

American Constitutional Exceptionalism Revisited

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The US Constitution is a global outlier. Its omission of positive rights, its brevity, and its remarkable duration and stability make it exceptional by global standards. The uniqueness of this venerable document has spurred a passionate debate over America's constitutional exceptionalism.

In this Article, we show that not all of American constitutionalism is nearly so distinctive. Over the past two centuries, Americans not only wrote the federal Constitution, but they have also written 149 state constitutions and approved thousands of amendments to those constitutions. Those state constitutions are also an essential part of the American constitutional tradition and yet are unexceptional by global standards.

We draw on original data based on our own hand coding of all state constitutions ratified between 1776 and 2011 to provide the first systematic comparison of US state constitutions to the world's national constitutions. Using these data, we highlight three features of state constitutions that should prompt reconsideration of America's constitutional exceptionalism. First, like most of the world's constitutions, state constitutions are rather long and elaborate documents that set out government policies in painstaking detail. Second, like most of the world's constitutions, state constitutions are frequently amended or overhauled. Third, like most of the world's constitutions, state constitutions contain positive rights relating to, for example, education, labor, social welfare, and the environment. Thus, at the state level, Americans have written their constitutions much like everyone else.

Our findings invite reconsideration not only of America's alleged constitutional exceptionalism but also of the nature of state constitutions. State constitutions are frequently derided for falling short of the example set by the federal Constitution and dismissed as statutory rather than constitutional in character. Our

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analysis suggests that the defining features of state constitutions do not merely represent a subnational mode of constitution making but characterize national and subnational constitutions alike. Moreover, these features represent an underappreciated mechanism of constitutional design that emphasizes flexibility and specificity over the entrenchment of broad statements of principles.

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INTRODUCTION: AN EXCEPTIONAL CONSTITUTION

At over two hundred years of age, the US Constitution is the oldest surviving national constitutional document in the world. Once immensely influential around the globe,¹ it now stands

¹ See George Athan Billias, *American Constitutionalism Heard round the World, 1776–1989: A Global Perspective* 105 (NYU 2009) (noting that “few [regions] made greater use of North American constitutionalism” than Latin America, and that “[h]uge sections of two constitutions—Argentina’s in 1853 and Brazil’s in 1891—were copied word for word from the U.S. Constitution”); Richard B. Morris, *The Emerging Nations and the American Revolution* 212 (Harper & Row 1970) (noting that much of the 1947 Japanese Constitution is “close paraphrasing or direct plagiarism from the Constitution of the United States”); George Athan Billias, *American Constitutionalism and Europe, 1776–1848*,

apart from the constitutional systems that it previously inspired.² It is, in many respects, a global outlier,³ distinguished from other national constitutions by its brevity, textual stability, and omission of explicit socioeconomic rights.⁴ These differences have led many to conclude that there is something different about Americans and their vision of government that is reflected in their very different Constitution.⁵

The federal Constitution may indeed be exceptional, but American constitutionalism is not confined to the text of the federal Constitution, nor to the ideas and practices associated with it. Claims about American constitutional exceptionalism, however, are generally grounded in studies of the federal Constitution

in George Athan Billias, ed, *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History* 13, 24 (Greenwood 1990) (noting that the main features of the US Constitution “were imitated in Europe . . . from 1776 to 1848 more than any other constitutional document”); Enrique M. Fernando, *The American Constitutional Impact on the Philippine Legal System*, in Lawrence Ward Beer, ed, *Constitutionalism in Asia: Asian Views of the American Influence* 144, 177 (California 1979) (“[T]he United States Constitution has had an impact, both deep-seated and profound, on the fundamental laws of practically all the Asiatic countries that have recently attained their statehood, as well as [those] of Japan.”).

² See David S. Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L Rev 762, 779–808 (2012); Alec Stone Sweet, *Constitutions and Judicial Power*, in Daniele Caramani, ed, *Comparative Politics* 162, 173 (Oxford 2d ed 2011) (deeming the American experience “increasingly irrelevant to global constitutionalism”); Heinz Klug, *Model and Anti-model: The United States Constitution and the “Rise of World Constitutionalism”*, 2000 Wis L Rev 597, 598 (observing that the US Constitution no longer enjoys “an unassailable, dominant status”). See also Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, NY Times A1 (Sept 18, 2008) (documenting the decreased international influence of the Supreme Court’s interpretations of the US Constitution).

³ See Law and Versteeg, 87 NYU L Rev at 781–96 (cited in note 2) (documenting empirically how the US Constitution is different from those written elsewhere).

⁴ See David S. Law and Mila Versteeg, *Sham Constitutions*, 101 Cal L Rev 863, 876 (2013) (pointing at the US Constitution’s “age, fixity, and brevity” as its distinctive features); Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* 1, 10 (Princeton 2005) (“The U.S. Constitution makes no reference to socioeconomic and welfare rights . . . that are standard features of both international rights regimes and the constitutions of European states.”).

⁵ See, for example, Alexis de Tocqueville, *Democracy in America* 454–58 (Anchor 1969) (J.P. Mayer, ed) (George Lawrence, trans). See also Dieter Grimm, *The Protective Function of the State*, in G. Nolte, ed, *European and US Constitutionalism: Science and Technique of Democracy* 119, 120–22 (Council of Europe 2005) (noting that negative rights characterize the US constitutional tradition and attributing this phenomenon to America’s lack of feudalism); Frederick Schauer, *The Exceptional First Amendment*, in Ignatieff, ed, *American Exceptionalism* 29, 46–47 (cited in note 4) (“American distrust of government is a contributing factor to a strongly libertarian approach to constitutional rights. . . . [V]iewing a constitution as the vehicle for ensuring social rights, community rights, or positive citizen entitlements of any kind is . . . highly disfavored.”).

alone.⁶ This narrow focus has distorted our understanding of American constitutionalism and inflated our sense of America's difference. Over the past two centuries, Americans have participated in extensive and ongoing constitution making at the state level, in the course of which they have evaluated and updated the choices reflected in the US Constitution.⁷ These efforts have long been central to the American constitutional tradition, and any examination of whether American constitutionalism is exceptional by global standards remains incomplete without consideration of state constitutions.

In this Article, we offer the first systematic comparison of US state constitutions to the world's national constitutions. We draw on an original dataset based on our own hand coding of all state constitutions in effect from 1776 to 2011⁸ and contrast it with existing data on national constitutions for the same period.⁹ Our analysis reveals three important features of state constitutions that should prompt reconsideration of US constitutional exceptionalism. First, like most of the world's constitutions, state constitutions are rather long and elaborate, and they include detailed policy choices.¹⁰ The exceptional American taste for constitutional brevity, it turns out, is confined to the federal document alone. Second, like most of the world's constitutions, state constitutions are frequently amended, overhauled, and

⁶ The lack of attention given to state constitutions is systemic in the study of constitutional law. See G. Alan Tarr, *Understanding State Constitutions* 1 (Princeton 1998) ("Leading constitutional-law texts . . . focus exclusively on the United States Constitution and its interpretation."); James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* 23 (Chicago 2005) ("When Americans speak of 'constitutional law,' they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it."); Robert F. Williams, *The Law of American State Constitutions* 1 (Oxford 2009) (dubbing state constitutions "low-visibility constitutions").

⁷ See generally John J. Dinan, *The American State Constitutional Tradition* (Kansas 2006).

⁸ We constructed a dataset of state constitutions by reading and hand coding these documents. For our analysis of constitutional revision, the data are supplemented by data collected in Rosalind Dixon and Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in Tom Ginsburg, ed., *Comparative Constitutional Design* 195 (Cambridge 2012). Specifically, we use their data on state constitutional amendments to construct a measure of state-constitution revision rates.

⁹ The data on national constitutions from 1946–2006 were collected by Professor Mila Versteeg and were first introduced in Benedikt Goderis and Mila Versteeg, *Transnational Constitutions* *13–17 (Center Discussion Paper No 2013-010, Apr 2013), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216582 (visited Nov 3, 2014). The data for 2006–2012 were coded by Law and Versteeg, 101 Cal L Rev 863 (cited in note 4). We supplement Law and Versteeg's data with data provided by Professor Tom Ginsburg and on file with the authors and the editors.

¹⁰ See Part II.

replaced.¹¹ Thus, the textual stability of the over-two-century-old federal Constitution is exceptional compared not only to other national constitutions but also to the constitutions of the American states, which are characterized, in part, by a commitment to progress and change. Third, like most of the world's constitutions, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights.¹² While the federal Constitution arguably omits explicit declarations of these rights, they are not foreign to the American *constitutional tradition*. On all these dimensions, it is at the federal level only that Americans' constitutional practices appear exceptional. When we include the writing and revision of state constitutions in our assessment, it becomes clear that American constitutionalism is not nearly as distinctive as most comparative studies and political commentators have suggested.

Our findings invite reconsideration not only of America's alleged constitutional exceptionalism but also of the practice of state-level constitution making. Scholars frequently criticize state constitutions for falling short of the example set by the US Constitution. Due to their elaborate detail, frequent revision, and inclusion of socioeconomic rights, state constitutions are often dismissed as merely statutory rather than truly "constitutional."¹³ What is more, these distinguishing features are often

¹¹ See Part III.

¹² See Part IV.

¹³ See, for example, Daniel J. Elazar, *The American Constitutional Tradition* 107–08 (Nebraska 1988) (noting that state constitutions are typically viewed as "wordy patchworks of compromises having little rhyme or reason"); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich L Rev 761, 819–20 (1992) (arguing that, if state constitutions reflect the character of the people, state citizens are "a frivolous people who are unable to distinguish between things that are truly important and things that are not"); A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 Va L Rev 816, 866 (1968):

Whatever the reasons for the great length and detail of the typical state constitution, commentators speak with one voice when they submit that such detail is simply not compatible with the traditional assumption that a constitution is properly the repository of the fundamental ordering principles of society, and that all else should be left to the statute books.

Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga L Rev 165, 196 (1984):

[S]tate constitutions are dusty stuff—too much detail, too much diversity, too much debris of old tempests in local teapots, too much preoccupation with offices, their composition and administration, and forever with money, money, money. In short, no grand vision, no overarching theory, nothing to tempt a scholar aspiring to national recognition.

attributed to state constitutions' subnational status.¹⁴ Commentators have suggested that, because the federal Constitution places constraints on state governments, state-level constitution makers have been freed from the need to constrain their governments.¹⁵ These commentators further assert that states have therefore devoted their fundamental documents to a host of relatively unimportant issues and have tinkered with them freely. State constitutions' verbosity and malleability are thus cited as evidence that these documents impose fewer constraints on state governments and are less fully constitutional than their federal counterpart.¹⁶ Yet the fact that most national constitutions share similar design features casts doubt on the assumption that this is merely a subnational mode of constitution making. If anything, state constitutions reflect the prevailing mode of constitutional design today.

Our analysis also reveals that, under some circumstances, constitutional specificity and flexibility can serve as a perfectly rational mechanism for constraining those in power. Under this model, people aiming to bind their governments do not do so by entrenching higher-order principles in hard-to-amend, judicially enforced constitutions. Instead, they attempt to limit legislative, executive, and judicial discretion alike by giving very specific guidance to each of the branches. These specific instructions are coupled with ongoing monitoring and adjustment of the government's marching orders through frequent revision.¹⁷ This design strategy reveals a distrust of those in office, including judges, and endows popular majorities and future generations with increased influence. We believe that this strategy represents an underappreciated mechanism in the constitutional-design literature and merits further research. Indeed, in this Article, we make a first attempt to expose the logic behind what appears to be the prevailing mode of constitution making both in American states and around the world.

¹⁴ See, for example, Tom Ginsburg and Eric A. Posner, *Subconstitutionalism*, 62 Stan L Rev 1583, 1602 (2010) (attributing state constitutions' "greater majoritarianism, weaker rights, and more frequent amendment" to their subnational status); Williams, *American State Constitutions* at 25 (cited in note 6) (noting that state constitutions are "different kinds of constitutions, or constitutions that are unique in the American federal system").

¹⁵ See, for example, Ginsburg and Posner, 62 Stan L Rev at 1602–03 (cited in note 14).

¹⁶ See Parts II.D, III.E.

¹⁷ See Part V.B.

The remainder of this Article is organized as follows: Part I describes how and why state constitutions form an integral part of the American constitutional tradition and why claims about American constitutionalism—including its alleged exceptionalism—are incomplete insofar as they omit state constitutions. Part II shows empirically that both state constitutions and other national constitutions are typically much longer than the US Constitution, which stands out for its limited scope and unusual lack of detail. Part III documents empirically that both state constitutions and the world's constitutions are replaced and revised more often than the US Constitution, which, despite being the world's oldest constitution, has undergone only twenty-seven amendments. Part IV shows that, while the US Constitution omits explicit socioeconomic rights, positive rights are a common feature of state and national constitutions alike. Part V exposes the logic behind the constitutional-design strategy that appears to characterize constitution making in both the American states and foreign countries. It suggests that this strategy does not represent merely a subnational or inferior mode of constitutional design but rather represents a deliberate attempt to constrain those in power. The Article concludes by reviewing the implications of these findings for our understanding of American constitutional exceptionalism, the nature of state constitutions, and constitutional theory more broadly.

I. AMERICAN CONSTITUTIONALISM (PROPERLY UNDERSTOOD)

Claims about American constitutional exceptionalism typically contrast the US Constitution with other national constitutions. Noting the dramatic differences between them, observers conclude that American constitutionalism is a global outlier.¹⁸ This mode of inquiry reduces American constitutionalism to the federal Constitution and the judicial interpretations surrounding it, creating a distorted picture of American constitutionalism. Indeed, to equate the federal Constitution with all of American constitutionalism is similar to describing an elephant solely with reference to its trunk. Surely, the trunk is an exceptional feature of the elephant, but it says little about how the elephant lives, digests its food, gets from place to place, mates, or gestates and nurses its young. When considering the entire elephant, it turns out to be more similar to other mammals than the trunk

¹⁸ See notes 2–3 and accompanying text.

alone suggests. Although an elephant's trunk is distinctive and important, one should not equate elephant studies with trunk studies.¹⁹

Just as it is impossible to understand the elephant by studying only its trunk, it is impossible to understand American constitutionalism by studying the federal Constitution alone. Despite the federal Constitution's centrality to American politics, descriptions of American constitutionalism that omit state constitutions as sites of constitutional design, lawmaking, and contestation are woefully incomplete.²⁰ Recent historical research on nineteenth-century state constitutional conventions has demonstrated that, like their famous counterparts in Philadelphia, state constitutional convention delegates debated fundamental principles of constitutional law and governance.²¹ In fact, the first state constitutions served as a model for the federal Constitution's Bill of Rights,²² and the many conventions that followed the US Constitution's ratification reconsidered a number of the federal delegates' constitutional choices.²³ When time and experience convinced the drafters of state constitutions of deficiencies in these early state documents, the drafters did not hesitate to adopt alternative designs, resulting in waves of constitutional revisions.²⁴ In the decade between 1844 and 1853, for instance, the majority of existing states adopted new constitutions that took increased care to guard democratic majorities from wealthy

¹⁹ See Sanford Levinson, *Framed: America's Fifty-One Constitutions and the Crisis of Governance* 28 (Oxford 2012) ("To identify a single constitution . . . with the entirety of American thinking about the constitutional enterprise is equivalent to offering a course on European art that turns out to focus exclusively on the art of the Italian Renaissance.").

²⁰ See Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 Rutgers L J 945, 952 (1994) (noting that the "ongoing process" of creating and amending state constitutions reveals "the core of practices, attitudes, and ideas that have been missing in our understanding of American constitutionalism").

²¹ See Dinan, *American State Constitutional Tradition* at 14–18 (cited in note 7).

²² See Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 Publius 19, 20–29 (Spring 1992) ("[T]he immediate background for the U.S. Bill of Rights was formed by the state bills of rights written between 1776 and 1787."); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temple L Rev 541, 541–42 (1989) (recounting John Adams's famous claim: "I made a Constitution for Massachusetts, which finally made the Constitution of the United States"). But see Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* 276–78 (Cambridge 2005) ("The Constitution ended the supremacy of the states Federal law was made supreme over state law and even state constitutions.").

²³ See Dinan, *American State Constitutional Tradition* at 3–4 (cited in note 7).

²⁴ See id. at 4–5.

minorities and to increase access to government.²⁵ State constitution makers also rethought the design of the judicial branch, and by 1860, eighteen of the thirty-one existing states had adopted entirely elected, rather than appointed, judiciaries.²⁶ Constitution makers in the newly formed western states crafted constitutions to mitigate the consequences of their relative lack of security and economic infrastructure.²⁷ As these examples attest, state constitution makers have consistently engaged in serious deliberation about constitutional design. The constitutions that they produced are not footnotes to the American history of constitutional thought but rather central components of it.²⁸

It is important to include state constitutions in assessments of American constitutional practices not only because of their historical relevance, but also because the content of state constitutions continues to exert substantial influence on public administration and policy. This is true because states remain partially or wholly responsible for a wide variety of critical government functions such as public education, family law, and voter registration. Although the federal government has played an increasingly large role in many areas of domestic policymaking, and despite the fact that federal laws supersede state laws, state governments are nonetheless real and—in many policy areas—autonomous governments. Within these areas, “states have inherent, autonomous lawmaking capacity: they can enact laws, regulate, and raise and spend money without having to secure authority from any other level of government.”²⁹ State constitutions not only structure the governments that make these decisions but also contain specific instructions about many areas of governance. They direct state legislatures to establish schools and specify the taxation systems to fund them, structure the

²⁵ See Tarr, *Understanding State Constitutions* at 94–109 (cited in note 6); Albert L. Sturm, *Methods of State Constitutional Reform* 114–15 (Michigan 1954).

²⁶ See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv L Rev 1061, 1097 (2010).

²⁷ See Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States*, 22 Stud Am Polit Dev 32, 43 (2008).

²⁸ See Dinan, *American State Constitutional Tradition* at 4–5 (cited in note 7) (noting that state constitutions reflect the “accumulated wisdom and experience of the American constitutional tradition”).

²⁹ Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 Vand L Rev 1303, 1306 (1994). See also Larry Kramer, *Understanding Federalism*, 47 Vand L Rev 1485, 1504 (1994) (“The law that most affects most people in their daily lives is still overwhelmingly state law—except perhaps law professors, for whom it is easier to study one federal system than many state systems, and who may, therefore, have a somewhat warped perspective.”).

way that states finance projects to build and maintain their infrastructure, mandate environmental preservation and cleanup, regulate and constrain local governments and their codes, and establish pension systems for veterans and public employees, to name only a few examples.³⁰ State-level constitutional choices, therefore, profoundly affect Americans' lives.

In addition to shaping and reflecting choices about many areas of American public policy, state constitutions and the state courts that interpret them are important features of the jurisprudential process in American constitutional lawmaking. Several influential constitutional doctrines, including substantive due process and separate but equal, originated from state courts' interpretations of state and federal constitutional provisions.³¹ More recently, state constitutions have provided alternative sources of constitutional law for those hoping to resist federal jurisprudential developments. The movement known as "New Judicial Federalism" is perhaps the most famous example of this dynamic.³² Frustrated by the Supreme Court's retrenchment in the protection of individual liberties, Justice William Brennan urged Americans to find stronger guarantees in the comparable provisions of their state constitutions.³³ The California Supreme Court's rulings that, under the California Constitution, the death penalty constitutes cruel or unusual punishment,³⁴ and that speech in privately owned shopping centers is protected from private suppression, exemplify this movement.³⁵ Following the Supreme Court's ruling that the US Constitution does not

³⁰ See Robert F. Williams, *State Constitutional Law: Cases and Materials* 529–34, 817–57, 953–97 (LexisNexis 4th ed 2006). For an illustration, see Ill Const Art XIII, §§ 5, 7 (creating pension rights and permitting the expenditure of public funds on public transportation).

³¹ See Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* 91–92, 134–38 (Princeton 2013).

³² See Tarr, *Understanding State Constitutions* at 161–70 (cited in note 6).

³³ See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 491 (1977) (arguing that, unless "the independent protective force of state law" is fostered, the "full realization of [American] liberties cannot be guaranteed").

³⁴ See *People v Anderson*, 493 P2d 880, 883 (Cal 1972) (reading the "or" in the California Constitution's prohibition on cruel or unusual punishment as disjunctive, thus making California's ban broader than the Eighth Amendment's prohibition on cruel and unusual punishment), *ovrld*, Cal Const Art I, § 27.

³⁵ See *Robins v Pruneyard Shopping Center*, 592 P2d 341, 347 (Cal 1979) (holding that the California Constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned"), *affd*, 447 US 74 (1980). See also *Pruneyard Shopping Center v Robins*, 447 US 74, 81 (1980) (establishing that states may grant rights broader than those provided under the US Constitution so long as those broader rights do not violate federal constitutional rights).

contain the right to education, educational reformers turned to state constitutions as an alternative basis for litigation, asking state courts to find and enforce state constitutional rights to education.³⁶ These advocates have achieved notable successes in transforming state school-financing systems.³⁷

A final reason why state constitutions should be included in characterizations of American constitutionalism is the reciprocal relationship between state and federal constitutional development. Throughout American history, state and federal constitutions have changed in response to one another. During the Progressive Era, for example, the temperance movement pursued its cause largely through amendments to state constitutions,³⁸ as did the women's suffrage movement.³⁹ These movements did not conduct their constitutional fights exclusively at the state or the federal level. Instead, reformers attempted to exploit and transform constitutional law at both levels of government.⁴⁰ The current struggle for government recognition of same-sex marriage also exemplifies this pattern. The US Supreme Court recently invalidated a federal law that defined marriage to exclude same-sex partnerships as a violation of the Fifth Amendment of the Federal Constitution.⁴¹ In the decade preceding this case, however, the battle over same-sex marriage was carried out via state constitutional amendments and litigation regarding the interpretation of state constitutions.⁴² Opponents of same-sex marriage

³⁶ See Joel S. Berke, *Recent Adventures of State School Finance: A Saga of Rocket Ships and Glider Planes*, 82 Sch Rev 183, 187–89 (1974).

³⁷ See Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* 9–10 (Princeton 2001); Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U Kan L Rev 791, 810–12 (2011); Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* 5–9 (Stanford 2010) (describing how state supreme court decisions in New Jersey and Kentucky set off far-reaching-school-finance reform).

³⁸ See Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* 39–40 (North Carolina 1995).

³⁹ See Eileen L. McDonagh and H. Douglas Price, *Woman Suffrage in the Progressive Era: Patterns of Opposition and Support in Referenda Voting, 1910–1918*, 79 Am Polit Sci Rev 415, 415–18 (1985); Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J L & Polit 339, 361, 429–31 (2008).

⁴⁰ See McDonagh and Price, 79 Am Polit Sci Rev at 416 (cited in note 39) (describing the dual efforts of national and state organizations to achieve women's suffrage).

⁴¹ See *United States v Windsor*, 133 S Ct 2675, 2695 (2013).

⁴² See, for example, *Goodridge v Department of Public Health*, 798 NE2d 941, 968 (Mass 2003). See also William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 BU L Rev 275, 283–91 (2013).

secured nearly thirty constitutional amendments limiting marriage to heterosexual partnerships,⁴³ while proponents found support in state high court decisions extending the legal benefits of marriage to same-sex couples or mandating the recognition of gay marriage.⁴⁴ From our contemporary vantage point, it is clear how incomplete and potentially misleading any study of the battle over same-sex marriage would be if it considered only the federal Constitution.

The fact that state constitutions are important to the American constitutional tradition does not automatically justify their comparison to other national constitutions. Indeed, commentators have suggested that their subnational status makes state constitutions substantively different from national constitutions;⁴⁵ too different, perhaps, to justify their comparison to national constitutions. Here, we adopt a nominal approach to defining constitutions; whatever a given polity understands to be its constitution is what we will analyze as a constitution. Instead of presuming that there exists a single constitutional ideal and excluding certain constitutions a priori, we begin with people's claims that they have produced constitutions, and we examine the variety of documents that have been given that title. In doing so, we uncover different ways that people design constitutions and govern under them. We also reveal remarkable similarities between US state constitutions and most national constitutions. Indeed, in the three Parts that follow, we demonstrate that, when state constitutions are included in characterizations of American constitutionalism, it becomes clear that Americans have participated in forms of constitutional politics that look very similar to those in the rest of the world.

II. CONSTITUTIONAL BREVITY

In its current form, the US Constitution comprises 7,762 words⁴⁶ contained in 7 original articles and 27 amendments.

⁴³ Arthur Lupia, et al, *Why State Constitutions Differ in Their Treatment of Same-Sex Marriage*, 72 J Polit 1222, 1225 (2010).

⁴⁴ See Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* 185–210 (Oxford 2008).

⁴⁵ See, for example, Ginsburg and Posner, 62 Stan L Rev at 1583 (cited in note 14) (outlining the differences between state and national constitutions).

⁴⁶ Comparative Constitutions Project, *CCP Rankings* (Sept 7, 2013), online at <http://comparativeconstitutionsproject.org/ccp-rankings> (visited Nov 3, 2014).

Most printed editions span no more than 17 pages.⁴⁷ Indeed, the prevailing view of constitutionalism in the United States tracks that of Chief Justice John Marshall in *McCulloch v Maryland*,⁴⁸ in which he argued that “only [the Constitution’s] great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”⁴⁹ Anything else, Marshall stated, would “partake of the prolixity of a legal code” and would “never be understood by the public.”⁵⁰

A. Comparing Constitutional Length

From a comparative perspective, the US Constitution is among the shortest in the world. Figure 1 depicts on a world map the number of words in all national constitutions today, showing that the overwhelming majority of current constitutions are longer than that of the United States.⁵¹ The average constitution comprises 21,960 words, which is about three times as many as the US Constitution contains. India’s constitution, at 146,385 words, is the world’s longest national constitution—almost twenty times the length of the US Constitution. Nations with constitutions shorter than the US Constitution include, among others, microstates like Luxembourg, Monaco, and Micronesia, as well as a handful of dictatorial regimes that, by and large, lack any meaningful constitutional tradition.⁵² Setting these aside, only three other nations have fundamental documents of comparable length to the US Constitution: Norway’s 1814 constitution, Denmark’s 1953 constitution, and Japan’s

⁴⁷ See, for example, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1313–29 (Wolters Kluwer 4th ed 2011) (printing the US Constitution, with amendments, in 17 pages); Daniel A. Farber, et al, *Cases and Materials on Constitutional Law: Themes for the Constitution’s Third Century* 1–15 (West 5th ed 2013) (15 pages); Geoffrey R. Stone, et al, *Constitutional Law* xli–lvi (Wolters Kluwer 7th ed 2013) (16 pages); Kathleen M. Sullivan and Noah Feldman, *Constitutional Law* lxxv–lxxix (Foundation 18th ed 2013) (15 pages).

⁴⁸ 17 US (4 Wheat) 316 (1819). Note that the original spelling of this case name was *M’Culloch v Maryland*, but we will refer to it herein as *McCulloch v Maryland*.

⁴⁹ *Id.* at 407.

⁵⁰ *Id.*

⁵¹ The data on the length of national constitutions were shared by Professor Tom Ginsburg and are on file with the authors and the editors.

⁵² The dictatorial regimes with constitutions that are shorter than the US Constitution are Djibouti, Equatorial Guinea, Laos, Libya, Mali, North Korea, Oman, Qatar, Saudi Arabia, and Turkmenistan.

1946 constitution (which was famously drafted by General Douglas MacArthur after World War II).⁵³

Two interrelated constitutional-design features appear to be responsible for the relative brevity of the US Constitution. First, the US Constitution has an unusually narrow scope and omits many topics that other constitutions today include. In the realm of constitutional rights alone, it omits many common features of global constitutionalism, such as socioeconomic rights, women's rights, and environmental protections.⁵⁴ Second, the US Constitution is characterized by an atypical lack of detail, generally opting to sketch broad frameworks and principles in lieu of elaborating on their application.⁵⁵ This constitutional design has resulted in a similarly unusual form of constitutional politics that requires judges, legislators, executives, and private citizens to generate constitutional meaning in the presence of exceptionally large indeterminacies.⁵⁶

Yet the exceptional taste for constitutional brevity is confined to the federal Constitution alone. The brief federal Constitution aside, Americans actually tend to govern through relatively lengthy constitutions. These (state) constitutions are exceptional in neither scope nor detail. National constitutions around the world and US state constitutions not only discuss a similarly wide range of issues, but both types of constitutions typically include detailed policy instructions about those issues.

⁵³ Bosnia and Herzegovina, Iceland, and New Zealand (which are neither autocratic nor microstates) also have constitutions that are apparently shorter than that of the United States. However, the brevity of these constitutions is deceptive for various reasons. For instance, the constitutions of New Zealand and Bosnia consist of many different documents or annexes that should be included in the word count. Similarly, Iceland's constitution is currently shorter than that of the United States, but after revisions now underway, it will be longer than the US Constitution.

⁵⁴ See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich L Rev 391, 395 (2008) (noting that the US Constitution includes "comparatively few enumerated rights"); Law and Versteeg, 87 NYU L Rev at 804–06 (cited in note 2) (attributing the United States' constitutional-outlier status to its omission of "generic building blocks" of global constitutionalism, such as women's rights and socioeconomic rights).

⁵⁵ See Tom Ginsburg, *Constitutional Specificity: Some Preliminary Investigations*, in Institute of Comparative Law in Japan, ed, *Future of Comparative Study in Law: The 60th Anniversary of the Institute of Comparative Law in Japan*, Chuo University 23, 36–38 (Chuo 2011) (distinguishing between scope and specificity, and noting that "scope is distinct from the length in words").

⁵⁶ For examples of the idea that constitutional interpretation is not confined to the judicial branch, see Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 2–15 (Harvard 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 135–37 (Oxford 2004).

These similarities are reflected in their comparable lengths. Figure 2 depicts the current word count of state constitutions, color-coded in the same way as Figure 1, which illustrates the same for current national constitutions.⁵⁷ The longest state constitution is Alabama's, which, at 340,136 words, is more than twice as long as the most verbose national constitution (India).⁵⁸ Even the shortest state constitutions, those of New Hampshire and Vermont, are longer than the federal Constitution.⁵⁹ On average, today's US state constitutions consist of 36,333 words, while the average national constitution today measures 21,960 words. The length of the average *democratic* national constitution is 24,430 words, which is even closer to the average for state constitutions.⁶⁰

⁵⁷ We collected the data on the length of state constitutions and compared them to data that was kindly shared with us by Professors Ros Dixon and Richard Holden. They introduce these data in Dixon and Holden, *Constitutional Amendment Rules* at 199–201 (cited in note 8).

⁵⁸ Alabama is followed by Texas (90,000 words), Colorado (74,522 words), and Oklahoma (74,075 words).

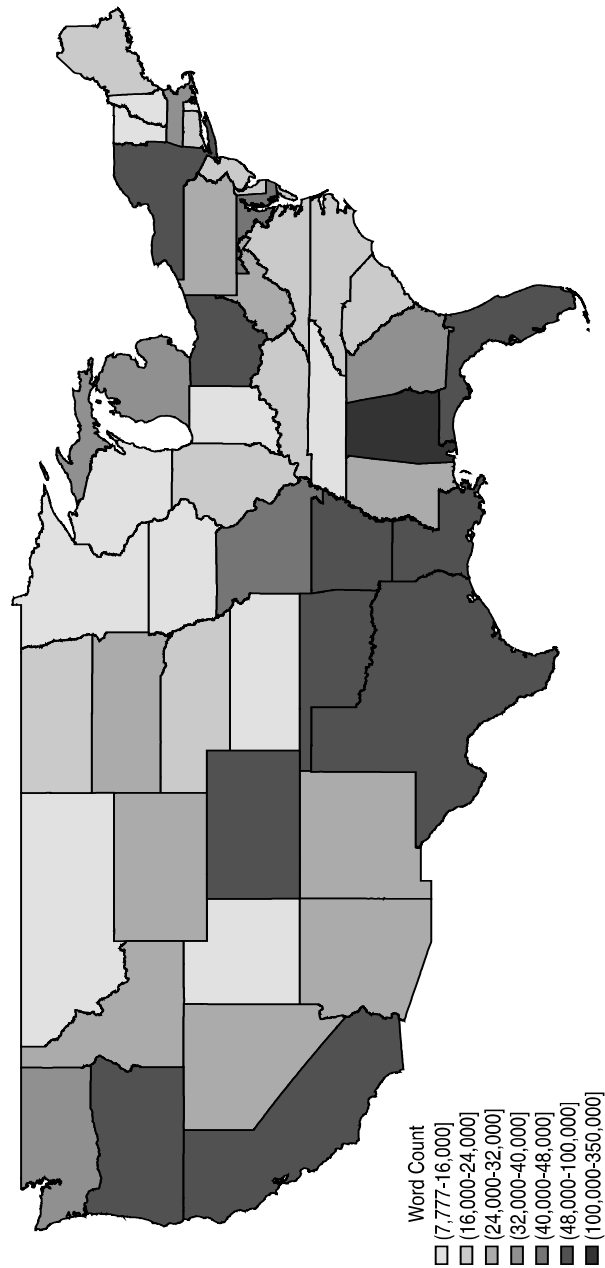
⁵⁹ The eleven state constitutions that are less than twice as long as the federal Constitution are those of New Hampshire (9,200 words), Vermont (10,286 words), Indiana (10,379 words), Rhode Island (10,908 words), Utah (11,000 words), Minnesota (11,547 words), Kansas (12,296 words), Iowa (12,616 words), Montana (13,145 words), Tennessee (13,300 words), and Wisconsin (14,392 words).

⁶⁰ We define a democratic constitution as the constitution of a country that has a score of at least four on the POLITY2 democracy indicator. See Monty G. Marshall, Ted Robert Gurr, and Keith Jaggers, *Polity IV Project: Political Regime Characteristics and Transitions, 1800–2012, Dataset Users' Manual* *17 (Center for Systemic Peace Apr 21, 2013), online at <http://www.systemicpeace.org/inscr/p4manualv2012.pdf> (visited Nov 3, 2014). Excluding Alabama and India (the longest state and national constitutions, respectively), the average length is 30,133 words for state constitutions and 21,312 words for national constitutions.

FIGURE 1. CURRENT LENGTH (WORD COUNT) OF WORLD CONSTITUTIONS

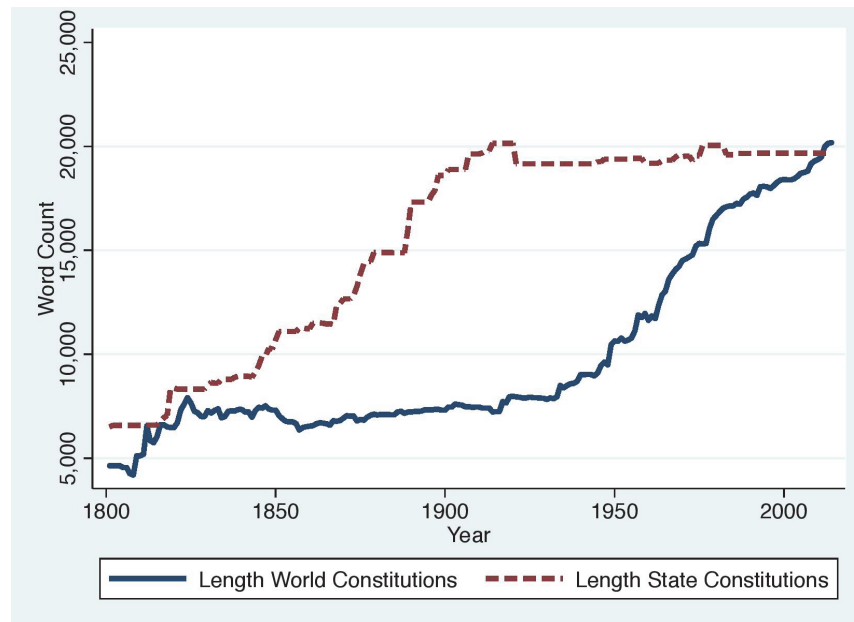


FIGURE 2. CURRENT LENGTH (WORD COUNT) OF STATE CONSTITUTIONS



Both national constitutions and US state constitutions have been steadily growing in length since the eighteenth century. Figure 3 depicts the average length of state and world constitutions over time. These data actually understate the growth of state and national constitutions because (unlike the data depicted in Figures 1 and 2) they are based on the length of constitutions at the time of their adoption; that is, they omit the impact of amendments. To illustrate, Alabama's lengthy constitution was 30,747 words when first adopted in 1901, one-tenth of its current length. Its amendment establishing the "Forever Wild Land Trust" alone was longer than the entire federal constitution.⁶¹ Figure 3 reveals a strong trend toward longer constitutions, both for states and foreign countries.

FIGURE 3. WORD COUNT OF WORLD AND STATE CONSTITUTIONS



B. Scope

A key reason for this increase in constitutional length is that more and more substantive areas of law are now included in these documents. Both national and state constitutions cover

⁶¹ See Ala Const Amend 543.

topics such as fiscal policy and economic development,⁶² management of natural resources,⁶³ and matters of cultural significance and citizen character.⁶⁴ Indeed, the scope of constitutions has grown to such a degree that they now routinely cover topics far afield from fundamental rights and basic governmental structure. For example, Louisiana's constitution designates Huey Long's birthday as a state holiday;⁶⁵ Venezuela's constitution references the "Liberator Simon Bolívar;"⁶⁶ and Turkey's constitution makes sixteen explicit references to "Atatürk," the nation's "immortal leader and unrivalled hero."⁶⁷ In addition to these matters of political symbolism, both state and national constitutions enshrine a host of policy choices. A number of state constitutions regulate the game of bingo,⁶⁸ some national constitutions regulate lotteries,⁶⁹ and no fewer than 26 percent of all national constitutions proclaim a right to play sports.⁷⁰ The Alabama Constitution deals with catfish, cattle, poultry, swine, sheep, and goats,⁷¹ while the constitution of Nepal designates a national cow and bird.⁷² The Swedish Constitution guarantees to an indigenous group the right to practice reindeer husbandry,⁷³

⁶² See, for example, Ecu Const Art 338 ("The State shall promote and protect domestic saving as a source of productive investment in the country. It shall also create incentives for the return of the savings and assets of emigrants, and so that the savings of persons and different economic units are directed towards quality productive investment."); Bhu Const Art 9, ¶ 2 (requiring that the government enable the pursuit of "Gross National Happiness").

⁶³ See, for example, Ven Const Art 127 (requiring that the government "protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance").

⁶⁴ See, for example, Hawaii Const Art X, § 4 ("The State shall promote the study of Hawaiian culture, history and language.").

⁶⁵ La Const Art XIX, § 22.

⁶⁶ Ven Const Preamble ("The people of Venezuela, exercising their powers of creation and invoking the protection of God, the historic example of our Liberator Simon Bolívar and the heroism and sacrifice of our aboriginal ancestors and the forerunners and founders of a free and sovereign nation.").

⁶⁷ Turkey Const Preamble, Arts 2, 42, 58, 81, 134.

⁶⁸ See, for example, Del Const Art II, § 17A ("The game of Bingo shall be lawful when sponsored and conducted by Volunteer Fire Companies, Veteran's Organizations, Religious or Charitable Organizations, or by Fraternal Societies provided the net receipts or profits . . . are used solely for the promotion or achievement of the purposes of such Companies, Organization [sic], or Societies.").

⁶⁹ See, for example, Bahamas Independence Order Art 26, ¶ 4(e); Bol Const Art 299, ¶ I(4); Switz Const Art 106, ¶ 2.

⁷⁰ This number is based on Versteeg's coding of national constitutions.

⁷¹ Ala Const Amends 400, 428, 452, 492, 715.

⁷² Nep Const Art 7, ¶ 2.

⁷³ Swe Const Ch 2, Art 17 ("The right of the Sami population to practise reindeer husbandry is regulated in law.").

and a number of other national constitutions protect animals or even enshrine animal rights.⁷⁴ Both state and national constitutions also contain detailed environmental regulations, such as California's Marine Resources Protection provisions,⁷⁵ New York's Forever Wild provision,⁷⁶ and Ecuador's rights for *Pachamama* (nature).⁷⁷ Moreover, as we will elaborate in Part IV, both state and national constitutions commonly contain a range of socioeconomic rights.

The expanding scope of constitutions is commonly associated with growth in the scope of governments' responsibilities. Professor John Boli describes the expansion of national constitutions: "By 1900, what a state had to do to behave properly as a state had expanded considerably [to include] mass education, the promotion of scientific research, the licensing and regulation of numerous types of professionals, the regulation of labor relations, and public health measures."⁷⁸ All these tasks, Boli notes, gradually became constitutional ones.⁷⁹ The same is true for state constitutions, which have similarly expanded in scope as they have come to address a wider range of government functions. As in national constitutions, these responsibilities include the provision of public education, the regulation of labor relations, the establishment of public-pension and workplace-insurance programs, and the maintenance of public health.⁸⁰

How should one understand this shift in constitutional design? One possibility is that broad constitutional scope fosters unconstrained government. Socialist and authoritarian constitutions, in particular, are often understood in this way—they cover a wide array of topics because they empower governments to

⁷⁴ See, for example, Switz Const Art 80, ¶ 1 ("The Confederation shall legislate on the protection of animals."); Ger Const Art 20a ("Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation."); India Const Art 51A ("It shall be the duty of every citizen of India . . . to have compassion for living creatures.").

⁷⁵ Cal Const Art 10B.

⁷⁶ NY Const Art XIV.

⁷⁷ Ecu Const Arts 71–74.

⁷⁸ John Boli, *World Polity Sources of Expanding State Authority and Organization, 1870–1970*, in George M. Thomas, et al, eds, *Institutional Structure: Constituting State, Society and the Individual* 71, 77–78 (SAGE 1987).

⁷⁹ *Id.*

⁸⁰ See Fritz, 25 Rutgers L J at 963 (cited in note 20) (recounting former governor Arthur Mellette's speech at the North Dakota constitutional convention of 1889: "[A]s the interests of the people have become more and more complex; as our commercial relations have extended . . . states have adopted the idea of embracing in their fundamental law as much legislation as they can with safety [include]").

intervene and regulate in many areas of human life.⁸¹ In the theoretical literature too, increased constitutional scope is often associated with decreased limitations on government.⁸² This link is particularly intuitive in the context of the US Constitution, which, as a document of enumerated powers, has long been understood to deprive the federal government of a wide range of powers simply by declining to address them.⁸³ In this context, increased constitutional scope might well reflect a relaxation of constitutional constraints on government.

Yet governments with more responsibilities are not necessarily unconstrained governments. Increased constitutional scope does not automatically track increased government discretion. In fact, in writing both national and state constitutions, constitutional drafters have often increased the scope of constitutions with the express intention of *limiting* governmental discretion.⁸⁴ These constitution makers aim to constrain government not by limiting its reach but by limiting the policy choices available to those in political office. In the United States, state-level constitution making illustrates this dynamic particularly well. State governments have plenary, rather than enumerated, powers, meaning that state governments do not need constitutional authorization to exercise their powers.⁸⁵ Thus, a state government can assume additional responsibilities in the absence of a constitutional amendment. However, amending a state constitution can *ensure* that a state government will perform those responsibilities, and astute interest groups routinely push for amendments to that effect, thereby increasing the scope of state constitutions.⁸⁶ For instance, to protect themselves from

⁸¹ See Saïd Amir Arjomand, *Law, Political Reconstruction and Constitutional Politics*, 18 Intl Sociology 7, 10, 13, 22–23 (2003) (noting that totalitarian regimes often “pa[y] lip-service to the idea of a written constitution” and include “impressive bill[s] of rights” only to “repressive[ly] use [] the organs of constitutional review” to further their own ideologies).

⁸² See, for example, David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal L Rev 1163, 1225 (2011) (describing statist constitutions as those that regard the state not as a “threat to liberty” but as a “guarantor of welfare and source of sustenance”).

⁸³ See, for example, Federalist 45 (Madison), in *The Federalist* 308, 313 (Wesleyan 1961) (Jacob E. Cooke, ed) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”).

⁸⁴ See note 95 and accompanying text.

⁸⁵ See Williams, *American State Constitutions* at 249–53 (cited in note 6).

⁸⁶ See Zackin, *Looking for Rights* at 34–35 (cited in note 31) (finding, based on historical case studies, that detailed state constitutional provisions “were not intended only

powerful corporations in the late nineteenth and early twentieth centuries, midwestern farmers' groups lobbied for constitutional provisions authorizing legislatures to manage or operate grain elevators and to regulate railroad rates.⁸⁷ They also pushed successfully for provisions instructing state governments to establish agricultural colleges and to promote the cultivation of particular crops.⁸⁸ At the national level, special interest groups (especially national and international NGOs) have likewise pushed for the inclusion of constitutional provisions that force the government to deal with pressing social issues. For instance, in the face of political elites' efforts to protect private property and the free market, constitution makers in South Africa have added justiciable socioeconomic rights, thereby constraining governments by insisting that they combat socioeconomic inequality and redistribute wealth.⁸⁹ These examples illustrate how constitutional drafters may increase constitutional scope in order to limit governmental discretion.

In some cases, constitutional expansion has constrained government not by forcing it to accept new responsibilities, but by expressly prohibiting the adoption of particular policies.⁹⁰ For instance, constitution makers at both the state and national level have often used constitutions to correct or preempt certain government behaviors regarding fiscal and economic policy. This practice was particularly conspicuous in nineteenth-century

to restrain the state, but also to force their legislatures into an expanded and protective role"); id at 25 (noting that strategic action by interest groups "may center on groups' bids for a bigger piece of some pie, but . . . may also focus on the pursuit of fundamental values"); Bridges, 22 *Stud Am Polit Dev* at 36 (cited in note 27) (noting that delegates of the Gilded Age conventions in western states "affirmed and expanded the prerogatives and authority of state government" in order to direct and constrain those states' actions).

⁸⁷ See, for example, Ill Const of 1870 Art XIII, § 1 (superseded 1970) ("All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."). See also James E. Leahy, *The North Dakota State Constitution: A Reference Guide* 156–57 (Praeger 2003).

⁸⁸ See, for example, Tex Const Art 7, § 10 (directing the establishment of a university with an agricultural department); Mich Const of 1850 Art 13, § 11 (superseded 1908) (mandating that the legislature "provide for the establishment of an agricultural school").

⁸⁹ See Rosalind Dixon and Tom Ginsburg, *The South African Constitutional Court and Socio-economic Rights as 'Insurance Swaps'*, 4 *Const Ct Rev* 1, 12–18 (2011).

⁹⁰ See Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in Paul Finkelman and Stephen E. Gottlieb, eds, *Toward a Usable Past: Liberty under State Constitutions* 388, 401 (Georgia 1991) (describing state constitutions as "positively hostile . . . to the exercise of government power," as reflected in their deliberate hampering of government to prevent its excessive expansion).

state constitutional conventions, which were often a direct response to state legislatures' disastrous experiments with deficit spending.⁹¹ These conventions moved quickly and decisively to craft new constitutional limits on legislatures to prevent them from being drawn back into risky speculation or from being corrupted by corporate wealth.⁹² These constitutional conventions placed new restrictions on the gifts and benefits that legislators could receive from corporations, established relatively low caps on state indebtedness, and forbade states from financing internal-improvement projects.⁹³ These limits expanded the scope of state constitutions both by adding new topics and by forcing legislatures to seek new constitutional amendments whenever they wanted to pursue a new type of internal-improvement project. Thus, topics previously handled only by legislatures were now within the scope of constitutional texts.⁹⁴

National constitutions across the globe have likewise increased in scope to guard against the creation of particular policies. Detailed fiscal policies that limit a government's discretion in spending, for example, are increasingly found in national constitutions.⁹⁵ Moreover, national constitutions have witnessed a strong trend toward the establishment of watchdog bodies. Electoral-oversight commissions, human rights commissions, ombudsmen, and countercorruption commissions are all standard features of national constitutions today.⁹⁶ Their adoption has increased the scope of these constitutions in an attempt to further constrain government discretion.

C. Detail

Not only do democratic countries' constitutions and US state constitutions resemble one another in scope, but they also resemble one another in their relatively high level of detail. Whereas the provisions of the US Constitution that establish the judicial branch—including its jurisdiction, the appointment and

⁹¹ See Tarr, *Understanding State Constitutions* at 111–12 (cited in note 6).

⁹² See *id.*

⁹³ See *id.* at 111, 113–17.

⁹⁴ See Fritz, 25 Rutgers L J at 967 (cited in note 20) (“Ultimately, a widespread distrust of legislatures convinced delegates to let conventions speak with a definitive voice on important governmental issues.”).

⁹⁵ See, for example, Ger Const Arts 104a–15; Hung Const Art 36 (“The National Assembly may not adopt an Act on the central budget as a result of which state debt would exceed half of the Gross Domestic Product.”); Nigeria Const §§ 59, 173(2), 210(2).

⁹⁶ See Ginsburg, *Constitutional Specificity* at 33–34 (cited in note 55).

compensation of judges, and the jury trial institution—comprise 291 words,⁹⁷ the constitutions of Alabama and Ecuador use almost 3,000 and 4,000 words, respectively, to establish their judicial branches.⁹⁸ These provisions are longer not because the judicial branches in Alabama and Ecuador perform a wider range of tasks than America's federal judiciary, but because these provisions are more detailed.

The comparably high level of detail in national and state constitutions seems to stem from similar political dynamics. As with the increasing scope of constitutions, constitutional detail reflects constitutional drafters' attempts to maintain tighter control over their governments.⁹⁹ Through these details, drafters attempt to constrain the choices of the officeholders who will interpret and implement the constitution, including judges and legislators.¹⁰⁰ Many US state constitutions, for instance, include detailed instructions about not only exactly what the state should do but also how it should pay for what it does, establishing an area of governmental responsibility and telling the state government exactly how it is to interpret and fulfill that responsibility. Thus, it is common for state constitutions to mandate that revenues from particular sources be placed in specific funds and used only for certain purposes. To illustrate, a 1988 amendment to the Minnesota Constitution established an "environment and natural resources trust fund," and a later amendment required that 40 percent of the state's lottery proceeds be placed into it.¹⁰¹ National constitutions often employ similar techniques. For example, the Costa Rican Constitution stipulates that "[p]ublic expenditure on State education, including higher education, shall not be less than six percent (6%) per annum of the gross domestic product,"¹⁰² while the Nigerian Constitution

⁹⁷ See US Const Art III, §§ 1–2. We did not include Art III, § 3 in our count because this section does not establish the judicial branch but deals with the crime of treason.

⁹⁸ See Ala Const Art 6; Ecu Const Arts 167–203.

⁹⁹ See Williams, *American State Constitutions* at 28 (cited in note 6) (noting that, because of their "necessity to enunciate specific limitations on otherwise virtually unlimited ('plenary') governmental power, state constitutions contain a high level of detail and specificity").

¹⁰⁰ See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 33–42 (Princeton 1996) (noting that state constitutions developed into long legislative codes because of "distrust of [] legislatures" and because citizens "wanted to make the restrictions on the legislature as specific as possible in order to prevent particular abuses of power").

¹⁰¹ Minn Const Art XI, § 14. See also Dean Rebuffoni, *Voters Back Environmental Amendment by Huge Margin*, Star Trib 11A (Nov 8, 1990).

¹⁰² Costa Rica Const Art 78.

contains extensive instructions on the routing and allocation of federal revenue.¹⁰³

Detail has also been added to constitutional provisions in order to expressly prohibit certain interpretations of those provisions.¹⁰⁴ For instance, the New York Constitution reads, “Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws . . . for the payment . . . of compensation for injuries to employees,” thereby constraining the judiciary’s power to nullify a state-run system of workers’ compensation as a violation of the state’s constitution.¹⁰⁵ In 1982, in response to a Massachusetts court’s ruling that the death penalty violated the state constitution,¹⁰⁶ the Massachusetts Constitution was amended to ensure that it could not be interpreted in such a manner: “No provision of the Constitution [] shall be construed as prohibiting the imposition of the punishment of death.”¹⁰⁷ Likewise, in response to growing judicial activism related to LGBT rights in other states, Louisiana amended its constitution to state: “No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.”¹⁰⁸ In all of these cases, constitutional detail was added to cabin interpreters’ discretion, allowing constitutional drafters and electoral majorities to maintain tighter control over those who govern under these documents.

Many national constitutions have employed similar strategies to curb judicial discretion. For example, most national constitutions include extensive limitation clauses that describe in great detail the circumstances under which rights can be limited.¹⁰⁹ In

¹⁰³ See Nigeria Const Arts 80–84. According to the Comparative Constitutions Project, 112 countries have an ownership-of-natural-resources provision. See Comparative Constitutions Project, *CCP Rankings* (cited in note 9).

¹⁰⁴ See generally John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 Rutgers L J 983 (2007).

¹⁰⁵ NY Const Art I, § 18.

¹⁰⁶ See *District Attorney for Suffolk District v Watson*, 411 NE2d 1274, 1286–87 (Mass 1980).

¹⁰⁷ Mass Const Art CXVI, amending Mass Const Pt 1, Art XXVI.

¹⁰⁸ La Const Art XII, § 15. It continues: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.” *Id.*

¹⁰⁹ See Law and Versteeg, 101 Cal L Rev at 932–33 (cited in note 4) (documenting that over half of all constitutions contain “right-specific limitation clause[s]” that “enumerate in detail the circumstances under which restrictions are permissible”).

some cases, constitutional drafters deliberately added detail to avoid replicating the US model, which endows the judiciary with substantial discretion in interpreting the Constitution. For example, case studies have found that the drafters of both the Canadian Charter of Rights and Freedoms and the Indian Constitution deliberately avoided the term “due process of law” for fear that it would provide overly broad discretion to the judiciary, opting instead for more specific language.¹¹⁰ Thus, both national and state constitution makers appear to have reconsidered the federal US Constitution’s strategy of employing broad and open-ended provisions.

D. Implications for State Constitutions

The similarities between the political calculations embodied in national constitutions around the world and those in US state constitutions not only serve as an important corrective to claims about America’s constitutional exceptionalism but also invite reconsideration of some of the prevailing views of state constitutions. Because they are so broad in scope and detailed in form, state constitutions are frequently derided as cluttered and silly or deemed merely statutory in nature rather than truly constitutional.¹¹¹ What is more, commentators have attributed these features of state constitutions to their subnational status. Professors Tom Ginsburg and Eric Posner argue that, because state governments are constrained by the federal Constitution, state constitution makers need not design constitutional mechanisms with the aim of constraining their government.¹¹² In the language of the principal-agent framework, state constitution makers face lower agency costs because the existence of federal monitoring mechanisms reduces the stakes of state constitutional choices.¹¹³ These lower agency costs, Ginsburg and Posner predict, will result in subnational constitutions with relaxed constraints

¹¹⁰ See, for example, Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 Intl J Const L 1, 15–24 (2004) (discussing the lengths to which Canadian constitutional drafters went “to avoid substantive due process altogether, not merely its economic limb”); Klug, 2000 Wis L Rev at 605–06 (cited in note 2) (noting that India rejected the phrase “due process of law” for fear of inviting *Lochner*-style jurisprudence).

¹¹¹ For examples of this view, see note 13.

¹¹² See Ginsburg and Posner, 62 Stan L Rev at 1585–86 (cited in note 14) (“If agency costs decline when a state becomes a substate, a subconstitution can be weaker than an ordinary constitution is.”).

¹¹³ See id at 1596–97.

on government.¹¹⁴ In line with this prediction, they interpret the verbosity of America's state constitutions as evidence that state drafters were free to focus not on the core constitutional task of constraining government, but instead on lower-stakes, second-order policy choices.¹¹⁵

The fact that many national constitution makers appear to have used the exact same design strategy as those in American states casts doubt on the notion that the scope and detail of America's state constitutions are simply byproducts of the states' subnational status and the resulting diminution of agency costs. As described above, constitutions' details have often reflected their authors' intentions to better solve the principal-agent problem, not their freedom to ignore it. This is true at both the state and national levels. By making a wide range of topics constitutional matters, popular majorities have attempted to maintain better control over their officeholders, forcing legislatures to take on important social roles and preventing those legislatures from repeating disastrous policy choices.¹¹⁶ Moreover, by giving specific instructions on the application of the provisions that they drafted, state constitution makers have limited the discretion of those that interpret and implement constitutional provisions.

Of course, working out all the details of government up front entails substantial negotiation costs. Constitutions are like incomplete contracts—in an ever-changing political environment, it is impossible to foresee all contingencies of governing.¹¹⁷ Yet constitution makers can strive for various degrees of completeness; they can write broad standards and principles or instead

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 1588, 1606 (distinguishing between “core interests” and “peripheral interests” and suggesting that, when agency costs are lower, more peripheral interests are enshrined in constitutions).

¹¹⁶ See Zackin, *Looking for Rights* at 18–35 (cited in note 31) (concluding, based on a historical case study of New York's constitutional regulation of ski trails, that these provisions about seemingly trivial topics were generally the product of conscientious and principled uses of constitutional law).

¹¹⁷ For an account of constitutions as incomplete contracts, see generally, for example, Philippe Aghion and Patrick Bolton, *Incomplete Social Contracts*, 1 J Eur Econ Assn 38 (2003). See also Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters*, in Denis J. Galligan and Mila Versteeg, eds, *Social and Political Foundations of Constitutions* 182, 192–201 (Cambridge 2013); Torsten Persson, Gérard Roland, and Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q J Econ 1163, 1165 (1997) (“Real-world political constitutions are incomplete contracts: elected politicians are not offered an explicit incentive scheme associating well-defined payoffs with actions in all states of the world.”).

attempt to draft specific rules. Specificity is likely to increase negotiation costs because it is easier for parties to reach agreement on broad principles than on specific rules.¹¹⁸ However, the increased negotiation costs that accompany the drafting of specific constitutional rules are offset, at least in part, by allowing the constitution to be easily adjusted.¹¹⁹ Malleability allows groups to renegotiate when design flaws emerge or when circumstances change. This knowledge might help parties to agree on detailed constitutional provisions, thereby reducing negotiation costs.

Indeed, it turns out that, in practice, constitutional verbosity goes hand in hand with frequent revision.¹²⁰ A polity that includes elaborate and detailed policies in its constitution will continue to tinker with the document in a process of trial and error and in response to changing economic and social conditions. According to our own data, the length of constitutions is positively correlated with their rate of revision, both at the state and national levels.¹²¹ The next Part will explain this dynamic in more detail, and Part V will describe the logic that appears to characterize the structure of most national and state constitutions alike.

III. CONSTITUTIONAL STABILITY

In a series of exchanges with James Madison, Thomas Jefferson famously argued that “the earth belongs in usufruct to the living,” and, therefore, that each generation should write its own constitution.¹²² Based on calculations in actuarial life tables, Jefferson determined that a generation lasts nineteen years and proposed this number as a natural constitutional expiration

¹¹⁸ See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557, 562–63 (1992) (“Rules are more costly to promulgate than standards because rules involve advance determinations of the law’s content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law’s content.”).

¹¹⁹ See Aghion and Bolton, 1 J Eur Econ Assn at 39, 44–51 (cited in note 117) (showing that, when a social contract is incomplete, simple-majority amendment rules are preferable to unanimous amendment rules).

¹²⁰ See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 Am Polit Sci Rev 355, 359, 362 (1994) (finding that longer constitutions are revised more frequently).

¹²¹ When pooling state and national constitutions, the correlation coefficient between length and the rate of revision is 0.51.

¹²² Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392, 392, 396 (Princeton 1958).

date.¹²³ Madison opposed this idea and argued forcefully that constitutions should be entrenched to bind future generations.¹²⁴

A. Stability

Within the United States, Madison's view prevailed at the national level, while Jefferson's vision of frequent popular revision was never realized. Indeed, the US Constitution has endured for over two centuries, making it the oldest constitutional document in the world. It has undergone textual changes only rarely, having been amended only twenty-seven times, on only seventeen different occasions.¹²⁵ Thus, the changes in this document's meaning have not come through wholesale rethinking or revision, nor through regular constitutional conventions. Instead, the US Constitution and the politics surrounding it are characterized by an unusual degree of concern for the document's stability. This mindset is reflected in a pervasive veneration of the Constitution's origins and in Americans' general reluctance to alter it.¹²⁶

As Professor Kim Lane Scheppele has argued, the fixation on a constitution's original meaning is almost uniquely American.¹²⁷ Foreign constitutional authors and interpreters do not generally share the American obsession with the stability of the original text and its meaning. In general, the citizens of other countries are more willing to revise their constitutions, and in contemplating these documents they tend to emphasize present

¹²³ See *id.* at 393–94 (calculating that 18 years and 8 months is the age of a generation and concluding that nineteen years “is the term beyond which neither the representatives of a nation, nor even the whole nation itself assembled, can validly extend a debt”); *id.* at 396 (“Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.”).

¹²⁴ See Federalist 49 (Madison), in *The Federalist* at 315 (cited in note 83).

¹²⁵ Posner and Ginsburg, 62 *Stan L Rev* at 1607 (cited in note 14).

¹²⁶ See Sanford Levinson, *Constitutional Faith* 9–17, 252–56 (Princeton 2011).

¹²⁷ See Kim Lane Scheppele, *Jack Balkin Is an American*, 25 *Yale J L & Humanities* 23, 23 (2013) (noting that a close inquiry “into a constitution’s original meaning is done almost nowhere else in the world”). See also Grant Huscroft and Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* 10 (Cambridge 2011) (“Originalist theory has little purchase outside of the United States.”). But see Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 *Vand J Transnatl L* 1239, 1282–87 (2011) (suggesting that originalism is not entirely confined to the United States but can also be found in nations where the drafters have developed a “cult of personality,” as in Turkey); Yvonne Tew, *Originalism at Home and Abroad*, 52 *Colum J Transnatl L* 780, 800–32 (2014) (documenting tenets of originalism in Singapore and Malaysia).

goals, needs, and purposes over history and continuity.¹²⁸ Constitution writing has often been likened to designing an “operating system” for the nation based on the latest principles of constitutional governance.¹²⁹ Such a commitment to continual redesign reflects a belief in the promise of innovation: a modern nation cannot run on “Windows 3.1,” but needs to update its operating system as new insights emerge.¹³⁰ The formal amendment rules of most national constitutions generate this flexibility at the textual level. Indeed, according to one study, the US Constitution is currently the hardest to amend in the world.¹³¹ Thus, when comparing US national constitutional politics to constitutional politics in other countries, the American approach appears to be an outlier.

At the state level, however, Americans engage in constitutional revision that more closely resembles that in other countries. State constitution makers have kept the Jeffersonian tradition alive, generally privileging the idea of progress and the desire to meet current needs over a commitment to constitutional stability. Professor Christian Fritz has shown that nineteenth-century state constitution makers perceived themselves as engaging in a forward-looking process of constant readjustment of past constitutional practices to current problems.¹³² As one delegate to the Louisiana constitutional convention of 1845 put it: “Those who are to come after us, advancing, as the world is . . . will certainly know better how to govern themselves than we can.”¹³³

State constitutions are designed to allow for such flexibility. The majority of state constitutions can be amended in a process

¹²⁸ See Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* 129 (Cambridge 2009).

¹²⁹ See, for example, Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U Pa J Const L 640, 641–44 (1999). For a description of the “science” of constitutional design, see generally Donald S. Lutz, *Principles of Constitutional Design* (Cambridge 2006).

¹³⁰ Adam Liptak, “We the People” Loses Followers, NY Times A1 (Feb 7, 2012).

¹³¹ See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 260–62 (Princeton 1995) (creating an index of amendment difficulty for national constitutions and finding that the US Constitution is surpassed in amendment difficulty only by the constitution of former Yugoslavia).

¹³² See Fritz, 25 Rutgers L J at 978, 982 (cited in note 20).

¹³³ Dinan, *American State Constitutional Tradition* at 34 (cited in note 7).

that requires sixty percent of the legislative vote¹³⁴ (in many cases by two subsequent legislatures¹³⁵), after which the amendment must be ratified by a majority of citizens.¹³⁶ While this makes state constitutions harder than ordinary legislation to write and amend, it is still generally thought to be easier to amend state constitutions than their federal counterpart. Furthermore, a number of states place an automatic expiration date on their constitution and require the legislature, at that expiration, to poll the public on whether to hold a constitutional convention. According to our coding, twelve state constitutions currently require the legislature to put this question to a referendum at regular intervals, with the intervals ranging from every seven years to every twenty years.¹³⁷ Like state constitutions, a number of national constitutions include sunset clauses. Fiji's 1990 and Micronesia's 1975 constitutions require review every ten years, while Papua New Guinea's constitution calls for review every three years.¹³⁸

B. Replacement

National and US state constitutions not only signal a similar openness to change, but they also resemble one another in their actual replacement rates. In a book-length treatment of the subject, Professors Zachary Elkins, Tom Ginsburg, and James Melton show that the world's constitutions typically last only nineteen years before replacement.¹³⁹ Jefferson's recommendation

¹³⁴ According to our coding, 22 state constitutions allow amendments to be initiated by a 67 percent legislative vote, 9 require 60 percent of the vote, and 12 require 50 percent of the vote.

¹³⁵ According to our coding, thirteen state constitutions require amendments to be passed by two subsequent legislatures.

¹³⁶ According to our coding, all but one state constitution require all amendments to be ratified by popular referendum.

¹³⁷ The following state constitutions currently include such a provision: Alaska (every ten years); Connecticut (every eleven years); Florida (every twenty years); Iowa (every ten years); Maryland (every twenty years); Michigan (every sixteen years); Missouri (every twenty years); New Hampshire (every seven years); New York (every twenty years); Ohio (every twenty years); Oklahoma (every twenty years); and Rhode Island (every ten years). The following constitutions used to include such a provision but are no longer in force: Delaware Const of 1831 (every year); Delaware Const of 1792 (every four years); Kentucky Const of 1792 (every seven years); Indiana Const of 1816 (every twelve years); and Virginia Const of 1870 (every twenty years).

¹³⁸ Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions* at 13–14 (cited in note 128).

¹³⁹ Id at 129–30 (cited in note 128) (reporting that the “median survival time” of a constitution is nineteen years).

matches, with striking accuracy, actual national-constitution replacement rates.

We replicate Elkins, Ginsburg, and Melton's analysis for American state constitutions. This exercise reveals that the median lifespan of state constitutions is forty-four years.¹⁴⁰ The median state constitution has thus endured over twice as long as the median national constitution. And yet, with respect to wholesale replacement, state constitutions are still far more similar to other countries' national constitutions than their own. If the US Constitution were replaced at the same rate as America's median state constitution, America would now be operating under its sixth Constitution.

To be sure, not all states are prolific constitution writers; 17 states are still operating under their original constitutions.¹⁴¹ Other states, however, have replaced their constitutions with remarkable frequency. Louisiana has had 11 constitutions, Georgia has had 9, Virginia and South Carolina have each had 7, and Florida and Alabama have each had 6.¹⁴² Combined, the states have produced a total of 149 documents to date.

C. Revision

Constitutional changes need not come about through wholesale replacement; both state and national constitutions are frequently updated through formal (that is, textual) amendments. As noted, the formal amendment rules of both state and national constitutions are generally understood to be more flexible than those of the US Constitution, thereby allowing these polities to more easily tinker with their respective constitutions on an ongoing basis.¹⁴³ The rate of replacement, therefore, provides merely a glimpse of the ongoing change within a constitutional system.

¹⁴⁰ Following Elkins, Ginsburg, and Melton, we plot the baseline hazard of a Cox proportional-hazards model without any predictor variables in the model. The advantage of this approach (as opposed to simply calculating the average age today) is that it accounts for "right-censoring," which is the fact that we do not yet know when the constitutions in force today will be replaced. *Id.* at 127.

¹⁴¹ These are: Alaska, Arizona, Colorado, Hawaii, Idaho, Kansas, Maine, Massachusetts, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

¹⁴² When we exclude those states that still use their first constitution, the median survival time of state constitutions is thirty-three years, which is closer to the Jeffersonian recommendation.

¹⁴³ See Lutz, 88 *Am Polit Sci Rev* at 360 (cited in note 120) (describing the formal amendment rules in both state and national constitutions and finding that flexible rules are correlated with a higher amendment rate).

A more complete picture of how constitutional systems experience formal change requires us to account for both replacement and amendment. In fact, the distinction between amendment and replacement is not always a meaningful one.¹⁴⁴ Some US states, for example, have employed the formal amendment process to overhaul their entire constitution, substituting packages of amendments for replacement. For instance, California passed 130 amendments to its constitution in 1966, and South Carolina passed 200 amendments between 1971 and 1973. When North Dakota voters rejected the work of a constitutional convention held in 1972,¹⁴⁵ the legislature moved to incorporate many of the convention's proposed changes through an expansive package of constitutional amendments, which was approved by the voters.¹⁴⁶

Not only can constitutions effectively be replaced via amendment, but the formal adoption of a new constitution does not always effect significant change in content. For example, Louisiana's 1861 constitution was exactly the same as its 1852 constitution, except that it replaced the words "United States" with "Confederate States" throughout.¹⁴⁷ This phenomenon is particularly common among fledgling national democracies, and it can often be observed when a new leader formally adopts a "new" constitution that maintains most of the previous constitution's content.¹⁴⁸ The historical constitutions of Haiti, the Dominican Republic, and Venezuela—which together account for 10 percent of all national constitutions ever written—are all mere variations on their predecessor documents; they were declared "new" constitutions only to mark changes in political leadership.¹⁴⁹ Most recently, the Egyptian transitional document adopted after

¹⁴⁴ See Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions* at 55–59 (cited in note 128) (finding that replaced constitutions "match their predecessor in 81 percent of topics, whereas amend[ed] [constitutions] do so in 97 percent").

¹⁴⁵ See D. Jerome Tweton, *Voters Reject New Constitution by Overwhelming Margin*, ND Stud (ND Human Council Apr 14, 1972), online at http://www.ndstudies.org/articles/voters_reject_new_constitution_by_overwhelming_margin (visited Nov 3, 2014).

¹⁴⁶ Since 1972, North Dakota passed 6 amendments in 1974, 43 amendments in 1976, and 47 amendments in 1978.

¹⁴⁷ See John Devlin, *Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 La L Rev 887, 893 (2003).

¹⁴⁸ See Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions* at 23–24 (cited in note 128) (noting that replacement does not always effectuate progress and that some states "replace their constitutions frequently but remain anchored to the same institutional choices").

¹⁴⁹ See id at 23–24, 57.

President Hosni Mubarak's ouster was a moderately modified version of the 1971 constitution.¹⁵⁰

To capture formal constitutional change while avoiding the difficulty of distinguishing between replacement and amendment, we calculate an average *annual revision rate*, which reflects the extent to which polities are sites of ongoing constitution-making activity. Specifically, the annual revision rate is the total number of years in which a state or country witnessed constitutional change of some sort (either through replacement or amendment, regardless of how many amendments were passed that year), divided by the total number of years that the state or country has existed.¹⁵¹

The left-hand column of Table 1 lists the twenty-five US states with the highest revision rates. It reveals that the state with the most frequently revised constitution is Louisiana, followed by Texas, New York, Oklahoma, and Virginia. Louisiana's place at the top of the list confirms the observation that constitutional revision "has been sufficiently continuous to justify including it with Mardi Gras, football, and corruption as one of the premier components of [Louisiana's] state culture."¹⁵² At the opposite end of the spectrum stand Vermont, New Hampshire, Maine, Iowa, and Kentucky. No state constitution, however, has a revision rate lower than that of the US Constitution, and with the exception of Vermont, New Hampshire, and Maine, all state constitutions have been revised at least twice as often as the federal Constitution. On average, across all states, the annual revision rate is 0.35, meaning that states have revised their constitutions roughly every three years.

The revision rates for national constitutions are depicted in the right-hand column of Table 1. This list is topped by India (which, coincidentally, has the same revision rate as Louisiana), followed by Singapore, Austria, Norway, and Malaysia. The most stable constitutional system is Japan's; General MacArthur's constitution has never been amended since its adoption in 1947. On average, the revision rate for national constitutions is 0.21, meaning that countries amend or replace their constitutions

¹⁵⁰ See Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, in Galligan and Versteeg, eds, *Social and Political Foundations of Constitutions* 398, 399 (cited in note 117).

¹⁵¹ These data on state constitutional amendments come from Dixon and Holden, *Constitutional Amendment Rules* (cited in note 8), and are available for forty-four states.

¹⁵² Mark T. Carleton, *Elitism Sustained: The Louisiana Constitution of 1974*, 54 Tulane L Rev 560, 560 (1980).

roughly every five years. This means that, while national constitutions are *replaced* more often than state constitutions (every nineteen versus forty-four years), their content is actually a little more stable than that of state constitutions (because national constitutions are revised every five versus three years, on average). The texts of both state and national constitutions, however, are clearly revised far more frequently than the US Constitution, which has a revision rate of 0.07.¹⁵³

¹⁵³ The United States ranks in the bottom ten in terms of its revision rate, surpassed in its stability only by Japan, Saudi Arabia, Denmark, Paraguay, Uzbekistan, the United Arab Emirates, Oman, Eritrea, and Iran. Notably, with the exceptions of Japan and Denmark, none of these countries is democratic.

TABLE 1. TWENTY-FIVE MOST FREQUENTLY REVISED STATE AND WORLD CONSTITUTIONS

State	Revision Rate	Nation	Revision Rate
Louisiana	0.68	India	0.68
Texas	0.61	Singapore	0.67
New York	0.50	Austria	0.59
Oklahoma	0.49	Norway	0.57
Virginia	0.49	Malaysia	0.56
New Jersey	0.48	Malawi	0.54
Colorado	0.47	Mexico	0.51
South Carolina	0.47	Kenya	0.49
New Mexico	0.46	Malta	0.46
North Dakota	0.45	Finland	0.45
Arizona	0.44	Russia	0.45
Delaware	0.44	Zimbabwe	0.43
Florida	0.43	Trinidad and Tobago	0.42
Ohio	0.41	Bangladesh	0.42
Oregon	0.41	Moldova	0.42
Washington	0.40	Georgia	0.41
California	0.39	Senegal	0.41
Pennsylvania	0.39	Guyana	0.40
Wisconsin	0.39	Pakistan	0.40
South Dakota	0.38	Switzerland	0.39
North Carolina	0.37	Sweden	0.38
Idaho	0.36	Germany	0.37
Nevada	0.35	Mauritius	0.37
Mississippi	0.34	Tanzania	0.37
Connecticut	0.32	Costa Rica	0.36

The overlapping revision rates of state and national constitutions signal a common willingness to revise constitutional texts. It is important to note, however, that the revision rate merely indicates the frequency of textual changes within a system but does not capture the degree of constitutional change that a system has undergone. First, the revision rate counts all amendments equally, despite the fact that amendments may vary widely in significance. Second, although a large package of

amendments passed in a single year might, in reality, overhaul an existing constitution, this revision measure cannot distinguish such a dramatic change from a single, rather trivial amendment. Finally, at least in the United States, substantial changes in constitutional meaning have occurred through changes in interpretation rather than textual revision.¹⁵⁴ Indeed, the fact that the United States has a low amendment rate does not imply that the meaning of the US Constitution has undergone little change. Nonetheless, the revision rates call into question the exceptionalist claim that Americans privilege textual stability over constitutional responsiveness. As with the length of the document, this characterization is true only of the politics surrounding the federal Constitution.

D. Popular Participation

In both the world's national constitutions and the US state constitutions, openness to constitutional revision coincides with a commitment to popular involvement in constitution making. Constitutional flexibility serves the wishes of the current generation, privileging democratic responsiveness over fidelity to past commitments.¹⁵⁵ In this sense, US state constitutions have almost universally followed the Jeffersonian model. According to our own coding, all but one of the current state constitutions require a new constitution to be approved by popular referendum,¹⁵⁶ and forty-one seek popular input on whether to hold a constitutional convention. Moreover, seventeen state constitutions establish direct popular initiatives, thereby allowing citizens to bypass their elected representatives altogether. Because of their openness to popular participation, state constitutions are sometimes described as manifesting "the voice of the people."¹⁵⁷

The same commitment to popular participation can increasingly be found in most national constitutions. Though national constitutions were historically written by elites,¹⁵⁸ recent decades

¹⁵⁴ See John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 *Am J Legal Hist* 44, 57–58 (1991) (quoting President Woodrow Wilson's famous remark that the Supreme Court has become "a constitutional convention in continuous session").

¹⁵⁵ See Letter from Thomas Jefferson to James Madison at 395–96 (cited in note 122).

¹⁵⁶ The one exception is Delaware, which requires a two-thirds legislative vote by two successive legislatures.

¹⁵⁷ *Vreeland v Byrne*, 370 A2d 825, 830 (NJ 1977).

¹⁵⁸ See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 43–44 (Harvard 2005).

have witnessed a strong trend toward more-inclusive-constitution-making processes.¹⁵⁹ The 1994 South African Constitution was drafted with broad public input and is widely considered a successful model of constitutional drafting.¹⁶⁰ Indeed, there is a growing consensus among international scholars, consultants, and activists that an inclusive and well-designed process is a critical ingredient for a successful constitution.¹⁶¹ In addition to the 1994 South African Constitution, the 1995 Ugandan Constitution,¹⁶² the 1997 Eritrean Constitution,¹⁶³ the 1997 Thai Constitution,¹⁶⁴ the recent radical, populist constitutions in Latin America,¹⁶⁵ and the 2011 “crowdsourced” constitution of Iceland¹⁶⁶ were all developed with popular participation. In fact, 40 percent of all current national constitutions were ratified by popular referendum, and that percentage has rapidly

¹⁵⁹ See Louis Aucoin, *Introduction*, in Laurel E. Miller, ed., *Framing the State in Times of Transition: Case Studies in Constitution Making* xiii, xiii (Institute of Peace 2010) (suggesting that there exists “an emerging international norm that constitution-making processes should be democratic, transparent, and participatory”); Thomas M. Franck and Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in Miller, ed., *Framing the State in Times of Transition* 3, 8 (observing the existence of a “new approach” to constitution making that started in Africa in the 1990s and that “emphasizes participation and puts great premium on dialogue, debate, consultation, and participation”); Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, in Miller, ed., *Framing the State in Times of Transition* 20, 20 (suggesting that, “[t]raditionally, negotiating a constitution was the province of political leaders who held power,” while “[d]rafting the constitutional text was expert work,” but observing that there has been a “significant change” toward more popular participation).

¹⁶⁰ See, for example, Hassen Ebrahim and Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid*, in Miller, ed., *Framing the State in Times of Transition* 111, 133–39 (cited in note 159).

¹⁶¹ See, for example, Richard H. Solomon, *Foreword*, in Miller, ed., *Framing the State in Times of Transition* xi, xi (cited in note 159) (noting that “[t]here are no one-size-fits-all formulas or models,” but that “well-conducted processes can [] contribute to building stable, peaceful states, whereas poorly conducted processes most certainly undercut such efforts”).

¹⁶² See Aili Mari Tripp, *The Politics of Constitution Making in Uganda*, in Miller, ed., *Framing the State in Times of Transition* 158, 165–67 (cited in note 159).

¹⁶³ See Bereket Habte Selassie, *Constitution Making in Eritrea: A Process-Driven Approach*, in Miller, ed., *Framing the State in Times of Transition* 57, 61–65 (cited in note 159).

¹⁶⁴ See Erik Martinez Kuhonta, *The Paradox of Thailand’s 1997 “People’s Constitution”: Be Careful What You Wish For*, 48 *Asian Surv* 373, 374, 391 (2008).

¹⁶⁵ See generally Phoebe King, *Neo-Bolivarian Constitutional Design: Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions*, in Galligan and Versteeg, eds., *Social and Political Foundations of Constitutions* 366 (cited in note 117).

¹⁶⁶ Anne Meuwese, *Popular Constitution-Making: The Case of Iceland*, in Galligan and Versteeg, eds., *Social and Political Foundations of Constitutions* 469, 483–84 (cited in note 117).

increased in recent decades.¹⁶⁷ Moreover, a growing number of national constitutions are written by specially elected constitutional assemblies, the establishment of which places constitutional revision outside the realm of ordinary lawmaking.¹⁶⁸ Thus, in their commitment to actively involving the public in writing and revising constitutional texts, US state constitutional processes resemble a growing number of national processes.¹⁶⁹

E. Implications for State Constitutions

The ease with which US state constitutions can be revised has led many scholars of American constitutionalism to impugn their design.¹⁷⁰ After all, not only are state constitutions filled with detailed policy choices, but these choices are also perennially shifting. This textual flexibility does not seem to reflect an aspiration “to endure for ages to come.”¹⁷¹ To the contrary, many state constitutions seem to change “with every legislative or popular whim.”¹⁷² This democratic responsiveness, coupled with state constitutions’ high level of detail, has led many observers to dub them merely “legislative” or “statutory” in character.¹⁷³

State constitutions’ flexibility strikes observers as statute-like in large part because so much of current constitutional theory

¹⁶⁷ Tom Ginsburg, Zachary Elkins, and Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 Ann Rev L & Soc Sci 201, 206–07 (2009).

¹⁶⁸ See id at 212–13.

¹⁶⁹ But see generally Mila Versteeg, *Unpopular Constitutionalism*, 89 Ind L J 1133 (2014) (finding that, while commitment to popular participation is on the rise, most national constitutions do not substantively reflect popular opinion).

¹⁷⁰ See, for example, Margaret Center Klinglesmith, *Amending the Constitution of the United States*, 73 U Pa L Rev 355, 371 (1925) (noting that, at the state level, “we no longer have any constitutional law, since all law is reduced to one level”); Vile, 35 Am J Legal Hist at 68 (cited in note 154) (noting the “vivid contrast” of state constitutions with the well-designed federal Constitution).

¹⁷¹ James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 Rutgers L J 985, 990 (1993), quoting *McCulloch*, 17 US (4 Wheat) at 415.

¹⁷² Pope, 24 Rutgers L J at 985 (cited in note 171).

¹⁷³ See, for example, Gail Donoghue and Jonathan I. Edelstein, *Life after Brown: The Future of State Constitutional Tort Actions in New York*, 42 NY L Sch L Rev 447, 475 n 143 (1998) (noting the “increasing function of state constitutions as legislation”); Peter J. Galie and Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 Hofstra L & Pol Symp 27, 29, 32 (1996) (“[S]tates have preferred to turn ordinary legislation into constitutional amendments.”); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 Temple L Rev 989, 1005 (1996) (“The continual process of state constitution-making has transformed the short, principle-oriented charters of the early republic into ‘super-legislative’ documents.”).

equates constitutionalism with entrenchment.¹⁷⁴ The malleability of state constitutions, therefore, appears to be evidence that these documents are meaningfully different from national constitutions. Professors Ginsburg and Posner, for example, have argued that state constitutions are amended so frequently precisely *because* they are merely subnational documents.¹⁷⁵ Freed from the need to keep their subnational governments in check, state constitution makers can relax the rigid amendment rules designed to ensure that governments continue to serve their citizens' interests.¹⁷⁶ Thus, state constitutions' flexibility is cited as evidence that agency costs have been relaxed at the subnational level and that Americans have consequently been more willing to tinker with their subnational constitutions than their national one.

Again, the fact that many national constitution makers have made their constitutions just as malleable as US state constitutions casts doubt on the assumption that flexibility is merely a product of subnational status. On the contrary, constitutional flexibility appears to be the prevailing design strategy around the world. What is more, constitutional flexibility, under some circumstances, can be a rational strategy to reduce agency costs. In other words, it is not the principal's strategy to make the constitution hard to change so that it can control the agent for ages to come. Instead, the principal chooses to maintain the power to consistently alter the constitution so that it can routinely update its instructions to its agent, continually creating new limitations on governmental discretion. To maintain tight control, these constitutions are typically crafted in great detail, since detail and flexibility are part of the same design strategy.¹⁷⁷

¹⁷⁴ For some famous entrenchment theories, see Russell Hardin, *Why a Constitution?*, in Galligan and Versteeg, eds, *Social and Political Foundations of Constitutions* 51, 59–62 (cited in note 117) (setting forth coordination theory, the touchstone of which is “conventionalism,” or raising the costs of doing things some other way); Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 134–77 (Chicago 1995); Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* 68–72 (Cambridge 1979) (describing self-binding).

¹⁷⁵ See Ginsburg and Posner, 62 *Stan L Rev* at 1606–11 (cited in note 14).

¹⁷⁶ See *id.* at 1599–1600. See also James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 73–74 (Michigan 1965) (implying that, when individuals have much at stake in constitutional rules, such as in the area of property rights, they will agree on only those constitutional-amendment rules that have nearly unanimous approval). But see generally Aghion and Bolton, 1 *J Eur Econ Assn* at 38 (cited in note 117) (noting that, because constitutions are incomplete social contracts, majority decisionmaking should prevail over unanimity).

¹⁷⁷ See Part IV.E.

Moreover, constitutional flexibility allows the principal to alter the very structure of government to correct perceived problems with the mechanisms that ensure responsiveness. Thus, like rigid amendment rules, flexibility can serve the purpose of maximizing popular control over government, enabling people to use constitutions to ensure that the government is meeting their existing needs. Part V will develop this idea more fully.

IV. SOCIOECONOMIC RIGHTS

“Education,” the US Supreme Court has declared, “is not among the rights afforded explicit protection under our Federal Constitution.”¹⁷⁸ The same is true for other socioeconomic rights, such as the rights to health care, to a limited workday, to social security disability benefits, and to a healthy environment.¹⁷⁹ The federal Constitution—per the Court’s interpretations—omits not only positive rights but also a requirement that the government take affirmative action to protect recognized *negative* rights.¹⁸⁰ According to this influential view, the Constitution merely directs the federal government to refrain from taking action—it constrains rather than mandates government intervention.

The US Constitution’s lack of specific socioeconomic guarantees is widely cited as evidence of American constitutional exceptionalism.¹⁸¹ A cursory glance at the world’s constitutions reveals that an overwhelming majority *do* contain explicit socioeconomic rights, such as the right to education, health care, housing, social security, work, workplace safety, water, and food. No less than 87 percent of all current national constitutions contain at least one

¹⁷⁸ *San Antonio Independent School District v Rodriguez*, 411 US 1, 35 (1973).

¹⁷⁹ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv L Rev 1131, 1133 & nn 2–5 (1999) (“[T]he Court has rejected constitutional claims to housing, to public education, and to medical services, on the view that the government does not owe its citizens any affirmative duty of care.”) (citations omitted).

¹⁸⁰ See *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 195–96 (1989) (noting that the Due Process Clauses generally do not include any “affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual”).

¹⁸¹ See, for example, Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in Ignatieff, ed, *American Exceptionalism* 90, 103–05 (cited in note 4); Kevin L. Cope and Mila Versteeg, *In Sickness and in Health: The Constitution Should Give Americans the Right to Basic Health Care*, Hive (Slate June 12, 2012), online at <http://hive.slate.com/hive/how-can-we-fix-constitution/article/in-sickness-and-in-health> (visited Nov 3, 2014) (noting that, unlike over “70 percent of national constitutions around the world,” the US Constitution does not “provide a right to health care”).

explicit socioeconomic right, and over half contain at least three such provisions.¹⁸² Provisions such as the workers' rights protections in Mexico's 1917 Constitution, the right to clean drinking water in contemporary South Africa, and other socioeconomic rights form the core of most nations' constitutional traditions.¹⁸³ Moreover, even the countries whose constitutions merely enshrine negative rights commonly recognize positive governmental obligations that flow from these negative obligations. In most systems, as well as under international human rights law, governments can violate negative-rights clauses by not acting or by failing to prevent rights abuses by private citizens.¹⁸⁴ The US Constitution, by contrast, appears to stand out as "a charter of negative rather than positive liberties."¹⁸⁵

Many commentators have attributed the lack of explicit and judicially recognized positive obligations in the US Constitution to a long-standing, distinctly libertarian tradition in American politics.¹⁸⁶ The US Constitution is so unusual, the argument

¹⁸² These numbers are obtained from our coding of all the world's constitutions. When considering the right to work, the right to a minimum wage, the right to safe working conditions, the right to rest, the right to an adequate standard of living, the right to food, the right to housing, the right to health care, and the right to education, we find that 87 percent of all national constitutions contain at least 1 of those rights, 53 percent contain at least 3 of these rights, and 26 percent contain 5 or more of these rights.

¹⁸³ See S Afr Const §§ 26–27 (health care, food, water, and social security), 29 (education); Mex Const Art 4 (food, health care, housing, childhood education, and recreation).

¹⁸⁴ See Louis Henkin, et al, *Human Rights* 217 (Foundation 2d ed 2009) (explaining that the negative rights in the International Covenant on Civil and Political Rights (ICCPR) also entail positive obligations); Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in Nolte, ed, *European and US Constitutionalism* 131, 134 (cited in note 5) (noting that the state-action doctrine is a comparative outlier). In addition, many foreign courts have used constitutional rights to shape private law doctrines. See Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in Varun Gauri and Daniel M. Brinks, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* 268, 268–97 (Cambridge 2008).

¹⁸⁵ Hershkoff, 112 Harv L Rev at 1133 (cited in note 179), quoting *Jackson v City of Joliet*, 715 F2d 1200, 1203 (7th Cir 1983) (quotation marks omitted).

¹⁸⁶ See, for example, *Jackson*, 715 F2d at 1203:

The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

But see Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" against Lofty Formalism*, 121 Harv L Rev 4, 21–22, 46–53 (2007) (stating that "[t]he Framers were not libertarians," and noting that influential eighteenth-century constitutional thinkers like Adam Smith and Thomas Paine supported notions of socioeconomic rights).

goes, because Americans are exceptionally suspicious of government, devoting their highest law to keeping government out of their affairs and seeking its protection only as a matter of statute.¹⁸⁷ In part, the US Constitution's omission of socioeconomic rights is related to its limited scope. According to our data, a positive correlation exists between the presence of explicit socioeconomic rights and constitutional length.¹⁸⁸ But the omission of socioeconomic rights from the federal Constitution is not merely a consequence of its brevity. In fact, even the three national constitutions of comparable brevity—those of Denmark, Japan, and Norway—all *do* include socioeconomic rights. Thus, many commentators have attributed the differences in the US Constitution to differences of national character, asserting that Americans have simply declined to include these kinds of rights in their constitutional law or jurisprudence.¹⁸⁹

When looking only at federal constitutional law, it appears that the United States is an outlier in a world replete with explicit, positive constitutional obligations. But when US state constitutions are considered, the United States is not so exceptional after all; Americans have enshrined many explicit positive rights in their state constitutions. As of 2012, thirty state constitutions included one or more provisions requiring the government to care for the poor or the disabled;¹⁹⁰ eleven required the state to set minimum wages or a maximum workday;¹⁹¹ sixteen protected the right to unionize;¹⁹² nine required the government to regulate workplace safety;¹⁹³ and fourteen protected the right to a clean and healthy natural environment.¹⁹⁴ Many western

¹⁸⁷ See Schauer, *The Exceptional First Amendment* at 46–47 (cited in note 5).

¹⁸⁸ The correlation between length and the number of socioeconomic rights is 0.61.

¹⁸⁹ See note 5 and accompanying text.

¹⁹⁰ See, for example, Mont Const Art XII, § 3(3) (“The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for aid of society.”).

¹⁹¹ See, for example, Ohio Const Art II, § 37:

Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise.

¹⁹² See, for example, NY Const Art I, § 17 (“Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”).

¹⁹³ See, for example, Okla Const Art XXIII, § 5 (“The Legislature shall pass laws to protect the health and safety of employees in factories, in mines, and on railroads.”).

¹⁹⁴ See, for example, Pa Const Art I, § 27:

states enshrine water rights in their constitutions,¹⁹⁵ a number of constitution makers in the late nineteenth century required their legislatures to establish caps on railroad rates,¹⁹⁶ and, most recently, constitution makers have added bills of rights to protect the victims of violent crimes.¹⁹⁷ As these examples illustrate, Americans do not shy away from imposing positive constitutional duties on government.¹⁹⁸

The constitutions of both nations and states vary in how they phrase and frame these rights. In both contexts, positive obligations are not always found in bills of rights. For example, socioeconomic rights can also be found in articles dealing with the legislature or in separate sections on socioeconomic policies. Both state and national constitutions also vary in how they phrase such rights. They sometimes use the language of rights, while at other times they treat socioeconomic rights as government duties (for example, “it is the duty of the state to . . .”) or mandates (for example, “the legislature shall . . .”).¹⁹⁹

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

¹⁹⁵ See, for example, Colo Const Art 16, § 5 (“The water of every natural stream . . . is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state.”).

¹⁹⁶ See Ward M. McAfee, *A Constitutional History of Railroad Rate Regulation in California, 1879–1911*, 37 Pac Hist Rev 265, 265–66 (1968).

¹⁹⁷ See, for example, Va Const Art I, § 8-A:

That in criminal prosecutions, the victim shall be accorded fairness, dignity and respect These rights may include, but not be limited to, the following: 1. The right to protection from further harm or reprisal . . . ; 2. The right to be treated with respect, dignity and fairness at all stages of the criminal justice system; 3. The right to address the circuit court at the time sentence is imposed; 4. The right to receive timely notification of judicial proceedings; 5. The right to restitution; 6. The right to be advised of release from custody or escape of the offender, whether before or after disposition; and 7. The right to confer with the prosecution.

¹⁹⁸ Professor Judith Resnik has argued that state constitutional rights assuring access to courts also constitute positive entitlements. See generally Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 SLU L J 917 (2012).

¹⁹⁹ The relevant provisions often mix and match these formulations. See, for example, NC Const Art XI, §§ 7–8:

Beneficent provision for the poor, the unfortunate and orphan, being one of the first duties of a civilized and christian State, the General Assembly, shall at its first session, appoint and define the duties of a Board of Public Charities There shall also, as soon as practicable, be measures devised by the State for

Many mandates in state constitutions could be characterized as positive socioeconomic rights. It is not our goal to catalogue them here, nor to draw bright lines between positive rights and other rights (nor between rights and nonrights). We intend to demonstrate only that the US states have constitutionalized many of the same socioeconomic rights that are found in national constitutions and that are widely believed to be missing from the US constitutional tradition. Accordingly, we selected nine socioeconomic rights that are commonly found in some form throughout the world's constitutions and searched for those rights in US state constitutions.²⁰⁰

The results are depicted in Table 2 and Figure 4. Figure 4 shows the total number of current positive rights by state. It illustrates that positive rights are commonplace in state constitutions. The only states that *do not* include any of the nine socioeconomic rights for which we coded are Connecticut, New Hampshire, Tennessee, and Vermont. Every other state includes at least one of these rights in its constitution. The state constitutions that currently include the greatest number of the rights for which we coded are those of Wyoming and Montana, each of which includes seven rights, followed by Arizona, Idaho, New York, Oklahoma, and Utah, each of which includes six. Table 2 shows the prevalence of each of the nine rights in both state and national constitutions today. It reveals that, among the American states, the right to education is the most common, followed by rights for the disabled and rights for the poor. Most common among world constitutions, by contrast, is the right to strike and unionize, followed by the right to a healthy environment and the right to education.

the establishment of one or more orphan Houses, where destitute orphans may be cared for, educated and taught, some business or trade.

According to our coding, over the period 1946–2012, an average of 19 percent of the national constitutions with education rights and 28 percent of the constitutions that provide for maximum workdays phrase those requirements as obligations of the government rather than as rights of citizens.

²⁰⁰ We coded the following: (1) provisions establishing a common school or free education; (2) provisions establishing a minimum wage; (3) provisions setting a maximum number of hours in a workday; (4) provisions guaranteeing workplace safety; (5) the right to strike or unionize; (6) prohibitions of child labor; (7) the right to a healthy environment; (8) rights or guarantees for the poor; and (9) rights and guarantees for the disabled. For purposes of our analysis, we excluded the cases in which the aforementioned issues are framed in a discretionary fashion (for example, the legislature *may* provide for a minimum workday).

Figure 4 and Table 2 show not only that Americans have created positive constitutional rights but also that the positive-rights tradition in the United States is uneven across states. Based on their state of residence, Americans possess different sets of constitutional rights in both number and content. We do not argue, therefore, that the United States has adopted any of these rights as fully or completely as the countries that have included them in their national constitutions. Our claim is only that these rights are not missing from US constitutional commitments. America's constitutional politics are not distinguished from other countries' by a hegemonic liberalism that has precluded the creation of socioeconomic rights. On the contrary, many generations of American constitution writers, across many different states, have added explicit positive rights to their constitutions.

FIGURE 4. NUMBER OF POSITIVE RIGHTS IN STATE CONSTITUTIONS

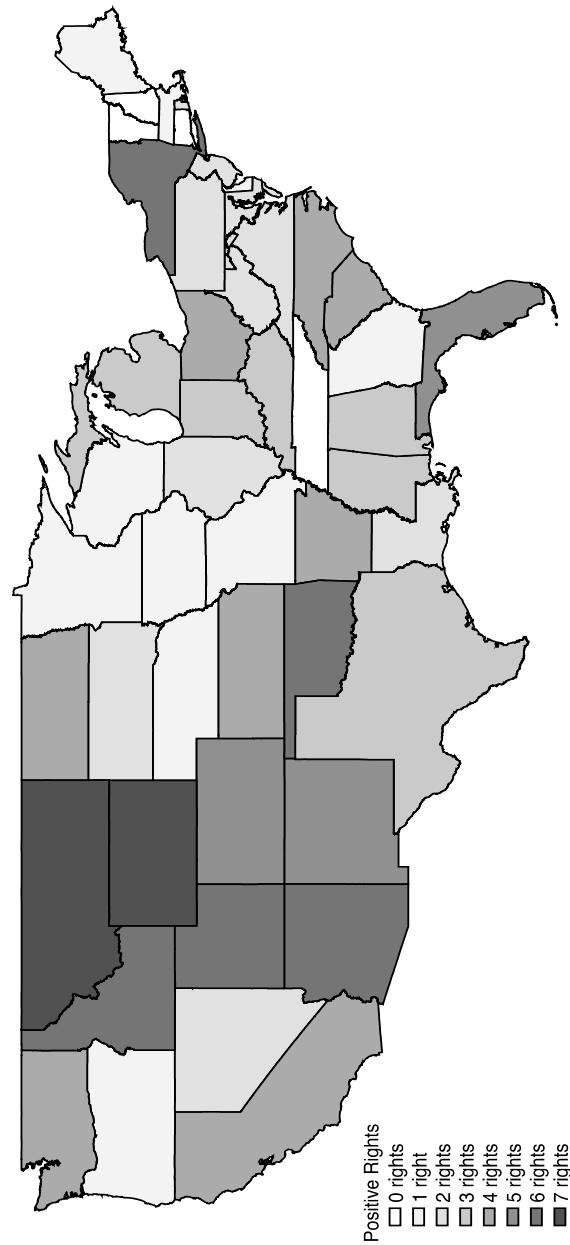


TABLE 2. THE PREVALENCE OF NINE SOCIOECONOMIC RIGHTS IN STATE AND WORLD CONSTITUTIONS

Socioeconomic Right	State Constitutions	World Constitutions
Right to Free Public Education	90%	65%
Rights for the Disabled	58%	34%
Rights for the Poor/Social Welfare	42%	64%
Right to Strike and/or Unionize	32%	72%
Right to a Healthy Environment	28%	65%
Right to Safe Working Conditions	26%	52%
Right to Maximum Workday/Right to Rest	24%	53%
Prohibition of Child Labor	20%	16%
Right to a Minimum Wage	10%	48%

A. The Right to Free Education

Education rights are both the clearest and the oldest example of America's positive constitutional rights. Of the rights for which we coded here, education rights were by far the most prevalent. Education rights are also a widespread feature of national constitutions. Figure 5 depicts the percentage of state constitutions (top panel) and world constitutions (bottom panel) that require the government to provide free public education.²⁰¹ A full 90 percent of state constitutions currently require the provision of free public education, and 65 percent of world constitutions today include a comparable requirement. Another 15 percent of national constitutions mention education without requiring its provision free of charge. Education rights are a common feature of state and world constitutions alike.

In national constitutions, the right to free public education was first adopted by Haiti in 1816, followed by Brazil (1824), Portugal (1826), and Peru (1828).²⁰² By 1900, sixteen of the thirty-four national constitutions in force at the time included a

²⁰¹ For state constitutions, the top panel captures common school provisions that require the state to establish free public education; for world constitutions, the bottom panel captures whether the constitution contains a right of citizens to free education or an obligation of the government to provide free public education. The data for state constitutions are based on our own coding of state constitutions. Our data on world constitutions for the period 1946–2012 are supplemented with data provided by Professor Ginsburg and on file with the authors and the editors.

²⁰² These dates are derived from data provided by Professor Ginsburg and on file with the authors and the editors.

right to free public education. These rights preceded the adoption of other positive rights in national constitutions as well as the rise of the social welfare state itself. According to Professor Micheline Ishay, this was because education rights were central to the nineteenth-century working class's struggle for universal suffrage.²⁰³ In response to claims that only literate citizens could vote, workers' movements around the world demanded the right to education.²⁰⁴ In addition, education rights were the primary focus of the movement against child labor in many countries. Appalling working conditions for young children during the Industrial Revolution mobilized progressive elites to ban child labor and to send children to school instead.²⁰⁵ The politics of early education rights were thus characterized by activists from different layers of society forcing the ruling elites to dedicate economic resources to public education by including educational mandates in their nations' constitutions. As a result, education rights became a mainstay of national constitutions well before other positive rights achieved the same status.

The first education rights to be enshrined in state constitutions were established even before such rights became common in national constitutions. The first full-fledged common school provision that explicitly guaranteed free public education was adopted by Indiana (1816), followed by Maine (1819), Michigan (1835), and Rhode Island (1843). However, Massachusetts was the first state to create a constitutional mandate related to education, and it did so in 1780. Its constitution proclaimed that:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all

²⁰³ See Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* 143–44 (California 2008).

²⁰⁴ See *id.* at 141 (“[U]niversal teaching must precede universal enfranchisement.”) (brackets in original).

²⁰⁵ See *id.* at 125.

seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns.²⁰⁶

Four years later, this provision was largely copied into New Hampshire's constitution.²⁰⁷

The phrasing of Massachusetts's and New Hampshire's Revolutionary-era provisions reflect a quintessentially republican concern about the character of the citizenry, as well as the conviction that self-government can work only with a citizenry educated in virtuous habits of thought and action.²⁰⁸ The later constitutional requirements that states establish free school systems undoubtedly have their roots in these republican convictions, but those requirements were also a product of the Jacksonian age and its rapid industrialization, the specter of young children laboring in appalling conditions, and a national concern with class and equality.²⁰⁹ Free, state-run schools were also popular among those who worried about the cultural implications of immigration and hoped to use schools as mechanisms for assimilating immigrants' children.²¹⁰ Another wave of constitutional provisions mandating free schools occurred during Reconstruction, when radical Republicans, including newly free black delegates, used the constitutional conventions to ensure that Southern states would establish common schools modeled on successful state systems in the North.²¹¹ As at the national level, social groups mobilized within US states to secure the constitutional protection of education, thereby forcing governments to dedicate resources to improving the position of children born into families that could not afford to educate them. This history of education provisions alone comprises a marked and long-standing commitment to positive constitutional rights in the United States, one that preceded the emergence of comparable rights in national constitutions across the globe.

²⁰⁶ Mass Const Pt II, ch V, § 2. Note that Massachusetts's education provision is not counted in Figure 5, as Figure 5 captures only provisions that explicitly grant free public education.

²⁰⁷ See NH Const Pt II, Art 83.

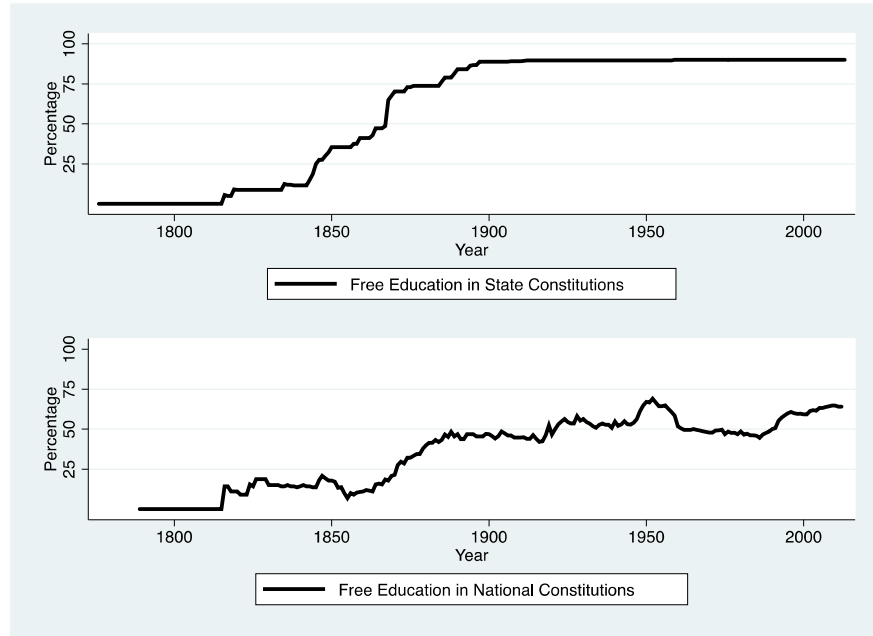
²⁰⁸ See Gordon S. Wood, *The Creation of the American Republic 1776–1787* 120–24 (Norton 1972).

²⁰⁹ See Charles E. Bidwell, *The Moral Significance of the Common School: A Sociological Study of Local Patterns of School Control and Moral Education in Massachusetts and New York, 1837–1840*, 6 Hist Educ Q 50, 51 (Fall 1966).

²¹⁰ See id at 51–52.

²¹¹ See David Tyack and Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 Am J Educ 236, 238 (1986).

FIGURE 5. FREE EDUCATION IN STATE AND WORLD CONSTITUTIONS



B. The Right to a Healthy Environment

The similarity between global socioeconomic rights and those found in US state constitutions is not merely a historical relic. For instance, national and state constitutions contain very similar guarantees of environmental protection, and these environmental rights date from the late twentieth century. Figure 6 depicts the prevalence of the right to a healthy environment in both US state constitutions (top panel) and world constitutions (bottom panel). It shows that constitutional environmental rights were virtually nonexistent before the 1960s, when they began to appear in US state and then national constitutions.²¹² It

²¹² In both contexts, these rights are typically phrased as guarantees of a natural environment that does not threaten people's physical health. Some specify the protection of air and water, and some include rights to the preservation not only of the environment's healthfulness but also its aesthetic and historic value. See, for example, S Afr Const § 24 (1996) ("Everyone has the right (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations."); Pa Const Art I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.").

also demonstrates that environmental rights proliferated both faster and sooner in the constitutions of the US states than in world constitutions.

The global constitutionalization of environmental rights is generally traced to the *Stockholm Declaration on the Human Environment*, which was the product of an international conference in 1972 that explicitly linked human rights with the state of the natural environment.²¹³ Of course, these rights also emerged in the context of the period's broader rights revolution, increasing worldwide concerns about environmental degradation, and a global shift toward constitutional democracy.²¹⁴

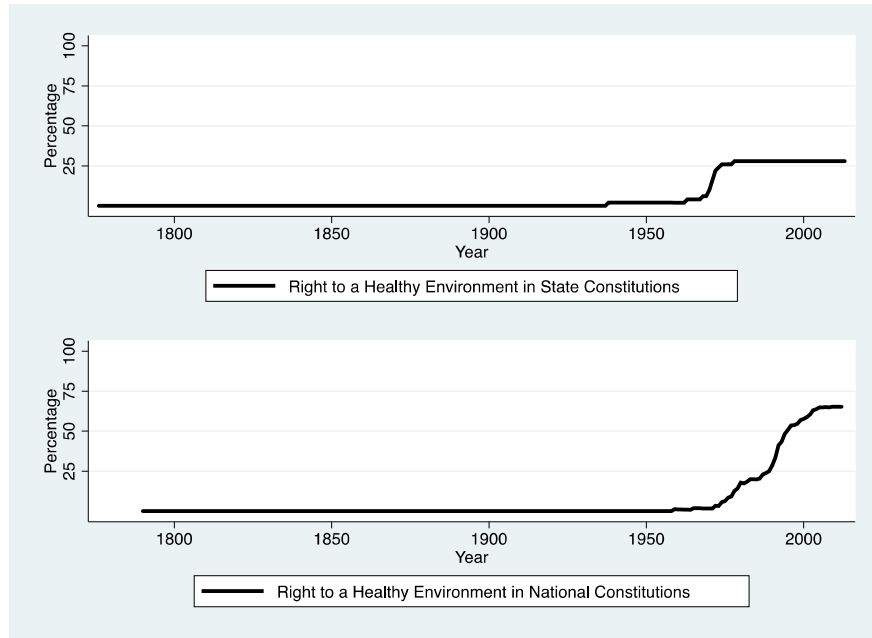
In the US states, environmental rights were included in both new and existing constitutions, and state legislatures displayed an eagerness to create these provisions. In fact, the first Earth Day, in 1970, seems to have motivated several state legislatures to create environmental-rights provisions.²¹⁵ These additions suggest that environmental rights were not merely created at the behest of environmental interest groups that participated in larger revision processes, but that these rights received sufficient public support to prompt separate amendments of existing constitutions.

²¹³ See David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* 13, 17 (UBC 2012).

²¹⁴ See *id.* at 7–12.

²¹⁵ See Zackin, *Looking for Rights* at 148–53 (cited in note 31).

FIGURE 6. RIGHT TO A HEALTHY ENVIRONMENT IN STATE AND WORLD CONSTITUTIONS



C. Other Socioeconomic Rights

US state constitutions and national constitutions around the world both contain many other kinds of socioeconomic rights. For instance, both state and national constitutions contain positive labor rights. By our count, a little over a quarter of all state constitutions currently in force contain positive workers' rights—such as a right to a minimum wage, a maximum work-day, or safe working conditions—while roughly 60 percent of world constitutions provide the same. However, the labor rights contained in national constitutions generally differ in form and content from those in state constitutions. Many national constitutions include broad declarations of the right of laborers to dignity, safety, and adequate remuneration. The Peruvian Constitution, for example, states that: “The worker is entitled to an adequate and fair compensation ensuring himself and his family material and spiritual well-being.”²¹⁶ Several state constitutions

²¹⁶ Peru Const Art 24. See also Ecu Const Arts 325–33 (offering many detailed provisions on the topic of “forms of work and pay”); Nigeria Const § 17, ¶ 3 (requiring the state to ensure that there is no discrimination in citizens' ability to secure jobs, that

contain similarly broad declarations of universal rights for workers. For instance, Wyoming's constitution declares: "The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state."²¹⁷ Yet the labor rights in many other state constitutions are far more circumscribed. Indeed, it is common for state constitutions to require government action to ensure safer working conditions in mines and on railroads or to create an eight-hour workday for people employed in these dangerous occupations.²¹⁸ Wage protections are usually targeted at these populations as well, or else restricted to female workers. The less expansive reach of workers' rights in state constitutions results, at least in part, from the older age of these rights.²¹⁹

A similar pattern exists with respect to constitutional provisions requiring the state government to care for the poor. Many

"conditions of work are just and humane," that employees' health and safety are protected, and that there is "equal pay for equal work without discrimination"); Ven Const Arts 89–97 (listing many detailed provisions meant to "improv[e] the material, moral and intellectual conditions of workers"); Bol Const Arts 46–55 (listing, among others, the right to "dignified work, with . . . safety, without discrimination, and with a fair, equitable and satisfactory remuneration or salary that assures a dignified existence for the worker and his or her family"); India Const Arts 39, 41–43 (providing for: a "right to an adequate means of livelihood"; "equal pay for equal work for both men and women"; protection of workers' health, including men's, women's, and children's; a "right to work"; "just and humane conditions of work"; "maternity relief"; and "a living wage").

²¹⁷ Wyo Const Art I, § 22. See also Ohio Const Art II, § 34 ("Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes [sic]; and no other provision of the constitution shall impair or limit this power."); Nev Const Art 15, § 16 (establishing a minimum wage); Mont Const Art XII, § 2(2) (imposing an eight-hour maximum workday "in all industries and employment except agriculture and stock raising").

²¹⁸ See, for example, Okla Const Art XXIII, § 4 ("Boys and girls under the age of eighteen years shall not be employed, underground, in the operation of mines; and, except in cases of emergency, eight hours shall constitute a day's work underground in all mines in the State."); Okla Const Art XXIII, § 5 ("The Legislature shall pass laws to protect the health and safety of employees in factories, in mines, and on railroads."); Colo Const Art 5, § 25a (imposing maximum eight-hour workdays for workers employed in mines); Colo Const Art 16, § 2 (requiring "proper ventilation of mines [and] the construction of escapement shafts," and prohibiting "the employment in the mines of children under twelve years of age").

²¹⁹ Comparing our coding of state constitutions with the Comparative Constitution Project's coding of national constitutions reveals that antistrikebreaking provisions proliferated in US state constitutions from 1880 onward, while the right to strike and unionize started appearing in national constitutions in 1920. Likewise, positive workers' rights—such as a right to a minimum wage, safe working conditions, and maximum workdays—proliferated in state constitutions from the 1860s onward, while they started appearing in national constitutions with some frequency only in the 1930s.

world constitutions have famously come to contain such rights: 17 percent currently include a broadly phrased right to food, 39 percent incorporate a right to housing or shelter, and a whopping 72 percent include a right to health care.²²⁰ America's state constitutions do not contain exactly equivalent rights. However, many do attest to the government's responsibility to care for destitute citizens. Montana's constitution, for instance, requires the state to "provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for aid of society,"²²¹ while New York's declares that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state . . . by such means as the legislature shall from time to time determine."²²² Many more state constitutions contain mandates to create institutions for the care of orphans, as well as indigent and mentally ill adults. These provisions are generally quite old, predating the rights revolution that gave rise to similar national constitutional provisions by almost a century. The state provisions stem from nineteenth-century norms of state government responsibility for the maintenance of public health and order. Thus, they tend to reflect a concern for public control of potentially destabilizing people and an emphasis on charitable obligations, while the postwar provisions in national constitutions tend to reflect the conviction that people are entitled to a measure of dignity and equality regardless of the economic circumstances in which they find themselves.²²³ In both cases, however, the provisions require the government to care for vulnerable social groups.

D. Justiciability

Both around the world and in US states, courts have demonstrated an increased willingness to enforce socioeconomic rights.²²⁴ At the national level, this trend is exemplified by recent

²²⁰ See, for example, Ecu Const Arts 13, 30, 32.

²²¹ Mont Const Art XII, § 3(3).

²²² NY Const Art XVII, § 3.

²²³ See Katharine G. Young, *Constituting Economic and Social Rights* 66–98 (Oxford 2012).

²²⁴ See Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 3, 43–45 (Cambridge 2008); Hershkoff, 112 Harv L Rev at 1135–36 (cited in note 179).

high-profile cases in countries as diverse as South Africa, India, Japan, Sri Lanka, and Finland, as well as in countries throughout Latin America.²²⁵ Within the United States, not all state courts have been equally assertive, but many courts have nonetheless interpreted governmental failures to comply with explicit constitutional directions as violative of state constitutions.²²⁶ They have done so most frequently in the arena of public education,²²⁷ but also in the areas of collective bargaining, environmental rights, and care for the poor.²²⁸

Both in the subnational and national contexts, socioeconomic rights are also enforced outside of the courts. In the American states, the reformers who placed socioeconomic rights in state constitutions later sought to enforce those rights through legislative lobbying, often in the absence of judicial involvement.²²⁹ At the national level, social movements have likewise mobilized around these rights even in the absence of judicial enforcement. Some national governments have used their constitutional socioeconomic rights (with the help of their constitutional courts) as leverage in negotiations with international financial institutions.²³⁰ Although there is no doubt that both states and countries

²²⁵ See generally Gauri and Brinks, eds, *Courting Social Justice* (cited in note 184); Bertrand G. Ramcharan, ed, *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials* (Martinus Nijhoff 2005). See also Langford, ed, *Social Rights Jurisprudence* at 75–208 (cited in note 224).

²²⁶ See, for example, Richard A. Goldberg and Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 Rutgers L J 729, 734 (1987) (noting that the New Jersey Supreme Court has declared positive workers' rights to be self-executing, while courts in other states have been more reluctant to do the same).

²²⁷ See Reed, *On Equal Terms* at 9–10, 20–22 (cited in note 37); Paris, *Framing Equal Opportunity* at 228–29 (cited in note 37).

²²⁸ See Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L J 881, 896–98 (1989) (encouraging state courts to utilize state constitutions, which recognize the “responsibility of the states to deal with education . . . food, shelter and health care,” and to “protect [the] chronically weak”); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 Rutgers L J 799, 828 (2002) (noting the “increasing number of courts” that have enforced “positive rights,” such as the rights of “children to receive public schooling” and “of the poor to receive public assistance,” in the years following Professor Burt Neuborne’s article). See also *Dade County Classroom Teachers Association, Inc v Legislature*, 269 S2d 684, 687–88 (Fla 1972) (noting that the legislature’s failure to enact legislation mandated by the constitution—which ensures that public employees can engage in collective bargaining—violated the state constitution, and stating that, if the legislature did not follow the mandate within a reasonable time, the court would “have no choice but to fashion such guidelines by judicial decree”).

²²⁹ See Zackin, *Looking for Rights* at 109 (cited in note 31).

²³⁰ See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 Tex L Rev 1921, 1924 (2004).

often fall short of their socioeconomic promises,²³¹ the constitutionalization of those rights is not merely aspirational but has actually forced governments to act on important social issues. Although there remains a great deal of room for more-stringent enforcement of socioeconomic rights in both state and national constitutions, these rights cannot be dismissed as toothless, un-enforceable symbols.

E. Implications for State Constitutions

Because they are located in state constitutions, America's positive constitutional rights have not always appeared to represent meaningful commitments. After all, state constitutions are extremely broad in scope, embracing an extraordinarily wide range of issues.²³² They are also relatively easy to amend and have therefore been susceptible to interest group pressure.²³³ It can thus appear that the positive-rights provisions in state constitutions are simply aspirational, added—perhaps at the behest of interest groups—to what are already long, convoluted, flexible, and eclectic documents. Indeed, Professors Ginsburg and Posner argue that, when federal rights protection already exists, state constitution makers need not design their own system of rights protection.²³⁴ Ginsburg and Posner therefore predict that the level of rights protection in state constitutions will be lower than in national constitutions. In their view, the positive rights found in state constitutions do not serve as real constraints but are mere policy goals that happen to be cast in the language of rights.²³⁵ There is certainly some truth to these assessments. Interest groups have often engineered these rights, and these groups were definitely pursuing rights creation as part of their larger policy goals.²³⁶ The success of their campaigns to create new rights is certainly attributable, at least in part, to the flexibility of

²³¹ See Law and Versteeg, 101 Cal L Rev at 916–18 (cited in note 4) (showing that many nations fail to live up to their constitutional promises, and that socioeconomic rights are among the most routinely violated constitutional rights).

²³² See Part II.B.

²³³ See Part III.C.

²³⁴ See Ginsburg and Posner, 62 Stan L Rev at 1599 (cited in note 14) (“If substate status reduces agency costs, then it will become less necessary for the substate to uphold its own system of rights.”).

²³⁵ See *id.* (predicting that lower agency costs will “result in more statutory rights—as the public or interest groups have more success persuading legislators to clothe their interests in rights protections”).

²³⁶ See Zackin, *Looking for Rights* at 48–49 (cited in note 31).

state constitutional texts and the revision procedures that render state constitutions so responsive to popular pressure. In other words, while flexibility is necessary to accommodate far-ranging and detailed documents, flexibility also invites more detail.

The fact that the same socioeconomic rights are prevalent in most national constitutions, however, casts doubt on the notion that the socioeconomic rights in state constitutions merely signify a subnational mode of constitution making, one in which constitution makers have been freed from the need to constrain their government with real rights. To the extent that the socioeconomic rights in state constitutions are “merely” products of flexible constitutional texts and capacious documents, the same is also true of the socioeconomic rights in national constitutions throughout the world. Indeed, our data demonstrate that national constitutions across the globe are similarly long and flexible, and that they contain similar rights. This suggests that the design features shared by state and national constitutions have opened these constitutions to groups seeking to force their governments into a protective or redistributive posture. We believe, therefore, that socioeconomic rights appear in state constitutions not because these constitutions are subnational, but because they are (like many national constitutions) designed in ways that invite their use by interest groups, including those committed to socioeconomic rights.²³⁷

This account of constitutional rights creation is very different from Professor Ran Hirschl’s famous description of rights as a vehicle through which elites attempt to entrench the status quo—usually in the form of neoliberal policies and property rights—against the changing preferences of democratic majorities.²³⁸ Indeed, proponents of socioeconomic rights generally champion these rights in pursuit of social change. To illustrate, the sweeping socioeconomic rights in the constitutions of Ecuador, Venezuela, and Bolivia are regarded as popular victories that forced these governments to redistribute economic wealth.²³⁹ Likewise, when negotiating the 1994 South African transitional constitution, the African National Congress demanded

²³⁷ See *id.*

²³⁸ See Hirschl, *Toward Juristocracy* at 43–46 (cited in note 158).

²³⁹ See King, *Neo-Bolivarian Constitutional Design* at 373–74 (cited in note 165) (describing rights protected in the Venezuelan, Ecuadorian, and Bolivian constitutions, including the “right and duty to work,” the “right to a [sufficient] salary,” and the right to “safe and comfortable” housing).

socioeconomic rights in exchange for property protections for the ruling elites.²⁴⁰

Professor Emily Zackin has demonstrated in her book-length treatment of the subject that the socioeconomic rights found in US state constitutions also have their origins in reform projects. At the turn of the nineteenth century, for example, labor unions advocated constitutional change in order to secure protective labor regulations from state governments, which were thought to be captured by large business interests.²⁴¹ Education activists also hoped to achieve policy changes in public school financing that, in the absence of direct constitutional mandates, legislatures had been reluctant to effect.²⁴² Thus, the socioeconomic rights in both national and US state constitutions represent concerted attempts to design constitutions that constrain governments' choices, forcing those governments to enact reforms that the political and economic environment might render particularly challenging to achieve.

V. TOWARD AN ALTERNATIVE THEORY OF CONSTITUTIONAL DESIGN

The foregoing analysis demonstrates that the US Constitution is truly exceptional, compared not just with foreign constitutions, but also with the constitutions of the American states. Despite the US Constitution's unusual design, many constitutional scholars appear to have developed theories of constitutionalism built around it and its English progenitor. Accordingly, scholars have identified long-term stability as a central feature of constitutional governance. As shown above, however, most modern constitutions are not nearly as rigid as the US Constitution but are instead flexible documents, full of specific and alterable policy details. A gap has consequently opened between existing theories of constitutionalism and the current practices of writing and governing with constitutional documents. Therefore, we believe that it may be fruitful to rethink the basic features and purposes of constitutional governance in light of the majority of the world's constitutions. In this Part, we argue that conventional accounts of constitutional governance take entrenchment—or long-term stability—to be the defining

²⁴⁰ See Dixon and Ginsburg, 4 Const Ct Rev at 12–14 (cited in note 89).

²⁴¹ See Zackin, *Looking for Rights* at 119–20, 126–27 (cited in note 31).

²⁴² See *id.* at 84–90.

feature of constitutions. While entrenchment characterizes the Anglo-American constitutional model, we propose that other constitutional systems have replaced entrenchment as a means of limiting government with detailed instructions about a broad range of policy choices.

A. Conventional Wisdom: Constitutionalism as Entrenchment

Many theories about the nature and purpose of constitutions posit that “exceptional legal entrenchment” is not just the hallmark of constitutions, but their *raison d’être*.²⁴³ These theories reflect the Anglo-American version of constitutionalism. In an influential account of the seventeenth-century origins of British constitutionalism, Professors Douglass North and Barry Weingast argue that constitutionalism emerged as a mechanism through which a weak monarch could remain in power by making credible commitments to the nobility about the security of their property. Constitutionalism—the idea of legally and perpetually limited government—thus emerged when the nobility entrenched limitations on the monarch’s power over their property in exchange for his continued rule.²⁴⁴ The resulting arrangement was a clear and binding set of limits on government, viewed by many as the birth of modern constitutionalism.

As Professor Larry Kramer has explained, the notion of constitutionalism as a set of entrenched limitations on the power of the Crown persisted into the eighteenth century: the British constitution was understood as a set of entrenched, even timeless, practices that defined the limitations on the government’s legitimate powers. In Kramer’s words: “[T]he content and authority of the British constitution derived from principles long-enshrined in English legal culture and practice. We can, in other words, describe the body of fundamental law that in the eyes of eighteenth-century Englishmen formed their constitution as a *customary* constitution.”²⁴⁵ This constitution was often described as immutable and unchanging even though it did of course evolve, both through the occasional constitutional crisis and as

²⁴³ Holmes, *Passions and Constraint* at 134–77 (cited in note 174).

²⁴⁴ See Douglass C. North and Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J Econ Hist 803, 816 (1989) (explaining the aftermath of the Glorious Revolution, when King William agreed to grant veto power to Parliament in exchange for assurances by the “representatives of wealth holders . . . to provide sufficient tax revenue” to “put the government on a sound financial footing”).

²⁴⁵ Kramer, *The People Themselves* at 12 (cited in note 56).

new practices achieved acceptance and eventually came to seem entrenched.²⁴⁶ Yet the basic structure of constitutional law was rooted in custom and defined by stability; entrenchment, in other words, was its distinguishing feature.

The entrenchment model of constitutionalism discourages the inclusion of highly specific policy choices in constitutional documents, since specific policies are unlikely to remain appropriate or tenable in the face of changing economic and social conditions. Indeed, Madison argued that, because a constitution is written for the ages to come, it should contain only general principles and ought to omit unnecessary detail.²⁴⁷ As a result, the conventional view of constitutions is not only that they are entrenched but also that they are spare frameworks of government, enshrining broad commitments rather than detailed policy choices.

An independent judiciary with the power of judicial review is generally taken to be central to the operation of an entrenching constitution.²⁴⁸ This is certainly true in the American experience. Beginning with the Federalists, constitutional theorists have portrayed the federal courts as watchdogs that guard the interests of the people by policing the boundaries of legitimate government action.²⁴⁹ In fact, when the meaning of the highly entrenched and spare federal Constitution has changed, it has often been because one political party or regime has succeeded in changing the composition of the Supreme Court and has thereby rendered the Court willing to redraw constitutional boundaries.²⁵⁰

²⁴⁶ See *id.* at 14–15.

²⁴⁷ See Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 *Am Polit Sci Rev* 837, 837–38 (1999).

²⁴⁸ See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv L Rev* 657, 661 (2011).

²⁴⁹ See, for example, Federalist 78 (Hamilton), in *The Federalist* at 521, 524–25 (cited in note 83) (describing judicial review as a mechanism that protects the “intention of the people” from the “intention of their agents”).

²⁵⁰ See Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va L Rev* 1045, 1067–68 (2001) (arguing that partisan entrenchment is the “best account of how” changes to the “meaning of the Constitution” are made “through Article III interpretation rather than through Article V amendment”); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *Am Polit Sci Rev* 511, 517–18 (2002) (finding that, often faced with a Democrat-controlled House, Republican presidents between 1870 and 1893 relied on Supreme Court nomination rather than congressional legislation to promote “economic nationalism”).

Judiciaries have, at times, been designed to serve this entrenching function in other countries as well. For instance, Professor Ginsburg has demonstrated that new Asian democracies constitutionalized judicial review as a form of political insurance, reassuring competing parties that, even if they found themselves electoral losers, they would have a way to enforce, or entrench, the constitution against those who won.²⁵¹ Similarly, Professor Hirschl describes how constitutions can facilitate a process that he calls “hegemonic preservation,” whereby ruling elites protect the policies that they have established from democratic majorities that might wish to change them by placing these policies directly into the constitution, thus enabling courts to nullify any future legislature’s attempt to repeal them.²⁵²

Not only can courts help entrench constitutions, but rigid and spare constitutional texts may actually invite judges to play a sizable role in the policymaking process. While entrenched-framework constitutions will not necessarily expand the judiciary’s discretion,²⁵³ if constitutional change is challenging to achieve through formal, textual amendment, then constitutional change may be more likely to occur through judicial interpretation.²⁵⁴ Especially when an entrenched constitution also omits detailed and specific policy choices, judges may be able to choose from a wide array of possible meanings, affording them considerable discretion over which practices the constitution requires and prohibits. Thus, a constitution with a spare and entrenched framework often entails a remarkable delegation of policymaking power to the judiciary.

²⁵¹ See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 22–30 (Cambridge 2003).

²⁵² Hirschl, *Towards Juristocracy* at 90–91 (cited in note 158).

²⁵³ One could imagine a system in which the judiciary was confined to answering only those constitutional questions with explicit textual answers or one in which other branches or popular interpreters were free to interpret and apply a constitution with only minimal regard for the judiciary’s reading. See generally Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas 1999); Kramer, *The People Themselves* (cited in note 56); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999).

²⁵⁴ See David A. Strauss, *The Living Constitution* 2–3 (Oxford 2010) (likening US constitutional law to a common-law system, whereby change comes about through judicial interpretation).

B. Alternative Design: Constitutionalism as Flexible and Detailed Instructions

As we have demonstrated, most constitutions do not endure unchanged over many generations but are full of detailed, routinely revised policy instructions. If these documents are not characterized by their long-term stability, how can one understand their design and function? We propose that the broad scope, highly detailed nature, and popular responsiveness of these constitutions may serve as a substitute for textual rigidity.

Rather than positing entrenchment as the end of constitution making, let us imagine that entrenchment is merely a means to the true end of constitution making: limiting government. Rigidity is one mechanism for binding government to the will of the governed, but it may not be the only one. Even readily changeable constitutions may limit government by telling it exactly what to do under particular circumstances. When constitutions can be easily changed through popular participation, disgruntled citizens may insist that constitutional texts be altered to clarify their wishes, using detailed and specific mandates to force government to take particular forms of action and to prevent it from taking others. Constitutions might also be drafted or amended to clarify the application of constitutional provisions to particular policy problems. Constitutions that work in this way limit government through a combination of flexibility and specificity, rather than rigidity.

In fact, flexible and detailed constitutions may actually become more specific over time. The possibility of frequent constitutional updating may encourage a variety of issue-oriented groups to pursue constitutional change in advancing their particular policy goals. As constitutions begin to respond to these groups' demands, other groups may follow suit, insisting on the inclusion of new or countervailing instructions. Thus, the frequent addition of detailed instructions on a wide range of policy choices may be a long-term mechanism through which constitutions require government to abide by the will of the governed.

Under such a model, courts may be viewed not as the people's loyal watchdog, faithfully policing the constitutional boundaries of government, but rather as agents of government, on whom the people might also wish to place constitutional limitations. Detailed constitutional provisions could also be a solution to the problem of judicial policymaking. Detailed policy provisions might be used to overturn unpopular court decisions or

simply to limit judicial discretion over public policymaking by explicitly including particular choices directly in the constitution. In fact, Professor John Dinan has demonstrated that US state constitutions have been amended to constrain courts in precisely these ways throughout American history.²⁵⁵ In order for constitutions to so limit government, they must be flexible enough that such provisions may be reliably or regularly added. Here again, flexibility and specificity might substitute for entrenchment as a means of establishing control over government.

Of course, limiting government through flexible and specific policy documents carries its own set of risks. First, while flexible constitutions are responsive to the demands of citizen groups, they are also vulnerable to the very officeholders that they purport to control. There exists a fine line between people adjusting their government's marching orders and officeholders enshrining their own interests. Around the world, examples abound of leaders changing constitutions to serve their own ends. Authoritarian leaders, for example, have sometimes been able to extend presidential term limits through constitutional amendment.²⁵⁶ The US states have attempted to solve this potential problem by designing revision procedures that require popular involvement; whether revisions come about through constitutional conventions or legislative amendments, citizens are almost always involved.²⁵⁷ At the national level, popular involvement has not yet reached the same unassailable status, although it is increasingly common and referred to as the "new gold standard in constitutional design."²⁵⁸ In fact, a majority of democratic nations now require the constitution to be approved by popular referendum.²⁵⁹

Another potential downside of flexible-policy constitutions is that their design is more majoritarian and participatory and, as such, less likely to offer robust protection to minorities. It is important to note, therefore, that while we suggest that the majority of world constitutions may be characterized by the alternative

²⁵⁵ See generally Dinan, 38 Rutgers L J 983 (cited in note 104).

²⁵⁶ See Zachary Elkins, Tom Ginsburg, and James Melton, *On the Evasion of Executive Term Limits*, 52 Wm & Mary L Rev 1807, 1848–54 (2011) (providing examples of executives evading term limits through constitutional amendment but also noting that, overall, "term limits seem to be observed with remarkable frequency").

²⁵⁷ See Part III.D.

²⁵⁸ Denis J. Galligan and Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in Galligan and Versteeg, eds, *Social and Political Foundations of Constitutions* 3, 33 (cited in note 117).

²⁵⁹ See Dag Anckar, *Constitutional Referendums in the Countries of the World*, 7 J Polit & L 12, 14 (2014).

design strategy described here, ours is a descriptive claim only. We do not argue that this design strategy is normatively superior. Indeed, because the two different design strategies that we have described carry different risks, they may be best suited for use in different environments.

CONCLUSION: NOT SO EXCEPTIONAL AFTER ALL

Since the nation's founding, Americans have written one federal Constitution and 149 state constitutions. They have enacted twenty-seven amendments to the federal Constitution and thousands of amendments to their state constitutions.²⁶⁰ When taking account of the prolific constitution making that has occurred at the state level, it turns out that Americans write constitutions much like everyone else. Like most foreign constitution makers, Americans draft constitutional documents that include a broad range of topics (including socioeconomic rights), describe those topics in elaborate detail, and frequently revise these documents. When we include state-level constitutional politics in our assessment of American constitutionalism, it does not appear so exceptional after all.

This finding contributes to the growing body of scholarship that counsels against essentialist thinking about the American constitutional tradition.²⁶¹ American constitutionalism is not a monolithic expression of a single set of political inclinations or values; it comprises numerous ways of crafting constitutional documents and of governing with them. National political contests have played out at least partly through state constitutions, and these constitutions have evolved in tandem with the federal Constitution. In addition, America's state constitutions evince many of the same design choices as the constitutions of other countries, including commitments to positive rights and democratic responsiveness. The content of state constitutions has sometimes even been drawn directly from international law.²⁶²

²⁶⁰ The forty states for which we have data passed 8,267 amendments for the period 1776–2005.

²⁶¹ See, for example, Richard A. Primus, *The American Language of Rights* 45 (Cambridge 1999) (arguing that “American conceptions of rights” have been “repeatedly alter[ed]” in the face of changing “problems and crises” throughout America’s history).

²⁶² See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 Yale L J 1564, 1626–33 (2006) (noting the multiple “ports of entry” for international law into American constitutional law, and observing that state constitutions have often served as ports of entry); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional*

Indeed, when considering these interrelationships, it is difficult to differentiate subnational contexts from national ones, as well as foreign ways of practicing constitutional politics from “genuinely American” ones.²⁶³ Thus, the data that we present in this Article suggest not only that claims of American constitutional exceptionalism should be reconsidered but also that the very dichotomies on which such claims are built should be reevaluated.

Our findings invite reconsideration both of American constitutional exceptionalism and of the nature of American state constitutions. America’s state constitutions are currently enjoying a new wave of scholarly attention, particularly from political scientists. These scholars have generally found state constitutions interesting precisely because they are so unlike their federal counterpart. Yet state constitutions are so different in form and function from the national Constitution that others remain skeptical about whether they should really be called constitutions at all. Their sweeping scope, elaborate detail, and frequent revision all seem to render state constitutions less than truly “constitutional.” In fact, commentators have suggested that the very reason why state constitutions possess these features is because they are subnational documents. The comparative analysis presented here suggests that it is time to revisit and revise this conclusion: the very features of state constitutions that have drawn such derision from American legal scholars are standard features of constitutions around the world.

This broader view suggests that it is time to abandon essentialist arguments not only about American constitutionalism but also about constitutionalism in general. That is, one need not seek to discover which constitutional documents are truly “constitutional.” Instead of presuming that there is a single constitutional

Discourse, 65 Mont L Rev 15, 23–26 (2004) (noting that the antidiscrimination provisions in the Puerto Rican Constitution were derived from international human rights law). State courts have also drawn on international human rights law. For instance, the California Supreme Court cited the Universal Declaration of Human Rights as a guide to interpreting the state constitution’s right to privacy. See *City of Santa Barbara v Adamson*, 610 P2d 436, 439 n 2 (Cal 1980). Likewise, the New Hampshire Supreme Court has relied on the ICCPR and the International Covenant on Economic, Social and Cultural Rights in its interpretation of parental rights. See *State v Robert H.*, 393 A2d 1387, 1389 (NH 1978).

²⁶³ See Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 Mo L Rev 1105, 1124–25 (2008); Levinson, 59 Kan L Rev at 796–97 (cited in note 37) (challenging the claim that there exists “a distinctly ‘American form’ of constitutionalism that can be found either by close conceptual analysis of the United States Constitution . . . or by an exclusive focus on the handiwork of the United States Supreme Court”).

ideal, it may be more productive to study the actual constitutional systems that people have developed and to leverage this variation to learn more about the reciprocal relationships between political environment and constitutional design. Of course, one may still want to determine which constitutional designs have worked best to achieve particular ends in distinct contexts, but we can abandon the attempt to determine which are most “constitutional.”