

TAKING CAUSALITY SERIOUSLY IN COMPARATIVE CONSTITUTIONAL LAW: INSIGHTS FROM COMPARATIVE POLITICS AND COMPARATIVE POLITICAL ECONOMY

*Christopher A. Whytock**

I. INTRODUCTION

Interesting and important causal questions permeate the field of comparative constitutional law. These questions are sometimes about the factors that shape constitutions and constitutional processes. What accounts for cross-national differences in constitutions? Under what circumstances is constitutional “borrowing” likely to occur, either in the form of references by domestic constitutional court judges to foreign legal principles in constitutional interpretation, or adoption by one country’s constitutional reformers of another country’s constitutional arrangements?¹ Why are some constitutions lasting, while others fail? Sometimes these questions are about the economic, political, or social consequences of constitutions. Constitutions may be intended to create checks and balances between different branches of government, to guarantee citizens certain rights, or to foster economic development—but do they have the intended effects? What unintended consequences might result when a constitution

* Associate Professor of Law, University of Utah S.J. Quinney College of Law; B.A., University of California, Los Angeles; J.D., M.S.F.S., Georgetown University; Ph.D., Duke University. Previous versions of the theoretical and empirical portions of this article were presented at the Annual Conference of the International Studies Association, San Diego, California, March 22–25, 2006, and the Workshop on the Economic Consequences of Democratic Institutions, Duke University, April 1–2, 2005. For helpful criticisms and suggestions, the author thanks participants at those meetings, especially Carles Boix, Walter Carnota, Herbert Kitschelt, Daniel Kselman, Kevin Morrison, Joel Simmons, Matthew Singer, and Günter Walzenbach.

1. Emphasizing the importance of such questions, Lee Epstein and Jack Knight argue that “decisions over whether to borrow or not, and from where . . . are decisions about institutional design.” Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT’L. J. CONST. L. 196, 200 (2003).

interacts with a country's other institutional features, and with its culture? What, in other words, are the real-world implications of different constitutional arrangements?² Furthermore, causal claims are intrinsic to the entire endeavor of constitutional design: prescribing a particular constitutional solution to a social problem implies a statement about the solution's likely consequences.³

Yet comparative constitutional law scholarship so far has shed little light on the answers to these questions and the validity of these claims. As Ran Hirschl notes, "Most leading works in the field continue to lag behind the social sciences in their ability to trace causal links among pertinent variables, let alone to substantiate or refute testable hypotheses."⁴ Similarly, Robert Cooter argues that with constitutional scholarship's focus "on the constitution as an historical agreement and a repository of values," it does not pay sufficient attention to "the constitution as an incentive structure that affects behavior."⁵ To the extent comparative law scholars have engaged in theorizing about cause-and-effect relationships, as they have done in the field of comparative law and economics, the emphasis has been on private law rather than public law.⁶ Insofar as positive theoretical efforts have been made to understand the consequences of constitutions, they generally have been

2. As Martha Nussbaum notes, outcomes are a pervasive concern of comparative constitutional law: "Whether or not constitutional provisions and their interpretation have a prepolitical moral basis, they have consequences. . . . Do they produce stability or instability? Do they deliver the welfare that they seek to deliver?" Martha C. Nussbaum, *Introduction to Comparative Constitutionalism*, 3 CHI. J. INT'L L. 429, 433 (2002).

3. Jon Elster has argued that constitutional design is better driven by considerations of justice rather than consequences. Jon Elster, *Arguments for Constitutional Choice: Reflections on the Transition to Socialism*, in CONSTITUTIONALISM AND DEMOCRACY 303 (Jon Elster & Rune Slagstad eds., 1988). However, to the extent justice is concerned with the real-world human implications of constitutions, or to the extent consequentialist arguments are rooted in notions about what kinds of outcomes are just, the distinction between consequences and justice in constitutional design would seem somewhat difficult to maintain. See, e.g., GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 198 (2d ed. 1997) ("If the consequences of institutional structures are impossible to predict, then the same darkness—and I would say an even greater one—applies to reforms dictated by justice.").

4. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125 (2005).

5. ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 360 (2000).

6. UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS*, at x (1997) ("[W]hile law and economics has made valuable contributions to the understanding of private law, its contribution to public law is less impressive and in that area much work still has to be done.").

unaccompanied by empirical hypothesis testing.⁷ And although there is relevant empirical scholarship, it is often aimed at description and conceptual refinement rather than explanation.⁸ These are important tasks to be sure,⁹ but they cannot by themselves respond to the fundamental causal questions and claims that flow through comparative constitutional law.

In this article, I argue that legal scholars have much to gain from taking causality seriously in comparative constitutional law, and I suggest that scholarship on comparative politics and comparative political economy provides useful insights about how this might be done.¹⁰ I develop my argument in four parts. First, I provide a brief overview of recent comparative constitutional law scholarship to highlight the pervasive issues of causality that it raises. These issues take two basic forms, one having to do with the origins of cross-

7. Cooter suggests that “[h]ypothesis testing in constitutional law awaits improved government statistics and a new generation of constitutional scholars with mastery over empirical methods.” COOTER, *supra* note 5, at 374. As I show below, there actually is a significant amount of existing work in comparative politics and comparative political economy that uses empirical analysis to systematically test hypotheses about the consequences of constitutions. *See infra* Part III; *see also* Hirschl, *supra* note 4 (reviewing comparative constitutional law research by comparative politics scholars that use qualitative methods to evaluate hypotheses about causality in comparative constitutional law).

8. Epstein & Knight, *supra* note 1, at 196–97; Hirschl, *supra* note 4, at 126.

9. Causal inference relies on description, and, as social science methodologist John Gerring emphasizes, “[c]oncept formation concerns the most basic question of social science research: *What are we talking about?*” JOHN GERRING, *SOCIAL SCIENCE METHODOLOGY: A CRITERIAL FRAMEWORK* 35 (2001).

10. By making this argument, I certainly do not intend to suggest that causal claims and questions are all that should concern comparative constitutional law scholars, and although I think they are of fundamental importance, I would hesitate to argue that they are necessarily the most important issues facing comparative constitutional law scholars. Moreover, by focusing on comparative politics and comparative political economy as sources of insights about causality in comparative constitutional law, I do not mean to downplay the importance of the contributions that other disciplines from outside the legal academy can make to comparative constitutional law scholarship. Finally, it is important to note at the outset that some scholars are skeptical about the very possibility of answering causal questions about constitutions with a useful degree of certainty. *See, e.g.*, Elster, *supra* note 3, at 304 (arguing that since “it is impossible to predict with certainty or even quantified probability the consequences of a major constitutional change,” constitutional reform should not be based on consequentialist grounds). *But see* SARTORI, *supra* note 3, at 198 (disagreeing with Elster’s argument, and with the “behaviourist absurdity” that “constitutions do not matter”). For a particularly optimistic view, *see* Peter C. Ordeshook, *Are “Western” Constitutions Relevant to Anything Other than the Countries They Serve?*, 13 CONST. POL. ECON. 3 (2002) (arguing based on rational choice theory that there are universally applicable principles of constitutional design). Although I agree that causal claims should be met with skepticism—indeed, this is part of my argument that comparative constitutional law scholars should take causality seriously—I generally am less pessimistic than Elster about the possibility of improving our understanding about the real-world impact of different constitutional arrangements, and less optimistic than Ordeshook.

national constitutional variation, the other with the economic, political and social consequences of this variation. However, comparative constitutional law scholars so far have done little to address these questions in an empirically rigorous manner.

Second, I introduce examples of the work that political scientists and economists have done on comparative constitutional law. They ask questions about the origins and consequences of constitutions that are similar to those raised by comparative constitutional law scholars. But they frame these questions in explicitly causal terms, developing positive theories about cause-and-effect relationships from which hypotheses can be derived, and testing them empirically using social science methods of causal inference.¹¹ Moreover, scholars of comparative politics and comparative political economy have provided strong empirical evidence that constitutions indeed have consequences for important outcomes, ranging from political stability and ethnic conflict, to fiscal deficits and public spending. This interdisciplinary perspective thus reinforces the real-world importance of comparative constitutional law as a field of study, and suggests that empirical comparative constitutional law represents a wide open frontier in comparative legal scholarship.

Third, I illustrate one way that social science methods of causal inference might be used to address causal claims and causal questions in comparative constitutional law. Substantively, the illustration is drawn from the field of comparative political economy and focuses on the economic consequences of constitutions. More precisely, it investigates the effects that different constitutional arrangements of executive-legislative relations have on levels of government spending. Methodologically, the illustration is a basic example of “large-N” statistical analysis—namely ordinary least squares regression analysis of cross-national data on constitutions, government spending, and various other institutional, demographic and economic factors in 80 democracies. I also show how multiplicative interaction terms can be used to model and empirically test for conditional relationships between constitutions and various political, social, or economic outcomes. By arguing that these methods can be important tools for comparative constitutional law

11. For a much more in-depth review of qualitative comparative politics research on constitutions aimed at making sound causal inferences, see Hirschl, *supra* note 4.

scholars, I do not mean to suggest that they are the only way to take causality seriously. As Hirschl richly illustrates, qualitative or “small-N” analysis is also important in comparative constitutional analysis and, as emphasized below, often better suited than statistical analysis for exploring causal processes.

I conclude by outlining an agenda for empirical comparative constitutional law. Theoretically, the focus would be on research questions that are framed in explicitly causal terms, and on the development of positive theories from which hypothetical answers could be derived. Methodologically, the goal would be to select appropriate techniques for empirically evaluating these hypotheses while maintaining awareness about the methodological tradeoffs that these choices entail. Pedagogically, the challenge is to figure out how, and how much, to incorporate considerations about the origins and consequences of constitutional arrangements into comparative law and constitutional law teaching.

Cooter argues that “constitutions can cause suffering on a vast scale or lay the foundation for a nation’s liberty and prosperity.”¹² Of course, human welfare also depends on many other factors, some of which surely are even more important than constitutions. Nevertheless, as Cooter’s comment suggests, the real-world consequences of constitutions are too important to ignore.

II. CAUSAL QUESTIONS AND CAUSAL CLAIMS IN COMPARATIVE CONSTITUTIONAL LAW

The comparative study of constitutions can be traced at least as far back as Aristotle’s analysis of the constitutions of Greek city-states in *The Politics*.¹³ Significant portions of *The Federalist Papers* focus on comparative constitutional analysis.¹⁴ John W. Burgess, the founder of Columbia University’s political science department and one of the founders of modern political science, considered comparative constitutional law to be one of that discipline’s cornerstones.¹⁵

12. COOTER, *supra* note 5, at 2.

13. ARISTOTLE, *THE POLITICS* (William Ellis trans., Prometheus Books 1986) (n.d.).

14. *See, e.g.*, THE FEDERALIST Nos. 18–20 (James Madison), NOS. 21–23 (Alexander Hamilton) (drawing lessons from the constitutional experiences of Germany, the Netherlands, and ancient Greece).

15. JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (Boston, Ginn & Co. 1893). Ira Katznelson and Helen Milner provide an explanation for political

Yet comparative constitutional law failed to find a secure and prominent place in either law or political science. In the legal academy, the study of American constitutional law flourished while comparative legal scholarship focused predominantly on private law.¹⁶ Some leading comparativists simply were not convinced that their methods were suited for the study of public law.¹⁷ In political science, the “behavioral revolution” temporarily marginalized the study of law and institutions altogether.¹⁸

But real-world events reinvigorated comparative constitutional law scholarship in both disciplines. As legal scholars Vicki Jackson

science’s early preoccupation with constitutions. According to them, early American political science was inspired by Woodrow Wilson’s late 19th-century work on public administration that emphasized both the centrality of the state and the need to subject it to constitutional restraints. Ira Katznelson & Helen V. Milner, *American Political Science: The Discipline’s State and the State of the Discipline*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 1, 9–10 (Ira Katznelson & Helen V. Milner eds., 2001). “Characterized by a focus on formal institutions, public administration and law, the core of the country’s new political science was infused with an emphasis on the elements of political liberalism articulated by Wilson.” *Id.* Thus, among the central concerns of the young discipline was to understand “the features that distinguish liberal democratic regimes from other forms of public authority, whether dictatorial, oligarchic or, later, totalitarian . . . and, most prominent of all, the rules governing relations between the state and its citizens in civil society.” *Id.*

16. Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 61, 62 (Vicki C. Jackson & Mark Tushnet eds., 2002).

17. Konrad Zweigert and Hein Kötz, for example, argued that their functionalist method of comparison was most appropriate for relatively “unpolitical” areas of private law. KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 40 (3d ed. 1998). Meanwhile, other comparativists began to question the private law/public law distinction altogether. *See, e.g.*, Martin Shapiro, *From Public Law to Public Policy, or the “Public” in “Public Law,”* 5 *PS: POL. SCI. & POL.* 410 (1972) (arguing against the public law-private law distinction on the grounds that both areas of law authoritatively allocate values).

18. Reflecting the influence of the behavioral approach, the opening editorial statement in the first issue of the political science journal, *Comparative Politics*, begins by expressing “skepticism about the value of institutional and legal analysis,” and calling for greater emphasis on “social and cultural factors” and “the application of the scientific method and, hence, with the verification of hypotheses through comparative analysis.” Bernard E. Brown et al., *A Statement by the Editors*, 1 *COMP. POL.* 1, 1 (1968). Comparative government had become comparative politics, and the triumph of the behavioralist revolution in the field was announced. *See* Ira Katznelson, *Structure and Configuration in Comparative Politics*, in *COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE* 81 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997). As Robert Dahl explains, the behavioral movement was a “protest movement within political science” against the traditional emphasis on institutions and in favor of increased study of individual political behavior. Robert A. Dahl, *The Behavioral Approach in Political Science: Epitaph for a Monument to a Successful Protest*, 55 *AM. POL. SCI. REV.* 763, 766 (1961). As a result, “[a]lthough the concept of institution never disappeared from theoretical political science, it [was] largely supplanted in recent years by a conception of political life that is noninstitutional.” JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 2–3 (1989).

and Mark Tushnet explain, “The present generation’s interest in comparative constitutional law has been fueled . . . by the confluence of the great wave of constitutional reform that flowed around the world—from Central and Eastern Europe to South Africa and Latin America—in the 1980s and 1990s, with the development of a strong community associated with international rights.”¹⁹ Similarly, according to political scientists Matthew Soberg Shugart and John M. Carey, “Recent advances of democracy in Central and Eastern Europe and other parts of the globe have given impetus to the study of designing constitutions and the consequences of institutional choice.”²⁰ The “new institutionalism” that developed in the aftermath of the behavioral revolution provided a conceptual and theoretical basis for the analysis of constitutions in the comparative politics subfield of political science.²¹

Three closely related approaches dominate contemporary legal scholarship on comparative constitutions.²² The first approach describes the various ways that different countries’ constitutions address similar problems, and then analyzes these differences with the goal of “self-reflection through analogy, distinction, and contrast,” or in order to refine constitutional concepts.²³ This is, for

19. Vicki C. Jackson & Mark Tushnet, *Introduction*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, at xi, xiii (Vicki C. Jackson & Mark Tushnet eds., 2002) (noting the importance of the development of a strong international human rights community for the resurgence of comparative constitutional study).

20. MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS I* (1992).

21. In 1984, James G. March and Johan P. Olsen declared that “a new institutionalism has appeared in political science.” James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 *AM. POL. SCI. REV.* 734, 734 (1984). Just as the behavioralist movement was a reaction to the formalism that preceded it, the new institutionalism was itself a reaction to the behavioralism of the 1960s and 1970s. See Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 *POL. STUD.* 936 (1996). As public law political scientist Rogers M. Smith explains, “The road March and Olsen stress is a path of reaction against the treatment of legal and political institutions simply as epiphenomena of self-interested individual and group behavior—a treatment dominant in mainstream U.S. political science since the 1950s” Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 *AM. POL. SCI. REV.* 89, 91 (1988). For an overview of the “new institutionalist” literature in political science, see Hall & Taylor, *supra*.

22. For a more methodologically oriented classification of comparative constitutional law scholarship, see Hirschl, *supra* note 4, at 126–32.

23. Hirschl, *supra* note 4, at 126. This combines Hirschl’s second and third categories of comparative constitutional law scholarship. As Mary Ann Glendon argues, “Since controlled experimentation in law is hardly ever possible, legal scholars often use comparative law, just as they sometimes consult history, to see how legal systems of the past or present have dealt with problems similar to ours. The hope is that history and comparison will give us insight into our

example, the standard approach in the growing number of comparative constitutional law casebooks,²⁴ which typically organize material according to a variety of important political or societal problems—such as constitutional review, the separation of powers, federalism, and individual rights—and invite analysis of different constitutional responses to these problems.²⁵ In effect, this involves the application of comparative private law’s traditionally dominant methodology, functionalism,²⁶ to comparative public law.²⁷ According to Konrad Zweigert and Hein Kötz’s classic statement of the functionalist method, “the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.”²⁸ Thus, the functionalist method begins by identifying common problems and only then turns to the analysis of different legal arrangements. The functionalist method has been vigorously criticized;²⁹ but by

own situation” MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 1, 1 (1987).

24. See, e.g., NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM* (3d ed. 2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); DONALD P. KOMMERS ET AL., *AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* (2d ed. 2004).

25. Hirschl, *supra* note 4, at 129. For example, both JACKSON & TUSHNET, *supra* note 24, and DORSEN ET AL., *supra* note 24, include chapters on constitutional review, separation of powers, federalism, and social and economic rights.

26. For overviews of functionalism in comparative law, see, for example, Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 100 (Pierre Legrand & Roderick Munday eds., 2003); Richard Hyland, *Comparative Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 184 (Dennis Patterson ed., 1996); Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006). For classic statements of functionalist methodology, see, for example, ZWEIGERT & KÖTZ, *supra* note 17; Arthur T. von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624 (1971), and Arthur T. von Mehren, *The Comparative Study of Law*, 6/7 TUL. CIV. L.F. 43 (1991).

27. See, e.g., Jackson & Tushnet, *supra* note 19, at xiii (noting that “[c]omparativists who focus on private law sometimes examine the ways in which diverse legal systems address problems that are functionally similar” and arguing that “[f]unctional inquiries [also] can be undertaken with constitutional law as their subject matter” but acknowledging the limits of functional analysis identified by critical comparative law scholars).

28. ZWEIGERT & KÖTZ, *supra* note 17, at 34.

29. Among the strongest critical statements are Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985), and Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J.L. STUD. 101 (1989). For other critical assessments of functionalism, see, for example, Hyland, *supra* note 26, Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) [hereinafter Tushnet, *Possibilities*], and Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325 (1998) [hereinafter Tushnet, *Returning with Interest*]. For a comprehensive review of the criticisms

illustrating the many ways in which constitutions differ, this first approach to comparative constitutional law not only provides valuable knowledge about constitutional variation, but may also “help dispel the sense of false necessity about the existing constitutional arrangements in one’s home country”³⁰

A second approach to comparative constitutional law scholarship focuses on “constitutional design.”³¹ As summarized by Hirschl, this approach uses comparative constitutional law “as a guide to constructing new constitutional provisions and institutions, primarily in the context of ‘constitutional engineering’ in the post-authoritarian world or in ethnically-divided polities.”³² Beyond describing and analyzing differences between constitutions, an important goal of the constitutional design literature is to prescribe constitutional solutions that are appropriate for political and social problems, and critically evaluate constitutional reforms. This “applied” branch of comparative constitutional law shares the more descriptive work’s functionalist orientation, with comparative constitutional law serving as “an ‘*école de vérité*’ which extends and enriches the ‘supply of solutions’ and offers the scholar of critical capacity the opportunity of finding the ‘better solution’ for his time and place.”³³ But the “applied branch” is characterized more by a spirit of policy advocacy than self-reflection.³⁴

leveled against functionalism and a very preliminary effort to develop a “new functionalism” that takes the most important criticisms into account while retaining functionalism’s advantages, see Christopher A. Whytock, *Toward a New Functionalism: Comparative Law and Comparative Methodology* (2005) (unpublished manuscript, available from author).

30. JACKSON & TUSHNET, *supra* note 24, at 169.

31. See, e.g., CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* (2001); Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511 (1991); Venelin I. Ganev, *Emergency Powers and the New East European Constitutions*, 45 AM. J. COMP. L. 585 (1997); Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, LAW & CONTEMP. PROBS., Spring 2002, at 251; Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT’L L.J. 29 (2003); Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, LAW & CONTEMP. PROBS., Spring 2002, at 223; Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT’L L. 51 (2003). For a collection of primarily political science work on constitutional design, see *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* (Andrew Reynolds ed., 2002).

32. Hirschl, *supra* note 4, at 128.

33. ZWEIGERT & KÖTZ, *supra* note 17, at 15 (citation omitted).

34. For an overview of U.S. involvement in foreign constitutional reform efforts, see Donald L. Robinson, *The Comparative Study of Constitutions: Suggestions for Organizing the Inquiry*, 25 PS: POL. SCI. & POL. 272 (1992). For a critical assessment of these efforts, see Jacques deLisle,

Closely related to constitutional design, a third approach to comparative constitutional law examines “constitutional borrowing.”³⁵ Rather than prescribing particular constitutional solutions, this approach is aimed at gaining a better understanding of the circumstances under which it is appropriate for one country to adopt another country’s constitutional arrangements or interpretations.³⁶ An instrumental version of this approach builds on the concept of constitutional design by emphasizing the conditions upon which the effectiveness of a constitutional solution depends.³⁷ According to Zweigert and Kötz, one must ask not only whether a foreign solution “has proved satisfactory in its country of origin,” but also “whether it will work in the country where it is proposed to adopt it.”³⁸ A normative version of this approach has taken form in response to what some scholars perceive as an increasing willingness of constitutional courts to cite foreign legal opinions on

Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond, 20 U. PA. J. INT’L ECON. L. 179 (1999).

35. See, e.g., Tushnet, *Returning with Interest*, *supra* note 29; Tushnet, *Possibilities*, *supra* note 29; see also Symposium, *Constitutional Borrowing*, 1 INT’L J. CONST. L. 177 (2003).

36. Moreover, there is a strong tradition in comparative law scholarship that seeks to explain more general patterns of cross-national legal borrowing. For a classic example, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (Univ. of Ga. Press 2d ed. 1993). See also Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *GOVERNANCE IN A GLOBALIZING WORLD* 253 (Joseph S. Nye Jr. & John D. Donahue eds., 2000); William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2004); William Twining, *Social Science and Diffusion of Law*, 32 J. L. & SOC’Y 203 (2005).

37. A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 403 (1996) (“Drafters who borrow an idea from other constitutions or systems may, however, not understand a principle’s genesis or its implications. The architects of a constitution may be borrowing a principle or idea from one tradition and applying it to another. Planting a proposition in a different cultural, historical, or traditional context may lead to results quite different from those one finds in the country from which the proposition was borrowed.”). Tushnet refers to this as the “organicist” critique, and attributes it to Montesquieu and Hegel. The basic argument is that only legal institutions that emerge organically within a society will be accepted by that society. As Tushnet explains,

Montesquieu observed that ‘the political and civil laws of each nation . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.’ This comes close to an express statement that one constitutional system cannot learn from another. To do so, one people would have to rely on the experiences that were ‘appropriate to’ another—and were at least presumptively inappropriate to themselves.

Tushnet, *Possibilities*, *supra* note 29, at 1265 (quoting CHARLES DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748)).

38. ZWEIFERT & KÖTZ, *supra* note 17, at 17.

constitutional matters,³⁹ as well as several recent controversial instances of foreign law citation by the U.S. Supreme Court.⁴⁰ Here the debate has focused on whether references to foreign legal decisions by courts engaged in domestic constitutional interpretation can be justified as a matter of constitutional theory and, if so, on the appropriate methods to apply when using foreign law.⁴¹

All of these approaches to comparative constitutional law scholarship raise interesting and important questions about the cause-and-effect relationships between different constitutional arrangements on the one hand, and cultural, economic, political and social differences on the other hand. These causal questions present themselves in the literature sometimes explicitly and sometimes implicitly. Generally, they take two basic forms.

First, what accounts for cross-national constitutional differences? What are the sources of constitutional variation illustrated so richly by descriptive constitutional law scholarship and analyzed from a policy perspective by constitutional design scholars? Under what circumstances are constitutional designers likely to borrow foreign constitutional arrangements, and when are courts likely to use foreign legal decisions to help guide domestic constitutional interpretation? These questions treat constitutional variation as the phenomenon to be explained. As such, constitutions

39. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91, 91–92 (2004) (“Increasingly, constitutional courts refer to the decisions and reasoning of other constitutional courts”); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005). But see David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006) (indicating through empirical analysis that, at least in the case of U.S. federal courts, foreign citations are no more common than they were in the past).

40. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (holding that a Texas statute criminalizing same-sex sodomy is unconstitutional and citing a decision of the European Court of Human Rights, *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)). For a concise overview of the controversy—among not only legal scholars, but also Supreme Court justices and politicians—see David S. Law, *Generic Constitutional Law*, MINN. L. REV. 652, 653–57 (2005).

41. See, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Law, *supra* note 40; Tushnet, *Returning with Interest*, *supra* note 29; Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003); Janella Ragwen, *Developments, The Propriety of Independently Referencing International Law*, 40 LOY. L.A. L. REV. 1407 (2007).

are the dependent variable. Political and other factors may be explanatory variables that help explain this variation.

Second, what are the consequences of different constitutional arrangements? This question treats constitutional variation as an explanatory variable—a factor that may help explain cross-national social, economic, or political differences, which are treated as dependent variables. As Nussbaum notes in a special issue on comparative constitutionalism in *The Chicago Journal of International Law*,

A pervasive concern . . . is with outcomes. Whether or not constitutional provisions and their interpretation have a prepolitical moral basis, they have consequences. And the authors appear to agree that both texts and interpretative traditions can reasonably be evaluated by looking at how they work. Do they produce stability or instability? Do they deliver the welfare that they seek to deliver?⁴²

In the instrumental version of the “borrowing literature,” the question of consequences is explicit: under what circumstances are borrowed foreign solutions likely to have their intended effect? This question implicitly flows through all of the functionally oriented comparative constitutional law scholarship, even though functionalism itself does not explicitly grapple with the issue of causality.⁴³ By illustrating constitutional variation in the face of similar social problems, the descriptive work may indeed help diminish a sense of false necessity about existing domestic solutions—but without clarifying the actual consequences of the status quo and likely consequences of proposed alternatives, this

42. Martha C. Nussbaum, *Introduction to Comparative Constitutionalism*, 3 CHI. J. INT'L L. 429, 433 (2002).

43. In the “new functionalism” that I propose elsewhere, I argue that the question of consequences should be explicitly addressed, and that this can be done by distinguishing intended function and actual consequences. Whytock, *supra* note 29. This distinction is similar to the distinction made in traditional sociological and anthropological functionalism between manifest and latent functions. MARK ABRAHAMSON, FUNCTIONALISM 17 (1978). *Compare id.* (“[Latent functions] involve consequences that are neither recognized nor intended by participants. Thus, initiation ceremonies may change male identities even though neither initiates nor adult males are aware of this consequence. Manifest functions, by contrast, contribute to adjustment or perpetuation of a system in ways that are both intended and recognized by participants.”), with Robert F. Spencer, *The Nature and Value of Functionalism in Anthropology*, in FUNCTIONALISM IN THE SOCIAL SCIENCES: THE STRENGTH AND LIMITS OF FUNCTIONALISM IN ANTHROPOLOGY, ECONOMICS, POLITICAL SCIENCE, AND SOCIOLOGY 6–9 (Don Martindale ed., 1965) (offering an anthropological perspective).

approach does not provide a strong foundation for reflecting on the relative merits of different constitutional arrangements. The constitutional design literature aspires to accomplish this by moving beyond reflection to prescription. Prescriptive claims, however, depend on causal claims about the real world consequences of proposed constitutional arrangements. Finally, it would seem that most normative approaches to the question of constitutional borrowing would consider the opportunity costs of rejecting an alternative solely on the grounds that it is foreign when its adoption might provide significant societal benefits, as well as the potentially costly unintended consequences of borrowing.⁴⁴

* * * * *

My central claim is this: *causal questions permeate the field of comparative constitutional law*. The field therefore poses fundamental challenges of causal inference—challenges about how one can gain knowledge about the effects that one thing may have on another, even in the face of limited evidence and the inability to perform controlled experiments on constitutional matters.⁴⁵ But so far comparative constitutional law scholarship has done little to address these challenges, leaving interesting and important questions unanswered and causal claims empirically unsupported. Consequently, the field is far short of the type of constitutional

44. Zweigert and Kötz argue that “[i]f comparative analysis suggests the adoption of a particular solution to a problem arrived at in another system one cannot reject the proposal simply because the solution is foreign and *ipso facto* unacceptable. . . . ‘The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden.’” ZWEIGERT & KÖTZ, *supra* note 17, at 17 (quoting RUDOLPH VON JHERING, *GEIST DES RÖMISCHEN RECHTS* 1 (9th ed. 1955)). This, however, is not as compelling an argument as it is in the case of morally charged constitutional issues on relatively technical legal issues, and it also downplays important questions about the “constitutional license” for borrowing. See, e.g., Tushnet, *Possibilities*, *supra* note 29; Alford, *supra* note 41. Nevertheless, one would want to know the practical implications of a decision to accept or reject a foreign alternative. Both constitutional principle and societal consequences are relevant to constitutional analysis. Elsewhere I take some very preliminary steps toward a positive theoretical investigation of the consequences of foreign law in domestic courts. Christopher A. Whytock, *Foreign Law in Domestic Courts: Different Uses, Different Implications*, in *GLOBALIZING JUSTICE: CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS* (Donald W. Jackson, Michael C. Tolley & Mary L. Volcansek eds. forthcoming).

45. For an overview of the logic of causal inference, see GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* ch. 3 (1994), and Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

theorizing that, by shedding light on the consequences of constitutions, might help “inform the public, guide politicians, and improve the decisions of courts.”⁴⁶ As Hirschl argues, the study of comparative constitutions has remained predominantly descriptive and conceptual, and has failed to treat claims about causal relationships as hypotheses that need to be tested against empirical evidence.⁴⁷ Simply put, “causal inference—arguably, the ultimate goal of scientific inquiry, quantitative or qualitative, positivist or hermeneutical—remains largely beyond the purview of comparative constitutional law scholarship.”⁴⁸ Hirschl correctly emphasizes that his critique in no way diminishes the importance of the descriptive and conceptual contributions made by comparative constitutional law scholars.⁴⁹ I would go even further: the causal questions and claims in comparative constitutional law scholarship that have yet to be rigorously investigated demonstrate the considerable potential of the comparative constitutional endeavor. By making these questions and claims explicit in their work and by addressing them with appropriate tools of causal inference—that is, by taking causality seriously—scholars of comparative constitutional law can help ensure that the field will acquire and retain the prominent place it deserves in legal scholarship.

46. COOTER, *supra* note 5, at 2.

47. See Hirschl, *supra* note 4, at 126 (identifying four major types of comparative constitutional scholarship: “(1) freestanding, single-country studies mistakenly characterized as comparative . . . ; (2) comparative reference aimed at self-reflection through analogy, distinction, and contrast; (3) comparative research aimed at generating ‘thick’ concepts and thinking tools through multi-faceted descriptions; and (4) studies that draw upon controlled comparison and inference-oriented case selection principles in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data,” and noting that there has been very little of the fourth type of scholarship); see also COOTER, *supra* note 5, at 374 (noting the lack of empirical work on constitutions in general).

48. Hirschl, *supra* note 4, at 153.

49. *Id.* (explaining that “the field has made a remarkable leap forward over the past few years—primarily through comparative research aimed at generating thick, multi-faceted descriptions, concepts, and thinking tools”). But Hirschl also urges comparative constitutionalists “to further release themselves from traditional doctrinal constraints, and contribute more significantly to the accumulation of theoretical knowledge through the deployment of more methodologically rigorous methods of research design.” *Id.* at 152–53 (“[M]ost leading works in the field still lag behind the social sciences in their ability to use controlled comparison to trace causal links among pertinent variables.”).

III. COMPARATIVE POLITICS, COMPARATIVE POLITICAL ECONOMY, AND COMPARATIVE CONSTITUTIONAL LAW

If my argument is convincing so far—if comparative constitutional law scholarship raises interesting and important causal questions, but generally does not grapple with the challenges of causal inference—then comparative constitutional law scholars may be interested in the work of political scientists working in the subfields of comparative politics and comparative political economy.⁵⁰ These scholars, along with a growing number of economists, are asking questions about the origins and consequences of constitutions, questions that are similar to those raised in the comparative constitutional law literature. Yet they are framing these questions in explicitly causal terms, developing positive theory from which hypothetical answers can be derived, and then testing them empirically using social science methods of causal inference. Without making any attempt to be comprehensive, I will review some of the relevant literature in order to highlight interesting empirical findings of political scientists and economists who have studied constitutions in comparative perspective, provide a bibliographical point of departure for comparative constitutional law scholars who are not already familiar with this literature, and reinforce the importance of comparative constitutional law as a field of study.

A. *Comparative Politics:*

The Political Origins and Consequences of Constitutions

Comparative politics scholars have been particularly interested in three basic constitutional features: electoral systems, federalism, and separation of powers. Their research has treated them as both dependent variables and explanatory variables. Research on constitutions as dependent variables explores political explanations for cross-national constitutional variation. For example, Carles Boix has done important research on the origins of electoral systems. He

50. My focus on political science and political economy is intended to illustrate the potential contributions of these fields, and not to suggest that other social science disciplines, such as anthropology, economics, and sociology, do not have their own, equally important contributions to make to the study of comparative constitutional law. See, e.g., Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389 (2004) (drawing on anthropology).

finds that the ruling parties at the time of an electoral reform consider different electoral arrangements in light of the consequences they expect different systems to have on their future electoral prospects, and then choose the electoral system that they anticipate will maximize their political representation.⁵¹ Challenging Boix's findings, Thomas Cusack, Torben Iversen, and David Soskice note that proportional representation electoral systems are closely linked to more government spending, more redistribution, and more frequent center-left governments, and ask why, given this relationship, the right would ever endorse proportional representation. They argue that forward-looking right politicians will favor majoritarian institutions, whereas forward-looking left politicians will favor proportional representation.⁵² Regarding the basic constitutional choice between presidential and parliamentary government, Gerald Easter finds that it is primarily a function of the interests and status of the pre-reform regime.⁵³ Similarly, Timothy Frye develops what he calls an "electoral bargaining approach" to constitutional design, arguing that two main factors account for the variation in presidential powers of post-communist countries: "the bargaining power of the electoral favorite and the degree of uncertainty over the electoral outcome."⁵⁴ What these different

51. According to Boix: (1) if the electoral arena does not change and the current electoral regime benefits the ruling parties, the electoral system is not changed; (2) if the entry of new voters or a change in voters' preferences alter the electoral arena leading to new parties, then (a) if the new parties are strong, the old parties (i) shift from plurality/majority to PR if no old party enjoys a dominant position but (ii) maintain non-PR system if there is a dominant old party, or (b) if the new parties are weak, non-PR is maintained regardless of old party positions. Carles Boix, *Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies*, 93 AM. POL. SCI. REV. 609 (1999).

52. Thomas Cusack, Torben Iversen & David Soskice, *Specific Interests and the Origins of Electoral Institutions* 6-9 (2004) (unpublished), available at <http://www.people.fas.harvard.edu/~iversen/pdffiles/CusackIversenSoskice2004.pdf>. Other comparative politics research addressing the origin of electoral systems includes Thomas F. Remington & Steven S. Smith, *Political Goals, Institutional Context, and the Choice of an Electoral System: The Russian Parliamentary Election Law*, 40 AM. J. POL. SCI. 1253 (1996), and Kenneth Benoit & John W. Schiemann, *Institutional Choices in New Democracies: Bargaining over Hungary's 1989 Electoral Law*, 13 J. THEORETICAL POL. 153 (2001).

53. Gerald M. Easter, *Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS*, 49 WORLD POL. 184 (1997).

54. Timothy Frye, *A Politics of Institutional Choice: Post-Communist Presidencies*, 30 COMP. POL. STUD. 523, 524 (1997). On the origins of different constitutional arrangements, see also Matthew Soberg Shugart, *The Inverse Relationship Between Party Strength and Executive Strength: A Theory of Politicians' Constitutional Choices*, 28 BRIT. J. POL. SCI. 1 (1998) (finding that there is an inverse relationship between party strength (the extent to which legislators campaign on the basis of their parties' reputations as providers of public policy, as opposed to

findings have in common is that constitutional variation is to a large extent explained by political power, political interests, and political expectations, rather than technical design principles.⁵⁵ This research does not necessarily question the importance of constitutions, but it raises the question asked by comparative politics and legal scholar Donald Horowitz: Is constitutional design an oxymoron?⁵⁶ On the one hand, the answer might be no. Constitutions *are* designed, albeit designed to serve the interests of powerful political interests. But if one understands constitutional design in the functionalist sense, as a plan for solving social problems rather than a result of political bargaining, then the research suggests that the answer may be yes.⁵⁷

Comparative politics scholars have also studied constitutions as explanatory variables, engaging in positive theory development and empirical research on the political consequences of different constitutional arrangements. From this perspective, they have, for example, treated democratic stability and ethnic conflict as dependent variables, that is, as outcomes that can be partly explained by cross-national constitutional differences.⁵⁸ A major debate in

personal reputations as providers of more narrowly targeted services) and executive strength (the constitutional authority of the executive to influence policy independent of partisan support in the legislature)), and JOSEP M. COLOMER, *STRATEGIC TRANSITIONS: GAME THEORY AND DEMOCRATIZATION* (2000) (emphasizing the bargaining power and electoral expectations of incumbents).

55. In their interesting article on constitutional borrowing as institutional design, Lee Epstein and Jack Knight summarize the argument as follows: “[W]e must analyze borrowing—institutional choices, really—as a bargaining process among relevant political actors, with their decisions reflecting their relative influence, preferences, and beliefs at the moment when the new institution is introduced, along with (and critically so) their level of uncertainty about future political circumstances.” Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT’L J. CONST. L. 196, 200 (2003).

56. Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in *DESIGNING DEMOCRATIC INSTITUTIONS: NOMOS XLII*, at 253 (Ian Shapiro & Stephen Macedo eds., 2000).

57. This raises another problem with the traditional functionalist method of comparative law—who defines the “problems” which laws are intended to “solve”? Whytock, *supra* note 29.

58. Comparative politics scholars also have found relationships between electoral systems and the number of political parties. *See, e.g.*, GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD’S ELECTORAL SYSTEMS* 8–9 (1997) (electoral institutions alone do not determine the number of parties; they impose upper bounds on the number of parties. The actual number of parties is an interactive function of electoral and social structure); MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 216–28 (Barbara North & Robert North trans., Methuen & Co. Ltd. 1954) (1951) (plurality electoral systems tend to lead to two-party systems). Comparative politics scholars have further found relationships between electoral systems and levels of government corruption. *See, e.g.*, Eric C.C. Chang & Miriam A. Golden, *Electoral Systems, District Magnitude and Corruption* (July 2004) (unpublished manuscript), available at <http://ssrn.com/abstract=713521>; Jana Kunicova & Susan Rose-Ackerman, *Electoral Rules as Constraints on*

comparative politics is about whether presidential constitutional designs reduce democratic stability. Juan Linz finds that presidential systems are indeed less stable than parliamentary systems, in part because they make deadlock likely between the president and the legislature.⁵⁹ José Cheibub and Fernando Limongi agree with the basic empirical finding that presidential regimes are less stable than parliamentary regimes, but disagree with Linz and others about the underlying causal mechanisms: “if parliamentary regimes have a better record of survival than presidential regimes, it is not because they are parliamentary.”⁶⁰ Shugart and Carey, on the other hand, argue that one cannot generalize about presidentialism and regime stability because presidential regimes vary substantially and interact in different ways with different sets of presidential powers and rules of executive-legislative relations. They do find, however, that presidential systems with greater presidential powers are likely to be less stable.⁶¹ As this brief summary of the debate over presidentialism and democratic stability shows, identifying empirical patterns is only one part of empirically oriented comparative constitutional law scholarship. It is also only one step toward reducing uncertainty about causal inferences—association is not

Corruption: The Risks of Closed-List Proportional Representation, (Jan. 15, 2002) (unpublished manuscript), available at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1025&content=berkeley_law_econ. No discussion of comparative political economy scholarship on comparative constitutions would be complete without mentioning George Tsebelis’s work on veto players. See, e.g., GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002). He treats the number of veto players, including the actors specified by the constitution that must agree in order to change the status quo (for example, the U.S. Constitution requires the agreement of the House, the Senate, and the president—barring a veto override—to enact legislation), as a key explanatory variable that helps explain various political and economic outcomes. *Id.*

59. Juan Linz argues that this is because presidential systems, among other things, have fixed terms for the chief executive, which creates rigidity by precluding continuous policy readjustment, with the result that disputes between the president and legislature are likely to be resolved by extraconstitutional means. Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 68 (1990); see also ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990, at 106–36 (2000) (finding that presidential democracies are less durable than parliamentary ones under all economic and political conditions).

60. José Antonio Cheibub & Fernando Limongi, *Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered*, 5 ANN. REV. POL. SCI. 151, 176 (2002).

61. SHUGART & CAREY, *supra* note 20, at chs. 3, 8; see also TSEBELIS, *supra* note 58, at ch. 9 (agreeing on the basis of veto player theory that regime survival should be lower when presidential powers are higher, because strong presidential powers in effect introduce another veto player, thus increasing policy stability which, in turn, increases regime instability).

causation. Causal inference also depends on positive theoretical work aimed at identifying causal processes, and empirical examination of the observable implications of those processes.

Different constitutional provisions may also have different consequences for ethnic conflict in divided societies. Arend Lijphart argues that consociational governments, which include proportional representation electoral systems, can reduce ethnic conflict by helping to ensure that all segments of society are represented in government.⁶² In contrast, Donald Horowitz argues for electoral systems that foster interethnic cooperation by creating incentives for vote pooling among different ethnic groups.⁶³ Nancy Bermeo finds that federal institutions generally help promote interethnic accommodation,⁶⁴ whereas Michael Hechter finds the implications more ambiguous: on the one hand, decentralization leads to reduced rebellion events; on the other hand, decentralization leads to increased protest events.⁶⁵ Too little decentralization can lead to rebellion, but too much can lead to fragmentation.⁶⁶

Political scientists have devoted considerable attention—albeit so far more theoretical than empirical—to the question of whether and how constitutions actually constrain the behavior of government actors. Adam Przeworski responds, “It is obvious that at times they do not.”⁶⁷ Reasoning that constitutions are written under specific

62. AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977).

63. Electoral systems can be designed to fragment ethnic groups politically by creating intra-party competition, to foster moderation in order to pool votes, and to facilitate the formation of multi-ethnic parties and coalitions. Donald L. Horowitz, *Ethnic Conflict Management for Policymakers*, in *CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES* 115 (Joseph V. Montville ed., 1990). For example, improvements over closed-list PR and first-past-the-post (“FPP”) in terms of incentives may include preferential electoral systems like the alternative vote (which, unlike FPP, allow voters to rank their choices among different candidates or parties). *Id.*; see also STEVEN I. WILKINSON, *VOTES AND VIOLENCE: ELECTORAL COMPETITION AND ETHNIC RIOTS IN INDIA* 241 (2004) (criticizing Lijphart’s approach, and finding that “even within the same constitutional structure in India there is substantial intrastate variation in ethnic violence, due to different levels of political competition”).

64. Her logic is that more layers of government create more settings for peaceful bargaining and give at least some regional elites a greater stake in existing political institutions. Nancy Bermeo, *A New Look at Federalism: The Import of Institutions*, 13 *J. DEMOCRACY* 96, 99 (2002).

65. Michael Hechter, *Nationalism and Rationality*, 35 *STUD. COMP. INT’L DEV.* 3, 14 (2000).

66. *Id.*

67. Adam Przeworski, *Do Constitutions Constrain?* 1 (Oct. 16, 2003) (unpublished manuscript), available at http://c250.columbia.edu/c250_events/symposia/constitutions/papers/przeworski_paper.pdf.

historical conditions to regulate government under future conditions, he argues that “[w]hen the future departs too far from the anticipations, constitutions either bend or break.”⁶⁸ Russell Hardin argues that constitutions are not “contracts” but rather an instrument for coordination. According to him, “Once a coordination is in place and people are following it, the cost of re-coordinating is the chief obstacle to moving to any supposedly superior order. This cost can block re-coordination even if it would be in virtually everyone’s interest to be in a new order.”⁶⁹ According to Barry Weingast, governments comply with limitations on their power when they believe that violating those limitations will lead to concerted action by citizens to depose the government or withdraw support.⁷⁰

68. *Id.* at 2.

69. RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 15–16 (1999). As Hardin elaborates,

Although its rationale in part is similar, this is not the system of checks and balances envisioned by Montesquieu. It is a finer grained application of Madison’s injunction: “Ambition must be made to counter ambition.” . . . To be sure, I block your action because I think it is wrong. But I do so with substantial support that makes my action costless or even beneficial to me. Similarly, I do my job well because others will generally support and reward me for working well. Moreover, it would be difficult to disrupt this system to anyone’s benefit, including that of a national president or prime minister.

Id. at 26 (quoting THE FEDERALIST NO. 51 (James Madison)). But Hardin is not completely optimistic: “Such a conventional norm system may not work equally well at all levels or in all circumstances” and he does not claim that “such a system can never be abused for essentially self-interested purposes.” *Id.* However, “its force can be seen in recent decades in the forced removal from office of legislators, high-ranking bureaucrats, presidential advisers, a president, and a vice-president in the United States, and of ministers and other high-ranking officials in Japan and several European nations, most notably Italy in recent years.” *Id.* Moreover, if a constitution provides coordination on a central program, “there is much less need to have an external force to control the government to make it comply with the constitutional order. Hence, constitutional government is feasibly workable. It can fail, however, if the central coordination requires great power that can be used for purposes other than managing the programme on which we have coordinated. In that case, the constitutional order can fail utterly.” *Id.* at 28. Adam Przeworski makes a similar argument, although not with reference to coordination or focal points: “[C]ompliance can be self-enforcing if the institutional framework is designed in such a way that the state is not a third party but an agent of coalitions of political forces.” ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 25 (1991); see also José María Maravall & Adam Przeworski, *Introduction*, in DEMOCRACY AND THE RULE OF LAW 1, 11–12 (José María Maravall & Adam Przeworski eds., 2003) (“[A] system of checks and balances leads the government as a whole to act in ways that are predictable and moderate when (1) these institutions have means and incentives to check one another and (2) when their institutional prerogatives are backed by support from organized interests.”).

70. See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 261 (1997) [hereinafter Weingast, *Foundations I*]; Barry R. Weingast, *A Postscript to “Political Foundations of Democracy and the Rule of Law,”* in

However, if the government believes that citizens are unable to act in concert to defend their rights, those limitations will not be self-enforcing.⁷¹ Maintaining limits on government is, therefore, a “massive social coordination problem.”⁷² Citizens must coordinate about which limits on governmental power are to be defended and how they are defined. Otherwise, collective action will be impossible.⁷³ Constitutions can provide a focal solution to this problem by specifying “widely accepted and unambiguous limits on the state.”⁷⁴ Under these circumstances, the rule of law will be self-enforcing, since the government factors the risk of losing citizen support into its interest calculations.

*B. Comparative Political Economy:
The Economic Consequences of Constitutions*

As illustrated above, political scientists studying comparative politics have devoted considerable attention to the study of constitutions, with an emphasis on their political origins and political consequences. They have provided evidence that cross-national constitutional variation matters for outcomes including democratic stability and ethnic conflict. Recent work by political scientists and economists studying comparative political economy suggests that the implications of comparative constitutional law are even wider. Political economy is the study of the relationship between political institutions and economic outcomes, including both economic policies and actual economic performance.⁷⁵ A central premise of

DEMOCRACY AND THE RULE OF LAW, *supra* note 69, at 109, 113 [hereinafter Weingast, *Foundations II*].

71. Weingast, *Foundations I*, *supra* note 70, at 246.

72. *Id.* at 261.

73. Weingast, *Foundations II*, *supra* note 70, at 111. Moreover, absent an effective focal point, a government may attempt to “divide and conquer” citizens by co-opting certain groups to form coalitions against others, thereby blunting citizen attempts to enforce compliance. *Id.*

74. Weingast, *Foundations I*, *supra* note 70, at 261.

75. As James Alt explains, political economists generally understand institutions as “rules, procedures, norms, or conventions designed self-consciously to determine ‘who has the power to do what when.’” James E. Alt, *Comparative Political Economy: Credibility, Accountability, and Institutions*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 147, 149 (Ira Katzelson & Helen V. Milner eds., 2002). Political economists study:

how political and economic institutions constrain, direct, and reflect individual behavior. It explains collective outcomes like production, resource allocation, and public policy in a unified way, stressing the political context in which market phenomena take place and using an economic approach, constrained maximizing and

political economy is that these outcomes are influenced not only by economic and social conditions, but also by political factors, including institutions.⁷⁶ Institutions affect these outcomes because they provide the context within which economic decisions are made—they determine who gets to decide, they impose limits on the choices available, they create incentives and disincentives for making different choices, and they prescribe norms of behavior.⁷⁷ Comparative political economy is the branch of political economy that explores the relationship between cross-national institutional differences and cross-national economic differences.

1. Comparative Political Economy and Comparative “Private” Law

Comparative political economy scholars in both political science and economics are increasingly interested in the economic consequences of law and legal institutions, although the focus has been primarily on private law.⁷⁸ Economist Andrei Shleifer and his coauthors focus on the economic consequences of legal origins, finding, among other things, that even after controlling for differences in economic development, “French civil law countries have less secure property rights, greater government regulation and intervention, greater government ownership of banks and industry, and higher levels of corruption and red tape than do common law countries” and that “common law countries are more financially

strategic behavior by self-interested agents. In sum, it emphasizes economic behavior in the political process and political behavior in the marketplace.

Id.

76. *Id.* at 148.

77. *See id.* at 150 (The institutional context “limits, constrains, channels, and determines what is available to choose, how choices from this feasible set are made, and who gets to make these choices”).

78. Much of this research is inspired by economist Douglass North’s work on the role of institutions in economic performance, particularly DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990). Within the discipline of economics, this field sometimes is referred to as the “new comparative economics.” *See, e.g.*, Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003). The World Bank has a group that works on the “Legal Institutions of the Market Economy.” *See* World Bank, Law & Justice, <http://www1.worldbank.org/publicsector/legal/index.cfm> (last visited Nov. 17, 2007). I use the term “private law” for convenience only; I have doubts about its analytic utility. *See, e.g.*, Shapiro (1972), *supra* note 17 (criticizing the public law/private law distinction). For example, property rights are as much a part of public law as private law.

developed than their civil law counterparts.”⁷⁹ In contrast, economists Daniel Berkowitz and Jean-Francois Richard, along with legal scholar Katharina Pistor, find that the effectiveness of legal institutions and, indirectly, economic development, depend more on the manner in which those institutions were transplanted, than on the institutions’ origins.⁸⁰ Moving beyond legal origins, other scholars have found that property rights institutions have an important impact on long-run economic growth, but that contracting institutions are less important;⁸¹ that cross-national variation in corporate and securities law affects corporate valuations;⁸² and that the quality of a country’s domestic legal institutions affects its international trade flows.⁸³ Peter Hall and David Soskice have developed an entire approach to comparative political economy that is based largely on cross-national legal and regulatory differences, including differences in contracting institutions.⁸⁴

Of course, law and economics scholars are also interested in the relationships between law and legal institutions on the one hand, and economics on the other hand;⁸⁵ thus, it has strong affinities with

79. Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193, 1220 (2002). For more detailed empirical findings regarding the effects of legal origins, see Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (arguing that common law countries have the strongest and French civil law countries the weakest legal protections of investors), Rafael La Porta et al., *The Quality of Government*, 15 J. LAW, ECON. & ORG. 222 (1999) (countries that use French laws have inferior government performance in terms of public sector efficiency, quality of public good provision, government size, and political freedom), and Thorsten Beck et al., *Law and Finance: Why Does Legal Origin Matter?* (Oct. 2002) (unpublished manuscript), available at <http://ssrn.com/abstract=355820> (cross-country differences in legal origins are determinants of financial development).

80. Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003). As the authors note, “The policy implication of these results are fundamental: a legal reform strategy should aim at improving legality by carefully choosing legal rules whose meaning can be understood and whose purpose is appreciated by domestic law makers, law enforcers, and economic agents, who are the final consumer of these rules.” *Id.* at 192.

81. Daron Acemoglu & Simon H. Johnson, *Unbundling Institutions* (July 2003) (unpublished manuscript), available at <http://ssrn.com/abstract=442900>.

82. For a review of this research, see Thorsten Beck & Ross Levine, *Legal Institutions and Financial Development* (Sept. 2003) (unpublished manuscript), available at <http://ssrn.com/abstract=636556>.

83. Daniel Berkowitz et al., *Legal Institutions and International Trade Flows*, 26 MICH. J. INT’L L. 163 (2004).

84. VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).

85. For overviews of law and economics, see, for example, ROBERT COOTER, *LAW AND ECONOMICS* (2004), and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2003).

political economy. Given the increasingly widespread use of the tools of law and economics by comparative law scholars, there are important links with comparative political economy in particular.⁸⁶ Generally, however, the work of political economists has placed a greater emphasis on the development and empirical testing of positive theories about actual relationships between legal and economic variables.⁸⁷ In addition, like most law-related comparative political economy scholarship, law and economics has devoted less attention to constitutional law than to “private law” subjects such as contract and tort law.⁸⁸

Because of the relative lack of empirical work in comparative law and economics, and because both comparative law and economics and comparative political economy scholars have devoted relatively little attention to comparative constitutional law, favoring instead the study of private law, there is an important gap in the literature. As Table 1 illustrates,⁸⁹ there already has been significant normative and positive theoretical work on the relationship between economics on the one hand, and comparative private law (Quadrant I) and comparative constitutional law (Quadrant II) on the other hand. Moreover, there is a rapidly growing body of empirical research on comparative law and economics (Quadrant III), albeit one that has yet to devote substantial attention to comparative constitutional law. Quadrant IV represents a wide open frontier for comparative legal scholarship that develops and empirically tests theories about the economic consequences of constitutions.

86. For contributions by a leading figure in comparative law and economics, see MATTEI, *supra* note 6.

87. See Alt, *supra* note 75, at 150 (“Relative to economics, a contribution of political science is to accord equal status to normative and positive questions, focusing *relatively* less on optimal arrangements and more on figuring out how things actually work.”). Of course, this is not to say that law and economics scholars are not concerned with positive theory and empirical testing—indeed, there is a subfield of positive law and economics. To reemphasize my qualification, I only mean to suggest a difference in emphasis.

88. Ugo Mattei—a leader in the field of comparative law and economics—notes that “while law and economics has made valuable contributions to the understanding of private law, its contribution to public law is less impressive and in that area much work still has to be done.” MATTEI, *supra* note 6, at x. *But see* COOTER, *supra* note 5 (applying economic analysis to constitutional law).

89. The four quadrants are, of course, closely related and mutually dependent. Most importantly, the value of positive theory and empirical testing depends not only on its ability to generate knowledge, but on the normative and policy implications of that knowledge. Conversely, normative and positive theoretical work that does not take into account real world consequences has its own limitations.

TABLE 1: FRONTIERS IN COMPARATIVE LAW AND ECONOMICS⁹⁰

	Comparative Private Law	Comparative Constitutional Law
Normative and Positive Theory	I. Mattei (1997)	II. Cooter (2000)
Empirical Testing	III. Glaeser & Shleifer (2002), Berkowitz et al. (2003)	IV. Empirical Comparative Constitutional Law

2. Comparative Political Economy and Comparative Constitutional Law

Recently, however, there has been a surge of interest among comparative political economists in constitutions.⁹¹ In particular, they have focused on the economic consequences of constitutional arrangements governing legislative elections, federalism, and separation of powers, treating these features as explanatory variables and various economic outcomes as dependent variables. Research on the economic consequences of electoral systems has focused on whether the electoral formula is based on a plurality rule (typically associated with “majoritarian” electoral systems), in which case the candidate with the highest number of votes in a particular district wins that district, or proportional representation (“PR”), in which case legislative seats are allocated approximately in proportion to the respective vote shares of the competing political parties.⁹² In their

90. This table is by no means intended to list comprehensively the relevant literature. It only lists one or two exemplars for each quadrant, and of course omits many important works, only some of which are discussed in the brief review included in this article.

91. For one important empirical contribution, see TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* (2003), which I discuss below.

92. For a clear and concise overview of electoral systems in comparative perspective, see AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* ch. 8 (1999). As Lijphart summarizes:

The plurality and majority single-member district methods are winner-take-all methods—the candidate supported by the largest number of voters wins, and all other voters remain unrepresented—and hence a perfect reflection of majoritarian philosophy. Moreover, the party gaining a nationwide majority or plurality of the votes will tend to be overrepresented in terms of parliamentary seats. In sharp contrast, the basic aim of proportional representation is to represent both majorities and

book *The Economic Effects of Constitutions*, Torsten Persson and Guido Tabellini analyze cross-national data from 80 democratic countries and find that majoritarian systems lead to lower overall government spending, lower spending on welfare programs, and smaller government deficits than PR systems.⁹³ Similarly, using cross-sectional time series data from 14 democratic countries, Torben Iversen and David Soskice find that PR systems redistribute wealth more than majoritarian systems, because center-left governments dominate in PR systems, whereas center-right governments dominate in majoritarian systems.⁹⁴

Regarding federalism, Jonathan Rodden and Erik Wibbels analyze cross-sectional time series data from 15 federal systems, and find that increased decentralization of expenditures—defined as the percentage of total public sector spending conducted by subnational governments rather than the central government—reduces overall fiscal deficits and inflation.⁹⁵ Using cross-sectional time series data from 44 countries, Rodden also finds that when fiscal decentralization is funded by direct transfers from the central government to subnational governments, the result is faster growth in overall government spending, whereas it is associated with slower growth in government spending when it is funded by autonomous local taxation.⁹⁶

The comparative political economy research on separation of powers generally focuses on executive-legislative relations and treats the presence or absence of a confidence requirement as a key explanatory variable. The existence of a confidence requirement, which is one of the defining features of parliamentary government,

minorities and, instead of overrepresenting or underrepresenting any parties, to translate votes into seats proportionally.

Id. at 143.

93. For a summary of their findings, see PERSSON & TABELLINI, *supra* note 91, at 270–76. Similarly, Carles Boix finds that the public sector is larger in PR countries. See CARLES BOIX, *DEMOCRACY AND REDISTRIBUTION* 189 (2003).

94. See Torben Iversen & David Soskice, *Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More than Others*, 100 AM. POL. SCI. REV. 165 (2006).

95. See Jonathan Rodden & Erik Wibbels, *Beyond the Fiction of Federalism: Macroeconomic Management in Multilateral Systems*, 54 WORLD POL. 494 (2002). They define fiscal federalism in terms of the percentage of total public sector spending conducted by subnational governments. *Id.* at 503.

96. See Jonathan Rodden, *Reviving Leviathan: Fiscal Federalism and the Growth of Government*, 57 INT'L ORG. 695 (2003).

allows the legislature to dismiss the head of the government from office by a vote of no confidence or censure.⁹⁷ In presidential systems, on the other hand, the head of government is elected to serve for a constitutionally prescribed period of time, and cannot be removed except by impeachment.⁹⁸ Using cross-sectional data from 80 countries, Persson and Tabellini find that presidential systems—which they operationalize as the absence of a confidence requirement—lead to lower overall government spending, and apparently lower welfare spending, relative to parliamentary forms of government.⁹⁹ Similarly, using time series data from approximately 65 countries, Boix finds that presidentialism has a negative effect on the size of the public sector, with public revenue about 4 percent of GDP lower than in parliamentary systems.¹⁰⁰

Perhaps the most ambitious effort to date aimed at establishing the relationship between constitutions and economic and social outcomes is John Gerring, Strom Thacker, and Carola Moreno's research on centripetal democratic governance. They examine the collective impact of electoral systems, federalism, and separation of powers.¹⁰¹ Conceptually, the authors distinguish centripetal government, which is unitary, parliamentary, and has a PR electoral system, and decentralized government, which is federal, presidential, and has a majoritarian electoral system.¹⁰² Using cross-sectional times series data from 77 to 126 countries (depending on the statistical model), they find that centripetalism is associated with

97. For an overview of executive-legislative relations in comparative perspective, see LIJPHART, *supra* note 92, ch. 7. As Lijphart explains, the presence or absence of a confidence requirement is only one of the characteristics that distinguish parliamentary government from presidential government. *Id.* The two other key characteristics are whether the head of government is popularly elected (yes in presidential systems, but in parliamentary systems the prime minister is selected by the legislature) and whether the executive is collegial (as in the case of a prime minister's cabinet, in which the most important decisions are made by the cabinet as a whole) or noncollegial (as in the case of a presidential cabinet, in which cabinet members are subordinate to the president). *Id.* at 117–18.

98. *Id.* at 117.

99. For a summary of these findings, see PERSSON & TABELLINI, *supra* note 91, at 273–76.

100. BOIX, *supra* note 93, at 189.

101. John Gerring et al., *Centripetal Democratic Governance: A Theory and Global Inquiry*, 99 AM. POL. SCI. REV. 567 (2005).

102. *Id.* at 571. As the authors explain, “The centralist theory . . . presumes that good governance flows from institutions that centralize power in a single locus of sovereignty. The decentralist theory . . . supposes that good governance arises from the diffusion of power among multiple independent bodies.” *Id.* at 567.

higher bureaucratic quality, higher tax revenues, better investment ratings, more trade openness, greater economic prosperity, fewer infant deaths, longer life expectancy, and lower rates of illiteracy.¹⁰³

By focusing on specific findings, the foregoing review runs the risk of exaggerating the conclusions drawn by comparative politics and comparative political economy scholars about the consequences of constitutions. These findings are by no means conclusive. Rather, they represent efforts, using social science methods, to take questions of causality seriously in comparative constitutional law by attempting to reduce and estimate the uncertainty of causal inferences about the relationships between different constitutional arrangements on the one hand, and various political and economic factors on the other.¹⁰⁴ In some cases the methods used are qualitative or “small-N,” and in others they are statistical or “large-N.” Nonetheless, the goal of reducing the uncertainty of causal inferences is the same.¹⁰⁵ A related point is that constitutions are not, of course, the only factors that influence political and economic outcomes. Other causal factors may be of equal or greater importance, and many of them are likely to remain beyond the reach of scholars’ understanding. However, a central aim of comparative politics and comparative political economy scholarship is to isolate the effects of institutional variables by controlling for the effects of other variables. The findings summarized above should be

103. *Id.* at 576.

104. This is not to say that the evidence is conclusive, and the authors do not claim that it is. To the contrary, as Lee Epstein and Gary King explain:

[N]o matter how perfect the research design, no matter how much data we collect, and no matter how much time, effort, and research resources we expend, we will never be able to make causal inferences with certainty. . . . Simply because uncertainty cannot be eliminated does not mean we cannot or should not draw causal inferences when the research necessitates it. Legal researchers, lawyers, the courts, and legislators need to make causal inferences, and so giving up and redefining the goal is not an option. Moreover, generating useful, policy-relevant research topics is among the things that legal scholars do best. We thus recommend that researchers not change the object of their inferences because causal inference is difficult. Instead, they should make their questions as precise as possible, follow the best advice science has to offer about reducing uncertainty and bias, and communicate the appropriate level of uncertainty readers should have in interpreting their results

Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 37 (2002).

105. Ran Hirschl reviews how qualitative methods can be applied to reduce the uncertainty of causal inferences in comparative constitutional law that should be extremely useful to comparative constitutional law scholars. See Hirschl, *supra* note 4. Below I provide one example of how statistical methods can be applied in furtherance of the same goal.

understood in this context: they are findings about the distinct effects of different constitutional arrangements after attempting to control for other factors, and they are not claims that other factors do not matter or are necessarily less important.

* * * * *

Comparative politics and comparative political economy research has produced a wide range of empirically supported causal inferences about the relationships between different constitutional arrangements on the one hand, and various political and economic factors on the other hand. These findings shed light on the ways in which politics influences constitutional arrangements, and on the ways in which constitutions can help explain important political and economic outcomes—including democratic stability, ethnic conflict, government spending, and fiscal deficits. By doing so, they reinforce the real world importance of comparative constitutional law.

This brief review also reveals one of the ways that legal scholars can add value to the emerging body of empirical comparative constitutional law research. Most of the comparative politics and comparative political economics scholarship on constitutions has focused on fairly blunt constitutional distinctions: majoritarian versus proportional electoral systems, federal versus non-federal systems, and presidential versus parliamentary systems.¹⁰⁶ With their expertise on the many other ways that constitutions vary cross-nationally and their familiarity with the nuances of constitutional processes, legal scholars are well positioned to play a leading role not only in refining existing theoretical and empirical approaches, but also in developing distinctive new approaches to empirical comparative constitutional law.

By focusing on findings, this review of the literature has not illustrated how political scientists and economists are using social

106. This approach has not gone uncriticized. See, e.g., SHUGART & CAREY, *supra* note 20; John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELECTORAL STUD. 417 (1995) (proposing a more fine-grained typology of electoral systems); Rodden & Wibbels, *supra* note 95, at 495 (noting the complaint “that scholars place too much emphasis on differences between federal and unitary systems and not enough on the institutional, political, and cultural diversity within these two types”); Alan Siaroff, *Comparative Presidencies: The Inadequacy of the Presidential, Semi-Presidential and Parliamentary Distinction*, 42 EUR. J. POL. RES. 287 (2003) (proposing more fine-grained typologies of presidential systems).

science methods of causal inference to reduce the uncertainty of their findings. This is the task of the next part of this article.

IV. COMPARATIVE CONSTITUTIONAL LAW AND GOVERNMENT SPENDING: AN EMPIRICAL ANALYSIS

I have argued that comparative constitutional law raises interesting and important causal questions, but that comparative constitutional law scholarship so far has done relatively little to address these questions systematically. How might this be done? The approach in comparative politics and comparative political economy is to apply social science methods of causal inference. Although the literature on social science methodology and causation is vast, there are several texts that should prove very useful to comparative constitutional law scholars who are interested in these techniques.¹⁰⁷ Moreover, there recently has been renewed interest among legal scholars in empirical legal studies, a major focus of which is the use of social science methods in legal research.¹⁰⁸ Perhaps of most immediate interest to comparative constitutional law scholars is Hirschl's recent article, which provides an overview of how social science research design principles can be applied in the study of comparative constitutional law with the goal of improving causal inferences.¹⁰⁹ I will make no attempt to duplicate that effort.

Instead, I will illustrate one method of addressing causal questions in comparative constitutional law. Substantively, my example explores the following causal claim, mentioned briefly in the review of comparative political economy scholarship above: that

107. For some of the leading texts used by students of comparative politics, see, for example, HENRY E. BRADY & DAVID COLLIER, *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* (2004), BARBARA GEDDES, *PARADIGMS AND SAND CASTLES: THEORY BUILDING AND RESEARCH DESIGN IN COMPARATIVE POLITICS* (2003), ALEXANDER L. GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (2005), and GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994). Lee Epstein and Gary King have condensed the main insights from KING ET AL., *supra*, and applied them to legal scholarship. See Epstein & King, *supra* note 104.

108. For an overview of empirical legal studies and an effort to rank law schools based on empirical scholarship, see Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 *IND. L.J.* 141 (2006). A plenary session at the 2006 meeting of the American Association of Law Schools was devoted to empirical legal research, and there have been recent calls from a project based at University of Wisconsin's law school for a "new legal realism" to bridge law and social science. See Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 *WIS. L. REV.* 335.

109. Hirschl, *supra* note 4, at 126.

presidential systems result in lower total government spending than parliamentary systems. Methodologically, I provide an example of statistical or “large-N” analysis.¹¹⁰ Hirschl has convincingly demonstrated the importance of basic principles of qualitative or “small-N” research design for comparative constitutional law scholarship.¹¹¹ My focus on statistical methods is intended to complement Hirschl’s emphasis by showing how a large-N approach can be useful. As in all matters of research design, however, my choice involves tradeoffs.¹¹² On the one hand, large-N approaches can facilitate understanding of broad patterns of cross-national constitutional variation and economic consequences, allow evaluation of the extent to which hypotheses about the consequences of constitutions can be validly generalized across countries, and provide a tool for reducing and estimating the extent of uncertainty surrounding a causal inference. On the other hand, large-N approaches provide relatively little detailed knowledge about specific constitutional arrangements and their local contexts, and are less readily able to trace the causal mechanisms that link constitutional features with political, social, or economic outcomes. Small-N methods are often better suited for these tasks.

A. *Theory and Hypotheses*

Persson and Tabellini predict that total central government spending should be higher in parliamentary regimes than presidential regimes.¹¹³ They base their prediction on a basic constitutional feature of parliamentary systems that governs executive-legislative relations: the dependence of the executive on legislative confidence. In a parliamentary system, the legislature can dismiss the cabinet

110. Although empirical legal scholarship emphasizes and to a certain extent may be defining itself in terms of statistical analysis, in comparative politics and comparative political economy, qualitative or “small-N” approaches are also treated as valid empirical methods and are widely used. Within political science, the most sophisticated methodological debates have less to do with whether one method is superior to another than with the tradeoffs involved in choosing a method and the circumstances, including the nature of one’s research problem, in which one method may be more appropriate than another. See KING ET AL., *supra* note 107, at 5–6 (arguing that although different in style, quantitative and qualitative methods are based on the same logic of scientific inference, and that “neither quantitative nor qualitative research is superior to the other”).

111. Hirschl, *supra* note 4, at 132.

112. See JOHN GERRING, *SOCIAL SCIENCE METHODOLOGY: A CRITERIAL FRAMEWORK* (2001).

113. PERSSON & TABELLINI, *supra* note 91, at 25.

with a vote of no confidence. In the typical presidential system, the constitutional rules governing executive-legislative relations are different: the president is popularly elected for a fixed term and generally cannot be removed by the legislature, except under extraordinary circumstances such as impeachment.¹¹⁴

The theoretical logic connecting a confidence requirement with higher government spending has two basic steps.¹¹⁵ First, a confidence requirement gives the governing coalition in parliament an incentive to act cohesively to retain its agenda-setting powers.¹¹⁶ As Persson, Roland, and Tabellini explain, in parliamentary systems, “agenda-setting powers over legislation are typically associated with ministerial portfolios, and the policy initiative thus belongs to the government coalition as long as it has the confidence of a majority in parliament. . . . The risk of losing valuable agenda-setting powers after a government crisis then gives a governing coalition strong incentives to form a stable legislative majority that does not shift from issue to issue. . . .”¹¹⁷ In presidential systems on the other hand, agenda powers “typically reside with powerful congressional committees, and different committees hold power over different policy dimensions. . . . As a result, legislative majorities often change from issue to issue.”¹¹⁸ No legislative majority is needed to keep an independently elected executive in office, giving members of the president’s party no additional incentive to act cohesively.¹¹⁹

114. These are the characteristics of presidential regimes that Shugart and Carey refer to as “separation of origin” and “separation of survival.” SHUGART & CAREY, *supra* note 20, at 22.

115. For a formal statement of the theory, see Torsten Persson et al., *Comparative Politics and Public Finance*, 108 J. POL. ECON, 1121 (2000).

116. As summarized by Persson and Tabellini:

Parties supporting a parliamentary executive hold valuable powers that they risk losing in a government crisis. Therefore, a confidence requirement creates strong incentives to maintain party discipline. . . . [T]he incentives to hold legislative cum executive majorities together extend from members of the same party to coalitions of parties. . . . [Thus] the confidence requirement creates ‘legislative cohesion,’ namely, stable majorities supporting the cabinet and voting together on policy proposals. The absence of a confidence requirement, by contrast, fosters unstable coalitions and less discipline within the majority.

PERSSON & TABELLINI, *supra* note 91, at 24.

117. Persson et al., *supra* note 115, at 1125.

118. *Id.* at 1124.

119. One difficulty with this step of Persson and Tabellini’s logic is that the government does not necessarily have predominant agenda-setting power in regimes with a confidence requirement. As Cheibub and Limongi note, “Government control over the legislative agenda does not follow from the definition of parliamentarism.” Cheibub & Limongi, *supra* note 60, at

Thus, the existence of a confidence requirement increases legislative cohesion.

Second, the stable majority of incumbent legislators that results from a confidence requirement, and “the majority of voters backing them, become ‘residual claimants’ on additional revenue; they can keep the benefits of spending within the majority, putting part of the costs on the excluded minority.”¹²⁰ The residual claimants, therefore, favor higher spending. Absent a confidence requirement, there are no such residual claimants on revenue, and the majority of voters and legislators will oppose high spending. Thus, legislative cohesion increases government spending.

Based on this reasoning, Persson and Tabellini predict that total government spending will be higher when there is a confidence requirement than when there is not.¹²¹ This prediction can be expressed in the following hypothesis:

H1 (Legislative Cohesion Theory): Government spending is higher in countries with constitutions that make the executive’s survival in power dependent on legislative confidence than in countries with constitutions that do not impose a confidence requirement on the executive.

As just explained, Persson and Tabellini’s legislative cohesion theory of government spending posits the following two causal steps: a confidence requirement increases legislative cohesion, and legislative cohesion increases government spending. I argue, however, that the nature of a country’s legislative electoral system can break the first step’s link between a confidence requirement and legislative cohesion, thus breaking the chain of causation between a confidence requirement and higher government spending. This is my reasoning: as comparative politics scholars John Carey and Matthew Shugart note, “it is widely accepted that in open list [electoral] systems, personal reputation is more valuable to legislative candidates than in closed-list systems.”¹²² In open-list systems, voters have an intra-party preference vote; that is, they are able to

174. This critique of Persson and Tabellini’s theory implies an interaction effect between the presence or absence of a confidence requirement and the extent of government agenda-setting powers.

120. PERSSON & TABELLINI, *supra* note 91, at 25.

121. *Id.*

122. SHUGART & CAREY, *supra* note 20, at 418.

choose from among two or more candidates listed under a party's label, and thus to determine which of the party's candidates are elected.¹²³ In open-list PR systems, for example, voters can rank their party's candidates on the ballot to determine the priority according to which the party's share of legislative seats is allocated among the party's candidates.¹²⁴ In other words, these intra-party preference votes determine which of a party's candidates win seats.¹²⁵ Thus, candidates from the same party compete against each other for votes in open-list systems, giving them a strong incentive to cultivate personal reputations among voters in order to distinguish themselves from the party's other candidates.¹²⁶ This runs against the incentive created by a confidence requirement for party members to act cohesively. Simply put, open-list electoral systems tend to undermine legislative cohesion.¹²⁷

By contrast, in closed-list systems voters do not enjoy an intra-party preference vote. In single-member district systems, parties generally field only one candidate in a given district, leaving voters with no intra-party choice.¹²⁸ In closed-list PR systems, party leaders rank their candidates on the ballot, and voters are not able to disturb this ordering.¹²⁹ With party leaders—rather than voters—having control over the ballot ranking, candidates in closed-list systems have a strong incentive to maintain party loyalty in order to appeal to party leaders.¹³⁰ Moreover, because voters choose among parties rather than individual candidates, the value of personal reputations is minimized, and the value of party reputations is increased.¹³¹ Thus,

123. *Id.* at 421; Daniel Kselman, *Corruption and Intra-Party Choice: The Importance of Preference-Voting for Electoral Accountability* 3 (April 23, 2006) (unpublished paper prepared for the Annual Conference of the Midwest Political Science Association, on file with the Loyola of Los Angeles Law Review).

124. In majoritarian systems, open-list systems include single-non-transferable vote and single-transferable vote systems. See Kselman, *supra* note 123, at 3.

125. See *id.*

126. See *id.*

127. See Cheibub and Limongi, *supra* note 60 (arguing that electoral systems that create personal vote incentives may undermine party discipline).

128. Following Kselman, I conceptualize these systems as closed-list. See Kselman, *supra* note 123, at 3.

129. See SHUGART & CAREY, *supra* note 20, at 421.

130. See Cheibub & Limongi, *supra* note 60; Matthew Soberg Shugart, *The Inverse Relationship Between Party Strength and Executive Strength: A Theory of Politicians' Constitutional Choices*, 28 BRIT. J. POL. SCI. 1 (1998).

131. See SHUGART & CAREY, *supra* note 20, at 421.

unlike open-list systems, closed-list electoral systems are consistent with the incentive created by a confidence requirement for party members to act cohesively.¹³² As comparative political economists Mark Hallerberg and Patrik Marier note in their discussion of open-list and closed-list systems, “This seemingly small modification to the system makes a big difference in terms of the level of fragmentation within the [legislature].”¹³³

Therefore, I propose a modification to Persson and Tabellini’s legislative cohesion theory. Because open-list electoral systems undermine legislative cohesion, breaking the chain of causation between a confidence requirement and higher government spending, a confidence requirement should only lead to higher government spending in closed-list electoral systems. In other words, I argue that there is an interaction effect between two institutional features: the presence or absence of a confidence requirement in the constitution and whether the electoral system is open-list or closed-list. The relationship between a confidence requirement and government spending depends on the nature of the electoral system and implies the following conditional hypothesis:

H2 (Modified Legislative Cohesion Theory): Government spending is higher in countries with constitutions that make the executive’s survival in power dependent on legislative confidence than in countries with constitutions that do not impose a confidence requirement on the executive, but only if there is a closed-list electoral system.

B. Data and Methods

The foregoing hypotheses both posit causal relationships between a constitutional feature—the presence or absence of a confidence requirement, which is the key explanatory variable—and government spending, which is the dependent variable. I will begin by replicating Persson and Tabellini’s test of the legislative cohesion hypothesis. To do this, I will use ordinary least squares regression analysis of their cross-sectional dataset of constitutional features, government spending levels, and various social and economic

132. In fact, this logic even suggests that closed-list electoral systems may actually enhance legislative cohesion.

133. Mark Hallerberg & Patrik Marier, *Executive Authority, the Personal Vote, and Budget Discipline in Latin American and Caribbean Countries*, 48 AM. J. POL. SCI. 571, 576 (2004).

control variables in 80 democratic countries between 1990 and 1998.¹³⁴ Then I will test my modified legislative cohesion hypothesis by incorporating into my statistical models the hypothesized interaction effect between the presence or absence of a confidence requirement and whether the electoral system is open-list or closed-list. This section describes the statistical models I will use to test these hypotheses. Appendix A reports my data on government spending, confidence requirements, electoral systems, and ideology. Appendix B provides a complete description of my data and its sources.

I wish to test hypotheses about the effect of cross-national constitutional differences on government spending levels. Thus, the dependent variable in my statistical models is *Central Government Spending* which, following Persson and Tabellini, is equal to total central government spending as a percentage of gross domestic product (“GDP”) averaged over the period 1990–1998.¹³⁵

To test the hypothesis implied by Persson and Tabellini’s legislative cohesion theory that the presence of a confidence requirement causes higher government spending (H1), I created the dummy variable *Confidence Requirement*, which equals 1 if a country’s constitution makes the executive dependent on legislative confidence, and 0 if it does not. To test the hypothesis implied by my modified legislative cohesion theory that this effect is conditional upon the existence of a closed-list electoral system (H2), I created the dummy variable *Closed-List Electoral System*, which equals 1 if a country has a closed-list electoral system and 0 if it is open-list, and

134. The dataset appears in TORSTEN PERSSON & GUIDO TABELLINI, DO CONSTITUTIONS CAUSE LARGE GOVERNMENTS? QUASI-EXPERIMENTAL EVIDENCE (2001), and is available at IGIER, Dataset, http://www.igier.uni-bocconi.it/folder.php?vedi=822&tbn=albero&id_folder=180 (last visited Nov. 17, 2007). Persson and Tabellini’s dataset contains 86 countries, but data on central government spending is only available for 80 countries. Once I add the variables discussed below for electoral systems and ideology, data limitations further reduce the number of observations. Nevertheless, in all cases the overall statistical significance of the models is high (p-values < .01).

135. An alternative might be to use general government spending, including spending by subnational jurisdictions. See, e.g., Carles Boix, *Democracy, Development, and the Public Sector*, 45 AM. J. POL. SCI. 1 (2001) (using current receipts of the general government as his dependent variable). I use Persson and Tabellini’s measure, both because their choice seems appropriate given that their theory is about central government institutions and in order to ensure that my results are comparable to theirs. In any event, both Persson & Tabellini and Boix report that central and general government data are relatively well correlated in their datasets. BOIX, *supra* note 93, at 179; PERSSON & TABELLINI, *supra* note 91, at 38.

I multiply it by *Confidence Requirement* to model the hypothesized interaction effect.¹³⁶ The result, *Confidence Requirement*Closed-List*, is referred to as a multiplicative interaction term.¹³⁷

I use three different groups of control variables to account for other factors that may affect levels of government spending. First, in all of my statistical models, I control for a number of economic and demographic factors that are both used in Persson and Tabellini's statistical model and considered by the broader literature to be significant determinants of government spending levels:¹³⁸ (1) as *Per Capita Income* increases, government spending is expected to increase;¹³⁹ (2) as *Trade Openness* increases, government spending is expected to increase;¹⁴⁰ (3) as the proportion of the *Population under 15* increases, government spending is expected to increase;¹⁴¹ and (4) as the proportion of the *Population over Age 65* increases, government spending is expected to increase.¹⁴² All models also include the following additional control variables used by Persson and Tabellini in order to replicate their findings and compare them to my own: (5) the *Age of Democracy*; (6) the *Quality of Democracy*, using the *Freedom House*¹⁴³ democracy ratings; (7) whether the country is *Federal*; (8) whether the country is a member of the Organization for Economic Cooperation and Development

136. For example, if *Confidence* = 1, but *Closed-List* = 0, then *Confidence*Closed-List* = 0, indicating that the confidence requirement in an open-list electoral system does not have an effect on government spending; but if *Closed-List* = 1, then *Confidence*Closed-List* = 1, indicating that the confidence requirement will increase government spending.

137. On multiplicative interaction terms in statistical models, see Thomas Brambor et al., *Understanding Interaction Models: Improving Empirical Analyses*, 14 POL. ANALYSIS 63 (2006), and Bear F. Braumoeller, *Hypothesis Testing and Multiplicative Interaction Terms*, 58 INT'L ORG. 807 (2004).

138. For a brief review of the political economy literature on the determinants of fiscal scale, see Alt, *supra* note 75, at 161–62.

139. Wagner's law posits that public spending increases with per capita income, a proposition that is empirically supported. PERSSON & TABELLINI, *supra* note 91, at 39; Alt, *supra* note 75, at 161; see also Rolf R. Strauch, *Information and Public Spending: An Empirical Study of Budget Processes in the US States*, in INSTITUTIONS, POLITICS AND FISCAL POLICY 139, 151 (Rolf R. Strauch & Jürgen von Hagen eds., 2000) ("The best known predictor of government spending is per-capita income.").

140. PERSSON & TABELLINI, *supra* note 91, at 39; see BOIX, *supra* note 93, at 182.

141. PERSSON & TABELLINI, *supra* note 91, at 39; Strauch, *supra* note 139, at 151.

142. PERSSON & TABELLINI, *supra* note 91, at 39; Strauch, *supra* note 139, at 151 (noting that both the youngest and oldest groups are "service-dependent social groups" with low tax capacity).

143. Freedom House, <http://www.freedomhouse.org> (last visited Nov. 17, 2007) (a non-profit, nonpartisan organization studying democracy throughout the world).

("OECD");¹⁴⁴ and (9) whether the electoral system is *Majoritarian*.¹⁴⁵ Together, these factors constitute my basic set of control variables.

Second, I include a potentially important control variable that Persson and Tabellini omit: ideology. As Alt explains, "the intuition linking the ideological complexion of the government to fiscal scale or the size of government is clear. Left governments are more likely than Right governments to want or to target a high level of spending."¹⁴⁶ Empirical findings support this intuition.¹⁴⁷ Indeed, Carles Boix argues that it is partisanship above all that determines economic strategy.¹⁴⁸ If the executive and legislative branches are both centrist or have different ideological leanings, the implications of ideology for government spending may not be clear. However, when both the executive and legislative branches are on the left of the political spectrum, one might expect higher government spending, whether or not there is a confidence requirement. Conversely, when both branches are dominated by right parties, one might expect lower government spending—again, with or without a confidence requirement.¹⁴⁹ To control for ideology, I created the

144. OECD, <http://www.oecd.org> (last visited Nov. 17, 2007) (organization funded by thirty different countries to achieve sustainable economic growth among member countries).

145. Although Persson and Tabellini are not explicit about this, one might expect the effectiveness of constitutional arrangements to be greater in more mature and well functioning democracies. One would expect central government spending to be lower in federal systems, to the extent that the results are that a greater proportion of total spending is local spending. However, Persson & Tabellini's data for this measure is not ideal, because it measures political rather than fiscal federalism. More economically developed countries are expected to spend more, and OECD membership is used by Persson and Tabellini as a proxy for development. Finally, Persson and Tabellini expect countries with majoritarian electoral systems to spend less than those with PR systems. PERSSON & TABELLINI, *supra* note 91, at 22, 37–50.

146. Alt, *supra* note 75, at 163.

147. See, e.g., ALBERTO ALESINA ET AL., POLITICAL CYCLES AND THE MACROECONOMY (1997); CARLES BOIX, POLITICAL PARTIES, GROWTH AND EQUALITY: CONSERVATIVE AND SOCIAL DEMOCRATIC ECONOMIC STRATEGIES IN THE WORLD ECONOMY (1998); EVELYNE HUBER & JOHN D. STEPHENS, DEVELOPMENT AND CRISIS OF THE WELFARE STATE: PARTIES AND POLICIES IN GLOBAL MARKETS (2001).

148. BOIX, *supra* note 93, at 144.

149. Excluding a variable from a statistical model does not create bias unless it both affects the dependent variable and is correlated with a key explanatory variable. KING ET AL., *supra* note 107, at 169 ("[W]e can safely omit control variables, even if they have a strong influence on the dependent variable, as long as they do not vary with the included explanatory variable."). Thus, excluding ideology will bias my findings about the consequences of constitutional variation only if ideology is a cause of government spending levels, as well as correlated with the presence of a confidence requirement and closed-list electoral systems. Such a correlation may appear doubtful, given that constitutional arrangements are generally stable relative to the ideological composition of governments. Nevertheless, I control for ideology both to check the robustness of my findings and to test the hypothesis that left-leaning ideology increases government spending.

variable, *Ideology*, using data on the political party affiliation of the executive and legislative branches, and coded it as follows: “-1” if both the executive branch and legislative branch are right-leaning ideologically, with the negative sign implying lower government spending; “+1” if both the executive branch and legislative branch are left-leaning, with the positive sign implying higher government spending; and “0” otherwise, indicating no clear expectations about the effect on spending.

Finally, in some of their models, Persson and Tabellini also include six variables controlling for the colonial origins and geographic location of a country.¹⁵⁰ My full set of controls includes these variables, along with my basic controls and *Ideology*.

C. Results and Discussion

The results are presented in Table 2.¹⁵¹ Model 1 replicates Persson and Tabellini’s findings and tests the hypothesis based on the legislative cohesion theory (H1). The coefficient for *Confidence Requirement* indicates that, all else being equal, the existence of a confidence requirement increases central government spending by an estimated 6.1 percent of GDP. There is 95 percent certainty that the actual effect is between 1.7 and 10.5 percent.¹⁵² As Models 2 and 3 indicate, the existence of a confidence requirement continues to have an upward effect on government spending even with the additional control variables included. Overall, these results support the hypothesis that government spending is higher in countries with

150. The controls include dummy variables for colonial origin (British, Spanish, and others) and geographical location (Africa, Asia, and Latin America). Persson and Tabellini include these additional variables on the grounds that they may influence policy performance measures (such as corruption) and also may have influenced the initial choice of constitutional arrangements, thus raising concerns about endogeneity. PERSSON & TABELLINI, *supra* note 91, at 114–15, 158–60.

151. Additional analysis accounted for the possibility of endogeneity by using two-stage least squares regression (findings regarding my key explanatory variables are the same). However, even this technique cannot eliminate the possibility of endogeneity. See, e.g., Daron Acemoglu, *Constitutions, Politics and Economics: A Review Essay on Persson and Tabellini’s The Economic Effects of Constitutions*, 43 J. ECON. LIT. 1025, 1047 (2005) (acknowledging the “robust correlations” documented by Persson and Tabellini, but questioning whether their statistical methods reveal actual causal effects of constitutional features). Due to limited data on electoral systems and ideology, the number of observations in models 2 through 6 drop considerably. However, the overall models remain highly statistically significant (p-values < .01 in all cases).

152. The significance level for *Confidence Requirement* is $p < .01$ in Model 1, meaning that there is less than a 1 percent probability that the null hypothesis (that there is no relationship between *Confidence* and *Central Government Spending*) is correct.

TABLE 2: EFFECT OF CONSTITUTIONAL ARRANGEMENTS ON
CENTRAL GOVERNMENT SPENDING (% OF GDP)

Explanatory Variable	(1) Legis- lative Cohesion Theory	(2) LCT with Ideology	(3) LCT with Full Controls	(4) Modified Legis- lative Cohesion Theory	(5) Modified LCT with Ideology	(6) Modified LCT with Full Controls
Confidence Requirement	6.077 (2.207)***	8.772 (2.567)***	6.821 (2.957)**	-1.322 (3.594)	-0.629 (3.915)	-2.402 (4.247)
Closed-List Electoral System	—	—	—	-8.330 (3.212)**	-10.707 (3.470)***	-11.336 (4.452)**
Confidence Requirement* Closed-List	—	—	—	12.205 (3.756)***	12.514 (3.965)***	14.311 (4.742)***
Ideology	—	3.605 (2.042)*	2.653 (2.197)	—	3.122 (2.051)	2.650 (2.158)
Per Capita Income	-1.896 (1.901)	-0.231 (2.508)	1.291 (2.589)	-1.309 (2.079)	-0.631 (2.590)	-0.005 (2.787)
Trade Openness	0.040 (0.019)**	0.042 (0.028)	0.024 (0.029)	0.044 (0.028)	0.032 (0.030)	0.039 (0.031)
Proportion of Population below 15	0.443 (0.266)	0.840 (0.326)**	0.922 (0.369)**	0.379 (0.260)	0.785 (0.325)**	0.836 (0.375)**
Proportion of Population over 65	1.791 (0.554)***	2.604 (0.645)***	2.491 (0.703)***	1.527 (0.537)***	2.319 (0.622)***	2.266 (0.670)***
Age of Democracy	-0.275 (5.281)	2.124 (5.070)	-0.317 (5.094)	-1.711 (4.901)	2.000 (4.754)	-0.250 (4.875)
Quality of Democracy	-1.893 (1.068)*	-0.848 (1.556)	-1.970 (1.670)	-2.330 (1.432)	-1.989 (1.542)	-2.647 (1.715)
Federal System	-2.990 (2.362)	-3.701 (2.625)	-4.274 (2.659)	-2.935 (2.305)	-3.810 (2.489)	-3.583 (2.528)
OECD Member	0.564 (3.615)	-3.644 (3.856)	-5.403 (4.262)	-0.326 (3.465)	-3.033 (3.675)	-5.308 (4.186)
Majoritarian Electoral System	-3.292 (1.903)*	-3.791 (2.055)*	-4.699 (2.539)*	-4.622 (2.079)**	-4.942 (2.155)**	-3.232 (2.632)
Constant	16.150 (24.527)	-19.079 (32.699)	-25.785 (34.537)	22.469 (26.026)	-0.029 (32.318)	-1.795 (35.525)
Colonial Origin and Geographical Controls	No	No	Yes	No	No	Yes
Observations	80	58	58	70	56	56
R-squared	0.63	0.73	0.78	0.72	0.78	0.82

Notes: Dependent variable in all models is *Central Government Spending* (% of GDP). Standard errors in parentheses. Significance levels: ***p < .01, **p < .05, *p < .10 (two-tailed tests). For all models, p-value of F statistic < .0001.

constitutions that make the executive's survival in power dependent on legislative confidence, versus countries with constitutions that do not impose such a confidence requirement.

However, the actual relationship between *Confidence Requirement* and *Central Government Spending* appears to be more complex: consistent with the hypothesis based on my modified legislative cohesion theory (H2), the effect of a confidence requirement on spending depends on whether the electoral system is open-list or closed-list. In Model 4, the existence of a confidence requirement does not appear to affect government spending when there is an open-list electoral system.¹⁵³ Moreover, consistent with my hypothesis, the coefficient for *Confidence Requirement*Closed-List* indicates that the joint effect of a confidence requirement and closed-list electoral system is to increase government spending by an estimated 12.2 percent of GDP. There is 95 percent certainty that the actual effect is between 4.7 and 19.7 percent. As Models 5 and 6 indicate, this effect continues even after including the additional controls.

Table 3 summarizes my findings. The hypothesis based on the legislative cohesion theory predicts that a confidence requirement will increase central government spending, without distinguishing between open-list and closed-list electoral systems (H1). In contrast, the hypothesis based on my modified legislative cohesion theory predicts that this will only be the case in closed-list electoral systems (H2). Table 3 shows that mean levels of government spending are higher when there is a confidence requirement with both types of electoral systems, but the difference is greater with closed-list (15 percent) than open-list (5 percent). Moreover, when there is an open-list system, there is 95 percent certainty only that the effect on central government spending of a hypothetical constitutional change

153. The 95-percent confidence interval for the coefficient of *Confidence Requirement* is [-8.5, +5.9]. Because Model 4 is an interaction model, the coefficient of *Confidence Requirement* now only captures the effect it has on *Central Government Spending* when *Closed-List Electoral System* = 0 (i.e., when the electoral system is open-list). Brambor et al., *supra* note 137, at 72. Interestingly, the coefficient for *Closed-List Electoral System* indicates that the existence of a closed-list electoral system reduces government spending by an estimated 8 percent of GDP when there is not a confidence requirement (i.e., when the political system is presidential). It is important to note that one reason for the lack of a statistically significant finding for *Confidence Requirement* in open-list systems might be lack of variation when *Closed-List Electoral System* = 0 (there are only five countries in my dataset—Brazil, Cyprus, Pakistan, Sri Lanka, and Switzerland—that combine *Confidence Requirement* = 0 and *Closed-List* = 0).

TABLE 3: SUMMARY OF FINDINGS

		ELECTORAL SYSTEM	
		Open-List	Closed-List
CONFIDENCE REQUIREMENT?	No	Mean of Central Government Spending: 28% of GDP	Mean of Central Government Spending: 20% of GDP
	Yes	Mean of Central Government Spending: 33% of GDP	Mean of Central Government Spending: 35% of GDP
H1 (Legislative Cohesion Theory): Hypothesized Effect of Change from No to Yes		Increase in Central Government Spending	
H2 (Modified Legislative Cohesion Theory): Hypothesized Effect of Change from No to Yes		No Effect	Increase in Central Government Spending
Estimated Effect of Change from No to Yes (% of GDP)		-1.3%	10.9%
95% Confidence Interval		-8.5 to 5.9	6.0 to 15.7

from no confidence requirement to a confidence requirement is between -8.5 percent and +5.9 percent of GDP—in other words, we do not even know with 95 percent certainty whether the effect is positive or negative.

In contrast, when there is a closed-list system, a hypothetical constitutional change from no confidence requirement to a confidence requirement increases government spending by an estimated 10.9 percent, with 95 percent certainty that the actual effect is between 6.0 and 15.7 percent. Overall, these results support the hypothesis based on the modified legislative cohesion theory that government spending is higher in countries with constitutions that make the executive's survival in power dependent on legislative confidence than in countries with constitutions that do not impose a confidence requirement on the executive, if there is a closed-list electoral system.

Regarding control variables, demographic factors have a significant impact on government spending. The proportion of the population over 65 has an upward effect on government spending in all models, with estimates ranging from +1.8 percent to +2.6 percent

of GDP. The proportion of the population under 15 is below traditional levels of statistical significance in some models, but has the expected positive sign in all models. Overall, these findings suggest that government spending is to a significant extent a response to demographic realities, particularly to increases in the size of the population of retirees. Majoritarian electoral systems have a downward influence on government spending, with estimates ranging from -3.3 percent to -4.9 percent, depending on the model, although the effect is not statistically significant at traditional levels in Model 6.

Other control variables generally do not have their anticipated effects on government spending. *Ideology* has the expected positive sign, which would indicate that left-leaning governments spend more than right-leaning governments, but this effect is not statistically significant except in Model 2.¹⁵⁴ The implication is that the interaction between constitutional rules governing executive-legislative relations and personal vote incentives created by electoral systems, combined with demographics, may be a more important influence on government spending than ideology. Perhaps this result should not be too surprising. Regardless of ideology, politicians seeking reelection may seek political support by spending on education for youth and benefits for retirees. And even if politicians on the right have an ideological preference for cutting social spending, doing so can be politically costly.

* * * * *

There are four important lessons to be learned from this analysis. First, constitutional differences matter. I have illustrated one way in which they matter economically: central government spending appears to be higher when the constitution makes the government dependent on the confidence of the legislature. In other words, the evidence suggests that parliamentary systems spend more than presidential systems. Second, whether constitutional differences matter, and how they matter, depend on the broader legal and institutional context. In this case, whether a confidence

154. Recent research has indicated, however, that there may be significant limits on cross-national comparability of measures of ideology based on political party affiliation, which implies that my negative findings regarding ideology could be a result of data limitations. Michael D. McDonald et al., *Cross-Temporal and Cross-National Comparisons of Party Left-Right Positions*, 26 ELECTORAL STUD. 62 (2007).

requirement leads to increased government spending depends on the nature of the electoral system. Third, perhaps obviously, but nevertheless empirically confirming intuitions and theoretical priors, other factors matter too. For example, not only constitutions and electoral systems, but also demographics, have an influence on government spending.

Finally, there is a lesson that returns us to this article's methodological theme. Large-N statistical analysis provides a powerful tool for taking causality seriously in comparative constitutional law: for evaluating causal claims about constitutions, and for exploring the extent to which such claims have cross-national validity. In this article, such analysis revealed the limited ability to generalize the claim that the presence of a confidence requirement increases government spending. However, it provided evidence in support of the broad cross-national generalizability of the proposition that there is such an effect when there is a closed-list electoral system, even after controlling for a wide range of other factors that influence government spending. On the other hand, neither this nor any regression analysis can *prove* causality. Rather, regression analysis is a technique for estimating causal effects and the uncertainty that surrounds them.¹⁵⁵ Moreover, this type of analysis provides little detailed knowledge about constitutions and government spending in particular countries. Nor does this analysis allow us to empirically trace the specific causal mechanisms posited by the legislative cohesion theory and the modified legislative cohesion theory. Small-N analysis, following principles of causal inference such as those illustrated by Hirschl,¹⁵⁶ may be better suited for such tasks. The point is that research requires methodological choices, and these choices involve tradeoffs. The goal is to find the method that is most appropriate for the research question at hand.

¹⁵⁵ Moreover, the appropriate statistical techniques for estimating causal effects are often contested by empirical scholars, providing another reason to refrain from treating statistical findings as conclusive. See, e.g., Acemoglu, *supra* note __, and Lorenz Blume et al., The Economic Effects of Constitutions: Replicating—and Extending—Persson and Tabellini (June 2007) (unpublished manuscript, available at <http://www.ssrn.com/abstract=985682>) (each questioning findings of Persson and Tabellini on various methodological grounds that also would apply to some of my findings in Part IV.C).

¹⁵⁶ See Hirschl, *supra* note 4.

For comparative constitutional law scholars, grappling with these tradeoffs is an important part of taking causality seriously.

V. CONCLUSION: AN AGENDA FOR EMPIRICAL COMPARATIVE CONSTITUTIONAL LAW

Taking causality seriously in comparative constitutional law implies an empirical agenda that has theoretical, methodological, and pedagogical dimensions. Theoretically, the focus would be on research questions about constitutional differences that are framed in explicitly causal terms, and on the development of positive theories from which hypothetical answers could be derived. Although the illustrations I have given in this article are primarily from comparative politics and comparative political economy, law and economics scholars, including those in comparative law, are already engaged in this type of work.¹⁵⁷ Cooter's *The Strategic Constitution* is an example of how this type of theorizing can be applied to constitutions.¹⁵⁸ Although I have attempted to show that economists and political scientists have made important theoretical contributions, legal scholars arguably have a comparative advantage given their familiarity with constitutional processes, and thus have a leading role to play in interdisciplinary comparative constitutional law theorizing.

What types of causal questions might be on the theoretical agenda of empirical comparative constitutional law? As I have argued, the questions can take at least two basic forms: one treating constitutions as dependent variables to be explained, and the other treating constitutions as explanatory variables that can help explain other phenomena. But even this general formulation may be unnecessarily constraining. For example, from a constructivist perspective, there are important questions to be asked about the constitutive effects of constitutions, questions which themselves have causal properties,¹⁵⁹ and questions which legal scholars are already

157. See, e.g., MATTEI, *supra* note 6 (taking a law and economics approach to comparative private law).

158. See COOTER, *supra* note 5.

159. As Martha Finnemore and Kathryn Sikkink explain in their review of constructivism in international relations and comparative politics scholarship,

For constructivists, understanding how things are put together and how they occur is not mere description. Understanding the constitution of things is essential in explaining how they behave and what causes political outcomes. . . . Constitution in this sense [i.e., the constructivist, not the legal, sense] is causal, since how things are

asking in other contexts.¹⁶⁰ As my review of the comparative politics and comparative political economy literature indicates, much of the existing empirical work on constitutions focuses on basic features of government, such as electoral systems, federalism, and executive-legislative relations. But so far the subject of comparative constitutional rights, even though it has received considerable doctrinal and normative attention from legal scholars, has been relatively neglected in empirical scholarship, suggesting that this may be a particularly important avenue for future empirical comparative constitutional law research.¹⁶¹ The main point, however, is not about which new questions should be asked. As I have attempted to demonstrate, comparative constitutional law scholarship already raises a host of interesting and important causal questions, questions that deserve to be taken seriously.

Methodologically, the goal would be to select appropriate techniques for evaluating hypotheses about the causes and consequences of cross-national constitutional variation, while maintaining awareness of the tradeoffs that are inherent in methodological choices.¹⁶² In this paper, I have illustrated how one type of statistical or “large-N” analysis can be applied to test

put together makes possible, or even probable, certain kinds of political behavior and effects. . . . [T]he fact that constitutive explanations have causal properties means that the distinction between constitutive explanations and other forms of explanation may not be sharp in practice, particularly in empirical work.

Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 394 (2001).

160. For example, Cass R. Sunstein argues that legal rules can change social norms. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 32–69 (1997). According to Sunstein, “Social practices, including law, will inevitably affect preferences. There is no way for a legal system to remain neutral with respect to preference formation.” *Id.* at 5. Likewise, Lawrence Lessig seeks to explain “how law helps construct social reality” and thus is “one dimension in the practice of changing incentives to change behavior.” Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948, 1021 (1995). Elsewhere I have sketched how constructivist theory might be applied to public law. See Christopher A. Whytock, *Thinking beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT’L L. 155 (2004); Christopher A. Whytock, *Thinking beyond the Domestic-International Divide: Constructivism and the Unified Concept of Public Law* (Apr. 16, 2005) (unpublished paper, on file with the Loyola of Los Angeles Law Review).

161. In related work, I have been developing an empirical comparative constitutional law project on the origins and consequences of social and economic rights.

162. As Cooter argues, positive theory, by “[r]eplacing intuition with logic often reveals causal connections that no one previously articulated. Logic, however, guarantees consistency, not predictive accuracy. Predictive accuracy comes from empirical validity” which in turn comes from empirically testing hypotheses. COOTER, *supra* note 5, at 374.

hypotheses in comparative constitutional law, and Hirschl has demonstrated the importance of qualitative “small-N” research techniques for comparative constitutional law scholarship.¹⁶³ Again, although my examples were drawn primarily from economics and political science, this does not mean that legal scholars do not have a leading role to play in the field of methods. To the contrary, with the recently renewed emphasis on empirical legal studies,¹⁶⁴ legal scholars are increasingly applying methods aimed at improving causal inferences. So far, there has been relatively little legal scholarship that brings together comparative law and empirical legal studies, but doing so is one way that legal scholars might explore methods for taking causality seriously in comparative constitutional law.

The methodological element of the empirical comparative constitutional law agenda has important implications for functionally oriented theories of constitutional interpretation. For example, in his book, *Active Liberty*, Justice Stephen Breyer argues that judges should strive to understand the purposes of the constitutional phrases being interpreted, and then “consider the likely consequences of the interpretative alternatives, valued in terms of the phrase’s purposes.”¹⁶⁵ In other words, Breyer calls on judges to make causal inferences. Yet in practice, one might suspect that when judges make inferences about likely consequences, they often do not do so in a very systematic manner and generally do not attempt to estimate the levels of uncertainty associated with their inferences.¹⁶⁶ The argument I made in this article suggests that empirical comparative constitutional law scholarship could play a supporting role in functional approaches to constitutional interpretation—one aimed not

163. Hirschl, *supra* note 4.

164. George, *supra* note 108.

165. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8 (2005). As Breyer clarifies, “to emphasize consequences is to emphasize consequences related to the particular textual provision at issue. The judge must examine the consequences through the lens of the relevant constitutional value or purpose.” *Id.* at 120.

166. See Hirschl, *supra* note 4, at 128–29 (noting judicial references to foreign law are too often “eclectic, at times even scant and superficial” using “[c]ase selection [that] is seldom systematic,” and “rarely pay[ing] due attention to the context and nuances that have given rise to similar or alternative interpretation or practice of constitutional norms. In short, from a methodological standpoint, we have yet to encounter a coherent theory of inter-court constitutional borrowing”); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69 (2004) (critiquing U.S. Supreme Court references to foreign law for its lack of a consistent underlying methodology).

at clarifying purposes, but at improving the causal inferences that are inherent in this type of judicial decision-making.¹⁶⁷

Pedagogically, the challenge is to figure out how, and how much, to incorporate considerations about the origins and consequences of constitutional arrangements into comparative law and constitutional law teaching. Mark Tushnet has argued:

The best use of non-U.S. materials in a basic Constitutional Law course would . . . identify practices or doctrines in other stable democracies that are different from those in the United States, and ask: “They do things differently there. What reasons might they have for adopting their practices or doctrines? What reasons might there be that caution against our adopting those practices or doctrines?”¹⁶⁸

The relevant reasons generally will include the expected consequences of different practices or doctrines, and the ways that different constitutional arrangements may interact with country-specific cultural, political or social differences to produce unanticipated consequences. By providing evidence about the real-world consequences of constitutions, empirical comparative constitutional law scholarship can help students think more concretely about these questions. More generally, empirical comparative constitutional law in its pedagogical form would invite students to think critically not only about the constitutional text, its history, and its judicial interpretations, but also about its role in broader social, political, and economic processes. Both positive theoretical work on how constitutions work and why they matter, and empirical findings about the political and economic consequences of constitutions, might help students grapple with these important questions.¹⁶⁹

167. Whether or not functional approaches to constitutional interpretation are desirable in the first place is a question that empirical comparative constitutional law scholarship alone cannot answer. And even if they are desirable, to play the supporting role I describe would be a very ambitious goal for empirical scholarship, and one that raises a wide range of challenges, including issues similar to those that surround the use of social science in general by litigants and judges. Even if imperfect, however, the argument can be made that “[l]awmakers would do better to use imperfect empirical analysis than perfect nonempirical analysis.” COOTER, *supra* note 5, at 5.

168. Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 674 (2005).

169. Two clarifications are in order here. First, consistent with Tushnet’s “obvious point that the more of one thing one does in a class, the less one can do of something else,” careful thought needs to be given to the tradeoffs involved in introducing empirical comparative material to

My overall argument implies that empirical comparative constitutional law should be an interdisciplinary endeavor. As I attempted to demonstrate in Parts II and III of this article, not only legal scholars, but also scholars of comparative politics and comparative political economy, have strong motivations to gain a better understanding of the origins and consequences of cross-national constitutional differences. At this stage, a reasonable assessment would be that the former have a comparative advantage in their appreciation of the nature of constitutional variation and of constitutional processes, whereas the latter have a comparative advantage in their familiarity with the political and economic contexts within which constitutions operate and with the social science methods that have been developed to address the challenges of causal inference. As Cooter laments, relatively few social scientists study constitutional law, and few constitutional scholars have the necessary training in empirical methods.¹⁷⁰ But ideally the interdisciplinary pursuit of an empirical comparative constitutional law agenda will allow legal scholars to improve their understanding of contextual factors and methods of causal inference, and allow political scientists and political economists to improve their understanding of constitutions. After all, taking causality seriously in comparative constitutional law involves not only taking causality seriously, but also taking comparative constitutional law seriously.

replace more traditional material. *Id.* at 672. It may well be that the pedagogical function of empirical comparative constitutional law is best performed primarily in upper-level elective courses on comparative constitutional law or perhaps in interdisciplinary courses that could be developed to focus specifically on the role of constitutions in economic, political and social context. Second, it should go without saying that empirical comparative constitutional law findings should not be presented to students as “facts” like the facts of a case. To the contrary, it is far more consistent with a social scientific spirit of causal inference to encourage a serious, yet skeptical, appreciation of empirical findings and to emphasize the importance of estimating the uncertainty associated with causal claims. Eventually, there may at some law schools be a critical mass of interested students and faculty that would make it appropriate to offer training in causal inference or empirical research more generally, including essential principles of comparative analysis. Even without specialized courses, some of these matters could—and at some law schools already are—addressed in law and social science courses.

170. COOTER, *supra* note 5, at 5, 374. As Part III suggests, the number of social scientists studying constitutions appears to be increasing—at least in comparative politics and comparative political economy. Recently renewed interest in empirical legal studies in the legal academy suggests that a growing number of legal scholars will have training in empirical methods, albeit not necessarily in comparative methods.

APPENDIX A: CENTRAL GOVERNMENT SPENDING,
CONFIDENCE REQUIREMENTS, CLOSED-LIST ELECTORAL
SYSTEMS, AND IDEOLOGY IN 71 DEMOCRACIES (1990–1998)

	Central Government Spending (%GDP)	Confidence Requirement (0=no, 1=yes)	Closed List Electoral System (0=no, 1=yes)	Ideology (-1=right, 0=center, 1=left)
No Confidence Requirement, Open-List				
Brazil	30.66129	0	0	0
Cyprus (G)	33.96568	0	0	0
Pakistan	23.11274	0	0	0
Sri Lanka	27.38108	0	0	.33
Switzerland	26.49568	0	0	—
Confidence Requirement, Open-List				
Australia	25.78327	1	0	0
Czech Republic	36.34661	1	0	.11
Denmark	40.14317	1	0	0
Estonia	29.99682	1	0	—
Finland	38.32095	1	0	0
France	45.25062	1	0	0
Greece	35.26539	1	0	.33
Hungary	49.95391	1	0	.11
India	15.78957	1	0	0
Ireland	38.09354	1	0	0
Latvia	31.39015	1	0	—
Luxembourg	40.17635	1	0	0
Malta	40.98212	1	0	-.78
Mauritius	22.50179	1	0	0
Nepal	16.97054	1	0	—
Slovak Republic	40.38233	1	0	—
Thailand	16.22416	1	0	0
No Confidence Requirement, Closed List				
Argentina	14.00048	0	1	-.89
Belarus	35.52256	0	1	—
Bolivia	20.98121	0	1	0
Chile	21.02538	0	1	0
Colombia	14.06831	0	1	0
Costa Rica	23.34365	0	1	-.11
Dominican Rep.	14.82071	0	1	0
Ecuador	16.32197	0	1	0
El Salvador	13.63237	0	1	-.11

.....

APPENDIX A (*continued*)

	Central Government Spending (%GDP)	Confidence Requirement (0=no, 1=yes)	Closed List Electoral System (0=no, 1=yes)	Ideology (-1=right, 0=center, 1=left)
No Confidence Requirement, Closed List (<i>continued</i>)				
Guatemala	9.74306	0	1	—
Honduras	21.47791	0	1	-1
Mexico	15.48577	0	1	1
Namibia	37.27320	0	1	1
Nicaragua	31.00764	0	1	—
Paraguay	11.97500	0	1	-1
Peru	17.27761	0	1	-.56
Philippines	18.89076	0	1	—
Russia	26.26176	0	1	—
South Korea	17.06728	0	1	-.78
United States	21.87741	0	1	.22
Uruguay	29.38198	0	1	0
Venezuela	19.34534	0	1	—
Confidence Requirement, Closed List				
Austria	40.14563	1	1	0
Bahamas	18.80976	1	1	-.56
Barbados	32.36219	1	1	-.33
Belgium	47.93909	1	1	0
Belize	30.06591	1	1	-1
Botswana	38.57272	1	1	-1
Bulgaria	42.44020	1	1	—
Canada	24.85338	1	1	0
Germany	32.67864	1	1	0
Iceland	31.80872	1	1	0
Israel	46.31829	1	1	0
Italy	48.80320	1	1	-.11
Japan	20.50902	1	1	0
Netherlands	51.17833	1	1	0
New Zealand	35.98045	1	1	-.44
Norway	39.88120	1	1	0
Papua N. Guinea	30.81113	1	1	0
Poland	39.48863	1	1	—
Portugal	41.66164	1	1	0
Romania	33.38912	1	1	.
South Africa	31.33985	1	1	-.33
Spain	36.19315	1	1	0
St. Vincent & Grenadines	34.78068	1	1	—
Sweden	44.75311	1	1	0
Trinidad & Tobago	28.06996	1	1	.22
Turkey	24.06719	1	1	-.33
United Kingdom	40.37266	1	1	-1

APPENDIX B: DATA AND SOURCES¹⁷¹**1. Dependent Variable**

Government Spending: Central government spending as a percentage of gross domestic product. *Source*: Persson and Tabellini, who obtained their data from the International Monetary Fund's International Financial Statistics.

2. Key Explanatory Variables

Confidence Requirement: Dummy variable equal to 1 if there is a confidence requirement, 0 otherwise. *Source*: I constructed this variable by using Persson and Tabellini's variable *PRES*, which is a dummy variable equal to 1 in presidential regimes (only those in which the confidence of the assembly is not necessary for the executive to stay in power), 0 otherwise. Thus, *Confidence Requirement* = $1 - PRES$. Persson and Tabellini coded their *PRES* variable based on Shugart and Carey (1992) and national sources.

Closed-List: Dummy variable equal to 1 if the legislative electoral system is closed-list, 0 if open-list. *Sources*: World Bank Database of Political Institutions *CL* variable, which equals 1 if closed lists are used and 0 if they are not, and Daniel Kselman's *OPEN* variable, which equals 1 if there is a preference vote (open-list), 0 if there is not (closed-list).¹⁷²

3. Control Variables

Ideology: Dominant ideology in the government, equal to -1 if the government is right-leaning, 0 if it is centrist, and +1 if it is left-leaning. *Source*: World Bank Database of Political Institutions *EXECRLC* and *ALLHOUSE* variables.¹⁷³ *EXECRLC* indicates whether the chief executive's ideology, based on his or her political party,

171. All references to Persson and Tabellini are to PERSSON & TABELLINI, *supra* note 91, at 279–86.

172. See Kselman, *supra* note 123; see also Thorsten Beck et al., *New Tools in Comparative Political Economy: The Database of Political Institutions*, 15 WORLD BANK ECON. REV. 165 (2001).

173. See Beck et al., *supra* note 172.

is left, centrist, or right. *ALLHOUSE* indicates whether the party of the chief executive has an absolute majority in all houses of the legislature that have lawmaking powers. Using this data, I coded my *Ideology* variable as -1 if the chief executive has right ideology and controls the relevant houses of the legislature; +1 if the chief executive has left ideology and controls the relevant houses of the legislature; and 0 otherwise; and I averaged the result for the nine years between 1989 and 1997 (with the one year lag on the grounds that ideological changes do not immediately change policy). The logic behind coding other situations as 0 is that (a) centrist ideology does not clearly imply an upward or downward effect on spending and (b) when the executive controls neither house or only one, he or she cannot push through legislation to cut or increase spending, so there is no clear effect on spending. Data is missing for some years; I coded *Ideology* as missing data if there was not at least seven years of data, except if *ALLHOUSE* = 0 for at least seven of nine years then I coded *Ideology* as 0, since in that case the left-right position of the executive would not have a clear policy impact anyway.

Per Capita Income: Natural logarithm of real GDP per capita in constant dollars expressed in international prices, base year 1985. *Source*: Persson and Tabellini's *LYP* variable, which uses Penn World tables and the World Bank World Development Indicators data.

Trade Openness: Sum of exports and imports of goods and services measured as a share of GDP. *Source*: Persson and Tabellini's *TRADE* variable, which uses World Bank World Development Indicators data.

Population Under 15: Percentage of the population under age 15 in the total population. *Source*: Persson and Tabellini's *PROP1564* variable, based on World Bank World Development Indicators Data, which equals the percentage of the population between 15 and 64 years of age. *Population under 15* = $100 - PROP1564 - PROP65$.

Population over Age 65: Percentage of the population over age 65 in the total population. *Source*: Persson and Tabellini's *PROP65* variable, based on World Bank World Development Indicators data.

Age of Democracy: This is Persson and Tabellini's *AGE* variable, defined as $(2000-DEM_AGE)/200$ and varying between 0 and 1, where (a) *DEM_AGE* is the first year of democratic rule in a country, corresponding to the first year of a string of positive yearly values for the variable *POLITY* for that country that continues uninterrupted until the end of the sample, given that the country was also an independent nation during the entire time period; does not count foreign occupation during World War II as an interruption of democracy; and (b) *POLITY* is the score for democracy, computed by subtracting the *AUTO*C score from the *DEMOC* score and ranging from +10 (strongly democratic) to -10 (strongly autocratic).

Quality of Democracy: This is Persson and Tabellini's *GASTIL* variable, equal to the average of indexes for civil liberties and political rights, where each index is measured on a 1 to 7 scale with 1 representing the highest degree of freedom and 7 the lowest, using the Freedom House "Annual Survey of Freedom Country Ratings."

Federal: Dummy variable equal to 1 if a country has a federal political structure, 0 otherwise. *Source*: Persson and Tabellini's *FEDERAL* variable.

OECD: Dummy variable equal to 1 for all countries that were members of the OECD before 1993, 0 otherwise. *Source*: Persson and Tabellini's *OECD* variable.

Majoritarian: Dummy variable for electoral systems, equal to 1 if all the lower house seats in a country are elected under plurality rule, 0 otherwise. *Source*: Persson and Tabellini's *MAJ* variable.