Toward an Alternative Theory of Constitutional Design

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1. Introduction

One of the central problems of constitutionalism is how to establish and simultaneously control a government. As James Madison famously put it in Federalist 51 "you must first enable the government to control the governed; and in the next place oblige it to control itself" (The Federalist 51, 1788). Many familiar constitutional features are tools to oblige government to act in the people's interest; the establishment of frequent elections is, perhaps, the most famous example.

Democratic constitutional features, like frequent elections, are widely compared to the rules of a game and described as the framework upon which a government is built. In order to maintain, not merely establish, a democratic polity, however, a good set of rules is, on its own, insufficient. If members of government, or the temporary majorities whom they represent, can subvert the very mechanisms designed to keep them in check, they can exceed the constitutional bounds on their authority without repercussions, and change the game entirely. Those who conceptualize constitutionalism as a form of contracting often refer to this risk as the principal-agent problem (Ginsburg & Posner 2011). In employing an agent (or creating a representative government), the principal (or people) will need to ensure that the agent acts in the principal's best interest, and not in its own interest at the expense of the principal. Thus, principals must carefully monitor their agents. The costs associated with this monitoring activity are known as agency costs.

Constitutional theorists have arrived at a near-universal solution to the problem of agency costs: entrenchment. In order for a constitution to create a democratic system that will remain democratic, they reason, the constitution's authors must not only erect a framework of government, but must also ensure the stability of that framework, entrenching it to protect it from the very people it will empower (Levinson 2011). Indeed, this entrenchment imperative, or the act of long-term commitment, is generally understood as central to the entire constitutional endeavor. Constitutions, therefore, are generally distinguished from ordinary law by their higher degree of formal entrenchment.

Indeed, enhanced entrenchment is not only the hallmark of formal constitutional documents, but also of the set of legal policies and practices that define a nation's informal, or "small-c" constitution (Eskridge & Ferejohn 2011; Levinson 2011, 701). "Exceptional legal entrenchment" is not only taken to be the defining feature of constitutions but is often described as their *raison d'etre* (Holmes 1995, 132-78). In fact, the origins of modern constitutionalism are generally attributed to monarchs or other elite rulers that attempted to make their commitments more credible by entrenching them. These elites developed constitutionalism as way to entrench the concessions they were forced to make to maintain the support of essential members of their political coalitions (North & Weingast 1989; Acemoglu & Robinson 2001).

The entrenchment imperative discourages the constitutionalization of highly specific policy choices, since specific policies are unlikely to remain appropriate and/or popular in the face of changing economic and social conditions. Indeed, James Madison argued that because a constitution is written for the ages to come, it can contain only general principles, and ought to omit unnecessary detail (Hammons 1999). Another reason that entrenchment works against constitutional specificity is that it is generally more challenging for diverse groups to agree on particular details than on broad standards or principles (Hardin 1999, 84), and we might expect this difficulty to be heightened if those agreements will be difficult to revise. The knowledge that a bargain's outcome will be highly entrenched, therefore, might well render ambiguity necessary to achieve consensus. Indeed, we have come to think of constitutions not only as entrenched, but also as spare, ambiguous frameworks of government. According to Andre Marmor (2007, 91-94), for instance, generality/abstraction is one of the six main features of written constitutions (along with longevity, rigidity, and judicial review, amongst others).

An independent judiciary with the power of judicial review is often seen as central to the project of constitutional entrenchment (Levinson 2011, 661). Constitutions render bargains credible in part because they enable courts to enforce the terms of those bargains if any party attempts to violate them (North and Weingast 1989).. Tom Ginsburg has described this phenomenon in new democracies that constitutionalize judicial review as a form of insurance, reassuring competing parties that even if they find themselves electoral losers, they will have a way to enforce the constitution against those who have won (Ginsburg 2003). Similarly, Ran Hirschl describes how constitutions can facilitate a process that he calls "hegemonic preservation," whereby ruling elites protect the policies they have established from democratic majorities that might wish to change them by placing these policies directly into the constitution, and enabling courts to nullify any future legislature's attempt to repeal them (Hirschl 2004). Those who conceptualize constitutional governance as the relationship between principal and agent explain that courts help to entrench the constitution by alerting the principal when the agent has overstepped its constitutional boundaries

As Professors Ginsburg and Hirschl's analyses suggest, constitutional projects devoted to entrenchment often invite the judiciary to play a sizable role in the policymaking process. After all, the less explicit and capacious the constitutional text is, the more discretion it will require to interpret and apply in new and changing circumstances. In addition, where constitutional change is challenging to achieve through formal, textual amendment, it may be more likely to occur through judiciaries, employing interpretive and/or extra-textual means. Entrenched, general constitutions do not necessarily expand the judiciary's discretion; we 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 the constitution with only minimal regard for the judiciary's reading (Whittington 1999; Kramer 2004). Yet where norms of judicial supremacy govern constitutional interpretation, spare and rigid frameworks will endow the judiciary with remarkable room to make constitutional meaning. In fact, when the meaning of highly entrenched constitutions does change, it is often because one political party or regime has succeeded in changing the composition of the constitutional court, rendering the court willing to redraw the constitutional boundaries it is responsible for policing (Balkin &

Levinson 2001; Gilman 2002). Thus, rigid framework constitutions are rigid at the level of their text, but not necessarily (and not likely) at the level of their actual meaning in either judicial doctrine or political practice.

3. The Gap Between Constitutional Theory and Modern Practice

The U.S. Constitution epitomizes the rigid, sparse framework that most of the constitutional literature describes. However, the vast majority of democratic constitutions, both within the United States and across the world, generally look very little like the U.S. Constitution. Specifically, most democratic constitutions are longer and less entrenched. In this section, we examine the length and revision rate of the constitutions of democratic polities, as well as the correlation between length and flexibility.

Our sample consists of the constitutions of all democratic national constitutions as well as the constitutions of the American states. In our previous work, we have shown that national constitutions and state constitutions share much in common (Versteeg & Zackin 2013). We examine both state and national constitutions here because both illustrate the constitutional design logic that we seek to expose in this paper. Our analysis, however, does not depend on the pooling of state and national constitutions, and both the empirical impressions painted in this section and the theoretical implications discussed in the next section remain similar when state and national constitutions are examined separately.

3.1 Constitutional Length

The prevailing view of constitutionalism in the U.S. has tracked that of Justice Marshall in *McCulloch v. Maryland*, when 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 deducted from the nature of those objects themselves." Anything else, Justice Marshall noted, would "partake a prolixity of a legal code" and would "never be understood by the public." (*McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316, 407 (1819)). Indeed, in its current form, the U.S. Constitution contains 7762 words, in seven original articles and twenty-seven amendments.

Few other democratic constitutions fit Marshall's famous prescription. For instance, most democratic constitutions are significantly longer.[1] The average constitution comprises 20,992 words, which is about three times as many as the U.S. Constitution. India's constitution, at 146,385 words, is the world's longest and almost twenty times the length of the U.S. Constitution. Nations with constitutions shorter than the U.S. Constitution include microstates like Luxembourg, Monaco, Micronesia, as well as a handful of dictatorial regimes that, by and large, lack any meaningful constitutional tradition, and that are not part of our analysis. Setting these aside, only three other democratic nations have fundamental documents of comparable length to the U.S. Constitution: Norway's 1814 constitution, Denmark's 1953 constitution, and Japan's 1947 constitution (which was famously drafted by General McArthur after World War

[1] The data on the length of national constitutions comes from the Comparative Constitutions Project.

II). The constitutions of the American states are comparable in length. The longest state constitution is that of Alabama, which at 340,136 words, is three times longer than the most verbose national constitution (India). Even the shortest state constitutions, those of New Hampshire and Vermont, are still longer than the federal Constitution. On average, democratic constitutions contain 28,468 words (36,333 words for state constitutions and 24, 371 words for the average national constitution).

Two interrelated constitutional design features appear to be responsible for the length of the world's constitutions and those of the U.S. states: their scope and detail (Ginsburg 2010). By scope, we mean that most democratic constitutions deal with an expansive range of topics. Both national and state constitutions cover topics such as fiscal policy and economic development, management of natural resources, and matters of cultural significance and citizen character. Indeed, the scope of constitutions has grown to such a degree that they now routinely cover topics far afield from fundamental rights and basic government structure. Louisiana's constitution designates Huey Long's birthday as a state holiday (La. Const. 1912, art. XIX, § 22) while Venezuela's constitution references the "liberator Simón Bolívar" (Venezuela Const. 1999, pmbl) and the Turkish constitution makes sixteen explicit references to "Atatürk," the nation's "immortal leader and the unrivalled hero" (Turkey Const. 1982, pmbl). In addition to these matters of political symbolism, both state constitutions and national constitutions enshrine a host of policy choices. The Alabama constitution deals with catfish, cattle, chickens, swine, sheep and goat, while the constitution of Nepal deals with cows and birds, the Swedish constitution provides for a right to reindeering, and a number of other national constitutions enshrine animal rights. Both state and national constitutions also contain detailed environmental regulations, as California's Marine Resources Protection provisions, New York's "Forever Wild" amendment, and Ecuador's rights for *pacha mama* (nature) attest.

Second, most democratic constitutions are characterized by substantial detail, using a large number of words to describe each of their provisions. For example, the provisions of the U.S. Constitution establishing the judicial branch—including its jurisdiction, the appointment and compensation of judges, and the institution of the jury trial—comprise 291 words (*compare* U.S. Const. art III, §§ 1–2 *with* Alabama Const. 1901, arts. 5-6; Ecuador Const. 2008, tit. 4, ch.4). By contrast, the constitutions of Alabama and Ecuador each use almost 4000 words to establish their judicial branches. These provisions are longer than Article III of the U.S. Constitution not because the judicial branches in Alabama or Ecuador perform a wider range of tasks than their counterparts, but only because these provisions describe the judiciaries' tasks in far greater detail.

3.2 Revision Rate

Not only are modern day democratic constitutions more capacious and detailed than the U.S. Constitution, they are substantially more flexible. Indeed, the U.S. Constitution has endured for over two centuries. By contrast, as Zachary Elkins, Tom Ginsburg and James Melton have demonstrated in a book length treatment on the subject, the median national constitution lasts nineteen years before it is replaced (Elkins at al. 2009). We ourselves have shown that the median state constitution lasts forty-four years before it is replaced (Versteeg & Zackin 2013).

Not only has the U.S. Constitution endured, the document has undergone textual changes only rarely, having been amended twenty-seven times, on seventeen different occasions. Thus, the changes in this document's meaning have not come through wholesale re-thinking or revision, and certainly not through regular constitutional conventions. Indeed, the U.S. Constitution and the politics surrounding it are characterized by an unusual degree of concern for the document's stability (Levinson 2011). Other democratic constitutions are typically amended with much higher frequency.

To capture the malleability of democratic constitutions, we calculate an *annual revision rate*, which captures constitutional changes that come about through wholesale replacement or amendment. Specifically, it 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 the state or country has existed.[2] The measure deliberately does not distinguish between amendment and replacement, because that distinction is not always meaningful (Sturm 1970). Some U.S. states, for example, have employed the formal amendment process to overhaul their entire constitutions, sometimes substituting packages of amendments for formal revision. For instance, California passed 130 amendments to its constitution in 1966, and South Carolina passed 200 amendments between 1971 and 1973. Not only can constitutions be effectively replaced through the mechanism of amendment, 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 the 1852 constitution, except for its replacing the words "United States" with "Confederate States" throughout. This phenomenon is also common in fledgling national democracies, when a new leader formally adopts a "new" constitution that maintains most of the content of its predecessor (Elkins et al., at 22-23). The collective historical constitutions of Haiti, the Dominican Republic, and Venezuela—which together account for ten percent of all national constitutions ever written—are essentially just variations on their predecessor documents; they were declared "new" constitutions only to mark changes in political leadership (Elkins et al., at 57).

The left-hand column of Table 1 list the top 30 most frequently revised democratic constitutions. This list is topped by India and Louisiana (which, coincidentally, have the same revision rates), followed by Texas, Austria, Norway, and Malaysia. The top 30 least frequently revised are depicted in the right-hand column of Table 1. The most stable national constitution is that of Japan, followed by the constitutions of the microstates of Nauru, Saint Lucia, and Saint Vincent and the Grenadines. The U.S. Constitution is among the most stable national constitutions. When excluding microstates, only the constitutions of Japan, Denmark, Paraguay, Cyprus and Vermont have been more insulated from change.

[2] This data comes from Dixon & Holden, and is available for 44 states.

Table 1: Top 30 most and least frequently revised democratic constitutions

Highest revision rate		**Lowest revision rate**	
Louisiana	0.68	Japan	0.02
India	0.68	Nauru	0.02
Texas	0.61	Saint Lucia	0.03
Austria	0.59	Saint Vincent & Gren.	0.03
Norway	0.57	Denmark	0.03
Malaysia	0.56	Antigua and Barbuda	0.03
Malawi	0.54	Saint Kitts and Nevis	0.03
Mexico	0.51	Paraguay	0.03
New York	0.50	Cyprus	0.04
Oklahoma	0.49	Andorra	0.05
Kenya	0.49	Kiribati	0.06
Virginia	0.49	Micronesia	0.07
New Jersey	0.48	Vermont	0.07
South Carolina	0.47	Bahamas	0.07
Colorado	0.47	United States	0.08
Malta	0.46	Australia	0.08
New Mexico	0.46	Namibia	0.08
North Dakota	0.45	Tuvalu	0.08
Finland	0.45	Dominica	0.08
Russia	0.45	Timor	0.08
Delaware	0.44	United Kingdom	0.09
Arizona	0.44	Palau	0.09
Florida	0.43	Italy	0.10
Trinidad & Tobago	0.42	Liberia	0.10
Bangladesh	0.42	Mozambique	0.10
Moldova	0.42	Fiji	0.10
Ohio	0.41	Bosnia and Herzegovina	0.10
Georgia	0.41	Marshall Islands	0.10
Oregon	0.41	Grenada	0.11
Senegal	0.41	New Hampshire	0.11

The average revision rate across all democratic polities 0.27, which means that average democratic constitution is revised roughly every three years. The revision rate for U.S. state constitution is 0.35, which means that the states revise their constitutions about every three years. The average revision rate for democratic national constitutions is 0.25, which means that democracies amend or replace their constitutions roughly every four years. This is substantially more than the U.S. Constitution, which, with a revision rate of 0.07 is revised every 14 years on average. To be sure, this is not a measure of how meaningfully or substantially these constitutions have been altered, only a measure of people's willingness to tinker with them. The word counts and revision rates presented above suggest that most democratic constitutions do get tinkered with fairly frequently and that they include not only the broad outlines of government, but also detailed policy provisions.

4. What Constitutions Really Do: An Alternative Theory of Constitutional Design

In order to understand why most democratic constitutions are neither particularly well entrenched nor exclusively broad frameworks, it is necessary to re-think entrenchment, viewing it not as an end or defining feature of constitutionalism, but as only one possible means of ensuring that a constitution's restraints will remain in effect. Entrenchment makes it harder for those bound by constitutions to dismantle the constitutional frameworks designed to restrain them, but the extremely specific policy provisions found in most of the world's less-entrenched constitutions may represent an alternative strategy to achieve this same end.

Specificity may substitute for entrenchment as a constitutional mechanism to constrain government. In the language of the principal-agent model, specific constitutional directives deprive the agent of discretion, leaving it with little room to abuse the principal's delegation of power. By increasing the scope of these constitutional mandates (i.e. including mandates on a wider array of policy issues) the principal can dictate exactly which policies its agents must enact and which they must refrain from enacting in manifold areas of governance. On this model, constitutions allow people to control their governments, not by establishing spare limitations through exceedingly rare (and rarefied) processes and making sure that those frameworks endure, but through constitutional micromanagement, specifying directly in the constitution how government should proceed.

This process generally requires the frequent delivery of detailed instructions and corrections to the organs of government through the vehicle of constitutional law. It permits democratic majorities to clarify their preferred applications of the constitution's majestic and broadly phrased principles and standards, and allows majorities to correct policies they see as mistaken, or even unconstitutional, by placing corrective provisions directly into the constitution.

Such specific constitutional policies require the un-entrenchment of constitutions. Writing a highly specific document likely entails substantial negotiation costs; different parties are often unable to agree on all the details of government up front. Flexibility may therefore be necessary to overcome the challenges associated with forging highly specific agreements. The knowledge that the constitution's meaning can be renegotiated on an ongoing basis, if groups come to perceive design flaws and/or circumstances change, might help parties to agree upon a detailed policy constitution. Alternatively, even when a constitution's drafters have not consciously lowered the bar for formal amendment, the inclusion of specific policies in a constitutional text may quickly necessitate updates to that text as small changes in circumstances require changes to the policy details enshrined in constitutions. Frequent amendment and periodic replacement may therefore become norms of a constitutional system that employs specificity.

Specificity and flexibility are mutually reinforcing not only at the birth of a constitution, but also throughout its life. The relatively undemanding amendment procedures and norms that enable frequent constitutional updating also encourage a variety of issue-oriented groups to pursue constitutional change in their efforts to advance particular policy goals. As constitutions begin to respond to the demands of these groups, other groups follow suit, insisting on the inclusion of a new set of specific policy instructions. Since constitutions are strongly path dependent (provisions are commonly

added, but rarely taken out), flexible constitutions tend to become increasingly broader in scope.

Of course, flexible constitutions are not only responsive to the demands of citizen groups, but are also vulnerable to the very officeholders they purport to control. There exists a fine line between the principal adjusting the agent's marching orders, and the agent enshrining its own interests. Around the world, examples abound of leaders changing the constitution to serve their own interests. Authoritarian leaders, for example, have sometimes been able to secure an extension of presidential term limits through constitutional amendment (Ginsburg et al. 2011). The U.S. 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 always involved. Popular involvement is thus an important condition to ensure that it is not the agent itself that changes the constitution to serve its own interest. 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 (Galligan & Versteeg 2013, 33). In fact, a majority of democratic nations now require the constitution to be approved by popular referendum (Ginsburg et al. 2009).

Flexible and specific constitutions reflect a different view of the judiciary from that of entrenched frameworks. They reflect the view that judges themselves can subvert a constitution, or that the judiciary is also an agent whose actions must be aligned with the interest of the principal. These constitutions attempt to guard against renegade judiciaries by providing detailed instructions to judges about how to (and how not to) interpret the constitution, and by allowing members of the polity to respond to unpopular judicial decisions through constitutional amendments that explicitly overturn unpopular rulings. Indeed, it is common for many constitutions to include amendments in direct response to unfavorable judicial rulings.

While judicial enforcement is often portrayed as essential to binding government with an entrenched constitution, it is not the only possible method of binding government. Although courts may certainly enforce the mandates and prohibitions contained in non-entrenched constitutions, their high level of specificity typically renders these documents less subject to battles over how to interpret and apply them, making it more obvious when government has violated them. It is therefore possible to hold elected officials accountable at the polls for these clear violations of their orders, especially in cases where elected officials violate recent and popularly-enacted constitutional instructions (Zackin 2013). The detailed nature of their provisions, therefore, renders these constitutions relatively enforceable without recourse to litigation.

The constitutional design we have sketched here, and the politics to which it gives rise, are dramatically different from the standard theory of constitutional design. These constitutions are subject to frequent revision, far more detailed, broader in scope, and create a very different role for the judiciary. Rather than view these differences as failings of constitutional design, however, we identify a coherent strategy in this design, one through which specificity and democratic participation limit government in place of fixed constitutional barriers. This design is more majoritarian and participatory, and as such, is less likely to secure robust protection to minorities. It is important to note, therefore, that while we argue that the majority of the world's constitutions are characterized by the

alternative design strategy we described here, ours is a descriptive claim only. We do not argue that this design strategy is normatively superior.

4.1. Rigid Frameworks and Flexible Policy Documents: A Unified Scale

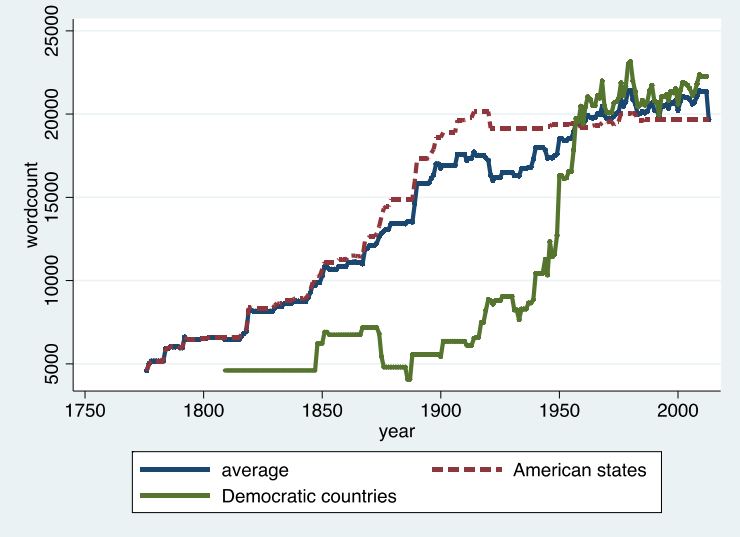
Given the alternative model of constitutional politics we have described here, we would expect constitutions' length and flexibility to be highly correlated. Indeed, the correlation between the revision rate and the word count of democratic constitutions is 0.51. It is no surprise then that the world's longest national democratic constitution—that of India— is also the most frequently revised. However, the entrenched framework and flexible policy-oriented constitutional models we describe here are ideal types. Even the U.S. Constitution contains several detailed policy provisions (take for instance the Third Amendment's guarantee that soldiers will not be quartered in private homes in times of peace without their owners' consent). Rather than placing real constitutions into one of these two categories therefore, we believe it is more fruitful to imagine constitutions lying along a continuum from entrenched, framework documents on the one side to flexible, policy-oriented constitution on the other.

5. Shifting Constitutional Models: From Rigid Frameworks to Flexible Policy Documents

As we demonstrated above most democratic constitutions today are relatively flexible and detailed, at least compared with the U.S. Constitution and the constitutional theories that emphasize entrenchment. In this section, we demonstrate that entrenched, framework constitution is the older model of constitutionalism, and that the flexibility and specificity we describe developed over time. This section examines when this shift took place and draws on the existing historical literature to describe its political context. This context is consistent with the alternative model of constitutionalism we have described, in which constitutions are designed to check government through specific and changeable provisions rather than entrenched frameworks.

First, constitutions have been getting longer. Figure 3 depicts the average length of state constitutions and the world's constitutions over time. These data actually understate the growth of state and national constitutions, since (unlike the data in Figures 1 and 2) it is based on the length of constitutions at the time of their adoption, that is, it omits the impact of amendments. To illustrate, Alabama's unwieldy constitution was 30,747 words long when first adopted in 1901, one-tenth of what it is today. (Its amendment establishing the "Forever Wild" program alone was longer than the entire federal constitution (Ala. Const. Amend 543 (amended 1992)). Nonetheless, Figure 3 reveals a strong trend towards longer constitutions, both for states and countries.

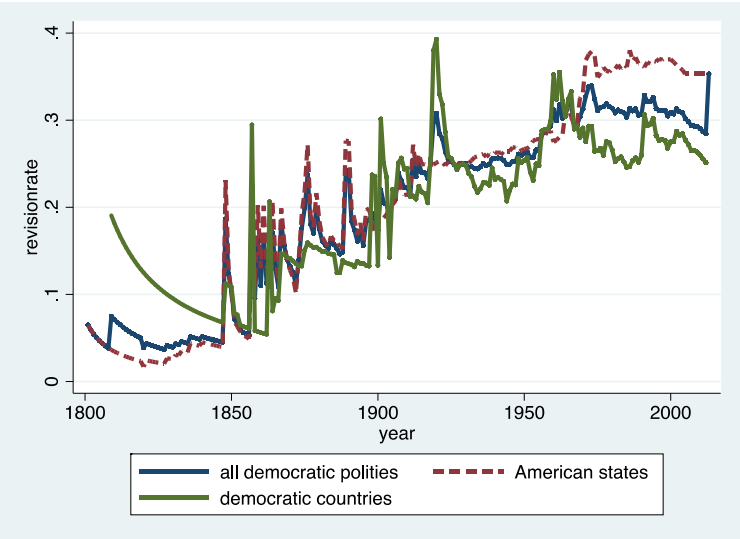
Figure 3: word count of democratic constitutions at time of their adoption



Second, the rate at which constitutions are revised has increased. In order to capture changes over time, we calculate a slightly different version of the revision rate introduced in part II. Specifically, we calculate for each democratic polity, in each year, the number of revisions the constitutional system has undergone at that point in time, and divide it by the total number of years that the polity has been in existence. So this revision rate changes from year to year in each polity.

Figure 4 depicts the average revision rates across all democratic polities; across all democratic countries and across all American states. Notably, it shows an upward trajectory for each of these groups.

Figure 4: Revision rates



Contextualizing the Shift:

We have argued that the changing form of constitutional documents reflects the emergence of a new model of constitutionalism, one in which specificity, rather than entrenchment, establishes meaningful checks on government. However, an alternative interpretation of this shift towards flexible, policy-oriented documents is that constitutions become more flexible and policy-oriented when they no longer need to constrain the government, and when constitutions no longer need to address the problem of agency control or the costs associated with it. Tom Ginsburg and Eric Posner, for instance, have argued that subnational constitutions are more flexible and specific than national constitutions because subnational polities do not need to exercise as much control over their sub-national governments when a national government will fulfill that monitoring function. They highlight U.S. State constitutions as an example of this phenomenon, arguing that state constitutions are more flexible and specific than the U.S. Constitution precisely because the U.S. Constitution and the Federal government can keep state governments in check. With the federal government in place to monitor state governments, state constitutions have devolved into changeable codes that reflect the particularistic and changeable outcomes of interest groups' bargains (Ginsburg and Posner, subconstitutionalism, 1610).

Ginsburg and Posner offer the increased amendment rate of state constitutions after the incorporation of the Bill of Rights as evidence that the flexibility of state constitutions was the result of a decreased need for these constitutions to check state governments once the Federal courts had assumed responsibility for monitoring them. (Ginsburg and Posner, subconstitutionalism, 1608-1610). As part of this analysis, Ginsburg and Posner distinguish between total revision through constitutional convention and piecemeal amendment, and argue that the decreasing rate of constitutional conventions at the state level, coupled with the increasing rate of amendment, is further evidence of a shift away from the creation of constitutions that establish meaningful monitoring structures toward constitutions that simply enact lower-order policy bargains.

When we measure constitutional flexibility differently, however, we arrive at a very different picture of the timing of this shift toward greater flexibility. As described above, individual amendments or groups of amendments can be quite substantively important, just as conventions can produce putatively new constitutions that are extremely similar to their predecessors. Therefore, we view constitutional changes achieved through both piecemeal amendment and wholesale revision as evidence of constitutional flexibility. Understood in this way, the states' constitutional flexibility is not a product of the mid-twentieth century, but of the mid-nineteenth. When we examine the rates of constitutional revision, rather than simply amendment, it becomes clear that state constitutions were changed more and more frequently throughout the second half of the nineteenth century (Figure 4). Furthermore, when we combine revision rates with state constitutional length (as a measure of their detail), we once again find that state constitutions began to grow in length at least a century before the incorporation of the Bill of Rights (Figure 3).

The political context of this nineteenth-century shift away from entrenched, framework constitutions is perhaps the most direct evidence that specific constitutions did not emerge from a diminished need to supervise and check government power, but from the opposite impulse to enhance citizens' oversight of governing institutions.

Indeed, as many scholars of U.S. state constitutions have noted, detailed instructions were added to nineteenth-century state constitutions as part of larger nationwide movements to enhance popular control over policymaking. The Jacksonians, then Populists, and finally Progressives all sought to augment and even replace representative government with new mechanisms of direct democracy. These reform projects were, of course, targeted at changing far more than state constitutional texts, but they accomplished their aims -- including the expansion of the franchise, the move to elect a greater number of governing officials, and the adoption of lawmaking through citizen initiative -- in part by securing changes to constitutional texts (Tarr 1998). Not only did state constitutions undergo these substantive changes, but the practice of constitutionalism itself (i.e. the drafting, amendment, and political use of these documents) also came to reflect a new model of constitutional governance, one that emphasized governments' simultaneous corruptibility and perfectibility, and used state constitutions as flexible mechanisms to exert direct and ongoing control of government officials and the public policies they created.

The original impetus to include detailed policy instructions in state constitutions is often traced to the economic crisis of 1839, which revealed the enormous fiscal blunders that many state legislatures had made, and motivated a wave of constitutional change designed to prevent legislatures from repeating these mistakes (Sturm 1982). Earlier in the decade, state legislatures had invested heavily in the canals, railroads, and banks, and had financed these investments not through taxation, but through indebtedness. As long as these investments were financially successful, they allowed state governments to profit from the economic boom while simultaneously developing their transportation and banking infrastructure, all without requiring them to raise taxes (Wallis 20055). However, when the economic boom of the 1830s ended with an equally dramatic bust, and these investments proved unprofitable, these schemes resulted in disaster. Many heavily indebted states were forced to default on their interest payments, while others only narrowly avoided default. These crises triggered widespread calls to ensure that legislatures would be permanently barred from this type of boom-time policymaking. Between 1842 and 1852, ten of the eleven states that held constitutional conventions wrote procedural restrictions on the way that states could issue debt directly into their constitutions (Wallis 2005, 219). These restrictions on state indebtedness were some of the earliest detailed policy instructions included in state constitutions.

Throughout the second half of the nineteenth century, agrarian reformers and advocates of organized labor pursued the inclusion of detailed policies for a similar purpose: to preempt particular policy choices and to force state governments into enacting new slates of popular policies. The Grangers, for instance, used constitutions to establish state oversight and regulation of railroad corporations and grain warehouses (Tarr 1998, 114-5). In many states, labor unions employed a similar strategy, pursuing the insertion of detailed, protective labor regulations directly into constitutional documents (Zackin 2013).

Nineteenth-century observers recognized this shift to policy-oriented constitutions, and identified these new documents as attempts to control the organs of state government. Indeed, it was obvious to many that a new model of constitutionalism was emerging, and by the end of the century, critics of this new form of constitutionalism regularly encouraged constitution writers to retain the familiar framework model, and leave policymaking to the institutions the framework established. The prominent jurist

Thomas Cooley, for instance, admonished the North Dakota Constitutional Convention of 1889: "You have got to trust somebody in the future, and it is right and proper that each department of government should be trusted to perform its legitimate function"(cited in Eaton 1892). As we have seen, however, these calls to preserve spare, framework constitutionalism went largely unheeded. An 1892 article in the Harvard Law Review described newly written state constitutions as products of the pervasive belief that "the agents of the people, whether legislative, executive, or judicial, are not to be trusted; so that it is necessary to enter into the most minute particulars as to what they shall not do"(Eaton 1892, 121). Even while the new model of constitutionalism was emerging, it was clear that specific policy-oriented constitutions had been designed to allow private citizens to exert more control over their governments.

Detailed policy provisions not only attest to a popular mistrust of legislatures, but also reflect the recognition that judges may exert enormous influence over public policy and that detailed, policy-oriented constitutions can curtail judicial power as well as legislative discretion. This is particularly true beginning at the beginning of the twentieth century, as it seemed increasingly apparent to progressives both within and outside the legal academy that judges were not neutral monitors, overseeing government officials on behalf of those they represented, but were themselves consequential policymakers. Progressive reformers realized that detailed constitutional provisions could check judicial power over the policymaking process by explicitly identifying particular policies as constitutionally permissible. As John Dinan has demonstrated, Progressive-Era opposition to judicial policymaking resulted in a wave of court-constraining constitutional provisions, designed to prevent state courts from invalidating legislation on subjects related to maximum working hours, minimum wages, collective bargaining, workers' compensation, and other social welfare programs (Dinan 2007). This wave of constitutional changes to add policy details developed not as a relaxation of the on government, but on the contrary, as an alternative model of constitutionalism—one in which specificity and frequent, democratic revision replaced entrenchment as a means of subordinating government to popular control exercised through referenda and elections.

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