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Legal Origins, Functionalism, and the Future of Comparative Law

*Christopher A. Whytock**

I. INTRODUCTION

Functionalism is historically one of the most influential approaches to the study of comparative law,¹ and perhaps the most controversial.² According to functionalism, comparative legal scholars should understand different countries' laws as solutions to similar social problems.³ As Ralf Michaels argues, "The functional method has become both the mantra and the *bête noire* of comparative law. For its proponents, functionalism offers the most, perhaps the only, fruitful method; to its opponents, it represents everything bad about mainstream comparative law."⁴ Some leading comparative legal scholars claim that functionalism is "compromised" and suffering from "exhaustion," and that new

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1. See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 428–29 (1985) (calling functionalism the "modern paradigm"); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 679 (2002) (describing insights of the functional approach as having become "generally accepted in the past fifty years"). *But see* Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100 (Pierre Legrand & Roderick Munday eds., 2003) ("[Functionalism] is one of the best-known working tools in comparative legal studies. . . . [But] it never represented the sole or even the dominant approach to comparative legal studies during the twentieth century. Nor is it the prevailing method today . . .").

2. See Richard Hyland, *Comparative Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 184, 188 (Dennis Patterson ed., 1996) (noting "the importance of functionalism, both in terms of its exceptional contributions and the intensity of the criticism it has provoked").

3. See KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 34 (3d ed. 1998) (describing functionalist approach).

4. Ralf Michaels, *The Functionalist Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 340 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (citation omitted).

approaches to comparative law are needed.⁵ Others argue that “a more methodologically aware functionalism will provide us with better insights into the functioning of law,” and that further functionalist efforts would therefore be “well worth the effort.”⁶

In this Article, I argue that legal origins scholarship—though produced primarily by economists, not legal scholars—has a close affinity with functionalist comparative law.⁷ As such, legal origins scholarship puts into relief the promises and perils, the strengths and weaknesses, of functionalism. Legal origins scholarship therefore deserves the careful and critical attention of comparative legal scholars as they deliberate over the place of functionalism in their field’s future. To that end, I attempt to draw out some of the implications of legal origins scholarship for the functionalism debate. I do so by focusing on three characteristics shared by legal origins scholarship and functionalist comparative legal scholarship: a quest for better legal solutions to societal problems (Part II); a need to rely on causal inference (Part III); and a need to consider the cultural, economic, political, and social context within which legal institutions exist (Part IV).⁸ The raw material for my analysis is Konrad Zweigert’s and Hein Kötz’s classic statement of the functionalist method in their *Introduction to Comparative Law*,⁹ and the work of four leading legal origins scholars: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishney.¹⁰ I will also draw on John Ohnesorge’s¹¹ and Daniel Sokol’s¹² contributions to this symposium.

5. Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L L.J. 221, 237, 239, 246 (1999).

6. Michaels, *supra* note 4, at 381.

7. This Article’s analysis is based primarily on the work of Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny. See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998) [hereinafter La Porta et al., *Law and Finance*]; Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FINANCE 1131 (1997) [hereinafter La Porta et al., *Legal Determinants*]; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins* (Nat’l Bureau of Econ. Research, Working Paper No. 13608, 2007), available at <http://www.nber.org/papers/w13608> [hereinafter La Porta et al., *Economic Consequences*].

8. In this Article, I use the terms “legal institutions” and “legal rules” broadly to include both formal and informal legal rules.

9. ZWEIGERT & KÖTZ, *supra* note 3.

10. See *supra* note 7.

11. John Ohnesorge, *Legal Origins and the Tasks of Corporate Law in Development*, 2009 BYU L. REV. 1619.

By focusing only on the three themes of better solutions, causal inference, and law's context, I do not purport to provide a thorough critique of either functionalism or legal origins scholarship—excellent critical reviews of both bodies of scholarship can be found elsewhere.¹³ However, I do attempt to develop the following claim: that comparative legal scholars should build upon their field's functionalist heritage by giving functionalism's "better solutions" impulse a qualified embrace, by systematically addressing the task of causal inference that is a necessary part of functional analysis,¹⁴ and by taking law's context seriously. I also hope to expand upon one of the core questions raised by Professor Ohnesorge—what can comparative legal scholars and legal origins scholars learn from each other?¹⁵ Finally, I hope to contribute to legal origins scholarship in a critical yet constructive way by applying to it some of comparative legal scholars' leading criticisms of functionalism.

II. BETTER SOLUTIONS

Perhaps the most widely criticized characteristic of the functional method of comparative law is its emphasis on the improvement of legal solutions to social problems. This so-called "better solutions" impulse¹⁶ flows from the principle of functionality, which is the

12. D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State Owned Enterprises*, 2009 BYU L. REV. 1713.

13. For overviews of functionalism in comparative law, see Graziadei, *supra* note 1; Hyland, *supra* note 2; and Michaels, *supra* note 4. For three of the most strongly critical views of functionalism, see Frankenberg, *supra* note 1; Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101 (1989); and Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240 (Pierre Legrand & Roderick Munday eds., 2003). For an overview of legal origins scholarship by three of the most prominent legal origins scholars, see La Porta et al., *Economic Consequences*, *supra* note 7. For critical takes on legal origins scholarship, see, for example, Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); and Mathias M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55 (2007).

14. For an earlier exploration of the theme of causation in comparative legal analysis, see Christopher A. Whytock, *Taking Causality Seriously in Comparative Constitutional Law: Insights from Comparative Politics and Comparative Political Economy*, 41 LOY. L.A. L. REV. 629 (2008).

15. See Ohnesorge, *supra* note 11, at 1619 (inquiring about the implications of legal origins scholarship for law and development and vice versa).

16. This label is based on Zweigert and Kötz's own reference to functionalism's utility for seeking "better solutions." ZWEIGERT & KÖTZ, *supra* note 3, at 15. It also is used by Hill in his critical essay on functionalism. See Hill, *supra* note 13, at 102 (referring to "better solution" comparative law).

foundation of functionalism as expounded by Zweigert and Kötz. Zweigert and Kötz assert that “the legal system of every society faces essentially the same problems”¹⁷ and argue that the object of comparison should be diverse legal solutions to those societal problems.¹⁸ Thus, functionalist analysis involves two preliminary steps: problem definition and solution identification. According to Zweigert and Kötz, “only rules which perform the same function and address the same real problem . . . can profitably be compared.”¹⁹ Functionality is therefore “[t]he basic methodological principle of all comparative law From this basic principle stem all other rules which determine the choice of laws to compare, the

17. ZWEIGERT & KÖTZ, *supra* note 3, at 34. Similarly, in a co-authored study of law in “radically different cultures,” Merryman and his colleagues “developed four typical social problems of the kind that are bound to arise in any society and examined how each of these problems was perceived and resolved in each of the four cultures.” Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 AM. J. COMP. L. 3, 27 (1999). When asked by Legrand whether he was “confident . . . that [he] could formulate the questions in non-ethnocentric terms,” Merryman replied, “Yes, we thought we were able to do that. The idea was that we would see how each problem was treated in each of the four cultures.” *Id.*

18. See ZWEIGERT & KÖTZ, *supra* note 3, at 34. Arthur von Mehren, Rudolf Schlesinger and John Merryman also emphasize the functionality principle in one form or another. For von Mehren,

the criterion of comparability is convergence at the functional level. Facially disparate institutions, principles, rules, and theories that serve similar purposes can be meaningfully compared. Where social, political, or economic values are shared in significant measure, the arrangements and intellectual structures through which societies seek to advance these values are comparable.

Arthur T. von Mehren, *The Comparative Study of Law*, 67 TUL. CIV. L.F. 43, 43 (1991–92). Schlesinger’s work—including his common core of legal systems project—used a “factual method” focused on the comparison of how different legal systems react to similar problems. RUDOLF B. SCHLESINGER, *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 32 (1968). According to Merryman, a legal system is a sub-system of society whose

principal social function is to respond to a certain range of social demands. The response of the legal system to the social demand can be called the ‘legal response.’ The legal system thus becomes the social mechanism that, in answer to a social demand, produces a legal response. The mechanism is composed of legal institutions, legal actors, and legal processes, and its internal integration and operation are controlled by the legal culture and secondary legal rules.

JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER* 486 (1999).

19. ZWEIGERT & KÖTZ, *supra* note 3, at 10; see also *id.* at 34 (“Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil [sic] the same function.”).

scope of the undertaking, the creation of a system of comparative law, and so on.”²⁰

The principle of functionality not only provides methodological guidance for comparative legal scholars, but also provides the basis for what Zweigert and Kötz call “applied” comparative law.²¹ In this mode, functionalism attempts to provide advice on legal policy by “suggest[ing] how a specific problem can most appropriately be solved under the given social and economic circumstances.”²² Zweigert and Kötz see comparative law as leading to “the discovery of models for preventing or resolving social conflicts,” and therefore

provid[ing] a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.²³

“Comparative law,” as they put it, “is 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.”²⁴

Other comparative legal scholars share this functionalist “better solutions” impulse. For Schlesinger, one use of comparative law is for consulting foreign solutions that might serve as models or guides: “[W]hen a problem is viewed in the deeper perspective made possible by the comparative method, a number of alternative solutions may come into sight.”²⁵ Likewise, von Mehren argues that “[i]nsight into how other legal systems have dealt with particular problems not only stimulates the jurist’s imagination but reveals the strengths and weaknesses of particular solutions. Comparative study thus assists legal reform as well as lawyers’ efforts to find creative solutions for problems that arise in legal practice.”²⁶ Merryman also

20. *Id.* at 34.

21. *Id.* at 11.

22. *Id.*

23. *Id.* at 15.

24. *Id.*

25. RUDOLF B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA & PETER E. HERZOG, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 15, 22 (5th ed. 1988).

26. Von Mehren, *supra* note 18, at 47; *see also* Arthur T. von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624, 628 (1971) (“[Comparative scholarship] is useful in that it gives a better understanding of inherent strengths and

argues that comparative legal analysis can be a useful basis for law reform, at least when such efforts are aimed at the reform of one's own legal institutions.²⁷

Legal origins scholarship also has a strong better solutions impulse, giving it a close affinity with functionalist comparative legal

weaknesses of given institutional forms. Such understanding has considerable theoretical interest and may also prove of directly practical value by providing perspective and direction for law reform efforts.”).

27. Merryman thus developed his own approach to law reform based on a critical reformulation of the law and development movement which he called “comparative law and social change.” MERRYMAN, *supra* note 18, at 433–76. As he explained:

The American lawyer who engages in social engineering within his own society (i.e. in “domestic law and development”) operates within a familiar environment, employing generally valid but unstated premises that are part of his natural “feel” for the culture. Consciously or unconsciously he is restricted by his own background to a range of proposals that shared experience tells him have a reasonable prospect of succeeding without disproportionate social costs. The proposals he does make will be critically evaluated by his peers and by a variety of responsible individuals and agencies and may not survive that evaluation (or may be significantly changed by it). Eventually, if the action program is adopted and put into practice it will be in the proponent's own society; he and the people with whom he most closely relates will observe its results and experience its consequences.

Id. at 461.

In contrast to domestic law reform in the United States, Merryman says:

[I]n third world law and development programs the American actor has neither a reliable “feel” for the local situation nor an explicit theory of law and social change on which to base his proposals. His only recourse is to project what is familiar to him onto the foreign context. There his status as “expert,” the implied superiority of foreign “developed” over domestic “underdeveloped” expertise, and other factors, give the proposals privileged status, an opportunity for lateral entry at the top without the disciplining need to work their way up through the community of scholars or through society either in the U.S. or in the “target” nation. If the program is implemented and is a disaster it is those in the developing nation who feel the impact. To the American scholar, at home, the sounds are muffled, the consequences attenuated, the impact softened by geographic, political and cultural distance. The foreign expert thus has less at stake than those in the developing nation. He is gambling with someone else's money.

Id. at 461–62. Merryman nevertheless stressed that his assessment was “not as depressing as it seems,” explaining:

It was merely a way of suggesting that, at least for Americans, third world law and development action is premature. Until we have tested, reliable theory (i.e. tested and reliable *vis-à-vis* the target society), we will be more responsible and productive if we limit ourselves to third world law and development *inquiry*. In this way we can begin to build theory of the sort that may eventually provide a more satisfactory basis for third world action. Meanwhile, if the urge to law and development action is uncontrollable, and cannot be sublimated in inquiry, it can be satisfied domestically: the U.S. is the most appropriate society in which to pursue the American style of progressive social engineering through law reform.

Id. at 463.

analysis. One of legal origins scholarship's central aims is to advance claims about which types of legal rules are most likely to solve specified economic problems. Specifically, legal origins scholarship examines legal solutions to problems like unemployment and the ability of firms to obtain financing through debt and equity markets, and related problems like corruption and the security of property rights.²⁸

Legal origins scholarship has reached two basic conclusions. First, societies with different legal origins—e.g., English common law, French civil law, German civil law, and Scandinavian law—are associated with different types of legal rules.²⁹ Second, these differences in legal rules affect important economic outcomes.³⁰ One group of prominent legal origins scholars summarize their findings as follows:

Compared to French civil law, common law is associated with a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement.³¹

They then propose a “blueprint for reforms” based on these findings.³²

Comparative legal scholars have criticized functionalism's better solutions tendency. This criticism also applies to legal origins scholarship's similar tendency, and therefore should be taken

28. See La Porta et al., *Legal Determinants*, *supra* note 7, at 1132 (“[I]n this article we try to assess the ability of firms in different legal environments to raise external finance through either debt or equity.”); La Porta et al., *Economic Consequences*, *supra* note 7, at 2–3 (noting legal origins scholarship on corruption, unemployment, and property rights).

29. See La Porta et al., *Economic Consequences*, *supra* note 7, at 2 (“[L]egal rules protecting investors vary systematically among legal traditions or origins, with the laws of common law countries (originating in English law) being more protective of outside investors than the laws of civil law (originating in Roman law) and particularly French civil law countries.”).

30. See, e.g., La Porta et al., *Legal Determinants*, *supra* note 7, at 1149 (“The results of this article confirm that the legal environment—as described by both legal rules and their enforcement—matters for the size and extent of a country's capital markets.”).

31. La Porta et al., *Economic Consequences*, *supra* note 7, at 20.

32. *Id.* at 60.

seriously by legal origins scholars. First, critics argue that functionalism's better solutions tendency exaggerates the extent to which different societies face similar problems.³³ James Whitman, while noting that functionalism has many strengths, argues that "it starts from at least one doubtful assumption: that all societies perceive life as presenting more or less the same social problems."³⁴ Richard Hyland also finds that "the idea that the social issues the law is asked to resolve are so similar as to present a constant across legal systems is . . . highly questionable."³⁵

Methodologically, the implication of this critique is that the potential cross-national scope of functionalist comparison might not be as broad as Zweigert & Kötz seem to assume.³⁶ Substantively, the critique raises doubts about functionalism's ability to determine which solutions are really best: a legal solution that effectively mitigates a problem in one society might not be appropriate for another society if the problem being solved in the former is different from the problem that needs to be solved in the latter.

Professor Ohnesorge's article in this symposium shows how this problem can manifest itself in legal origins scholarship. He argues that legal origins scholarship's insistence on investor protection is misplaced from the perspective of some developing countries.³⁷ According to Professor Ohnesorge,

It would seem that for a developing country with few successful corporations, the major tasks of corporate law would be to encourage entrepreneurs to invest their own capital in productive enterprises, to help them attract early-stage capital from outside investors as necessary, and to give them the incentives and the

33. See, e.g., James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312 (Pierre Legrand & Roderick Munday eds., 2003).

34. *Id.* at 313.

35. Hyland, *supra* note 2, at 189.

36. Hyland suggests that functionalism's assumption that all societies face the same problems is a way of avoiding the steps necessary to determine whether or not the societies under comparison in fact face similar problems:

Since the actual function and effect of legal institutions is a matter of sociological concern, one might imagine that an empirical investigation would be a necessary prelude to functionalist research in comparative law. The functionalists avoid this step by means of a central premise, namely that the practical problems that the law is asked to resolve are similar or even . . . identical across different cultures.

Id. at 188–89.

37. Ohnesorge, *supra* note 11, at 1630–31.

flexibility that would allow them to take the large risks that they will face as they try to capture markets and to grow. This is particularly true when the goal is export-led growth, in which products must compete on international markets, the competition will be fierce, and risk-taking and flexibility will be at a premium. None of these tasks is closely related to the strength of minority shareholder protections in corporate law, the central concern of Legal Origins.³⁸

Professor Sokol's article likewise suggests that the problems emphasized by legal origins scholars are not necessarily the same problems that are most pressing in all legal systems. Specifically, he points out that with its focus on private firms, legal origins scholarship has largely overlooked the widespread problem of state-owned-enterprise governance.³⁹

The second criticism of the better solutions tendency is voiced by Jonathan Hill, who argues that the problem with comparative law as an approach to law reform is "obvious: [O]n what basis," he asks, "are comparative lawyers qualified (or at any rate better qualified than lawyers whose studies are limited to their own country) to make evaluations of different legal systems?"⁴⁰ Hill claims that functionalists believe they can make such judgments because their method is "objective."⁴¹ However, according to Hill, this reliance on objectivity is misplaced.⁴² The problem, he argues, is that evaluating different legal solutions requires value judgments—for example, judgments about fairness and justice—but functionalism simply cannot provide a basis for making those judgments.⁴³

38. *Id.*

39. Sokol, *supra* note 12, at 1716.

40. Hill, *supra* note 13, at 102.

41. *Id.*

42. *Id.*

43. *Id.* at 103. Whitman makes a related criticism: "Also problematic, in my view, is another implicit claim of the functionalist approach. This is the claim that it matters relatively little what doctrinal and procedural means are used to solve a particular problem. This claim understates the social consequences of the choice of one particular means over another." Whitman, *supra* note 33, at 313 n.8. Functionalism may also overlook the distributional consequences of different legal rules that provide otherwise similar solutions to a problem. From the perspective of institutionalist theory in political science, this is the problem of "life on the Pareto frontier" discussed by Stephen Krasner. See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336 (1991). The problem is that there can be multiple Pareto-optimal equilibria—in our context, roughly speaking, multiple equally effective legal solutions—that have different distributional consequences. For example, different actors may prefer different equally efficient solutions for

“[C]omparatists,” says Hill, “cannot avoid the fact that their perception of the merits and demerits of different legal systems will be based on a range of (often unarticulated) value-judgments.”⁴⁴ Comparative law’s failure “to provide an objective basis for evaluation . . . is patently clear.”⁴⁵ Therefore, Hill concludes, “[C]omparative law in its ‘applied version’—to the extent that it attempts to determine the proper policy for the law to adopt—is faced by very serious, if not insoluble, theoretical problems.”⁴⁶

Notwithstanding these criticisms, comparative legal scholars should not abandon functionalism’s (and legal origins scholarship’s) better solutions impulse. As Whitman argues,

Traditionally minded comparative lawyers write in ways that reflect the concerns and interests of the legal profession, while neglecting the sorts of issues that preoccupy social scientists and political leaders. Thus, they focus on topics like the different jurisprudential approaches and procedures of the common law and civil law traditions, while finding little to say about the role of the law in different socioeconomic systems. The result is that comparative law scholarship often seems out of tune with the dominant issues of the modern world. Accordingly, our first step . . . should be to shake free from our comfortable habit of addressing ourselves to the community of lawyers. Instead, we should write for a wider audience of readers concerned about contemporary differences in social and economic orientation.⁴⁷

From this perspective, discarding functionalism’s emphasis on the economic, political, and social consequences of legal rules, and rejecting the possibility of comparative legal scholarship that can help

doctrinal, procedural, or other reasons that do not affect the effectiveness of the solution. *See id.* at 338.

44. Hill, *supra* note 13, at 106.

45. *Id.* at 104.

46. *Id.* at 113. Hill concedes that comparative law has some role to play in law reform because it fosters detachment and “scepticism about taking the assumptions and values underlying the English legal system for granted, and offers a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.” *Id.* at 105–06 (internal quotation marks and citation omitted).

47. James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 *YALE L.J.* 340, 344–45 (2007); *see also* Brian Z. Tamanaha, *The Primacy of Society and the Failure of Law and Development*, 39 (St. John’s Univ. Sch. of Law, Legal Studies Research Paper Series Paper No. 09-0172, 2009), *available at* <http://ssrn.com/abstract=1406999> (“Law must develop and every effort should be made to help legal institutions develop in positive ways, with the awareness that this is a never-ending project.”).

inform efforts to improve the law, would be steps in the wrong direction.

However, for functionalism (or legal origins scholarship) to have a promising future in comparative legal scholarship, it must take the criticisms seriously. One way to start addressing the two criticisms noted above would be to clarify functionalism's ambiguous concept of function.⁴⁸ Two ambiguities need to be resolved. First, does "function" refer to the intended function of a legal rule or its actual consequences? To "fulfill" or "perform" a function would seem to imply the latter.⁴⁹ But the term "function" implies not just any consequence but some consequence that is specified or understood a priori.

Second, for whom is a legal rule functional? By focusing on societal problems, functionalists like Zweigert and Kötz seem to assume that legal rules are functional for a society as such.⁵⁰ Likewise, for Merryman the legal system is a mechanism that responds to societal "demands" that are expressed in primary legal rules.⁵¹ Unfortunately, these answers beg the question. Societies are not monolithic; they are composed of diverse individuals and groups. Thus, it is difficult to speak of societal functions per se.⁵² Instead, we must speak in terms of which individuals and groups define the

48. Hill doubts that the function of a legal institution can necessarily be identified at all. He argues that "[t]he function of many legal institutions is . . . debatable" and that, to a large extent, "attempts to identify the function of legal institutions depend on subjective interpretations, which cannot be divorced from value-judgments." Hill, *supra* note 13, at 104.

49. See ZWIGERT & KÖTZ, *supra* note 3, at 34 ("Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil [sic] the same function.").

50. *Id.* Functionalists in sociology and anthropology also refer to societal functions. For them, a society is a "system," a distinct entity with specific needs. As Robert Spencer put it, "Every society possesses what may be termed functional prerequisites, forms necessary to its perpetuation." 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* 1, 15 (Don Martindale ed., 1965).

51. MERRYMAN, *supra* note 18, at 486.

52. Others also have criticized the concept of societal functions. For example, Merton points out the same ambiguity in sociological functionalism, noting that different individuals or groups may receive different benefits from institutions; that is, what is functional for some may not be for others. MARK ABRAHAMSON, *FUNCTIONALISM* 43-44 (1978); see also David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 590-91 n.76 (summarizing argument that functionalists are "hopelessly naïve" for assuming the existence of "society as an organic entity with identifiable 'needs' and 'functions'").

intended consequences of a legal institution. Functionalism proposes neither an answer nor a general approach to these questions.

Therefore, rather than referring generically to a legal rule's "function," functionalist comparative legal scholars should explicitly distinguish between the rule's intended function and its actual consequences. Both concepts are essential. Even if one is able to identify the consequences of a legal institution, one cannot tell if it has fulfilled its function unless one knows what the intended function is. Conversely, even if one is able to identify a legal institution's intended function, one cannot tell whether it has fulfilled that function until one has identified the institution's consequences.⁵³ Legal rules can still be understood as attempted solutions to "social" problems, but only if it is understood that these problems are defined by individuals and groups rather than a society as such.

Beyond clarifying the concept of function, the intended functions/actual consequences approach addresses the criticism that functionalism assumes that different societies face similar problems. It does so by transforming the assumption into a question: What economic, political, or social problems are different individuals or groups in a particular society intending to solve? This approach also responds to the criticism that functionalists assume that they have an objective basis for identifying "better" legal solutions. Rather than implying objectivity regarding the definition of intended functions, this approach acknowledges that the definition can vary both across and within different societies.

There are several possible techniques which functionalist comparative legal scholars could use, singly or together, to pursue understandings of the intended functions of legal rules.⁵⁴ One

53. This distinction is similar to the distinction made in traditional sociological and anthropological functionalist scholarship between manifest and latent functions. For brief explanations of this distinction, see ABRAHAMSON, *supra* note 52, at 17 (sociology), and Spencer, *supra* note 50, at 6–9 (anthropology). As Abrahamson explains,

[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.

ABRAHAMSON, *supra* note 52, at 17.

54. One technique that must not be used is to assume that simply because a legal institution has certain consequences, those consequences must have been intended. This assumption would render the principle of functionality tautological. This was considered a

technique, drawn from anthropology, would use interpretive methods.⁵⁵ Another technique, inspired by political science, would use positive theory and empirical research to uncover the political interests that actually gave rise to the legal institution in question.⁵⁶

The intended function/actual consequences approach would recognize the relativity of the notion of “better solutions”: actual consequences would be assessed with reference to potentially diverse subjective understandings of intended functions, rather than based on presumptions about objective societal goals. Functionalists may seek to speak objectively about the actual consequences of legal rules; but using this alternative approach, they would evaluate those consequences using intended rather than supposedly objective functional criteria. Of course, this does not mean that comparative legal scholars must refrain from using normative arguments to critique legal institutions or their consequences. However, when using functionalist arguments to do so, they should clearly identify the intended functions they are using as criteria.

In summary, as comparative legal scholars contemplate the future of their field, they should embrace functionalism’s—and legal origins scholarship’s—better solutions impulse to improve knowledge about the real-world consequences of legal rules, and to use that knowledge to propose improvements to those rules.⁵⁷ However,

problem with some variants of sociological functionalism. ABRAHAMSON, *supra* note 52, at 39. To solve this problem, Durkheim advocated the use of causal analysis to avoid the pitfall of equating cause and function: “the causes of [a practice] . . . are, then, independent of the ends it serves.” *Id.* at 23. This also was considered a problem with some variants of anthropological functionalism. As Jarvie explains, “To be told that the function of church-going is to express and reinforce social solidarity and that the main test of the desire to express and reinforce social solidarity is church-going is to get into a circle which cannot be broken in favor of a ‘deeper’ explanation.” I.C. Jarvie, *Limits of Functionalism and Alternatives to It in Anthropology*, in FUNCTIONALISM IN THE SOCIAL SCIENCES, *supra* note 50, at 18, 25.

55. See generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973). For a brief summary of interpretive methods, see GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 36–41 (1994).

56. This approach seeks to understand the actual processes that give rise to political outcomes, such as laws and institutions. They typically begin by asking which actors were involved in a decision, what their interests were, and how these interests were aggregated to create a policy. This type of approach could help functionalists understand the interests that in fact define a legal institution’s intended functions.

57. To be clear, I do not mean to suggest that this is the only worthy goal for comparative legal scholars. To the contrary, diverse research agendas and methods will make comparative legal scholarship most vibrant and fruitful. I simply mean to argue that this aspect of functionalism should be a significant part of the field.

functionalist comparative legal analysis suffers from two tendencies that have been justifiably criticized: a tendency to assume that different societies face similar problems and a tendency to imply the ability to make objective claims about which legal solutions to those problems are superior. Functionalist comparative legal scholarship can move toward addressing these criticisms by clarifying its concept of function with a distinction between intended functions and actual consequences. This leaves open the question of how to analyze actual consequences. Part III addresses that question.

III. CAUSAL INFERENCE

While discovering intended functions is largely an interpretive endeavor, discerning the consequences of legal rules is a matter of causal inference. Even without distinguishing between intended functions and actual consequences, as proposed in Part II, causal questions and claims are at the heart of functionalist comparative legal analysis.⁵⁸ In its theoretical form, functionalism seeks “to describe the causes of the legal similarities or differences” that comparative legal scholarship reveals.⁵⁹ Thus, functionalists are sometimes interested in studying legal institutions as effects, and seeking to understand their causes. In its applied form, too, functionalism relies on causal questions and claims. According to Zweigert and Kötz, “Whenever it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it.”⁶⁰ To answer the first question, one must have some

58. Causal questions and claims are also pervasive in other areas of comparative legal scholarship. For example, comparative constitutional law scholarship raises issues about the political and economic factors (understood as explanatory variables) that lead to different constitutional arrangements (the dependent variable), and the impact of those arrangements (now treated as explanatory variables) on outcomes such as political stability, ethnic conflict, fiscal deficits, and public spending (dependent variables). Whytock, *supra* note 14, at 631–32.

59. ZWEIFERT & KÖTZ, *supra* note 3, at 11.

60. *Id.* at 17; *see also* MERRYMAN, *supra* note 18, at 444–45 (“If we are to make and apply law in such a way as to recognize and advance specified social interests we must know how to bring about desired social consequences through law.”); *id.* at 461 (“Action in the arena of law and social change requires some coherent theory or program that is based on justifiable assumptions about the probable effects of alternative courses of action.”). Merryman hoped for an “explanatory comparative law,” which, in 1974, he called “very nearly a virgin field.” *Id.* at 486. The goal was “to transcend the limitations of specific legal systems in specific societies in the quest for more general understanding of legal behavior.” *Id.* at 464. He sought

understanding of the actual effects of a legal solution on a specified outcome in the country of origin; and to answer the second, one must have some understanding of the likely effects of a similar legal institution in a country that adopts it.

This gives rise to another criticism of functionalism: notwithstanding the centrality of cause-and-effect relationships between legal rules and social problems in functionalist comparative legal scholarship, functionalists generally have not devoted systematic attention to the challenges of causal inference.⁶¹ Causal inference is

to move beyond descriptive comparison to explanatory comparison having the objective of producing or testing general explanatory propositions. *Id.* at 461, 481.

61. See MERRYMAN, *supra* note 18, at 477 (emphasizing the need to take seriously the question of actual consequences, but lamenting that notwithstanding this hoped-for “paradigm shift in comparative law scholarship, . . . in all candor things have not greatly changed”); see also Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125 (“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.”); Whytock, *supra* note 14, at 631–32 (arguing that comparative constitutional law scholars so far have done little to address the causal question in an empirically rigorous manner).

Other critics go further, implying that the necessary causal inferences are not feasible. To engage in causal inference, the explanatory variable (legal rules) must be kept analytically distinct from the dependent variable (a specified social outcome). But Frankenberg argues that this distinction is not possible because law and society are mutually constitutive, not separate. See Frankenberg, *supra* note 1, at 423–24 (criticizing claim that “[law] can be distinguished from its socio-economic and politico-cultural ‘environment,’ with which it is said to interact causally”).

Mark Tushnet has other reasons for questioning the feasibility of making the causal inferences necessary to support functionalist analysis. First, he argues that “functionalist analysis *always* omits some relevant variables.” Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1265 (1999). Tushnet is surely correct; no analysis of any kind can include all relevant variables. Moreover, his criticism points toward a major problem in causal inference: omitted variable bias. Omitted variable bias occurs when the omission of a variable results in a causal inference which either overestimates or underestimates the effect of an explanatory variable. HENRY E. BRADY & DAVID COLLIER, *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* 296 (2004); KING ET AL., *supra* note 55, at 168–82.

But Tushnet may be too pessimistic about the potential for causal inference under these circumstances, because an omitted variable only leads to biased causal inferences if that variable is both correlated with the key explanatory variable and has a causal effect on the dependent variable. KING ET AL., *supra* note 55, at 169. Thus, as King et al. summarize, “[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.” *Id.* Thus, Tushnet is correct: omitted variables can pose serious problems for causal inference. But the circumstances under which this is a problem are limited, which is a reason for cautious optimism about the potential of sound functionalist analysis.

Second, Tushnet argues that “once even a limited number of additional variables are taken into account, the number of cases from which one might actually learn turns out to be

the analysis of observed facts in order to estimate cause-and-effect relationships between one or more hypothesized explanatory variables and a specified dependent variable.⁶² In other words, it is the process of analyzing the influence that one thing has on another thing. Claims and assumptions about cause-and-effect relationships are only as reliable as the underlying causal inferences. Therefore, this is a criticism that functionalist scholars—and other comparative legal scholars asking causal questions, relying on causal assumptions, or making causal claims—should take seriously.

Legal origins scholarship offers lessons—both positive and negative—about how comparative legal scholars can address the challenges of causal inference. The approach of legal origins scholarship has been to rely primarily on regression analysis, a standard statistical method for estimating the causal effects that hypothesized explanatory variables have on a specified dependent variable, while controlling for the effects of other potential explanatory variables.⁶³ In many circumstances, functionalist

too small to support any functionalist generalization.” Tushnet, *supra*, at 1265. His concern is about whether one can make valid inferences about the effects of a particular legal institution in two or more legal systems that otherwise are very different—perhaps socially, economically, culturally, and politically. *See id.*

This criticism points to another central issue in causal inference: comparability. But causal inference actually depends on differences. In particular, the value of the explanatory variables—including the key explanatory variable and relevant control variables—must vary. JOHN GERRING, *SOCIAL SCIENCE METHODOLOGY: A CRITERIAL FRAMEWORK* 189 (2001); KING ET AL., *supra* note 55, at 140, 146. That is, they should *not* have the same values in all the cases being compared. The reason is that “the causal effect of an explanatory variable that does not vary cannot be assessed.” KING ET AL., *supra* note 55, at 146; *see also* GERRING, *supra*, at 189. Thus, it is best to test “causal hypotheses in as many diverse situations as possible.” KING ET AL., *supra* note 55, at 99. Notwithstanding variation of key variables, cases generally are comparable “when they respond in similar ways to similar stimuli.” GERRING, *supra* at 176. As John Gerring stresses,

It is neither necessary nor possible for *all* features to be similar. Indeed, as the criterion of variation suggests, we do not want identical cases. . . . We should not conclude that a heterogeneous sample of cases . . . is undesirable *unless* we have reason to believe that such differences (a) might affect the outcome . . . , and (b) cannot be effectively controlled in the analysis.

GERRING, *supra*, at 177. In summary, while being wisely cautious, Tushnet may be too pessimistic about the feasibility of making the causal inferences necessary for sound functional analysis.

62. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 24–36 (2002).

63. *See* La Porta et al., *Economic Consequences*, *supra* note 7, at 12–28 & tbls.1, 2 & 3 (surveying results of regression analyses used to estimate impacts of legal origins and legal rules on various economic outcomes).

comparative legal analysis could use similar methods to estimate the actual consequences of a legal rule (understood as an explanatory variable) on a specified outcome (the dependent variable).⁶⁴

However, legal origins scholarship is neither a complete, nor necessarily the best, model for making the causal inferences required for functional analysis. First, some of the causal claims advanced in legal origins scholarship are based on attempts to explain previously observed correlations. For example, legal origins scholars first observed a strong relationship between different legal origins and particular types of legal rules, and then attempted to develop an explanation for this relationship.⁶⁵ Moreover, Ohnesorge notes that legal origins scholarship's causal hypotheses "may have been developed in a mood of 'irrational exuberance' over Anglo-American economic ascendance, and by people committed to a free-market vision of capitalism," and criticizes this approach for failing to consider "a range of successful episodes of capitalist development when formulating the hypotheses."⁶⁶ The problem is that there is a difference between testing theoretically derived causal hypotheses and attempting to establish causal claims, but legal origins scholarship sometimes seems to cross from the former to the latter. I do not want to go too far and argue that all comparative legal scholarship should be deductive rather than inductive; however, comparative legal scholars' causal inferences generally are more likely to be reliable if they are developed in a genuine spirit of theory testing.⁶⁷

Second, while legal origins scholarship relies principally on regression analysis, the best attempts at causal inference will not rely

64. See, e.g., Whytock, *supra* note 14, at 658–73 (using regression analysis to estimate the effects of constitutional rules on government spending, while noting the limits of this methodology). See generally Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797 (2009) (discussing use of statistical analysis in comparative legal scholarship).

65. See La Porta et al., *Economic Consequences*, *supra* note 7, at 28–29 (noting that these correlations "require an explanation," that their earlier articles "do not advance such an explanation," and that "[i]n the ensuing years, many academics, ourselves included, [have sought] a theoretical foundation for the empirical evidence").

66. Ohnesorge, *supra* note 11, at 1628.

67. See Bruce Bueno de Mesquita, *Toward a Scientific Understanding of International Conflict: A Personal View*, 29 INT'L STUD. Q. 121 (1985) (arguing that deductive methods should be preferred). *But see* Stephen M. Walt, *Rigor or Rigor Mortis?: Rational Choice and Security Studies*, 23 INT'L SECURITY 5, 31 (1999) (arguing that inductive methods are also important).

solely on quantitative or “large-N” methods, but instead will complement such methods with qualitative or “small-N” analysis.⁶⁸ As I have argued before,

large-N approaches can facilitate understanding of broad patterns of cross-national [legal variation and various social consequences,] . . . allow evaluation of the extent to which hypotheses about the consequences of [legal variation] . . . can be validly generalized across countries, and provide a tool for reducing and estimating the extent of uncertainty surrounding a causal inference.⁶⁹

But “large-N approaches provide relatively little detailed knowledge about specific [legal institutions] and their local contexts, and are less readily able to trace the causal mechanisms that link [legal features] with political, social, or economic outcomes. Small-N methods are often better suited for these tasks.”⁷⁰ Thus, as Ran Hirschl has convincingly argued, the basic principles of qualitative or “small-N” research design are very important for comparative legal scholarship.⁷¹

Professor Ohnesorge’s and Professor Sokol’s articles demonstrate how valuable qualitative analysis can be in comparative law. Ohnesorge’s regional case study of East Asia shows that there can be successful economic development without the types of legal rules advocated by legal origins scholars.⁷² And Professor Sokol’s article defines the relevant “case” not only geographically, but also functionally, offering an impressive cross-national analysis of state-owned-enterprise governance.⁷³

In summary, not only functionalists, but also other comparative legal scholars who ask causal questions, make causal claims, or rely on causal assumptions, should grapple systematically and explicitly with the task of causal inference. Legal origins scholarship is a positive model for comparative legal scholars insofar as it attempts to test its causal claims with statistical methods of causal inference.

68. Note, however, that legal origins scholars have used historical methods to seek explanations for the observed correlation between legal origins and legal rules. *See, e.g.,* La Porta et al., *Economic Consequences*, *supra* note 7, at 28–45.

69. Whytock, *supra* note 14, at 659.

70. *Id.*

71. Hirschl, *supra* note 61, at 132.

72. *See* Ohnesorge, *supra* note 11.

73. *See* Sokol, *supra* note 12.

However, when legal origins scholarship drifts from testing to attempting to establish causal claims, comparative legal scholars should be wary. Moreover, functionalist comparative legal scholarship would benefit from more methodological diversity than legal origins scholarship in its quest to take causality seriously. None of this is to suggest that all comparative legal scholars should ask causal questions or make causal claims about legal institutions; but when they do, they should be explicit about the process by which they make their causal inferences.

IV. LAW'S CONTEXT

In addition to criticisms aimed at functionalism's better solutions impulse and inattention to causal inference, comparative legal scholars have criticized functionalism for failing to take seriously the cultural, economic, political, and social context within which legal rules exist. The functionalists Zweigert and Kötz acknowledge that, beyond legal solutions, comparative legal scholars must consider "everything whatever which helps to mould human conduct in the situation under consideration."⁷⁴ But they argue that "when the process of comparison begins, each of the solutions must be freed from the context of its own system."⁷⁵ Thus, Günter Frankenberg accuses functionalists of "legocentrism": "There is nothing outside legal texts and institutions for functionalists."⁷⁶

74. ZWIEGERT & KÖTZ, *supra* note 3, at 11 (citation omitted). Zweigert and Kötz continue:

Sociologists of law take this for granted, since they start out from the assumption that human behavior is controlled by many factors other than law, but lawyers find it more difficult—and comparative lawyers are generally lawyers of some kind. They have to force themselves to be sufficiently receptive to non-legal forces which control conduct, and here they have much to learn from the more open-minded sociologists of law.

Id.

75. *Id.* at 44. It must be noted, however, that when it comes to explaining differences between solutions (as opposed to outcomes), Zweigert and Kötz clearly do appreciate the importance of non-legal factors:

If we find that different countries meet the same need in different ways, we must ask why. This is a particularly demanding task, since the reasons may lie anywhere in the whole realm of social life, and one may have to venture into the domains of other social sciences, such as economics, sociology or political science.

Id. (citation omitted).

76. Frankenberg, *supra* note 1, at 438.

The so-called “organicist” critique of functionalism implies that this omission renders functionalist comparative legal analysis irrelevant, at least for law reform. The critique, which Mark Tushnet attributes to Montesquieu, is that only legal institutions that emerge organically within a society will be accepted by that society.⁷⁷ 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.⁷⁸

A strong version of the organicist critique would imply that context is determinative: regardless of whether a legal rule works in one society, it will not work in another society because of its unique context—and functionalist comparative legal analysis would have little to contribute to law reform.⁷⁹

Even if one does not accept this deterministic version of the organicist critique, the implication is that functionalist law reform proposals are likely to lead to unintended consequences—or no consequences at all—if they do not take into account country-specific contextual factors.⁸⁰ The reason is that the same legal rule may produce different results in different countries (and perhaps no significant results in some countries) due to such contextual factors.

77. Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST'L L. 325, 333 (1998). Tushnet does not, however, fully endorse the organicist critique, which he refers to as “clearly overstated.” *Id.*

78. Tushnet, *supra* note 61, at 1265.

79. See Tushnet, *supra* note 77, at 334 (“[A] strong organicist position . . . would argue that all constitutional borrowings are bound to fail.”).

80. See Tamanaha, *supra* note 47, at 4–5 (“[S]ociety is the all-consuming center of gravity of law and development. The term ‘society’ is used here in a capacious sense—encompassing the totality of history, culture, human and material resources, religious and ethnic composition, demographics, knowledge, economic conditions, and politics. No aspect of law or development operates in or can be understood in isolation from these surrounding factors. The qualities, character, effects and consequences of law are thoroughly and inescapably influenced by the surrounding society. Because every legal context in every society involves a unique constellation of forces and factors, there can be no standard formula for law; a good law in one location may have ill effects or be dysfunctional elsewhere; unanticipated consequences are to be expected.”); see also Whytock, *supra* note 14, at 676 (arguing that “different constitutional arrangements may interact with country-specific cultural, political or social differences to produce unanticipated consequences”).

Moreover, without understanding the potentially complex interactions between legal rules and contextual factors, it is difficult to estimate the causal effects of legal rules with a useful degree of certainty.

Legal origins scholarship provides a model—albeit an imperfect one—to which functionalist comparative legal scholars can refer as they orient their efforts to respond constructively to these criticisms. In particular, the concept of “legal origins” draws attention to the relationship between legal rules and the economic, political, and social context in which those rules exist. Legal origins scholars define legal origins as “highly persistent systems of social control of economic life,”⁸¹ and posit that these systems generally are exogenous to a given country.⁸² In legal origins scholarship, legal origins are analytically distinct from legal rules: legal origins, an explanatory variable, have “strong and pervasive effects” on legal rules, a dependent variable.⁸³ Although legal origins scholarship attempts to account for a variety of contextual factors surrounding the law—typically by including them as control variables in regression analyses—the most important contextual factor in legal origins scholarship is a country’s legal origin.⁸⁴

In the abstract, then, it might seem that comparative legal scholars should embrace this aspect of legal origins scholarship. However, there are at least two reasons why comparative legal scholars should be hesitant to follow this model too closely. The first has to do with how legal origins scholars operationalize the concept of legal origins. Rather than attempting to independently identify “highly persistent systems of social control of economic life,” they equate these systems with four different “legal traditions” identified by comparative legal scholars: common law, French civil law,

81. La Porta et al., *Economic Consequences*, *supra* note 7, at 63–64.

82. *See id.* at 2 (arguing that “legal traditions were typically introduced into various countries through conquest and colonization, and as such were largely exogenous”); *id.* at 7 (“The key feature of legal traditions is that they have been transplanted, typically though not always through conquest or colonization, from relatively few mother countries to the rest of the world. . . . [This] legal transplantation represents [a] kind of involuntary information transmission”); *id.* at 20 (stating that “legal origins are . . . exogenous”).

83. *See id.* at 5 (noting “the strong and pervasive effects of legal origins on diverse areas of law and regulation”); *id.* at 12 (noting “the links from legal origins to particular legal rules”).

84. *See, e.g., id.* at tbl.V (controlling not only for legal origin, but also gross domestic product, the power of left political parties, and whether there is a proportional representation electoral system).

German civil law, and the Scandinavian tradition.⁸⁵ Thus, in their regression analyses, legal origins are measured by indicator variables for each of these legal traditions.⁸⁶ The problem is that this approach to legal classification no longer describes the principal differences between legal systems with much accuracy.⁸⁷ Furthermore, as Whitman argues, the civil law-common law classification is based on technical legal distinctions regarding different legal systems' principal sources of law and basic procedural characteristics.⁸⁸ These distinctions seem to shed little light on the economic problems that concern legal origins scholars.⁸⁹ The lesson for comparative legal scholars is that taking context seriously requires not only careful, theoretically-informed concepts of relevant contextual factors, but also appropriate operationalization of those factors so that the variables used in a comparative analysis correspond as closely as possible to those concepts.⁹⁰

Second, legal origins scholarship is ambiguous regarding the role of contextual factors. This ambiguity stems from a tension between legal origins scholarship's two distinct research agendas. One agenda is to establish the link between legal rules and economic outcomes. For example, legal origins scholars have analyzed the impact of investor protection laws on the development of financial markets.⁹¹

85. *See id.* at 5–12.

86. *See id.* at tbls.I–V (each using indicator variables for common law, civil law, or Scandinavian legal tradition to operationalize legal origins).

87. *See* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 10–12 (1997) (critiquing the traditional civil law-common law distinction).

88. Whitman, *supra* note 47, at 350–51.

89. *Id.* Whitman elaborates:

Why did these economists [referring to legal origins scholars] not focus on the socioeconomic functions of the law? Why did they think the divide between the common law and civil law “families” was so important? The answer is that when they sat down to do their research, they found a comparative law literature that insisted that the common law-civil law divide was what mattered. They can hardly be blamed for believing what they read.

Id. at 351.

90. *See* KING ET AL., *supra* note 55, at 111 (“[O]ur abstract and general terms must be connected to specific measurable concepts at some point to allow empirical testing. The fact of that connection—and the distance that must be traversed to make it—must always be kept in mind and made explicit.”).

91. *See, e.g.,* La Porta et al., *Legal Determinants*, *supra* note 7, at 1149 (exploring how “legal rules and their enforcement—matters for the size and extent of a country's capital markets”).

In early legal origins scholarship, this legal rules-economic outcomes agenda seemed to have priority: the goal was to test hypotheses derived from law-and-finance theory about the impact of different legal rules on financial development.⁹² According to legal origins scholars, their findings point to “a blueprint for reforms” that can help countries improve the efficiency of their legal rules.⁹³

The other agenda is to establish the link between legal origins—the principal contextual factor in legal origins scholarship—and legal rules.⁹⁴ The concept of legal origins seems to have been introduced primarily for methodological reasons—namely, as an instrumental variable for legal rules to address concerns about endogeneity and reverse causation.⁹⁵ But the legal origins-legal rules agenda now

92. See, e.g., La Porta et al., *Law and Finance*, *supra* note 7, at 1126 (explaining this methodological role of the legal origins variable).

93. See La Porta et al., *Economic Consequences*, *supra* note 7, at 59–63 (describing legal origins scholarship’s reform agenda).

94. See *id.* at 63–64 (describing the “basic contribution” of legal origins scholarship as “the idea that legal origins . . . have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes”).

95. See *id.* at 2–3, 12 (describing legal origins scholarship’s early use of “legal origins of commercial laws as an instrument for legal rules in a two stage procedure, where the second stage explained financial development”). La Porta et al. explain their original logic as follows:

Even if we were to find that legal rules matter, it would be possible to argue that these rules endogenously adjust to economic reality, and hence the differences in rules and outcomes simply reflect the differences in some other, exogenous, conditions across countries. Perhaps some countries chose to have only bank finance of firms for political reasons and then adjusted their laws accordingly to protect banks and discourage shareholders. Some individual rules are probably endogenous. However, this is where our focus on the legal origin becomes crucial. Countries typically adopted their legal systems involuntarily (through conquest or colonization). Even when they chose a legal system freely, as in the case of former Spanish colonies, the crucial consideration was language and the broad political stance of the law rather than the treatment of investor protections. The legal family can therefore be treated as exogenous to a country’s structure of corporate ownership and finance. If we find that legal rules differ substantially across legal families and that financing and ownership patterns do so as well, we have a strong case that legal families, as expressed in the legal rules, actually cause outcomes.

La Porta et al., *Law and Finance*, *supra* note 7, at 1126.

La Porta et al. no longer advocate the two-stage instrumental variables approach. See La Porta et al., *Economic Consequences*, *supra* note 7, at 12 (indicating that they now view legal origins “dangerous to use” as instruments because “legal origins influence many spheres of law-making and regulation”); *id.* at 63 (“We now . . . are skeptical about the use of instrumental variables.”). Nevertheless, they continue to insist that their use of legal origins addresses concerns about reverse causation, explaining that “legal origins are still exogenous, and to the extent that they shape legal rules protecting investors, these rules cannot be just responding to market development.” *Id.* at 20–21.

appears to have taken priority. The central claim in this agenda is that exogenously determined legal origins—again, defined as “highly persistent systems of social control of economic life”—have “strong and pervasive effects on diverse areas of law and regulation, which in turn influence a variety of economic outcomes.”⁹⁶ The implication is that legal origins, not legal rules, are what ultimately dictate economic outcomes. This risks moving toward the strong version of the organicist critique.⁹⁷

Leading legal origins scholars have acknowledged that “[s]ome accuse us of claiming that legal origin is destiny, so any reform of investor protection or of other regulations short of wholesale replacement of the legal system is futile.”⁹⁸ They insist, however, that the legal origins-legal rules claims are not deterministic.⁹⁹ But to leave room for legal rules to have an independent effect on economic outcomes—and thus in order for comparative law reform to be a worthwhile enterprise—it would seem that one or both of two things must be true: either (1) legal origins must be more fluid and susceptible to change than claimed by legal origins scholars, or (2) legal rules must be more independent from legal origins than claimed by legal origins scholars. The problem for legal origins scholarship is that if neither of these is true, the legal rules-economic outcomes agenda loses policy relevance; but the more it moves in the direction of either of the two concessions, the more its concept of legal origins loses theoretical and methodological relevance.

The more productive route would seem to be for legal origins scholarship to relax its quasi-deterministic claims about the impact of legal origins, while continuing to take seriously the importance of legal origins as context.¹⁰⁰ Even without agreement on the concept of legal origins and its operationalization, this approach would at least

96. La Porta et al., *Economic Consequences*, *supra* note 7, at 5; *see also id.* at 63–64 (describing “the basic contribution” of legal origins scholarship as “the idea that legal origins . . . have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes”).

97. *See supra* notes 80–83 and accompanying text.

98. La Porta et al., *Economic Consequences*, *supra* note 7, at 62.

99. *Id.* (arguing that “[t]his is not what Legal Origin Theory says”).

100. In fact, it appears that legal origins scholarship may be heading in this direction. *See id.* at 62 (“The theory indeed holds that some aspects of the legal tradition are so hard-wired that changing them would be extremely costly, and that reforms must be sensitive to legal traditions. Nevertheless, many legal and regulatory rules, such as entry regulations, disclosure requirements, or some procedural rules in litigation, can be reformed without disturbing the fundamentals of the legal tradition.”).

have the virtue of reminding comparative legal scholars that, due to country-specific contextual factors, legal rules may often be resilient to change. And even when formal legal rules can be changed, deeper patterns of economic, political, and social regulation may persist, thereby muting the effects of law reform or leading to unintended consequences.

In summary, comparative legal scholars—particularly functionalist comparative legal scholars—should take context seriously. No analysis can account for all relevant contextual factors—that would be an unrealistic standard.¹⁰¹ But other things being equal, the more carefully an analysis takes into account contextual factors, the more certainty one should be able to have in the resulting inferences about the consequences of legal rules. On the one hand, it probably goes too far to claim that legal rules will necessarily fail if they are based on foreign examples instead of being developed entirely within a society, as implied by the strong version of the organicist critique and a deterministic reading of legal origins scholarship.¹⁰² On the other hand, it almost certainly goes too far to claim that certain types of legal institutions are appropriate for all societies.¹⁰³ Functionalist comparative legal scholars should therefore treat the appropriateness of a particular legal institution for a particular country, regardless of its origins, as an open question that needs to be addressed on a case-by-case basis in light of contextual factors. What is needed is a nuanced and sophisticated understanding of the relationship between legal rules and contextual factors, and how they interact to affect various economic, political, and social outcomes, rather than contextual determinism or one-size-fits-all assumptions. Even if legal origins scholarship's particular concept or measurement of legal origins is problematic, its emphasis on legal origins can at least serve as an important reminder about the limits of comparative law as a law reform tool.

101. See Tushnet, *supra* note 61, at 1265 (“Every society’s law is tied to so many aspects of that society—its politics, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more—that no functionalist account can identify and take into account all the variables that might affect the degree to which participants in one system can learn from the experience in others.”).

102. Cf. Tushnet, *supra* note 77, at 333 (“A strong organicist position . . . would argue that all constitutional borrowings are bound to fail.”).

103. See, e.g., Peter C. Ordeshook, *Are ‘Western’ Constitutions Relevant to Anything Other than the Countries They Serve?*, 13 CONST. POL. ECON. 3, 22 (2002) (arguing that there are universal principles of democratic constitutional design).

V. CONCLUSION

Should comparative law abandon or build upon its functionalist heritage? Based on a critical evaluation of functionalism and of legal origins scholarship—which has a close affinity with functionalism—I conclude that comparative law should build upon functionalism’s legacy. The field should embrace functionalism’s (and legal origins scholarship’s) quest for a better understanding of the real-world consequences of legal institutions and for improved legal solutions to social problems.¹⁰⁴ But future functionalist scholarship must respond to the claim that functionalism has a tendency to exaggerate the extent to which different societies face similar problems and to imply the ability to make objective claims about which solutions are better. I have argued that by distinguishing between intended functions and actual consequences, functionalist scholarship can begin addressing those criticisms.

Moreover, because comparative legal scholarship—especially functionalist scholarship—frequently asks causal questions, makes causal claims, and relies on causal assumptions, it should devote more effort to the task of causal inference.¹⁰⁵ Legal origins scholarship provides one model of causal inference, one largely based on statistical analysis. Although statistical analysis is a tool that functionalist comparative legal scholars can often use to their benefit, there is even more to be gained by combining those methods with qualitative analysis. The contributions of Professor Ohnesorge and Professor Sokol are examples of how fruitful qualitative approaches to comparative legal analysis can be.

Future functionalist comparative legal scholarship should also strive to take law’s context seriously.¹⁰⁶ Legal institutions are likely to interact with country-specific cultural, economic, political, and social factors. Without considering these factors, the causal inferences upon which functionalism relies are unlikely to be reliable, and legal solutions based on functional analysis are likely to lead to unintended consequences. Deterministic notions of context are no more likely to be helpful than one-size-fits-all notions of legal solutions. Future functionalist scholars should instead strive for a more sophisticated

104. *See supra* Part II.

105. *See supra* Part III.

106. *See supra* Part IV.

understanding of how legal institutions interact with contextual factors.

None of this is to imply that functionalism should be *the* approach to comparative law. After all, different approaches are appropriate for different endeavors. Moreover, there are surely many other important lessons that functionalism can learn through critical engagement with legal origins scholarship, as well as other related fields. But a new functionalism that combines the traditional better solutions impulse with a refined concept of function, and that takes causal inference and contextual factors seriously, would have the potential to make valuable contributions to our understanding of law and to the improvement of legal institutions.¹⁰⁷

107. For a different and more comprehensive take on what the future of functionalist comparative legal analysis might look like, see Michaels, *supra* note 4.

