



The New York Times |

U.S.

'We the People' Loses Appeal With People Around the World

FEB. 6, 2012

Sidebar

By ADAM LIPTAK

WASHINGTON — The Constitution has seen better days.

Sure, it is the nation's founding document and sacred text. And it is the oldest written national constitution still in force anywhere in the world. But its influence is waning.

In 1987, on the Constitution's bicentennial, *Time* magazine calculated that "of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version."

A quarter-century later, the picture looks very different. "The U.S. Constitution appears to be losing its appeal as a model for constitutional drafters elsewhere," according to a new study by David S. Law of Washington University in St. Louis and Mila Versteeg of the University of Virginia.

The study, to be published in June in *The New York University Law Review*, bristles with data. Its authors coded and analyzed the provisions of 729 constitutions adopted by 188 countries from 1946 to 2006, and they considered 237 variables regarding various rights and ways to enforce them.

“Among the world’s democracies,” Professors Law and Versteeg concluded, “constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s.”

“The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world’s democracies are, on average, less similar to the U.S. Constitution now than they were at the end of World War II.”

There are lots of possible reasons. The United States Constitution is terse and old, and it guarantees relatively few rights. The commitment of some members of the Supreme Court to interpreting the Constitution according to its original meaning in the 18th century may send the signal that it is of little current use to, say, a new African nation. And the Constitution’s waning influence may be part of a general decline in American power and prestige.

In an interview, Professor Law identified a central reason for the trend: the availability of newer, sexier and more powerful operating systems in the constitutional marketplace. “Nobody wants to copy Windows 3.1,” he said.

In a television interview during a visit to Egypt last week, Justice Ruth Bader Ginsburg of the Supreme Court seemed to agree. “I would not look to the United States Constitution if I were drafting a constitution in the year 2012,” she said. She recommended, instead, the South African Constitution, the Canadian Charter of Rights and Freedoms or the European Convention on Human Rights.

The rights guaranteed by the American Constitution are parsimonious by international standards, and they are frozen in amber. As Sanford Levinson wrote in 2006 in “Our Undemocratic Constitution,” “the U.S. Constitution is the most difficult to amend of any constitution currently existing in the world today.” (Yugoslavia used to hold that title, but Yugoslavia did not work out.)

Other nations routinely trade in their constitutions wholesale, replacing them on average every 19 years. By odd coincidence, Thomas Jefferson, in a 1789 letter to James Madison, once said that every constitution “naturally expires at the end of 19

years” because “the earth belongs always to the living generation.” These days, the overlap between the rights guaranteed by the Constitution and those most popular around the world is spotty.

Americans recognize rights not widely protected, including ones to a speedy and public trial, and are outliers in prohibiting government establishment of religion. But the Constitution is out of step with the rest of the world in failing to protect, at least in so many words, a right to travel, the presumption of innocence and entitlement to food, education and health care.

It has its idiosyncrasies. Only 2 percent of the world’s constitutions protect, as the Second Amendment does, a right to bear arms. (Its brothers in arms are Guatemala and Mexico.)

The Constitution’s waning global stature is consistent with the **diminished influence of the Supreme Court**, which “is losing the central role it once had among courts in modern democracies,” Aharon Barak, then the president of the Supreme Court of Israel, wrote in *The Harvard Law Review* in 2002.

Many foreign judges say they have become less likely to cite decisions of the United States Supreme Court, in part because of what they consider its parochialism.

“America is in danger, I think, of becoming something of a legal backwater,” Justice Michael Kirby of the High Court of Australia said in a 2001 interview. He said that he looked instead to India, South Africa and New Zealand.

Mr. Barak, for his part, identified a new constitutional superpower: “Canadian law,” he wrote, “serves as a source of inspiration for many countries around the world.” The new study also suggests that the Canadian Charter of Rights and Freedoms, adopted in 1982, may now be more influential than its American counterpart.

The Canadian Charter is both more expansive and less absolute. It guarantees equal rights for women and disabled people, allows affirmative action and requires that those arrested be informed of their rights. On the other hand, it balances those rights against “such reasonable limits” as “can be demonstrably justified in a free

and democratic society.”

There are, of course, limits to empirical research based on coding and counting, and there is more to a constitution than its words, as Justice Antonin Scalia told the Senate Judiciary Committee in October. “Every banana republic in the world has a bill of rights,” he said.

“The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours,” he said, adding: “We guarantee freedom of speech and of the press. Big deal. They guaranteed freedom of speech, of the press, of street demonstrations and protests, and anyone who is caught trying to suppress criticism of the government will be called to account. Whoa, that is wonderful stuff!”

“Of course,” Justice Scalia continued, “it’s just words on paper, what our framers would have called a ‘parchment guarantee.’ ”

A version of this article appears in print on February 7, 2012, on page A1 of the New York edition with the headline: ‘We the People’ Loses Followers.