Interested in a Great Example of (How To Conduct) Empirical Legal Research? 
Look No Further Than How Constitutional Rights Matter*

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I. Introduction

We may live in an age of data but scholars of comparative constitutional law are still using quill pens.1 Either they are unaware of the role that data has played in transforming entire fields of law scholarship. Or, equally likely, they are all too aware of the empirical turn in law and are gatekeeping because data studies don’t play to their own comparative advantage.2 Whatever the reason, comparative con law is about the last place many empirical legal researchers would look to find an awesome data study like Chilton and Veersteg’s How Constitutional Rights Matter.3 Actually, How Constitutional Rights Matter is more than awesome. It’s a model of how to design and execute empirical work, the kind of study you’d give to students and advise them to DO THIS.

Why? Because on the two major components of empirical studies—developing the project and analyzing the data—How Constitutional Rights Matter earns an A+. This much Parts III. and IV. below detail. Worth noting from the get-go, though, is the challenge that Chilton and Veersteg confronted—the challenge of drawing causal inferences. Specifically, the authors

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1A variant on this sentiment appears in Lee Epstein, Barry Friedman, & Geoffrey Stone, Foreword: Testing the Constitution, 90 NYU L. Rev. 1001 (2015), which bemoans the lack of empirical work in U.S. constitutional law.
2Because I intend to outline the perils of ignoring data in studies of comparative law in another paper, suffice it to note here that even the titles of the gatekeepers’ articles are so out of touch with the realities of modern-day (legal) scholarship that they border on the hilarious. E.g., “Is a Science of Comparative Constitutionalism Possible?” and “Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or All Smoke and Mirrors?”
want to know whether the inclusion of a de jure right in a constitution, “translates into [read: causes] better de facto protection of that right.” The point of highlighting this challenge, in Part II, is not only to applaud Chilton and Veersteg for successfully meeting it but also to refute the gatekeepers’ (or, if you prefer, quant phobes’) claim that causal inferences are nearly impossible to draw with comparative data, so why bother trying?

II. The Fundamental Problem of Causal Inference

To understand the challenge of making causal claims about the efficacy of constitutional rights, perform this thought experiment: If you had absolutely no constraints—if you were superhuman—how would you answer Chilton and Veersteg’s question?

Here’s a possibility: Randomly select a country from all the countries in the world. Then assign the country’s constitution a right—say, the right to unionize—and observe union prosperity. Now reverse time to precisely the moment you assigned the country’s constitution the right to unionize (remember, you’re a super-human researcher), only this time assign the country—the same country—no constitutional right to unionize. If you observe the same level of union prosperity in both versions of the same country, you would conclude that the constitutional right had no effect on union prosperity. If you observe unions flourishing in the version of the country with a constitutional right and unions faltering in the absence of the right, you’d conclude that the constitutional right to unionize generates greater prosperity for unions.

Why this approach is the “ideal” is no great mystery: Because we’ve concocted a plan for comparing precisely the same country at precisely the same moment in time there’s no need to worry about the many other things that could affect union success—other than the presence or absence of a constitutional right—such as the level of democracy, wealth, and judicial independence. Under our experiment these factors are held constant so we can focus on the explanation of interest: the presence or absence of a constitutional right.

Of course no mere mortal can ever conduct this experiment. We can’t assign a country a constitutional right and then reassign it no right; and we certainly don’t have the power to rerun history. This is known as the fundamental problem of causal inference, and it means that researchers can only observe the factual (e.g., union prosperity in country with a constitutional right to unionize if, in fact, the country has constitutional right to unionize)

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4Chilton & Versteeg, supra note 3 at 6.

5The thought experiment and other ideas in this section are adapted from Lee Epstein and Andrew D. Martin, An Introduction to Empirical Legal Research (2014), at 5-7.

6A random probability sample is one in which each element (e.g., a country) in the total population (e.g., all countries) has a known probability of being selected.

7Although “ideal,” this experiment doesn’t fully capture Chilton & Versteeg’s study because the authors hypothesize differential effects for individual versus organizational rights. See infra Part III.

8For explanations of why these factors might affect the adoption and protection of rights, see Chilton & Versteeg, supra note 3 at 108-109.

and not the counterfactual (e.g., union prosperity in the absence of the constitutional right if, in fact, the constitution enumerates the right). 10

Unless (until?) humans develop the power to reverse time, this is a problem without a solution. 11 And perhaps that’s why some law professors say we shouldn’t bother trying to make causal claims, that we should talk only in the language of correlations or associations, as in “the constitutional right to unionize is associated with an increase in union prosperity” (and not “the constitutional right to unionize caused an increase in union prosperity”).

Nonsense. In the first place, lawyers, judges, and legislators often depend on, if not make, causal inferences, and so throwing in the towel isn’t an option. Moreover, generating useful, policy-relevant research is among the things that legal academics do best. No way should outstanding researchers like Chilton & Versteeg change their goals just because causal inference is hard. Actually: They’re precisely the kinds of law scholars we want conducting such studies.

Which takes me to the second point: Scholars have understood the problem of causal inference for decades and, more consequentially, have devised various fixes. Some say the gold standard solution is a proper experiment—that is, an experiment in which the researcher randomly selects subjects from the population of interest (all countries, in the Chilton & Versteeg study) and then randomly assigns the subjects to treatment and control conditions (a constitution with and without union rights). 12 Experiments in law meeting the first condition are almost non-existent (unless the researchers embed an experiment in a randomized survey of the population of interest, the researchers usually recruit their subjects); and more generally, experiments are hardly problem-free, with external validity 13 and (the) replication (crisis) 14 among the list of concerns. On top of it all, experiments are infeasible for many empirical legal projects, including the analysis of whether constitutional rights matter (i.e., can you imagine a country allowing Chilton & Versteeg to give it—and take away—various constitutional rights). 15

So, for these reasons, studies of law and legal institutions usually (must) make use of data

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10 For a more formal accounting of these ideas in the context of empirical legal scholarship, see Christina L. Boyd, Lee Epstein, and Andrew D. Martin, Untangling the Causal Effect of Sex on Judging, 54 Am. J. Pol. Sci. 389 (2010); Lee Epstein. Daniel E. Ho, Gary King, Jeffrey A. Segal, The Supreme Court During Crisis, 80 NYU L. Rev. 1 (2005).

11 Chilton & Versteeg, supra note 3 well understand the problem but write that we shouldn’t let “the perfect be the enemy of the good” (at 13). I couldn’t agree more.


15 That noted, Chilton & Versteeg, supra note 3 at 121. do conduct two survey experiments, in the United States and in Turkey, both of which were designed to assess “whether respondents changed their support for certain policies when they were told that these policies violated the Constitution.”
the world, not the researchers, created—including the degree of union prosperity in actual
countries with actual constitutions that do and do not include a right to unionize. No
doubt the use of this sort of *observational* data substantially complicates the task confronted
by empirical legal researchers. Again think about the data we developed in our thought
experiment. Because these data were produced by assignment of a union right to the same
country at the same point in time, they minimize the effect of all other factors on union
success. The same cannot be said of observational data. In the real world, something or
someone else—surely not Chilton & Versteeg—determined whether the constitution would
include the right to unionize or not.

But, once again, this complication most definitely does NOT mean that drawing credible
causal inferences is impossible—only challenging. To draw them, researchers follow the best
advice science as to offer in developing the research and analyzing the data; and, in the pro-
cess, communicating the appropriate level of uncertainty readers should have in interpreting
their results. This is precisely how Chilton & Versteeg proceeded.

### III. Developing the Research

Descriptions of how to conduct empirical research vary.\(^\text{16}\) For purposes of this review, two
components seem especially relevant: Designing the Research and Analyzing the Data. De-
sign, the subject of this Part, entails asking research questions (Part III.A.), theorizing and
extracting observable implications (a/k/a hypotheses) from the theory (Part III.B.), and
specifying the research methods (Part III.C.).\(^\text{17}\)

#### A. Questions

Almost all empirical legal research starts with a basic question or set of questions that the
authors want to answer. *How Constitutional Rights Matter* is no exception. Chilton &
Versteeg, recall, hope to learn “whether and how constitutional rights matter.”\(^\text{18}\)  *E.g.,* If
the constitution includes a right to unionize, does the very existence of that right improve
outcomes for unions?

What is exceptional among comparative law studies: Chilton & Versteeg’s question meets
the two key criteria for a great research question. The first is that it seeks to engage the
existing literature; the second is that the question carries potential implications—normative,
policy, or otherwise—for the real world.\(^\text{19}\) For Chilton & Versteeg’s study, these criteria are

\(^{16}\)Compare, *e.g.*, Epstein & Martin, *supra* note 5; Robert M. Lawless, Jennifer K. Robbennolt, & Thomas
S. Ulen, *EMPIRICAL METHODS IN LAW* (2016); Frans L. Leeuw with Hans Smeets, *EMPIRICAL LEGAL

\(^{17}\)The capital letters in this sentence should be taken for what they are: subparts, not steps in a flowchart.
Empirical research is a dynamic process requiring researchers to have the flexibility of mind to deviate, to
overturn old ways of looking at the world, ask new questions, revise their blueprints as necessary, and collect
more or different data than they might have anticipated.

\(^{18}\)Chilton & Versteeg, *supra* note 3 at 6.

\(^{19}\)Epstein & Martin, *supra* note 5; Gary King, Robert O. Keohane, & Sidney Verba, *DESIGNING SOCIAL
related. That’s because “a strong normative consensus” exists among relevant players in the comparative community that rights not only belong in constitutions; but the more rights, the better(!) to safeguard against repressive governments.\(^{20}\) Considering the community’s aversion to data you won’t be surprised to learn that this “consensus”—really a set of assumptions—almost ever gets tested despite good reasons to question it.\(^{21}\)

If agreement about the value of rights was mere Ivory tower stuff, *How Constitutional Rights Matter* would still make a contribution by setting the academic record straight. But, for better or worse, assumptions about the importance of de jure rights have bled into the real-world. As Chilton & Versteeg note, “when a constitution is (re-)written, a community of transnational actors . . . descends upon the country to offer assistance in constitution-writing,” which invariably means a “push[] for constitutional rights.”\(^{22}\) Perhaps this explains Chilton & Versteeg’s empirical finding of a “profound increase” in the rights enumerated in constitutions and the continuous “invention” of new rights.\(^{23}\)

Should efforts to inject more and more rights into constitutions come to a grinding halt? Ought academics rethink the assumptions that have guided their commentary and “consulting” work for decades? These are just the kinds of questions that Chilton & Versteeg’s research is designed to address: questions that really matter, or at least really should matter to researchers, lawyers, policy makers, and constitution drafters alike.

B. Theories and Their Observable Implications

Once analysts have settled on a research question, they usually begin theorizing about possible answers from which they can derive observable implications (sometimes called hypotheses or expectations). “Theory” and “theorizing” are words academics often bandy about, but what do they mean? They probably mean different things depending on the discipline and the project.\(^{24}\) In empirical studies, “theorizing” entails the development of “a reasoned and precise speculation about the answer to a research question.”\(^{25}\) “Observable implications” are what we’d expect to observe in the real world—what our data should unearth—if our theory is right.

As with most excellent empirical projects, Chilton & Versteeg devote considerable attention

\(^{20}\)See the studies cited in Chilton & Versteeg, *supra* note 3 at 60-63.

\(^{21}\)See Chilton & Versteeg, *supra* note 3 at 63.

\(^{22}\)Chilton & Versteeg, *supra* note 3, at 62

\(^{23}\)Chilton & Versteeg, *supra* note 3, at 83-84.

\(^{24}\)Regarding traditional legal academic work, Friedman observed, “theory” is king. But people who talk about legal ‘theory’ have a strange idea of what ‘theory’ means. In most fields, a theory has to be testable; it is a hypothesis, a prediction, and therefore subject to proof. When legal scholars use the word ‘theory,’ they seem to mean (most of the time) something they consider deep, original, and completely untestable.” Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 *DENVER U. L. REV.* 661, 668 (1998).

\(^{25}\)King, Keohane, & Verba, *supra* note 19.
to these matters. And for this reason, the material is best absorbed in toto, not digested. But here’s the crux of the argument.

1. Lacking external enforcement, governments will occasionally repress constitutional rights.

2. Individual citizens face coordination and collective-action problems in their efforts to stop or punish governments from so doing.

3. Organizations, however, can overcome these problems when the government encroaches on their rights; and “when the [organizations] do resist, they can be a force to be reckoned with.”

Following from this theory is a clear observable implication: Relative to constitutional rights mostly practiced by individuals, “organizational rights”—rights that organizations care about and that, in fact, may require them to exercise—will be more efficacious. The right to unionize falls into this category, as do the rights to form political parties and to practice religion. The rights to speech, movement, education, and healthcare do not.

C. Design

So far so good. Chilton & Versteeg pose a clear research question and, following from theory, a clear observable implication: Whether constitutional rights matter, they hypothesize, depends on the right, such that organizational rights, compared with individual rights, are more likely to lead to better de facto protection.

Now comes the task that has brought down many an empirical study: devising the methods and measures to assess whether data support the expectation. The problems, recall from the thought experiment, are many but Chilton & Versteeg offer high-quality solutions.

Let’s start with their approach to the research—actually approaches. Chilton & Versteeg write up some “case studies” mainly to probe the plausibility of their theory (and, I suspect, to toss a bone to traditional comparative law scholars); they conduct two survey experiments in the United States and Turkey; and they field a survey to a sample of con law experts. Fine. “Mixed-methods”—a term that seems to mean the application of a range of methods to study one problem with the hope that each method points in the same direction—is quite fashionable (perhaps tracing to scientific merit or to the desire to satisfy multiple constituencies and reviewers in one fell swoop).

But the core of the book, and to my mind its chief contribution, is a large-n study of the efficacy of constitutional rights. The dataset alone is quite the accomplishment. It’s an original, reliable, unusually comprehensive, and publicly available collection of quantified

\[26\text{Chilton & Versteeg, supra note 3, Chapter 2.}\]
\[27\text{Chilton & Versteeg, supra note 3, at 9.}\]
\[28\text{See note supra note 15.}\]
information on constitutional rights in 194 countries over 60 years—with emphasis, as dictated by the hypothesis, on two sets of rights: the organizational and the individual. The plan is to deploy the dataset to draw four comparisons for each right (all of which, by the way, take seriously the fundamental problem of causal inference). The authors conveniently summarize the comparisons in a table, reproduced below.29

<table>
<thead>
<tr>
<th>Comparison</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Countries With/Without Right</td>
<td>Comparing the average level of respect for rights for countries with and without the right over time.</td>
</tr>
<tr>
<td>(2) Years Before/After Adoption</td>
<td>Comparing the average level of respect for rights in the five years before and after adoption of the right.</td>
</tr>
<tr>
<td>(3) Stacked Event Study</td>
<td>Using the same sample of “treatment: countries that added a right to their constitution as Comparison (2) but creating a control group of all countries that did not add or remove the right from the constitution during a given “treatment event.”</td>
</tr>
<tr>
<td>(4) Stacked Event Regression</td>
<td>Using the sample from Comparison (3) but estimating a regression that includes standard control variables, country fixed effects, year fixed effects, and event fixed effects.</td>
</tr>
</tbody>
</table>

Table 1. Four comparisons drawn by Chilton & Versteeg.

Note that the comparisons, though different, all focus on an input—whether or not the right existed. This input is sometimes called the causal variable of interest, and it’s easy enough for Chilton & Versteeg to clarify (or “measure”): the constitutional right was included in the constitution or not.30 Recall that for organizational rights, the inclusion is hypothesized to exert a meaningful effect on “respect for the right” but for individual rights no effect is expected.

With the input clarified, the authors must do the same for the output (often called the outcome), which necessitates defining in concrete terms (i.e., measuring) de facto respect for each right. For this purpose, Chilton & Versteeg turn to the “most widely used dataset in the empirical human rights literature:”31 Cingranelli & Richards’s “CIRI” data.32 CIRI delineates, for each human right in 195 countries (1981-2011), respect for the right on a three-point scale—from “the right is often restricted or violated” to “the right is almost never restricted or violated.”

Criticizing these various measurement choices (or, for that matter, the measurement choices in any data study) is the last refuge of scoundrels—the true anti-empirical gatekeepers—

29Chilton & Versteeg, supra note 3 at 110.
30But see Mark Tushnet’s review of How Constitutional Rights Matter, “Sometimes the Magic Works. Sometimes It Doesn’t”: A Comment on Chilton & Versteeg at: https://lawreviewblog.uchicago.edu/2021/04/05/cv-tushnet/. See also infra note 33.
31Chilton & Versteeg, supra note 3 at 112.
because it’s so easy! You need to know next to nothing about methods or even the topic at hand to say: “Your measures are too simple. They don’t adequately capture the underlying concept. There are better measures out there.” Etc. Etc.

The truth of the matter is that all measurement schemes are susceptible to the critique of oversimplification. Instead of learning about “de facto respect for rights” in nearly 200 countries over six decades by looking at all countries all at once (is that even possible?), researchers like Chilton & Versteeg simplify the task by assigning numbers to the inputs and outputs—for each county for each year in the study. More to the point, understanding the real world always requires a certain level of abstraction. The key is that researchers abstract the right dimensions for their purposes, measure enough dimensions of each subject to capture all the parts that are essential to their research question, and, most crucially of all, carefully evaluate their choices and procedures.

These are precisely the precautions that Chilton & Versteeg took. They didn’t make their measurement choices willy-nilly, as some of the quant-phobes might assert. They evaluated their choices based on the two criteria researchers use to assess their measures and measurement procedures: reliability (the extent to which it is possible to replicate a measure) and validity (the extent to which a reliable measure reflects the underlying concept being measured).

In ways big and small, Chilton & Versteeg convincingly demonstrate that their measures meet these criteria. Take their input—whether a constitutional right existed. The authors developed very clear coding rules and not only checked their results against the Comparative Constitutions Project’s dataset; they also interrogated their choices against expert judgments. As for the CIRI measure: They compared it to other indicators, as well as to more “objective” data developed by the World Bank (e.g., government spending on healthcare).

To say the authors performed due diligence is to understatement the case.

IV. Analyzing the Data

After researchers design their studies and collect their data, they try to make sense of what the data tell them—that is, they analyze their data. How the analysis proceeds depends on the goals of the project, the nature of the observable implications, and the kinds of data in hand, among other considerations.

For this reason, the ins and outs of Chilton & Versteeg’s analysis aren’t especially important to detail here. Suffice it to say that the authors proceed in a sensible fashion, reporting the results of each comparison listed in Table 1 for each constitutional right under analysis.

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34https://comparativeconstitutionsproject.org
35Chilton & Versteeg, supra note 3 at 114.
Their reports come in two forms: easy-to-decode visual displays: (mostly) simple line graphs showing, for example, whether de facto union protection increased after countries adopted a constitutional right to unionize. No special skills are required to understand the results of each and every comparison. For the more quant-oriented readers, Chilton & Versteeg supply the regression results in tables in the appendices. And I do mean results. The authors analyze the data in multiple ways with an eye toward assessing the robustness of their findings (e.g., different model specifications and alternative formulations of rights protection); they also take great care to specify the uncertainty of their results.

After reviewing the displays and tables, it will be patently obvious to readers that the data validate the observable implication: Organizational rights, relative to individual rights, are more efficacious. So, it turns out, (some) constitutional rights are in fact little more than “parchment barriers,”36 while others can “matter.” Let’s hope the community—especially those legal academics and groups that “descend upon [countries] to offer assistance in constitution-writing”—is paying attention.37

Prior to publication of How Constitutional Rights Matter any scholar who claimed that a “science of comparative constitutionalism is impossible” or that “empirical research in comparative constitutional law is all smoke and mirrors” carried a heavy burden—considering, say, Ginsburg et al.’s classic book on the endurance of constitutions,38 Versteeg and Law’s powerful paper on the U.S. constitution’s declining influence worldwide,39 and Jung, Hirschl and Rosevear’s masterful article questioning claims of growing global constitutional homogeneity.40

With publication of How Constitutional Rights Matter, that burden is more than heavy; it simply can’t be met. No longer can the gatekeepers claim—at least not with a straight face—that empirical work is pointless. Even more than that, Chilton & Versteeg’s contributions are of such academic import and policy consequence that they will inevitably encourage other excellent scholars to enter a field that will only grow in importance as data studies move front and center. At long last.

36In a letter to Thomas Jefferson (October 17, 1788), James Madison famously wrote “[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State ....” At: https://press-pubs.uchicago.edu/founders/documents/v1ch14s47.html.
37Chilton & Versteeg, supra note 3, at 62
40Courtney Jung, Ran Hirschl & Evan Rosevear, Economic and Social Rights in National Constitutions, 52 Am. J. Comp. L. 1043 (2014).