Weingast 1989)
 - Devices for selecting and controlling agents (James Madison 1789)
- Large-C vs. small-c constitutions

Sample and waves of constitution-making



Sample

- Time:
 - 1789-2006
- Space:
 - All independent countries
- Laws:
 - The nominal “constitution” or “basic law” or;
 - Laws that set up or suspend a branch of government

Three questions

- How long do constitutions last?
- What determines their content?
- Do they matter? de jure-de facto correspondence
- [Inform constitutional design]

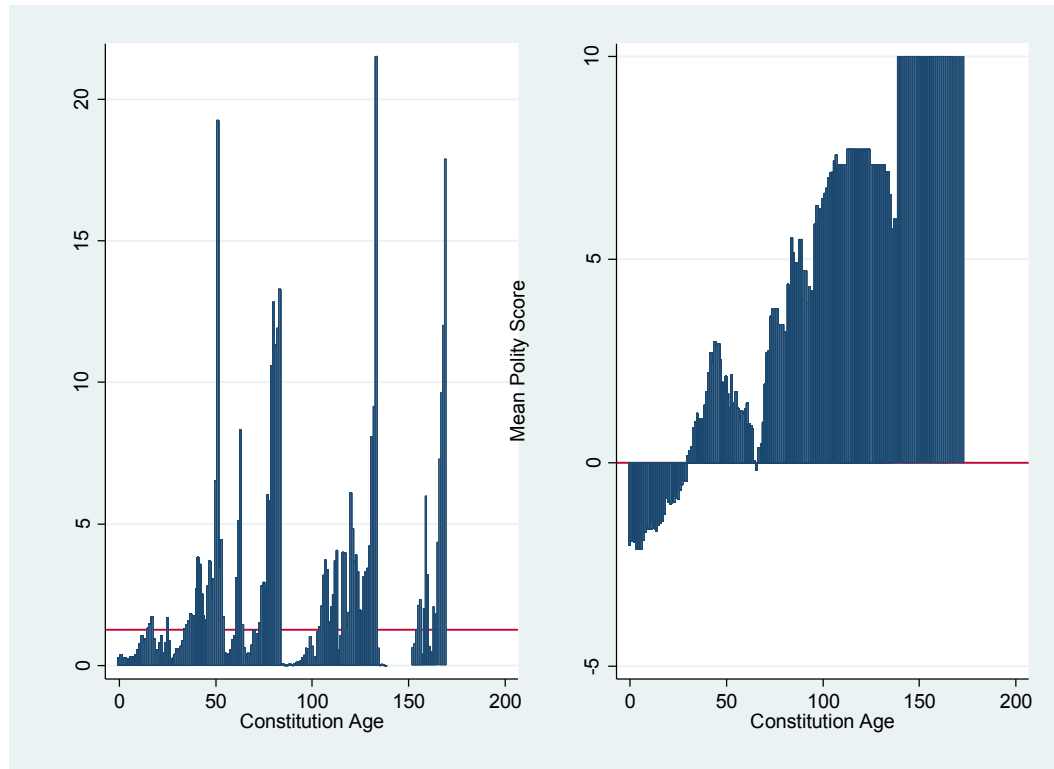
I. The Endurance of Constitutions

- How long do constitutions last?
- How long *should* constitutions last?
- What explains their demise?

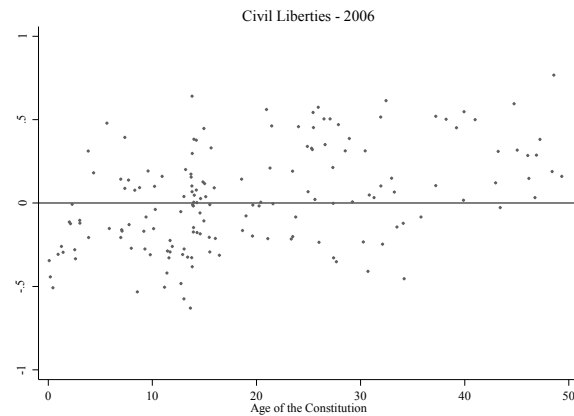
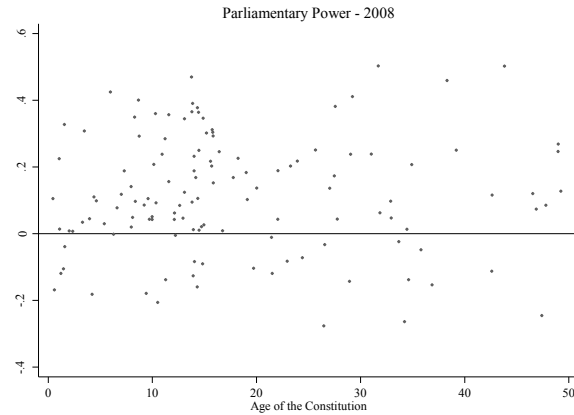
Is Long Life Good?

- Arguments against long life:
 - Thomas Jefferson: Anti-democratic.
 - Constitutions may not fit after some time
- Arguments for long life:
 - Political conservatism (Burke)
 - Necessary for the institutions of democracy to develop
- Instrumental view: long life is good if it gives us good things (economic growth, democratic stability)

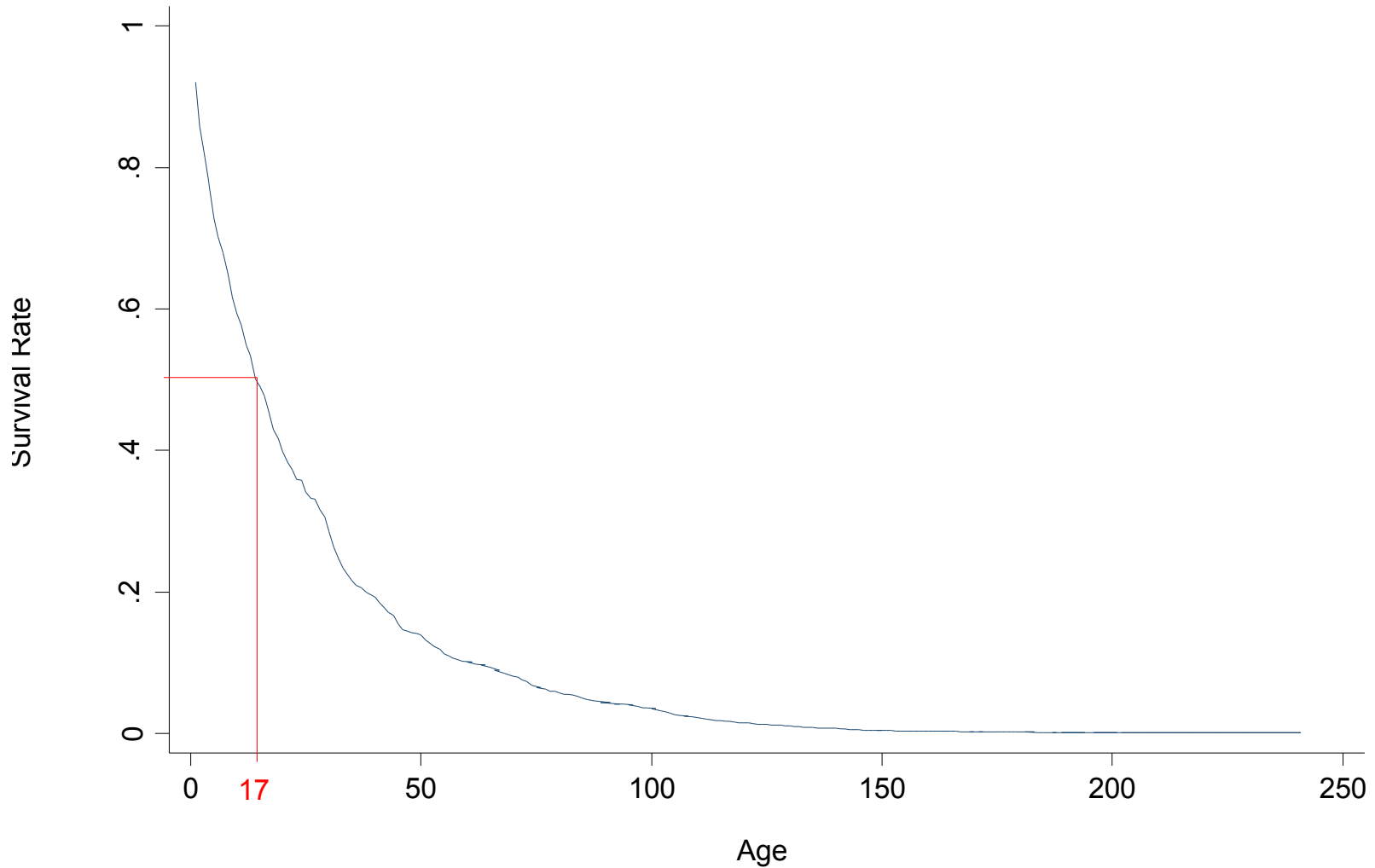
Constitutional Duration, FDI and Democracy



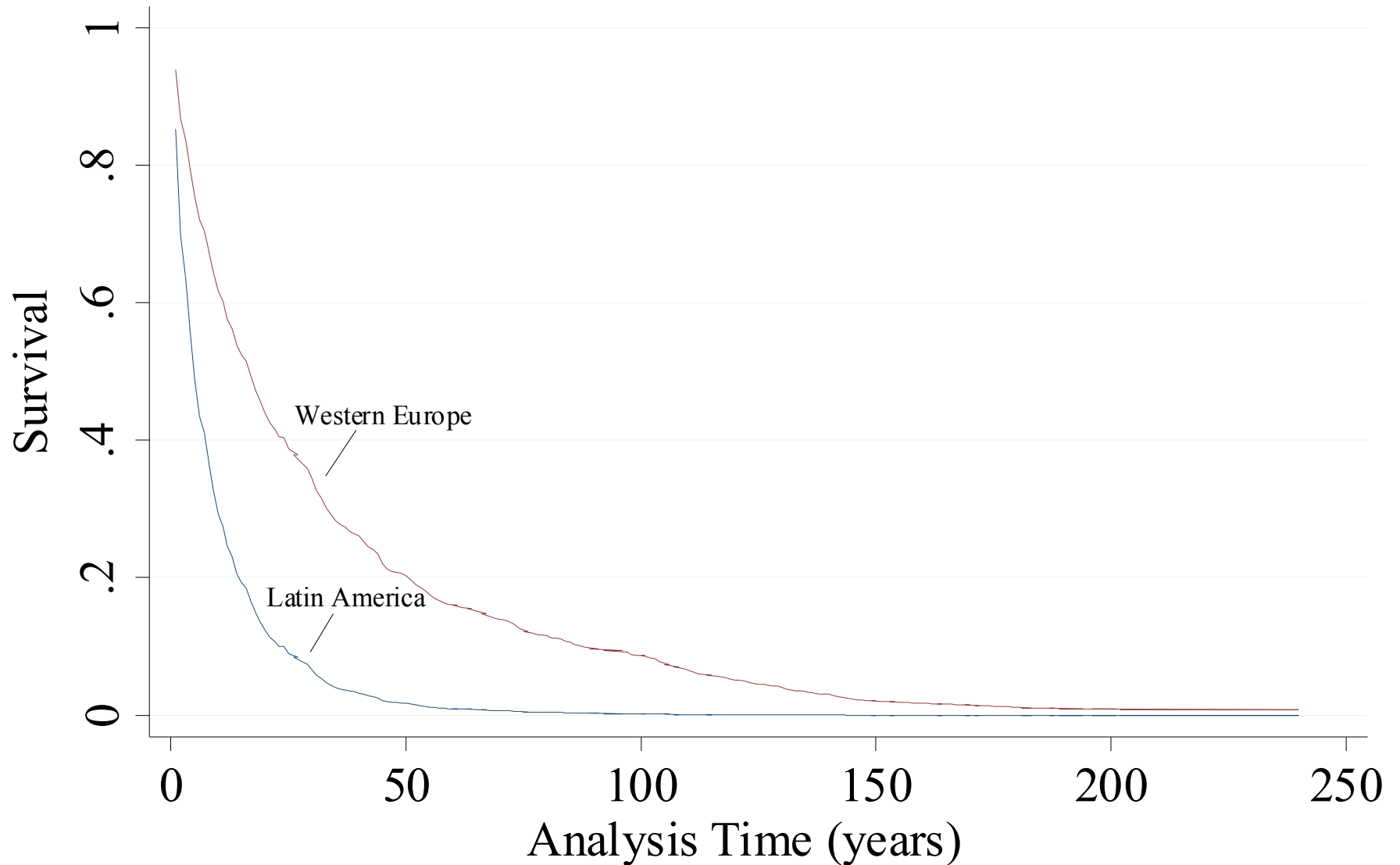
Difference between text and practice over time



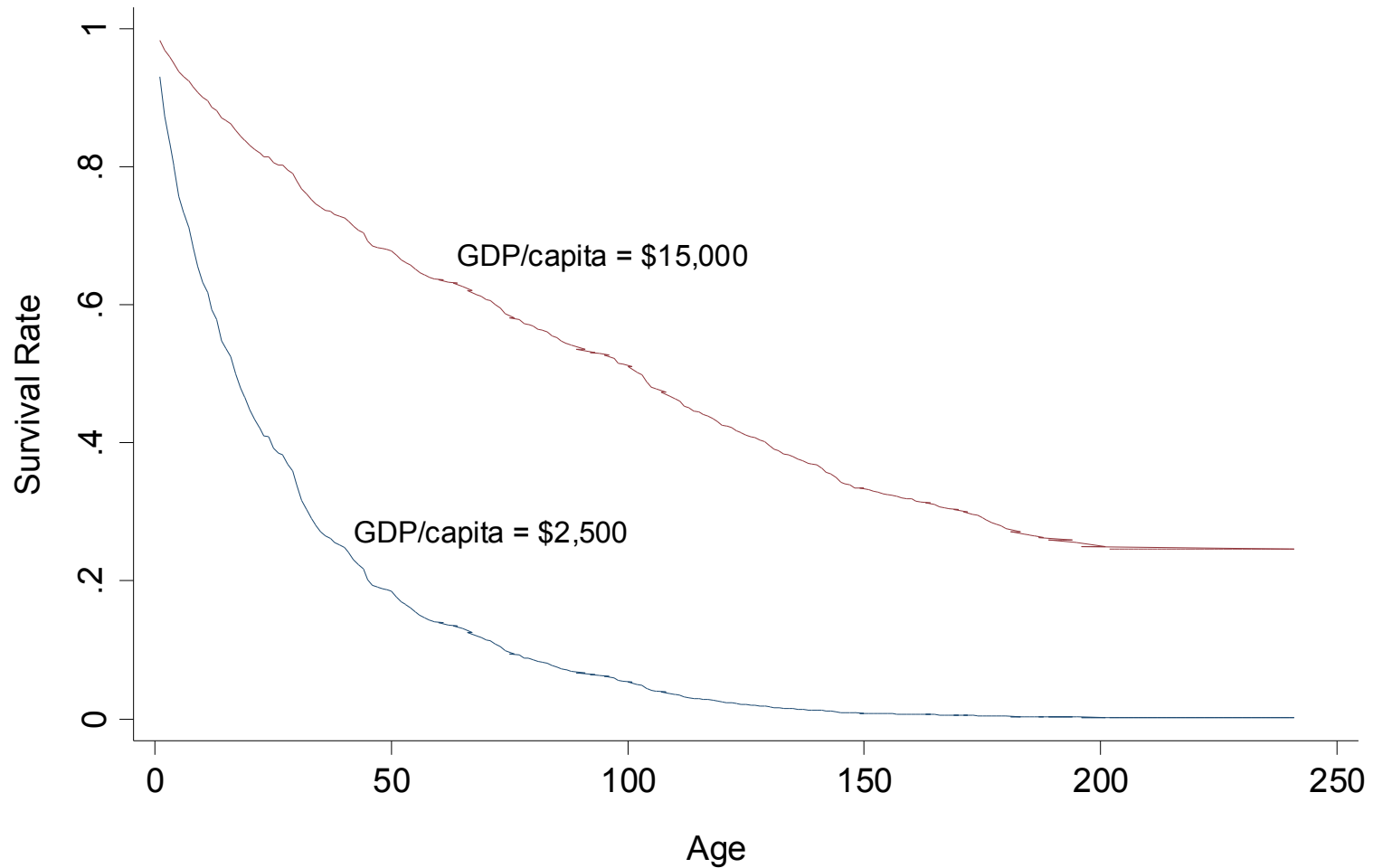
Baseline Survival Estimates



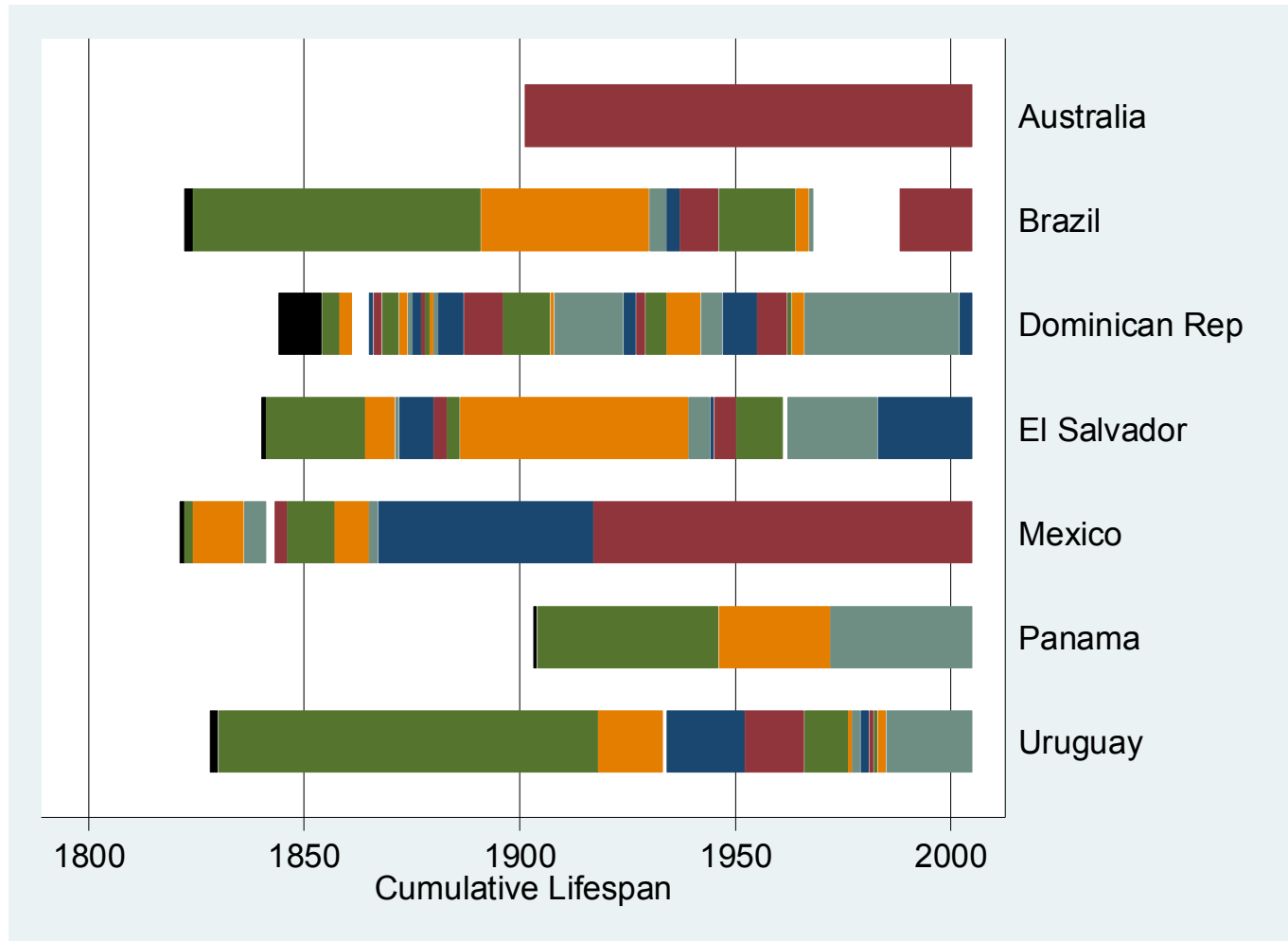
Survival Estimates, by Region



Survival Estimates, by GDP per capita



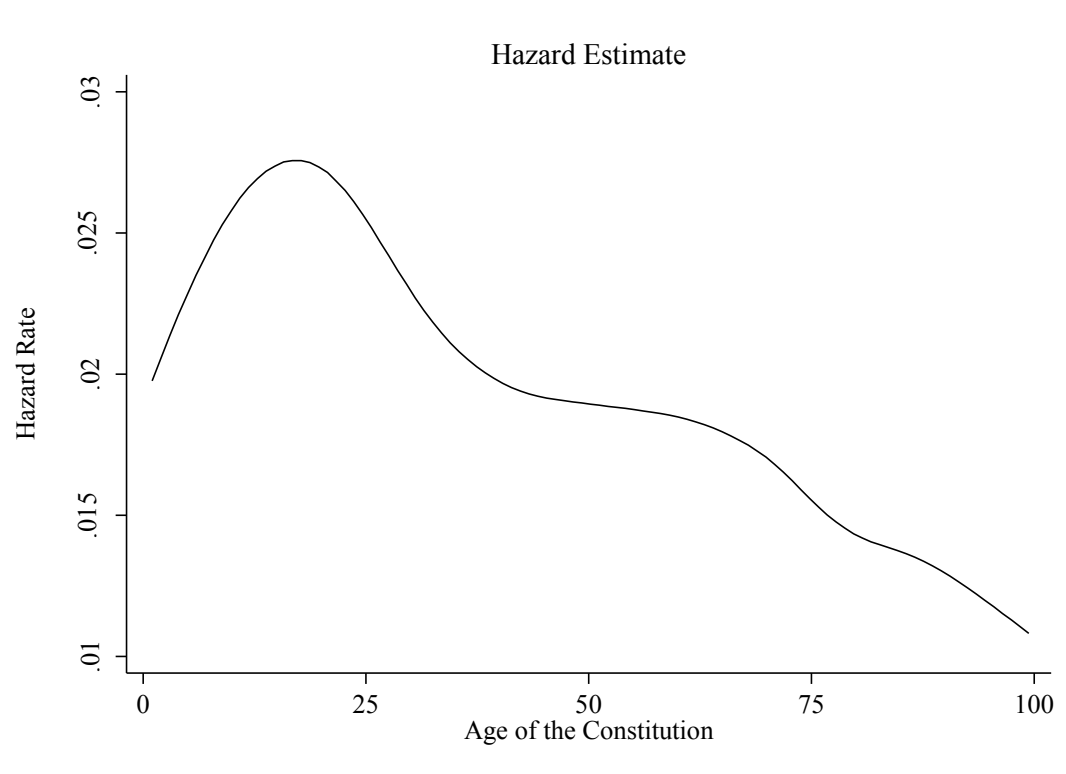
National Patterns of Lifespan



Explaining Constitutional Duration: A Contractual Perspective

- Constitutions as political bargains that must usually be self-enforcing
- Formation: involves bargaining and reservation price
- Contractual incompleteness
 - Hidden information: e.g. oil deposits in Kurdistan
 - Incomplete information: future contingencies
 - Time may have offsetting effects
- Stable until they are subject to internal or external pressures which lead to demand for renegotiation
- Risk factors for constitutional systems
 - Shocks/precipitating factors (e.g. war, economic crisis)
 - Structural sources of resiliency
 - State characteristics (wealth, ethnic homogeneity, legal system)
 - Constitutional features: flexibility, inclusion, specificity

Baseline Hazard Rate



Predictors of Death in multivariate hazard models

Predicted lifespan: 19 years

PRECIPITATING FACTORS

- Defeat in War (+)
- Coups and Crises (+)
- Neighboring Constitutional **Diffusion** > Global Constitutional Diffusion (+)

STATE-LEVEL CHARACTERISTICS

- Ethnic Fractionalization (+ in autocracies)
- Wealth (-)
- **Post-1945 (+)**
- **Legacy of Endurance (-)**

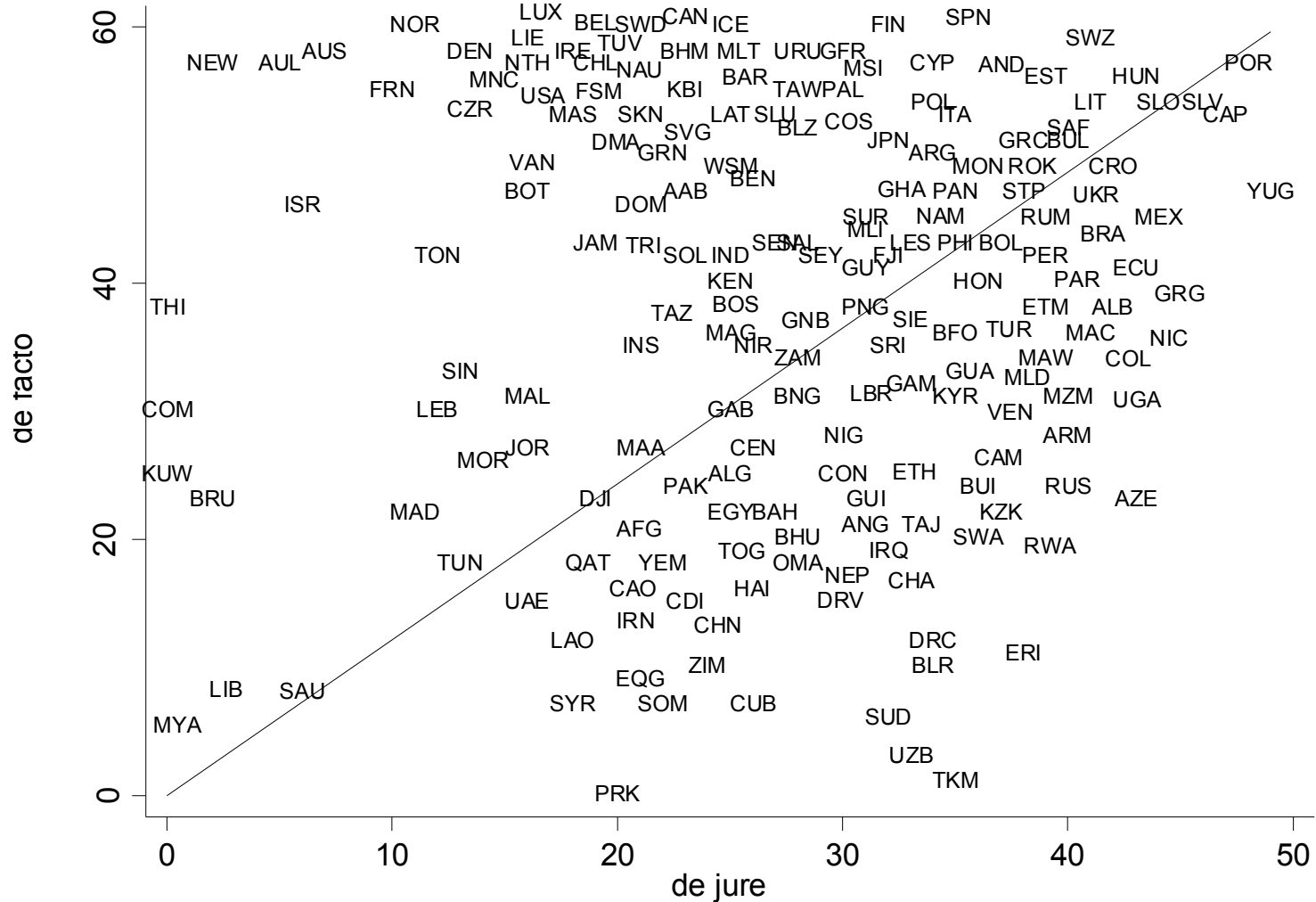
INTERNAL FEATURES OF THE CONSTITUTIONS

- Flexibility of Amendment Procedures (-)
- Constitutional Review x Democracy (-)
- Our measure of Inclusion: Public promulgation (-)
- Specificity: Detail > Scope (-)

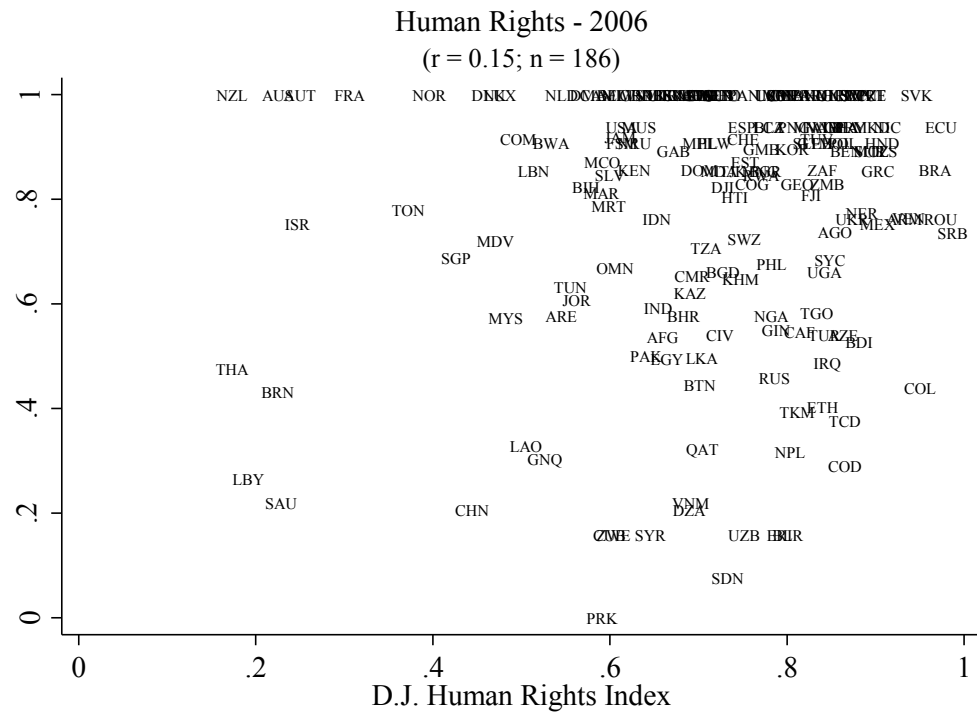
II. The Relation between Text and Practice

- The insufficiency of gap studies
- Provision as the unit of analysis
- Dimensions of variation
 - Structure v. rights
 - Time horizons
 - Costliness: degree of contemplated change
 - Precision and clarity

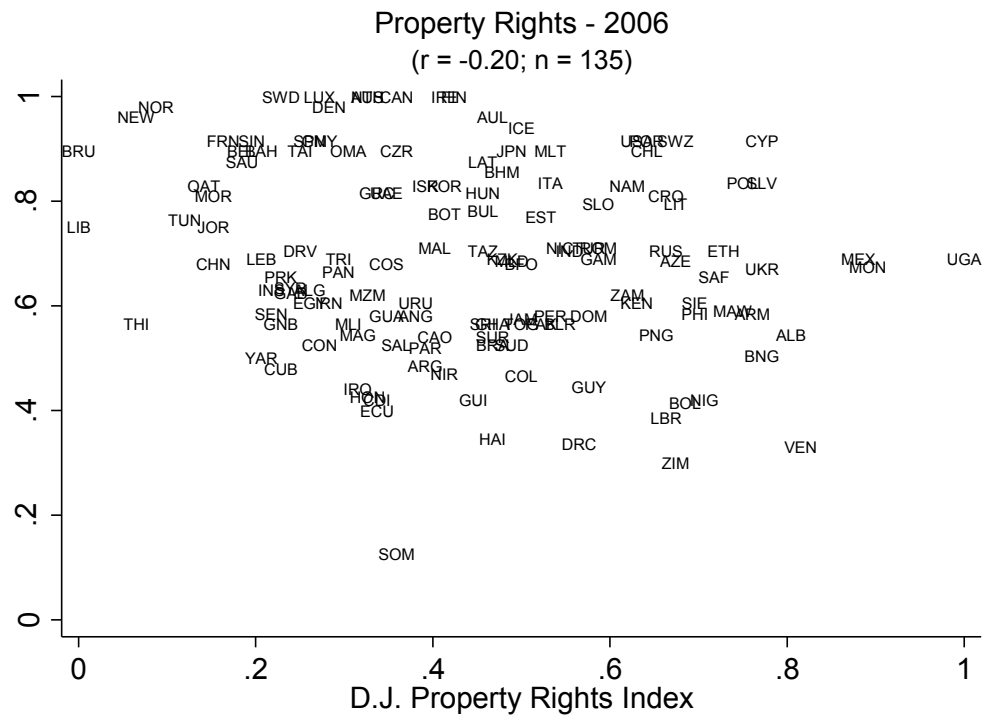
Civil Liberties: *de facto* vs. *de jure*



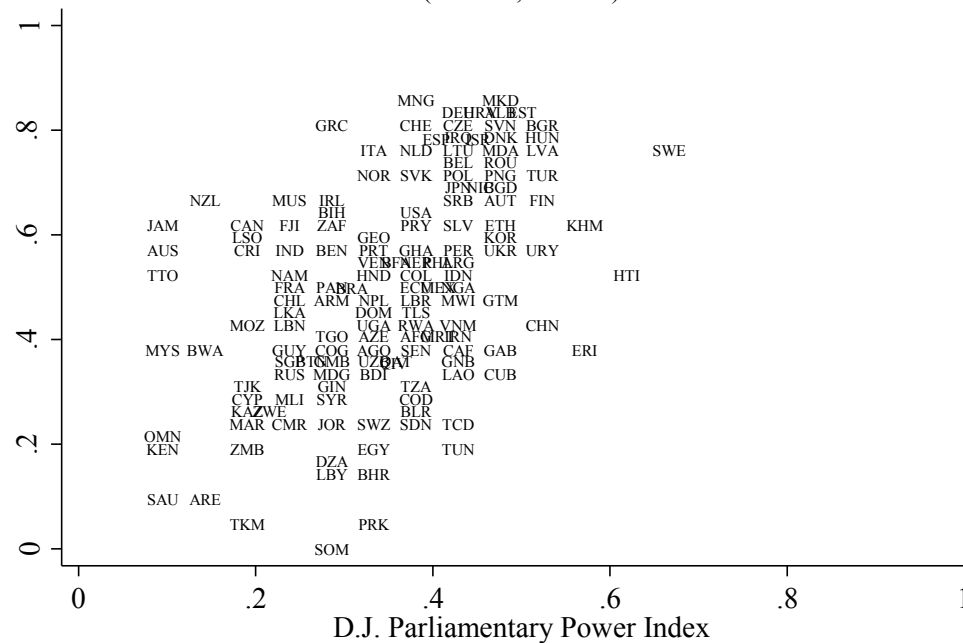
Human Rights



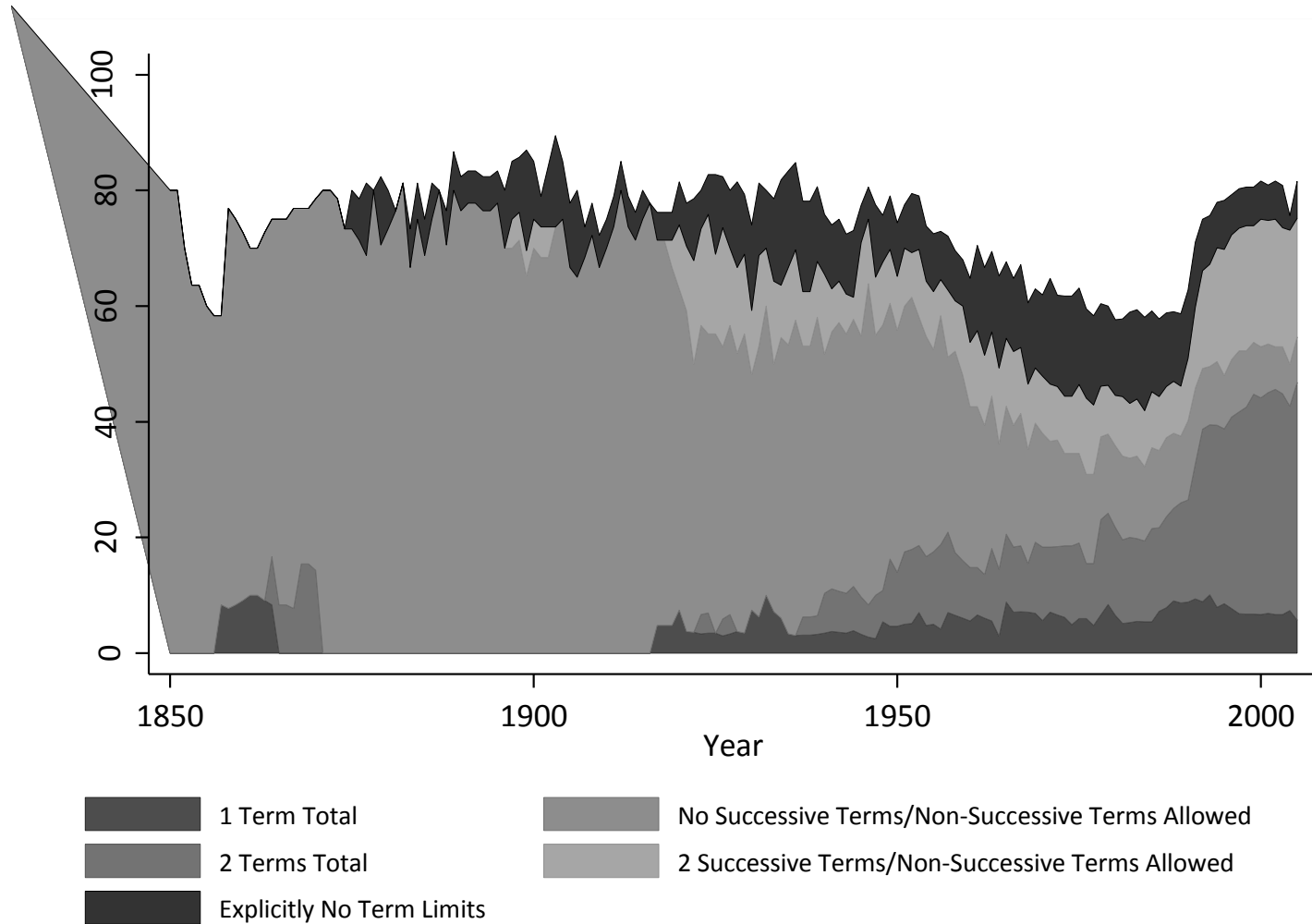
Property Rights



Parliamentary Power

Parliamentary Power - 2008
($r = 0.46$; $n = 148$)

Prevalence of Term Limits



Notes: universe is constitutional systems with fixed-term heads of state, since 1850

Arguments for and against term limits

- Arguments for
 - Incumbent has agenda control, media exposure, control over government machinery → tyranny
 - Status quo bias
 - Indirect effects: barrier to entry
 - Will induce public-regarding behavior in final period (Virginia plan)
- Arguments against
 - Restriction on choice
 - Experience may improve performance (Hume)
 - Uniquely qualified leader
 - Will lead to private-regarding behavior in the final period (final version of US Const.)
- Instrumental view; default rule.

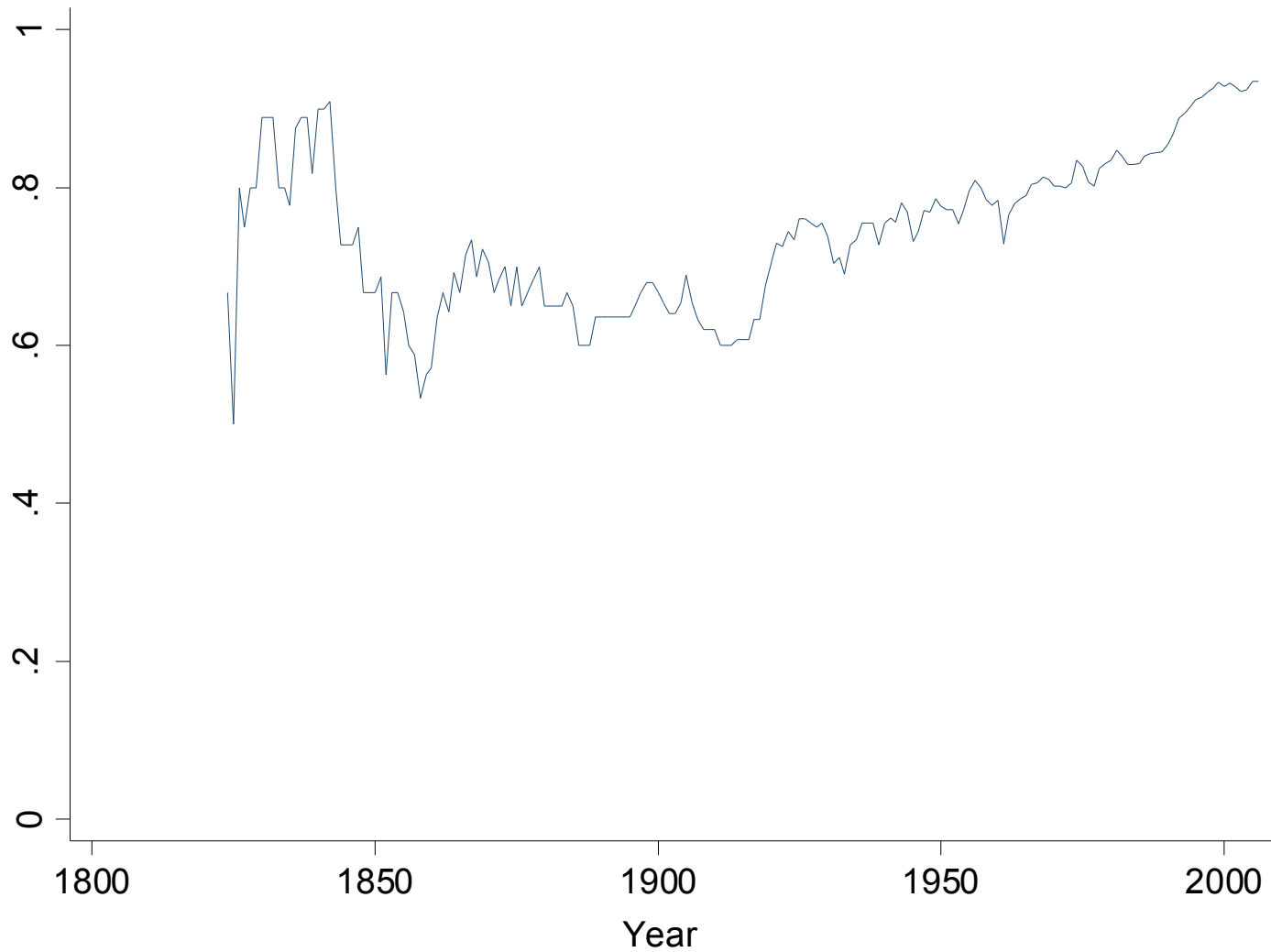
Determinants of Overstay

- Characteristics of the leader
 - age, military background, assumed power through irregular means
- Type of term limit: two terms
- Younger constitution (democracies only)
- Previous overstay makes future overstays less likely

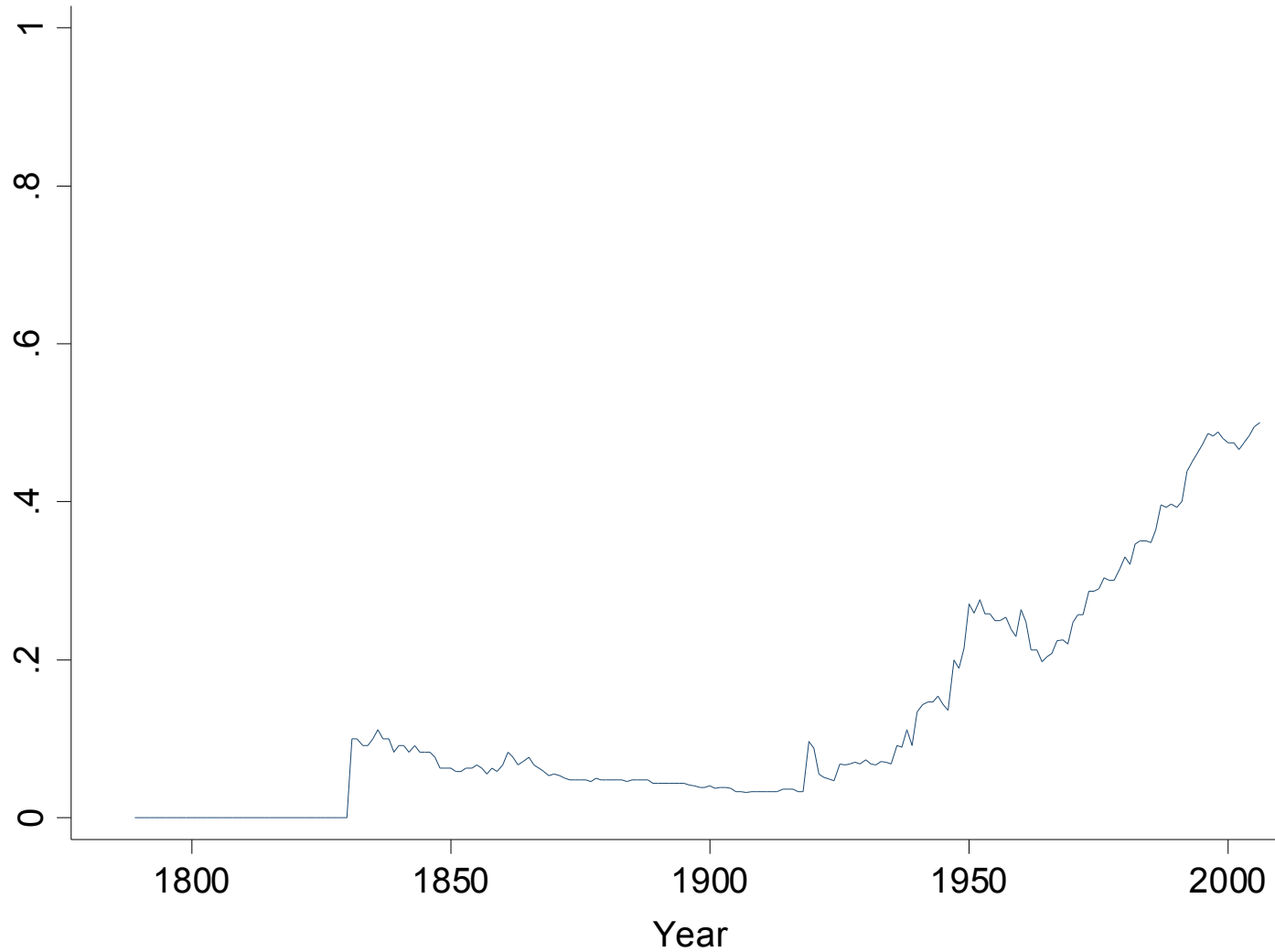
III. Form: The Content of Constitutions

- External influences on constitution making
 - Diffusion and the question of herd behavior
 - Direct imposition
 - Learning
- Rational design: e.g. judicial review as an insurance mechanism

Right to Free Speech



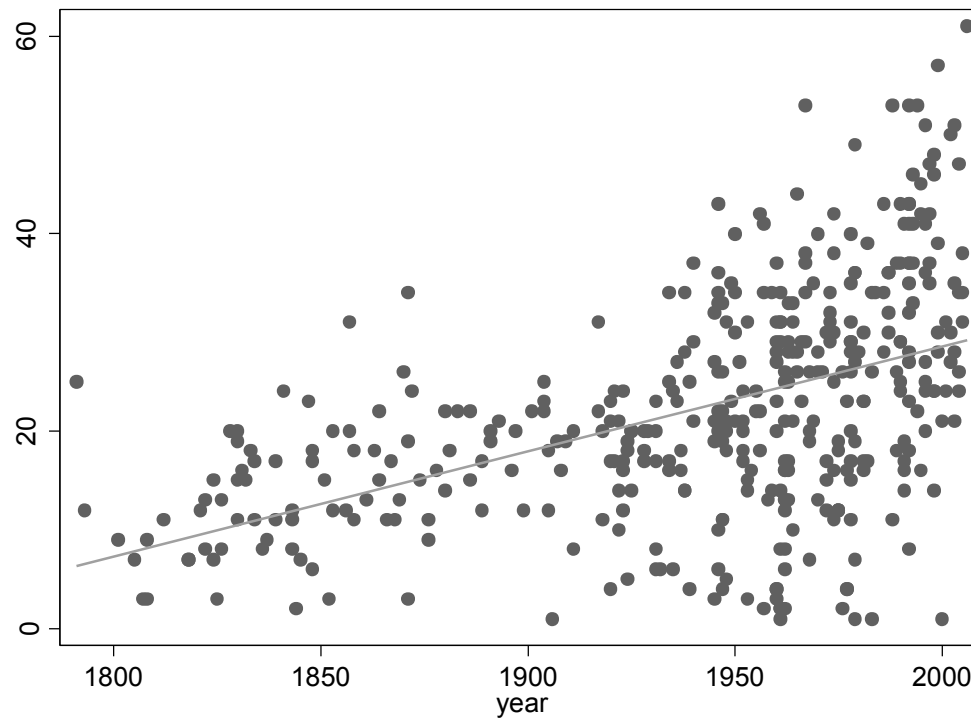
Right to Health Care



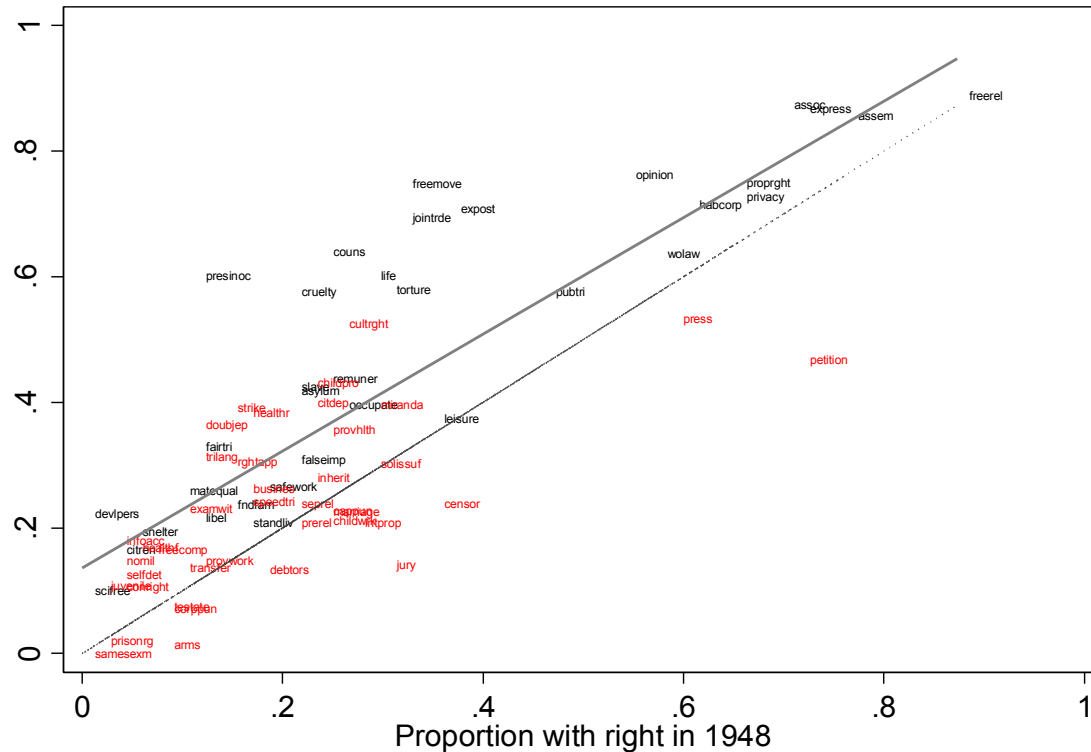
Right to Free Education



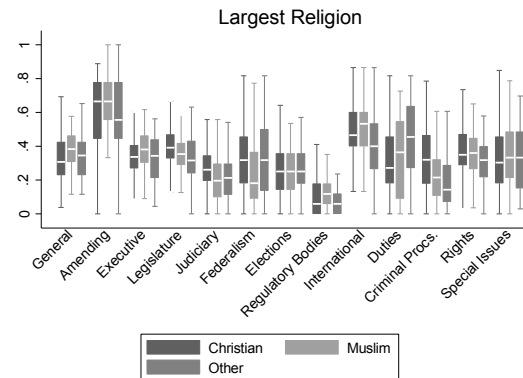
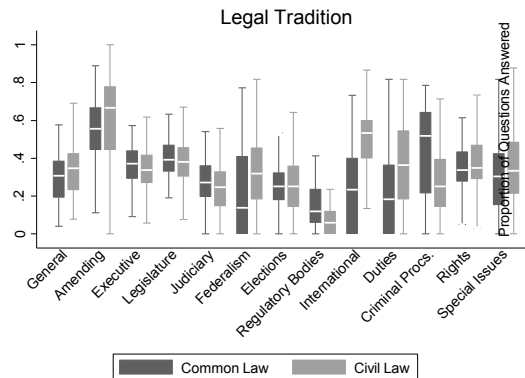
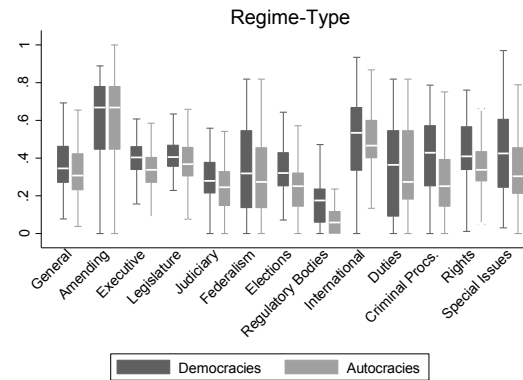
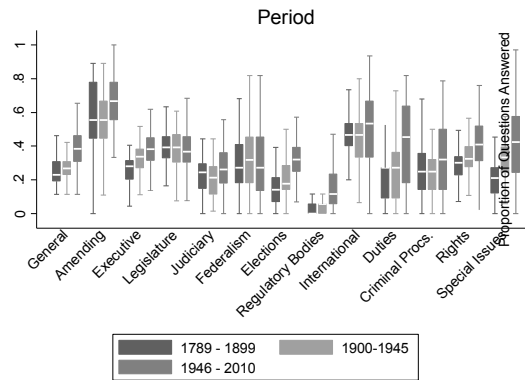
Figure 2 Number of rights provided, by year (n = 549 new constitutions)



Effect of Universal Declaration of Human Rights



Convergence of constitutional form



Conclusion

- Summary
 - town hall view of constitutions is out of date: region and time seem to be important determinants of content
 - Some provisions seem to matter in some circumstances
 - Constitutions endure when more like statutes: flexible and detailed
 - Research challenges and future directions
 - Measurement of de facto performance
 - Solving omitted variable and endogeneity problems

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Resources for Constitutional Design



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Constitutional Texts



Reports
Trends and Sample
Provisions by Topic



Designers Forum
Scholars and
Practitioners Offer
Insights

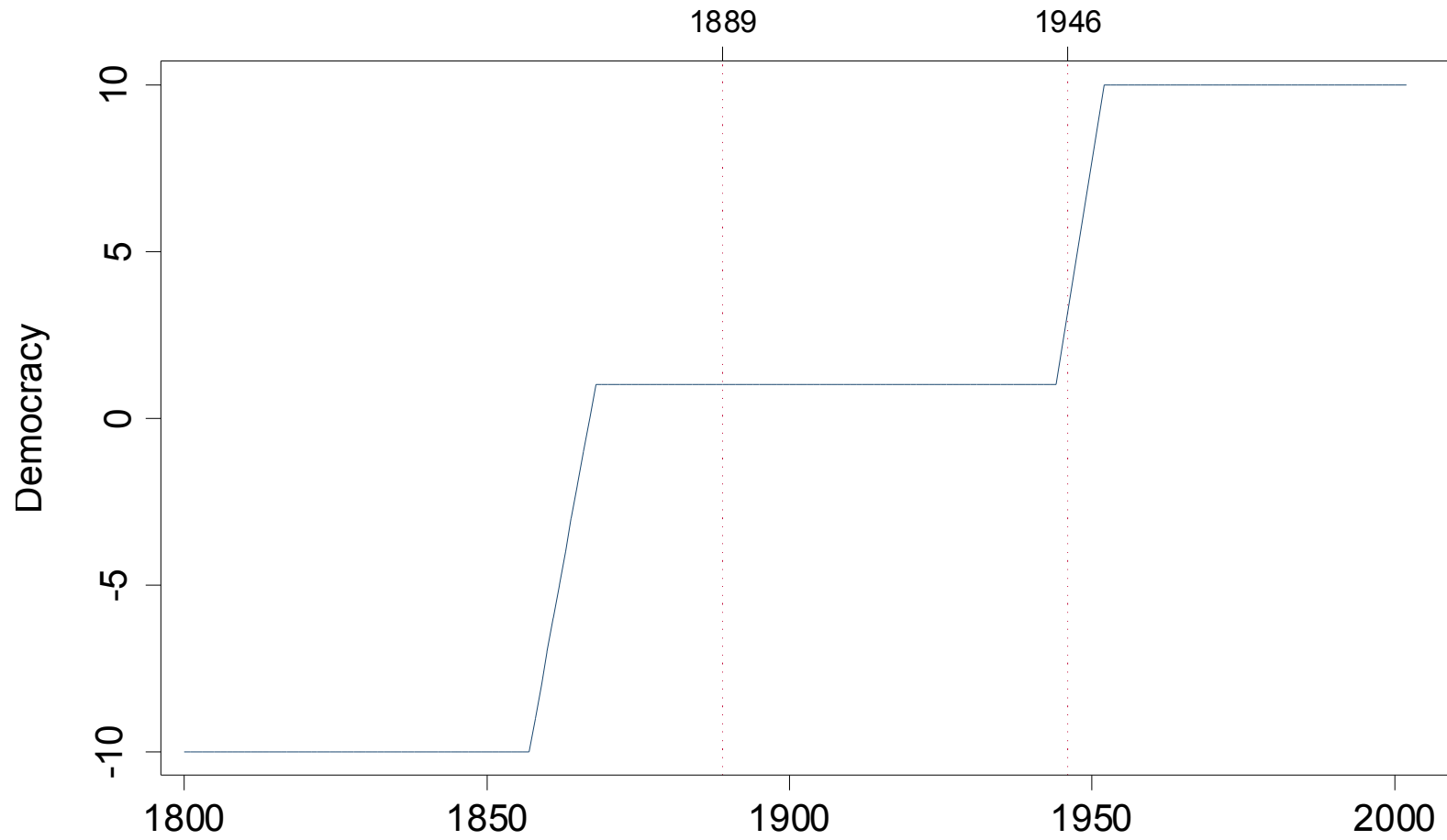
Constitution-making.org is a joint project of the Comparative Constitutions Project (CCP) and the United States Institute for Peace (USIP). We aim to provide designers with systematic information on design options and constitutional text, drawing on the CCP's comprehensive dataset of national constitutions since 1789. We are motivated by the simple premise that constitutional drafters benefit from a

Recent Developments

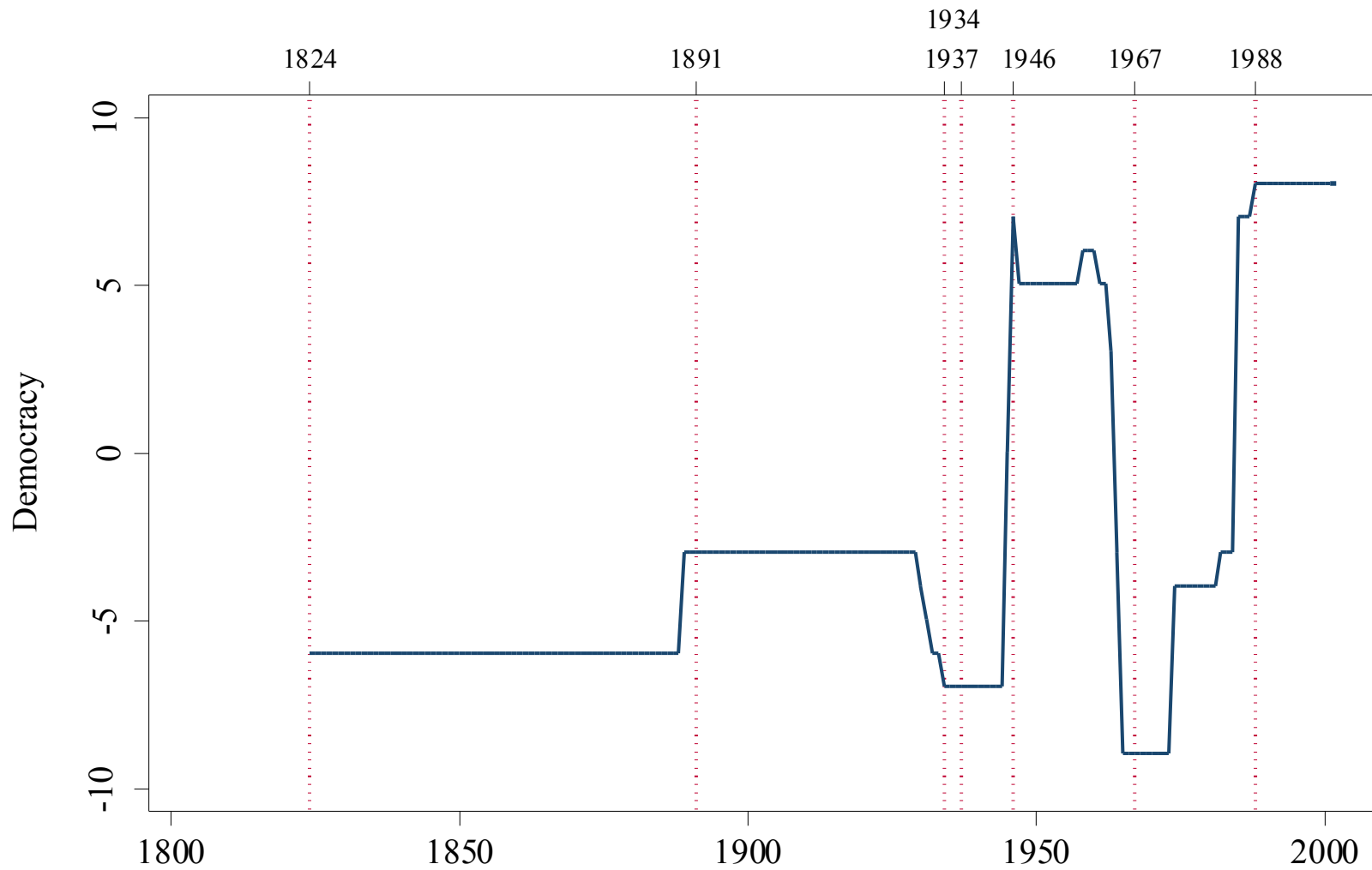
[Test Labels 2](#)

by melton - Apr 16, 2008

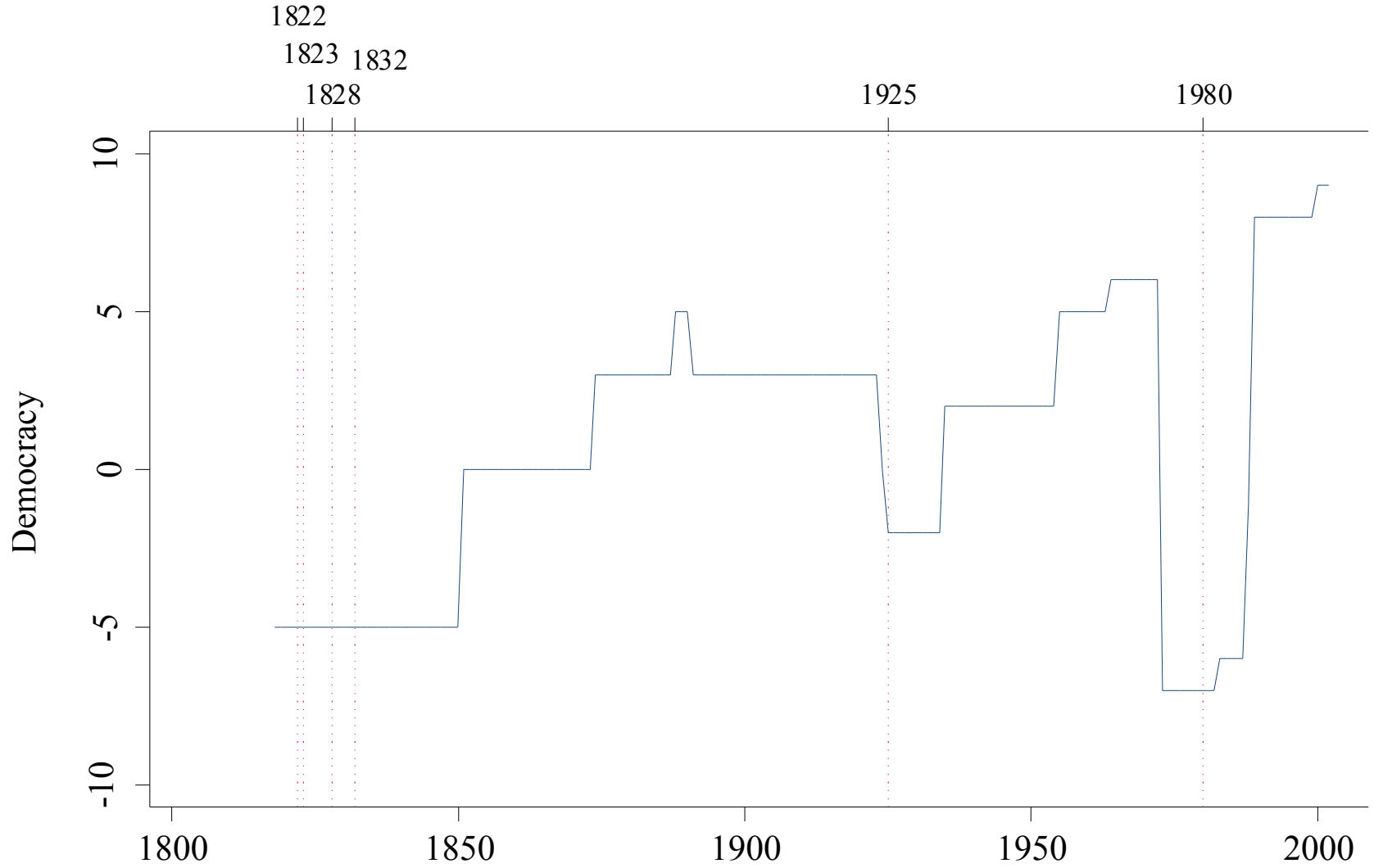
Japan



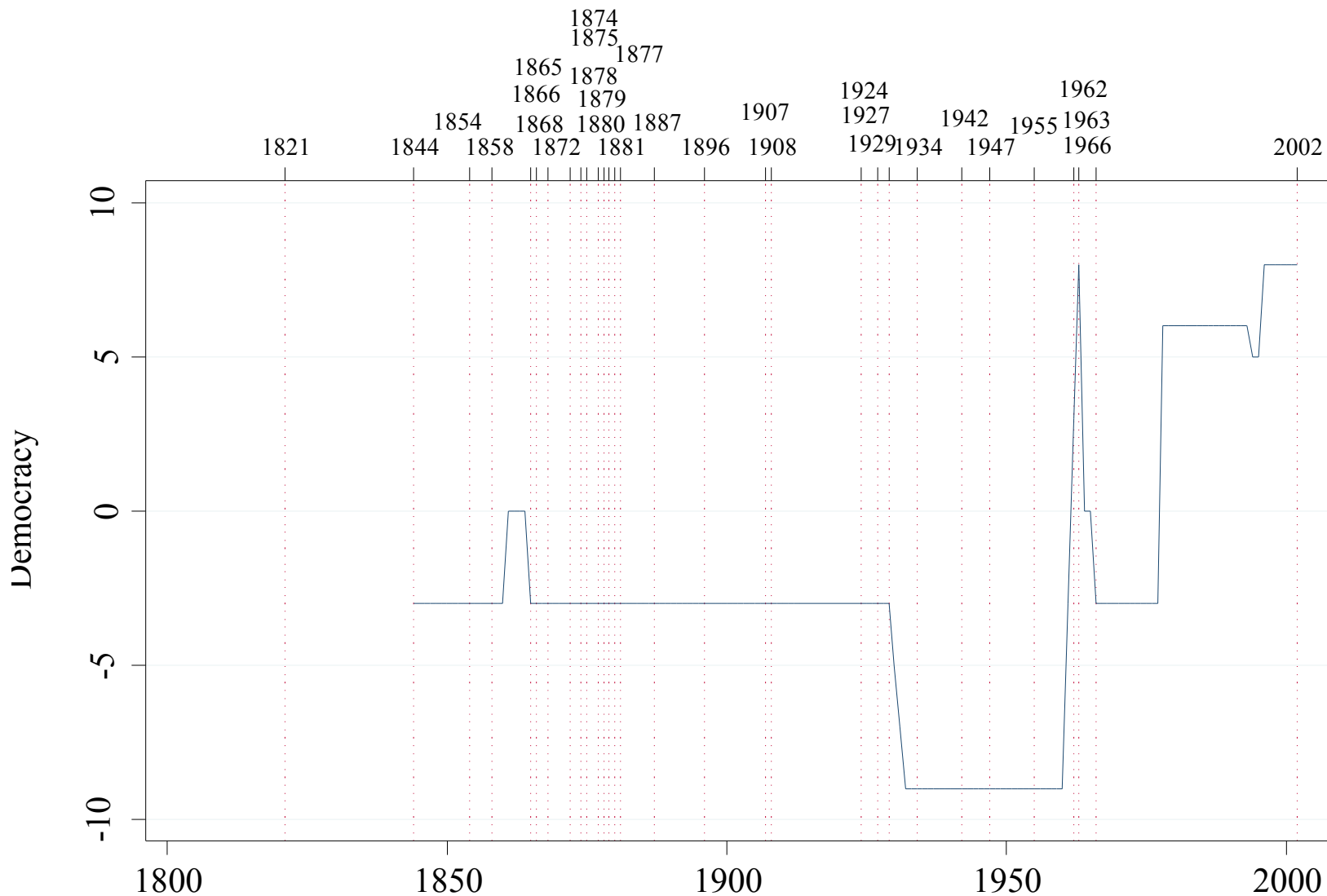
Brazil



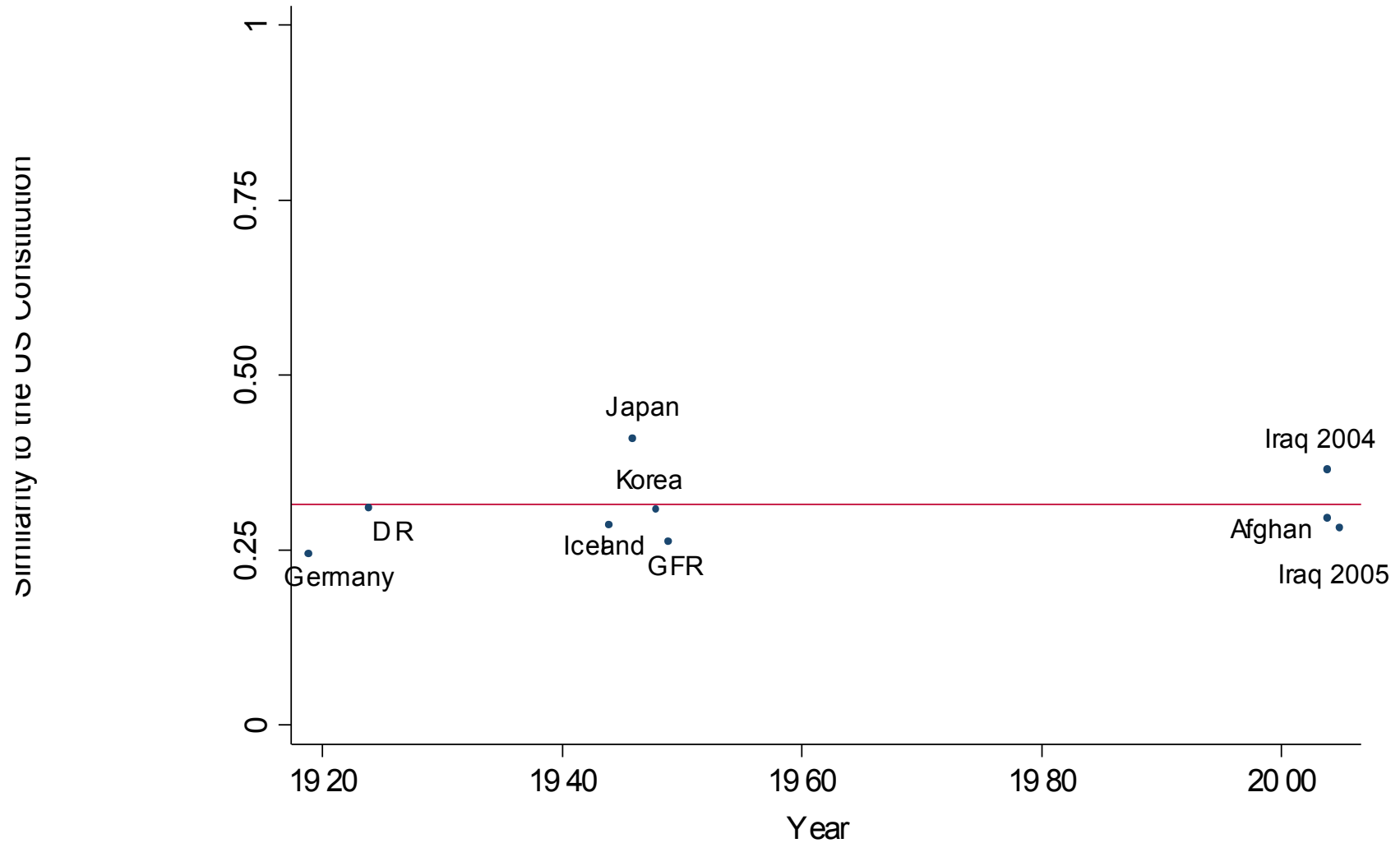
Chile



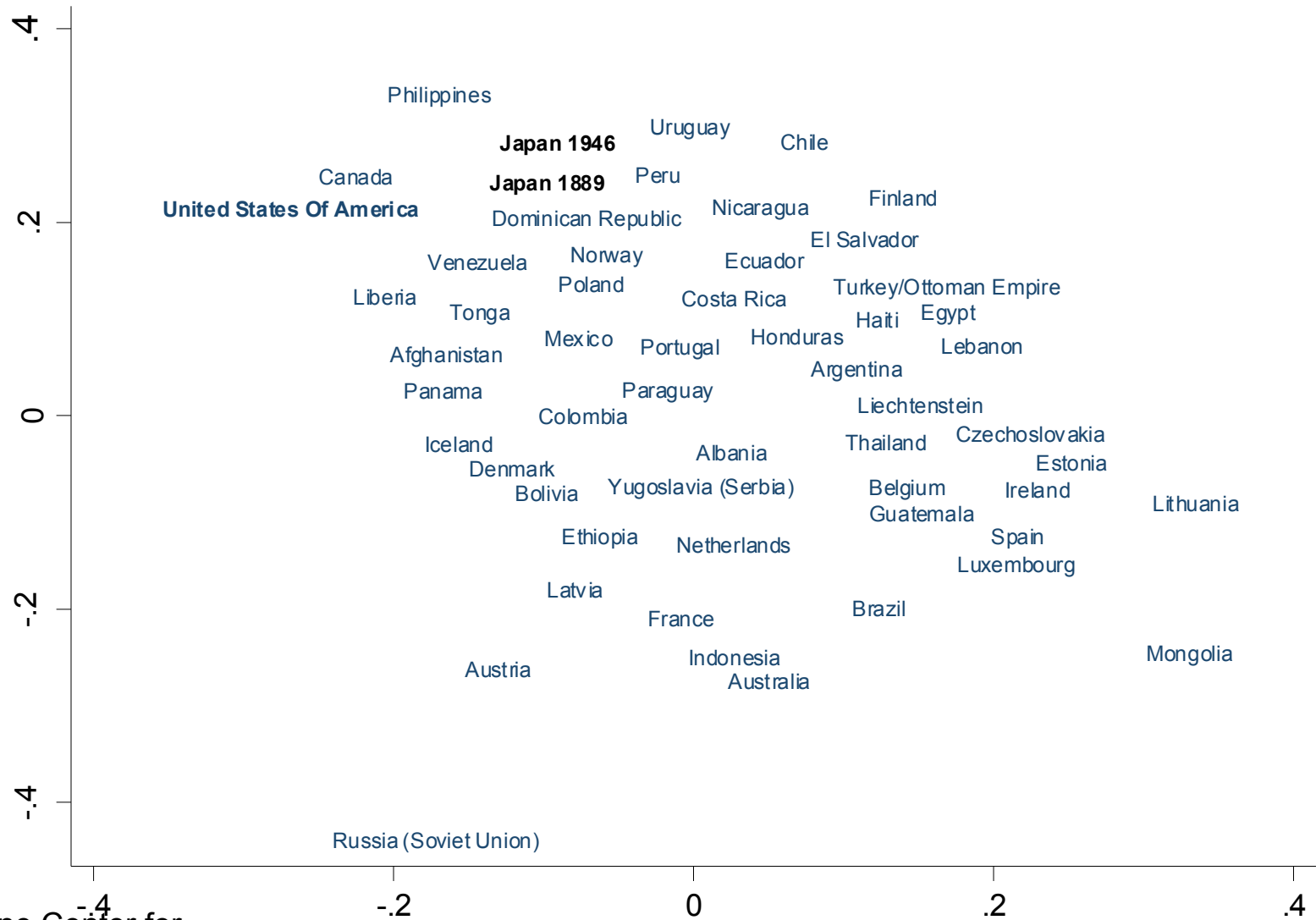
Dominican Republic



Constitutions Written Under Occupation by the US



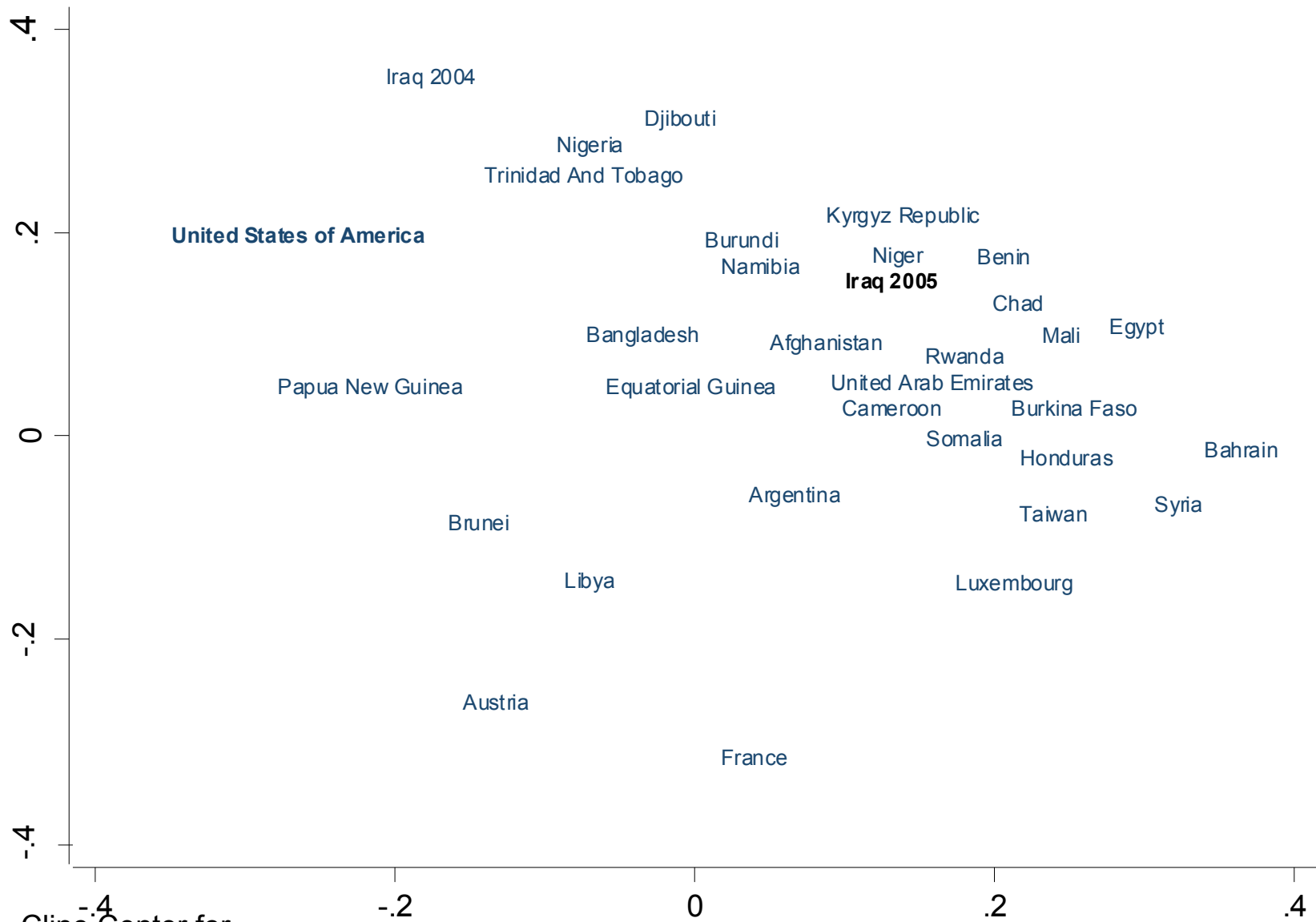
Proximity to the Japan 1946 Constitution



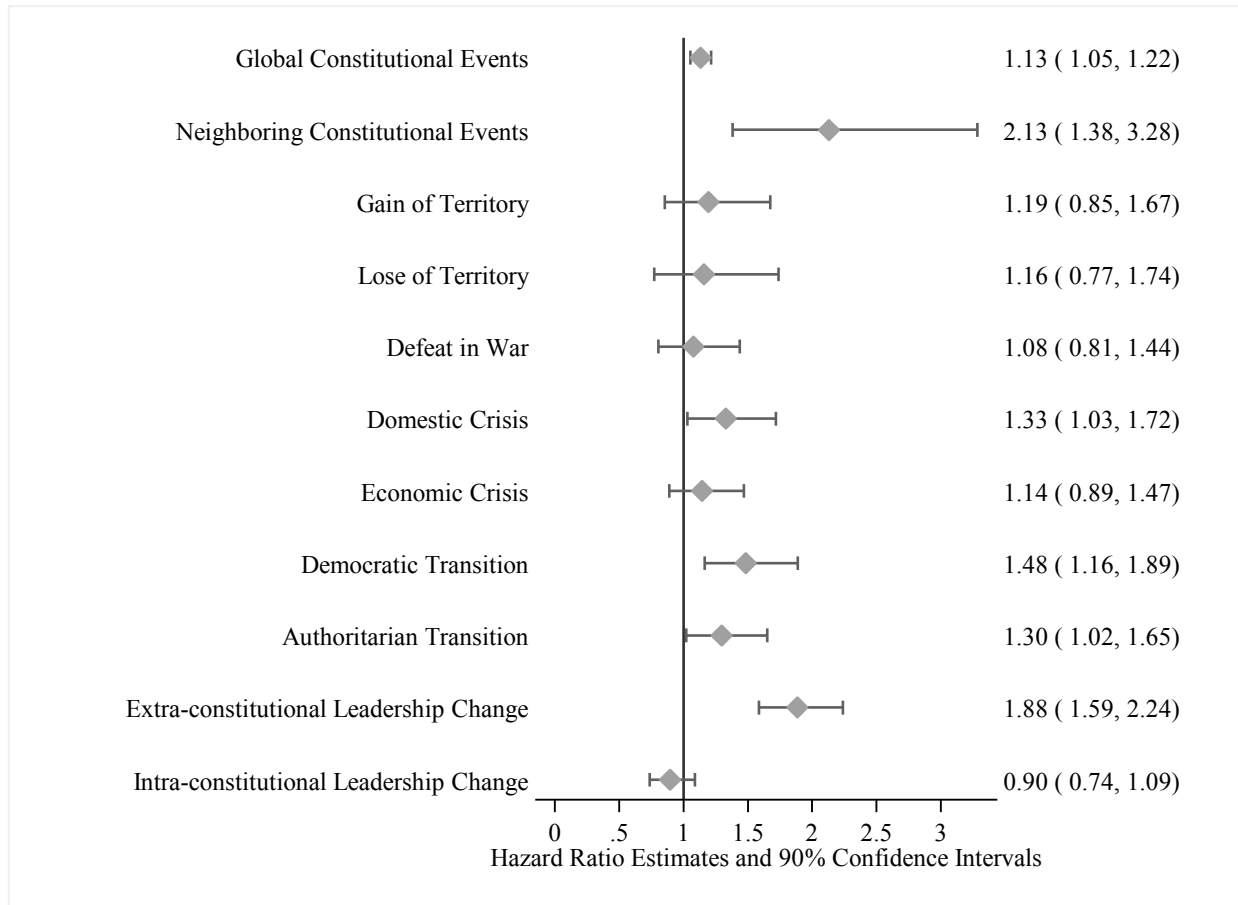
Predicting Constitutional Similarity

	Non-Occupation Constitutions		Occupation Constitutions	
	b	s.e.	b	s.e.
State's Previous Constitution	0.21	0.01	0.14	0.03
Year difference (in 100's)	-0.13	0.02	-0.12	0.03
Occupier's Constitution	---	---	0.06	0.02
Common Land Border	0.03	0.01	0.01	0.02
Common Colonizer	0.08	0.01	-0.01	0.09
Common Language	0.09	0.01	0.03	0.02
Constant	-0.36	0.01	-0.35	0.01
N (Constitutional Dyads)	57983		2613	
R-squared	0.28		0.14	

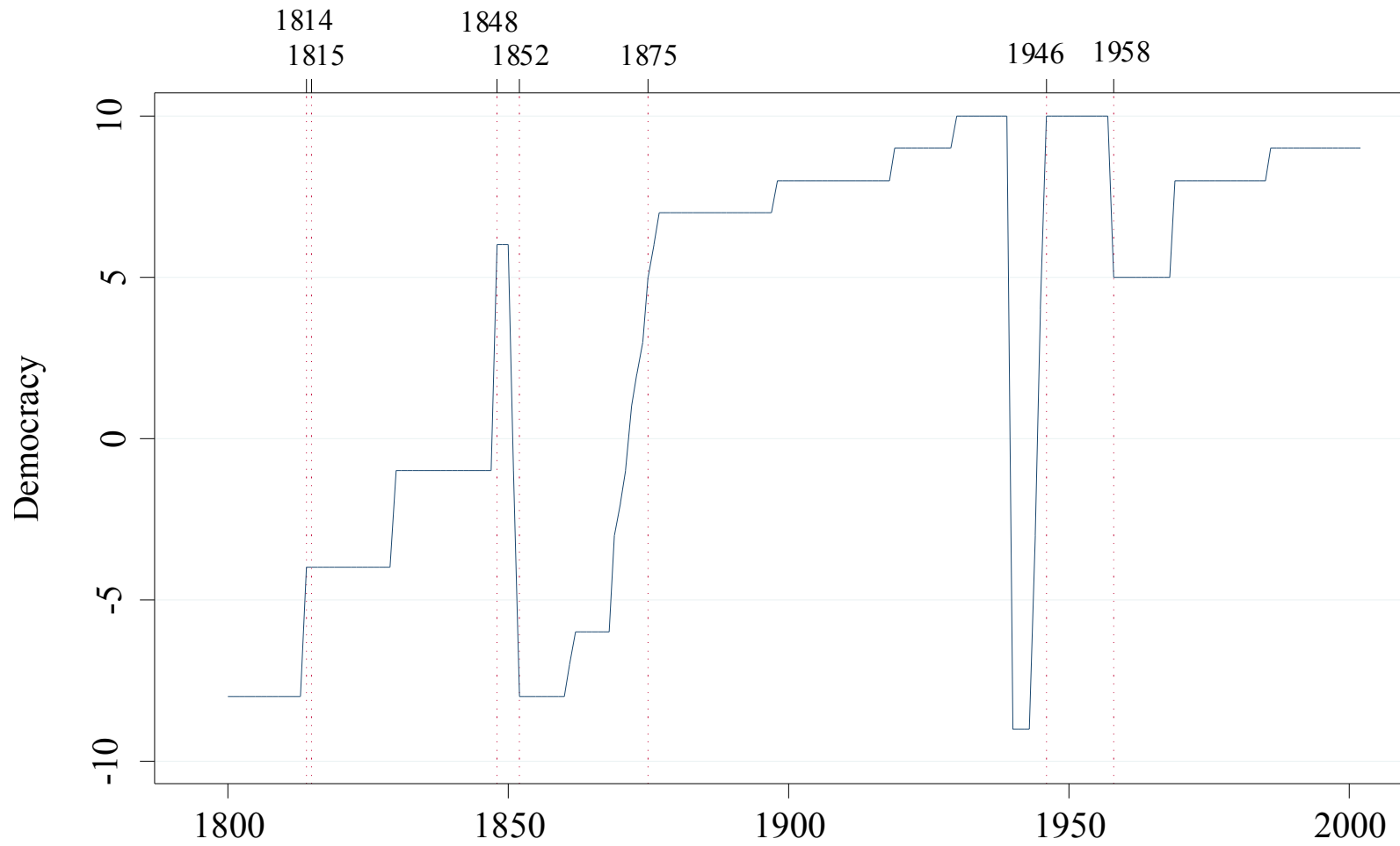
Proximity to the Iraqi 2005 Constitution



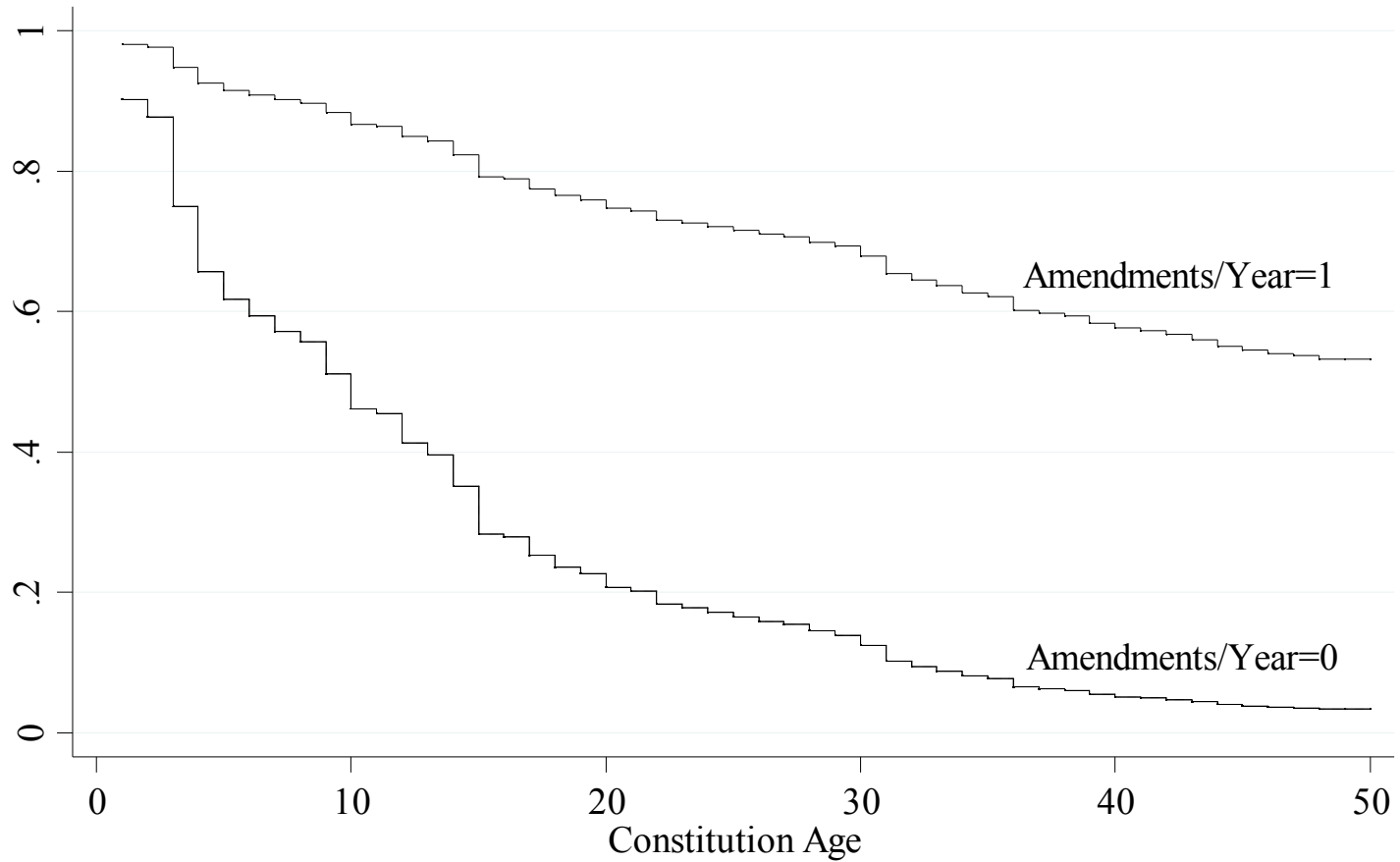
Environmental Variables



France



The Effect of Amendment Rate on Duration

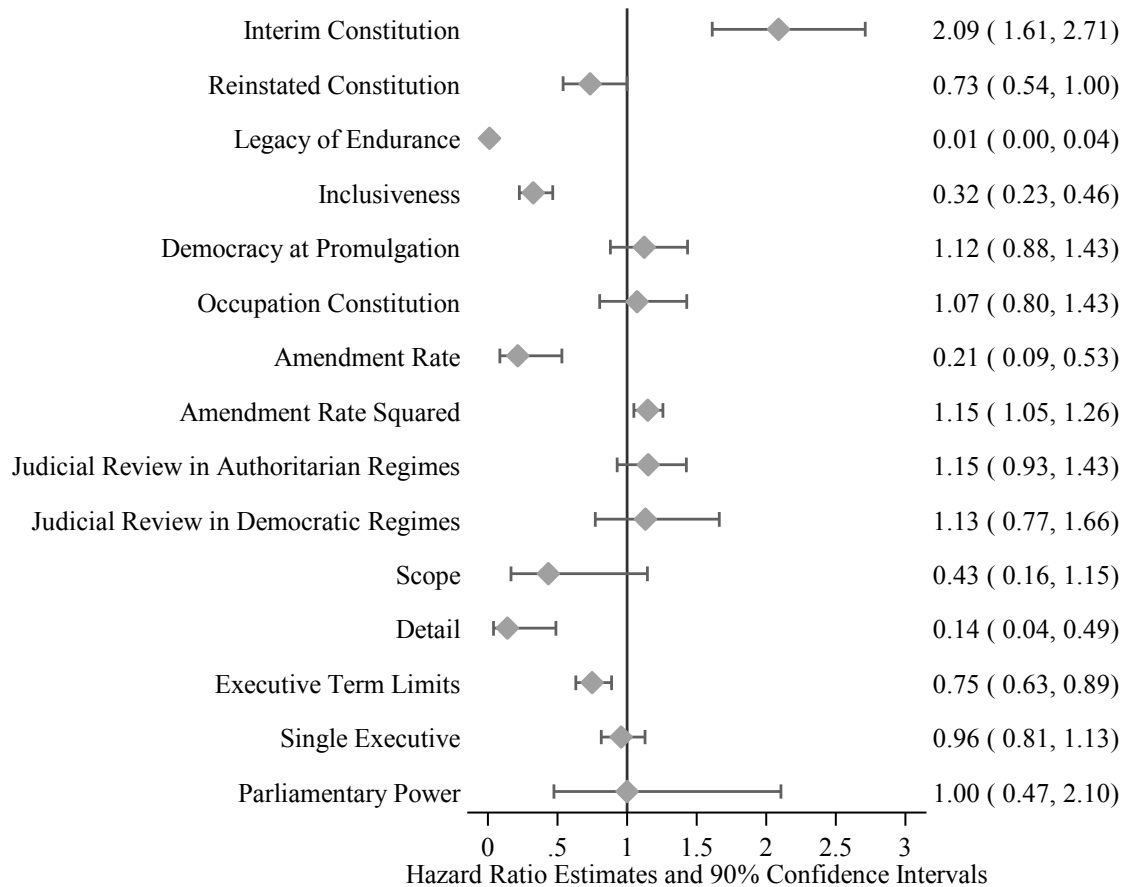


Explaining rights presence

Table 2 – Summary of Estimates for Explaining the Presence of Certain D.J. Rights (Models 4-5)

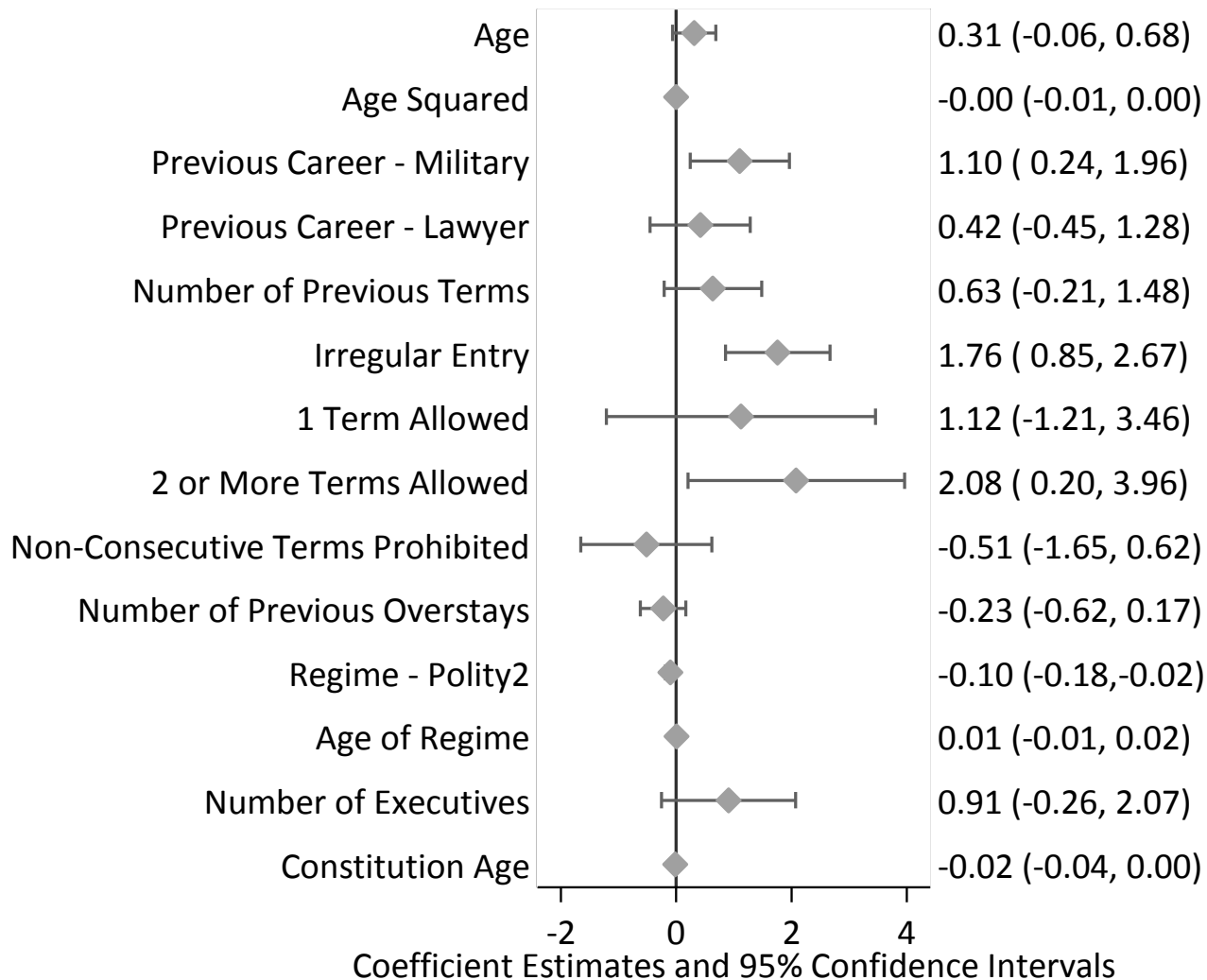
Variable	Appeal	Assoc	Couns	Examwit	Express	Freedom	Freedom	Presin	Pre	Pubt	Speed	Tortu	Total
<i>Time-Invariant</i>													
1 st Before WWII	--		--			--		--				--	5
British Colony	++			++							++		3
French Colony	--	-	--	--		--				--	--	--	8
Christian (%)	++						++	++				++	4
Muslim (%)								++					1
<i>Time-Variant</i>													
Democracy			++	++		++		++	++			++	6
Population (ln)													0
GDP (ln)	--	--		--		--		--				--	6
Treaty Ratification										--			1
<i>Spatial Lags</i>													
Foreign Aid Competitor	++		++				--				++		4
Export Competitor													0
Common Colonizer			++										1
Common Legal				++					++			+	3
Foreign Aid										++			1
Export													0
Region	++								++	++	++	++	5
Regime		++	++		++	++		++			++	++	7

Structural Variables



Determinants of Overstay (cont.)

(n = 350; 87% classified correctly)



Determinants of Overstay (cont.)

- The following makes overstay more likely:
 - Leader around age 40 (0.07 increase)
 - Leader who was previously in the military (0.13 increase)
 - Leader who assumed office through irregular means (0.26 increase)
 - Two term limit (0.33 increase)
- The following makes overstay less likely:
 - Lower Polity IV score (~0.01 decrease for each unit)
 - Older constitution (~0.002 decrease for each year)
 - Presidential Systems (0.09 decrease)
- Results depend on regime-type
 - Only consistent result is that of profession(military leaders always make overstay more likely)
 - Age of the constitution is significant in democracies

Consequences of Overstay

- Constitutional/Political Crisis?
 - Only 32 constitutions (<5% of all constitutions) died as a result of overstay, but this is a high percent of overstays
 - Political conflict is *less* likely surrounding term limit violations than the end of potential overstayers' terms
 - 0.7 years with conflict versus 1.1 years
 - Overstay makes future overstays less likely
 - 24.9% of executives overstay in countries with no previous overstays versus 15.1% in countries with at least 1 overstay
 - Overstay seems to have no effect on the level of democracy
 - Virtually no change in countries' polity scores during the tenure of overstayers (similar to potential overstayers), regardless of regime-type