

# RESPONSE

## COMMENTS ON LAW AND VERSTEEG'S *THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION*

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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

It was with great interest that we read David Law and Mila Versteeg's thoughtful article on the influence of the U.S. Constitution.<sup>1</sup> Their piece contributes some very useful and clearly-drawn empirical benchmarks, which will undoubtedly advance the conversation about the historical role of the U.S. Constitution in interesting and even provocative ways. Law and Versteeg provide many empirical nuggets to consider.

We take the opportunity here to examine and elaborate upon two of their central themes: (1) the historical trajectory and timing of drift from the U.S. Constitution; and (2) whether such drift should be understood as a decline in *influence*. In some sense, our analysis complements and extends theirs. Appealing to a broader set of data, we clarify the timing and magnitude of any drift away from U.S.

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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, 762 (2012) (arguing that “other countries have, in recent decades, become increasingly unlikely to model either the rights-related provisions or the basic structural provisions of their own constitutions upon those found in the U.S. Constitution”).

constitutional principles. However, we also offer a very different version of history than they do.

If one pushes further than do Law and Versteeg with respect to the conceptualization and measurement of constitutional similarity, two trends are apparent. First, constitutions have incrementally and regularly taken on new bells and whistles; we call this constitutional *modernization*. Second, despite this modernization, the *influence* of the U.S. Constitution remains evident; in fact, it has become increasingly more central compared to competing nineteenth-century alternatives.

## I

### THE LONG DECLINE

The subject of the U.S. Constitution's influence abroad is an important one that can be examined using numerous methodologies.<sup>2</sup> In a 2009 book, we ourselves examined this topic.<sup>3</sup> Our particular reason for doing so was to assess the effect of constitutional replacement: that is, whether countries that replace their constitutions renovate their institutions to reflect modern styles, or instead simply make small changes at the margin to their founding constitutions.<sup>4</sup> We analyzed something we call "inventory" similarity—that is, the degree to which the same substantive domains are addressed or unaddressed in two texts—between the U.S. document and each of the 238 Latin American constitutions written between 1789 and 2006.<sup>5</sup> Our study showed a decline over time in inventory similarity, much like the decline observed by Law and Versteeg.<sup>6</sup> Figure 1 below replicates a

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<sup>2</sup> See, e.g., GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989* (2009) (tracing the reception of American constitutional ideas abroad over two centuries); *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J. Rosenthal eds., 1990) (collecting essays on U.S. influence on such topics as separation of powers, judicial review, and rights).

<sup>3</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 25 (2009) (noting that Latin American countries drew inspiration from the U.S. Constitution).

<sup>4</sup> See *id.* at 24–29 (describing the methodology).

<sup>5</sup> In our parlance, an inventory is the set of topics within our survey that is addressed by any particular constitution. The measure of inventory similarity compares pairs of constitutions across seventy-five topics and calculates the proportion of topics for which two constitutions match, in that they both include or exclude the topic. *Id.* at 24. For the list of items in the analysis, see ELKINS ET AL., *supra* note 3, at 222–24. Also, it is worth noting that Latin American constitutions bear the analytic virtue of having been replaced rather regularly for the last 200 years. The expected life span of constitutions written in Latin America is shorter than constitutions written in other regions. *Id.* at 135 (showing that Latin American constitutions have a high "hazard rate", meaning that they are at greater risk of death).

<sup>6</sup> *Id.* at 25. The analysis extended the time frame beyond the post–World War II

figure from our book. It employs the same measure of similarity as that used by Law and Versteeg, Pearson's phi,<sup>7</sup> but draws from a larger sample of countries.<sup>8</sup> Our interpretation was that drafters have, not surprisingly, incorporated new styles and new constitutional elements rather steadily over the last 200 years. We characterize this incorporation as a kind of *modernization*, analogous to the familiar process of technological advance seen in most industries.

We note that there is an important distinction between a newer constitution that distances itself from an older one by adding new attributes and one that does so by shedding older attributes in favor of others. The first approach speaks to *modernization*, while the second speaks to declining *influence*. Modernization is certainly worth documenting, and Law and Versteeg make a real contribution by doing so. Influence, however, is something else. As we show in this Comment, the U.S. Constitution's influence is not on the decline. We examine this point in greater detail in Parts IV and V.

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period and the substantive areas beyond rights. The analysis was based on a measure of inventory similarity that differed substantively from Law and Versteeg's measure of similarity. *See supra* note 5 and accompanying text (describing the methodology used in the Elkins, Ginsburg, and Melton book); *see also* Law & Versteeg, *supra* note 1, at 770–72 (describing the methodology used for the Law and Versteeg analysis). The prior analysis also used a different metric to compute similarity scores; instead of using Pearson's phi, it used the percentage of inventory items shared by two constitutions. ELKINS ET AL., *supra* note 3, at 24–25. In the analyses of rights below, we employ Pearson's phi to maintain comparability with Law and Versteeg's analysis.

<sup>7</sup> We use Pearson's phi to compute similarity scores in Figure 1 in order to conform to Law and Versteeg's methodology. Pearson's phi is a measure of association for two binary variables. Given a cross-tabulation of matches between two constitutions in which *a* and *d* represent the cells in the diagonal of agreement (that is, where both constitutions either include or exclude the provision), and *b* and *c* represent the cells in the diagonal of disagreement (that is, where one constitution includes the provision while the other excludes it), Pearson's phi is calculated as:

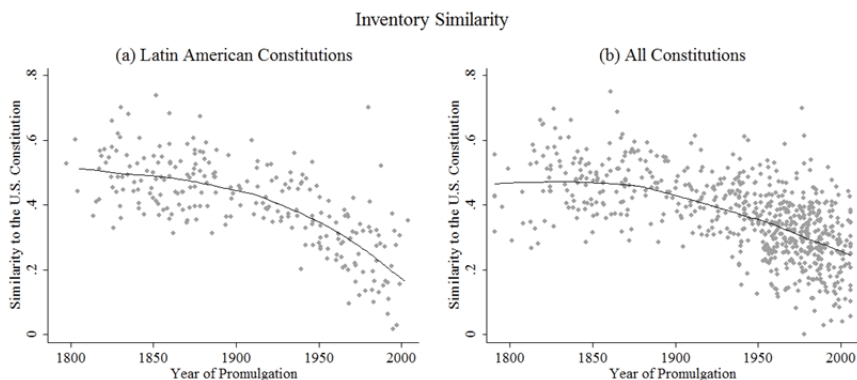
$$\frac{ad - bc}{\sqrt{(a + b)(a + c)(d + b)(d + c)}}$$

It ranges from -1 to 1, where 1 is perfect agreement and -1 is perfect disagreement. *See also* Law & Versteeg, *supra* note 1, at 772 (describing the Law and Versteeg methodology).

<sup>8</sup> Originally, we limited the analysis to Latin America because the region has the longest history of written constitutions. As a result, we hold the set of countries in the analysis more or less constant, which would not be the case if one were to include all regions. To some degree, this controls for country-specific factors that might explain variation in the willingness to adopt American-style institutions. We include constitutions written globally in the right panel of Figure 1 to make our analysis more comparable to that of Law and Versteeg.

FIGURE 1: SIMILARITY TO THE U.S. CONSTITUTION OVER TIME  
WITH RESPECT TO INVENTORY

Sample and universe: (a) 240 of 290 constitutions written in Latin America, 1789–2006; (b) 671 of 859 constitutions written globally, 1789–2006



Regardless of the label we attach to what Law and Versteeg have measured, it is clear that the U.S. Constitution has begun to show its age. (One can view our analysis of inventory similarity as corroborating Law and Versteeg’s evidence on this point.) But when, exactly, did the decline in U.S. constitutional centrality begin? To answer this question, it is important to extend Law and Versteeg’s sample to maximize the temporal perspective. Law and Versteeg analyze the post–World War II era, a reasonable and interesting focus given the unprecedented growth during that era both in the number of sovereign states and in the number of rights enjoyed by those living in the new states. Nevertheless, this limited focus does not account for broader (or, at least, prior) processes of change. For example, Law and Versteeg mark the high point of U.S. influence in roughly 1987, the year of the U.S. bicentennial.<sup>9</sup> This is a curious and somewhat beguiling year for a high-water mark; one would think that drift from the U.S. document would have begun long before the Constitution’s 200th year.

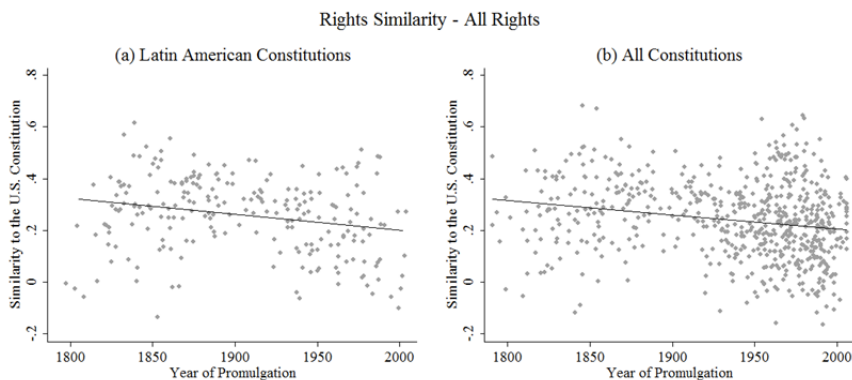
Indeed, an analysis of earlier constitutions suggests that the decline in similarity began long before 1987. The plot of inventory similarity depicted in Figure 1 suggests that Latin American constitutions’ similarity to the U.S. Constitution peaks in the mid-nineteenth century and then begins to decline secularly, with some

<sup>9</sup> Law & Versteeg, *supra* note 1, at 781 (“It is an unfortunate irony . . . that the onset of this decline [in similarity] roughly coincided with celebration of the Constitution’s bicentennial in 1987.”).

acceleration in the early twentieth century.<sup>10</sup> Analysis of the full sample of constitutions shows a similar decline beginning in around 1900. It could be that Law and Versteeg are right to single out 1987 as a local maximum for the modern era, but the process of updating world constitutions began long before that.

This earlier turning point is also evident when we evaluate *rights*—the focal element of Law and Versteeg’s article—across a longer time frame. Figure 2 plots similarity across seventy-four rights for both global and Latin American samples. Even if the eye does not pick up this point vividly, the rate of decline in similarity of other constitutions’ rights provisions to those of the United States in the first half of the twentieth century doubles that of the second half, an indicator of an earlier turning point.<sup>11</sup> We continue the re-analysis of rights similarity in Part III to rejoin the discussion of modernization versus influence.

FIGURE 2. SIMILARITY TO THE U.S. CONSTITUTION ACROSS 74 RIGHTS  
Sample and Universe: (a) 228 of 290 constitutions written in Latin America, 1789–2006; (b) 616 of 859 constitutions written globally, 1789–2006



<sup>10</sup> See *supra* Figure 1.

<sup>11</sup> We regress a measure of similarity of the U.S. Constitution to a second constitution on the year of the second constitution’s promulgation across two sets of constitutions: 126 constitutions written between 1900 and 1950 and 340 written after 1950. The analysis of the slope in this equation tells us something about the rate of decline, since the slope represents the change in similarity associated with each year. The coefficient for the variable (year) for the first half of the twentieth century is  $-0.0025$  and that for the second half is  $-0.0015$ . In other words, the rate of decline in similarity associated with each year is almost twice as high in the first half as it is in the second half.

## II DECLINING *INFLUENCE*?

Again, the main analytic question is whether declining similarity of global constitutions to the U.S. Constitution reflects the U.S. Constitution's declining *influence*. We begin by making two conceptual points.

First, the degree of observed similarity may turn on the level of abstraction at which one engages in the analysis. Surely, the ideas in the U.S. Constitution have done better than, say, the fashions worn by the drafters. Waistcoats and wigs are “out”; but rights and judicial review are surely still “in” even if their precise forms are different from those found in the U.S. Constitution. Thus we might see deep channels of influence that are not immediately apparent.

Consider a rock and roll metaphor. Suppose a young person in the 1960s is a fan of musical performers like Bob Dylan, The Who, and The Rolling Stones. As time goes on, the young man ages; by 2012, his ponytail has gone white, as has the hair of his favorite band members. His children and grandchildren may listen to Jack White and Ingrid Michaelson—artists he likes but does not know well. His favorite songs still get radio airplay, but hardly the amount that they did in the 1960s or 1970s. Would we say that because his favorite groups are no longer as popular as they used to be, they are less *influential*? Not really. Instead, we would say that the medium they helped to create and popularize—rock and roll—has become a large and diverse field of musical endeavor. The influence is measured not by whether Jack White uses precisely the same chord progressions or lyrics, but by the fact that he plays in the same medium. At a high level of abstraction, bands in the two eras are engaged in the same endeavor, even if the details are different.

Indeed, it may be that the influence of the Rolling Stones on, say, Jack White, is best studied through looking at aspects that are both taken for granted and difficult to measure. Both play songs in 4/4 time; both have some influence from the electric blues; both like the key of E. This is not to say that White's music is derivative; indeed, he has many other influences—simply because he began playing later in history—with many other potential role models.

Our second point is that we need to distinguish those differences that are produced through agglomeration of new elements from those that are produced through rejection of old elements. When a designer in any endeavor adds new features, she is not necessarily diminishing the *influence* of older models. On the other hand, when the designer rejects essential elements of older models, we might say that the older model has experienced declining influence.

Let us take another example from the field of technology. How similar is the manual typewriter to the modern personal computer? Very different, it would seem. On one you can produce neatly printed documents while on another you can shop, watch a film, and communicate across the world (among countless other features). If one were to itemize, using a metric similar to Law and Versteeg's, the various features of the personal computer and then score different technologies on whether they had such a feature, the typewriter would, alas, appear about as similar to the modern personal computer as would a common telephone. One need only look at a typewriter and personal computer to recognize their evolutionary connection, but the standard metrics of comparison are not actually or easily comparable across eras. Scoring the typewriter on a checklist of modern features tells us simply that document processing has evolved, not that the influence of the typewriter is trivially small.

### III

#### THE ROLE OF TIME: PERIOD AND COHORT EFFECTS

The critical insights from the discussion in Part II are, first, that constitutions are products of their generations, and second, that any older constitution is, for reasons we describe below, likely to appear dissimilar to a newer one. These points are especially true if one focuses on rights and on the presence or absence of modern rights, which advance by accretion. In our various analyses of constitutional similarity, we have found that the most consistently strong predictor of the similarity of any two documents is the difference between the years in which they were produced.<sup>12</sup>

One way to think about the way in which time matters is to consider cohort and period effects, which are common concepts in generational analyses.<sup>13</sup> Events, trends, and fashions can affect

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<sup>12</sup> See ELKINS ET AL., *supra* note 3, at 26 fig.2.1 (depicting similarity between constitutions over a 200-year period); José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, 1708 (2011) (finding that the century or region in which a constitution was written better predicts institutional similarity than other types of institutional classifications); Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 COMP. POL. STUD. 969, 986 (2010) (discussing the effect of constitutional age on similarity); Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul . . . : Constitution-Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1156, 1175–76 tbl.1, 1177 fig.1, 1178 fig.2 (2008) (listing the promulgation year of various constitutions and depicting their level of similarity).

<sup>13</sup> See, e.g., C. Osmond & M. J. Gardner, *Age, Period, and Cohort Models: Non-Overlapping Cohorts Don't Resolve the Identification Problem*, 129 AM. J. EPIDEMIOLOGY 31 (1989) (distinguishing and developing a model to analyze period and cohort effects).

constitutions (like they do individuals) at any time in their lives, but susceptibility to outside influences may differ at certain points in the life cycle. Specifically, one would think that exposure to a foreign text is particularly important at the time of a constitution's birth, but that constitutional texts (at least in the formal sense in which we discuss them here) are only moderately susceptible to influence thereafter. This sort of dynamic would lead to strong cohort (i.e., generational) effects, such that constitutions born at the same time will share striking similarities even as they age. On the other hand, it may be that a constitution that spans various periods will absorb the fashions of those subsequent periods, almost regardless of its age. These are called period effects: Constitutions born in different eras but subject to influences in the same period would undergo changes simply for having operated in the same period.

We think it is likely as a theoretical matter that cohort effects will be more powerful than period effects with regard to constitutions. While fashions can influence constitutions throughout their life cycle, there are reasons to think that these fashions are not always likely to be reflected in formal texts. Constitutional texts are, by design, difficult to change. Furthermore, enacting a formal amendment requires the expenditure of political energy. Also, the interpretation of a constitution may be easier to change than the text itself, in which case there may be no need to update the actual language.<sup>14</sup> Therefore, we expect that constitutions will exhibit stronger cohort effects than period effects. If this is true, we should also expect lower levels of similarity among constitutions produced in different cohorts than among those in the same cohort. This would be true independent of the particular level of influence that one cohort had on subsequent ones. Similarity would be constant across cohorts only if there were never any institutional innovation.

#### IV

#### MEASURING INFLUENCE

Rights do not fit the metaphors of music or fashion in one important respect: Trends in rights are not cyclical. Do not expect the “right to bear arms” to come back in style like oversize glasses, mustaches, or the retro-soul sound of Amy Winehouse.<sup>15</sup> Our own finding is that, almost without exception, rights are either monotonically increasing in popularity or, in the case of the

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<sup>14</sup> See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION* 237, 241, 245 (Sanford Levinson ed., 1995) (treating judicial interpretation and formal amendment as substitutes).

<sup>15</sup> See, e.g., AMY WINEHOUSE, *BACK TO BLACK* (Universal Island Records Ltd. 2006).



exceptional right to bear arms, monotonically decreasing.<sup>16</sup> We think of rights as a one-way ratchet, mostly moving in the direction of expansion.<sup>17</sup> The reason is easy to understand. Once introduced, rights are very hard to erase. What politician wants to stand up in a constitutional assembly to argue against some constituent's right?

In terms of measuring similarity, this one-way ratchet introduces a problem of non-stationarity. Stationarity is an assumption in time-series models that the joint probability distribution, as well as parameters such as the mean and variance, does not change over time.<sup>18</sup> In our case, the mean number of possible rights, as well as the proportion of constitutions with a given right, is trending steadily upwards. This introduces some special analytic problems. One aspect of this problem is that the contexts in which any two constitutions are written may be radically different, and, as a result, assessments of similarity between an eighteenth-century document and a twentieth-century document are complicated, to say the least. Comparing older and modern documents against a set of modern rights essentially measures whether the old document adopted or anticipated modern fashions. Such a comparison is not a good measure of the older document's influence.

How might we assess the influence of older documents and, for that matter, the similarity of constitutions across contexts? One way is to examine constitutional development along only those features that would be theoretically "possible" to adopt in a given era. It would be unfair to expect an eighteenth-century constitution to have provisions for consumer or environmental rights; and conversely, we should not evaluate modern constitutions on whether they allow slavery. Operationally, then, one way to refine a measure of similarity might be to limit the set of rights under consideration to those features that had been adopted by some percentage (say, twenty-five percent) of constitutions in each era. Call this set of rights "common rights"—that is, rights that are common to each temporal context. The question is whether the set of rights selected by the U.S.

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<sup>16</sup> Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. (forthcoming 2013) (manuscript at 12–13) (on file with the *New York University Law Review*); see also *Reports*, CONSTITUTIONMAKING.ORG, [www.constitutionmaking.org/reports.html](http://www.constitutionmaking.org/reports.html) (last visited Sep. 20, 2012) (offering a summary of the progression of twelve constitutional rights over time).

<sup>17</sup> Law and Versteeg call this "rights creep." See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1194–98 (2011) (noting that the number of rights included in constitutions is increasing).

<sup>18</sup> See generally Janet M. Box-Steffensmeier & Renée M. Smith, *Investigating Political Dynamics Using Fractional Integration Methods*, 42 AM. J. POL. SCI. 661 (1998) (discussing stationarity and methods to address non-stationarity).

Constitution's framers remains more influential than do the other sets of rights in circulation during the same time that the framers did not select.

After all, even for those drafting constitutions in the nineteenth century, the rights enshrined in the U.S. Constitution offered just *one* set of a larger universe of rights. New Latin American countries and democratizing states in Europe had several different "menus" to choose from, such as those in the series of French charters starting in 1791 or that in the widely disseminated Spanish Constitution of 1812, known as the Cádiz Constitution.<sup>19</sup> These menus, or models, were decidedly different with respect to their content. Of the twenty-three common rights in general circulation, only eleven in both the U.S. Constitution and French Constitution of 1791 "match," meaning that both constitutions either exclude or include the right. The other twelve rights are included in one constitution but not the other. The number of matching common rights for the U.S. and Cádiz constitutions is similar. This scattered distribution of rights is helpful analytically: One can assess the influence of one "menu" of rights against real alternatives. One way to do this is by following the methodology we describe above—that is, comparing measures of similarity composed of items common across all eras (or, in our operationalization, rights prevalent in at least twenty-five percent of constitutions in each half century). We can then see how well the U.S. menu of rights tracks across time, compared to its alternatives.

### FIGURE 3. SIMILARITY TO THE U.S. CONSTITUTION ACROSS TWO SETS OF RIGHTS

Sample and universe: (a) 228 of 290 constitutions written in Latin America, 1800–2006; (b) 616 of 859 constitutions written globally, 1800–2006

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<sup>19</sup> See, e.g., AN AUTHENTIC COPY OF THE FRENCH CONSTITUTION AS REVISED AND AMENDED BY THE NATIONAL ASSEMBLY, AND PRESENTED TO THE KING ON THE THIRD OF SEPTEMBER, 1791 (London, Printed for J. Debrett 1791); AUTHENTIC COPY OF THE NEW CONSTITUTION OF FRANCE, ADOPTED BY THE NATIONAL CONVENTION, JUNE 23, 1793 (London, Printed for J. Debrett 1793); POLITICAL CONSTITUTION OF THE SPANISH NATION PROCLAIMED IN CADIZ, 19 MARCH, 1812, *reprinted in* CONSTITUTIONS THAT MADE HISTORY 117 (Albert P. Blaustein & Jay A. Sigler eds., 1988).

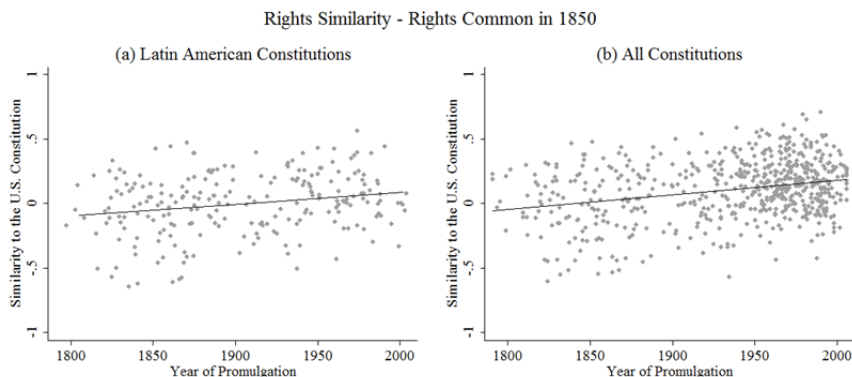


Figure 3 presents an analysis of the similarity of the U.S. Constitution to others with respect to common rights. As in Figure 2, we analyze two samples: one of Latin American constitutions and one drawn from all constitutions. These graphs can be contrasted against those in Figure 2, which replicate and extend Law and Versteeg’s analysis by plotting the similarity of each set of constitutions to the U.S. Constitution across all rights. We see that, as expected, in Figure 2, constitutions appear increasingly dissimilar to the U.S. Constitution, suggesting that, on average, constitutions have evolved and absorbed modern rights. Figure 3, however, plots the similarity of constitutions to the U.S. Constitution across those rights that were popular (that is, found in at least twenty-five percent of constitutions) before 1850. As we suggest above, this metric better captures the *influence* of the U.S. Constitution. We see that across this set of rights, the U.S. Constitution is actually *increasingly* similar to other constitutions over time.

## V

### SOME SIGNATURE, IF LESS CENTRAL, ELEMENTS OF U.S. INFLUENCE

We close with a regrettably short discussion of some arcane elements of the U.S. Constitution, which may seem inconsequential. But it is in part because of their triviality—or at least their arbitrary selection by the founders—that these elements tell us something about influence. To understand why, consider another function of constitutional text: simple coordination. David Strauss has noted that “it is more important that some things be settled than that they be settled right.”<sup>20</sup> Many types of constitutional rules have little distributive consequence. Nevertheless, *some* rule must be adopted.

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<sup>20</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 907 (1996).

In such cases, the rule from one constitution simply may be more likely to be emulated by constitutional drafters, further increasing similarity between constitutions.<sup>21</sup>

For example, many constitutions have a minimum age requirement to hold certain offices, an innovation of the U.S. Constitution. Article II requires one to be at least thirty-five years old to become president.<sup>22</sup> This number has been remarkably sticky, having been borrowed by a plurality of constitutions in our sample (thirty percent of the 534 constitutions that specify an age limit for the head of state).<sup>23</sup> Similarly, the U.S. age limit (twenty-five) for serving in the lower house of the legislature remains the most popular number globally (thirty-seven percent of the 565 constitutions that specify an age limit for members of the lower house).<sup>24</sup> Despite a significant increase in life expectancies since the eighteenth century, the U.S. “solution” has remained in place. This is an example of constitutional drafters *failing* to modernize and suggests evidence of textual influence.

Consider another example: term limits. Most presidential constitutions have had term limits. As we show in our study of term limits, the most popular form historically was a version in which the officer could serve for multiple nonconsecutive terms but no consecutive terms.<sup>25</sup> However, the U.S. version, which was not codified until the Twenty-Second Amendment was ratified in 1951, has become the single most popular option.<sup>26</sup> This is another example of *increasing* U.S. influence over time, in which modernization has moved in the direction of the U.S. model.

As a final example, we note that most constitutions followed the American approach of using preambles. In an early working paper, we find that the expression “We the People” is the single most popular phrase found in national preambles since 1789 and that its use is *increasing* in popularity over time.<sup>27</sup>

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<sup>21</sup> See generally Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33 (2005) (discussing emulation as a mode of diffusion across countries).

<sup>22</sup> U.S. CONST. art. II, § 1, cl. 5.

<sup>23</sup> Data on file with authors.

<sup>24</sup> Data on file with authors; see also U.S. CONST. art. I, § 2, cl. 2.

<sup>25</sup> Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1836 (2011).

<sup>26</sup> *Id.* at 1839 fig.1 (showing that the two-term limit is now the primary variant).

<sup>27</sup> Zachary Elkins, Nicholas Foti, Tom Ginsburg & Daniel N. Rockmore, “We the Peoples”: The Global Origins of Constitutional Preambles 6–7 tbl.1 (Aug. 1, 2012) (unpublished manuscript) (on file with the *New York University Law Review*) (finding that 14.7% of all constitutions have the phrase, including 25.4% of those written in 1990 or after). To be sure, other U.S. institutions have not fared as well. Judges in the United States serve during good behavior, but most other countries have adopted some sort of

We do not have space for a complete analysis of what aspects of constitutions are most likely to exhibit declining or increasing similarity over time. Our only point is that rights may not be completely representative of constitutional influence or similarity. To their credit, Law and Versteeg push their analysis beyond rights, but their analysis still leaves many areas of constitutions untouched. After all, constitutional drafters are expansive, and increasingly so, in what they try to regulate. Other features of the U.S. Constitution may well be different, or they may show more enduring influence.

#### CONCLUSION

Law and Versteeg have made a real contribution with their analysis of constitutional similarity over time, restarting an important conversation with a fascinating set of empirical benchmarks.<sup>28</sup> Their findings are in some sense consistent with our own, though we have slightly different interpretative emphases. Our focus is on the degree of renovation that occurs in constitutional replacement, which is consistent with the idea that older constitutions reflect their drafting cohort. Law and Versteeg emphasize the seeming abandonment of the U.S. Constitution, a finding which is, of course, of great interest to an American audience that is increasingly concerned about an era of relative decline. Canadians, too, may be interested to learn that Canada scores high on measures of similarity, so that Canada is more influential than its southern neighbor in at least one field.<sup>29</sup> But for reasons we state above, we think such a comparison is a bit unfair, given that the Canadian document was written in 1982, nearly two hundred years after the United States drafted its constitution.

Perhaps a fairer comparison would be to compare the influence of the U.S. Constitution over time with that of its contemporaries, such as the Cádiz Constitution. Both these documents have had an enormous influence on the trajectory of nineteenth-century constitutionalism, at least in Latin America,<sup>30</sup> but their apparent *influence* today could not be more different. While the rights menu of

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limit to judicial service. *See, e.g.*, EDWARD MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING 51–57 (1986) (comparing retirement ages for judges on the supreme courts of a number of countries, including Canada, India, Japan, and Germany).

<sup>28</sup> *See, e.g.*, Adam Liptak, 'We the People' Loses Followers, N.Y. TIMES, Feb. 7, 2012, at A1 (discussing the Law and Versteeg article).

<sup>29</sup> *See* Law & Versteeg, *supra* note 1, at 811 (pointing to data that suggest that the Canadian Constitution is more popular than is the American model).

<sup>30</sup> *See* Elkins, *supra* note 12, at 981–84 (discussing the influence of these constitutions in Latin America); *see also* ROBERTO GARGARELLA, THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS 1776–1860, at 95–101, 114, 116–17 (2010) (discussing the influence of the French Revolution, French Declaration on the Rights of Man, and Cádiz Constitution).

the U.S. Constitution is alive and well, and even increasing in prevalence, that of the Cádiz Constitution is waning.<sup>31</sup> This, combined with our findings on other areas of constitutional text, such as age qualifications, term limits, and preambles, suggests that the aged U.S. Constitution may still have some influence over contemporary constitution making.

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<sup>31</sup> Compare the average similarity (across the twenty-three common rights) between Latin American constitutions and: (a) the U.S. document, and (b) Spain's 1812 document. The average similarity score for Spain's 1812 constitution shifts *downward* from -0.11 to -0.16, across centuries, while that for the U.S. document shifts *upward*, from -0.04 to 0.04. The U.S. model has clearly fared better than has the Spanish one, though of course the Spanish document was in force for a much shorter period.