

Book Review

Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter*, New York: Oxford University Press, 2020, p. 388, \$99.

Reviewed by Katharine G. Young

Constitutional rights leave a mark on almost every subject in the American law school curriculum. The terse words of the U.S. Bill of Rights, interpreted famously in a “field of pain and death,”¹ matter greatly. They forbid, permit, or require various state actions; even their silences are important. This is true, as an early generation of constitutional scholarship pointed out, not only for the “discrete and insular” minorities underserved by majoritarian processes, but for the “diffuse and anonymous” minorities and majorities as well.² It is still open for debate as to whether constitutional rights should be handled more like dentistry or politics;³ it is clear, nonetheless, that their expressive, educative, polarizing, doctrinal, and material effects are well activated within American constitutional culture. Even the pathways of constitutional backsliding divert directly through constitutional rights, just as do the strategies of defense.⁴

But is this true of constitutional rights everywhere? In terms of textual content, we know that the rest of the world’s constitutions seek to guarantee much more than the venerable U.S. Bill of Rights. Constitutions over the past two decades, in particular, have grown in length and promises.⁵ They tend to protect the conventional civil and political rights of the U.S. Bill of Rights but add such economic and social rights as rights to social security, education, and health care; newer rights such as the rights to land, water, sanitation, and

Katharine G. Young is Associate Dean of Faculty and Professor of Law, Boston College Law School. This review is current as of May 2021.

- 1 Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).
- 2 Compare United States v. Carolene Products Co., 304 U.S. 144, 147, 152 n.4 (1938) and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) with Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).
- 3 Compare Frederick Schauer, *The Supreme Court as Public Educator?*, 88 U. COLO. L. REV. 333, 336 (2017) with Kellye Y. Testy, *Why Law Matters*, 65 J. LEGAL EDUC. 707, 708 (2016).
- 4 See, e.g., JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021); see also CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018).
- 5 David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L. REV. 762 (2012).

a clean and healthy environment, and even rights for animals and nature.⁶ As demonstrated by a global field of study, these constitutions are also often easier to amend and update, subject to a different method of judicial reasoning and balancing, and interpreted by very differently designed constitutional or apex courts.⁷ The pathways of constitutional backsliding—an almost worldwide phenomenon that gathered speed during the past rocky decade⁸—do not leave them untouched. How do these constitutional rights matter? And how can we tell?

Enter Adam Chilton and Mila Versteeg's new book, which deploys both quantitative and qualitative comparative research in the search for empirical answers. Chilton, a professor at the University of Chicago Law School, and Versteeg, a professor at the University of Virginia School of Law, open their examination with a deflationary view. Eschewing the conventional wisdom of American constitutional culture, they instead choose to invoke the realist—or radically relativist—foreign policy of Henry Kissinger. As secretary of state in 1975, Kissinger famously replied to his Turkish counterpart, Melih Esenbal, in relation to a proposal whose illegality had already been confirmed, "[T]he illegal we do immediately, the unconstitutional takes a little longer." [laughter]⁹. This perspective, suggest Chilton and Versteeg, may be a more apt description of constitutional practice in a world of Russia's Vladimir Putin, Turkey's Recep Erdoğan, or Hungary's Viktor Orbán. Constitutional rights matter, they suggest, but very little. Indeed, rights that they term "individual" may not matter much at all. Rights they term "organizational" may matter somewhat, in the face of concerted opposition, but only for a limited time.

I. Empirical Constitutional Studies

Both Chilton and Versteeg are astute empiricists in the field of comparative constitutional law. In this work, they favor a mixed methods research approach to examine how constitutional rights matter in constitutional systems outside the United States. Their study involves statistical surveys from a coded database of the world's constitutions, which includes eight key rights: freedom of speech, the prohibition of torture, freedom of movement, the right to education, the right to health care, freedom of religion, the right to unionize, and the right to

6 *E.g.*, DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2011); Evan Rosevear et al., *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* (Katharine G. Young ed., 2019).

7 Representative scholarship, too large to collect here, includes KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* (2012) and sources cited below.

8 *E.g.*, *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (Mark A. Graber et al. eds., 2018).

9 The quotation is reproduced at ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* 6, n 29 (2020) (citing memorandum of conversation, *Aid Cut-Off: Cyprus*, WIKILEAKS PUBLIC LIBRARY OF US DIPLOMACY (Mar. 10, 1975)).

establish political parties.¹⁰ They select these rights and not others, as they note, because of the presence of data on their realization.¹¹ Alongside the coding of capital-C constitutional text, they also conduct interviews with judges, religious leaders, trade unionists and civil society representatives in Colombia, Myanmar, Poland, Russia, and Tunisia. They therefore seek out “nominal” rather than “functionalist” or “essentialist” constitutional rights, by which they mean they count the rights that local participants consider to have risen to constitutional status, rather than those that emphasize core constitutional functions or those that are merely textually entrenched.¹² With this data, Chilton and Versteeg seek to answer causal questions of how constitutional rights outside the United States make a difference.

Unsurprisingly, they find little evidence that textual protections of constitutional rights, by themselves, provide for a firewall guarantee of protection. This by now familiar conclusion has been reached in decades of socio-legal scholarship in relation to rights of many hues (labor protections, civil rights, education rights, health care rights, and/or international human rights), usually by qualitative case study. Their approach draws partly on law and society scholars like Stuart Scheingold (who mapped the “politics of rights”)¹³ and comparativists like Charles Epp (who referred to the “social support structure” needed for a “rights revolution”).¹⁴ Alongside these domestic and comparative studies, Chilton and Versteeg also engage with political scientists examining the effect of international human rights law on the domestic law of different states. Beth Simmons, Oona Hathaway and other political scientists have long dampened any enthusiasm for human rights treaties, by offering somewhat similar observations¹⁵—i.e., that there is nothing “self-enforcing” about rights, and that textual or legal guarantees are only a sideshow on the journey of rights protection.

More notable is Chilton and Versteeg’s finding that some rights, once constitutionalized, are harder to violate than others. The constitutional rights that they code as freedom of religion, the right to unionize, and the right to form political parties are systematically associated with an improvement along the outcomes they measure; other constitutional rights, including the right to

10 *Id.* at 86.

11 *Id.* (“We could only select rights for which we have data on their de facto fulfillment.”).

12 *Id.* at 90–91.

13 STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND SOCIAL CHANGE* (1974).

14 CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (thus categorizing India (weak), the United Kingdom (modest), Canada (dramatic), and the United States (standard)).

15 CHILTON & VERSTEEG, *supra* note 9, at 74–77; BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009) (noting influence of a constitutional regime transition toward democracy); OONA A. HATHAWAY, *Do Human Rights Treaties Make a Difference?* 111 *YALE L.J.* 1935 (2002).

free speech, the prohibition on torture, the freedom of movement, the right to education, and the right to health care are not. In their model, the former rights are practiced by, or within, an organization, while the latter are individualized. Thus, because religious groups, unions, and parties have a vested interest in their protection, these organizational rights became "self-enforcing"¹⁶ across different constitutional systems. Interestingly, the authors suggest that this self-enforcement occurs even without the backstop of independent courts or democratic regimes. This finding shifts both litigation and voting as the primary mechanisms for constitutional rights protection. Sometimes this is because the protection of these rights aligns with government interests; but even when it does not, strong organizations succeed in lobbying against or otherwise defending against rights violations that might limit their ability to operate, giving rise to a "self-enforcing" feedback loop in support of the rights' durability and staying power.¹⁷

The authors suggest that organizational rights, while harder to violate than individual rights, are best viewed as "speedbumps" that can help slow down a government that is actively attempting to repress rights but cannot necessarily prevent such conduct over a longer period.¹⁸ Indeed, Chilton and Versteeg suggest that the "speedbumps" metaphor is more accurate than the popular image of American constitutional culture, that rights operate as "ropes" that tie the government (Ulysses) from the call of acts of repression or shipwreck (the sirens).¹⁹ The implication is that our constitutional theories are usefully updated by comparative empirical study.

II. Disaggregating Constitutional Rights

The disaggregation of constitutional rights into differently situated interests, of different political strength, is not new. Just as the distinction between insular and diffuse rights-holders worked to frame the priorities of judicial review in past U.S. constitutional commentary,²⁰ so too have theorists of rights long understood that the power valence of particular rights operates differently. Indeed, liberal theorists have interrogated important conceptual questions about the instrumental versus intrinsic importance of different rights.²¹ Rights of democratic participation, for example, have been theorized as both intrinsically important for each individual and instrumentally "preservative of all rights."²² The right to education—or at the very least "some identifiable

16 CHILTON & VERSTEEG, *supra* note 9, at 27.

17 *Id.* at 27, 44.

18 *Id.* at 11–12.

19 *Id.* (citing JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1984)).

20 ELY, *supra* note 2; Ackerman, *supra* note 2.

21 Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFFS.* 315 (2004).

22 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*,

quantum”²³ of it—has been described as an “empowerment” right, helping those who are economically and socially marginalized to obtain the means to participate in their communities and defend their rights.²⁴ And equality rights of women, introduced in conditions of religious, cultural, and social hostility, have been described as “placeholder” rights in an inevitably slow and non-linear process of change.²⁵ These rights clearly do more than bind Ulysses to the mast.

Chilton and Versteeg are, however, firmly focused on the instrumental question, and only on the empirically testable dimension of that question. In addition to guiding their choice of what constitutional rights to study, their empirical focus and search for causes forces them to seek out only what is measurable over a confined timeline (at most, over several decades, but in some cases for no more than the five years after constitutional entrenchment).²⁶ Nor do they entertain questions of how prominent rights “spill over” from one arena of protection, such as how the protection of educational rights might affect, say, democracy rights or health rights.²⁷ This restriction is somewhat ill-matched to the larger questions they seek to answer, as discussed below.

Instead, they design their study around two prominent theoretical challenges of political agency: the coordination problem, which impedes diverse or differently motivated citizens, and the collective action problem, which discourages a rational individual from taking part in joint action.²⁸ As they note, dedicated organizations can help overcome these two problems, and formal organizations with a membership base and ties of loyalty and financial backing can do this best. In other words, some rights attract a “natural organizational vehicle,” but others do not;²⁹ it is these vehicles that

118 U.S. 356, 370 (1886)).

23 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

24 *The Right to Education*, General Comment No. 13, U.N. ESCOR, Comm. on Econ., Soc., & Cult. Rts., 21st Sess., U.N. Doc. E/C. 12/1999/10 (1999) (“Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.”).

25 Sari Kouvo & Corey Levine, *Law as a Placeholder for Change? Women’s Rights and Realities in Afghanistan*, in *THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL* 195 (Kim Rubenstein & Katharine G. Young eds., 2016). This long-term view bears parallels to the rise of the Second Amendment in the United States. See *infra* text accompanying n 56.

26 E.g., CHILTON & VERSTEEG, *supra* note 9, at 187.

27 This they leave to future study. *Id.* at 331.

28 MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 47 (1982). The import of the earlier U.S. constitutional scholarship with which this review begins thus becomes clear. See, e.g., Ackerman, *supra* note 2, at 724–25. For updates in the claims of the diffusely organized to rights protections, see Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537, 1539–42 (2010).

29 CHILTON & VERSTEEG, *supra* note 9, at 183–84.

make these rights “self-enforcing.” This theory draws from, as Chilton and Versteeg acknowledge, stability-focused studies of constitutional political economy,³⁰ where a constitution’s “self-enforcement” occurs when political opponents gain more from cooperating within a constitutional order than from attempting to derail it.

In identifying these vehicles, Chilton and Versteeg emphasize the corporate dimension of particular “organizational” rights. This includes religious liberty and the recognition of organized religion, and guarantees of the associational rights of trade unions, registered political parties and their ability to participate in electoral cycles.³¹ This corporatized status allows such collectives to secure access to legal personality, register members, sue, make payments, etc. As well as the ability to access corporate form, Chilton and Versteeg also measure the organizations’ ability to protect certain “core activities,” such as collective worship in the case of religious groups, and collective bargaining or political activity in the case of unions and parties. These outcomes are plotted statistically and also form the basis of their interviews and case studies. These reveal important insights, particularly in explaining the strength of constitutional religious freedom in recent decades. These findings, as well as the authors’ conclusions about rights to health care and education, and about organizational as opposed to associational rights, are discussed below.

A. Religious Freedom

The disaggregation of religion from other rights provides an instructive insight about the past two decades of global constitutionalism. For Chilton and Versteeg, religious freedom rights are best measured as rights to religious liberty. While those practicing minority (and even majority) religions would surely point to the separation of church and state and the protections against religious discrimination as core to religious freedom, Chilton and Versteeg’s thinner version of religious rights opens up an interesting tracing exercise. In 1946, freedom of religion was included in eighty percent of the constitutions then in force; by 2016 this number had risen to ninety-five percent,³² which includes the right’s individual and organizational character.³³ (The related right not to be discriminated against based on religious beliefs, and the

30 Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century*, 29 J. L., ECON. & ORG. 278 (2013); see also Daryl F. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011); Sujit Choudhry, *Resisting Democratic Backsliding: An essay on Weimar, self-enforcing constitutions, and the Frankfurt School*, 7 GLOB. CONSTITUTIONALISM 54 (2018).

31 As they note, the United States is an outlier in granting constitutional protections to corporations (at least, at present): CHILTON & VERSTEEG, *supra* note 9, at 47 (noting Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 231 (Micah Schwartzman et al., eds, 2016)).

32 *Id.* at 232.

33 *Id.* at 233.

guaranteed separation of church and state, are not nearly as prominent.³⁴) Chilton and Versteeg demonstrate that an organization protected by religious freedom works more effectively than individuals can, when governments move to limit the right. This is partly due to the organization's relative control over limitations arguments: Governments often act within doctrinal requirements that require them to justify any limitations of rights, and the "ambiguities [in defense of rights] are more easy to exploit for individual over organizational rights."³⁵

The right to religion thus tilts toward features that are protective of religious organizations. The strength of the religious organization(s) is itself bolstered through the ties of loyalty created, the social, moral, psychological, and identity-based benefits conferred, and the mobilizational effects of physical church spaces, practices of worship, and charismatic leaders.³⁶ Chilton and Versteeg's brief case study involves not the United States (which might be highly instructive for their thesis),³⁷ but Russia, and the long opposition by the Russian Orthodox Church to proposed laws restrictive of religious freedom. This clearly majority religious organization helped to delay the suspension of religious liberty under Russian President Vladimir Putin for a time, but it did not ultimately prevent the 2016 Yarovaya's Law, which is highly restrictive of religious organizations in general but is particularly restrictive of minority and "foreign" religions (as the Jehovah's Witnesses and Church of Scientology went on to experience in Russian courts).

This case study, which launches the book's opening chapter, supports their arguments that both organizational rights are more resilient to government limitation than individual rights, and that this strength can hold out for only so long. Thus, this apparently unfavorable story about the effectiveness of rights (long term) takes on a different cast when compared with "individual" rights in Russia, which were far more rapidly eroded. The Russian Orthodox Church was able to protect religious liberty and defend its constitutional rights for far longer than the Russian media were able to do with the constitutional right to free speech. The latter right was far more quickly co-opted by a government intent on control, because, according to Versteeg and Chilton, of a lack of organizational defense (the media being bought by government).³⁸

34 *Id.* at 233-34. Under their count, religious discrimination is prohibited in only sixty-five percent of constitutions and the separation of church and state is guaranteed in only thirty-eight percent.

35 *Id.* at 238.

36 *Id.* at 240-42.

37 *Id.* at 244. They acknowledge the trajectory of the U.S. as influential, but they do not track the transnational networks in detail. Cf. Ran Hirschl & Ayelet Shachar, *Competing Orders: The Challenge of Religion to Modern Constitutionalism*, 85 U. CHI. L. REV. 425, 452 (2018); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 254 (2010).

38 CHILTON & VERSTEEG, *supra* note 9, at 1-25.

The book's highlighting of the organizational strength that helps to 'self-enforce' religious liberty will be of interest to legal scholars who observe the lopsided dimensions of certain rights conflicts (LGBTQ rights and women's sexual and reproductive health rights and protections against domestic violence being immediate and very relevant cases in point, although, as noted, these rights are not included in their constitutional rights survey³⁹). That said, the study does somewhat flatten the treatment of majority religious organizations (as opposed to minority religious organizations) within different constitutional systems, and overlooks the peculiar and very direct effect that religion can have on the enjoyment of other constitutional rights.⁴⁰

B. Rights to Education and Health Care

While this treatment of the organizational dimension of religious liberty is instructive, particularly as compared with the effectiveness of the rights they code as "individual"—including the right to speech, the prohibition of torture and the freedom of movement—the insights that come from the authors' treatment of rights to education and health care are more limited. Under Chilton and Versteeg's model, these rights are also coded as "individual," as they provide individual benefits to claimants. They concede that such rights operate narrowly or regressively when operationalized as individual rather than collective guarantees, but they claim that this is a better description, given that schools and hospitals (their only canvassed possibilities) present little evidence as adequate organizational defenders,⁴¹ and that individual successes are implemented more easily than joint or collective claims. To answer the question of the empirical effect of these rights, they choose to include changes to social spending within the five years before and after the rights' constitutional entrenchment.⁴² With this measure, they find little to establish a causal link between constitutionalization and social spending increases. They ultimately conclude that such rights are likely not to matter, thus confirming their thesis that "individual rights" are constitutively distinct from "organizational rights."

Two literatures are critical to understand the limitations of this insight. The first is a copious and recent comparative constitutional literature. As Chilton and Versteeg themselves note, numerous empirical studies have

39 For exploration of recent rights conflicts, see Katharine G. Young, *Human Rights Originalism*, 110 GEORGETOWN L. J. (forthcoming).

40 For succinct exegesis on different domains exposed by comparative law, see Aernout J. Nieuwenhuis, *State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks*, 10 INT'L J. CONST. L. 153 (2012) (noting not only that a state's absolute hostility to religion or its absolute convergence with it—theocracy—are incompatible with the rule of law (and thus all other constitutional rights), but also the existence of crossovers between religion and the very domains under Chilton and Versteeg's study, such in the formation of political opinion, the social service sector, and the field of education).

41 CHILTON & VERSTEEG, *supra* note 9, at 170.

42 *Id.*

sought to measure the impact of economic and social rights across different constitutional systems. Much of this scholarship focuses on success stories and the qualifications that must accompany measures of success—in Brazil, Colombia, India, Indonesia, South Africa, and the American states.⁴³ Apart from their case study of Colombia’s litigation around the constitutional right to health care, which they concede complicates their finding that rights do not matter, they do not wrangle with these studies’ implications that organizations and social movements may spring from the presence of constitutional rights and may be galvanized or mobilized by them.⁴⁴ They are disappointed by the right to health care in Colombia, given the slow and nonlinear successes that were wrought from judicial activism and social mobilization (taking a period of at least seven years),⁴⁵ but this unevenness is unsurprising in light of these omitted studies. In part this is because Chilton and Versteeg are unwilling to let courts cloud too much of their findings—and clearly, there is only a handful of unusually “activist” courts in the Global South⁴⁶—yet a more committed consideration of these findings would be helpful; not least because their disaggregation of particular rights would add interesting dimensions to that literature.⁴⁷

The second literature includes the lines drawn between welfare state studies and human rights measurement. For the former, it is salutary to note that the first generation of comparativists in welfare state studies also assumed that levels of social spending could adequately reflect a state’s commitment to economic and social rights. As seminal studies like Gøsta Esping-Andersen’s showed, these studies were misleading⁴⁸: Expenditures were epiphenomenal in the rich countries he assessed. All spending does not count equally; moreover, high spending can be a function of high unemployment, while low spending on some programs can signify a more serious commitment to full employment. Even in developing countries, where marginal returns to spending tend to be

43 Many empirical studies are cited, *id.* at 170–71, including *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008) and *SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK* (Malcolm Langford et al. eds., 2017).

44 *Cf.* CHILTON & VERSTEEG, *supra* note 9, at x (discussing possibility of rights acting as focal points).

45 *Id.* at 192–206.

46 *Id.*; see also *SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES* (Helena Alviar García et al., eds., 2014); *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* (Daniel Bonilla Maldonado ed., 2013).

47 *E.g.*, CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ-FRANCO, *RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH* (2015); see also Katharine G. Young, *The right-remedy gap in economic and social rights adjudication: Holism versus separability*, 69 U. TORONTO L.J. 124 (2019) (exploring associational and class explanations for rights to health care faring better than rights to housing).

48 GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 19 (1990).

higher, other policy measures, addressed to governance or inflation, can at times achieve similar results, and the quality of governance (including control of corruption) strongly influences any positive effects.⁴⁹ These warnings were internalized in the design of human rights measures, which combine different indicators to capture economic and social rights fulfillment, such as outcomes like life expectancy and literacy, alongside the more obvious, capturable results such as spending, as well as participation indicators and those that indicate other constraints,⁵⁰ in order to draw better conclusions.

While Chilton and Versteeg acknowledge some of these questions—for example, they note that their analysis leaves open the possibility that social rights can vary the allocation of resources without changing overall spending,⁵¹ and that their measure does not detect slow-moving changes—the findings are better summarized as answering a different, more measurable, and far less consequential question than how constitutional rights matter. Rather, their question is whether the constitutionalization of rights to education or health care increases aggregate education or health care expenditure, controlling for variables such as urbanization (by which they deliberately omit attention to organized workers), percentage of elderly in the population, economic growth, and inflation. To that question, it is not surprising that the answer would be no.

C. *Disaggregating Organizations*

This focus on individual and organizational rights provides an interesting hypothesis of how constitutions matter. Organizations are central, by which they mean formal organizations such as churches, trade unions, and political parties. This is a very provocative triumvirate of organizations that matter very distinctively (and sometimes in opposition to one another) with respect to constitutional rights. Each organization operates under very different mechanisms, for example, in seeking out constitutional representation, or in support of other fundamental rights. This insight will no doubt lead to further instructive findings on the balance struck by differently positioned organizations, such as ideas about the separation of party and state, union and state, and church and state.

This focus on organizations calls for further analysis of how constitutional rights matter, in two important ways. The first, not canvassed by the study, is how organizations work to obstruct rather than enforce constitutional rights. While the study does note in passing that “powerful vested economic interests” might oppose certain rights, particularly those concerned about

49 These measures find that social spending alone is likely insufficient. Cf. CHILTON & VERSTEEG, *supra* note 9, at 184 (citing Emanuele Baldacci et al., *Social Spending, Human Capital, and Growth in Development Countries*, 36 *WORLD DEV.* 1317 (2008)).

50 See, e.g., Office of the UN High Comm’r on Human Rts., Rep. on Indicators for Promoting and Monitoring the Implementation of Human Rights, at 11, 15 UN Doc. HRI/MC/2008/3 (2008); see also SAKIKO FAKUDA-PARR ET AL., *FULFILLING SOCIAL AND ECONOMIC RIGHTS* (2015) (utilizing different data for high-income and low-income countries).

51 CHILTON & VERSTEEG, *supra* note 9, at 171.

access or the tax bill associated with spending on social rights,⁵² the authors do not venture to examine this feature of constitutional politics in any detail, or to factor it into their theory of rights effectiveness. This is an ironic omission in a study so alert to the associational potentials of corporatized groups, when private groups exercising significant political power—such as private military contractors, pharmaceutical companies, financial and tech corporations, real estate developers, private schools, doctors associations, natural resources companies—have long operated to limit particular interpretations of constitutional rights. The artificial boundaries of constitutional theory have thus artificially influenced their empirical research design, and factual findings, in significant ways.⁵³

Second, Chilton and Versteeg are interested in separating organizational rights from the general freedom of association enjoyed by both specific and more general collectives. Indeed, the authors distinguish organizational rights with the constitutional freedom of association enjoyed by other rights defenders, such as human rights organizations or education interest groups. They also note that these associational freedoms do not help secure rights in the same degree, partly in light of observations about a “closing space” for contemporary civil society,⁵⁴ which they adopt. To be sure, Chilton and Versteeg’s study does not delve very deeply into the makeup or transnational coordination of the networks behind such rights (the literature on the changing membership base of Amnesty International or Human Rights Watch is not assessed, for example; nor is the vibrant advocacy basis (such as patients groups or parents pro-education groups) identified beyond the organizations of hospitals or schools).⁵⁵

Similarly, the authors restrict themselves from exploring other “protective constituencies” that may serve to protect distinctive interpretations of individual rights. They do acknowledge the ready power gained, for example, by the National Rifle Association’s protection of the right to bear arms in the United States;⁵⁶ but they do not in this current work explore similar dynamics with respect to the rights under study. And they do not incorporate into their model the contributions of more informal, dynamic collectives, such as Twitter or Facebook groups or the other forms of spontaneous action or protest that

52 *Id.* at 184.

53 As the field of law and political economy has amassed an increasing body of work, it is hoped that constitutional political economy will engage with them.

54 CHILTON & VERSTEEG, *supra* note 9, at 10 (citing THOMAS CAROTHERS & SASKIA BRECHENMACHER, *CLOSING SPACE: DEMOCRACY AND HUMAN RIGHTS SUPPORT UNDER FIRE* (2014)).

55 *E.g., id.* at 55.

56 *Id.* at 19, 330 (acknowledging the historical institutionalist literature on protective constituencies, PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT* (1994); JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (2018)).

have become key to moments of constitutional instability and change.⁵⁷ We might add other constituencies, such as the social movements (or the trade unions) that have sought support for both health care and education alongside each other.⁵⁸ Instead, their focus is to survey formal organizations with a more direct rights agenda, rather than these more dynamic, and perhaps harder-to-measure, rights constituencies. The failure to address the role of these “looser” organizations or more indirect constituencies might be considered a missed opportunity in the book, or at least a subject for future research.

Conclusion

Chilton and Versteeg are ambitious practitioners of empirical—and largely quantitative—analysis, and they apply it indefatigably to comparative constitutional law. Their findings, particularly in relation to the rise of organizational religious freedom rights, are worth testing further, particularly with further qualitative study. In several passages in the book they acknowledge the criticism that asserting causal answers by these sorts of empirical studies can do more harm than good. Nonetheless, they are not content to merely air plausible theories or flag the mechanisms or scope conditions of constitutional success; they aim to provide causal explanation and are reluctant to “make the perfect be the enemy of the good” for such a monumentally important field of study.⁵⁹ They therefore undertake to measure cause and effect in comparative constitutional law through controlling for an expansive number of variables, such as the wealth of a country, its population size, its democratic status, whether it is engaged in war, its judicial independence, and its regime durability (for civil and political rights); and its economic growth, inflation, population age, and urban population (for economic and social rights).⁶⁰ It is worth noting that very convincing arguments have been made against these types of claims, including from the perspective of “decolonizing” the field of comparative constitutional studies⁶¹—arguments not ignored but perhaps not fully addressed by the authors. Notwithstanding these criticisms, this book provides an expansive overview of the global reach of constitutional rights, and some notable findings about the uneven supply of the formal organizations that are motivated to defend them.

57 See, e.g., ZEYNEP TUFEKCI, *TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST* (2017) (cited by CHILTON & VERSTEEG, *supra* note 9, at 17).

58 E.g., SECTION27 (in South Africa); SOCIAL AND ECONOMIC RIGHTS, *supra* note 46; JOE WILLS, *CONTESTING WORLD ORDER? SOCIOECONOMIC RIGHTS AND GLOBAL JUSTICE MOVEMENTS* (2017).

59 CHILTON & VERSTEEG, *supra* note 9, at 102 (addressing Holger Spamann, *Empirical Comparative Law* 11 ANN. REV. L. & SOC. SCI. 131, 138 (2015)).

60 *Id.* at 115.

61 From a further social science perspective, see Spamann, *supra* note 59; see also Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 189 (2004). From the vantage point of law's claims to legitimacy, see Katharine G. Young, *On What Matters in Comparative Constitutional Law: A Comment on Hirschl*, 96 B.U. L. REV. 1375 (2016).