The Problem With Constitutional Borrowing:
Imitation is *not* necessarily the sincerest form of Flattery

Gordon Silverstein
University of Connecticut
School of Law

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"… the other confederacies which could be consulted as precedents … furnish no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued. The most that the convention could do in such a situation, was to avoid the errors suggested by the past experience of other countries, as well as of our own …"

- *James Madison, Federalist 37* (1788)

"I would not look to the US constitution, if I were drafting a constitution in the year 2012. …"

- *Justice Ruth Bader Ginsburg* (2012)

"if you think about the word constitution, it doesn't mean a Bill of Rights, it means structure – say a person has a sound constitution -- [and you mean that he] has a sound structure." The Bill of Rights "was an afterthought." The framers' focus was on how to "prevent the centralization of power in one person or in one Party. [W]hen that happens, the game is over. [T]he real key to the distinctiveness of America is the structure of our government."

- *Justice Antonin Scalia* (October 5, 2011)

"In sum, rather than leading the way for global constitutionalism, the U.S. Constitution appears instead to be losing its appeal as a model for constitutional drafters elsewhere."

- *David Law and Mila Versteeg* (2012)[1]

David Law and Mila Versteeg offer a tsunami of data to demonstrate that where once the U.S. Constitution was the template on which newly emerging states would rush to build their own, this habit has been in real decline for many years now. If new states look to other models, they look to Canada, or Germany, or, as Justice Ginsburg suggested, perhaps even South Africa.

At first blush, this certainly seems like something Americans ought to be embarrassed about: Who, David Law asked a reporter, wants a copy of Windows 3.1 when there are newer, faster, and far more efficient versions on offer. At the very least it seems to confirms Sandy Levinson's

[1] David Law and Mila Versteeg, "The Declining Influence of the United States Constitution." 87 *NYU Law Review* 2012 (forthcoming).

insistence that the Constitution must be radically revised if not simply replaced. But before we rush off to embrace the Canadian Charter of Rights, we might pause a moment and consider these three related questions:

a) Are rights provisions the appropriate measure of constitutional success and influence? Or should we instead count and measure the replication of institutional structures and rules?

b) Assuming there are compelling rights provisions and even institutional structures on offer in other constitutions, is replicating these provisions a wise strategy?

c) If not, then how should new constitution writers make use of these models and examples – the success, the failures and even the seeming has-beens? And how might we properly measure the influence of constitutions and constitutional systems?

(a) Are Rights Provisions the Appropriate Measure?

Explicit rights provisions are no doubt vitally important. The Declaration of Independence states clearly that governments are instituted to secure rights. And that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish" that government, and establish a new government that will better secure those rights. But how are these rights secured? James Madison was deeply skeptical about the efficacy of written rights. In a letter to Thomas Jefferson in 1788 he wrote that "experience proves the inefficacy of a bill of rights on those occasions when its control is most needed." Overbearing majorities, Madison reminded Jefferson, have committed "repeated violations of these parchment barriers" in every State, including those with rich and robust written guarantees of rights. Madison conceded that proclaiming rights in a "solemn manner" might be helpful at the margins, as over time and with enough repetition they might "become incorporated with the national sentiment," and thus help to "counteract the impulses of interest and passion." But the primary protection for rights would lie in the careful construction of institutions designed to frustrate those who might abuse rights.

And this is precisely the point Justice Scalia was trying to make in his testimony before the U.S. Senate Judiciary Committee in October of 2011. The Bill of Rights, Scalia testified, "was an after thought." The real protection for rights in America, he argued, lies in the structure of government, in institutional allocation of power and not in the words of the first ten amendments.

Think of the word 'Constitution,' Scalia suggested to a rapt audience of U.S. Senators, "it doesn't mean a bill of rights, it means structure – say a person has a sound constitution, [and you mean] he has a sound structure. For the framers in Philadelphia, Scalia added, the Bill of Rights was an after thought. Their key concern was to "prevent the centralization of power in one person or one Party.[2] [W]hen that happens," he added, "the game is over."

But aren't the institutional provisions simply words on a page as well? They might be, Madison notes in *Federalist 48*, unless one properly designs the institutions called forth by those words. Institutions, properly constructed, should constitute something of a "machine that will go of

[2] Indeed, if we pause to look at the Constitution itself we see that the rights provisions that *are* included in the body of the document are overwhelmingly concerned with the abuse of power – with usurpation or tyranny – and not with individual rights of conscious or autonomy.

itself."[3] The "most difficult task," Madison wrote, "is to provide some practical security for each [branch of government] against the invasion of the others." It is not enough, he argues, "to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power." And so power has to be allocated, and as he adds in *Federalist 51* "the interests of the man must be connected with the constitutional rights of the place."

(b) Is the Replication of Rights Provisions (or Institutional Structures) a Wise Idea?

Should we, then, substitute a count of the structural provisions for a count of the textual rights guarantees in gauging the influence of a constitutional system?

Embedded in the Law-Versteeg paper is the far-too common assumption that constitution writing is a science that might eventually aspire to arrive at broad, trans-national, generalized and replicable solutions to universal problems. While many (though not all) of these problems are wide spread, perhaps even universal, the solutions are not. Much depends on complex interactions of history, geography, economy, and demographics.

The formal rights provisions in constitutions as well as their structural frameworks are merely the *means* to secure and protect particular *ends*. And those ends are the product of the aspirations and fears of the polity that will be governed by that constitution.

Here we might profit from a formulation of the problem Ronald Dworkin offers, distinguishing between "concepts" and "conceptions."[4] While there are a number of widely shared, if not universal ends, or objects of government – call these the broad concepts that so many share – how to achieve them, the application or manifestation of the problems will vary greatly in different polities. Consider the United States.

Samuel Huntington (building on Louis Hartz) noted in 1981 that the basic values of the American Creed – "liberty, equality, individualism, democracy, and the rule of law under a constitution" – can and do often clash with each other. America's political ideology, Robert McCloskey wrote, is not "a consistent body of dogmas tending in the same direction, but a conglomerate of ideas which may be and often are logically inconsistent." What these values share, Huntington asserts, is an overarching commitment to "imposing limits on power and on the institutions of government."[5]

There is, to be sure, a deep fear of power and of the institutions and instruments of a strong government, as Huntington notes. But what really complicates things is that – at least for the founding generation – this fear of power was coupled with an equal fear of anarchy: The conviction that too much power may be as dangerous to rights and liberty and happiness as is one that is too strong.

As Madison made clear in *Federalist* 37, the great challenge for the constitutional convention was to find a way to combine "the requisite stability and energy in government, with the

[3] James Russell Lowell coined this phrase in a speech before the Reform Club of New York in 1888.
[4] Though this distinction is widely used, in Rawl's *Theory of Justice* among others, I have in mind here the distinction offered by Ronald Dworkin in Chapter 2 of *Law's Empire*.
[5] Samuel Huntington, *American Politics the Promise of Disharmony.* Harvard University Press, 1981. p 33 (The McCloskey quote is taken from Huntington, p 16).

inviolable attention due to liberty and to the republican form." America's first constitution – The Articles of Confederation – had made governance impossible and opened the nation to the danger of external attack as well as internal collapse."

All this and more informs and animates the American Constitution – both in its rights provisions as well as in its institutional constructs.[6] For fledgling federated nations, thousands of miles from the capitals of major world powers, sitting on tremendous natural resources, and having just emerged from a civil war that overthrew monarchy – these might well be institutions that could and should be adopted wholesale – assuming of course that one was setting out to govern with a minimalist state that would provide minimalist services.

But if not, then one needs a clear understanding of the tradeoffs, and the consequences intended and not of the political deal that lie behind many institutions and even the language of a document that was assembled by Committee and ratified by a series of separate and distinct conventions. The German Basic Law has some marvelous provisions, but they make a lot more sense if you know the constitution was written in the shadow of the recently fallen Third Reich. One cannot understand American property rights, nor the vital role of a judicial system that has served as a guarantor of minority rights against majority preferences, absent an understanding of what Mark Graber refers to as the "constitutional evil" that lies at the core of the American Constitution.[7] Similarly, though there is much to celebrate and even emulate in the South African constitution's rights provisions, one must be aware that some of these are there not to advance a fresher or more modern view of governance and human rights, but rather quite explicitly to solve a political crisis: How to convince those who came to power and wealth on the back of Apartheid to peacefully agree to surrender power? South Africa's rights provisions and institutional arrangements (not the least of which was a constitutional court empowered to enforce the bargain that was made to achieve that peaceful transition) cannot be understood outside of that context and surely it makes no sense to simply import these provisions into a very different polity facing very different challenges, albeit to the same broad "concepts" such as liberty, equality of treatment, property rights and justice.

No doubt Justice Ginsburg is right that a wise constitution writer circa 2012 would pay close attention to the rights provisions of the South African Constitution, as to the German Basic Law and the Canadian Charter – but that hardly means such terms and institutional arrangements ought to be simply imported into a constitution for Egypt or Libya, for example.

c) How then to Write Constitutions? And How to Measure Their Influence and Salience for Others?

Constitutions and their provisions – rights provisions as well as institutional provisions which are, ultimately, the real guardian of rights – are not necessarily the best measure of the degree of influence one polity might have on another.

Here's a little quiz: Where is the fascination with the British Royal Family, British class-structure, and British tabloids most deeply embedded? Where in the world is the mystique of Oxford and Cambridge the most intense? And what society on Earth is more deeply and indelibly influenced by English law, English political ideas and English political rhetoric?

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[6] As noted in footnote * above, if we pause to look at the Constitution itself we see that the rights provisions that *are* included in the body of the document are overwhelmingly concerned with the abuse of power – with usurpation or tyranny – and not with individual rights of conscious or autonomy.

[7] Mark Graber, *Dred Scott and the Problem of Constitutional Evil.* Cambridge University Press, 2006.

The answer, of course, is: In Her majesty's *former* colonies – the United States of America.

But does the American Constitution borrow from the British document? Well, for starters, there is no British document. But moving past that, theirs is effectively a unicameral legislature[8] in which the Executive is selected by the majority party in the legislature; and where the Executive cabinet members all continue to represent constituencies and vote on legislation; where, until only recently, one House of Parliament was comprised of hereditary peers and where, again until only recently, there was no formal judicial review of the constitutionality of legislative enactments. Indeed, a nation where – before 1949 – citizens were not citizens, but rather Royal Subjects, a status they continued to enjoy along with the title citizen from 1949 until 1983, when they finally could drop their subjugation and subservience to the "Royal Brute of Britain" (at least on their passports).

I could go on. I won't.

My simple point here is that while the American constitution – both in its structure and in its formal rights guarantees – is dramatically distinct from what Britons understand as their constitution, there is no nation that has exerted greater or more lasting influence on American politics and culture. (And vice versa, I might add).

So – measuring America's declining influence by measuring the adoption of American political institutions and constitutional rights provisions certainly raises some important questions: Apply the same logic to the U.S.-British relationship and one might conclude that Britain has negligible (and slipping) influence over U.S. governance and society

Therefor, if we are to measure the various degrees to which various constitutional systems are influencing others, positively and negatively, we might benefit from asking not simply about the particular institutional or linguistic data, but rather about the underlying concepts, ends, purposes, and values that animate those institutional and linguistic choices.

Most constitution writers today wisely avoid America's fragmented political system with its deep anti-government bias. But does that mean that the American constitution has lost its influence? If we, again, turn away from the 18th Century conceptions embodied in the document and think instead about the dramatic and lasting conceptual contributions that have grown from that document and the institutions it established, the question of influence takes on a very different appearance.

The Constitution offered the mechanical means to achieve a set of powerful and still stunningly influential concepts and ideas. These near-universal concepts which the United States has helped to propagate continue to echo as loudly in Tiananmen Square as in Tahrir Square just as they continue to bounce off the towers surrounding Zuccatti Park just off Wall Street; The arguments that emerged from the Congregational pulpits of New England and gave rise to the American Revolution are no less fresh and no less powerful today than there were in the 17th Century; Tom Paine's unbridled defense of democracy and attack on monarchy plays as well today in Syria and the Saudi Kingdom as it did in Boston or Philadelphia. The ideas and arguments the can be found in Jefferson and Lincoln's inaugurals or the sermons and speeches of Martin Luther King, and in the soaring and searing rhetoric of critical U.S. Supreme Court opinions and dissents such as *Ex Parte Milligan* or Justice Harlan's dissent in *Plessy v.*

[8] Yes, there is a House of Lords, but bills rejected by the Lords can still quite easily be passed by the Commons. The Lords at their best provide a pause for reflection.

Ferguson are no less compelling today in Asia or Africa then they were – and continue to be – in the United States. The influence of these ideas and ideals has never waned, and is as strong today across the globe as ever they were in the United States. More so, perhaps.

To measure the influence of the American constitution – and its relative decline – it seems to me, requires far more than a word count of rights provisions. The challenge is how to design institutions best suited to achieve these goals within the peculiar and particular circumstances each constitution writer faces: As Jefferson put it in the Declaration of Independence, "it is the right of the people … to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." And to do that we need to consider the institutional mechanics at least as much as the textual rights provisions – and we need to account for the deep concepts as the particular and passing applications and conceptions.