

# RESPONSE

## COMMENT ON LAW AND VERSTEEG

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In response to David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

### INTRODUCTION

David Law and Mila Versteeg have used their considerable legal and empirical skills to identify what they provocatively describe as the “declining influence of the U.S. Constitution,” or of what they sometimes call “American constitutionalism.”<sup>1</sup> This claim has been headline-grabbing in important part because of the larger sociolegal context, in which the question of American hegemony in the world of global politics and economics is deeply unsettled. Declining influence in the design of constitutions thus resonates with a larger set of anxieties about the role of the United States in the world.

An alternative to seeing greater variations among constitutional instruments as a sign of decline in the influence of the U.S. Constitution within a framework of power hierarchy and competition,<sup>2</sup> is instead to see the increased variations in a framework of evolution and diffusion, and as a sign of the success—not the failure—of the U.S. constitutionalist project. To read “decline” into greater variation may, then, be simply a reflection of anxieties in other spheres, rather than a troublesome development in its own right. In the rest of this comment, I offer brief thoughts on the influence of the U.S. Constitution and on the challenges of accurately and completely tracking such influence. I close with some questions about whether and why influence matters.

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<sup>1</sup> David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

<sup>2</sup> *See id.* at 823–33 (section titled “Other Contenders for the Constitutional Crown”).

## I

## DECLINING INFLUENCE? SUCCESSFUL INFLUENCE? CHOICES OF WHAT TO MEASURE

Choosing what to measure in empirical legal studies involves normative values; understanding the data likewise involves interpretive judgment.<sup>3</sup> For these reasons, there are usually questions to be asked about empirical studies. Law and Versteeg's project is a quite interesting effort to give empirical meaning to the idea of a "generic" constitution, measuring not only similarities and differences but also identifying different constellations of provisions.<sup>4</sup> As would be expected with any innovative effort to measure constitutional *influence*, however, the work raises questions. Below, I discuss questions about (1) the level of generality at which empirical measurement occurs; (2) the effects of excluding constitutional case law and supranational instruments; (3) assumptions of past predominance; and (4) the relative magnitude of any decline in common features. But I also want to draw attention to Law and Versteeg's important findings about multiple constitutional models.

Perhaps the most significant contribution of the U.S. Constitution is a conception of government under and according to a *written* constitution. It is the very writtenness of the Constitution (unlike the unwritten constitution of Great Britain), identified as a central distinguishing feature in *Marbury v. Madison*,<sup>5</sup> that implied both limits on government and judicial enforcement of those limits. Indeed, Law and Versteeg acknowledge that "[t]he idea of adopting a constitution may still trace its inspiration to the United States . . . ."<sup>6</sup> To the extent that more and more countries around the world engage in constitution-making and adopt written constitutions, this may be taken as a sign of the success, influence, or imitation of the project of written constitutions as limits on governments.

Moreover, as noted above, it would seem reasonable to predict that, as more countries adopt written constitutions, the variations included within them would increase. To the extent that the U.S. experience has influenced other countries to adopt written constitutions, it is predictable that different countries in different contexts will adopt variations as they develop their own constitutions,

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<sup>3</sup> Cf. David S. Law, *Constitutions*, in THE OXFORD UNIVERSITY HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 380 (Peter Kane & Herbert M. Kritzer eds., 2010) (noting the "profound" normative implications that empirical questions about constitutions may have).

<sup>4</sup> Law & Versteeg, *supra* note 1, at 772–79.

<sup>5</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

<sup>6</sup> Law & Versteeg, *supra* note 1, at 850.

and that some of these variations will themselves become influential. That is to say, the “decline in influence” Law and Versteeg find might itself be a predictable consequence of the success of the most fundamental idea of the U.S. Constitution.

If one focuses on some of the other larger ideas embodied in the U.S. Constitution, one could say more. True, some ideas in the original Constitution—for example, the Electoral College, or an indirectly elected Senate—have lost appeal, including in the United States itself. But other ideas—separated and cross-checking powers, a written bill of rights, some form of judicial review to keep government within constitutional limits and to protect rights, and representative democracy—have all been highly influential.<sup>7</sup> While the U.S. presidential system is not the only method of organizing executive and legislative power, the idea that government power should not be concentrated in a single institution that is legislature, executive, administrative agency, and judge all in one has become a dominant trope in constitutional thought around the world. And, as I will discuss further below, judicial review of the constitutional actions of other parts of government is a signal feature of the U.S. constitutional project. On representative democracy, the U.S. Constitution is the oldest continuous written exemplar of the possibility that a workable and functioning government for a large country can be founded on regular democratic elections.<sup>8</sup>

Indeed, the idea of a representative democracy under a written constitution has only grown in importance in the years since the Berlin Wall fell. When Lincoln spoke of a “government of the people, by the people, for the people,”<sup>9</sup> he was articulating a normative vision whose appeal has reached across territories and cultures. Although not a unique contribution of the U.S. Constitution, representative

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<sup>7</sup> Although I do not here develop a full list of attributes of U.S. constitutionalism for the purpose of measuring influence, the aspects I have focused on bear a relationship to work that focuses at a higher level of generality than do Law and Versteeg. *See, e.g.*, Louis Henkin, *Introduction*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 1, 11–12 (Louis Henkin & Albert J. Rosenthal eds., 1990) (listing eleven basic features of the U.S. Constitution and four sets of rights); *Introduction* to *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD*, at xv, xviii (Douglas Greenberg et al. eds., 1993) (discussing the definition of constitutionalism as including judicial review, separation of powers, and due process). Of course, many of those ideas—including separation of powers, for example—are drawn from the writings of political theorists that long preceded their concrete instantiation in the U.S. Constitution.

<sup>8</sup> The inequalities and exclusions of the 1787 U.S. Constitution are well known. But for its time, it was a move towards a more democratic form of government.

<sup>9</sup> Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), *reprinted in* Arthur L. Rizer, III, *LINCOLN'S COUNSEL: LESSONS FROM AMERICA'S MOST PERSUASIVE SPEAKER* 200 (2010).

democracy's realization through an unbroken series of elections held under the Constitution, at the times when they were supposed to occur, and sometimes resulting in actual changes in the parties in control, has—notwithstanding its many imperfections—served to knit together the idea of a written constitution and of representative democracy, exerting a powerful and continuing influence across the world.

Thus, the headline-grabber of “decline” may depend on whether the focus is on larger ideas or more detailed provisions. But even as to the content of a constitution's specific provisions, the study's methodology may understate the degree of similarity that continues to exist between the U.S. constitutional system and those of other countries. Indeed, one might wonder whether there has been any substantial decline in influence, rather than a set of departures in discrete, albeit significant, areas.

For one thing, the authors' research design rests, generally, on comparisons only of formal constitutional texts.<sup>10</sup> The exclusion of constitutional case law and conventions may have contributed to the quantifiability and reliability of the empirical analysis. But the study of what can readily be quantified and coded, while interesting, should not obscure that other equally or more important phenomena may be harder to quantify reliably. And the impact of U.S. case law on constitutional design and interpretation in the rest of the world has been considerable.

The impact of the authors' methodology is suggested by the fact that a number of specific rights that the authors describe as existing in “generic”—that is, widely held—constitutions, but not in the United States, are in fact well-fixed in U.S. constitutional case law.<sup>11</sup> These include rights of freedom of movement<sup>12</sup> and women's rights.<sup>13</sup>

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<sup>10</sup> The data set “excludes judicial interpretations and unwritten constitutional conventions and practices, even though these may be integral parts of a country's small-c, or de facto, constitution.” David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1188 (2011). The authors, however, used a de facto as well as de jure code for judicial review. *Id.* at 1198–99. Somewhat confusingly (to this reader), the authors treat the U.S. Constitution as including a right of privacy. Law & Versteeg, *supra* note 1, at 779 & n.32. However, this right was largely developed in case law, as the authors elsewhere implicitly acknowledge. See Law & Versteeg, *supra* note 1, at 809 & n.114 (describing “substantive due process” rights as developed in case law, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), which the authors describe as recognizing “a constitutional right of married couples to use contraceptives”). This right is quite commonly understood as involving the right to privacy. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003) (describing *Griswold* as involving the “right to privacy”).

<sup>11</sup> See Law & Versteeg, *supra* note 1, at 779 tbl.3 (comparing rights found in the U.S. Constitution to those in the “generic” constitution).

<sup>12</sup> See, e.g., *Crandall v. Nevada*, 73 U.S. 35 (1867) (finding constitutional protection of

Indeed, U.S. case law may well have influenced the adoption of formal rights in later adopted written constitutions.<sup>14</sup>

Moreover, among the provisions listed as being found only in the U.S. Constitution, and not in the “generic” constitution, are speedy and public trial rights.<sup>15</sup> But cognate rights are set out in the European Convention on Human Rights (ECHR)<sup>16</sup> and are enforced by the European Court of Human Rights (ECtHR);<sup>17</sup> both the Convention and the ECtHR’s case law function as a form of quasi-constitutional supranational public law for forty-seven member states. Law and Versteeg’s methodological choice to focus only on formal constitutional texts (and not to include externally binding human rights commitments) may thus also have resulted in some overstatement of the degree of separation between the U.S. constitutional system and those of other countries.

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the right to travel through states); *United States v. Guest*, 383 U.S. 745, 757–58 (1966) (treating the constitutional right to travel from one state to another as well-settled); *Saenz v. Roe*, 526 U.S. 489, 500–03 (1999) (grounding different aspects of the right to travel in basic constitutional structure and in the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment). *See also* *Shapiro v. Thompson*, 394 U.S. 618, 642–43 (1969) (Stewart, J., concurring) (emphasizing the breadth and depth of the unqualified right to travel); *Edwards v. California*, 314 U.S. 160, 173 (1941) (finding that a ban on bringing indigents into the state was an “unconstitutional barrier to interstate commerce”). The authors’ treatment of the U.S. Constitution as lacking a right to travel is particularly notable in light of the fact that a constitutional right to travel was first recognized by the Supreme Court in the mid-nineteenth century.

<sup>13</sup> *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that the Constitution generally forbids sex discrimination unless the distinction can be justified under a heightened standard of review). Not only did the Nineteenth Amendment protect women from discrimination in suffrage, but it also laid a foundation for the Court to read the Fourteenth Amendment as protecting more generally against gender bias. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (arguing that the historical relationships between the Fourteenth and Nineteenth Amendments should inform interpretation of the former).

<sup>14</sup> *See* sources cited *infra* note 44. Moreover, U.S. constitutional case law, for example, on the right to privacy, has been referred to by other constitutional courts in developing interpretations of their own constitutions. *See, e.g.,* *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 168 (Can.) (discussing *Griswold*).

<sup>15</sup> Law & Versteeg, *supra* note 1, at 779 tbl.3.

<sup>16</sup> *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, 228 [hereinafter ECHR] (providing for “fair and public” hearings).

<sup>17</sup> *See, e.g.,* *Lorenzetti v. Italy*, App. No. 32075/09, 5–7 (Eur. Ct. H.R. Apr. 10, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110270> (finding a denial of the Article 6.1 right to a public hearing); *Reinhardt and Slimane-Kaïd v. France*, 1998-II Eur. Ct. H.R. 640, 663 (finding a violation of Article 6.1 because the relevant proceedings, each of which lasted more than eight years, had not been completed within a “reasonable time”). Article 6.1 of the ECHR provides in relevant part: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly . . .”

As to the baseline for ascertaining a decline, the authors appear to assume that the U.S. Constitution once served as “the primary source of inspiration for constitution making in other nations,” and seem to invite regret that it no longer does.<sup>18</sup> But when did the U.S. Constitution play this role? The authors correctly note the substantial influence of the U.S. Constitution on constitution-making, especially in South America in the nineteenth century;<sup>19</sup> at that time, the U.S. Constitution was indeed a preeminent example of a constitutional instrument that appeared to give rise to a successfully working republic (at least until the time of the Civil War). But was there national constitution-making in the *twentieth* century that took the U.S. Constitution as the only model? And even before then, was the U.S. Constitution the only significant model in the world?

In an important collection in 1990, Louis Henkin described the U.S. Constitution as “a source of inspiration,” among others, and noted the influences on the U.S. Constitution of European political ideas.<sup>20</sup> Thomas Fleiner-Gerster’s chapter in the collection noted that in the nineteenth century, “French centralism had a far greater impact on Europe . . . than did American federalism,” and argued that the influence of U.S. ideas about federalism grew only in the post–World War II period.<sup>21</sup> It seems unlikely that the U.S. Constitution was the

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<sup>18</sup> Law & Versteeg, *supra* note 1, at 809–10.

<sup>19</sup> The authors state that “[i]n a number of countries, constitutional drafters have copied extensively, and at times verbatim, from the text of the U.S. Constitution.” *Id.* at 765. Their footnote, which deals with South American countries in the nineteenth century, notes, for example, that large sections of Argentina’s and Brazil’s nineteenth-century constitutions were “copied word for word from the U.S. Constitution.” *Id.* at 765 n.5 (quoting GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD 1776–1989: A GLOBAL PERSPECTIVE* 105 (2009)) (internal quotation marks omitted). Elsewhere the authors note the influence of the U.S. Constitution on the constitutions of Liberia, founded by former slaves in the nineteenth century; Tonga, a former British colony whose constitution also dates to the nineteenth century; and the Philippines, a U.S. possession before it adopted a constitution in 1935. *See id.* at 782–83 and accompanying notes.

<sup>20</sup> Henkin, *supra* note 7, at 1–2 (emphasis added); *see id.* at 5 (noting how the U.S. idea of rights “drew on European origins”); *id.* at 13 (stating that efforts to assess the U.S. Constitution’s influence “would have to . . . disentangle multiple strands [of influence], notably, for example, the reciprocal influences of English, French, and American ideas, persons, and events in the last half of the eighteenth century; the impact of the French Declaration of the Rights of Man and Citizen and the U.S. Bill of Rights in Latin America in the nineteenth century; or the contributions in recent decades of U.S. constitutional ideas and of the Universal Declaration of Human Rights (UDHR), the latter itself a product of multiple influences . . . [and] to sort out the influence of ideas from that of power and image”).

<sup>21</sup> Thomas Fleiner-Gerster, *Federalism, Decentralization, and Rights, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 19, 20 (Louis Henkin & Albert J. Rosenthal eds., 1990). *Cf.* Helmut Steinberger, *American Constitutionalism and German Constitutional Development, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED

“primary source of inspiration” for the constitution of the French Third Republic (1875), or the Austrian Constitution of 1920, or even the Australian Constitution (1900), which plainly manifested the strong influence of British parliamentarianism as well as U.S. constitutionalism. And it is hard to imagine that even U.S. advisors to other countries’ constitution-making processes would have drawn only from the U.S. Constitution by the mid-twentieth century.<sup>22</sup>

Moreover, although the authors have identified a statistically significant downward trend in similarity between the provisions of the U.S. Constitution and those of other constitutions in the world, the extent of this decline could be characterized as relatively modest—indeed, smaller than might be expected given the tremendous growth in constitution-making and the expected increase in variability. The decline, they report, is from 0.30 in 1946 (or a high of 0.31 in 1981) to 0.26 in 2006.<sup>23</sup> On the charts that are displayed, this looks like a very large and steep decline—because the charts run from 0.25 to 0.35.<sup>24</sup> Whether to characterize this change as large or small seems to me an open question, even if one assumes it is not simply an artifact of the empirical method. And whether dissimilarity implies lack of influence is also an open question.

The authors’ more significant point is not the “decline” of U.S. influence, but rather their astute observation that the content of the constitutions in effect around the world is not defined or predicted by any single leading constitutional system. It is, in their words, a “polycentric and multipolar process that is not dominated by any particular country.”<sup>25</sup> This is an important point, not unrelated to the increasing permeability of constitutional law and international law.<sup>26</sup> But whether the authors have shown an actual decline in U.S.

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STATES CONSTITUTION ABROAD 199, 210 (Louis Henkin & Albert J. Rosenthal eds., 1990) (observing that “[b]eyond the ideas and principles commonly shared in the Western world at the time of their incorporation in the Weimar Constitution [of 1919], no specific American influence can be traced from the records”).

<sup>22</sup> In 1960, for example, Thurgood Marshall contributed to the negotiations over Kenya’s constitution, through a suggested bill of rights that included rights of social support, rights to work, and other rights not found as such in the U.S. Constitution; he explained that he was drawing on “the U.S. Constitution, the Malayan Bill of Rights, and the Constitution of Nigeria.” Mary L. Dudziak, *Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya*, 56 DUKE L.J. 721, 757–58 (2006).

<sup>23</sup> Law & Versteeg, *supra* note 1, at 781 n.38.

<sup>24</sup> *See id.* at 782 fig.2.

<sup>25</sup> *Id.* at 851.

<sup>26</sup> *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 255–80 (2010) (analyzing the interdependence of constitutional and international law; the influences of international law on constitutions as the sites of “blending” of international and constitutional law; the role of constitutional diversity in mediating between international and domestic law; and why globalization can be expected to yield both convergences and divergences among constitutions).

influence, given the acknowledged limits of their methodology, and of what magnitude, remains a question.

## II

### CHALLENGES OF TRACKING INFLUENCE AND CAUSATION: THE “VARIETIES AND SUBTLITIES OF ‘INFLUENCE’”

Louis Henkin wrote years ago about the “varieties and subtleties of ‘influence.’”<sup>27</sup> Ideas are hard to contain; influences may be silent as well as vocal.<sup>28</sup> Changing circumstances may provide the ground for new legal ideas developing around the same time by different methods. In light of these challenges of identifying influence, a broader range of empirical techniques would be a useful supplement to the authors’ approach in order to properly assess their causal claims.

For example, it is possible that, contrary to the authors’ conclusion that Germany’s influence was “stagnant, if not declining,”<sup>29</sup> Germany’s influence in comparative constitutionalism may have been obscured by their methodology: In the area of rights, rather than looking at overall similarities of texts, the authors might have explored the impact of Germany’s human dignity clause in giving impetus and meaning to that idea in constitutions around the world.<sup>30</sup> And with respect to the impact of international instruments, the authors dismiss a trend of convergence to the International Covenant on Civil and Political Rights (ICCPR) because the trend began before its adoption.<sup>31</sup> But a more complex model of causation, taking into account the reflexivity of transnational legal processes,<sup>32</sup> might yield a different finding. The work on the ICCPR might have had influence before its adoption and, if the ICCPR had never been

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<sup>27</sup> Henkin, *supra* note 7, at 12.

<sup>28</sup> See JACKSON, *supra* note 26, at 193–95 (describing the possibility of “Prudential Noncitation” of transnational sources that may have been considered by a court and noting that “[d]eliberative engagement does not itself require public citation”); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1580, 1594–97 (2006) (describing the “silent absorption” of the transnational commitment to human dignity into U.S. constitutional case law, “without direct citation to the U.N. Charter, the UDHR, or the other conventions or constitutions that rely so prominently on that term in their texts”).

<sup>29</sup> See Law & Versteeg, *supra* note 1, at 824.

<sup>30</sup> Two other aspects of the German Basic Law that I suspect other methods of inquiry might find influential are the constructive vote of no confidence mechanism and the success in establishing the constitutional court as an independent and respected part of the government.

<sup>31</sup> Law & Versteeg, *supra* note 1, at 839–40.

<sup>32</sup> Cf generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review) (discussing the complex, interactive, and iterative character of “transnational legal process”).

adopted, it is not clear that the trend would have continued.

Law and Versteeg claim that Canada's Charter of Rights and Freedoms has been influential.<sup>33</sup> What their data show is that Canada's Charter is more similar to the rights provisions of generic constitutions today than is the U.S. Constitution—hardly surprising given the time at which each was drafted and the availability of international human rights archetypes beginning in the mid-twentieth century. To the extent one is concerned with *influence*, it is correct that Canada has been influential, for a number of reasons, including the Canadian Charter's limitation clause<sup>34</sup> and the proportionality jurisprudence to which it has given rise,<sup>35</sup> and the perception that the Charter implemented international human rights covenants to which Canada was a party. The idea of a "limitations" clause concerning rights dates back at least to the Universal Declaration of Human Rights (UDHR), Article 29(2) of which provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>36</sup>

Although this clause does not have all of the refinements of the Canadian clause—lacking its "demonstrably justified" language, for example<sup>37</sup>—the purpose limits and the reference to "just requirements" of Article 29 of the UDHR could be understood to anticipate or incorporate the ideas of necessity and justification.

But where did the idea for the limitations clause in the UDHR come from? According to Louis Sohn, one influence on the drafting of Article 29 of the UDHR was a report by a study committee of the American Law Institute.<sup>38</sup> It takes nothing away from the importance

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<sup>33</sup> See Law & Versteeg, *supra* note 1, at 809–14.

<sup>34</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.) (1982) ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

<sup>35</sup> For early articulations of the proportionality test by the Canadian Supreme Court, see, for example, *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 (Can.); *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

<sup>36</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, ¶ 29(2), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>37</sup> See Canadian Charter of Rights and Freedoms, § 1, *supra* note 34.

<sup>38</sup> Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 44 (1982) (stating that the reference to "democratic society" in Article 29(2) of the UDHR was inserted by the drafters "on the basis of a similar clause in the statement of essential human rights, prepared in 1946 by a

of the Canadian Charter and its accompanying constitutional jurisprudence to observe the indirect influence of U.S. participants in the spread of limitations clauses—a small illustration of the complexity, and variety, of causal influences.

### III

#### JUDICIAL REVIEW, INTERPRETATION, AND AMENDMENT

One of the signal contributions of the U.S. constitutional system to comparative constitutional development has been the role of courts. The judicial powers are separated from the executive and legislative; the judiciary reviews both executive acts and state and national legislation for constitutionality. The interpretive process by which courts exercise this function has been remarkably influential—for many, the very idea of constitutionalism is bound up with judicial enforcement of constitutional limits on government.

For some, the spread of judicial review is to be critiqued: a “juristocracy” inconsistent with democratic development, a “Gouvernement des Juges.”<sup>39</sup> For others, judicial review is a key method by which commitment to the rights of individuals can be sustained in a polity that is also committed to democratic self-governance.<sup>40</sup> Although different institutional models now exist by which review is performed, the underlying idea is one that has spread;<sup>41</sup> and there is contest and debate over how different the two

committee of the American Law Institute and presented to the United Nations . . . .”) (internal quotation marks omitted); see also Am. Law Inst., *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 26 (1946). The ALI committee was multinational. *Id.* at 18.

<sup>39</sup> See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); EDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS* (1921).

<sup>40</sup> See Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

<sup>41</sup> On the marked rise in the number of constitutions providing for judicial review, see Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1433–34 (2009). Law and Versteeg rely in part on Alec Stone Sweet for the proposition that more countries use the European centralized system than the American system of judicial review. Law & Versteeg, *supra* note 1, at 794 n.66 (citing Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMPARATIVE POLITICS* 217, 223 & tbl.9.1 (Daniele Caramani ed., 2008)) (relying on data collected by Dr. Arne Mavčič in 2005). In 2010, Dr. Arne Mavčič’s data reflected the following: 29.05% of the countries of the world used the American model; 29.61% used the European model; smaller percentages used several other models; and 2.79% had no judicial review. Arne Mavčič, *Type of Court/No. of Countries*, CONCOURTS.NET, <http://www.concourts.net/chart.php> (last visited Dec. 5, 2011); see also Arne Mavčič, *A Tabular Presentation of Constitutional/Judicial Review Around the World*, CONCOURTS.NET, <http://www.concourts.net/tab/tab1.php?lng=en&stat=1&pri=0&srt=0> (last visited Sept. 15, 2012) (presenting data as of Jan. 4, 2010). Law and Versteeg also cite Stephen Gardbaum,

major models—U.S.-style decentralized review, and European-style centralized review—really are.<sup>42</sup>

Although the authors note recent discussions of declining influence of U.S. case law abroad, this, too, can be understood in a sense to reflect the success of the idea of judicial review. In 1989, and then again in 1999, Chief Justice William H. Rehnquist called U.S. courts “laggard” in not referring more to the constitutional case law of other countries.<sup>43</sup> He saw at those moments that significant bodies of jurisprudence in other countries had developed, and his suggestion that U.S. judges begin to look to other countries *a fortiori* contemplated that judges in other countries would look not only at the United States when they looked outside. Although the political valence of that receptivity to foreign law has shifted since September 11, 2001, the recognition that the United States was no longer singular in its development of constitutional case law remains important.

The authors are, I think, correct to note the significance of the U.S. amendment process in explaining some divergences between formal constitutional texts: If enacting amendments were easier, for example, the United States would probably have an equal rights amendment protecting women’s rights. But the fact that U.S. constitutional law developed by interpretation (rather than

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*The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 411–12 (2008) for the proposition that “by the mid-1980s, the American model ‘seemed exceptional’ as compared to the European model, but arguing that the contrast between the two models has diminished over time.” Law & Versteeg, *supra* note 1, at 794 n.66. Gardbaum’s analysis emphasizes the lack of U.S. exceptionalism. See Gardbaum, *supra*, at 412 (stating that while in the late 1980s the U.S. form of decentralized review “seemed exceptional,” several more recent developments “reduce, if not eliminate, both the relative exceptionalism of the American model and the primacy of the American/European distinction as the most useful or important one concerning the institutionalization of judicial review”).

<sup>42</sup> See, e.g., Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 MINN. J. INT’L L. 61, 71–72, 91–97 (2007) (emphasizing the difference between the United States’ approach and other countries’ approaches to democratic control of and appointments to constitutional courts and summarizing the debate over whether differences between European and U.S. models of judicial review matter); Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2745–46 (2003) (arguing that “there is an increasing convergence in how review actually operates” under the European and American approaches); Gardbaum, *supra* note 41 (arguing against the U.S. exceptionalism thesis in this and other areas). For a thoughtful comparative discussion, see VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE (2009).

<sup>43</sup> William Rehnquist, *Constitutional Courts – Comparative Remarks*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (remarks given at a 1989 conference); William H. Rehnquist, *Foreword*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW, at viii (Vicki C. Jackson & Mark Tushnet eds., 2002) (remarks given at a 1999 conference).

amendment) does not mean that it was not influential in the decisions of others.<sup>44</sup>

Indeed it is possible that the difficulty of amending the U.S. Constitution has contributed to the influence of the U.S. Supreme Court's interpretive decisions. The difficulty of a political response through amendment to the Court's constitutional interpretations raises the stakes for its decisions. The power and weight thus granted to the Court's decisions may well have enhanced the Court's influence both at home and abroad.

#### IV

#### WHY DOES IT MATTER?

The authors refer to the "Decline of American Constitutional Leadership."<sup>45</sup> The implications are clearly negative;<sup>46</sup> indeed, the authors seek to fix "blame" for the result.<sup>47</sup> But why does "constitutional leadership," in their sense, matter? I explore this first through a brief discussion of the causes for the asserted decline.

The authors offer several "possible hypotheses": "(1) the advent of a superior or more attractive competitor; (2) a general decline in American hegemony; (3) judicial parochialism; (4) constitutional obsolescence; and (5) a creed of American exceptionalism."<sup>48</sup> But, as the authors' conclusion about the polycentricity of constitutional development suggests, the model of a market with a single best constitution seems quite inapt. Given the "expressive" functions that constitutions often play, one would not expect a single "leader" long

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<sup>44</sup> See Steinberger, *supra* note 21, at 204, 207–09 (noting that in discussions around constitution-making in mid-nineteenth century Germany, Robert von Mohl drew on *Marbury v. Madison* to argue for including the power of judicial review); M. Abel, *American Influences on the Making of the Indian Constitution*, 1 J. CONST. PARLIAMENTARY STUD. 35, 41–42 (1967) (describing how the Framers of the Indian constitution were "guided . . . by the actual constitutional practice" in the United States, and providing as an example a lengthy discussion of U.S. Supreme Court doctrine on First Amendment freedoms by Dr. Ambedkar, Chair of the Constitutional Drafting Committee, during the Indian Constituent Assembly); see also Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004) (noting the aversive impact of the *Lochner* decision on the drafting of the Canadian Charter of Rights and Freedoms); Soli J. Sorabjee, *Equality in the United States and India*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 94, 96–101 (Louis Henkin & Albert J. Rosenthal eds., 1990) (noting the influence of Justice Frankfurter's ideas regarding procedural and substantive justice on the Indian constitution).

<sup>45</sup> Law & Versteeg, *supra* note 1, at 850.

<sup>46</sup> A more neutral statement, also found in the article, is that "the content of the U.S. Constitution is becoming increasingly atypical by global standards." *Id.* As already noted, the increase in atypicality might be viewed as relatively small.

<sup>47</sup> *Id.* ("[W]hat—or who—is to blame?").

<sup>48</sup> *Id.* at 850–51.

to hold sway. The decline in American hegemony seems plausible as a partial explanation, although the United States had influence on foreign constitutions in the nineteenth century, before it had developed its post–World War II hegemony. Judicial parochialism is not directly relevant to constitutional texts, the subject of their study, and does not, in my judgment, accurately capture the distinctive U.S. attitude, which is better characterized as one of ambivalence.<sup>49</sup> Constitutional obsolescence is a somewhat loaded term for an “old . . . and . . . difficult to amend”<sup>50</sup> constitution. There is no doubt that most U.S. scholars have their favorite dysfunctional part of the old Constitution. But it is not clear that because a constitution is newer, it is more functional; interestingly, in the authors’ prior study, constitutions with the most rights tended to belong to countries with the worst human rights records.<sup>51</sup>

Some other possibilities that could be explored include these: first, the spread of the idea of written constitutions, with its expected variations and diversity on an evolutionary model, given the differing contexts and conditions around the world; second, the possibility of constitutional learning over time, which may be related to the difficulty of amending the U.S. Constitution, as an explanation for some divergences; third, the significance of regional or “genetic” influences among countries with specific historical, cultural, or linguistic links; and fourth, the substantive change in the orientation of the U.S. Supreme Court, which makes several of its members less interested in others’ practices and which produces case law that may be less inspiring to others.<sup>52</sup> In recent years, the Court has been closing doors to many classes of litigants, rather than opening them;<sup>53</sup>

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<sup>49</sup> See Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 584–91 (1999) (describing resistance as “ambivalent”); JACKSON, *supra* note 26, at 103–14 (describing U.S. Supreme Court constitutional cases affirmatively using foreign law or practice). Although exceptionalism and parochialism are theoretically distinct, the “creed of American exceptionalism” does not seem to be an independent explanation in the authors’ account, but rather a reformulation of “judicial parochialism” in less negative normative terms.

<sup>50</sup> Law & Versteeg, *supra* note 1, at 807.

<sup>51</sup> Law & Versteeg, *supra* note 10, at 1220 (noting that “actual respect for human rights is negatively correlated with the number of rights found in the constitution,” even holding constant the age of the constitution and the degree of democracy it provides).

<sup>52</sup> Cf. Claire L’Heureux Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 29–37 (1998) (noting the declining influence of the Rehnquist Court’s case law as compared with the Warren and Burger Courts because of fewer groundbreaking decisions, U.S. preoccupation with original intent, and a narrower understanding of rights protected by the Constitution, among other reasons).

<sup>53</sup> See, e.g., Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 544–46 (2005) (describing how, in habeas

for countries whose constitutional courts are trying to establish themselves as legitimate providers of constitutional justice, the Warren Court jurisprudence may be more attractive.

The Law and Versteeg study is fraught with a vocabulary of worry and fear over declining U.S. influence.<sup>54</sup> Both the framing and the vocabulary of the study reflects a certain historically specific set of anxieties. By the time of the Velvet Revolutions of the early nineties, it was clear in the literature that the U.S. Constitution, though a model, was not the only or the most important model in formal constitution-making.<sup>55</sup> Writings at that moment understood and

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corpus cases, the Court changed doctrine under existing statutes to make habeas review less available); Judith Resnik, *The Supreme Court, 2010 Term—Comment: Fairness In Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 80 (2011) (describing how, in consumer class actions and other cases, the Court's recent decisions "make plain that the constitutional concept of courts as a basic public service provided by government is under siege"); *The Supreme Court, 2010 Term—Leading Cases*, 125 HARV. L. REV. 172, 331 (describing Connick v. Thompson, 131 S. Ct. 1350 (2011), which denied relief in a § 1983 action for a prosecutor's office's alleged failure to adequately train its lawyers to avoid *Brady* violations, as "another step down an improvident path that weakens prosecutorial accountability").

<sup>54</sup> See, e.g., Law & Versteeg, *supra* note 1, at 766 ("There are growing suspicions . . . that America's days as a constitutional hegemon are coming to an end."); *id.* at 768 ("Our findings do little to assuage American fears of diminished influence in the constitutional sphere."); *id.* at 769 (describing the Constitution as "an increasingly unpopular model for constitutional framers elsewhere"); *id.* at 852 (discussing "erosion of the American brand").

<sup>55</sup> See, e.g., Jon Elster, *Making Sense of Constitution-Making*, 1 E. EUR. CONST. REV. 15, 16 (1992) (noting, as influences on Eastern European constitution-making, "their pre-Communist past, . . . contemporary European constitutions, notably the German and French ones . . . [and] the more recent, Communist past"); Eric Stein, *Out of the Ashes of a Federation, Two New Constitutions*, 45 AM. J. COMP. L. 45, 49 (1997) (noting with respect to the then-new Slovak Constitution that the "available current" models included "the American presidential system, its modified French version, and the chancellor system of Germany and Austria," and that "the choice went to an essentially classic parliamentary form which corresponded with the Czecho-Slovak tradition") (footnote omitted) (internal quotation marks omitted); see also Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 197–98, 218–19, 230 (1995) (describing five forms of constitution-making, identifying the limited circumstances in which the U.S. approach is the best, arguing that parliamentary constitution-making may be the better alternative in other contexts, and praising evolutionary or staged constitution-making as occurred in Eastern Europe and South Africa); Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 275, 275 (Sanford Levinson ed., 1995) (arguing that the best amendment process for Eastern Europe is one with "relatively lax conditions for amendment, [and which] keeps unamendable provisions to a minimal core of basic rights and institutions, and usually allows the process to be monopolized by parliament"—unlike the procedure in the U.S. Constitution). In the 1990s, moreover, there was vigorous debate among legal scholars about constitutionalizing social welfare rights—emphatically not the U.S. national model—and recognizing the trend towards inclusion of such rights. See, e.g., Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996) (noting the "dazzling array" of social and economic rights in new and proposed Eastern

explored this phenomenon with far less anxiety than is expressed in this study.

So why, today, does it matter to the future interests of the United States—its people or its elites—whether other countries do or do not follow the details of the U.S. constitutional model? Is there some national identity based investment in worldwide veneration of the detailed choices made by the Framers of the U.S. Constitution that is offended by such departures? Or is there some more tangible and present national interest that might reasonably be thought to be in play?

I do not question that countries with democratic constitutionalist systems and relatively free markets benefit from the existence of other countries similarly constituted. They do so, as Law and Versteeg's earlier work suggests, for many reasons, including trade benefits (though it should be noted that the U.S. has derived economic benefits from relationships with nondemocratic regimes),<sup>56</sup> and the lower likelihood of warfare between democratic countries.<sup>57</sup> But there is little reason to expect that those benefits depend on confluence in the details of the many specific rights explored in this study. Indeed, there is reason to think that they might depend on the degree to which a set of basic rights and democratic practices are respected "on the ground," criteria this study does not purport to measure.

Thus, while I do not deny that the United States has interests in other countries' constitutional design, interpretation, and application in practice, the reciprocal implication is that other countries have interests in our Constitution and its interpretation and application. To the extent influence matters, learning is something of a two-way street. If U.S. officials, or academics, care about the U.S.

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European constitutions but arguing against inclusion of such "positive rights").

<sup>56</sup> According to the U.S. Census Bureau, of the ten largest U.S. trading partners in May 2012, China was second and Saudi Arabia the eighth largest. U.S. Census Bureau, *Top Trading Partners—Total Trade, Exports, Imports* (May 2012), <https://www.census.gov/foreign-trade/top/dst/2012/05/balance.html>.

<sup>57</sup> See, e.g., BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE 4-5 (1993) (explaining Kant's vision of a perpetual peace among states with "republican constitutions" as compatible with "basic contemporary understandings of democracy"); *id.* at 9-11 (introducing the "empirical fact of peace among democracies"); *id.* at 11 (arguing that "democratically organized political systems in general operate under restraints that make them more peaceful in their relations with other democracies" (though not necessarily with other political systems) and that the "relationship of relative peace among democracies is importantly a result of some features of democracy, rather than being caused exclusively by economic or geopolitical characteristics correlated with democracy"); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1160 (1986) (elaborating on the theoretical foundations for the "liberal peace" among democratic governments, based, inter alia, on the work of Kant).

Constitution's influence because of a belief that being surrounded by successful constitutional democracies makes the world safer and better for the United States as a constitutional democracy, then it would follow that other constitutional polities, as well, have reason to be concerned with the well-being of other constitutional democracies, including the United States. The United States has been ambivalent about both parts of this process—less ambivalent about seeking to extend the influence of its own model and more ambivalent about the possibility of learning from others. But understanding the webbed relationships in which the countries of the world function, and the significant synergies that can develop from free and open communication about common problems, are sounder normative reasons to engage with the work of other countries than a desire to extend U.S. influence on particular details of other countries' constitutional systems. Nonetheless, empirical work like Law and Versteeg's sheds interesting light on the global constitutional topography, and thus contributes importantly to understanding the context of the increasing interactions among the constitutional systems of the world.