Why Do Countries Adopt Constitutional Review?

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The past few decades have witnessed a sweeping trend toward constitutional review. This movement is arguably one of the most important phenomena in late twentieth and early twenty-first century government. Yet the trend poses important puzzles of political economy: Why would self-interested governments willingly constrain themselves by constitutional means? What explains the global move towards the judicial branch? Though different theories have been proposed, none have been systematically tested against each other using quantitative empirical methods. In this paper we rely on a unique new dataset on constitutional review for 204 countries for the period 1781-2011 to test various theories that explain the adoption of the institution of constitutional review. Using a fixed-effects spatial lag model, we find substantial evidence that the adoption of constitutional review is driven by domestic electoral politics. By contrast, we find no evidence that constitutional review adoption results from ideational factors, federalism, or international norm diffusion.

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1. Introduction

The past few decades have witnessed a sweeping global convergence toward constitutional supremacy, institutionally guaranteed through constitutional review by courts or court-like bodies. A wide range of countries – from Afghanistan to Colombia to Uzbekistan – has adopted constitutional review in recent decades, so that today 151 nations have provided the judiciary with a mandate to supervise the constitution. Even the traditional bulwarks of parliamentary sovereignty, such as New Zealand, Britain, and Canada, have adopted some form of constitutional review, albeit limited in scope (Gardbaum 2001). By our account, some 38% of all constitutional systems had constitutional review in 1951; by 2011, 83% of the world’s constitutions had given courts the power to supervise implementation of the constitution and to set aside legislation for constitutional incompatibility. Thus, what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state (De Tocqueville 1835: 72-77).

Arguably, this trend is one of the most important phenomena in late twentieth and early twenty-first century government. But even though this move towards “juristocracy” (Hirschl 2004) has been almost unequivocally endorsed by scholars, jurists, and activists alike, it poses an important puzzle in political economy: Why would self-interested governments willingly constrain themselves by constitutional means? And why would democratic majorities restrict their future political choices and put their faith in the hands of unelected judges? What underlies this radical global move toward “judicialization” or “juristocracy” (Hirschl 2004; Gardbaum 2009)?

Several theories have been proposed to explain this phenomenon. Early theoretical accounts of these developments were federalist or ideational in character. Some argued that constitutional review arose to respond to governance problems such as federalism, or the need to coordinate among multiple branches of government (Shapiro 1999). Ideational accounts instead emphasized a growing awareness of the rule-of-law and rights, or the need to be protected from the vagaries of government action (Cappelletti 1989). More recent work has proposed strategic explanations, in which constitutional review is conceptualized as a response to the domestic electoral market (Ginsburg 2003; Hirschl 2004; Finkel 2008; Stephenson 2003; Erdos 2010). When constitution-
makers foresee losing power after constitutional adoption or revision, they are more likely to institute constitutional review, as the judiciary may protect the substantive values the drafters will be unable to vindicate through the political process. Constitutional review, in this account is a form of “political insurance,” through which constitution-makers safeguard their future political interest (Ginsburg 2003). In addition, there is a recent but growing literature on cross-national diffusion of constitutional rules, which suggests that constitutional provisions are often adopted in response to constitutional developments in foreign states (Goderis and Versteeg 2011; Law and Versteeg 2011; Dixon and Posner 2011; Elkins 2009). If constitutional rules diffuse, so might constitutional review, which drafters may adopt to achieve conformity with international norms (Stone Sweet 2008).

While there is no lack of theories, little is known in an empirical and systematic way about the origins and evolution of constitutional review on a global scale. In particular, none of these theories have been systematically tested against each other using quantitative empirical methods. And thus far, almost no effort has been made to apply theories of norm diffusion to the adoption of constitutional review. This paper takes up these challenges. Drawing on an original dataset that documents the adoption of constitutional review in 204 countries since 1781, we are in a unique position to empirically document the historical trajectory of constitutional review. We then use this data to test which of the theories appear to provide the best explanation for the spread of constitutional review around the globe over the past two centuries.

We find that the adoption of constitutional review is best explained by domestic politics, and in particular, uncertainties in the electoral market. More specifically, when the difference between the proportion of seats held by the first and second parties in the legislative branch is smaller, and thus electoral uncertainty larger, constitution-makers are more likely to adopt constitutional review. This phenomenon, we find, does not depend on the type of review that is adopted, and is present in autocracies, old democracies, and young democracies alike. But while we find empirical support for the theory that constitutional review is adopted as a form of political insurance, we do not find robust evidence to support theories of transnational diffusion, or the idea that constitutional review is adopted in response to previous adoption by other states. This finding has implications for the literature on norm diffusion. Recent work has revealed substantial evidence of diffusion in the realm
of constitutional rights (Goderis and Versteeg 2011). Our findings suggest that the structural part of the constitution is less prone to foreign and international influence than the bill of rights. This dichotomy arguably follows from the fact that structural provisions such as constitutional review are likely to have more direct effects on the political and institutional interests of constitution-makers, while rights provisions can be a relatively inexpensive way of signalling conformity to international norms (Cope forthcoming).

The remainder of this paper is organized as follows. Part 2 provides an historical account of the origins and spread of constitutional review. Part 3 reviews the leading theories that explain the spread of this institution. Part 4 describes our data and methodology, while Part 5 presents our main results. Part 6 discusses sensitivity analyses and the potential endogeneity of our findings. Part 7 concludes.

2. The Origins and Global Spread of Constitutional Review

Constitutional review, which we define as the formal power of a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution, has spread rapidly around the world in recent decades.¹ This power, which Alexis de Tocqueville once deemed to be “peculiar to the American magistrate,” is now a standard feature of most of the world’s constitutions (De Tocqueville 1835: 72-77). As Figure 1 below depicts, constitutional review was non-existent in 1781 but steadily gained popularity over the next 230 years, such that 83% of the world’s constitutions now include it.

¹ Constitutional review is technically a subcategory of judicial review, which also includes review of administrative action for conformity with a statute or the constitution, although the terms are often used interchangeably in the literature. Within the meaning of local court, we include all courts located within a country whose jurisdiction extends over the nation or some part thereof. We use the term local to distinguish systems in which the only review body is external to the country, such as commonwealth countries whose only institution for review is the Privy Council in London. See discussion in Part 4.2 below.
But not all countries adopted the same variety of constitutional review. The first and oldest model of constitutional review can be traced back to the United States federal judiciary and is characterized by decentralized review exercised at every level of the judiciary, with a Supreme Court at the top. An important feature of this model is that review takes place only in the face of a concrete dispute, or a “case or controversy.” In contrast with this American model, a growing number of countries today have centralized constitutional review by placing this power in a specialized constitutional court, and denying the rest of the judiciary the power to void legislation. This kind of centralized review is often “abstract”: the constitutional court does not resolve concrete cases between two litigating parties but answers constitutional questions referred to it by elected government officials, either before or after the adoption of a law. In addition, many constitutional courts may also review concrete disputes, i.e., constitutional questions referred to it by the judiciary in the course of ordinary litigation. Ordinary proceedings are suspended until the constitutional court has ruled on the constitutionality of the statute in question. Once rendered, the constitutional court’s

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2 As the U.S. Supreme Court has noted “[i]t is a basic principle of Article III [of the Constitution] that a justiciable case or controversy must remain extant at all stages of review.” See Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997).
judgement is sent back to the referring court, which decides the case on the basis of the ruling. In a minority of countries using the constitutional court model, individuals can petition the constitutional court directly even without an existing dispute. One particular centralized constitutional review variant, which has its origins in France, allows for abstract review only prior to the adoption of a law. This French model of review is therefore akin to an additional step in the law-making process, whereby the court effectively functions as a third house of the legislature that can invalidate proposed legislation at the request of the legislature or executive. In recent years there has been some convergence between this French model and other modes of specialized constitutional review (Stone Sweet 2008).

Figure 2 depicts the popularity of the decentralized and centralized models of judicial review among the countries that have judicial review in their constitution. It shows that while the decentralized U.S. model used to be dominant, the specialized constitutional court is slightly more popular today. The same trend is apparent from Figure 3, which shows the same data on a set of world maps at 30-year intervals to illustrate the development of this institution around the world over time. The remainder of this section will provide a historical narrative of the spread of the institution of constitutional review.

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3 This form of review, exercised over the course of litigation, is typically considered to be “concrete,” but it is still more “abstract” than review in the American system, as the constitutional court decides the constitutional question in the abstract, not in the context of the lower court’s specific dispute.

4 Because there were only very few cases of constitutional review before 1850, we exclude those from Figure 2.
Figure 2

% Countries with Decentralized and Centralized Review

General_Court
Specialized_Court

year
1800 1850 1900 1950 2000

0 20 40 60 80 100

Figure 3

Judicial Review in 1920

[interval] (country count)
None (35)
Centralized Review (2)
Decentralized Review (16)
No data (155)
A. Early History and the American Model

Constitutional review originated in the American colonial charters and state constitutions, which were used by colonial judges to disapply laws even before the establishment of the federal government (Prakash and Yoo 2003). The U.S. federal Constitution is not explicit about whether federal courts would have the power to strike down statutes incompatible with the Constitution, but many scholars believe that the founding fathers assumed the federal courts would have this power (Snowiss 1990; Treanor 2005). Indeed, Alexander Hamilton (1788) famously devoted much of Federalist 78 to justifying the practice.\(^5\) After *Marbury v. Madison*, 5 U.S. 137 (1803), there was no doubt that the federal courts could disapply federal statutes, though, for many years, courts devoted most of their energy to invalidating state statutes. Even if it was seldom exercised against national legislation, the power’s existence was well recognized by the mid-nineteenth century (De Tocqueville 1835: 28).

A few European nations also adopted some form of constitutional review around the same time. A brief experiment with what would today be called a constitutional court took place in the Netherlands between 1802 and 1805. During this time, the *National Syndicate*, a body comprising three members of the judiciary, exercised centralized constitutional review (Van der Schyff 2010).\(^6\) In the rest of Europe, the early history of constitutional review was limited. Switzerland’s 1848 Constitution allowed citizens to sue for constitutional violations before the federal tribunal (Art. 113.3). Norway’s Supreme Court had constitutional review under the 1814 Constitution but largely refrained from exercising it (Slagstad 1995; Smith 2000). Portugal introduced constitutional review in the Constitution of 1911 (Art. 63), but it was likewise rarely exercised.

It was not until the adoption of written constitutions in the new nations of Latin America that the institution began to spread more widely, even if the power was in many cases more formal than real. Some early Latin American constitutions modelled their judiciary on the U.S. pattern, thus

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\(^5\) He argued, for example, that the Constitution can be “preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”

\(^6\) It is interesting that the Netherlands was one of the early adopters of constitutional review, considering that today it is one of the remaining countries without constitutional review (Netherlands Const. art. 120 (1983)).
allowing the ordinary judiciary, and ultimately the Supreme Court, to exercise judicial review. For example, the Supreme Court established by the 1824 Mexican Constitution had the power to adjudicate “infractions of the Constitution and general laws” (Art. 137). However, the court struggled for judicial independence and was finally subsumed by the executive in 1855 (Hale 2000). Regardless, the 1824 Constitution made clear that Congress had final interpretive authority over the constitution (Art. 165). Several other early constitutions in Latin America adopted the U.S.-style constitutional review, though the power was exercised fairly sparingly if at all (Rosenn 1974).

The 1857 Constitution of Mexico introduced the suit of *amparo*, which would become the wellspring of rights protection in Latin America. The suit of *amparo* is comparable to the American model of judicial review, in that review powers are placed within the general judiciary and that courts can only exercise concrete review. Yet an important difference is that these decisions traditionally had effect only *inter partes* and not *erga omnes*; any finding of constitutional violations is restricted to the case at hand and does not have any general effects. Thus, courts could not nullify a statute when they found it to be unconstitutional; they could only correct its application in the particular case. In other words, the court decisions did not have any precedential value. In that sense, this conception of constitutional review fits well within the civil law tradition, which traditionally does not recognize precedents and generally denies law-making authority to the courts (Merryman and Pérez-Perdomo 2007).

The *amparo* suit became influential in other countries beginning in the latter part of the nineteenth century. It later spread to the constitutions of most Latin American countries, and even to

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8 Articles 101 and 102 of the 1857 Mexican Constitution allowed federal courts to “resolve all controversies arising from violations of individual constitutional guarantees” (Hale 2000: 267). While this language suggests a broad protection, the *amparo* suit in practice became a mechanism to appeal lower court decisions for alleged misapplication of law in violation with constitutional rights guarantees (Hale 2000: 267-68). This was because Article 14, which states that “no one can be judged or sentenced except by laws made prior to the fact and exactly applied to it by the tribunal that had previously enacted the law.” The phrase “judged and sentenced” shifted protection from rights abuses by the government in general to abuses by bad judges (Hale 2000: 267), while the “exactly” was interpreted as “literally” and opened the door for numerous appeals from lower court decisions for alleged misapplication of law (Hale 2000:268).
the Philippines. But despite the widespread prevalence of the amparo suit, Latin American courts were hardly vigorous in their powers of review until the emergence of democracy in the late twentieth century. Yet the similarity in constitutional form set the region apart from other parts of the world as an early mover toward judicial protection of fundamental rights (Ferrer MacGregor 2006; Brewer-Carias 2008).

In sum, the early history of judicial review was mainly a U.S. and Latin American phenomenon and was relatively limited in practice. Moreover, rights protection in Latin America took place through the amparo suit, rather than through full-fledged review with general application. In recent decades, however, Latin American notions of constitutional review have begun to converge with understandings of this institution in other parts of the world. For instance, the Colombian *Accion de Tutela*, adopted in the 1991 Constitution, allows challenges to generalized grievance common to the population (Art. 86) and has general effect. Mexican constitutional amendments in 1994 introduced the *Acción de inconstitucionalidad*, which allows certain government institutions to challenge statutes as violative of the constitution. And in 2011, constitutional amendments established some categories of rights for which amparo can be used for *erga omnes* challenges (Magaloni 2011).

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10 There were other innovative uses of constitutional review in Latin America. Art. CXXXI of El Salvador’s 1871 Constitution required the Supreme Court of Justice to examine all the existing secondary laws for compatibility with the new constitution.

11 These government institutions are the Procurador General de la República, political parties, 33% of the congress that issued the statute, and the ombudsman. Technically Art. 105 of the Constitution provided a similar power prior to the 1994 judicial reform, but important implementing legislation was lacking. Between 1917 and 1994, only 33 actions of this type were brought. In 2008 alone, the figure was 174 (De La Garza Santos, manuscript).
B. Kelsen’s Innovation

In the early history of constitutional review, review was typically exercised within the ordinary judiciary and ultimately, a supreme court or other general judicial body. The great Austrian legal theorist Hans Kelsen designed a new approach to constitutional review for the 1920 Constitution of the Austrian First Republic. Consistent with his later scholarly masterpiece, the Pure Theory of Law (1934), Kelsen saw the constitution as the fundamental norm of the state that served as the ultimate basis for all other law. As such, a contradiction between the “lower” norm and the highest norm had to be resolved in favor of the latter. But this hierarchy did not address who should be empowered to make this determination. Ordinary judges, in Kelsen’s view, were servants of the law, and their task was limited to interpreting and applying it. Judges were not empowered to make law, nor could they properly determine the constitutionality of legislation. This view squarely falls within the civil law tradition which, building on Montesquieu, envisions a strict division of labor between three branches of government rather than a system of checks and balances in which the different branches have overlapping and potentially conflicting roles (Merryman 2007). In order to preserve legislative sovereignty (and the traditional conception of separation of powers) as much as possible, Kelsen designed a special and more explicitly political body called a Constitutional Court, whose members were appointed for life by the legislature to adjudicate constitutional disputes, chiefly those involving Austrian federalism. When an ordinary court came upon a constitutional issue in the course of adjudication, it was to suspend the case and send the issue to the Constitutional Court for adjudication and possible annulment of a law (Austria Const. art. 89 (1920)).

This model, which is sometimes known as the Kelsenian model of constitutional review, was soon adopted in other countries, including Czechoslovakia (Const. art. 54.13 (1920)), Liechtenstein (Const. art. 104 (1921)), and Iraq (Const. art. 83 (1925)), ultimately finding a place in the Basic Law of post-war Germany. Whereas the Austrian model gave the states, central government, political figures, and ordinary courts limited access to the Court, the German model introduced the device of the individual constitutional complaint, in which any individual could complain about the constitutionality of a statute or government action, even without a specific case or controversy. This
new mechanism played an important role in democratizing access to the constitutional court, and associating the institution with the protection of rights. An essentially similar institutional arrangement, but one without direct constitutional complaint, is found in Italy (Ferejohn and Pasquino 2004; 2012). Constitutional courts of the Kelsenian type were adopted throughout Europe after the World War II (for example in Portugal 1976, Spain 1978, and Belgium 1985) and spread to the former Soviet bloc after the cold war in the so-called third wave of constitutional review (Elster 1995).

C. The French Variant

Another model of constitutional review is associated with the 1958 Constitution of France, and was transposed to many French colonies that gained independence shortly thereafter (Favoreu 1990; Stone Sweet 1992). In this model, the focus of constitutional control was not the protection of individual rights as much as the preservation of a realm of executive lawmaking, which was one of the innovations of the 1958 Constitution (Stone Sweet 2008). The Conseil Constitutionnel was a specially designated body that heard challenges to legislation from a limited number of governmental actors before legislation was promulgated. (A similar scheme operated under several Ecuadorian constitutions after 1929, when the Supreme Court was limited to pre-promulgation review (Art. 67 (1929); Art. 41 (1945); Art. 67 (1946)).) The French model has evolved radically, first when the Conseil read the 1789 Declaration of the Rights of Man and Citizen into the Constitution, providing a basis for protection of human rights. In 1974, constitutional amendments expanded standing to parliamentary minorities, launching a period of “constitutionalization” of French politics (Stone Sweet 1992). Constitutional amendments in 2008 expanded jurisdiction to include post-promulgation review as well. In short, the version of constitutional review in France has evolved much closer to the German or Italian variant than to the original French formulation. Yet many French colonies have not updated their model to keep pace with the developments in the metropole, so that the distinct French model of pre-promulgation review remains alive and well.
3. Theories of the Adoption of Constitutional Review

What explains the rapid spread of this institution, which was considered exceptional and theoretically problematic into the early twentieth century? The literature has proposed different theoretical explanations for why countries adopt constitutional review. In this section, we briefly survey these theories and translate them into testable hypotheses. In earlier work of both authors, these theories are explored in more detail (see e.g., Ginsburg 2003; Goderis and Versteeg 2011; Law and Versteeg 2011; Galligan and Versteeg forthcoming).

A. Ideational Theories

Early accounts of constitutional review adoption focused on ideas that generate a local demand for constitutional review.12 The ideational story of judicial review adoption focuses on the association between constitutional review and rights (Cappelletti 1989). One of the core premises of the ideational story is that a “mature democracy,” in Ronald Dworkin’s (1990) words, must protect itself from the tyranny of the majority through judicial review of self-binding rights provisions that protect vulnerable groups and individuals (Weinrib 2007; Elster 1993). The development of such mature democracy is often traced back to the World War II: fascist atrocities during World War II demonstrated the potential dangers of unconstrained democracy, causing Europeans to begin to doubt the merits of parliamentary sovereignty in the post war period (Zakaria 2003: 17). The horrors of the war, moreover, provided an impetus for the development of an international human rights regime (Simmons 2009; Henkin et al. 2009), and more generally, induced a growing rights-consciousness around the globe. This growing awareness of rights, which is often portrayed as a bottom-up demand by the people and as a genuine reflection of popular will (Hirschl forthcoming),

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12 We recognize that the conceptual distinction between ideational, multi-level governance, electoral market and diffusion theories is not watertight. For example, the coupling of rights and constitutional review might serve a strategic purpose when rights align with the interests of political elites. This was likely the case for many countries in postwar Europe. The same might potentially be true for the link between federalism and rights. Even though we recognize that these distinctions can be challenged, we merely summarize the existing literature for the purpose of this brief overview.
is what leads countries to embrace a more mature version of democracy, whereby the majority is constrained by judicially enforceable rights (Cappelletti 1989).

Yet ideational accounts of the association between constitutional review and rights must grapple with the fact that the founding cases of constitutional review occurred well before World War II and did not emphasize rights during their first century. Therefore, in a competing ideational account, Shapiro (1999) discusses what he calls the “rule-of-law” theory, suggesting that constitutional review will flourish in countries with stronger allegiances to the rule-of-law and the liberal ideal of limited government. Such rule-of-law countries emphasize legal mechanisms for resolving social and political problems. Because the English common law tradition emphasized this idea (Hayek 1960; Mahoney 2001), English colonies were particularly receptive environments for judicial review. But other countries with a strong rule-of-law tradition, such as Germany with its longstanding Rechtstaat tradition, are likely to be attracted to this institution (Shapiro 2002).

B. Multilevel Governance Theories

In addition to ideational theories, there are also some explanations for that focus on the separation of powers and multi-level governance. Such theories suggest that judicial review helps the establishment of effective governance arrangements in multi-level polities by enforcing the separation of power between the major branches of government, and between the central and provincial/regional legislatures. The persistence and stability of complex governance in multi-layered systems require an independent and apolitical judiciary to serve as an impartial arbiter in disputes concerning the scope and nature of the fundamental rules of the political game. Such a need for judicial review is particularly pronounced in federalist countries (Shapiro 1999), which by definition feature multiple levels of law-making. Indeed, the early systems in which constitutional review was effective, including those in the United States, Austria, and later, Australia and Canada,
were all federal systems, suggesting that there may be a link between federalism and the existence of constitutional review (Shapiro 1999; Weingast 1995).

C. Electoral Market Theories

A different set of theories, electoral market theories, ground the adoption of constitutional review in domestic political logics. It has long been established that constitutional courts should be understood as an integral part of the larger political setting, and cannot be explained independently from it (Dahl 1991; Shapiro 1964). Taking this logic as a starting point, Ginsburg (2003) argues that the spread of constitutional review is driven by demand for political insurance. Constitutional review, he argues, is a solution to the problem of political uncertainty at the time of constitutional design. Parties who fear losing power in the future are likely to prefer constitutional review by an independent court because the court provides an alternative forum for challenging government action and mitigates the risk of electoral loss (Ginsburg 2003; see also Finkel 2008; Erdos 2010; Magealheas forthcoming). On the other hand, stronger political parties will have less desire for independent constitutional review because they anticipate successfully advancing their interests in the post-constitutional legislature (Stephenson 2003; Chavez 2004). Political fragmentation, Ginsburg finds, is associated with constitutional review.

Hirschl (2004) offers a complementary political account of judicialization, which he calls hegemonic preservation. His view is that judicialization, including establishment of constitutional review, is a strategy adopted by elites who foresee losing power. Hirschl’s account is squarely focused on the crucial issue of the timing of the adoption of review (Hirschl 2004; Hirschl forthcoming). In the final stages of their rule, elites who foresee themselves losing power set up courts to preserve some of their substantive values by placing them outside the realm of ordinary law-making (Hirschl 2004). For example, Mexico empowered its Supreme Court in the waning

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13 Some accounts of the growth of judicial review at the supranational level (Alter 2010), and particularly within the European Court of Justice, also portray judicial review as a response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member-states in an era of converging economic markets (Stone-Sweet 2000).
years of PRI rule, presumably to protect its agenda (Finkel 2008; Magaloni 2008). Hirschl and Ginsburg’s theories are similar in that they both rely on intertemporal electoral uncertainty as the primary theoretical driver for the adoption of constitutional review. Hirschl’s hegemonic preservation focuses on declining powers, while Ginsburg’s insurance also accounts for new, non-hegemonic, political parties’ (as in Eastern Europe) support for establishing constitutional review when those parties foresee post-constitutional electoral failure. Both insurance and hegemonic preservation theses, then, are rooted in exogenously specified domestic political incentives.

D. Diffusion Theories

A last set of theories, diffusion theories, are those associated with the literature on policy diffusion. The basic intuition of this literature is that the more countries adopt a particular policy or institution, the more likely others are to follow (Strang 1991). Existing research suggests that countries are influenced by each other in establishing independent central banks (Polillo and Guillén 2005), adopting neoliberal policies (Simmons and Elkins 2004), environmental policies (Frank et al. 2000) and establishing democracy (Gleditsch and Ward 2006; Linos 2011), among other things. Recent work has also found evidence of transnational diffusion in the realm of constitutional rights (Goderis and Versteeg 2011; Law and Versteeg 2011). It is possible that the same logic applies to constitutional review adoption: the more countries adopt constitutional review, the higher the probability that others will do the same.

The diffusion literature has proposed a wide range of mechanisms through which transnational diffusion may take place, “ranging from Bayesian learning to rational competition through hegemonic domination to unthinking emulation of leaders” (Simmons et al. 2006). Each of these mechanisms comes with a distinct logic of why countries would follow each other, and who borrows from whom (Simmons and Elkins 2005). Goderis and Versteeg (2011) conceptualize

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14 In Hirschl’s (2004) account, losing elites typically entrench neo-liberal values, protecting property and the free market, but there are also competing accounts that suggest that the kind of values that are protected by the judiciary are those of the cosmopolitan left (Bork 2003). Ginsburg (2003) does not make any assumptions on the kind of values that are protected through judicial review.
diffusion in the constitutional realm and suggest that constitutional provisions might diffuse as a result of four distinct mechanisms: (1) coercion, (2) economic competition, (3) learning, and (4) acculturation (see also Elkins et al., 2006). The first mechanism, coercion, suggests that powerful states, like former colonizers or aid donors, push for the adoption of specific constitutional arrangements in less powerful states. As an example, the independence constitutions of Britain’s former colonies in Africa and the Caribbean were drafted and negotiated by Britain, which insisted upon the inclusion of a bill of rights modelled after the European Convention on Human Rights (Parkinson 2007: 1-19). In a similar fashion, the United States directed the writing of the 1935 constitution of the Philippines (Billias 2010) and the 1986 constitution of Micronesia (Tamanaha forthcoming), while more recently it exerted pressure on the writing of the 2005 Iraqi Constitution (Feldman 2005).

The logic of the second diffusion mechanism, competition, suggests that states strategically copy particular constitutional arrangements in order to attract foreign buyers and investors (Goderis and Versteeg 2011; Law 2008). The more countries successfully attract investment by adopting specific constitutional rules, the more likely others are to follow, producing a “race to the top” (Law 2008). As an example, the Mubarak regime in Egypt realized that its socialist and nationalist commitments obstructed inflows of capital because investors were always at risk of expropriation, which put it at a comparative disadvantage. As a result, the regime created an independent constitutional court authorized to enforce constitutional guarantees, including an anti-expropriation guarantee (Moustafa 2007: 67-70, 77-79).

The third mechanism, learning, entails a functional borrowing of constitutional provisions among states that share important pre-existing similarities, such as a similar legal system. Where states have information that certain constitutional features are successful in other states that they consider their peers, they may decide to follow that example. As an example, the drafters of the 1922 Irish constitution translated and carefully considered all pre-existing constitutions in Western nations and extensively debated their potential application to the Irish case (Brady forthcoming).

The last diffusion mechanism, acculturation, suggests that states emulate foreign constitutional rules not because they are convinced by the intrinsic merits of these rules, but to gain
international acceptance and legitimacy (Goodman and Jinks 2004; Meyer and Rowan 1977; DiMaggio and Powell 1983; Meyer et al. 1997). Once a critical number of states adopt a certain constitutional rule, this rule may become a global script of the international community, or “world society.” In order to be accepted into world society, states must conform to these global constitutional scripts (de Wet 2006; Bobbitt 2002). As an example, the government of Taiwan, deprived of regular diplomatic relations with most of the world, allegedly engaged in western-style constitutional reform to cultivate the goodwill of other nations (Madsen 2001; Law and Versteeg 2011).

As acknowledged by Goderis and Versteeg (2011), it is often impossible to empirically distinguish these mechanisms from each other, or to establish whether a state is indeed “learning,” “acculturating”, or perhaps adopting foreign constitutional provisions for some other reason. Nonetheless, these mechanisms do help us in conceptualizing the more specific channels through which diffusion might take place. In the case of constitutional review adoption, we expect some channels to be particularly relevant. We expect that an important determinant for the diffusion of constitutional review is whether states share colonial ties. It has been documented that many of the former colonies adopted their independence constitutions under the strong influence of colonial power, which also affected their arrangements on constitutional review (Go 2003). Most of the French former colonies adopted the French style constitutional council, for example, while many of the former British colonies retained the Privy Council as the highest court to exercise constitutional review (Voigt et al. 2007; Go 2003). Other plausible determinants of the diffusion of constitutional review include a shared language, a shared religion and geographic proximity, all of which are also standard channels in the policy diffusion literature (Goderis and Versteeg 2011). Finally, it is possible that the influence of foreign constitutions is global in reach and that diffusion takes place through a “world culture” or a “global world” polity, in which all states influence each other.
4. Data and Methodology

We now turn to the empirical analysis, in which we test the central research question of this paper: why do countries adopt constitutional review? Specifically, we develop quantitative measures for each of the theories set forth in the previous section and use quantitative analysis to test whether any of these accounts are supported by statistical evidence.

A. The Empirical Model

To explain why countries adopt constitutional review, we estimate the following probit model:

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P(y_{it} = 1 \mid y_{it-1} = 0, \sum_{j \neq i} (W_{ijt-1} \times y_{jt-1}), X_{it}) = F(\beta \sum_{j \neq i} (W_{ijt-1} \times y_{jt-1}) + \alpha + \delta_i)
\]

where \(y_{it}\) is a binary variable that captures whether or not a country \(i\) has adopted constitutional review at time \(t\). We use this model to explain the “onset” of constitutional review, or the presence of constitutional review conditional upon the absence of constitutional review in the previous year.\(^\text{15}\)

Thus, the aim of our analysis is to explain why countries adopt constitutional review, not why they retain constitutional review after adoption.

\(F\) denotes the cumulative distribution function of the standard normal distribution, so that we use standard probit maximum likelihood techniques to estimate the parameters of the model. \(X_{it}\) is a

\(^{15}\)In particular, letting \(z_{it}\) represent a dummy variable that takes a value of one if a country’s constitution contains constitutional review and zero if it does not, the dependent variable \(y_{it}\) is constructed as follows:

\[
y_{it} = \begin{cases} 
1 & \text{if } z_{it} = 1 \text{ and } z_{it-1} = 0 \\
0 & \text{if } z_{it} = 0 \text{ and } z_{it-1} = 0 \\
. & \text{if } z_{it-1} = 1
\end{cases}
\]

Since our data has very few instances of removal of constitutional review once adopted, we believe the onset model is appropriate.
set of explanatory variables that captures possible domestic determinants of constitutional review, as conceptualized by the ideational, multi-level governance, and electoral market theories described in the previous section. $\sum_{j \neq i} (W_{ijt-1} \times y_{jt-1})$ is a set of “spatial lags” that capture the weighted average incidence of constitutional review in other countries $j \neq i$ (see Goderis & Versteeg 2011). The weights $W_{ijt-1}$ correspond to the relative connectivity from country $j$ to country $i$ in year $t - 1$ along different dimensions of space (e.g., shared language, shared colonizer). The variable $y_{jt-1}$ captures the presence of constitutional review in country $j$ in the previous year $t - 1$. Thus, the “spatial lags” capture the prevalence of constitutional review in other countries, while recognizing that some foreign countries are more important than others, and thus giving higher weights to countries that are in closer proximity.

$\alpha_i$ is a set of country fixed-effects, which are included to control for observed and unobserved country characteristics that do not vary over time. Factors like whether or not a country has a common law legal heritage or popular attitudes towards human rights are all captured by the fixed-effects. $\delta_t$ is a set of cubic polynomials, $t$, $t^2$ and $t^3$, which are used to account for time, 

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16 We use temporally lagged spatial lags because if we would use contemporaneous spatial lags, we create so-called “simultaneity bias,” whereby we cannot distinguish who influences who if countries adopt judicial review simultaneously (Brueckner 2003). To avoid this bias, we temporally lag the spatial lags by one year. Lagging by one year eliminates simultaneity only if two conditions are satisfied. First, the error terms should not be subject to first-order serial correlation. And second, the adoption of constitutional review by country $j \neq i$ in year $t - 1$ should not directly depend on the adoption of that provision by country $i$ in the (subsequent) year $t$. Because it is not obvious that these two conditions for the elimination of simultaneity are satisfied, we also estimate all specifications using lags that are temporally lagged by five years instead of one. When doing so, results are largely similar to the original.

17 The fixed-effects probit runs into the well-documented “incidental parameters problem”: for a fixed number of within-group observations and a growing number of groups, the fixed-effects cannot be estimated consistently. Yet, the incidental parameter problem is most pronounced in large N, small T data sets (Heckman 1981), while it becomes smaller, if not negligible, in datasets with long time-series. Moreover, a recent study shows that even where the estimated coefficients of the fixed-effects probit model might be biased, the bias for the marginal effects tends to be negligible (Fernández-Val 2009). Given that we report marginal effects, and considering our long time series (from 1781 to 2011), we do not think that the incidental parameters problem is a major concern for our analysis. However, to make sure our choice of the fixed-effects probit model does not affect our results, we re-estimate the baseline specification using a fixed-effects conditional logit model, which does not suffer from the incidental parameters problem. When doing so, results are virtually identical (see section 6 infra). A possible drawback of the conditional logit specification, however, is that it does not allow us to calculate marginal effects, making it impossible to say anything about substantive importance of each of the different theories of constitutional review adoption. Following Goderis & Versteeg (2011), moreover, we re-estimate all findings using a linear probability model, which yields results similar to the fixed-effects probit model. For a recent application of the fixed-effects probit model as used in our baseline analysis
or the growing likelihood of constitutional review adoption as the constitution grows older.\textsuperscript{18} Finally, to account for heteroskedasticity and the correlation of error terms over time, we compute robust standard errors clustered at the country level.

\textit{B. Data Collection}

\textit{1. Constitutional Review}

Our data on constitutional review comes from the Comparative Constitutions Project (CCP). In particular, for every constitution ever written since 1781 we coded whether or not the constitution mandates a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution. This definition distinguishes transnational courts of review, such as the European Court of Justice, the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Caribbean Court of Justice, which are charged with interpreting

\footnotesize{see Bosker and De Ree 2011. For further discussion on how our model specification might affect our findings, see section 6 infra.}

\footnotesize{\textsuperscript{18} Our probit "onset" model is the same as a duration model in which the baseline hazard is considered to be duration independent (meaning that the likelihood of adoption does not increase over time). For constitutional review adoption, however, it seems plausible that probability of adoption will increase with time, as countries might be more prone to adopt institutions that have been around longer. This suggests that we have to account for duration dependence in our model. The literature has proposed different ways of doing so. One option would be to use an event history framework, which is most sophisticated if it comes to modelling duration dependence (see Elkins et al., 2009 for an application). The downside of the event history framework however is that it is less intuitive and also less flexible than an ordinary probit regression. Therefore, we model duration dependence using an ordinary probit model (Box-Steffensmeier et al. 2005). The most common way of doing so is to include time dummies for each time period since an event has taken place (Beck et al. 1998). Though intuitive, this time dummy approach performs poorly when N is relatively small and t is relatively large (see Carter & Signorino 2010, reporting, based on Monte Carlo simulations, that time dummies perform poorly if N < 1000 and t > 15). An alternative approach to modelling time in a duration framework, which does not run into these problems, is through inclusion of natural cubic splines. While easy to implement, this approach requires some non-straightforward modelling decisions and, perhaps most importantly, the cubic splines do not lend themselves to straightforward empirical interpretation. Following recent methodological insights by Carter and Signorino (2010), we simply account for time by putting in cubic polynomials $t$, $t^2$ and $t^3$, which are equivalent to the inclusion of natural splines. For sensitivity we also re-estimated our findings using the duration framework, using a particular a semi-parametric Cox proportional hazards model, a parametric exponential hazards model and a parametric Weibull hazard model, respectively. In all these cases, the results are similar to those obtained from the probit model with cubic splines.}
international treaties (Cf. Stone Sweet 2000; Dixon and Jackson 2012). Conversely, it also excludes systems in which review is limited to examining the compatibility of international treaties with the constitution (Niger Const. art 55 (1960)). In addition, it excludes systems in which review is limited to executive action rather than legislation. This definition of constitutional review moreover is a formal one: it only takes into account the power of review as written down in a nation’s constitution. Of course, we realize that there is a wide range of variation around the world in the degree to which courts are actually able to use their mandate. Yet the strength and independence of any given court is notoriously hard to measure and we believe that our study of the formal mandate will offer important first insights into government’s motivations to adopt constitutional review.

In operationalizing our definition of constitutional review, we consider several difficult coding cases. British commonwealth countries present particular challenges because in some countries the review by the court is not final and binding. As is well known, the United Kingdom has long followed a tradition of parliamentary sovereignty, in which the courts have no general power over legislation (Dicey 1915). This changed somewhat with the adoption of the Human Rights Act 1998, under which local courts perform a limited review for compatibility with the European Convention of Human Rights (Bogdanor 2009). This is a kind of constitutional review, though it is one in which parliament retains the option of legislating contrary to the Human Rights Act, so long as it is clear about doing so. Similarly, the Canadian Charter of Rights and Freedoms allows provincial legislatures to legislate notwithstanding a court decision that the act infringes the Charter (Art. 36 (1982)). These are examples of the so-called “new commonwealth model” of constitutional review, or “weak-form” review (Gardbaum 2001; Tushnet 2003; Erdos 2010). We consider the Canadian case, based as it is on the local constitution, to be a case of constitutional review, though we do not treat the UK system as such.20

19 A recent example of such transnational constitutional review was a decision by the East African Court of Justice that Kenya’s election rules violated the Treaty Establishing the East African Community. (Peter Anyang’ Nyong’o v. Attorney General of Kenya (2006) (East African Court of Justice)).

20 More generally, our definition of constitutional review excludes all cases of review based on the European Convention on Human Rights and Fundamental Freedoms (ECHR). Some European Constitutions, however, like the Dutch Constitution of 1983, do not allow for constitutional review yet nonetheless allow local courts to review statutes for
The Privy Council is more problematic. After formal independence from England, many commonwealth jurisdictions retained the possibility of appeal from the final court in the jurisdiction to the Judicial Committee of the Privy Council in London in cases involving the interpretation of the Constitution (Trin. & Tobago Const. art. 80(1)(c) (1962)). This body, which dates from 1833, retains appellate jurisdiction in some form for 31 different jurisdictions (Voigt et al. 2007). In this sense it is a form of transnational review, but one that is based on the local legal order. No doubt, extra-territorial review functioned to reassure audiences of the quality of the legal system in the early years of independence (Voigt et al. 2007). The drafting of many of these constitutions was carried out in a similar fashion, and we observe close similarities in provisions in many of these cases. In the regression analyses that follow, we opt to include the Privy Council as a form of constitutional review.

We also should define what we mean by a court or court-like body. The key factor for us is that the institution be staffed by judges or justices without significant executive or legislative representation. Of course, many appointment mechanisms to constitutional courts depend on the action of executive or legislative agencies. But if the body is primarily staffed with executive or legislative officials, we do not consider it a court. For example, in many systems with a tradition of parliamentary sovereignty, a legislative body is charged with ensuring constitutionality of legislation. In China, for example, the Standing Committee of the National People’s Congress compatibility with the ECHR. Adjusting our coding so that all ECHR signatories possess constitutional review from the moment they signed the ECHR does not affect our results however.

21 Today, eight independent nations retain the appeal to “Her Majesty in Council,” who will then refer the case to the judicial committee of the Privy Council. These are Antigua and Barbuda, the Bahamas, Grenada, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Tuvalu. For four other states, Dominica, Mauritius, Trinidad and Tobago, and Kiribati retain appeal directly the Committee. Brunei uses the Judicial Committee as well, though it is advisory to the Sultan, who is the head of state.

22 The commonwealth countries with nearly identical Bills of Rights, with largely similar provisions on constitutional review, include Antigua and Barbuda, Bahamas, Barbados, Belize, Botswana, Dominica, Gambia, Grenada, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malta, Mauritius, Nigeria, Samoa, Seychelles, Sierra Leone, Solomon Islands, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Swaziland, Trinidad and Tobago, Uganda, Vanuatu, Zambia, and Zimbabwe. For a historical explanation of these similarities see Parkinson (2007).

23 If we adjust our coding so that the Privy Council is not considered as a form of constitutional review, our findings are largely similar to those for the original coding (in which the Privy Council does count as constitutional review), though a little less significant (specifically, the political insurance variable is significant at the 10 percent confidence level instead of the 5 percent confidence level for the baseline model reported in Table 2, column 1).
interprets the constitution (Const. art. 67(1) (1982)). Similar institutions commonly operate in other socialist countries. For example, in the Constitution of Equatorial Guinea 1968, the Upper House is charged with ensuring constitutionality. We do not consider these cases to have judicial review for our purposes.

On the other hand, partial membership by non-jurists does not disqualify the institution in our view. In the French tradition, the Conseil Constitutionnel includes the former presidents of the republic as a formal matter, currently Valery Giscard d'Estaing and Jacques Chirac. But the majority of the members of the Conseil have judicial or legal experience. Combined with its court-like procedures, we treat this body as exercising the power of constitutional review (Stone Sweet 1992; 1995; 2000).

Another problem comes from constitutions that do not expressly provide for constitutional review. Most famously, the U.S. Constitution omits any direct mention of the power, though, as stated, scholars widely believe that the founders thought that the courts would possess such power (Snowiss 1990; Treanor 2005). The United States is not alone in this respect. The Australian Constitution does not expressly mention constitutional review, but constitutional review has long been considered an “axiomatic” part of the legal system (Foley 2007). In part the formal silence on constitutional review is because the U.S. Constitution served as a model for the Australian one (Billias 2010). While the Australian High Court had long exercised the power, it was not until Australia ended its relationship with the Privy Council in 1987 that the High Court began to assert itself with great vigor. Our approach excludes the small number of cases, chiefly the United States and Australia, whose constitutions do not explicitly provide for constitutional review power even though courts exercise the power in practice.

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24 Indeed, only one of the 11 current members, Jacques Barrot, lacks any prior legal experience.


26 If, however, we recode these countries as possessing constitutional review the results are nearly identical to the original.
Following these rules, we collected information on constitutional review for 204 different countries (including some that have ceased to exist). In the remainder of this section, we explain how we operationalize the different theories of judicial review adoption, and which explanatory variables are included in the model.

2. Ideational and Multilevel Governance Theories

Having discussed our dependent variable, we will next discuss how we operationalize the various theories. Ideational theories that link constitutional review to popular attitudes on rights are rather hard to quantify. At this point, we have no solid measure on the rights-consciousness of any particular country. Yet to the extent any country’s rights-consciousness is stable over time, it is controlled for by the country fixed-effects in our model. Ideational theories that link constitutional review to a rule-of-law tradition (Shapiro 1999) can be captured with a new legal infrastructure index created by Nardulli et al (2011). This index includes country-level data on the number of legal publications published and the number of law schools that are open in any given year. Our assumption is that the more law schools are open and the more legal publications are being produced in any given country, the more a rule-of-law culture has taken hold, since legal infrastructure indicates an increased importance of law in society. We weight these measures according to

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27 Most of our empirical analysis is based on a more limited number of countries however, due to the availability of the explanatory variables. Our baseline specification is based on 135 countries.

28 We experimented with the new ngram tool by google that, according to Science magazine, is “revolutionizing the humanities,” and has provided the impetus for a new academic field “culturonomics”(Cohen 2010; Michel et al. 2010). It allows us to search billions of digitized literary works in 7 major languages (English, Chinese, Hebrew, French, Russian, Spanish and German) and track how often the term “human rights” appears in the literary works written in each language, as well as how this changes over time. Such an exercise would rest on the assumption that the degree to which the term “human rights” appears in a national language literature is a proxy for “rights-consciousness” of a nation. We had to abandon this proxy after consultation with the Google ngram team, because of the limited availability of books in languages other than English.
population size, so that they capture the number of legal publications and law schools per capita.\textsuperscript{29} This data is available for the period 1800-2011.\textsuperscript{30}

For the theories that link constitutional review to the existence of potential governance problems in a multi-layered federal system, we use data from the polityIII data project to construct a variable that captures whether any given country, in any given year possesses a federal system (Gurr et al. 1990).\textsuperscript{31}

3. Electoral Theories

To quantify political insurance theory as conceptualized by Ginsburg (2003), we use data from Henisz (2002) on the party composition of the legislative branch of government to construct a variable that captures the difference between the proportion of seats held by the first and second largest parties in the lower house of the legislative branch.\textsuperscript{32} We realize that such a

\textsuperscript{29} Because data on population size is only available from 1950 onwards, we calculate the average population size for the period 1950-2010 and use this as the weight.

\textsuperscript{30} We could have used a variable that captures whether any given country has a common law system as a proxy for a rule of law tradition, since many believe that the common law tradition is characterized by a high respect for the rule of law (see Hayek 1960). Yet we believe that the number of law schools per capita and the number of legal publications per capita are better proxies for a rule of law tradition. Moreover, a common law variable is collinear with the fixed-effects in our model, which means that the effect of the common law system can only be estimated when omitting the fixed-effects from our model. In the specification that does include the common law variable (reported in Table 2, column 4), it is not a statistically significant predictor of constitutional review adoption.

\textsuperscript{31} In particular, we use “cent” variable in the Polity III dataset, which covers 177 countries from 1800 to 1994. (Although there exists a more recent “Polity IV” iteration of this dataset, the newer iteration lacks the data on federalism used here.) The manner in which this variable is coded divides countries into the following three categories: (1) a “Unitary State” category, in which regional units have little or no independent decision-making authority; (2) an “Intermediate” category; and (3) a “Federal State” category, in which most or all regional units have substantial decision-making authority. We consider a country to be federal when it falls into the third category.

\textsuperscript{32} Specifically, we construct the political insurance variable as follows: \( \frac{P_1}{T_S} - \frac{P_2}{T_S} \), where \( P_1 \) is the number of seats held by the largest party in the lower house of the legislature, \( P_2 \) the number of seats held by the second largest party in the lower house of the legislature and \( T_S \) is the total number of seats in the legislature. In the cases where there is no legislative branch altogether, we assign a value of 1 to the political insurance variable, which is equivalent to assuming that one party holds all seats. The Henisz data is available from 1800-2007 for up to 139 countries. For a description of the variables see Henisz (2002). In 25 cases, this electoral data was not available at the time the first constitution was adopted. In these cases, we interpolate the existing data backwards. This means we assume that the constitution-makers foresaw the composition of seats in the legislation branch after the first election. A case can probably be made that
contemporaneous measure of party composition might be an imperfect measure of electoral politics in any given country in any given year. Specifically, political parties might already have expectations on the electoral make-up of the legislature following the next election, which might differ substantially from the current composition and potentially changes their views on the desirability of constitutional review adoption. To account for this possibility, we also experimented with alternative measures that captures the difference between the proportion of seats held by the first and second largest parties in the lower house of the legislature lagged forward by one, two, three and four years, respectively. When using these alternative measures, the effect of the political insurance variable becomes substantially larger and more significant than when based on the contemporaneous measure.\(^\text{33}\) Yet, because we think it is implausible to assume that parties have perfect information on what will happen after the next election, we will use the contemporaneous measure for the analysis that follows.

We use the same data from Henisz (2002) to operationalize Ran Hirschl’s notion of hegemonic self-preservation.\(^\text{34}\) In this case, we construct a binary measure that takes the value of one in the four years prior to which the largest party in the lower house of the loses power, after it has been in power for at least twelve years. The rationale behind the twelve-year threshold to define hegemony is that the modal maximum lower house term is four years and we assume that, in order for a party to have a hegemonic interest to preserve, it needs to have been in power for three electoral terms. We also experimented with alternative thresholds (of fifteen and twenty years, respectively) and this did not affect our results. We use the four-year threshold for initiating a preservation strategy because we believe that, if governments are losing power, they are likely to preserve their interest in their last electoral term, when they start receiving information that they might not be re-elected.

\(^\text{33}\) The measures that are lagged one, two, three and four years forward are all significant at the 1 percent confidence interval and the effect is up to ten times as large as for the contemporaneous measure as reported in Table 2, column 1.

\(^\text{34}\) The coverage for this variable is lower than for the political insurance variable because in a few cases Henisz does not provide information on which party is the largest one.
4. Diffusion Theories

To capture the influence of the constitutional decisions of foreign countries, we construct a set of so-called “spatial lags.” As discussed above, each spatial lag captures the weighted average incidence of constitutional review in other countries. What distinguishes the different spatial lags from each other is the weighting: each spatial lag is weighted according to a different dimension of space (e.g., geography, language).

To test diffusion through colonial ties, we construct a binary indicator that captures whether any two countries ever shared a common colonizer and interact it with a variable that captures constitutional review adoption. Thus, the spatial weight links all Britain’s former colonies to each other, while the resulting spatial lag captures judicial review adoption by all foreign countries to which any given country is linked through colonial ties. To test diffusion through a shared language, we construct a binary measure that captures whether any two countries share a common official language, and again use it to construct a spatial lag that captures constitutional review adoption by all countries with which any given country shares the same language. To test diffusion through a shared religion, we construct a binary measure that captures whether any two countries share a common dominant religion (Barro and McCleary 2005) and use it to construct a spatial lag that captures constitutional review adoption by all countries with which a country shares a common dominant religion. Finally, to test diffusion through geographic proximity, we construct a variable that captures whether any pair of countries shares a common border and construct a lag that captures constitutional review adoption by neighboring countries.

Table 1 lists

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35 This indicator is created from the CEPII Distance Dataset. [http://www.cepii.fr/anglaisgraph/bdd/distances.htm](http://www.cepii.fr/anglaisgraph/bdd/distances.htm)

36 To address potential problems of non-stationarity, we ‘row-standardize’ the spatial weights matrices (as commonly done in spatial econometrics) by dividing each weight by the sum of weights. As a result, the spatial lags can be viewed as weighted averages.

37 Data comes from the CEPII Distance Dataset.

38 The Barro and McCleary dataset contains information on the prevalence of different religions in both 1970 and 2000. For our baseline estimation we use 1970 data, while we use the 2000 data to test the robustness of our results.

39 Data for both measures comes from the CEPII Distance Dataset.
all the variables used in estimation along with their minimum, maximum, mean and standard deviations.\footnote{The numbers in Table 1 are based on the linear probability model reported in Table 2, column 2, for all variables save “Legal Publications Per Capita,” Law Schools Per Capita,” Hegemonic Preservation,” and “federal,” which are based on the specification in Table 2, column 3.}

<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>(1) N</th>
<th>(2) Mean</th>
<th>(3) Std. Dev.</th>
<th>(4) Min</th>
<th>(5) Max</th>
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</thead>
<tbody>
<tr>
<td>Dependent Variable: Adoption of Constitutional Review</td>
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<td>0.0336</td>
<td>0.180</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
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<td>0.806</td>
<td>0.344</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Diffusion: Shared Religion</td>
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<td>0.157</td>
<td>0.208</td>
<td>0</td>
<td>1</td>
</tr>
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<td>Diffusion: Common Legal Origin</td>
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<td>0.172</td>
<td>0.218</td>
<td>0</td>
<td>0.818</td>
</tr>
<tr>
<td>Diffusion: Common Colonizer</td>
<td>4,969</td>
<td>0.167</td>
<td>0.233</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Diffusion: Common Border</td>
<td>4,969</td>
<td>0.255</td>
<td>0.334</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Diffusion: Shared Language</td>
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<td>0.198</td>
<td>0.246</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Time</td>
<td>4,969</td>
<td>137.4</td>
<td>53.73</td>
<td>1</td>
<td>227</td>
</tr>
<tr>
<td>Time Squared</td>
<td>4,969</td>
<td>21,756</td>
<td>14,337</td>
<td>1</td>
<td>51,529</td>
</tr>
<tr>
<td>Time Cubed</td>
<td>4,969</td>
<td>3.745e+06</td>
<td>3.231e+06</td>
<td>1</td>
<td>1.170e+07</td>
</tr>
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<td>Legal Publications Per Capita</td>
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<td>0.275</td>
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<td>Law Schools Per Capita</td>
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<td>0.0325</td>
<td>0.0301</td>
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<td>0.155</td>
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<tr>
<td>Hegemonic Preservation</td>
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<td>1</td>
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<tr>
<td>Federal System</td>
<td>4,174</td>
<td>0.148</td>
<td>0.355</td>
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<td>1</td>
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</tbody>
</table>

5. Main Empirical Findings

When testing the various explanatory theories against each other, we find that political insurance is a statistically significant and substantively important determinant of constitutional review adoption, while the other theories hold no statistically significant explanatory power. To reach this conclusion, we experimented with a range of different model specifications, which will be discussed in this section. Section 6 will further discuss the robustness of these results as well as to what extent they might represent a causal relationship.

To test the determinants of judicial review adoption, we use the fixed-effects probit model specified in equation (1) as our benchmark specification. Because not all variables discussed in the previous section are available for the full sample period, we first estimate this specification when
including only the variables for which we have the largest coverage across time and across countries: the spatial lags and the insurance variable. These are also our main variables of interest. Table 2, column 1, reports the marginal effects for this specification. The results suggest that the political insurance variable is a statistically significant predictor of constitutional review adoption at the 5% confidence level. Its effect is negative, which means that the larger the difference in the proportion of seats held by the first and second party of the legislative branch, the less likely a country is to adopt constitutional review. This supports the political insurance hypothesis: the more uncertainty there is about which party will hold power in the future, the more likely the constitution is to establish constitutional review.

\footnote{To obtain marginal effects, we set all the variables at their mean value.}
<table>
<thead>
<tr>
<th>VARIABLES</th>
<th>FE Probit</th>
<th>FE LPM</th>
<th>FE Probit</th>
<th>Probit</th>
</tr>
</thead>
<tbody>
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<td>-0.036**</td>
<td>-0.007**</td>
<td>-0.018**</td>
</tr>
<tr>
<td></td>
<td>(0.004)</td>
<td>(0.015)</td>
<td>(0.004)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Diffusion: Shared Religion</td>
<td>0.014</td>
<td>0.094**</td>
<td>0.013</td>
<td>-0.003</td>
</tr>
<tr>
<td></td>
<td>(0.013)</td>
<td>(0.036)</td>
<td>(0.011)</td>
<td>(0.015)</td>
</tr>
<tr>
<td>Diffusion: Common Legal Origin</td>
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<td>0.081</td>
<td>0.010</td>
<td>0.030</td>
</tr>
<tr>
<td></td>
<td>(0.012)</td>
<td>(0.049)</td>
<td>(0.011)</td>
<td>(0.024)</td>
</tr>
<tr>
<td>Diffusion: Common Colonizer</td>
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<td>0.050</td>
<td>0.011</td>
<td>0.009</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
<td>(0.041)</td>
<td>(0.009)</td>
<td>(0.017)</td>
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<tr>
<td>Diffusion: Common Border</td>
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<td>0.008</td>
<td>0.002</td>
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<td></td>
<td>(0.004)</td>
<td>(0.015)</td>
<td>(0.004)</td>
<td>(0.008)</td>
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<tr>
<td>Diffusion: Shared Language</td>
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<td>-0.049</td>
<td>-0.003</td>
<td>-0.020</td>
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<tr>
<td></td>
<td>(0.013)</td>
<td>(0.059)</td>
<td>(0.011)</td>
<td>(0.017)</td>
</tr>
<tr>
<td>Time</td>
<td>-0.000</td>
<td>-0.000</td>
<td>0.000</td>
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</tr>
<tr>
<td></td>
<td>(0.000)</td>
<td>(0.000)</td>
<td>(0.000)</td>
<td>(0.000)</td>
</tr>
<tr>
<td>Time Squared</td>
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<td>-0.000</td>
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<tr>
<td></td>
<td>(0.000)</td>
<td>(0.000)</td>
<td>(0.000)</td>
<td>(0.000)</td>
</tr>
<tr>
<td>Time Cubed</td>
<td>-0.000</td>
<td>-0.000</td>
<td>-0.000</td>
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</tr>
<tr>
<td></td>
<td>(0.000)</td>
<td>(0.000)</td>
<td>(0.000)</td>
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<td></td>
<td></td>
<td>(0.054)</td>
<td></td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.075)</td>
<td></td>
<td></td>
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<tr>
<td>Hegemonic Preservation</td>
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<td></td>
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<td></td>
<td></td>
<td>(0.003)</td>
<td></td>
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<td></td>
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<tr>
<td></td>
<td></td>
<td>(0.005)</td>
<td></td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.0274)</td>
<td></td>
<td></td>
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<td>4,174</td>
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<td>0.000</td>
</tr>
<tr>
<td>Time Effects</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Country Effects</td>
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<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Spatial Weights</td>
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<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Standard errors in parentheses</td>
<td>*** p&lt;0.01, ** p&lt;0.05, * p&lt;0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
We next consider the size of this effect. The marginal effects of the insurance variable reported in Table 2 capture the change in the probability of constitutional review adoption in percentage points for a 100 percentage-point increase in the value of the political insurance variable. This means that in the hypothetical case that the ‘first’ party in the legislative branch sees a 10 percentage point gain in the number of seats it holds (from the mean of 83 percent), the probability of constitutional review adoption decreases by 0.1 percentage points in the given year. To further appreciate the size of this effect, these numbers can be evaluated against a “baseline probability” of adoption, which is the probability of adoption when all predictor variables are evaluated at their sample means.42 This baseline probability of adoption is 0.5 percent in each year. This means that, ceteris paribus, over the course of a twenty-year period, the probability that the average country adopts constitutional review is 12.4 percent.43 But when the proportion of seats held by the first party increases by 10 percentage points, the probability of judicial adoption decreases from 0.5 percent to 0.4 percent in each year. As a result, over a twenty-year period, the probability of adoption becomes 10.3 percent, a decrease of 2.1 percentage points relative to the counter-factual. While this effect might appear to be modest at first, it becomes more sizable over time.

While domestic politics matters, international norms, values, and considerations do not. As can be seen from Table 2, column 1, none of the spatial lags that capture transnational diffusion theory turn out to be statistically significant predictors of constitutional review adoption.44 This is an

42 Calculating the baseline probability as the mean predicted value (as opposed to the predicted value at the sample means) does not substantively change the exposition. The baseline probability of adoption in the mean predicted value specification is 2.5%.

43 These numbers are calculated as $\sum_{t=1}^{T+20} F(\rho \sum_{j \neq t} (\bar{W}_{ijt-1} \times \bar{y}_{jt-1}) + \beta \bar{X}_{it} + \bar{a}_i + \bar{\delta}_t)$ (where an overbar denotes a mean value). Since we do not report the probit coefficients, calculations are available from the authors on request.

44 The correlations between the different spatial lags are relatively high and range from 0.50 to 0.77. We therefore tested whether the spatial lags might be jointly significant. We found that the spatial lags are also not jointly significant in our baseline specification, although they do enter jointly significant in a few of the other specifications reported in Tables 2 and 3. Results and calculations are available from the authors upon request. We also tested whether the diffusion effect might be confined to the post WWII period, as the literature suggest that transnational influences in constitutional design are a post WWII phenomenon (Law and Versteeg 2012b). Yet, when re-estimating our baseline model for two subsamples of the pre- and post WWII period, respectively, we did not find any significant difference between the two periods.
important finding for the literature on policy diffusion, as this suggests that the adoption of constitutional review follows a different logic than the adoption of constitutional rights. Previous research by Goderis and Versteeg (2011) shows that bills of rights are inherently transnational documents, shaped by the constitutional choices of foreign states. Our findings suggest that this logic does not carry over to the choice of institution tasked with enforcing the bill of rights. A possible explanation for this finding is that rights are potentially “cheap talk,” or a low-cost way of paying lip service to international norms (Law and Versteeg 2012c). By contrast, constitutional review adoption might carry ex-post enforcement cost, making constitution-makers less likely to adopt this institution to please international audiences (Cope forthcoming).

These findings are the same when we re-estimate the specification reported in Table 1, column 1 using a fixed-effects linear probability model instead of a fixed-effects probit model. We perform this additional analysis because of the potential econometric problems associated with a fixed-effects probit model (see footnote 20 supra for the specifics). Results are reported in Table 2, column 2.\textsuperscript{45} Again, the political make-up of the legislature is a negative and statistically significant predictor of constitutional review adoption at the 5 percent confidence level. The size of the effect appears to be slightly larger than for the probit model. When the ‘first’ party in the legislative branch suddenly gains 10 percent more seats, the probability of constitutional review adoption decreases by 0.36 percentage points in each year.\textsuperscript{46} Overall, these results are largely similar to the results from the fixed-effects probit model.\textsuperscript{47}

\textsuperscript{45} The LPM is used by, amongst others by Goderis & Versteeg (2011) and Miguel et al. (2004). One possible downside of this approach is that the LPM does not take into account the binary nature of the dependent variable, as a result of which predicted values may fall outside the 0 to 1 interval. Wooldridge notes however that the LPM is often a convenient approximation of the probit or logit model, and, more specifically, that the more of the explanatory variables are binary (or the more “saturated” the model is), the better the performance of the LPM (Wooldridge 2002). In our case, most of our explanatory variables are either binary or bounded between 0 and 1, suggesting that the LPM estimates are likely to be a good approximation of the probit model.

\textsuperscript{46} When using the linear probability model, the spatial lag that captures constitutional review adoption by countries with the same religion is also a statistically significant and positive predictor of constitutional review adoption, although this finding is not robust to alternative specifications.

\textsuperscript{47} See footnote 49 infra for explanation on why we have fewer observations in the probit model.
In order to maximize the number of observations in our sample, we so far only considered the spatial lags and the political insurance variable. Yet, political insurance and transnational diffusion are not the only possible explanations for constitutional review adoption. As discussed in the previous section, there are a number of alternative explanations that we can test using quantitative data. To test whether these other theories hold any explanatory power, we next augment the baseline specification of Table 1, column 1 with an additional four variables: (1) the number of law schools per capita (capturing the rule-of-law theory); (2) the number of legal publications per capita (also capturing rule-of-law theory);\(^{48}\) (3) whether or not a country possesses a federal system (capturing functional theories on coordination);\(^{49}\) and (4) the variable that indicates when hegemonic parties are about to lose power (capturing the hegemonic self-preservation thesis). When re-estimating the baseline specification with these four variables included, none of them turn out to be statistically significant predictors of constitutional review adoption.\(^{50}\) At the same time, the insurance effect is still negative and significant at the 5 percent confidence level, while the spatial lags are again not statistically significant. Because our main interest is in diffusion and political insurance, and because these additional variables reduce the number of observations by over 20 percent, we use the baseline specification reported in Table 2, column 1 as the basis for the further analysis.

Our findings remain the same when we exclude the country fixed-effects from our specifications. In all specifications reported thus far we included fixed-effects to control for all those things within a country that do not change over time. We believe that such country fixed-effects are substantively important, since our analysis compares often radically different countries to each

\(^{48}\) The correlation between the number of law schools per capita and the number of legal publications per capita is only 0.38, as a result of which we consider it appropriate to include both variables in the same specification.

\(^{49}\) The federalism variable varies over time, as countries sometimes move from a centralized government system to federalism, and vice-versa. Yet, because such changes occur only infrequently, there is some concern that the inclusion of this variable in a fixed effects model will leave too little variation to find any effects of federalism. When estimating the same specification without fixed effects however, federalism still is not a statistically significant predictor of constitutional review adoption.

\(^{50}\) Although the hegemonic preservation variable falls only just outside the 10 percent confidence interval, suggesting that there is some weak support for this theory in the data.
other. This observation is further supported by the LR-test statistic for unobserved heterogeneity (reported in Table 2), which indicates that unobserved country heterogeneity is indeed prevalent (Wooldridge 2002). Yet a possible concern with these fixed-effects estimations is that they take out all cross-sectional variation, leaving perhaps too little variation to identify potentially important correlations. Thus, while the inclusion of country fixed-effects decreases the probability of type I errors, whereby we would wrongfully conclude that the proposed theories in the literature indeed explain constitutional review adoption, they actually increase the probability of type II errors, whereby we would wrongfully conclude that these theories do not explain constitutional review adoption (for an overview of the debate on the desirability of fixed effects compare Green, Kim and Yoon 2001 with Beck and Katz 2001 and Oneal and Russett 2001). To address this concern, Table 2, column 4 re-estimates the fixed-effects probit specification from Table 2, column 1 when taking out the country fixed-effects. As can be seen from Table 2, column 4, the results are rather similar to the baseline specification from column 1 in terms of both size and significance. This finding is reassuring and suggests that the fixed-effects do not mistakenly cause us to rule out important substantive explanations.

A. Further Questions: Different Types of Review and Different Types of Countries

Our findings thus far suggest that constitutional review is a product of constitution-makers purchasing political insurance in the face of insecurity over future electoral power. By contrast, there is little evidence to support transnational diffusion, multi-level governance, or ideational

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51 Another possible problem with the fixed-effects approach, which is specific to models with a binary dependent variable, is that we effectively take out all the countries that never experienced any constitutional review onsets, thereby limiting our estimation to those who do. This explains the lower number of observations of the probit model reported in Table 2, column 1 than for the LPM model in Table 2, column 2.

52 This specification includes each of the spatial weights that were previously controlled for by the fixed effects as separate variables. Thus, as an example, this specification does not only include the spatial lag that captures adoption by countries with the same legal origin, but also a set of binary variables for each of the different legal origins on which the spatial weights were based. As a result, any statistically significant effect of the legal origin lag captures constitutional review adoption by countries with the same legal origin, after controlling for the general effect of legal origin. In this fashion, we account for the possibility that countries with certain legal origins (e.g., the common law) are simply more inclined to adopt constitutional review, regardless of the choices of others.
theories. In this section, we further unpack our findings and explore whether the mechanisms behind constitutional review adoption might perhaps be different for different types of constitutional review, as well as for different types of countries.

We first explore whether the process of constitutional review adoption might be different for different types of constitutional review. Purchasing political insurance might be more relevant to the specialized Kelsenian constitutional court than for the decentralized American model. In particular, recent years have seen the growth of the Kelsenian model at the expense of the American model (Law and Versteeg 2012a). As part of the third wave of democratization (Huntington 1991), and after the fall of the Soviet Union, many countries opted for the Kelsenian-style constitutional court as it is easy to craft onto existing institutions and, perhaps more importantly, because existing highest courts were often associated with the previous regime (Ginsburg 2003). It is therefore possible that the documented effect of the electoral market mainly concerns this Kelsenian model, and not the American model. Also transnational diffusion might work differently for different types of constitutional review. For example, the French colonies initially opted for a French-style constitutional council, while Britain’s former colonies under Britain’s direction established a generalist judiciary and granted ultimate powers of review to the Privy Council (Voigt et al. 2007; Go 2003), which suggests that diffusion channels concern specific types of judicial review, rather than the institution in general.

To test whether the determinants of constitutional review adoption depend on the type of constitutional review adopted, we construct two alternative versions of the dependent variable that capture constitutional review by a specialized constitutional court (either of the Kelsenian or the French variety53) and by the general judiciary (the American variety), respectively. We also adjust the spatial lags, so that they also only capture the previous adoption of the American or Kelsenian model of constitutional review. The results of these models are reported in Table 3, columns 1 and 2. Column 1 reports the specification for the American model, while column 2 reports the same specification for the Kelsenian model. These results suggest that there are no important differences

53 Because of the (growing) similarity between these two models of review, and because of the small number of countries that have the French model, we combine the two.
between the two types of constitutional review. In fact, the political insurance effect is not statistically significant for either of these models, although it falls just outside the 10 percent confidence interval for the Kelsenian model. In the case of the Kelsenian model, there is also some evidence of diffusion: the more countries with the same official language adopt this type of constitutional review, the more likely others are to follow. Overall, however, there is little evidence to support the hypothesis that the determinants of constitutional review adoption are different for these different models.

We next explore whether some countries might be more prone to purchasing political insurance than others, and more specifically, whether there might be a difference between democratic and non-democratic countries, respectively. Our initial expectation is that autocracies will be more susceptible to transnational influences than democracies, as autocrats with poor human rights records might adopt constitutional review to pay lip service to the norms of the international community without actually being constrained by such courts (Law and Versteeg 2012c). Even though constitutional review adoption might overall be more costly than rights adoption, autocrats might expect that they will be able to control the courts, thus making adoption of this institution relatively costless. Autocracies will also be less sensitive to the logic of political insurance, since autocratic rulers tend to stay in office longer (Bueno de Mesquita et al., 2005) and are almost by definition less likely to need political insurance to secure their agenda. To explore such differences between democratic and non-democratic countries, we re-estimate the baseline specification reported in Table 2, column 1 for two subgroups of democratic and autocratic regimes, respectively.54

Contrary to our expectations, we find some evidence of diffusion in democratic regimes, but not in autocratic regimes. The results, reported in Table 3, columns 3 and 4, show that democracies follow the lead of countries with whom they share a common colonizer or with whom they share a

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54 We consider a country to be democratic if it has a score of 4 or higher on the polity2 democracy variable from the polity IV data project, which is a threshold that is commonly used in the literature.
religion, although the size of the effect is really small.\textsuperscript{55} This finding suggests that autocratic regimes do not simply adopt constitutional review to secure international approval, possibly because constitutional courts often in fact do constrain autocrats, in ways that are hard to predict up front (see Ginsburg and Moustafa 2008). Democracies, by contrast, turn out to be more susceptible to international norms, possibly because they align with their pre-existing internal preferences. The results also show that the political insurance variable is negative and statistically significant for both democratic and autocratic regimes. Thus, both for the sub-group of democracies and autocracies, the probability of constitutional review adoption increases when the difference between the proportion of seats held by the first and second largest party is smaller. This finding is reassuring as it suggests that the political insurance theory also captures the nuances within democratic regimes, and not simply the broad differences between democracies and autocracies.

Finally, we explore whether, within the subset of democratic countries, newly democratic countries are more likely to adopt constitutional review than old democracies. Newly democratic countries, after all, are likely to consciously consider constitutional review, while at the same time, they do not have much of a history on which to base expectations on who will hold future electoral power (Ginsburg 2003). Yet we do not find any meaningful difference between young and older democracies,\textsuperscript{56} suggesting that the political insurance theory is not confined to young democracies, but applies to new and old democracies alike.

\textsuperscript{55} Columns 3 and 4 again report marginal effects when evaluating all variables at their mean. We opt to estimate two subsamples of democratic countries and autocratic countries rather than work with an interaction term because of the problems associated with interaction terms in non-linear models (Ai and Norton 2003).

\textsuperscript{56} We define young democracies as countries that became democratic in the past 10 years, but we also experimented with a 5- and 15-year threshold.
<table>
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<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
<th>(6)</th>
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<td>Conditional</td>
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<td>Model</td>
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<td>Logit</td>
<td>Probit</td>
</tr>
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<td>-0.000** (0.010)</td>
<td>-0.029** (0.776)</td>
<td>-1.355** (0.193)</td>
<td>-0.599*** (0.193)</td>
</tr>
<tr>
<td>Diffusion: Shared Religion</td>
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<td>0.000 (0.000)</td>
<td>0.000** (0.026)</td>
<td>2.892 (2.258)</td>
<td>0.237 (0.418)</td>
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<tr>
<td>Diffusion: Common Legal Origin</td>
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<td>0.000 (0.000)</td>
<td>0.023 (0.029)</td>
<td>2.245 (2.217)</td>
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<td>-0.000 (0.000)</td>
<td>0.000* (0.31)</td>
<td>-0.014 (2.275)</td>
<td>0.798 (0.467)</td>
<td>0.368 (0.204)</td>
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<td>-0.009 (0.010)</td>
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</tr>
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<td>0.001 (0.001)</td>
<td>0.021 (0.121)</td>
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</tr>
<tr>
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<td>-0.000 (0.000)</td>
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</tr>
<tr>
<td>Time Cubed</td>
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<td>0.000 (0.000)</td>
<td>0.000 (0.000)</td>
<td>-0.00 (0.000)</td>
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<td>0.232</td>
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<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>-</td>
<td></td>
</tr>
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<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
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</tr>
<tr>
<td>Spatial Weights</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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</tr>
</tbody>
</table>

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1
6. Robustness and Endogeneity

In this section, we will explore to what extent the results are robust to alternative model specifications. We will also discuss to what extent our finding that constitutional review is tied to the electoral market can plausibly be regarded as a causal explanation or whether it merely represents a correlation.

Our findings are robust to a range of alternative model specifications. In the previous section we reported results not only from a fixed-effects probit model (Table 2, column 1), but also from a linear probability model (column 2) and a probit model without fixed-effects (column 3). However, as discussed in section 4, none of these models is without potential problems: the fixed-effects probit model potentially suffers from the “incidental parameters problem”; the fixed-effects linear probability model does not take account of the binary nature of the dependent variable; and the regular probit model (without fixed-effects) does not take account of unobserved cross-country heterogeneity. To explore whether any of these potential problems indeed affect our findings, we experiment with two alternative models that do not suffer from these potential problems: (1) a fixed-effects conditional logit model and (2) a random-effects probit model. The results from both of these models (the coefficients and marginal effects of which are reported in Table 3, columns 1 and 2, respectively) are rather similar to our original findings. Yet neither the conditional logit nor the random effects probit models are our preferred baseline model as they come with their own distinct set of problems. In particular, the coefficients produced by the conditional logit model model do not lend themselves to substantive interpretation, while the random effects probit model does not fully take account of unobserved cross-country heterogeneity. However, the fact that both of these models produce results that are very similar to our original specifications suggests that our findings are unlikely to be an artefact of model selection.

While our finding that constitutional review adoption is closely linked to the electoral market is robust to a range of alternative model specifications, there is an open question whether political

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57 The size of the marginal effects of the random effects probit model are larger than in the baseline specification, which probably results from the fact that a random effects model does not take account of unobserved cross-country heterogeneity as the fixed-effects model.
insurance theory is indeed a *causal* determinant of constitutional review adoption (as opposed to a mere correlation). One reason why political insurance might not be a causal predictor of constitutional review is the possibility of *reversed causality*, which means that constitutional review affects the political composition of the legislative branch, rather than vice-versa. This scenario, however, seems a highly unlikely one. Constitutional review does not commonly affect electoral outcomes in a direct manner, and there are only a small number of high profile cases where the courts step into this type of mega-politics (though *Bush v. Gore* may immediately come to mind to American readers). Moreover, at the time that any country decides to adopt constitutional review, there is not typically an active court that can already alter the political composition of the legislative branch through judicial review. The question then becomes whether the *expectation* that constitutional review will be adopted in the future might alter the composition of the legislative branch. Given that constitutional courts rarely venture into the electoral realm and that there might be very little information on which such expectations could be based, this possibility seems highly unlikely.

Potentially more problematic than the possibility of reversed causality is the possibility of *omitted variable bias*. Omitted variable bias is present when there exists an alternative explanation for constitutional review adoption that is related to the political insurance story but omitted from our analysis. In this case, the effect of this alternative, but omitted, explanation would be attributed to the political insurance story, causing us to overestimate the importance of political insurance. Thus, in more technical terms, omitted variable bias is present if the political insurance variable is correlated with omitted factors that are also correlated with constitutional review adoption.

The concern for potentially important but omitted variables is in part mitigated by our inclusion of country fixed-effects, which control for all time-invariant country characteristics. As a result, omitted variable bias could only be caused by time-varying factors. It is possible that such factors indeed do exist. One possible candidate is democracy, which is correlated with demand for political insurance. Democratic countries may simply be more likely to adopt constitutional review, since constitutional review, arguably, is a feature of “mature democracies,” in which majority rule is constrained (Dworkin 1990). To explore this possibility, we augment the baseline specification from
Table 2, column 1 with a democracy variable taken from the Polity IV data project (Gurr et al. 1990). When adding this variable, the political insurance variable is still statistically significant at the 5 percent confidence level, while the democracy variable is only statistically significant at the 10 percent confidence level. This finding is reassuring as it suggests that our findings are not in fact driven by democracy, but by more specific workings of the electoral market instead. We do not include democracy in our baseline specifications, however, because the existence of constitutional review is commonly part of the various available democracy indicators, which makes it hard, if not impossible, to establish how democracy affects constitutional review adoption.\footnote{For example, the democracy variable from the Polity IV data project includes a measure of executive constraints as one of its components, which “refers to the extent of institutionalized constraints on the decision-making powers of chief executives, whether individuals or collectivities” that are imposed by “accountability groups” such as; councils of nobles or powerful advisors in monarchies; the military in coup-prone polities; and in many states a strong, independent judiciary” (Marshall et al. 2010: 24 ).}

This paper has been the first comprehensive empirical analysis of the determinants of constitutional review adoption. It has done so by drawing on a new and unique quantitative dataset that documents the development of this institution across the globe since 1781. It turns out that our findings on why countries adopt constitutional review are remarkably consistent with recent qualitative research on the same question (Ginsburg 2003; Finkel 2008), suggesting that some of the small-N findings extend to the global plane. This is reassuring, as it is well documented that the findings from quantitative research and qualitative research do not always align (Hafner-Burton and Ron 2009). At the same time, we are not yet in a position to draw any final causal conclusions. Even though, to our knowledge, there are no obvious stories that are omitted from our analysis, we have to acknowledge that, at least in theory, there may exist alternative explanations for constitutional review adoption that are not captured by our analysis. While our analysis establishes with some certainty that political insurance is likely to be an important determinant of constitutional review adoption, it is surely not the only determinant. In fact, it is possible (though unlikely) that it is not even a determinant at all, in case there would be a closely related but slightly different explanation for constitutional review adoption. Our analysis, therefore, is merely a first step and it is our hope that future research will further explore the question why countries adopt constitutional review.
7. Conclusion

Constitutional review has spread around the world in recent decades, and several different theories have arisen to account for this development. We have canvassed several different types of theories: (1) ideational theories which view constitutional review adoption as a product of a growing consciousness of the rule-of-law and protection of individual liberties; (2) multi-level governance theories that hold that constitutional review is adopted to coordinate states in a federal system; (3) electoral market theories that hold that constitutional review is adopted when constitution-makers envision themselves out of power after the adoption of the constitution; and (4) diffusion theories that posit that constitutional review is adopted in response to international audiences and constitutional developments in foreign states.

We used a fixed-effects spatial lag model to develop the most extensive empirical test so far of these alternative accounts. Our results provide strong support for the insurance-based theory, and less support for the alternative accounts. The adoption of constitutional review is above all a response to domestic political incentives, rather than ideas, the demands of federalism, or diffusion pressures. The lack of support for diffusion-based accounts is particularly important, given that other work has demonstrated the role of diffusion with regard to constitutional provisions on human rights. We suggest that this reflects the relatively low cost of adopting rights provisions relative to institutional structures in national constitutions. Rights may represent “cheap talk,” while institutions are likely to develop a self-enforcing quality so that constitutional designers must treat them as involving higher stakes.
8. References


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9. Constitutions

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