

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. ONLINE 1 (2012), www.nyulawreview.org/online-features/choudhry; 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. ONLINE 11 (2012), www.nyulawreview.org/online-features/elkins-ginsburg-melton; and Vicki C. Jackson, *Comment on Law and Versteeg*, 87 N.Y.U. L. REV. ONLINE 25 (2012), www.nyulawreview.org/online-features/jackson.

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

[†] 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.

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 influence 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.

INTRODUCTION

We have long admired the work of Professors Choudhry, Jackson, Elkins, Ginsburg, and Melton, and we are privileged and honored to be a part of this scholarly exchange with them. At the outset, we would like to say that many of our apparent differences with them strike us more as matters of emphasis and framing than of substance. Consider, for example, the point made by Professors Elkins, Ginsburg, and Melton and Professor Jackson alike that, at a sufficiently high "level of abstraction," the U.S. Constitution remains

very influential.¹ This is a point that we make ourselves.² Given that the United States (along with Belgium, France, and Poland³) can legitimately lay claim to the very idea of adopting a formal constitution, all constitutions can be described as profoundly influenced by the U.S. Constitution. Ancestral similarity at such a high level of generality is, however, of limited practical importance to those engaged in actual constitutional drafting. Dwelling upon the influence of the U.S. Constitution at this level of abstraction is somewhat akin to emphasizing that Judaism is the progenitor of Mormonism: Although there exist genuine similarities between the two religions, their differences loom larger in everyday life. Likewise, other constitutions can be said at some level to owe their very existence to the U.S. Constitution, but it is the extensive areas of difference from the U.S. Constitution that define and necessitate the contemporary enterprise of constitution writing. We do not deny that the U.S. Constitution deserves much of the credit for the existence of written constitutions. But we focus upon the different question of whether the U.S. Constitution remains a model for *how* to write a constitution.

I

RESPONSE TO PROFESSOR CHOUDHRY

We are in enthusiastic agreement with Professor Choudhry on several counts. The field of comparative constitutional law can only benefit from embracing both empiricism and methodological pluralism as he urges: Qualitative (“small-n”) and quantitative (“large-n”) empirical research are complementary, and quantitative research is of particular value to qualitative researchers in guiding case selection.⁴ We also concur in his suggestion that “the generic bill of rights” is best understood “as representing a core of convergent constitutional practice—a *floor* that represents the minimum content of a bill of rights.”⁵ Indeed, in an article published last year,⁶ we

¹ 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. ONLINE 11, 16 (2012) [hereinafter Melkinsburg]; see Vicki Jackson, *Comment on Law and Versteeg*, 87 N.Y.U. L. REV. ONLINE 25, 25–28 (2012).

² See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 765–66 (2012) (pointing out “the popularity of the Constitution’s most important innovations, such as judicial review, entrenchment against legislative change, and the very idea of written constitutionalism”).

³ See *id.* at 765 n.8 (discussing constitutions and constitution-like legal codes of the late eighteenth century and earlier).

⁴ Sujit Choudhry, *Method in Comparative Constitutional Law: A Comment on Law & Versteeg*, 87 N.Y.U. L. REV. ONLINE 1, 1 (2012).

⁵ *Id.* at 6.

showed empirically that departures from the “core of generic rights”⁷ tend to involve the inclusion of additional rights rather than the omission of generic rights: Many constitutions expand upon the generic core by including provisions that are not (yet) generic⁸ or that possess an ideological character that is not universally shared.⁹

We are more hesitant to accept Professor Choudhry’s suggestion that we weight our similarity calculations by population size. Although per capita measurement is well accepted and appropriate in much of social science, it is not appropriate for our purposes. Because our study focuses on the extent to which states adhere to particular constitutional models, the relevant unit of analysis is the state, not the individual, and it is most sensible for purposes of our analysis to treat all states as equally worthy of study by weighting them equally. Suppose, for example, that we are studying a world of ten countries: Nine countries have roughly the population of Canada and adopt constitutional system A, while the tenth has the population of the United States and adopts constitutional system B. It would be counterintuitive to describe systems A and B as equally prevalent. If we were to weight by population, however, then a country like the United States would indeed weigh more than 9 times as much in our analysis than Canada (or 13 times more than Australia, or 400 times more than Fiji, or 1000 times more than Iceland). But population size is not a very good proxy for a country’s role or significance in defining global constitutional practice.

It is appropriate for scholars of comparative federalism to take population size into account, but that is partly for reasons that are peculiar to federalism. Scholars have long observed that population size is itself an important reason for which countries adopt federalism.¹⁰ The logic is simple: The larger the country, the more

⁶ David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011).

⁷ *Id.* at 1202; *see also id.* at 1199–1202 (listing the contents of this “core”).

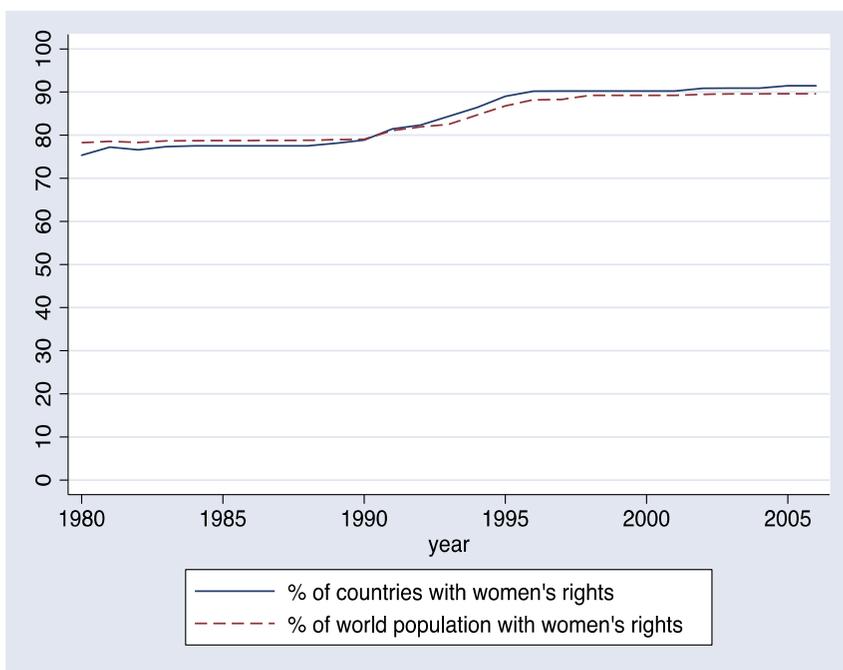
⁸ *See id.* at 1217–26 (describing a “generic bill of rights” and listing its contents).

⁹ *See id.* at 1239–43 (identifying a pattern of ideological polarization among the world’s constitutions).

¹⁰ *See, e.g.*, GEORGE ANDERSON, *FEDERALISM: AN INTRODUCTION* 13 (2008) (suggesting that all democracies with populations significantly upwards of 100 million are federal systems because “[t]here seems to be a limit to the size of population or territory that a single, popularly elected government can manage effectively”); Maria Escobar-Lemmon, *Fiscal Decentralization and Federalism in Latin America*, 31 PUBLIUS 23, 36 (2001) (explaining that larger countries frequently find it necessary to create subnational governments to help with administration); Jonathan Rodden, *Comparative Federalism and Decentralization: On Meaning and Measurement*, 36 COMP. POL. 481, 493 (2004) (arguing that centralized political systems in countries that have large territory and large heterogeneous population will face strong pressure to decentralize); Michael J. Hiscox & David A. Lake, *Democracy, Federalism and the Size of States* 35 (Jan. 2002) (unpublished

unwieldy and ill-suited to centralized management it is, and the more appealing that federalism will be. As a result, however, any population-weighted measure of the prevalence of federalism will tend to make federalism look more popular. Thus, Professor Choudhry's conclusion that federalism is growing rather than declining in popularity is partly a result of the fact that federalism is functionally more appealing to larger countries than to smaller ones. By contrast, there is no such reason why adoption of the rights-related provisions from which we calculate our constitutional similarity scores would be affected by population size. For example, it makes little difference whether one measures the prevalence of constitutional rights for women on a per capita basis or on a state-by-state basis, as Figure 1 shows.

FIGURE 1: PERCENTAGE OF COUNTRIES VERSUS PERCENTAGE OF WORLD POPULATION COVERED BY FORMAL CONSTITUTIONAL GUARANTEES OF WOMEN'S RIGHTS



manuscript) (on file with the *New York University Law Review*) (finding an empirical link between federalism and country size that is conditional upon whether the country in question is democratic).

II RESPONSE TO PROFESSOR JACKSON

Our differences with Professor Jackson strike us as relatively minor. They are more matters of emphasis (or, on occasion, choice of language on our part) than deep and genuine substantive disagreement. Most importantly, we are entirely in agreement that constitutional influence is “polycentric and multipolar” in character, and that this finding is the appropriate empirical premise for discussion of constitution-making influence going forward.¹¹ We also believe that a number of our apparent differences disappear upon closer examination or clarification.

Professor Jackson suggests that our study “may understate the degree of similarity that continues to exist between the U.S. constitutional system and those of other countries” because it fails to consider “more important phenomena” that may be harder to quantify—namely, case law.¹² In her words, “the impact of U.S. case law on constitutional design and interpretation in the rest of the world has been considerable.”¹³ Insofar as she is simply making the point that empirical scholars ought to study case law as well as written constitutions if they are to draw definitive conclusions about the influence of “constitutional systems” as a whole, we wholeheartedly endorse her call for empirical research on constitutional jurisprudence that is global in scope.¹⁴

We cannot agree, however, that case law is a “more important” phenomenon than formal constitutional text if this is taken to mean that any study focused solely on constitutional text is unhelpful or misleading unless paired with an analysis of case law. The absence of transnational empirical research on the significance and influence of case law means that there is no empirical basis for suggesting either that the influence of case law is “more important” globally than the

¹¹ Jackson, *supra* note 1, at 31 (quoting Law & Versteeg, *supra* note 2, at 851). Our conclusion that global constitutionalism is evolving in a “polycentric and multipolar” rather than monolithic manner reflects the findings of our earlier work as well as the present Article. See Law & Versteeg, *supra* note 6, at 1233–43 (documenting the existence of two increasingly distinct ideological families of constitutions—one “statist,” the other “libertarian”—that are defined by the manner in which they go beyond a shared “generic core” of rights); Benedikt Goderis & Mila Versteeg, *The Transnational Origins of Constitutions: An Empirical Investigation 2–3* (Aug. 2011) (unpublished manuscript) (on file with the *New York University Law Review*), available at <http://ssrn.com/abstract=1865724> (finding that constitutional rights provisions tend to diffuse more readily within groups defined by such shared characteristics as a common former colonizer or aid donor).

¹² Jackson, *supra* note 1, at 28.

¹³ *Id.*

¹⁴ *Id.* at 40.

influence of constitutional text, or that case law is “more important” than constitutional text in some general sense. It is especially important for American constitutional scholars to bear in mind that, compared to the U.S. Constitution, the constitutions of other countries tend to be both more recent¹⁵ and more detailed,¹⁶ which decreases the importance of judicial interpretation relative to the constitution itself.

In our view, the problem that Professor Jackson identifies is very real, but it consists of a hole in the empirical literature on constitutionalism rather than a flaw in our own study.¹⁷ We share her desire, if not impatience, for genuinely global empirical research on constitutional case law. However, such research should develop alongside global empirical research on constitutional drafting—not in lieu of it. For now, the field of empirical constitutional studies is a relatively new one that has barely begun to articulate itself in a self-conscious way, and the gap that she identifies may not be filled in the very first wave of such scholarship.¹⁸

Finally, we hasten to clarify our motives in light of certain inferences that Professor Jackson draws from our article. Our goal was to document the declining attraction of the U.S. Constitution as a constitutional template, not to fix “blame”¹⁹ or “invite regret”²⁰ over this development, as Professor Jackson puts it. We realized from the outset that many of our readers would lament our findings and might even be interested in fixing blame. On occasion, the framing of our discussion reflects our understanding of the perspective from which many readers would approach our findings. We did not mean to suggest, however, that the declining influence of the U.S. Constitution *should* be a source of regret. As empirical researchers, we take no stance on the appropriate emotional reaction to our findings. Whether they are cause for lamentation or celebration is very much

¹⁵ See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 129 (2009) (reporting that the “median survival time” of a constitution is nineteen years).

¹⁶ As of 2006, the world’s constitutions contained an average of 159 articles. The longest constitution today is the Indian Constitution, which contains 395 articles, followed by those of Colombia and Honduras, at 380 and 379 articles respectively. Mila Versteeg, *Words of Liberty: On the Origins and Evolution of Constitutional Ideas* 109–10 (June 18, 2011) (unpublished D.Phil. thesis, University of Oxford) (on file with the *New York University Law Review*).

¹⁷ See David S. Law, *Constitutions*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 376, 378–79 (Peter Cane & Herbert M. Kritzer eds., 2010) (discussing the relative rarity of empirical scholarship on formal or “large-c” constitutional arrangements).

¹⁸ See *id.* at 379 (observing that “[t]he growth of quantitative empiricism” in the field of constitutional scholarship “comes not a moment too soon”).

¹⁹ Jackson, *supra* note 1, at 36 (quoting Law & Versteeg, *supra* note 2, at 850).

²⁰ Jackson, *supra* note 1, at 30.

in the eye of the beholder.²¹

III

RESPONSE TO PROFESSORS ELKINS, GINSBURG, AND MELTON ("MELKINSBURG")

Professors Elkins, Ginsburg, and Melton (writing under their collective pen name of "Melkinsburg") are pioneers in the field of empirical constitutional studies, and their work has greatly informed our own.²² In their response to our article, they challenge our findings and conclusions on both conceptual and empirical grounds. First, they contend on conceptual grounds that we have misinterpreted our empirical findings of declining *similarity* to the U.S. Constitution as evidence of declining *influence*. Second, they argue on the basis of original empirical analysis that the decline in similarity to the U.S. Constitution began in 1850, nearly a century before the time period covered by our analysis.

A. The Conceptual Challenge: Does Declining Similarity Denote Declining Influence?

Melkinsburg's conceptual criticism is that we have misinterpreted declining similarity to the U.S. Constitution as evidence of declining influence, and that the U.S. Constitution does in fact remain influential. Their argument relies on a distinction between the addition of "new features" to an existing model and the rejection of "essential elements" of an existing model.²³ Only the latter, they say, should be interpreted as evidence that the model is losing influence. In other words, Melkinsburg argue that we ought to have defined "influence" differently. They also suggest that it is "unfair" to compare constitutions that belong to different "cohort[s]" because "[e]vents, trends, and fashions" affect constitutions differently at different points in their "life cycle."²⁴

We respectfully disagree. First, we reject the notion that a constitution can only be deemed to have lost influence if its "essential

²¹ For proof that one country's cause for teeth-gnashing and finger-pointing can be another country's cause for celebration, see, for example, Randy Boswell, *Canadian Model a Global Template, U.S. Study Finds*, VANCOUVER SUN, Apr. 14, 2012, at B2, and John Ibbitson, *Charter That Reshaped Canada Becomes a Model to the World*, GLOBE & MAIL (TORONTO), Apr. 16, 2012, at A1.

²² See Law & Versteeg, *supra* note 2, at 799 n.77 (citing the findings reported in ELKINS ET AL., *supra* note 15, on constitutional similarity among Latin American countries to the United States); *id.* at 772 n.23 (contrasting their use of Pearson's phi with their use of simple percentages to calculate constitutional similarity).

²³ Melkinsburg, *supra* note 1, at 16.

²⁴ *Id.* at 17-19.

elements” have been rejected.²⁵ Their definition of influence is incompatible with the goal of our study, which was to identify where constitutional drafters today look for inspiration and what models they consider worthy of imitation. Under Melkinsburg’s approach, one would have to say the Apple II is just as influential today in the world of computing as it was thirty years ago because none of its “essential elements” have been repudiated. Although there will always be a historical and evolutionary sense in which the Apple II can be described as influential, it is no longer held up as a model of how computers should be built. Likewise, our interest lies in the decisions that constitutional drafters make today, rather than the debts that they owe to the past.

Second, there is nothing inherently “unfair” about comparing old constitutions to new constitutions.²⁶ The popular music analogy used by Melkinsburg illustrates our point. The Rolling Stones have had decades to establish their reputation and grow and experiment as a band. If there is any unfairness in comparing the influence of the Rolling Stones to that of newer bands, the unfairness is to the newer bands. Likewise, the United States enjoys a considerable first-mover advantage in the realm of constitution writing, has had much longer experience with a written constitution, and has been free to revise its constitution on the basis of that extensive experience.

As the music analogy suggests, a crucial reason why it is fair to compare older and newer constitutions is that constitutions can and do evolve. The Beatles are famously influential not because they recorded “Love Me Do,” but because they outgrew their early work by leaps and bounds.²⁷ Likewise, constitutions can evolve in ways that maintain or even increase their influence.²⁸ As Melkinsburg have documented, most countries revise and replace their constitutions on an ongoing basis.²⁹ A constitution originally authored in the eighteenth or nineteenth century can thus be at the cutting edge of constitutionalism in the twenty-first century. Fairness demands only that we compare constitutions as they have evolved up to the same point in time, which is precisely what we do. At no point do we compare the original version of the U.S. Constitution with the latest

²⁵ *Id.* at 16.

²⁶ *Id.* at 19.

²⁷ *Compare, e.g.,* THE BEATLES, PLEASE PLEASE ME (Parlophone 1963) with THE BEATLES, THE BEATLES (commonly known as “The White Album”) (Apple 1968).

²⁸ *Cf.* Law & Versteeg, *supra* note 2, at 812 (finding that the average constitutional similarity to the Canadian Constitution initially decreased following the adoption of the Canadian Charter of Rights and Freedoms in 1982 but recovered sharply thereafter).

²⁹ ELKINS ET AL., *supra* note 15, at 129 (reporting that constitutions on average are updated or amended every nineteen years).

version of the Canadian Constitution. Instead, we compare the *latest* version of the U.S. Constitution with the *latest* version of the Canadian Constitution. The U.S. Constitution does not fare poorly in that competition because it was originally authored in 1787 any more than the Canadian Constitution fares well because it was originally authored in 1867. Rather, the U.S. Constitution fares poorly because it has not evolved the way that the Canadian Constitution has evolved.

Another reason why it is not “unfair” to compare old constitutions to new constitutions is that, even if they fail to evolve, constitutions do not become obsolete in any objective sense. In this respect, the analogy between constitutions and technology does not hold. Constitutional obsolescence is not precisely like technological obsolescence. Outside of a handful of specialized applications, vacuum tubes are unambiguously inferior to modern semiconductors.³⁰ By contrast, there is no similarly objective basis on which to reject a bill of rights as obsolete. There is nothing incontestably and tangibly better about a constitution that contains more rights as opposed to fewer rights, or a constitution that emphasizes third-generation rights over first-generation rights. Whether a constitution is deemed obsolete is a function of taste, not truth. Unlike obsolete technologies, old constitutional paradigms therefore have the potential to retain their past popularity or to be rediscovered in the future.

In this sense, constitutional drafting is more akin to architecture than either music or technology. Like constitutional drafting, architecture involves the deliberate design of structures that will serve basic human needs in an enduring way. It also combines elements of objective performance and subjective taste. Like constitutional design, architecture is evaluated partly on the basis of hard performance criteria that are unlikely to change (e.g., buildings should not collapse; countries should not disintegrate into civil war) and partly on the basis of softer criteria involving subjective taste and value judgments (buildings should be beautiful or inspiring; constitutions should express national aspirations or character). In other words, there are ways in which constitutions can objectively fail, but there are also ways in which they can go in and out of fashion.

The U.S. Constitution is not the equivalent of a building that no

³⁰ Coincidentally, the United States is the world’s largest exporter of vacuum tubes, which consistently rank among the country’s top exports. See Chris Kahn, *62-Year Milestone: Fuel Tops List of U.S. Exports*, SEATTLE TIMES, Dec. 31, 2011, at A1, available at http://seattletimes.nwsourc.com/html/nationworld/2017130298_export31.html (reporting that vacuum tubes have been among the top five U.S. exports for the last five years).

one dares to copy because it has fundamentally failed to perform the most basic functions of a constitution, like a building that has collapsed. Its rejection as a model for constitutional drafters is instead more akin to that of an architectural style that has fallen out of vogue. There is nothing clearly and objectively wrong or defective about the U.S. Constitution that would prevent it from making a comeback in the same manner that Classical architecture enjoyed a resurgence in Renaissance Italy and continues to reappear throughout the world today.³¹ The fact that constitutional drafters are unwilling to faithfully reproduce the U.S. Constitution today suggests not that older constitutions are inherently unfit for imitation, but rather that tastes have changed.

B. The Empirical Question: Is the Twentieth-Century Trend Merely an Extension of a Nineteenth-Century Trend?

Melkinsburg argue on the basis of original empirical analysis of their own extensive data that the declining similarity to the U.S. Constitution that we identify as beginning in 1987 is in fact merely the diluted continuation of a trend that began in 1850. In their view, we have merely identified “a local maximum for the modern era.”³² Analyzing vast amounts of data, they find that similarity to the U.S. Constitution declined more sharply over the nineteenth century than the twentieth century. Their explanation for this decline contains a good deal of jargon in their response concerning “period effects,” “cohort effects,” “non-stationarity,” “one-way ratchet[s],”³³ and the like, but it appears to boil down to the relatively simple notion that similarity to the U.S. Constitution has decreased over the last two hundred years because other countries have added rights to their constitutions while the United States has not. To employ their vocabulary, growing dissimilarity reflected the addition of “new features” to the U.S. model rather than the rejection of “essential elements” of the U.S. model.³⁴

We agree that constitutions tend to contain an increasing number of rights over time. Indeed, in our previous work, we identified and defined this phenomenon as “rights creep.”³⁵ We thus welcome

³¹ See ALAIN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* 28 (2006) (“The Greeks gave birth to the Classical style, the Romans copied and developed it, and, after a gap of a thousand years, the educated classes of Renaissance Italy rediscovered it. . . . Classical buildings appeared as far apart as Helsinki and Budapest, Savannah and St Petersburg.”).

³² Melkinsburg, *supra* note 1, at 15.

³³ *Id.* at 17–19.

³⁴ *Id.* at 16.

³⁵ See Law & Versteeg, *supra* note 6, at 1194–98 (describing and empirically

Melkinsburg's finding that rights creep predates the twentieth century as both a corroboration and extension of our own findings. Moreover, given that our own data extends only as far back as World War II, we have no empirical basis for questioning their finding that similarity to the U.S. Constitution declined in the nineteenth century.

What we reject is Melkinsburg's explanation of this decline and their resulting conflation of different eras in the evolution of global constitutionalism. Declining similarity to the U.S. Constitution has not simply been the product of rights creep. Moreover, the causes of this decline have changed so much over time that it is misleading to describe the inflection point of 1987 as merely the "local maximum" of a 200-year trend.³⁶ Just as the same symptom can be indicative of different diseases, declining similarity to the U.S. Constitution has reflected distinct evolutionary processes at different points in time. Melkinsburg's analysis fails in particular to take account of two interrelated and mutually reinforcing developments that render post-World War II trends qualitatively and analytically distinct from nineteenth-century trends.

The two developments that have characterized the evolution of written constitutionalism from the late twentieth century onward are *constitutional proliferation* and *constitutional standardization*. Constitution writing today is the product of interaction and reciprocal influence in a densely populated constitutional environment that simply did not exist in the early to mid-nineteenth century or, for that matter, even the early twentieth century.³⁷ As Melkinsburg acknowledge, our focus on the post-war period makes sense because this is precisely the period during which the constitutional universe

documenting the phenomenon of "rights creep").

³⁶ Melkinsburg, *supra* note 1, at 15.

³⁷ See, e.g., CHARLES O.H. PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES* 6, 11 (2007) (noting the impact of India's 1950 Constitution and Canada's 1960 Bill of Rights on constitutional drafting in former British colonies); Robert E. Goodin, *Designing Constitutions: The Political Constitution of a Mixed Commonwealth, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES* 223, 230 (Richard Bellamy & Dario Castiglione eds., 1996) ("Reading across any large set of constitutional texts, it is striking how similar their language is; reading the history of any nation's constitution making, it is striking how much self-conscious borrowing goes on."); A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 402 (1996) (describing the "typical process" of constitutional drafting in Eastern Europe as one that involves "compil[ing] the texts of various constitutions, especially those whose systems seem worthy of emulation," and observing that "[o]ne who reviews a draft constitution in the post-communist world in Central and Eastern Europe can usually discern which Western constitutions have been the most influential"); Law & Versteeg, *supra* note 2, at 773 tbl.1 (noting the growth in the number of national constitutions from 63 in 1946 to 188 as of 2006).

mushroomed and viable competing models emerged.³⁸ As of 1850, there were only forty-three constitutions in the world, twenty-one of which were concentrated in Latin America alone.³⁹ Data drawn from the sparse and geographically skewed experience of the nineteenth century offer a rather poor guide to the developments of the late twentieth century, a period when formal constitution writing became a genuinely global phenomenon.⁴⁰ But by the turn of the twenty-first century, thanks to both a boom in constitution writing at the nation-state level and the emergence of the international human rights regime, there were hundreds of constitutional and quasi-constitutional examples and models from around the globe that a constitutional drafter might consider.⁴¹

This late twentieth-century proliferation in the number of both transnational human rights instruments and domestic constitutions made constitutional standardization possible. It has simultaneously enabled constitution-writers to identify, and made it difficult for them to ignore, something akin to a global consensus on the minimum rights that a constitution should contain.⁴² Moreover, as we have documented elsewhere, even the departures from this generic core of rights have become increasingly standardized into two internally coherent, increasingly well-defined ideological families.⁴³ Neither

³⁸ See Melkinsburg, *supra* note 1, at 14 (deeming our focus on the post–World War II era “reasonable and interesting . . . given the unprecedented growth during that era both in the number of sovereign states and in the number of rights considered by these states’ founders”).

³⁹ These counts are derived from the data relied upon, and generously shared with us, by Melkinsburg.

⁴⁰ The extent of U.S. influence in Latin America in the nineteenth century, both generally and in the specific context of constitution writing, renders it questionable whether any explanations of declining similarity to the U.S. Constitution derived from Latin American constitutionalism in the nineteenth century can be generalized to other regions or time periods. See, e.g., GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE* 105 (2009) (noting that Latin America looked to the U.S. Constitution during the nineteenth century more than almost any other region, sometimes to the point of copying language verbatim). It is difficult to see how Latin American constitutions could have become more similar to the U.S. Constitution than they already were from the outset. Realistically, constitutional drafting in Latin America had little room to move in any direction other than away from the model of the U.S. Constitution.

⁴¹ There were 188 constitutions and over 100 international human rights instruments (depending upon how one counts them). Law & Versteeg, *supra* note 2, at 833–36 (discussing the proliferation of international human rights instruments).

⁴² *Id.* at 773 (documenting the existence of a growing number of “generic” rights that have been so widely embraced that one can now speak of the existence of a “generic bill of rights”).

⁴³ See Law & Versteeg, *supra* note 6, at 1235–41 (describing the ideological clustering of constitutions into a “statist” camp and a “libertarian” camp); see also *id.* at 1217–21 (discussing constitutional variation along the non-ideological dimension of comprehensiveness, with the result that some constitutions extend to “esoteric” provisions

these competing constitutional families nor the “generic bill of rights,” however, had coalesced prior to World War II.⁴⁴ These forms of collectively defined constitutional behavior could not have emerged absent the critical mass of constitution writing reached in the late twentieth century.

What declining levels of similarity to the U.S. Constitution over the late twentieth century reflect is not merely rights creep, but rather the rejection of the U.S. Constitution as a textual template in favor of a “polycentric and multipolar” process of standardization.⁴⁵ Such standardization was not a realistic possibility in the nineteenth century, given how sparsely populated the constitutional universe was at that time. And the rejection of the U.S. Constitution as the basis for that standardization was not preordained by its date of birth, or by the existence of rights creep. Constitutions can reinvent and renew themselves in ways that extend their influence, and mere adoption of a growing number of rights is not enough to remain in sync with global trends if those rights are idiosyncratic rather than generic.

Given both the overall influence of the United States and the long head start that it enjoys in the realm of constitution writing more specifically, the U.S. Constitution ought to have enjoyed a powerful first-mover advantage when it came to defining global standards for constitution writers. Just as the English language leveraged its initial advantages to become the international language of business and diplomacy, the U.S. Constitution could have defined the *lingua franca* of constitutional drafting. In the constitutional world, however, what has prevailed instead is the equivalent of Esperanto—a synthetic universal language, an amalgam of global constitution-writing practices that belongs uniquely to no specific jurisdiction but is instead defined by the substantial area of overlap among all jurisdictions. Melkinsburg’s new findings, focused as they are on the constitutionally sparse nineteenth century and tilted heavily toward the experience of Latin America, hint at a very interesting story. But it is not the story of how the twentieth-century process of constitutional standardization came to bypass the U.S. Constitution in favor of a more genuinely global synthesis.

while others tend to contain only relatively “generic” provisions).

⁴⁴ See Law & Versteeg, *supra* note 2, at 773–75 tbl.1 (documenting the growing popularity of certain “generic” rights from 1946 onward); Law & Versteeg, *supra* note 6, at 1200–02 tbl.2 (same).

⁴⁵ Law & Versteeg, *supra* note 2, at 851.