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## Mixing-and-Matching Across (Legal) Family Lines

J. Mark Ramseyer\*

### ABSTRACT

*“Legal origins” scholars explain economic performance by a country’s membership in a given “legal family.” To demonstrate the proposition, they regress various indices of performance on, inter alia, that membership.*

*These regressions are properly specified only if (a) countries cannot switch families, and (b) family membership seriously constrains legal change. If countries can switch, then family membership is endogenous to economic performance—since a country will decide whether to stay in a family with an eye to its expected economic effect. If countries can readily borrow across legal family lines, then membership does not bind—and necessarily can have no effect on performance.*

*Unfortunately, neither of these propositions is true. Countries can indeed switch and borrow—easily. That one does not observe much cross-family switching or borrowing in practice merely reflects the fact—nicely demonstrated by Spamann—that countries find it easier to borrow from other countries that use the same language, and that legal families tend to correlate with linguistic families. Given that statutory options within any one legal family usually offer countries all the options they need, countries have little reason to move outside those linguistic groups.*

*I illustrate the possibility of cross-family switching and borrowing with the example of pre-war Japan.*

### I. THE CAUSES OF GROWTH

Economies thrive (or not) for a variety of reasons. They thrive when governments keep trading markets operational, and define and enforce rights to scarce resources. But they also thrive when workers bring a basic education to their jobs, when firms can exploit a well-

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\* Mitsubishi Professor of Japanese Legal Studies, Harvard University. In assembling these comments, I benefited greatly from conversations with Mark Roe, and comments from Tom Ginsburg, Curtis Milhaupt, and Mark Roe. Holger Spamann graciously saved me from many errors with his patient and generous suggestions to multiple drafts of this article.

developed transportation network, and when entrepreneurs with good projects have ready access to capital.

Some of these “causes” of economic performance are also its “result.” Put otherwise, many of the causes are endogenous to the performance itself. Economies may grow faster when workers bring a basic education, but rich societies choose to invest more heavily in education than poor. They may grow faster where firms can rent sophisticated transportation services, but rich societies choose to build more elaborate transportation networks than poor. They may grow faster when entrepreneurs can tap capital readily, but rich societies offer more elaborate financial services than poor.

Unfortunately for scholars, this two-way causation stymies academic proof. Traditionally, we have explored whether factors  $A_1$  and  $A_2$  (the independent variables) cause outcome B (the dependent variable) by regressing B on  $A_1$  and  $A_2$  through ordinary least squares. We can properly do so, though, only when  $A_1$  and  $A_2$  are not endogenous to the purported effect B. If B also causes  $A_1$  and  $A_2$ , we cannot tell by running ordinary least squares. Education may contribute to economic performance, but we cannot test the proposition by regressing performance on education. Transportation and financial services may enhance performance, too, but we cannot regress economic performance on either.

At times, scholars can find econometric ways around this endogeneity. If we can identify a third variable that causes  $A_1$  but is not itself a function of B, we can run the regression with “instrumental variables.” Yet good instruments are hard to find. Fame may go to scholars who can demonstrate causation unambiguously. But in the field of economic growth, that demonstration has proven maddeningly elusive.

## II. LEGAL ORIGINS AND THE STRUCTURAL THEORY

Enter the “legal origins” team, a shifting coalition of Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishney, with occasional appearances from others.<sup>1</sup> Countries picked their legal systems decades ago, they

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1. A recent iteration that presents itself as a summary but in fact differs from past articles in significant ways is Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008). This legal origins literature is massive, and something of a moving target. In one of the more recent iterations, for example, the authors write that they “adopt a broad conception of legal origin as a style of

reason, sometimes centuries ago. For the most part, the countries did not pick their systems with an eye toward their effect on economic performance. Instead, most found the family thrust upon them by their colonizer.

What is more, continues the “legal origins” team, this initial choice decisively constrained the country’s later legal options. If a country initially adopted the French legal system, it could not readily switch to an Anglo-American regime. Neither could it readily adopt legislative solutions developed in an Anglo-American country.

The econometric possibilities follow straightforwardly. If (a) a country chose its legal family at the outset without an eye on its economic effect, and (b) that choice constrained the range of legal measures it could later adopt, then (c) the country’s legal family (i) potentially mattered, and (ii) was exogenous. Scholars could indeed regress economic variables on a country’s legal family membership.

Crucially, however, scholars can properly run these regressions only if both statements (a) and (b) are true. Suppose that countries choose their legal family with an eye toward its economic effect. When the Japanese government reformed its legal system in the late nineteenth century, for example, it did so explicitly as part of a campaign to build a “rich country with a strong military.”<sup>2</sup> If countries choose their legal family with economic effects in mind, then the choice is indeed endogenous. Scholars cannot properly regress economic outcomes on the initial choice.<sup>3</sup>

But of course not all countries aped Japan. Those that began as colonies could not have chosen their legal families with expected

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social control of economic life (and maybe of other aspects of life as well).” *Id.* at 286. At that level, the authors would seem to be reintroducing the debates among sociologists and anthropologists in the 1950s and 1960s over “national cultures” and national “cultural styles.” Distinctive national cultures may or may not exist, and, if they do exist, may or may not affect patterns of economic growth. But the inquiry into cultural styles is a fundamentally different inquiry from whether growth patterns are affected by having the Napoleonic code, the Prussian code, or the U.C.C. In this Article, I use the term “legal family” as lawyers and legal scholars have long understood it: to refer to the character of laws in place. By this long-established tradition, if a country has a close variation on a set of German civil, criminal, and procedural codes, it is a member of the German legal family. If it has a variation on a set of French codes, it is in the French legal family. I do not discuss any national cultural styles (if there are any) or languages that might (or might not) correlate with legal family membership.

2. JOHN K. FAIRBANK, EDWIN O. REISCHAUER & ALBERT M. CRAIG, *EAST ASIA: THE MODERN TRANSFORMATION* 229 (2004).

3. The endogeneity point is developed elsewhere as well. *See generally, e.g.*, CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW & CAPITALISM* (2008).

economic performance in mind. They did not choose their legal families at all. Rather, the colonial powers simply imposed the family on them, and imposed what they knew best. If the colonial powers designed their own legal systems with expected economic performance in mind, the imposition might still be endogenous to that performance. But table the objection—perhaps the connection is sufficiently weak.

Or suppose a country's initial legal family choice does not constrain current legal policy. For example, suppose first that a country can switch legal families. Granted, a country may have made its initial legal family choice without regard to its economic consequences. But by the second half of the 20th century, virtually all countries passed statutes with their likely economic consequences in mind. If a country were now to switch families, it would be switching with an eye to expected economic performance. If it could switch families but did not, then its decision *not* to switch would itself be endogenous: it does not switch only because it believes that its current family promotes desirable economic outcomes as effectively as any alternative.

Suppose second that a country can readily adopt legal measures from countries in other legal families.<sup>4</sup> Suppose, in other words, that legal family membership does not seriously constrain current legal policy. If it does not constrain, it necessarily has no effect—and logically cannot affect economic performance. Although the legal origins team concedes that “[o]ccasionally, countries adopt some laws from one legal tradition and other laws from another,” it insists that cross-family borrowing is exceptional. For their regressions to mean anything, it must be so.<sup>5</sup> If legal family membership does not constrain but a regression on legal family yields a significant coefficient anyway, that coefficient must—necessarily—capture the effect of some omitted variable.<sup>6</sup>

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4. This point has been nicely made by a wide variety of scholars. *See, e.g.*, MILHAUPT & PISTOR, *supra* note 3. This is also key to Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006), and John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 57 AM. J. COMP. L. 579 (2009).

5. La Porta et al., *supra* note 1, at 288.

6. The irrelevance of the legal variables used by the “legal origins” team is discussed carefully and at length in, e.g., Holger Spamann, *On the Insignificance and/or Endogeneity of La Porta et al.’s ‘Anti-Director Rights Index’ under Consistent Coding* (European Corporate Governance Inst., Working Paper No. 67, 2006), available at <http://papers.ssrn.com/>

## III. SPAMANN

Holger Spamann asks why legal systems change in the directions that they do.<sup>7</sup> Rather than characterize legal families as largely immutable, he recognizes that laws change. Despite this change, however, he properly notes that contemporary countries within a given family still tend to resemble each other. They need not resemble each other because of anything inherent in the original codes, he writes.<sup>8</sup> Perhaps instead they resemble each other because they have changed together—because the changes themselves have followed family lines: “[S]ubstantive differences between countries of different families around the world,” explains Spamann, are “the result of separate diffusion processes rather than of intrinsic differences between common and civil law.”<sup>9</sup>

Two countries in the French legal family may maintain similar legal systems, in other words, but perhaps they do not do so because the French imposed similar codes at the outset. That happened decades ago, and both countries have changed their laws many times since. Rather, perhaps they maintain similar systems because—since adopting the original codes—both countries have copied France. What is more, continues Spamann, they do not both copy France because no other laws would fit with the original French codes. They copy France because they read French.<sup>10</sup>

More specifically, Spamann first observes that legal developments within a legal family tend to correlate. Legal scholars in the former French colonies cite French scholars rather than German or English. Legislators in the former French colonies copy French statutes rather than German or English. Judges in the former French colonies mimic French judges rather than German or English.<sup>11</sup>

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sol3/papers.cfm?abstract\_id=894301; Mark J. Roe & Jordan I. Siegel, *Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus*, 47 J. ECON. LITERATURE 781 (2009); KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

7. See Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 B.Y.U. L. REV. 1813, 1815.

8. *Id.*

9. *Id.* at 1813.

10. See *id.*

11. See *id.* at 1837–44 (describing data on diffusion within French legal family). Presumably, the countries also stay within their legal families because the firms with which they trade most frequently come from the same traditions and would find the laws most familiar. This, however, seems not to be a major part of the debate.

Scholars, legislators, and judges do this, Spamann argues, in part simply for linguistic convenience.<sup>12</sup> Those in the former French colonies follow Paris because they read the French language. They read French because they or their professors studied at French universities. And they learned French and studied in France because—relationship-specific investments being what they are—their domestic firms disproportionately trade with France and other former French colonies.<sup>13</sup>

At least impliedly, perhaps legal family membership itself (as opposed to the language with which it is correlated) just does not matter. Scholars in the former French colonies could read German scholars or French scholars, and could profitably learn from either. They stick with the latter because they read French easily—because of linguistically-driven positive switching costs. They could learn German and read the German scholars, but why bother? Given that the French scholars suit their purposes adequately, any marginal gains would be modest at best.<sup>14</sup> Legislators in the former French colonies could borrow regulatory statutes from Germany too, but, again, why bother? French statutes serve just as well.<sup>15</sup> Much the same logic explains why judges cite French rather than German cases.<sup>16</sup>

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12. *See id.* at 1852.

13. *See id.* at 1855.

14. The marginal (not absolute) costs of moving across legal family lines obviously do depend on the language used in the home country. A Japanese scholar who hopes to adopt a French provision will need to learn French—but would need to learn German if he wanted to borrow a German provision instead. A scholar in a former German colony would already know German. The *gains* (whether marginal or absolute) from moving across legal family lines, however, should not vary. If a country has a German Civil Code, the potential gains to adopting a French-style legal measure do not depend on whether the citizens in the country do or do not speak German.

15. There are multiple ways to solve most of the more common legal problems: statutes, administrative regulations, common law—usually, one can reach an answer from any of these approaches. For the proposition that a country adopts one approach rather than another because of its political history, see Roe, *supra* note 4.

16. Spamann suggests that the tendency for legal changes to diffuse within family lines leads to substantive differences within families. Spamann, *supra* note 7, at 1819–20. Spamann theorizes at some length about why this tendency could occur: “From the point of view of rational actor models used in economics and political science, it may seem puzzling why countries would cling to models of their legal family rather than make a conscious decision of a suitable normative model.” *Id.* at 1862. He then speculates about externalities, collective action problems, and path dependence. *Id.* at 1863–64. In fact, the purported externalities and collective action problems seem implausible: leaders in autocratic governments internalize much of what would otherwise be externalities, and politicians in democracies face competitive

If family membership does not seriously constrain the legal (or other) choices a country makes, then legal family membership itself—the basic legal codes in place—cannot logically affect observed economic performance. If performance is correlated with family membership, that must reflect *other* variables tied to the country's initial colonization. France colonized one group of countries, and administered them in one way; Germany colonized a very different set and administered them differently; and England followed yet another path. Legal family membership correlates with these colonization patterns and—because it does so—with a wide variety of other institutional characteristics besides. To the extent that those other characteristics influence economic performance, any regression of performance on legal family that omits those characteristics will generate significant coefficients on the family variable.<sup>17</sup>

#### IV. DOES LEGAL FAMILY MATTER?

“Legal origins” scholars argue that a country's legal family membership matters and is exogenous. It is immutable, it was chosen without regard to its likely economic consequences, and it cabins the legal policy choices available to national leaders. By contrast, if the legal changes adopted in a country simply depend on the languages that legal scholars can most fluently read, then that membership is either irrelevant, endogenous, or both. This would seem an empirically testable question.

Suppose that—for reasons inherent in the legal technology of codes—countries can neither switch legal families nor borrow across family lines. The former French colonies cannot switch to another legal family, and their French legal codes prevent them from borrowing from any other country. By contrast, suppose Spamann is right. If so, then the French colonies borrow from France primarily because they read French better than they read either German or English. In this latter world, countries could indeed switch families

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electoral markets. The answer to Spamann's puzzle is that countries do *not* cling to inappropriate models. Spamann would have noticed this if he had not constrained his country dataset the way he did.

17. This point is nicely developed in Daniel Klerman, Paul Mahoney, Holger Spamann & Mark Weinstein, *Legal Origin and Economic Growth* (Apr. 30, 2009) (unpublished manuscript), available at [http://law.usc.edu/assets/docs/Klerman\\_Origin.pdf](http://law.usc.edu/assets/docs/Klerman_Origin.pdf), and Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001).

or borrow across family lines. If they do not often do so, they stay within their family only because it presents all the legal policy options they need.

To test the hypotheses, a scholar must look at countries where legal family membership does not correlate with linguistic ties—at French-code countries that do not speak French, or German-code countries that do not speak German. Take Korea. Koreans may speak German no better than French, but they use German codes. According to the structuralists, their legal family membership will prevent them from switching to the French legal family or adopting French statutory measures. Japanese may speak English much better than German, but according to the structuralists they will not be able to switch to the common law system or adopt U.S. regulatory measures.

By contrast, suppose much legal change simply follows linguistic lines. Sometimes, Koreans may decide to borrow from France. Scholars with good German ability may study in Frankfurt and cite their German peers, but those with better French will go to Paris. In turn, Japanese will borrow from the United States. After all, some college students still learn German, but everyone studies English. Most Japanese scholars will find U.S. articles easier to read than German, legislative staffers will find U.S. statutes easier to understand, and judges will find U.S. cases easier to cite. Japan may sport the German Civil Code, but most Japanese were raised on Hollywood and the Beatles. They know English better than German. According to the structuralist theory, they will borrow from Germany anyway. According to Spamann's eminently good sense, they will borrow from the United States and the U.K.

## V. JAPAN

Consider Japan a test. Since World War II, it has followed American legal developments far more closely than German,<sup>18</sup> but perhaps some observers will (quite plausibly) attribute this to the impact of the American-dominated occupation. To avoid the effect of that intervention, consider instead the pre-war period. When

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18. See generally Curtis J. Milhaupt, *Historical Pathways of Reform: Foreign Law Transplants and Japanese Corporate Governance*, in *CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US* 53, 55 (Klaus J. Hopt et al. eds., 2005).

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Japan adopted a western legal system in the late 19th century, it was not a colony. Most citizens did not speak any foreign language at all, and most firms lacked a history of foreign trade. As a result, for testing the impact of legal structure (not language or legal culture, but the laws themselves) on legal family changes or legal borrowing patterns, pre-war Japan offers a nice example.

After toying with Chinese legal models, the early government in 1880 adopted a French-based Criminal Code and Criminal Procedure Code.<sup>19</sup> For its constitution, it looked to Germany, and in 1889 adopted a constitution with Prussian roots.<sup>20</sup>

## SELECTED JAPANESE LAWMAKING

<u>Year</u>	<u>Item</u>	<u>Influence</u>
1880	Criminal Code	French
1880	Criminal Procedure Code	French
1889	Constitution	German
1890	Civil Code	French
1890	Civil Procedure Code	German
1890	Commercial Code	Eclectic
1890	Criminal Procedure Code	Eclectic
1898	Civil Code (II)	German
1899	Commercial Code (II)	German
1905	Secured Bonds Trust Act	Common Law
1907	Criminal Code (II)	German
1922	Criminal Procedure Code (II)	German
1922	Bankruptcy Act	German
1922	Trusts Act, Trust Business Act	Common Law

The government next turned to the Civil Code, Civil Procedure Code, and Commercial Code. In 1890, it passed all three. But where it liked the Napoleonic civil code, it preferred German procedural and commercial rules. Accordingly, in the same year that it adopted a

19. See Kichisaburo Nakamura, *Keibo [Criminal Code]*, in 9 KOZA: NIHON KINDAI HO HATTATSU SHI [HISTORY OF DEVELOPMENT OF EARLY MODERN JAPANESE LAW] 31–61 (Nobushige Ukai et al. eds., 1960); Atsushi Nagashima, *The Accused and Society: The Administration of Criminal Justice in Japan*, in LAW IN JAPAN 297 (Arthur Taylor von Mehren ed., 1963); Kenzo Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868–1961*, in LAW IN JAPAN, *supra*, at 5, 15–17, 18–21.

20. DAI NIPPON TEIKOKU KENPO [Great Japanese Imperial Constitution] (1889); see Takayanagi, *supra* note 19, at 6–12.

French-based Civil Code,<sup>21</sup> it adopted a heavily German Civil Procedure Code<sup>22</sup> and an eclectic Commercial Code.<sup>23</sup> Simultaneously, it replaced the now ten-year-old French-based Criminal Procedure Code with a new, more German statute.<sup>24</sup> Spamann's claim that "the only legal materials that seem to be able to cross legal family lines are those from common law countries"<sup>25</sup> is not quite true.

Having begun with French legislation, the Japanese government gradually turned to Germany. Facing opposition from some conservatives to the Napoleonic code, it redrafted its French Civil Code along Germanic lines. By 1898, it had a new code, and replaced the 1890 one with a German-based statute.<sup>26</sup> It replaced its Commercial Code with a second—again Germanic—code in 1899.<sup>27</sup>

The government did not just look to France and Germany. In 1905, it passed an Anglo-Indian trust statute for its budding financial industry, and added further common-law trust legislation in 1922.<sup>28</sup> In 1907—after using the French Criminal Code for a quarter century—it replaced it with a German-based code.<sup>29</sup> The earlier French-influenced Criminal Procedure Code, however, it kept. Not until 1922 would it swap the French procedural code for a German code.<sup>30</sup> Instead, for fifteen years it paired a German substantive criminal code with a more French-inspired procedural framework.

If legal structure prevents mixing and matching across family lines, no one told the Japanese. During the decades before the Second World War, the Japanese government drew from each of the French, German, and Anglo-American families. Spamann writes

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21. See 1 SAKAE WAGATSUMA, MINPO TAI [OVERVIEW OF CIVIL CODE] 11 (1944); Takayanagi, *supra* note 19, at 27–30.

22. See Takayanagi, *supra* note 19, at 32–33 (describing the Civil Procedure Code); Kohji Tanabe, *The Process of Litigation: An Experiment with the Adversary System*, in LAW IN JAPAN, *supra* note 19, at 73.

23. See TERUHISA ISHII & TSUNEO OTORI, GAISETSU SHOHO [COMMERCIAL CODE COMMENTARY] 17–18 (1975); Takayanagi, *supra* note 19, at 31–32.

24. See Nagashima, *supra* note 19, at 297.

25. Spamann, *supra* note 7, at 1861.

26. See 1 WAGATSUMA, *supra* note 21, at 11; Takayanagi, *supra* note 19, at 30–31.

27. See ISHII & OTORI, *supra* note 23, at 18; Takayanagi, *supra* note 19, at 31–32.

28. See Takayanagi, *supra* note 19, at 33–34.

29. See *id.* at 17–18.

30. See *id.* at 21–23; Ryuichi Hirano, *The Accused and Society: Some Aspects of Japanese Criminal Law*, in LAW IN JAPAN, *supra* note 19, at 274.

“that no country ever fully switched from one legal family to another,”<sup>31</sup> but in the late nineteenth century Japan seems forthrightly to have switched legal families: it began with French legal codes in 1880, but by 1940 had adopted German codes. And during the intervening decades, it mixed and matched with abandon. In 1890, it paired a French-style Civil Code with a more Germanic Civil Procedure Code. From 1907 to 1922, it paired a German Criminal Code with a French Criminal Procedure Code. And after 1905, it added an overlay of Anglo-American trust law.<sup>32</sup>

This is not a government that knew not what it did. During these decades of mix-and-match experimentation, the economy grew explosively. From 1870 to 1920, per capita GDP rocketed from \$737 to \$1696.<sup>33</sup> Concomitantly, the government amassed enormous military power. From its self-imposed (and gun-less, navy-less) isolation of 1853, it built a military machine that would defeat the Czar in 1905, annex Korea in 1910, and begin a ruthless march into north China.

Countries can indeed switch legal families, and thrive. They can borrow across family lines, and thrive. Not to put too fine a point on it, mixing and matching across legal families works.

## VI. CONCLUSION

The “structural theory” is simply wrong. The initial adoption of one set of legal codes does not preclude later switches. Even less does it preclude borrowing across legal family lines.

And if both of those statements be true, then any regression of economic performance on legal origin is fundamentally misspecified. Countries do not need to stay with a set of legal codes. Instead, they decide whether to stay with the economic effect of any potential switch in mind; legal structures are therefore endogenous to expected economic consequences; and scholars cannot properly regress economic performance on legal family membership. Neither

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31. Spamann, *supra* note 7, at 1865.

32. See Takayanagi, *supra* note 19, at 33–34 (trust legislation).

33. See ANGUS MADDISON, STATISTICS ON WORLD POPULATION, GDP AND PER CAPITA GDP, 1-2006 A.D., at tbl.3 (2009) (horizontal file), available at <http://www.ggdc.net/maddison/>. During the same period, per capita French GDP grew from \$1876 to \$3227, and German GDP from \$1839 to \$2796. *Id.* Before the start of World War I, in 1914, per capita GDP in France was \$3236 and in Germany \$3059. *Id.* These calculations are measured in 1990 International Geary-Khamis dollars.

does legal family membership limit policy options. Instead, countries can mix and match statutes across family lines; legal family membership does not—logically cannot—seriously constrain legal policy; and legal family membership cannot affect economic outcomes.

To be sure, countries do not often switch families. But they rarely switch only because doing so would rarely earn them a significant benefit. If legal family membership does not constrain legal policy, why bother?