Experience Must Be Our Only Guide: Constitutional Decentralization and Instability at the American Founding

Robinson Woodward-Burns
Doctoral Candidate
Department of Political Science
University of Pennsylvania
rowood@sas.upenn.edu

Since 1791, the federal Constitution has been amended only 17 times, while the 146 state constitutions have been amended 5,900 times. What explains the federal Constitution's stability relative to the states? Scholars suggest judicial review and popular constitutional reinterpretation postpone or prevent federal amendment, while the state constitutions' low thresholds to amendment and constitutional culture invite revision. Instead, this paper points to constitutional decentralization. Demographic shifts force national constitutional controversies, threatening the reigning national party. That party devolves these issues to the states. State radicals use these contentious issues to fracture the dominant state coalition, entrenching their new power in a new state constitution. State constitutional revision resolves national constitutional crises, preempting federal amendment, and quieting national inter-branch conflict. This paper defends the claim with an original dataset of all 242 proposed state constitutions and a case study of revolutionary-era state constitutions' influence on the 1787 Constitution. In sum, devolution of controversies to the states stabilizes the federal Constitution while upsetting the state constitutions.

Nearly 230 years old, the America's federal Constitution is the world's oldest and most stable national constitutional document, while the American state constitutions undergo generational revision, lasting on average 63 years.[1] The federal government has had a single constitution with seventeen amendments since 1791, while the states have boasted 146 constitutions and 5,900 amendments since 1776. What explains the difference? Why is the federal Constitution so stable relative to the state constitutions?

Liberal constitutions are inflexible rules, binding citizens to a common contract to punish lawbreakers for the shared good.[2] But liberal constitutions also constitute and bound the polity, creating a

[1] The federal Constitution is also the tersest and perhaps steadiest written constitution in the world, too extreme an outlier to represent national constitutions. While the American state constitutions resemble national constitutions in textual specificity, rights protections, and duration (Versteeg and Zackin 2014), hinting at determinants of national constitutional stability, this work does not speculate on constitutional duration in other nations.

[2] In America, particularly at the state level, a dominant political party entrenches its power through constitutional revision. Less flexible than a statute, a constitutional clause may durably restrain hostile branches of government, rally allied litigants, and exclude political opponents from citizenship.

body politic capable of democratic deliberation and autonomy. As the informal people change and grow, they seek to revise or amend these stable constitutional rules.[3]

The federal and state constitutions vent this tension differently. Most paths to federal constitutional reform are closed. The federal Constitution's high bar to amendment has shielded the document from formal revision. Informal reinterpretation is rare, as popular and judicial interpreters tend to defer to existing readings of the federal Constitution. For example, landslide popular majorities may elect national and state legislators and executives who can assert their own readings of the federal Constitution, but these massive majorities are rare. Alternately, popular mobs can circumvent legislators, judges, and formal amendment to assert new, informal interpretations of the Constitution. But these mobs assemble infrequently, during crises. And most ordinary Americans subscribe to the same core constitutional commitments, shying from rejecting these hallowed values for radical new constitutional readings.[4] Alternately, one might expect the judiciary to radically reinterpret and destabilize the national Constitution. But the courts usually function as neutral arbiters, resolving constitutional disputes that might otherwise force constitutional amendment or crisis, stabilizing the Constitution. And courts can read clauses flexibly, helping an old constitution adjust to new contexts. Moreover, the president and Congress strategically defer politically divisive issues to the courts, knowing judges can dismiss or slow appeals, quiet constitutional controversies, preserve the balance between reigning parties, and prevent formal change. Judges usually act as legitimators, and can only radically reinterpret the Constitution when it the other two branches allow it, or fail to stop it.

These are the dominant explanations for the Constitution's stability, and they only focus on the national branches and parties. But the state constitutions defy and complicate the federal model. American scholars largely neglect the 146 state constitutions for the federal one, missing much of American constitutional politics. Far more flexible than their federal counterpart, undergoing frequent wholesale replacement, with many more provisions on citizenship, the franchise, education, and economic and

[3] Thus the old dilemma in constitutional law – does legitimacy lie in democratic constituent power, or the formal constitution? This essay recognizes, but does not tackle, this important question.
[4] Americans interpret these shared values in diverse and sometimes conflicting ways, but rarely escape them.

positive rights, these state constitutions are the main site of citizenship debate, constituting the American polity. Myopic focus on the federal Constitution, designed for inflexibility and permanence, exaggerates the stability of civic inclusion, constitutional reform, and American constitutionalism as a whole.

This project posits two factors unique to the state constitutions that explain their relative instability. First, Madison worried that a long, mutable constitution could not compel subjects' obedience, and would collapse. The state constitutions are exceptionally specific, packed with politically motivated, contentious provisions, and are easy to amend, tethered to sudden swings in state coalition politics. This may explain their instability. Second, Madison claims widespread veneration preserves a constitution. While the federal Constitution commands broad public respect, most Americans ignore or denigrate their state constitution and have few reservations with state constitutional revision.

Finally, the state and federal Constitutions evolve jointly. But scholars describe national judicial review, national popular constitutionalism, and state constitutionalism in isolation, and misread each. Since state constitutional revision stabilizes the federal Constitution, ignoring the state constitutions, as most scholars do, misunderstands the federal Constitution. The aim of this project is to integrate accounts of state and national constitutional change to show how these sorts of change interact.

This project proposes a new determinant of American constitutional change – constitutional decentralization. National parties defer divisive cross-cutting issues to the states. Opportunistic state radicals use these wedge issues to split the dominant state coalition, seizing power and easily redrafting the state constitutions. The may resolve the controversy. Further, state constitutional reform is slow, piecemeal, and at times unsuccessful, sometimes killing issues. Resolved or trapped at the state level, the national issue quiets, stabilizing national constitutional politics. States usually vent national controversies. But if the divisive issue aligns with sectional tensions, devolution can exacerbate the controversy, forcing national constitutional reform. Thus the thesis: national coalitions devolve controversial issues to the states, destabilizing state coalitions and constitutions, which usually stabilizes the federal Constitution. The state constitutions guide the timing, nature, and scope of American constitutional and political development. This in some senses is an old but forgotten fact. Two centuries ago at the Federal

Convention, John Dickinson reminded the federal framers to look first to the state constitutions, declaring the states' "Experience must be our only guide."[5]

There are three implications to this. National coalitions defer controversies not only to the courts, but also to the states. Armed with unique, plenary constitutional powers, the states affect national policy in ways courts cannot. The constitutional change that some courts scholars trace to the judiciary actually works through the states. Second, federal actors defer to the states to postpone or prevent inter-branch conflict. Scholars who neglect the state constitutions may miss how the states quietly mediate national inter-branch politics. Third, states guide national constitutional realignments. States do not always lag behind national realignments, but sometimes lead. Additionally, constitutional devolution postpones change, explaining the periodicity of American constitutional realignments.

This paper proceeds in four parts, first reviewing present accounts of American constitutional development, and then rebutting these with a model of American constitutional federalism. Third, the paper offers preliminary data on state and federal constitutional development and finally, a case study on constitutional devolution in the founding era.

I. Explaining American Constitutional Development

Civic disputes drive American constitutional change. Slow demographic, economic, and technological tides reshuffle the population and the electorate. New populations grow, organize, and petition for legal and constitutional recognition. But the national Constitution by design entrenches law against reform. Like all constitutions, the national Constitution is to some degree a tool for civic exclusion, legally and inflexibly bounding the polity. The Constitution, ever unresponsive, exacerbates civic controversies. Often these controversies cut across party lines, internally fragmenting both national parties, and strengthening regional third parties. The dominant parties survive by cooperatively excluding

[5] Here Dickinson argued the House of Representatives ought to originate money bills, as was precedent in the House of Commons and under eight of the fourteen state constitutions.

these issues and voters.[6] Parties can postpone electoral change, but as demographic change continues, public pressure for partisan and constitutional realignment mounts (Key 1955; Burnham 1971), exacerbated by the Constitution's stubborn inflexibility. Eventually the parties fragment and realign into a new coalition, perhaps merging with a once-peripheral third party, and revise the Constitution to inflexibly entrench their interests, renewing the cycle.[7]

There are two ways to preclude or postpone national amendment. First, coalitions defer to the courts to prevent realignment, preserving the national constitutional regime.[8] Robert Dahl asserts constitutions, statutes, and precedents are ambiguous, allowing courts leeway in deciding contentious political issues (Dahl 1957). Yet courts rarely use this flexibility to overrule the executive or legislature. Dahl explains the president and Congress restrain the Court through frequent appointment and foreknowledge of nominees' preferences, excluding hostile nominees. The Court merely legitimizes the dominant national coalition's platform. Dahl downplays the Court's independence by excluding the activist New Deal and Warren Courts (Casper 1976), so the question is not *whether* the judiciary follows the executive and legislature, but *when*. When a contentious, crosscutting issue threatens to split a

[6] Slavery divided both the Democrats and Whigs. Monetary policy split Populist-era Republicans and Democrats. Race did the same in the mid-twentieth century. For a full discussion and list of cross-cutting constitutional issues see (Sundquist 1983; Burnham 1975).

[7] Some suggest political realignment is gradual and continuous, rather than abrupt and periodic (Key 1959; Carmines and Stimson 1989; Mayhew 2002). If parties faithfully and constantly followed demographic changes, this would likely be the case. However, self-interested political parties resist these demographic changes, often through civic and franchise exclusion, creating the pressure that causes sudden critical realignments. And even this incremental model described partisan realignment, it would not describe constitutional realignment. The Constitution, with its extraordinarily high barriers to reform, is designed to resist minor, incremental change. This inflexibility distinguishes constitutional politics from ordinary partisan politics. Constitutions evolve by realigning periodically.

[8] The most fractious issues – and those most often deferred to the courts – concern citizenship and civic exclusion. Most assume civic exclusion destabilizes American constitutional orders, while inclusion secures stability. Louis Hartz (1955) proposes Americans rejected European feudalism for inclusive Lockean liberalism, yielding a bloodless Revolution, a nineteenth century lacking socialism and class tension, and a twentieth century that shunned radicalism and communism. Writing in a more contentious time, Walter Dean Burnham (1971), Samuel Huntington (1981), and Bruce Ackerman claim excluded groups periodically vie for and achieve civic inclusion via intense organizing and realignment within the major parties, culminating in a critical election and new, stable, egalitarian constitutional vision. Rogers Smith debunks Hartz and Huntington's liberal thesis, asserting civic exclusion drives instability and political and constitutional change (Smith 1993; Smith 1999).

national coalition, the coalition defers to the judiciary, quarantining the issue (Graber 1993).[9] Since the president leads national coalitions (Skowronek 1993), Whittington suggests presidents decide when coalitions defer to the courts (Whittington 2009). Reconstructive presidents that lead new, unified national coalitions can seize constitutional interpretation from the courts, while presidents leading waning, fracturing coalitions shift interpretation of divisive constitutional controversies to the courts.[10]

Second, the public may circumvent judges through popular constitutionalism. Bruce Ackerman describes America as a "dualist democracy," with entrenched representatives passing ordinary statutes and the people infrequently electing radicals to amend or reinterpret the Constitution to legally bind these entrenched representatives. For example, the Reconstruction Republicans, like later New Dealers, "provoked a fundamental reworking of constitutional identity," through the Reconstruction Amendments and Social Security Act (Ackerman 1998, 8).[11] These parties won landslide election during times of unusual crisis, gaining the massive legislative majority needed to revise the Constitution. But these coalitions are exceptional.[12] Additionally, Larry Kramer trusts ordinary people and out-of-doors mobs to repudiate officeholders and abrogate laws according to their own vision of the Constitution (Kramer 2004). This rarely results in formal amendment. Nor do these local mobs often achieve the national consensus required to informally reinterpret core constitutional commitments. Moreover, popular

[9] The Court does not always quiet controversies. Lasser notes three cases in which constitutional controversy pushed reactionaries on the Court to issue a decision exacerbating national polarization and the need for realignment (Lasser 1985). *Dredd Scott* is one such example. Gates confirms controversial cases polarize justices (Gates 1989).
[10] Per Dahl and Funston, the Court, appointed by the old regime, opposes a reconstructive president or congress until these bodies appoint new, allied justices and shift the Court (Dahl 1957; Funston 1975). Adamany agrees the Court may initially oppose realignment coalitions, stripping new presidents and congresses of constitutional legitimacy (Adamany 1973, 820–5). This may be why realignment presidents like Jackson, Lincoln, and Franklin Roosevelt claimed sole authority to interpret the constitution, to the exclusion of the Court. Gates suggests the Court's resistance varies across realignments (Gates 1989).
[11] Unlike Jacobsohn, Ackerman does not assert revising core commitments changes constitutional identity. This leaves Ackerman's idea of identity murky. See (Finn 1999)
[12] Note, however, reformers can circumvent Article V's high bar for constitutional amendment with extralegal politicking. For example, Northern voters elected a Republican majority to the Thirty-Ninth Congress, which in December of 1865 excluded representatives from all Confederate states save Tennessee. This granted Republicans four-fifths of congressional seats, enough to score the 13th and 14th Amendments, constraining subsequent conservative Democratic congresses. Though procedurally legal, this violated Article V's spirit of consensual revision, and the antebellum Constitution's commitment to slavery (Ackerman 1998, 15–7, 99–119).

reinterpretation rarely challenges the fundamental tenants that give the Constitution its identity.[13] National popular constitutionalism, circumventing ordinary politics, is reserved for crises and moments of exception. So it is rare, explaining national constitutional stability.

Most scholars ignore the state constitutions.[14] These documents, with their hundreds of conventions, thousands of obscure, provincial provisions, and ten thousand proposed amendments, are dauntingly long, unpolished, and unwieldy, so discussion of American constitutionalism disregards the state documents for the federal one, misunderstanding both.[15] This is a problem. The federal and state constitutions evolve interdependently, so ignoring the latter misinterprets the former. Much of federal constitutional politics begins with the states. Popular, grassroots organizing usually grows from state politics and constitutions (Wolin 1990; Miller 1988; Dinan 2006; Zackin 2013), as do citizens' identities and cultures (Elazar 1972; Elazar 1982), municipal regulations, and some public ideologies, like American republicanism (Wood 1972; Wood 1992b). Against previous readings, state constitutions are not parochial, but spark national reform, not particularistic, but reflect reasoned convention debate, not ill-designed and contradictory, but often functional (Scalia 1999, 3–47; Dinan 2006; Zackin 2013, 18–35). When Americans missed this point, the British Lord Bryce instructed:

[13] See for example (Kammen 1986)

[14] The state constitutions literature is sparse. Most accounts are narrow and descriptive, shying from explaining constitutional development and endurance.[14] Historians and lawyers chronicle particular eras, like the Revolution (Wood 1972; Wood 1992b; Lutz 1980; Kruman 1999; Adams 2001), particular states, regions, and cultures, like the South (Elazar 1972; Elazar 1982; Fehrenbacher 1989; McHugh 2003), particular ideas, like republicanism (Wood 1972; Wood 1992b; Scalia 1999; Henretta 2009; Onuf 2009), or particular policy issues, like positive rights (Hershkoff and Loffredo 2010; Hershkoff 2001; Hershkoff 1999). In isolating eras, regions, ideas, and policies, these scholars miss how the interaction of these orders drives American political development. Others trace the interaction of these ideas, policies, regions, and levels of government over state constitutional history (Sturm 1982; Friedman 1988; Tarr 1998; Dinan 2006; Hall 2009; Versteeg and Zackin 2014). For example, Julie Novkov and Emily Zackin argue that state constitutionalism shapes national debates over family and marriage regulation and over positive rights (Novkov 2008; Zackin 2013). But these accounts focus on a single issue area in which states have affected federal policy, and they many miss cases when state revision preempts federal change, systematically understating the state constitutions' effect on the federal one.

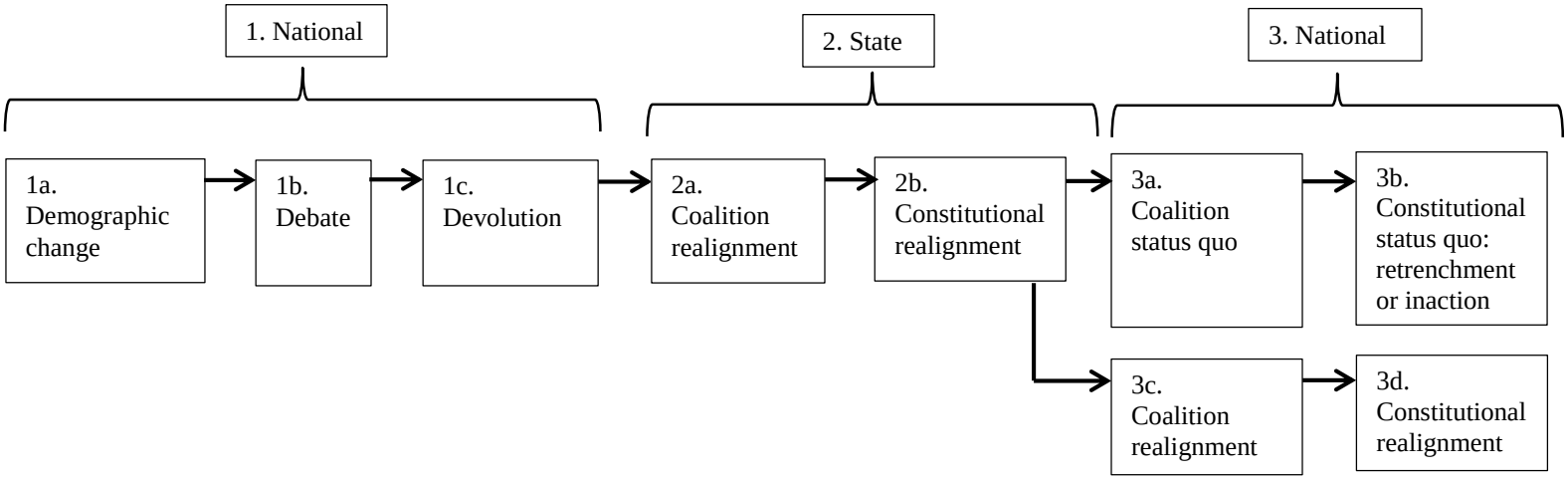
[15] Early American political science described laws and institutions, including state constitutions (Jameson 1887; Dodd 1910; Dodd 1915; Dodd 1920; Green 1930). The *American Political Science Review* regularly published updates on state constitutional development, but turned to political behavior in the mid-twentieth century, neglecting the institutions and constitutions that shape this behavior (Lutz 1982, 27–31; Beienburg 2014). Many legal scholars overlook the states, genuflecting to the federal Constitution (Levinson 2012, 15–7), which exceeds the state documents in power, gravitas, and stability (Tarr 1998, 1–3). For a history of this neglect, see (Lutz 1982, 27–31; Friedman 1988, 33–5; Tarr 1998, 1–5; Dinan 2006, 1–6; Williams 2009, 1–11; Onuf 2009, 388–90; Levinson 2012, 1–32; Zackin 2013, 1–36; Beienburg 2014).

> the State constitutions furnish invaluable materials for history. Their interest is all the greater because the succession of constitutions and amendments to constitutions from 1776 till to-day enables the annals of legislation and political sentiment to be read in these documents more easily and succinctly than in any similar series of laws in any other country. They are a mine of instruction for the natural history of democratic communities (Bryce 1908, 450).

With Congress polarized, gridlocked, and pitted against a White House that will likely remain in Democratic control, the states, often operating under functional, single-party governments, have resolved constitutional issues over healthcare and same-sex marriage that the federal branches could not. Especially now, the state constitutions matter for national politics.

II. Theory

This paper argues decentralization of national constitutional controversies, particularly over citizenship and civic exclusion, stabilizes the national Constitution while destabilizing the state constitutions. Specifically, national coalitions devolve controversies to the states (1), realigning state coalitions and constitutions (2). These revised constitutions may resolve the issue, preventing national coalition and constitutional realignment, usually stabilizing the federal Constitution (3). Sometimes state revision exacerbates the issue, realigning the national coalition and the Constitution.[16]



[16] The model applies only to American constitutionalism, and only imperfectly. The figure illustrates a single constitutional realignment over a single issue. In a particular context, this process may occur partially or completely, once or repeatedly, for one issue or for many. Devolution may kill some national controversies, preempting national realignment at the third stage. Other issues begin at the second stage, emerging in the states before inciting national realignment. Some issues take multiple cycles to resolve: state realignment may prompt unsuccessful national realignment and renewed federal devolution.

Figure 1. The States' Role in American Constitutional Realignment

A national constitutional amendment is a powerful legal tool. More durable and legitimate than a statute, a national amendment can invalidate past constitutional provisions and past statutes, can constrain statutory lawmaking and judicial interpretation and litigation, can extend rights, citizenship, and the franchise to allies and seize them from opponents, building a voting base and a body politic, and can even set institutional powers. Amendments matter because they set the rules of the game and determine who plays. But the federal Constitution is exceptionally inflexible,[17] and amendments do not pass without the support of a widespread, diverse coalition of parties and social movements. These broad, standing parties are deeply invested in preserving the existing constitutional regime, which in turn, preserves the party system.

Demographic, economic, and technological tides slowly erode constitutional orders (1a). New populations grow and petition for legal inclusion, but constitutions by nature entrench law against reform. Constitutions are tools of civic exclusion, legally and inflexibly bounding the polity.[18] Put alternately, constitutions limit the autonomy of the demos to constitute and bound its own membership. Threatened by outsiders' push for inclusion, the dominant parties use their best political weapon – constitutional policymaking – to further entrench their position, ossifying the constitution and exacerbating the problem.

Without policy outlet, outsiders petition, stir controversies, and form third parties (1b). Civic debates rise over the gap between the ideal, unrealizable textual people and the actual, embodied people,[19] or between dueling interpretations of the same constitutional value or provision,[20] or between separate and

[17] A successful national constitutional amendment must be proposed by at least two thirds of the House and Senate or of state legislatures, and ratified by three fourths of state legislatures or conventions.
[18] Constitutions exacerbate the boundary problem by legally excluding some members of the polity, who, to gain legal inclusion, must be constitutional members. For a description of the problem, see (Whelan 1983).
[19] As the constitutional text gradually fails this ideal, the actual people seize authority and legitimacy as authors of new constitutional texts and interpretations (Norton 1988). Constitutions, burdened with special public scrutiny and the unique role of constituting the people face much greater public pressure than ordinary citizenship statutes. The embodied American people, bound by civic exclusion, chase the inclusive textual ideal through cyclical constitutional rewriting, but can never achieve full inclusion, doomed to permanent cyclical reconstitution.
[20] For example, the Fifth Amendment Due Process Clause simultaneously protected slaveholders' property in slaves and slaves' liberty. For more see (Tribe 1987; Jacobsohn 2006, 380–2).

opposed constitutional commitments or traditions may clash.[21] These ideological debates and third parties threaten the dominant national parties. These large parties, weakly united by a common commitment to the standing constitution, are vulnerable to fragmentation these cross-cutting issues. Outsiders strategically and intentionally use these rising issues, ideas, and rhetoric, especially over civic membership, to bridge allies and to split rivals (Lieberman 2002, 702; Parsons 2010, 130–1). Bound to its constitutional platform, the dominant coalition struggles to co-opt these rhetorical tools.

The national coalition survives by devolving threatening issues to the states (1c), isolating debates to silence national third parties and radicals.[22] Put differently, national coalitions remain stable by controlling the scope of constitutional conflict.[23] Censoring ideas and rhetoric preserves some coalitions and disarms others, quietly setting the rhetorical agendas that shape policymakers' preferences (Lieberman 2002, 702; Parsons 2010, 130–1).[24]

Federal devolution allows opportunistic state radicals to force debate on previously neglected topics, realigning state coalitions (2a).[25] The national Constitution has widespread popular support and is difficult to amend. National reformers, thwarted by these barriers to national constitutional reform, further pressure state coalition moderates.[26] Or state reformers, with special Tenth Amendment legal prerogatives over health, safety, morals, and welfare can initiate change, even without the aid of national radicals.

State coalition realignment incites state constitutional realignment (2b). State constitutions are exceptionally easy to change. Since few Americans venerate their state constitutions, ordinary people can

[21] On the tension between constitutional liberalism, republicanism, and ascription, see (Smith 1993; Smith 1999).
[22] Parties also defer to the courts (Dahl 1957; Graber 1993; Whittington 2009). For example, when abolitionism split both Democrats and Whigs, these parties overcame their differences to jointly gag Congress' antislavery minority, prohibiting floor debate over abolition in 1837 and devolving the issue to the courts and to the states through popular sovereignty. The two parties jointly governed the country for two more decades.
[23] See (Schattschneider 1975; Graber 1993).
[24] Still, the process is inexact. Broad public philosophies, including ideas of identity, can shift preferences without any policymakers intending or perceiving the process (Mehta 2010). Words and identities are flexible, unreliable instruments that may backfire, be co-opted, or ossify through path dependence.
[25] State coalitions do not defer these controversial issues to the courts. There are two explanations for this. First, as Graber suggests, variation between states is greater than variation within states, so states' relative homogeneity and small size unify state coalitions. This blunts wedge issues, so state coalitions rarely need to defer to the judiciary, and only do on especially divisive issues like abortion (Graber 1993, 40, 56–9). However, state politics is more contentious than Graber admits, so it is more likely that entrepreneurial state coalition outsiders strategically use these issues to unseat moderate coalition leaders.
[26] See (Dinan 2006; Dinan 2012; Beienburg 2014).

reinterpret the meaning of their state constitution. State judges can do the same, though they are often constrained by state amendments that narrow their jurisdiction, and by the national Constitution's Guarantee and Supremacy Clauses. Most state constitutional change instead happens through formal amendment or replacement.

There are at least two reasons why state constitutions are vulnerable to amendment or replacement, especially compared to the federal Constitution. First, the state constitutions exceed the federal one in textual flexibility and specificity.[27] States' flexibility – their low bars to amendment and replacement – tethers state constitutions to swings in popular coalition politics (Lutz 1994; Tarr 1998).[28] States with smaller legislatures can coordinate amendment passage more easily, may be dominated by a single party that clears amendments' supermajority requirement (Dixon and Holden 2012). In most states this is a two-thirds supermajority, but fifteen states require only a simple majority to propose an amendment. Failing this, in eighteen states one can amend the constitution through an initiative. One can propose an initiative with as little as 3% of the number of votes cast in the last election.[29] National amendments in contrast, require a two-thirds majority in congressional houses, and three-fourths of the states. Failing a state amendment, one can call a statewide convention with a simple majority to a two-

[27] Conceptually, flexibility and specificity are distinct, such that a flexible constitution could be brief and vague. Historically, flexible state constitutions have been long and specific (Lutz 1994; Hammons 1999; Dixon and Holden 2012), so this essay treats these two concerns together. So too have constitutional theorists. For example, James Madison accused the state constitutions of a prolixity and "luxuriancy of legislation" that failed "to mark with precision the duties" of American citizens, and worried their easy, flexible revision muddled their text, confusing citizens and preventing the veneration and cooperative enforcement that preserves constitutions (Madison 1999, 75). More recently, Congleton and Rasch affirm unstable texts confuse the terms of coordination against the sovereign, deflating subjects' confidence in the pact (Congleton and Rasch 2006).

[28] Relatedly, state elites cannot often erect high barriers to state constitutional amendment to shield state constitutions from popular revisionists. For a general theory of elite constitutional entrenchment, see (Hirschl 2009). Conversely, flexible constitutions may survive by adapting to exogenous shocks and violations by the sovereign (North and Weingast 1989; Weingast 1997; Weingast 2006; Mittal and Weingast 2013). Empirically, enduring national constitutions tend to be moderately flexible, while exceptionally mutable or inflexible ones quickly collapse (Elkins, Ginsburg, and Melton 2009).

[29] In Massachusetts, a proposed initiative must receive a number of signatures over 25,000 and equal to or greater than 3% of the total votes cast in the preceding gubernatorial election. This is a lax requirement in such a populous state.

thirds majority, depending on the state, affirmed in all states by a simple majority popular vote.[30] Fourteen states require such votes at least once every 20 years. Relatedly, state constitutions are long and specific. Their average length is 26,000 words, though Alabama's 1901 Constitution is 220,000 words. The federal Constitution, at 7,400 words, is shorter than every standing state constitution (Hammons 1999, 840).[31] These long, quasi-statutory state constitutions include contentious provisions like regulation of crime, education, or finance, inviting revision (Friedman 1988, 36; Lutz 1994, 357–9; Tarr 1998, 20–3), while the brief national Constitution earns public respect, dissuading potential reformers, and allows judges the leeway in judicial review that preserves the constitution.[32]

Second, state constitutions are easy to revise because they get little respect. While the federal Constitution enjoys near religious devotion, only half of Americans are aware state constitutions exist (Tarr 1998, 2). The handful of New England constitutions resemble the national document in endurance and popular admiration, but most state constitutions are closer to the Southern model – overtly partisan, ignored by their populations, and short-lived.[33] To the extent states have a political culture, it is one of revision – Louisiana, with a French civil law tradition, has had eleven lengthy documents, enough to for a Louisiana lawyer to quip that "Constitutional revision in Louisiana, whether in conventions or by amendment, has been sufficiently continuous to justify including it with Mardi Gras, football, and corruption as one of the premier components of state culture."[34] Since state constitutions are not buttressed by a local civic culture, they are vulnerable to revision.[35]

---

[30] Six states do not fully specify the procedure for calling a convention. Historically, even fewer states specified the means of constitutional change (Lutz 1994, 356; Tarr 1998, 35), allowing frequent, extralegal popular conventions and amendments.

[31] Berkowitz and Clay, with a wider set of observations, put the figure at 28,000 words (Berkowitz and Clay 2005, 69)

[32] Christopher W. Hammons objects that longer state constitutions, stocked with pork barrel provisions, have more beneficiaries and backers in the state legislatures, and greater endurance (Hammons 1999). But with the election of new legislators, this coalition wanes. These detailed, particularistic constitutions are more rigid, and gradually lose support in the state legislatures, growing vulnerable to replacement. Consequently, longer state constitutions are replaced or amended more frequently (Berkowitz and Clay 2005; Cayton 2015).

[33] For variation between state constitutional cultures, see (Stephanopoulos and Versteeg 2015).

[34] Quoted in (Tarr 1998, 142–3; Dinan 2006, 12). For an account of state constitutional culture, see (Elazar 1972; Elazar 1982; McHugh 2003).

[35] There is good theoretical grounding for this claim. If constitutions are pacts enforced by their citizens (Ordeshook 1992; Hardin 1989; North and Weingast 1989; Weingast 2006), then consent to or admiration for the constitution

State revision may resolve the national issue, preserving the national coalition (3a). This may eliminate the need for federal constitutional reform (3b).[36] For example, in the early nineteenth century, Congress, backed by federal courts, devolved morality, temperance, lottery, and criminal justice regulation to the states, precluding federal action on these controversial domains. Some states resolved this issue with further devolution and county-by-county regulation, as in the case of dry counties, or local legal prostitution in Nevada. This yields federal constitutional inaction. Or state constitutional experimental may resolve the national issue, offering a positive or negative model for federal reform. The dominant coalition can retrench its constitutional platform by imitating state innovations.

The short, vague Tenth Amendment does not specify which issues are subject to state police powers regulation, so the political construction and interpretation of the Tenth Amendment, and of states' powers, determines which national issues the states can quiet.[37] For example, current interpretation of the Tenth Amendment allows states nearly exclusive oversight over divisive issues like lottery and alcohol regulation and much of citizenship law, stabilizing federal constitutional policy. The broader the interpretation of the Tenth Amendment, and related clauses like the Elections Clause, the more effective the states can be at killing national controversies.

Alternately, under three conditions, state revision may exacerbate national controversies, requiring federal action. First, devolution can insulate and incubate constitutional debates in some states. First, under the Tenth Amendment, states can introduce new policies and laws that federal courts and the

---

should preserve the document. Relatedly, there is some empirical evidence to suggest that inclusive national constitutions (those with participatory drafting processes, elections, and wide distribution of goods) last longer (Elkins, Ginsburg, and Melton 2009, 76–93). This may be true of inclusive state constitutions (Friedman 2014).

[36] Relatedly, some state issues have sectional but not national traction and never prompt national reform. Water rights regulation is a source of conflict in the constitutional politics of Western states, but is less significant nationally (Bridges 2008).

[37] The few policy areas from which states are explicitly excluded, like monetary and military policy, are also politically constructed, usually in response to states' failure to regulate these areas effectively. For example, Revolutionary-era states could constitutionally coin money, but could not coordinate coinage, forcing federal constitutional revision in 1787 that stripped this power from the states. The states' legal authority is shapes, but is also shaped by the politics of constitutional federalism.

Congress had not considered.[38] This state experimentation could arm national coalition radicals with new, viable, tested constitutional platforms, which they can turn against national coalition moderates.[39] Or, second, state politicians might see their constitution undermined by a neighboring state, and pursue national constitutional reform to strong-arm their neighbors.[40] Third, when national constitutional controversy aligns with sectional tensions, devolution can exacerbate these regional divides and further inflame the issue. Acting in their short-term interest, national party leaders may continue to devolve the issue to the states, even though this promises eventual discord. Antebellum congressional devolution of fugitive slave laws and territorial slave policy is one such example. Unresolved conflict destabilizes national coalitions (3c), allowing partisan realignment and reinterpretation or amendment to the federal Constitution (3d).[41]

National constitutional realignment destabilizes national politics generally. Constitutions undergird ordinary politics, statutory legislation, enforcement of laws, civic culture, and political legitimacy, so constitutional instability affects citizens' very beliefs and safety. National realignment also

[38] These are the police powers over health, safety, morals, and welfare. Additionally, states have special legal prerogative over elections and citizenship law. For example, Novkov shows state constitutional and statutory citizenship regulation affected the development of national citizenship regulations (Novkov 2008).

[39] If, as Graber claims, state coalitions "spend little energy constructing policies that might satisfy constitutional standards," then they would not offer viable solutions to federal policy debates (Graber 1993, 58). However Zackin rebuts Graber, showing state coalitions draft and implement successful solutions to federal constitutional problems, especially on positive rights (Zackin 2013). For more on state constitutional experimentation and consequent effect on the federal Constitution see (Burgess and Tarr 2012, 18–21).

[40] For example, in 1776 Maryland and Virginia allowed slavery, but Pennsylvania Quakers abolished slavery in 1780, attracting runaways. Southerners, including Marylanders and Virginians, passed the Fugitive Slave Act of 1850, forcing federal and local agents to return runaways, reforming the laws of Pennsylvania and other free states. Free states like Wisconsin and Vermont abrogated the Act, worsening the controversy. Devolution of slavery regulation aggravated sectionalism, forcing the 1850 Act, which further split the Democratic and Whig parties, forcing the Civil War and constitutional realignment.

[41] Is it possible for a new national coalition (3c) to fail to realign the federal Constitution (3d), and instead maintain the constitutional status quo (3b)? That is, can a mass partisan realignment occur without a constitutional realignment? It is possible, but rare. A new coalition wants to revise the Constitution to entrench its platform. A national realignment coalition holds an exceptional majority of Congress, likely meeting the two-thirds supermajority of a national convention or of both congressional houses required to propose a federal amendment. These national majorities are often backed by reformist state majorities (2a), which may meet the three-fourths supermajority required for state legislatures or conventions to ratify the proposed amendment. But these are exceptionally high thresholds that may thwart realignment coalitions. Coalitions have other options, like passing quasi-constitutional statutes like the Social Security Act, designed to last generations, or packing the judiciary and revising the federal Constitution through judicial review. Given the difficulty of revising the Constitution, it is unlikely a surviving but waning coalition (3a), falling short of a realignment coalition's supermajority, could realign the Constitution (3d).

affects the states, as the federal Supremacy Clause, congressional enabling acts, and judicial review force lagging states to match these federal reforms. Devolution initially quiets national conflict but may eventually backfire, provoking national conflict.[42] In a federal system, the subnational units vent controversies, but often imperfectly.[43]

III. Results: Data Analysis

This section of the article evaluates the claim that state replacement peaks during national crises, preempting national amendment. The article studies all ratified state constitutions and the additional 96 unratified constitutions proposed by state conventions. Given this, the project should include all proposed American state constitutions.[44] Studying these unratified proposed state constitutions also avoids selection bias toward successful constitutional proposals. For example, between 1912 and 1945, only Louisiana ratified a new constitution. But in these years the states held thirteen conventions, including Ohio's nationally-significant 1912 Convention, which helped rally American progressives around Theodore Roosevelt.[45] And in the Civil Rights era, most attempted constitutional replacement failed. The article also includes the state constitutional amendments, ratified and unratified, proposed between 1776 and 1861.

Preliminary evidence suggests state constitutional revision spikes during national constitutional crises. Most state constitutional replacements (126, 53%) coincide with federal constitutional stability.[46] However, in three cases, devolution exacerbated sectional divisions over citizenship and the franchise,

[42] Similarly, Graber shows legislative deference to the judiciary works in the short run but may eventually backfire (Graber 1993, 65–8).
[43] In *The Discourses* Machiavelli lauded the Roman practice of periodically venting popular tensions against elites for the sake of political stability. More recently, Tarr, Burgess, and Marshfield argue federal national constitutions allow constitutional discretion, or "space," to subnational units for the sake of stability (Tarr 2010; Burgess and Tarr 2012; Marshfield 2010).
[44] All American state constitutions have been ratified by four types of bodies: constitutional commissions, legislatures, royal government, and constitutional conventions. The data does not include failed proposals by constitutional commission, state legislature, or royal government, and could systematically miss these types of failed proposals. But there should be very few (if any) of these. Of the 146 ratified state constitutions, 135 were proposed by convention. Constitutions are very rarely proposed by legislature or commission, and these methods were used almost entirely in the South in the late twentieth century. And no constitutions were proposed by royal government after 1776.
[45] On the 1912 Ohio Convention's importance, see (Dinan 2006, 16).
[46] Excluding the three crises noted below, totaling 65 years, the remaining 174 years of American constitutional development since 1776 have seen 126 state constitutions, but only 10 federal amendments.

forcing national partisan realignment and multiple amendments to the Constitution. These cases are the founding, beginning with the Declaration of Independence and the first state constitutions (1776), and ending with the adoption of the Bill of Rights (1791), the Civil War, between the Compromise of 1850 and the Fifteenth Amendment (1870), and the Civil Rights Era (1964-80). These three realignments took 65 years total, just over a quarter (27%) of American constitutional history. Yet nearly half of all state constitutions (113, 47%) were proposed and ratified in these three moments. A quarter of American state constitutions were proposed or ratified during the Civil War crisis alone. During these three crises, the federal Constitution was amended 17 times, 63% of total amendments. In these cases, devolution likely exacerbated sectional divisions, requiring federal intervention

Consider the following figure, which sorts state constitutions by ratification date, including state conventions that proposed but failed to ratify constitutions. The figure also lists national partisan realignments.[47]

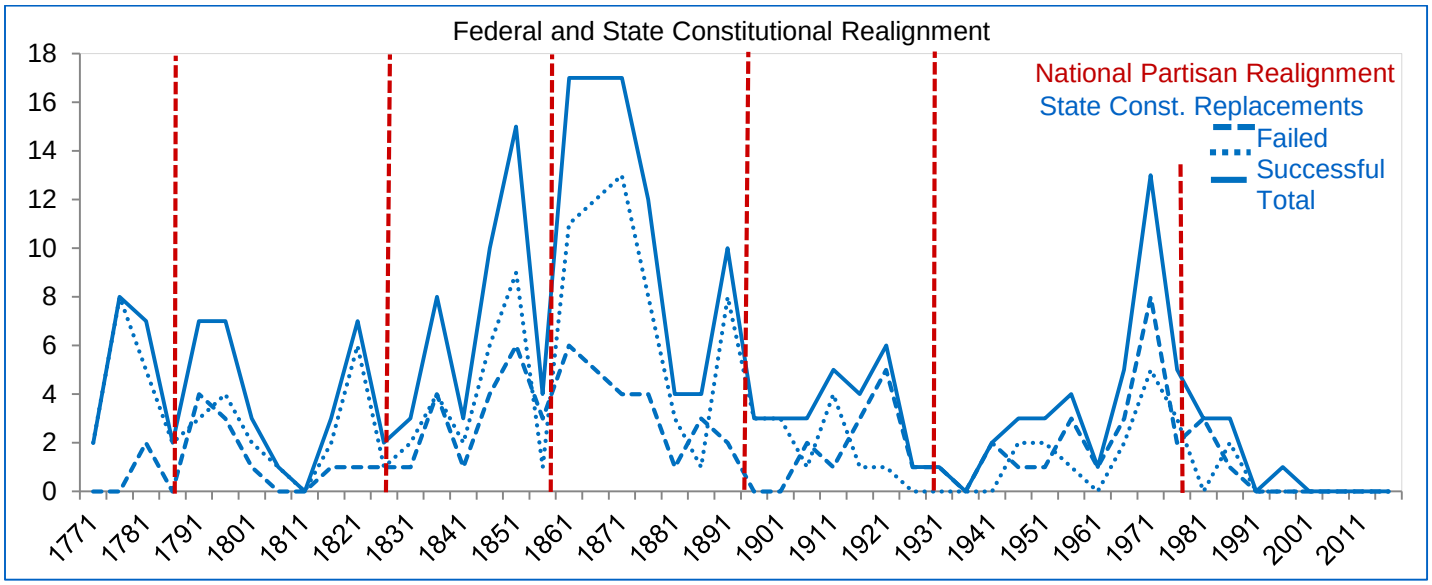


Figure 2: State and National Constitutional Development. State data from (Sturm 1970; Sturm 1982; Browne 1973). Realignments from (Burnham 1971; Sundquist 1983).

Attempted state constitutional replacement peaks roughly a decade before national partisan realignment, plummets while the national parties realign and pass a new constitutional platform, and then resumes. The pattern holds fairly well across American history.

[47] In this histogram, state constitutions are sorted into five-year bins by ratification or proposal date.

Now consider American constitutional devolution in detail. At the behest of the Continental Congress, the states ratified twelve constitutions between 1776 and 1778. These constitutions structured government, political participation, bills of rights, and enforced national sovereignty during the Revolution. Models varied from Pennsylvania's 1776 unicameral system with a weak executive and broad rights and participation, to Massachusetts' 1780 tripartite model limiting populism. The 1787 Federal Convention adopted Massachusetts' design (Wood 1972) and the states' written bills of rights (Lutz 1992). In the early 1790s, straggling states revised their constitutions to match the federal model.

The federal Constitution deferred suffrage regulation to the states, so between 1811 and 1824, state legislatures and conventions revised their constitutions to extend near-universal suffrage to white males. This state-level revision tripled the electorate (McCormick 1960), prompting Jackson's landslide 1828 victory, the collapse of the reigning Democratic-Republicans, and the rise of the Democratic and Whig parties. At the behest of Southern Democrats, in 1835 Jackson allowed federal postmasters to seize American Anti-Slavery Society pamphlets, and two years later, congressional Democrats and Whigs joined to ban congressional antislavery petitions. Both parties, hamstrung by slavery, deferred the issue to the states and courts. State constitutional revision spiked. Between 1828 and 1861, states drafted 28 new constitutions. Twenty-one of these were Southern or Mid-Atlantic states that were grappling with slavery or slavery's recent legacy. These years also saw 22 conventions that failed to draft new constitutions. In the late antebellum era, older states amended their existing constitutions to confront the controversies of the era, and amendment outpaced wholesale replacement.

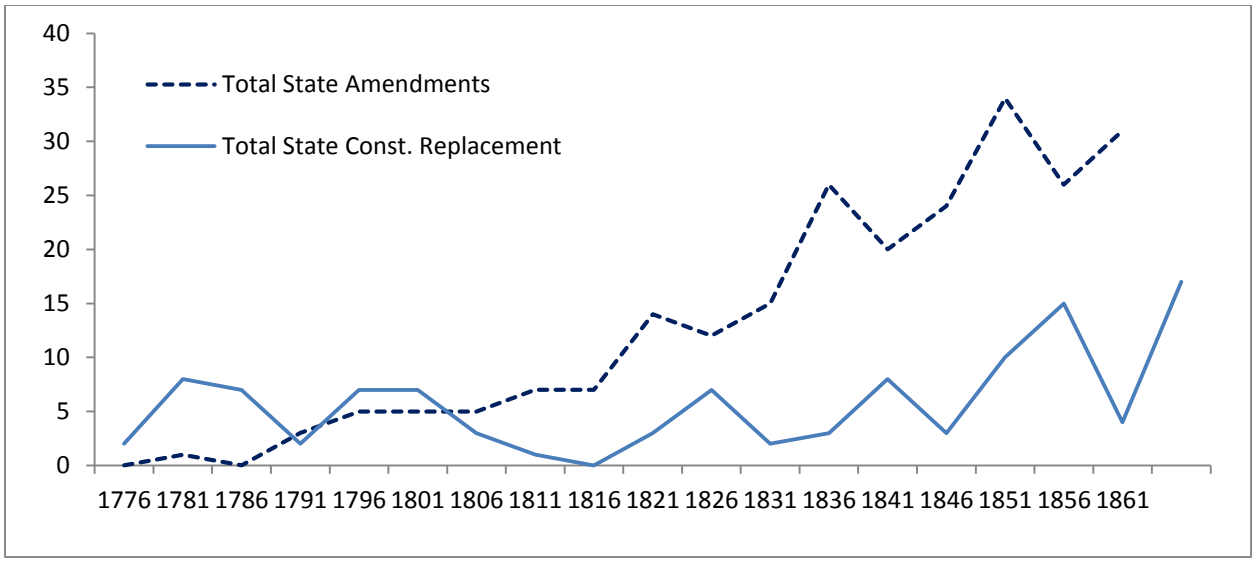


Figure 4: State Amendment and Replacement Compared. Replacement data from (Sturm 1970; Sturm 1982; Browne 1973), amendment data from David Bateman and Stephan Stohler.

State constitutional replacement and amendment, alongside judicial intervention, postponed the slavery crisis, preserving the Jacksonian party system.

But eventually, state constitutional revision exacerbated sectionalism. Northerners and Westerners passed antislavery state constitutions and elected Republicans, while Southern elected proslavery Democrats and Cotton Whigs. Finally, Southern states seceded by redrafting their constitutions in 1861. They did so again in 1864. This partisan realignment forced the federal Reconstruction Amendments, which in turn brought a wave of Reconstruction state constitutions in the late 1860s and 1870s.

In the 1880s and 1890s, Populist, Progressive, and Western states protected economic and positive rights, well before the formation of national Progressive coalitions, the critical election of 1896, and the Progressive federal amendments of 1913-1920. For example, Article XIII, Section 1 of the Illinois' 1870 Constitution declared all grain elevators "public warehouses," protecting small farmers from privately-owned silos' predatory charges, some seven years before the U.S. Supreme Court

considered the issue in *Munn v. Illinois*.[48] Southern Redeemers also constitutionalized Jim Crow in the 1890s.

The reforms of the Progressives and Redeemers led to a lull in state constitutional replacement in the interwar years. Between 1922 and 1945, only two states attempted to replace their constitutions.[49] There are three reasons for this. First, by 1912 all of the territories within the continental United States had achieved statehood.[50] Second, Progressive innovations like the referendum, initiative, and expert constitutional commission superseded wholesale replacement by convention. Progressive framers set a low bar for citizens to propose amendments, bumping the number and frequency of amendments, and largely replacing wholesale constitutional replacement by convention, especially in the West.

The third reason is rooted in Southern politics. Southern constitutions ossified in the interwar years. The handful of Southern states had accounted for over half of the constitutional replacement in antebellum, Civil War, and Reconstruction America.[51] But with the end of Reconstruction, Redeemers and ex-Confederates entrenched their power through durable state constitutions and statutes that disenfranchised Republican, black, and biracial state coalitions.[52] This new, white, solidly-Democratic electorate locked Southern states under Democratic control for generations. Southern legislatures, insulated from interparty competition, called no new conventions, and Southern state constitutional replacement flat-lined.[53] Between Virginia's 1902 Constitution and the Civil Rights movement of the

[48] These silos were owned by railroads. For more on Populist constitutional regulation of railroads, see (Zackin 2013; Versteeg and Zackin 2014).
[49] New Hampshire in 1930 and 1938 and New York in 1938.
[50] Progressive and eugenicist congressmen were wary of granting statehood to the handful of territories outside the continental United States, particularly to those seized during the Spanish-American War, arguing their populations were unsuited to American liberal constitutionalism. Similarly, in the *Insular Cases* (1901), the Supreme Court selectively extended rights under the national Constitution to these populations
[51] Between 1828 (Jackson's election) and 1902 (Virginia's Jim Crow Constitution), the thirteen Southern states framed 49 of America's 87 state constitutions (56%), and drafted 59 of the total 113 proposed constitutions (44%).
[52] Virginia's 1902 Constitution, which disenfranchised the biracial populist Readjustors, exemplifies this trend.
[53] Though there was intraparty legislative competition and extralegal rioting in the South, these conflicts did not lead to extralegal, popular state constitutional conventions, as they had in the late eighteenth and early nineteenth century. Perhaps this was because by the late nineteenth century, Southern states had developed powerful police forces and mobs to punish extralegal mobbing.

1960s, only two Southern states replaced their constitutions, and the Jim Crow constitutions became firmly entrenched for generations.[54]

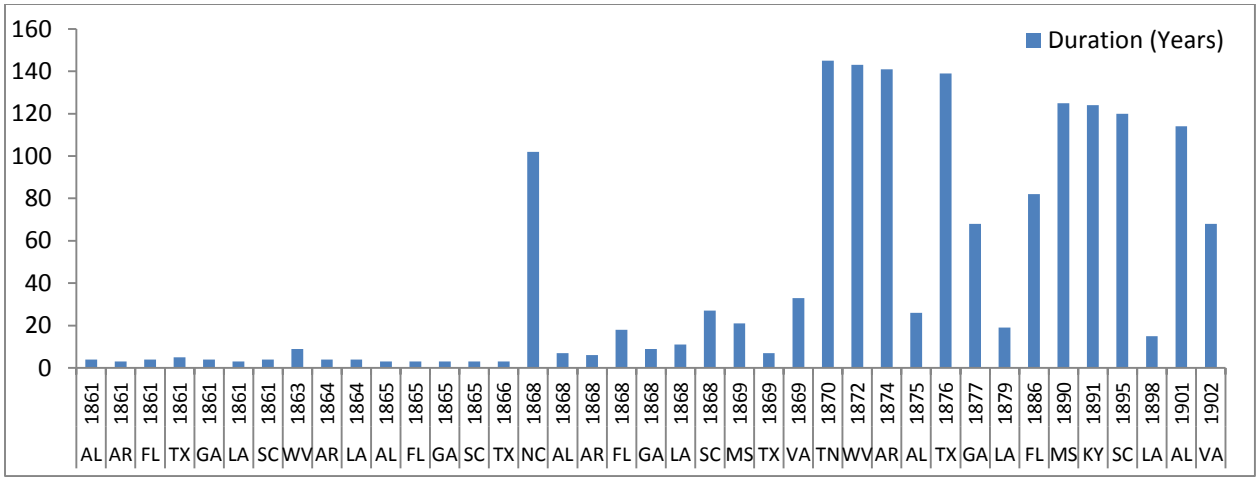


Figure 4: Duration of Southern State Constitutions Framed between 1861 and 1902. Data from (Sturm 1970; Sturm 1982; Browne 1973).

For example, Alabama's 1901 Constitution, rife with Jim Crow provisions, is still in force. It has 892 amendments. National Democratic leaders like capitulated to Jim Crow constitutionalism, for fear of splitting the party. Wilson advanced the Jim Crow program in the federal government and Franklin Roosevelt left the Redeemer state constitutions untouched. The South, once the hotbed of constitutional replacement, was now quiet, and aggregate American state constitutional replacement declined.

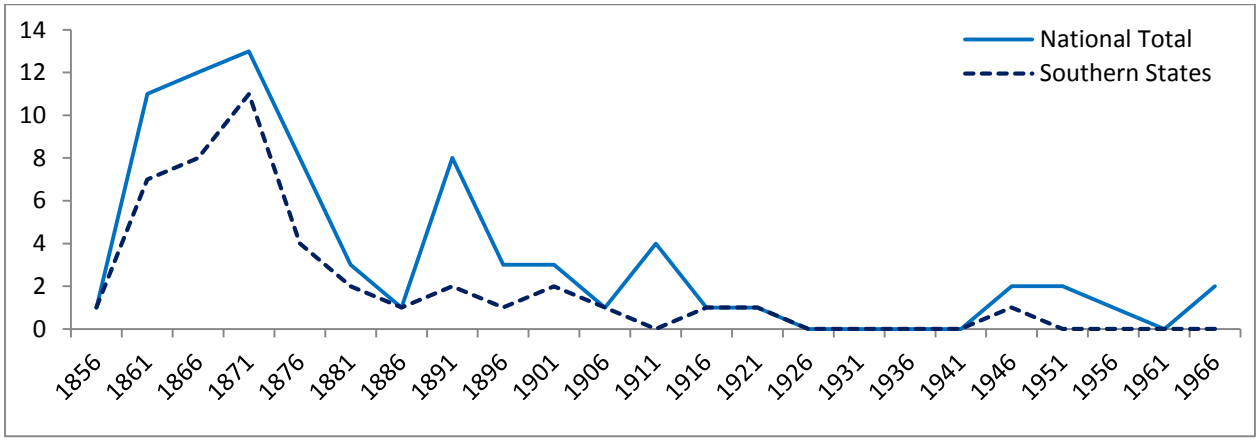


Figure 5: Southern State Constitutional Replacement as a Proportion of the National Total, 1856-1966. Data from (Sturm 1970; Sturm 1982; Browne 1973).

[54] Louisiana in 1913 and 1921 and Georgia in 1945. Florida broke this lull by replacing its constitution in 1968.

With the Great Depression, Democrats swept Congress and the White House, regulating state commerce and welfare programs, sometimes to the exclusion of the states.[55] It is tempting to argue the New Deal made the states irrelevant. But in other cases, the states retained constitutional authority over welfare programs. In *Steward Machine Co. v. Davis* (1937), the Court upheld the Social Security Act of 1935, arguing the Act recognized and enabled states' preexisting welfare statutes and positive constitutional rights, balancing national authority and devolution. And in *Home Building & Loan Association v. Blaisdell* (1934), the Court deferred to a Minnesota statute granting beleaguered lessees a two-year moratorium extension on home loan payments, one of many such state laws and constitutional provisions.

Finally, in the 1960s all three federal branches aggressively intervened in state regulation of education, criminal justice, and voting and apportionment law.[56] Between 1960 and 1977, states attempted to replace their constitutions at levels unseen since Reconstruction. Ten states ratified new constitutions, though only five of these were states were Southern, suggesting perhaps that Civil Rights-era concerns plagued Northern and Western constitutions. More than half of attempted replacements were unsuccessful – fourteen states, five of them in the South, did not ratify proposed constitutions.

The gradual backlash to Civil Rights-era reforms also began with the states. Local grassroots organizing for Goldwater and Nixon in the Sunbelt states eventually realigned national partisan politics

[55] The New Deal Congress first passed the National Industrial Recovery Act (NIRA) and Agricultural Adjustment Act (AAA) of 1933. Four of the Supreme Court's reactionary Republican appointees – Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter – led the court to strike down the NIRA as an overextension of federal commerce powers in *Schechter Poultry Co. v. U.S.* (1935), and the AAA as an invasion of traditional state powers in *U.S. v. Butler* (1936). But after Roosevelt threated to pack the Court with sympathetic justices, the Court capitulated, recognizing federal commerce power to regulate intrastate economic production in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), and in *Wickard v. Filburn* (1942). The importance of Roosevelt's threat is a matter of debate. *West Coast Hotel v. Parrish* (1937) is often read as the Court's capitulation to Roosevelt's court packing threat, the famous "switch in time that saved nine." However, it is not clear that Roosevelt's plan influenced the justices' meetings on this case, nor is it clear the threat influenced subsequent cases on New Deal programs. In the *NLRB* case, Butler, McReynolds, Sutherland, and Van Devanter still opposed federal authority to establish the NLRB, and none of the four allowed expansion of federal commerce power in *Wickard*, as all four had retired.

[56] On federal intervention in state education policy and desegregation, see *Brown* I (1954) and II (1955), *Cooper v. Aaron* (1958), the Elementary and Secondary Education Act of 1965, and *Green v. County School Board of New Kent County* (1968). On criminal justice, see *Mapp v. Ohio* (1961), *Miranda v. Arizona* (1966), and *Duncan v. Louisiana* (1968). On redistricting, see for example *Baker v. Carr* (1964), *Reynolds v. Sims* (1965), and the 1965 Voting Rights Act.

and vaulted Reagan into the White House, (McGirr 2002; Lassiter 2006). The contemporary national parties, now trapped by legislative gridlock, defer to the states on contentious issues like regulation of abortion, capital punishment, gun control, drug control, and voting and elections. Facing many disparate and narrow issues, the states have turned to specialized amendments, rather than wholesale constitutional replacement – Rhode Island was the last state to replace its constitution, in 1986. These many state amendments and cases still influence national constitutional politics. For example, thirty-six states had legalized same-sex marriage by amendment or federal or state ruling before the Supreme Court followed suit in *Obergefell v. Hodges* (2015).

Since the Civil War, state constitutional replacement has gradually declined, while the Supreme Court's docket caseload has increased, especially since the Civil Rights era. When, in 1953, Earl Warren became Chief Justice, the Court docket caseload was 1,463 cases. When he retired, it was 4,202. In 2013, it was 8,580.[57] Consider the following graph:

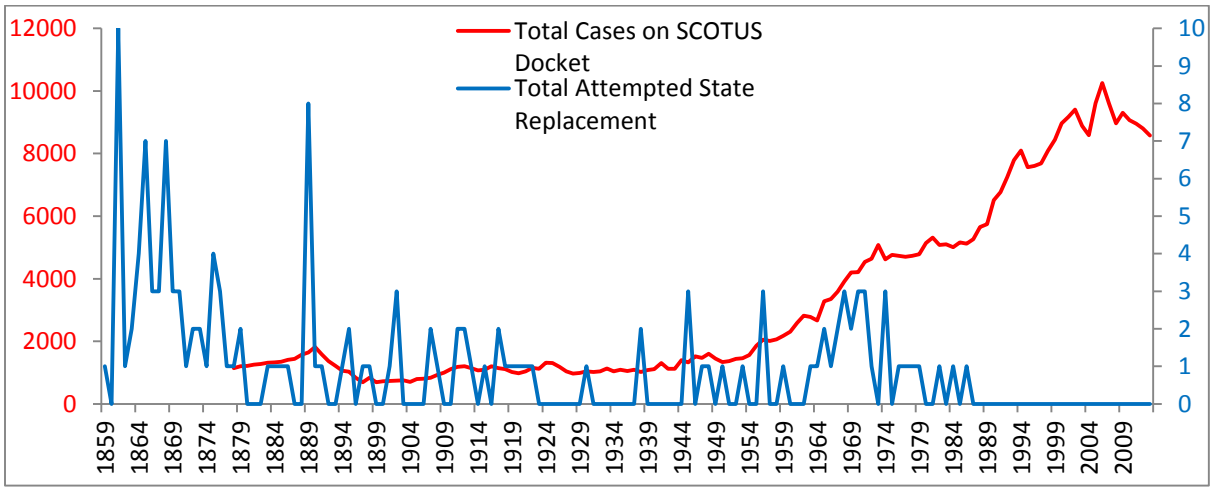


Figure 6: State Constitutional Replacement and U.S. Supreme Court Caseload, 1859-2013. State data (1859-2013) from (Sturm 1970; Sturm 1982; Browne 1973), Court data (1878-2013) from Federal Judiciary Center.

This is not to suggest that the Supreme Court has replaced the states as the main site for resolving national constitutional disputes. Rather, piecemeal state amendments and state court decisions act as a parallel track to the federal judiciary for resolving national disputes. Sometimes the states move prior to the

[57] The Supreme Court disposes the majority of these cases (7,547 of 8,808 cases in 2013). The majority of the remaining cases are *in forma pauperis* direct appeals to the Supreme Court by prison inmates, to which the Supreme Court will not grant cert.

federal courts, cuing the federal courts' rulings. Again, recall that in legalizing same-sex marriage in *Obergefell*, the Supreme Court deferred to prior changes in public opinion and state constitutional reform. The states influence national institutional politics as much as they did at their inception in 1776.

This brief overview measures state constitutional change as wholesale constitutional replacement. This has few shortcomings. It does not systematically observe state revision through amendment, judicial review, or extralegal popular constitutional interpretation.[58] Even accounting for these measures, not all revisions are equally important for national devolution. Compare the federal First Amendment's religious, speech, assembly, press, and petition protections to the Twenty-Seventh Amendment regulating congressional pay. The same constitutional issue can differ across era and region – state school segregation was less controversial in the 1850s than in the 1950s – so to identify significant constitutional change, one must attend to these particularities. Thus this paper turns to a case study of constitutional devolution in the Revolutionary era.

IV. Case Study: Revolutionary-Era Constitutional Decentralization

When the Revolutionary War required new, independent colonial governments, the Continental Congress deferred to the colonies the contentious task of designing these governments. A decade later, all three major national constitutional documents – the Declaration, the Constitution, and the Bill of Rights – drew heavily on these original documents. This section explains how federal framers drew on Pennsylvania's 1776 Constitution to prevent disputes at the 1787 Federal Convention.[59]

[58] Elkins, Ginsburg, and Melton use the proportion of textual provisions replaced to indicate constitutional change (Elkins, Ginsburg, and Melton 2009, 55–9). However this approach is misleading, as framers can revise or add many provisions without changing meaning, either as empty elite concessions to riled citizens, or from inexperience or lack of imagination in drafting, or from inability to find alternatives to old, successful, path dependent, or sticky constitutional or institutional rules. Elkins, Ginsburg, and Melton even admit this constitutional torpor defines Latin American constitutional history (Elkins, Ginsburg, and Melton 2009, 23–9). State constitutions, overloaded with minute, particularistic provisions undergo constant textual revision without significant change. New Hampshire has had seventeen conventions, but has not changed the fundamental meaning of its document since 1784 (Friedman 2014). For more on the difficulty of establishing what constitutes a major revision, see (Rodriguez 2011).

[59] In some senses, the founding is an unrepresentative case to measure federal constitutional stability, as the 1777 Articles and 1787 Constitution were new and unusually unstable documents. Yet studying this era helps observe and control the effects of other variables. The federal and state constitutions were so young that differing constitutional cultures of veneration or amendment had not yet emerged. The state constitutions were fairly similar in length and revision process to each other, and to the federal document.[59] National deference to the judiciary plays little or no

The colonies drafted their first constitutions during the Revolution. Colonists' gradual westward expansion forced the British into the French and Indian War, resulting in the 1763 Proclamation Line limiting further migration, and taxes and duties under the Navigation Acts, including the controversial Stamp Act (1765), Coercive Acts (1767) and Intolerable Acts (1774). Further, Lord Mansfield outlawed slavery in Great Britain in the 1772 *Somerset* decision, worrying Americans Britain might do the same in the colonies. Colonists organized committees of safety and correspondence to abrogate Navigation Act taxes and supplant the royal governments, which collapsed in the spring of 1775. Yet the scattered committees could not coordinate statewide government. A few weeks into the Siege of Boston, the Massachusetts Congress requested from the Continental Congress authority to design a war government. Designing state governments was too complex and controversial an issue for the beleaguered Continental Congress, which, following the Battle of Bunker Hill, recommended Massachusetts reinstate its 1691 Charter.[60] The Congress allowed New Hampshire, South Carolina, and Virginia the same liberty (Wood 1972, 130–2). On April 12, 1776, North Carolina's provincial legislature issued the Halifax Revolves, calling on the Continental Congress to declare independence.

John Adams answered the challenge. He led congressional Whigs to pass a resolution devolving the formation of additional governments to the colonies. On May 10, 1776, the Second Continental Congress, now confronted with coordinating legal and military resistance, deferred the entire work to the states – the single-sentence resolution let the colonies select whether and how to form governments.[61] Adams, aided by Edward Rutledge, and Richard Henry Lee, added an equally short and vague preamble to the resolution five days later.

---

role between 1776 and 1800, as the modern judiciary did not exist until 1787, and was not powerful enough to influence federal and inter-branch politics until the *Marbury* decision of 1804.

[60] Colonial charters served as initial constitutions, specifying the structure of government, rights, means of political participation, and land distribution for colonies, counties, cities, and corporations. However, since they did not provide for the security of their subjects, especially during the revolution, they were not true constitutions in the sense Ordeshook, Hardin, and Weingast describe.

[61] The resolution: "Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general" (Worthington 1906, IV:342).

Adams' goal was to secure independence by drafting new colonial governments. He encouraged states to rebellion without specifying the proper design of government, a fiercely disputed issue. The brevity of his resolutions was strategic. Framers looked to many opposed models – ancient Saxon unicameral direct democracy, Roman and Florentine republicanism, English common law constitutionalism, and English Whig bicameral government (Bailyn 1967, 22–54; Wood 1972, 3–90). Debate was heated, as direct democracy and unicameralism threatened propertied families, who favored the Whig scheme and its aristocratic upper house. As Robert Williams writes, "The real controversies over the first state constitutions had little to do with rights. What was at stake was how new state governments would be structured and which groups in society would have the dominant policy-making role under the new governments" (Williams 1989, 544). The tension between hardscrabble western frontiersmen and eastern and propertied elites threatened to split the American Continental Congress. Other frontier issues, like the regulation of Indians, of domestic insurrections, and the establishment of Catholic Quebec, split framers. Also unresolved was the status of slaves, and of taxation, representation, and rights after the Navigation Acts. The state framers' pamphlets and letters expressed the contention, uncertainty, and novelty of their endeavor, which took little guidance from Congress or the royal charters (Wood 1972, 127–9; Kruman 1999, 1–4, 15–20).[62] On November 15, 1777, the Continental Congress adopted the Articles of Confederation, little more than a mutual defense pact, to further devolve governing authority to the states. The Articles legally recognized the states' existing plenary powers over health, safety, morals, and welfare, over taxation, and war.

By 1780, all revolutionary state congresses had established new constitutions. In the four years since Adams' May 10 resolutions, fourteen states had called as many conventions, in what Gordon Wood calls "the most creative and significant period of constitutionalism in modern Western history," (Wood 1992a, 911).[63] Even rogue New Yorkers drafted a constitution for a republic they called Vermont. Framed

[62] Also see Kruman for the colonial framers' reliance on English constitutionalism (Kruman 1999, 7–14).
[63] New Hampshire and South Carolina had two conventions each, while Connecticut and Rhode Island retained their colonial charters with a few modifications, and thus had no constitutional conventions. Between 1776 and 1780, each other state had a single convention.

quickly and under duress, these documents were experimental, emergency plans to organize the states for war. Between 1776 and the 1787 Convention, eight states drafted bills of rights, and all of these but North Carolina explicitly recognized a popular right to revolt (Dumbauld 1958, 343–3; Lutz 1992). The state constitutions were the first modern constitutions, at once self-enforcing coordination pacts and frames of government.

Framing a structure of government was the toughest task. Four states attempted the unicameral or direct democratic model. Georgia, Vermont, and Pennsylvania shunned upper houses for unicameral legislatures and secret balloting. Georgia elected nearly all civil officers annually (Wood 1972, 148 n40, 150, 226 n41). Vermont abrogated New York's conservative, elitist constitution, instead borrowing Pennsylvania's unicameral legislature, limited executive, yearly public review of legislation, and regular public review of the constitution. Beginning with a sweeping bill of rights, the 1777 Vermont Constitution granted universal manhood suffrage, abolished slavery, and even redistributed land to small farmers (Nash 2006, 280–4). Maryland's Declaration of Rights established a mixed government, including an upper house, but elected both houses annually. Under an early draft constitution, modeled on the Pennsylvania and Vermont, legislation faced public, not gubernatorial, review. Following the Georgian model, citizens regularly elected all public officials. Further, taxation was proportional to wealth, debt was limited, and the franchise was broad, a concession to armed disenfranchised citizens in five counties.[64]

Prompted by the Continental Congress' May 10 and 15 resolutions, on May 22, 1776, these Pennsylvania radicals, mainly Scots-Irish frontiersmen and the urban poor, assembled in Philadelphia to form a new, insurrectionist state constitution, abrogating the old colonial charter and the elite-dominated colonial Assembly.[65] A June meeting dictated constitutional conventional delegates had to forswear

[64] This spurred elite backlash. Wealthy planters dominated Maryland's final constitutional convention, restricting the franchise to the wealthiest half of property-owners and reducing the frequency of elections (Nash 2006, 284–8).
[65] Under the colonial Assembly government, wealthy families dominated Pennsylvania politics. In 1775, only 335 of the 3,452 male taxpayers in the City of Philadelphia had enough property to vote, a much lower proportion than in a similar city like New York. And unlike the city governments of New York or Boston, the leaders of the Corporation of the City of Philadelphia did not face public meetings or elections. Mobs frequently interrupted Philadelphia

allegiance to the crown, excluding Quaker elites, who refused oaths, and eastern loyalists (Thayer 1953, 184). Reformist convention delegates outnumbered conservatives two to one, drafting a radical new constitution that summer (Branning 2004, 9–16; Ford 1895, 426–7).[66] The popular, or radical, party was led by wealthy Presbyterian Philadelphians like Ben Franklin, who allied with populist Germans from the middle counties, backwoods western farmers, and wayward Philadelphia Quakers. As the colonial Assembly collapsed, patriot Philadelphia Quakers joined the convention, hoping to maintain their dominance under this new government.

The radical party dominated the 1776 Convention, and Pennsylvania's new Constitution was the most populist of the Revolutionary state documents.[67] Pennsylvanians shunned a governor for a weak directly elected executive council overseen by the legislature. Legislators sat in a unicameral chamber for one-year terms, serving no more than four terms in seven years. The legislature debated publicly and printed and distributed transcripts of the debates. Proposed laws required a period of public review before adoption by a consequent legislative session. Districts were reapportioned every seven years in accord with census returns, assuring parity in representation between urban elites and growing Appalachian counties. According to Gary B. Nash, Pennsylvania "created the most liberal franchise known in the Western world to that date." Suffrage required merely a single year of residence, an age minimum, and tax payment (Nash 2006, 268–77; Wood 1972, 169). A directly elected Council of Censors checked the legislature and executive did not defy the popular will as formalized in the Constitution. Finally, the

---

elections, either to cast multiple illegal ballots, or to harass wealthy voters with clubs and stones. Rowdy Pennsylvanians mobbed polling places in Philadelphia in 1705 and 1742, Chester County in 1739, Lancaster County in 1749, York County in 1750, and Bucks County in 1752. The following year the Assembly dispatched constables with lists of taxpayers to elections to expel ineligible voters, stifling the protests (McKinley 1905, 284–5, 290–2; Countryman 1985, 117).

[66] Philadelphia's ideological tenor complemented the radicals' aims. Pennsylvanians alone "rejected three of the most honored elements of English republican thought" – ideals of bicameralism, executive independence, and property-based suffrage (Nash 2006, 273–4). Instead Pennsylvanians followed a series of populist 1776 Philadelphia pamphlets. Two particularly mattered. The first was *The Genuine Principles of the Ancient Saxon, or English Constitution*, for the Saxon model of the local "tithing," the egalitarian village meeting in which all men of age held stake. Tithings annually elected a common, unicameral legislature, and retained the right to revoke their delegates (Wood 1972, 226–32). Second, Paine's *Common Sense* argued for simple unicameral government and a broad franchise (Williams 1989, 551).

[67] Thayer explains: "When one considers the composition of the Constitutional Convention, it becomes apparent that almost any procedure adopted in choosing a drafting committee would have given it a radical majority…the opposition could do little more than register its protest" (Thayer 1953, 191).

constitution abolished imprisonment of debtors and funded public education through a property tax. A proposed clause would have distributed land from Pennsylvania's planters to small farmers, but failed on procedural grounds. Wood concludes "it was in Pennsylvania that the most radical ideas about politics and constitutional authority voiced in the revolution found expression."

The new constitution alienated conservatives in Pennsylvania and across the colonies. Pennsylvania held its first legislative elections in the fall of 1776, with radicals winning majorities in all but two counties, occasionally with the aid of physical intimidation. Radicals, largely political novices, began caucusing as the Constitutional Party. Veteran conservatives organized as the Republican Party to block the Constitutional Party's legislative program. British troops threatened Philadelphia's storehouses and armories, but the Executive Council, scattered around the state, was unable to meet to move the provisions. The Continental Congress chastised Pennsylvania's weak government for neglecting its economic and military duties. The 1776 Constitution was clearly unsuited to the present emergency (Brunhouse 1942, 27–38; Selsam 1936, 205–46; Nash 2006, 277–80). The Republicans also shifted the ideological tenor in Pennsylvania, printing a host of pamphlets decrying the new government as majoritarian tyranny. Arguments once used to attack the overbearing British crown were turned against the state legislature.

Framers in other states rejected the Pennsylvanian model for one of checks and balances. Massachusetts' John Adams feared the unchecked constituent power of the Pennsylvanian people and legislature. A repudiation of the Pennsylvania document, his *Thoughts on Government* reimagined a state constitution as a means to regularize and restrain popular participation.[68] Shortly after the pamphlet arrived in North Carolina, the state's convention switched from a unicameral model to one of checks and balances (Williams 1989, 561–74). New York followed suit the next year. In 1780, Massachusetts voters abandoned their colonial charter for a constitution based on the tripartite English Whig model, with a

[68] Recall Rousseau's claim elections restrain the people: "The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing." Not coincidentally, the French looked closely to Pennsylvania's 1776 Constitution as their Revolution loomed (Selsam and Rayback 1952; Williams 1989, 563).

powerful wartime executive checked by a bicameral legislature and written bill of rights.[69] These framers took England's three classes – the monarchy, nobility, and commons – as the natural division of man, known since Aristotle, applicable in as much in America as in England. Dominance by one class corrupted the whole. The English Whigs' insight was to use ambition to check ambition, granting each class a role in parliament – that of the monarch, House of Lords, and House of Commons (Bailyn 1967, 34–72). The idea of checks and balances resonated widely. As Gordon Wood avers, "in most of the states the theory of mixed government was so axiomatic, so much a part of the Whig science of politics, that it went largely unquestioned." Each state constitution, save South Carolina's, stripped the executive's legislative authority. Many governors were elected annually, by the legislature, and all were supervised by a special legislative council. Appointment and treaty-making devolved to the legislatures. Juries and written bills of rights checked governors. To maintain the power of the gentry, some legislatures ensconced their aristocrats in an upper house. South Carolina's William Henry Drayton proposed state senators be not elected, but appointed for life from the state's wealthiest families, and Madison advocated property qualification based on suffrage (Wood 1972, 206–222). Four years after Massachusetts, New Hampshire revised its constitution, and Vermont abandoned its populist unicameral system.

Seven years after the Massachusetts revision, the Federal Convention met at Philadelphia. Up to half of the delegates were former state framers, and the most influential delegates opposed the Pennsylvanian example.[70] Gouverneur Morris and James Wilson, both critics of Pennsylvania's Constitution, engineered a strong national executive and infrequent national elections. They joined James Madison, Edmund Randolph to immediately table Convention debate on unicameralism. Per Williams, "One of the earliest—and most resolute—decisions of the Convention was in favor of bicameralism…There was no real controversy over this point" (Williams 1989, 577). Instead the

[69] Following the English Civil War, English Whigs shifted sovereignty from the crown to Parliament, so the crown was sovereign in Parliament, a legislative check. Frustrated with colonial governors, American colonists eagerly misinterpreted the Whigs' polemical, hyperbolic republican pamphlets as sober warnings. As Edmund Burke wrote in 1775, Americans "augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze."
[70] Williams, backed by at least five other scholars, estimates a third to a half of the federal delegates had already framed state constitutions (Williams 1987; Williams 1989, 542–3).

Convention drew so heavily on Massachusetts' Whig model that Massachusetts' framer, John Adams, quipped "I made a constitution for Massachusetts, which finally made the Constitution of the United States" (Williams 1989, 541–2). Following the federal Convention, Georgia, Pennsylvania, South Carolina, Delaware, and Vermont replaced their constitutions to match the federal model. Though the Constitution's Guarantee Clause only requires of states "a republican form of government," since 1787, states have almost invariably chosen bicameral tripartite governments.

Returning to the question: why does federal constitutional duration exceed state constitutional duration? Devolution may explain. During the Revolution, the Continental Congress deferred the difficult, controversial task of structuring governments to the colonies. Within two years of this devolution, all but three colonies replaced their charters with constitutions of varying design. Massachusetts in 1780 and New Hampshire in 1784 provided tripartite, executive-led governments that lasted the War and the subsequent centuries. The Massachusetts model resolved the design controversy for federal delegates in 1787, allowing a more stable federal convention in 1787. Devolution postponed the task of forming a national government, and state experimentation closed many controversies that could have split the federal framers.

V. Conclusion

This model has three implications. First, accounts of judicial and popular constitutional reinterpretation that ignore the states misread American constitutional development. Taken alone, these two accounts cannot explain what they claim to explain. Constitutional reformers are opportunistic, working through multiple channels. All American constitutional realignments mix national popular constitutionalism, national judicial review, and state constitutionalism, and often these paths intersect, so to study one path in isolation is to misunderstand it. Court scholars are correct that fragmenting parties defer to the courts. But parties also defer to the states. The influence that scholars have attributed to the courts could also be attributed to state revision.[71] For example, devolution to the states through popular sovereignty may have caused the eventual slavery crisis and realignment that one could blame on *Prigg v.*

[71] Graber suggests this in passing (Graber 1993, 40).

Pennsylvania (1842) or *Dred Scott* (1857). Though national policy changes or remains stable after judicial deference, it is not solely because of judicial deference. The judiciary's effect on national constitutional development is conditioned on the states. Similarly, much of the popular agitation described by Bruce Ackerman, Larry Kramer, Elizabeth Beaumont, Douglass Reed, and Jason Frank has occurred at the state level.[72] To understand the courts, the people, and the states' effect on the American constitutions, one must study all three in conjunction.

Second, the federal branches may defer to the states to postpone or prevent inter-branch conflict. For example, the federal judiciary may devolve controversial issues to the states to avoid confronting a hostile, powerful realignment president. Recall the Federalist Marshall Court devolved commerce debates to the states rather than challenge the Jackson.[73] The contemporary US Supreme Court has repeatedly deferred the constitutional status of same-sex marriage not only to federal and state courts, but also to state constitutions. Studying only the federal branches, Dahl and Whittington miss how the state constitutions quietly mediate and direct federal inter-branch conflict. If court devolution to the states results in policy change, then Dahl again misreads state power as court power. Relatedly, the national Constitution's inflexibility, particularly to citizenship reform, constrains the president and Congress. Devolution to state constitutions' initially quiets controversy, but sometimes the long run fractures executive and legislative coalitions. The presidency is not a "battering ram" against unbending constitutional orders, as Skowronek and Whittington claim; rather, the constitutions constrain the branches, and have some agency in creating new political orders.[74]

---

[72] Several of these authors recognize this.

[73] In *Gibbons v. Ogden* (1824) the Marshall Court allowed states to regulate intrastate commerce to the exclusion of the judiciary. In *Willson v. Black Bird Creek Marsh Co.* (1829) Marshall held a state charter preempted judicial intervention via the Commerce Clause, given no federal law expressly applied the Clause against the charter. In *Barron v. Baltimore* (1833), Marshall upheld a state taking to the exclusion of judicial regulation. These are cases of both capitulation to Jackson and devolution to the states. Against this economic devolution trend see *University v. Foy* (1805) and *Fletcher v. Peck* (1810).

[74] As a corollary, the states retain a role in interpreting the national Constitution. This role is a legal one, as the national Constitution prompts the states to resolve national constitutional disputes and ambiguities. The Tenth Amendment asks the states to elaborate non-enumerated provisions of the national Constitution, and the Article Five requires the states amend enumerated provisions. As Lutz argues, the framers wrote an "incomplete text" that intentionally deferred controversies over citizenship, the franchise, the constitutionality of slavery to the states (Lutz 1988).[74] Antebellum states even nullified and interposed provisions of the national Constitution. The states' role is

Third, the state constitutions mediate national realignments. V.O. Key's midcentury studies claimed the states lagged behind federal reforms, especially in the South, and especially on race (Key 1955; Key 1956; Key 1963). Subsequent scholars ignored the states, tracing national realignments to national institutions like the presidency (Skowronek 1993), national parties (Burnham 1971; Sundquist 1983; Aldrich 2011), or to national ideologies like liberalism (Huntington 1981). No current model integrates the states.[75] This project suggests some states precede and incite federal coalition and policy realignment, while other states follow. Conservative state coalitions can constitutionally entrench the local status quo, postponing the state realignments that spark national change. Even after national coalition and policy realignments, these states can block policy implementation.[76]

Justice Louis Brandeis was right to dub the states "laboratories of democracy." When demographic, economic, and technological shifts threaten the reigning national coalition, the coalition defers these contentious issues, particularly ones of populism and civic inclusion, to the states. State radicals use these wedge issues to fracture the dominant state coalition, entrenching their new power in a new state constitution. This state revision often preempts federal amendment, stabilizing American constitutional and political development.

Bibliography

Ackerman, Bruce. 1998. *We the People: Transformations. 2*. Belknap Press of Harvard University Press.

Adamany, David. 1973. "Legitimacy, Realigning Elections, and the Supreme Court." *Wisconsin Law Review* 1973: 790.

Adams, Willi Paul. 2001. *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*. Rowman & Littlefield.

Aldrich, John H. 2011. *Why Parties?: A Second Look*. University of Chicago Press.

Bailyn, Bernard. 1967. *The Ideological Origins of the American Revolution*. Belknap Press of Harvard University Press.

---

also political, arming national coalitions with solutions to federal constitutional controversies. Whittington describes the historical contest between departmentalist and judicial modes of interpretation, but largely misses this third mode of state interpretation, which mediates and directs the interaction of the other two.

[75] To this author's knowledge. However, some have recognized the states' influence on national electoral law (McCormick 1960), citizenship law (Novkov 2008), and constitutional law (Blocher 2010; Tarr 2010; Burgess and Tarr 2012), for example.

[76] Dinan suggests states have five means to block or change federal constitutional policy: lobbying the federal government, lawsuits in federal court, state statutes, and most importantly, constitutional amendments (Dinan 2012).

Beienburg, Sean. 2014. “Contesting the U.S. Constitution through State Amendments: The 2011 and 2012 Elections.” *Political Science Quarterly* 129 (1): 55–85. doi:10.1002/polq.12146.

Berkowitz, Daniel, and Karen Clay. 2005. “American Civil Law Origins: Implications for State Constitutions.” *American Law and Economics Review* 7 (1): 62–84.

Blocher, Joseph. 2010. “What State Constitutional Law Can Tell Us about the Federal Constitution.” *Penn State Law Review* 115: 1035.

Branning, Rosalind L. 2004. *Pennsylvania Constitutional Development*. University of Pittsburgh Press.

Bridges, Amy. 2008. “Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States.” *Studies in American Political Development* 22 (01): 32–58. doi:10.1017/S0898588X08000035.

Browne, Cynthia E. 1973. *State Constitutional Conventions from Independence to the Completion of the Present Union, 1776-1959: A Bibliography*. Greenwood Press.

Brunhouse, Robert Levere. 1942. *The Counter-Revolution in Pennsylvania, 1776-1790*. Harrisburg : Pennsylvania Historical Commission. http://archive.org/details/counterrevolutio00brun.

Bryce, James. 1908. *The American Commonwealth*. Macmillan.

Burgess, Michael, and G. Alan Tarr. 2012. “Introduction: Sub-National Constitutionalism and Constitutional Development.” In *Constitutional Dynamics in Federal Systems: Sub-National Perspectives*, edited by Michael Burgess and G. Alan Tarr. McGill-Queen’s Press - MQUP.

Burnham, Walter Dean. 1971. *Critical Elections: And the Mainsprings of American Politics*. W. W. Norton & Company.

———. 1975. “Party Systems and the Political Process.” In *American Party Systems: Stages of Political Development*, edited by William N. Chambers and Walter Dean Burnham. New York: Oxford University Press.

Carmines, Edward G., and James A. Stimson. 1989. *Issue Evolution: The Race and the Transformation of American Politics*. Princeton University Press.

Casper, Jonathan D. 1976. “The Supreme Court and National Policy Making.” *The American Political Science Review* 70 (1): 50–63. doi:10.2307/1960323.

Cayton, Adam. 2015. “Why Are Some Institutions Replaced While Others Persist? Evidence from State Constitutions.” *State Politics & Policy Quarterly*, July, 1532440015594663. doi:10.1177/1532440015594663.

Congleton, Roger D., and Bjørn Rasch. 2006. “Amendment Procedures and Constitutional Stability.” In *Democratic Constitutional Design and Public Policy: Analysis and Evidence*. MIT Press.

Countryman, Edward. 1985. *The American Revolution*. Macmillan.

Dahl, Robert A. 1957. “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker.” *Journal of Public Law* 6: 279.

Dinan, John. 2006. *The American State Constitutional Tradition*. University Press of Kansas.

———. 2012. “State Constitutions and American Political Development.” In *Constitutional Dynamics in Federal Systems: Sub-National Perspectives*, edited by Michael Burgess and G. Alan Tarr. McGill-Queen’s Press - MQUP.

Dixon, Rosalind, and Richard Holden. 2012. “Constitutional Amendment Rules: The Denominator Problem.” In *Comparative Constitutional Design*, edited by Tom Ginsburg. Cambridge University Press.
Dodd, W. F. 1910. “Judicial Control over the Amendment of State Constitutions.” *Columbia Law Review* 10 (7): 618–38. doi:10.2307/1110983.
———. 1915. “The Function of a State Constitution.” *Political Science Quarterly* 30 (2): 201–21. doi:10.2307/2141919.
———. 1920. “The Problem of State Constitutional Construction.” *Columbia Law Review* 20 (6): 635–51. doi:10.2307/1111866.
Dumbauld, Edward. 1958. “State Precedents for the Bill of Rights.” *Journal of Public Law* 7: 323.
Elazar, Daniel J. 1972. *American Federalism: A View from the States*. Crowell.
———. 1982. “The Principles and Traditions Underlying State Constitutions.” *Publius* 12 (1): 11–25. doi:10.2307/3329670.
Elkins, Zachary, Tom Ginsburg, and James Melton. 2009. *The Endurance of National Constitutions*. Cambridge ; New York: Cambridge University Press.
Fehrenbacher, Don Edward. 1989. *Constitutions and Constitutionalism in the Slaveholding South*. University of Georgia Press.
Finn, John E. 1999. “Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity.” *Constitutional Political Economy* 10 (4): 355–65. doi:10.1023/A:1009023000354.
Ford, Paul Leicester. 1895. “The Adoption of the Pennsylvania Constitution of 1776.” *Political Science Quarterly* 10 (3): 426–59. doi:10.2307/2139954.
Friedman, Lawrence M. 1988. “State Constitutions in Historical Perspective.” *Annals of the American Academy of Political and Social Science* 496 (March): 33–42.
———. 2014. “The Endurance of State Constitutions: Preliminary Thoughts on the New Hampshire Constitution.” Accessed November 24. http://waynelawreview.org/the-endurance-of-state-constitutions-preliminary-thoughts-on-the-new-hampshire-constitution/.
Funston, Richard. 1975. “The Supreme Court and Critical Elections.” *The American Political Science Review* 69 (3): 795–811. doi:10.2307/1958390.
Gates, John B. 1989. “Supreme Court Voting and Realigning Issues: A Microlevel Analysis of Supreme Court Policy Making and Electoral Realignment.” *Social Science History* 13 (3): 255–83. doi:10.2307/1171372.
Graber, Mark A. 1993. “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary.” *Studies in American Political Development* 7 (01): 35–73. doi:10.1017/S0898588X00000687.
Green, Fletcher Melvin. 1930. *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy*. University of North Carolina Press.
Hall, Kermit. 2009. “Mostly Anchor and Little Sail: The Evolution of American State Constitutions.” In *Toward a Usable Past: Liberty Under State Constitutions*, edited by Paul Finkelman and Stephen E. Gottlieb. University of Georgia Press.
Hammons, Christopher W. 1999. “Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions.” *The American Political Science Review* 93 (4): 837–49. doi:10.2307/2586116.

Hardin, Russell. 1989. "Why a Constitution." In *The Federalist Papers and the New Institutionalism*, edited by Bernard Grofman and Donald Wittman. Algora Publishing.
Hartz, Louis. 1955. *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution*. Houghton Mifflin Harcourt.
Henretta, James A. 2009. "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915." In *Toward a Usable Past: Liberty Under State Constitutions*, edited by Paul Finkelman and Stephen E. Gottlieb. University of Georgia Press.
Hershkoff, Helen. 1999. "Positive Rights and State Constitutions: The Limits of Federal Rationality Review." *Harvard Law Review* 112 (6): 1131–96. doi:10.2307/1342383.
———. 2001. "Positive Rights and the Evolution of State Constitutions." *Rutgers Law Journal* 33: 799.
Hershkoff, Helen, and Stephen Loffredo. 2010. "State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis." *Penn State Law Review* 115: 923.
Hirschl, Ran. 2009. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Harvard University Press.
Huntington, Samuel P. 1981. *American Politics: The Promise of Disharmony*. Harvard University Press.
Jacobsohn, Gary. 2006. "Constitutional Identity." *The Review of Politics* 68 (03): 361–97. doi:10.1017/S0034670506000192.
Jameson, John Alexander. 1887. *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding*. Callaghan.
Kammen, Michael G. 1986. *A Machine That Would Go of Itself: The Constitution in American Culture*. St. Martin's Press.
Key, V. O. 1955. "A Theory of Critical Elections." *The Journal of Politics* 17 (01): 3–18. doi:10.2307/2126401.
———. 1956. *American State Politics: An Introduction*. 1st ed. New York: Knopf.
———. 1959. "Secular Realignment and the Party System." *The Journal of Politics* 21 (02): 198–210. doi:10.2307/2127162.
———. 1963. *Southern Politics in State and Nation*. New York: Vintage Books.
Kramer, Larry D. 2004. *The People Themselves: Popular Constitutionalism and Judicial Review*. Oxford University Press.
Kruman, Marc W. 1999. *Between Authority and Liberty: State Constitution-Making in Revolutionary America*. UNC Press Books.
Lasser, William. 1985. "The Supreme Court in Periods of Critical Realignment." *The Journal of Politics* 47 (04): 1174–87. doi:10.2307/2130812.
Lassiter, Matthew D. 2006. *The Silent Majority: Suburban Politics in the Sunbelt South*. Princeton University Press.
Levinson, Sanford. 2012. *Framed: America's 51 Constitutions and the Crisis of Governance*. Oxford University Press.
Lieberman, Robert C. 2002. "Ideas, Institutions, and Political Order: Explaining Political Change." *American Political Science Review* 96 (04): 697–712. doi:10.1017/S0003055402000394.
Lutz, Donald S. 1980. *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*. Louisiana State University Press.

———. 1982. “The Purposes of American State Constitutions.” *Publius* 12 (1): 27–44. doi:10.2307/3329671.
———. 1988. “The United States Constitution as an Incomplete Text.” *Annals of the American Academy of Political and Social Science* 496 (March): 23–32.
———. 1992. “The State Constitutional Pedigree of the U.S. Bill of Rights.” *Publius: The Journal of Federalism* 22 (2): 19–45.
———. 1994. “Toward a Theory of Constitutional Amendment.” *The American Political Science Review* 88 (2): 355–70. doi:10.2307/2944709.
Madison, James. 1999. “The Vices of the Political System of the United States.” In *Writings*, edited by Jack Rakove. Library of America.
Marshfield, Jonathan L. 2010. “Models of Substantial Constitutionalism.” *Penn State Law Review* 115: 1151.
Mayhew, David R. 2002. *Electoral Realignments: A Critique of an American Genre*. Yale University Press.
McCormick, Richard P. 1960. “New Perspectives on Jacksonian Politics.” *The American Historical Review* 65 (2): 288–301. doi:10.2307/1842870.
McGirr, Lisa. 2002. *Suburban Warriors: The Origins of the New American Right*. Princeton University Press.
McHugh, James T. 2003. *Ex Uno Plura: State Constitutions and Their Political Cultures*. SUNY Press.
McKinley, Albert Edward. 1905. *The Suffrage Franchise in the Thirteen English Colonies in America*. Philadelphia: University of Pennsylvania Press.
Mehta, Jal. 2010. “The Varied Roles of Ideas in Politics: From ‘Whether’ to ‘How.’” In *Ideas and Politics in Social Science Research*, edited by Daniel Beland and Robert Henry Cox. Oxford University Press.
Miller, Joshua. 1988. “The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty.” *Political Theory* 16 (1): 99–119.
Mittal, Sonia, and Barry R. Weingast. 2013. “Self-Enforcing Constitutions: With an Application to Democratic Stability In America’s First Century.” *Journal of Law, Economics, and Organization* 29 (2): 278–302. doi:10.1093/jleo/ewr017.
Nash, Gary B. 2006. *The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America*. Penguin.
North, Douglass C., and Barry R. Weingast. 1989. “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England.” *The Journal of Economic History* 49 (04): 803–32. doi:10.1017/S0022050700009451.
Norton, Anne. 1988. “Transubstantiation: The Dialectic of Constitutional Authority.” *The University of Chicago Law Review* 55 (2): 458–72. doi:10.2307/1599813.
Novkov, Julie. 2008. “Bringing the States Back In: Understanding Legal Subordination and Identity through Political Development*.” *Polity* 40 (1): 24–48. doi:10.1057/palgrave.polity.2300093.
Onuf, Peter S. 2009. “State Politics and Republican Virtue: Religion, Education, and Morality in Early American Federalism.” In *Toward a Usable Past: Liberty Under State Constitutions*, edited by Paul Finkelman and Stephen E. Gottlieb. University of Georgia Press.
Ordeshook, Peter C. 1992. “Constitutional Stability.” *Constitutional Political Economy* 3 (2): 137–75. doi:10.1007/BF02393118.

Parsons, Craig. 2010. “Ideas, Positions, and Supranationality.” In *Ideas and Politics in Social Science Research*, edited by Daniel Beland and Robert Henry Oklahoma. Oxford University Press.
Rodriguez, Daniel B. 2011. “State Constitutional Failure.” *University of Illinois Law Review* 2011: 1243.
Scalia, Laura J. 1999. *America’s Jeffersonian Experiment: Remaking State Constitutions, 1820-1850*. Northern Illinois University Press.
Schattschneider, E. 1975. *The Semi-Sovereign People : A Realist’s View of Democracy in America*. [S.l.]: Holt Rhineart and Winston.
Selsam, J. Paul. 1936. *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy*. Philadelphia: University of Pennsylvania Press.
Selsam, J. Paul, and Joseph G. Rayback. 1952. “French Comment on the Pennsylvania Constitution of 1776.” *The Pennsylvania Magazine of History and Biography* 76 (3): 311–25.
Skowronek, Stephen. 1993. *The Politics Presidents Make: Leadership from John Adams to George Bush*. Cambridge, Mass: Belknap Press.
Smith, Rogers M. 1993. “Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America.” *The American Political Science Review* 87 (3): 549–66. doi:10.2307/2938735.
———. 1999. *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*. Yale University Press.
Stephanopoulos, Nicholas, and Mila Versteeg. 2015. “The Contours of Constitutional Approval.” SSRN Scholarly Paper ID 2646773. Rochester, NY: Social Science Research Network. http://papers.ssrn.com/abstract=2646773.
Sturm, Albert L. 1970. *Thirty Years of State Constitution-Making, 1938-1968: With an Epilogue: Developments During 1969*. National Municipal League.
———. 1982. “The Development of American State Constitutions.” *Publius* 12 (1): 57–98. doi:10.2307/3329673.
Sundquist, James L. 1983. *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States*. Brookings Institution Press.
Tarr, G. Alan. 1998. *Understanding State Constitutions*. Princeton University Press.
———. 2010. “Explaining Sub-National Constitutional Space.” *Penn State Law Review* 115: 1133.
Thayer, Theodore. 1953. *Pennsylvania Politics and the Growth of Democracy: 1740 - 1776*. Pennsylvania Historical and Museum Commission.
Tribe, Laurence H. 1987. “Idea of the Constitution: A Metaphor-Morphosis, The.” *Journal of Legal Education* 37: 170.
Versteeg, Mila, and Emily Zackin. 2014. “American Constitutional Exceptionalism Revisited.” SSRN Scholarly Paper ID 2416300. Rochester, NY: Social Science Research Network. http://papers.ssrn.com/abstract=2416300.
Weingast, Barry R. 1997. “The Political Foundations of Democracy and the Rule of Law.” *The American Political Science Review* 91 (2): 245–63. doi:10.2307/2952354.
———. 2006. “Designing Constitutional Stability.” In *Democratic Constitutional Design and Public Policy: Analysis and Evidence*, edited by Roger D. Congleton and Birgitta Swedenborg. MIT Press.

Whelan, Frederick. 1983. “Prologue: Democratic Theory and the Boundary Problem.” In *Liberal Democracy*, edited by James Roland Pennock and John W. Chapman. New York: New York University Press.
Whittington, Keith E. 2009. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton University Press.
Williams, Robert F. 1987. “Experience Must Be Our Only Guide: The State Constitutional Experience of the Framers of the Federal Constitution.” *Hastings Constitutional Law Quarterly* 15: 403.
———. 1989. “The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism.” *Temple Law Review* 62: 541.
———. 2009. *The Law of American State Constitutions*. Oxford University Press, Incorporated.
Wolin, Sheldon. 1990. *The Presence of the Past: Essays on the State and the Constitution*. Johns Hopkins University Press.
Wood, Gordon S. 1972. *The Creation of the American Republic, 1776-1787*. Norton.
———. 1992a. “Foreword: State Constitution-Making In the American Revolution.” *Rutgers Law Journal* 24: 911.
———. 1992b. *The Radicalism of the American Revolution*. Random House Digital, Inc.
Worthington, Chauncey Ford, ed. 1906. *Journals of the Continental Congress 1774-1789*. Vol. IV. U.S. Government Printing Office.
Zackin, Emily. 2013. *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights: Why State Constitutions Contain America’s Positive Rights*. Princeton University Press.