LECTURE

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Model, Resource, or Outlier? What Effect Has the U.S. Constitution Had on the Recently Adopted Constitutions of Other Nations?

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Abstract
The United States Constitution, the world's oldest written design of government, was a novel political development in the 18th century. No nation previously had adopted a written instrument to create and limit its national government. But it has been more than 200 years since our Constitution and Bill of Rights came into being, and numerous other nations have adopted their own written organic political instruments since then. Have those nations looked to the U.S. Constitution as a model or a resource for their own constitutions, or has the U.S. Constitution become an outlier in the world? If the latter, what does that say about the structure and substance of our Constitution and how it is considered in the international community?

This paper, in its entirety, can be found at **http://report.heritage.org/hl1223**

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The Birth of the New Fundamental Law of Hungary

DR. ISTVÁN STUMPF: I would like first to thank The Heritage Foundation for inviting me to this panel discussion on a very important topic. I would also like to say a special "thank you" to Attorney General Ed Meese, who experienced the Hungarian constitution-making environment firsthand last summer when Hungary inaugurated a statue dedicated to Ronald Reagan on Freedom Square.

Indeed, it was not only outstanding American personalities like President Reagan who have inspired freedom-minded people around the world, but also America's founding documents, which serve as a model for other nations. Today, I will talk about how this played out recently in Hungary during our constitutional reform process last year.

Waiting for Constitutionalism

To understand why Hungary needed a new constitution and the legal heritage we drew upon, we have to go back in time to a point in history that demonstrated a common love of liberty among our two peoples.

The first major experiment in Hungary to establish representative

Key Points

- Despite talk about a post-American era and American decline, the ideals of the Founders and the principles of the U.S. Constitution and the Declaration of Independence are not in decline. Democracies around the world, old and new, need them now more than ever.
- We should not envy or adopt constitutional elements simply because they are popular. Rather, we should value the norms that have served this country well while not closing our minds to emerging principles that have proved effective in other constitutional systems.
- Other countries, in drafting the language of their constitutions, may not follow our lead, but the loss is theirs. We have shown that we can create a nation that not only survives, but also thrives and guarantees speech that others find offensive, hateful, insulting, or blasphemous.

democratic government was the 1848–49 revolution. After the revolution and the war of independence were crushed by absolutist Austria with the help of Russia in 1849, Hungary's former revolutionary leader, Lajos Kossuth, traveled across the sea with the help of the United States Navy to the land of the free, where he hoped to promote the case of Hungarian independence and universal values like national self-government and republicanism. In an 1852 speech to Members of Congress here in Washington, D.C., he praised the American constitutional model:

> Your principles will conquer the world. By the glorious example of your freedom, welfare, and security, mankind is about to become conscious of its aim. The lesson you give to humanity will not be lost. The respect for State rights in the Federal Government of America, and in its several States, will become an instructive example for universal toleration, forbearance, and justice to the future states and republics of Europe.[1]

Reflecting the enthusiasm of the American people at the time, Secretary of State Daniel Webster expressed his sympathy for Kossuth:

> We shall rejoice to see our American model upon the Lower Danube and on the mountains of Hungary.... That first prayer shall be that Hungary may become independent of all foreign power.... I limit my aspirations for Hungary, for the present, to that single and simple point—Hungarian independence, Hungarian self-government, Hungarian control of Hungarian destinies.[2]

Kossuth, not unlike other Hungarian revolutionaries, knew of the American Founding Fathers, and he was fond of their idea of republican self-government. At a dinner given in his honor by the U.S. Congress just a few blocks from here, he said, "[E]ither the continent of Europe has no future at all, or this future is American republicanism."[3] This was 160 years ago.

For Hungary, it took 15 more decades of stormy history—including Soviet invasion and 40 years of Communism—until in 1989–90 we finally regained real independence, the ability to govern ourselves through a constitutional parliamentary democracy.

The Need for a New Constitution

The ideas that inspired Kossuth were the same ideas that inspired the democratic opposition of the 1990s: freedom of speech, freedom of association, freedom from oppression, and the right to shape our own future. As someone who was "present at the beginning" at Bibó College, where these ideas took shape in the Hungarian context, I can attest to the fact that the young system-changers (figures like current Prime Minister Viktor Orbán, President János Áder, Speaker of the Parliament László Kövér, or European Parliament member József Szájer) had a passionate commitment to these universal values. They still do.

It was thanks to this commitment to freedom that legal reforms could be negotiated between the ruling Hungarian Socialist Workers Party and the democratic opposition during the so-called Round Table Talks, but I know from firsthand experience that the new democratic system was a result of a series of compromises and political bargains, some that were difficult to make. The change brought to life a new political order, but the old socialist political and economic elite was able to partially transfer its political, social, and economic capital to the new system that was established—and so maintain a form of real power over future politics. From a Communist system, Hungary became a post-Communist country.

Although the new Constitution of 1989 was liberated from most of the Communist regime's dogma and the new text was different from the 1949 text, there were many instances in which the ghosts of the past regime were looming over the document that became the bedrock of our new democratic constitutional system. For example, it said that members of the Constitutional Court could not be members of "the" party, presuming that there would only be one. It also referred to a "social market economy" in the preamble. Its structure more or less still followed the Soviet-style constitution structure, and there were special protections for "workers" and "labor unions."

Technically, the 1989 document was only an amendment of the original Communist constitution, signed by the dictator Mátyás Rákosi and officially called the "20th

1. Lajos Kossuth, Speech at the Dinner Given in His Honor by the U.S. Congress in Washington D.C. (Jan. 7, 1852), *available at* http://ecommons.cornell.edu/bitstream/1813/1448/1/Kossuth_Congress_1852.pdf.
2. *The United States and Hungary: Paths of Diplomacy 1848–2006 in* Foreign Relations of the United States 16 (U.S. Department of State 2007).
3. *See supra* note 1.

Act of 1949," symbolizing the continued legacy and incomplete abolishment of the Communist regime. For this reason, many Hungarians deeply desired to replace the document, to reject the Communist legacy and memory of Soviet domination once and for all. After all, it had been that very 1949 constitution of the People's Republic of Hungary which declared the citizens' right to personal liberty and security, but that did not prevent the execution of hundreds and the imprisonment of tens of thousands on political grounds without a fair trial. The document was essentially what James Madison called a "parchment barrier."

The compromise reforms of 1989 and the preamble itself written in that year pointed toward and helped prepare the way for—at some point in the not so distant future—a new constitution adopted by the new, democratically elected Hungarian Parliament. This same intention guided legislators in 1995 when the socialist–liberal majority Parliament adopted a resolution on the preparation of the new constitution. But there was never a political consensus strong enough and lasting enough to draft and adopt a new constitution for Hungary, so between 1990 and 2009, there were 49 amendments to our 1989 constitution—compared to the 12 amendments made to the U.S. Constitution in its first 20 years.

The deadlock ended when, at the 2010 parliamentary elections, the center-right Fidesz–KDNP coalition gained a two-thirds parliamentary majority, a majority that gave the new government the necessary votes in Parliament to modify the constitution or to adopt a new constitution.

As a political scientist, throughout the early 2000s, I myself participated in countless public debates arguing that the political governing structure created in 1989 needed a "reset" because it was loaded with so many systemic problems: an overburdened public administration system, an oversized Parliament, an overcomplicated electoral system, *etc*.

According to the consensus opinion among constitutional scholars, the constitution in many ways was outdated. The adoption of a new constitution seemed to be the most characteristic ending of the transitional period mentioned in the preamble of the old constitution and a sign of a symbolic new beginning after all the social and political struggles of the past 20 years. So a new constitution was a rational political step, if not an inevitable one, in 2010.

Constitution-Making

The official preparation of the new constitution began in September 2010 by the newly created Parliamentary Constitution Drafting Committee. Government agencies, other branches of the government, NGOs,[4] and the academic community were called upon to submit their suggestions for the concept and framework of the new constitution.

The parliamentary debate took place over the course of a month, with the participation of only one opposition party in Parliament; the final text of the bill was adopted by a two-thirds majority of the Parliament in a vote split largely along party lines.[5]

On April 25, 2011, the new constitution—the "Fundamental Law of Hungary"—was promulgated in the official gazette.

Resources, Constitutional Culture. The framers of the new constitution looked at many international examples and scholarly work from which the new Hungarian constitution drew inspiration. Last year, when Mr. Szájer participated at a panel discussion here at The Heritage Foundation, he said that "one of the most important documents which was inspiring the drafting of the Hungarian constitution was that of the U.S."[6] Indeed, one of the main objectives of drafting a shorter (by European standards) and easier to understand constitution for Hungary was to make it more accessible and meaningful for average Hungarian citizens.

In America, especially with the rise of the Tea Party, there is an enviable attachment to and reverence for the U.S. Constitution. It is looked upon as an intellectual masterwork, but also as an inspired standard against which to judge political action as well as a source of inspiration to guide future action. Hungary wanted to create a similarly strong document which would be a source of patriotism and serve as a common creed for our nation. The main resource in the process of making the new constitution was, of course, our own legal heritage and the practice of

4. Nongovernmental organizations.

5. The Hungarian Socialist Party (Hungarian: Magyar Szocialista Párt, or MSZP) and Politics Can Be Different (Hungarian: Lehet Más a Politika, or LMP), a green liberal political party, refused to take part in the parliamentary debates on the bill on the new constitution. The Jobbik, or Movement for a Better Hungary (Hungarian: Jobbik Magyarországért Mozgalom), a radical nationalist political party, participated in the debate, but its MPs voted against adoption of the new constitution.

6. József Szájer, National Consultation Committee on the Constitution, Remarks at the Heritage Foundation: Hungary's New Constitution: Prospects for the Rule of Law & Liberty in New Europe (Mar. 21, 2011), *available at* http://www.heritage.org/events/2011/03/hungarian-constitution.

the Constitutional Court based on the 1989 constitution, but there were many new characteristics and elements which were added.

Characteristics of the New Fundamental Law

Strong Symbolism and Value Orientation. The 1989 constitution was quite a technical text. It didn't even have a conceptual reference about the source of power like "We the people" in the U.S. Constitution. It only stated the fact that it was the "Parliament of the Republic of Hungary" who adopted the document.

In contrast, drawing inspiration from the U.S., the lengthy preamble of the new Fundamental Law,[7] the so-called Avowal of National Faith (or "National Creed") makes its declarations in the name of "We the Members of the Hungarian Nation" and also serves in a manner the same purpose your own Declaration of Independence does for America. At a very fundamental level, it states our national aspirations and basic principles while also defining the established community which it serves, protects, and regulates.

This was important because the framers of the Hungarian Fundamental Law understood that the constitution was not simply a technical legal document, but it was also an expression of ideas that bind a nation together philosophically and emotionally. The preamble states that "Our Fundamental Law shall be the basis of our legal order: it shall be a covenant among Hungarians past, present and future. It is a lasting framework expressing the nation's will and the form in which we wish to live."

The change of the name from constitution to Fundamental Law reflects the idea that during its history, Hungary has had a "historical constitution": that is, a set of written laws and unwritten public law traditions. Examples of these include the legal heritage of the Golden Bull of 1222, which was the Hungarian Magna Carta of a sort, as well as Hungary's 1568 Torda Declaration, the earliest declaration of freedom of religion in Europe.

Separation of Powers. A clear example of inspiration that came from the U.S. was the explicit reference to the principle of separation of powers. The 1989 constitution already declared that Hungary shall be a "State under the rule of law," and the early Constitutional Court deduced the principle of separation of powers from this reference, but in the new Fundamental Law, this all-important principle was explicitly recognized in Article C.[8]

It is, of course, the responsibility of the different branches to respect this principle, and in a parliamentary system, we know that the executive and the legislative power are intertwined. But the explicit reference to Montesquieu's idea can serve as a concrete point of reference in the future to protect the checks and balances in the new Hungarian constitutional order.

Who has the power to protect the Fundamental Law? In a strict sense, only the Constitutional Court. In Hungary, ordinary courts were not granted the power of judicial review. So in our parliamentary system, the most significant—and sometimes the only—institutional check on the government is the Constitutional Court, which, according to the Fundamental Law, "shall be the principal organ for the protection of the Fundamental Law."

The preamble of the Act on the Constitutional Court specifies "enforcing the principle of the separation of powers" as one of the main functions of the Court. For example, the Court will soon have to decide about a very real instance of separation of powers.

The Parliament passed a law last December which reregulated the recognition of churches in Hungary. In the new system, it is not the courts who decide about an appeal of an organization to gain church status, but the majority of the Parliament, and the Parliament's decision cannot be appealed. So in a way, the legislative power became the executive: The same body who made the law is entitled to apply it on individual organizations. It will be up to the Constitutional Court to decide about what the rule of law in Hungary requires in this case.

Judicial Review. Another important development as significant as the Marshall Court's *Marbury v. Madison* decision in the early days of the United States is that the Fundamental Law extended the competence of the Constitutional Court to review decisions of other courts in Hungary. Previously, the Constitutional Court could only review specific rules of law, but now it can also deal with the judicial decisions of other courts and decide about their conformity with the Fundamental Law.

Although constitutions draw from timeless principles and centuries-old legal heritage, the Fundamental Law must answer 21st century challenges. The new Fundamental Law was born in the middle of the most severe economic crisis in decades. Runaway government debt and looming deficits were crippling the nations on both sides of the Atlantic. This is exactly why the

7. See Magyarország Alaptörvénye [The Fundamental Law of Hungary], *available at* http://www.mkab.hu/rules/fundamental-law. Hungary's constitution is referred to as the Fundamental Law of Hungary.

8. Art. C, § 1 specifies that "The functioning of the Hungarian State shall be based on the principle of the separation of powers."

Fundamental Law introduced a new concept, which is not that new for American audiences: a sort of balanced budget amendment. The Fundamental Law mandates that the Parliament cannot pass a budget which would increase the debt at all until it falls below 50 percent of GDP. I consider this constitutional novelty to be a child of the crisis but also the hope of our children's future.

Strictly related to this clause, the new constitution also restricted the Constitutional Court's ability to review laws related to the central budget and taxation as long as the nation is in a dire economic state and the debt is above 50 percent. The text does contain a loophole which says that if human dignity and certain fundamental freedoms are endangered, the Court can rule on *even these* cases, but this is obviously not an elegant way for the Court to approach serious matters of private property rights.

Social Values. Marriage between one man and one woman and life beginning at conception—these clauses reflect deeply held beliefs of the Hungarian people that strike at the core of the human experience. What, exactly, these provisions will mean for future codified law we do not yet know, but it would ideally be the role of the Constitutional Court to keep the settlement of these questions in the hands of the Hungarian people's representatives and not bypass them by following prevailing European legal standards and norms on such social questions.

Like it or not, Hungarians have passed a new constitution through their elected representatives, and if they want to amend it, they can do so through constitutional channels intended to respect the consent of the governed.

Rules of Interpretation

After all these changes, you might ask the question: For an originalist, what is considered "original" in the Hungarian context? Given the unwritten laws and customs and our vast legal heritage, the Constitutional Court decisions of the past 20 years, and an increasing body of international court decisions, what is the proper way to interpret the Fundamental Law?

The document itself gives us some indication when it says, "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the Avowal of the National Creed contained therein, and with the achievements of our historical constitution," and "When interpreting the Fundamental Law or rules of law, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good." Notice the explicit reference to "common sense," which is quite unique in our age of sometimes absurd legalese texts.

What is astounding to me is that, despite the clear command of the Fundamental Law, the Court has not yet turned itself to seriously considering the arguments to interpret provisions of the Fundamental Law and of the Act on the Constitutional Court in accordance with their purposes and common sense. Instead, so far, what prevailed was a strict constructionist approach and the semiautomatic adaptation of the old practices, based on the 1989 constitution and on the previous Act on the Constitutional Court. On this point, I have to say that I agree with Justice Antonin Scalia, who emphasized that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[9]

In my firm opinion, the manner of our interpretation will define the long-term legitimacy of both the Fundamental Law and the Constitutional Court, so I hope that we shall see positive development in this area.

Allow me here to comment briefly on the independence of the judiciary, which has been the subject of so much attention and concern by your own State Department and certain human rights NGOs. I have always said that Hungary's constitutional rebirth through the power of interpretation by independent judges gives more power to the courts than they had since the 1990s.

I truly believe that the Constitutional Court itself has a "Marshall moment" where it can shape the character of the nation's constitutional system and define key concepts of freedom for the future generations. It is our responsibility as judges to take this role seriously, and we do it with utmost humility, because it is sometimes up to the courts to define and highlight basic rights and serve as an effective check on the Parliament.

We have done so already on several occasions. The Court has struck down parts of the media law, the religion law, the law on retroactive taxation, and the law on firing civil servants without a cause. This Court is not afraid to be a vigilant defender of the Hungarian people's liberties if the Parliament oversteps its constitutional boundaries, and the Court will never be afraid to continue to do so as long as I am there.

We must make sure that basic principles of constitutionalism are firmly established. We are not legislating

9. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Princeton University Press 1998).

from the bench. We are drawing clear lines of demarcation for the legislators. It is our duty, and it is for the benefit of our own country.

American Constitutionalism

In summary, let me say that Hungary, of course, has different legal traditions from that of the United States. The American Founding could start from scratch; no continental European nation has had an opportunity to do that. In the last 20 years, Hungarian legal scholars and practitioners have developed much stronger ties with European academia—the German influence is particularly strong—but as you have seen, there is a very strong interest in the American constitutional heritage, and we should by no means underestimate the United States Constitution as a model for other nations.

The basic notions of rule of law, separation of powers, natural law, judicial review, and human rights came to life thanks to the example of the United States in the last 225 years, which in turn has influenced the entirety of Western civilization, including Hungary. The theoretical foundations of American constitutionalism, the works of American legal scholars, and the practice of the U.S. Supreme Court are valuable resources and strong points of reference for lawyers in Hungary and all over the world.

I am confident that it is for the benefit of the American academia to study from time to time how the concepts and institutions of American constitutionalism flourish or face difficulties in other countries. It is an honor for me to be here and take part in this conversation. As Hungary sets out to solidify its commitment to truths that are self-evident, to the protection of unalienable rights, to a limited but effective government, and to a renewed constitutionalism, I am convinced that we may in the future inspire one another.

Let me close with this thought: There is much talk about a post-American era and American decline. As a young scholar visiting America since the 1980s, I got to know this country through road trips across the heartland as well as Ivy League university lecture halls, and I can tell you that the ideals of the Founding Fathers, the principles of the U.S. Constitution, and the Declaration of Independence *were not and are not* in decline. On the contrary, democracies around the world, old and new, need them now more than ever.

As Chief Justice John Marshall said, "The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will."

*—**The Honorable Dr. István Stumpf** is a Justice on the Constitutional Court of Hungary.*

The Declining Influence of the United States Constitution: Synopsis and Commentary

> "I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012."
>
> —Justice Ruth Bader Ginsburg

MILA VERSTEEG: For some time, both scholars and the public have considered the U.S. Constitution the world's dominant model. Those beliefs are not without foundation: Fundamental structures like judicial review, as well as the very notion of a written constitution, are American inventions which have long shaped global constitution-making. But a growing number of voices are questioning this notion of American constitutional hegemony, with much of this attention focusing on the reportedly declining importance of U.S. Supreme Court precedent in foreign judicial decisions and others, like Justice Ginsburg, suggesting that the Constitution itself is flagging as a model for foreign constitutional drafters.

Methodology

In this article,[10] David Law and I seek to reconcile these viewpoints empirically. One of the article's primary goals is to document the similarity between the American Constitution and evolving global constitutional practices over the past 60 years. As I describe in more detail below, we find evidence that the U.S. Constitution's typicality in the world and, it seems, its sway as a global model are dwindling.

The basis for this analysis was a data set of world constitutions that I compiled between 2007 and 2008. The data set quantifies the rights-related provisions of all of the world's constitutions from 1946 to 2006—729 constitutional versions of 188 countries—on 237 variables. From these 237 variables, my co-author and I aggregated and condensed them into 60 variables that we believe capture the full substantive range of global constitutional rights. We also included two provisions that are not strictly rights-related: judicial review and a national ombudsman.

Using this data, we compared each constitution in the data set to every other constitution, yielding a similarity

10. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L. Rev. 762 (2012).

index that ranges from 1 (perfect similarity) to –1 (perfect dissimilarity) between any two documents.

Globally Generic Rights

Before describing the results of the analysis with regard to the U.S. Constitution, it is worthwhile to explore one of the notions that underlies the question we attempt to answer. That is, how similar are the constitutional rights provisions among the world's constitutions? And if there exists a high degree of similarity—i.e., an international template of rights (as has been previously documented)—what specific rights does it include?

To answer those questions, we created a table ranking all of the 60 identified rights by their world popularity in 2006. At the top of that ranking are rights such as freedom of religion, freedom of expression, the right to private property, equality guarantees, and the right to privacy, each of which appeared in at least 95 percent of constitutions in 2006. At the bottom of the list were provisions such as protection of fetus rights and the right to bear arms, which in 2006 appeared in just 8 percent and 2 percent of constitutions, respectively.

Other themes emerged from the data. For instance, almost all of the 60 constitutional components are increasing in similarity; even most of the unpopular ones (such as protection of fetuses) are becoming more popular. In fact, only two provisions, the right to bear arms and the recognition of an official state religion, are less popular now than they were just after World War II.

Having assembled the world's most popular constitutional provisions, we engaged in a thought experiment. It so happens that the 25 most popular rights in 2006 appeared in at least 70 percent of constitutions. By coincidence, the average constitution over the entire 61-year period contained exactly 25 rights. We therefore compiled a theoretical "generic bill of rights" containing those 25 most popular rights. We then compared all of the world's constitutions over time to the generic bill of rights, finding that similarity has been increasing steadily since 1946 (an unsurprising finding, given that the generic bill of rights is crafted from rights popular in 2006).

We also found that although constitutions are becoming more generic, not all constitutions are equally so. On one end of the spectrum, the constitutions of Djibouti, St. Lucia, Botswana, and Grenada are the world's most generic, with similarity indexes to the generic bill of rights above 0.70. On the other end, constitutions with very few rights, such as those of Saudi Arabia, Brunei, and Australia, are the most unusual, with similarity indexes at or below 0.12.

The United States Constitution's Declining Similarity

The existence of this generic set of rights begs the question of whether certain countries have led the way in adopting these generic rights and, if so, to what extent these rights pioneers have impacted the subsequent constitutional practices of other countries. As the article's title suggests, we focused first and foremost on the U.S. Constitution and whether the conventional wisdom of its status as a constitutional pioneer was supported by the data.[11]

Unsurprisingly, attempting to gauge one constitution's "influence" on another involves various conceptual and methodological challenges. To illustrate, a highly generic constitution may be generic because others have followed its lead, because it has modeled others, or simply by coincidence. That said, if two constitutions are becoming increasingly *dis*similar, by definition, one cannot be following the other. That is, neither is exerting *influence* on the other (at least not in a positive way).

This is the phenomenon we observed in comparing the U.S. Constitution to the rest of the world; based on the rights index, the U.S. has become less similar to the world since 1946 and, with a current index of 0.30, is less similar now than at any point during the studied period. This phenomenon has occurred even among current American allies; among countries in regions with close cultural and historic ties to the U.S. (namely, Latin America and Western Europe); and among democracies. Only among common law countries is constitutional similarity higher than it was after World War II, but even that similarity has decreased since the 1960s.

Rights provisions are not the only constitutional elements that have lost favor with the rest of the world; structural provisions pioneered by American constitutionalism—such as federalism, presidentialism, and judicial review—have also been losing their global appeal.

- For instance, in the early 20th century, 22 percent of constitutions provided for federalistic systems, while today, just 12 percent do.
- A similar trend has occurred for presidentialism, another American innovation. Since the end of World

11. David Law and I took up the question of how the world's constitutions have developed and converged more fully in another article published last year in the *California Law Review. See* David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal. L. Rev. (2011).

War II, the percentage of countries employing purely presidential systems has declined, mainly in favor of mixed systems, which were a favorite of former Soviet bloc countries.

- Finally, though judicial review is not mentioned in the U.S. Constitution, it has proved the most popular American structural innovation. But though the popularity of judicial review in general has exploded over the past six decades, most countries have opted for the European style of review (which designates a single, constitutional court which alone has the power to nullify laws inconsistent with the constitution) over the American model (in which all courts are empowered to strike unconstitutional laws). In 1946, over 80 percent of countries exercised American-style constitutional review; today, fewer than half do.

Reasons for the Decline

It appears that several factors are driving the U.S. Constitution's increasing atypicality. First, while in 2006 the average national constitutions contained 34 rights (of the 60 we identify), the U.S. Constitution contains relatively few—just 21—and the rights it does contain are often themselves atypical.

Just one-third of constitutions provide for church and state separation, as does the U.S. Establishment Clause, and only 2 percent of constitutions (including, e.g., Mexico and Guatemala) contain a "right to bear arms." Conversely, the U.S. Constitution omits some of the most globally popular rights, such as women's rights, the right to social security, the right to food, and the right to health care.

These peculiarities, together with the fact that the U.S. Constitution is both old and particularly hard to amend, have led some to characterize the Constitution as simply antiquated or obsolete.

Thus, one reason why the Constitution is increasingly atypical may be that modern drafters in other countries prefer to look to modern legal innovations in crafting their own governing documents, and though American *law* may offer some such innovations, the U.S. Constitution cannot. In fact, foreign drafters may be attracted to provisions recognized in comparably modern U.S. statutory law, or even U.S. constitutional law—but not in the Constitution itself. Examples include the statutory innovations in the Civil Rights Act of 1964 and the Social Security Act, as well as the constitutional doctrines of substantive due process and judicial review.

Concluding Views

In this concluding part, I add some normative views on the findings from our article. In doing so, then, I speak only for myself, not necessarily for my co-author. I first clarify a normative position that the article does *not* take: that is, whether the U.S. Constitution's decreasing influence, or its increasing outlier status, are undesirable *per se*.

There are certainly some critics who believe that the Constitution has become dysfunctional and that a substantial overhaul is long overdue. I have not taken this view. I believe there is a certain value to constitutional longevity: A constitution can become part of a nation's tradition and popular imagination, promoting citizenship and political stability. Indeed, the U.S. has a unique tradition of respect for its venerable Constitution, so much so that it has even been described as a civic religion. Many of the American Constitution's fundamental principles appear to have worked well in this country.

As I describe above, our article conceptualizes a "generic constitution"—that is, one that contains the 25 most popular global constitution rights elements—but we do not suggest that a "generic" constitution is an "ideal" constitution or that it otherwise should serve as a model for the United States or other countries. To the contrary, I tend to resist the notion that constitutional design based on a standardized template is generally desirable. Rather, I adhere to the view that constitutions should be written with popular input and tailored to the needs, traditions, values, and interests of the society they govern. There is no "one-size-fits-all" constitution.

Indeed, history and the literature have documented the adverse effects of foreign values being inserted into a citizenry that is unprepared to accept them. As an example, most former British colonies in Africa and the Caribbean received the exact same bill of rights upon independence, rights which were taken from the European Convention on Human Rights. In most cases, these bills of rights, oblivious to the deep ethnic tensions and persistent poverty, became a grand failure.

Of course, that does not mean that the experience of other nations cannot reveal best practices. Countries can learn from each other and improve their constitutional documents. But when importing best practices from elsewhere, foreign norms should be considered in light of the experiences and history of the nation adopting them. The wholesale cutting and pasting of an entire bill of rights is rarely a good thing.

Is there anything the United States could learn from nations abroad? I believe that under some circumstances,

the answer is yes. As we have noted, the U.S. Constitution has demonstrated a historic hostility to the very idea of positive socioeconomic rights. The constitutional text contains no such rights, and given the Constitution's libertarian tradition, courts have been unwilling to read positive rights into the document.

But I believe, as many American and foreign commentators do, that positive rights are not incompatible with a strong tradition of negative rights. Instead, positive rights can complement and facilitate the exercise of civil and political rights. For instance, a person without access to basic physical needs like food and shelter may be less able to exercise her right to vote, to travel, or to engage in free expression.

And contrary to some assumptions, a constitutional right does not equate to entitlement to government handouts; as with the right to assistance of counsel in the United States, many basic positive constitutional rights are provided only as a safety net. Meaningful basic guarantees of health care, education, and physical nourishment can enable the citizenry, promoting opportunities for travel, for freer exchanges of enlightened ideas, and for fuller enjoyment of life.

In sum, I do not believe the declining influence of the United States Constitution should be a *per se* cause for lament. Instead, I view this article's findings as an opportunity to discuss and critically examine the continuing usefulness of American constitutional norms. In doing so, we should not envy or adopt constitutional elements simply because they are popular. Rather, we should value the norms that have served this country well while not closing our minds to emerging principles that have proved effective in so many other constitutional systems throughout the world.

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Declining Influence or Difficulty in Measuring?

JEREMY RABKIN: Professor Mila Versteeg has assembled a lot of data suggesting that the U.S. Constitution seems to have had declining influence on constitution-writing in other countries over the past 60 years.

As a former political scientist, I was impressed by the ambition of the data collection on which the project rests—but also somewhat reinforced in my longtime skepticism about the reliability of conclusions to be drawn from such data. As a defender of the U.S. Constitution, I was reassured by the very cautious, qualified conclusions Professor Versteeg, herself, draws from this data.

As a participant in this conference, I can say—very sincerely—that I think her article does raise valuable questions. I want to extend the range of questions she poses in that article.

Limits of the Data

The data set draws on constitutions from "every country in the world over the past six decades." Since most of these countries have had a number of different constitutions, the total comes to 729 different constitutions. The first and most obvious question is whether there is any sense in comparing texts that have vastly different significance, since they correspond to such different forms of government.

The overwhelming majority of "constitutions" in the data sets must be associated with non-democratic regimes that had (or still have) little regard for the rule of law. The fact that someone has labeled these texts a "constitution" does not mean they were intended to function in any way like a legal constraint on government, as we assume our own constitution does. Most of these texts might be more relevant to a study with a title like "Rhetorical Trends Among Tyrannies."

Grouping them all in the same study seems somewhat akin to studying "military practice" by comparing official training manuals of the U.S. Army, the British army, the Army of God (Hezbollah) in Lebanon, and the Swiss Guards at the Vatican along with a sampling of manuals from very small countries (Luxembourg, Iceland, Norway, etc.) or very poor countries (Paraguay, Burundi, Nepal) that essentially rely on large allies to defend them. Even if you compiled data on all the "armies" of the world, the majority would be very different institutions than the fighting forces of a large, modern state. I don't think we would be very concerned if the data from such a sample suggested that the U.S. Army was somehow an outlier whose examples were not widely followed.

The Law–Versteeg article in the *New York University Law Review*[12] does, to be sure, offer further breakdowns by region and even by alliance status (which is a way of separating democracies from others), but these more focused comparisons seem deficient to sustain very meaningful conclusions. Essentially, the data tell us what formal

12. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L. Rev. 762 (2012).

provisions (or how many) appear in formal constitutional texts. They don't tell us what these provisions actually mean in practice. That's a problem, even when trying to investigate actual constitutional regimes.

So, for example, the Law–Versteeg article notes that, unlike most other modern constitutions, the U.S. Constitution does not include a guarantee against "sex discrimination." True enough, but it has a guarantee against denial of "equal protection of the laws" which the Supreme Court, since the 1970s, has interpreted as prohibiting many kinds of sex discrimination.

In countries which do have an explicit provision on sex discrimination, do courts—or governments—read it to require complete integration of women in the military or in university athletics or in religious ministries? In practice, those settings where our courts shrink from demanding complete disregard for sex differences may be the same ones that courts in other democratic countries find to be outside the scope of their more explicit (but still very general and vague) constitutional provisions on sex discrimination.

The same effect may arise where other countries lack constitutional prohibitions that we do have in our Constitution—as with our prohibition on "establishment of religion." Does it make much difference that Canada lacks this prohibition when it still has guarantees (in its 1982 constitution) of religious liberty? The point, again, is that the wording of a particular constitutional provision may say very little about the scope of effective legal protections.

Even when we are comparing American provisions with those in other democratic and rule-of-law states, what it means to have a "constitutional" guarantee may differ. In most European countries, what they call the constitution can be changed by legislative enactment, with merely a larger majority than required for ordinary legislation. Some of these countries have very limited provision for judicial review (in the sense of judicial authority to hold legislative enactments invalid). Some have none at all.

Even where there are constitutional courts with power to enforce constitutional guarantees, some are understood as non-justiciable. The fact that most countries have "constitutional" guarantees of economic and social rights does not mean courts can enforce them. They seem in most countries to be understood as hortatory provisions, designed to inspire legislatures. The United States does not spend less on public education or retirement benefits, or perhaps even on public health measures, than countries that have constitutional guarantees for such programs. The practical difference between having or not having formal constitutional provisions addressed to these policies may not be very significant.

To sum up: Inventories of constitutional provisions don't tell us very much about actual constitutional guarantees in practice. You would need to know a great deal about each country's legal system in its larger context to make very serious comparisons. But then, even if you amassed such extensive background understanding, you probably could not summarize the results in neat tables based on simple counts of which protections were or were not "present" in each country in the survey.

This is, of course, a challenge for many sorts of multinational survey data which try to cover a large number of nations, but constitutional protections may be particularly unsuited to this kind of research method.

The Constitution Is Much More Than Rights Guarantees

At a deeper level, I have serious reservations about the framing of the inquiry in the Law–Versteeg article. The article focuses on a list of rights guarantees. That is consistent with the way the international human rights movement thinks about rights protection.

That is not, however, how the American Founders thought about rights protection. After all, the Constitution emerged from the Philadelphia Convention without a separate bill of rights, and *The Federalist* defended this omission on the grounds that accountability to the public in elections for different offices—along with an elaborate system of internal checks built into the structure of the government—made the Constitution as a whole a better protection for rights than any formal list of rights guarantees.

If you view rights in terms of listed guarantees, you may be tempted to think that the more rights that make it on to the list, the more free are the people protected by it. Does that really make sense?

Even if you focus on the classical rights enumerated in 18th century constitutions (what human rights advocates sometimes call "first generation rights"), there are inevitable conflicts among them. If your constitution provides strong protection for contract rights, are you more free or less free than in a system which offers liberal access to bankruptcy protection (or ready escape from "unconscionable contracts")? Are you more free in a system with stronger protections against libel or in a system where free speech is given more priority?

The potential for conflict gets still larger if you treat claims to economic and social benefits as "rights." You

might favor a right to health care and a right to higher education and a right to unemployment insurance, but if you want all these things supplied by government, you will probably have to accept many constraints on market freedoms. You will certainly have to pay more taxes, compromising your right to decide for yourself how to spend your own earnings. The more rights, the more they may conflict, so more of one will likely mean less of another.

Once you recognize the inevitability of trade-offs among rights, you may worry about who decides. In America, we think rights are ultimately secured by making government dependent on the consent of the governed. That is surely the theory of our Declaration of Independence ("to secure these rights, governments are instituted...deriving their just powers from the consent of the governed....").

You might think the capacity to hold government to account is itself an important right. The right to participate in government thus appears (if in attenuated form) in the Universal Declaration of Human Rights and in the Covenant on Civil and Political Rights. Extend that logic a bit and you might conclude that a more decentralized governing structure is more conducive to freedom because it allows for more choices and also allows for more participation in government, hence more accountability or active consent.

If you look at rights protection in these terms, you might think it is quite relevant to consider structural characteristics of different constitutions and not just the length of their lists of rights guarantees, but comparisons here are inescapably complicated. Many large states have some federal arrangements, but the United States is almost unique in the extent to which it leaves states to set their own fiscal policy—which is why our states differ so much on tax levels and levels of service provision.

In contrast to parliamentary systems, our strong separation of powers allows for much more legislative initiative on policy and more intense legislative oversight of the executive because the legislature can't force new elections ahead of schedule or even force executive officials from office, so it is not bound to "support the government." If you add up all the structural features of the American Constitution, you might say we have many more avenues for citizen participation in government—or that we have more checks and balances on a national majority.

All of these complications have relevance to the ultimate question: whether we should worry about falling behind global trends or about exerting less influence as our scheme comes to seem less relevant to modern constitution-makers in other countries. But here I simply want to stress the difficulty of discerning what other nations are actually aiming at from a formal inventory of constitutional structures. It may be that different structures actually serve somewhat parallel functions in practice.

So, for example, if you looked at national constitutions in each European nation, you might conclude that governmental authority in these countries is much more centralized, making it harder for smaller groups to challenge the agreed policies established by parliamentary majorities. But some two dozen nations in Europe now answer to the European Union, which provides different forms of access and different sets of checks on national governments. Something similar might be said of the influence of the European Court of Human Rights on its nearly four dozen participating states.

It might be that the United States has less willingness to submit to international authorities of these kinds because we put more trust in our own constitutional structures, but one might think of these regional overlays in Europe as providing some of the benefits—or some of the effects—of the American constitutional structure, at least when it comes to checking central authority. I do not have firm views about how to measure the results, but I am sure that simply taking an inventory of structural features within national constitutions gives a very misleading picture of how today's Europeans are governed.

Influence Is Hard to Measure

All these complications are merely conceptual. If you want to measure influence you have a still deeper challenge.

When foreigners look at the United States, they don't focus on the short list of provisions in the Bill of Rights. They look at the larger trends in American society—what we still sometimes call "the American way of life." By earlier views, our "constitution" is the whole range of policies and practices that constitute us as Americans, and the parchment text in the National Archives is only a small part of that.

Around the world, a lot of people love or envy what they see as "American." Many fear or despise things they view as American, often just because they are (or can be seen as) "American." Much of the world has a love/hate relationship with America, and that's hardly surprising, given that America is so large and powerful and hard (for others) to control.

So we should expect that leaders in many countries may want to embrace certain American patterns without saying so or without doing so too openly or explicitly. Many leaders may view America as an ultimate model but

not something they can imitate directly or imitate fully right now, and there may be very practical and realistic reasons for such inhibitions, quite apart from the background of ambivalence in public opinion.

Even when people are not ambivalent in their desire to embrace American practices, they may not have the wherewithal to do so, given their own resources. That is true even for constitutional arrangements. You might think it is enviable to have an old, well-established constitution, but that doesn't mean you can just grab it off the shelf and enjoy it in your new democracy. You might think it is enviable to have a broad respect for free debate and tolerance of difference, but that doesn't mean you can wave a wand and supply it to your own population. We can't think of most constitutional practices as techniques or technologies which can be imported into different cultures as easily as cell phones or Internet connections.

Our own constitutional experience is somewhat revealing here. The American Founders were at some pains to deny any resemblance between the federal Constitution and British practice, since Americans were enamored with the idea of establishing a free republic and associated British practice with monarchy and oppression, but many analysts have noted that the American presidency seems to draw a good deal—if covertly—from characteristics of British monarchy in the 18th century. Much of our legislative practice (regarding the internal rules of each chamber) was modeled on parliamentary practice without quite saying so. And American courts continued to draw on the common law, even on common law rulings of English courts in later periods.

It would not be easy to measure the long-term influence of English models in American constitutional practice. It would be foolish to suppose the influence ended in 1776 or that it does not count unless it has been explicitly avowed. We are continually adapting historic English practices to our own setting, which is very different in important ways—but not nearly so different as early American statesmen (and many nationalist-minded scholars) have claimed.

If you take a wider view of "constitutionalism" beyond particular formal structures, let alone lists of rights guarantees, I think it is at least arguable that Europe has, in some ways, been adapting to something we think of (and Europeans may think of) as "the American way of life." In important ways, the liberalization of trade has unsettled cozy relationships between governments and favored industries or firms. Protesters in France and other countries regularly denounce the trends toward more open, competitive markets as "Anglo–Saxon" or "American." Similar complaints are heard in Latin America. To the rest of the world, liberal political economy is "American"—more so than particular details of our constitutional structure.

I agree with Professor Versteeg that we have no reason to rethink our own Constitution simply because it has not kept up with constitutional trends (in the narrow sense of "constitutional") in other countries. We should not sacrifice the advantages we gain from constitutional stability merely to emulate those who don't have the option of relying on an old constitution. We have longstanding, shared traditions of understanding which allow our courts to read a great deal into terse constitutional formulas like "due process of law." Others, without the benefit of such traditions, may need to spell out a longer list of guarantees.

But we should remember that the nations of the world are not competing to see who can best institutionalize the ideals of international human rights conventions. Many countries reject the aims of human rights conventions (or at least their original aims). Fascism looked attractive to many countries—before 1945. Extreme forms of socialism remained attractive until the collapse of the Soviet empire in 1989. We have no reason to believe that history has now ended. The new regimes that have been emerging in the wake of the Arab Spring seem more inspired by Iran or Turkey than by Western liberal models.

When we think about the influence of the American constitutional scheme, we should think in large terms and in the long term. Getting other countries to copy particular provisions in our formal constitutional texts is not the ultimate prize.

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Exporting American Freedoms

RONALD D. ROTUNDA: Justice Ruth Bader Ginsburg appeared on Egyptian television last winter and discussed the art of writing a new Constitution. She said, among other things, that she "would not look to the United States Constitution if I were drafting a constitution in the year 2012." She called the South African Constitution "a really great piece of work."[13]

13. *E.g.*, Ariane de Vogue, *Ginsburg Likes S. Africa as Model for Egypt*, ABC News (Feb. 3, 2012), http://abcnews.go.com/blogs/politics/2012/02/ginsburg-likes-s-africa-as-model-for-egypt/.

Sadly, the Egyptians took her advice and did not follow the U.S. Constitution. Under the constitution they did adopt, an Egyptian court recently sentenced a woman and her seven children to 15 years' imprisonment for the crime of converting from Islam to Christianity.[14]

Some criticized Justice Ginsburg for "dissing" the U.S. Constitution while traveling abroad.[15] Professor Mila Versteeg has offered a scholarly response. She has presented a detailed empirical study showing that many nations drafting new constitutions have included rights and provisions that one does not find in the U.S. Constitution.

First, let us praise Justice Ginsburg for apparently acknowledging that the words a constitution uses mean something and should be important to judges. Justice Ginsburg did not always hold that opinion. She had no trouble writing in 2010 that the First Amendment does not offer its free speech protections to corporations. The First Amendment provides, in part, that Congress shall make "no law" "abridging the freedom of speech, or of the press." Ginsburg looks at those words and thinks that it really says that Congress shall make no law abridging the freedom of speech and press *of human beings*, even though those limiting words do not appear in the text.

Actually, to be more precise, Ginsburg argued—in the opinion she joined in *Citizens United*—that the Framers had "little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of *individual Americans* that they had in mind."[16] So when the First Amendment says that Congress shall make "no law" "abridging the freedom of speech, or of the press," it really means that Congress can abridge the freedom of speech and press of persons who are not individual Americans. The dissenters in *Citizens United* would apparently exclude from the protection of the First Amendment all corporations, unions, and aliens.

Oh, what a tangled web we weave when we look outside the words of the Constitution and instead look inside our personal predilections.[17]

The Difficulty of Measuring America's Impact

Professor Versteeg's empirical study is important, and we owe her a debt for trying to bring some hard numbers to measure soft subjects like "influence." It is difficult to measure, in a jeweler's scale, how much America persuades other countries.

Moreover, as she acknowledges, a major reason that many of the more modern constitutions differ from the American Constitution is that our Constitution does not guarantee many economic rights, such as adequate food and shelter, or a free education. These are often called positive economic rights. Instead, our Constitution, when it grants rights, focuses on denying power to the government—what we often call negative rights. Courts find it a lot easier to enforce negative rights (invalidating a law that abridges freedom of speech) than to enforce positive rights (creating a better environment). That is why, since the beginning of the common law, courts do not order the opera singer to sing.[18]

The American Bill of Rights does not, at first, appear to offer much when compared with the sweeping promises of the typical Communist constitution. A constitution of the now-deceased Soviet Union, for example, guaranteed rights to "work, health protection, [and] education."[19] Our Bill of Rights secures none of that. Yet a half-century after the end of World War II, Communism and its failed promises are in disarray while democracy and capitalism are the wave of the future. As Salman Rushdie, author of *The Satanic Verses*, has noted, the "people's spiritual needs, more than their material needs, have driven the commissars from power."[20]

It is no coincidence that Rushdie values free speech. It was, after all, his speech that many Muslims found

14. Benjamin Weinthal, *Egyptian Court Sentences Christian Family to 15 Years for Converting from Islam*, FoxNews.com (Jan. 15, 2013), http://www.foxnews.com/world/2013/01/16/egyptian-court-sentences-entire-family-to-15-years-for-converting-to/.

15. *E.g.*, Alex Pappas, *Justice Ginsburg Causes Storm Dissing the Constitution While Abroad*, The Daily Caller (Feb. 6, 2012), http://dailycaller.com/2012/02/06/justice-ginsburg-causes-storm-dissing-the-constitution-while-abroad/#ixzz26UHPDRfO.

16. Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 950 (2010) (Stevens, J., concurring in part and dissenting in part, joined by Ginsburg, Breyer, and Sotomayor, JJ.) (emphasis added). During oral argument, Justice Ginsburg repeatedly said that corporations do not have First Amendment rights. *E.g.*, "A corporation, after all, is not endowed by its creator with inalienable rights." Transcript of Oral Argument, at *4, 2009 WL 6325467.

17. *See* Ronald D. Rotunda, *The Intellectual Forebears of Citizens United*, 16 Nexus 113 (2010–2011).

18. *E.g.*, Lumley v. Wagner, 1 DeGex, MacNaghten & Gordon 604 (Chancery 1852).

19. Konstitutsiia SSSR (1977) [USSR Constitution] ch. 7, arts. 39–45, *reprinted in* Basic Documents on the Soviet Legal System (William E. Butler ed. & trans. 1983). *See generally* Ronald D. Rotunda, *Interpreting an Unwritten Constitution,* 12 Harv. J. L. & Pub. Policy 15, 15–16 (1989).

20. Salman Rushdie, Is Nothing Sacred: The Herbert Read Memorial Lecture (Feb. 6, 1990) at 8–9 (1990).

insulting. In early 1989, when his *Satanic Verses* hit the bookstores, the then-spiritual head of Iran announced to the world that Rushdie must die because his book was, in his eyes, offensive to Muslims. For many years after that, Rushdie lived in hiding while several people who translated his book from English to other languages were killed. While British subjects like Cat Stevens (now called Yusuf Islam) publicly announced that Rushdie "must be killed," Great Britain protected him. Margaret Thatcher defended his free speech, did not craven to the mullahs who wanted Rushdie dead, and did not lecture the British people on their responsibility to avoid offending Muslims.[21]

Our Bill of Rights guarantees no food for the body or other material things. Instead, it offers food for the mind by protecting the freedom of conscience. It protects freedom of speech and the right to vote so that people can use those rights to affect the legislative process, to enact laws that provide for such things as public education, Social Security, and welfare.

Protecting Free Speech: Patterns of Inconsistency

The South African constitution, which Justice Ginsburg praised, does copy many of our most important rights, such as freedom of speech, but it also weakens those rights that it declares. For example, § 16(1) proclaims freedom of expression, but § 16(2)(c) provides that this right explicitly "does not extend" to any "advocacy of hatred that is based on…religion, and that constitutes incitement to cause harm."[22]

Recently, some South African gold miners protested, and when the strike turned violent, the police killed 34 miners. The response of the prosecutors was to arrest 270 miners and charge them with the murder because they provoked the police to open fire. A statute specifically authorized such prosecutions.[23] Prosecute and blame the victims, not the police who did the shooting! A constitution that permits such a law is not one that we should emulate, no matter what Justice Ginsburg says.

Salman Rushdie would not find protection under the South African constitution. Nor would those people who created *Innocence of Muslims*, a short film that makes fun of the Prophet Muhammad. A Pakistani cabinet minister has now offered a £61,600 bounty to whoever murders the American maker of this film.[24] The U.S. Constitution protects this speech[25] because it does not *falsely* shout "fire" in a crowded theater intending to create a riot. The White House initially blamed this YouTube video for the riots and death in Libya, Egypt, and elsewhere but now concedes that organized terrorists were behind the carefully planned attacks.

Innocence of Muslims does not fit our constitutional test for "incitement." An "incitement" only covers situations like lynch mobs, where the speaker both objectively and subjectively advocates violence in the context where the violence is imminent, immediate, and instinctive. Our First Amendment would protect Marc Antony's funeral oration in Shakespeare's *Julius Caesar* because Antony did not use words that directly advocated violence, although we may assume he subjectively intended the revolt (which he subsequently led) and that the crowd was in the mood to act on his subjective intent.[26]

Those who wrote, produced, and distributed the Broadway musical *The Book of Mormon* know that the First Amendment protects satire, just as it protects *The Satanic Verses*. Blasphemy cannot be a crime in America.[27] When a New York museum displayed the image of the Virgin Mary in elephant dung and photographs of female genitalia, then-Senator Hillary Clinton defended the free speech right of the museum to display what it considered "art." Now Secretary of State Clinton, instead of defending the First Amendment, condemns *Innocence of Muslims* as "reprehensible and disgusting."[28]

21. Michael C. Moynihan, *Life in the Fatwa's Shadow*, Wall St. J., Sept. 18, 2012, at A15.

22. *See* S. Afr. Const., 1996, *available at* http://www.info.gov.za/documents/constitution/1996/96cons2.htm#16.

23. *E.g.*, David Batty, *South African Miners Charged with Murder of Colleagues Shot by Police*, The Guardian, Aug. 30, 2012, *available at* http://www.guardian.co.uk/world/2012/aug/30/south-african-miners-charged-murder. Later, public pressure forced the prosecutor to drop the charges. *Marikana Mine Strike: South Africa Court Frees Miners*, BBC News Africa (Sept. 3, 2012), http://www.bbc.co.uk/news/world-africa-19466825.

24. *E.g.*, Tom Hussain, *Pakistani Government Minister Offers Bounty for Killing Innocence of Muslims Makers*, Telegraph, Sept. 22, 2012, *available at* http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9559842/Pakistani-government-minister-offers-bounty-for-killing-Innocence-of-Muslims-makers.html.

25. *See* 5 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance & Procedure §§ 20.15(d), 20.15(e), 20.15(f) (4th ed. 2008).

26. *Id.* at § 20.15(3) & n.34.

27. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), held that New York could not ban a motion picture because it was blasphemous. In that case, Edward T. McCaffrey, the Commissioner of Licenses for New York City, "declared the film 'officially and personally blasphemous' and ordered it withdrawn at the risk of suspension of the license to operate the Paris Theatre." 343 U.S. at 512–513; *see* 5 Rotunda & Nowak, *supra* note 13 at § 20.29.

Fortunately, many other countries, such as France and Denmark, have defended those who exercise their rights to criticize or make fun of other religions, whether they are Mormon, Christian, Jew, or Muslim. Meanwhile, in many Muslim countries, the local press routinely makes fun of Christians, Jews, and other religions. Rioters in some Muslim countries protest *Innocence of Muslims* while expressing no concern for Bashar al-Assad's butchering of Muslims in Syria.[29]

Other countries, in drafting the language of their constitutions, may not follow our lead, but the loss is theirs, not ours. We have shown that we can create a nation that not only survives, but also thrives and guarantees speech that others find offensive, hateful, insulting, or blasphemous.

Considering Foreign Law

Consider the South African constitution. The title of Article 37 is "States of Emergency." This one article, *dedicated to suspending rights* under various circumstances, is 970 words long. This one article is more than 20 percent of the length of the entire U.S. Constitution of 1787. Article 37 has a table of "non-derogable rights." Free speech is not one of those. Which constitution would you prefer to live under if the country were at war and you opposed the war?

Let us turn to Section 39(c) of the South African constitution. Section 39(c) authorizes South African courts to "consider foreign law" when interpreting that document. If the justices chose to consider, for example, the law of Saudi Arabia, they would find a nation where the law forbids women from driving, where free speech does not exist, where forming a political party is illegal, and where young women are forced to die in a burning building because, while trying to escape, their abayas and veils did not fully cover them.[30]

Fortunately, when the South African courts turn to foreign constitutions, they often turn to ours. Pardon my shameless self-promotion, but it is not difficult to find the South African Constitutional Court and other South African courts citing my constitutional treatise when protecting their citizens' rights.[31]

It is difficult to measure the influence of foreign constitutions on American law. Justice Stephen Breyer has told us that when the U.S. Supreme Court cites foreign law, that foreign law does not really influence the Court, which cites it merely to give foreign courts "a little boost sometimes with their legislators."[32] So Supreme Court Justices cite foreign law not because they find it persuasive, but for the same reason that professors cite their friends' law review articles: to make them feel loved. (Of course, if he

28. She is hardly alone in her inconsistency. The New York Times defended *The Virgin Mary* and *Piss Christ* while joining in the attack on *Innocence of Muslims*. *Compare* N.Y. Times, Editorial, Oct. 2, 1999 (the "museum is obliged to challenge the public" by displaying the provocative art), *available at* http://www.nytimes.com/1999/10/02/opinion/the-battle-of-brooklyn.html?pagewanted=all&src=pm, *with* N.Y. Times, Editorial, Sept. 12, 2012 (now the *Times* tells us that the "core principle" of the United States is apparently no longer the First Amendment but "respecting all faiths"), *available at* http://www.nytimes.com/2012/09/13/opinion/murder-in-benghazi.html?_r=2&partner=rssnyt&emc=rss.

29. Here is a thought experiment. First, consider the Syrian Constitution. Article 22 of the Syrian Constitution of 2012 requires the state to "protect the health of citizens and provide them with the means of prevention, treatment and medication" and "guarantees" that apply to "every citizen and his family in cases of emergency, sickness, disability, orphan-hood and old age…." *See* Constitution of Syria, *available at* http://www.voltairenet.org/Constitution-of-the-Syrian-Arab. No protection against missiles or tanks, though. Article 23 of the Syrian Constitution offers special protections for women. It announces that "[t]he state shall provide women with all opportunities enabling them to effectively and fully contribute to the political, economic, social and cultural life, and the state shall work on removing the restrictions that prevent their development and participation in building society." *Id*. If you are a woman, would you rather live in Syria or the United States, which has no Article 23 and no constitutional right to medication, protection in old-age, etc.?

30. R. James Woolsey, *Black Gold and Black Veils*, Wall St. J., Sept. 19, 2012, at A13.

31. *E.g.*, Baloro v. Univ. of Bophuthatswana, 1995 SACLR LEXIS 233 *53–57 (Supreme Court, Bophuthatswana Provincial Division, 1995) (citing Rotunda & Nowak, *supra* note 13); President of RSA v. SARFU, 1999 SACLR LEXIS 21, *282 n.188 (Constitutional Court 1999) (citing Rotunda & Nowak, *supra* note 13); Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1998 SACLR LEXIS 36 *152 n.149 (Constitutional Court 1998) (citing Rotunda & Nowak, *supra* note 13); S v. Solberg, 1997 SACLR LEXIS 30 *150, n.136 (Constitutional Court 1997) (citing Rotunda & Nowak, *supra* note 13); Prinsloo v. Van der Linde, 1997 SACLR LEXIS 92, *36 n.23 (Constitutional Court 1997) (citing Rotunda & Nowak, *supra* note 13); Mwellie v. Ministry of Works, Transp. & Commc'n, 1995 SACLR LEXIS 277 *30 (High Court, Namibia 1995) (citing Rotunda & Nowak, *supra* note 13); S v. Majavu, 1994 SACLR LEXIS 236 *86 (Supreme Court, Ciskei General Division 1994) (citing Rotunda & Nowak, *supra* note 13); Matinkinca v. Council of State, Ciskei, 1994 SACLR LEXIS 268 *53 (Supreme Court, Ciskei General Division 1994) (citing Rotunda & Nowak, *supra* note 13).

32. As Justice Breyer said to the ABA, "in some of these countries, they're just trying to create these independent judicial systems to protect human rights and contracts and all these other things. And if we cite them sometimes, not as binding, I promise, not as binding, well, that gives them a little boost sometimes with their legislators, I might say. As I say, the Supreme Court of the United States, which you've heard of as citing us and we cite them sometimes, doesn't bind, but nonetheless it sort of gives them a little leg-up for rule of law and freedom, I say." Stephen Breyer, Associate Supreme Court Justice, Is the Independence of the Judiciary at Risk? Remarks at the American Bar Association Annual Meeting (Aug. 9, 2005); *see* Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 10.2-2.11(h) (2012–2013 ed.) (quoting and discussing the speech).

meant what he said, he effectively nullified any benefit foreign nations should take from what he and his colleagues do.)

Just as it is difficult to measure the influence of foreign law on the U.S. Constitution, it is difficult to measure objectively the influence of the American Bill of Rights on foreign law. It is much easier to count our exports of wheat or computers than it is to quantify our export of freedom.

However, we do have soft measures of influence. For example, recently, the Romanian Constitutional Court invalidated the effort to impeach its president. It responded to pressure from the United States and the European Union, both of which considered the impeachment a violation of the rule of law.[33] Ukraine, as well, understands that it must begin to protect human rights if it wants to be a part of the modern Western Europe.[34] The Afghanistan courts are now relying on forensic evidence, instead of confessions exacted under duress, because of American pressure to protect human rights.[35]

Conclusion

About 2,800 years ago, the Prophet Elijah sought to escape the wrath of Jezebel, who had just ordered the execution of 400 other Israelite prophets. Jezebel worshipped the god Ba'al, whose immanence was in the physical world. His supporters saw him in the fierce wind, earthquake, or fire, but the Lord was in none of these. Instead, Elijah finds God in a still small voice, the sound of the thinnest stillness.[36] If we try to find the influence of American freedom, we will find it there, not in wind, earthquake, or fire.

I leave you with a photograph, a bit of happy news in a world teaming with war, terrorism, and hate. I suspect that few people have ever thought that they would read in one sentence the words Shakespeare and Kabul. Well, here it is: Shakespeare is in Kabul. Since 2005, Afghan actors have performed *Love's Labor's Lost* in a Farsi dialect. The condensed play includes the bawdier bits. In 2001, every woman was wearing a burqa. Now women are performing publicly with men—who in some scenes were only wearing sarongs.

One robin does not a spring make, but it is still a harbinger of what may come to pass.

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33. *See* Gordon Fairclough, *Romanian Court Quells Bid to Oust President*, Wall St. J., Aug. 22, 2012, at A7; *see also* Ronald D. Rotunda, *Nici o constitutie...*, 18 Lumea Azi 4 (May 2, 1991) (published in Romanian); Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. Ill. L. Rev. 1065 (1991).

34. Viktor Yushchenko, *Ukraine's Democracy Hasn't Come of Age*, Wall St. J., Aug. 23, 2012. Yushchenko was president of Ukraine from 2005 to 2010.

35. Nathan Hodge, *Kabul Court Discovers Forensics*, Wall St. J., Aug. 17, 2012, at A12.

36. 1 *Kings* 19:8–13.