On the Migration of Constitutional Ideas

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Constitutional ideas are on the move. Although new constitutions these days are rarely borrowed and even more rarely imposed, it is a mistake to assume that they are therefore inevitably created indigenously, largely devoid of extra-national influence, pressure, and incentives. Indeed, the model of the indigenous constitution is even rarer than the model of the borrowed or imposed one, and understanding the non-indigeneity of even the most seemingly indigenously created constitutions is an important facet of contemporary constitution-making and contemporary constitutionalism. In this paper I seek to explain this phenomenon, a phenomenon that will, *en passant*, illustrate why seeing constitutions as necessarily either indigenous or imposed is invariably to see today's constitutions through yesterday's lenses.

I. THE IMPOSED CONSTITUTION

As is well-known and well-documented, constitutions are sometimes imposed from outside. The classic example is the Japanese Constitution of 1947, much more the contribution of Douglas MacArthur than of internal Japanese decision.[1] More specifically, the Japanese Constitution of 1947 was largely the product of a process created and managed by an occupying power that had achieved that status by virtue of an unconditional surrender followed by a period of occupation from September 1945 until April 1952. This period in Japan was characterized by both capitulation and aggressive occupation, and the constitution, adopted on November 3, 1946, and in

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[1] *See generally* DALE M. HELLEGERS, WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION (2001) (describing the process of crafting the Japanese constitution); KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING (1991) (comparing the English and Japanese versions); RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR (2002) (evaluating America's imposition of a constitution on Japan).

force from May 3, 1947,[2] is plainly the work largely of the occupying power.[3] Some pre-war Japanese legal and political traditions were explicitly or implicitly incorporated in the document, but these were comparatively minor, and the Japanese Constitution may remain as the best example we have of a truly imposed constitution.[4]

Somewhat more complex are two other examples of allegedly imposed constitutions. One is the re-imposition of the Constitution of the United States on the Confederate states following the Civil War, a process that was coupled, even more importantly, with compelling those states to ratify the Thirteenth, Fourteenth, and Fifteenth Amendments.[5] Although some of the legal and political complexities are still far from clear, the basic idea was that of a victorious combatant imposing constitutional acquiescence on the losing side, and it is thus not unreasonable to add the Reconstruction Amendments to the case of Japan in the catalog of imposed constitutions or imposed constitutional provisions.

Somewhat less clear still is the case of the Basic Law of the Federal Republic of Germany, which was internally approved on May 8, 1949, and took formal effect on May 23, 1949.[6] Although the process of constitution-making was set in motion by the occupying Allied powers, and although the final product was subject to Allied approval, the actual drafting, both in the large and in the small, was essentially a German process drawing on German models and German traditions.[7] It is true that drafting in the

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[2] This, incidentally, explains why the document is sometimes referred to as the 1946 Constitution and at other times the 1947 Constitution.

[3] *See, e.g.*, JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II (1999); KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 1 (Ray A. Moore ed. & trans., 1997); Dan Fenno Henderson, *Introduction* to THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, at xiii (Dan Fenno Henderson ed., 1968); John M. Maki, *Japanese Constitutional Style*, *in* THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, *supra*, at 8.

[4] *See* Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 418, 421 (1999). *Contra* Tanaka Hideo, *The Conflict Between Two Legal Traditions in Making the Constitution of Japan*, *in* DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION 107, 108, 125 (Robert E. Ward & Sakamoto Yoshikazu eds., 1987) (describing American ideas as "totally foreign to Japanese tradition").

[5] *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 375 (2001) (evaluating the legality of the amendment process). *See generally* JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997) (describing the ratification process in each southern state); ERIC MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 326–63 (1960) (describing the amendments' process and consequences). For a discussion of the Framers' intent and the Supreme Court's impact on the Thirteenth and Fourteenth Amendments, see Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 46–47, 68 (1987).

[6] THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS 191, 193 (Elmar M. Hucko ed., 1987). For a description of the document and its historical setting, see generally THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (Ulrich Karpen ed., 1995).

[7] Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 57, 57 (Michel Rosenfeld ed., 1994).

shadow of the necessary approval of an occupying power undoubtedly had an effect on the process, but the effect was less than the Allied powers had hoped for, and certainly much less than existed in Japan.

That truly imposed constitutions are so rare[8] should come as little surprise. Much of the phenomenon of imposition in general, at least prior to the twentieth century, was attributable to colonialism, but colonial constitutional imposition was rare. The chief colonial powers were Great Britain, which itself had no single-document written constitution,[9] and France, which at the time did not take constitutionalism seriously and typically treated its colonies not as separate entities but as overseas *departments* of France itself, thus obviating the necessity of them having constitutions of any kind. By the time the late twentieth century and its post-colonial environment had arrived, imposing anything had a bit of a bad odor. As a result, one of the intriguing aspects of thinking about Iraq and Afghanistan as case studies of potentially imposed constitutionalism[10] is that the phenomenon has in fact been so rare. That rarity not only indicates that we have so few models of its operation, but also suggests that there are indeed formidable obstacles to its success.

II. THE TRANSPLANTED CONSTITUTION

Far more common than the imposed constitution is the transplanted one, where perhaps the more accurate label is the *borrowed* constitution.[11] The important difference between the borrowed constitution and the imposed constitution is the impetus for the transplant, and a more frequently observed model than that of a constitution imposed by a dominating or occupying outsider is that of a constitution willingly and non-coercively

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[8] It is true that most of the Eastern European constitutions adopted from 1946 until the end of the Cold War were imposed by the Soviet Union, and equally true that most of the constitutions of the various republics of the Soviet Union were imposed from Moscow. But because these written constitutions (or written constitutions in general) mattered almost not at all in these times and places to either the imposer or the imposee, this example may be of somewhat less importance.

[9] The so-called unwritten British constitution does include some written documents, such as the Magna Carta and the Bill of Rights of 1688, and so it is slightly misleading to think of it as unwritten, even though there is no single document that one can point to and identify *it* as *the* constitution. *See* HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 9 (4th ed. 2002) (noting that although the United Kingdom has an "unwritten" constitution, such classifications do not tell the whole constitutional story of the evolution of its constitution). With Great Britain's accession to the legal regimes of the European Union and the European Convention on Human Rights, the issues are now even more complex. *See also* RODNEY BRAZIER, CONSTITUTIONAL REFORM 12–13 (2d ed. 1998) (noting that the Liberal Democrats in Britain aim to incorporate the European Convention on Human Rights as "an important remedy for constitutional ills"). *See generally* REFORMING THE CONSTITUTION: DEBATES IN TWENTIETH-CENTURY BRITAIN (Peter Catterall et al. eds., 2000) (discussing the effects of political considerations on the constitutional reform debate).

[10] Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005).

[11] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (2d ed. 1993); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 4 (1994).

selected by a country itself from among a menu of available external exemplars. The image is similar to that of a consumer looking to buy a car from a dealership. The purchaser has a choice about whether to buy a Ford, a Chrysler, a Cadillac, a Honda, a Subaru, or a BMW, and has a choice within any of the brands about which model to buy. Indeed, even a bit of customization is possible. But in the final analysis when you go to the Ford dealer what you buy is a Ford, and the car that the Ford buyer drives away from the dealership is far more the product of Ford designers than of the buyer's choice.

So too with borrowed constitutions. A newly constitutionalizing nation may choose whether to rely heavily on an American, or (more commonly) a German model, but the picture is one of picking a largely off-the-rack constitution, rather than making it one's self. A bit of customization is invariably necessary, but like the customized Ford the customized external constitution is characterized principally by its externally created design and structure.

We do have exemplars of this model, although far fewer than world-traveling American and German (and, increasingly, Canadian) constitutionalists would like us to believe. The initial articles and bill of rights provisions of the Constitution of the Marshall Islands bear the earmarks of the Constitution of the United States, as do the federalism provisions of the Australian constitution.[12] So too with the pervasive influence of the German Basic Law, especially in Latin America.[13] Some Eastern European constitutions resemble the previously partly-imposed constitutions that those countries had when they operated under Soviet domination, just as the brevity and linguistic indeterminacy of the Canadian Charter of Rights and Freedoms of 1982 bespeaks a degree of Americanism that a Canadian process in 2005 would likely find far less sympathetic.[14] Newly independent and newly transforming nations creating their own new constitutions can and sometimes do look to constitutional models, structures, designs, and texts from other countries, and insofar as they do this we might think of their constitutions as borrowed although not imposed; an accepted transplant by a willing transplantee rather than a transplant forced upon an unwilling victim.

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[12] *See* L.J. Priestley, *A Federal Common Law in Australia?*, 46 S.C. L. REV. 1043, 1062 (1995).

[13] This is a running theme in the various articles in *The U.S. Constitution and the Constitutions of Latin America* (Kenneth Thompson ed., 1991). *See also* Edward M. Andries, *On the German Constitution's Fiftieth Anniversary: Jacques Maritain and the 1949 Basic Law* (Grundgesetz), 13 EMORY INT'L L. REV. 1, 1 (1999).

[14] The complex relationship between the United States and Canada, embodied significantly but hardly exclusively in constitutional issues, does go back a long way. *See generally* Justice Robert Sharpe, *Brian Dickson, the Supreme Court of Canada, and the* Charter of Rights*: A Biographical Sketch*, 21 WINDSOR Y.B. ACCESS JUST. 603, 619–29 (2002).

III. THE INDIGENOUS CONSTITUTION

Yet although there *are* substantially borrowed constitutions, even that phenomenon is rarer than we might think. Much of the constitution-making in the past twenty years, and there has been an enormous amount, appears to be largely internally driven, internally organized, and internally implemented, so that the written constitutions that have emerged from such processes appear overwhelmingly to be internally created. However much the Constitutional Committee of the African National Congress ("ANC") traveled to other countries to get ideas before the ANC was in power, and however much the ANC in power welcomed the input of non-South Africans, the document that emerged resembles little else in the world, and is largely the product of South Africans creating a uniquely South African constitution.[15] So too, although less prominently, in Estonia, where the Estonians temporarily stopped singing[16] for long enough to put their own legal drafters to work on hurriedly creating a distinctively Estonian constitution shortly after independence from the Soviet Union.[17] Brazil's massive written constitution—217 pages long in one English version—is entirely Brazilian in conception and construction. So too with the much shorter Spanish constitution of 1978.[18] And most of the new constitutions in Eastern Europe—in Poland,[19] in Hungary,[20] and in the Czech Republic,[21] for example—are largely domestically created from some combination of dramatically amended Communist era constitutions, pre-Communist constitutions in those countries, and new constitutional ideas and language designed to deal with new issues and challenges in a post-Communist era.[22]

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[15] *See generally In re* Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744 (CC).

[16] This is a reference to the fact that Estonia's peaceful revolution was crystallized by mass singing in the central square of Tallinn, causing the transformation from Soviet status to true independence to be called "The Singing Revolution."

[17] Interviews with Jan-Erik Truuvalli, Former Professor of Law at Tartu University and Minister of Justice, in Tallinn, Estonia (Aug. 1992). I rely here on conversations with Truuvalli, who was a central figure in the process of drafting the constitution.

[18] *See* Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1893, 1896–97 (1998).

[19] *See* Wiktor Osiatynski, *A Brief History of the Constitution*, 6 E. EUR. CONST. REV. 66, 67–68 (1997).

[20] *See* RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 180–83 (1996).

[21] *See* Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 511 (1991); Jiří Přibáň, *Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution-Making*, 38 L. & SOC'Y REV. 407, 408 (2004).

[22] *See* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 1–5 (2000). *See generally* ALEC S. SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 31–60 (2000); Pedro Magalhaes, *The Politics of Judicial Reform in Eastern Europe*, 32 COMP. POL. 43, 49–58 (1999), *available at* http://links.jstor.org/sici; Albert P. Melone, *Judicial Independence and Constitutional Politics in Bulgaria*, 80 JUDICATURE 280, 280–81 (1997);

At first glance, it appears as if much of contemporary constitution-making is a largely indigenous process.

There are two likely reasons for this commitment to indigenous constitution-creating. One reason is the close relationship between constitutions and national identity. Estonia can borrow an American model for its bankruptcy law without feeling much less Estonian, but not so with its constitution. To make a constitution is to declare independence in the strongest sense of that term, and a nation that is not perceived—by itself and others—as having made its own constitution is likely perceived as being for that reason just so much a less independent and less mature country.

In addition, there is reason to believe that even willingly borrowed constitutions suffer from what is known in the literature as the "transplant effect."[23] Because laws of any kind must be enforced and internalized within an institutional structure, and because formal and informal institutional structures persist through regime changes and political transformations, transplanted laws and constitutions typically entail some degree of mismatch between the provisions of the documents and the institutional structures that are needed to enforce them. Controlling for an impressive range of other factors, the existing research appears to indicate that transplanted laws work less well than indigenously created ones.[24] Drawing on this research, therefore, we might expect much the same for constitutions.

The research on the transplant effect is compatible with research on the relationship between indigenous constitution-creation and economic development. Using a data set consisting of a large number of the semi-autonomous Indian "nations" within the United States,[25] Stephen Cornell and Joseph Kalt have concluded that nations that created their own constitutions achieved greater economic development than those whose constitutions were taken off-the-shelf from the Bureau of Indian Affairs.[26] Because constitution-making requires the antecedent creation of the cooperative institutions that will produce the constitution, Cornell and Kalt argue that the necessity of creating institutions of cooperation allows those very institutions to serve as institutions of economic development, while the nations that have had no need to create the institutions in the context of

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Herman Schwartz, *Eastern Europe's Constitutional Courts*, 9 J. DEMOC. 100, 102–11 (1998), *available at* www.muse.jhu.edu/journals/journal_of_democracy/v009/9.4schwartz.html.

[23] Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 168, 174–75, 180 (2003).

[24] *See id.* at 165–66.

[25] Whether to call these entities "nations" or "tribes," and whether to describe them as "sovereign," "semi-sovereign," "independent," or "semi-independent," are historical, political, philosophical, and ideological confusions that I would prefer, at least here, simply to sidestep.

[26] Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache*, 33 ECON. INQUIRY 402, 402–04, 407, 415 (1995).

constitution-making will lag behind when it comes time to create the institutions of economic development.[27]

All of this may explain why significantly indigenous constitution-making appears so prevalent and why significantly imposed constitutionalism strikes Professor Feldman and others as so jarring. In arguing in favor of indigeneity and against imposed constitutionalism, largely on the basis of the way in which the former encourages a necessary degree of "buy-in," to use contemporary management-speak, Feldman offers us a new argument for what appears on the surface to be the dominant mode of modern constitution-making.[28] Feldman also offers a new argument against those who see the current circumstances in Afghanistan, Iraq, and possibly other countries as an opportunity to fight against the forces of morally problematic indigeneity—largely on the inter-connected issues of religion and gender.[29] For those who seek to influence Afghani and Iraqi constitution-making in morally preferable directions, Feldman argues, there is a substantial risk that such influence will prevent the necessary buy-in at the outset and thus prevent in the intermediate and long-term the establishment of the deeply-rooted constitutionalism that can eventually provide the foundation for true human rights advances.[30] Because occupations are as a practical and political matter limited in time, the departure of an occupying force may leave an unsupported and unsupportable constitutionalism unless that constitutionalism is allowed (by the occupying powers and others) to create itself—moral warts and all—from the very beginning.

IV. THE TRANSNATIONAL CONSTITUTION

In the way in which he portrays the occupying American and other forces as leaving Afghanistan and Iraq, and more precisely in the way in which he depicts the post-occupation environment, Feldman appears to have fallen into the trap of assuming that non-imposed and non-borrowed constitutions are necessarily indigenous ones. Yet, such a picture of the universe of options is substantially inconsistent with the modern transnational nature of law-making and constitution-making in much of the developing and transitioning world.[31] When occupying powers leave, they do not leave a void, but rather leave a scenario in which an enormous amount of law-making and constitution-making remains significantly influenced in complex ways by numerous other countries and by an important number of

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[27] *Id.* at 424.

[28] *See* Feldman, *supra* note 10, at 888–89.

[29] *See id.* at 857, 859–60, 888–89.

[30] *See id.* at 867–75, 888–89.

[31] This phenomenon is documented in LAW UNDER EXOGENOUS INFLUENCES (Markku Suksi ed., 1994).

highly influential multi-national organizations.

Consider, for example, the United States-Vietnam Bilateral Trade Agreement of 2000.[32] Although the Vietnamese now hold the United States, the Vietnam War (which the Vietnamese, not surprisingly, call the American War) notwithstanding, in less contempt than they hold the French, the Russians, and the Chinese, there is little indication that the United States has even the slightest inclination to use its military force to influence Vietnamese legal development. The Vietnamese, however, have a great desire to expand the markets for their goods and to increase foreign direct investment, and the Bilateral Trade Agreement is designed, in large part, to serve these goals. It turns out, however, that the agreement, for numerous complex reasons, imposes on Vietnam a range of "rule of law" requirements. Among these requirements are ones that mandate the publication of the laws and judicial decisions, that require reduced influence of the government in judicial decisions in civil and criminal cases, that seek to ensure the availability of appeals from adverse judgments, and that demand numerous other procedural reforms.[33] So although the Vietnamese are writing and re-writing their own laws, they are doing so against the background of economic and political pressure exercised, so it seems, for mutual advantage.

It would be easy to respond to this example by speculating that the United States is now doing with its economic power what it tried to do with its military power in Vietnam in the 1960s, and what it is doing with its military power in Afghanistan and Iraq right now. But a closer look reveals that the Vietnam-United States Bilateral Trade Agreement is but an analytically simple two-country example of a pervasive phenomenon. Any country aspiring to membership in the World Trade Organization, for example, must comply with far more onerous requirements of legal development than one finds in the Bilateral Trade Agreement. So too with the requirements to join the European Union, as Turkey is now discovering, and as many other newly-admitted European Union countries have discovered over the last decade. And so too with loan eligibility from the World Bank, the International Monetary Fund, the Inter-American Development Bank, and the Asian Development Bank. None of these organizations is without influence, and none of these organizations is unwilling to use its influence to shape what it believes to be advantageous[34] constitutional and legal development.

The importance of this phenomenon is twofold. First, the picture of

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[32] Agreement Between the United States and Vietnam on Trade Relations, July 13, 2000, *available at* 2001 WL 1792868.

[33] *Id.* at ch. vi.

[34] Advantageous to the organization, to donor and developed countries, and to developing countries, in proportions that vary depending on the country, the issue, and the perspective of the person or entity assessing the proportions.

the United States and other coalition members leaving Iraq and Afghanistan, and thus leaving Afghanistan to the Afghans and Iraq to the Iraqis, is highly misleading, for even with no Americans there would still be (and indeed there is more likely to be) the World Bank, the International Monetary Fund, the European Union, the United Nations Development Program, numerous so-called donor countries, and countless other organizations who would both remain involved in legal, political, technological, and economic development, and whose involvement would hardly be without substantive influence as they manage their own involvement. Iraq and Afghanistan, no less than most other countries in the world, exist at a vortex of international involvement. Consequently, a picture of an America-free Iraq as one in which only Iraqis were making important constitutional and associated legal decisions does not comport with very much that we know about the modern world.

These patterns of transnational influence are no less important when they are less formal. When judges and prosecutors and lawyers from developing countries travel to international conventions, or are invited on study tours, or in other ways are in contact with their counterparts from other countries, there is often a desire to be part of a larger professionally-described group, and some degree of transnational harmonization is likely to follow.[35] Indeed, the fact that Iraq in its most recent elections has required that women constitute one-third of all electoral lists cannot be explained in any way other than by operation of a complex process of international legal and constitutional and human rights harmonization. This is a process that aligns Canada with South Africa and the European Convention on Human Rights in its approach to rights adjudication.[36] It is a process that makes nationhood without a single written constitution now unthinkable, the positive experiences of the United Kingdom, New Zealand, and perhaps Israel[37] notwithstanding. It is a process that leads television-watching Chinese to demand their *Miranda* rights when they are arrested.[38] And it is a process that has engendered increasingly well-known and acri-

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[35] This focus on the importance of transnational global networks of professionals, including lawyers and judges, has been a frequent theme in the work of Anne-Marie Slaughter. *E.g.*, Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 185 (1997).

[36] *See* Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND AMERICAN CONSTITUTIONALISM (Georg Nolte ed., forthcoming Sept. 2005) (addressing the contrast between the United States' First Amendment protections and the architecture of the Canadian, European and South African constitutions).

[37] I say "perhaps" largely because of the question whether Israel's statutory Basic Laws have such exalted quasi-constitutional status as to make them more constitutional than non-constitutional in actual effect.

[38] *See TV carries the American dream around the world*, CHI. TRIB., Oct. 12, 2001, at 4, LEXIS, News Library, Chtrib File.

monious Supreme Court debate in the United States[39] as the Court debates the propriety of references to foreign law.

We at best dimly understand these processes of international influence and international or transnational harmonization.[40] Indeed, they are sometimes just as dependent on political, social, cultural, economic, and historical desires for non-harmonization, as when the Vietnamese sympathize with Americans because they are not French, or when the courts in the Republic of Ireland look to non-English precedents precisely for their non-Englishness, or when Canada increasingly looks eastward to Europe[41] and not southward to the United States as a way of identifying itself with the community of what it perceives to be progressive nations.[42] But whatever these patterns of influence are, they are patterns that make the idea of a non-imposed constitution somewhat quaint. More accurately, perhaps the notion of a non-imposed constitution is just as quaint as the notion of an imposed one, and understanding the patterns of migration of legal and constitutional ideas in the twenty-first century requires that we recognize that mechanisms of political influence, economic incentives, regional cooperation and much else will say far more about who influences whom than less complex notions of imposition and non-imposition.[43] When occupying countries depart the countries they have occupied, they do not leave a vacuum and they do not leave an Eden of indigeneity. They leave a messy environment in which numerous non-occupying countries are vying for influence, in which numerous multi-national organizations are attempting to impose their views, in which even more numerous multi-national corporations are trying simultaneously to please numerous first world constituencies as they search for second- and third-world profits, and in which domestic political and legal elites may push for the adoption of non-domestic models in order to increase a country's transnational presence.[44] In such an

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[39] *Compare* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (citing foreign precedent), *with id.* at 586, 598 (Scalia, J., dissenting) (expressing outrage at relying on what "foreign nations" are doing). See also the same debate in *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

[40] On the related but different phenomena of harmonization and convergence in the legal development context, see generally KATHARINA PISTOR & PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT, 1960-1995 (1999) (discussing converging patterns of legal development among six eastern Asian nations).

[41] And southwestward to Australia and New Zealand and southeastward to South Africa.

[42] *See* Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253 (Joseph Nye & John Donahue eds., 2000). *See generally* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296 (2003) (introducing and discussing *aspirational* and *aversive* constitutional borrowing).

[43] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (seeking to explain the convergence of transnational constitutional ideas largely in terms of growth in various transnational intellectual trends as well as internal social, political, and economic tension).

[44] On this last phenomenon, see BILL MAURER, RECHARTING THE CARIBBEAN: LAND, LAW, AND CITIZENSHIP IN THE BRITISH VIRGIN ISLANDS (1997) (presenting an anthropological study of the origin

environment the question is not one of imposition or non-imposition, but instead is one of trying to understand patterns of influence that may be slightly less heavy-handed but no less important and no less effective.

V. CONCLUSION: THE MANAGEMENT OF INFLUENCE

None of the foregoing is designed to suggest that fostering or allowing local buy-in is either pointless or undesirable. In this respect Professor Feldman is plainly correct. But the various local agents who are acting locally will not simply be acting locally. They will be deciding which multi-national organizations they wish to join, to which nations they will send their officials on visits, to which countries they will send their students for high-prestige education, which regional and global alliances they wish to forge, and where they wish to sell their products. And every one of these decisions involves relinquishing, sometimes formally and sometimes informally, some degree of control over the truly indigenous creation of political, constitutional, and legal values, ideas, structures, and institutions.

From the perspective of an external entity—the United States, the Catholic Church, the United Nations, the WTO, Amnesty International, and scores of others—the question is not whether, but how. Legal development and constitution-making in Iraq, in Afghanistan, in the Middle East, and in much of the rest of the world will invariably be shaped by an elaborate interrelationship between the views of these groups[45] and the views of local residents and local authorities.[46] And for the more influential of these entities, non-involvement is not an option, not only because of their influence and pervasive reach, but also because even nominal non-involvement sends out signals and thus has influence. These entities must decide how to exercise their influence, and to what substantive end. But there is no not deciding.

Even the oldest and most enduring constitutions are not entirely indigenous. If the United States has a common law constitution[47] it is in part because the United States is a common law country, and the United States is a common law country for many reasons, one of which, purely by way of example, is that the British did not lose to the French and the Indians in the French and Indian War. Although South Africa at one level made its own constitution, its constitution plainly reflects a desire to preserve much of South Africa's Roman-Dutch legal tradition, a tradition that owes a bit to

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of multiculturalism and transnationalism in the British Virgin Islands in light of the islands' status as a "dependent territory" of the United Kingdom).

[45] The views of these groups are, of course, themselves shaped by internal politics, economics, history, and their relationship with other entities.

[46] *See* Sally Engle Merry, *Anthropology, Law, and Transnational Processes*, 21 ANN. REV. ANTHROP. 357 (1992) (discussing how transnational processes shape local legal systems).

[47] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

the Romans, a bit to the Dutch, and a great deal to the English.[48] Hungary has a constitutional court largely because of the German model, but Germany has a constitutional court largely because of the influence of the Austrian Hans Kelsen.[49] And when Australia, whose constitution has no bill of rights, finds a right to freedom of speech and freedom of the press in its constitution, it does so not only because of the indirect influence of countries that protect freedom of speech and freedom of the press, but also because of the ways in which some of the chief beneficiaries of a right to freedom of the press—broadcasters, publishers, editors, and reporters, most notably—are themselves part of extensive and complex international networks that overlap with but are not congruent with various political and legal international networks.[50]

Explaining the migration of constitutional ideas is thus the task of a lifetime and not of a brief comment.[51] And there is no doubt that the enduring debates between human rights and self-determination, between imposition and self-governance, and between competing conceptions of the good play a substantial role in this explanation. But there is much more than that, and if we too easily assume that the antithesis of imposition is indigeneity we may too easily ignore the existence and effect of substantial external influences on even the most seemingly internal of constitutional decisions. For Afghanistan, for Iraq, and for numerous other developing, emerging, and transitioning nations, the principal question is not one of constitutional imposition or not. It is a question that accepts the inevitability of external influence and the inevitability of external influencers seeking to achieve their own goals and to propagate their own ideas and their own ideals. Doing this effectively will require that those external forces recognize that being too heavy-handed will be counter-productive, as will failing to recognize the instrumental importance of allowing a considerable degree of indigenous control. But once we see external influence not in

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[48] *See* REINHARD ZIMMERMAN & DANIEL VISSER, SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (1996); Hugh Corder, *Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000*, 118 S. AFR. L.J. 773 (2001); David Dyzenhaus, *Judicial Independence, Transitional Justice and the Rule of Law*, 10 OTAGO L. REV. 345 (2003) (describing Roman-Dutch legal tradition and its influence in shaping constitutional democracy in South Africa).

[49] On the phenomenon of constitutional courts generally, see Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705 (2004).

[50] *See* Nationwide News Pty Ltd. v. Wills, (1992) 177 CLR 1, 33–34; Australian Capital Television Pty Ltd. v. Commonwealth, (1992) 177 CLR 106, 144–47. *See generally* MICHAEL CHESTERMAN, FREEDOM OF SPEECH IN AUSTRALIAN LAW: A DELICATE PLANT (2000).

[51] Indeed, even the word "migration" may suggest a more linear process than exists, and the interrelationship between national and global legal influence may be much more complex. *See* SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY (1998) (detailing the economics of globalization and the importance of place in the global economy); Eve Darian-Smith, *Structural Inequalities in the Global Legal System*, 34 L. & SOC'Y REV. 809 (2000) (identifying the role of the nation-state in determining the limits and substantive content of global law).

terms of the effect or power of one nation or one human rights organization or one pressure group, we see as well that the withdrawal of any one such group will simply leave the field to others, and that the passivity of any one group will possibly produce more power for indigenous authority, but definitely more activity by other non-indigenous groups. Power abhors a vacuum, and there is no shortage of individuals and groups willing to fill it. This makes the task of explaining constitutional development far more difficult, and it makes the task for any group of deciding how and when to act more difficult still. That the tasks are difficult, however, cannot justify avoiding them. It only makes understanding them all the more important.