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Our Exceptional Constitution

Posted By [Timothy Zick](#) On October 10, 2011 @ 10:09 am In [Civil Rights, Constitutional Law, First Amendment, International & Comparative Law](#) | [14 Comments](#)

Scholars have long debated the extent to which the U.S. Constitution has influenced constitution-making and constitutional interpretation abroad. David Law (Washington University) and Mila Versteeg (Virginia) have recently posted [an interesting empirical study](#) [1] of the extraterritorial influence of the U.S. Constitution, entitled "The Declining Influence of the United States Constitution." I recommend it to anyone interested in comparative constitutionalism and formal constitutional modeling.

As the title suggests, the authors conclude that in recent decades (particularly since the 1990s), other nations have become increasingly unlikely to model their rights-related (or structural) constitutional provisions on the U.S. Constitution. Their study, which is based on 60 years of data, offers a systematic analysis of the declining influence of U.S. constitutionalism abroad. With regard to rights in particular, the authors conclude that the U.S. Constitution is increasingly far from the global mainstream, both in the sense that it contains provisions not found in most constitutions (i.e., a right to bear arms, a formal separation of church and state) and in the sense that its Bill of Rights does not contain what the authors refer to as a developing "generic component" of constitutional rights (the existence of which casts some doubt on the notion that constitutions are strongly expressive instruments). Lack of formal modeling is only one datum concerning the declining influence of the Bill of Rights. Many commentators have argued that the Supreme Court's reluctance to cite or rely upon foreign legal and constitutional sources may be diminishing the global influence and appeal of American constitutional jurisprudence and norms.

Insofar as countries still look to the U.S. as an example, Law and Versteeg conclude that it is likely not to imitate but rather to avoid the Constitution's perceived flaws. Although there is no emergent global model, the authors conclude that at least with respect to nations sharing an Anglo-American legal tradition, Canada's constitution has become far more influential than the U.S. Constitution. The causes for the decline of U.S. constitutionalism are varied. The authors point to several possible factors, including the rise of a superior model, a "general decline of American hegemony," "judicial parochialism," the "obsolescence" of the U.S. Constitution, and America's exceptionalist creed.

Like the rest of the Bill of Rights, the First Amendment is exceptional. Nations are not inclined to copy its absolutist language. As in other rights areas, many have opted instead for speech and press language similar to that found in transnational human rights instruments. For some time now, foreign courts have been unlikely to follow American approaches with regard to hate speech, libel, and other First Amendment concerns. The global marketplace has reached rather clear conclusions on these issues.

With regard to both formal modeling and application, the First Amendment is likely to remain exceptional among the world's expressive (and religious) liberty paradigms. As I mentioned in previous posts, this has implications for "exporting" First Amendment norms and principles. In essence, Law and Versteeg's study provides support for the proposition that the market for exporting formal First Amendment norms has drastically diminished. The principal export markets still open include diplomatic channels and the global market for communications technologies. As the U.S. becomes ever more exceptional in terms of free speech and press freedoms, it might begin to exhibit greater protectionism in an effort to preserve its exceptional approach. Or it might find there are benefits to transnational engagement and dialogue, even where cultural and constitutional expressive norms seem hard-wired and unalterable. Whichever approach the U.S. adopts, in light of the emerging consensus on rights it will at least have to pay "decent respect to the opinions of mankind."

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[1] an interesting empirical study: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923556

[2] : http://en.wikipedia.org/wiki/Constitution_of_Japan

[3] : <http://www.amazon.com/Constitution-Japan-Contextual-Analysis-Constitutional/dp/1841137928/>

[4] : <http://www.amazon.com/Imperial-Myth-Democracy-Constitutions-1889-2002/dp/0870816748/>

[5] : <http://ssrn.com/abstract=1940649>

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