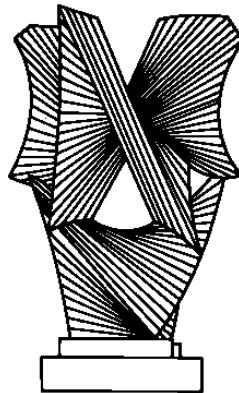


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THE LIMITS OF CONSTITUTIONAL CONVERGENCE

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THE LIMITS OF CONSTITUTIONAL CONVERGENCE

Rosalind Dixon* and Eric A. Posner**

Abstract

Globalization, some legal scholars suggest, is a force that makes increasing convergence among different countries' constitutions more or less inevitable. This Essay explores this hypothesis by analyzing both the logic – and potential limits – to four different mechanisms of constitutional convergence: first, changes in global “superstructure”; second, comparative learning; third, international coercion; and fourth, global competition. For each mechanism, it shows, quite special conditions will in fact be required before global convergence is likely even at the level of legal policy. At a constitutional level, it further suggests, it will be even rarer for these mechanisms to create wholesale convergence. This also has direct implications for ongoing debates over the desirability of constitutional decision-makers seeking to engage in global learning or borrowing.

Introduction

In recent years, legal scholars have given increasing attention to the ways in which constitutional law in one country influences the development of constitutional law in another country.¹ This scholarship has been driven in part by the high-profile, politically charged debate about whether the U.S. Supreme Court's constitutional decisions should rely on foreign law.² But the scholarship also addresses larger questions about the process of legal change and the relationship between national law and globalization.

There are two positions in this debate. The first is that the constitutional law of one country is, or should be, largely independent of the constitutional law of other countries.³ The people or national political elites choose a constitutional law that meets their needs. This claim is sometimes made today about the U.S. Constitution. The U.S. Constitution changes through amendment or judicial construction that, with a few exceptions, is not influenced by constitutional developments elsewhere in the world. To be sure, all constitutions must start

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¹ See, e.g. Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004); Harvard Law Review, *Comment, The Debate Over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103 (2005).

² See, e.g. *Lawrence v. Texas*, 539 U.S. 558, 573, 576-77 (2003) (Kennedy, J.); *Roper v. Simmons*, 543 U.S. 551, 576-77 (2005) (Kennedy, J.). For opposition to this use of foreign and international law, see, e.g. Reaffirmation of American Constitutional Independence Resolution of 2004, H.R. Res. 568, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004).

³ See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 66 (2004); Committee on the Judiciary. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, 109th Cong., 3rd Sess. (statement of Judge John Roberts in resp to question from Sen. Kyl); POSNER, *A Political Court*; Justice Antonin Scalia, *Commentary*, 40 SAINT LOUIS L. J. 1119 (1996).

somewhere. The drafters of the U.S. Constitution were influenced by British and Roman constitutional law, English common law, and constitutional theory from continental Europe. But in mature Constitutional systems, foreign influence is muted.⁴

The second is that the constitutional law of one state inevitably influences, and should influence, constitutional law in other states, putting aside extreme cases—such as isolated countries like North Korea or failed states like Somalia. Constitutional systems are not hermetically sealed.⁵ Judges and other relevant decisionmakers seek inspiration in the constitutional developments of foreign countries, or, at least, cannot help be influenced by what happens elsewhere. Scholars who take this position tend to believe that constitutions not only influence each other but also become more similar, so that over time constitutions converge.⁶

Supporters of the convergence thesis can cite a mass of anecdotal evidence. Liberal democracy has advanced in a succession of waves over the past two hundred years. Setbacks have occurred, but the trend is clear and in the last several decades has accelerated.⁷ Judicial independence, including judicial protection of individual rights, has also advanced steadily, making significant incursions in countries with traditions of parliamentary sovereignty.⁸ At the retail level, certain kinds of rights—freedom of expression, freedom of religion, the right not to be tortured—have spread, as have various doctrinal techniques for trading off liberties and other values.⁹ Citing this evidence, Mark Tushnet has argued for the “inevitability” of at least some forms of constitutional convergence.¹⁰

But the convergence thesis raises a number of questions that have received little attention from scholars. The major empirical question is whether convergence is really taking place—whether the anecdotal evidence reflects deep forces or is epiphenomenal.¹¹ Recent years have seen an upsurge of authoritarianism in Russia, China, and many other countries; and certain types of convergence at the retail level have been offset by other types of new or persistent divergence. Recent empirical studies, such as those by Tom Ginsburg, Zachary Elkins and Beth

⁴ Scalia, *supra* note 3.

⁵ See, e.g. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819 (1999); Vicki C. Jackson, *Foreword – Comment: Constitutional Comparisons, Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. L. J. 192 (2003); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999).

⁶ See, e.g. David Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985 (2009). For other endorsements of the convergence thesis, see Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2007); TREVOR ALLEN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (Oxford University Press 2001); DAVID BEATTY, *The Ultimate Rule of Law* (Oxford University Press 2004).

⁷ See, e.g. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (Free Press 1992). Contra. SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (Simon & Schuster 1996).

⁸ See, e.g. Linda Camp Keith, *Judicial Independence & Human Rights Protections Around the World*, 4 JUDICATURE 195, 197-200 (2002).

⁹ RAN HIRSCHL, *Towards JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (Harvard University Press 2004).

¹⁰ Tushnet, *supra* note 6.

Simmons and David Law and Mira Versteeg, have found no pattern of constitutional convergence.¹²

There is also the theoretical question why one would expect convergence to take place. What are the mechanisms of constitutional borrowing and convergence? One such theory is David Law's.¹³ He argues that states adopt similar constitutional norms in order to attract capital investment and migration. For example, because investors can easily move their money to countries that offer the highest return, because certain constitutional norms—preeminently, protection of property rights by an independent judiciary—are necessary to ensure high returns, and because countries seek foreign investment, countries will compete for investors by constitutionalizing property rights. However, Law identifies just one of a number of possible mechanisms of constitutional convergence, and his theory, as we will show, is vulnerable to important objections.

In this Essay, we describe four paths to constitutional convergence, address the evidence for each of them, and discuss their normative significance. *Superstructure theories* argue that constitutions reflect deeper forces—technological, demographic, economic—and so constitutions converge across countries just when those other factors converge. If, for example, increased international trade reduces within-country inequality, and constitutional norms reflect the degree of inequality, then constitutional convergence should occur when international trade increases—which it has over the last fifty years. If these theories are correct, then constitutional borrowing is not within the direct control of legal and political decisionmakers. Constitutional change is epiphenomenal.

The other three mechanisms assume that decisionmakers do control constitutional change, and are not merely puppets of hidden forces.¹⁴ *Learning theories* argue that judges, political actors, and other people who influence constitutional norms self-consciously copy what they see in other countries. These theories imply that constitutional borrowing will often go in one direction—from more successful or older countries to less successful or newer countries, or from countries with a great deal of experience with an issue to countries that must address that

¹² See Tom Ginsburg, Zachary Elkins & Beth Simmons, *How do International Human Rights Treaties Influence National Constitutions?* (Working Paper, 2010) (finding a mixed pattern in respect of the incorporation of international human rights guarantees into the text of national constitutions); David Law & Mira Versteeg, *The Evolution & Ideology of Global Constitutionalism* (Working Paper, 2010) (finding a pattern of increasing polarization, or divergence, in respect to the recognition of different sets of rights in the text of post-World War II constitutions).

¹³ Law, *supra* note 6.

¹⁴ We draw on the large literature on policy diffusion in political science. This literature originally addresses the diffusion of policy among the American states, but in recent years the ideas in that literature have been applied to the diffusion of policy among nation states. See, e.g., Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AMER. POL. SCI. REV. 171 (2004) (analyzing the diffusion of liberal economic policies); Kurt Weyland, *Theories of Policy Diffusion: Lessons from Latin American Pension Reform*, 57 WORLD POL. 262 (2005) (analyzing the diffusion of pension reform). For previous work applying this in a constitutional context, see also, e.g. Tom Ginsburg, Svitlana Chernykh & Zach Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201

issue for the first time. Learning theories underlie the positions of those who urge the U.S. Supreme Court to borrow from foreign law.¹⁵

Coercion theories argue that countries try to compel other countries to change their constitutional norms. We define “coercion” broadly to include threats (to cut off trade, to withhold aid, to use military force, etc.), bribes, and more intangible risks to reputation. Indeed, the “target” states may voluntarily change their norms in order to avoid being cut off or isolated, or to preserve or enhance their reputation for international cooperativeness. This phenomenon can lead to herd behavior and other pathologies of collective action.

Competition theories argue that countries change their norms to attract capital, migration, or trade. Law’s is one such competition theory, but, as we will discuss, there are others as well. It turns out that competition leads to convergence only under special conditions; competition can also lead to divergence, as illustrated by Tiebout’s model of jurisdictional competition.¹⁶

After describing these theories, we analyze the conditions necessary for each theory to lead to constitutional convergence. We identify several factors that may limit the degree to which each mechanism creates convergence. Superstructure theories imply that convergence will not take place when underlying factors such as equality diverge across states. Learning theories imply that convergence will not take place when there exists disagreement among countries about constitutional values, rather than means for implementing constitutional values about which there already exists a consensus. Coercion theories imply that convergence will not take place unless a single country (or a group of constitutionally similar countries) dominates international affairs, and has both a strong enough interest in, and set of tools for, enforcing its preferred constitutional principles. Competition theories imply that convergence will not take place when people in different countries have sufficiently different preferences over constitutional outcomes or public goods more generally.

In a brief conclusion, we address implications for the practice of constitutional comparison by courts and other decisionmakers, and academics.

I. Conceptual Distinctions

Scholars writing about constitutional convergence use the term in a general way that masks a number of complexities. We address some of these complexities here.

Rights Versus Structure. In making claims about constitutional convergence, some scholars, such as David Law, focus on the idea of rights-based convergence or a global “race to the top” when it comes to the protection of individual rights generally or certain rights such as the right to freedom of expression.¹⁷ Others, such as Mark Tushnet, have focused on structural

¹⁵ For arguments in favor of this kind of empirical or functionally-oriented forms of comparison, see e.g. Sanford Levinson, *Looking Abroad When Interpreting the US Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 364 (2004); Tushnet, *supra* note 5.

¹⁶ Charles Tiebout, *A Pure Theory of Local Expenditures*, JOURNAL OF POLITICAL ECONOMY 64 (5): 416–424 (1956).

¹⁷ Law, *supra* note 6.

constitutional norms, such as those governing legislative and judicial supremacy or finality.¹⁸ Clearly it is important to distinguish between the two claims: structural convergence occurs when the form of government—separation of powers, for example—converges; convergence of rights occurs when states adopt similar constitutional rights. The two forms of convergence may occur in parallel; be mutually reinforcing; or rather work in opposite directions, so that convergence in one domain serve to entrench constitutional difference, or even promote greater constitutional divergence, in the other.

Retail Versus Wholesale Constitutional Norms. In assessing claims about constitutional convergence, it is also important to distinguish between “wholesale” and “retail” forms of constitutional convergence. Wholesale convergence involves the development of across-the-board similarities between different constitutional systems; retail forms of convergence can co-exist with substantial constitutional differences in other areas. One could imagine, for example, a general trend in favor of limited government, but divergent approaches to limited government, with some states opting for presidential systems with separation of powers and others opting for parliamentary systems with strong norms of party cooperation.

In some cases, retail-level forms of convergence may also contribute to increasing divergence at the wholesale level. Take the changes made to Venezuela’s Constitution in 1998-1999, allowing for constitutional amendments to be proposed by a constituent assembly, rather than the ordinary legislature.¹⁹ In 1992, Donald Lutz compiled “an index of difficulty” for the difficulty of amending various national constitutions, worldwide, based on the formal legal hurdles to the proposal and adoption of amendments in particular countries.²⁰ The mean score on this index was 3.26; and on this measure, the amendment rule in Venezuela was substantially above the mean: Lutz gave Venezuela an index score of 4.75.²¹ Only the United States and (what was then) Yugoslavia had constitutions that were more difficult to amend.²² The move in Venezuela in 1998-99 to make amendment to the constitution less difficult was, therefore, clearly an instance of retail-level constitutional convergence. At the same time, this change also paved the way for subsequent changes to the Venezuelan Constitution, such as the creation of five branches of government and a unicameral legislature, which made the Constitution substantially less, rather than more, similar at a wholesale level to other constitutions, worldwide.²³

Convergence Versus Liberalization. Countries have added formal, written rights guarantees to their constitutions with great frequency over the last several decades, and they very

¹⁸ Tushnet, *supra* note 6.

¹⁹ See Constitution of the Bolivarian Republic of Venezuela, Asamblea Nacional Constituyente (Impreso en la República Bolivariana de Venezuela, 2006), available at

http://www.analitica.com/bitlibioteca/venezuela/constitucion_ingles.pdf (english) and

<http://www.gobiernoenlinea.ve/docMgr/sharedfiles/059.pdf> (spanish); see also Larry Rohter, *80% of Vote Reported to Back Rewrite of Venezuela’s Charter*, N.Y. TIMES, April 26, 1999, at A9.

²⁰ Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, 237 (Sanford Levinson ed., 1995).

²¹ *Id.*

²² *Id.* at 260-61.

²³ See Larry Rohter, *Venezuelans Give Chavez All the Powers He Wanted*, N.Y. TIMES, Dec. 16, 1999, at A11

rarely remove rights from their constitutions.²⁴ States have thus “liberalized” in the sense of adding these rights, but liberalization is not the same thing as convergence.

Convergence occurs when the rights states add become more similar. Law and Versteeg, however, have found that liberalization in post-World War II constitutions has not in fact produced convergence in written constitutions, but instead a bimodal distribution of constitutions.²⁵ States have diverged from a common core of rights to two separate models.

Another good illustration of this distinction involves recent trends in global laws on abortion. In this context, there has been a quite clear trend toward liberalization in recent years: 13 countries moved to allow greater access to abortion, while only 3 (El Salvador, Nicaragua and Poland) moved to restrict access to abortion.²⁶ This has not, however, involved anything like clear convergence toward a single global position on abortion – because prior to this, countries were equally divided between wholly prohibiting access to abortion (or at least, strictly limiting access to it, to circumstances where it was necessary to save the life of a woman) and allowing it on extremely broad grounds.²⁷

Constitutional Versus Policy Convergence. Constitutional convergence should not be confused with policy convergence or what political scientists call “policy diffusion.”²⁸ In a context such as abortion regulation, for example, while abortion rights have clearly spread across the globe in recent years,²⁹ this may or may not represent constitutional convergence – depending on how one draws the line between constitutional and more ordinary statutory or policy norms.³⁰

²⁴ See Law and Versteeg, *supra* note 12.

²⁵ *Id.*

²⁶ See Center for Reproductive Rights, *The World's Abortion Laws 2009 Factsheet*, (Sept. 2009), <http://reproductiverights.org/en/document/world-abortion-laws-2009-fact-sheet>; Susheela Singh et. al., *Abortion Worldwide: A Decade of Uneven Progress*, GUTTMACHER INSTITUTE at 12 (2009), www.guttmacher.org/pubs/AWWfullreport.pdf.

²⁷ Anika Rahman, et. al., *A Global Review of Laws on Induced Abortion, 1985-1997*, INT'L FAMILY PLANNING PERSPECTIVES, June 1998, at 58 (noting that as of 1997, among 151 countries worldwide, 54 countries wholly prohibited abortion or permitted access only where necessary to save the life of the mother; another 54 recognized rights of access to abortion on socio-economic grounds or without restriction as to reason; and 43 countries took a more intermediate position, which permitted access to abortion where a woman's physical or mental health was threatened).

²⁸ Compare Simmons & Elkins, *supra* note 14.

²⁹ *Id.*

³⁰ For example, in most of the 100 or so countries that the Guttmacher Institute identified as providing broad or relatively broad access to abortion, abortion rights were purely statutory or code-based in origin. See United Nations, *Abortion Politics: A Global Review*, <http://www.un.org/esa/population/publications/abortion/> (2002) (detailing abortion rights in Albania, Algeria, Argentina, Austria, several other states and both territories in Australia, Belgium, Benin, Bhutan, Bolivia, Bosnia-Herzegovina, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Costa Rica, Croatia, Cuba, the Czech Republic, Denmark, Ecuador, Eritrea, Ethiopia, Finland, France, Ghana, Greece, Guinea, India, Iraq, Israel, Japan, Jordan, Korea, Kuwait, Liberia, Malawi, Mali, Malaysia, Mongolia, Namibia, Nepal, the Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russia, Rwanda, Saint Lucia, Singapore, Slovenia, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, the United Kingdom, Uruguay, Vietnam, Zambia and Zimbabwe). In a significant number of other cases, access to abortion was also the pure product of the common law defense of necessity (see e.g. the position several states in Australia, Gambia, Jamaica, Trinidad and Tobago and Northern Ireland), and executive or royal degree (see e.g. the position in Armenia, Azerbaijan, Belarus, Bulgaria, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova,

One obvious way to draw such a line is by reference to the scope of written constitutions.³¹ The problem with this approach, however, is that constitutional rules can also be created by judicial construction, requiring the researcher to consult cases as well as written rules, and judicial opinions are often difficult to interpret. In addition, some countries, like Britain, have unwritten constitutions; constitutional norms can exist as a part of political understanding without being written down, let alone in any single canonical text labeled ‘constitutional’.

Thus, a second way to identify constitutional convergence is by reference to the idea of entrenchment – i.e. the idea that, either as a matter of legal form or political convention, change to some legal rules requires a degree of super-majority, as opposed to ordinary-, majority support in the legislature. On this view, in countries such as the United Kingdom, Parliament changes the constitution by enacting statutes; and even in the United States, Congress may create constitutional or quasi-constitutional norms by enacting certain kinds of “super-statute”.³²

For some authors, even this definition is too narrow to capture to capture peoples’ actual understanding of what count as constitutional, in various countries, and therefore a third way to approach the issue is by reference to those laws that help establish, or alternatively “check” or impose limits on, the scope of government power, or even simply to ask what laws people within a particular society view as fundamental.³³

Each of the three approaches has somewhat different advantages, in terms of the trade-off it makes between objectivity and over- versus under-inclusiveness. Each also suggests a somewhat different understanding of how constitutional change occurs: on the first view, constitutional change will occur only via formal constitutional amendment or replacement; on the second view, it may occur via the enactment or handing down of either super-statutes or “super-precedents”³⁴; and only on the third view, via any and all of these mechanisms – or by more ordinary forms of statutory, common law and popular constitutional change.³⁵

No matter which of these approaches one prefers, however, some distinction of this kind must clearly be drawn if claims about constitutional convergence are to be assessed with any accuracy.

Morocco, Saudi Arabia, the Slovak Republic, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan). *Id.* There were also few countries, among these three groups, where the relevant legal or policy limits on abortion could be said to reflect a constitutional “ceiling” created by any textual guarantee of fetal life. *Id.* (Examples of countries in this category are Ecuador and Poland, and at least prior to 2010, Spain). This does not mean, however, that if one took a more functional approach to the question of entrenchment, or limits on government power, that abortion rights in all of these countries would necessarily enjoy purely sub-constitutional, rather than constitutional status.

³¹ This, for example, is the approach generally adopted in various large-n studies of global constitutions, though the authors also clearly acknowledge the limits of such an approach. See, e.g. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (Cambridge University Press, 2009).

³² William Eskridge & John Ferejohn, *Super-statutes*, 50 *DUKE L.J.* 1215 (2001). See also BRUCE ACKERMAN, *WE THE PEOPLE, VOL. 1: FOUNDATIONS* (Belknap Press, 1993).

³³ See discussion in Rosalind Dixon & Tom Ginsburg, *Introduction*, in *THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW* (Edward Elgar, forthcoming 2011).

³⁴ MICHAEL GERHARDT, *THE POWER OF PRECEDENT* (Oxford University Press, 2008).

³⁵ On popular constitutionalism, see, e.g. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (OXFORD UNIVERSITY PRESS, 2004).

Borrowing Versus Convergence. The literature also neglects the distinction between constitutional borrowing and constitutional convergence, apparently treating borrowing as tantamount to convergence. Borrowing, however, need not result in convergence. Imagine that only one of the 200-odd countries constitutionalizes (say) a right to gay marriage. Now a second country imitates the first. The second country has in this way engaged in constitutional borrowing, but clearly constitutional convergence is not taking place. Indeed, divergence is taking place. A nearly unanimous refusal to constitutionalize a right to gay marriage has eroded. Convergence can take place only against a background in which a majority of states recognize a constitutional rule, and then members of the minority borrow from the majority. Much of what today appears to be constitutional convergence—for example, adoption of judicially enforceable bills of rights—started off as divergence by first-movers from the opposite norm.

I. Convergence Mechanisms and Their Limits

This Part surveys the four mechanisms of constitutional convergence. Throughout, we focus on the mechanisms through which convergence occurs (or does not occur), and provide some preliminary evidence by way of illustration.

A. Superstructure Theories

A number of scholars writing in the economics and political science literatures treat constitutions as endogenous, that is, as the outcomes of deeper social processes that are outside the control of constitution-makers. As an illustration, we use the argument of Acemoglu and Robinson.³⁶

Their model divides society into elites and ordinary people. The elites enjoy disproportionate wealth, education, and other favorable attributes. At an early stage, the elites have all the power under the constitution. They enact laws that create public goods (for example, defense against external enemies), but impose all the costs on ordinary citizens through taxes. At this earlier stage *de facto* and *de jure* power are aligned: the people do not have (*de jure*) political rights (such as the right to vote) that could be used to affect policy, nor do they have enough (*de facto*) power or organizational capacity to launch peaceful protests such as strikes or violent protests, so as to compel the elites to make concessions to the people's interests.

Over time, technological, demographic, and other changes transfer some *de facto* power to the people. They become better educated, allowing them to organize more effectively, or to be able to deprive the elites of more wealth by going on strike. They become more numerous and hence more difficult for the elites to control. They take advantage of new communication technologies that allow them to mobilize. At some point, the *de facto* power of the people exceeds their *de jure* power by a substantial amount. A salient event—an economic crisis, a military defeat—provides a focal point that allows the people to organize protests against the

³⁶ The following is based on DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP & DEMOCRACY* (Cambridge University Press, 2005). See also CHARLES BOIX, *DEMOCRACY AND REDISTRIBUTION* (Cambridge University Press, 2003).

elite-controlled regime. The people demand that the elites transfer wealth to them, and threaten to use strikes and violence against elites and their property if their demands are not met.

The elites could respond in several ways. First, they could engage in repression. If repression is successful, then the elites do not have to transfer wealth to the people. But repression is costly and, more important, if it fails, a violent revolution could occur, with the result that the elites are deprived of all or most of their property. Second, the elites could make one-time transfers of wealth to the people. For example, they could reduce taxes, or build clinics and schools. The problem here—and the reason that the transfer of wealth is one-time—is that the elites cannot credibly promise to make the transfer permanent, for example, in the form of permanently more progressive taxation. Once the crisis passes and the people's ability to organize falters, the elites will rationally stop transferring wealth to the people. Third, the elites could make permanent constitutional concessions to the people. For example, they could extend the franchise to the people. Here, the people are given *de jure* powers that match their *de facto* power. Technically, because a broad franchise favors the median voter, and the people (by definition) form the majority, the extension of the franchise will transfer power from the elites to the people. Institutional changes solve the commitment problem, satisfying the people and persuading them to desist from violent revolution.

Which path do the elites choose? Acemoglu and Robinson focus on the distribution of wealth. If the elites start off much wealthier than the people (inequality is high), then the people have a strong incentive to threaten revolution. However, the elites fear that if they grant democratic concessions to the people, then the people, once in power, will implement massive tax-and-transfers. So the elites will respond with repression if inequality is high, and nondemocracy will prevail.

If inequality is low, then the elites do not fear massive tax-and-transfers after the people obtain the franchise. The wealth of the median voter is not much different from the wealth of the elites; accordingly, the median voter will not support a radically progressive tax-and-transfer system. But by the same token, the people are less likely to demand constitutional concessions in the first place. Already happy with their lot, they have little incentive to incur the costs of revolution to obtain constitutional rights that would not improve their well-being. If inequality is low, non-democracy will also prevail.

Democracy will come into existence only in the intermediate case, where inequality is neither high nor low. Inequality is high enough to spur the people toward revolution. The costs of revolution are less than the gains to be had from political power that would allow the people to redistribute wealth. But inequality is low enough to discourage the elites from engaging in repression. If inequality is not too high, then the people, once in power, will not need to redistribute wealth very much.

The constitution, then, reflects fundamental demographic factors such as inequality.³⁷ Inequality itself will also be a function of technology, population density, and so forth. These

³⁷ Acemoglu and Robinson also discuss two other variables: the size of the middle class and the economic structure of the country. Larger middle classes encourage democratization because the median voter is likely to be closer in wealth to the elites. An economy dependent on land ownership is less likely to democratize than an industrial or

factors also influence the constitution by affecting the ability of the people to launch a revolution and the elites to launch a coup; as we have seen, technological changes that make it easier for the people to organize will result in a more democratic constitution.³⁸

Our purpose is not to criticize or defend this theory, but to use it as an illustration of the possibility that constitutions are purely endogenous. This means that constitutional convergence will take place only if the underlying factors that determine constitutional design themselves converge. In Acemoglu and Robinson's model, convergence to liberal democracy will take place only if countries converge to an intermediate level of inequality. This, in turn, depends on other factors—for example, the diffusion of technology that favors a particular level of inequality.

Thus, the question of constitutional convergence becomes a more general question about the extent to which technology and perhaps other factors such as social norms spread across states. Globalization is often taken to refer to such homogenization, and indeed the constitutional convergence debate could be understood as an offshoot of the globalization debate. However, although globalization has involved the diffusion of technology, it has not led to convergence in the degree of inequality in each state. In some states inequality has increased, while in other states inequality has declined.³⁹

B. Learning

States learn from each other. During the Meiji Restoration, the Japanese government sent officials around the world to learn about the policies and institutions of other countries, and imitated those judged to be best.⁴⁰ In the early twentieth century, first fascist, then communist political institutions gained adherents because they appeared to address successfully economic malaise and class warfare. In the late twentieth century, liberal economic practices spread around the world as communist governments collapse and their successors sought models in the

commercial economy because the government can tax land owners (who lack an exit option) more easily than it can tax capital and income from capital (which can be more easily moved abroad). *Supra*, note 36.

³⁸ One question that arises is why the two sides will obey the de jure constitution at all. Why don't they just act on the basis of de facto power? Acemoglu and Robinson assume that the parties will act on the basis of de facto power only when the de jure distribution of power and de facto distribution of power diverge by more than some threshold. *Id.* The reason is that either side will organize and use force if the other side engages in a de jure violation (cf. Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century* (working paper, 2008) available at <http://politicalscience.stanford.edu/faculty/weingast/WeingastSelf-EnforcingConstitutio900.pdf>). We might, then, distinguish "normal times," when both sides comply with the de jure rules, and "crises," when one side threatens violence unless those de jure rules are changed. In normal times, parties comply with de jure rules because they fear that violation will lead to a violent response by the other side. In crisis times, one side violates or threatens to violate the de jure rule in an effort to establish a new constitutional rule; it can do so because the other side's threat to retaliate is no longer credible (because it has lost de facto power). A crisis occurs when a salient event such as an economic downturn or war provides a focus for the people's grievances, enabling them to organize when otherwise organization would be thwarted by the collective action problem.

³⁹ INTERNATIONAL INSTITUTE FOR LABOR STUDIES, *WORLD OF WORK REPORT, 2008: INCOME INEQUALITIES IN THE AGE OF FINANCIAL GLOBALIZATION* 10 (Raymond Torres, ed. 2008, <http://www.ilo.org/public/english/bureau/inst/download/world08.pdf>).

⁴⁰ See MARIUS JENSEN, *THE MAKING OF MODERN JAPAN* 107-28 (Belknap Press, 2002).

wealthiest states.⁴¹ These same countries also sought new constitutional arrangements and many of them imitated western constitutions.⁴² In all cases, the imitation seemed to result from a self-conscious effort by government officials and ordinary citizens to evaluate the practices in foreign states and adopt those that seemed best.

It might seem obvious that states would study the policies of other states and imitate those that work best, but there are two major limits to the value of learning. First, all states are different, and what works in one state will not necessarily work in another state. As Kurt Weyland notes in his study of the diffusion of pension reform in Latin America, the liberalized pension system initiated by Chile may not be appropriate for states with different demographic burdens and economic conditions.⁴³ Second, states may define “success” differently. In empirical studies, “success” is usually defined in terms of economic performance,⁴⁴ but most governments have other concerns as well, for example, maintaining political stability, respecting public values, and staying in power, which may mean paying off disparate groups with narrow ends.

To examine these factors more rigorously, and in the constitutional setting, imagine that one state has a constitutional norm that establishes a particular religion, while another state has a constitutional norm that forbids religious establishment. Should the first state imitate the second state (or vice versa)? Several considerations may come into play. Initially, what does the first state hope to achieve through its constitutional religion clause? It seems unlikely that it seeks economic growth. More likely, it hopes to keep religious peace, or (what may be the same thing) to satisfy the preferences of powerful interest groups, or (conceivably) to address religious objectives. If the second state does not share these objectives, then its example will be of little value to the first state. So if the first state is a theocracy like Iran, and the second state is a secular democracy like the United States, one would not predict that Iran would imitate the United States.

Suppose, however, that the states share the same goal. For example, both states have a history of internal religious turmoil, and hope to keep religious peace through a constitutional norm. They just disagree about how to do it. Policymakers in the first state believe that an established church channels religious enthusiasm into placid bureaucratic channels while delegitimizing radical sects.⁴⁵ Policymakers in the second state believe that a government position of neutrality ensures that competition among religious groups will remain peaceful.⁴⁶ These propositions are both empirical assumptions, albeit extremely difficult to evaluate and test. It is therefore not surprising that once a particular state picks one approach, it will not change it unless the evidence of the superiority of the alternative approach becomes overwhelming.

⁴¹ For evidence, see Simmons & Elkins, *supra* note 14 at 182.

⁴² Huntington, *supra* note 7.

⁴³ Weyland, *supra* note 14 at 279-81.

⁴⁴ E.g., Simmons & Elkins, *supra* note 14 at 182.

⁴⁵ FREDERICK G. WHELAN, *HUME AND MACHIAVELLI: POLITICAL REALISM AND LIBERAL THOUGHT*, 156 & n 66 (Lexington Books, 2004)

⁴⁶ Compare ROGER WILLIAMS, *BLOODY TENENT WASHED AND MADE WHITE IN THE BLOOD OF THE LAMB*, at 2 (John Cotton, ed. Kessinger Publishing, 2003).

Accordingly, if the first state experiences some religious turmoil, while the second does not, the first state will not necessarily conclude that the approach of the second state is superior. It will engage in Bayesian updating, taking into account its priors as well as the experiences of the other state and the fact that differences in conditions in that other state, not constitutional differences, may account for its relative success. A further relevant factor is the extent to which other states act like the second state and also experience religious peace. As the number of other such states increases, the probability that the constitutional provision generates religious peace increases rapidly.⁴⁷

The last point we need to address is the difference between policy and constitutional convergence. States that observe successful policies in other states are most likely to want to experiment with those policies before entrenching them. Otherwise, they may find that foreign practices do not translate well domestically, but are nonetheless difficult to reverse. In many cases, constitutional learning will also point to the dangers of various constitutional choices, in which case, domestic decision-makers are even less likely to want to entrench legal changes domestically. A good example of this is the response of countries such as India and Canada to the Supreme Court's interpretation of the Due Process Clause during the *Lochner* era: this experience was a major reason, many people suggested, for excluding a general guarantee of liberty from entrenched constitutional protections in these countries.⁴⁸

Thus, borrowing will most commonly take the form of statutory and regulatory borrowing, not constitutional borrowing. There is a paradox here for constitutional convergence because, to the extent that constitutionalism involves entrenchment, it is hard to see how one can experiment with entrenchment. This may explain why the most prominent examples of constitutional borrowing occur when states experience crises (for example, eastern European states after the fall of communism) and when the decisions of constitutional courts are relatively easy to reverse, at least as a formal matter (most of the world outside the United States).

In sum, a state will rationally update its priors and change a constitutional norm when other states with similar demographic and social conditions have a different constitutional norm that produces a better outcome than the first state shares, and those other states are sufficiently numerous. These are the strong conditions for borrowing, and—to the extent these conditions apply to most or all states—convergence. The main constraint on convergence through learning, then, is the inherent diversity of states, both in their social conditions and the goals of their populations.

C. Coercion, Reputation, and Bribing

States might also adopt the constitutional norms of other states in response to various kinds of international pressure. Pressure of this kind can also take a number of forms. At one extreme, powerful states may attempt to force weak states to change their constitutions by threatening them with military force, blockades, economic sanctions, diplomatic isolation, and

⁴⁷ See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

⁴⁸ See Sujit Choudry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. (I.CON.) 1, 50-51 (2004). In Canada, a right to liberty and property have less entrenched protection under the Bill of Rights 1960.

other harms. At the other extreme, powerful states may attempt to encourage weak states to change their constitutions simply by offering certain economic incentives, such as cash, foreign aid, or trade concessions, or by social and diplomatic pressures.⁴⁹ In between, there are various more subtle forms of pressure. Weak states might want to maintain a reputation for cooperativeness among powerful states, and for this reason try to anticipate the wishes of powerful states by imitating their constitutional forms, even without being asked to do so.⁵⁰

Consider the influence of the European Union and United States, after the collapse of the Soviet Union. The EU, during this period, attempted to exert significant pressure on various former Soviet countries to adopt European constitutional norms, including human rights norms such as the ban on the death penalty, by holding out the possibility of accession to states in the European periphery.⁵¹ The United States, in turn, tried to export the so-called “Washington Consensus”, which emphasized monetary stability, free markets, and political liberalization, by urging the IMF to condition loans to emerging countries on political and institutional reforms along western lines. Together, the United States and the EU also presented a joint commitment to liberal democracy that meant that many newly independent states believed they had no choice but to adopt liberal democratic constitutions, if they were to have a chance at attracting global trade and investment.

For pressure of this sort to succeed in creating constitutional change, however, a dominant state (or group of states) must have both an interest in changing the behavior of a weak state (or group of states) and the means to accomplish the change. Dominant states could have an interest in changing the behavior of weak states for both selfish and altruistic reasons. For example, a powerful state might seek to introduce a market system in a weak state so as to have a trading partner; it might also do so from a conviction that the well-being of people in the weak state will improve as a result. Often motives are mixed. At least since the Peloponnesian Wars, powerful countries have seen geopolitical advantages in molding weak countries in their image. The democratic peace literature gives a gloss of respectability to this impulse. If, as this literature suggests,⁵² democracies do not fight democracies, then a powerful democracy might try to force other countries to become democracies so that they no longer pose military threats to themselves or their allies. This was one of the motives of the second Iraq War.

In either case, the dominant state’s interest must be strong enough to make worthwhile the expense of coercing the weak state. Almost any method of coercion can also turn out to be extremely costly for dominant states. Military intervention, for example, can often turn out to be extremely difficult and risky. The United States has learned (and forgotten) this lesson over and over, from the failed attempt to protect UN troops in Somalia in 1992 and 1993, to the trillion-

⁴⁹ On the way in which various forms of peer pressure, or socialization, can pressure states into compliance with international law. See, e.g. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (Oxford University Press, forthcoming).

⁵⁰ For a discussion of coercion and policy convergence, see Weyland, *supra* note 14 at 271-74.

⁵¹ Presidency Conclusions, Copenhagen European Council 7.A.iii (1993) (“Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.”).

⁵² See, e.g. BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* (Princeton University Press, 1993).

plus dollar war against Iraq. The basic problems are that people in weak states resent and resist foreign military intervention, even when it has a humanitarian motive; and they benefit from their knowledge of local terrain and conditions. These factors give them impressive advantages against which powerful military resources are helpless.

Attempts to use foreign aid and related benefits, such as trade privileges, to change foreign states' behavior can also be both costly, and limited in their effectiveness. Policies of this kind can often lead to resentment against the countries that adopt them, and even in some cases, to retaliatory forms of trade sanction. Such policies also often fail because of the difficulties in monitoring how foreign aid is used, which give recipients a strong incentive to use aid for internal political purposes (or just to pocket it) rather than use it in desired ways.⁵³

Whatever method is used, there is yet another problem that limits the effectiveness of coercive methods for achieving convergence. This is the problem of collective action. When multiple countries seek to coerce other countries to adopt certain constitutional norms, the dominant countries may themselves try to free ride on each other. Each of the dominant countries prefers that the other countries incur the expense and risks of coercion. And when the dominant countries disagree, then the weak countries can play them off each other.

These problems are especially severe when dominant countries seek to secure constitutional change, as opposed to mere policy change, in subordinate countries. If constitutional change, for example, requires a formal amendment to a country's written constitution, this will often generate far greater public attention, and also opposition, than more ordinary forms of legal change. If instead such change is understood to involve entrenchment, it may also be more strongly resisted than ordinary forms of legal change, because the relevant undesired outcomes will be permanent (or at least longstanding) rather than temporary. Even when dominant states can pressure weak states into amending their constitution, or otherwise entrenching particular legal change, there is also no guarantee that this will be enough to cause actual change in behavior if judges, policymakers, and ordinary citizens do not accept the legitimacy of the relevant change.

A further limitation on coercion as a mechanism for convergence is that it depends on a single country, or group of countries, sharing similar constitutions and principles. Where major powers have different constitutional norms, either weaker countries must choose between imitating one power or another, or the influence of the two sets of powers is largely self-cancelling. The tendency, therefore, is toward either constitutional polarization or no change.

During the cold war era, for example, countries in the Soviet orbit generally became communist and countries in the American orbit generally became democracies, in form if not always in fact. In both cases, countries imitated their patrons in order to avoid isolation and even military coercion, and to obtain aid, investment, and trade, and the result was constitutional polarization rather than convergence.

⁵³ See, e.g. DAMBISA MOYO, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA* (Farrar, Straus and Giroux, 2009).

In the post-Cold War era, we also see many instances in which as countries become less dependent on the west for trade, investment, and foreign aid, the pressure for convergence toward western norms is diminished. China, for example, provides safe haven for commodity-rich countries such as Sudan that might otherwise face international isolation from the west. Religious countries, such as the Vatican (or Holy See) and certain Islamic countries, also provide an ongoing counterweight to the influence of the U.S. and Western Europe in certain areas.

A good example of this involves the conflict over abortion between the U.S. and the Vatican (or Holy See) over rights of access to abortion during the Clinton administration.⁵⁴ In Latin American countries during this period, the influence of the two sets of countries often led to directly opposing forms of constitutional change, rather than constitutional convergence. In El Salvador, for example, most people believe that the Vatican played a decisive role in the 1999 amendment to the constitution adopting protection for fetal life “from conception” and requiring the legislature “to pass corresponding statutory amendments prohibiting abortion in all circumstances.”⁵⁵ In Colombia, by contrast, the U.S. played a clear indirect role in helping create constitutional change in exactly the opposite direction – namely, a decision by the Constitutional Court of Colombia to strike down an absolute prohibition against abortion as unconstitutional.⁵⁶

In other countries, such as Brazil, the competing influence of the two countries also meant that there was little change in access to abortion: while the U.S. spent millions of dollars on family planning activities, the Vatican publicly called for the excommunication of all doctors who performed abortions, even those who acted within the bounds of Brazil’s law permitting abortion in cases of rape and threats to a mother’s health.⁵⁷

D. Competition

The previous section discussed ways in which states respond to pressure from other states. In this discussion, foreign governments put pressure on other governments. But states also respond to more indirect forms of pressure resulting from the choices of individuals—in particular, the choices to migrate and invest. Some states seek migrants, or certain types of

⁵⁴ During this period, the U.S. was a powerful international advocate for women’s reproductive rights both via the provision of USAID funding for family planning services and via advocacy at an international legal and policy level, conferences such as the 1994 United Nations International Conference on Population and Development in Cairo and 1995 Beijing conference. It also quite clearly supported the idea that abortion should be legally available in at least some circumstances, and that information about abortion should be provided by family planning organizations. See, e.g. Patrick E. Tyler, *Forum on Women Agrees on Goals*, THE NEW YORK TIMES, September 15, 1995, at A1. The Vatican, on the other hand, adopted the position that abortion should both be prohibited in all circumstances and attract a penalty of automatic excommunication. See John Allen, Jr., *Under Vatican Ruling, Abortion Triggers Automatic Excommunication*, NATIONAL CATHOLIC REPORTER, January 17, 2003.

⁵⁵ Jack Hitt, *Pro-Life Nation*, N.Y. TIMES MAGAZINE, April 9, 2006, available at <http://www.nytimes.com/2006/04/09/magazine/09abortion.html?pagewanted=1>.

⁵⁶ An important basis for the Court’s decision was the inconsistency between such an absolute prohibition and international human rights norms in this area, which the U.S. clearly helped influence in a pro-abortion direction in contexts such as the 1995 Beijing Women’s conference. See Veronica Undurraga & Rebecca Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, in CONSTITUTION EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW (S. H. Williams, ed., Cambridge University Press, 2009); *supra* note 54.

⁵⁷ See *Vatican Backs Abortion Row Bishop*, BBC News, March 7, 2009, available at <http://news.bbc.co.uk/2/hi/americas/7930380.stm>.

migrants such as skilled professionals, and also want to avoid brain drain that takes place when their own educated citizens migrate to other countries. States also want to attract investment from foreign citizens, and to deter their own citizens from investing overseas.

A number of scholars have argued that competition should lead to constitutional convergence.⁵⁸ As before, however, we need to distinguish policy convergence and constitutional convergence. The first question is whether competition for investment and migration would lead to policy convergence; the second question is whether the policy convergence would take constitutional form.

To see why this distinction is important in the present context, consider the large literature on domestic (that is, within-U.S.) competition among the states for corporate charters.⁵⁹ This literature has focused on policy convergence, that is, whether states modify their statutory corporate law in order to attract corporate charters. The literature has not focused on constitutional convergence, that is, whether states modify their constitutions in order to attract corporate charters.

Scholars have argued that competition for migration should lead to convergence because people will want to migrate only to places where they have rights. In the effort to attract such people, nations that do not have rights, or have only weak rights regimes, will adopt and strengthen rights. For example, states might adopt the right against self-incrimination, the right to a lawyer, and the right not to be tortured, because people will be unwilling to migrate to places where they would have no such rights.

Again, however, there are important potential limits to a mechanism of this kind when it comes to the likely breadth of constitutional convergence. It is, for example, not clear that everyone gives such priority to those rights. Migrants may believe that, however weak their rights in such countries, they do better because of their high wages. Calculations such as these must explain that the countries that attract the most labor migrants—the Persian Gulf countries—do not have strong rule-of-law protections.⁶⁰

A similar point can be made about investment. Farber, Law, and others argue that the desire to attract foreign investment will cause countries to adopt stronger property and due process rights, resulting in convergence. Foreign investors will not sink their capital into factories, mines, and other expensive physical plant if the host country is likely to expropriate their investments. It is surely true that countries seeking investment will not expropriate every investment. But the extent of convergence could be very shallow. Investors might acquiesce in a degree of taxation or limited expropriation as the price of doing business, especially if this practice ensures general conditions of political and civil stability which are necessary for doing business. Many of the most significant beneficiaries of foreign investment over the last

⁵⁸ Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85-94, 98 (2002); Law, *supra* note 6; Tushnet, *supra* note 6.

⁵⁹ See, e.g., Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209 (2006).

⁶⁰ Compare Law, *supra* note 6 at 1330-31 (noting the limits of competition-based mechanisms in the case of poorer workers).

decades—countries like China and Russia, many African countries—have extremely weak rule of law guarantees, while others, such as India, have formal protections that are frequently ignored in practice because the judicial system is slow and corrupt.

States can also attract migration and investment by carving out legal enclaves of protection not available to the general public.⁶¹ In some countries, like Saudi Arabia, foreigners live in segregated compounds where they enjoy rights that are denied to natives. Other countries, like China, create special regions where foreign investments are protected from arbitrary expropriation by local authorities. In these cases, constitutional convergence will at most occur in only a very narrow, retail sense, and may not even occur at all, because to maintain enclaves, countries may need to violate norms of equal protection that are observed in other countries.

In other contexts, the pressure for legal convergence may also be reduced because people can travel in order to obtain enjoy certain legal rights. A classic example of this involves the history of “abortion tourism” in European countries such as the Republic of Ireland, Portugal and Poland, where women have long travelled to neighboring countries such as the UK, Spain, Belgium, Germany and Austria, and even the Ukraine, Lithuania, Russia, Belarus, the Czech Republic and Slovakia, in order to obtain access to abortion.⁶² Not only has constitutional tourism of this kind served to diffuse domestic political pressure for change to abortion laws in these countries. It has also meant that these countries have been able to remain competitive in their ability to retain female domestic labor, even in the face of constitutional convergence in the rest of Europe countries toward a different position.⁶³

A final point about policy convergence is that competition can actually lead to jurisdictional differences under fairly weak assumptions. Potential migrants have different tastes and values.⁶⁴ For example, imagine two types of migrants—one belonging to a large religious group such as Islam, and the other belonging to a small group like a dissenting Protestant sect. The first migrant might be attracted to a state where Islam is the established religion, while the other migrant is more likely to be attracted to a state where religious tolerance is the norm. Competition for migration thus can lead states to “specialize” in different types of migration, with the migrants sorting themselves into the different states. Legal structures would accordingly diverge rather than converge.⁶⁵

Likewise, in some countries, people might prefer certain public goods to foreign investment, while in other countries people prefer foreign investment. The first group of countries does not compete for foreign investment, while the second group of countries does. Venezuela, for example, clearly is willing to risk the loss of foreign investment so that it can

⁶¹ Compare Law, *supra* note 6, at 1340-42.

⁶² See Marcy Bloom, “Abortion Tourism” Sheds Light on Need for Health Care Access, *Alternet.org* February 25, 2008; Victoria Burnett, *Citing Persecution, Spanish Abortion Clinics Go on Strike*, *THE NEW YORK TIMES*, January 9, 2008, at A9; Carl O’Brien, *Council of Europe Calls on Ireland to Legislate for Abortion*, *THE IRISH TIMES*, April 17, 2008, at 6.

⁶³ See FRED RAMB, *POPULATION AND SOCIAL CONDITIONS: EMPLOYMENT GENDER GAP IN THE EU IS NARROWING*, 1 (Eurostat - European Communities, 2008).

⁶⁴ Compare Law, *supra* note 6 at 1336-39.

⁶⁵ Tiebout, *supra* note 16.

expropriate assets and redistribute them to the poor. Foreign investors might take their capital to other countries with less egalitarian policies, but that is a price that Venezuela is willing to pay.

At a constitutional rather than policy level, there are also additional reasons why competition for global labor may not lead to convergence. In order to adopt entrenched forms of constitutional protection for foreign workers or investors, for example, governments will need, in most cases, to pass some form of constitutional amendment. By itself, this can create significant constitutional variation among countries faced with the same competitive pressures, because constitutional amendment rules vary significantly across countries.⁶⁶

Governments may also decide that it is desirable to maintain legal flexibility in order to respond to protect migrants and investors. Suppose, for example, that migrants and investors are threatened by a crime wave, or by a new insurgency. A strong government that can meet these challenges without interference by the courts may provide a more attractive place to do a business than a government constantly foiled by its courts. Similarly, if legal protections for foreign firms turn out to be deeply unpopular domestically, the danger this creates of political instability may mean that, even for these firms, it is preferable that certain legal protections be repealed.⁶⁷

Competitive pressures, therefore, need not lead to convergence at either the policy or constitutional level. Instead, it could lead to divergence and constitutional sorting.

IV. Conclusion: Normative Implications

Our main theoretical conclusion is that the pressures toward constitutional convergence are not as strong as scholars have argued. Learning has limitations because of differences across states in constitutional and social values, and the limited information that can be obtained from observing states with different social and demographic conditions. Coercion has limitations because of the sheer cost of forcing or bribing other countries to change their behavior, and problems of coordination among dominant states. Competition can just easily lead to sorting and hence divergence as to increasing similarity. Probably the best case for constitutional convergence comes from the superstructure approach. To the extent that countries have become more similar in their policies and values because of increasing interaction, it would not be surprising if their constitutions became similar as well. But it is not clear that countries are becoming more similar, or, if they are, that these increasing similarities are temporary or permanent.

What of the evidence that seems to support the convergence thesis—including the waves of democratization, the growth of rights cultures across countries, and the rise of independent

⁶⁶ Lutz, *supra* note 20 at 260-62.

⁶⁷ Recent experience in Bolivia certainly suggests that, when faced with potentially destabilizing forms of opposition to the existing legal rights, some foreign actors have been willing to support the renegotiation of existing rights, rather than insist on strict ongoing enforcement of the prior legal regime. See, e.g. *Bolivia Gas Under State Control*, BBC News, May 2, 2006, available at <http://news.bbc.co.uk/2/hi/americas/4963348.stm> (citing calls by the Spanish Foreign Ministry for “authentic negotiations and dialogue” between the Bolivian government and foreign firms such as the Spanish-Argentine company Repsol YPF, in response to the government’s proposal to restructure radically existing resource contracts).

judiciaries? It is easy to find spurious patterns in anecdotal evidence, and, as we noted above, rigorous empirical work has so far not found any evidence of constitutional convergence.⁶⁸ In addition, research on policy (as opposed to constitutional) convergence suggests that policy diffusion follows the pattern of an S-shaped curve. One country moves first; a few countries slowly imitate it; then the number of imitators rapidly increases; and then it flattens out. Significantly, the flattening out can occur well before all or even most countries have adopted the policy initiated by the first country.⁶⁹ If policy diffusion does not always lead to convergence, then certainly constitutional diffusion will not necessarily lead to constitutional convergence, given the greater difficulty in effecting constitutional change.

Debates over the extent of constitutional convergence and comparison are also closely linked –not just in a temporal sense.⁷⁰

To be useful, constitutional comparison requires that global constitutional practices provide some additional information to domestic decisionmakers about either the workability or desirability of particular constitutional choices. The more constitutional convergence occurs as a result of the superstructure idea, coercion or competition, the less likely it is also that global practices will in fact provide information of this sort.

If global constitutional practices are simply the product of the global superstructure, for example, the existence of those practices will provide no useful information to domestic decision-makers about what other similarly situated constitutional decision-makers regard as either a morally or pragmatically desirable. Foreign decisionmakers themselves are helpless, or at the mercy of events. The constitutional practices they adopt will therefore only be as good, or bad, as the underlying factors that influence them.

If foreign constitutional practices are the result of coercion, there will again be little useful information to be gained by identifying the existence of those practices. While there may be reasons to justify international coercion in some cases, in general, we think that coercion raises potentially troubling normative issues. Where compliance reflects coercion, rather than consent, the mere fact that some countries comply with particular international norms also says nothing at all about the moral desirability or correctness of those norms.⁷¹

Even where constitutional changes occur as a result of competition, rather than exogenous changes in conditions or coercion, there will also be limits to the information this can provide domestic decision-makers about the right answer to hard constitutional questions: from the perspective of countries that are large exporters of capital and labor, changes of this kind will often simply reflect the export of existing domestic constitutional preferences, rather than new information about foreign constitutional preferences.

⁶⁸ Law & Versteeg, *supra* note 12; Ginsburg, Elkins, & Simmons, *supra* note 12.

⁶⁹ See, e.g., Weyland, *supra* note 14 at 267.

⁷⁰ For the temporal linkage, see note 1, *supra*.

⁷¹ Compare Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 69 STAN. L. REV. 131 (2006); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005) (on the conditions necessary for meaningful deliberation among countries about the morality of various practices).

If constitutional convergence based on these mechanisms is in fact as broad and inevitable as some suggest, therefore, constitutional decisionmakers should also have much greater pause, than currently, as to the scope for useful forms of constitutional comparison— at least by them, rather than scholars.

The more such mechanisms apply, the less likely it is, in any given context, that even an apparent global “consensus” on a particular constitutional question will in fact provide useful information about constitutional morality or consequences.⁷² For constitutional outsiders, it will also often be extremely difficult to determine the precise role played by such mechanisms, relative to more independent forms of constitutional judgment in foreign countries.

Only if constitutional convergence is in fact limited and contingent, in the way we suggest, can domestic decisionmakers be truly confident that, probabilistically, there will be useful information to be gained from the fact of consistent global constitutional practices in a particular area, and, therefore, that in general there is scope for meaningful forms of comparative learning and borrowing.

⁷² Compare e.g. *Roper*, 543 U.S. 551, 576 (2005) (noting that “every country in the world ... save for the United States and Somalia” had ratified the United Nations Convention on the Rights of the Child, which “contains an express prohibition on capital punishment for crimes committed by juveniles under 18”).