

# THE DECLINING INFLUENCE OF THE UNITED STATES CONSTITUTION

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*It has been suggested, with growing frequency, that the United States may be losing its influence over constitutionalism in other countries because it is increasingly out of sync with an evolving global consensus on issues of human rights. Little is known in an empirical and systematic way, however, about the extent to which the U.S. Constitution influences the revision and adoption of formal constitutions in other countries.*

*In this Article, we show empirically 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. Analysis of sixty years of comprehensive data on the content of the world's constitutions reveals that there is a significant and growing generic component to global constitutionalism, in the form of a set of rights provisions that appear in nearly all formal constitutions. On the basis of this data, we are able to identify the world's most and least generic constitutions. Our analysis also confirms, however, that the U.S. Constitution is increasingly far from the global mainstream.*

*The fact that the U.S. Constitution is not widely emulated raises the question of whether there is an alternative paradigm that constitutional drafters in other countries now employ as a model instead. One possibility is that their attention has shifted to some other prominent national constitution. To evaluate this possibility, we analyze the content of the world's constitutions for telltale patterns of similarity to the constitutions of Canada, Germany, South Africa, and India, which have often been identified as especially influential. We find some support in the data for the notion that the Canadian Charter of Rights and Freedoms has influenced constitution making in other countries. This influence is neither uniform nor global in scope, however, but instead reflects an evolutionary path shared primarily by other common law countries. By comparison, we uncover no patterns that would suggest widespread constitutional emulation of Germany, South Africa, or India.*

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*Another possibility is that international and regional human rights instruments have become especially influential upon the manner in which national constitutions are written. We find little evidence to indicate that any of the leading human rights treaties now serves as a dominant model for constitutional drafters. Some noteworthy patterns of similarity between national constitutions and international legal instruments do exist: For example, the constitutions of undemocratic countries tend to exhibit greater similarity to the Universal Declaration of Human Rights, while those of common law countries manifest the opposite tendency. It is difficult to infer from these patterns, however, that countries have actually emulated international or regional human rights instruments when writing their constitutions.*

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I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012.

—Justice Ruth Bader Ginsburg<sup>1</sup>

# INTRODUCTION: THE DECLINE AND FALL OF AMERICAN CONSTITUTIONALISM?

In 1987, to mark the bicentennial of the U.S. Constitution, *Time* magazine released a special issue in which it called the Constitution “a gift to all nations” and proclaimed proudly that 160 of the 170 nations then in existence had modeled their constitutions upon our own.<sup>2</sup> As boastful as the claim may be, the editors of *Time* were not entirely without reason. Over its two centuries of history, the U.S. Constitution has had an immense impact on the development of constitutionalism around the world.<sup>3</sup> Constitutional law has been called

<sup>1</sup> The Middle East Media Research Institute TV Monitor Project, *U.S. Supreme Court Justice Ruth Bader Ginsburg to Egyptians: Look to the Constitutions of South Africa or Canada, Not to the U.S. Constitution*, MEMRI TV (Jan. 30, 2012), <http://www.memritv.org/clip/en/3295.htm> (video clip of an interview with Justice Ginsburg, originally broadcast by the Egyptian television station Al-Hayat TV) [hereinafter *Justice Ginsburg to Egyptians*].

<sup>2</sup> John Greenwald, *A Gift to All Nations*, *TIME*, July 6, 1987, at 92.

<sup>3</sup> A considerable body of scholarship has sought to document the influence of the U.S. Constitution abroad. See, e.g., *AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY* (George Athan Billias ed., 1990); *GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE* (2009); *CONSTITUTIONALISM IN ASIA: ASIAN VIEWS OF THE AMERICAN INFLUENCE* (photo. reprint 1988) (Lawrence W. Beer ed., 1979); *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* (Louis Henkin & Albert J. Rosenthal eds., 1990); CARL J.

one of the “great exports” of the United States.<sup>4</sup> In a number of countries, constitutional drafters have copied extensively, and at times verbatim, from the text of the U.S. Constitution.<sup>5</sup> Countless more foreign constitutions have been characterized as this country’s “constitutional offspring.”<sup>6</sup>

It is widely assumed among scholars and the general public alike that the United States remains “the hegemonic model” for constitutionalism in other countries.<sup>7</sup> The U.S. Constitution in particular continues to be described as “the essential prototype of a written, single-document constitution.”<sup>8</sup> There can be no denying the popularity of

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FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* (1967); RICHARD B. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* (1970). Although some of these studies are more restrained in their conclusions than others, they have generally concluded that “the influence of American constitutionalism abroad was profound in the past and remains a remarkable contribution to humankind’s search for freedom under a system of laws.” BILLIAS, *supra*, at xv.

<sup>4</sup> Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1 (quoting Anne-Marie Slaughter, then Dean of the Woodrow Wilson School of Public and International Affairs at Princeton).

<sup>5</sup> See BILLIAS, *supra* note 3, at 105 (noting that “few [regions] made greater use of North American constitutionalism” than Latin America and that “[h]uge sections of two constitutions—Argentina’s in 1853 and Brazil’s in 1891—were copied word for word from the U.S. Constitution”); Donald L. Horowitz, *The Federalist Abroad in the World*, in *THE FEDERALIST PAPERS: ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY* 502, 505 (Ian Shapiro ed., 2009) (describing what Simon Bolivar dubbed a “craze for imitation” among Latin American constitutional drafters in the nineteenth century).

<sup>6</sup> *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. . . . These countries are our ‘constitutional offspring’ . . .”).

<sup>7</sup> Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597, 597 (“[B]oth advocates and detractors of the American experience assume that the United States is, at the beginning of the twenty-first century, the hegemonic model [for constitutionalism in other countries].”); see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 41 & 178 n.1 (2001) (reporting the finding of a 1997 poll conducted by the National Constitution Center that 34% of respondents “strongly agreed” and another 33% “somewhat agreed” with the statement that “[t]he U.S. Constitution is used as a model by many countries”).

<sup>8</sup> Klug, *supra* note 7, at 605. To be sure, other countries can boast long experience with written constitutions. France’s experience is nearly as long as that of the United States, while Poland and Belgium both flirted with written constitutionalism in the late eighteenth century. See BILLIAS, *supra* note 3, at 65–66 (discussing European constitutionalism between 1787 and 1800). For an even earlier example, one might consider the code of China’s Tang Dynasty a “constitution” that inspired imitators in its own right. See JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 29–30 (1991) (noting that the Yōrō Code of eighth-century Japan, which was “for the most part a direct copy of the T’ang Code,” “remained in theory Japan’s fundamental national law for over a millennium”); Hayden Windrow, *A Short History of Law, Norms, and Social Control in China*, 7 ASIAN-PAC. L. & POL’Y J. 244, 245 (2006) (observing that the Tang Dynasty Code of 637 B.C. “employed a legalist bureaucratic apparatus to enforce

the Constitution's most important innovations, such as judicial review, entrenchment against legislative change, and the very idea of written constitutionalism.<sup>9</sup> Today, almost 90% of all countries possess written constitutional documents backed by some kind of judicial enforcement.<sup>10</sup> As a result, what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state.<sup>11</sup>

There are growing suspicions, however, that America's days as a constitutional hegemon are coming to an end.<sup>12</sup> It has been said that

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Confucian norms" and "established an efficient, minimalist political model that governments followed until the early twentieth century"). Nevertheless, the U.S. Constitution can lay claim to being the oldest surviving example of a written constitution. See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 399 & n.28 (2008) (naming the constitutions of Norway, Belgium, Luxembourg, Mexico, and Canada as runners-up to the U.S. Constitution in terms of longevity).

<sup>9</sup> See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 48–50 (2009) (observing that "formal constitutions are the norm" for most countries, and deeming every country in the world from 1789 to 2006 to have possessed a formal constitution with the sole exception of the United Kingdom); Gardbaum, *supra* note 8, at 393, 411 (identifying the United States as "the inventor of modern constitutional supremacy" in the form of "a constitution containing a bill of rights that is entrenched, the supreme law of the land, and enforced by the power of judicial review," and observing that these "constitutional fundamentals" have become so prevalent that "countries which continue to reject one or all of them . . . are now truly exceptional").

<sup>10</sup> See *infra* Figure 9 (documenting the percentage of countries that provide explicitly for judicial review in their constitutions).

<sup>11</sup> See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 72–77 (Richard D. Heffner ed., trans., Signet Classic 2001) (1835) (deeming "the right of judges to found their decisions on the *Constitution* rather than on the *laws*" a form of "immense political power" that is "peculiar to the American magistrate").

<sup>12</sup> See, e.g., DAHL, *supra* note 7, at 43 (observing that the "basic elements" of the American constitutional system are imitated by none of the world's "older democracies"); Klug, *supra* note 7, at 598 (arguing that, "instead of enjoying an unassailable, dominant status," advocates of the American model now face "open competition from advocates of the German, Canadian, Indian, or other constitutional experiences"); Wiktor Osiatynsky, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 250 (2003) (noting that in post-Cold War Eastern Europe, the American constitutional model was "rejected almost out of hand because of the drastic difference in U.S. and postcommunist traditions and social conditions"); Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *GOVERNANCE IN A GLOBALIZING WORLD* 253, 260 (Joseph S. Nye Jr. & John D. Donahue eds., 2000) ("[I]n some political quarters, avoiding American influence just because it is American often appears to be a driving force."); Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMPARATIVE POLITICS* 217, 231 (Daniele Caramani ed., 2008) (deeming "the American experience" "increasingly irrelevant to global constitutionalism"); Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 84 (Sujit Choudhry ed., 2006) ("The Constitution of the United States provided the inspiration for the rights-protecting constitutions of liberal democracies across the world. Yet the constitutional systems developed or newly established since the Second World War now differ from their U.S. precursor."); Miguel Schor, *Book Review*, 20 L. & POL. BOOK REV. 155, 157 (2010) (reviewing GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD AROUND THE WORLD, 1789–1989: A GLOBAL PERSPECTIVE* (2009)), <http://www.lpbr.net/2010/05/american->

the United States is losing constitutional influence because it is increasingly out of sync with an evolving global consensus on issues of human rights.<sup>13</sup> Indeed, to the extent that other countries still look to the United States as an example, their goal may be less to imitate American constitutionalism than to avoid its perceived flaws and mistakes.<sup>14</sup> Scholarly and popular attention has focused in particular upon the influence of American constitutional jurisprudence. The reluctance of the U.S. Supreme Court to pay “decent respect to the opinions of mankind”<sup>15</sup> by participating in an ongoing “global judicial dialogue”<sup>16</sup> is supposedly diminishing the global appeal and influence of American constitutional jurisprudence.<sup>17</sup> Studies conducted by

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constitutionalism-heard-around.html (“The once predominant position of the United States within the Western constitutional tradition is under challenge by constitutional seeds planted immediately after the Second World War, such as the Universal Declaration of Human Rights (1948) and the German Basic Law (1949).”).

<sup>13</sup> See, e.g., James Allan & Grant Huscroft, *Constitutional Rights Coming Home To Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 2 (2006) (“The U.S. Bill of Rights looks old and deficient compared to modern bills of rights.”); Schauer, *supra* note 12, at 258 (arguing that constitution makers are increasingly less likely to borrow from the U.S. Constitution, because “[o]n issues of freedom of speech, freedom of the press, and equality, for example, the United States is seen as representing an extreme position”). See generally AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005) (documenting different aspects of “American Exceptionalism” in the realm of human rights).

<sup>14</sup> See, e.g., Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 15–24 (2004) (discussing the lengths to which Canadian constitutional drafters went to “avoid substantive due process altogether, not merely its economic limb”); Klug, *supra* note 7, at 605–06 (noting India’s rejection of the phrase “due process of law” for fear of inviting *Lochner*-style jurisprudence, and raising the possibility that the U.S. Constitution may now serve as an “anti-model”). See generally Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296 (2003) (discussing the phenomenon of “aversive constitutionalism,” wherein certain countries serve as negative models that other countries consciously strive not to emulate).

<sup>15</sup> *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari) (quoting DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

<sup>16</sup> David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 525–27 (2011) (reviewing the various types of “global judicial dialogue” that are said to exist, and the various terms that have been used to describe them); see also, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 74, 243 (2004) (describing the increasing prevalence of “global judicial conversation” and “global judicial human rights dialogue”).

<sup>17</sup> See, e.g., SLAUGHTER, *supra* note 16, at 74 (arguing that courts that are adept at “captur[ing] and crystalliz[ing] the work of their fellow constitutional judges around the world” enjoy disproportionate influence); 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, 27, 114 (2002) (arguing that the Supreme Court is “losing the central role it once had among courts in modern democracies,” whereas “[t]he Supreme Court of Canada is particularly noteworthy for its frequent and fruitful use of comparative law,” with the result that “Canadian law serves as a source of inspiration for many countries around the world”); Law & Chang, *supra* note 16, at 568–74 (contrasting the U.S. Supreme

scholars in other countries have begun to yield empirical evidence that citation to U.S. Supreme Court decisions by foreign courts is in fact on the decline.<sup>18</sup> By contrast, however, the extent to which the U.S. Constitution itself continues to influence the adoption and revision of constitutions in other countries remains a matter of speculation and anecdotal impression.

With the help of an extensive data set of our own creation that spans all national constitutions over the last six decades, this Article explores the extent to which various prominent constitutions—including the U.S. Constitution—epitomize generic rights constitutionalism or are, instead, increasingly out of sync with evolving global practice. A stark contrast can be drawn between the declining attraction of the U.S. Constitution as a model for other countries and the increasing attraction of the model provided by America's neighbor to the north, Canada. We also address the possibility that today's constitution makers look for inspiration not only to other national constitutions, but also to regional and international human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Our findings do little to assuage American fears of diminished influence in the constitutional sphere.

Part I introduces the data and methods used in this Article to quantify constitutional content and measure constitutional similarity. Part II describes the global mainstream of rights constitutionalism, in the form of a set of rights that can be found in the vast majority of the

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Court's relatively rare use of foreign law in constitutional cases with the Taiwanese Constitutional Court's nearly automatic consideration of foreign law); Liptak, *supra* note 4, at A1 (suggesting that the influence of the Supreme Court is waning in part because it does not engage in open intellectual exchange with foreign courts).

<sup>18</sup> See, e.g., Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 29 (1998) ("An informal analysis of Canadian Supreme Court decisions since 1986 revealed that the Rehnquist Court was cited in fewer than one-half as many cases as the Warren Court, and in just under one-third the number of Burger Court cases."); Russell Smyth, *Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis*, 22 TEMP. INT'L & COMP. L.J. 409, 425 tbl.1 (2008) (reporting a decline in citations to U.S. federal court decisions by Australian state supreme courts from 1905 to 2005); see also, e.g., James Allan et al., *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?*, 11 OTAGO L. REV. 433, 437 (2007) (finding that courts and litigants involved in rights litigation in New Zealand cite Canadian Supreme Court decisions more often than U.S. Supreme Court decisions); Michael Kirby, *Think Globally*, 4 GREEN BAG 2D 287, 291 (2001) (observing, with the benefit of personal experience as a High Court judge, that the High Court of Australia often turns for inspiration to "the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa" instead of the U.S. Supreme Court, for inspiration).

world's constitutions. From this core set of rights, we construct a hypothetical *generic bill of rights* that exemplifies current trends in rights constitutionalism. We then identify the most and least generic constitutions in the world, measured by their similarity to this generic bill of rights, and we pinpoint the ways in which the rights-related provisions of the U.S. Constitution depart from this generic model.

Part III documents the growing divergence of the U.S. Constitution from the global mainstream of written constitutionalism. Whether the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same: The U.S. Constitution has become an increasingly unpopular model for constitutional framers elsewhere. Possible explanations include the sheer brevity of the Constitution, its imperviousness to formal amendment, its omission of some of the world's generic constitutional rights, and its inclusion of certain rights that are increasingly rare by global standards.

Parts IV and V tackle the question of whether a prominent constitution from some other country has supplanted the U.S. Constitution as a model for global constitutionalism. Part IV contrasts the growing deviance of the U.S. Constitution from global constitutional practice with the increasing popularity of the Canadian approach to rights constitutionalism. Unlike its American counterpart, the Canadian Constitution has remained squarely within the constitutional mainstream. Indeed, when Canada departed from the mainstream by adopting a new constitution, other countries followed its lead. Closer examination reveals, however, that the popularity of the Canadian model is largely confined to countries with an Anglo-American legal tradition. In other words, our analysis suggests that Canada is in the vanguard of what might be called a Commonwealth model of rights constitutionalism, but not necessarily of global constitutionalism as a whole.

Part V considers whether the widely celebrated constitutions of Germany, South Africa, or India might instead be leading the way for global constitutionalism. Although all three are currently more mainstream than the U.S. Constitution, we find little evidence that global constitution-writing practices have been strongly shaped by any of the three.

Part VI explores the possibility that transnational human rights instruments have begun to shape the practice of formal constitutionalism at the national level. The evidence that international and regional human rights treaties may be serving as models for domestic constitutions varies significantly from treaty to treaty. In particular,

we find that the average constitution has increasingly grown to resemble the International Covenant on Civil and Political Rights and the European Convention on Human Rights, as well as the African Charter on Human and Peoples' Rights and the Charter of Civil Society for the Caribbean Community. There is little evidence, however, that any of these treaties is actually responsible for generating global consensus as to what rights demand formal constitutional protection. Although these treaties may express and reinforce preexisting global constitutional trends, they do not appear to define those trends in the first place.

Finally, the Conclusion discusses possible explanations for the declining influence of American constitutionalism. These include a broad decline in American hegemony across a range of spheres, a judicial aversion to constitutional comparativism, a historical and normative commitment to American exceptionalism, and sheer constitutional obsolescence.

## I

### METHODS FOR MEASURING CONSTITUTIONAL SIMILARITY

The basis of our empirical analysis is a new collection of data on the rights-related provisions of the written constitutions of every country in the world over the last six decades.<sup>19</sup> This data set covers a total of 729 constitutions adopted by 188 different countries from 1946 to 2006. For each constitution, the text of the entire document was analyzed, and information on 237 different variables regarding both substantive rights and rights-enforcement mechanisms was collected. The measurement of constitutional content in numerical form, of the type required by the statistical techniques that we employ in this Article, required numerous decisions as to what types of constitutional provisions would be coded, and in what manner. Some of the rules that we adopted for handling difficult cases can be justified on substantive grounds, while others were adopted for the sake of minimizing ad hoc, subjective coding decisions and thus enhancing the

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<sup>19</sup> This dataset was first introduced in Benedikt Goderis & Mila Versteeg, *The Transnational Origins of Constitutions: An Empirical Analysis*, Sixth Annual Conference on Empirical Legal Studies (Nov. 4, 2011) (unpublished manuscript) (on file with the *New York University Law Review*), available at <http://ssrn.com/abstract=1865724>, and is also analyzed in David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011).

transparency and replicability of our methodology.<sup>20</sup> We describe these coding decisions in greater detail in our earlier work.<sup>21</sup>

To quantify the degree of similarity between constitutions, we first constructed a *rights index* that captures the rights-related content of each constitution in numeric form. The rights index was constructed as follows. From the initial list of 237 constitutional provisions for which raw data had been collected, we selected and aggregated a number of these provisions into a sixty-variable index designed to measure the overall rights content of each constitution. Our goal in creating this index was to construct a measure of constitutional content that would capture all meaningful substantive variation in the rights-related content of the world's constitutions yet, at the same time, would disregard minor textual differences that amounted largely to matters of drafting style or semantics. For example, we lumped a number of rights that overlapped both conceptually and in practice, such as freedom of the press and freedom of expression, into a single right for purposes of the index.<sup>22</sup>

Ultimately, we selected 113 of the 237 variables from the complete data set, then aggregated and condensed these variables further until we were left with the sixty variables that make up the index. Most of the variables in the index consist of actual substantive rights or substantive limitations upon such rights. We also included two variables relating to the existence of rights-enforcement mechanisms: whether the constitution provides for (a) judicial review or (b) a human rights commission and/or human rights ombudsmen. Appendix

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<sup>20</sup> A commonly encountered type of rights-related provision, for example, is a limitation clause that purports to limit the scope of rights in a constitution, often in a boilerplate or blanket manner. A typical example is section 1 of the Canadian Charter of Rights and Freedoms, which stipulates that the rights contained therein are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." 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.). Such provisions are not included in our data. *See* Law & Versteeg, *supra* note 19, at 1189 & nn.111–12 (explaining why limitations clauses, other than those pertaining to property rights, were not coded). Another recurring issue was the appearance in many constitutional texts of clauses that purport to incorporate or otherwise refer to regional and international human rights instruments. As a general rule, the provisions of such instruments were not counted as part of a constitution unless they actually appeared in the constitution, whether in the main text or as an appendix of some sort. Thus, for example, the United Kingdom's Human Rights Act 1998, c. 42, which not only incorporates the European Convention on Human Rights but sets forth the latter in full as an appendix, was coded as including the provisions of the latter document. *See* Law & Versteeg, *supra* note 19, at 1189 & nn.111–13 (describing our approach to the coding of such provisions in greater detail, and giving examples of how the rule was applied in practice).

<sup>21</sup> *See* Law & Versteeg, *supra* note 19, at 1187–90 & nn.103–16.

<sup>22</sup> *See id.* at 1191 (discussing the aggregation of related rights into a single "overarching" right for coding purposes).

I lists all of the components of the index. Each constitution in the data is represented by a string of sixty binary indicators, one for each right in the index: A zero indicates that the constitution in question lacks a particular right, while a one indicates that it contains the right.

We then used this index to calculate a measure of the similarity between any two constitutions in the data. To be specific, the similarity score for constitutions A and B measures the correlation between the rights index for constitution A and the rights index for constitution B. The measure that we compute is Pearson's phi,<sup>23</sup> which is a correlation coefficient for binary variables. Calculation of Pearson's phi for every possible pairing of constitutions in each year of our data yields a total of 648,429 similarity scores, each of which ranges from -1 to 1. A similarity score of -1 means that the two constitutions have precisely the opposite content, as measured by the index: Where constitution A contains a given provision, constitution B does not, and vice versa. Thus, a score of -1 means perfect disagreement between A and B. Conversely, a similarity score of 1 means that the two constitutions contain and omit precisely the same components of the index, or are in perfect agreement. The actual similarity scores ranged from -0.41 to 1, while the average similarity score across all pairs of constitutions over the entire period was 0.35.

## II

### THE RIGHTS CONTENT OF A TYPICAL CONSTITUTION

The notion that certain prominent constitutions influence the adoption and revision of constitutions elsewhere presupposes that there are, in fact, discernible patterns to the content of the world's constitutions. If constitutional content varies at random, it becomes difficult to argue that there exist widespread constitutional practices, much less that any particular constitution is responsible for shaping those practices. In this Part, we explore whether and to what extent there is a standard or generic way of writing constitutions. Is there a generic model of constitutionalism to which actual constitutions tend to conform? If so, what are the elements of this generic model, and

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<sup>23</sup> There is more than one way to compute the similarity between two constitutions. Compare Zachary Elkins et al., *Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1155 (2008) (using Pearson's phi to measure constitutional similarity), with ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 24–25 (2009) (using percentage of matching content in lieu of Pearson's phi as a measure of constitutional similarity). We employ Pearson's phi because it is a standardized, commonly used measure of association between two binary variables, and the -1 to 1 numerical scale lends itself to intuitive interpretation: -1 indicates that two constitutions have perfectly opposite content and 1 indicates that they have identical content, while 0 indicates a complete lack of either positive or negative correlation.

which constitutions resemble it most closely? To answer these questions, we first identify a variety of rights-related constitutional provisions that can accurately be described as generic. We then construct from these provisions a hypothetical *generic bill of rights* that exemplifies the contemporary practice of rights constitutionalism.

A. *Generic Constitutional Rights*

A significant number of constitutional provisions are so ubiquitous that they might fairly be called generic. This fact is immediately evident from Table 1, which ranks the components of the rights index according to their global popularity in 2006 and documents the growth in their popularity over the last six decades. The most popular, or generic, rights in the world are freedom of religion, freedom of expression, the right to private property, and equality guarantees. Each of these rights can be found in no less than 97% of all constitutions in force as of 2006. In addition, privacy rights, the prohibition of arbitrary arrest and detention, the rights to assembly and association, and women’s rights are all found in over 90% of the world’s constitutions. Nor are these the only rights that might fairly be described as generic: Each of the twenty-five most popular constitutional provisions appears in over 70% of all constitutions. The existence of a corpus of constitutional provisions that are shared by a wide majority of the world’s constitutions can fairly be said to define a shared, or generic, global practice of rights constitutionalism.<sup>24</sup> In other words, over 40% of the components of our rights index are relatively generic.

TABLE 1: GLOBAL POPULARITY OF  
RIGHTS INDEX COMPONENTS BY DECADE<sup>25</sup>

| Rank | Type of provision                             | 1946<br>(n=63) | 1956<br>(n=75) | 1966<br>(n=120) | 1976<br>(n=138) | 1986<br>(n=156) | 1996<br>(n=182) | 2006<br>(n=188) |
|------|---|----------------|----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| 1    | Freedom of religion                           | 81%            | 88%            | 87%             | 88%             | 92%             | 95%             | 97%             |
| 2    | Freedom of the press and/or expression        | 87             | 88             | 84              | 86              | 87              | 95              | 97              |
| 3    | Equality guarantee                            | 71             | 77             | 85              | 88              | 92              | 95              | 97              |
| 4    | Right to private property                     | 81             | 85             | 81              | 83              | 87              | 95              | 97              |
| 5    | Right to privacy                              | 83             | 83             | 78              | 81              | 83              | 94              | 95              |
| 6    | Prohibition of arbitrary arrest and detention | 76             | 81             | 81              | 79              | 81              | 92              | 94              |
| 7    | Right of assembly                             | 73             | 77             | 73              | 75              | 81              | 90              | 94              |
| 8    | Right of association                          | 72             | 74             | 78              | 77              | 80              | 91              | 93              |

<sup>24</sup> See David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 662–726 (2005) (discussing the theoretical, analytical, and doctrinal components of generic constitutional law).

<sup>25</sup> This table also appears in Law & Versteeg, cited above in note 19, at 1200 tbl.2.

| <b>Rank</b> | <b>Type of provision</b>                         | <b>1946<br/>(n=63)</b> | <b>1956<br/>(n=75)</b> | <b>1966<br/>(n=120)</b> | <b>1976<br/>(n=138)</b> | <b>1986<br/>(n=156)</b> | <b>1996<br/>(n=182)</b> | <b>2006<br/>(n=188)</b> |
|-------------|--|------------------------|------------------------|-------------------------|-------------------------|-------------------------|-------------------------|-------------------------|
| 9           | Women's rights                                   | 35%                    | 51%                    | 62%                     | 70%                     | 77%                     | 90%                     | 91%                     |
| 10          | Freedom of movement                              | 50                     | 55                     | 58                      | 58                      | 64                      | 84                      | 88                      |
| 11          | Right of access to court                         | 68                     | 68                     | 64                      | 62                      | 64                      | 85                      | 86                      |
| 12          | Prohibition of torture                           | 37                     | 37                     | 41                      | 45                      | 56                      | 80                      | 84                      |
| 13          | Right to vote                                    | 63                     | 74                     | 73                      | 69                      | 74                      | 82                      | 84                      |
| 14          | Right to work                                    | 55                     | 65                     | 59                      | 67                      | 65                      | 80                      | 82                      |
| 15          | Education right (positive)                       | 65                     | 72                     | 59                      | 65                      | 65                      | 78                      | 82                      |
| 16          | Judicial review                                  | 25                     | 32                     | 53                      | 51                      | 58                      | 80                      | 82                      |
| 17          | Prohibition of ex post facto laws                | 41                     | 51                     | 57                      | 60                      | 67                      | 77                      | 80                      |
| 18          | Physical needs rights                            | 44                     | 60                     | 52                      | 57                      | 61                      | 75                      | 79                      |
| 19          | Right to life                                    | 33                     | 33                     | 38                      | 41                      | 51                      | 71                      | 78                      |
| 20          | Presumption of innocence                         | 8                      | 12                     | 31                      | 37                      | 49                      | 69                      | 74                      |
| 21          | Right not to be expelled from home territory     | 30                     | 33                     | 38                      | 44                      | 48                      | 70                      | 73                      |
| 22          | Limits on property rights                        | 51                     | 63                     | 58                      | 68                      | 70                      | 70                      | 73                      |
| 23          | Right to present a defense                       | 30                     | 37                     | 52                      | 57                      | 64                      | 69                      | 72                      |
| 24          | Right to unionize and/or strike                  | 25                     | 35                     | 49                      | 50                      | 50                      | 69                      | 72                      |
| 25          | Right to counsel                                 | 10                     | 17                     | 31                      | 38                      | 47                      | 66                      | 70                      |
| 26          | Right to public trial                            | 43                     | 47                     | 46                      | 48                      | 53                      | 65                      | 69                      |
| 27          | Rights for the family                            | 28                     | 28                     | 38                      | 43                      | 46                      | 62                      | 67                      |
| 28          | Right to form political parties                  | 9                      | 16                     | 28                      | 26                      | 31                      | 63                      | 65                      |
| 29          | Children's rights                                | 25                     | 35                     | 30                      | 35                      | 40                      | 59                      | 65                      |
| 30          | Citizen duties                                   | 53                     | 62                     | 52                      | 59                      | 56                      | 63                      | 65                      |
| 31          | Right to a healthy environment                   | 0                      | 0                      | 1                       | 8                       | 20                      | 52                      | 63                      |
| 32          | Other workers' rights                            | 32                     | 45                     | 38                      | 42                      | 46                      | 57                      | 59                      |
| 33          | Education right (negative)                       | 57                     | 56                     | 44                      | 38                      | 35                      | 52                      | 55                      |
| 34          | Minority rights                                  | 16                     | 24                     | 20                      | 20                      | 26                      | 43                      | 51                      |
| 35          | Prohibition of double jeopardy                   | 16                     | 19                     | 26                      | 31                      | 37                      | 46                      | 50                      |
| 36          | Right against self-incrimination                 | 29                     | 29                     | 32                      | 31                      | 38                      | 47                      | 49                      |
| 37          | Right to a timely trial                          | 8                      | 11                     | 18                      | 22                      | 31                      | 40                      | 47                      |
| 38          | Artistic freedom                                 | 10                     | 16                     | 13                      | 17                      | 23                      | 42                      | 45                      |
| 39          | Rights for handicapped                           | 0                      | 1                      | 3                       | 5                       | 13                      | 30                      | 43                      |
| 40          | Ombudsman or human rights commission             | 5                      | 5                      | 4                       | 9                       | 15                      | 27                      | 37                      |
| 41          | Right to marry                                   | 18                     | 31                     | 30                      | 28                      | 26                      | 32                      | 35                      |
| 42          | Right to asylum                                  | 11                     | 21                     | 18                      | 21                      | 21                      | 32                      | 35                      |
| 43          | Reference to international human rights treaties | 0                      | 1                      | 18                      | 17                      | 15                      | 30                      | 35                      |
| 44          | Rights for elderly                               | 3                      | 3                      | 3                       | 7                       | 12                      | 26                      | 34                      |
| 45          | Right to information about government            | 2                      | 4                      | 3                       | 5                       | 8                       | 25                      | 34                      |
| 46          | Separation of church and state                   | 20                     | 25                     | 28                      | 25                      | 25                      | 36                      | 34                      |
| 47          | Right to protection of one's reputation or honor | 13                     | 11                     | 8                       | 10                      | 17                      | 29                      | 32                      |

| <i>Rank</i> | <i>Type of provision</i>                        | <i>1946</i><br>( <i>n</i> =63) | <i>1956</i><br>( <i>n</i> =75) | <i>1966</i><br>( <i>n</i> =120) | <i>1976</i><br>( <i>n</i> =138) | <i>1986</i><br>( <i>n</i> =156) | <i>1996</i><br>( <i>n</i> =182) | <i>2006</i><br>( <i>n</i> =188) |
|-------------|---|--------------------------------|--------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| 48          | Affirmative action                              | 3%                             | 9%                             | 17%                             | 20%                             | 26%                             | 27%                             | 30%                             |
| 49          | Natural resources for benefit of all            | 8                              | 7                              | 8                               | 15                              | 19                              | 27                              | 29                              |
| 50          | Right to appeal to higher court                 | 8                              | 8                              | 7                               | 7                               | 8                               | 20                              | 25                              |
| 51          | Prohibition of death penalty                    | 10                             | 9                              | 8                               | 9                               | 12                              | 20                              | 24                              |
| 52          | Official state religion                         | 39                             | 39                             | 32                              | 27                              | 26                              | 24                              | 22                              |
| 53          | Prisoners' rights                               | 10                             | 12                             | 9                               | 12                              | 10                              | 15                              | 18                              |
| 54          | Consumer rights                                 | 0                              | 0                              | 0                               | 1                               | 6                               | 12                              | 16                              |
| 55          | Right to resist when rights are violated        | 8                              | 7                              | 4                               | 4                               | 4                               | 15                              | 16                              |
| 56          | Substantive principles for education            | 11                             | 16                             | 10                              | 15                              | 15                              | 14                              | 14                              |
| 57          | Prohibition of genocide/crimes against humanity | 0                              | 0                              | 0                               | 1                               | 2                               | 6                               | 12                              |
| 58          | Rights for victims of crimes                    | 0                              | 0                              | 0                               | 0                               | 1                               | 7                               | 10                              |
| 59          | Protection of fetuses                           | 0                              | 0                              | 1                               | 1                               | 6                               | 7                               | 8                               |
| 60          | Right to bear arms                              | 8                              | 6                              | 4                               | 4                               | 3                               | 3                               | 2                               |

It is also evident from Table 1 that the trend toward adoption of a generic set of constitutional rights is gaining momentum. The adoption rate for most components of the rights index is increasing over time: An increasing number of rights are becoming generic, while those that can already be described as generic are becoming even more ubiquitous over time. The proportion of constitutions that contain women's rights, for example, has more than doubled over the last six decades, from just 35% to 91%, while the popularity of a constitutionally entrenched presumption of innocence for criminal defendants has increased nearly tenfold, from a mere 8% adoption rate in 1946 to 74% as of 2006. The right to a healthy environment has enjoyed the most dramatic increase in popularity: Whereas not a single constitution contained this right in 1946, nearly two-thirds of constitutions do so now.

At the same time, almost none of the components of the index are declining in popularity. For the most part, even relatively unpopular rights appear to be growing somewhat more common. For example, express protection for fetuses appears in only 8% of constitutions today but could not be found at all prior to 1961, when it made its debut in Venezuela.<sup>26</sup> The only two components of the index that are less prevalent now than sixty years ago are provisions specifying an official state religion, which once appeared in nearly 40% of the world's constitutions but now appear in less than 25%, and the right to bear arms. Even as the U.S. Supreme Court lurches toward a more

<sup>26</sup> CONSTITUCIÓN DE LA REPUBLICA DE VENEZUELA, Jan. 23, 1961, art. 74 ("Necessary measures shall be enacted to ensure full protection to every child, without discrimination of any kind, from his conception until he is full grown . . .").

expansive reading of the Second Amendment,<sup>27</sup> the global popularity of this right is in a nosedive: The percentage of constitutions that contain a right to bear arms has declined over the last sixty years from an already scant 8% to a mere 2%.

### *B. A Generic Bill of Rights*

The empirical identification of the world's most generic constitutional content makes possible an interesting thought experiment: If we know what constitutional content is generic, we can also define a hypothetical generic constitution. As noted above, the twenty-five most common components of our rights index appear in over 70% of the world's constitutions and thus can fairly be called generic. By coincidence, the average constitution has, over the last sixty years, contained exactly twenty-five of the sixty components in our index. Accordingly, we can construct a hypothetical bill of rights that expresses the mainstream of global constitutionalism by selecting the twenty-five most prevalent provisions. This generic bill of rights contains both the average *number* of rights provisions and the most *common* rights provisions over the last six decades. Its content consists of all twenty-five rights above the horizontal dividing line in Table 1.

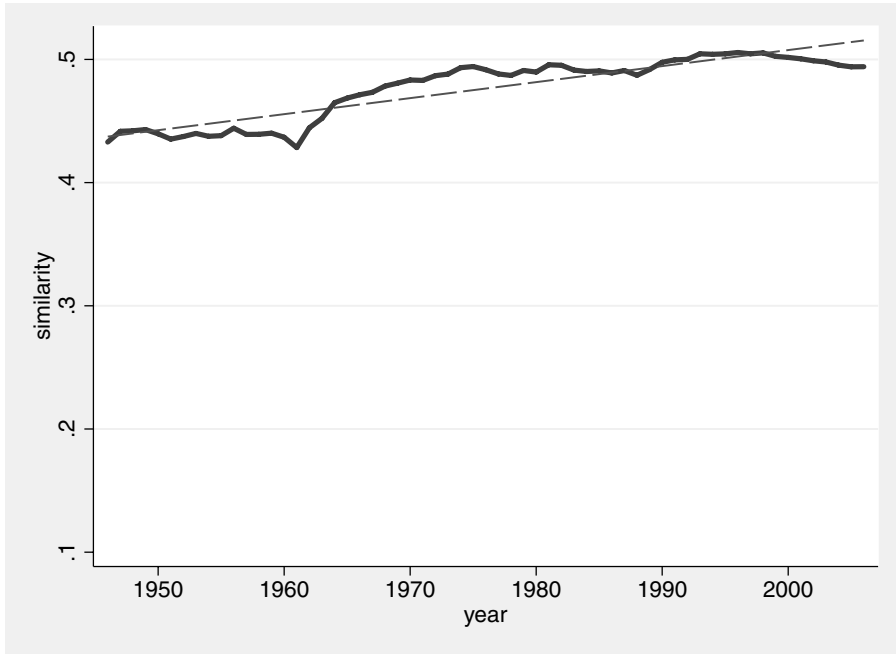
The growing popularity of this generic rights paradigm is illustrated by Figure 1, which graphs the average similarity of the world's actual constitutions to our hypothetical bill of rights.<sup>28</sup> The upward trend merely depicts in graphical terms what we already know—namely, that the world's constitutions increasingly share a generic, and growing, core of rights-related provisions.

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<sup>27</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding the Second Amendment applicable to states); *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (invalidating a federal ban on handguns in the District of Columbia on Second Amendment grounds).

<sup>28</sup> This correlation is computed across the sixty components of the rights index described above in Part II.A.

FIGURE 1: AVERAGE SIMILARITY TO GENERIC BILL OF RIGHTS



Needless to say, however, not all constitutions are equally (or increasingly) generic. Table 2 lists the real-world constitutions that are most and least similar to our hypothetical “generic constitution” as of 2006. The list of the most generic or mainstream constitutions is dominated by Commonwealth countries, with a handful of former French colonies interspersed among them. The constitutions of former British colonies were often drafted under strong British influence at the time of independence and, as a result, tend to share a common blueprint.<sup>29</sup> Over time, a number of Commonwealth members, such as Canada,

<sup>29</sup> See CHARLES O.H. PARKINSON, *BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN’S OVERSEAS TERRITORIES 1–19* (2007) (describing the United Kingdom’s involvement in the drafting of the independence constitutions of its (former) colonies in Africa and the Caribbean, and its insistence upon bills of rights modeled upon the European Convention on Human Rights); Thomas M. Franck & Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT’L L. 467, 500–04 (2003) (describing a “transformation in British attitudes towards written constitutions with Bills of Rights” that ultimately led to the inclusion of bills of rights “heavily influenced by the provisions of the [European Convention on Human Rights]” in the constitutions of Nigeria, Kenya, and Uganda).

New Zealand, and the United Kingdom itself, have adopted rights provisions that have rendered their constitutions more generic.<sup>30</sup> A notable exception to the trend among Commonwealth countries, however, is Australia, which instead possesses one of the world's *least* mainstream constitutions. With a constitution that contains only a scattering of rights, Australia now enjoys the dubious distinction of being "the only western nation without any form of Bill of Rights at any level of government."<sup>31</sup>

TABLE 2: MOST AND LEAST GENERIC CONSTITUTIONS AS OF 2006

| <i>Rank</i> | <i>Most generic constitutions (as of 2006)</i>  | <i>Similarity to generic constitution</i> |
|-------------|---|---|
| 1           | Djibouti  | 0.76                                      |
| 2           | St. Lucia                                       | 0.74                                      |
| 3           | Botswana  | 0.73                                      |
| 4           | Grenada   | 0.73                                      |
| 5           | Mali  | 0.71                                      |
| 6           | Antigua & Barbuda                               | 0.70                                      |
| 7           | Kenya   | 0.70                                      |
| 8           | St. Kitts & Nevis                               | 0.70                                      |
| 9           | St. Vincent & Grenadines                        | 0.70                                      |
| 10          | Solomon Islands                                 | 0.70                                      |
| <i>Rank</i> | <i>Least generic constitutions (as of 2006)</i> | <i>Similarity to generic constitution</i> |
| 1           | Saudi Arabia                                    | 0.09                                      |
| 2           | Brunei  | 0.12                                      |
| 3           | Australia                                       | 0.12                                      |
| 4           | Argentina                                       | 0.16                                      |
| 5           | Norway  | 0.18                                      |
| 6           | China   | 0.20                                      |
| 7           | Indonesia                                       | 0.23                                      |
| 8           | Turkmenistan                                    | 0.28                                      |
| 9           | Armenia   | 0.29                                      |
| 10          | Colombia  | 0.29                                      |

The absence of the U.S. Constitution from Table 2 is revealing. Although the U.S. Constitution is not one of the world's least generic

<sup>30</sup> See DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* 47–125 (2010) (documenting the rise of bills of rights in Canada, New Zealand, and the United Kingdom); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 708–09 (2001) (outlining the features of the new rights-protection mechanisms in Canada, New Zealand, and the United Kingdom).

<sup>31</sup> See George Williams, *Human Rights and Judicial Review in a Nation Without a Bill of Rights: The Australian Experience*, in CONSTITUTIONALISM IN THE CHARTER ERA 305, 305 (Grant Huscroft & Ian Ross Brodie eds., 2004) (noting that Australia became the last holdout among Western nations following Britain's enactment of the Human Rights Act 1998); *id.* at 313–17 (reviewing the six "important, but scattered, freedoms" found in the Australian Constitution).

constitutions, it is not on the list of the world's most mainstream constitutions either. Table 3 identifies the dissimilarities between the "generic bill of rights" described above and the U.S. Constitution. The fact that the U.S. Constitution departs in so many ways from the global mainstream hints strongly at the possibility that the U.S. Constitution is not widely emulated. It is this possibility that we explore at length in Part III.

TABLE 3: ITEMIZED COMPARISON OF THE U.S. CONSTITUTION AND GENERIC BILL OF RIGHTS

| <i>Provisions found in both documents</i>  | <i>Provisions found only in the generic bill of rights</i>  | <i>Provisions found only in the U.S. Constitution</i>  |
|--|---|--|
| Right to life<br>Prohibition of torture<br>Prohibition of arbitrary arrest or detention<br>Right of access to court/impartial tribunal<br>Right to present a defense<br>Prohibition of ex post facto laws<br>Right to counsel<br>Freedom of religion<br>Right of assembly<br>Right to vote<br>Right to private property<br>Equality guarantee<br>Right to privacy <sup>32</sup><br>Freedom of expression | Freedom of movement<br>Right not to be expelled from home territory<br>Presumption of innocence<br>Right of association<br>Establishment of judicial review<br>Right to work<br>Right to unionize and/or strike<br>Physical needs rights<br>Right to education<br>Women's rights<br>Limits on property rights | Right to bear arms<br>Separation of church and state<br>Right to public trial<br>Right to timely trial<br>Right against self-incrimination<br>Prohibition of double jeopardy |

### III

#### THE DECLINING INFLUENCE OF THE U.S. CONSTITUTION

##### *A. Constitutional Similarity as an Indicator of Constitutional Influence*

The existence of this generic core of constitutional content raises the question of whether there are particular countries that play an especially significant role in driving its popularity or shaping its content. Are there specific constitutions that define this core and serve as models for rights constitutionalism in other countries? And if so, is the U.S. Constitution such a model?

The question of whether and to what extent any given constitution shapes, or conversely, is shaped by, global constitutional practice is deeply vexing for both conceptual and methodological reasons. It is relatively straightforward to measure, as we have done here, the

<sup>32</sup> The Fourth Amendment's prohibition of "unreasonable searches and seizures," U.S. CONST. amend. 4, is coded as a constitutional protection of privacy.

extent to which two constitutions are similar to one another. The fact that two constitutions exhibit extensive similarities does not necessarily imply, however, that one has influenced the other. Likewise, the fact that a constitution happens to be highly generic, or typical, does not necessarily mean that it serves as a model for other constitutions. A constitution may be generic, for example, not because it serves as a model for other constitutions, but rather because it follows the practice in other countries. Realistically speaking, some countries are more likely to be followers than leaders. It would be surprising if the average constitutional drafter were to exhibit a keen awareness of the (highly generic) constitutions of Botswana or St. Lucia, much less to look deliberately to them for inspiration.<sup>33</sup>

Constitutions may also be similar for functional reasons. To the extent that countries face similar challenges that lend themselves to a limited range of constitutional solutions, the result is likely to be a degree of constitutional similarity, regardless of whether countries look to one another for examples.<sup>34</sup> It is a chronic challenge in social science that the available data may be susceptible to multiple interpretations and explanations,<sup>35</sup> and our data on constitutions is no exception.

Nevertheless, much can be learned simply by analyzing the extent to which constitutions resemble one another or typify global practice.

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<sup>33</sup> See *supra* Table 2 (noting that the constitutions of Botswana and St. Lucia are among the ten most mainstream constitutions in the world). In fact, analysis of the constitution-making processes in Botswana and St. Lucia suggests that both countries modeled their constitutions after the European Convention on Human Rights and Fundamental Freedoms, a more plausible model for constitution makers around the world. See ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 179 & n.36 (2010) (noting Britain's conscious use of the European Convention on Human Rights as a prototype for the constitutions that it helped to install in over twenty former colonies, including St. Lucia and Botswana); A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 872–73 (2001) (observing that Britain's policy of inserting bills of rights in the constitutions of newly emancipated colonies rendered the European Convention on Human Rights "a valued instrument" for perpetuating "the civilizing mission of British colonialism . . . in the post-colonial world"). For further discussion of regional human rights instruments as constitutional models, see Part VI.C below.

<sup>34</sup> See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 Nw. U. L. REV. 1277, 1307–42 (2008) (arguing that global competition for capital and skilled labor provides countries with an incentive to offer bundles of rights that are attractive to potential investors and skilled workers).

<sup>35</sup> See, e.g., Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 143–45 (2009) (discussing the methodological problems that arise from the fact that judicial ideology is a "latent trait" that cannot be directly observed and, indeed, may not exist in the manner or form assumed by scholars).

If two constitutions are becoming increasingly dissimilar, it stands to reason that neither is following the example of the other. Likewise, an increasingly atypical constitution is almost certainly not serving as a model for global constitutionalism. To the extent that a particular constitution is increasingly out of sync with global trends, we can rule out the possibility that it is leading those trends. And it is in precisely this manner that we establish the declining influence of the U.S. Constitution.

*B. Declining Similarity to the U.S. Constitution in the Area of Constitutional Rights*

Whatever the ongoing appeal of American constitutional jurisprudence happens to be,<sup>36</sup> the U.S. Constitution itself appears to have lost at least some of its attraction as a model for constitution writers in other countries. If the components of the rights index are used as the yardstick, the world's constitutions have on average become less similar to the U.S. Constitution over the last sixty years. As Figure 2 reveals, average similarity to the U.S. Constitution was higher in 1946 than in 2006.<sup>37</sup> It is an unfortunate irony, moreover, that the onset of this decline roughly coincided with celebration of the Constitution's bicentennial in 1987.<sup>38</sup> Although the 1990s were a period of intense constitution-making activity<sup>39</sup> during which American victory in the Cold War might have been expected to translate into American constitutional influence, this decade actually saw a noticeable decline in average similarity to the U.S. Constitution. During this time, dozens of Central and Eastern European countries overhauled their Soviet-era constitutions,<sup>40</sup> while countries in Africa and Asia underwent a

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<sup>36</sup> See *supra* note 18 (reviewing evidence of decreased reliance by foreign courts on the constitutional case law of the U.S. Supreme Court).

<sup>37</sup> Because the content of the U.S. Constitution did not change at all over this time frame with respect to the components of the rights index, the decrease in the average level of similarity necessarily reflects the evolution of other constitutions away from the U.S. Constitution, rather than evolution of the U.S. Constitution away from other constitutions.

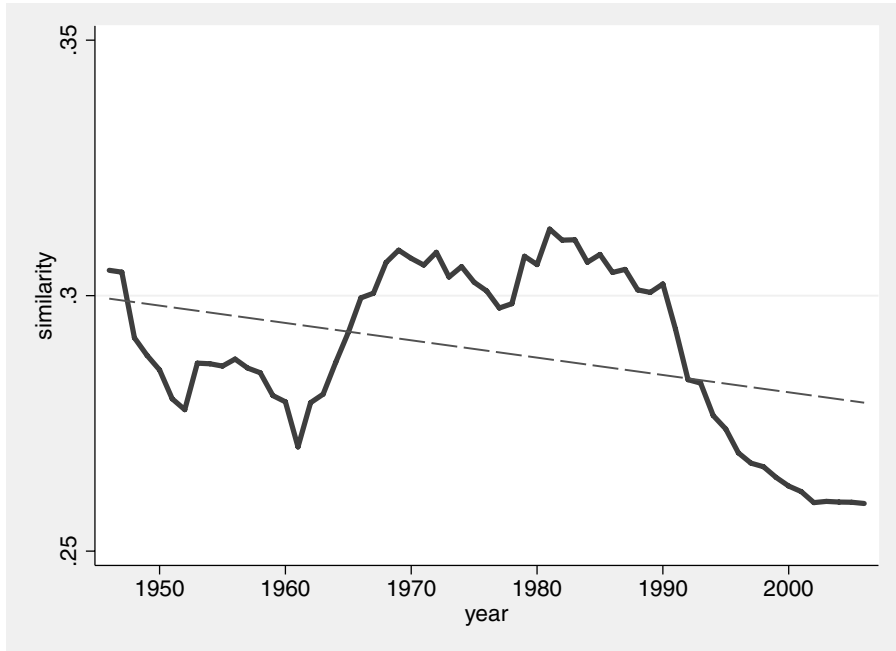
<sup>38</sup> The average correlation between the U.S. Constitution and other constitutions was 0.30 in 1946, reached a peak of 0.31 in 1981, and proceeded to fluctuate within a narrow range for the remainder of the 1980s. In 1991, however, the correlation slipped below 0.30 and has since drifted downward. As of 2006, it had declined to 0.26.

<sup>39</sup> See ELKINS ET AL., *supra* note 9, at 113 fig.5.2 (documenting a global surge in the number of new constitutions circa the early 1990s); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 368–69 (1995) (identifying “at least seven . . . waves” of constitution making, the most recent of which followed the fall of communism in 1989).

<sup>40</sup> See Elster, *supra* note 39, at 368–69 (citing the emergence of “a couple of dozen new constitutions” in post-communist Central and Eastern Europe).

contemporaneous wave of constitutional reforms.<sup>41</sup> Whatever constitutional script prevailed amidst the ostensible triumph of liberal democracy,<sup>42</sup> however, it was not that of the venerable U.S. Constitution.

FIGURE 2: AVERAGE SIMILARITY TO THE U.S. CONSTITUTION



Which constitutions have shown the most extreme similarity—or dissimilarity—to the U.S. Constitution over the last six decades? Table 4 sets forth the answer. Most similar to the U.S. Constitution, for many years, was the constitution of Liberia, which is unsurprising

<sup>41</sup> See, e.g., Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* 1, 1 (Philip Alston ed., 1999) (noting the “prolonged fit of ‘constitutional fever’” that took hold in Africa following the Cold War); Michael C. Davis, *The Political Economy and Culture of Human Rights in East Asia*, in *RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW* 414, 433 (Sarah Joseph & Adam McBeth, eds., 2010) (describing the East Asian landscape in recent decades as “riddled with constitution-making exercises”); Julian Go, *A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000*, 18 *INT’L SOC.* 71, 78 (2003) (“[M]any of the postcolonial constitutions in existence in 2000 were written in the 1990s.”); Victor T. Le Vine, *The Fall and Rise of Constitutionalism in West Africa*, 35 *J. MOD. AFR. STUD.* 181, 198 (1997) (pointing to a proliferation of “re-democratized regimes and constitutions” as evidence of a “democratic revival in West Africa” between 1989 and 1997).

<sup>42</sup> See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, at xi (1992) (suggesting that the triumph of liberal democracy in the 1990s was so complete that it marked “the end of history”).

given the degree to which the histories of the two countries are intertwined. Not only was Liberia founded by freed slaves from the United States, but the first Liberian constitutions were drafted with the help of the American Colonialization Society, the organization that arranged the settlement of the former slaves.<sup>43</sup> Likewise, the fact that the Philippines was a colony of the United States readily explains the proximity of its post-war constitution to the American model.<sup>44</sup> By contrast, the reasons for the close and continuing resemblance between the American and Tongan constitutions are less obvious.<sup>45</sup> Tonga is a British colony that is governed through a mixture of western institutions and chieftainship, with a polity divided into three classes—the king, the nobility, and the commoners.<sup>46</sup> Perhaps the crucial link between the two constitutions is that they are both very old: At 134 years of age and counting, the constitution of Tonga is by now older than all but a handful of the constitutions in our data.<sup>47</sup> Thus, at the time that the Tongan constitution was drafted, the U.S. Constitution was not only one of the most prominent models available, but also one of the *only* models available.

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<sup>43</sup> See Horst Dippel, *Modern Constitutionalism: An Introduction to a History in Need of Writing*, 73 *LEGAL HIST. REV.* 153, 168 (2005) (observing that the Liberian Constitution of 1847 embraced the principles of the Virginia Declaration of Rights); Horowitz, *supra* note 5, at 507 (identifying Harvard Law School professor Simon Greenleaf as the author of Liberia's 1847 constitution and noting that its 1983 revision was also modeled on the U.S. Constitution).

<sup>44</sup> See BILLIAS, *supra* note 3, at 229–33 (describing U.S. influence on the drafting of the constitution of the Philippines); Horowitz, *supra* note 5, at 507 (characterizing the 1935 Philippine constitution as an “American-style document”).

<sup>45</sup> Historical evidence suggests that the Tongan constitution-making process was influenced more by the Kingdom of Hawaii than the United States. See PARKINSON, *supra* note 29, at 32 (noting that Tonga's bill of rights was influenced by the Hawaiian constitutions of 1825 and 1864).

<sup>46</sup> See Guy Powles, *Accommodating Monarchy and Representative Government: Tonga's Political Reform Process*, 24 *PAC. ECON. BULL.* 140, 140–41 (2009) (describing the political and constitutional system of Tonga).

<sup>47</sup> Among the few national constitutions currently in force that predate that of Tonga are those of Belgium, New Zealand, Norway, and the United States. Unlike the U.S. Constitution, however, the constitutions of Belgium, New Zealand, and Norway have been amended multiple times in recent decades. See ALAN SIAROFF, *COMPARATIVE EUROPEAN PARTY SYSTEMS: AN ANALYSIS OF PARLIAMENTARY ELECTIONS SINCE 1945*, at 186 (2000) (counting four sets of revisions to the Belgian constitution from 1970 through 1993); B.V. Harris, *The Constitutional Future of New Zealand*, 2004 *N.Z. L. REV.* 269, 279–80 (2004) (listing thirty new constitutional statutes passed in New Zealand from 1972 to 2003); Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* 319, 337 fig.12.2 (Roger D. Congleton & Birgitta Swedenborg eds., 2006) (reporting that, from 1989 to 1993 alone, the Norwegian Constitution was amended five times).

TABLE 4: CONSTITUTIONS THAT ARE MOST SIMILAR AND DISSIMILAR TO THE U.S. CONSTITUTION

| <b>The five constitutions most similar to the U.S. Constitution</b>  |       |
|--|-------|
| Liberia (through 1983)   | 0.82  |
| Tonga (through 2006)   | 0.75  |
| Uganda (1967–1994)   | 0.70  |
| Philippines (through 1972)   | 0.70  |
| Kiribati (1979–2006)   | 0.70  |
| <b>The five constitutions least similar to the U.S. Constitution</b> |       |
| Burkina Faso (1988–1990)   | -0.18 |
| Ghana (1991)   | -0.17 |
| New Zealand (1962–1970)  | -0.13 |
| Venezuela (1948–1952)  | -0.13 |
| Indonesia (2001–2006)  | -0.13 |

Figures 3 through 6 are color-coded maps that convey geographic patterns of similarity to the U.S. Constitution at four points in time: 1946, 1966, 1986, and 2006. (The maps appear beginning on page 789.) Each map is a global snapshot of the extent to which other constitutions resembled or diverged from the U.S. Constitution at a particular point in time. Darker shades of blue represent closer similarity to the U.S. Constitution, while darker shades of red indicate greater dissimilarity.<sup>48</sup> These maps illustrate not only an overall global trend of divergence from the U.S. Constitution, but also a conspicuous regional pattern—namely, a notable evolution away from the American model among Latin American countries. Historically, Latin American constitutions reflected American hegemony in the region in the form of a high degree of resemblance to the U.S. Constitution.<sup>49</sup> Today, by contrast, the rights-related content of the constitutions of Peru, Argentina, and Venezuela is negatively correlated with that of the U.S. Constitution, meaning that these constitutions tend to contain provisions that the U.S. Constitution lacks, while at the same time omitting provisions that can be found in the U.S. Constitution.

<sup>48</sup> Countries that lack any shading at all were omitted from our analysis for the year in question because they either did not yet exist or did not possess a constitution at that time according to our criteria. See Law & Versteeg, *supra* note 19, at 1187–90 & nn.103–16 (setting forth the criteria for identifying a “constitution”).

<sup>49</sup> See BILLIAS, *supra* note 3, at 124–41 (discussing the influence of the U.S. Constitution in nineteenth-century Latin America).

### C. *The Flagging Popularity of the Structural Constitution*

Our analysis thus far offers strong evidence that the U.S. Constitution is losing popularity as a model for constitution makers, at least as far as the enumeration of rights is concerned. But what of the structural and institutional innovations for which the U.S. Constitution is also renowned? There are three features of what has come to be known as the “structural constitution”<sup>50</sup> that are closely associated with American constitutionalism: federalism,<sup>51</sup> presidentialism,<sup>52</sup> and judicial review.<sup>53</sup> Is it merely the rights guarantees found in the U.S. Constitution that fail to inspire today’s constitution makers, or is the global popularity of the structural constitution also in decline? The answer appears to be that the most distinctive and celebrated structural features of the U.S. Constitution have also fallen out of vogue.

#### 1. *Federalism*

Federalism held considerable appeal to constitution makers in the early nineteenth century, and nowhere more so than in Latin America, where it was embraced by Argentina, Brazil, Chile, Uruguay, Venezuela, and Mexico, among others.<sup>54</sup> Even at the peak of its popularity in the early twentieth century, however, only 22% of

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<sup>50</sup> See, e.g., J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1688 (2004) (defining as “structural” “those provisions that appear to direct responsibility for a decision to a particular branch of the federal government or to the states,” and arguing that such provisions are as integral to safeguarding individual liberty as those that explicitly concern individual rights).

<sup>51</sup> See KLAUS VON BEYME, *AMERICA AS A MODEL: THE IMPACT OF AMERICAN DEMOCRACY IN THE WORLD* 71 (1987) (attributing “the modern idea of federalism” to the United States, and arguing that “of all the institutions within the American constitutional structure, it is federalism that has had the greatest influence in the world”).

<sup>52</sup> See BILLIAS, *supra* note 3, at 34, 35 (noting that “[p]residentialism was largely the invention of the framers” and that the U.S. President was “quite unlike any other chief executive existing in any nation at the time”).

<sup>53</sup> See, e.g., *id.* at 4 (describing “three important institutions incorporated in the U.S. Constitution: presidentialism, federalism, and judicial review”); Horowitz, *supra* note 5, at 503 (“Federalism, presidentialism and judicial review are widely known and adopted, albeit in varying frequencies, around the world.”). To this list of defining features of American constitutional structure, one might also add the characteristics of “strong bicameralism” with “significant unequal representation in the second chamber.” DAHL, *supra* note 7, at 45–46. These latter features do not appear to enjoy strong global popularity: According to Dahl, only four of the world’s twenty-two “older democracies”—defined as countries that have been democratic for “at least half a century”—possess strongly bicameral legislatures, while the degree of unequal representation in the U.S. Senate is “by far the most extreme” among the world’s federal systems. *Id.* at 43–50.

<sup>54</sup> See, e.g., BILLIAS, *supra* note 3, at 106, 124–40 (noting the “great appeal” of American-style federalism in Latin America); Horowitz, *supra* note 5, at 506 (describing the spread of federalism in Latin America).

the world's nations employed some form of federalism.<sup>55</sup> Since that time, federalism has diminished in popularity.<sup>56</sup> Following a significant decline in the inter-war period, the proportion of countries with a federal system recovered somewhat to about 18% in the immediate aftermath of World War II but has since stabilized at a mere 12%. These developments are depicted in Figure 7, which graphs the proportion of countries with a federal system over the last two centuries.<sup>57</sup>

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<sup>55</sup> Our data on the prevalence of federalism is drawn from the "cent" variable in the Polity III dataset, which covers 177 countries from 1800 to 1994. (Although there exists a more recent "Polity IV" iteration of this dataset, the newer iteration lacks the data on federalism analyzed here.) The manner in which this variable is coded divides countries into the following three categories: (1) a "Unitary State" category, in which regional units have little or no independent decision-making authority; (2) an "Intermediate" category; and (3) a "Federal State" category, in which most or all regional units have substantial decision-making authority. Ted Robert Gurr, Keith Jagers & Will H. Moore, *The Transformation of the Western State: The Growth of Democracy, Autocracy, and State Power Since 1800*, 25 *STUD. COMP. INT'L DEV.* 73, 83 (1990) (setting forth the use of these three categories in the older Polity II dataset); Keith Jagers & Ted Robert Gurr, *Polity III: Regime Type and Political Authority: 1800–1994*, INTER-U. CONSORTIUM FOR POL. & SOC. SCI. RES., 9 (Sept. 1996), [http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=6695&ds=1&file\\_id=668684](http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=6695&ds=1&file_id=668684) (citing Gurr et al., *supra*, for an explanation of the "cent" variable utilized in the Polity III dataset).

<sup>56</sup> See DAHL, *supra* note 7, at 43 (noting that, of the twenty-one countries other than the United States that have been democratic for "at least half a century," only six possess federal systems); RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 4 (3d ed. 2008) (noting that, from 1960 through the late 1980s, federalism suffered declining popularity and many "post-war federal experiments . . . were temporarily suspended or abandoned outright," but there was a "revival of interest" in federal systems in the 1990s); Horowitz, *supra* note 5, at 503, 518 (noting that "[f]ederalism proved particularly attractive in the first decades of the nineteenth century" but is at present "relatively unpopular").

<sup>57</sup> Figure 7 depicts the percentage of nations with a value of "3" on the "cent" variable from the Polity III dataset—namely, those nations that are identified as "Federal States."

FIGURE 3: SIMILARITY TO THE U.S. CONSTITUTION IN 1946

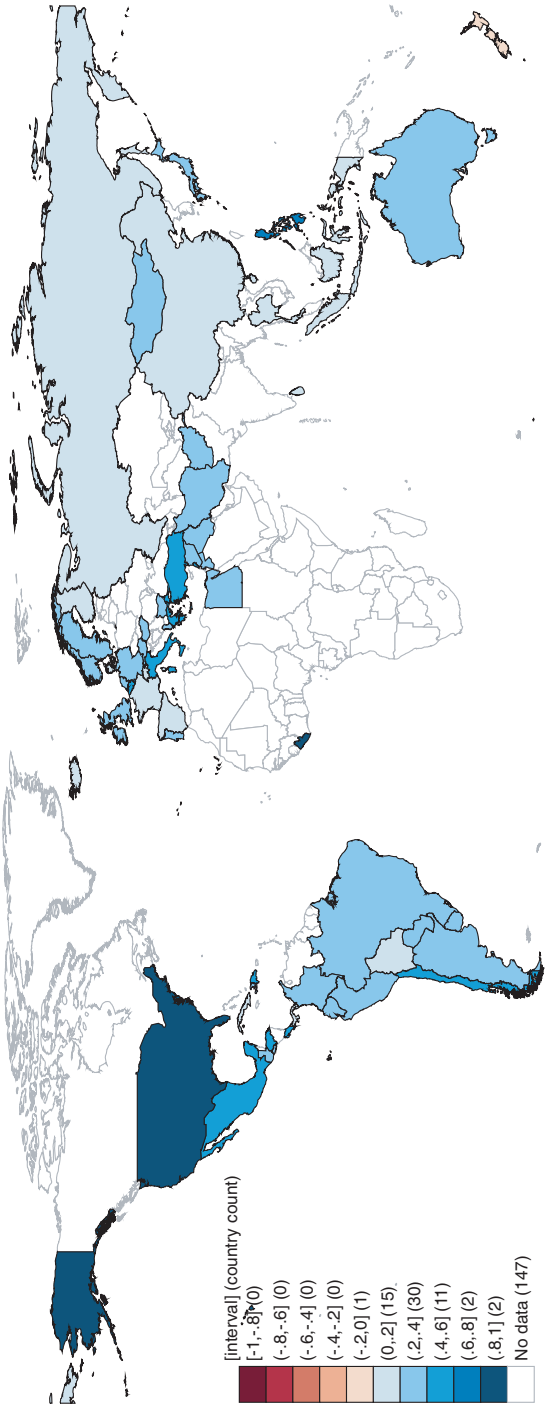


FIGURE 4: SIMILARITY TO THE U.S. CONSTITUTION IN 1966

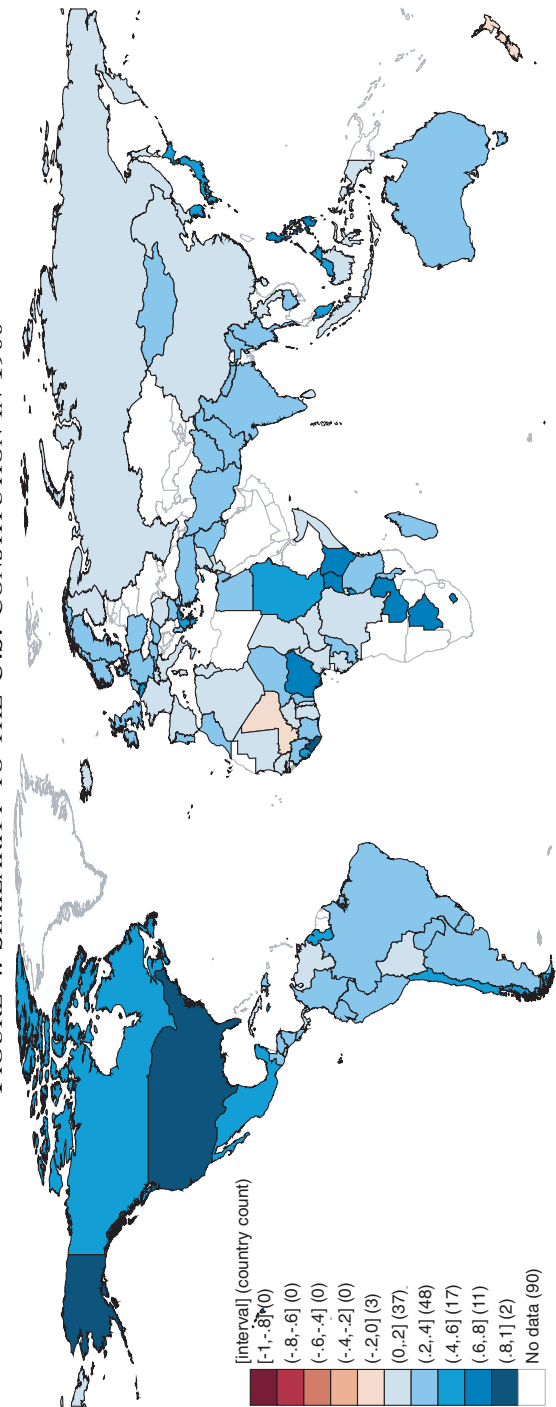


FIGURE 5: SIMILARITY TO THE U.S. CONSTITUTION IN 1986

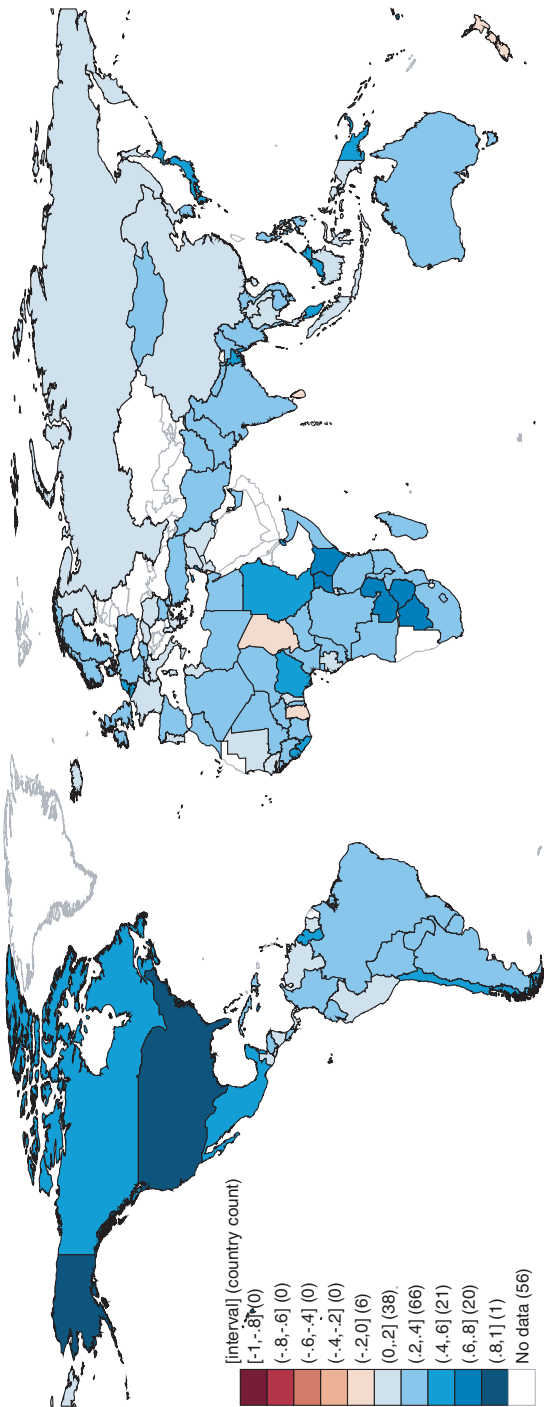


FIGURE 6: SIMILARITY TO THE U.S. CONSTITUTION IN 2006

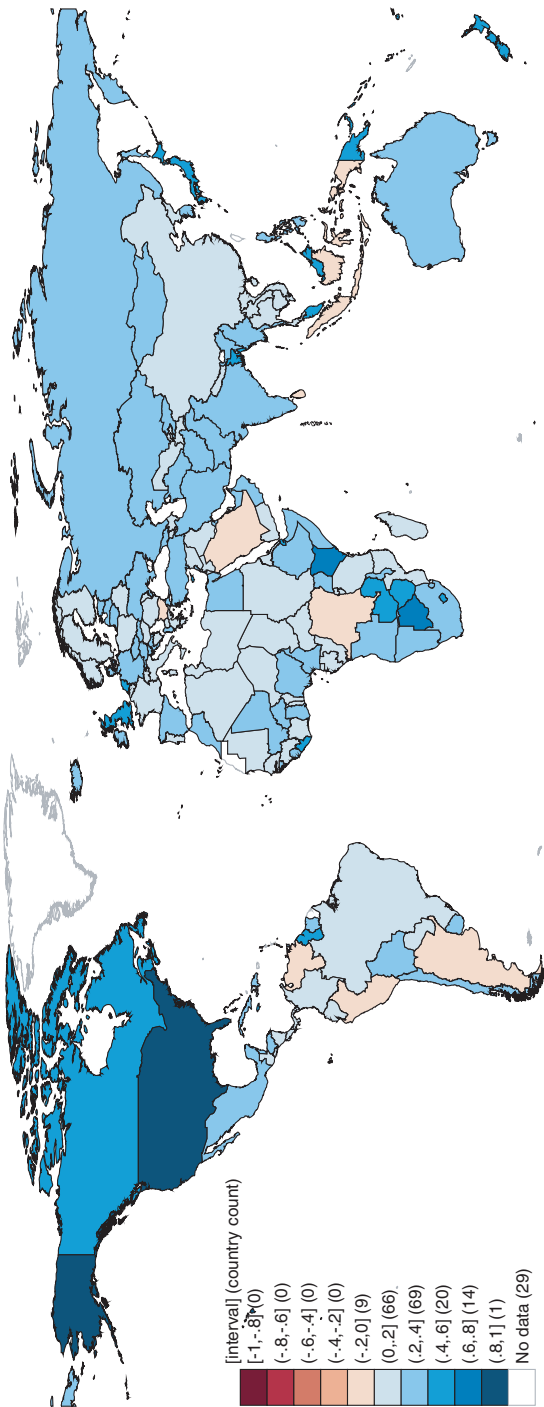
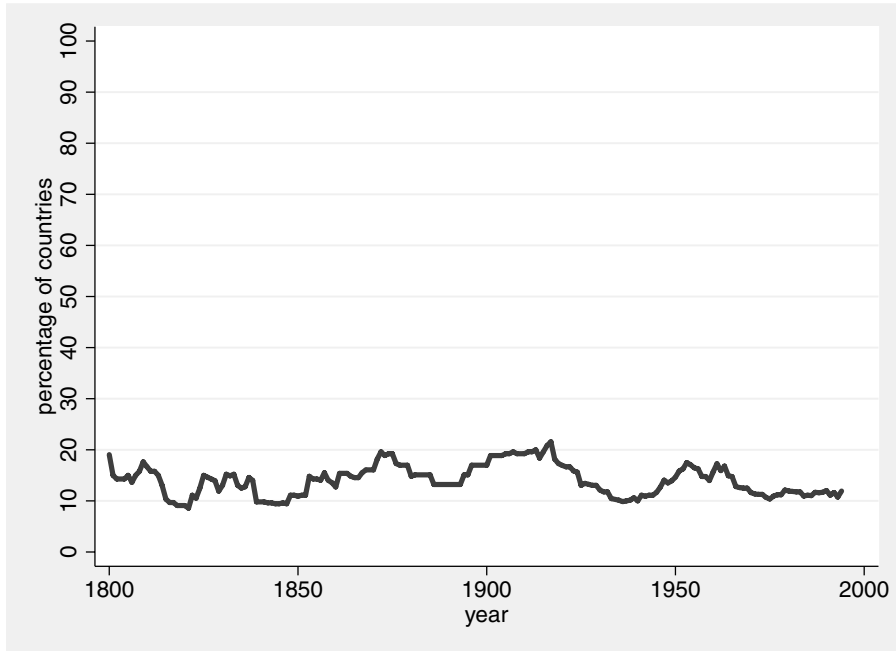


FIGURE 7: PERCENTAGE OF COUNTRIES WITH FEDERAL SYSTEMS



## 2. *Presidentialism*

A similar fate has befallen another famous American constitutional innovation, that of presidentialism. Like federalism, presidentialism enjoyed early popularity in Latin America.<sup>58</sup> Many of these early Latin American experiments with presidentialism degenerated into dictatorial rule,<sup>59</sup> however, and these failures helped to give presidentialism itself a bad name<sup>60</sup> and to discourage other nations from adopting similar systems.<sup>61</sup> Figure 8 depicts the prevalence of presidential, semi-presidential (or mixed), and parliamentary systems

<sup>58</sup> See BILLIAS, *supra* note 3, at 363–64 (noting that the countries “that tried the purely presidential system were few in number” and mainly confined to nineteenth-century Latin America); Karl Loewenstein, *The Presidency Outside the United States: A Study in Comparative Political Institutions*, 11 J. POL. 447, 447 (1949) (describing Latin America as the “primary area of adoption” of the presidential system).

<sup>59</sup> See José Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy* 150–51, 154 (2007) (noting that, after an initial period of stability under presidential constitutions in the late nineteenth century, numerous Latin American countries in the 1920s and 1930s experienced “democratic breakdowns” and transitions to military dictatorship).

<sup>60</sup> See Scott Mainwaring, *Presidentialism in Latin America*, 25 LATIN AM. RES. REV. 157, 163 (1990) (pointing to an entire body of scholarship that “excoriated presidentialism” in reaction to early experiments with presidentialism in Latin America).

<sup>61</sup> See Horowitz, *supra* note 5, at 516 (observing that presidentialism “remains a minority taste”).

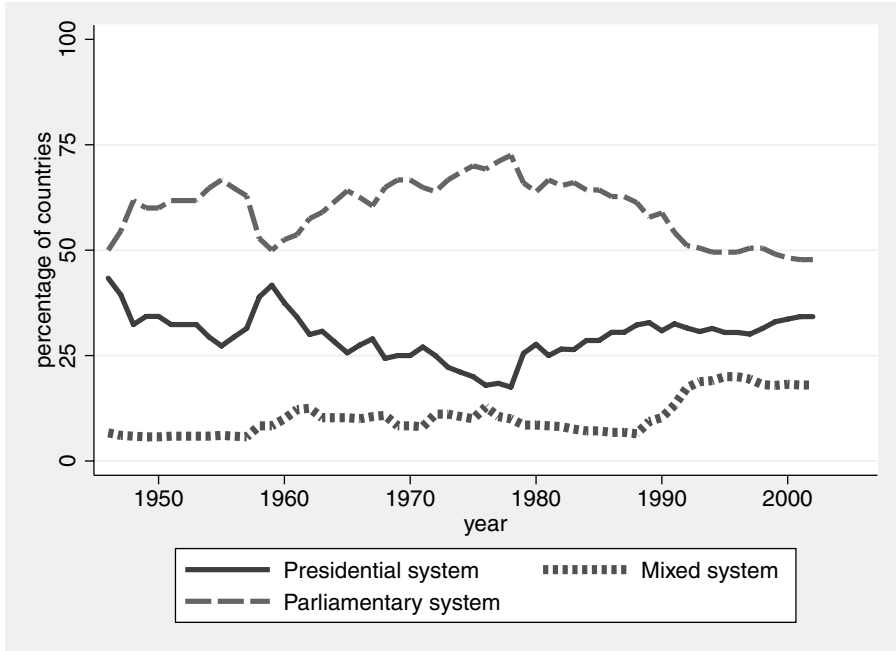
among the world's democracies over the last six decades.<sup>62</sup> In absolute terms, the parliamentary model has consistently been the most popular of the three and is at present the choice of roughly half of the world's democracies. By contrast, although presidentialism has enjoyed a slight resurgence since its nadir in the 1970s, it remains less widespread now than it was in the immediate aftermath of World War II. What has gained popularity over time, mainly at the expense of parliamentarism, is the mixed or semi-presidential model, which was widely adopted among the former Soviet bloc countries that emerged from communism in the 1990s.<sup>63</sup>

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<sup>62</sup> See José Antonio Cheibub et al., *Democracy and Dictatorship Revisited*, 143 PUB. CHOICE 67, 79 (2010) (noting the "general consensus" that democratic governments can be divided into "presidential," "parliamentary," and "mixed" or "semi-presidential" systems). The data underlying Figure 8 is derived from the variable "Hinst" coded by José Cheibub and Jennifer Gandhi. This variable is coded 0 for a "Parliamentary Democracy," 1 for a "Mixed Democracy," 2 for a "Presidential Democracy," 3 for a "Civilian Dictatorship," 4 for a "Military Dictatorship," and 5 for a "Monarchic Dictatorship." See Cheibub et al., *supra*, at 68 (describing the "six-fold regime classification"); Pippa Norris, *Democracy Crossnational Dataset, Release 3.0 Spring 2009*, PIPPA NORRIS DATA (Mar. 2009), <http://www.hks.harvard.edu/fs/pnorris/Data/Data.htm> (follow link labeled "Stata SE version"). Figure 8 is a graph of the percentage of countries in each of the first three categories.

<sup>63</sup> See CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC 120 (2005) (describing "semi-presidentialism" as the "modal type" of government adopted by former Soviet bloc countries); Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarianism Versus Presidentialism*, 46 WORLD POL. 1, 4 (1993) ("[O]f the approximately twenty-five countries that now constitute Eastern Europe and the former Soviet Union, only three . . . have chosen pure parliamentarianism.").

FIGURE 8: POPULARITY OF PRESIDENTIAL, PARLIAMENTARY, AND MIXED SYSTEMS



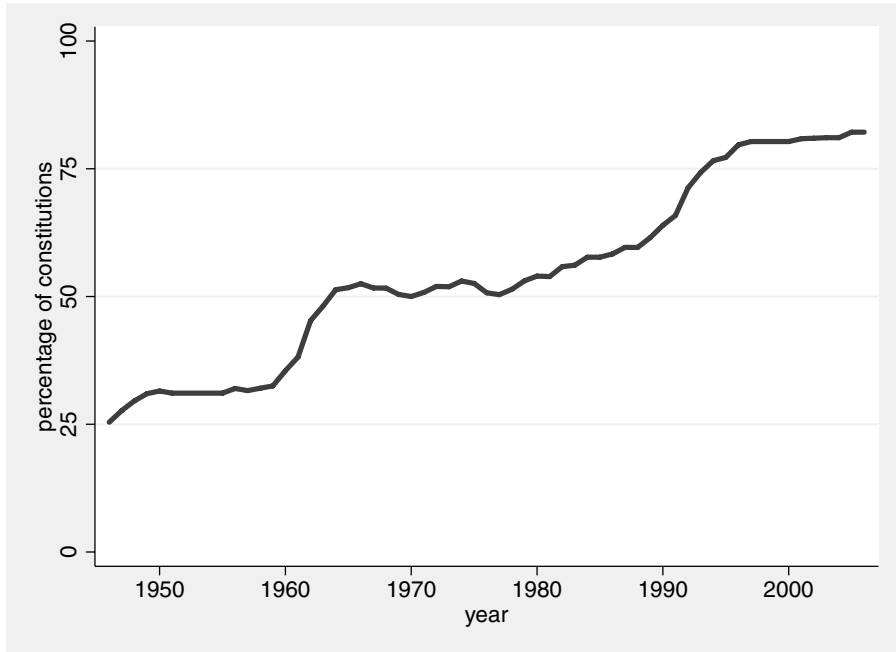
3. *Judicial Review*

It is perhaps ironic that the most popular innovation of American constitutionalism has been judicial review,<sup>64</sup> given that this celebrated institution is nowhere mentioned in the U.S. Constitution itself. Today, the majority of the world’s constitutions mandate judicial review in some form, as shown in Figure 9.<sup>65</sup> In 1946, only 25% of all constitutions explicitly provided for judicial review; by 2006, that proportion had increased to 82%.

<sup>64</sup> See BILLIAS, *supra* note 3, at 321 (describing judicial review as “the fastest-growing American institution abroad” as of 1989); *id.* at 365 (characterizing judicial review as “America’s most important export” (quoting VON BEYME, *supra* note 51, at 85)).

<sup>65</sup> The data underlying this graph is our own.

FIGURE 9: PERCENTAGE OF CONSTITUTIONS  
THAT PROVIDE EXPLICITLY FOR JUDICIAL REVIEW



The particular form of judicial review that has proven most popular, however, is not the form that was pioneered by the United States.<sup>66</sup> Under the American model, the power of judicial review is vested in courts of general jurisdiction, which rule upon the constitutionality of government action as the need arises in the course of ordinary litigation.<sup>67</sup> Under the European model, by contrast, the power to decide constitutional questions is exercised exclusively by a specialized constitutional court that stands apart from the regular

<sup>66</sup> See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 161 (1991) (“[M]ost liberal democracies have not embraced the American system of permitting ordinary courts to rule on constitutional questions [but have instead] tended to prefer variants of a system developed in Austria in the 1920s, where such matters are referred to a tribunal that deals only or mainly with constitutional issues.”); Stone Sweet, *supra* note 12, at 223 & tbl.9.1 (reporting that countries that have adopted the “European model” outnumber those that have adopted the “American model” by a count of eighty-five to fifty-three, with another thirty-six countries that employ a mixture of the two models or some other unique and unclassifiable mechanism); cf. Gardbaum, *supra* note 8, at 411–12 (observing 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).

<sup>67</sup> See Gardbaum, *supra* note 8, at 412–13 (summarizing the differences between the American and European models); Stone Sweet, *supra* note 12, at 222, 223 & tbl.9.1 (distinguishing between the two models).

judiciary.<sup>68</sup> The prototypical examples of this model are the constitutional courts that Hans Kelsen devised for Austria.<sup>69</sup> A further distinction is routinely drawn between concrete review, which characterizes the American model, and abstract review, which typifies the European model. In a system of concrete review, courts decide constitutional questions in the course of ordinary litigation, as part of what Americans would call a case or controversy,<sup>70</sup> whereas in a system of abstract review, the constitutionality of a law can be decided in the absence of a concrete, adversarial dispute and, indeed, before the law has even gone into effect.<sup>71</sup>

Over the last six decades, a growing proportion of constitutions have adopted the European model of abstract review by specialized courts, as opposed to the American model of concrete review by

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<sup>68</sup> See sources cited *supra* note 67.

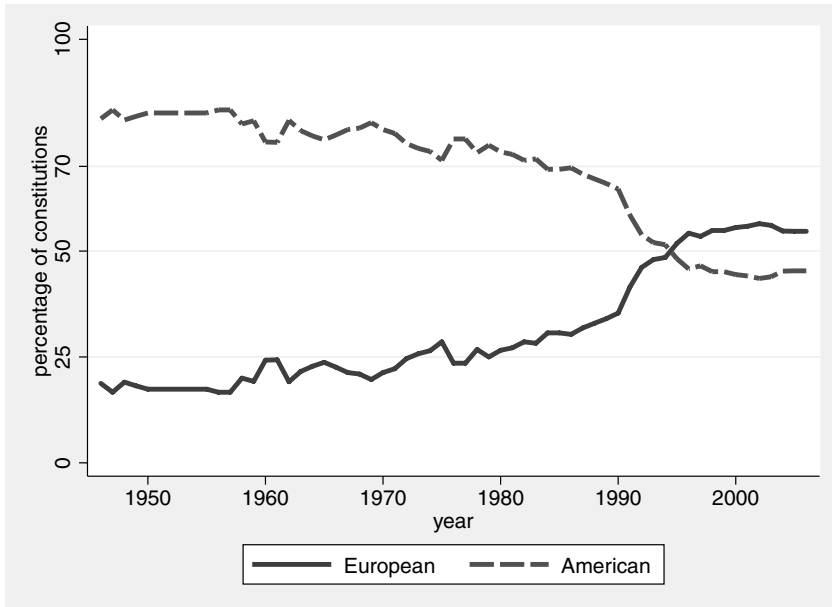
<sup>69</sup> See Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 W. EUR. POL. 77, 79 (2002) (discussing Kelsen's invention of the "modern European constitutional court," which "enjoy[s] exclusive and final constitutional jurisdiction," as well as its adoption by "most of Central and Eastern Europe"). Consequently, constitutional courts of this type are sometimes known as Kelsenian courts. See *id.* at 78–79.

<sup>70</sup> See U.S. CONST. art. III, § 2 (providing that the "judicial Power shall extend" to specified categories of "Cases" and "Controversies").

<sup>71</sup> See Gardbaum, *supra* note 8, at 412–13 (reviewing the distinguishing features of the American and European models); Stone Sweet, *supra* note 12, at 224–25 (defining and distinguishing "abstract review" and "concrete review," and the European and American models of judicial review). The possibility that courts can engage in constitutional review of laws before they have even been promulgated introduces yet another twist on the institution of judicial review—namely, the distinction between *ex ante* and *ex post* review. *Ex ante* or pre-enactment review refers to judicial review of laws that have not yet gone into effect. *Ex ante* review is closely identified with both abstract review and the European model for a variety of reasons, not the least of which are purely logical. In a system that provides only for concrete review, *ex ante* review is untenable for the simple reason that concrete controversies and disputes cannot arise under a law that has not yet been promulgated. By contrast, in a system that provides only for abstract review, it is possible to restrict the scope of judicial review still further to pre-enactment or *ex ante* review, wherein the constitutionality of a law can be decided *only* before it goes into effect. The best-known exemplar of a European-style specialized constitutional court limited to *ex ante*, abstract review was, until recently, the French Conseil Constitutionnel. See Gardbaum, *supra* note 8, at 414–15 (identifying France as the only country to still practice *a priori* review, following its abolition in Spain and Portugal). However, constitutional amendments adopted in 2008 moved France sharply toward a system of concrete review, under which ordinary courts may now refer constitutional questions that arise in the course of ordinary litigation to the Conseil Constitutionnel. See MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS 202–04 (2011) (describing the recently added article 61-1 of the French Constitution and its implementing legislation); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 23–116 (1992) (describing the origins and operation of French constitutional review prior to the 2008 amendments); Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 N.Y.U. J. INT'L L. & POL. 15, 18–23 (2010) (describing the post-2008 legal framework for judicial review in France and the reasons for its adoption).

ordinary courts. At the close of World War II, the American model enjoyed a commanding lead over the European model as the choice of over 80% of constitution makers, but its popularity began to erode in the 1970s. By the mid-1990s, the European model had overtaken the American model as the choice of over half the world's constitutions. Figure 10 illustrates these global trends. The creation of specialized constitutional courts of the European variety has proven especially popular among newly democratic states, where distrust of existing judicial institutions associated with the old regime is often widespread.<sup>72</sup> Thus, although the U.S. Constitution may have pioneered the idea of binding judicial enforcement of individual rights—an idea that now enjoys nearly universal acceptance—it is no longer the leading source of inspiration for how such enforcement is to be institutionalized. America's long and successful experience with judicial review may be responsible for encouraging other countries to adopt the practice, but the form of judicial review that other countries actually choose to adopt has a more European than American flavor.

FIGURE 10: POPULARITY OF AMERICAN-STYLE VERSUS EUROPEAN-STYLE JUDICIAL REVIEW



<sup>72</sup> See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 9–10* (2003) (discussing the possibility that new democracies may distrust the judiciary because it “was typically trained, selected, and promoted under the previous regime”).

*D. Friends But Not Followers: Constitutionalism Among  
American Allies*

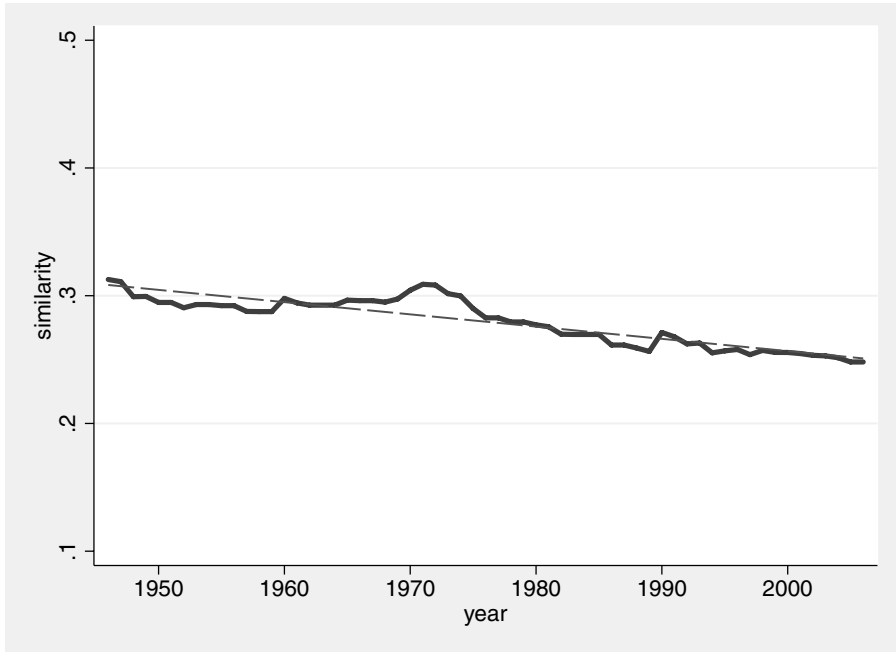
It is plausible to think that the influence of the U.S. Constitution is declining only among certain groups of countries and not others. One possibility, for example, is that the decline of similarity to the U.S. Constitution might track polarization of the global community into pro- and anti-American contingents. As a superpower, the United States has inevitably alienated some countries while attracting and influencing others. Might it be the case, therefore, that some countries have chosen to resist American hegemony by repudiating American-style constitutionalism, while others that remain aligned with the United States or within its sphere of geopolitical influence have remained faithful to the American constitutional model?

Examination of our data on the rights-related content of the relevant constitutions suggests that the answer is no. Figure 11 below depicts the average level of similarity to the U.S. Constitution among allies of the United States, defined as those countries that deployed troops either to Afghanistan in 2001 or to Iraq in 2003.<sup>73</sup> The graph offers little support for the notion that the U.S. Constitution remains an attractive model for America's allies. If anything, the American example is being rejected to an even greater extent by America's allies than by the global community at large.

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<sup>73</sup> Excluding the United States itself, the following countries satisfied these criteria: Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, the Dominican Republic, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Macedonia, Moldova, Mongolia, the Netherlands, New Zealand, Nicaragua, Norway, the Philippines, Poland, Portugal, Romania, Singapore, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Thailand, Tonga, Turkey, Ukraine, and the United Kingdom. See Benedikt Goderis & Mila Versteeg, *Human Rights Violations After 9/11 and the Role of Constitutional Constraints*, 41 J. LEGAL STUD. 131, 143 tbl.2 (2012) (utilizing this measure of military alliances with the United States).

FIGURE 11: AVERAGE SIMILARITY TO THE U.S. CONSTITUTION  
AMONG U.S. ALLIES



*E. Other Spheres of American Influence: Regional, Political, and Legal*

Of course, a country's military alliances may not capture the scope or extent of its constitutional influence. It may be that the countries most likely to follow the American constitutional model are not merely sympathetic to the United States, but also *similar* to it in relevant ways. Relevant similarities might be geographic, historical, political, or legal in nature. For example, Western Europe and Latin America have close historical and political ties to the United States and have been within the American sphere of influence. Countries in those regions might thus be more likely to adhere to an American model of constitutionalism than those elsewhere. Or perhaps the relevant peer group is defined less by geography than by regime type: We might expect democracies to be more likely to follow the constitutional lead of a fellow democracy. Yet another plausible hypothesis is that countries with the same legal heritage and traditions as the United States ought to be more receptive to the example set by the

U.S. Constitution, which is itself rooted in the common law tradition.<sup>74</sup>

Initial examination of the data offers little support for the notion that the U.S. Constitution remains an attractive model for any of these groups. Consider first the patterns evident in geographic regions where the U.S. Constitution might be thought to enjoy enduring influence. Figure 12 graphs the average degree of similarity between the U.S. Constitution and the constitutions of Latin America<sup>75</sup> and Western Europe.<sup>76</sup> With respect to Latin America, the graph fleshes out in greater detail the pattern of declining similarity suggested by the maps above.<sup>77</sup> After decades of slow and irregular movement away from the American model, Latin American constitutions began to differentiate themselves quite sharply from the U.S. Constitution beginning in the 1980s and continuing through the present. Likewise, Western European constitutions are less similar to the U.S. Constitution now than at any point over the last sixty years, although the extent of the decline in similarity has been less dramatic.

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<sup>74</sup> See, e.g., Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 917 (2005) ("If the United States has a common law constitution it is in part because the United States is a common law country . . ."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 887–90 (1996) (arguing that constitutional law in the United States is part of the common law tradition).

<sup>75</sup> "Latin America" is defined as including the following countries: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

<sup>76</sup> "Western Europe" is defined as including the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

<sup>77</sup> See *supra* Figures 3, 4, 5 & 6. Professors Elkins, Ginsburg, and Melton arrive at similar conclusions regarding the similarity over time between Latin American constitutions and the U.S. Constitution. See ELKINS ET AL., *supra* note 9, at 24–26.

FIGURE 12: AVERAGE SIMILARITY TO THE U.S. CONSTITUTION IN LATIN AMERICA AND WESTERN EUROPE

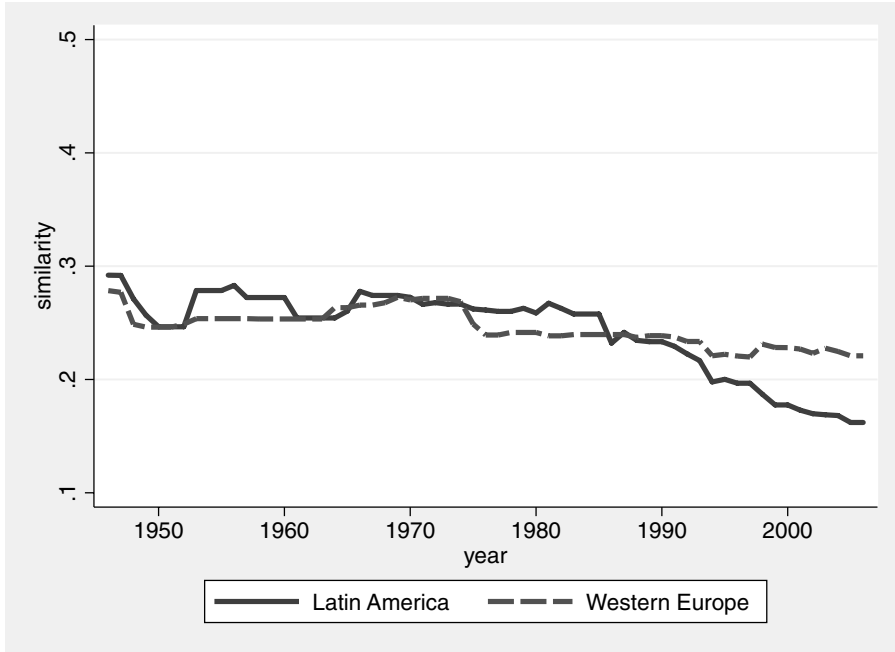


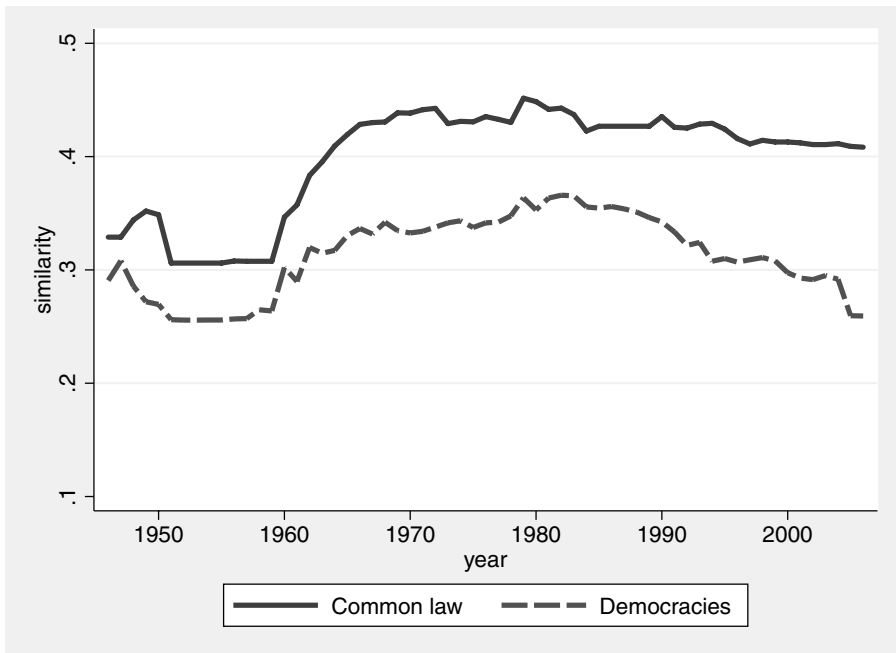
Figure 13 depicts the average degree of similarity between the U.S. Constitution and the constitutions of (1) other common law countries<sup>78</sup> and (2) other democracies.<sup>79</sup> In absolute terms, the level of average similarity to the U.S. Constitution has consistently been higher for common law countries than for any of the other groups of countries depicted in Figures 8 and 9. But while common law

<sup>78</sup> We adopt the definition of “common law” countries employed by Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 app.B at 268–76 (1999). The jurisdictions covered by our data set that also fall within their definition are as follows: Antigua and Barbuda, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Botswana, Brunei, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Ireland, Israel, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Malawi, Malaysia, Maldives, the Marshall Islands, the Federated States of Micronesia, Namibia, Nepal, New Zealand, Nigeria, Pakistan, Papua New Guinea, American Samoa, Saudi Arabia, Sierra Leone, Singapore, the Solomon Islands, Somalia, South Africa, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sudan, Swaziland, Tanzania, Thailand, Tonga, Trinidad and Tobago, Uganda, the United Arab Emirates, the United Kingdom, the United States, Vanuatu, Zambia, and Zimbabwe.

<sup>79</sup> Our measure of a country’s level of democracy is the “polity2” variable from the Polity IV data set. This variable ranges from +10 (strongly democratic) to -10 (strongly autocratic). For purposes of this Article, countries with a score of 6 or higher are classified as “democracies.” See Monty G. Marshall & Keith Jaggers, *Polity IV Project: Dataset User’s Manual*, CENTER FOR SYSTEMIC PEACE 15–16 (Oct. 24, 2007), [http://home.bi.no/a0110709/PolityIV\\_manual.pdf](http://home.bi.no/a0110709/PolityIV_manual.pdf).

countries converged strongly on the American model over the 1960s, they have been drifting in the opposite direction since the mid-1980s. It is among the world's democracies, however, that constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s. The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world's democracies are, on average, less similar to the U.S. Constitution now than they were at the end of World War II.

FIGURE 13: AVERAGE SIMILARITY TO THE U.S. CONSTITUTION  
AMONG DEMOCRACIES AND COMMON LAW COUNTRIES



*F. What Variables Predict Similarity to the U.S. Constitution?*

To determine which of these variables are statistically significant predictors of constitutional similarity to the United States, we employ regression analysis.<sup>80</sup> Such analysis enables us not only to test the

<sup>80</sup> To be specific, we implemented an ordinary least squares regression model. The fact that we are analyzing time-series cross-sectional data called for a number of methodological refinements. First, the model is estimated with robust standard errors that are both corrected for problems of heteroscedasticity that are common to panel data, and clustered at the state level to allow for serial correlation over time. Second, to address the serial

statistical significance of specific variables, but also to control for the effect of other variables.<sup>81</sup> The results largely confirm the impressions conveyed by the figures above. The predictors of constitutional similarity that we test are: (1) whether the country that adopted the constitution is located in Western Europe;<sup>82</sup> (2) whether the country is located in Latin America;<sup>83</sup> (3) whether the country has a common law system;<sup>84</sup> (4) whether the country is militarily allied with the United States, as measured by whether it sent troops to either Afghanistan in 2001 or Iraq in 2003;<sup>85</sup> and (5) the country's level of democracy, as measured numerically in the political science literature.<sup>86</sup> To test the possibility that older or less frequently updated constitutions may bear a greater resemblance to the U.S. Constitution than newer or more frequently updated constitutions, we also include (6) the number of years since the constitution was adopted or last revised with respect to any of the sixty provisions in the rights index.<sup>87</sup>

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correlation of standard errors that tends to characterize time-series data, the model includes, as an additional predictor variable, a lagged version of the dependent variable—namely, the constitution's similarity to the U.S. Constitution over the *preceding* decade. See TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* 78–79 (2005) (noting that time-series cross-sectional data are prone to the problems of heteroscedasticity and time-serial autocorrelation, and employing a lagged version of the dependent variable to address the autocorrelation); Nathaniel Beck & Jonathan N. Katz, *Nuisance vs. Substance: Specifying and Estimating Time-Series-Cross-Section Models*, 6 POL. ANALYSIS 1, 8–9 (1996) (explaining that inclusion of a lagged version of the dependent variable is a standard technique for addressing the problem of serial correlation in time-series data). Finally, because constitutions tend to change infrequently, our model predicts changes in similarity not from year to year, but instead from decade to decade. The average value of each predictor variable over an entire decade is used to predict the average level of similarity to the U.S. Constitution over that same decade. Each “decade” was defined as follows: 1946 through 1949 are the “1940s,” 1950 through 1959 are the “1950s,” 1960 through 1969 are the “1960s,” 1970 through 1979 are the “1970s,” 1980 through 1989 are the “1980s,” 1990 through 1999 are the “1990s,” and 2000 through 2006 are the “2000s.” The resulting regression encompasses 651 observations.

<sup>81</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 77, 79 (2002) (stressing the need for researchers to evaluate and reject alternative explanations for their findings by employing “control variables” that account for those alternative explanations).

<sup>82</sup> See *supra* note 76 (listing the countries that are categorized as belonging to “Western Europe”).

<sup>83</sup> See *supra* note 75 (listing the countries that are categorized as belonging to “Latin America”).

<sup>84</sup> See *supra* note 78 (listing the countries that are coded as possessing a common law system).

<sup>85</sup> See *supra* note 73 (listing the countries that are coded as having sent troops to Iraq or Afghanistan).

<sup>86</sup> See *supra* note 79 (describing which countries are classified as democracies).

<sup>87</sup> We did not attempt to distinguish between substantial and insubstantial (or important and unimportant) amendments. See ELKINS ET AL., *supra* note 9, at 55–59 (discussing the difficulties of arbitrariness and subjectivity involved in drawing such distinctions).

Given how infrequently constitutions are amended or replaced, the strongest predictor of a constitution's similarity to the U.S. Constitution in any given year is likely to be its similarity to the U.S. Constitution in the preceding year. To prevent constitutional inertia of this kind from distorting our results, we include as a predictor (7) similarity to the U.S. Constitution over the *preceding* decade.<sup>88</sup> The regression model further includes (8) decade-specific predictor variables that enable us to determine which decades, if any, were characterized by distinctive trends.<sup>89</sup> Finally, we tested the possibility that similarity to the U.S. Constitution might correspond to sheer physical proximity to the United States by estimating an alternative version of the model in which we replaced the two existing geographically based variables—namely, the indicators of whether a country is part of Latin America or Western Europe—with a single variable that measures the physical distance between the country's capital and New York City.<sup>90</sup>

Although the model as a whole does a fairly good job of predicting constitutional similarity,<sup>91</sup> only a handful of specific variables proved to be statistically meaningful predictors of similarity to the U.S. Constitution. There is no statistically significant relationship between a country's level of democracy and the extent to which its constitution resembles the U.S. Constitution; likewise, neither the fact that a country is militarily allied with the United States nor the fact that it is located inside or outside of Western Europe appears to make a difference. Nor does mere physical proximity to the United States, by itself, predict increased constitutional similarity to the United States. On the contrary, the fact that a country is located in nearby Latin America predicts *decreased* similarity to the American model. Notwithstanding Latin America's reputation for being highly receptive to American constitutional ideas in the nineteenth century, the

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<sup>88</sup> See Beck & Katz, *supra* note 80, at 8–9 (explaining that inclusion of a lagged version of the dependent variable is a standard technique for addressing the problem of serial correlation in time-series data).

<sup>89</sup> To be specific, the model included a separate dummy variable for each decade, with similarity levels in the 1940s serving as the baseline for comparison. See *supra* note 80 (defining the “decades”).

<sup>90</sup> The alternative version of the model was the same in all respects save for the replacement of the two regional dummy variables with a continuous variable that measures the distance between New York City and each country's capital city in kilometers. Because a country's location in a particular geographic region and its physical distance from the United States both capture geographical location and are highly correlated with one another, it is inadvisable to include both the regional dummy variables and the physical distance variable in the same regression model.

<sup>91</sup> The r-squared associated with the regression is 0.835.

region has on the whole exhibited the opposite tendency over the second half of the twentieth century.<sup>92</sup>

Common law countries as a group exhibit constitutional similarity to the U.S. Constitution, but this tendency is fairly muted and has diminished since the 1980s.<sup>93</sup> As expected, constitutions that are older or less frequently updated exhibit greater similarity to the U.S. Constitution than do recently drafted or amended ones.<sup>94</sup> Finally, the results of the regression confirm that the steep decline in average similarity to the U.S. Constitution over the last two decades pictured in Figure 2 is statistically significant.<sup>95</sup>

### *G. Why Is the U.S. Constitution Increasingly Atypical?*

There are undoubtedly many reasons for which the U.S. Constitution, notwithstanding its long reputation for being exceedingly influential, is becoming increasingly atypical by global standards, but a handful of quantitative and qualitative differences between the U.S. Constitution and other constitutions deserve particular attention. First, the U.S. Constitution is increasingly atypical in the purely quantitative sense that it offers relatively few enumerated rights.<sup>96</sup> While the catalog of rights found in other constitutions has steadily grown,<sup>97</sup> the laconic U.S. Constitution has not added any rights at all over the last century. As a result, it contains only twenty-one of the sixty provisions in our rights index, whereas the average constitution currently contains thirty-four.

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<sup>92</sup> The fact that a country is located in Latin America is a statistically significant predictor of decreased similarity to the U.S. Constitution at a 5% confidence level ( $p = 0.04$ ).

<sup>93</sup> In this case, the fact that a country has a common law system is a statistically significant predictor of increased similarity at the 5% confidence level ( $p = 0.016$ ). However, statistical significance must not be confused with substantive significance. A measure of statistical significance, such as a p-value, captures the likelihood that the relationship observed between two variables is more than a mere fluke of the data, but it does not measure the magnitude of the relationship. On a scale from -1 to 1, where -1 is perfect dissimilarity and 1 is perfect similarity, the fact that a country has a common law system increases the predicted similarity of its constitution to that of the United States by only 0.02, holding all other variables constant.

<sup>94</sup> Like the presence or absence of a common law system, the age of a constitution is a statistically significant predictor of increased similarity ( $p < 0.01$ ), but the size of this effect is modest. On a scale from -1 (representing perfect dissimilarity) to 1 (representing perfect similarity), the addition of one year to a constitution's lifespan increases its predicted similarity to the U.S. Constitution by only 0.001.

<sup>95</sup> The dummy variables for the 1990s and the 2000s are statistically significant predictors of decreased similarity at a 1% confidence level (with p-values of 0.004 and 0.006, respectively).

<sup>96</sup> See, e.g., Gardbaum, *supra* note 8, at 395 (deeming it a distinguishing feature of the U.S. Constitution that it contains "comparatively few enumerated rights").

<sup>97</sup> See Law & Versteeg, *supra* note 19, at 1194–98 (documenting an increase in the average number of rights per constitution, and dubbing this phenomenon "rights creep").

Second, among the relatively few rights that the U.S. Constitution does contain are provisions that happen to be rare at a global level. One is the Establishment Clause: Today, only about one-third of the world's constitutions provide expressly for a separation of church and state.<sup>98</sup> Another is a right that is now so rare that it has become practically *sui generis*—namely, the right to bear arms. The only other constitutions in the world today that still feature such a right are those of Guatemala and Mexico,<sup>99</sup> while the Argentinean constitution contains a somewhat different duty to bear arms in defense of the fatherland.<sup>100</sup> Figure 14 illustrates the extent to which this right, which was already rare from the outset, has only declined in popularity over time.

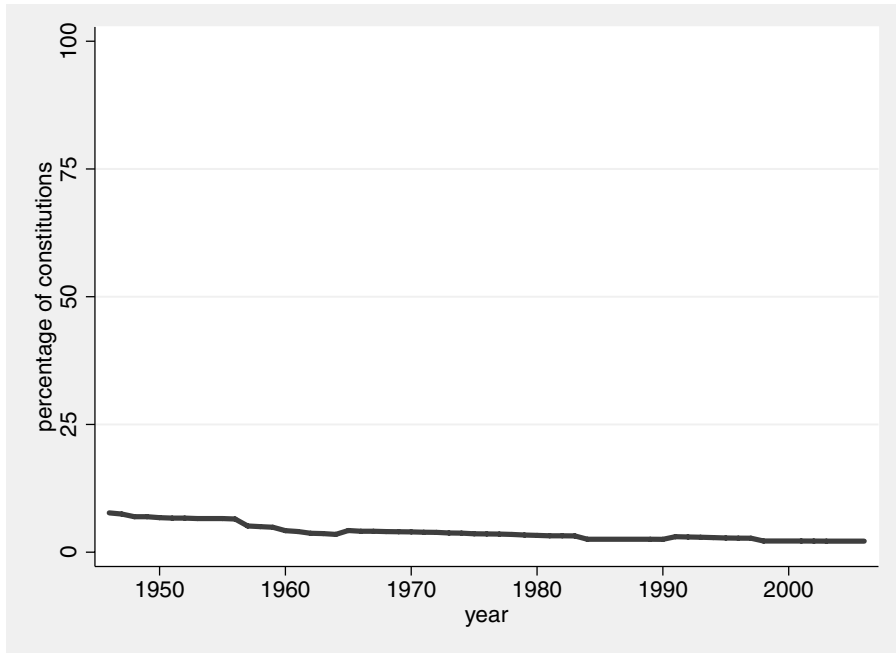
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<sup>98</sup> See *supra* Table 1 (showing that 34% of all constitutions in 2006 contain a provision providing for the separation of church and state).

<sup>99</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 10, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (guaranteeing inhabitants of Mexico “the right to possess arms in their homes for their security and legitimate defense,” subject to the qualification that “[f]ederal law shall determine the cases, conditions, requirements and places in which inhabitants may be authorized to carry arms”); Constitución Política de la Republica de Guatemala [C.P.], *as amended*, art. 38, Diario de Centro América [DCA], 3 de Junio de 1985 (Guat.) (recognizing “[t]he right to own weapons for personal use, not prohibited by the law, in the place of inhabitation,” and “[t]he right to bear arms . . . regulated by the law”). Constitutions that previously contained such a right but no longer do so include the Liberian constitution prior to its amendment in 1983, the constitution of Honduras prior to 1956, and the statutory bill of rights that was in place in Latvia from 1991 to 1997. CONSTITUTION OF THE REPUBLIC OF LIBERIA, *as amended*, May 1955, art. 1 § 12; CONSTITUCIÓN DE LA REPUBLICA DE HONDURAS, Mar. 28, 1936, art. 68; Declaration on the Accession to Human Rights Instruments (Dec. 10, 1991) (Lat.), art. 11, *translated in* INTERNATIONAL CONSTITUTIONAL LAW (A. Tschentscher, ed.), [http://www.servat.unibe.ch/icl/lg03000\\_.html](http://www.servat.unibe.ch/icl/lg03000_.html) (last modified May 29, 2010).

<sup>100</sup> Art. 21, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (“Every Argentine citizen is obliged to bear arms in defense of his country and of this Constitution, in accordance with such laws as the Congress may enact for the purpose and with decrees of the National Executive.”), *translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: ARGENTINA 6 (Albert P. Blaustein & Gisbert H. Flanz, eds. 1983).

FIGURE 14: POPULARITY OF THE RIGHT TO BEAR ARMS



Third, the U.S. Constitution omits a number of the generic building blocks of global rights constitutionalism. Women's rights, for example, can currently be found in over 90% of the world's constitutions, but they do not appear anywhere in the text of the U.S. Constitution.<sup>101</sup> The same is true for physical needs rights, such as the right to social security, the right to health care, and the right to food, which appear in some form in roughly 80% of the world's constitutions but have never attained constitutional status in the United States.<sup>102</sup> The U.S. Constitution is, instead, rooted in a libertarian

<sup>101</sup> See *supra* Table 1.

<sup>102</sup> See *id.*; see also, e.g., Gardbaum, *supra* note 8, at 399 (deeming the U.S. Constitution "exceptional in how few enumerated rights it contains, especially of a substantive rather than a procedural nature"); Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 13, at 1, 10 ("The U.S. Constitution makes no reference to socioeconomic and welfare rights—entitlements to food, shelter, health care, and unemployment insurance—that are standard features of both international rights regimes and the constitutions of European states."); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 13, at 90, 92 (deeming the U.S. Constitution "distinctive" in its omission of social and economic rights, unlike the constitutions of "most nations").

constitutional tradition that is inherently antithetical to the notion of positive rights.<sup>103</sup>

Fourth, the fact that the U.S. Constitution is both old—older, indeed, than any other constitution currently in force<sup>104</sup>—and extremely difficult to amend<sup>105</sup> raises the possibility that it is simply becoming obsolete. Whereas the average constitution has a 38% chance of being revised in any given year and is replaced every nineteen years,<sup>106</sup> the U.S. Constitution has survived over two centuries and has been amended only once in the last forty years.<sup>107</sup> Critics have thus argued that the U.S. Constitution is in many respects dysfunctional, antiquated, and sorely in need of repair.<sup>108</sup> Indeed, the older a constitution becomes, the more dysfunctional it may be. A constitution is likely to become increasingly obsolete over time, but efforts to update it may be thwarted by the fact that the costs involved in switching to a new set of arrangements are likely to increase as well. The existence of path dependency and other “entrenchment

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<sup>103</sup> See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 9 (2d ed. 1991) (arguing that the U.S. Constitution is rooted in a deeply and persistently Lockean intellectual tradition).

<sup>104</sup> See Richard H. Pildes, *Political Parties and Constitutionalism*, in *COMPARATIVE CONSTITUTIONAL LAW* 254, 254 (Tom Ginsburg & Rosalind Dixon eds., 2011) (identifying the U.S. Constitution as the oldest of its kind); *Justice Ginsburg to Egyptians*, *supra* note 1 (quoting Justice Ginsburg’s observation that the United States has “the oldest written constitution still in force in the world”).

<sup>105</sup> See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 21 (2006) (identifying the U.S. Constitution as “the most difficult to amend of any constitution currently existing in the world today”); David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. COLLOQUY 86, 93 (2007) (observing that “the nationwide supermajoritarian action needed to adopt a constitutional amendment is notoriously difficult and costly” to secure, and noting by way of illustration that ratification of the uncontroversial Twenty-Seventh Amendment was delayed by over two hundred years).

<sup>106</sup> See ELKINS ET AL., *supra* note 9, at 101, 129 (calculating a mean “predicted amendment rate” of 0.38 per year for the world’s constitutions, and reporting that constitutions have a median survival time of nineteen years).

<sup>107</sup> First proposed in 1789, the Twenty-Seventh Amendment was not ratified until 1992. See Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 102 (1994).

<sup>108</sup> See, e.g., DAHL, *supra* note 7, at 15–20, 46–55 (critiquing undemocratic features of the U.S. Constitution such as the Electoral College and the Senate); *id.* at 91–119 (measuring the performance of the American constitutional system across a range of real-world social, economic, and political metrics, and finding its performance “mediocre at best”); LEVINSON, *supra* note 105, at 9 (arguing that the U.S. Constitution is “significantly dysfunctional” to the point of warranting a constitutional convention); LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* 4–5 (2007) (bemoaning the “political ossification” and “grotesque” inequities that have resulted from failure to engage in more than “insufficient tinkering” with the Constitution over the last two centuries); Ignatieff, *supra* note 102, at 11 (dubbing the U.S. Bill of Rights “a late eighteenth-century constitution surrounded by twenty-first century ones, a grandfather clock in a shop window full of digital timepieces”).

dynamics” suggests that constitutions will “tend to become both increasingly dysfunctional and increasingly difficult to change” over time.<sup>109</sup>

By way of analogy, consider an old computer operating system that remains functional thanks only to the long accretion of awkward and inefficient add-ons and workarounds.<sup>110</sup> For existing users, it may not be sensible to abandon the existing system and start afresh. Substantial investments in the existing system may render switching costs prohibitively high relative to the expected benefits from adoption of a new system. Some might become accustomed or even attached to the quirks and flaws of the existing system. Yet it would make little sense for a new user to forgo the latest technology and install the old system on a new computer.

Likewise, even if continued use of an old constitution with little or no amendment makes sense for a particular country, constitutional drafters elsewhere working with a relatively clean slate, the benefit of hindsight, and contemporary needs and circumstances in mind may be unlikely to adopt that constitution as a template for their own efforts. And to the extent that they do look to the old system for inspiration, they may look not to its ancient core, but to the subsequent engineering efforts that have kept it viable. With respect to the U.S. Constitution, some of these efforts have been statutory, as in the case of the Civil Rights Act of 1964,<sup>111</sup> the Administrative Procedure Act,<sup>112</sup> or even the Social Security Act.<sup>113</sup> Others have been the

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<sup>109</sup> Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 714–15 (2011) (describing various mechanisms that ensure “systems of constitutional law will tend to be self-entrenching, accumulating greater political support over time”); see also, e.g., ELKINS ET AL., *supra* note 9, at 20 (observing that “a large institutional infrastructure has developed alongside the U.S. Constitution and the investment in these institutions has been considerable,” and that “political life has grown around [the Constitution] and adapted to its idiosyncratic edicts”).

<sup>110</sup> See Law, *supra* note 34, at 1287 (drawing parallels between a constitution and the operating system of a computer).

<sup>111</sup> See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237 (2001) (dubbing the Civil Rights Act of 1964 a “super-statute” that has “pervasively affected federal statutes and constitutional law” alike).

<sup>112</sup> See MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, & JUDICIALIZATION 138 (2002) (characterizing both the Civil Rights Act of 1964 and the Administrative Procedure Act as “constitution-like” in the sense that both are “entangled with constitutions” and “treated as overarching norms applied in judicial review of a wide range of government—and often private—actions”).

<sup>113</sup> See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 427, 446, 461 (2007) (observing that the Social Security Act is “functionally more entrenched, at least right now, than the First Amendment’s prohibition on flag burning,” and describing it as the “sort of extracanonical supplementation . . . by which a Constitution that is very old and hard to amend manages to serve the needs of a modern and highly complex society”).

handiwork of judges: Many of the most famous and important features of American constitutional law, such as substantive due process<sup>114</sup> and judicial review,<sup>115</sup> are not to be found in the text of the Constitution at all, but have instead been fashioned by the Supreme Court, which Woodrow Wilson justifiably dubbed a “constitutional convention in continuous session.”<sup>116</sup>

Recurring suggestions that the influence of the Supreme Court is also waning, however, suggest that there may be more at work than the mere obsolescence of a formal constitutional document.<sup>117</sup> If other countries are, indeed, increasingly avoiding the example set by our constitutional judges as well as our constitutional scripture, it becomes harder to escape the conclusion that American constitutionalism more generally enjoys diminished global influence.

#### IV

#### IS CANADA A CONSTITUTIONAL SUPERPOWER?

##### A. *The Fall and Rise of Canadian Constitutionalism*

Constitutional drafters rarely invent new forms of political organization or discover new rights from whole cloth but instead lean heavily upon foreign examples for inspiration.<sup>118</sup> The fact that the U.S. Constitution no longer serves as the primary source of inspiration

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<sup>114</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a constitutional right to abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a constitutional right of married couples to use contraception); *Lochner v. New York*, 198 U.S. 45 (1905) (invoking a constitutionally protected liberty of contract to invalidate state workplace regulations).

<sup>115</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of judicial review); *Cooper v. Aaron*, 358 U.S. 1 (1958) (asserting judicial supremacy in the area of constitutional interpretation); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (reiterating that the judiciary possesses final say over the meaning of the Constitution, notwithstanding the enforcement powers expressly given to Congress by section 5 of the Fourteenth Amendment).

<sup>116</sup> J.W. PELTASON, CORWIN & PELTASON’S UNDERSTANDING THE CONSTITUTION 191 (14th ed. 1997) (quoting Wilson).

<sup>117</sup> See *supra* note 17 and accompanying text (describing a recent decline in citations to U.S. Supreme Court constitutional jurisprudence in some foreign courts).

<sup>118</sup> See, e.g., A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 402 (1996) (noting the frequency with which constitutional “[d]rafters ask their staffs to compile the texts of various constitutions, especially those whose systems seem worthy of emulation”); Schauer, *supra* note 74, at 910 (“A newly constitutionalizing nation may choose whether to rely heavily on an American, or (more commonly) a German model, but the picture is one of picking a largely off-the-rack constitution, rather than making it one’s self.”); Goderis & Versteeg, *supra* note 19, at 3 (finding empirical evidence of transnational constitutional borrowing). See generally THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006) (collecting a variety of perspectives on the phenomenon of the transnational “migration” of constitutional ideas, which encompasses but is not limited to the practice of conscious “borrowing”).

for constitution making in other nations thus begs the question of what, if anything, has emerged to take its place. The literature on comparative constitutional law suggests a handful of plausible candidates. Scholarly attention has focused disproportionately upon a few countries whose constitutional practices are deemed particularly influential.<sup>119</sup>

One possible heir to the throne also happens to be America's closest neighbor. The Canadian Constitution has often been described as more consistent with, and more influential upon, prevailing global standards and practices than the U.S. Constitution.<sup>120</sup> The Canadian Charter of Rights and Freedoms, which was adopted in conjunction with the patriation of the Canadian Constitution in 1982, has been

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<sup>119</sup> See, e.g., PARKINSON, *supra* note 29, at 6, 11 (observing that the constitutions of Pakistan and Malaysia were influenced by the Indian Constitution, and that colonial territories followed such constitutional developments as India's 1950 Bill of Rights and Canada's 1960 Bill of Rights "with great interest"); Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 3, 8 (Sujit Choudhry ed., 2008) (observing that the scholarly literature on comparative constitutional law is "oriented around a standard and relatively limited set of cases" consisting of a combination of jurisdictions that have turned "relatively recently" to rights-based constitutionalism and "more established constitutional systems" that serve as "benchmarks for comparison," and defining this "standard" set of cases as including "South Africa, Israel, Germany, Canada, the United Kingdom, the United States and to a lesser extent, India"); Gardbaum, *supra* note 8, at 395 (identifying Germany's 1949 Basic Law, Canada's 1982 Charter of Rights and Freedoms, and South Africa's 1996 Final Constitution as "paradigmatic post-1945 rights-protecting constitutions"); Klug, *supra* note 7, at 598 (identifying Germany, Canada, and India as offering competing alternatives to the American model of constitutionalism).

<sup>120</sup> See, e.g., SLAUGHTER, *supra* note 16, at 74 (suggesting that the constitutional courts of both Canada and South Africa are "looking around the world and canvassing the opinions of their fellow constitutional courts, and each is disproportionately influential as a result"); F. VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES 27 (2000) ("[T]he constitutional jurisprudence of the Canadian Supreme Court has become an influential reference-point in the development of constitutionalism, especially in countries with a history of parliamentary sovereignty inherited from Westminster in colonial times."); Allan et al., *supra* note 18, at 437 (finding empirically that "the decisions of Canadian courts are cited by New Zealand judges far more than those from any other jurisdiction"); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 821 (1999) (observing that "the Canadian Charter of Rights and Freedoms has, in recent years, become a leading alternative" to the U.S. Bill of Rights as a model for constitutional drafters elsewhere); Schauer, *supra* note 12, at 258 (noting that Canadian constitutional thinking has been "disproportionately influential" because "Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier"); Liptak, *supra* note 4, at A1 (reporting that many legal scholars have "singled out" the Canadian Supreme Court and the South African Constitutional Court as "increasingly influential"); Justice Ginsburg to Egyptians, *supra* note 1 (identifying the Canadian Constitution as a more appropriate model for contemporary drafters than the U.S. Constitution).

described as the leading influence upon the drafting of the South African Bill of Rights, the Israeli Basic Laws, the New Zealand Bill of Rights, and the Hong Kong Bill of Rights, amongst others.<sup>121</sup> And in a world where the United States offends as often as it charms, the Canadian Constitution may derive added influence from the simple fact that it is not the U.S. Constitution.<sup>122</sup> Could it be that Canada has surpassed or even supplanted the United States as a leading global exporter of constitutional law?

The data suggest that the Canadian model enjoys greater popularity than the American model but, at the same time, possesses only limited appeal beyond a particular subset of countries. Initial analysis of the data reveals that the Canadian Constitution, unlike the U.S. Constitution, is increasingly in sync with global constitutionalism. Figure 15 graphs average similarity to the Canadian Constitution over time. In accordance with our overall approach toward the coding of statutory bills of rights,<sup>123</sup> Canada's 1960 Bill of Rights, though technically a statute, was counted as constitutional in character. Until its enactment, Canada did not boast "constitutional" protection of any of the rights in the similarity index for purposes of our analysis. As a result, no similarity score is available for Canada prior to 1960. From the enactment of the Bill of Rights in 1960 through the dawn of the 1980s, the overall global constitutional trend was one of increasing

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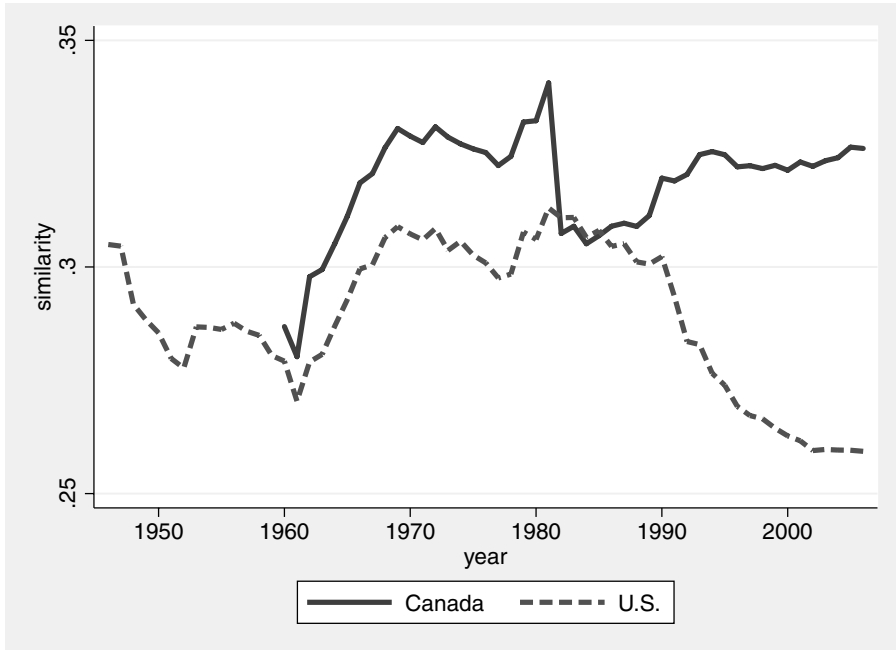
<sup>121</sup> See, e.g., Choudhry, *supra* note 120, at 821–22 (naming various countries that have been influenced by the Canadian Charter of Rights and Freedoms when drafting their own rights provisions); L'Heureux-Dubé, *supra* note 18, at 24 (noting the influence of the Canadian Charter upon the drafters of the South African Constitution and Israel's Basic Laws); Paul Rishworth, *The Inevitability of Judicial Review Under "Interpretive" Bills of Rights: Canada's Legacy to New Zealand and Commonwealth Constitutionalism?*, in CONSTITUTIONALISM IN THE CHARTER ERA, *supra* note 31, at 233, 254–55 (discussing the impact of the Canadian Charter on, and the personal participation of Canadian constitutional scholar Peter Hogg in, the initial drafting of New Zealand's Bill of Rights); Lorraine Weinrib, *The Canadian Charter as a Model for Israel's Basic Laws*, 4 CONST. F. 85, 85–87 (1993) (suggesting that the Canadian Charter offered Israel an attractive example because it is a "coherent national statement" of values and priorities found more generally in the "post-World War Two family of rights-protecting instruments").

<sup>122</sup> See Schauer, *supra* note 12, at 259 ("[T]he influence of Canadian constitutional ideas in many parts of the world appears to be partly a function of the extent to which Canada has the virtue of not being the United States."). Compare Tania Groppi, *A User-Friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies*, 36 S. CT. L. REV. (2d) 337, 360 (2007) (suggesting that Canada's "lack of any kind of 'legal imperialism'" renders it "particularly 'persuasive'" on questions of human rights), with Ignatieff, *supra* note 102, at 13–16 (describing American "messianism" about constitutional values as "the last imperial ideology left standing in the world, the sole survivor of imperial claims to universal significance").

<sup>123</sup> See Law & Versteeg, *supra* note 19, at 1188 (discussing the methodological decision to treat statutes that govern "functionally constitutional matters" as constitutional in nature, but not "statutes enacted to implement constitutional requirements or execute constitutional obligations").

similarity to the Canadian Constitution. Average similarity to the Canadian Constitution dropped dramatically with the adoption in 1982 of the Charter of Rights and Freedom, only to rebound strongly to levels last seen in the 1970s, although the overall level of similarity still falls short of the heights reached immediately prior to adoption of the Charter.

FIGURE 15: AVERAGE SIMILARITY TO THE CANADIAN AND U.S. CONSTITUTIONS



Overall, the evolution of global constitutionalism has tilted more toward the mild-mannered country to the north than its superpower neighbor to the south. Over the 1960s and 1970s, global constitutionalism showed signs of convergence on both the American and Canadian models. During this time, average similarity to both the American and Canadian models tended to rise and fall in tandem, but global constitutionalism followed the Canadian model much more closely. Canada's adoption of a statutory bill of rights in 1960 placed it slightly closer to the constitutional mainstream from the outset, and by 1982, this initially minor difference had grown into a large gap.

Most striking, however, is what happened after Canada broke sharply from its past by adopting the Charter of Rights and Freedoms in 1982. For a few brief years following those revisions—and for the first time ever—the Canadian Constitution became more of an outlier

than the U.S. Constitution. By 1986, however, Canada was once again more in line with the constitutional mainstream than the United States. The gap between the two countries proceeded to widen dramatically in the 1990s, as average similarity to the U.S. Constitution went into a nosedive at the same time that similarity to the Canadian Constitution continued to creep upward. This divergence can be seen in Figure 15: The downward-trending dotted line represents similarity to the U.S. Constitution, while similarity to the Canadian Constitution is represented by the upward-trending solid line.

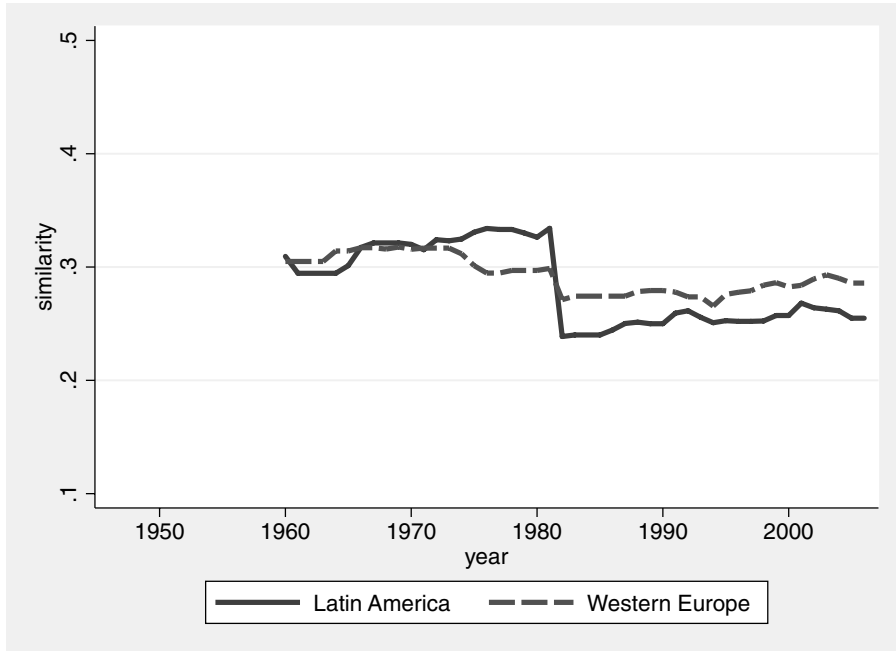
Constitutional similarity to Canada is not confined to a specific geographic region, but some regions exhibit a stronger affinity for the Canadian model than others. Figures 16 through 18 map these geographic patterns in 1966, 1986, and 2006, respectively. (These Figures appear beginning on page 815.) These maps suggest a noticeable increase in average similarity to the Canadian Constitution in Eastern Europe and southern Africa since the early 1980s. At the same time, however, the popularity of Canadian-style constitutionalism appears to be declining in Latin America<sup>124</sup> and Western Europe.<sup>125</sup> Figure 19 focuses on the overall trends in these two regions. In Latin America, similarity to the Canadian model dropped dramatically following adoption of the Charter of Rights and Freedoms in 1982 and has shown little sign of recovery since that time. The notion that Latin American constitutionalism bears little resemblance to Canadian constitutionalism may come as little surprise: Whereas one might have expected American hegemony in Latin America to translate into constitutional influence, there is little about Canada's historical or cultural ties, geographic location, or hegemonic reach to suggest that Canadian constitutionalism would serve as an example for Latin American countries. Likewise, constitutionalism in Western Europe shows little sign of following Canada's lead. Adoption of the Charter in 1982 was not a radical departure from prevailing constitutional practices in Western Europe. Nor, however, have Western European countries followed in Canada's footsteps after 1982. As a result, the average Western European constitution is slightly less similar to the Canadian Constitution now than in 1960.

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<sup>124</sup> See *supra* note 75 (listing the countries that are categorized as "Latin America").

<sup>125</sup> See *supra* note 76 (listing the countries that are categorized as "Western Europe").

FIGURE 19: AVERAGE SIMILARITY TO THE CANADIAN CONSTITUTION IN LATIN AMERICA AND WESTERN EUROPE



### B. *A New Model of Commonwealth Rights Constitutionalism?*

As in the case of the U.S. Constitution, there are reasons to think that the attractiveness of the Canadian model may vary across different types of countries. Some countries may be especially prone to borrow from the Canadian Charter of Rights and Freedoms because they perceive themselves as sharing the same goals and values as Canadian society,<sup>126</sup> or because they are exposed to a greater than average degree to Canadian legal thought, owing perhaps to linguistic ties or geographical proximity. In particular, one might expect Canada to exercise constitutional leadership with respect to other Commonwealth countries, in light of their historical ties, common law roots, and shared language.<sup>127</sup> Along such lines, Stephen Gardbaum

<sup>126</sup> See, e.g., EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 19 (5th ed. 2003) (discussing how homophily, or similarity, between two parties increases the likelihood that one will adopt innovations from the other); Barak, *supra* note 17, at 111 (arguing that legal systems can only serve as “a source of comparison and inspiration” for one another if they share “social, historical, and religious circumstances” that “create a common ideological basis”).

<sup>127</sup> See Groppi, *supra* note 122, at 340–41, 345–59 (hypothesizing that courts in Commonwealth countries will, partly for genealogical reasons, be particularly likely to cite

FIGURE 16: SIMILARITY TO THE CANADIAN CONSTITUTION IN 1966

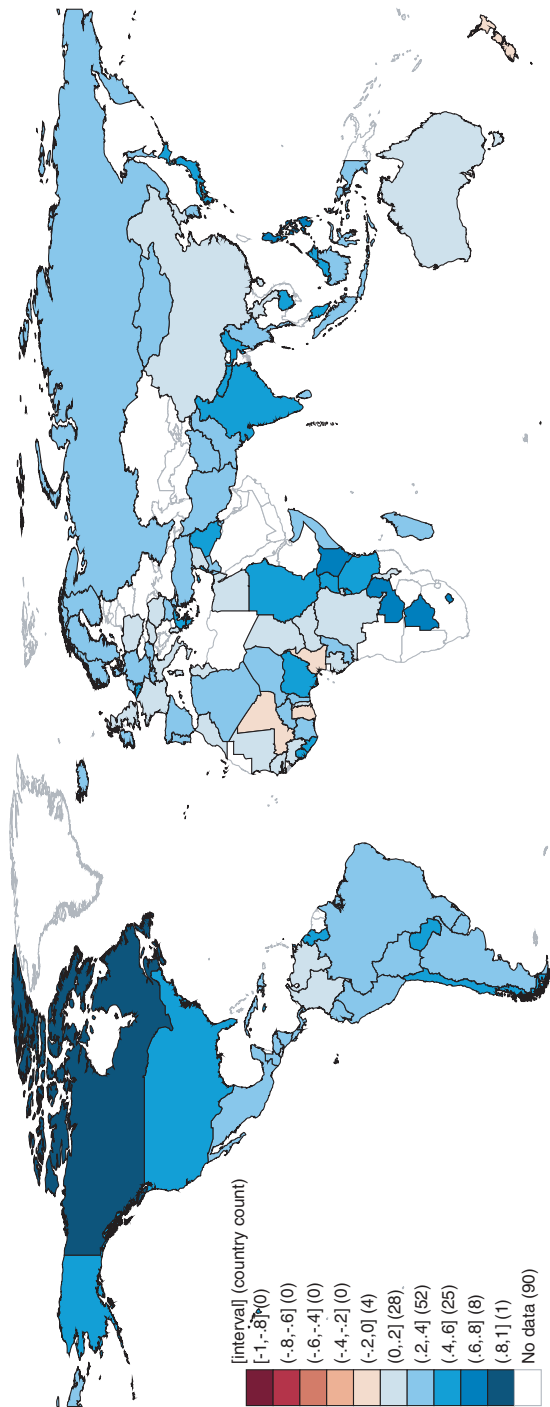


FIGURE 17: SIMILARITY TO THE CANADIAN CONSTITUTION IN 1986

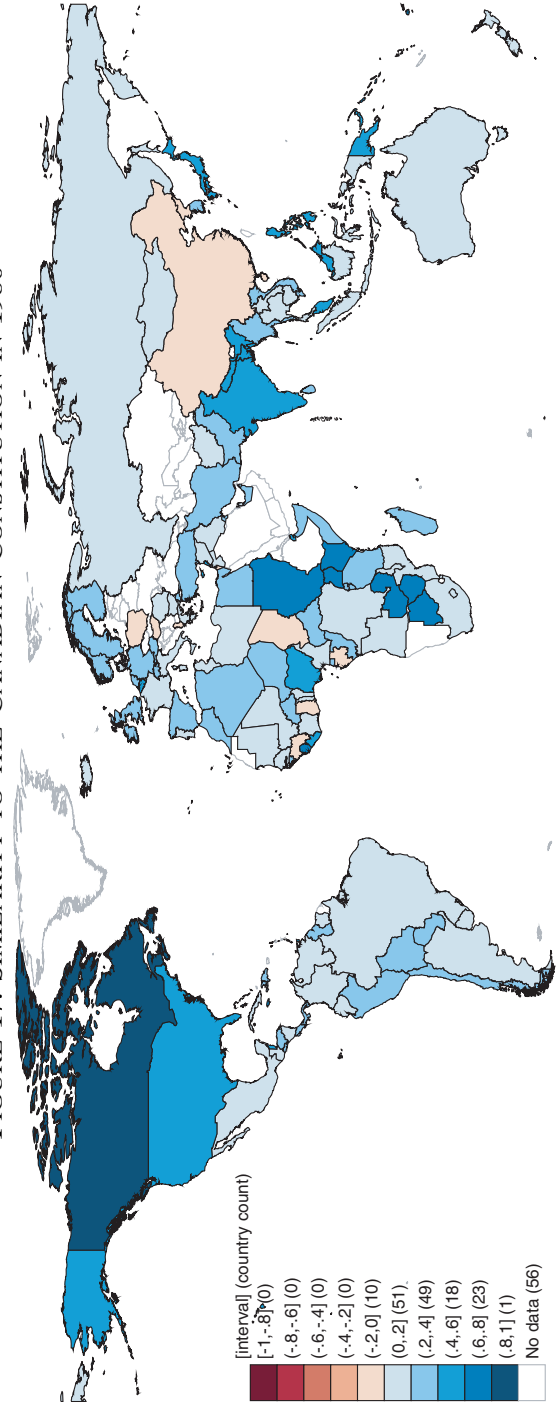
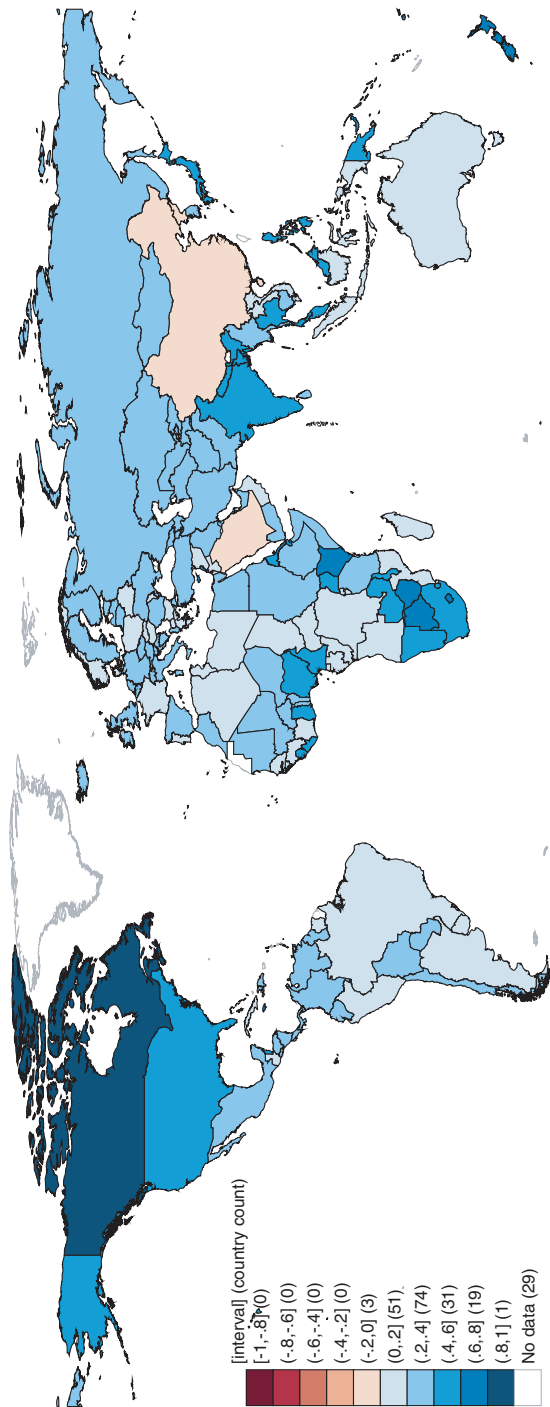


FIGURE 18: SIMILARITY TO THE CANADIAN CONSTITUTION IN 2006



has placed Canada at the forefront of a “new Commonwealth model of constitutionalism.”<sup>128</sup> For Gardbaum, the defining characteristic of this model is the adoption of certain institutional mechanisms for balancing judicial and legislative power; his definition of Commonwealth constitutionalism neither assumes nor implies that the written constitutions of Commonwealth countries will contain similar rights guarantees. Might it be the case, however, that there also exists a Commonwealth model of *rights* constitutionalism—one that is epitomized, if not led, by Canada?

We do find evidence of a strengthening Commonwealth model of rights constitutionalism, in the form of robust and growing constitutional similarity between Canada and other members of the common law family. Figure 20 depicts the average degree of similarity between the Canadian Constitution and the constitutions of (1) other common law countries,<sup>129</sup> and (2) all other countries. The average common law constitution has grown increasingly similar to the Canadian model since 1960 and is now more similar to the Canadian model than the American model by a healthy margin.<sup>130</sup> A brief period of declining similarity followed Canada’s adoption in 1982 of the Charter of Rights and Freedoms. No sooner did Canada break away from the rest of the common law pack, however, than the pack followed its lead.

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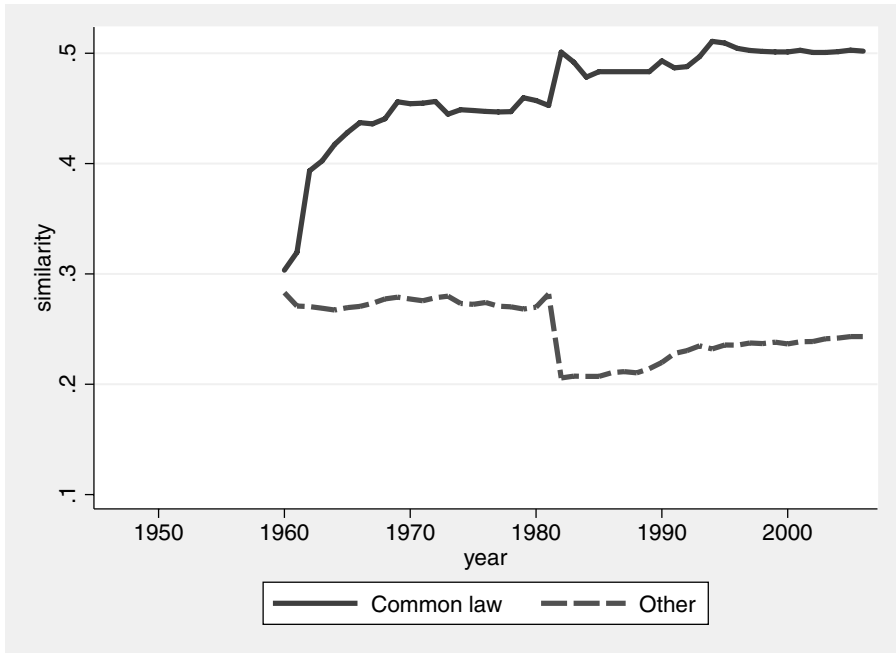
Canadian Supreme Court decisions, and finding as an empirical matter that such courts do in fact refer frequently to Canadian constitutional jurisprudence).

<sup>128</sup> Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT’L J. CONST. L. 167, 167–68 (2010).

<sup>129</sup> See *supra* note 78 (listing the countries in this category).

<sup>130</sup> As of 2006, the average correlation coefficient between the U.S. Constitution and the constitutions of other common law countries was 0.41. By contrast, the average correlation coefficient between the Canadian Constitution and the constitutions of other common law countries was 0.50.

FIGURE 20: AVERAGE SIMILARITY TO THE CANADIAN CONSTITUTION AMONG COMMON LAW VERSUS NON-COMMON LAW COUNTRIES

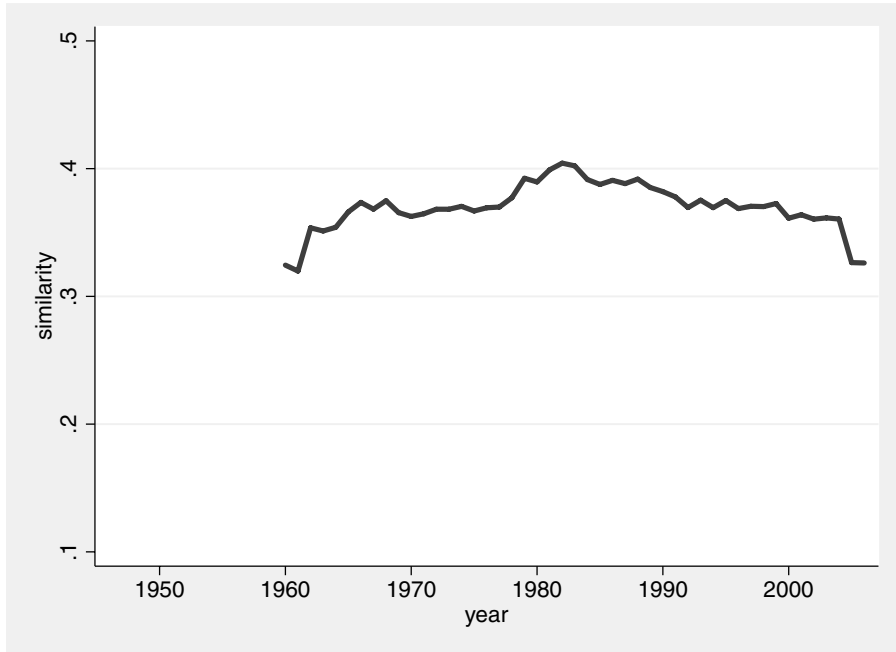


By contrast, we find little evidence that the Canadian model is also gaining popularity among other categories of countries. If common law countries are excluded entirely from the analysis, overall similarity to the Canadian model is barely increasing and remains well below its pre-1982 levels, as Figure 20 illustrates. Nor does a strong convergence upon the Canadian model appear to be occurring if we limit our analysis to democratic nations.<sup>131</sup> On average, the world's democracies are constitutionally more similar to Canada than to the United States.<sup>132</sup> However, as Figure 21 shows, that similarity has declined since adoption of the Charter to a level last seen in 1960.

<sup>131</sup> See *supra* note 79 (describing which countries are classified as “democracies”).

<sup>132</sup> The constitutions of democratic countries have, on average, a correlation coefficient of 0.25 with the U.S. Constitution as opposed to 0.33 with the Canadian Constitution.

FIGURE 21: AVERAGE SIMILARITY TO THE CANADIAN CONSTITUTION AMONG DEMOCRACIES



These findings shed considerable light upon not only the popularity of Canadian-style constitutionalism, but also the manner in which constitutionalism is evolving at a global level. The data are certainly consistent with the hypothesis that, among common law countries, Canada has served as a constitutional trendsetter. With its adoption of the Charter of Rights and Freedoms in 1982, Canada broke dramatically with the rest of the common law world. Since that time, however, Canada has not amended the rights-related provisions of its constitution. As a result, the increasing similarity to the Canadian Constitution documented above cannot be attributed to changes on Canada's part. Instead, other common law countries have changed their constitutions in ways that have made them, on average, more similar to the Canadian model. The fact that other common law countries have ultimately followed the same path does not necessarily prove, of course, that they did so because they were influenced by Canada. However, given Canada's relatively high prestige and goodwill as a member of the international community, as well as anecdotal evidence that Canadian constitutionalism has been influential in other countries,<sup>133</sup> the most plausible inference to draw from our empirical

<sup>133</sup> See *supra* notes 119–22 and accompanying text.

findings is that Canada is, at least to some degree, a constitutional trendsetter among common law countries.

This split between common law countries and the rest of the world has important implications for the global development of constitutionalism. First, it suggests the existence of a distinctive strain of rights constitutionalism that sets common law countries apart from the rest of the world. Within this family of nations defined by historical and linguistic ties, constitutional convergence has been occurring in the direction of the Canadian model. Consequently, it is possible to speak of a “new Commonwealth model of constitutionalism”<sup>134</sup> in more ways than one: This emerging model appears to encompass not only a set of institutional mechanisms for reconciling judicial and legislative power, but also a set of substantive rights guarantees and limitations.

Second, this split raises the possibility that global constitutionalism may be characterized not by global convergence, but rather by what might best be described as clustered convergence, or even polarization. Our results suggest that, within a particular cluster of countries, such as the Commonwealth, the pattern may be one of convergence, but across different clusters, such as the Commonwealth and Latin America, the pattern may instead be one of divergence. In other words, the emergence of a robust and distinctive Commonwealth model of rights constitutionalism is consistent with empirical findings we have reported elsewhere: The evolution of global constitutionalism is characterized by a combination of *intra*-group convergence and *inter*-group divergence.<sup>135</sup>

### C. What Variables Predict Similarity to the Canadian Constitution?

Regression analysis largely confirms these findings and offers further evidence of the existence of a Commonwealth model of rights constitutionalism that tracks the Canadian Charter of Rights and Freedoms to a growing extent. To facilitate comparison between the United States and Canada, we employ the same regression model that we used in Part III.F to predict similarity to the U.S. Constitution, with only minor exceptions.<sup>136</sup> Table 5 summarizes and contrasts the

<sup>134</sup> See generally Gardbaum, *supra* note 128 (describing the “new Commonwealth model of constitutionalism” and evaluating its success in practice).

<sup>135</sup> See Law & Versteeg, *supra* note 19, at 1228–43 (arguing that the evolution of constitutionalism is characterized at a global level by the emergence of two competing ideological camps—one libertarian in orientation, the other statist—and that within each camp, convergence is occurring, but the two camps themselves are becoming increasingly distinct from one another).

<sup>136</sup> See *supra* note 80 (explaining the methodology behind the model). The model contains the same predictor variables as the model in Part III.F, the sole exception being that

results of the two statistical models. Although common law countries exhibit similarity to both the American and Canadian models, their affinity for the Canadian model is stronger.<sup>137</sup> By contrast, the model predicts that constitutions in Western Europe and Latin America will be less similar to the Canadian Constitution than those from other parts of the world, all other things being equal.<sup>138</sup> To the extent that Canada epitomizes the common law tradition, this divergence is unsurprising, as Western European and Latin American countries predominantly possess civil law systems.<sup>139</sup>

On the whole, the variables that predict similarity to the Canadian Constitution differ considerably from those that predict similarity to the U.S. Constitution. First, all other things being equal, the more democratic a particular country happens to be, the more its

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we omit the variable that captures military alignment with the United States. As a result, the predictors of similarity to the Canadian Constitution that we test are: (1) whether the country that adopted the constitution is located in Western Europe, *see supra* note 76 (listing the countries that are categorized as belonging to “Western Europe”); (2) whether the country is located in Latin America, *see supra* note 75 (listing the countries that are categorized as belonging to “Latin America”); (3) whether the country has a common law system, *see supra* note 78 (listing the countries that are counted as possessing a common law system); (4) the country’s level of democracy, *see supra* note 79 (describing the numerical measure of democracy that we use); (5) similarity to the Canadian Constitution over the preceding decade; (6) the number of years since the constitution was last revised with respect to any of the sixty provisions in the rights index, *see supra* note 87 and accompanying text (describing the manner in which we calculate the age of a constitution); and (7) decade-specific predictor variables that enable us to determine which decades, if any, were characterized by distinctive trends. (To be specific, the model included a separate dummy variable for each decade, with similarity levels in the 1960s serving as the baseline for comparison.) The resulting regression model has 516 observations and an r-squared of 0.80.

<sup>137</sup> The fact that a country has a common law system is a statistically significant predictor of increased constitutional similarity to Canada at the 1% confidence level ( $p = 0.001$ ). On a scale from -1 to 1, where -1 is perfect dissimilarity and 1 is perfect similarity, the fact that a country has a common law system increases its predicted constitutional similarity to Canada by 0.054, holding all other variables constant. By comparison, having a common law system yields a predicted increase in constitutional similarity to the United States of only 0.002 on the same scale.

<sup>138</sup> Being located in Western Europe is a statistically significant predictor of dissimilarity to the Canadian Constitution at the 5% confidence level ( $p = 0.012$ ). On a scale from -1 to 1, a location in Western Europe decreases a country’s constitutional similarity to Canada by 0.036 points, holding all other variables constant. Being located in Latin America is a statistically significant, but negative, predictor of similarity to the Canadian Constitution at the 10% confidence level ( $p = 0.054$ ). On a scale from -1 to 1, a location in Latin America decreases similarity to the Canadian Constitution by 0.019 points, holding all other variables constant.

<sup>139</sup> *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 2–3 (3d ed. 2007) (identifying the civil law tradition as “the dominant legal tradition in Europe [and] all of Latin America”).

constitution will resemble that of Canada.<sup>140</sup> A country's level of democracy does not, by contrast, correlate with greater constitutional similarity to the United States. Second, whereas similarity to the U.S. Constitution tends to increase with the age of a constitution, constitutional age is not a statistically significant predictor of similarity to the Canadian model. Third, although Western European constitutions are characterized on the whole by a degree of divergence from the Canadian model, they do not exhibit divergence from the American model.<sup>141</sup>

TABLE 5: PREDICTORS OF SIMILARITY TO THE  
U.S. AND CANADIAN CONSTITUTIONS<sup>142</sup>

|               | <i>Located in<br/>Western<br/>Europe</i> | <i>Located<br/>in Latin<br/>America</i> | <i>Common<br/>Law</i> | <i>Military<br/>Ally</i> | <i>Democracy</i> | <i>Age of<br/>Constitution</i> |
|---------------|--|---|-----------------------|--------------------------|------------------|--------------------------------|
| <i>U.S.</i>   | Insignificant                            | Negative                                | Positive              | Insignificant            | Insignificant    | Positive                       |
| <i>Canada</i> | Negative                                 | Negative                                | Positive              | N/A                      | Positive         | Insignificant                  |

## V

### OTHER CONTENDERS FOR THE CONSTITUTIONAL CROWN

Germany, India, and South Africa are often cited as offering particularly influential examples of constitutionalism.<sup>143</sup> In this Part, we consider the extent to which three constitutional models that feature prominently in the comparative constitutional law literature typify actual global trends in written constitutionalism: the German Basic Law,<sup>144</sup> the South African Constitution of 1996,<sup>145</sup> and the Indian Constitution of 1949.<sup>146</sup>

<sup>140</sup> Democracy is a statistically significant predictor of similarity to the Canadian Constitution at the 1% confidence level ( $p = 0.000$ ). On a scale from -1 to 1, where -1 is perfect dissimilarity and 1 is perfect similarity, a one-point increase in the democracy scale (which ranges from -10 to 10) increases similarity to the Canadian Constitution by 0.003 points, holding all other variables constant. Thus, if a total autocracy (with a democracy score of -10) were to turn into a total democracy (with a democracy score of 10), its predicted similarity to the Canadian Constitution would increase by 0.06 points on this scale.

<sup>141</sup> See *supra* text accompanying notes 91–92 (describing the results of the regression model used to identify predictors of constitutional similarity to the United States).

<sup>142</sup> Variables labeled in Table 5 as “insignificant” were not statistically significant predictors of constitutional similarity at the  $p = 0.05$  level.

<sup>143</sup> See *supra* note 119.

<sup>144</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

<sup>145</sup> S. AFR. CONST., 1996.

<sup>146</sup> INDIA CONST.

### A. Germany

The German Grundgesetz, or Basic Law, has been identified as an important source of inspiration for constitutional drafters elsewhere and, indeed, the “most important post-war constitution.”<sup>147</sup> The degree to which the rights-related provisions of other constitutions have mirrored those found in the Grundgesetz over the last six decades, however, indicates that the influence of the German model is stagnant, if not declining.

As Figure 22 shows, overall trends in global constitutional similarity to the Basic Law have loosely tracked those for the U.S. Constitution, with the conspicuous exception of a sharp spike in the early 1990s. There is some movement in the direction of the Basic Law over the 1960s, but this trend reverses itself in the early 1970s, and constitutional similarity to Germany thereafter drifts downward for nearly two decades. The sudden surge in similarity to the Grundgesetz in the early 1990s coincides with a tumultuous period in both German constitutionalism and European constitution making more generally. This spike is not attributable, however, to changes to the Basic Law. Although reunification of East and West Germany in 1990 entailed extension of the Basic Law—which had initially been written only for West Germany—to the whole of Germany,<sup>148</sup> the constitutional amendments that accompanied reunification did not touch upon any of the rights-related provisions found in our rights index.<sup>149</sup>

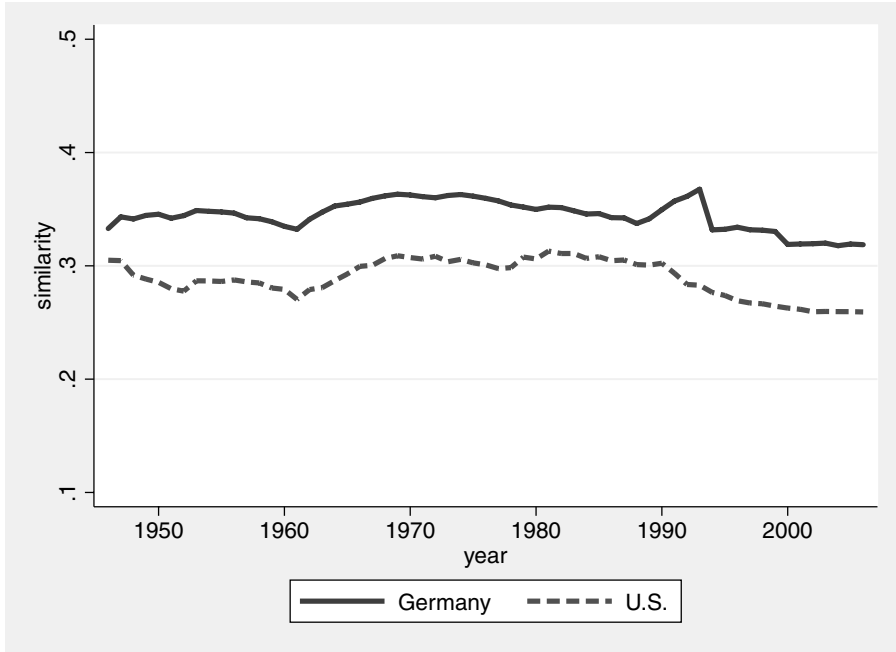
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<sup>147</sup> Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOB. STUD. L. REV. 257, 265 (2008) (noting that the Basic Law “has proven highly influential with scholars and constitution designers” alike); see also A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS 5 n.20 (1999) (noting the influence of the Grundgesetz’s property clause on constitutional drafting around the world); VENTER, *supra* note 120, at 27 (describing the German Constitution as a “benchmark for post-war constitutionalism”); Howard, *supra* note 118, at 402 (identifying Germany’s Basic Law as one of the world’s most influential constitutions); Schauer, *supra* note 74, at 910 (suggesting that the German constitutional model may be more influential than the American model).

<sup>148</sup> See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 30–31 (2d rev. ed. 1997).

<sup>149</sup> See *id.* at 31 (noting that none of the relatively few amendments that were ultimately adopted in the course of reunification “modified the Basic Law’s essential features or affected the fundamental structure of the political system”). Until 1994, no amendment to the Basic Law touched upon any of the sixty features captured by our rights index.

FIGURE 22: AVERAGE SIMILARITY TO  
THE GERMAN AND U.S. CONSTITUTIONS



It seems clear, instead, that the surge in constitutional similarity to Germany of the early 1990s reflects a change in constitution-writing practices outside of Germany itself. The most likely explanation lies in the fevered constitution making among Central and Eastern European nations intent upon revising or abandoning their Soviet-era constitutions at that time.<sup>150</sup> Germany's economic power, influential legal tradition, and geographic proximity were all factors that encouraged these newly democratizing nations to look to the Basic Law for inspiration.<sup>151</sup> As can be seen from Figure 22, however, this surge was short lived. Part of the explanation for the equally abrupt decline that followed may lie in Germany's adoption in 1994 of constitutional amendments that introduced, inter alia, affirmative action for women and environmental rights.<sup>152</sup> At least at the time, these amendments rendered the Grundgesetz less typical by global standards:

<sup>150</sup> See *supra* notes 39–40 and accompanying text.

<sup>151</sup> See Schauer, *supra* note 12, at 259 (identifying Germany as “the most legally and economically significant of the European nations,” and noting “a substantial effort” by various Baltic and Eastern European states “to design their laws on German models” out of a belief that such legal harmonization would “itself make the harmonizing nation look more European”).

<sup>152</sup> See Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Oct. 27, 1994, BGBl. I at 49 (Ger.).

Environmental rights provisions had not yet become widespread, while affirmative action provisions remain relatively rare today.<sup>153</sup>

Given that average constitutional similarity to Germany is currently hovering near its lowest point in decades, it seems implausible that the German Grundgesetz has replaced the U.S. Constitution as a dominant model of written constitutionalism. At the same time, however, the stagnant popularity of the German paradigm must be kept in comparative perspective. As Figure 22 illustrates, the German Grundgesetz has consistently been more in sync with global norms of rights constitutionalism than the U.S. Constitution, and the gap between the two is only growing.

### B. South Africa

Although South Africa is a fairly new constitutional democracy, its approach to constitutionalism has already attracted considerable attention and admiration.<sup>154</sup> Its transformation from “pariah nation”<sup>155</sup> to constitutional role model<sup>156</sup> was both rapid and dramatic. The apartheid-era 1909 constitution defied global constitutional norms in a number of respects, not least of all in its failure to guarantee any individual rights at all.<sup>157</sup> Amendments in 1983 added a

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<sup>153</sup> See *supra* Table 1 (tracing the global popularity of environmental rights and affirmative action provisions from 1946 through 2006).

<sup>154</sup> See, e.g., Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005*, at 2 (2012) (unpublished manuscript) (on file with the *New York University Law Review*) (observing that South Africa’s constitutional development holds interest for historians, transitional justice scholars, and comparative politics scholars alike, and suggesting that the South African Constitutional Court in particular attracts attention for advancing “international understanding of the way a modern liberal constitution . . . ought to be interpreted”); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 261 (2001) (dubbing the South African constitution “the most admirable constitution in the history of the world”); Ronald Dworkin, *Response to Overseas Commentators*, 1 INT’L J. CONST. L. 651, 651 (2003) (“Since apartheid’s end, . . . the [South African] Constitutional Court has already become one of the most influential such courts in the world.”); Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753, 766 (2002) (“In slightly more than five years, the South African Constitution has already become a model for other nations.”).

<sup>155</sup> Schauer, *supra* note 12, at 259.

<sup>156</sup> See, e.g., Kende, *supra* note 154, at 766; *Justice Ginsburg to Egyptians*, *supra* note 1 (identifying the South African Constitution, among others, as a more suitable example for contemporary constitutional drafters than the U.S. Constitution).

<sup>157</sup> Although various structural provisions explicitly assumed the existence of popular elections, any voting rights that could be inferred from these provisions were themselves expressly subject to limitation on the basis of “race or colour.” South Africa Act of 1909, 9 Edw. 7, c. 9, § 35 (Eng.) (providing that no “person in the province of the Cape of Good Hope” shall be disqualified from voting “by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses”).

rather cynical guarantee of equality, as well as property rights and a guarantee of freedom of enterprise,<sup>158</sup> but these changes did relatively little to bring the document in sync with global norms. It was, instead, the two-stage transformation of the South African Constitution marking the abolition of apartheid that ended South Africa's status as a constitutional outlier. The first stage was the adoption in 1993 of an interim constitution that included an entire chapter of "fundamental rights" ranging in substance from traditional civil liberties to positive socioeconomic rights.<sup>159</sup> The second stage was the replacement of the 1993 interim constitution with the permanent 1996 constitution,<sup>160</sup> which simultaneously reflected the influence of both broad popular participation and emerging global trends.<sup>161</sup>

The magnitude of these changes and the degree to which they brought South Africa into the constitutional mainstream are captured by Figure 23, which contrasts average constitutional similarity to South Africa and the United States.<sup>162</sup> The constitutional revisions of the mid-1990s immediately moved South Africa from a position well outside the global mainstream to one that is much more mainstream than that of the United States. Moreover, since that time, the trends for the two constitutions have diverged even further: Average similarity to the South African Constitution continues to increase, while the U.S. Constitution has become increasingly atypical.

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<sup>158</sup> S. AFR. CONST., 1983 pmbl., *amended by Republic of South Africa Constitution Act 1983*, No. 110, Government Gazette, 1983-09-28, No. 8914, 1-79, *available at* <http://www.info.gov.za/documents/constitution/83cons.htm> (stating a commitment to uphold "the equality of all under the law").

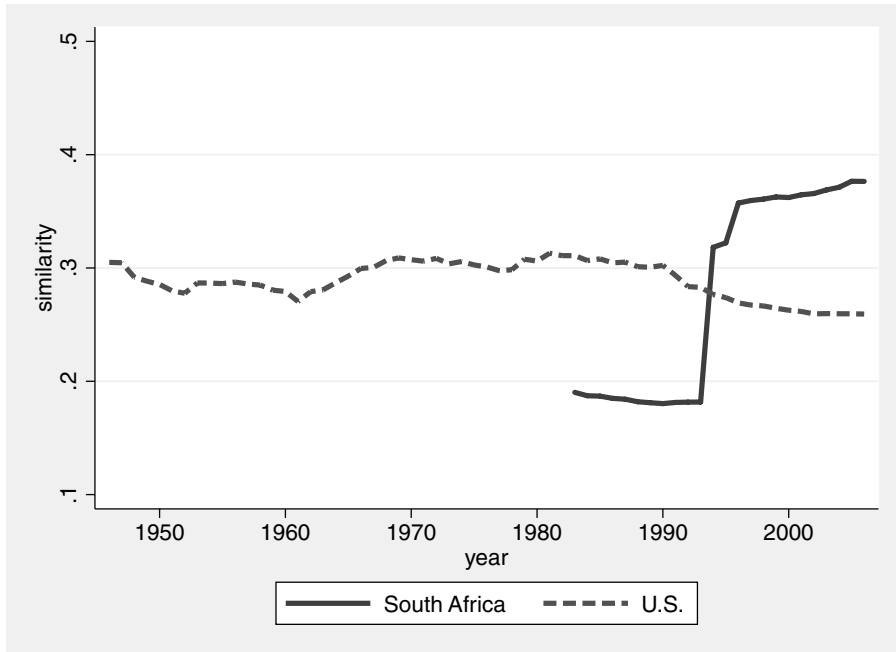
<sup>159</sup> S. AFR. (INTERIM) CONST., 1993, §§ 7-35; *see* Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 125 (2001) (discussing the formal adoption of socioeconomic rights in South Africa).

<sup>160</sup> S. AFR. CONST., 1996.

<sup>161</sup> *See, e.g.*, VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 266 (2010) ("Although the leadership of the South African movement was indigenous, the influence of international law and of other liberal, democratic constitutional systems was obvious in the research and consultations performed."); HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 1-11 (2000) (stressing the internationalist content of the 1996 constitution).

<sup>162</sup> Because it is mathematically impossible to calculate a correlation coefficient for a constitution that contains no rights whatsoever, Figure 23 does not depict similarity to the South African Constitution prior to 1983.

FIGURE 23: AVERAGE SIMILARITY TO THE  
SOUTH AFRICAN AND U.S. CONSTITUTIONS



The mainstreaming of the South African Constitution can be understood as part of a self-conscious effort on the part of a former “pariah state” to win acceptance from the international community by absorbing constitutional ideas and influences from abroad on a generous and ongoing basis.<sup>163</sup> The inclusion of a constitutional provision that expressly authorizes the courts to “consider foreign law” when interpreting the bill of rights<sup>164</sup> is perhaps the best known and most

<sup>163</sup> See, e.g., Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law*, 37 GA. J. INT’L & COMP. L. 219, 229 (2009) (describing the “strong incentive” of South Africa’s Constitutional Court “to look to other democracies in light of [the country’s] recent history as a pariah state”); Schauer, *supra* note 12, at 259 (noting South Africa’s “desire to have its judges bring South Africa into harmony with international standards, independent of a normative judgment about the intrinsic desirability of those international standards,” in light of the country’s “recent history as an outcast or pariah nation”); see also, e.g., KLUG, *supra* note 161, at 48–49 (arguing that global culture motivated South Africa to adopt a Western liberal constitutional model that significantly empowered the judiciary, notwithstanding its long experience with government use of the judiciary as an instrument of oppression); Law & Versteeg, *supra* note 19, at 1181 (listing South Africa, Israel, and Taiwan as examples of “marginal states” that have sought to “enhance[ ] their legitimacy by engaging in constitutional conformity”).

<sup>164</sup> S. AFR. CONST., 1996, § 39, cl. 1 (stipulating that, “[w]hen interpreting the Bill of Rights,” courts “must consider international law” and “may consider foreign law”).

obvious sign of this desire to conform to global practice, but it is by no means the only sign. The actual rights found in the South African Constitution are themselves fairly typical by global standards. The content of the document has thus given the South African Constitutional Court both the opportunity and the authority to engage in comparative analysis and participate in a globalized constitutional discourse.<sup>165</sup>

Whether the South African Constitution has itself become a source of inspiration for constitution makers around the world remains open to debate. South Africa's initial movement into the constitutional mainstream in the mid-1990s reflected domestic adoption of global standards, as opposed to domestic influence upon global standards. The dramatic leap in average constitutional similarity to South Africa at this time is attributable to the country's wholesale constitutional revisions of 1993 and 1996. Over the decade that followed, the world's constitutions drifted somewhat in South Africa's direction, while the South African Constitution itself remained unchanged in all relevant respects. This increase in average similarity does not by itself prove, however, that other countries are being directly or indirectly influenced by South Africa. Its post-apartheid constitutions may have merely anticipated or reflected the evolution of global constitutionalism, instead of shaping or altering that evolution. It is only to be expected that a relatively young constitution will reflect the latest trends. The extent to which such a new constitution can be given credit for inventing those trends in the first place is questionable. But it is certainly plausible that the new South African model is helping to popularize "important elements of the possibly emerging transnational constitutional order."<sup>166</sup>

### C. India

Like those of South Africa and Germany, India's constitution features prominently in the comparative law literature.<sup>167</sup> On its face,

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<sup>165</sup> See Bentele, *supra* note 163, at 227 (reporting that, since adoption of the 1996 constitution, the South African Constitutional Court has cited foreign law in over half of its judgments and "grappled extensively with the opinions of courts in other jurisdictions" in "more than a third"); *id.* at 244 (describing the Constitutional Court's extensive and deliberate use of clerks with foreign legal training).

<sup>166</sup> JACKSON, *supra* note 161, at 266 (suggesting that the current South African Constitution does in fact incorporate such elements).

<sup>167</sup> See, e.g., CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (documenting a "rights revolution" in India, Britain, Canada, and the United States); SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 124-49 (2008) (describing socioeconomic rights litigation in the Indian courts); Tom Ginsburg,

the Indian Constitution of 1949 stands out for its sheer length and the frequency with which it has been amended.<sup>168</sup> But it has also been celebrated for the care and deliberation with which it was drafted: Its authors debated its provisions for nearly three years and cast a wide net in their search for sources of inspiration, without blindly copying the U.S. Constitution.<sup>169</sup> The resulting document is said to have served as a source of inspiration for constitution makers around the world, especially in developing countries.<sup>170</sup> India's purported constitutional influence rests upon the country's strong commitment to democracy and rule of law in the face of significant developmental challenges and internal conflict<sup>171</sup> and, in more recent decades, the activist approach of Indian courts to the enforcement of positive rights.<sup>172</sup>

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*Constitutional Endurance*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 104, at 122 (describing the Indian Constitution's survival through a crisis in the 1970s, and deeming both the Indian Constitution and the U.S. Constitution the "embodiment" of their respective regimes); Ran Hirschl, *Comparative Constitutional Law and Religion*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 104, at 422, 433–35 (comparing the Indian Constitution's treatment of religion with that of the constitutions of Kenya, Israel, and Nigeria, among others); Gary J. Jacobsohn, *The Formation of Constitutional Identities*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 104, at 129, 137–40 (discussing and comparing the efforts of constitutional drafters in India and South Africa to address the problem of entrenched social structures).

<sup>168</sup> See ELKINS ET AL., *supra* note 9, at 152 (describing the Indian Constitution as "extremely detailed" and designed for "easy amendment"); Law, *supra* note 24, at 694 n.150 (contrasting the U.S. Constitution, which is under 8000 words long, with the Indian Constitution, which "weighs in at over 22,000 words, excluding schedules and appendices," and ran to 254 pages "as originally published with all accoutrements").

<sup>169</sup> See EPP, *supra* note 167, at 77 (noting that India's constitutional drafters "consult[ed] a wide range of constitutions, constitutional scholars, and jurists from other countries"); see also GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 1–25 (1966) (describing the origins, composition, and workings of the constituent assembly that drafted the Indian Constitution); Law, *supra* note 24, at 704 n.197 (noting India's rejection of both an American-style due process clause and American-style federalism, on the advice of American jurists and legal scholars alike).

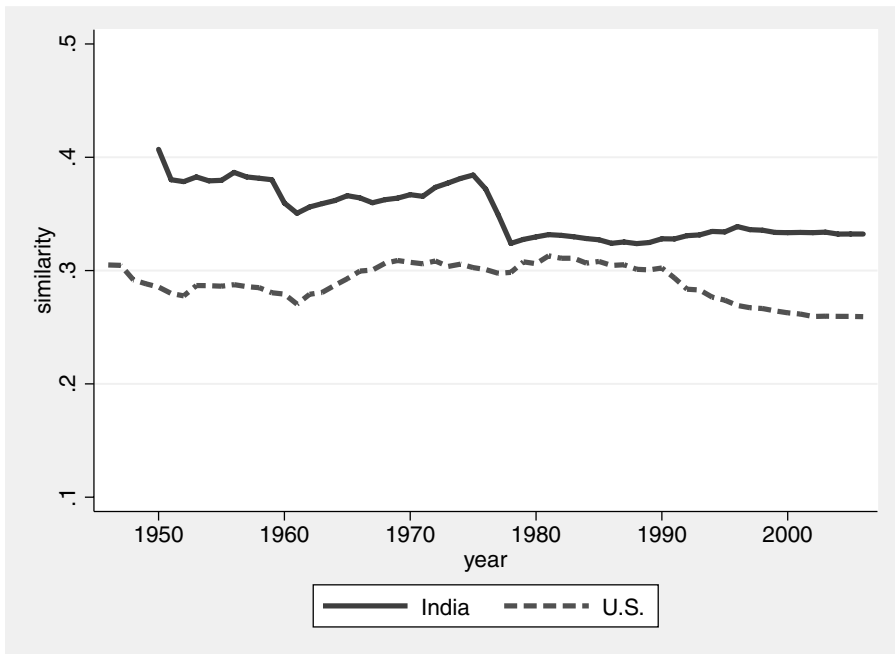
<sup>170</sup> See AUSTIN, *supra* note 169, at 308–10 (suggesting that the Indian Constitution has not only "worked well," but also generated a norm of "democratic political behaviour based on the belief that man can shape his own destiny"); PARKINSON, *supra* note 29, at 6, 11 (observing that former British colonies followed the development of the Indian Constitution "with great interest," and that the constitutions of Pakistan and Malaysia in particular were influenced by its example).

<sup>171</sup> See MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* 279 (1989) (deeming India "quite unusual among Third World countries" in that "courts and lawyers are a highly visible part of Indian life").

<sup>172</sup> See FREDMAN, *supra* note 167, at 5, 124–25 (describing public interest litigation in the Indian Supreme Court as "radical and unparalleled," and noting the lengths to which the court has gone to ensure that "the voices of the poor and disadvantaged can be heard"); Law, *supra* note 24, at 680 & n.106 (giving examples of the "tendency of the Indian bench toward micromanagement of public affairs" in the areas of environmental protection and education).

Despite its reputation, however, the Indian Constitution does not appear to be leading or defining the constitutional mainstream. Average similarity to the Indian Constitution has, on the whole, declined over the past six decades. The upward spike in similarity over the 1960s and early 1970s is consistent with the notion that the post-colonial constitutions adopted around this time may have been influenced by the Indian model. Yet as Figure 24 shows, average similarity to the Indian Constitution dropped considerably in the mid-1970s and has remained stagnant since that time.

FIGURE 24: AVERAGE SIMILARITY TO THE INDIAN AND U.S. CONSTITUTIONS



One possible explanation for the decline is that the U.S. Constitution influenced the drafting of the Indian Constitution to such an extent that the two constitutions now share a similar fate.<sup>173</sup> Closer

<sup>173</sup> See J. BARTON STARR, *THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH AND INFLUENCE IN ASIA* 162 (1988) (observing that the Indian Constitution bears the “stamp of the American [B]ill of Rights”); Soli J. Sorabjee, *Equality in the United States and India*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 94, 94–99 (Louis Henkin & Albert J. Rosenthal eds., 1990) (noting that “[t]he basic philosophy and the guiding principles of the United States Constitution, particularly the Bill of Rights, had substantial impact on the framing of India’s Constitution,” and tracing the beginnings of “the pervasive influence of United States legal ideals” to the formulation of the Indian Constitution); cf. Klug, *supra* note 7, at

examination reveals, however, that the popularity of the Indian model cannot be considered a proxy for that of the American model (or vice versa). First, as Figure 24 shows, the Indian Constitution remains significantly closer to the global mainstream than the U.S. Constitution. Second, notwithstanding their much-vaunted similarities, the two constitutions have exhibited divergent trends over the last two decades. Whereas the U.S. Constitution begins its extended decline in the 1990s, the Indian Constitution suffers a substantial drop in similarity in the mid-1970s but has stabilized since that time.

Another potential explanation for India's shift away from the global mainstream in the mid-1970s concerns the package of constitutional amendments adopted in 1976. These amendments introduced a pair of rights-related provisions that were, at least at the time, relatively rare by global standards. The first of these added to the "directive principles of state policy" found in Part IV of the Indian Constitution an obligation on the part of the government to "protect and improve the environment."<sup>174</sup> At that time, constitutional protections for the environment could be found in only 8% of constitutions. Given that such protections have become considerably more popular in recent years, however, the inclusion of an environmental provision cannot by itself explain why the Indian Constitution remains less than paradigmatic.<sup>175</sup> The second relevant provision was an amendment to the preamble that explicitly declared India a "secular" state.<sup>176</sup> Such provisions were not widespread then and have grown only modestly in popularity. As of 1976, only one-quarter of the world's constitutions contained constitutional guarantees of state secularism,<sup>177</sup> and guarantees of this type have actually declined in popularity after hitting a modest peak of 36% in the 1990s.<sup>178</sup> Whatever the explanation, however, the generally flat level of average constitutional similarity to India over the last thirty years suggests that the country's numerous

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605–06 (explaining that India's constitutional drafters rejected the phrase "due process of law" for fear of opening the door to *Lochner*-type jurisprudence).

<sup>174</sup> INDIA CONST. art. 48A ("The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."), *amended by* The Constitution (Forty-Second Amendment) Act, 1976, § 10.

<sup>175</sup> As of 1976, 8% of all constitutions contained environmental protections; by 2006, this figure had risen to 63% of all constitutions. *See supra* Table 1.

<sup>176</sup> *See* INDIA CONST. pmb. (defining India as a "sovereign[,] socialist[,] secular [and] democratic republic"); The Constitution (Forty-Second Amendment) Act, 1976, s.2 (India) (adding the word "secular" to the definition of India in the preamble).

<sup>177</sup> *See supra* Table 1.

<sup>178</sup> The percentage of constitutions containing an explicit separation of church and state declined from 36% in 1996 to 34% in 2006. *See id.* The other two rights-related provisions that lost popularity over the same period are the right to bear arms and provisions that provide for an official state religion. *See id.*

constitutional revisions and innovations are not closely imitated on a wide scale.<sup>179</sup>

## VI

### THE INFLUENCE OF TRANSNATIONAL CONSTITUTIONAL PARADIGMS

#### A. *International Human Rights Instruments as Constitutional Models*

The absence of obvious global leaders among the constitutions analyzed above could imply that our analysis thus far has simply focused upon the wrong constitutions. Alternatively, however, the error may lie in focusing upon constitutions at all. It may be that transnational human rights instruments have displaced domestic constitutions as the primary inspiration for constitution makers. Public international law features a growing number of human rights instruments that resemble constitutional bills of rights in substance, if not also in function and effect. This globalization of human rights law may have transformed the consciousness of constitution makers to such an extent that they now look to transnational legal instruments rather than specific countries for guidance.

Over the last six decades, international human rights law has mushroomed in both scope and amount. As Beth Simmons observes, “[t]he most striking fact about the international law of human rights is its nearly complete absence prior to the end of World War II.”<sup>180</sup> When the Universal Declaration of Human Rights was adopted in 1948, there were only a handful of international human rights treaties,<sup>181</sup> and those that did exist were often ad hoc responses to specific problems that had garnered publicity.<sup>182</sup> Until that time, the politics of

<sup>179</sup> As of 2006, the Indian Constitution has been amended ninety-four times. See *The Constitution (Amendment) Acts*, INDIA CODE, <http://indiacode.nic.in/coiweb/coifiles/amendment.htm> (last visited Apr. 18, 2012) (listing the acts that have amended the constitution).

<sup>180</sup> BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 36 (2009); see also, e.g., LANDMAN, *supra* note 80, at 4 (“[E]ven the most optimistic observers in 1948 could not have imagined the subsequent growth and influence of human rights discourse and doctrine . . .”).

<sup>181</sup> See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; American Declaration of the Rights and Duties of Man, OEA/Ser.L/V.11.23, doc. 21, rev. 6 (1948), reprinted in *Org. of Am. States Inter-Am. Court of Human Rights, Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/I.4 rev. 9 at 19 (2003); Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

<sup>182</sup> See SIMMONS, *supra* note 180, at 38 (characterizing the pre-war treaties as “ad hoc,” driven by “the salience of particular issues,” lacking in “serious institutional supports,” and

colonialism had helped to thwart efforts to enshrine rights on a universal basis through international law. The very notion of universal human rights was intellectually incompatible with the kind of systematic, large-scale exploitation routinely entailed by colonial rule.<sup>183</sup> As a result, principles of state sovereignty and non-interference took precedence over humanitarian concerns.<sup>184</sup> Global outrage at the well-publicized atrocities of World War II provided the impetus for the establishment of an international human rights regime, beginning with the establishment of the United Nations in 1945 and its rapid adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.<sup>185</sup>

The number of international human rights treaties rose sharply thereafter. Today, there exist over one hundred multilateral treaties on human rights, which are in turn supplemented by a host of international declarations, comments, interpretations, decisions, and pronouncements that enjoy “soft law” status and further specify treaty norms.<sup>186</sup> The prospects for monitoring compliance and enforcing this expanding corpus of law, meanwhile, have brightened thanks to the

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“far from a comprehensive approach to human rights”). Examples of early treaties in this vein include the International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431, and the Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55. Other early treaties that touched upon human rights fell within the specific categories of international humanitarian law and the law of war. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846; Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, July 6, 1906, 35 Stat. 1885, T.S. No. 464; Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, T.S. No. 403; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377.

<sup>183</sup> *See* SIMMONS, *supra* note 180, at 36 (observing that, prior to World War II, “international law served largely to denigrate human rights because it was often complicit in supporting imperialism, which in turn rested on wide-ranging forms of exploitation”).

<sup>184</sup> *See id.* (noting the view widely held among nineteenth-century British legal scholars that international law existed “for the mutual benefit of the civilized states” and left “the treatment of the natives to the conscience of the state to which sovereignty is awarded”).

<sup>185</sup> *See* MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 179–82, 211–25 (2d ed. 2008) (describing the birth of the international human rights regime).

<sup>186</sup> *See, e.g.*, Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 252 (2005) (reporting the existence of “more than one hundred multilateral and bilateral international treaties on the protection of human rights”); *International Human Rights Instruments*, UNIV. OF MINN. HUMAN RIGHTS LIBRARY, <http://www1.umn.edu/humanrts/instrtree/ainstls1.htm> (last visited Apr. 15, 2012) (listing over three hundred human rights instruments, including one hundred global and regional multilateral human rights currently in force).

proliferation of such mechanisms as human rights committees, optional protocols, individual complaint procedures, and special rapporteurs. These efforts at the global level have also been paralleled at the regional level, in the form of detailed rights regimes specific to Europe, the Americas, Africa, and the Caribbean.<sup>187</sup>

The rapid growth of the international treaty regime is evident from Figure 25, which depicts the average number of “core” international human rights treaties ratified by the countries in our data. “Core” human rights treaties are defined by the U.N. High Commissioner for Human Rights as those whose implementation by ratifying states is formally monitored by a designated “committee of experts.”<sup>188</sup> As of 1946, no treaties satisfied this definition; by 2006, thirteen treaties and associated protocols did so.<sup>189</sup> As the graph shows, the average country today has ratified seven of these core treaties, and that number is increasing over time.

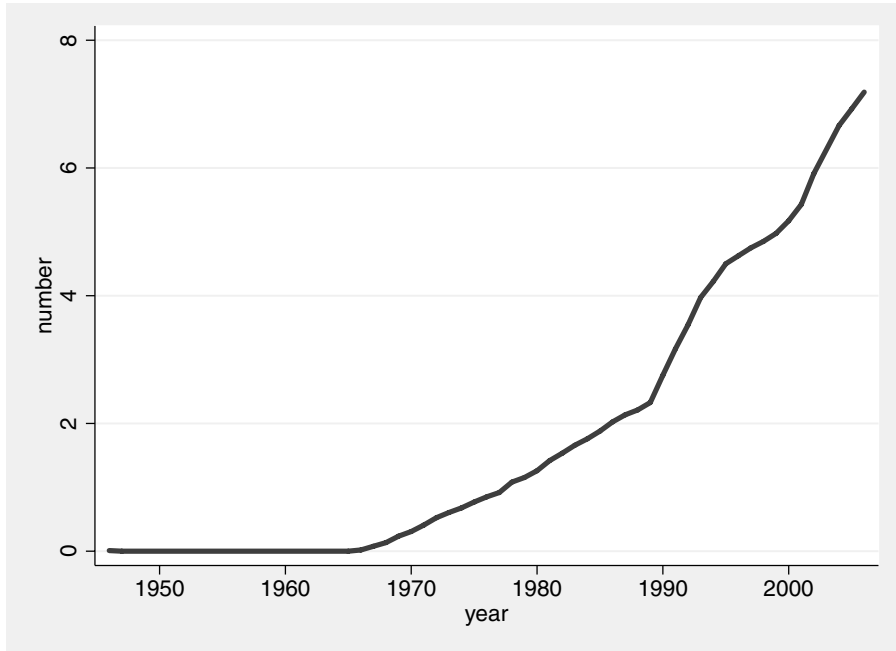
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<sup>187</sup> HENRY STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 925–1086 (3d ed. 2007) (describing the regional human rights arrangements).

<sup>188</sup> See *International Law*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/index.htm#core> (last visited Apr. 15, 2012).

<sup>189</sup> See *id.* The treaties and protocols that satisfied this definition as of 2006 are as follows: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 237; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, S. TREATY DOC. NO. 106-37, 2173 U.N.T.S. 222; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, S. TREATY DOC. NO. 106-37, 2171 U.N.T.S. 227; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Second Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 15, 1989, 1642 U.N.T.S. 414; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195, 212.

FIGURE 25: AVERAGE NUMBER OF  
HUMAN RIGHTS TREATIES RATIFIED



It is widely thought that the rapid growth of the international human rights regime has profoundly influenced the practice of written constitutionalism at the national level.<sup>190</sup> By design, the constitutional

<sup>190</sup> See, e.g., GRAHAM HASSALL & CHERYL SAUNDERS, *ASIA-PACIFIC CONSTITUTIONAL SYSTEMS* 1 (2002) (“The [Universal] Declaration of Human Rights . . . must surely have had more impact on thinking about law, constitutionalism and governance than any other document produced in the last century.”); JACKSON, *supra* note 161, at 40 (“Many foreign constitutions drafted since World War II rely on international human rights instruments (or on other constitutions that relied on these instruments) as archetypes, leading to parallel rights-protecting provisions.”); VAN DER WALT, *supra* note 147, at 4 (“[M]any domestic constitutions have either copied examples from international and regional human rights instruments or have been influenced by [them].”); HENC VAN MAARSEVEEN & GER VAN DER TANG, *WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY* 190 (1978) (citing U.N. Secretary-General U Thant’s pronouncement in 1968 that “not less than forty-three recently enacted constitutions were clearly inspired by the [UDHR] and very often reproduced its phraseology”); Richard Cameron Blake, *The Frequent Irrelevance of U.S. Judicial Decisions in South Africa*, 15 S. AFR. J. HUM. RTS. 192, 198 (1999) (describing the South African constitution of 1996 as a product of “other nations’ constitutions . . . and contemporary human rights conventions”); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, in *POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY: ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN* 197, 200–01 (Jonathan I. Charney et al. eds., 1997) (documenting a “growing trend in many countries to come up with national constitutional schemes designed to strengthen and make more effective the domestic application and enforcement of international obligations,” in particular human rights treaties); John Claydon, *International Human Rights Law*

models provided by the international human rights regime seek to articulate and advance a global consensus on human rights.<sup>191</sup> They are products of international deliberation that have been approved by a large majority of states. It seems only fair to entertain the possibility that they have their intended effect of influencing the manner in which domestic constitutions are written. As an empirical matter, however, very little is known about the impact of international human rights instruments on constitution writing at the national level.<sup>192</sup>

To explore the relationship between international human rights instruments and domestic constitutions, we calculate the average similarity of the world's constitutions to the three most prominent international human rights instruments: the Universal Declaration of Human Rights (UDHR),<sup>193</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>194</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>195</sup> Although the three treaties are known collectively as the "International Bill of Human Rights,"<sup>196</sup> each has a distinctive substantive character. At one extreme, the ICCPR consists largely of traditional civil and political rights, or first-generation rights, which typically take the form of negative

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*and the Interpretation of the Canadian Charter of Rights and Freedoms*, 4 SUP. CT. L. REV. 287, 295–302 (1982) (noting the influence of the European Convention on Human Rights, the UDHR, and other international human rights instruments upon the Canadian Charter of Rights and Freedoms); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 500 (2001) (observing that the human rights instruments promulgated by the United Nations have strongly influenced constitution making in various countries); Janet Koven Levitt, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 293–301 (1999) (describing the frequent inclusion in Latin American constitutions of rights provisions drawn from international human rights instruments).

<sup>191</sup> See Heyns & Viljoen, *supra* note 190, at 488 ("The treaty system has largely defined the international consensus on human rights norms.").

<sup>192</sup> See VAN MAARSEVEEN & VAN DER TANG, *supra* note 190, at 189–210 (analyzing the content of constitutions adopted before and after the UDHR for patterns of similarity to the UDHR, and finding that constitutions that postdated the UDHR corresponded more closely to the UDHR in some respects but not in others); Zachary Elkins et al., *Constitutional Convergence in Human Rights? The Reciprocal Relationship Between Human Rights Treaties and National Constitutions*, GLOBAL L. F., 28 fig.4 (Dec. 2008), <http://www.globallawforum.org/UserFiles/File/paper1.pdf> (finding that constitutions that postdate the UDHR, ICCPR, and American Convention on Human Rights bear a greater resemblance to those instruments than constitutions that predate them).

<sup>193</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (Dec. 12, 1948) [hereinafter UDHR].

<sup>194</sup> ICCPR, *supra* note 189.

<sup>195</sup> ICESCR, *supra* note 189.

<sup>196</sup> Office of the U.N. High Comm'r for Human Rights, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30, at 6–7, U.N. Doc. GE/05/41693 (June 2005), available at <http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf> (internal quotation marks omitted).

protections against government action.<sup>197</sup> At the other extreme, the ICESCR is characterized by an emphasis on socioeconomic rights, or positive rights that obligate the government to act affirmatively in certain ways; such rights are often described as second-generation rights.<sup>198</sup> The UDHR, meanwhile, straddles this divide by incorporating both types of rights.<sup>199</sup>

The similarity of each of these treaties to the average constitution reveals much about the popularity of different types of rights. Figure 26 is a graph of the average similarity of the world's constitutions to the UDHR, ICCPR, and ICESCR over the last six decades. The fact that the average constitution resembles the hybrid UDHR more closely than either the ICCPR or ICESCR reflects the tendency of constitutions to contain a combination of both first- and second-generation rights. Over time, the ICCPR has been catching up in popularity to the UDHR, which suggests a growing constitutional tilt in favor of the kinds of negative civil and political rights found in the ICCPR.<sup>200</sup> By contrast, the historically low levels of constitutional similarity to the ICESCR imply that it has been rare for constitutions to focus upon socioeconomic rights to the exclusion of civil and political rights.

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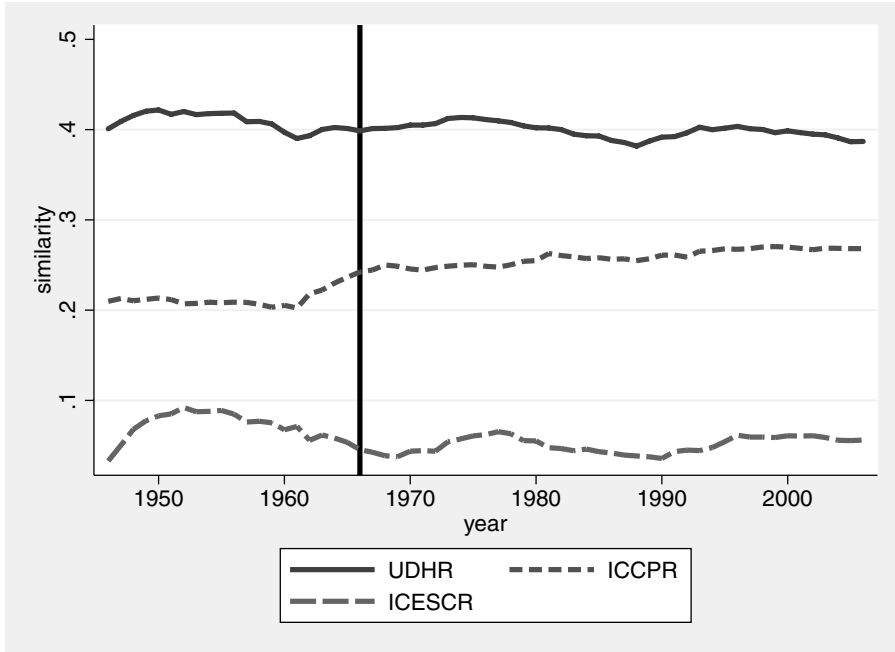
<sup>197</sup> See Carl Wellman, *Solidarity, the Individual and Human Rights*, 22 HUM. RTS. Q. 639, 639 (2000) (explaining that the "first generation" of human rights were "primarily" those defined in the ICCPR).

<sup>198</sup> See *id.* (explaining that the "second generation" of human rights consisted mainly of those found in the ICESCR).

<sup>199</sup> Compare, e.g., UDHR, *supra* note 193, art. 18 ("Everyone has the right to freedom of thought, conscience and religion . . ."), with, e.g., *id.* art. 23, § 1 ("Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.").

<sup>200</sup> Cf. Law & Versteeg, *supra* note 19, at 1234 & fig.18 (documenting a slight global trend in the direction of "libertarian," as opposed to "statist," constitutionalism).

FIGURE 26: AVERAGE SIMILARITY TO UDHR, ICCPR AND ICESCR



Our analysis does not suggest, however, that global constitutionalism has followed the lead of these three treaties. In fact, the average constitution has become less similar to the UDHR and ICESCR over the last six decades, as Figure 26 illustrates. Only similarity to the ICCPR has enjoyed an upward trend, and even in this case, the sequence of events renders it unlikely that this trend reflects the influence of the ICCPR. The vertical line in Figure 26 corresponds to 1966, the year in which both the ICCPR and ICESCR were introduced. From the position of the vertical line, it is clear that the growing similarity of the average constitution to the ICCPR predates the introduction of the ICCPR: The average constitution had already started to resemble the ICCPR before the ICCPR came into existence. Obviously, the ICCPR could not have been shaping global constitutionalism before it even existed. A more logical interpretation of this chronology is, instead, that the ICCPR merely happened to reflect or express global constitutional trends that were already underway.<sup>201</sup> At most, it might be argued that adoption of the ICCPR reinforced or

<sup>201</sup> Cf. VAN MAARSEVEEN & VAN DER TANG, *supra* note 190, at 207–08 (concluding that the UDHR may have had an “inspirational effect” on later constitutions but was itself a “byproduct” of earlier constitutions).

bolstered preexisting trends. But it cannot easily be said that the ICCPR created those trends in the first place.<sup>202</sup>

*B. A Statistical Model of the Influence of International Human Rights Instruments on National Constitutions*

Even if none of the international treaties analyzed above have obviously affected constitution writing on a global scale, some countries may be more susceptible to the influence of international models than others. For example, a country that revises its constitution frequently might be expected to have a constitution that is more in sync with the latest human rights treaties. Likewise, there are several reasons why a country that has actually ratified a treaty might be more inclined to incorporate the provisions of that treaty into its constitution than a country that has not ratified the treaty.<sup>203</sup>

The constitutional impact of human rights instruments may also depend upon deeply rooted characteristics of a country's legal and political system. Scholars have suggested, for example, that democracies may be more likely to incorporate their treaty commitments into their constitutions than non-democratic countries.<sup>204</sup> Similarly, whether a country possesses a common law system may affect its susceptibility to the influence of human rights treaties. Common law

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<sup>202</sup> Our findings contrast with those of Professors Elkins, Ginsburg, and Simmons, who report that constitutions adopted following the introduction of the UDHR, ICCPR, and American Convention on Human Rights bear a greater resemblance to those instruments than constitutions adopted beforehand. See Elkins et al., *supra* note 192, at 14 & 28 fig.4.

<sup>203</sup> Only upon ratification is a country legally obligated to uphold the rights enshrined in an international human rights treaty, and to report to the bodies that monitor treaty compliance. See STEINER ET AL., *supra* note 187, at 844–73 (describing state reporting to the ICCPR Committee). Once a country has already committed itself to honor the rights found in a treaty, however, the practical cost of reiterating those rights in constitutional form would seem low: There is no additional compliance burden for a state to adopt rights that it is already obligated to respect. Failure to incorporate those rights into the constitution, meanwhile, may generate a degree of cognitive dissonance, if not embarrassment. The appearance that domestic law is inferior to international law, in the sense of guaranteeing fewer rights, may motivate domestic actors to close the gap by incorporating treaty rights expressly into the constitution. See Law, *supra* note 24, at 711–17 (arguing that Britain's ratification of the ECHR and accession to the European Union generated "pressures toward conformity" with supranational human rights law that included the "dismay and injured pride" involved in discovering that domestic law was less protective of rights than its treaty commitments).

The opposite hypothesis is, however, also plausible: Ratification of a treaty could conceivably reduce the likelihood that the rights in the treaty will be constitutionalized. Commitment to an international human rights regime could render a country less inclined to incorporate the norms of the regime in their own constitutions for the simple reason that their inclusion would be redundant. In other words, there may exist a *substitution effect* wherein treaty rights substitute for, rather than supplement, constitutional rights.

<sup>204</sup> See Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 229.

countries may react differently not only because they appear to possess a somewhat distinctive approach to rights constitutionalism,<sup>205</sup> but also because they tend to follow a “dualist” approach to international law, under which treaties and other sources of international law lack legal effect unless they have been incorporated into domestic law.<sup>206</sup> In countries that follow a “monist” approach, treaties are binding upon ratification, and incorporation of their content into domestic law is therefore redundant.<sup>207</sup> Dualism, by contrast, creates a need for the incorporation of treaty obligations into domestic law, and a logical way for dualist countries to satisfy this need is to include treaty rights in their constitutions.

To explore whether certain types of countries may be especially inclined to follow the lead of international human rights law when crafting their constitutions, we turn to regression analysis. For each of the three major international human rights instruments discussed above—namely, the UDHR, the ICCPR, and the ICESCR—we estimate an ordinary least squares (OLS) regression model. Each model enables us to test whether certain variables predict that a country’s constitution will resemble the treaty in question.<sup>208</sup> The predictor variables that we test are: (1) a country’s level of democracy;<sup>209</sup>

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<sup>205</sup> See *supra* Part IV.B (offering evidence that Canada is at the forefront of a distinctive “Commonwealth model of rights constitutionalism”).

<sup>206</sup> VIRGINIA A. LEARY, *INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW* 36–38 (1982) (explaining that, in dualist systems, the domestic effect of treaties is dependent upon “legislative incorporation,” meaning that “the provisions of ratified treaties do not become national law unless they have been enacted as legislation by the normal method,” and noting that this approach is followed in, *inter alia*, “the United Kingdom, Commonwealth countries and Scandinavian countries”); STEINER ET AL., *supra* note 187, at 1097 (noting that “[d]ualist theories distinguish between the system or public order of international law and of national law” and establish a system in which “[n]either international law nor national law can *per se* create or invalidate the other”).

<sup>207</sup> See LEARY, *supra* note 206, at 36–38 (noting that monist systems are characterized by “automatic incorporation” of treaty obligations); STEINER ET AL., *supra* note 187, at 1096–97 (describing monism as an approach that proclaims the “supremacy of international law in relation to national law” and treats national and international law as possessing “comparable, equivalent, or identical subjects, sources and substantive contents” (internal citation omitted)); Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT’L L. 103, 109–10 (2002) (“Most Francophone African countries that were under French or Belgian colonial rule have adopted a monist view of international law, while Anglophone States of British colonial heritage have embraced the dualist position.”).

<sup>208</sup> Each of the three international human rights instruments is the subject of a separate regression model. The statistical models employed here are similar to those used in Parts III.F and IV.C to predict constitutional similarity to the U.S. Constitution and the Canadian Charter. The r-squared associated with the regression model for predicting similarity to the UDHR was 0.815; for the ICCPR regression model, the r-squared was 0.80, and for the ICESCR, it was 0.86. Each of the models was estimated from 657 observations.

<sup>209</sup> See *supra* note 79 (describing the “polity2” variable).

(2) whether the country has a common law system;<sup>210</sup> (3) the age of the constitution, defined as the number of years since the constitution was rewritten or revised in a manner affecting any of the sixty components of the rights index;<sup>211</sup> (4) the geographic region to which the country belongs;<sup>212</sup> and (5) a set of variables designed to control for the existence of decade-specific trends.<sup>213</sup> In the case of both the ICCPR and ICESCR—but not the UDHR<sup>214</sup>—we also include variables that capture (6) whether the country ratified the treaty in question; and (7) whether the treaty in question had been adopted yet.<sup>215</sup>

This last variable is of particular interest because it provides a rough test of whether the adoption of the two treaties had an impact on the content of the world's constitutions, controlling for all of the other variables in the model. We know, for example, that average similarity to the ICCPR has increased over time,<sup>216</sup> but this fact alone does not necessarily mean that countries are increasingly imitating the ICCPR when writing their constitutions. It is possible that this growing similarity to the ICCPR merely reflects a trend that predates the existence of the ICCPR. If constitutional similarity to the ICCPR

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<sup>210</sup> See *supra* note 78 (listing the countries that are coded as possessing a common law system).

<sup>211</sup> See *supra* note 87 and accompanying text (describing the construction of the constitutional age variable).

<sup>212</sup> The model included dummy variables for seven different geographical regions, with Western Europe and North America serving as the reference category. The other regions are: (1) South Asia; (2) East Asia, the Pacific, and Oceania; (3) Central and Eastern Europe and Central Asia; (4) Sub-Saharan Africa; (5) North Africa and the Middle East; and (6) Latin America and the Caribbean. These classifications were borrowed from Paul Collier & Benedikt Goderis, *Commodity Prices and Growth: An Empirical Investigation*, EUR. ECON. REV. (forthcoming) (manuscript at 6), available at <http://dx.doi.org/10.1016/j.eurocorev.2012.04.002>.

<sup>213</sup> To be specific, the model included a separate dummy variable for each decade, with similarity levels in the 1960s serving as the baseline for comparison. See *supra* note 80 (defining the relevant “decades”). The same approach of measuring changes in constitutional similarity from decade to decade, rather than from year to year, was used in the preceding analyses of similarity to the U.S. Constitution and the Canadian Charter. See *supra* Parts III.F, IV.C (specifying the two regression models).

<sup>214</sup> The regression model used to predict constitutional similarity to the UDHR does not include a ratification variable because the UDHR is technically not a treaty, but instead a declaration that was never subject to ratification. The variable that measures whether the treaty had entered into force yet is omitted from the UDHR regression model due to a lack of pre-UDHR data: The UDHR was adopted in 1948, but our data dates back only as far as 1946.

<sup>215</sup> The model also includes a lagged version of the dependent variable as an additional predictor variable, and it employs robust standard errors that are clustered at the state level. See *supra* note 80 (explaining these methodological choices). The fact that the adoption-date variable and the decade dummy variables both measure the passage of time raises a potential problem of collinearity. However, estimation of the regression models without the decade dummy variables led to the same results.

<sup>216</sup> See *supra* Figure 26 and accompanying text.

did not increase at the point that the ICCPR came into being, then it becomes harder to argue that global constitutionalism was actually influenced by the ICCPR's debut on the world scene.

The results of the regressions offer little or no support for any of our hypotheses, or for the notion that any of the three leading international human rights instruments have been widely emulated by constitution makers. Instead, they suggest only that different types of countries tend to exhibit constitutional similarity to different treaties. Table 6 indicates which variables proved to be statistically significant predictors of constitutional similarity to each treaty, and whether the variable was associated with higher or lower levels of similarity.

TABLE 6: PREDICTORS OF SIMILARITY TO  
INTERNATIONAL HUMAN RIGHTS INSTRUMENTS<sup>217</sup>

| <i>Treaty</i> | <i>Democracy</i> | <i>Common Law</i> | <i>Age of Constitution</i> | <i>Geographic Region</i> | <i>Treaty Ratified</i> | <i>Treaty Adopted</i> |
|---------------|------------------|-------------------|----------------------------|--------------------------|------------------------|-----------------------|
| UDHR          | Negative         | Negative          | Insignificant              | Only in some cases       | N/A                    | N/A                   |
| ICCPR         | Insignificant    | Positive          | Insignificant              | Insignificant            | Positive               | Insignificant         |
| ICESCR        | Negative         | Negative          | Negative                   | Insignificant            | Insignificant          | Insignificant         |

Several patterns are noteworthy. All other things being equal, the more democratic that a country happens to be, the less that its constitution will resemble either the UDHR or the ICESCR.<sup>218</sup> The impact of democracy (or autocracy) is, moreover, stronger in the case of the ICESCR than the UDHR: Highly autocratic countries tend to exhibit even greater constitutional similarity to the ICESCR than to the UDHR.<sup>219</sup> Conversely, the fact that a country has a common law legal system is a statistically significant predictor of *decreased* constitutional similarity to both the UDHR and the ICESCR.<sup>220</sup> In the case of the

<sup>217</sup> Variables labeled in Table 6 as “insignificant” were not statistically significant predictors of constitutional similarity at the  $p = 0.05$  level.

<sup>218</sup> The negative relationship between a country's level of democracy and its constitutional similarity to the UDHR is statistically significant at a 5% confidence level ( $p = 0.035$ ). The relationship between level of democracy and similarity to the ICESCR is statistically significant with even greater certainty ( $p = 0.010$ ).

<sup>219</sup> On a scale from -1 to 1, where -1 is perfect dissimilarity and 1 is perfect similarity, a one-point increase in a country's democracy score (which ranges from -10 to 10, *see supra* note 79) decreases predicted similarity to the UDHR by 0.001, holding all other variables constant. By contrast, a one-point increase in a country's democracy score decreases predicted similarity to the ICESCR by 0.002, again holding all other variables constant.

<sup>220</sup> On a scale from -1 to 1, where -1 is perfect dissimilarity and 1 is perfect similarity, having a common law system decreases predicted similarity to the UDHR by 0.017, holding all other variables constant. Likewise, having a common law system is negatively associated with constitutional similarity to the ICESCR at a 1% confidence level ( $p = 0.002$ ). On the same scale from -1 to 1, the fact that a country has a common law system

UDHR, but not the ICESCR, there are also regional patterns. Similarity to the UDHR tends to be higher among countries in Sub-Saharan Africa, North Africa, and the Middle East.<sup>221</sup> Meanwhile, in the case of the ICESCR, but not the UDHR, the age of the constitution matters: Recently revised or rewritten constitutions are characterized by greater similarity to the ICESCR.<sup>222</sup> Whether a country has actually ratified the ICESCR, however, is not a meaningful predictor of whether its constitution resembles the ICESCR. Last but not least, controlling for all other variables in the model, there was no statistically significant increase in constitutional similarity to the ICESCR following its adoption in 1966, which casts doubt upon the notion that it has served as a model for constitution writers.

Constitutional similarity to the ICCPR, by contrast, is unrelated to a country's level of democracy but is higher among both common law countries<sup>223</sup> and countries that have ratified the ICCPR.<sup>224</sup> As noted previously, the ICCPR emphasizes negative liberty rights and omits positive rights.<sup>225</sup> Thus, the fact that common law countries exhibit greater constitutional similarity to the ICCPR tends to confirm the existence of a "Commonwealth model of rights constitutionalism" with a somewhat libertarian cast.<sup>226</sup> It is difficult to conclude, however, that this pattern is attributable to conscious emulation of the

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decreases the predicted similarity of its constitution to the ICESCR by 0.032, holding all other variables constant.

<sup>221</sup> Compared to the reference category of Western Europe and North America, countries in the regions of (1) Sub-Saharan Africa and (2) North Africa and the Middle East have a statistically significant tendency to possess constitutions that bear a greater resemblance to the UDHR (with associated *p*-values of *p* = 0.003 and *p* = 0.025, respectively).

<sup>222</sup> The age of a constitution is negatively associated with its similarity to the ICESCR at a 1% confidence level (*p* = 0.002). For each additional ten years that a constitution remains unchanged, its predicted similarity to the ICESCR decreases by 0.010 (on a scale from -1 to 1), holding all other variables constant.

<sup>223</sup> The common law system is positively associated with constitutional similarity to the ICCPR at a 5% confidence level (*p* = 0.015). On a scale from -1 to 1, where -1 is perfect dissimilarity and 1 is perfect similarity, the fact that a country has a common law system increases the predicted similarity of its constitution to the ICCPR by 0.021, holding all other variables constant.

<sup>224</sup> ICCPR ratification is positively associated with similarity to the ICCPR at a 10% confidence level (*p* = 0.100). On a scale from -1 to 1, the fact that a country has ratified the ICCPR increases the predicted similarity of its constitution to the ICCPR by 0.014, holding all other variables constant.

<sup>225</sup> See *supra* note 197 and accompanying text (discussing the ICCPR's focus on first-generation rights).

<sup>226</sup> See Law & Versteeg, *supra* note 19, at 1221–26 (finding empirically that constitutions vary on an ideological spectrum ranging from "libertarian" to "statist," and that common law countries tend to possess "libertarian" constitutions); *supra* note 134 and accompanying text (noting a "split between common law countries and the rest of the world" that "suggests the existence of a distinctive strain of rights constitutionalism" unique to current and former Commonwealth nations).

ICCPR. Controlling for the other variables in the model, there was no statistically significant increase in constitutional similarity to the ICCPR following its adoption in 1966.<sup>227</sup>

### C. *Regional Human Rights Instruments as Constitutional Models*

Like the major international human rights instruments, the most prominent regional human rights instruments might also be thought to guide the manner in which constitutions are written.<sup>228</sup> To explore the relationship between regional human rights instruments and national constitutions, we calculate the average similarity of the world's constitutions to four of the most ambitious regional human rights instruments<sup>229</sup>: the European Convention on Human Rights (ECHR);<sup>230</sup> the American Declaration of the Rights and Duties of Man (the "American Declaration");<sup>231</sup> the African Charter on Human and Peoples' Rights (the "African Charter");<sup>232</sup> and the Charter of Civil Society for the Caribbean Community (the "Caribbean Charter").<sup>233</sup>

These treaties differ in their substantive focus. The ECHR, like the ICCPR, primarily features traditional, first-generation civil and political rights.<sup>234</sup> The American Declaration, meanwhile, parallels the UDHR in its inclusion of both first-generation rights and second-

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<sup>227</sup> Compared to our reference category of Western Europe and North America, countries in the region Central Asia and Eastern Europe exhibit greater constitutional similarity to the ICCPR, and this difference is statistically significant at the  $p = 0.040$  level.

<sup>228</sup> See *Justice Ginsburg to Egyptians*, *supra* note 1 (opining that contemporary constitutional drafters should "almost certainly look at the European Convention on Human Rights").

<sup>229</sup> Other regional human rights instruments tend not to be as comprehensive in scope. See, e.g., Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994).

<sup>230</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>231</sup> American Declaration of the Rights and Duties of Man, *supra* note 181, at 19.

<sup>232</sup> Organization of African Unity [OAU], African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 58 (1992) [hereinafter African Charter].

<sup>233</sup> Charter of Civil Society for the Caribbean Community [CARICOM], Feb. 19, 1997, [http://www.caricom.org/jsp/secretariat/legal\\_instruments/chartercivilsociety.jsp](http://www.caricom.org/jsp/secretariat/legal_instruments/chartercivilsociety.jsp) [hereinafter Caribbean Charter].

<sup>234</sup> See Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 631 n.20 (2002) (noting that the guarantees in the ECHR "focus on civil and political rights"); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1109 n.21 (2000) ("The European Convention on Human Rights codifies a basic catalogue of civil and political rights . . ."). Compare ICCPR, *supra* note 189, with ECHR, *supra* note 230.

generation socioeconomic rights.<sup>235</sup> The African and Caribbean Charters are even broader in scope: they combine first- and second-generation rights with third-generation environmental and group rights.<sup>236</sup> Over the last six decades, the world's constitutions have, on average, grown more similar to all of these regional instruments except the American Declaration. Figure 27 depicts these trends.

It is difficult to conclude from these trends, however, that the ECHR, African Charter, and Caribbean Charter are actually responsible for shaping the global evolution of rights constitutionalism. The difficulty of drawing such conclusions is apparent when one considers the sequence of events. Each of the four vertical lines in Figure 27 corresponds to the point in time at which one of the four instruments in question entered into force: The leftmost line marks the adoption of the American Declaration in 1948, the second line from the left corresponds to the adoption of the ECHR in 1950, the third line marks the adoption of the African Charter in 1981, and the rightmost line marks the adoption of the Caribbean Charter in 1997. It is clear from the positioning of these lines that states were already adopting the rights found in these instruments before the instruments themselves had entered into force.

The most plausible interpretation of this sequence of events is that regional human rights instruments do not actually generate global consensus as to what rights demand formal constitutional entrenchment, but instead express and perhaps reinforce trends that have already begun to emerge.<sup>237</sup> Yet even the relatively modest claim that regional human rights instruments express or reinforce emerging global trends does not always hold true. As Figure 27 shows, average

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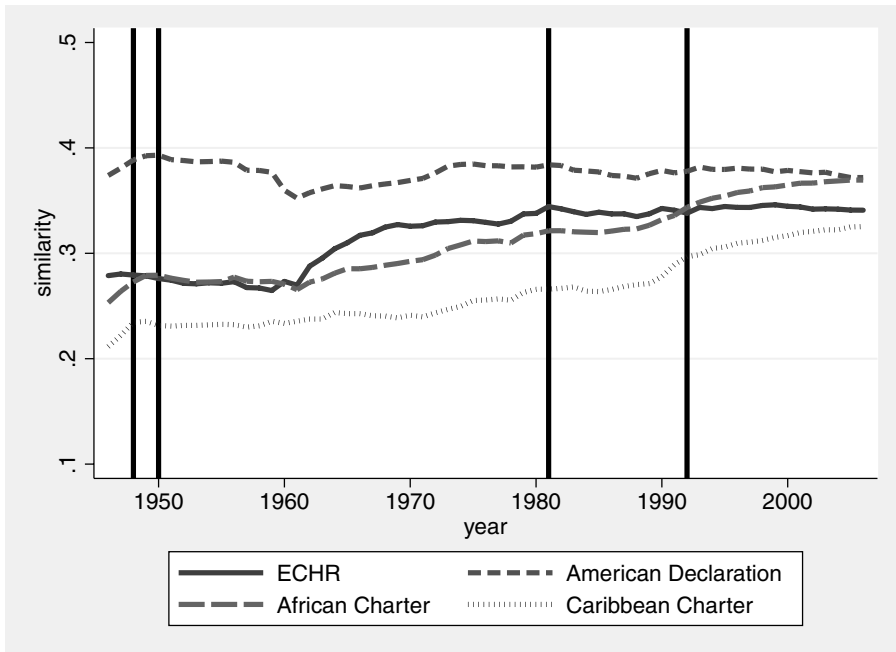
<sup>235</sup> See Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 16 (1988) (observing that the American Declaration encompasses both civil and political rights and socioeconomic rights). Compare American Declaration of the Rights and Duties of Man, *supra* note 181, with UDHR, *supra* note 193.

<sup>236</sup> Examples of each type of right in the Caribbean Charter include (first-generation) electoral rights, (second-generation) cultural rights, and (third-generation) environmental rights. See Caribbean Charter, *supra* note 233, art. VI, § 1 ("The States shall ensure the existence of a fair and open democratic system through the holding of free elections at reasonable intervals, by secret ballot . . ."); *id.* art. X ("[E]very person has the right to participate in the cultural life of his or her choice."); *id.* art. XXIII, § 1 ("Every person has a right to an environment which is adequate for his or her health and well-being and a corresponding duty to protect, conserve and improve the environment."). The African Charter contains similar electoral and cultural rights. See African Charter, *supra* note 232, art. 13, § 1; *id.* art. 17, § 2. The African Charter also includes a third-generation right to "national and international peace and security." *Id.* art. 23, § 1.

<sup>237</sup> Cf. PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 483 (2002) (observing that international law is invariably shaped by the constitutional model of the victors of epochal war).

constitutional similarity to the American Declaration actually decreased for more than a decade following its adoption and has yet to recover to its initial level. Its trajectory over time is, in fact, somewhat comparable to that of the UDHR, which should come as little surprise in light of the extent to which the two documents contain a similar mix of rights.

FIGURE 27: AVERAGE SIMILARITY TO ECHR, AMERICAN DECLARATION, AFRICAN CHARTER AND CARIBBEAN CHARTER



*D. A Statistical Model of the Influence of Regional Human Rights Instruments on National Constitutions*

Perhaps it is expecting too much to think that regional human rights instruments might shape constitutionalism on a global scale. If the purpose of a regional human rights treaty is first and foremost to guide practices in a specific region, then the most natural place to seek evidence of its influence is in that region. It is plausible that regional treaties do have an impact on domestic constitutionalism, but only within their respective regions. To test this possibility, we once again turn to regression analysis. As in Part III.B, we estimate a separate

OLS regression model for each of the treaties in question,<sup>238</sup> and each model enables us to test whether certain variables predict that a country's constitution will resemble a particular treaty. If it is indeed the case that regional instruments influence constitution writing within their respective regions, then region ought to be a meaningful predictor of similarity to each of the regional instruments.

The variables that we test parallel those used in Part III.B in the context of international human rights treaties. They are: (1) a country's level of democracy;<sup>239</sup> (2) whether or not a country has a common law system;<sup>240</sup> (3) the number of years since the constitution was adopted or last revised with respect to any of the sixty provisions in the rights index;<sup>241</sup> and (4) a series of variables designed to control for decade-specific trends.<sup>242</sup> The relevant regression models for the African Charter and the ECHR (but not the American Declaration or the Caribbean Charter) include (5) a variable that captures whether a country has ratified the treaty in question.<sup>243</sup> In the cases of the Caribbean Charter and the African Charter (but not the ECHR or the American Declaration), the model also includes (6) a variable that captures whether the treaty in question had entered into force yet.<sup>244</sup>

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<sup>238</sup> The regression models used here parallel those used to predict similarity to the U.S. Constitution and the Canadian Constitution in Parts III.B and IV.C. The r-squared associated with the ECHR regression model was 0.79. For the American Declaration regression model, the r-squared was 0.75; for the African Charter regression model, the r-squared was 0.75; and for the Caribbean Charter regression model, the r-squared was 0.76. Each model was estimated from 657 observations.

<sup>239</sup> See *supra* note 79 (describing the "polity2" variable).

<sup>240</sup> See *supra* note 78 (listing the countries that are categorized as possessing a common law system).

<sup>241</sup> See *supra* note 87 and accompanying text (describing the construction of this variable).

<sup>242</sup> To be specific, the model included a separate dummy variable for each decade, with similarity levels in the 1950s serving as the baseline for comparison. See *supra* note 80 (defining each "decade" for purposes of our analysis). The same approach of measuring changes in constitutional similarity from decade to decade, rather than from year to year, was used in our analyses of similarity to the U.S. Constitution, the Canadian Constitution, and the international human rights treaties. See *supra* Parts III.F, IV.C, VI.B (describing the analysis conducted and the results).

<sup>243</sup> The regression models used to predict similarity to the American Declaration and Caribbean Charter do not include such a ratification variable because these treaties are technically declarations and were never open for ratification.

<sup>244</sup> The models that predict similarity to the ECHR and the American Declaration do not include such a variable because these treaties entered into force within the first decade of our sample (1950 and 1948, respectively). As in our analysis of similarity to the U.S. Constitution, the Canadian Charter, and the international treaty models, we predict changes from decade to decade rather than from year to year. Moreover, we calculate robust standard errors that are clustered at the state level and include a lagged version of the dependent variable as an additional predictor variable. See *supra* note 80 (explaining these methodological choices).

Last but not least, each model contains an additional variable that indicates (7) whether the country in question belongs to the region covered by the treaty.<sup>245</sup>

As in the case of the international human rights instruments, our analysis offers little support for the claim that any of the four regional human rights instruments has changed the way in which constitutions are written, even within their respective regions. Table 7 summarizes which variables were statistically significant predictors of similarity to each treaty, and whether their impact was positive or negative. None of the variables that we tested proved to be good predictors of constitutional similarity to all four of the regional treaties. Most notably, the fact that a country falls within the region governed by a particular treaty does not mean that its constitution will resemble the treaty more closely.

TABLE 7: PREDICTORS OF SIMILARITY TO  
REGIONAL HUMAN RIGHTS INSTRUMENTS<sup>246</sup>

| <i>Treaty</i>        | <i>Democracy</i> | <i>Common Law</i> | <i>Age of Constitution</i> | <i>Geographic Region</i> | <i>Treaty Ratified</i> | <i>Treaty in Effect</i> |
|----------------------|------------------|-------------------|----------------------------|--------------------------|------------------------|-------------------------|
| ECHR                 | Insignificant    | Positive          | Insignificant              | Insignificant            | Insignificant          | N/A                     |
| American Declaration | Negative         | Insignificant     | Insignificant              | Insignificant            | N/A                    | N/A                     |
| African Charter      | Insignificant    | Insignificant     | Positive                   | Insignificant            | Positive               | Positive                |
| Caribbean Charter    | Insignificant    | Insignificant     | Positive                   | Insignificant            | N/A                    | Positive                |

<sup>245</sup> For the ECHR, the relevant region includes all members of the Council of Europe. The following countries were accordingly counted as “European”: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom.

For the American Declaration, we defined a region called the “Americas” that included the following countries: Antigua and Barbuda, Argentina, Aruba, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, the Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela.

For the African Charter, the relevant region includes all countries on the African continent. Finally, for the Caribbean Declaration, the relevant region consisted of the following countries: Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominica, the Dominican Republic, Grenada, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

<sup>246</sup> Variables labeled in Table 7 as “insignificant” were not statistically significant predictors of constitutional similarity at the  $p = 0.05$  level.

Overall, our analysis uncovers no clear evidence that transnational human rights instruments are shaping global or even regional trends in constitution writing, much less that they have displaced the U.S. Constitution as a source of inspiration for constitution makers. We do not purport, however, to have resolved the difficult question of whether the pronouncements of international or regional organizations influence constitution-making processes at the national level. Even without the benefit of empirical analysis, it is obvious that the impact of transnational human rights instruments on domestic constitutionalism will vary from instrument to instrument and from country to country. But the causes of this variation and, more generally, the relationship between transnational and domestic constitutionalism are sorely in need of further empirical study.

CONCLUSION:  
EXPLAINING THE DECLINE OF AMERICAN  
CONSTITUTIONAL LEADERSHIP

The appeal of American constitutionalism as a model for other countries appears to be waning in more ways than one. Scholarly attention has thus far focused on global judicial practice: There is a growing sense, backed by more than purely anecdotal observation, that foreign courts cite the constitutional jurisprudence of the U.S. Supreme Court less frequently than before.<sup>247</sup> But the behavior of those who draft and revise actual constitutions exhibits a similar pattern. Our empirical analysis shows that the content of the U.S. Constitution is becoming increasingly atypical by global standards. Over the last three decades, other countries have become less likely to model the rights-related provisions of their own constitutions upon those found in the U.S. Constitution. Meanwhile, global adoption of key structural features of the Constitution, such as federalism, presidentialism, and a decentralized model of judicial review, is at best stable and at worst declining. In sum, rather than leading the way for global constitutionalism, the U.S. Constitution appears instead to be losing its appeal as a model for constitutional drafters elsewhere. The idea of adopting a constitution may still trace its inspiration to the United States, but the manner in which constitutions are written increasingly does not.

If the U.S. Constitution is indeed losing popularity as a model for other countries, what—or who—is to blame? At this point, one can only speculate as to the actual causes of this decline, but five possible

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<sup>247</sup> See *supra* note 18 and accompanying text (citing empirical research on the citation of American judicial decisions by foreign courts).

hypotheses suggest themselves: (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.

With respect to the first hypothesis, there is little indication that the U.S. Constitution has been displaced by any specific competitor. Instead, the notion that a particular constitution can serve as a dominant model for other countries may itself be obsolete. There is an increasingly clear and broad consensus on the types of rights that a constitution should include, to the point that one can articulate the content of a generic bill of rights with considerable precision.<sup>248</sup> Yet it is difficult to pinpoint a specific constitution—or regional or international human rights instrument—that is clearly the driving force behind this emerging paradigm. We find only limited evidence that global constitutionalism is following the lead of either newer national constitutions that are often cited as influential, such as those of Canada and South Africa, or leading international and regional human rights instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Although Canada in particular does appear to exercise a quantifiable degree of constitutional influence or leadership, that influence is not uniform and global, but more likely reflects the emergence and evolution of a shared practice of constitutionalism among common law countries.<sup>249</sup> Our findings suggest, instead, that the development of global constitutionalism is a polycentric and multipolar process that is not dominated by any particular country.<sup>250</sup> The result might be likened to a global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution.

Another possibility is that America's capacity for constitutional leadership is at least partly a function of American "soft power" more generally.<sup>251</sup> It is reasonable to suspect that the overall influence and

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<sup>248</sup> See *supra* Part II.B (defining a "generic bill of rights" that consists of an average number of the most popular rights).

<sup>249</sup> See *supra* Part IV (discussing the influence of Canadian constitutionalism, especially among common law countries).

<sup>250</sup> See Law & Versteeg, *supra* note 19, at 1164 (documenting empirically the simultaneous growth of "generic rights constitutionalism" and emergence of increasingly distinct "libertarian" and "statist" constitutional paradigms).

<sup>251</sup> See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS*, at x (2004) (defining "soft power" as "the ability to get what you want through attraction" without resort to "sticks and carrots" or "coercion or payments," and citing the construction by Chinese student protesters in Tianenmen Square of a replica of the Statue of Liberty as an example of American soft power).

appeal of the United States and its institutions have a powerful spillover effect into the constitutional arena. The popularity of American culture, the prestige of American universities, and the efficacy of American diplomacy can all be expected to affect the appeal of American constitutionalism, and vice versa. All are elements of an overall American brand, and the strength of that brand helps to determine the strength of each of its elements. Thus, any erosion of the American brand may also diminish the appeal of the Constitution for reasons that have little or nothing to do with the Constitution itself. Likewise, a decline in American constitutional influence of the type documented in this Article is potentially indicative of a broader decline in American soft power.

There are also factors specific to American constitutionalism that may be reducing its appeal to foreign audiences. Critics suggest that the Supreme Court has undermined the global appeal of its own jurisprudence by failing to acknowledge the relevant intellectual contributions of foreign courts on questions of common concern<sup>252</sup> and by pursuing interpretive approaches that lack acceptance elsewhere.<sup>253</sup> On this view, the Court may bear some responsibility for the declining influence of not only its own jurisprudence, but also the actual U.S. Constitution: One might argue that the Court's approach to constitutional issues has undermined the appeal of American constitutionalism more generally, to the point that other countries have become unwilling to look either to American constitutional jurisprudence or to the U.S. Constitution itself for inspiration.<sup>254</sup>

It is equally plausible, however, that responsibility for the declining appeal of American constitutionalism lies with the idiosyncrasies of the Constitution itself rather than the proclivities of the Supreme Court. As the oldest formal constitution still in force and

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<sup>252</sup> See *supra* note 17 and accompanying text (discussing possible consequences of the U.S. Supreme Court's comparatively sparing use of foreign law).

<sup>253</sup> See Vicki C. Jackson & Jamal Greene, *Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 104, at 599, 607 (acknowledging that originalism is not a "made-only-in-the-USA phenomenon," but observing that the U.S. Supreme Court is nevertheless "more concerned with original understandings than are their counterparts in many other jurisdictions"); L'Heureux-Dubé, *supra* note 18, at 33 (observing that decisions focused on the intent of eighteenth-century constitutional framers are "unhelpful to those who are interpreting constitutions or human rights provisions drafted in the latter half of the twentieth century," and that originalism "is usually simply not the focus, or even a topic, of debate elsewhere").

<sup>254</sup> See, e.g., Klug, *supra* note 7, at 598 (arguing that, "although historically the United States Constitution provided an inspiration to many, the recent direction of United States constitutional jurisprudence has led most constitution-makers to seek alternative models").

one of the most rarely amended constitutions in the world,<sup>255</sup> the U.S. Constitution contains relatively few of the rights that have become popular in recent decades.<sup>256</sup> At the same time, some of the provisions that it does contain may appear increasingly problematic, unnecessary, or even undesirable with the benefit of two hundred years of hindsight.<sup>257</sup> It should therefore come as little surprise if the U.S. Constitution strikes those in other countries—or, indeed, members of the U.S. Supreme Court<sup>258</sup>—as out of date and out of line with global practice.<sup>259</sup> Moreover, even if the Court were committed to interpreting the Constitution in tune with global approaches, it would still lack the power to update the actual text of the document. Indeed, efforts by the Court to update the Constitution via interpretation may actually reduce the likelihood of formal amendment by rendering such amendment unnecessary as a practical matter.<sup>260</sup> As a result, there is only so much that the U.S. Supreme Court can do to make the U.S. Constitution an attractive formal template for other countries. The obsolescence of the Constitution, in turn, may undermine the appeal of American constitutional jurisprudence. Foreign courts have little reason to follow the Supreme Court's lead on constitutional issues if the Supreme Court is saddled with the interpretation of an unusual and obsolete constitution.<sup>261</sup> No amount of ingenuity or solicitude for foreign law on the part of the Court can entirely divert attention from the fact that the Constitution itself is an increasingly atypical document.

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<sup>255</sup> See *supra* notes 104–08 and accompanying text.

<sup>256</sup> See *supra* notes 97–100 and accompanying text (discussing the U.S. Constitution's relative paucity of enumerated rights and omission of various "generic" rights).

<sup>257</sup> See, e.g., Gardbaum, *supra* note 8, at 395 (observing that the distinguishing features of the U.S. Constitution include its sheer age and consequent attention to "anachronistic concerns"); Law & Versteeg, *supra* note 19, at 1200–02 tbl.2 (reporting that, by contrast with the U.S. Constitution, nearly three-quarters of the world's constitutions contain express restrictions on property rights, while only 2% contain a right to bear arms); *supra* note 14 and accompanying text (noting efforts by constitutional drafters in other countries to steer clear of language that could open the door to *Lochner*-style substantive due process jurisprudence); *supra* note 108 and accompanying text (reviewing various criticisms of the U.S. Constitution voiced by American scholars).

<sup>258</sup> See *Justice Ginsburg to Egyptians*, *supra* note 1 (advising constitutional drafters in search of inspiration to look to more recent and typical constitutions, such as those of Canada and South Africa, rather than the U.S. Constitution).

<sup>259</sup> See *supra* notes 12–18, 108 and accompanying text (canvassing scholarly criticisms of the U.S. Constitution and evidence of foreign aversion to American constitutionalism).

<sup>260</sup> See, e.g., Sunstein, *supra* note 102, at 98 (suggesting that the Equal Rights Amendment failed to secure ratification in part because the Supreme Court had already interpreted the Equal Protection Clause to reach sex discrimination).

<sup>261</sup> See L'Heureux-Dubé, *supra* note 18, at 31 (suggesting that "the structural dissimilarity between the U.S. Constitution and those written more recently" is "one of the most significant reasons for the diminished influence of the United States Supreme Court").

One way to put a more positive spin on the U.S. Constitution's status as a global outlier is to emphasize its role in articulating and defining what is unique about American national identity. Many scholars have opined that formal constitutions serve an expressive function as statements of national identity.<sup>262</sup> This view finds little support in our own empirical findings, which suggest instead that constitutions tend to contain relatively standardized packages of rights.<sup>263</sup> Nevertheless, to the extent that constitutions do serve such a function, the distinctiveness of the U.S. Constitution may reflect the uniqueness of America's national identity. In this vein, various scholars have argued that the U.S. Constitution lies at the very heart of an "American creed of exceptionalism," which combines a belief that the United States occupies a unique position in the world with a commitment to the qualities that set the United States apart from other countries.<sup>264</sup> From this perspective, the Supreme Court's reluctance to make use of foreign and international law in constitutional cases amounts not to parochialism, but rather to respect for the exceptional character of the nation and its constitution.<sup>265</sup>

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<sup>262</sup> See Law & Versteeg, *supra* note 19, at 1167 & n.6, 1170 (surveying the literature to the effect that constitutions are "unique and defining statements of national aspiration and identity," but concluding as an empirical matter that the rights-related content of the world's constitutions is relatively standardized and tends to vary in predictable ways); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1270–71 (1999) (discussing the long-held view among many comparative legal scholars that "constitutions emerge out of each nation's distinctive history and express its distinctive character").

<sup>263</sup> See Law & Versteeg, *supra* note 19, at 1243 (concluding that the rights content of the world's constitutions is characterized on the whole by the existence of two constitutional paradigms that share a substantial generic core in common); *supra* Part II.B (describing a "generic bill of rights" consisting of those rights that are found in the vast majority of the world's constitutions).

<sup>264</sup> Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1340, 1397 (2006) (arguing that other scholars are "dead right" to characterize the Constitution as the "focal point" of an "American creed of exceptionalism"); see, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 5, 96 (1988) (quoting the views of Samuel Huntington and others that the Constitution is the "central covenant of the community," the "supreme symbol and manifestation" "of the American nation," the "central sacred text" of the United States as a "faith community," the "conscious political act" to which the United States owes its very existence, and so forth (internal quotation marks omitted)); Gardbaum, *supra* note 8, at 392–93 (noting the "widespread" view of "both American and comparative legal scholars" that American constitutional law is a defining element of American exceptionalism); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 589–602 (2007) (observing that negative reactions to the U.S. Supreme Court's use of foreign precedent "tap into a longstanding tradition of exceptionalism and particularism in American attitudes toward foreign law").

<sup>265</sup> See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("We must never forget that it is a Constitution *for the United States of America* that we are expounding." (emphasis added)); ROBERT H. BORK, COERCING VIRTUE: THE

Unfortunately, it is clear that the reasons for the declining influence of American constitutionalism cannot be reduced to anything as simple or attractive as a longstanding American creed of exceptionalism. Historically, American exceptionalism has not prevented other countries from following the example set by American constitutionalism. The global turn away from the American model is a relatively recent development that postdates the Cold War. If the U.S. Constitution does in fact capture something profoundly unique about the United States, it has surely been doing so for longer than the last thirty years.

A complete explanation of the declining influence of American constitutionalism in other countries must instead be sought in more recent history, such as the wave of constitution making that followed the end of the Cold War.<sup>266</sup> During this period, America's newfound position as lone superpower might have been expected to create opportunities for the spread of American constitutionalism. But this did not come to pass.

Once global constitutionalism is understood as the product of a polycentric evolutionary process, it is not difficult to see why the U.S. Constitution is playing an increasingly peripheral role in that process. No evolutionary process favors a species that is frozen in time. At least some of the responsibility for the declining global appeal of American constitutionalism lies not with the Supreme Court, or with a broader penchant for exceptionalism, but rather with the static character of the Constitution itself. If the United States were to revise the Bill of Rights today—with the benefit of over two centuries of experience, and in a manner that addresses contemporary challenges while remaining faithful to the nation's best traditions—there is no guarantee that other countries would follow its lead. But the world would surely pay close attention.

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WORLDWIDE RULE OF JUDGES 9, 16 (rev. ed. 2003) (characterizing the creation and judicial use of international human rights law as an effort by an elite liberal "New Class" to circumvent American policymakers and traditional American values "by having liberal views adopted abroad and then imposed on the United States"); Law, *supra* note 24, at 653–59 (describing the conflict among the Justices over the propriety of comparative constitutional analysis); *supra* note 264 (citing various scholars who have argued that the Supreme Court's approach to the use of foreign law exemplifies a tradition of exceptionalism).

<sup>266</sup> See *supra* notes 39–42 and accompanying text (describing post-Cold War constitution making).

APPENDIX 1: COMPONENTS OF THE RIGHTS INDEX<sup>267</sup>

- Affirmative action provision authorizing or requiring compensatory action in favor of disadvantaged groups
- Artistic and/or scientific freedom
- Children's rights (including the prohibition of child labor)
- Citizen duties (imposition of affirmative duties on citizens)
- Consumer rights
- Education right, negative (including freedom of education and right to establish private schools)
- Education right, positive (right to receive an education)
- Equality guarantee (including both blanket equality provisions and enumerated guarantees of equality without respect to race, place of origin, ethnicity, education, social status, caste, tribe, religion, belief or philosophical conviction, political preference or opinion, economic status or property ownership, ancestry, nationality, disability, age, sexual orientation, language, and/or HIV/AIDS status)
- Protection of fetuses and/or abortion restrictions
- Freedom of the press and/or expression
- Freedom of movement
- Freedom of religion
- Judicial review (judicial invalidation of unconstitutional laws)
- Limits on property rights (property may be limited through regulation, substantive limits (for example, property may be limited by its social function), restriction of land rights, or mandate of land reform)
- Minority rights (special protection of minorities, protection of minority language, right to preserve traditional ways of life, or minority culture, right for minority groups to establish their own schooling, right for minorities to be represented in national government, right to use traditional lands, right to some degree of autonomy for minority communities)
- Natural resources for benefit of all (requirement that the government use natural resources effectively and/or for the benefit of all citizens)
- Ombudsman or human rights commission
- Physical needs rights or subsistence rights (right to social security, right to adequate standard of living, right to food, right to housing, right to water, right to health)

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<sup>267</sup> Each variable in the index is binary, meaning that for each constitution in the data, each variable in the index is coded either "yes" (indicating the presence of a particular provision in that constitution) or "no" (indicating the absence of the provision).

Presumption of innocence  
Prohibition of arbitrary arrest and detention  
Prohibition of death penalty  
Prohibition of double jeopardy  
Prohibition of ex post facto laws (retroactive laws)  
Prohibition of genocide and/or crimes against humanity  
Proclamation of an official state religion  
Prohibition of torture  
Reference to international human rights treaty obligations  
Right of access to court or impartial tribunal  
Right to appeal to higher court  
Right of assembly  
Right of association  
Right to asylum  
Right to bear arms  
Right to counsel  
Rights for the elderly (including equality regardless of age)  
Rights for the family  
Right to form political parties  
Rights for the handicapped (including equality regardless of disability)  
Right to a healthy environment (including the duty to protect the environment, civil or criminal liability for damaging the environment, right to information about the environment, right to compensation when living environment is damaged, right to participate in environmental planning)  
Right to information about government  
Right to life  
Right not to be expelled from home territory  
Right to marry  
Right to present a defense  
Rights for prisoners  
Right to privacy (including personal privacy, inviolability of the home, protection of personal data, privacy of family life, and inviolability of communication)  
Right to private property  
Right to protection of one's reputation or honor  
Right to public trial  
Right to resist when rights are violated  
Right to work (including the freedom to choose one's occupation and freedom of enterprise)  
Right against self-incrimination  
Right to a timely trial

Right to unionize and/or strike

Rights for victims of crimes

Right to vote

Right to work

Separation of church and state

Substantive principles for education (including religious principles, communist principles, nationalist principles, internationalist principles, democratic principles)

Women's rights (including gender equality, women's empowerment in labor relations (e.g., equal pay for equal work), equality of spouses within the family, special protection of women (e.g. special conditions at work), right to maternity leave, special protection of mothers)

Worker's rights (right to favorable working conditions, right to rest, right to minimum wage)