

REJOINDER

DEBATING THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION: A RESPONSE TO PROFESSORS CHOUDHRY, JACKSON, AND MELKINSBURG

DAVID S. LAW[†] & MILA VERSTEEG[‡]

In response to Sujit Choudhry, *Method in Comparative Constitutional Law: A Comment on Law and Versteeg*, 87 N.Y.U. L. REV. 2078 (2012); Zachary Elkins, Tom Ginsburg & James Melton, *Comments on Law and Versteeg's The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 2088 (2012); and Vicki C. Jackson, *Comment on Law and Versteeg*, 87 N.Y.U. L. REV. 2102 (2012).¹

This brief essay responds to the commentaries by Professor Choudhry, Professor Jackson, and Professors Elkins, Ginsburg, and Melton ("Melkinsburg") on our article, The Declining Influence of the United States Constitution. We agree with much of the substance of their thoughtful commentaries, especially their calls for methodological pluralism and broader-ranging empirical research. Some of our differences, meanwhile, are matters of emphasis and framing. For example, their point that the U.S. Constitution remains influential upon constitution writing at a high level of abstraction is one that we make ourselves. We also emphasize, however, that highly abstract similarities are no indication that constitutional drafters in other countries find the U.S. Constitution a useful or attractive model to emulate as a practical matter.

Our most significant disagreement lies with two of Melkinsburg's arguments. First, they contend that we have misinterpreted our empirical findings of declining similarity to the U.S. Constitution as evidence of declining influence. We reject their suggestion, however, that the U.S. Constitution can only be said to have lost influ-

[†] Professor of Law and Professor of Political Science, Washington University in St. Louis; Visiting Professor, Georgetown University Law Center. B.A., M.A., Ph.D., Stanford University; J.D., Harvard Law School; B.C.L. in European and Comparative Law, University of Oxford.

[‡] Associate Professor, University of Virginia School of Law. B.A., LL.M., Tilburg University; LL.M., Harvard Law School; D.Phil., University of Oxford. We thank Kevin Cope and James Melton for helpful comments and conversations. Copyright © 2012 by David S. Law and Mila Versteeg.

¹ For the complete rejoinder, see David S. Law & Mila Versteeg, *Debating the Declining Influence of the United States Constitution: A Response to Professors Choudhry, Jackson, and Melkinsburg*, 87 N.Y.U. L. REV. ONLINE 41 (2012), www.nyulawreview.org/online-features/law-versteeg.

ence to the extent that its “essential elements” have been repudiated. No definition of a concept such as influence can be proclaimed exclusively correct by fiat. Moreover, their definition comports neither with intuition nor with our goal of identifying where constitutional drafters today look for inspiration.

Second, they argue that the trends we identify as belonging to the late twentieth century are merely continuations of trends that actually began in the mid-nineteenth century. In our view, their analysis gives insufficient consideration to two dynamics that render post–World War II constitutional trends qualitatively distinct from nineteenth-century trends. Those two dynamics are constitutional proliferation, meaning an explosion in the sheer number of constitutions, and constitutional standardization, or the increasing use of increasingly standard constitutional models that bear limited resemblance to the U.S. Constitution. Constitutional drafting today reflects the emergence of pockets of consensus in a densely populated constitutional environment that simply did not exist in the mid-nineteenth century or even the early twentieth century. Any conclusions that Melkinsburg draw from ostensibly global nineteenth-century data are likely to be disproportionately influenced by the atypical experience of Latin American constitutionalism. Our focus, by contrast, is upon a late twentieth-century process of constitutional standardization that ultimately bypassed the U.S. Constitution in favor of a more genuinely global synthesis.

