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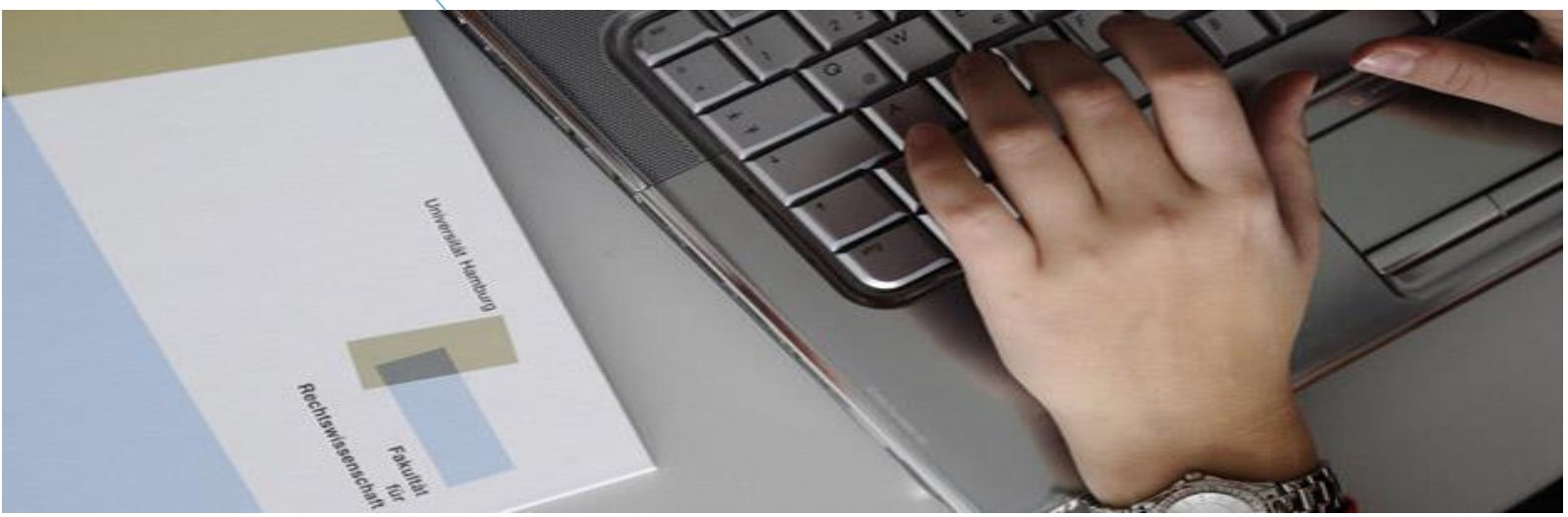

Mind the Gap – Analyzing the Divergence between Constitutional Text and Constitutional Reality

STEFAN VOIGT[a]

This version: November 8, 2019

Abstract:

Constitutional Economics – the analysis of constitutions drawing on the economic approach – has made important progress over the last two decades. The factors determining whether a constitution is complied with, however, have received only little attention. This is surprising, as a huge gap between constitutional text and constitutional reality seems to exist in many countries. In this paper, this gap is referred as the de jure/de facto gap. The paper discusses ways in which the gap can be researched systematically and surveys the scant available literature that has tried to do so thus far.

Keywords: constitutional compliance; de jure/de facto gap.

JEL Codes: H11; K38; P51.

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Mind the Gap – Analyzing the Divergence between Constitutional Text and Constitutional Reality

1. Introduction

Many constitutions the world over promise paradise on earth, but few seem to deliver. Formulated as a question: How much can one learn about the reality of a country by studying its constitution? And, what are the factors leading to a high (low) correspondence between constitutional text and constitutional reality? It is important to know the answers to these questions because the effects of constitutional rules obviously depend on the degree to which they are implemented and not only on how the constitutional text reads. Here is a concrete example of this general claim: *De jure* judicial independence does not have much of an effect on economic growth, it is the *de facto* independence of the judiciary that is conducive to economic growth (Feld and Voigt, 2003; Voigt et al. 2015). More generally speaking, constitutions are likely to reduce uncertainty only if they are actually implemented. Uncertainty is detrimental to investment and, hence, to economic development.

In the example just given, the focus is on economic consequences of non-compliance with the constitution. The potentially detrimental effects of non-compliance do, however, not end there. For example, non-compliance with basic human rights reduces individual freedom and can, hence, be harmful *per se* independently of any economic consequences. Therefore, using basic human rights to analyze the divergence between constitutional text and constitutional reality suggests itself, because it is here that the gap seems to be particular wide. But

questions of non-compliance are definitely not confined to human rights. Why are presidential term limits only complied with some of time, under what conditions are elections likely to be postponed or entirely cancelled, under what conditions is the relationship between the national government and the regional ones not in line with constitutional text, and under what conditions are governments more likely to ignore court rulings? Of course, the list of questions could be extended.

Amazingly, very few scholars have attempted to answer these questions.[1,2] And among the few contributions to the topic, conceptual ideas clearly seem to outweigh both careful theoretical arguments as well as empirical studies. In this survey, I provide a summary of the scant empirical evidence on the question, and also deal with some of the conceptual difficulties that need to be tackled before the questions can be satisfactorily answered. The two most important ones are: How to define the gap? And how to measure it? These are conceptual questions that need to be answered before the central question underlying this survey can be answered empirically. In addition, theory is needed that helps direct our search for potentially important factors determining a *de jure/de facto gap*. I therefore begin this survey by considering a number of plausible conjectures.

Related projects have inquired into the determinants of constitutional longevity (Elkins et al. 2009) as well as constitutional success (Elster 2000, Ginsburg /Huq 2016). They are closely intertwined with our question because being complied with (our topic) seems to be a necessary condition for being successful (Elster's question). Others have described a gap between ideals and institutions (e.g. Huntington 1982), or a gap between the intentions of the framers of a constitution

(however ascertained) and the outcomes reached. I am not dealing with the last two gaps here.

The remainder of this paper is structured as follows: Section 2 develops hypotheses regarding potential determinants of a *de jure/de facto gap*, which I define as non-congruence between provisions explicitly written down in the document called the constitution and the behavior of the top representatives of the various government branches such as cabinet members, legislators, and members of the country's top court(s). Section 3 deals with some of the intricacies of that definition and asks how the gap can be measured. Section 4 surveys the available empirical evidence. As there is actually little evidence, it can also be read as a research program since some of the open questions are explicitly described there. Section 5 concludes.

2. Possible Determinants of the Gap: Theory

2.1. A Theoretical Framework

As this contribution is a survey, I do not strive to develop or propose unified theory here, but to present in a systematic fashion the scattered and varied hypotheses that have been developed by others.

Elkins et al. (2009, 2) propose to distinguish between "design factors" on the one hand and "environmental factors" on the other. Design factors refer to the content and structure of the constitution, whereas environmental factors refer to the environment into which the constitution is implemented. They ask whether these factors are crucial for explaining the longevity of constitutions. I propose to take their argument one step further. Assuming constitutional design to be malleable and

environmental factors to be largely determined exogenously, I argue that constitutional content not aligned with its environment is unlikely to be complied with.

Before generating any hypotheses, I propose to be more specific regarding both "design factors" as well as "environmental factors". In a contribution interested in exploring possible means for maintaining constitutional order, Wagner and Gwartney (1989) propose to distinguish between substantive constraints on the one hand and procedural design on the other. Substantive constraints are "designed to limit the scope of the ordinary legislative process", whereas procedural design "establishes political institutions and procedures" (ibid., 37). Procedural design measures are meant to make the constitution self-enforcing, e.g., by installing veto players who are expected to guard their own competences against any intrusions by other political actors. This is why Vanberg (2011) later makes the argument that procedures are more likely to lead to constitutional compliance than substantive constraints. Hence, when considering design factors it is possible to separate substantive constraints from procedural design.

Regarding environmental factors, I am not aware of a similar delineation. A simple delineation could be to separate all other possible factors from the way the constitution was generated and passed. These other factors might be exogenous, like the geographic location of the country and its constitutional history, but might also include the values and norms prevalent among members of society. This will not give us a simple dichotomy, but a continuous measure based on the degree of exogeneity of the specific factor.

One possibility to establish a connection between design factors and environmental factors is to refer to constitutional culture. This term has been used in a variety of ways by many scholars. Ferejohn et al. (2001, 10) define constitutional culture as "a web of interpretative norms, canons, and practices which most members of a particular community accept and employ (at least implicitly) to identify and maintain a two-level system of the appropriate sort." A few pages later (ibid., 15), they continue: "In short, we must look to a constitutional culture. . .rather than to a constitutional text to describe both how a polity actually operates and. . .how its citizens believe it should operate." Ferejohn et al. thus argue that in order to understand how constitutional text (i.e., the *de jure* constitution) is implemented, we need to look at how people actually think it should be operating (an environmental factor).

Until now, the attempt to structure possible arguments has focused on constraints. At the end of the day, compliance with the constitution is determined by actors and what needs to be analyzed are, hence, the incentives of the relevant actors, given the various constraints. I propose to distinguish four non-exclusive groups of actors: (1) those who are supposed to be constrained by the constitution, such as members of government; (2) those who can potentially assume the role of veto player vis-à-vis the government, such as legislators, judges, and others; (3) governments of other countries; and (4) the citizens at large.

In Table 1, I try to combine the various constraints with the four actor groups. A number of questions immediately emerge when looking at the table: What is more important, substance or procedure? How can potential veto players make non-compliance less likely? How do governments from other states come in at all? What

is the potential role of citizens? In what sense is the content of the values and norms followed by many members of society relevant in determining constitutional compliance?

Table 1 around here

To generate hypotheses referring to all these questions, I propose to rely on a simple expected utility equation in the spirit of Becker (1968).

$$E(U) = (1-p)\times b + p\times c$$

We are interested in the expected utility of actors who are supposed to be constrained by the constitution. I assume that they could, at least in principle, make themselves better off by reneging upon the constitution (which implies the realization of benefits "b"). To ascertain "b", we thus need to concentrate on the preferences of those in a position to renege upon the constitution. If the product of the probability "p" of being criticized, sanctioned etc. with costs "c" is sufficiently high, politicians will decide to comply with the constitution.[3] Now, a variety of actors can impose costs on governments and I propose to discuss conjectures by looking at the different actors in turn. I begin by discussing a number of factors potentially determining benefits from not complying with the constitution.

In setting up the theoretical framework, I have done three things: propose a simple taxonomy of factors relevant for determining a *de jure/de facto gap*, introduce actors that might be profiting from a *de jure/de facto gap* as well as those who are interested in preventing a gap from emerging and, as a final step, a simple cost-benefit framework. This cost-benefit framework is used to structure the rest of this section. In 2.2, the potential benefits from non-compliance for government will be

discussed. Section 2.3 deals with the probability p of some potentially costly opposition being produced, whereas Section 2.4 looks at the costs that various actors can impose on government. Within that subsection, I look into the costs potentially caused by the various actors also introduced here, namely the veto players, foreign actors, and citizens at large.

2.2. Potential Benefits from Non-Compliance

I conjecture that the size of b, i.e., the benefits from reneging on the constitution, is determined by a number of factors. The more the preferences of the governing deviate from the constraints laid down in the constitution, the higher b. More specifically, the tighter the constraints in the constitution, the more attractive it is not comply with it, *ceteris paribus*. However, the personality of the governing might also matter, as they might have a preference for rule-abidance itself. If the mechanism used to select and appoint political leaders rewards rule-abidingness, this reduces the probability of non-compliance.

Divergence Between Constitutional Content and the Preferences of Government

Benefits from reneging are low if the constraints laid down in the constitution are aligned with the preferences of government, i.e., if government does not wish to have any competences at its disposal that the constitution does not grant it. This could mean that older, non-amended constitutions are less likely to be complied with. Notice, however, that this argument is not shared by everyone. Elkins et al. (2009), for example, argue that there might be something like an "increasing fit", and that the longer a constitution has been in place, the higher the likelihood that *de jure* and *de facto* constitutions align. Regarding basic rights, Elkins et al. (see also

2016, 233) seem to favor what they call the "maturation hypothesis." They point out that aspirational rights might have a motivating force for politicians which might lead to their actual implementation a number of years down the road.[4] Empirically, they do find maturation effects (i.e., convergence between constitutional reality and constitutional text), substantially, however, the effect proves to be miniscule.

Preferences of current leaders are less likely to be aligned with constitutional content if the constitution was imposed by a foreign power. Berkowitz et al. (2003) show empirically that legal transplants that are imposed on a population have fewer chances of being implemented, whereas transplants from legal systems with which the population is acquainted have a higher chance of being implemented. I thus expect a higher *de jure/de facto gap* if the constitution was imposed by a foreign power, *ceteris paribus*. Another factor is closely related with the possibility that preferences regarding the use of policy measures might change over time. In other words, the more difficult it is to amend the constitution, the higher the likelihood that it will be ignored (Gavison 2002; Elkins et al. 2009).

Substantive Constraints

Our general hypothesis regarding potential benefits from reneging against substantive constitutional constraints is brief and straightforward: The more constraining the constitution, the higher the benefits from reneging, *ceteris paribus*. Imagine a constitution completely prohibiting any kind of redistribution such as basic welfare policies.[5] Other, less extreme, examples are constitutional budget

limits, substantive limits of federal governments to interfere with state government by, e.g., prohibiting certain grants and so on.

Selection Mechanisms for Politicians

We now move on to discuss an idea that has probably never been discussed with regard to constitutional compliance, but that might have an important effect on the degree to which the constitution is being complied with. The idea is that different selection mechanisms, referring to the selection of members to parliament and to the executive, can lead to the selection of politicians with different traits. The underlying assumption is that different types behave differently, and draw different benefits from not complying with the constitution. Brennan and Hamlin (2000) assume dispositional heterogeneity among (political) actors that they make concrete by assuming that politicians can be driven by virtue or by self-interest and then ask whether institutions can be designed such that virtuous individuals are more likely to run for political office and to be elected into political office. They proceed in two steps. In the first (static) step, dispositions are assumed to be given. In the second (dynamic) step, institutions can affect the distribution of dispositions among actors (i.e., institutions can be virtue-enhancing). This idea is concerned with the benefits to politicians of constitutional non-compliance in the sense that some types are expected to realize higher benefits from reneging than others.

Over the last couple of years, a number of studies have analyzed the patterns of (self-) selection into political office. Dal Bó et al. (2017) analyze selection patterns into politics in Sweden and find that overall, politicians are significantly smarter than the population they represent. They conclude that “it is possible for democracy

to generate competent and socially representative leadership." But they are interested in the ability and responsiveness of politicians, which is not necessarily identical with their propensity to abide by the rule of law.

Inquiring into the relationship between politicians' age and their behavior, Alesina et al. (2016) find that younger politicians (in their case, Italian mayors) are "more likely to behave strategically in response to election incentives." They are likely to increase spending in pre-election years as well as obtain more transfers from central government. Dealing with the possible reasons causing younger mayors to behave more strategically than their older colleagues, Alesina et al. (2016) argue that this difference in behavior is most likely due to career concerns, and not their longer time horizons or being more energetic. But their study is mute on our question, namely whether young politicians are less (or more) likely to comply with constitutional rules than older politicians.

The paper by Dal Bó and Finan (2018) is closest to our question. According to their model, politicians can be characterized by two traits, namely ideology on the one hand, and valence on the other. The term "valence" incorporates desirable traits such as charisma, competence, and integrity. A high degree of integrity would supposedly make a politician comply with the constitution. Their basic idea is that selection patterns depend on the cost of running for office which might vary among candidates. To be able to test their model empirically, one would, hence, need to be able to observe valence which is not the case. Dal Bó and Finan (ibid.) point out that most empirical studies rely on proxies for valence such as education, pre-office income levels, or the pre-office type of occupation. But assuming that any of these are very highly correlated with norm-compliance seems far-fetched.

Instead of deploring the lack of both theoretical as well as empirical insights, I simply propose a number of *ad hoc* conjectures regarding personal traits of leading politicians.

(a) Leaders who achieved power through irregular means may also be more likely not to comply with the boundaries laid down in the constitution. If you have acquired power by breaking rules, why should you comply with the rules while governing?[6]

(b) Leaders who once served in the military may be less likely to comply with the constitution. The underlying assumption is that a sizeable portion of military leaders are ready to place their own preferences regarding law and order above constitutional constraints that might appear slow and cumbersome to them.

(c) Female leaders may be more likely to comply with the constitution. There is some evidence (Dollar et al., 2001) that countries ruled by women suffer less from corruption, which could be interpreted as one proxy for rule compliance.

(d) Younger leaders may be less likely to comply with the constitution because securing tenure has a higher value for them than for older leaders. The argument is, hence, that the present value of b is higher for younger leaders. One might, however, also expect the exact opposite: if reneging on the constitution increases the chances of being thrown out of office, younger leaders might be more careful not to renege.[7]

The underlying assumption regarding all four conjectures is that benefits from non-compliance are not objectively given but depend on the actors' personal characteristics. This motivates the following question: What procedures are more

likely to lead to the appointment of people who acquire power through regular means, who have not had a military career, and who are unlikely to stay in politics for decades because they are young?[8]

Political systems conducive to strong parties might be conducive to constitutional compliance because individual politicians with a short time horizon are unlikely to become leaders of such parties as these organizations are collectively conducive to lower discount factors (Brennan and Kliemt 1994). Framed in terms of the cost-benefit calculus in the spirit of Becker, benefits from non-compliance are expected to be lower in systems with strong parties since such parties can be expected to have a longer time horizon.

This concludes our list of potential benefits from not complying with constitutions. These potential benefits have been analyzed from the point of view of government. Constitutional rules not only enable government, they also constrain it, which is why some government actors would benefit from non-compliance. Because constitutional rules are the most basic layer of rules, there is no more basic layer that can be drawn upon to sanction non-compliers. This implies that compliance with constitutional rules is expected to be high if the relevant actors cannot make themselves better off by not enforcing the rules. This trait has often been referred to as "self-enforceability". What means are available for making non-compliance with constitutional rules unattractive? In cost-benefit terms, how can non-compliance be made so costly that actors representing government do not have an incentive to do so?

2.3. Factors Determining the Probability of Being Sanctioned

In this section, I present a number of factors that might determine the probability with which non-compliance of some government actors with constitutional constraints is revealed. Revealing non-compliance is a necessary, but not a sufficient condition for sanctions. At times, it is difficult to disentangle the probability p from the cost c. At the end of the day, however, this is not a problem because what matters is the product of the two.

The potentially most important environmental factor determining constitutional compliance can be grasped with a simple game described by Weingast (1997) in which citizens need to coordinate against government in case government tries to renege on constitutional rules. This appears more likely if constitutional rules are framed in a precise way that leaves little room for interpretation. Constitutional rules could, hence, become focal points à la Schelling (1960). *Ceteris paribus, the likelihood of constitutional compliance increases with the precision of constitutional rules.*[9]

In an argument largely following Hayek (1960), Leeson (2011) argues that limiting the scope of government would increase the likelihood of the constitution being enforced because it is easier to monitor the behavior of smaller governments. Whereas Weingast (ibid.) focuses on the precision of the constitution, Leeson focuses on its constraining functions. Note that this argument is in conflict with a conjecture described with regard to potential benefits from reneging on the constitution. There, it was maintained that a very limited scope of competences

allocated to politics could increase the likelihood of politicians overstepping their constitutional mandate.

Reaching consensus among citizens that government has overstepped its competences (and then acting on this insight) seems more likely if the citizens share many values and norms. In other words, it is not the precision of the constitutional text alone but also the homogeneity of its interpretation. Vanberg (2011, 313) argues that homogeneity is not important because citizens hold similar values but that shared values enable them to coordinate their expectations regarding legitimate and illegitimate government action. Formulated as a hypothesis: *The likelihood that citizens interpret the behavior of their government uniformly as not being in line with the constitution is increasing in the degree to which values and norms are shared among the population.*[10] Here again, the interaction between design and environmental factors is crucial in the sense that the written constitution can contain precise constraints that will become effective if citizens share expectations on how these written constraints should be interpreted and acted upon.

A precondition for interpreting government behavior as reneging on the constitution is to dispose of information regarding the contents of the constitution on the one hand (i.e., the *de jure* constitution) and the actual behavior of government on the other. Having that information at one's disposal, an evaluation is needed judging if government behavior is to be interpreted as complying with the constitution or not. The media can play an important role in providing the relevant information, as well as in offering a possible evaluation. I hypothesize that *a high degree of media freedom is conducive to a small* de jure/de facto *gap*.[11]

Finally, I hypothesize that the way in which the constitution was generated and passed affects its likelihood to be enforced according to its literal meaning. *The more encompassing the deliberations about the content of the constitution, the higher the legitimacy accredited to the document and the higher the likelihood that it will be defended in case some actors try to renege upon it* (see also Widner 2005).[12] This hypothesis can be complemented with a closely related one, namely that *The more encompassing the procedure of passing the constitution, the higher the legitimacy accredited to the document and the higher the likelihood that it will be defended it in case some actors try to renege upon it.*

2.4. Severity of Sanctions

If costs are imposed, they need to be imposed by actors other than those not complying with the constitution. I propose to distinguish three groups of actors here: (1) other representatives of government; (2) other governments; and (3) non-state actors, in particular citizens.

2.4.1 Costs Imposed by Veto Players

Among a constitution's design factors, the separation of powers between various government actors is key. This not only refers to the usual separation between the three branches of government, but extends to the division of competences among the various levels of government (federalism) and to independent agencies, such as a central bank. If more than one actor is needed to implement a policy decision, then each of these actors has incentives to make sure that the other actors do not overstep their competences, as this frequently implies a diminution of one's own

competences. I thus expect that *a higher number of constitutional veto players increases the likelihood of constitutional compliance*.[13]

Another institutional device that promises to be of relevance in making politicians comply with their constitution is constitutional review, i.e., the competence of the judiciary to check whether legislation is in compliance with the constitution. Formulated as a hypothesis: *Countries with judicial review will experience a lower de jure/de facto gap than countries without*.[14]

Not all forms of constitutional review have the same impact on constitutional compliance. If government oversteps its competences, constitutional review needs to be initiated by some other actors, as the judiciary is almost never the agenda-setter and can, hence, not initiate proceedings on its own.[15] Generally speaking, I expect that *the more actors able to serve the function of agenda-setters for the judiciary, the higher the degree of constitutional compliance*. It might be worth emphasizing that in some constitutions, citizens are given the role of the "guardian of the constitution" in the sense that citizens have *ius standi* in front of the constitutional court. Analyzing whether this particular procedural right has a significant impact on the activity of the constitutional court and, in turn, increases constitutional compliance seems well warranted. This mechanism to increase constitutional compliance can, thus, be based on an interaction between the judicial branch of government and direct citizen involvement.

This ends our discussion of possible ways in which other government actors could impose costs on the current government. I now turn to ask whether foreign actors

such as foreign governments or international organizations can potentially impose costs on the non-complying domestic government.

2.4.2 Costs Imposed by Foreign Actors

Prima facie, the notion that foreign actors, such as international organizations or foreign governments, could be instrumental in keeping the domestic government within the confines of the constitution might appear awkward. Yet, I argue that other governments might be important in making the implicit promises in the constitution more credible. Constitutions contain many promises, among which secure property rights are particularly salient. Yet, once invested, government might be tempted to expropriate the owners of property. Since investors will anticipate this, little investment will take place, unless government is able to turn its promise into a binding commitment (Voigt and Gutmann 2013). One way of doing this (discussed in the previous section) is by creating veto players who have incentives to keep their government in check. A second, and possibly complementary, means to make commitments credible and for government to constrain itself is to ratify international treaties.

Compliance is only likely to increase as a consequence of international treaties if some sanction looms in case of non-compliance. It has often been argued that the sanction could be a loss in international reputation (Downs and Jones 2002; Brewster 2009). Such a loss could imply a lower likelihood of entering into additional international agreements in the future. But it could also reduce a government's reputation at home. If the potential loss of reputation is perceived as sufficiently costly, forward looking governments have an incentive to comply with

their constitution. I would thus expect that *having ratified many international treaties increases the likelihood of constitutional compliance*.[16]

Yet, it might not only be the number of international treaties a country has ratified that could matter. A treaty's content could matter too. For the entire argument proposed here, I must assume that the content of international agreements is in accordance with the domestic constitution.[17] And regarding the content, the existence of formalized monitoring and (or) sanctioning procedures might well make a difference. The European Union is supposedly the most advanced in this regard. It has formalized court procedures that allow the European Court of Justice to sanction member states that have not complied with their obligations regarding EU law.[18] If member states are found guilty of not having complied with some fundamental values of the EU (such as liberal democracy and the rule of law), they might even have their voting rights suspended.[19] The Council of Europe has created the European Court of Human Rights, which has the competence to judge on the compliance of member states with its Charter of Human Rights. Similar provisions exist for other regional human rights courts. The expectation is that *the existence of explicit monitoring and (or) sanctioning mechanisms increases the likelihood of compliance*.

2.4.3 Costs Imposed by Non-State Actors

The previous section ended with the possibility that a government that loses its international reputation might also suffer a loss in its popularity domestically. Governments in democratic countries are more likely to systematically prevent this from happening because failure to do so could imply being voted out of office. This

leads directly to the first hypothesis in this section, namely that *democracies are likely to reach higher degrees of convergence than non-democracies*.

In section 2.3, the factors determining the probability that a government attempts to renege on constitutional provisions were discussed. Identifying such attempts is a necessary condition for sanctioning government, but not sufficient. Identification needs to be complemented by coordinated action sactioning government should it try to renege on the constitution. The possibility of individuals to overcome the dilemma of collective action is an environmental factor.[20] Ceteris paribus, *the higher the number of non-governmental organizations in a country, the easier it is for members of society to act collectively*. The original purpose of non-governmental organizations is only of marginal importance, the sole fact that some members of society have managed to overcome the dilemma of collective action should increase the likelihood that they will also manage to overcome the dilemma in opposing government.

Voigt (1999) argues that constitutions need to be backed by internal institutions. Internal institutions can be defined as rules whose non-compliance is sanctioned by members of society, rather than the government. A rule demanding that citizens oppose government in case it oversteps its constitutionally defined competences that is coupled with the threat of sanctions if someone does not comply with the rule would be an internal institution conducive to collective action. Sanctions can range from disapproval of behavior to being expelled from a group. *Norms making it a duty to oppose government should it try to overstep the constitution increase the likelihood of constitutional compliance.*

Referring to the relevance of internal institutions as a factor explaining the degree to which governments comply with constitutional constraints is very abstract, and the explicit mentioning of more concrete institutions is certainly desirable. In their work, Inglehart and Welzel (2005) argue that self-expression values are the best predictor for effective democracy.[21] Now, "effective democracy" is not identical with constitutional compliance, but it can be argued that the two go hand in hand. It is hard to think of a country with an effective democracy in which governments do not comply with the constitution.

Todd (1985) argues that historical family types can not only explain ideological convictions but also institutions, including the rule of law. One example is the "stem family", which is characterized by the inequality between brothers (via inheritance rules) and the cohabitation of parents and their oldest son (and his wife and their children). This family type is based on both inequality (between siblings) and hierarchical authority (between father and son). Todd's main conjecture is that family types will be reflected in society at large, and countries in which the stem family type is prevalent should score low on the rule of law. The main conjecture can be used to produce a host of hypotheses regarding the effects of family types, many of which have a direct bearing on the degree of constitutional compliance (such as the strength and stability of the state, the likelihood of military coups, the number of government changes in conformity with the constitution, and so on).

If a country's constitution is in accordance with the rule of law, then countries dominated by family types not conducive to the rule of law are likely to suffer from constitutional non-compliance. Formulated concretely: *Family types encouraging hierarchical relations as well as family types encouraging inequality among*

siblings (e.g., via inheritance norms) are more likely to suffer from constitutional non-compliance.

Todd (2018) insists that family types are more ancient and more stable than religions. But, of course, religion could also have effects on the size of the *de jure/de facto* gap, and family types and religions interact. Religion can have an important effect on how people conceive of the state. It has been argued that different religions foster different attitudes towards accepting – or not accepting – hierarchies, which is why it might be interesting to take this into account. I hypothesize that *questioning hierarchy is an important precondition for protesting against government in case it reneges against the constitution*. High levels of protest are assumed to be equivalent to high costs for government if it does not comply with the constitution. A government expecting protest against its reneging on the constitution is therefore more likely to comply with it.

Trust is one component of self-expression values as introduced above. But trust may be an important factor determining citizen behavior in its own right. In low trust societies, people are less likely to expect the government to follow the rules, people expect the next politician will be just as bad as the current one. As a consequence, people living in low trust societies will not punish the government harshly for non-compliance.[22]

Before concluding this section, I would like to mention a concept that can also be expressed as the product of p and c, namely constitutional patriotism ("*Verfassungspatriotismus*"), which played an important role in German constitutional discourse, and can be summarized as loyalty to the constitution.

Although proponents of the concept (such as Müller 2009) generally refuse its positive analysis, I believe it would be highly interesting to see whether higher levels of loyalty to the constitution among the citizens translate into higher levels of compliance with the constitution among politicians. Ideally, loyalty to the constitution would be separated from potentially competing loyalties to the party, the family, the clan or the tribe. In terms of a hypothesis: *the higher the loyalty to the constitution, the lower the* de jure/de facto *gap*.[23]

In sum, I have argued that there are three basic mechanisms by which costs can be imposed on government in case it tries to renege on the constitution. Costs can be imposed by (domestic) veto players, by governments of other states, and by non-state actors and, in particular, citizens. At the end of the day, the behavior of the citizens is crucial, because the first two mechanisms are more likely to be effective if they receive citizen support. These basic mechanisms are not mutually exclusive, but can reinforce each other. In addition, it seems likely that different mechanisms have their strengths with regard to different parts of the constitution. A government trying to reduce basic human rights might be made compliant by popular protest, whereas a government trying to intrude into the competences of parliament or the judiciary might be made compliant via the separation of powers.

3. How to Define and Measure the Gap?

This section first deals with some of the difficulties in defining the *de jure/de facto* gap, and then asks how it can possibly be measured. Above we defined the gap as non-congruence between provisions explicitly written down in the document called the constitution and the behavior of the top representatives of the various

government branches such as cabinet members, legislators, and members of the country's top court(s).

Simply speaking, the *de jure/de facto* gap is the difference between a *de jure* and a *de facto* measure. According to the definition proposed above, the *de jure* part only refers to provisions explicitly written in the constitution. This implies that court decisions interpreting the constitution are not included, an implication many jurists might want to quarrel with. Yet, a decision in favor of including such court decisions would cause a serious headache for the empiricist, as "knowing" the constitution of a country would be truly mind boggling. The definition further implies that aspirational articles that are not meant to be enforceable based on the wording of the constitution should not be taken into consideration when ascertaining the gap.

The *de facto* part of the definition suggests to only take the behavior of the top representatives of the various government branches into account. In other words, the behavior of lower ranked government officials and the entire administration is not taken into account. There are a number of arguments in favor of that delineation. First of all, the subordinate might be following the orders of her or his superiors, or might simply not follow constitutional provisions based on her or his own drive. The latter would thus primarily indicate an ill-conceived principal-agent relationship. Second, it makes life easier for the empiricist as the behavior of fewer actors needs to be recognized.

Lacking state capacity might look like a serious excuse for not complying with constitutionally guaranteed promises. But shouldn't promise makers only make

promises that they have the capacity to deliver? Having to discount constitutional promises with some measure of state capacity would make any measure subject to various criticisms, which is why I propose not to consider it explicitly.

How to deal with the very slow implementation of constitutionally guaranteed services? If the judiciary is independent but needs years to come up with decisions, this can cause severe problems as the old saying "justice delayed is justice denied" implies. It would certainly be interesting to explicitly take into account the time needed to carry out constitutional promises, but this creates at least two problems. The first problem revolves around the availability of data. If we not only need information about the precise actions taken by top representatives of government, but also place these actions in a timeframe, I am afraid data availability would be reduced dramatically. Further, we would need to rely on some normative judgment that discerns the period of time a constitutional promise is not kept and, thus, can be counted as constitutional non-compliance. This is why I refrain from explicitly taking the time element into account here.

What the proposed definition leaves open is how to deal with situations in which the articles of the constitution are not explicitly broken, but circumvented by making important decisions in forums not specified in the constitution (Caruso et al. 2015)? A concrete example for such a practice is offered by Eisenstadt et al. (2015, 605) who refer to Mexico where the "ruling party autocrats implemented one of the most progressive constitutions in the world … but established metaconstitutional practices … and informal bargaining tables … to circumvent de jure dictates in favor of de facto elite practices."

When trying to come up with a measure, does it make sense to come up with a single aggregate measure? At least two considerations against such an overall measure can be named. First, a number of aggregation decisions would need to be made: Should the dimensions simply be added up? Should different weights be attached to different dimensions? If yes, how to decide upon the relative weights? The second consideration is more theory based: Is there any good reason to assume that the various parts of the constitution will be indiscriminately complied with or not? There are certainly a number of reasons that speak against such an assumption. For example, a government's non-compliance with some rules is likely to be highly unpopular, whereas non-compliance with other rules might even be applauded by major segments of the population. Connecting this observation with the argument that the enforcement of constitutional rules ultimately depends on the citizens, directly leads to the conjecture that the concrete size of the *de jure/de facto* gap is likely to differ depending on the concrete subject area or procedural rules one is analyzing. The immediate follow-up question is: What type of rules are most likely not to be complied with? In the abstract, answering this question is straightforward, namely those constitutional rules whose beneficial effects are not immediately apparent.

Regardless of the level of aggregation chosen to measure constitutional compliance, one also needs to decide whether categorically or ordinally scaled variables make more sense. Many options between a simple dummy and a fine-grained ordinal scale appear possible.

To conclude, more fine-grained measures promise to be more useful. It might make sense to separate the rights part of a constitution from its organizational part. Within

the rights part, one might want to distinguish between negative and positive rights, and so on. Yet, an aggregate measure has the advantage of being a single number – and might receive more attention in public debate.

4. Attempts to Analyze the Gap: Empirics and Open Questions

4.1 Introductory Remarks

Having proposed a theoretical structure designed to identify the factors that determine a *de jure/de facto* gap along with a discussion of some of the methodological challenges in ascertaining it empirically, I finally turn to a brief survey of the insights regarding a gap. It is fairly superficial, because the topic has not been at the top of many researchers' agenda. This is why, at times, it reads more like an extended research proposal.

Because it seems straightforward that the literature on the effects of constitutional design is more developed than that of environmental factors, a clear emphasis will be on the former. Following the suggestion made in Section 2.1 above, I propose to distinguish between substantive constraints on the one hand, and procedural ones on the other. In a sense, Elkins et al. (2009, 29f.) chose exactly the same delineation. Their book contains two hands-on measures for the *de jure/de facto* divergence, one measuring civil liberties (a particular aspect of substantive constraints), and the other measuring parliamentary powers (a specific aspect of procedural constraints). They find (ibid., 53f.) that ". . .the constitutional provisions regarding parliamentary power describe the reality in these countries much better than do the constitutional provisions about civil liberties. . .the more general finding in our data that the

functioning of important political institutions is described fairly accurately in constitutions, but the extent to which rights provisions are implemented in practice varies dramatically across countries, with some countries promising more than they deliver and others delivering more than they promise." Their findings support both the theoretical the methodological arguments made above: the theoretical one that procedural constraints are more likely to be complied with than substantive ones, and the methodological one that specific compliance indicators are more useful than a single highly aggregate overall one.

The evidence presented in this section is divided into two major parts. In the first, evidence regarding the enforcement of constitutionally entrenched rights occupies center stage. This also includes the right to own property. As an example for another substantive constraint, the evidence regarding the enforcement of budget deficit rules is briefly summarized. The second part of this section is devoted to procedural constraints. Evidence regarding the relationship between the various government branches are presented with judicial independence occupying a prominent place. Beyond that, the focus is on the rules regulating states of emergency, as well as those on constitutional amendment.

A survey not only has the function of summarizing the current state of knowledge, but also of pointing out important gaps in our knowledge. So this section also serves to highlight some of the important lacunae regarding constitutional compliance.

4.2 Gaps Referring to Substantive Constraints

4.2.1 Basic Rights

In their study on "sham constitutions", Law and Versteeg (2013) look into three categories of constitutional rights, namely: personal integrity rights, civil and political freedoms, and socioeconomic and group rights. For the *de jure* part, they code whether a particular right is mentioned in the constitution, for the *de facto* part, they rely on a number of publicly available datasets. Potential determinants of underperformance are separated into country characteristics on the one hand, and constitutional characteristics on the other. The empirical results are only offered in a summary fashion, and neither coefficients nor standard errors are reported. The strength of their results thus remains unknown.

They present results for both an overall indicator and for the three different groups just mentioned. It is noteworthy that none of the potential determinants turns out to be significantly correlated with all four indicators. This finding supports my plea for fine-grained indicators and against aggregate ones. If we look at country characteristics, both the level of income and democracy are conducive to the convergence of constitutional reality and constitutional text. The experience of civil war, a large population and a high degree of ethnic fractionalization all lead to the divergence of constitutional reality from constitutional text. Law and Versteeg (ibid.) differentiate between a constitution that "contains only generic rights" and one that "also encompasses more esoteric provisions." They refer to this difference as "comprehensiveness", and find that more comprehensive constitutions are less likely to reach convergence.

The paper by Law and Versteeg can only be a very first step in analyzing government compliance with constitutional rights. Chilton and Versteeg (2015) is a follow-up paper based on a simple and straightforward conjecture: Rights that are addressed to groups and allow for the formation of associations like unions or parties ("organizational rights") are more likely to be actually enforced than rights addressed to individuals only. Once parties or unions are formed, the cost of denying them their right to existence is supposed to be higher than denying an individual his or her right to free movement or freedom of expression. The empirics are in line with their conjecture. In a second follow-up, Chilton and Versteeg (2017) simply ask whether rights to education and healthcare are associated with an increase in government spending and find that this is not the case. It seems, hence, that these rights are only promised but the promises are not delivered upon.

Metelska-Szaniawska (2016) analyzes the *de jure/de facto* gap focusing on 27 countries of Central and Eastern Europe that have been subject to a fundamental transition process since the beginning of the 1990s. Relying on seven basic rights (habeas corpus, prohibition of torture, freedom of religion etc.), she tries to identify the determinants of the gap and finds that being part of a conflict as well as constitutional comprehensiveness (in the sense of a larger number of rights promised in the constitution) widen the gap, whereas the degree of democracy as well as of the actual independence of the judiciary lower it.

The paper by Ben-Bassat and Dahan (2008) focuses on social rights. They ask whether constitutionally guaranteed social rights are a good predictor for the social policies actually observed, but do not find a robust relationship between

constitutional commitments and social policies except regarding the right to social security.

Are countries either implementing constitutional rights across all four dimensions or not delivering in all of them? According to Blume and Voigt (2007), there is no homogenous implementation of constitutional rights across all their dimensions. Of the 136 countries included in their study, 20 perform badly in all four categories, and another 26 perform strongly in all four, implying that 90 countries have a mixed performance. Compared to all other areas covered in this survey, our knowledge gap regarding the determinants that lead to a *de jure/de facto* gap with regard to constitutional rights seems to be relatively small.

4.2.2 Constraints on Government Spending

In his reflections on the French revolution, Edmund Burke (1909, para 377) wrote that "the revenue of the state is the state", hence emphasizing the centrality of government revenue for the state. I am not aware of any constitutional rules explicitly limiting the collection of state revenue. There are, however, quite a few constitutions that have introduced constraints on government spending.

For various reasons, governments are tempted to incur large deficits. Some constitutional economists argue that constitutionally entrenched spending limits are an adequate means of correcting this bias (e.g., Buchanan and Wagner, 1977). With the Maastricht Treaty, Europe initiated a grand experiment with entrenched budget rules by setting maximum levels for both current deficits and aggregate debt. However, quite a few countries beyond the European Union had already experimented with entrenched budget rules prior to enactment of the treaty.

If existing spending limits are not in the (short-term) interest of politicians, politicians may simply ignore them. Spending limits, in other words, are not self-enforcing. Compliance with constitutional deficit rules is likely only if non-compliance is heavily sanctioned. Alternatively, politicians might prefer not to renege upon spending limits outright, but rather search for possibilities to circumvent them. I am not aware of any study systematically inquiring into the degree to which constitutional deficit rules are being complied with. However, a number of studies have analyzed their effects on the incentives of politicians who would possibly like to spend more.

Kiewiet and Szakaly (1996) find some evidence in favor of the hypothesis that the introduction of constitutional limits on borrowing induces attempts to circumvent such rules (in their case, to shift from guaranteed to nonguaranteed debt), and also that some devolution of debts can be observed, in the sense that lower debt at the state level is accompanied by higher debt at the communal level. Bohn and Inman (1996) use a panel of 47 U.S. states for the period from 1970 to 1991 and find tentative evidence "that constraints grounded in the state's constitution are more effective than constraints based upon statutory provisions." Hence, with regard to the United States, constitutions seem to be more constraining than statutory law, but they also induce politicians to circumvent them by shifting expenditure categories.

In democracies, it is primarily the voters who can sanction deficit-making governments by refusing to reelect them. In their contribution on constitutionally entrenched spending limits, Blume and Voigt (2013) argue that voters having readily available information about the spending behavior of government is a

necessary precondition for spending limits to have any actual constraining effect, i.e., for their compliance. This is why they analyze the effects of constitutional spending limits in conjunction with the amount of information publicly available regarding the budget. They find that spending limits are most likely to have a constraining effect on government spending if they are combined with a high level of transparency regarding the generation and content of the budget, as well as the monitoring of its implementation.

Summarizing the available empirical evidence, it seems fair to say that we know quite a bit about the effects of substantive rules within (federal) states. However, our knowledge as to the effects of substantive rules in cross-country settings is unsatisfactory. Experiences in the U.S. further remind us that reducing government behavior to the dichotomy "comply with constitution" vs. "not comply with constitution" might not be fine-grained enough as the circumvention of constitutional rules might be a third option.

4.3 Procedural Constraints

4.3.1 Limits on Single Branches

Many constitutions of presidential systems stipulate term limits for the president. Apparently, the constitutional assemblies establishing these limits were afraid that an unlimited number of terms could have negative effects; the likelihood of a long-staying president not complying with the constitution might be one such factor. Yet, knowing that a particular term will be a president's last one, (s)he might very well have incentives to renege on the constitution during that term.[24]

Ginsburg et al. (2010) have analyzed to what degree constitutional term limits are reneged upon.[25] They point out that one advantage of presidential term limits is their clarity. As spelled out in section 2.3 above, this might increase the probability of being complied with. Another advantage would be that term limits (ibid., 1822) "also promote a party-based, as opposed to personality-based, vision of democracy." Their empirical findings show that of those leaders who stayed at least their maximum tenure "*more than 25 percent stayed longer than allowed*" (ibid., 1847). Finally, the likelihood of overstaying is a lot higher in autocracies than in democracies.

4.3.2 On the Relationship between Legislature and Executive

A straightforward question to ask is whether non-compliance with the constitution depends on the underlying form of government. It has often been argued that presidential systems enjoy a higher degree of the separation of powers. Within our analytical frame, this is equivalent to a higher number of veto players, which would translate into a higher probability of constitutional compliance. Here, I am, however, making the argument that presidential systems suffer from a greater likelihood of politicians ignoring the rules of the game, even though the formal degree of separation of powers might be higher in these systems.

Presidents often claim that they are the only ones who represent the people as a whole. This might make them more audacious than, e.g., prime ministers in reneging on constitutional constraints. Political parties are regularly weaker in presidential than in parliamentary systems, which might further increase the incentive for a president not to take constitutional rules too seriously: if parties are

weak, the possibility of opposition to a president who fails to honor the constitution might be less than in systems with strong political parties. A reduced likelihood of opposition does, of course, make reneging upon constitutional rules more beneficial. There might be yet another transmission mechanism concerned with political parties. As already described above, Brennan and Kliemt (1994) show that organizations such as political parties often have longer time horizons than individual politicians: whereas presidents will be out of office after one or two terms (as in Mexico or the United States), political parties might stay in power for a very long time (like in Japan). If the discount rate of presidents is indeed higher than that of, say, prime ministers or party leaders, offenses against formal constitutional rules may appear more beneficial to presidents than to prime ministers. There is some evidence showing that presidential systems are more susceptible to constitutional non-compliance than parliamentary ones (Svolik 2015).[26]

So, there are conflicting predictions regarding the effect of presidential systems: one would expect presidential systems to be more complying (the standard view), the other would expect presidential systems to be less complying (the view briefly sketched here). It seems straightforward to let the data speak with regard to these conflicting expectations.

4.3.3 On the Relationship Between Government and Judiciary

In the theory section, the potentially important role of the judiciary and, in particular, the role of constitutional review, for ensuring constitutional compliance was mentioned. The available empirical literature on the judiciary does not focus

exclusively on constitutional review but on the independence of the judiciary from the other branches of government.

In an early paper inquiring into the determinants of *de facto* judicial independence (JI), Hayo and Voigt (2007) found that while *de jure* and *de facto* JI were not very highly correlated, *de jure* JI was still the single best predictor for *de facto* JI.[27] At the time, the only indicators for both *de jure* and *de facto* JI available for a fairly large number of countries were cross-sectional. In the meantime, panel data for both *de jure* and *de facto* JI have become available.

In a paper dealing with the relationship between *de jure* and *de facto* JI, Melton and Ginsburg (2014) question whether *de jure* JI really matters. Starting from the premise that at the end of the day constitutional constraints must be self-enforcing, they argue that those provisions in which multiple players are involved are most likely to be enforced because each player has an incentive to meticulously guard its own competences. They observe that both selection and removal procedures of judges are often divided between executive and legislature, making representatives of each branch a guardian of the other. Other aspects often mentioned as conducive to JI would be less relevant as long as their enforcement is not secured via checks and balances.

The empirical findings reported in Melton and Ginsburg (2014) support their considerations: as such, none of the conventionally used variables proxying *de jure* JI is significantly correlated with *de facto* JI. But as soon as the strength of checks on the executive are interacted with selection and removal procedures, they are significantly correlated with *de facto* JI. In addition, the institutional environment

also plays a role in the sense that *ceteris paribus*, the correlations between selection and removal procedures with *de facto* JI are higher in autocracies than in democracies. These results provoke a number of follow-up questions: (1) What aspects of *de jure* JI are good predictors of *de facto* JI? Is it really true that only two variables are relevant here? (2) What are the additional conditions that need to be given for *de jure* aspects to have any significant effect on *de facto*?

Drawing on data from the EU Justice Scoreboard, Gutmann and Voigt (2018) identify a puzzle: *de facto* JI on the national level (as perceived by the citizens of EU member states) is negatively associated with the presence of formal legislation usually considered as conducive to judicial independence, i.e., *de jure* JI. The negative association is more pronounced in the "old" member states than in the "young" ones from Central and Eastern Europe, implying that the relationship is not driven by countries that were striving to become members of the European Union and simply passed independence-enhancing legislation without changing anything on the ground. The negative association also holds across legal families. Since none of the more standard ways to resolve the puzzle works, the authors ask whether cultural traits can help to put it together. It turns out that countries with high levels of generalized trust (and also countries where citizens are characterized by a high level of individualism) exhibit increased levels of *de facto* JI and, at the same time, reduced levels of *de jure* JI. It seems that explicit legislation (in this case dealing with JI) serves as a substitute for high trust levels when they are absent. The authors conclude that cultural traits are of fundamental importance for the quality of formal institutions, even in societies as highly developed as the EU member states.

Given the findings of the study just reported, it is straightforward to ask whether the relationship between *de jure* JI, *de facto* JI, and trust also holds beyond Europe. This is exactly what Gutmann and Voigt (2019a) did. Based on entirely different datasets, they could not only replicate their previous findings with regard to Europe, but also found a very similar relationship for the Americas. But with regard to Africa, a new puzzle emerged, they found a highly significant positive correlation between *de jure* and *de facto* JI. In other words, in Africa, but not in Europe or the Americas, *de jure* JI is a good predictor for *de facto* JI. The counterintuitive results do not stop there, at the world level, *de jure* and *de facto* are almost perfectly uncorrelated. Yet, as soon as one distinguishes between democracies and non-democracies, it turns out that there is a negative correlation for democracies and a positive one for non-democracies. All these counterintuitive results suggest that we need to dig a lot deeper into environmental factors to make sense of them. One such factor could be colonial history. It seems that having a colonial history leads to an inversion of the coefficients: countries that have never been colonized have a negative correlation between *de jure* and *de facto* JI and a positive one between trust and *de facto* JI. In other words, the results found for Europe remain valid beyond Europe as long as the countries have never been colonized. Countries with a colonial history tend to have a positive correlation between *de jure* JI and *de facto* JI, but a negative one between trust and *de facto* JI.

Hayo and Voigt (2018) are specifically interested in the dynamic relationship between *de jure* and *de facto* JI. Separating OECD from non-OECD countries, their findings are largely in line with the ones just reported. Following up on a conjecture contained in Melton and Ginsburg (2014), they ask whether causality could also run

from *de facto* to *de jure,* in other words, if there is any evidence for actual independence levels being written into the law *ex post facto*. No evidence in favor of such reversed causality could, however, be found.

Finally, the possibility that judges could overstep their competences, and thus contribute to a *de jure/de facto* gap, needs to be mentioned. High degrees of *de facto* JI can also be misused by judges to further their own preferences at the expense of constitutional compliance. One way to proxy for the compliance of the judiciary with the constitution is judicial accountability (JA), i.e., the degree to which judges are accountable to the law, and non-accountability is somehow sanctioned. A high degree of JA is expected to counteract judicial activism, a concept frequently associated with constitutional compliance by the judiciary (see, e.g., Lindquist and Cross 2009, 23 and passim). However, to date, most attempts to measure judicial activism have been confined to the U.S., and the measures used to proxy for the U.S. are often not convincing, either. The number of times the Supreme Court strikes down new legislation is, in all likelihood, also a function of whether or not this legislation is in compliance with the constitution.

4.3.4 On the Relationship Between Different Government Levels: Vertical Separation of Powers

Federalism can be considered a vertical separation of powers, as there are at least two different levels of government who are endowed with different competences. At times, they can make decisions on their own and at times, decisions can only be taken if both levels of government are in agreement. The German sociologist Fritz

Scharpf (1991, 422) once talked of the "*Lebenslüge des Föderalismus*", a term that can be translated as the lifelong lie of federalism or its sham existence. His point is based on the observation that over time the federal government reliably amasses more and more competences, hence, federalist states fail to deliver on the promise of federalist theorists. I can think of at least two versions of such a lifelong lie. One scenario could be that constitutional amendments allocate more and more power to the central government. This might be problematic for proponents of federalism and for constitutionalism more generally, but since it does not create a *de jure/de facto* gap, it need not concern us here. In the second scenario, central government acquires more power without formally amending the constitution. It is this scenario of the lifelong lie of federalism I am interested in, because it creates a *de jure/de facto* gap.[28]

Based on the hypothesis that more veto players make compliance with constitutional rules more likely, one would expect governments of federally constituted countries to be more rule-complying than governments of unitary states. According to the hypothesis, veto players on both levels would have incentives to guard their own competences, so non-compliance would be unlikely to occur. Yet, it has often been observed (e.g., Greve 2000) that some deals could make representatives of both levels better off, possibly to the detriment of compliance. For example, the constitution might allocate higher education policy to the states, but if the federal government wants to have an important influence on higher education, and if the states allow the federal government to dictate certain policy measures in exchange for increased federal revenues, a *de jure/de facto* gap is created.

Very early on, Kantorowicz (1927, 46) provided an example for an unexpected deviation between *de jure* and *de facto* regarding federalism. According to him, the realized degree of federalism in Germany's Weimar constitution was higher than the one expected according to the text of the document. Kantorowicz argues that the *de jure* influence of Prussia was very high but that in reality, it "could not dream of using such a right." It seems interesting to ask whether there are other countries in which the realized degree of federalism is higher than one would expect based on the text of the constitution. Of course, this possibility could also be relevant with regard to other areas of the constitution.[29] Until now, we have implicitly assumed that it is the central government that is more likely to renege on the constraints laid down in the constitution. Yet, the possibility that the states do not comply is just as real: they might, e.g., simply ignore deficit constraints hoping to be bailed out when they become unable to service outstanding debts. Argentina might be a case in point.

One notion of federalism insists that it is the states that form a union in order to be stronger, in particular vis-à-vis other countries (most prominently, Riker 1964). In this notion, it is the states that create a central government. If this notion is descriptively accurate, then the likelihood of the center infringing upon the rights of states seems lower than in countries with a federal constitution with a different genesis because the states are more likely to oppose any infringement by the central government. Imagine a non-federalist country that is large in terms of both geography and population. In such a setting, if the central government passes a federal constitution hoping that this will reduce overall administration costs, the states are less likely to oppose intrusions by the central government. China might

be a case in point. Hence, I propose to take the historical context explicitly into account as a potential determinant of a *de jure/de facto* gap. A distinction between "bottom up" versus "top down" federalism might be an option to take this hypothesis to the test.

Gutmann and Voigt (2017) inquire into the determinants of both federalism and decentralization. They find that higher levels of linguistic fractionalization are significantly correlated with what they call top down federalism. Countries in Latin America, for example, are significantly more likely to pass a federal constitution and to implement top-down federalism. Latin American countries might have a federal constitutional set-up, but the regions are effectively not given much power. A tentative interpretation of this finding is that Latin American countries are more likely to experience a *de jure/de facto* gap than countries in other world regions An obvious follow-up question is why this is primarily found in Latin America and not elsewhere.

Analyzing decentralization, which is distinct from federalism, Arzaghi and Henderson (2005) find the degree of ethnolinguistic fractionalization to be positively correlated with institutional decentralization, but also with the share of central government consumption. So it seems that countries with a fractionalized society adopt higher institutionalized decentralization, but *de facto*, they are more centralized than other states. In a sense, these results indicate a *de jure/de facto* gap. It seems worth asking if a similar gap can be identified with regard to federally structured countries.

4.3.5 Direct Democracy as an Additional Constraint on Government?

Many constitutions enable citizens to vote directly on substantive issues. If the constitution contains the possibility of an initiative, then citizens can be regarded as agenda setters. Not only can they propose new legislation, they can also weigh in on legislation passed by parliament. All this implies that initiatives might be viewed rather critically by government. It could imply that governments have incentives to prevent the citizens from using their right to an initiative. If they cannot prevent a referendum from being held and they are unhappy with its result, they might try not to implement its outcome.

I am not aware of any study that has systematically analyzed whether governments simply refused to organize a popular vote after citizens had collected the necessary number of signatures, which would amount to a *de jure/de facto* gap if direct democracy rights are codified in the constitution. However, Gerber et al. (2001) is an interesting study that looks at a closely related question, namely: given that an initiative has taken place and was successful what are the odds that politicians will enforce it, i.e., comply with its substance?

Relying on a principal-agent model in which the citizens are the principals and the politicians the agents, and further distinguishing between implementation agents on the one hand and enforcement agents on the other, Gerber et al. (2001, Chapter 3) develop four predictions, namely: (1) high costs of implementing the initiative correspond to lower levels of compliance, (2) high sanctioning costs correspond to higher compliance levels, (3) ease of observing compliance corresponds to higher compliance levels, and (4) under normal conditions, the likelihood of full compliance would approach zero.

The first three hypotheses are, of course, in line with much of what has been discussed above. Unfortunately, the authors do not proceed to test their hypotheses systematically, but rely on case studies pointing out that no measure of initiative compliance exists which would enable them to run large N empirical tests. Testing these hypotheses empirically is definitely a desideratum.

Blume et al. (2009) is the first cross-country study to analyze the economic effects of direct democracy and their findings only partially confirm previous results. The actual use of direct democratic institutions often has more significant effects than their potential use, implying that (contrary to what economists would expect) the direct effect of direct democratic institutions is more relevant than its indirect effect. This is why taking account of the referendums that were not run although the necessary number of signatures had been collected in an initiative would be highly interesting. Unfortunately, this is fraught with difficulties as courts can declare initiatives as unlawful for many different reasons, such as incompatibility with constitutional constraints, incompatibility with international law, and so on. In addition, the legislature might accept an initiative as is, but can also accept something similar but not identical with the original initiative, which would make subjective evaluations necessary.

4.3.6 States of Emergency

In a number of papers, Bjørnskov and Voigt have analyzed the effects of constitutionalized emergency provisions ("emergency constitutions" for short). As of today, no one has analyzed if (and under what conditions) governments comply with emergency constitutions. Emergency constitutions usually expand the powers

of the executive at the expense of both the legislature and the judiciary. Three stages of possible non-compliance can be distinguished: (1) the declaration of a state of emergency, (2) government actions under a state of emergency, and (3) the declaration to end a state of emergency.

Regarding the declaration of a state of emergency, the more difficult or costly it is to declare, the more likely one would expect to observe non-compliance. Regarding government behavior once a state of emergency has been declared, the amount of extra powers conferred to government are expected to be an important factor determining compliance: the more powers the government enjoys, the more likely it is to comply with the (loose) constraints. Given the frequency with which states of emergency are declared and the massive consequences they often have on a country's population – like a significant deterioration in human rights scores – it appears desirable to analyze the conditions under which emergency constitutions are complied with in more detail.

4.3.7 Amendment Procedures

It has been argued that if it is very costly to amend constitutions, compliance with constitutional amendment rules becomes less likely (e.g. Gavison 2002, Elkins et al. 2009). The underlying logic seems straightforward. Yet, empirically testing this hypothesis is fraught with difficulties. To test the hypothesis, a variable indicating the "cost of amendment" is needed. Various attempts to produce such an indicator have been made (Lutz 1994, Lorenz 2005, Rasch and Congleton 2006). Unfortunately, the correlations between these indicators are very low, possibly indicating conceptual disagreement between the authors. Conceptually, at least, a

measure for a possible *de jure de facto* gap with regard to constitutional amendment seems rather straightforward. A dummy indicating whether the constitution was being complied with or not should suffice.

In the various constitutional dimensions discussed to this point, the first candidate for not complying with the constitutional constraints has been the executive. With regard to constitutional amendment, this would be at least partially different as most constitutions can only be changed if the legislature agrees.

A specific case of constitutional amendment rules are non-amendability or eternity clauses. According to them, specific parts of the constitution are declared completely unamendable. Recently, some interest in analyzing the determinants that lead to their promulgation has arisen. Scholars have produced datasets recording all such clauses (Hein 2018). I am, however, not aware of any study that has analyzed the degree to which these rules are being complied with.

Summing up Section 4.3 of this survey, it seems fair to conclude that our state of knowledge regarding the reasons for a gap between constitutional text and constitutional reality leaves much to be desired. Empirical research into the issue is confronted with a number of serious challenges. But such challenges should make it all the more exciting to delve into this topic!

4.4. The Relevance of Environmental Factors

I am not aware of any research explicitly focusing on constitutional compliance that analyzes the environmental factors as a possible determinant. Above, I briefly mentioned the work by Inglehart and Welzel (2005) who argue that self-expression

values are the best predictor for effective democracy. If we assume that "effective democracy" and constitutional compliance are highly correlated, we can learn something from their findings.

Inglehart and Welzel (2005) find that 80 percent in the cross-national variance in effective democracy can be explained by the strength of self-expression values. They distinguish these from survival values. Self-expression is a latent factor calculated on the basis of many variables contained in the World Value Survey. The five variables with the highest factor loadings are: (1) giving priority to self-expression and quality of life over economic and physical security, (2) describing oneself as very happy, (3) perceiving homosexuality as sometimes justified, (4) having signed or willing to sign petitions, and (5) not thinking one has to be very careful about trusting people.

This latent variable is highly correlated with many other variables from the World Values Survey including the treatment of women in comparison to men, tolerance vis-à-vis minorities, and behavior regarding environmental protection. In analogy to Inglehart and Welzel (2005), I suggest that *politicians are more likely to comply with constitutional constraints the higher the self-expression values among the population*.

One important element of the Inglehart argument is that values are subject to change and that many societies have developed some post-materialist values over the last number of decades. We are here interested in a more long-term perspective trying to understand in what way individual values can impact the behavior of politicians. Assuming there is a significant correlation between individual values and the

behavior of politicians, we would, then, like to know more about the sources of the relevant values.

In brief, much research needs to be done regarding the possible effects of environmental factors on constitutional compliance.

5 Conclusion and Outlook

In essence, I have done three things in this survey. First, I have collected scattered bits and pieces of theory intended to help us to predict the determinants of constitutional compliance or non-compliance. I have repeatedly emphasized that a coherent theory is currently unavailable, and, hence, a desideratum. Second, I have highlighted some of the challenges in measuring the *de jure de facto* gap. Finally, I have presented the scattered and sketchy empirical evidence that has been produced regarding possible determinants of such gap empirically. At times, I have proposed concrete steps that could be taken to reduce our knowledge gap regarding the *de jure de facto* gap.

Germany experienced how its (Weimar) constitution was misused and how people who were in disdain of both democracy and the rule of law brought terrible harm to many people all over Europe and beyond. In Germany's post World War II constitutional discourse, the concept of "militant democracy" as proposed by Löwenstein (1937a, b; Müller 2012 is an up-to-date overview) played an important role. The central question was what institutional measures could be taken to make democracy sustainable. Given that democracy is in danger in many countries today, the concept seems a topical one, indeed.

Whereas the concept of militant democracy aims at preventing those striving to abolish democracy to hold any government office which they could misuse to reach their aim, the concept of militant constitutionalism would strive to prevent those already in government from not complying with the constitution. There are numerous studies dealing with the normative aspects of militant democracy, but practically nothing ascertaining its effects. The concept of militant constitutionalism has been proposed in various guises, but its effects have seldom been studied (Gutmann and Voigt 2019b is a very first attempt).[30]

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Notes

[1] Almost thirty years ago in a paper on "constitutional maintenance", Niskanen (1990, 54) wrote: "My sense is that we do not yet have an adequate theory of constitutional maintenance." Thirty years later, my sense is that this statement holds still true.

[2] Others believe the question to be framed wrongly. Elkins et al. (2016, 233) argue that the "surprising fact is *not* that constitutions are often ignored; it is that they guide the behavior of power-hungry leaders at all."

[3] To be more precise, "p" can be interpreted as the product of two different probabilities: first, the probability that non-complying behavior is revealed and second, the probability that some action against such non-compliance is taken. Also note that (1-p) + p does not necessarily add up to 1 as the two terms are determined by different actors independently of each other.

[4] The 14th amendment to the U.S. Constitution was passed in 1868 and was to offer equal protection of the laws to all U.S. citizens. It is sometimes argued that it took around a century to display its effects.

[5] It is easy to imagine that a government not complying with such a constitution could even be highly popular among major segments of the population.

[6] Hayo and Voigt (2016) find that reaching power through irregular means is significantly correlated with a change in the constitutionally guaranteed level of judicial independence.

[7] For a long time, institutional economists (broadly conceived) have emphasized the relevance of institutions, thereby implicitly underestimating the potential relevance of personal traits. Of late, that has changed. For example, Jones and Olken (2005) show that the unexpected death of a leader can have substantial repercussions on the country's growth. Dollar *et al*. (2001) find that a larger share of female parliamentarians is significantly correlated with lower levels of corruption. Göhlmann and Vaubel (2007) analyze the impact of the professional background of central bankers on inflation. Dreher *et al*. (2008) provide evidence suggesting that politicians' professional background has an impact on the likelihood of implementing market-liberalizing reforms. Besley and Reynal Querol (2011) show that on average, democracies are governed by more highly educated leaders than autocracies.

[8] Brennan and Hamlin put their focus on selection mechanisms that are likely to draw virtuous people into politics. Others have been interested in how to draw talented or competent people into politics. In a very early contribution, Kantorowicz (1927, 53) reports that a weak parliament is incapable of attracting talented people. An ad hoc hypothesis could be that federally constituted states provide a fertile practicing ground for politicians who can prove their competence at the state level before taking on responsibilities at the federal level.

[9] Note that constitutions can also serve various factions within the elite to coordinate their behavior and, hence, reduce the probability that non-elite resistance will be successful (the possible functions of constitutions in authoritarian regimes are dealt with in Ginsburg and Simpser 2014)

[10] One way of taking this into account empirically could be to draw on a measure of ethno-linguistic fractionalization which measures the probability that two randomly drawn individuals from one society do not speak the same language, follow the same religion, or belong to the same ethnic group.

[11] Of course, the degree of media freedom is endogenous to government behavior itself. This needs to be taken into account when assessing the conjectures empirically.

[12] Widner (2005) finds that post-ratification levels of violence are correlated with the degree of participation in the drafting process in some parts of the world such as Africa, the Americas, and the Pacific. Voigt (2004) contains a number of hypotheses regarding possible effects of broad participation in constitution-making including the likelihood of the constitution to be complied with. Ginsburg et al. (2009) is an empirical paper testing many of the conjectures developed in previous papers.

[13] It could be argued that some veto players might be indifferent to non-compliance, or even support it some of the time. Their interaction situation can then essentially be described by the game proposed in Weingast (1997): they might insist on compliance with the constitution because not being solidaric with those reneged on now might lead to non-solidarity of those in another instance in which my rights are being transgressed against. Here again, the question is whether some norms of solidarity exist or not. When testing this hypothesis empirically, it is worth making an explicit distinction between institutional and actual veto players. If a legislature is bicameral and each house needs to consent to new legislation, then we have two institutional veto players. If this occurs in a system with highly disciplined parties and the same party holds a majority in both houses, then it might be advisable to count this as one actual veto player only. Fortunately, this distinction has found explicit recognition in some indicators such as Henisz' (2000) and does, hence, not constitute a barrier to empirical tests.

[14] Lin /Ginsburg (2015) describe the effects that the absence of constitutional review has in China.

[15] India's Public Interest Legislation is a noteworthy exception.

[16] Some evidence that membership in international organizations does have some effects is available. Dreher and Voigt (2011) show that membership in international organizations increases a country's credibility. Dreher et al. (2015) show that membership in international organizations leads to higher inward flows of FDI.

[17] Of course, there is an important discussion among law scholars regarding the relationship between domestic and international law. It also deals with the question of what law is considered superior in case the two conflict with each other.
[18] Often, the European Union is not considered as an international organization, but a supranational one. In our context, this difference is, however, irrelevant.
[19] The limits of the current treaty to make non-complying EU sanction member states comply with the rule of law as well as a proposal how these deficits could be reduced are discussed in Voigt (2019).
[20] Olson (1965) identified three conditions conducive to the formation of manifest interest groups.
[21] The International Encyclopedia of the Social Sciences (2007) defines values as "[…] conceptions of the desirable, influencing selective behavior. Values are not the same as norms for conduct. […] Values are standards of desirability that are more nearly independent of specific situations. The same value may be a point of reference for a great many specific norms; a particular norm may represent the simultaneous application of several separable values." Values are not identical with institutions. But many internal institutions are based on values and norms. Conceptions regarding the right behavior are presupposed for such institutions. Behavior that is not compatible with normative conceptions is sanctioned by third parties.
[22] One might, of course, wonder if trust is really exogenous. There are some epidemiological studies showing that second generation immigrants to the U.S. display trust levels that are very similar to the country of origin of their parents, which is often interpreted as evidence in favor of the stickiness of trust levels. Bjørnskov and Voigt (2014) show that trust levels are negatively correlated with the length of constitutions, as if societies in which people do not trust each other wanted to write down all constraints explicitly as a substitute for trust.
[23] Ariely (2011) asks how "cultural patriotism" – as a form of moderate culturally based nationalism – and "constitutional patriotism" related to people's perception of national membership and finds that cultural patriotism is correlated with ethnic, cultural, and political criteria whereas constitutional patriotism is only correlated with political criteria.
[24] The Mexican president only has a single term. His compliance with the constitution might have been secured by the PRI that supplied the president without interruption between 1928 and 2000. Yet, it has often been claimed that Mexican presidents use their last years in office to accommodate their family and friends with attractive positions within the state apparatus. Public notaries – which are a very good business – are particularly notorious for being handed out to friends and family. It is also maintained that some privatized companies were given to presidents' friends at very favorable terms, the most infamous case being the transfer of the national telephone company to Carlos Slim.
[25] An alternative to reneging is to change the constitution such that the current president may stay in office. We are not concerned with that possibility here.
[26] Identifying presidential systems as causing non-compliance is, however, challenging as the form of government is endogenously chosen and not randomly spread across the globe (Cheibub 2007). Hayo and Voigt (2010) report that presidential systems are less likely to fail than parliamentary ones.
[27] Not all variables included in the *de jure* indicator are, however, codified on the constitutional level.
[28] Of course, a *de jure/de facto* gap can also emerge when the constituent states suck in more power than allocated to them in the constitution.
[29] With regard to constitutional rights, Law and Versteeg (2013) refer to such countries as "overperformers".
[30]

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Table 1: Design Factors/Environmental Factors Relevant Actors

		Actors		
		Veto players	Foreign actors	Citizens
Design Factors	Substance			
	Procedure			
Environmental Factors	Constitutional history			
	Geography, Climate			
	Shared values and norms			
	Trust			