

RESPONSE

METHOD IN COMPARATIVE CONSTITUTIONAL LAW: A COMMENT ON LAW AND VERSTEEG

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In response to David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

INTRODUCTION

Of the many questions raised by David Law and Mila Versteeg's important article,¹ I want to focus on two. First, as a methodological matter, do they measure constitutional convergence and divergence in the right way? Second, what is the relationship between quantitative, large-n work of the genre represented by Law and Versteeg's article and small-n, qualitative work that has hitherto been the favored methodological approach in comparative constitutional law and politics?

I

MEASURING CONVERGENCE AND DIVERGENCE

Law and Versteeg measure constitutional convergence by treating each dimension of a constitution as a binary variable.² For bills of rights, they aggregate the number of rights-protecting provisions to sixty, and make a series of pairwise comparisons between each bill of rights and, inter alia, (a) a hypothetical, generic bill of rights,³ and (b) the U.S. Constitution.⁴ With respect to rights-protecting provisions, they score the degree of convergence of each

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¹ David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

² *Id.* at 771–72.

³ *See id.* at 776–79 (describing a “generic” bill of rights).

⁴ *See id.* at 781–84 (describing declining similarity between the U.S. Constitution and the constitutions of other nations).

constitutional text (using Pearson's phi), and for each year, calculate the mean convergence for the entire universe of constitutions.⁵ This allows them to track changes in the degree of convergence over time, and is the basis for their central claim that there is a growing divergence between the U.S. constitutional model and other constitutions. Other dimensions of constitutional design (i.e., judicial review, presidentialism, and federalism) are treated as separate variables, and the degree of convergence with the United States is measured through prevalence.⁶

This research strategy is built around two assumptions. First, Law and Versteeg weight each constitutional system equally in the calculations of the mean convergence of rights-protecting provisions and of prevalence.⁷ Second, they treat all divergences equally, irrespective of the direction in which they occur—i.e., supplementation or subtraction.⁸ Upon closer reflection, both assumptions are open to question.

Consider the first assumption: the equal weight accorded to constitutional systems. An obvious alternative would be to attach population weights to each system, such that larger constitutional systems would count for more in calculations of convergence and prevalence. What would Law and Versteeg's results look like if we made this adjustment? Consider federalism. Law and Versteeg's dataset generates the result that the number of federal systems rose in the post-World War II period, only to then decline to pre-existing levels—yet another point of constitutional divergence between the United States and the rest of the world. This cuts against the dominant view held by scholars of comparative federalism that federal forms of governance are on the rise.⁹

The difference between these two views can be explained by how states are counted. If we weight each state equally, as Law and Versteeg do, their conclusion is correct. In 1946, the percentage of countries with federal constitutions stood at 10.5%. The percentage rose to 14.9% in 1950, peaked at 17.1% in 1953, and then declined to 11.5% in 1994 (the last year for which the Polity III dataset codes for federal state status).¹⁰ But if we weight states by their populations—as scholars of comparative federalism would be inclined to do—a

⁵ See *id.* at 772 (describing the calculation).

⁶ See *id.* at 785–96 (describing the declining popularity of the structural provisions of the U.S. Constitution).

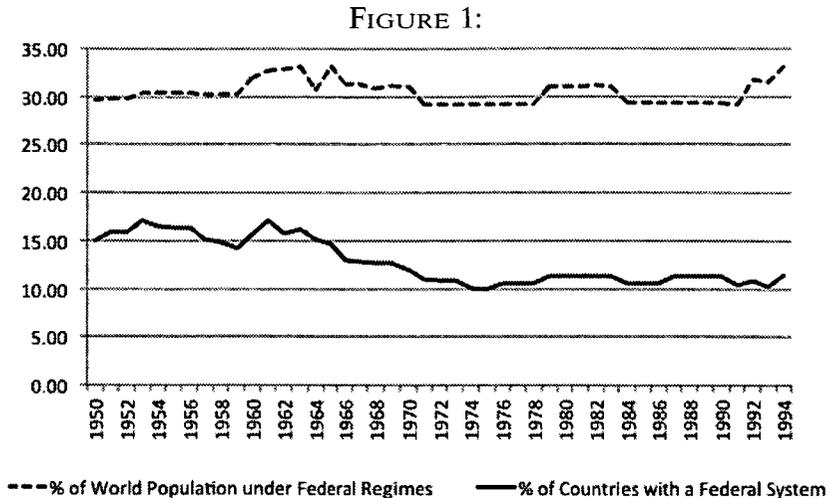
⁷ *Id.* at 772.

⁸ See *id.* (describing the Pearson's phi similarity scale).

⁹ See, e.g., RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 2–4 (3d ed. 2008) (arguing that there has been a recent “revival of interest” in federalism).

¹⁰ See Law & Versteeg, *supra* note 1, at 786 n.55 (describing the Polity III dataset and the authors' use of it).

different picture emerges. Beginning in 1950 (the first year for which we have complete and reliable global population data), the percentage of persons in self-governing states under federal rule was 29.7%, rose to 33.1% in 1963, declined to a low of 29.1% in 1974, and then rose again to 33.2% in 1994.¹¹ The graph below compares the two sets of results.



The gap between the two measures becomes even more pronounced if we push the data out to 2010.¹² Since 1994, the percentage of those living under federal rule has increased to an all-time high of 38.9% in 2010,¹³ whilst the percentage of countries with federal constitutions has marginally increased to 12.7%.¹⁴ These results reflect the

¹¹ Following Law and Versteeg, our data on the number of countries with federal constitutions is derived from the Polity III dataset. *See id.*

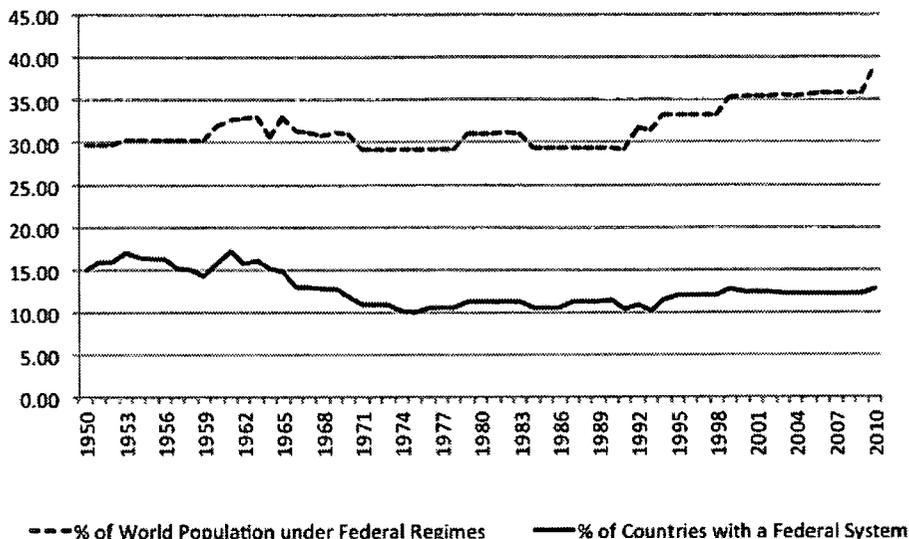
¹² For the purposes of classifying countries as either federal or unitary from 1995–2010, we use the Polity III dataset criteria. In following these criteria, the three countries that have turned to federalism since the 1994 Polity III dataset are Bosnia (in 1995), Nigeria (in 1999), and Pakistan (in 2010).

¹³ We note that the Polity III dataset has employed somewhat questionable coding with respect to certain countries that have been classified as “intermediate,” meaning that they fall somewhere in between “unitary” states, where “regional units have little or no independent decision-making authority,” and “federal” states, where “most/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). However, these states are widely considered to be federal. For the purposes of comparison, we have not altered the classifications. If, however, these countries (Argentina, Austria, and Spain) were to be included as federal for the purposes of further comparison, the percentage of those living under federal rule in 2010 would rise to 40.3%.

¹⁴ The Polity III dataset does not include the entirety of world countries within the scope of its analysis. In 1994, the final year for which data is provided, the dataset lists 157

fact that the most populous states in the world have chosen the federal form of government and the number of persons living under federal constitutions is on the rise.

FIGURE 2:



What drives the choice between these two ways of counting constitutional systems depends on what kind of inquiry is being undertaken. If the goal of this inquiry is to aggregate discrete choices made in national constitution-drafting processes to make a generalization about the content of constitutional choices, then one moment of constitutional choice matters as much as another and should count equally. On the other hand, if the objective is to assess the prevalence of a constitutional model, then counting each system equally yields some counter-intuitive results. It suggests that how many people live

countries. In the same year, however, there were 184 Member States of the United Nations (Switzerland, which is included in the Polity III dataset, joined the U.N. in 2002, and so would be counted in addition to the 184 Member States). The twenty-eight Member States that are not included as of 1994 are Andorra, Antigua and Barbuda, Bahamas, Barbados, Belize, Brunei Darussalam, Cape Verde, Djibouti, Dominica, Equatorial Guinea, Eritrea, Liechtenstein, Maldives, Malta, Marshall Islands, Micronesia, Monaco, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Seychelles, Solomon Islands, Suriname, and Vanuatu. Press Release, United Nations, United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006), available at <http://www.un.org/News/Press/docs/2006/org1469.doc.htm>. The failure to include all the states creates a downward shift when calculating the percentage of world's nations that employ federalism. Whereas with 157 countries the percentage of countries with federal constitutions stood at 11.5% in 1994, dividing the number of federal states by 185 countries yields only 9.73% of the world's nations following a federal system.

under a form of government is irrelevant to quantifying the degree of diffusion of that model, and hence, to measures of convergence or divergence. But when people talk about the success of a constitutional model, surely the number of people governed by it is one dimension of success. For example, the literature on democratization employs both metrics of prevalence—i.e., how many states are democratic, and what proportion of the global population lives under democratic rule—to assess claims about the spread of democratic governance.¹⁵ This could be a useful addition to Law and Versteeg's analysis. To put the point another way, population is a proxy for the significance of a constitutional choice. Factoring it into their analysis would add texture.

Now let us turn to the second assumption. The most interesting analytic device in Law and Versteeg's article is the generic bill of rights, which they stipulate as a convergent point of contemporary constitutional practice.¹⁶ Over time, they assess the mean degree of convergence toward the generic bill of rights, and find that it is on the rise. But one can imagine two very different ways in which a bill of rights can diverge from the generic bill of rights. On the one hand, a bill of rights may protect all of the rights in the generic bill of rights and augment or supplement it with additional rights. On the other hand, it may be under inclusive, and fall far short of the generic bill of rights.

These are radically different cases of divergence. One is a case where a bill of rights matches and surpasses the generic bill of rights, whereas the other is a case where a bill of rights is radically deficient. The problem is that Law and Versteeg's metric conflates both cases because it treats all divergences of equal magnitude as equivalent, regardless of the direction in which they occur. This has two consequences. First, it makes unlikes look alike. A bill of rights that diverges as a result of supplementation stands in a fundamentally different relation to the generic bill of rights than one that diverges as a consequence of deficiency, but the two may nonetheless have the same score. Second, it may overstate the mean divergence, because divergences as a result of supplementation count against convergence on the generic bill of rights, when in fact those documents match and

¹⁵ See, e.g., ARCH PUDDINGTON, FREEDOM HOUSE, FREEDOM IN THE WORLD 2012: THE ARAB UPRISINGS AND THEIR GLOBAL REPERCUSSIONS—SELECTED DATA FROM FREEDOM HOUSE'S ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 3–4, 24–25 (2012), available at http://www.freedomhouse.org/sites/default/files/FIW%202012%20Booklet_0.pdf (presenting the data of freedom in the world in terms of both percentage of countries and percentage of population).

¹⁶ See Law & Versteeg, *supra* note 1, at 776–79 (describing the generic bill of rights).

exceed the generic bill of rights document. In short, there may be greater convergence than Law and Versteeg report.

A different approach would be to treat supplementation and deficiency differently. Deficiency would be treated as Law and Versteeg suggest. But bills of rights that meet and surpass the generic bill of rights would be coded as fully congruent. Supplementation would not count against congruence. This proposed shift ties into a deeper point about how to conceptualize the role of a generic bill of rights in the contemporary practice of constitutionalism. Counting divergences arising from supplementation or deficiency equally in effect treats the generic bill of rights as a *complete* model that bills of rights depart from, regardless of whether they entrench fewer *or* more rights. By contrast, it would be better to understand the generic bill of rights as representing a core of convergent constitutional practice—a *floor* that represents the minimum content of a bill of rights.

On this approach, supplementation and deficiency are quite different. Deficiency should be captured by measures of divergence. But supplementation should not. Indeed, the idea of the generic bill of rights as a floor, and not a ceiling, is how comparative models function on the ground in real-world processes of constitutional transitions. Foreign advisors never suggest that meeting and then exceeding the standard schedule of rights departs from convergent constitutional practice and should therefore be avoided. On the contrary, they regard bills of rights that supplement the basic package as being fully consistent with comparative best practice. Indeed, a parallel line of reasoning may be a more fruitful way to conceptualize the role that international human rights treaties play in constitution-drafting exercises. Rather than serving as complete models for rights-protection, they set floors that countries meet—but may exceed—without being perceived as departing from international human rights law.

II INTEGRATING QUANTITATIVE AND QUALITATIVE METHODS IN COMPARATIVE CONSTITUTIONAL LAW

Law and Versteeg's article should be read against the backdrop of a significant body of work on the diffusion of constitutional ideas.¹⁷ I coined the phrase "the migration of constitutional ideas" to highlight that the reality of the globalization of constitutional practice has

¹⁷ See, e.g., VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010) (describing examples of transnational convergence in constitutional interpretation).

outstripped the traditional, dated comparative law terminology of borrowing.¹⁸ This literature includes a broad substantive and institutional focus. It examines not only the diffusion of constitutional provisions (Law and Versteeg's focus) during the moments of constitutional adoption or renovation, but also the use of comparative materials in constitutional interpretation. It accordingly examined the role of comparative materials in a variety of institutional settings (for example, constitutional drafting bodies and courts) and their use by a variety of actors, including constitutional drafters, lawyers, litigants, judges, and political actors more generally.¹⁹

The literature makes a number of important contributions to the debate over why and how comparative materials can and should matter to contemporary constitutional practice. This is a hotly contested point, and there are two poles to this debate: nationalism and cosmopolitanism.

To nationalists, the globalization of modern constitutional practice is wrong, because it contradicts the notion that a "constitution of a nation emerges from, embodies, and aspires to sustain or respond to a nation's particular national circumstances."²⁰ To participate in a national constitutional conversation is to engage in a particular and local political practice about *this* place, about who and what *we* are and want to become as a nation. Proponents of this view hold that constitutions should only be framed and interpreted by reference to sources internal to a nation's history and political traditions. Comparative engagement is a curiosity of no practical relevance, or, even worse, a form of legal imperialism.

At the other end of the spectrum are cosmopolitans "who posit that constitutional guarantees are cut from a universal cloth."²¹ An emerging consensus among foreign legal systems is proof of a particular constitutional provision's truth or rightness. They exhort courts to regard themselves as interpreting constitutional texts that protect rights that transcend national boundaries. All constitutional courts are part of an interpretive community engaged in effecting the same set of principles.

This remains a surprisingly polarized debate—especially in the United States, where it has become yet another issue that divides

¹⁸ Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1 (Sujit Choudhry ed., 2006).

¹⁹ *Id.*; see also Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 *YALE J.L. & HUMAN* 1 (forthcoming 2013) (manuscript at 16–17, 19, 25) (on file with the *New York University Law Review*).

²⁰ Choudhry, *supra* note 19 (manuscript at 4).

²¹ *Id.* (manuscript at 6–8).

conservatives and liberals. Conservatives accuse liberals of promoting a project of constitutional convergence that undermines American sovereignty.²² Liberals fuel these fears by viewing comparative engagement as a way of “affirming America’s membership in the community of liberal democracies.”²³ There are transparently obvious politics to this.

The American debate has become deadlocked, futile, and sterile. It also bears little connection with the real world. Over several years, I have closely examined how constitutional drafters, courts, and legal counsel across a variety of constitutional systems engage with comparative materials. I have identified the reasons they give for comparative constitutional argumentation.²⁴ What emerges is what I term the dialogical model of comparative constitutional reasoning. The starting point is that a claim to constitutional distinctiveness is inherently relative: A constitutional text and its interpretation are only unique by comparison with other constitutions and interpretations. Since difference is defined in comparative terms, a keener awareness and a better understanding of difference can be achieved through a process of comparison. If we engage comparatively and ask *why* a foreign constitution has been drafted and interpreted in a certain way, this better enables us to ask ourselves why *we* reason the way *we* do. Comparative materials are interpretive foils, tools for constitutional self-reflection that help to identify what is special or distinctive about a constitutional order.

When engaging in the comparative exercise, constitutional actors may conclude that domestic and foreign assumptions are sufficiently similar to one another to warrant following a foreign model. Constitutional actors follow that model not because they are bound by it, but because they are persuaded by it—in part because it coheres with national constitutional assumptions. Conversely, constitutional actors may conclude that comparative materials emerged from a fundamentally different constitutional order.

²² *Id.* (manuscript at 8).

²³ *Id.* (manuscript at 8–9).

²⁴ See generally Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819 (1999); Sujit Choudhry, *How To Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation*, in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* 45 (S. Khilnani, V. Raghavan & A. Thiruvengadam eds., forthcoming 2012); Choudhry, *supra* note 18; Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 *INT’L J. CONST. L.* 1 (2004); Sujit Choudhry, *Worse than Lochner?*, in *ACCESS TO CARE, ACCESS TO JUSTICE: THE LEGAL DEBATE OVER PRIVATE HEALTH INSURANCE IN CANADA* 75 (Colleen M. Flood, Kent Roach & Lorne Sossin eds., 2005).

This literature is rich and increasingly sophisticated. However, it has suffered from selectivity and reliance on highly anecdotal evidence. Particularly relevant is that it is built around a standard set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and, to a lesser extent, India. These are jurisdictions which operate in English, or for which English translations are available. It ignores much, if not most, of contemporary constitutional practice and therefore serves as a slender basis upon which to base general accounts of the phenomenology of the migration of constitutional ideas.²⁵

One of the great values of Law and Versteeg's article is that it will substantially assist in the identification of a much broader set of cases for study. Because it provides a measure of divergence and convergence with respect to the generic bill of rights across all constitutions in a sixty-year time frame, it provides small-n researchers with a rich source of data from which to select jurisdictions for closer examination through traditional case study methods.

For single country case studies, the dataset identifies potential candidates for further study because of radical change across time (from divergence to convergence or vice versa), because a country is on the vanguard of convergence, or because a country persists in its divergence in the face of growing convergence. For small-n case studies, the dataset permits researchers to isolate sets of cases that persist in divergence but where one remains divergent while others converge. Likewise, it assists researchers in identifying sets of cases where countries have persisted for many years in being differently situated vis-à-vis the generic bill of rights (one divergent, others convergent) and the change of the outlier country to a stance of convergence. Of course, the identification of case studies is merely the starting point of small-n studies. The elucidation of causal mechanisms is required through historical institutionalist methods.

Indeed, Law and Versteeg may wish to consider turning to such methods as they move forward with their exciting research agenda. As they note, there are many possible reasons for constitutional convergence toward the generic bill of rights. Their large-n work does not itself differentiate among them. The most basic question is why convergence happens. Toward the end of their article, Law and Versteeg provocatively suggest that "the development of global constitutionalism is a polycentric and multipolar process that is not dominated by any particular country. The result might be likened to a

²⁵ See, e.g., *COMPARATIVE CONSTITUTIONAL LAW* (Tom Ginsburg & Rosalind Dixon eds., 2011) (relying on these jurisdictions).

global language of constitutional rights, but one that has been collectively forged rather than modeled upon a specific constitution.”²⁶ Similarity does not necessarily connote influence—or the migration of constitutional ideas—although it is consistent with this practice. Single country case studies and small-n case studies will enable them, and other scholars, to substantiate this account.

In sum, there is a tight interdependence between quantitative and qualitative studies of comparative constitutional law. Quantitative studies, such as Law and Versteeg’s, enhance the selection of cases for qualitative work. Qualitative studies supply the evidence to differentiate among the causal mechanisms suggested by quantitative studies. Given the paucity of high quality quantitative work, Law and Versteeg’s article represents an important contribution to the literature.

²⁶ Law & Versteeg, *supra* note 1, at 851.