

–American Reconstitution: Revision of the Federal and State Constitutions”

Robinson Woodward-Burns  
University of Pennsylvania

*Since 1791, the federal Constitution has been amended 17 times, while the nearly 150 state constitutions have been amended 6,000 times. What explains the federal constitution’s stability relative to the states? Scholars explain this through the federal judiciary’s ability to postpone federal revision, or through the state constitutions’ easy amendment, constitutional culture, and citizenship controversies. Instead, this paper points to constitutional devolution. Gradual demographic, economic, and technological shifts force new constitutional debates, threatening the reigning national party. That party or coalition defers 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. These constitutional reform movements grow among the states, eventually forcing federal coalition realignment and constitutional change. Devolution of controversies to the states stabilizes the federal constitution while upsetting the state constitutions.*

Constitutions vary in duration. Why do some collapse? The question is old. Plato and Aristotle prescribed constitutions to channel and calm Greek factions, Machiavelli revived Roman institutions to reconcile warring Florentine classes, Hobbes and Locke bound the English crown and republicans to a common contract, and inspired by these constitutions, Madison framed a document to survive ~~the~~ mortal diseases under which popular governments everywhere have perished.” Theorists return to the question because it is central to politics – constitutions shape formal institutions and statutes and informal civic norms – and because it remains unsolved. Some nations frequently revise their constitutions while others do not.

Nearly 230 years old, America’s federal Constitution is the world’s oldest and most stable, while the American state constitutions undergo generational revision, lasting on average 70 years.<sup>1</sup> The federal government has had a single constitution with seventeen amendments since

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<sup>1</sup> The federal constitution is the oldest and tersest operating written constitution in the world, too extreme an outlier to represent national constitutions. While the American state constitutions resemble national constitutions in textual

1791, while the states boast nearly 150 constitutions and 6,000 amendments. What explains the difference? What determines the duration of the American national and state constitutions?

To observe duration, one must understand constitutional commitments. Core normative commitments define a constitution.<sup>2</sup> When revisions scrap these particular commitments, they scrap the constitution, even if most of the document legally endures. The national Constitution faces periodic major revision by amendment, like the Reconstruction Amendments' abolition of slavery, by significant statutes, like the 1935 Social Security Act, and by judicial reinterpretation, like the Court's rejection of segregation in *Brown*. Each realignment fundamentally changes the Constitution, opening a new era of constitutional interpretation and politics. America has had a single national constitution since 1787, but several significantly different national constitutional regimes. One must not study the endurance of the formal federal and state documents, but rather the duration of these regimes.

Constitutional regimes collapse when they cannot adjust to technological, economic, and demographic change. In America, arising national coalition entrenches its power through constitutional revision. Less flexible than a statute, a constitution durably and legally binds present and future opponents. This constitution also inflexibly constitutes the polity through legal limits on citizenship. Yet demographic, economic, and technological tides slowly force new political issues, particularly citizenship controversies, which threaten these rigid boundaries. Its constitutional platform besieged, the coalition fragments and is replaced with a new coalition and constitutional order. For example, the 1793 invention of the cotton gin boosted revenue from slave labor, expanding the slave population and spreading slavery west. Slaves'

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specificity, rights protections, and duration (Versteeg and Zackin 2014), hinting at determinants of national constitutional stability, this work is not concerned with constitutional duration in other nations. For average state duration, see (Hammons 1999, 837).

<sup>2</sup> These are usually ideological commitments defining the constitution's purpose. See (Jacobsohn 2006; Jacobsohn 2010; Jacobsohn 2011)

citizenship status internally divided both Democrats and Whigs, who agreed in 1837 to gag congressional slavery debate, punting the issue to the Supreme Court in *Prigg* (1842) and *Dred Scott* (1857), which contained the issue until the Civil War and Reconstruction Amendments. Such massive generational shifts are gradual, explaining the slow tempo of political and constitutional realignment.

Beleaguered national coalitions can buy time, postponing national constitutional realignment. These coalitions quiet threatening issues, especially ones of civic exclusion, by deferring these issues to the courts. Robert Dahl (1957) notes the Court rarely defies the dominant legislative coalition. Why? Stephen Skowronek (1993) answers that a powerful “reconstructive” president, backed a rising congressional coalition, seizes constitutional review from the judiciary, rewriting and reinterpreting the Constitution. Mark Graber (1993) and Keith Whittington (2009) add that weaker presidents shield their fragmenting coalitions from divisive issues by deferring these issues to the courts. Courts can postpone change, but eventually the president’s coalition collapses and a realignment president introduces a new coalition and new constitutional vision.

Three factors unique to the state constitutions may explain their instability relative to the federal one. First, civically inclusive constitutions may have more backers and greater endurance. To the extent that state constitutions are less inclusive than the federal Constitution, they should be less stable. Second, 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. Finally, while the federal Constitution enjoys widespread veneration, most state polities ignore or denigrate their constitution, and have few cultural reservations with constitutional revision.

This paper proposes another determinant of American constitutional change – constitutional devolution. National coalitions defer wedge issues to the courts, but also to the states. Devolution gags national reformers, temporarily preserving the constitutional order. Opportunistic state radicals use these wedge issues to split the dominant state coalition, seizing power and easily redrafting the state constitution. States' flexible constitutions and plenary legal power gradually incubate and arm national reform movements, which fragment national coalitions to force federal constitutional and political realignment. But state reform is slow, piecemeal, and sometimes unsuccessful, suggesting devolution can kill national controversies, stabilizing the national Constitution. Since devolution quiets some national controversies, we can expect it to stabilize the federal constitution and destabilize the states.

American scholars largely neglect the 149 state constitutions for the federal one, missing much of American citizenship law. Far more flexible than their federal counterpart, undergoing frequent wholesale replacement, with many more provisions on citizenship, the franchise, education, and economic and 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 American constitutionalism and politics.

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 Dahl, Skowronek, Graber, and Whittington trace to the judiciary actually works through the states. Second, federal actors defer to the states to postpone or prevent inter-branch conflict. Neglecting the states, Dahl and others miss how the states quietly mediate inter-branch constitutional conflicts. Third, states

guide national constitutional realignments. States do not always lag behind national realignments, as V.O. Key suggests (Key 1955; Key 1956; Key 1963), but sometimes lead. Additionally, constitutional devolution postpones change, explaining the periodicity of American constitutional realignments.

This paper proceeds in four parts, first reviewing accounts of American constitutional development and duration, and then rebutting these with a federal model that incorporates state constitutionalism. Third, the paper offers a preliminary overview of state and federal constitutional development and a case study in federal constitutional devolution, before finally considering the model's implications.

## **I. Explaining American Constitutional Development**

The canonical narrative of American constitutional development focuses solely on the national Constitution. National constitutional realignments begin with slow demographic, economic, and technological tides. As new demographic groups emerge, the electorate shifts, and standing parties ideally follow (Key 1959). However, demographic shifts rouse civic debates and third parties that threaten standing parties. Dominant parties maintain power by excluding hostile issues through gag rules (Schattschneider 1975) and hostile voters through civic exclusion. The gravest issues cut across both parties, so even opposed parties agree to exclude issues or voters to preserve their shared party system (Burnham 1975; Sundquist 1983). Parties can postpone electoral change, but as demographic change continues, public pressure for party realignment mounts, until parties collapse and realign in a critical election (Key 1955; Burnham 1971). The newly dominant party, perhaps once a peripheral third party, constitutionally entrenches its power through constitutional replacement, amendment, or reinterpretation, legally binding hostile partisans while extending citizenship to allies. However, constitutions resist revision – the

American Constitution especially – and cannot adjust to demographic change, gradually building pressure until the next critical election, continuing the cycle.<sup>3</sup>

Coalitions defer to the courts to prevent realignment, preserving the national constitutional regime. Robert Dahl asserts legal guides like constitutions, statutes, and precedents are ambiguous, allowing courts leeway in deciding contentious political issues. Yet courts rarely use this flexibility to overrule the executive or legislature – the Supreme Court overruled only 86 congressional statutes between 1790 and 1957, only 15 of which were major policies overruled within four years of passage, and almost all of these were reversed by congressional legislation. 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 1957). 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 national coalition, the coalition defers to the judiciary to quarantine the issue (Graber 1993).<sup>4</sup> 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

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<sup>3</sup> 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 reflected demographic changes, this would likely be the case. However, self-interested political parties resist these demographic changes, creating the pressure that causes sudden critical realignments.

<sup>4</sup>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).

coalitions shift interpretation of divisive constitutional controversies to the courts.<sup>5</sup> This model explains national constitutional and political realignment and inter-branch power.

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 debunksHartz and Huntington’s liberal thesis, asserting civic exclusion drives instability and political and constitutional change (Smith 1993; Smith 1999).

Most scholars ignore the state constitutions. The state constitutions, 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.<sup>6</sup>This

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<sup>5</sup>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).

<sup>6</sup>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 2006a, 1–6; Williams 2009, 1–11; Onuf 2009, 388–90; Levinson 2012, 1–32; Zackin 2013, 1–36; Beienburg 2014).

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 2006a; Zackin 2013), as do citizens' identities and cultures (Elazar 1972; Elazar 1982a), municipal regulations, and some public ideologies, like American republicanism (Wood 1972; Wood 1992a). 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 2006a; Zackin 2013, 18–35). Finally, state constitutions' flexibility allows policy experimentation. This variation helps explain why some constitutions endure while others fail. When Americans missed this point, the British Lord Bryce instructed:

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).

Mining the state constitutions educates the scholars, officials, and organizers seeking durable reforms like constitutional same-sex marriage protections. In an era of policy devolution and social contention, the state constitutions matter.

The tenuous literature on state constitutionalism offers no comprehensive causal explanation of state constitutional duration.<sup>7</sup> Historians and lawyers chronicle particular eras, like the Revolution (Wood 1972; Wood 1992a; Lutz 1980; Kruman 1999; Adams 2001), particular states, regions, and cultures, like the South (Elazar 1972; Elazar 1982a; Fehrenbacher 1989; McHugh 2003), ideas, like republicanism (Wood 1972; Wood 1992a; Scalia 1999; Henretta

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<sup>7</sup> See Friedman (2014) for a admittedly brief application of Elkins, Ginsburg, and Melton (2009) to the American state constitutional duration.



2009; Onuf 2009), or policy issues, like positive rights (Hershkoff and Loffredo 2010; Hershkoff 2001; Hershkoff 1999). Others trace the interaction of these ideas, policies, and regions over time (Sturm 1982; Friedman 1988; Tarr 1998; Dinan 2006a; Hall 2009; Zackin 2013; Versteeg and Zackin 2014), but shy from a comprehensive model that explains national realignments and politics.

Still, one can glean three elements unique to state constitutions that make these documents less stable than their federal counterpart. First is inclusivity. Constitutions backed by widespread consent may endure. Peter Ordeshook posits that prior to the social pact, individuals pursue their private self-interest to the common detriment, a prisoner's dilemma akin to Hobbes' state of nature. A contract, enforced by a third party, directs individual action to the common good, solving the dilemma. Yet national constitutions lack outside, third-party enforcement, and must be enforced by the constituting individuals (Ordeshook 1992). So, national constitutions must be ongoing self-enforcing pacts. Barry Weingast adds that liberal, Lockean constitutions coordinate subjects to deter the sovereign's violations (North and Weingast 1989; Weingast 2006). Since resistance benefits all subjects, these contracts are self-enforcing and stable. The more enforcers, the greater the stability. Additionally, widespread participation in drafting and ratification, in subsequent elections, and in distribution of goods keep citizens invested in a constitution (Elkins, Ginsburg, and Melton 2009). States' open conventions, staffed by novices and outsiders, referenda, easy amendment, and elected judiciaries invite enduring popular reforms. Popular campaigns use constitutional rights to legally and thus durably constrain elite-dominated courts and legislatures – accordingly many contemporary positive rights date to the Populist and Progressive eras (Zackin 2013, 1–13). Inclusive national constitutions seem to endure, and preliminary evidence suggests civically inclusive American state constitutions do too (Elkins,

Ginsburg, and Melton 2009, 76–93; Friedman 2014).<sup>8</sup> State constitutions that exceed the national Constitution in inclusivity ought to be especially stable, while exclusive ones ought to be less stable.

Second, the state constitutions exceed the federal one in textual flexibility and specificity.<sup>9</sup> James Madison worries easy, flexible revision muddles the constitutional text, confusing citizens and preventing the veneration and cooperative enforcement that preserves constitutions (Madison 1999, 75). Congleton and Rasch affirm unstable texts confuse the terms of coordination against the sovereign, deflating subjects' confidence in the pact (Congleton and Rasch 2006). Flexibility tethers state constitutions to swings in popular coalition politics, and elites erect high barriers to state constitutional amendment to shield state constitutions from popular revisionists (Lutz 1994; Tarr 1998).<sup>10</sup> States with smaller legislatures can coordinate amendment passage more easily, may be dominated by a single party that clears amendments' supermajority requirement, and in fifteen cases, only require a simple majority for amendments (Dixon and Holden 2012). This differs from Article V's imposition of high amendment thresholds on the large national Congress. Madison adds that over-specificity yields textual contradictions, confusing citizens' duties to check the sovereign while expanding sovereign authority, threatening tyranny and constitutional collapse. Long, quasi-statutory state constitutions include contentious provisions like regulation of crime, education, or finance,

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<sup>8</sup>For more on this point, see Hardin (1989), who notes constitutions are coordination pacts that make subsequent contracts possible. Subnational constitutions like those of the American states are enforced by the national government, and may not face this enforcement dilemma to the same degree.

<sup>9</sup>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.

<sup>10</sup>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).

inviting revision (Friedman 1988, 36; Lutz 1994, 357–9; Tarr 1998, 20–3), while brief state documents earn public respect and dissuade potential reformers, and allow judges the leeway in judicial review that preserves the constitution (Sturm 1982; Elazar 1982b; Lutz 1982; Fritz 1997, 35–6; Zackin 2013, 22–7).<sup>11</sup>

Third, Madison suggests a culture of constitutional veneration increases duration. 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 respect, but most state constitutions are closer to the Southern model – overtly partisan, ignored by their populations, and short-lived. 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.”<sup>12</sup>

As a caveat, homogeneity can preserve constitutions. A homogenous population might align framers’ interests, yielding a coherent text that clarifies citizens’ enforcement duties, increasing endurance.<sup>13</sup> To the extent that state polities are more homogenous than the national polity, their constitutions ought to be more stable. Elkins, Ginsburg, and Melton find little

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<sup>11</sup> However, Christopher W. Hammons finds specificity reflects coalition politics, such that longer state constitutions, stocked with pork barrel provisions, are more stable (Hammons 1999). Long national documents allow the clarity necessary for enforcement, can have textual provisions to coordinate actors’ response to exogenous crises, reflect actors’ investment in the framing process and thus in the document itself, and spur interest in updating and preserving the document (Elkins, Ginsburg, and Melton 2009, 81–3, 99–103).

<sup>12</sup> Quoted in (Tarr 1998, 142–3; Dinan 2006a, 12). For an account of state constitutional culture, see (Elazar 1972; Elazar 1982a; McHugh 2003).

<sup>13</sup> Conversely, taking a Madisonian tack, Stefan Voigt proposes heterogeneous, opposed subjects thwart each other’s profiteering attempts to cooperate with the sovereign’s violations, stabilizing constitutions (Voigt 1998; Voigt 1999).

evidence that homogeneity affects national constitutional duration, and state constitutional scholars leave the subject untouched.

## II. Theory

The national Constitution's relative stability may reflect the Constitution's inclusivity, textual inflexibility and brevity, popular veneration, or political coalitions' deference to courts. Instead, this paper asserts national devolution of constitutional controversies, particularly over citizenship and civic exclusion, stabilizes the national Constitution while destabilizing the state constitutions.

To understand constitutional devolution, one must first understand the tensions within constitutional development. A constitution has two functions. One is to entrench rules. Polities face threats from foreign incursion, domestic criminals, and government usurpation. A constitution is partly a liberal prior contract to coordinate and commit subjects against these threats to sovereignty, durably restraining transgressors.<sup>14</sup> A constitution also constitutes the polity by bounding citizenship. This exclusion creates a national identity, some equality between included citizens, a public sphere distinct from the private, an according space for political activity and competition, and a limited polity capable of deliberation and autonomy. An autonomous polity can expand or contract these boundaries at will. As in ancient cities, a constitution enables the growth of the individual and the polity.<sup>15</sup>

The functions are opposed. One restrains and the other empowers, posing the old normative dilemma between common stability and democratic autonomy. It also explains constitutional collapse – polities slowly outgrow their constitutional restraints. These restraints

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<sup>14</sup> Following Hobbes and Locke, Elster calls a constitution a rational pre-commitment for the common good, and Buchanan and Tullock, Ordeshook, Hardin, and Weingast argue constitutions are contracts or pacts for rational subjects to restrain governments and criminals.

<sup>15</sup> Aristotle holds a constitution (*politeia*) limits citizenship (*Politics* III.5). Arendt also describes these ancient bounding functions (Waldron 2000).

necessarily and inflexibly bound the polity, requiring eventual replacement. The former function limits the ability of the polity to constitute itself, while the latter encourages the polity to reconstitute itself. Since each function is inherent to a constitution, this tension underlies and destabilizes all constitutions.

A three-step model explains how the tension between constitutional restraint and democratic autonomy unfolds cyclically through American constitutional development. National coalitions punt civic and citizenship controversies to the states, which realign and force federal constitutional reform:

1a demographic change → 1b constitutional controversy → 1c national devolution →

2a state coalition realignment → 2b state constitutional realignment/duration →

3a national coalition realignment → 3b national constitutional realignment/duration

First, framers constitutionally entrench their policies. A constitution is more durable than a statute, can invalidate past constitutions and statutes, and sets institutional rules to bind hostile branches and courts and buttress allied litigants. Constitutionalized policies claim special legitimacy and esteem, and durably extend the franchise and civil and economic rights to allies while seizing these from opponents, building a voting base across multiple elections. The constitution exceeds statutes in publicity, rallying allied voters, and allows high-profile litigation that draws voters and dismantles hostile citizenship laws. Constituting the people, by preamble or provision, is a legal role unique to constitutions (Pitkin 1987; Norton 1988; Jacobsohn 2006; Jacobsohn 2010).

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. Stability and exclusion are the twin, interdependent purposes of constitutions. This designed, necessary unresponsiveness to changes in civic membership exacerbates the boundary problem,<sup>16</sup> legally excluding some members of the polity, who, to gain legal inclusion, must be constitutional members. Put alternately, constitutions limit the autonomy of the demos to constitute and bound its own membership. Threatened by outsiders' push for inclusion, the dominant coalition uses its best political weapon – constitutional policymaking – to further entrench its position, ossifying the constitution and exacerbating the problem.

Without policy outlet, outsiders' petitions become grievances and controversies (1b). Outsiders rally within the dominant parties or form third parties. Civic debates rise in at least three forms. First is the gap between the ideal, unrealizable textual people and the actual, embodied people. 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. Second, a single constitutional commitment or aspiration can yield dueling interpretations (Tribe 1987; Jacobsohn 2006, 380–2). Organizers turn to the same shared, authoritative constitutional values to turn out their base and build coalitions, but interpret these values in incompatible ways. For example, the Fifth Amendment Due Process Clause simultaneously protected slaveholders' property in slaves and slaves' liberty. Finally, separate and opposed constitutional commitments may clash, akin to Rogers Smith's multiple civic traditions (Smith 1993; Smith 1999).

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<sup>16</sup> For a description of the problem, see (Whelan 1983).

These debates and third parties threaten the dominant national coalition. The dominant national coalition can be one party or several. Recall that abolitionist debate and party organizing cross-cut and undermined both Jacksonian Democrats and Whigs. Outsiders strategically and intentionally use these rising issues, ideas, and rhetoric to bridge allies and to split rivals (Lieberman 2002, 702; Parsons 2010, 130–1).<sup>17</sup> Civic identities are especially powerful divisive tools. Adept agenda setters preclude some alternatives, quietly and intentionally manipulating rivals' preferences. Bound to its constitutional platform, the dominant coalition struggles to coopt these rhetorical tools. Words and identities are inexact, unreliable instruments that may backfire or solidify through path dependence, further resisting cooption.

The national coalition survives by devolving the issues to the states (1c), isolating the debate to silence third party radicals. Put differently, national coalitions remain stable by controlling the scope of conflict.<sup>18</sup> Congressional Jacksonian Democrats and Whigs overcame their differences and gagged slavery debate to quiet Congress' antislavery minority, deferring to the states through popular sovereignty.

Federal devolution allows opportunistic state radicals to force debate on previously neglected topics, realigning state coalitions (2a).<sup>19</sup> National reformers, thwarted by federal gag rules and high barriers to federal constitutional revision, further pressure state coalition moderates, seeking state realignment and policy change.<sup>20</sup> Coalition realignment incites constitutional realignment. A fracturing coalition may refuse constitutional change, exacerbating

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<sup>17</sup> Constitutional framers' preferences reflect material or economic interests, but are mediated by ideas. For more on the interaction of ideational and material contexts, see (Smith 2014).

<sup>18</sup> See (Schattschneider 1975; Graber 1993).

<sup>19</sup> 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.

<sup>20</sup> See (Dinan 2006a; Dinan 2012; Beienburg 2014).

the standing controversy and speeding the coalition and constitution's demise. Or it might make constitutional concessions. Once begun, revision is difficult to end. Frequent revisions lower state constitutions to ordinary coalition politics, eroding the public veneration that shields constitutions from further amendment. Unless the revision satisfies all parties, losers push for more revision. No revision can achieve complete civic inclusion, so there will always be losers undermining the document.

These new state reform coalitions easily realign state constitutions and politics, given states' low barriers to constitutional reform (2b). This may quiet or resolve the national issue, preempting national action and stabilizing the national coalition and constitution. In the early 19<sup>th</sup> century, the Congress, backed by federal courts, devolved morality, temperance, lottery, and criminal justice legislation 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 in the South, or local legal prostitution in Nevada. Or state constitutional revision may resolve the national issue, offering a positive or negative model for federal reform – contemporary state constitutional same-sex marriage protections have preceded federal action. Or state revision may exacerbate the issue, requiring federal action – devolution of slavery regulation aggravated sectionalism, sparking the Civil War and federal constitutional resolution. Devolution insulates national coalitions from identity debates, but conversely, insulates and incubates these debates in some states.<sup>21</sup> In all three cases, devolution shields and extends the national constitutional regime, though in two cases, it causes eventual national realignment.

State experimentation arms national coalition radicals with viable, tested policies, which they turn against national coalition moderates (3a). This realigned coalition, or a perhaps a rising

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<sup>21</sup> For example, Novkov shows state constitutional and statutory citizenship regulation affected the development of national citizenship regulations (Novkov 2008).



third party, reinterprets or revises the federal Constitution(3b).<sup>22</sup>National constitutional collapse 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 affects the states, as the federal Supremacy Clause, congressional enabling acts, and judicial review force lagging states to match these federal reforms. State realignments stoke national realignments – Midwestern and New England abolition and abrogation of proslavery federal law eventually forced federal abolition and the Reconstruction Amendments. Devolution initially quiets national conflict but eventually backfires, provoking national conflict.<sup>23</sup>In a federal system, the subnational units vent controversies, but only briefly.<sup>24</sup>

Some constitutional issues may not undergo all three steps of this model. As noted, devolution may kill some issues, preempting national realignment at the third stage. Other issues may grow organically from the states, beginning at the second stage, before inciting national realignment. Some issues take multiple cycles to resolve. State realignment may force unsuccessful national realignment and renewed federal devolution – the framers deferred morality and temperance regulation to the states, which passed diverse and conflicting temperance laws, prompting the failed federal 18<sup>th</sup> Amendment, and a renewed federal

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<sup>22</sup> 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).

<sup>23</sup> Similarly, Graber shows legislative deference to the judiciary works in the short run but may eventually backfire (Graber 1993, 65–8).

<sup>24</sup> 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).

devolution to the states under the 21<sup>st</sup> Amendment. Conceivably, the state and federal government could play hot potato with controversies indefinitely.

Devolution helps explain and temper standing theories of American constitutional development. States' relative textual flexibility and specificity aid state constitutional reformers, but do not explain why reformers look to the states in the first place. Devolution, rather than textual factors, empowers state reformers. Extension of national citizenship debates to the states may explain why some states constitutions are civically inclusive and others are exclusive. Devolution regularly destabilizes the state constitutions, and as Madison suggests, this instability likely saps public veneration for these constitutions.

Devolution may explain the policy change that Dahl, Graber, and Whittington attribute to the courts.<sup>25</sup> Courts rely on presidential and Congressional enforcement, so national coalitions defer to Courts not to resolve, postpone, or legitimize issues, as Dahl suggests, but to kill them.<sup>26</sup> Hirschl asserts dominant and waning coalitions use courts to entrench their power and silence or preempt outsider claims, just as Rosenberg's "flypaper" Supreme Court attracts, traps, and kills minority rights claims (Rosenberg 2008; Hirschl 2009). American state constitutional revision has the power the courts lack. Conventions, amendments, and referenda are written with political aims, have plenary legal power, and structure executives and legislatures to enforce these policy aims.<sup>27</sup> Federal courts may even punt controversies like contemporary same-sex

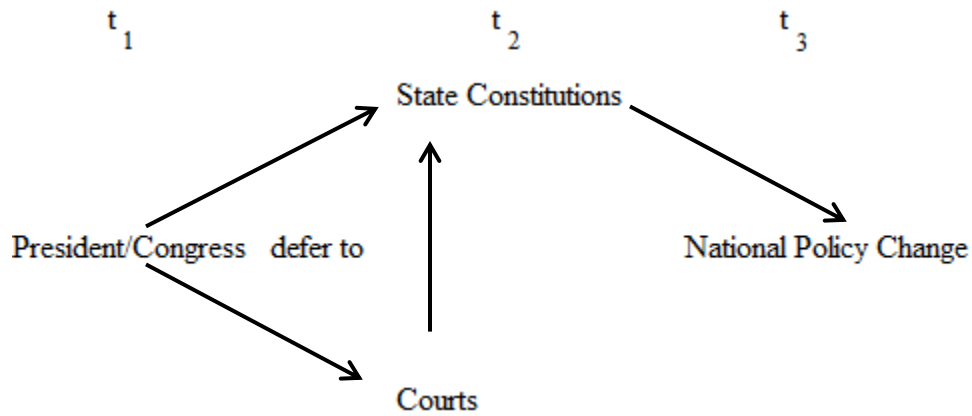
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<sup>25</sup> Graber mentions devolution only in passing (Graber 1993, 40).

<sup>26</sup> This is closer to Graber's claim.

<sup>27</sup> Dinan and Burgess and Tarr note state constitutions' easy revision procedure and special legal prerogatives attract reformers thwarted at the national level (Dinan 2006a; Dinan 2012; Burgess and Tarr 2012, 17–8). Yet constitutional devolution reflects national coalitions' political tactics and intentions, as much as these legal incentives.

marriage to the states.<sup>28</sup> The states, not the courts, resolve controversies and force national constitutional and policy change:



**Figure 1: State and Federal Constitutional Interaction**

Dahl, Graber, and Whittington are correct that the federal government at  $t_1$  defers to the courts at  $t_2$ , and that federal policy changes at  $t_3$ . However, limited enforcement power prevents courts at  $t_2$  from achieving policy change at  $t_3$ . Neglecting the state constitutions, they miss that federal devolution to the states at  $t_1$  and state constitutional revision at  $t_2$  changes federal policy at  $t_3$ . National coalitions defer to both courts and states, but the states drive policy change.

### III. Evidence of Constitutional Devolution

Preliminary evidence suggests state constitutional replacements spike roughly a decade before national constitutional realignment. The following figure sorts state constitutional replacements into consecutive five year bins:

<sup>28</sup> Conversely, federal courts sometimes invalidate state constitutional provisions during realignments (Casper 1976). Gates confirms that during realignments, federal courts are especially likely to invalidate state statutes and constitutional provisions related to realignment issues (Gates 1987; Gates 1989, 265–6). However, Gates’ findings are limited to three realignments and do not consistently distinguish statutory and constitutional provisions. Further, Caldeira and McCrone suggest federal judicial invalidation of state law may not coincide with national realignments (Caldeira and McCrone 1982). The federal judiciary may devolve controversies for the same strategic and political reasons that face the executive and legislature, or out of deference to local democracy. This dispute merits resolution.

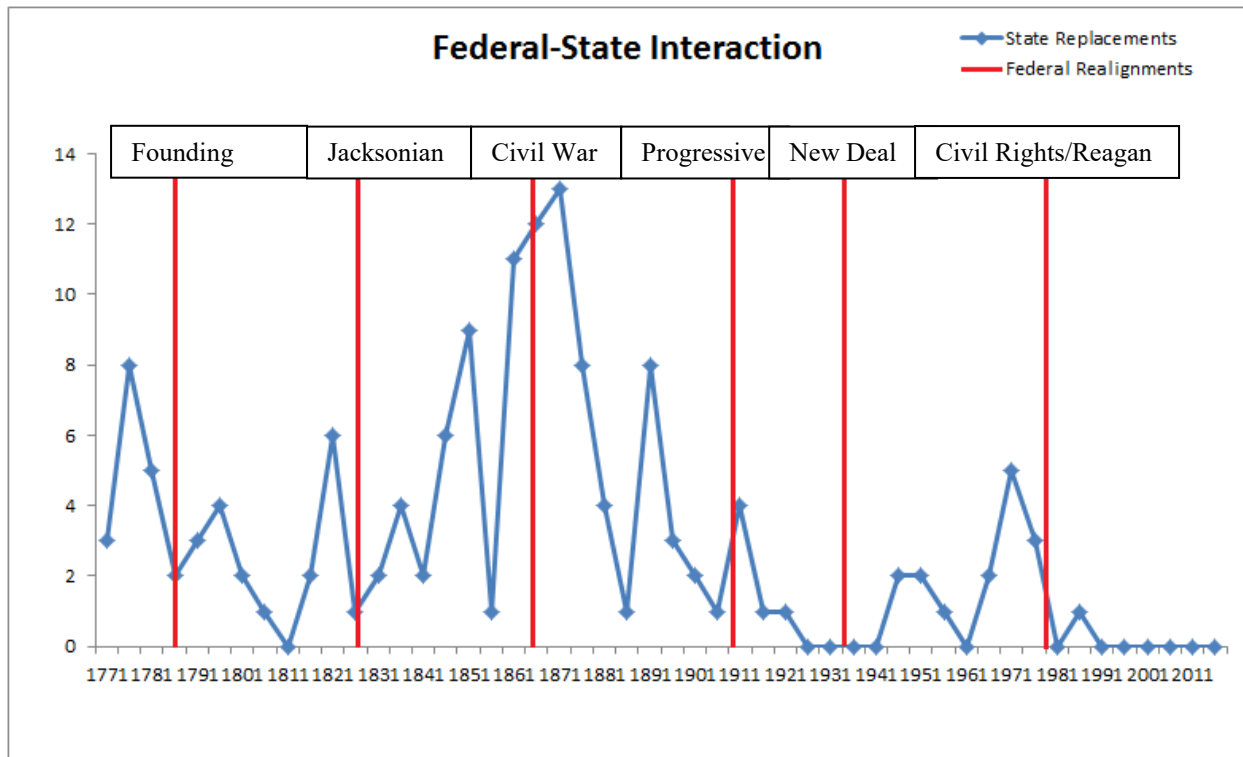


Figure 2: State and National Constitutional Development. Data from Sturm 1970, 1982, Browne 1973.

In each era the federal government devolves controversies to the state constitutions, inciting state realignment and eventual federal constitutional reform. 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 defers election and 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), allowing Jackson's landslide 1828 victory, which Skowronek aptly calls a constitutional realignment. After Congress delegated regulation of slavery to the states, Northern and Western states constitutionalized abolition, while Southern states seceded, all between 1841 and 1861. This forced the federal Reconstruction Amendments, which in turn brought a wave of state reconstruction constitutions in the late 1860s.

In the 1880s and 1890s, Populist, Progressive, and Western states protected economic and positive rights (Zackin 2013), decades before 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*.<sup>29</sup> Southern states also constitutionalized Jim Crow in the 1890s. Progressives introduced constitutional amendment through popular initiative and referendum, supplanting wholesale constitutional replacement by convention. Late Progressive state amendments and reforms like Minnesota's home loan moratorium predated federal New Deal statutes, as Justice Benjamin Cardozo admits in *Steward Machine Co. v. Davis* 301 U.S. 548 (1937).

Finally, in the 1960s all three federal branches forced states, particularly in the South, to reform education, criminal justice, and voting and apportionment law. This was not a case of devolution, but rather aggressive federal intervention into the states' traditional constitutional domains. This prompted Southern and Sunbelt constitutional revision and grassroots mobilizing for Nixon and later Reagan's realignment election and presidency (McGirr 2002; Lassiter 2006).

This brief overview measures state constitutional change as wholesale constitutional replacement. This has few shortcomings. It does not observe state revision through amendment,

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<sup>29</sup> These silos were owned by railroads. For more on Populist constitutional regulation of railroads, see (Zackin 2013; Versteeg and Zackin 2014).

judicial review, or extralegal popular constitutional interpretation.<sup>30</sup> Even accounting for these measures, not all revisions are equally important for national devolution. Compare the federal 1<sup>st</sup> Amendment's religious, speech, assembly, press, and petition protections, or the 14<sup>th</sup> Amendment incorporating the Bill of Rights, to the 27<sup>th</sup> Amendment regulating congressional pay. The significance of the method and content of constitutional reform varies 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 and founding era. When the Revolutionary War required new, independent colonial governments, the Continental Congress deferred to the colonies the contentious task of designing these governments. Solutions ranged from Pennsylvania's unicameral direct democracy to Massachusetts' tripartite checks-and-balances system. In 1787, delegates redrafted the federal Constitution to imitate Massachusetts' relatively stable scheme.

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 Stamp and Townshend Acts. Colonists organized committees of safety and correspondence to abrogate these 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,

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<sup>30</sup> 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).

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.<sup>31</sup> The Congress allowed New Hampshire, South Carolina, and Virginia the same liberty (Wood 1972, 130–2).

John Adams led congressional Whigs to pass a resolution devolving the formation of 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.<sup>32</sup> Adams, aided by Edward Rutledge, and Richard Henry Lee, added an equally short and vague preamble to the resolution five days later.

The brevity was strategic. Adams' goal was to secure independence by drafting new colonial governments, all without specifying the proper design of government, a disputed issue. 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; Wood 1972). Debate was heated, as direct democracy and unicameralism threatened propertied elites and families, who favored the Whig scheme and its 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

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<sup>31</sup> 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.

<sup>32</sup> 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).

new governments” (Williams 1989, 544). The tension between hardscrabble western frontiersmen and eastern and propertied elites that led the British to the 1763 Proclamation still dogged and threatened to split the American Continental Congress. The state framers’ pamphlets and letter 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).<sup>33</sup> In 1777, the Articles of Confederation, little more than a mutual defense pact, further devolved governing authority to the states, legally recognizing the states’ existing plenary powers over health, safety, morals, and welfare, over taxation, and war.

So the states set to work. All but two revolutionary state congresses called constitutional conventions. By 1777 all but three states adopted new constitutions in what Gordon Wood calls ~~the~~ “the most creative and significant period of constitutionalism in modern Western history,” (Wood 1992b, 911). Even rogue New Yorkers drafted a constitution for a republic they called Vermont. Framed quickly and under duress, these documents were experimental, some explicitly temporary emergency constitutions. They were the first modern constitutions, at once self-enforcing coordination pacts and frames of government. Between 1776 and the 1787 Convention, seven states added bills of rights to clarify legal rights and means of participation.

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,

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<sup>33</sup> Also see Kruman for the colonial framers’ reliance on English constitutionalism (Kruman 1999, 7–14).



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.<sup>34</sup>

Pennsylvania best represents this populist model. The War and the Continental Congress’s May resolutions destabilized Pennsylvania’s colonial coalitions, allowing excluded westerners to force debate that split reigning Philadelphia Quakers. Colonial Pennsylvania was divided between Philadelphia Quaker and mercantile elites, German Lutherans in the agrarian middle counties, and Presbyterian Scots-Irish frontiersmen in the far west. Eastern Quakers dominated the colonial Assembly through a tenuous alliance with frontiersmen and through property restrictions on suffrage under the colonial Charter of Privileges. Western frontiersmen sought to arm and organize themselves against French and Indian incursions during the Seven Years War, but Quaker legislators, insulated from fighting and morally pacifists, refused funding (Selsam 1936, 18–31). A decade after the War’s end, the Assembly extended westerners an olive branch, funneling funds to infrastructure improvement and relaxed post-War taxes on western counties (Thayer 1953, 127–39). The accord was brief. Wealthy Quakers dominated the Assembly by disenfranchising poor Philadelphians and by blocking organization of far western lands into counties that could elect representatives.

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<sup>34</sup>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).

Western legislators split from the conservative eastern faction, allying with central Pennsylvanians and eastern radicals. This new coalition formed committees of safety and correspondence against British rule, meeting in January of 1775 to form a Provincial Convention to challenge the Assembly as Pennsylvania's legitimate government. Prompted by the Continental Congress' May 10 and 15 resolutions, on May 22, 1776, these radicals assembled in Philadelphia to form a new, insurrectionist state constitution, abrogating the old colonial charter and the colonial Assembly. A June meeting dictated constitutional conventional delegates had to forswear allegiance to the crown, excluding Quakers, 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). 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, revolutionary Philadelphia Quakers joined the convention, hoping to maintain their dominance under this new government.

Philadelphia's ideological tenor complemented the radicals' aims. Pennsylvanians alone ~~re~~jected 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).

The radical party dominated the 1776 Convention, and Pennsylvania's new Constitution was the most populist of the Revolutionary state documents.<sup>35</sup> 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 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

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<sup>35</sup>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).

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.<sup>36</sup> 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 powerful wartime executive checked by a bicameral legislature and written bill of rights.<sup>37</sup> 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

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<sup>36</sup> 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).

<sup>37</sup> 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."

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.<sup>38</sup> 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 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

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<sup>38</sup> 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).

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.

Attending to the state constitutions debunks the mainstream story of the Philadelphia Convention. Consider bicameralism. The textbook story, repeated by esteemed scholars like William Riker, Frances Lee, and David Robertson describes bicameralism as the "Great Compromise" between large states delegates, led by Madison of Virginia, and small states delegates, led by Roger Sherman of Connecticut (Riker 1984; Lee 1999; Robertson 2005). Yet the failure of the unicameral Pennsylvanian legislature and the success of Massachusetts' bicameral one biased delegates toward bicameralism long before federal Convention delegates even met. Similarly, many take the centralization of power under the 1787 Constitution as a repudiation of the decentralized Articles of Confederation, which could not repel foreign threats. Yet this centralization is just as much a rejection of Pennsylvania's weak wartime government, localism, and populism, and an attempt to curb domestic threats by the assembled people. A mainstream history studies the 1787 Convention through Madison's convention notes, *The Federalist*, or Max Farrand's *Records of the Federal Convention of 1787*, and misses how two centuries of colonial and state charters and constitutions quietly settled the fundamental debates well before the Convention began.

In studying the Convention record and *The Federalist*, mainstream scholars miss how previous state framers' choices silently closed topics in the federal Convention debate while opening others.<sup>39</sup> The federal Constitution was not written in 1787, but long before, by the states.

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<sup>39</sup> A handful of historians debate the states' influence on the federal Constitution. Most influential is Gordon Wood, but see also Adams, Kruman, Lutz, Miller, Nash, and Onuf (Adams 2001; Kruman 1999; Lutz 1992; Miller 1999;

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 and Constitution. Between 1787 and 1793, six of the original colonies, including Pennsylvania, Georgia, and Vermont, revised their constitutions again to conform to the Massachusetts and federal design.

Other factors play a minor role. 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.<sup>40</sup> National deference to the judiciary plays little or no 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. Inclusivity plays some role, as the federal Constitution adopted Massachusetts moderate model rather than Pennsylvania's radically

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Nash 2006; Onuf 2009; Wood 1972; Wood 1992b). Regrettably these insightful histories neither venture a broader causal model nor speculate beyond the founding era.

<sup>40</sup> Save Virginia and South Carolina, all states revised or amended their constitutions through special conventions or committees. All but two constitutions used solely this process, while Massachusetts' 1780 and New Hampshire's 1784 Constitutions allowed public review of proposed revisions. For states' homogeneity in using conventions, see (Kruman 1999, 15–24).

inclusive, democratic one. Yet this suggests the effect of civic inclusion is conditioned partly on devolution and interaction between the federal and state documents.

#### **IV. Implications and Conclusion**

This model has three implications. First, Dahl, Graber, Skowronek, and Whittington ignore the states, incorrectly attributing the power of state constitutional revision to the federal courts. For example, Graber shows Congress deferred to the judiciary on slavery, yielding *Dred Scott*, on monopoly regulation via the 1890 Sherman Act and *E.C. Knight*, and on abortion in *Roe* (Graber 1993, 45–61). Yet Congress also deferred to the states on slavery via the 1820 and 1850 Compromises and Stephen Douglas' popular sovereignty, and to state constitutions on positive rights like monopoly and labor regulation, abortion provision, and contemporary same-sex marriage. Federal devolution to the state constitutions likely explains the lively positive rights tradition observed by Brennan, Hershkoff, and Zackin (Brennan 1977; Hershkoff 1999; Hershkoff 2001; Hershkoff and Loffredo 2010; Zackin 2013). State courts aid state constitutional revision, but are bound by federal precedent and state elections and constitutional amendments.<sup>41</sup> The federal and state judiciaries are perhaps weaker than Dahl admits, undermining the vast literature damning unelected judges as impeding popular majorities (Bickel 1986; Tushnet 2000; Kramer 2004). Conversely, popular state conventions and referenda have plenary legal power and special policy domains that courts lack.

Second, the federal branches 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

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<sup>41</sup> On court-constraining amendments, see (Dinan 2006b)



devolved commerce debates to the states rather than challenge the Jackson.<sup>42</sup> 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 in the long run, may fracture 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.

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).<sup>43</sup> Antebellum states even nullified and interposed provisions of the national Constitution. The states' role is also political, arming national coalitions with solutions to federal constitutional controversies. Whittington describes the historical contest between

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<sup>42</sup> 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).

<sup>43</sup>Akin to Dinan, Burgess and Tarr, and Marshfield's claims on subnational constitutional "space."

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.

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.<sup>44</sup> 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.<sup>45</sup>

Realignment theorists like Burnham, Sundquist, and Huntington posit realignments are periodic, but as Mayhew notes, they struggle to explain why, relying "on suggestions and metaphors rather than on sustained argument" (Mayhew 2002, 15–20).<sup>46</sup> One metaphor describes "pressure buildup" against old, inflexible institutions, as popular majorities revise political systems based on the "dead issues of the past."<sup>47</sup> Constitutions explain the periodicity of realignments. Article V requires two thirds of the House, Senate, and state legislatures to approve a proposed national amendment. This frustrates all but the most committed movements,

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<sup>44</sup>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.

<sup>45</sup>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).

<sup>46</sup>One exception is Beck, who claims impressionable young voters flock to a new realignment coalition and maintain this affective party identification through their lives. Parties stay entrenched for roughly a generation before replacement, explaining periodicity (Beck 1974).

<sup>47</sup>Sundquist quoted in Mayhew.

which gradually build at the state level until they clear this national threshold, scoring national constitutional and policy realignment.

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. These constitutional reform movements grow at the state level, eventually forcing federal coalition realignment and constitutional change. State and federal constitutional duration reflects the devolution of politically sensitive issues, especially over civic inclusion.

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For some 20 years Aristotle was Plato's student and colleague at the Academy in Athens, an institution for philosophical, scientific, and mathematical research and teaching founded by Plato in the 380s. Although Aristotle revered his teacher, his philosophy eventually departed from Plato's in important respects. Aristotle rejected Plato's theory of Forms but not the notion of form itself. For Aristotle, forms do not exist independently of things—every form is the form of some thing. Scholars are divided over the question of whether the *Laws* indicates that Plato changed his mind about the value of democracy or was simply making practical concessions in light of the limitations of human nature.