AMERICAN RECONSTITUTION:
HOW THE STATES STABILIZE AMERICAN CONSTITUTIONAL DEVELOPMENT

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A DISSERTATION

In Political Science

Presented to the Faculties of the University of Pennsylvania

In Partial Fulfillment of the Requirements for the

Degree of Doctor of Philosophy

2017

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To Mom and Dad, My First Teachers

ACKNOWLEDGEMENTS

In my first week at the University of Pennsylvania I determined to live by Franklin's thirteen virtues until I completed my dissertation. I had some help from a few people, who modeled the following virtues from Franklin's list. Years before, my father taught me multiplication and division, which I was certain I could not learn, and so also taught me *resolution*. Suitably, decades later he helped me draft the quantitative part of this dissertation. My mother taught me *humility*. Like my father, she holds a deep commitment to public service, which inspired me to study political science. I would also like to remember my grandfather Ralph, who as a first-generation American had the chutzpah to put himself through college at Penn.

My dissertation committee demonstrated other virtues that Franklin listed. Rogers Smith, my advisor, was a model of *industry*, quickly reading and returning lengthy chapter drafts despite his many commitments to Penn and the discipline. He has shaped my thinking and identity as a political scientist. This dissertation would not exist without him. Anne Norton broadened my understanding of American political thought and also listened to my anxieties about failing my comprehensive examinations and about applying for jobs, and so demonstrated *sincerity*. Mark Graber, who taught me at the University of Maryland and supported my transfer to Penn, informed my understandings of how the Constitution has confronted questions of slavery, law, and *justice*, and gave a lawyer's insight on my work.

I would like to thank other professors as well. Jeff Green read my essays on Emerson's contemplative nature walks, and guided my thinking on living contemplatively and with *silence* and *tranquility*. Many Penn faculty answered other, more concrete questions. Professors at Maryland, including Fred Alford, introduced me to the professional study of political science. Faculty at the College of William and Mary, and P.J. Brendese in particular, encouraged my graduate school applications and gave me a sound intellectual foundation. I would also like to thank the University of Pennsylvania and University of Maryland for funding my doctoral study over the last seven years.

Finally, my classmates and friends at Penn and Maryland, living on graduate student stipends, showed me how to live in *frugality*, though we were not always as *moderate*, *chaste*, and *temperate* as the puritanical Franklin instructed. Occasionally we failed Franklin's injunction to temperance and to "drink not to elevation," but I trust this elevated our minds and conversation. A few of these classmates were at times also roommates who tolerated my lapses in *order* and *cleanliness* while demonstrating these virtues themselves. To these friendships and late night conversations I owe this dissertation's best ideas.

ABSTRACT

AMERICAN RECONSTITUTION:
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Robinson Woodward-Burns

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The American Constitution is exceptionally stable. Americans have proposed and ratified only one national constitution with only twenty-seven amendments. In contrast, the American states have proposed 354 constitutions, held 250 conventions, and ratified 146 constitutions with at least 5,900 amendments. Why is the federal Constitution so much more stable than the state constitutions? Many scholars cite the federal Constitution's higher procedural barriers to revision. But this dissertation asserts that ongoing state constitutional revision resolves national constitutional controversies, preempting federal constitutional amendment and quieting national inter-branch conflict. The dissertation tests this claim in two ways. First, it compares all attempted federal and state constitutional revision since 1776, drawing on an original dataset of all proposed state constitutions to show that federal and state constitutional revision are closely associated over time. Second, the dissertation disaggregates this trend by topic, offering case studies in which state constitutional revision preempted or resolved national constitutional conflicts. Since the states constrain the scope of national constitutional controversies, one cannot fully understand the political development of the national branches or Constitution without the states.

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PART I: CONSTITUTIONAL THEORY

CHAPTER 1: EXPLAINING FEDERAL AND STATE CONSTITUTIONAL REVISION

"The question of the relation of the States to the Federal Government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it."

Woodrow Wilson, 1908[1]

I. Question: What Determines Constitutional Duration?

Constitutions vary in duration. Some last a year, while others last centuries. Why is this, and what ought to be done about it?

This question is particularly important in the United States, home to the world's first and oldest formal written national constitution.[2] Americans have proposed and ratified only one national constitution and passed only twenty-seven national amendments in the 230 years since the Constitution's drafting. In contrast, the American states have proposed 354 state constitutions, held 250 conventions, and ratified 146 constitutions and 5,900 amendments. The average state constitution lasts only 64 years.[3]

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[1] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 173.

[2] The question is much older than the United States. Plato and Aristotle prescribed constitutions to calm Greek factions, Machiavelli revived Roman institutions to reconcile warring Florentine classes, and Hobbes and Locke bound the English crown and republicans to a common contract. Inspired by these constitutions, Madison framed a document to survive "the mortal diseases under which popular governments have everywhere perished." Theorists return to the question because it is central to politics – constitutions shape formal institutions and statutes and informal civic norms – and because it remains unsolved. Madison's mortal diseases plague modern national constitutions, which last on average only nineteen years. For the quote see Alexander Hamilton, James Madison, and John Jay, *The Federalist: With Letters of Brutus*, ed. Terence Ball (New York: Cambridge University Press, 1788), 40. For the estimate of nineteen years see Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge ; New York: Cambridge University Press, 2009), 129.

[3] The federal Constitution is also the tersest and perhaps most stable written constitution in the world, too extreme an outlier to represent other national constitutions. While the state constitutions resemble many national constitutions, this project does not speculate on constitutions outside the United States. For the comparison of American state to other national constitutions, see Mila Versteeg and Emily Zackin, "Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design," *American Political Science Review* 110, no. 4 (2016). This dissertation uses a dataset including all 146 ratified state constitutions to calculate that a ratified state constitution on average lasts 64 years. This figure is roughly affirmed by Hammons. Christopher W. Hammons, "Was James Madison Wrong? Rethinking the American

What explains the difference? Why is the federal Constitution so much more stable than the state constitutions and what does this mean for American constitutional development?

The federal Constitution is stable for a few well-known reasons.[4] Almost all proposed amendments have fallen short of the supermajority requirements in Article V. Amendments must first clear two-thirds of both congressional houses or both houses of two-thirds of state legislatures, and then clear three-quarters of the state legislatures for ratification. Between 1788 and 2014, only twenty-seven of 11,792 proposed amendments passed.[5]

Additionally, the Constitution's brevity and ambiguity might allow activist federal judges to fundamentally reinterpret the document, achieving constitutional reform without amendment. But judges rarely use this power. The president and Congress nominate and confirm sympathetic and restrained judges, can strategically constrain federal courts' jurisdiction, and may keep contentious issues off the federal docket to prevent constitutional reinterpretation.[6] And even an activist judiciary cannot unilaterally enforce its decisions without executive enforcement and congressional financing.[7] So the courts usually use their interpretive power to resolve or preempt constitutional disputes

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Preference for Short, Framework-Oriented Constitutions," *The American Political Science Review* 93, no. 4 (December 1, 1999): 837–49, doi:10.2307/2586116. For the number of state amendments, see G. Alan Tarr, *Understanding State Constitutions* (Princeton University Press, 1998), 24.

[4] A stable constitution is one that is infrequently amended, replaced, or reinterpreted.

[5] See Michael G. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (St. Martin's Press, 1986), 11; "Amending America: Proposed Amendments to the United States Constitution, 1787 to 2014," *National Archives and Records Administration Data Catalog*, 2016, http://www.archives.gov/open/dataset-amendments.html.

[6] Robert Alan Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279; Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7, no. 01 (1993): 35–73, doi:10.1017/S0898588X00000687.

[7] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed (Chicago: University of Chicago Press, 2008).

that might otherwise force constitutional amendment or crisis, gradually easing America's eighteenth-century Constitution into new contexts.

Instead, the public might reinterpret the Constitution. Bruce Ackerman describes America as a "dualist democracy," with entrenched representatives passing ordinary statutes and the people in rare moments of crisis electing radicals to amend or reinterpret the Constitution to legally bind these entrenched representatives.[8] But these radical, landslide majorities and constitutional realignments, circumventing ordinary politics, are by definition exceptional. Larry Kramer trusts popular mobs to circumvent legislators, judges, and formal amendment and assert new, informal interpretations of the Constitution.[9] Yet this rarely results in formal amendment. Further, most ordinary Americans subscribe to the same core constitutional commitments, shying from rejecting these hallowed values for radical new constitutional readings.[10]

But the state constitutions complicate this story. American scholars largely neglect the 146 state constitutions for the federal one, missing almost all of American constitutional revision. Far easier to amend or replace, the state constitutions include many more provisions on citizenship, the franchise, education, police powers, and economic and positive rights. Myopic focus on the federal Constitution, designed for

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[8] These radicals win landslide election during times of unusual crisis, gaining the massive legislative majorities – sometimes extralegally – needed to revise the Constitution. For example, Northern voters elected a Republican majority to the Thirty-Ninth Congress, which in December of 1865 excluded representatives from all Confederate states save Tennessee. This granted Republicans four-fifths of congressional seats, enough to score the 13th and 14th Amendments, constraining subsequent conservative Democratic congresses. Though procedurally legal, this violated Article V's spirit of consensual revision, and the antebellum Constitution's commitment to slavery. Bruce Ackerman, *We the People: Transformations*, vol. II (Cambridge, Mass.: Belknap Press, 1998), 15–17, 99–119.

[9] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

[10] Americans interpret these shared values in diverse and sometimes conflicting ways, but rarely escape them. On veneration for the federal Constitution, see for example Kammen, *A Machine That Would Go of Itself*; Sanford Levinson, "Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?," *William and Mary Law Review* 29 (1988 1987): 113.

inflexibility and permanence, exaggerates the stability of civic inclusion, constitutional reform, and American politics generally.

A few factors unique to the state constitutions explain their relative instability. First, the state constitutions are easy to amend, and so are packed with politically motivated, contentious provisions, which are subject to continuous repeal or replacement. Further, while the federal Constitution enjoys broad public veneration, most Americans ignore or denigrate their state constitutions and have few reservations with state constitutional revision. Finally, state constitutions are perennially embroiled in citizenship law disputes, and thus are subject to frequent revision.

But most importantly, the state and federal constitutions evolve jointly. Many scholars describe federal and state constitutional revision in isolation, and misread each. The aim of this project is to integrate accounts of federal and state constitutional development.

This dissertation proposes a new determinant of American constitutional change – constitutional decentralization. State constitutional reform addresses national constitutional controversies, averting federal amendment. Specifically, presidents, members of Congress, and federal judges can defer divisive and complicated constitutional issues to the states. Reformers thwarted by Article V might also take their cause to the state legislatures. These wedge issues may split state legislative parties, or state legislators may capitulate to reformers, proposing constitutional revisions that clear the states' relatively low bar to reform. Even if they are unsatisfied with this revision, reformers may find their cause trapped at the state level, where constitutional reform can be slow, piecemeal, or unsuccessful. Controversy is often resolved or quarantined at the

state level, quieting calls for national constitutional reform and preventing national amendment.

The state constitutions vent pressure for national constitutional reform, and thus can guide the timing, nature, and scope of American constitutional and political development. There are three implications to this. National coalitions defer controversies not only to the courts, but also to the states. Armed with unique police powers, the states affect state and national policy in ways courts cannot. Second, in postponing or resolving national disputes, the states may quietly temper conflict between the national branches. Neglecting the states risks misunderstanding national constitutional development. Third, the states guide national constitutional realignments. States do not always lag behind national realignments, but sometimes lead them. Additionally, constitutional devolution can postpone change, explaining the periodicity of American constitutional realignments. Since state constitutional revision stabilizes the federal Constitution, ignoring the state constitutions, as most scholars do, misunderstands the federal Constitution.

Finally, state constitutional instability solves an old normative dilemma in American constitutionalism. The federal Constitution claims popular authorization, but forbids almost all Americans from directly engaging in the amendment process. Only the people's representatives assembled in Congress, the state legislatures, and in constitutional conventions can vote on proposed amendments, and Article V's supermajority requirements have blocked almost all reformers from calling these bodies to a vote. The Constitution lacks popular legitimacy. Yet ordinary Americans have revised their state constitutions through initiatives, referenda, legislative amendments,

legislative conventions, popular conventions, and extralegal popular tactics. State constitutional revision makes American constitutionalism more legitimate.

The state constitutions are a quiet but main engine of American constitutional and political development. This dissertation expounds this claim in two parts. Part I ventures a theory of American constitutional development. This first chapter recounts common, independent explanations of national constitutional stability and state constitutional instability. The second chapter challenges these, asserting that state constitutional instability and reform quiets national controversies, securing national constitutional stability and guiding American constitutional development. The third chapter gives a brief overview of all attempted state and federal constitutional revision. Part II tests this claim against American constitutional development. The fourth chapter recounts how Revolutionary-era state constitutional framers resolved questions over legislative sovereignty and design, frontier regulation, and slavery, preempting these debates at the federal Convention. In the antebellum era, state constitutional reform prevented and resolved national constitutional controversies over slavery, banking, and suffrage reform, as explained in the fifth chapter. The final chapter shows how crises over territorial slavery, fugitive slaves' rights, black citizenship, and state sovereignty escalated into the Civil War, and how postwar state constitutional revision settled national debates and shaped Reconstruction constitutional order. State constitutional reforms quiet some national constitutional controversies and reforms while entirely preempting others. Thus one cannot fully understand national constitutional and political development in America without studying the states.

II. Federal Constitutional Stability

Scholars give several explanations for the federal Constitution's stability. First, the document is notoriously difficult to amend. Article V requires a proposed federal amendment receive a two-thirds majority in both congressional houses or in two-thirds of the state legislatures, and then pass three-fourths of the state legislatures or ratifying conventions. All legal efforts to reform Article V have failed, and themselves would have to clear these difficult supermajority requirements.[11] Further, Congress has set strict deadlines for a proposal to clear these hurdles, killing some proposals that waited for ratification.[12] As in the past, partisan polarization in Congress and the state legislatures currently precludes consensus and thus amendment.

Generations of scholars have attributed the Constitution's stability to Article V's supermajority requirements. In 1902, the reform-minded political scientist John William Burgess lamented that the Constitution's great "error lies in the artificially excessive majorities required in the production of constitutional changes," which block the innovative, experimental "impulse in democratic societies."[13] His progressive colleague Herman Ames agreed that Article V raises "insurmountable constitutional obstacles" before necessary constitutional reforms, concluding that the "majorities required are too large."[14] Writing in 1929, Michael Musmanno reiterated Ames' conclusion, as did Lester

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[11] Janice C. May, "Constitutional Amendment and Revision Revisited," *Publius: The Journal of Federalism* 17, no. 1 (January 1, 1987): 154–55.

[12] Such was the fate of the Equal Rights Amendment and the District of Columbia Voting Rights Amendment. In 1921, the Supreme Court in *Dillon v. Gloss*, 256 U.S. 368, 376 (1921) upheld the seven-year ratification window set by Congress.

[13] John William Burgess, *Political Science and Comparative Constitutional Law: Sovereignty and Liberty*, vol. I (Boston: Ginn and Company, 1902), 151.

[14] Herman Vandenburg Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History* (Washington: Government Printing Office, 1897), 301–4. John R. Vile summarizes the progressives' special dislike for the Article V process. See John R. Vile, *The Constitutional Amending Process in American Political Thought* (New York: Praeger, 1992), 137–56.

B. Orfield in 1942, Charles Leedham in 1964, Clement Vose in 1972, and Alan Grimes in 1978.[15] Recently Michael Kammen, Bruce Ackerman, and Robert Dahl have reaffirmed this story.[16] As Michael J. Lynch noted "more than 10,000 proposals have led to a mere twenty-seven amendments. The obvious limiting factor is the special majority required in Congress."[17] Even after passing Congress, a proposal requires ratification by both houses of three-fourths of the states. Since the 1791 ratification of the Bill of Rights, the states rejected six of twenty-three amendments subject to a ratification vote. Sanford Levinson concludes: "Article V constitutes what may be the most important bars of our constitutional iron cage… [it] has made it next to impossible to achieve such adaptation where amendment is thought to be necessary."[18]

But Article V alone cannot explain the Constitution's endurance. Surveying all national constitutions ratified since 1789, Elkins, Ginsburg, and Melton find that inflexible constitutions cannot adjust to survive unexpected crises. They also find the United States Constitution to be the least flexible of all national constitutions, suggesting

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[15] See Michael Angelo Musmanno, *Proposed Amendments to the Constitution: A Monograph on the Resolutions Introduced in Congress Proposing Amendments to the Constitution of the United States of America.* (Washington: Government Printing Office, 1929); Lester B. Orfield, *The Amending of the Federal Constitution* (Ann Arbor: University of Michigan Press, 1942); Charles Leedham, *Our Changing Constitution* (New York: Dodd, Mead, 1964); Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900* (Lexington, MA: Lexington Books, 1972); Alan Pendleton Grimes, *Democracy and the Amendments to the Constitution* (Lexington, MA: Lexington Books, 1978). For a review of these and other scholarly works on Article V, see David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (University Press of Kansas, 1996), ix–xviii.

[16] Kammen, *A Machine That Would Go of Itself*; Bruce Ackerman, *We the People: Foundations*, vol. I (Cambridge, Mass.: Belknap Press, 1993); Robert Alan Dahl, *How Democratic Is the American Constitution?* (New Haven, Conn: Yale University Press, 2001), 144–45; Kramer, *The People Themselves*, 251.

[17] Per Lynch, only seven amendments have failed ratification by the states after being proposed by Congress, suggesting that the barrier to amendment is not the states but Congress. Michael J. Lynch, "Other Amendments: The Constitutional Amendments That Failed," *Law Library Journal* 93 (2001): 309.

[18] Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford University Press, 2006), 159–66.

that Article V would threaten the Constitution's endurance.[19] How, then, has the Constitution survived?

In lieu of amendment, the Constitution's brevity and according ambiguity allow federal judges leeway to reinterpret the document. In reinterpreting or negating a core value, judges can fundamentally change the Constitution.[20] But federal judges rarely do so. Per Robert Dahl, presidents and Congress appoint likeminded federal judges to affirm existing statutes and constitutional interpretations.[21] Moreover, since the president leads national coalitions, presidents often determine whether to defer constitutional issues to the courts, keeping some issues off the federal docket.[22] Presidents leading new, unified congressional coalitions can seize constitutional interpretation from the courts.[23]

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[19] Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 81–83, 99–101, 140–41.

[20] According to Jacobsohn, detailed "militant" documents or provisions specify how institutions can interpret and implement these aspirations. For example, the 1868 Fourteenth Amendment specifically deputized Congress to implement the principle of equal protection over the objections of ex-Confederates in the states. Conversely, short, vague "acquiescent" constitutions defer these textual controversies to political institutions to determine in accord with existing norms. See Gary Jacobsohn, *Constitutional Identity* (Cambridge, Mass: Harvard University Press, 2010), 226–38. Many provisions in the American Constitution are the latter sort. For more on constitutional identity and fundamental reinterpretation, see Gary Jacobsohn, "Constitutional Identity," *The Review of Politics* 68, no. 03 (June 2006): 361–397, doi:10.1017/S0034670506000192; Gary Jacobsohn, "Rights and American Constitutional Identity," *Polity* 43, no. 4 (October 2011): 409–31, doi:10.1057/pol.2011.10; Jacobsohn, *Constitutional Identity*, 2010.

[21] Dahl, "Decision-Making in a Democracy." Dahl notes the Supreme Court overturned only eighty-six congressional statutes between 1790 and 1957, only fifteen of which were major policies overruled within four years of passage, and almost all of these were reversed by congressional legislation. Dahl explains the president and Congress restrain the Court through frequent appointment and foreknowledge of nominees' preferences, excluding hostile nominees. Dahl's study downplays the Court's independence by excluding the activist New Deal and Warren Courts, so the real question is not *whether* federal judges uphold existing constitutional readings, but *when*. See Jonathan D. Casper, "The Supreme Court and National Policy Making," *The American Political Science Review* 70, no. 1 (March 1, 1976): 50–63, doi:10.2307/1960323. As Lasser notes, the Court does not always quiet controversies. Lasser notes three cases in which reactionaries on the Court issued a decision that exacerbated national polarization and the need for realignment. William Lasser, "The Supreme Court in Periods of Critical Realignment," *The Journal of Politics* 47, no. 04 (November 1985): 1174–1187, doi:10.2307/2130812. *Dredd Scott* is one such example.

[22] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, Mass: Belknap Press, 1993); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2009).

[23] Per Dahl and Funston, the Court, appointed by the old regime, opposes a reconstructive president or Congress until these bodies appoint new, allied justices and shift the Court. Dahl, "Decision-Making in a Democracy"; Richard Funston, "The Supreme Court and Critical Elections," *The American Political Science Review* 69, no. 3 (September 1, 1975): 795–811, doi:10.2307/1958390. Adamany agrees the Court

Alternately, when a contentious, crosscutting issue threatens to split a waning coalition, the president can defer the issue to the courts, which will dismiss or slow appeals and quiet constitutional controversies, helping preempt amendment.[24] In either case, the courts will likely avoid radical constitutional reinterpretation. And the few activist judges that defy the president and Congress, lacking the power of the sword and purse, cannot unilaterally enact constitutional reform.[25]

One might trust ordinary citizens to circumvent federal officials and reinterpret, protest, or block repugnant constitutional provisions, reforming the Constitution.[26] For example, Revolutionary mobs captured Stamp Act officials in order to abrogate the Act, and antebellum abolitionists hid fugitive slaves to vacate the Constitution's Fugitive Slave Clause.[27] But Americans are constitutionally pious, accepting the dominant, shared, popular constitutional dogma. The risk of American mobs is not so much their violence as their conformity. Public circumvention of ordinary politics is thus rare, reserved for crises and moments of exception.[28] And even in these moments, popular mobs and

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may initially oppose realignment coalitions, stripping new presidents and congresses of constitutional legitimacy. David Adamany, "Legitimacy, Realigning Elections, and the Supreme Court," *Wisconsin Law Review* 1973 (1973): 820–25. This may be why realignment presidents like Jackson, Lincoln, and Franklin Roosevelt claimed sole authority to interpret the constitution, to the exclusion of the Court.

[24] Graber, "The Nonmajoritarian Difficulty."

[25] Rosenberg, *The Hollow Hope*.

[26] This school of "popular constitutionalism" rests on Aristotle's insight that a people and its constitution are distinct – a people can outlast a constitution, and vice versa – but are interdependent. See Aristotle's *Politics* III.3, 5-8, 1277b, IV.11 1295a, VIII, which describes the *politea,* or constitutional regime, as a city's formal rules distributing property and public office and informal way of life. A single polity can shuffle between various types of regime. Similarly, Hanna Pitkin takes "constitution" as a verb describing an adversarial, discursive process pitting competing values against each other. A constitution is "the unintended, collective by-product of our myriad private activities…constituting is not just doing what one pleases." Hanna Fenichel Pitkin, "Idea of a Constitution, The," *Journal of Legal Education* 37 (1987): 168.

[27] Kramer, *The People Themselves*; Jason A. Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Duke University Press, 2010); Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path Toward Constitutional Democracy* (Oxford University Press, 2013). See Article IV, Section 2, Clause 3.

[28] For example, Larry Kramer traces American popular constitutionalism to the Glorious Revolution, when Englishmen and colonists protested, rioted, and fundamentally revised their constitutional customs. This moment is exceptional, perhaps only matched in Anglo-American law by the American Revolution.

activists eschew the formal process of amendment, explaining the resilience of the written Constitution.

Similarly, Bruce Ackerman describes America as a "dualist democracy," with entrenched representatives passing ordinary statutes and the people infrequently electing radicals to amend or reinterpret the Constitution to legally bind these entrenched representatives. For example, the Reconstruction Republicans, like later New Deal Democrats, "provoked a fundamental reworking of constitutional identity," through the Reconstruction Amendments and Social Security Act.[29] These parties won landslide election during times of unusual crisis, gaining the landslide legislative majority needed to revise the Constitution. But these coalitions too are exceptional.

This stability further increases veneration. James Madison hoped the people would interpret the Constitution rarely, only on "certain great and extraordinary occasions… [for] frequent appeals would in great measure deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[30] The Constitution, thanks to Article V and judicial review,[31] ages largely unamended and earns public veneration,

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Additionally, since American popular constitutionalism grew from English practice, it relies on ideas of shared constitutional custom, tradition, and gradualism. Kramer credits the English constitution with the "capacity to improve without changing," adding "Details, applications, even institutions might change, but the fundamental law itself remained constant and retained its essential substance." Kramer, *The People Themselves*, 14–15.

[29] Unlike Jacobsohn, Ackerman does not assert revising core commitments changes constitutional identity. This leaves Ackerman's idea of identity murky. See Ackerman, *We the People*, II:8; John E. Finn, "Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity," *Constitutional Political Economy* 10, no. 4 (November 1, 1999): 355–65, doi:10.1023/A:1009023000354; Jacobsohn, "Constitutional Identity," June 2006; Jacobsohn, *Constitutional Identity*, 2010; Jacobsohn, "Rights and American Constitutional Identity.".

[30] Hamilton, Madison, and Jay, *The Federalist*, 245–46, 309.

[31] In *Federalist 78*, Alexander Hamilton stripped colonial legislatures and popular conventions of the power of constitutional review, granting it to the unelected federal judiciary, hoping the people would defer to judges. Hamilton claimed "the will of the legislature declared in its statutes stands in opposition to that of the people declared in the constitution, [and] judges ought to be governed by the latter, not the former."

requires from public officials an oath of fealty, and forbids mandatory religious oaths to other idols.[32] Veneration cools popular passions for amendment,[33] which increases stability, in turn increasing veneration. Madison designed the federal Constitution to ossify as it aged.[34]

Legislators follow passing majoritarian passions, against the aim of the permanent Constitution and thus against popular will. Life tenure insulates the judiciary from these majoritarian passions, allowing impartial judicial review in accord with true constitutional aims and the true, enduring popular will. The judiciary thus tempers and modifies popular agitation for constitutional reform. To Hamilton, judges understand the popular will better than the people themselves, or their elected representatives. Popular constitutional revision is not only misguided, but also defies true popular will. Similarly, Rousseau asserts the majoritarian "will of all" is not the true, unanimous general will, but rather an impermanent and inaccurate representation of the general will. In this sense Rousseau, like Madison and Hamilton, constrains popular, majoritarian politics. See Ibid., 377–83. *On the Social Contract* II.3-4, IV.2.

[32] See Article II, Section 1, Clause 8, and Article VI, Section 3.

[33] As a tangential point, this undermines reading Madison as a liberal pluralist. In *Federalist 10*, Madison uses federalism to moderate factions, claiming it is impossible and undesirable to control citizens' preferences. This Madison adopts the classical liberal argument for value neutrality, against interference in private belief, and adopts the pluralist argument that legal procedure channels competing interest groups toward the public good. Charles Beard and Robert Dahl popularized *Federalist 10* as the main thesis of *The Federalist*. However, *The Federalist* is a polemical and thus inconsistent pamphlet. In *Federalist 37, 49*, and *78*, Madison and Hamilton suggest popular constitutional veneration will stabilize the constitution, constraining popular passions and thus popular politics. For Madison, a constitution is a tool to control hearts and minds: "The passions ought to be controuled and regulated by the government." Hamilton, Madison, and Jay, *The Federalist*, 248; Jack Rakove, "Constitutional Problematics, circa 1787," in *Constitutional Culture and Democratic Rule*, ed. John Ferejohn, Jack N. Rakove, and Jonathan Riley (Cambridge University Press, 2001), 42–46.

[34] Madison got his wish, for Americans have long worshipped their Constitution. For example, on July 4, 1788, Philadelphians celebrated the Constitution's recent ratification with a grand "Federal Procession." Pennsylvania's Chief Justice Thomas McKean led the parade, brandishing a copy of the Constitution while standing atop an ornate coach, followed by workingmen's trade councils bearing signs and banners. Three weeks later, New Yorkers of all trades held their own parade to salute the Constitution. See Sean Wilentz, *Chants Democratic: New York City & the Rise of the American Working Class, 1788-1850* (New York: Oxford University Press, 1984), 87; Kammen, *A Machine That Would Go of Itself*, 14–15, 45. After the tumult of the Civil War, Congress' Reconstruction Acts forced state constitutional framers to acknowledge the primacy of the federal Constitution and forced state officeholders to "support the Constitution and laws of the United States." In 1887, the Constitutional Centennial Commission reaffirmed this. John Fiske's widely read 1891 schoolbook, *Civil Government in the United States*, called the federal Convention "one of the most remarkable deliberative bodies in history." John Fiske, *Civil Government in the United States: Considered with Some Reference to Its Origins* (Boston: Houghton, Mifflin and Company, 1891), 209. Progressive historians, lawyers, and political scientists advocated a flexible constitution, and observed and warned against this resurgence in constitutional veneration. Hermann Von von Holst, *The Constitutional and Political History of the United States*, trans. Ira Hutchinson Brainerd, vol. I (Washington: Callaghan, 1877); A. Lawrence Lowell, "The Responsibilities of American Lawyers," *Harvard Law Review* 1, no. 5 (1887): 232–40, doi:10.2307/1321338; James Mitchell Ashley, "Constitution Worship," in *Public Opinion: A Comprehensive Summary of the Press throughout the World on All Important Current Topics*, vol. XIX (New York: Public Opinion Company, 1895); Edward S. Corwin, "Worship of the Constitution," *Constitutional Review* 4 (1920): 3–10. But as Franklin Roosevelt centralized constitutional authority under the New Deal, the 1937 Sesquicentennial Commission again reminded Americans of the authority of their national Constitution. Half a century later, the Bicentennial Commission printed and distributed reams of

This is not to say Americans agree in interpreting constitutional commitments. Rather, political opponents legitimize their claims by upholding the same Constitution, and often the same clause. In the Fifth Amendment's Due Process Clause's loose guarantee of "life, liberty, and property" antebellum slaveholders saw a right to their property in slaves, and these slaves saw a right to their freedom.[35] American constitutional discourse and development is fraught and adversarial, but rarely escapes the bounds of the Constitution.

The federal Constitution's inflexibility, brevity, and age and public veneration encourage judges and citizens to reinterpret their Constitution, rather than amend or replace it. But popular and judicial reinterpretation tend to affirm existing constitutional commitments or aspirations. Since national popular constitutionalism and judicial review often work within existing constitutional commitments, they rarely fundamentally realign the federal Constitution, helping explain the Constitution's stability.

III. State Constitutional Instability

Most scholars ignore the state constitutions. Early American political scientists chronicled state constitutional development until turning to political behavior in the mid-twentieth century. [36] Despite the recent return to historical institutionalism and American

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pocket Constitutions. In modern America's fairly pluralist, secular society, the Constitution remains one of the few objects of common worship. Thomas C. Grey, "The Constitution as Scripture," *Stanford Law Review* 37, no. 1 (1984): 1–25, doi:10.2307/1228651; Kammen, *A Machine That Would Go of Itself*; May, "Constitutional Amendment and Revision Revisited," 168; Levinson, *Our Undemocratic Constitution*; Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (Oxford University Press, 2012).

[35] Similarly, the Constitution's companion, the Declaration of Independence, is an aspirational document, promising an equality unrealized at its framing and still incomplete. But it is an exceptionally vague and acquiescent document. And so, eighty-seven years after its ratification, Abraham Lincoln found in the Declaration a promise of equality compatible with abolition, and Jefferson Davis found a right to proslavery succession.

[36] For this history see Donald S. Lutz, "The Purposes of American State Constitutions," *Publius* 12, no. 1 (January 1, 1982): 27–31, doi:10.2307/3329671. For Progressive-era accounts of the state constitutions, see

political development, no comprehensive causal account of state constitutional duration has been written.[37] Similarly, many legal scholars overlook the states, genuflecting to the federal Constitution, which exceeds the state documents in power, gravitas, and stability. The state constitutions, with their thousands of obscure provisions and ten thousand proposed amendments are dauntingly long and unwieldy. Thus most literature on American constitutionalism disregards the state documents for the federal one.[38]

This is a problem. Almost all constitutional revision in America happens at the state level. Further, the federal and state constitutions evolve interdependently, so to

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for example John Alexander Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* (Chicago: Callaghan and Company, 1887); James Bryce, *The American Commonwealth*, vol. I (London: Macmillan, 1888), 427–62; Francis Newton Thorpe, “Recent Constitution-Making in the United States,” *The ANNALS of the American Academy of Political and Social Science* 2, no. 2 (November 1, 1891): 1–57, doi:10.1177/000271629100200201; Amasa M. Eaton, “Recent State Constitutions,” *Harvard Law Review* 6, no. 2 (1892): 53–72, doi:10.2307/1321703; Walter Fairleigh Dodd, “Judicial Control over the Amendment of State Constitutions,” *Columbia Law Review* 10, no. 7 (November 1, 1910): 618–38, doi:10.2307/1110983; Christopher B. Coleman, “The Development of State Constitutions,” *Indiana Magazine of History*, June 1, 1911; Walter Fairleigh Dodd, “The Function of a State Constitution,” *Political Science Quarterly* 30, no. 2 (June 1, 1915): 201–21, doi:10.2307/2141919; James Quayle Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914* (Boston: Ginn and Company, 1915); Walter Fairleigh Dodd, “The Problem of State Constitutional Construction,” *Columbia Law Review* 20, no. 6 (June 1, 1920): 635–51, doi:10.2307/1111866; John Donald Hicks, *The Constitutions of the Northwest States* (Montana Constitutional Convention Commission, 1923); Fletcher Melvin Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy* (University of North Carolina Press, 1930).

[37] See Griffin Stephen M. Griffin, “Constitutional Theory Transformed,” in *Constitutional Culture and Democratic Rule*, ed. John Ferejohn, Jack N. Rakove, and Jonathan Riley (Cambridge University Press, 2001). For an inquiry on applying historical institutionalism to the American constitution, see Lawrence M. Friedman, “The Endurance of State Constitutions: Preliminary Thoughts on the New Hampshire Constitution,” *Wayne Law Review* 60 (2014). Friedman’s study is admittedly “a very preliminary effort to explore these issues, and in a purely anecdotal way it is much more a thought-experiment than a conclusive study…Considerably more study is required.”

[38] For a description of this problem, see Lutz, “The Purposes of American State Constitutions,” 27–31; Lawrence M. Friedman, “State Constitutions in Historical Perspective,” *Annals of the American Academy of Political and Social Science* 496 (March 1, 1988): 33–35; Tarr, *Understanding State Constitutions*, 1–5; John Dinan, *The American State Constitutional Tradition* (Larwrence: University Press of Kansas, 2006), 1–6; Robert F. Williams, *The Law of American State Constitutions* (Oxford University Press, Incorporated, 2009), 1–11; Peter S. Onuf, “State Politics and Republican Virtue: Religion, Education, and Morality in Early American Federalism,” in *Toward a Usable Past: Liberty Under State Constitutions*, ed. Paul Finkelman and Stephen E. Gottlieb (University of Georgia Press, 2009), 388–90; Levinson, *Framed*, 1–32; Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights: Why State Constitutions Contain America’s Positive Rights* (Princeton University Press, 2013), 1–36.

ignore the states is to misunderstand the federal Constitution. The dominant understanding of national constitutional development is incomplete.

Much of national constitutional politics begins with the states. Popular, grassroots organizing usually grows from state politics and constitutions,[39] as do citizens' identities and cultures,[40] municipal regulations, and some public ideologies. Against previous readings, state constitutions are not parochial, but spark national trends, not particularistic, but reflect reasoned convention debate, not ill-designed and contradictory, but often functional.[41] Finally, the flexibility of state constitutions allows policy experimentation. This variation helps explain why some constitutions endure while others fail. With the contemporary Congress polarized and gridlocked, the states, often operating under single-party governments, have recently resolved constitutional issues over gun regulation and same-sex marriage that the federal branches alone could not. Especially now, the state constitutions matter for national politics. Myopic focus on the federal Constitution, designed for inflexibility and permanence, exaggerates the stability of American constitutionalism as a whole.

The state constitutions literature is sparse. Most accounts are narrow and descriptive, shying from explaining constitutional development and endurance.[42]

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[39] See Sheldon Wolin, *The Presence of the Past: Essays on the State and the Constitution* (Johns Hopkins University Press, 1990); Joshua Miller, "The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty," *Political Theory* 16, no. 1 (February 1, 1988): 99–119; Dinan, *The American State Constitutional Tradition*; Zackin, *Looking for Rights in All the Wrong Places*.

[40] See Daniel J. Elazar, *American Federalism: A View from the States* (Crowell, 1972); Daniel J. Elazar, "The Principles and Traditions Underlying State Constitutions," *Publius* 12, no. 1 (January 1, 1982): 11–25, doi:10.2307/3329670.

[41] Laura J. Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820-1850* (Northern Illinois University Press, 1999), 3–47; Dinan, *The American State Constitutional Tradition*; Zackin, *Looking for Rights in All the Wrong Places*, 18–35.

[42] See Friedman for an admittedly brief application of Elkins, Ginsburg, and Melton to American state constitutional duration. Friedman, "The Endurance of State Constitutions." For a broader account of state duration, see Adam Cayton, "Why Are Some Institutions Replaced While Others Persist? Evidence from

Historians and lawyers chronicle particular eras, like the Revolution,[43] particular states, regions, and cultures, like the South,[44] particular ideas, like republicanism,[45] or particular policy issues, like positive rights.[46] In isolating eras, regions, ideas, and policies, these scholars may miss how the interaction of these orders drives American political development. Others trace the interaction of these ideas, policies, regions, and levels of government over state constitutional history.[47] For example, Julie Novkov and Emily Zackin argue that state constitutionalism shapes national debates over family and marriage regulation and over positive rights.[48] But these accounts focus on a single issue

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State Constitutions," *State Politics & Policy Quarterly*, July 22, 2015, 1532440015594663, doi:10.1177/1532440015594663.

[43] See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Norton, 1972); Gordon S. Wood, *The Radicalism of the American Revolution* (Random House Digital, Inc., 1992); Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Louisiana State University Press, 1980); Marc W. Kruman, *Between Authority and Liberty: State Constitution-Making in Revolutionary America* (UNC Press Books, 1997); Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Rowman & Littlefield, 2001).

[44] See Elazar, *American Federalism*; Elazar, "The Principles and Traditions Underlying State Constitutions"; Don Edward Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South* (University of Georgia Press, 1989); Kermit Hall and James W. Ely, *An Uncertain Tradition: Constitutionalism and the History of the South* (University of Georgia Press, 1989).

[45] See Wood, *The Creation of the American Republic, 1776-1787*; Wood, *The Radicalism of the American Revolution*; Scalia, *America's Jeffersonian Experiment*; James A. Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," in *Toward a Usable Past: Liberty Under State Constitutions*, ed. Paul Finkelman and Stephen E. Gottlieb (University of Georgia Press, 2009); Onuf, "State Politics and Republican Virtue: Religion, Education, and Morality in Early American Federalism."

[46] Helen Hershkoff and Stephen Loffredo, "State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis," *Penn State Law Review* 115 (2011 2010): 923; Helen Hershkoff, "Positive Rights and the Evolution of State Constitutions," *Rutgers Law Journal* 33 (2002 2001): 799; Helen Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review," *Harvard Law Review* 112, no. 6 (April 1, 1999): 1131–96, doi:10.2307/1342383.

[47] Albert L. Sturm, "The Development of American State Constitutions," *Publius* 12, no. 1 (January 1, 1982): 57–98, doi:10.2307/3329673; Friedman, "State Constitutions in Historical Perspective"; Tarr, *Understanding State Constitutions*; Dinan, *The American State Constitutional Tradition*; Kermit Hall, "Mostly Anchor and Little Sail: The Evolution of American State Constitutions," in *Toward a Usable Past: Liberty Under State Constitutions*, ed. Paul Finkelman and Stephen E. Gottlieb (University of Georgia Press, 2009); Mila Versteeg and Emily Zackin, "American Constitutional Exceptionalism Revisited," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 26, 2014), http://papers.ssrn.com/abstract=2416300.

[48] Julie Novkov, "Bringing the States Back In: Understanding Legal Subordination and Identity through Political Development*," *Polity* 40, no. 1 (2008): 24–48, doi:10.1057/palgrave.polity.2300093; Zackin, *Looking for Rights in All the Wrong Places*.

area in which states have affected federal policy, and they may miss cases when state revision preempts federal change, systematically understating the state constitutions' effect on the federal one.

Three characteristics of state constitutions make them unstable. First, the states have more and easier paths to reform than does the federal Constitution. Consider state amendments. All state legislatures have fewer members than Congress and so can more easily coordinate to propose amendments.[49] In most state legislatures this is a two-thirds supermajority, but fifteen states require only a simple majority to propose an amendment. Legislators can also deputize an expert constitutional commission to amend the constitution, or can submit a constitutional referendum to voters. Failing that, in eighteen states voters can circumvent the legislature and amend the constitution through an initiative.[50] One can propose an initiative with as little as three percent of the number of votes cast in the last election,[51] and in all but one state, ratification requires only a simple majority of voters. In contrast, ratification of a federal amendment requires three-quarters of the states. Failing a state amendment, one can call a convention to replace the constitution. This takes only a simple majority in fifteen states and to a two-thirds majority in others, affirmed in all states by a simple majority popular vote. Fourteen states require such votes at least once every twenty years. In all but three states, voters

[49] See May, "Constitutional Amendment and Revision Revisited," 168; Rosalind Dixon and Richard Holden, "Constitutional Amendment Rules: The Denominator Problem," in *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge University Press, 2012). Save Delaware, all states require voters approve an amendment proposed by the legislature. This is a hurdle that proposed federal amendments need not clear. However, it is a low hurdle – only a simple majority of voters is needed to approve the amendment, except for in Florida (requiring a three-fifths majority) and New Hampshire (requiring a two-thirds majority).
[50] Council of State Governments, *The Book of the States 2015* (Council of State Government, 2015).
[51] In Massachusetts, a proposed initiative must receive a number of signatures over 25,000 and equal to or greater than 3% of the total votes cast in the preceding gubernatorial election. This is a lax requirement in such a populous state. On the Massachusetts initiative process, see the Massachusetts Constitution of 1780, Article XLVIII.

ratify convention votes by only a simple majority. Finally, six states do not fully specify the procedure for calling a convention.[52] Historically, even fewer states specified the means of constitutional change,[53] allowing frequent, extralegal popular conventions and amendments. Of the ninety-six nineteenth-century constitutions, twenty-seven were made without legal authority.

This flexibility permits frequent state constitutional reform, partly explaining state constitutional instability.[54] Specifically, the ease of constitutional revision tethers state constitutions to swings in popular politics,[55] such that when state legislative control changes, state constitutions change.[56] Dragged into tumultuous ordinary politics, these documents have short lives relative to their federal counterpart.[57] And in general, states with lower barriers to amendment or replacement face more frequent revision. For

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[52] Data on state revision procedure from May, "Constitutional Amendment and Revision Revisited," 155–62; Council of State Governments, "State Constitutions," in *The Book of the States 2014*, vol. 46 (Council of State Government, 2014).
[53] Donald S. Lutz, "Toward a Theory of Constitutional Amendment," *The American Political Science Review* 88, no. 2 (June 1, 1994): 356, doi:10.2307/2944709; Tarr, *Understanding State Constitutions*, 35.
[54] For more on this point see May, "Constitutional Amendment and Revision Revisited," 155–64; Lutz, "Toward a Theory of Constitutional Amendment"; Michael Besso, "Constitutional Amendment Procedures and the Informal Political Construction of Constitutions," *Journal of Politics* 67, no. 1 (2005): 71–75, doi:10.1111/j.1468-2508.2005.00308.x. Similarly, Elkins, Ginsburg, and Melton suggest extremely flexible national constitutions are more likely to be replaced. See Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 81–83, 140–41.
[55] While elites may entrench their power through durable constitutional provisions, the American state constitutions' flexibility thwarts elite entrenchment. See Zackin, *Looking for Rights in All the Wrong Places*. For example, Nineteenth-century conventions armed political novices, outsiders, and reformers with plenary power to rebuild their state constitution. Christian G. Fritz, "Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1997), http://papers.ssrn.com/abstract=1447962; Tarr, *Understanding State Constitutions*, 99–135; Dinan, *The American State Constitutional Tradition*, 3; Zackin, *Looking for Rights in All the Wrong Places*, 59–61.
[56] James Madison offered an additional explanation, worrying that the state constitutions' flexibility would muddle the constitutional text, preventing the veneration and cooperative enforcement that preserves constitutions. He complained "We daily see laws repealed or superseded, before any trial can have been made of their merits; and even before knowledge of them can have reached the remoter districts within which they were to operate. See James Madison, "The Vices of the Political System of the United States," in *Writings*, ed. Jack Rakove (Library of America, 1999), 75.
[57] Friedman, "State Constitutions in Historical Perspective," 36; Tarr, *Understanding State Constitutions*, 20–23.

example, the fourteen states that require periodic votes calling for a constitutional convention undergo especially frequent change.[58]

Further, this flexibility lets state legislators stock their constitutions with partisan pork-barrel provisions.[59] When new parties enter the state legislature, they can easily repeal these provisions, or quickly supersede them with new, additional clauses. Consequently, all state constitutions are longer than the federal one, and on average are quadruple the federal length. Alabama's Constitution, at 376,000 words, is the world's longest,[60] and is fifty times longer than the federal Constitution, which, just under 7,600 words, is the world's shortest.

This textual specificity may further decrease the average state constitution's duration.[61] These detailed, overtly-partisan provisions are vulnerable to replacement or supersession after eventual switches in state legislative control. Consequently, longer

[58] Half of these states have had at least five constitutions, exceeding the average of three. See Dinan, *The American State Constitutional Tradition*, 11.

[59] These long, quasi-statutory state constitutions include contentious provisions regulating crime, education, or finance, which invite revision. May, "Constitutional Amendment and Revision Revisited," 164–70; Lutz, "Toward a Theory of Constitutional Amendment," 357–59.

[60] Berkowitz and Clay put the average state constitution at 28,000 words. See Daniel Berkowitz and Karen Clay, "American Civil Law Origins: Implications for State Constitutions," *American Law and Economics Review* 7, no. 1 (April 1, 2005): 69. Note however that Georgia's 1945 Constitution was 500,000 words. Vermont's 1793 7,600-word document was the briefest constitution ratified by any state. The few New England state constitutions mirror but cannot match the federal Constitution's brevity. Massachusetts' exceptionally brief 1780 Constitution was a model for the federal Constitution. Akin to higher law compacts, these unusual New England documents command respect that dissuades potential reformers. Sturm, "The Development of American State Constitutions"; Daniel J. Elazar, "From the Editor of Publius: State Constitutional Design in the United States and Other Federal Systems," *Publius* 12, no. 1 (January 1, 1982): 1–10, doi:10.2307/3329669; Lutz, "The Purposes of American State Constitutions"; Fritz, "Alternative Visions of American Constitutionalism," 35–36; Zackin, *Looking for Rights in All the Wrong Places*, 22–27.

[61] Conceptually, flexibility and specificity are distinct, such that a flexible constitution could be pithy, rather than long and specific. For this reason, Elkins, Ginsburg, and Melton address flexibility and specificity separately. But historically, flexible state constitutions have been longer and more specific than the federal Constitution. And the states with longer constitutions tend to have easy amendment processes, so this project treats flexibility and specificity together. Lutz, "Toward a Theory of Constitutional Amendment"; Hammons, "Was James Madison Wrong?"; Dixon and Holden, "Constitutional Amendment Rules: The Denominator Problem."

state constitutions are replaced or amended more frequently.[62] And while the brief federal Constitution allows judges interpretive leeway, the state constitutions' incredible specificity limits the power of state judges.[63] Further, these state judges are constrained by legislators' constitutional amendments,[64] and by federal statutory and constitutional law. With this state judicial review partly blocked, reformers have even more reason to attempt state constitutional amendment. Finally, Madison accused the state constitutions of a prolixity and "luxuriancy of legislation" that failed "to mark with precision the duties" of citizens.[65] With state citizens ignorant of the legal checks on their elected representatives and their parties, government might frequently change hands between self-interested representatives or factions, bringing new constitutional clauses.

Second, because Americans do not venerate their state constitutions, they likely have fewer reservations with state constitutional revision. Only fifty-two percent of respondents to a 1991 survey knew the states have constitutions, thirty-seven percent were unsure, and eleven percent believed the states did not.[66] Respondents to a 2014 survey, when informed they had a state constitution, approved of it, but this approval reflected respondents' pride in their state more than their political knowledge. Approval

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[62] Christopher W. Hammons claims that these particularistic provisions give state constitutions more beneficiaries and backers in the state legislatures, and greater endurance. Similarly, a long national constitution might reflect actors' investment in the framing process and thus in maintaining the document. Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 81–83, 99–103. But as Tarr for example shows, partisan state legislators are more likely to repeal provisions that benefit their competitors. Thus longer state constitutions lave lower durations. See Friedman, "State Constitutions in Historical Perspective," 36; Tarr, *Understanding State Constitutions*, 20–23; Hammons, "Was James Madison Wrong?"; Berkowitz and Clay, "American Civil Law Origins"; Cayton, "Why Are Some Institutions Replaced While Others Persist?".

[63] Albert L. Sturm, *Thirty Years of State Constitution-Making, 1938-1968: With an Epilogue: Developments During 1969* (National Municipal League, 1970), 6; James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (University of Chicago Press, 2005).

[64] John Dinan, "Court-Constraining Amendments and the State Constitutional Tradition," *Rutgers Law Journal* 38 (2007 2006): 983.

[65] Madison, "The Vices of the Political System of the United States," 75.

[66] Tarr, *Understanding State Constitutions*, 2n4; Cayton, "Why Are Some Institutions Replaced While Others Persist?," 3–4, 19n3.

had little association with the constitution's content, suggesting public knowledge of the state constitutions is fairly superficial.[67] And this approval did not reach levels of approval for the federal Constitution.[68] While the handful of New England constitutions resemble the national document in endurance and popular admiration, most state constitutions are closer to the Southern model – overtly partisan, neglected by their citizens, and short-lived.[69] To the extent that American states have a constitutional culture,[70] it is one of revision – Louisiana, with a French civil law tradition, has had eleven lengthy documents, enough for a Louisiana lawyer to quip that "Constitutional revision in Louisiana, whether in conventions or by amendment, has been sufficiently continuous to justify including it with Mardi Gras, football, and corruption as one of the premier components of state culture."[71] The other nine states first organized under French, Spanish, and Mexican civil law customs also have unusually high amendment

[67] A one-point increase in state pride resulted in a 0.45-point rise in approval for the state constitution, greater than the 0.3 and 0.005-point rise respectively for political knowledge and congruence between the respondent's attitude and the constitution's content. A one-point increase in respondents' knowledge of their constitution resulted in a nearly one-point rise in approval. While the state pride and political and constitutional knowledge variables are statistically significant (at the 1% level), the congruence variable is not. For the effects of these and other demographic variables, see Nicholas Stephanopoulos and Mila Versteeg, "The Contours of Constitutional Approval," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 18, 2015), 26–29, 36–39, 66–67, http://papers.ssrn.com/abstract=2646773.
[68] Respondents' on average rated their state constitution 6.7 on a ten-point scale, while the federal Constitution received a mean approval score of 7.8 and a median score of nine. Ibid., 20.
[69] Southern states accounted for ten of the nineteen states in which respondents' average state constitutional approval rating was below the national average. The only three Southern states to meet or exceed the national average were Texas, Florida, and West Virginia. For approval measures by states, see Ibid., 21–25. For categorization of states by region, see subsequent chapters.
[70] For an account of state constitutional culture, see Elazar, *American Federalism*; Elazar, "The Principles and Traditions Underlying State Constitutions"; James T. McHugh, *Ex Uno Plura: State Constitutions and Their Political Cultures* (SUNY Press, 2003).
[71] Quoted in Tarr, *Understanding State Constitutions*, 142–43; Dinan, *The American State Constitutional Tradition*, 12.

and replacement rates relative to other states,[72] further distinguishing the states from the gradualist common law tradition of federal constitutional reform.

Finally, constitutions backed by widespread consent should endure.[73] Recent rational choice theorists have revived this contractarian account of constitutional endurance, asserting that common enforcement,[74] checks on government,[75]and broad

[72] These states are Alabama, Arizona, Arkansas, California, Florida, Louisiana, Mississippi, Missouri, New Mexico, and Texas. Only Louisiana still practices civil law Berkowitz and Clay, "American Civil Law Origins.".

[73] Hobbes, for example, asserts common consent institutes a powerful sovereign which preserves the social contract. He proposes warring, self-interested individuals contractually renounce their right to harm each other, transferring their collective power to an irrevocable sovereign who would enforce peace and subjects' cooperation. This initial disarming is collectively rational. However it is irrational for individuals who are surrounded by potential enemies, yielding a coordination problem that prevents this initial contract. Hobbes interpreters like David Gauthier and Edwin Curley have noted this can be explained as a prisoner's dilemma. Edwin Curley, "Introduction to Hobbes' Leviathan," in *Leviathan: With Selected Variants from the Latin Edition of 1668*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994). Hobbes does not explicitly answer this impediment to an initial contract, but one answer may be that individuals simultaneously renounce their rights. Alternately, a sovereign may first emerge by force or acquisition and then shepherd individuals through this contract, using his force to prevent defection. See *Leviathan* II.18

[74] Like Hobbes, Peter Ordeshook agrees a powerful sovereign is the best way to compel subjects to obey their constitution, but that national constitutions lack this third-party enforcement. Thus national constitutions must be enforced by the constituting individuals. Constitutions are ongoing, self-enforcing pacts regulating subjects' repeated interactions. For more on self-enforcing pacts, see Hardin, who notes constitutions are coordination pacts that make subsequent contracts possible. Russell Hardin, "Why a Constitution," in *The Federalist Papers and the New Institutionalism*, ed. Bernard Grofman and Donald Wittman (Algora Publishing, 1989). Also see James MacGill Buchanan and Gordon C. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Liberty Fund, Incorporated, 1962).

[75] Barry Weingast asserts liberal rights prevent overreach by the sovereign, preserving the constitutional order. He posits a model with a sovereign and two subjects. The sovereign steals from one subject, distributing the stolen goods to himself and to the other subject. The victim cannot resist without the aid of the other subject, who has no incentive to help. Lacking incentive to coordinate resistance, both subjects acquiesce to the sovereign's violations. Subjects resolve this prisoner's dilemma by contracting to jointly punish the sovereign's violations, coercing the sovereign and serving the subjects' common good. This constitutional contract is self-enforcing, as it benefits all actors, and none have incentive to break it. Essentially, "the problem of constitutional stability becomes one of incentives" and widespread consent. Barry R. Weingast, "Designing Constitutional Stability," in *Democratic Constitutional Design and Public Policy: Analysis and Evidence*, ed. Roger D. Congleton and Birgitta Swedenborg (MIT Press, 2006), 343. As in Locke, these rational subjects use a constitution to constrain their sovereign – Weingast's exemplar of constitutionalism is Lockean England's Glorious Revolution. Barry R. Weingast, "The Political Foundations of Democracy and the Rule of Law," *The American Political Science Review* 91, no. 2 (June 1, 1997): 247–51, doi:10.2307/2952354. But Weingast also notes that authoritarian regimes can be stable, so long as the sovereign transgresses against some, but not all subjects. Weingast, "The Political Foundations of Democracy and the Rule of Law." Liberal rights protect individuals' life, liberty, and property, checking the sovereign, lowering the stakes and likelihood of conflict, and alleviating subjects' fears of violation. Weingast posits that if the sovereign merely threatens to violate the pact and subjects' rights, subjects' incentives shift from enforcement to resistance. Since constitutions rest on subjects' fickle perceptions and

distribution of benefits increase constitutional duration.[76] Evidence suggests inclusive national constitutions endure. Elkins, Ginsburg, and Melton propose that broad participation in drafting and ratification publicizes the terms of coordination of enforcement, and widespread distribution of goods garners broad support, boosting stability. Additionally, inclusive electoral participation keeps citizens culturally invested in a constitution.[77]

State constitutions are the center of disputes over citizenship and civic exclusion. In drafting the Tenth Amendment, Congress allowed the states unique and sometimes exclusive constitutional power to regulate and limit state citizenship, the franchise, office-holding, legislative district apportionment, and police powers including morality and religion, temperance, education, labor rights, environmental rights, gender and sexuality rights, disability rights, and racial classifications. State constitutions were the

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fears of violation, "constitutions are necessarily delicate." This is opposed to Hobbes' claim that the sovereign uses fear to compel obedience and secure the regime. It is closer to Locke's assertion that a regime that respects rights will likely not be overthrown. Constitutions are self-enforcing, and thus stable, when many subjects favor enforcement.

[76] There are two shortcomings of Weingast's model of a constitution as a self-enforcing pact. For Weingast, liberal constitutions' stability benefits subjects, who join to support liberal constitutions. The initial constitutional contract spurs a matching civic and constitutional culture. Weingast, "The Political Foundations of Democracy and the Rule of Law," 253–54. Yet Weingast reduces constitutional cultures and norms to an epiphenomenal result of the original contract. His model does not admit values shape and mediate actors' preferences. Further, Weingast describes liberal constitutions that pit the citizen against the sovereign. He cannot describe the many constitutions or cultures in which the people are the sovereign, as in Aristotle's Athens, or in classical or Rousseauean republicanism. In America, republican constitutional design and culture may even eclipse the liberal model. Most notably see Wood, who shows that even during the Revolution, state framers were as much concerned with empowering the sovereign people through frequent elections as with restraining the executive. Wood, *The Creation of the American Republic, 1776-1787*.

[77] See Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 78–81, 97–99. There are caveats to this contractarian account. Framers of Jim Crow state constitutions so successfully disempowered Southern blacks through disenfranchisement and physical intimidation that these exclusive constitutions endured. Some state constitutions might survive by further excluding already disempowered groups. Additionally, modern state constitutions are not social contracts formed and maintained for common security and survival. Since the stakes for state constitutional revision are lower in the modern era, there may be greater incentive for revision. And contrary to the contractarian expectation that citizens form constitutions in order to weather crises, Americans tend to repeal their state constitutions in moments of crisis, further suggesting the contractarian theory of national constitutions may not apply to subnational constitutions.

battleground on which, for example, the franchise was won by white males, then suffragettes, then lost by Jim Crow blacks, to be regained by black civil rights litigants.

These citizenship struggles and exclusions likely destabilize state constitutions.[78] State constitutional duration reflects local coalition politics. Elites may grant constitutional rights either to compromise with progressive allies or to legally entrench their waning power.[79] According to this entrenchment theory, constitutions are conservative documents which elites use to bind progressive legislatures or courts. Yet at the state level this is likely not the case.[80] State constitutions' open conventions, staffed by novices and outsiders, states' referenda, easy amendment, and elected judiciaries invite popular reforms. That is, state constitutions' popular revision process is actually a source of instability. Further, exclusive state citizenship provisions prompt contention, repeal, and further revision.[81] For example, in 1790, ten of thirteen states used property qualifications to exclude adult white males from the franchise. These men rallied,

[78] The very limited evidence on state constitutional duration suggests inclusion increases duration. Lawrence Friedman asserts New Hampshire's 1776 constitution collapsed because it excluded the public from drafting and ratification. Conversely, the current 1784 constitution survives as a "model of inclusion" Friedman, "The Endurance of State Constitutions.".

[79] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2009).

[80] Emily Zackin trusts popular "sustained constitutional movements" can secure durable constitutional reforms, particularly those entrenching positive rights. As Zackin notes, "the relative rigidity of constitutional law is only one of its many attributes that cause people to seek constitutional change" – outsiders also pursue constitutional change to circumvent or durably constrain elite-led legislatures and judiciaries in which they lack power. Zackin, *Looking for Rights in All the Wrong Places*, 1–35, 52–61, 64; Dinan, *The American State Constitutional Tradition*, 11. This debunks the view that entrenchment is an elite project, and that state constitutional reforms do not endure. But still, relative to the ancient federal Constitution, state constitutions are exceptionally short-lived.

[81] Relatedly, population heterogeneity can destabilize national politics and constitutions. Coordinating a constitutional pact requires shared interests and easy communication, which is tougher in countries deeply divided by race, ethnicity, or class. See Weingast, "The Political Foundations of Democracy and the Rule of Law"; Sonia Mittal and Barry R. Weingast, "Self-Enforcing Constitutions: With an Application to Democratic Stability In America's First Century," *Journal of Law, Economics, and Organization* 29, no. 2 (April 1, 2013): 278–302, doi:10.1093/jleo/ewr017. Empirically, there is little evidence heterogeneity decreases national constitutional duration. See Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 138–39.

proposing at least forty-six state constitutional reforms, so that by 1855, only three of thirty-one states maintained such qualifications.[82]

In conclusion, the federal Constitution's inflexibility and widespread veneration discourage amendment and popular and judicial reinterpretation. The state constitutions, with their flexibility, cultures of revision, and civic controversies, face frequent amendment. But these explanations alone are incomplete, for the national and state constitutions develop together. The federal government has broad authority over state constitutions – Congress and the president can defer enabling acts that recognize state constitutions, while federal courts and constitutional amendments invalidate or reinforce provisions of state constitutions and steer state judicial review.[83] Further, innovations in federal governance can obviate state constitutions. The federal government strategically enforces and relaxes these constraints, relegating thorny issues to the states and controlling the scope of conflict.[84] For example, the federal framers, unable to agree on regulation of virtue, crime, citizenship, and education, delegated morality legislation to the states, requiring only "a republican form of [state] government."[85] Thwarted at the national level, reformers target the state constitutions, which are flexible and have many special policy prerogatives. Nineteenth-century temperance and morality crusaders first reformed the state constitutions, building the national coalition that eventually scored the Eighteenth and Nineteenth Amendments. These national coalitions carry policies and

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[82] For a list of state franchise regulations in force between 1790 and 1855, see Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 330–35. See also and the subsequent chapter.
[83] Tarr, *Understanding State Constitutions*, 37–59; Gardner, *Interpreting State Constitutions*.
[84] Hall, "Mostly Anchor and Little Sail: The Evolution of American State Constitutions," 388–95.
[85] See the Guarantee Clause, Article IV, Section 4. Lutz, "The Purposes of American State Constitutions," 31–44.

ideas across state borders, so that reforms diffuse across states.[86] Pennsylvania's populist 1776 Constitution, for example, inspired constitutional provisions in Vermont, Maryland, and Georgia.[87] Federal deference to the states may destabilize state constitutions. This interaction is the subject of the next chapter.

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[86] Tarr, *Understanding State Constitutions*, 50–55; Zackin, *Looking for Rights in All the Wrong Places*, 20–22.

[87] Wood, *The Creation of the American Republic, 1776-1787*; Robert F. Williams, "The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism," *Temple Law Review* 62 (1989): 541; Gary B. Nash, *The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America* (Penguin, 2006), 273–88.

CHAPTER 2: HOW STATE CONSTITUTIONAL REVISION STABILIZES THE FEDERAL CONSTITUTION

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

Louis Brandeis, 1932[88]

I. Model

The federal Constitution creates national and state governments, enumerating specific powers of the national government and denying many of these to the states. The Tenth Amendment reserves non-enumerated powers to the states and their constitutions, to the exclusion of the national government. But since the federal Constitution is short and ambiguous, many powers delegated to the national government are not expressly denied to the states, allowing broad concurrent authority. This lets the federal government defer some constitutional controversies to the states, the subject of this chapter.

A petitioner seeking to reform concurrent powers picks the venue, national or state, that offers the greatest chance of success. A smarter petitioner bends the rules to repeatedly guide his or her cause to a friendly venue. Since the rules for arbitration are themselves contested or unclear,[89] the authority and operation of the national and state constitutions, courts, and legislatures is often disputed, with petitioners strategically constructing and

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[88] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[89] The federal framers, deeply divided over the scope of national and state powers, largely avoided defining each. On May 31, 1787, James Madison proposed Congress veto state legislation to clarify national and state powers, but the Convention rejected his proposal on July 17th and August 23rd, and the issue remained unresolved. The federal Constitution's brevity also allows political contestation over the boundaries between federal and state authority. In cases of conflicting federal and state law, the Constitution's Supremacy Clause instructs judges to uphold the national Constitution and national statutes over state law, but does not define when a conflict occurs. The Clause itself may apply to federal or state judges, each of which may be biased, preventing impartial arbitration. See Article VI, Clause 2. See also Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South*, 33–38.

moving between each. Put very simply, reformers can attempt federal or state constitutional revision, which can stabilize or destabilize the federal Constitution. Consider Table 1.

		Venue to address constitutional dispute	
		Decentralized/states	Centralized/national
Federal	Stability/resolved	1. Slavery 1800-50	2. Power over post office, post-1787
Outcome	Instability/unresolved	3. Slavery 1850-65	4. Coinage/monetary policy 1870-90

Table 1: Paths and Examples of American Constitutional Development.

Analysis of American constitutionalism often ignores cells one and three above, focusing on the federal Constitution in cells two and four. Scholars have thoroughly documented how the national courts, Congress, and executive have exacerbated or resolved national constitutional debates. These national conflicts are important, if over-studied. This dissertation studies all four cells, showing how disputants strategically choose their venue, national or state, and how this encourages national constitutional stability or instability.

Specifically, this dissertation argues that when Americans leave disputes to the states, the states usually resolve these issues, preserving the national Constitution. State constitutionalism has quieted and stabilized national constitutional politics.[90] In studying the states, this dissertation does not deny the importance of national actors, or claim that all cases of national constitutional change involve the states. Rather, this study explains how state constitutional revision often preempts or resolves national conflicts, shaping

[90] Tocqueville for example affirmed Americans' enthusiasm for quarantining some constitutional issues to the states:
"Nothing has made me admire the good sense and practical intelligence of the Americans more than the way they avoid the innumerable difficulties deriving from their federal Constitution. I have hardly ever met one of the common people in America who did not surprisingly and easily perceive which obligations derived from a law of Congress and which were based on the laws of his state and who, having distinguished matters falling within the general prerogatives of the Union from those suitable to the local legislature, could not indicate the point where the competence of the federal courts commences and the of the state courts ends." Alexis de Tocqueville, *Democracy in America*, ed. Jacob Peter Mayer (New York: Harper Collins, 1835), 165.

the choices of national actors. Paradoxically, to understand national constitutional politics, one cannot study solely the national Constitution. This chapter outlines how federal and state constitutional reform interact, concluding by exploring the implications of this interaction.

The following model demonstrates how constitutional decentralization can abate pressure for national constitutional reform. National controversies emerge, allowing state constitutional revision to resolve the controversy, usually preventing national partisan and constitutional change.

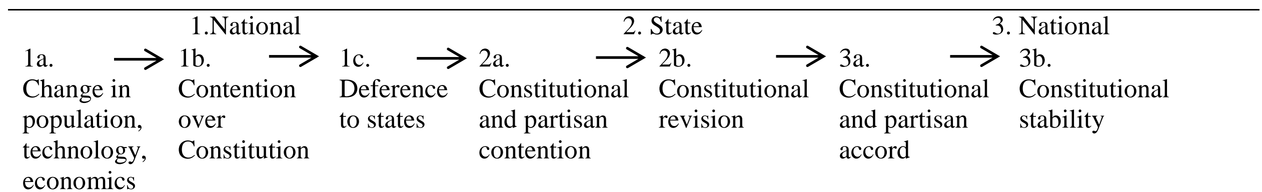

Figure 1: The States' Role in American Constitutional Reform.

This model applies only to American constitutionalism, and only imperfectly. In a particular context, this process may occur partially or completely, once or repeatedly, for one issue or for many.[91] Given America's diverse, incomparable regimes and eras, this model is not a universal or complete account of American constitutional politics, but can explain constitutional change on particular issues in a given context.[92]

Consider each step in the model. American constitutional conflict grows from a broader dilemma in modern liberal constitutionalism. Constitutions have usually two

[91] For example, deference to the states may kill some national controversies, preempting national realignment at the third stage. Other issues begin at the second stage, emerging in the states to preempt or incite national realignment. Some issues take multiple cycles to resolve: state realignment may prompt unsuccessful national realignment and renewed federal deference to the states, as in the case of prohibition. Further, different states confront deference differently. And the same state may face controversy differently in different eras.

[92] For a similar but generalized approach to political development, see Rogers M. Smith, "Ideas and the Spiral of Politics: The Place of American Political Thought in American Political Development," *American Political Thought* 3, no. 1 (March 2014): 126–36, doi:10.1086/675651.

main purposes. One is to entrench stable rules for the common good.[93] Another is to create a polity and an according common space to enact democratic citizenship.[94] These functions are opposed. The former restrains the polity and the latter empowers it to reconstitute itself, posing the old normative dilemma between common stability and democratic autonomy. It also helps explain constitutional change – polities slowly outgrow and break their inflexible constitutional restraints.

This tension is particularly clear in American constitutionalism, as the Constitution's preamble and the Declaration of Independence encourage democratic constitutional reform while Article V supermajority requirements entrench the national Constitution against popular revision. As noted in Figure 1, demographic, economic, and technological trends, especially, slowly delegitimize the entrenched constitutional order (1a). New populations grow and petition for legal inclusion, trying to translate their constituent authority into a constitutional amendment.[95] But constitutions by nature and design entrench law against reform, legally and inflexibly bounding the polity. This

[93] Polities face threats from foreign incursion, domestic criminals, and government usurpation. A constitution is partly a liberal prior contract structuring durable institutions that restrain transgressors and secure the common welfare. Following Hobbes and Locke, Elster calls a constitution a rational pre-commitment between subjects to enforce the common good, and Buchanan and Tullock, Ordeshook, Hardin, and Weingast argue constitutions are contracts or pacts for rational subjects to restrain governments and criminals. Buchanan and Tullock, *The Calculus of Consent*; Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge University Press, 1979); Hardin, "Why a Constitution"; Weingast, "Designing Constitutional Stability."

[94] This exclusion creates a national identity, some civic equality between included citizens, a public sphere distinct from the private, an according space for political activity and competition, and a limited polity capable of deliberation and autonomy. An autonomous polity can expand or contract these boundaries at will. As in ancient cities, a constitution enables the growth of the individual and the polity. For example Aristotle holds a constitution (*politea*) limits citizenship (*Politics* III.5). Arendt also describes these ancient bounding functions. Jeremy Waldron, "Arendt's Constitutional Politics," in *The Cambridge Companion to Hannah Arendt*, ed. Dana Villa (Cambridge University Press, 2000).

[95] An amendment is desirable because it is a powerful political tool. An amendment, more durable and legitimate than a statute, can invalidate past constitutional provisions and statutes, guides and constrains statutory lawmaking, and sets institutional rules to bind hostile branches and courts and buttress allied litigants. Constitutionalized policies claim special apolitical legitimacy and esteem, and durably extend the franchise and civil and economic rights to allies while seizing these from opponents, building a voting base across multiple elections. The Constitution exceeds statutes in publicity, rallying allied voters, and allows high-profile litigation that draws voters and dismantles hostile citizenship laws.

designed, necessary unresponsiveness to changes in civic membership exacerbates the boundary problem,[96] legally excluding some members of the polity, who, to gain legal inclusion, must be citizens. If threatened by outsiders' push for inclusion, national parties can appoint conservative judges to uphold the constitutional status quo, ossifying the Constitution and exacerbating the problem. Inflexible national constitutions cannot adjust to survive unexpected crises,[97] and thanks to Article V, the United States Constitution is the world's least flexible constitution.[98] Blocked from achieving a national amendment, reformers may turn to the courts for reinterpretation. But legislators and executives confirm judges who uphold the constitutional status quo,[99] and activist judges cannot unilaterally enforce their decisions.[100] Popular majorities can instead elect radical legislators,[101] or abrogate contentious constitutional provisions,[102] but Americans so venerate their Constitution that this is exceptional and rare.

Without constitutional amendment or reinterpretation, reformers' petitions can become grievances and constitutional controversies (1b). Those lacking full citizenship rights can expansively interpret egalitarian provisions like the Equal Protection Clause or can propose new amendments.[103] The gap between evolving civic aspiration and inflexible legal reality plagues all laws, but none more than constitutions, which express civic aspirations and face special public attention and scrutiny. Reformers can chase the

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[96] For a description of the problem, see Frederick Whelan, "Prologue: Democratic Theory and the Boundary Problem," in *Liberal Democracy*, ed. James Roland Pennock and John W. Chapman (New York: New York University Press, 1983).
[97] Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 81–83, 140–41.
[98] Ibid., 99–101.
[99] Dahl, "Decision-Making in a Democracy"; Graber, "The Nonmajoritarian Difficulty"; Whittington, *Political Foundations of Judicial Supremacy*.
[100] Rosenberg, *The Hollow Hope*.
[101] Bruce Ackerman, "Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93 (1984): 1013–72.
[102] Kramer, *The People Themselves*.
[103] Anne Norton, "Transubstantiation: The Dialectic of Constitutional Authority," *The University of Chicago Law Review* 55, no. 2 (April 1, 1988): 458–72, doi:10.2307/1599813.

inclusive textual ideal through cyclical constitutional rewriting, but can never achieve full civic inclusion, such that each revision is imperfect, planting the seed for its successor. Alternately, a single constitutional commitment or aspiration can yield dueling interpretations.[104] Organizers turn to the same shared, authoritative constitutional values to turn out their base and build coalitions, but interpret these values in incompatible ways. Finally, separate and opposed constitutional commitments and clauses may clash.[105]

Article V puts all proposed amendments before Congress, and the executive and federal courts also field constitutional controversies. These national actors have several reasons to avoid contentious issues and to defer them to the states. First, the states' broad, traditional police powers to regulate health, safety, morals, and welfare encourage national actors to defer these to the states. National actors that read their powers narrowly have more incentive to recognize state authority. Second, constitutional controversies can split the national parties. Reformers can strategically phrase their constitutional appeals and grievances to internally divide parties, to seize new factions for their cause and form dissident coalitions and third parties.[106] Civic identities are especially powerful divisive tools.[107] Alternately, members of Congress may be overburdened and may avoid thorny

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[104] For example, the Fifth Amendment Due Process Clause simultaneously protected slaveholders' property in slaves and slaves' liberty. See also Laurence H. Tribe, "Idea of the Constitution: A Metaphor-Morphosis, The," *Journal of Legal Education* 37 (1987): 170; Jacobsohn, "Constitutional Identity," June 2006, 380–82.

[105] Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *The American Political Science Review* 87, no. 3 (1993): 549–66, doi:10.2307/2938735; Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997).

[106] James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* (Brookings Institution Press, 1983); Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, no. 04 (2002): 702, doi:10.1017/S0003055402000394; Craig Parsons, "Ideas, Positions, and Supranationality," in *Ideas and Politics in Social Science Research*, ed. Daniel Beland and Robert Henry Oklahoma (Oxford University Press, 2010), 130–31.

[107] The most fractious issues – and those often deferred to the courts and states – concern citizenship and civic exclusion. Most assume civic exclusion destabilizes American constitutional orders, while inclusion secures stability. Louis Hartz proposes Americans rejected European feudalism for inclusive Lockean liberalism, yielding a bloodless Revolution, a nineteenth century lacking socialism and class tension, and a

legal debates over federalism. Finally, Congress may avoid proposing an amendment that the states are unlikely to ratify.

Congress, the president, and the federal courts have many constitutional tools to defer issues to the states (1c). Several clauses in the federal Constitution encourage this. The Tenth Amendment grants the states expansive authority over any constitutional power not prohibited to them or expressly delegated to the federal government.[108] The Elections Clause lets states regulate the time, place, and manner of elections.[109] Under the Guarantee Clause's vague requirement of "republican government" in the states, the Congress, executive, and federal courts have upheld deference to the states and occasionally found grounds to threaten to force state constitutional revision.[110] The Full Faith and Credit Clause also allows Congress to intervene in conflicts between states, forcing states to address particular constitutional issues.[111] And citing the Territories Clause, Congress used enabling acts to force territorial legislatures to address divisive national constitutional issues until the early twentieth century.[112] The broader the

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twentieth century that shunned radicalism and communism. Writing in a more contentious time, Walter Dean Burnham, Samuel Huntington, and Bruce Ackerman claim excluded groups periodically vie for and achieve civic inclusion via intense organizing and realignment within the major parties, culminating in a critical election and new, stable, egalitarian constitutional vision. Rogers Smith also debunks Hartz and Huntington's liberal thesis, asserting civic exclusion often drives instability and political and constitutional change. See Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (Houghton Mifflin Harcourt, 1955); Walter Dean Burnham, *Critical Elections: And the Mainsprings of American Politics* (W. W. Norton & Company, 1970); Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Harvard University Press, 1981); Smith, "Beyond Tocqueville, Myrdal, and Hartz"; Smith, *Civic Ideals*.

[108] The short, vague Tenth Amendment does not specify which issues are subject to state police powers regulation, so the political construction and interpretation of the Tenth Amendment determines which national issues the states can quiet. For example, current interpretation of the Tenth Amendment allows states nearly exclusive oversight over divisive issues like lottery, alcohol, and franchise regulation, stabilizing federal constitutional policy.

[109] Article I, Section 4, Clause 1.

[110] Article IV, Section 4, Clause 1. On the Guarantee Clause, see *Luther v. Borden,* 48 U.S. 1 (1849), and on the Tenth Amendment, see the Court's regular invocation of the states' broad police powers.

[111] Article IV, Section 1.

[112] For example, Democratic and Whig congressional leadership united to silence antislavery radicals in both parties by devolving slavery regulation to the territories, citing a reading of the Territories Clause

interpretation of these provisions, the more effective the states can be at seizing and national controversies. Put differently, national coalitions quiet threatening issues by forcing them on the states, controlling conflict by limiting its national scope.[113] Censoring ideas and rhetoric preserves some coalitions and disarms others, quietly setting the rhetorical agendas that shape policymakers' preferences.[114]

The states can tackle national controversies by proposing state constitutional reforms (2a).[115] There are several ways states and territories can claim authority over national issues. Congressional, presidential, and federal judicial deference can shift controversies to the states, pressuring moderates and letting opportunistic state radicals push constitutional debates and reforms on previously neglected topics.[116] National reformers, thwarted by barriers to national constitutional amendment and reinterpretation, may propose state constitutional reforms.[117] Sometimes state reformers may push constitutional reforms that are uncontroversial at the national level, but have the potential

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popularized by Lewis Cass and Stephen Douglas. See Article 4, Section 3, Clauses 1 and 2. Congress also used the Clause and enabling acts to condition territories' admission on revision of the territorial constitution.

[113] See Elmer Eric Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America.* (Holt, Rhineart, and Winston, 1975); Graber, "The Nonmajoritarian Difficulty."

[114] Still, the process is inexact. Broad public philosophies can shift preferences without any policymakers intending or perceiving the process. Lieberman, "Ideas, Institutions, and Political Order"; Jal Mehta, "The Varied Roles of Ideas in Politics: From 'Whether' to 'How,'" in *Ideas and Politics in Social Science Research*, ed. Daniel Beland and Robert Henry Cox (Oxford University Press, 2010); Parsons, "Ideas, Positions, and Supranationality.". Words and identities are flexible, unreliable instruments that may backfire, be co-opted, or ossify through path dependence.

[115] The states are excluded from some areas under Article I, Sections 8 and 10, the Supremacy Clause of Article VI, and are subject to congressional oversight on franchise regulation through several amendments.

[116] State coalitions do not defer these controversial issues to the courts. There are two explanations for this. First, as Graber suggests, variation between states is greater than variation within states, so states' relative homogeneity and small size unify state coalitions. This blunts wedge issues, so state coalitions rarely need to defer to the judiciary, and only do on especially divisive issues like abortion. Graber, "The Nonmajoritarian Difficulty," 40, 56–59. However, state politics is more contentious than Graber admits, so it is more likely that entrepreneurial state coalition outsiders strategically use these issues to unseat moderate coalition leaders.

[117] See Dinan, *The American State Constitutional Tradition*; John Dinan, "State Constitutions and American Political Development," in *Constitutional Dynamics in Federal Systems: Sub-National Perspectives*, ed. Michael Burgess and G. Alan Tarr (McGill-Queen's Press - MQUP, 2012); Sean Beienburg, "Contesting the U.S. Constitution through State Amendments: The 2011 and 2012 Elections," *Political Science Quarterly* 129, no. 1 (2014): 55–85, doi:10.1002/polq.12146.

to preempt national debates and reforms. Or state officials may unilaterally seize authority over a constitutional issue, even without federal deference. And some clauses of the federal Constitution grant the states special or exclusive authority over nationally contentious issues.[118] A fracturing state coalition may refuse constitutional change, exacerbating the standing controversy and speeding the coalition and constitution's demise. A new legislative coalition then may push for state constitutional amendment or replacement.[119]

Since state constitutional reform is relatively easy, many proposed reforms pass (2b). All state constitutions have a lower amendment threshold than the federal Constitution,[120] and in many states one can propose amendments through popular initiatives and referenda, such that almost two-thirds of proposed state constitutional amendments have been ratified. Failing amendment, states can propose new constitutions through a host of easily methods, and almost half of proposed constitutions have cleared these hurdles.[121] Further, state courts can reinterpret their state constitutions.[122] Alternately, ordinary Americans do not venerate their state constitutions as they do their

[118] For example, the Elections Clause allows the states to regulate the franchise, subject to Congressional override.
[119] See also Cayton, "Why Are Some Institutions Replaced While Others Persist?" Note also that a coalition may use a constitution revision to reapportion or gerrymander legislative seats, tightening its grip on the state legislature. Party balance in the state legislature spurs constitutional revision, which in turn changes partisan balance.
[120] These range from a simple to a two-thirds legislative majority to propose an amendment.
[121] States can propose new constitutions through their legislatures, governors, and constitutional conventions, committees, and commissions, and councils. Of the states' proposed 9,500 amendments, at least 5,900 have passed. See Tarr, *Understanding State Constitutions*, 24. Of 354 proposed state constitutions, 146 have been ratified.
[122] But state courts likely do not drive state constitutional reform. The sitting governor and legislature can appoint friendly judges to uphold the constitutional status quo, so state judges often avoid radically reinterpreting the state constitution. And activist judges can lose judicial jurisdiction though legislative state constitutional amendments and through congressional statutes and federal court rulings. See for example Dinan, "Court-Constraining Amendments and the State Constitutional Tradition."

national Constitution, and so have fewer reservations with reinterpreting, nullifying, or abrogating state constitutional provisions.[123]

This frequent revision increases state constitutional length and decreases public veneration, encouraging further revision.[124] Easy and frequent addition of new clauses may make a state constitution seem more like an ordinary statute and unworthy of popular veneration. Accordingly states with higher revision rates have especially low levels of constitutional veneration.[125] Citizens who do not venerate their constitution likely have fewer qualms with amending or replacing it, further decreasing veneration.[126] An easy amendment process also yields a long, particularistic, specific document. This specificity loads a document with contentious provisions, decreasing veneration and encouraging further revision, further eroding veneration. Once begun, the revision cycle is difficult to end. Unless the revision satisfies all parties, losers push for more

[123] Eighteenth and nineteenth-century Americans rallied to block or harass state officials, disband or intimidate state legislatures, or convene extralegal conventions and elections. By the twentieth century, citizens vented their frustration through constitutional initiatives and referenda. For informal reinterpretation of the state constitutions, see Besso, "Constitutional Amendment Procedures and the Informal Political Construction of Constitutions."

[124] See the previous chapter on this.

[125] On average, each state has ratified 2.96 constitutions. Of the seventeen states to have ratified four or more constitutions, in twelve states, respondents' current average approval for their state constitution was below the national average. This varies by region as well. Ten of these seventeen states were Southern. Similarly, of the nineteen states in which the average state constitutional approval rating was below the national average, all but five had a state constitutional replacement rate that exceeded the national average of 2.96 ratified constitutions per state. Similarly, respondents in states with lower average constitutional duration reported lower admiration for their current constitution. See the appendix for Figure 19.

[126] Cayton correctly notes that the public is ignorant of state constitutional politics, precluding public attitudes on state constitutional revision. However, per Elazar and Berkowitz and Clay, elites like legislators and lawyers in different states have different constitutional cultures and traditions. For example, the nine former civil law states have retained a higher rate of revision, even after switching to common law, than the forty states founded on common law, suggesting state legal traditions exist and are durable. Louisiana, which was founded on and continues to practice civil law, has adopted 11 constitutions, more than any other state. Elazar, *American Federalism*; Elazar, "The Principles and Traditions Underlying State Constitutions"; Berkowitz and Clay, "American Civil Law Origins"; Cayton, "Why Are Some Institutions Replaced While Others Persist?"

revision.[127] Constantly vulnerable to revision, a state constitution survives only as long as a coalition can support it.

State reforms resolve national constitutional conflicts in chiefly two ways (3a).[128] In cases of *preemptive resolution*, state legislators and framers first seize and address a national constitutional issue, preventing the federal branches from later intervening or proposing amendments in this area. Alternately in cases of *joint resolution*, the federal and state governments jointly propose amendments addressing the same constitutional issues. However, since state amendment is much easier, usually reform only occurs at the state level. Further, state revisions may appease reformers and quiet calls for both state and federal constitutional revision.[129] Both types of resolution stabilize the federal Constitution (3b).

Consider four cases that can lead to preemptive and joint resolution. First, national leaders can defer to the states by citing states' Tenth Amendment powers or the effectiveness of the states' constitutional regulations, preempting new constitutional conflicts or jointly resolving existing ones.[130] And national elites can retrench their

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[127] For example, on citizenship matters, no revision can achieve complete civic inclusion, so there will always be losers undermining the document.

[128] Actually four outcomes are possible: reforms to concurrent powers can be proposed at solely the federal level, solely the state level, both, or neither. This dissertation focuses on the second and third cases (proposals for reform are made at solely the state level or at both the state and federal level) partly because state reform is understudied, requiring further explanation, and partly because it occurs frequently, accounting for most of American constitutional reform. Thus the emphasis on these two out of the four possible outcomes.

[129] In *The Discourses* Machiavelli lauded the Roman practice of periodically venting popular tensions against elites for the sake of political stability. More recently, Tarr, Burgess, and Marshfield argue federal national constitutions allow constitutional discretion, or "space," to subnational units for the sake of stability. G. Alan Tarr, "Explaining Sub-National Constitutional Space," *Penn State Law Review* 115 (2011 2010): 1133; Michael Burgess and G. Alan Tarr, "Introduction: Sub-National Constitutionalism and Constitutional Development," in *Constitutional Dynamics in Federal Systems: Sub-National Perspectives*, ed. Michael Burgess and G. Alan Tarr (McGill-Queen's Press - MQUP, 2012); Jonathan L. Marshfield, "Models of Substantial Constitutionalism," *Penn State Law Review* 115 (2011 2010): 1151.

[130] For example, some twentieth-century congressional Democrats upheld Jim Crow state constitutions and statutes on states' rights grounds, quieting national civil rights debate and amendments.

constitutional platform by imitating state innovations through congressional statute, preempting amendment. Relatedly, second, the diversity of state constitutional provisions, especially on morality, creates a patchwork nation that lets Americans pick a state that suits their lifestyle. Diversity for mobile Americans means more choices and greater satisfaction, preventing federal amendment. Alternately, third, a local or regional movement that scored state constitutional reform may not be prepared to capture a national majority. Movements might fizzle out locally, preempting national debate.[131] And similarly, fourth, splitting a national movement across fifty states may fracture and kill the national movement, producing many disparate state reforms. The states' seemingly parochial, localist, diverse amendments can actually present a coherent, locally-tailored, viable solution to a rising or existing national controversy, preempting or resolving these controversies.[132] These parochial provisions allow federal constitutional stability. Oddly the state constitutions' parochialism makes them nationally significant. In sum, with national controversy quieted, there is little incentive to launch a difficult national campaign to pass a federal amendment, so the federal Constitution remains stable. The states preemptively and jointly resolve national controversies.[133]

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[131] For example, arid Western states carefully regulate water use, but there is little incentive for Western reformers to make this a national cause.

[132] For example, Florida's Constitution regulates the catching of saltwater finfish, a seeming obscure and unimportant provision, but is part of a broader and nationally-important tradition of local fishery regulation. See the Florida Constitution of 1968, Article X, Section 16.

[133] One might object that national actors strategically guard issues from state interference, so that constitutional change circumvents the states. National constitutional debates (1b) might realign the national coalition (3a) and Constitution (3b) without the states. For example, since the New Deal, Congress has used grants-in-aid to coerce states into constitutional compliance with federal law, potentially preventing state mediation. And today, the ideal of states nullifying or modifying the federal Constitution may seem a relic of the nineteenth century. Indeed, for a handful of issues like coinage or national security, the states have no constitutional authority. But, as noted earlier, these few policy areas from which states are explicitly excluded are also politically constructed, usually in response to states' failure to regulate these areas effectively. Revolutionary-era states could constitutionally coin money, but could not coordinate coinage, forcing federal constitutional revision in 1787 that stripped this power from the states. Outside of these few

There are exceptions. Rarely, state revision can exacerbate national controversies, requiring federal action. Deference to the states can incubate constitutional debates in some states. Under the Tenth Amendment, states can introduce new policies and laws that federal courts and the Congress cannot consider.[134] This state experimentation could arm national coalition radicals with new, viable, tested constitutional platforms.[135] Alternately state politicians might see their constitution undermined by a neighboring state, and pursue national constitutional reform to strong-arm their neighbors.[136] Or, when the national constitutional controversy aligns with sectional tensions, deference to the states can exacerbate these regional divides and further inflame the issue. Acting in their short-term interest, national party leaders may continue to defer the issue to the states, even though this promises eventual discord.[137] Unresolved conflict can destabilize national coalitions, allowing partisan realignment and reinterpretation or amendment of the federal Constitution,[138] and widespread political change.[139] But since national actors

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issues, the states structure national authority even when they do not directly intervene in a conflict, as the next section shows.

[134] These are the police powers over health, safety, morals, and welfare. Additionally, states have special legal prerogative over elections and citizenship law. For example, Novkov shows state constitutional and statutory citizenship regulation affected the development of national citizenship regulations. Novkov, "Bringing the States Back In."

[135] If, as Graber claims, state coalitions "spend little energy constructing policies that might satisfy constitutional standards," then they would not offer viable solutions to federal policy debates. However Zackin rebuts Graber, showing state coalitions draft and implement successful solutions to federal constitutional problems, especially on positive rights. For more on state constitutional experimentation and consequent effect on the federal Constitution see Graber, "The Nonmajoritarian Difficulty," 58; Burgess and Tarr, "Introduction: Sub-National Constitutionalism and Constitutional Development," 18–21; Zackin, *Looking for Rights in All the Wrong Places*.

[136] For example, between 1777 and 1786 the legislatures and courts of Massachusetts, Vermont, and New Hampshire extended due process protections to resident slaves, potentially including fugitives. Southerners passed the Fugitive Slave Act of 1850, forcing federal and local agents to return runaways, reforming the laws of free states. Free states like Wisconsin and Vermont abrogated the Act, worsening the controversy. Devolution of slavery regulation aggravated sectionalism, forcing the 1850 Act, which further split the Democratic and Whig parties, forcing the Civil War and constitutional realignment.

[137] Congressional devolution of fugitive slave laws and territorial slave policy in 1850 is one such example.

[138] Is it possible for a new national coalition to fail to realign the federal Constitution, and instead maintain the constitutional status quo? That is, can a mass partisan realignment occur without a constitutional realignment? It is possible, but unlikely. A national realignment coalition holds an exceptional majority of

use deference to quiet controversies, this should be rare. And even in rare cases when state revision fails to preempt federal amendment, this state revision can quiet debates around the amendment, easing its passage.

II. Implications for American Constitutional Development

This model upsets the conventional approach to American constitutional development which focuses on the federal Constitution. First, scholars ignoring the states miss almost all American constitutional revision, which happens at the state level.[140] More importantly, state constitutionalism mediates how national actors affect the federal Constitution. Constitutional reformers are opportunistic, simultaneously working at the national and state level. Often these paths intersect, so to study one path in isolation is to misinterpret it.

To clarify: imagine American constitutionalism simplified to only courts and states. Figure 2 illustrates such a system.

Congress – a realignment coalition is defined in part by its unusually large legislative majority – and thus likely meets the two-thirds supermajority of a national convention or of both congressional houses required to propose a federal amendment. These national majorities are often backed by reformist state majorities (2a), which may meet the three-fourths supermajority required for state legislatures or conventions to ratify the proposed amendment. But these are exceptionally high thresholds that may thwart realignment coalitions. Coalitions have other options, like passing quasi-constitutional statutes like the Social Security Act, designed to last generations, or packing the judiciary and revising the federal Constitution through judicial review. Given the difficulty of revising the Constitution, it is unlikely a surviving but waning coalition (3a), falling short of a realignment coalition's supermajority, could realign the Constitution.

[139] National constitutional realignment destabilizes national politics generally. Constitutions undergird ordinary politics, statutory legislation, enforcement of laws, civic culture, and political legitimacy, so constitutional instability affects citizens' very beliefs and safety. National realignment also affects the states, as the federal Supremacy Clause, congressional enabling acts, and judicial review force lagging states to match these federal reforms. Deference to the states initially quiets national conflict but may eventually backfire, provoking national conflict. Similarly, Graber shows legislative deference to the judiciary works in the short run but may eventually backfire. Graber, "The Nonmajoritarian Difficulty," 65–68.

[140] As stated, Americans have proposed only a single federal constitution with only twenty-seven amendments, but have proposed at least 354 state constitutions, ratified 146, proposed at least 9,500 state constitutional amendments, and ratified at least 5,900.

Figure 2: The Courts and States in National Constitutional Reform

In ignoring the states, scholars sometimes attribute outcomes to the judiciary which may actually be caused by state constitutional revision. The many accounts of judicial review that ignore the states cannot explain all that they claim to explain. That is, most accounts of national judicial and constitutional development are fundamentally flawed.

For example, Robert Dahl, Mark Graber, and Keith Whittington assert judges usually preserve existing readings of the Constitution, while William Lasser and David Adamany disagree. [141] Both camps miss that national actors defer controversies to the states. If judges are the impartial, apolitical arbiters they claim to be, then judges too may defer some political questions to political bodies like state legislatures and conventions.[142] If judges are instead partial and political, then they likely strategically devolve some issues to the states to avoid inter-branch confrontation.[143] Judges can defer political questions to the states by refusing to grant a writ of certiorari to hear a case.

[141] Dahl, Graber, and Whittington assert that Congress and the executive defer controversies to federal judges to postpone political and constitutional reform. Lasser and Adamany reply that strong courts can defy weak executives and congresses Dahl, "Decision-Making in a Democracy"; Adamany, "Legitimacy, Realigning Elections, and the Supreme Court"; Casper, "The Supreme Court and National Policy Making"; Lasser, "The Supreme Court in Periods of Critical Realignment"; Graber, "The Nonmajoritarian Difficulty"; Whittington, *Political Foundations of Judicial Supremacy*.

[142] For this principle, see *Luther v. Borden* (1849). More recently, Justices Marshall, Holmes, Rehnquist, and O'Connor frequently and gladly devolved controversies to the states. Note also that Supreme Court justices defer to state amicus briefs. See Stefanie A. Lindquist and Pamela C. Corley, "National Policy Preferences and Judicial Review of State Statutes at the United States Supreme Court," *Publius: The Journal of Federalism* 43, no. 2 (April 1, 2013): 151–78, doi:10.1093/publius/pjs044.

[143] Marshall is an instructive case – an arch-Federalist, he stripped states' economic regulatory power in *Fletcher v. Peck* (1810), *McCulloch v. Maryland* (1819), and *Gibbons v. Ogden* (1824), until the 1828 election of the states-rights Democrats and Andrew Jackson forced Marshall to defer to states' commerce regulations in *Willson v. Black-Bird Creek Marsh Co.* (1829) and *Barron v. Baltimore* (1833). See *Fletcher v. Peck,* 10 U.S. 87 (1810), *McCulloch v. Maryland,* 17 U.S. 316 (1819), *Gibbons v. Ogden,* 22 U.S. 1 (1824), *Willson v. Black-Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245 (1829), and *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833).

Studying only cases that go before the courts, courts scholars systematically miss the many cases the courts refuse and quietly defer to the states. Selecting issues over which the courts have power, these studies may consistently exclude cases of federal deference to the states, missing an important part of judges' reasoning and of national constitutional development.

When we integrate the states, many cases of national constitutional action or inaction attributed to the courts could instead or additionally be explained by state revision.[144] Courts scholars are correct that judicial review can prompt national constitutional stability or instability. But they often miss that deference by Congress, the president, and the courts to the states spurs state constitutional and statutory revision.[145] American state legislatures, voters, and conventions have amendment power the courts lack. These amendments are written with political aims, have plenary legal power, structure executives and legislatures to enforce these policy aims, and can constrain state judiciaries.[146] Relatedly, federal deference to the state constitutions likely explains the lively positive rights tradition observed by Brennan, Hershkoff, and Zackin.[147] Further,

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[144] For example, in 1850, Stephen Douglas led Congress to defer regulation of slavery to territorial constitutional conventions, causing the slavery crisis that Adamany and Lasser blame on *Prigg v. Pennsylvania* (1842) and *Dred Scott v. Sandford* (1857). Graber also shows Congress deferred to the judiciary on slavery, yielding *Dred Scott*, on monopoly regulation via the 1890 Sherman Act and *E.C. Knight*, and on abortion in *Roe*. see Graber, "The Nonmajoritarian Difficulty," 45–61. Yet Congress also deferred to the states on each of these issues: on slavery, as stated, on Progressive monopoly and labor rights, and on modern abortion and same-sex marriage. See *Prigg v. Pennsylvania,* 41 U.S. 539 (1842) or *Dred Scott v. Sandford,* 60 U.S. 393 (1857), *United States v. E. C. Knight Co.,* 156 U.S. 1 (1895), and *Roe v. Wade* 410 U.S. 113 (1973).

[145] Graber suggests this in passing. Ibid., 40.

[146] Dinan and Burgess and Tarr note state constitutions' easy revision procedure and special legal prerogatives attract reformers thwarted at the national level. Dinan, *The American State Constitutional Tradition*; Dinan, "State Constitutions and American Political Development"; Burgess and Tarr, "Introduction: Sub-National Constitutionalism and Constitutional Development," 17–18. Yet constitutional deference to the states reflects national coalitions' political tactics and intentions, as much as these legal incentives.

[147] William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90, no. 3 (January 1, 1977): 489–504, doi:10.2307/1340334; Hershkoff, "Positive Rights and State Constitutions"; Hershkoff, "Positive Rights and the Evolution of State Constitutions"; Hershkoff and

the courts, lacking the power of the purse and the sword, can rarely force unilateral policy change.[148] The states, not the courts, may drive national constitutional change or stability. Put differently, national constitutionalism is often stable *after* judicial review, but not solely *because of* judicial review. The judiciary's effect on national constitutional development is significantly conditioned on the states.

Describing popular constitutionalism without the states would be equally misguided. According to Bruce Ackerman, citizens assemble and elect representatives to revise the federal Constitution, while Larry Kramer emphasizes how popular mobs block the implementation of federal constitutional provisions.[149] Scholars like Elizabeth Beaumont, Douglas Reed, and Jason Frank study informal practices and moments of constituent power, catching popular constitutionalism at both national and local levels.[150] This dissertation builds on these accounts, explaining the interaction of state and national popular constitutionalism.

The model has three implications for American constitutional and political development. First, as stated, the judiciary's effect on constitutional stability is

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Loffredo, "State Courts and Constitutional Socio-Economic Rights"; Zackin, *Looking for Rights in All the Wrong Places*.

[148] For example, Rosenberg demonstrates that after Southern states ignored *Brown* until Congressional budgeting forced compliance. See Rosenberg, *The Hollow Hope*. Coalitions defer to Courts not only to legitimize, resolve, or postpone issues, as Dahl suggests, but also to kill them, as Graber claims. Hirschl asserts dominant and waning coalitions use courts to entrench their power and silence or preempt outsider claims, just as Rosenberg's "flypaper" Supreme Court attracts, traps, and kills minority rights claims. See Hirschl, *Towards Juristocracy*. Dahl, Graber, and Whittington show the federal government at T_1 defers to the courts. Sidelined by their weak enforcement powers, the courts merely legitimize the national constitutional status quo at T_3. See *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).

[149] Beaumont, *The Civic Constitution*, 3–5.

[150] See Douglas S. Reed, "Popular Constitutionalism: Towards a Theory of State Constitutional Meanings," *Rutgers Law Journal* 30 (1999 1998): 871; Frank, *Constituent Moments*; Beaumont, *The Civic Constitution*. Other historians, lawyers, and political scientists have long noted the state constitutional conventions' localist, republican and Jeffersonian character. Fritz, "Alternative Visions of American Constitutionalism"; Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (Harvard University Press, 1998); Scalia, *America's Jeffersonian Experiment*; Dinan, *The American State Constitutional Tradition*; Amy Bridges, "Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States," *Studies in American Political Development* 22, no. 01 (March 2008): 32–58, doi:10.1017/S0898588X08000035.

significantly conditioned on the states. Relatedly, the federal and state judiciaries are perhaps less influential than they seem, undermining the literature damning unelected judges for impeding popular majorities.[151]

Second, the federal branches sometimes defer to the states to postpone or prevent inter-branch conflict.[152] Studying only the federal branches risks missing how state constitutional revision quietly mediates and directs federal inter-branch conflict, and national constitutional development generally. Further, describing only the unbending federal Constitution, some scholars of American political development place political agency in actors and coalitions' behavior, and little in constitutional law.[153] This dissertation suggests the inverse. The national constitution's inflexibility, particularly to citizenship reform, strains national coalitions and constrains presidential leadership, while the state constitutions' flexibility invites political reform. Constitutional law and structures have some agency in determining the timing and nature of inter-branch conflict and political realignment.

As a corollary, the states retain a role in interpreting the national constitution. The federal framers wrote an "incomplete text" that intentionally deferred many controversies over citizenship, the franchise, slavery, and other issues to the states.[154] Consequently

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[151] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000); Kramer, *The People Themselves*.

[152] For example, the federal judiciary may defer controversial issues to the states to avoid confronting a hostile, powerful realignment president. Recall the Federalist Marshall Court devolved commerce debates to the states rather than challenge the Jackson. The contemporary US Supreme Court until recently repeatedly deferred the constitutional status of same-sex marriage not only to federal and state courts, but also to state constitutions.

[153] Skowronek and Whittington for example repeatedly describe the presidency as a battering ram against the old, inflexible federal Constitutional order, exemplified by reconstructive presidents like Jackson, Lincoln, and Franklin Roosevelt.

[154] Donald S. Lutz, "The United States Constitution as an Incomplete Text," *Annals of the American Academy of Political and Social Science* 496 (March 1, 1988): 23–32. This is akin to Dinan, Burgess and Tarr, and Marshfield's claims on subnational constitutional "space."

through the Tenth Amendment the states elaborate non-enumerated provisions of the Constitution and through Article V they amend enumerated provisions. Antebellum states even nullified and interposed provisions of the national constitution. The states' role is also political, arming national coalitions with solutions to federal constitutional controversies. Whittington for example describes the historical contest between departmentalist and judicial modes of interpretation, but largely misses this third mode of state interpretation, which mediates and directs the interaction of the other two.

Finally, states mediate national realignments. V.O. Key's midcentury studies claimed the states lagged behind federal reforms, especially in the South, and especially on race.[155] Subsequent scholars ignored the states, tracing national realignments to national institutions like the presidency,[156] national parties,[157] or to national ideologies like liberalism.[158] No current model integrates the states.[159] This project suggests some states precede and incite federal coalition and policy realignment, while other states follow. Conservative state coalitions can constitutionally entrench the local status quo, postponing the state realignments that spark national change. Even after national coalition and policy realignments, these states can block policy implementation.[160]
Realignment theorists like Burnham, Sundquist, and Huntington posit realignments are periodic, but as Mayhew notes, they struggle to explain why, relying "on suggestions and

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[155] V. O. Key, "A Theory of Critical Elections," *The Journal of Politics* 17, no. 01 (February 1955): 3–18, doi:10.2307/2126401; V. O. Key, *American State Politics: An Introduction*, 1st ed. (New York: Knopf, 1956); V. O. Key, *Southern Politics in State and Nation* (New York: Vintage Books, 1963).
[156] Skowronek, *The Politics Presidents Make*.
[157] Burnham, *Critical Elections*; Sundquist, *Dynamics of the Party System*; John Herbert Aldrich, *Why Parties?: A Second Look* (University of Chicago Press, 2011).
[158] Huntington, *American Politics*.
[159] To this author's knowledge.
[160] Dinan suggests states have five means to block or change federal constitutional policy: lobbying the federal government, lawsuits in federal court, state statutes, and most importantly, constitutional amendments. Dinan, "State Constitutions and American Political Development."

metaphors rather than on sustained argument."[161] One metaphor describes "pressure buildup" against old, inflexible institutions, as popular majorities revise political systems based on the "dead issues of the past."[162] Constitutions explain the periodicity of realignments. Article V frustrates all but the most committed movements, which gradually build at the state level until they clear this national threshold, scoring national constitutional and policy realignment.[163] The following chapter explains these trends in more detail.

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[161] David R. Mayhew, *Electoral Realignments: A Critique of an American Genre* (Yale University Press, 2002), 15–20. One exception is Beck, who claims impressionable young voters flock to a new realignment coalition and maintain this affective party identification through their lives. Parties stay entrenched for roughly a generation before replacement, explaining periodicity. Paul Allen Beck, "A Socialization Theory of Party Realignment," ed. Richard G. Niemi (Jossey-Bass, 1974).

[162] Sundquist quoted in Mayhew.

[163] Some suggest political realignment is gradual and continuous, rather than abrupt and periodic. V. O. Key, "Secular Realignment and the Party System," *The Journal of Politics* 21, no. 02 (May 1959): 198–210, doi:10.2307/2127162; Edward G. Carmines and James A. Stimson, *Issue Evolution: The Race and the Transformation of American Politics* (Princeton University Press, 1989); Mayhew, *Electoral Realignments*. If parties faithfully and constantly followed demographic changes, this would likely be the case. However, self-interested political parties resist these demographic changes, often through civic and franchise exclusion, creating the pressure that causes sudden critical realignments. And even this incremental model described partisan realignment, it would not describe constitutional realignment. The Constitution, with its extraordinarily high barriers to reform, is designed to resist minor, incremental change. This inflexibility distinguishes constitutional politics from ordinary partisan politics. American constitutions evolve by realigning periodically.

CHAPTER 3: TRENDS IN FEDERAL AND STATE CONSTITUTIONAL REVISION

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

Lord Bryce, 1888[164]

Previous chapters proposed that the state and national constitutions develop in tandem. The first section of this chapter explains how to observe proposals for federal and state constitutional reform. The second section applies this method to demonstrate a positive and statistically significant association between attempts at federal and state constitutional reform. The third section disaggregates federal revision by issue area and state revision by revision procedure, era, and region. This gives an overview of American constitutional federalism, tentative evidence for the dissertation's theory, and a guide to subsequent chapters.

I. Observing Constitutional Change

This dissertation argues that broad demographic, economic, and technological changes spur groups to organize and contest for constitutional reform. National political actors may defer these controversies to the states, or clever reformers may circumvent national venues and seek state and local legal reform. State constitutional revision often resolves these national controversies, averting national constitutional reform. Table 2 lists the steps in this process and the means used to observe each step.

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[164] Bryce, *The American Commonwealth*, I:450.

	1. National			2. State		3. National	
Concept	1a. Change in population, technology, economics	1b. Constitutional contention	1c. Deference to states	2a. Constitutional contention	2b. Constitutional revision	3a. Coalition (in)stability	3b. Constitutional (in)stability
Measure	Demographic, census measures, etc.	Congressional 1) proposals for federal constitutional amendments 2) records	Records of federal branches	Legislative 1) proposals for constitutional amendments, replacements, 2) turnover	1) Ratified constitutional amendments, replacements, 2) statutes, court cases	Congressional 1) proposals for national constitutional amendments, 2) turnover	1) Ratified constitutional amendments, 2) landmark judicial decisions

Table 2: Observing National and State Constitutional Contention and Change.

To observe broad demographic, economic, and technological change (1a), this dissertation uses secondary sources on American political history and development. To observe agitation for federal constitutional reform (1b), this dissertation studies all federal amendments proposed in Congress. Why Congress? Under Article V, all proposed revisions to the federal Constitution must be submitted to Congress, either by members of Congress or by the states. As Michael Kammen noted, knowledge of these proposals, "of their stimuli, and of the controversies they generated, is woefully limited."[165] In aggregating primary and secondary sources on the proposed federal amendments, this dissertation fills that gap. Two sources together list nearly all proposed federal amendments.[166] In 2015, John R. Vile compiled an encyclopedia listing by year the number of proposed amendments and most common amendment topics.[167] A 2016 dataset by the National Archives and Records Administration (NARA) lists proposed amendments by date, sponsor, congressional committee and chamber, and resolution

[165] Kammen, *A Machine That Would Go of Itself*, 11.
[166] These lists of proposals before Congress, if comprehensive, should include all proposed federal amendments. The lists are derived from early and perhaps incomplete congressional records, but these records are the best and most complete records available.
[167] John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2015* (Santa Barbara: ABC-CLIO, 2015). Vile compiled previous editions of the encyclopedia in 1996, 2003, and 2010, a catalog of proposed federal amendments from 1787 to 2001, and a supplement to the catalog for 2001 to 2010.

number.[168] The NARA data covers more years than Vile's, with more information on each year, including descriptions of each proposal in each year. The Vile data strongly confirm the accuracy of the NARA data.[169] For only eight of the years 225 observed in both the NARA and Vile data, the NARA data differ significantly from the Vile data.[170] For these eight years, when possible the dissertation uses the original congressional record to correct inaccuracies in the NARA data, and subsequently relies on the corrected NARA data.[171]

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[168] The NARA data covers 1788 to 2014. See "Amending America: Proposed Amendments to the United States Constitution, 1787 to 2014."

[169] The number of proposals from 1788 to 2012 for the NARA data in total is 11,759 (52.17 per year) and for Vile's data 11,575 (53.09 per year). The average of the difference in yearly observations between the datasets is 4.64, and the correlation coefficient between datasets is 0.995. The Vile and NARA data for 1788-1990 are derived from the same six congressional publications. For 1788-1889, the Vile and NARA data use Ames, for 1889-1926, Tansil, for 1937-62, an anonymous Government Printing Office report, for 1963-9, an anonymous supplement to the previous report, for 1969-84, Davis, and for 1985-90, Harris. See, respectively Ames, *The Proposed Amendments*; Charles Callan Tansill, *Proposed Amendments to the Constitution of the United States: Introduced in Congress from December 4, 1889, to July 2, 1926* (Westport, CT: Greenwood Press, 1926); *Proposed Amendments to the Constitution of the United States Introduced in Congress from the 69th Congress, 2d Session through the 87th Congress, 2d Session, December 6, 1926 to January 3, 1963*, S. Doc. No. 163, 87th Cong. 2d Sess. (Washington: Government Printing Office, 1963); *Proposed Amendments to the Constitution of the United States Introduced in Congress from the 88th Congress, 1st Session through the 90th Congress 2d Session, January 9, 1963 to January 3, 1969*, S. Doc. No. 91-38, 91st Cong. 2d Sess. (Washington: Government Printing Office, 1969); Richard Davis, *Proposed Amendments to the Constitution of the United States Introduced in Congress from the 91st Congress, 1st Session through the 98th Congress, 2d Session, January 1969-December 1984*, CRS Report No. 85-36 GOV (Washington: Congressional Research Service, 1985); Daryl B. Harris, *Proposed Amendments to the Constitution: 99th-101st Congress (1985-1990)*, CRS Report No. 92-555 GOV (Washington: Congressional Research Service, 1992). For 1990-2012, Vile uses his own compendium, and for 1990-2014, the NARA dataset relies on the online congressional record. Vile also relies on a 1929 catalog by Michael Musmanno. See Musmanno, *Proposed Amendments to the Constitution: A Monograph on the Resolutions Introduced in Congress Proposing Amendments to the Constitution of the United States of America.* For a guide to these sources, see Lynch, "Other Amendments."

[170] For these years, a significant difference is defined as three standard deviations greater than the expected difference of zero.

[171] The Vile and NARA yearly counts differ significantly for 1861, 1945, 1991, 1992, 1995, 1996, 2007, and 2009. For 1861, Vile lists 121 proposals, Ames' congressional record, 122, and the original NARA data, 167; however, since these additional NARA observations are confirmed by additional information, the dissertation does not delete them, and keeps the uncorrected 167. For 1945, Vile lists 116 observations, the congressional record, 72, and the NARA data 73, so the dissertation does not correct the NARA data. Congress last compiled a yearly list of proposed amendments in 1990. For observations after 1990, the NARA data seems to switch the years of some proposals made between 1991 and 1992 and between 1995 and 1996, so the dissertation relies on the Vile data for 1990 to 2012. Given both the Vile and NARA data show there were relatively few proposals in these years, the divergence likely does not skew the overall data.

But the number of proposals per year alone cannot indicate significant constitutional revision. A single amendment can change a constitution's identity, effectively creating a new constitution, even if the old one legally endures.[172] Conversely, a slew of amendments may be insignificant.[173] Put differently, a constitution's identity exists through its normative commitments.[174] Significant constitutional change – a change in constitutional identity – occurs only when these provisions are revised.

Normative provisions give America's federal Constitution its identity.[175] This poses five challenges for observing significant constitutional change. First, not all textual provisions are normative commitments that define constitutional identity, so some amendments are only minor revisions, like the Twentieth Amendment, setting January 20th as Inauguration Day. A comprehensive survey of all proposed or ratified amendments will be skewed by the mass of insignificant proposals. Some individual

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[172] Take for example the controversial but unratified 1861 Corwin Amendment to preempt abolition or the 1875 Blaine Amendment to forbid public funding for religious schools.

[173] As the English jurist Matthew Hale argued, the flood of minor amendments to the English Constitution affirmed the Constitution's fundamental principles, maintain the Constitution's identity. Hale explained: "particular variations and accessions have happened in the laws, yet they being only partial, and successive, we may with just reason say, they are the same English laws now, that they were six hundred year since, in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials." Here Hale recalls Theseus' paradox on the nature of identity. According to Plutarch, Athenians preserved Theseus' ancient ship by replacing each rotting plank until entirely new parts composed the ship. Was the ship the same? Constitutional revision can be similarly piecemeal, particularly in the Anglo-American common law tradition, which incorporates constitutional amendments, judicial cases, and practices based on shared normative commitments. See Matthew Hale, *The History of the Common Law of England and an Analysis of the Civil Part of the Law*, 6th ed. (London: Butterworth, 1820), 84.

[174] Unlike an ordinary statute, a constitution expresses a polity's normative aims. For more on this, see Jacobsohn, "Constitutional Identity," June 2006; Jacobsohn, *Constitutional Identity*, 2010; Jacobsohn, "Rights and American Constitutional Identity." But also see Finn, "Transformation or Transmogrification?"; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010).

[175] For Hale and the old English common lawyers, all amendments originated from the English people and their customs and principles, and so most amendments maintained the English Constitution's identity. But this coherence is difficult in a modern heterogeneous country with different principles across groups and eras. In a modern, pluralistic country, values change, and when this change periodically extends to revising core constitutional values – as it should in a democracy – the identity of the constitution changes. Thus, an amendment might follow the legal procedure for revising the constitution, but might violate core normative commitments, fundamentally changing the constitution. Kramer, *The People Themselves*, 9–18.

proposals have been submitted repeatedly, inflating proposal rates; for example, there have been over a thousand proposals for an equal rights amendment.[176] The political scientist William S. Livingston rightly observed that a simple count of proposed amendments

"is of little significance. Many of the proposals were identical, or at least were concerned with the same questions; many were trivial; many were ridiculous; and many were unnecessary. But the most significant explanation of the large number of proposals is the unlimited right of American Congressmen to introduce as many resolutions as they like."

Since congressmen often pander to their narrow base by proposing amendments, many proposals "command no public support whatsoever" with the broader nation.[177] A simple, aggregate count of amendment proposals alone cannot indicate national pressure for constitutional reform.

One might answer this issue by identifying the federal Constitution's core, nationally-shared commitments, giving more weight to, say, Bill of Rights provisions, and to proposed or ratified amendments to these provisions. But, second, the constitution's commitments are themselves a subject of dispute and thus are unclear.[178] Relatedly, third, commitments are contested, such that a single clause can have contradictory meanings.[179] Fourth, given America's common law tradition, constitutional commitments exist in in diverse places, in the formal constitutional text but also in

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[176] Vile, *Encyclopedia of Constitutional Amendments*.

[177] William S. Livingston, *Federalism and Constitutional Change* (Oxford: Oxford University Press, 1956), 200–201.

[178] For example, some modern conservatives deny the commitment to privacy established by the Supreme Court in *Griswold v. Connecticut*. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[179] Antebellum Americans read the Due Process clause to protect slaves' liberty and slaveholders' right to property in slaves, and the Privileges and Immunities Clause to allow free blacks to travel the South and slaveholders to take their slaves north. See the Fifth Amendment and Article IV, Section 2, Clause 1.

statutes,[180] as well as legal and informal practices.[181] Finally, commitments do not inhere in single clauses, but shade into each other. As Justice Oliver Wendell Holmes, Jr. stated "great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[182] In sum, simple revision counts cannot affirm or refute this dissertation's theory, which aims to observe not only aggregate change, but also normatively and politically significant change.

Normative commitments exist in constitutions, statutes, precedents, and practices, so to identify major constitutional changes one must also look to all these sources.[183] Therefore this dissertation uses the NARA data to find proposals, after which it uses case studies to trace these through the congressional record and secondary literature to assess their importance.[184] It supplements this with judicial records, executive speeches, and the writings of constitutional framers, as well as the broader public, which claimed and reinterpreted the written constitution. Similarly, to observe the national branches' deference to the states (1c), the dissertation looks to the congressional record, as well as to judicial decisions and presidential speeches, letters, and decrees.

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[180] Some statutes survive generations, and like constitutional clauses, undergird subsequent legislation. For example, Medicare was a 1965 amendment to the 1935 Social Security Act. Observing only revision of the federal Constitution's clauses misses these relevant sources.

[181] America's commitment to popular sovereignty inheres in the Constitution's preamble, which invokes government by "We the People," in the Guarantee Clause's establishment of republican state governments, in judicial affirmation of this clause in *Luther v. Borden*, in the preambles of the state constitutions, in the Declaration of Independence, and in Americans' periodic constitutional mobs and rallies. See Article IV, Section 4, Clause 1 and *Luther v. Borden,* 48 U.S. 1 (1849).

[182] *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 276 (1928). The right to privacy is a modern penumbral commitment according to *Griswold*.

[183] This dissertation does not give a comprehensive list of the Constitution's commitments, as such a list is itself a subject of dispute.

[184] Herman V. Ames' catalog of proposed amendments and amendments topics is particularly useful. See Ames, *The Proposed Amendments*.

State constitutional amendment and replacement is largely the legal prerogative of the state legislatures.[185] Hence, contention for state constitutional revision within a state (2a) should be concentrated in the legislature.[186] Political contention within a state can be observed as the change in a party's share of the legislature, as recorded by Michael Dubin.[187] To identify cases of contention specifically over *constitutional* issues, this dissertation observes the number and nature of proposals for new state constitutions.[188] The dissertation assembles a dataset of state constitutional proposals, merging five incomplete lists of proposals for new state constitutions,[189] checking each against the others.[190] To catch any observations not included in these five lists, and to verify and

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[185] Legislators can propose a constitution or call a convention or commission to do the same. In every state save Delaware, legislators must submit a proposed constitution to the voters. Legislators can also propose amendments, which may be contingent on public approval. In some states, citizens can circumvent the legislature and pass an amendment by initiative.

[186] However, Revolutionary and antebellum Americans often challenged the legitimacy of their state legislatures, and sometimes pursued extralegal constitutional change, as this dissertation later explains.

[187] This dissertation relies on Dubin's observations, which are more comprehensive than the other available dataset, the Partisan Division of American State Governments, 1834-1985, assembled by Walter Dean Burnham. See Michael J. Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006* (McFarland, 2007).

[188] This dissertation defines a proposal for a new constitution as the assembly of a convention, commission, or committee with the *authority* to propose an entirely new constitution. This includes assemblies that fail to draft a completely new constitution, or cannot alone ratify a constitution, as is the case with all commissions save Florida's, and all conventions, save Delaware's.

[189] These five sources are Cynthia E. Browne, ed., *State Constitutional Conventions from Independence to the Completion of the Present Union, 1776-1959: A Bibliography* (Westport, CT: Greenwood Press, 1973); Sturm, *Thirty Years of State Constitution-Making, 1938-1968*; Sturm, "The Development of American State Constitutions"; Dinan, *The American State Constitutional Tradition*; Horst Dippel, "The Rise of Modern Constitutionalism, 1776 - 1849," n.d., http://www.modern-constitutions.de.

[190] None of the five are complete lists of all proposed state constitutions. First, Browne lists extant records of state constitution-making assemblies between 1776 and 1959, but excludes unrecorded proposals and those made after 1959. The list includes some "limited" assemblies that lacked the authority to propose an entirely new constitution; this dissertation does not include these commissions as attempts to propose a new constitution. If it is unclear whether the assembly listed in Browne (1973) is limited, the dissertation includes the commission. The dissertation also refers to a supplement updating Browne's list to 1976. See Bonnie Canning, ed., *State Constitutional Conventions, Revisions, and Amendments, 1959-1976: A Bibliography* (Westport, CT: Greenwood Press, 1977). Second, Sturm (1970) lists constitutional proposals between 1938 and 1968, including a thorough list of constitutional commissions. But Sturm (1970) does not include proposals outside of this span. Sturm also lists limited commissions that could prepare for a convention, but not propose a replacement constitution. See Sturm, *Thirty Years of State Constitution-Making, 1938-1968*, 138–53. This dissertation does not include these limited commissions as attempts to propose a new constitution. Given Sturm's list spans only 1938 to 1968, one might worry this dissertation systematically undercounts commissions outside this era. But Sturm, Dinan, and Tarr assert commissions

expand information on each observation, this dissertation surveys and codes every reference to a state constitutional proposal in every volume of the *Oxford Commentaries on the State Constitutions of the United States,* a series on the constitutional history every state.[191] To resolve any remaining ambiguities, the dissertation refers to *The Constitutionalism of the American States*, an edited volume on the constitutional history of every state, and also refers to additional secondary sources, and to primary source documents, including convention and legislative minutes, newspaper articles, and private correspondence, sometimes obtained through archival research. Given this, the dissertation should include nearly all proposed and ratified American state constitutions.[192] Studying failed proposals avoids selection bias toward successful

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occurred mainly in the mid-twentieth century. See Sturm, *Thirty Years of State Constitution-Making, 1938-1968*; Sturm, "The Development of American State Constitutions"; Tarr, *Understanding State Constitutions*; Dinan, *The American State Constitutional Tradition*. This suggests that Sturm's study from 1938 to 1968 captures most commissions. And to catch any observations outside of Sturm's range, the dissertation refers to the *Reference Guides to the State Constitutions of the United States*, which surveys the constitutional development of every state from its founding to the present. Third, Sturm (1982) lists all proposed constitutions between 1776 and 1981, but not those after 1981. Fourth, Dinan lists all constitutional conventions between 1776 and 2006. Ibid., 8–28. But this excludes proposals not made by convention. Fifth, the Rise of Modern Constitutionalism database includes texts of proposed state constitutions up to 1849, but excludes proposals after 1850.

[191] This fifty-volume series, published by Oxford University Press, was previously released by Greenwood Press as the *Reference Guides to the State Constitutions of the United States*.

[192] The dataset includes state assemblies which the authority to propose an entirely new constitution. Thus it excludes five kinds of proposals for new state constitutions. First are the constitutions of overseas federal territories and the District of Columbia's 1982 and 2016 constitutional conventions and constitutions for the state of New Columbia. See May, "Constitutional Amendment and Revision Revisited," 157. Second are the few state constitutions drafted under a sovereign foreign government, including the 1812 East Florida Constitution drafted under Spanish control. Third are the periodic state-sponsored votes on whether to call a constitutional convention, as these votes consider whether to propose a constitution, but themselves are not proposals for a new constitution. Fourth are the 41 "limited" conventions, commissions, and committees assembled exclusively and explicitly to amend but not replace a constitution, to collect information, and/or to prepare for a constitutional convention without proposing a draft constitution. To identify these cases, the dissertation refers to a list of limited commissions and conventions compiled by Albert Sturm. See Sturm, *Thirty Years of State Constitution-Making, 1938-1968*, 35–36, 65–66, 110, 113, 132–55. All but four of these assembled between 1944 and 1973. For a list of these 41 excluded proposals, see **Error! Reference source not found.** in the appendix. Last are the few private constitutional assemblies ormed without legal authority, as sanctioned by the state legislature, and/or without local territorial control. To identify or exclude these observations, this dissertation uses the *Reference Guides to the State Constitutions of the United States*.

constitutional proposals.[193] To the author's knowledge, this is the most complete list of proposed American state constitutions.[194] A list of all 354 proposals is included in the appendix.

This dissertation observes state constitutional revision (2b) as the number of constitutions ratified and enforced within a state. Not all proposals result in the ratification of an entirely new document, as some proposals are split into amendments and only partially ratified, and even fully ratified proposals may not be the sole constitution enforced in a state.[195] When coding proposals for a new constitution, this dissertation considers a proposal successfully passed only if it is completely ratified and effectively enforced as a state's sole constitution. The dissertation also observes all state constitutional amendments proposed and ratified since 1776.[196]

But as stated, a simple count of attempted and successful constitutional replacements or amendments cannot reveal which revisions matter. Some states propose many constitutions but ratify few,[197] and even states that regularly replace their

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[193] For example, between 1912 and 1945, only Louisiana ratified a new constitution. But in these years the states held over a dozen conventions, including Ohio's nationally-significant 1912 Convention, which bolstered Theodore Roosevelt's presidential bid, rallying progressives. Dinan, *The American State Constitutional Tradition*, 16.

[194] Dinan's thorough survey of constitutional conventions, likely the most comprehensive published list of state constitutional proposals, counts 233 conventions. This dissertation includes Dinan's observations, but also several conventions he does not include, as well as commissions and committees, for 354 total observations. See Dinan, *The American State Constitutional Tradition*.

[195] Rhode Island had two opposed constitutional conventions and two subsequent governments in 1841, as did Kansas after 1855, as did Civil War border states like Virginia. And some territorial and frontier constitutions, though establishing the territory's sole, legitimate government, went largely unenforced. Delegates to an 1859 convention in Denver met for a single day at the Apollo Hall tavern to draft a constitution for the Jefferson Territory, Colorado's extralegal predecessor. Voters approved the constitution, but the Jefferson legislature local faced resistance from miners committees around Denver and Pikes Peak. See Dale A. Oesterle and Richard B. Collins, *The Colorado State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2002), 2–6.

[196] The dissertation uses the Wallis data for ratified state amendments and the Rise of Modern Constitutionalism data for proposed but unratified amendments. Dippel, "The Rise of Modern Constitutionalism, 1776 - 1849"; John Wallis, "The NBER - Maryland State Constitutions Project," 2006, www.stateconstitutions.umd.edu.

[197] New Hampshire has held seventeen conventions, but kept its 1784 Constitution.

constitutions might only rarely change their core normative constitutional commitments. Framers can revise or add many provisions without changing meaning, either as empty elite concessions to riled citizens, or from inexperience or lack of imagination in drafting, or from inability to find alternatives to old, successful, path dependent, or sticky constitutional rules.

State framers and judges have long affirmed that state constitutional identity inheres in core normative provisions.[198] The New Jersey Supreme Court declared "Not all constitutional provisions are of equal majesty… The task of interpreting most if not all of [the New Jersey Constitution's] 'great ordinances' is an evolving and on-going process."[199] State constitutional commitments are drafted, revised, and interpreted by state convention delegates, special commissions, judges, legislators, governors, voters casting ballots in referenda and initiatives, and by extralegal mobs, meetings, and committees. The methods vary by era,[200] so the significance of the same reform can vary by era. Identifying significant state constitutional change requires studying the complex

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[198] In 1780 Massachusetts' framers forbade legislators from making laws that were "repugnant or contrary to this constitution," suggesting that some core provisions of the Constitution ought to be impervious to legislative amendment. See the Massachusetts Constitution of 1780, Frame of Government, Chapter I, Section I, Article IV. For a similar provision, see the New Hampshire Constitution of 1784, Form of Government, Section 2.

[199] See *Vreeland v. Byrne*, 72 N.J. 292, 370 A.2d 825 (1977) and Robert Forrest Williams, *The New Jersey State Constitution* (New York: Oxford University Press, 2012), 42. See also the North Carolina Supreme Court in *Corum v. University of N.C.*, 413 S.E.2d 276, 289 (N.C. 1992). However, in *Omaha National Bank v. Spire* 223 Neb. 209, 389 N.W. 2d 269 (1986), the Supreme Court of Nebraska considered whether an amendment to the Nebraska Constitution violated a core principle of the state's Constitution, and hence whether the amendment was unconstitutional. The Court implied the Nebraska Constitution had no core provisions, that all provisions of the Nebraska Constitution were equally important in adjudicating a case, and accordingly the amendment was valid. While all provisions may be equally important in *adjudicating* a constitution, they are not equally important in *identifying* a state constitution. If the Nebraska Constitution were revised to include a bicameral legislature for the first time in nearly a century, it would become a fundamentally different document. For a general comment on state constitutional identity, see James Gray Pope, "An Approach to State Constitutional Interpretation," *Rutgers Law Journal* 24 (1993 1992): 985; Robert A. Schapiro, "Identity and Interpretation in State Constitutional Law," *Virginia Law Review* 84, no. 3 (April 1, 1998): 389–457, doi:10.2307/1073668.

[200] Major nineteenth century revisions came through conventions, while modern reformers use Progressive reforms like referenda

interactions of all of these bodies over time. This dissertation follows this ongoing process through records kept by state constitutional convention delegates, legislators, judges, governors, and newspapers, backed by secondary sources and some archival research.

Finally, observing stability in national constitutional politics (3a) and the federal Constitution (3b) is possible, but difficult. One might observe constitutional stability as the proportion of federal amendment proposals ratified, with fewer ratifications indicating relative stability in a given era. But only 0.002% or twenty-seven of the 11,797 proposed amendments have cleared Article V and been ratified, so this proportion is so low as to be meaningless. Rather, this dissertation observes the significance of ratified amendments as they are interpreted in congressional and federal court records.

II. Comparing National and State Constitutional Change since 1787

As stated in the previous chapter, there are at least two ways that state constitutional reform can preclude federal reform. In cases of *preemptive resolution*, states can seize and address a national constitutional issue, preventing the federal branches from intervening in this area. Alternately, in cases of *joint resolution*, the federal and state governments together address the same constitutional issue, while the states alone revise their constitutions.

This section examines the *joint resolution* claim. This claim has two testable propositions. First, attempts at federal constitutional revision, measured as the number of proposed federal constitutional amendments, should be positively associated with attempts at state constitutional revision, measured as the number of proposed state constitutions and state amendments. Second, a high proportion of these state

constitutional proposals should be ratified, while few federal amendments proposals should be ratified.

As expected, the aggregate numbers of federal and state proposals are closely associated. To further examine this association, this dissertation regresses separately four measures of attempted state constitutional reform – the total number of proposed state constitutions, of partly or fully unratified state constitutions, of fully ratified state constitutions, and of ratified state constitutional amendments – as independent variables on the number of attempted federal amendments as a dependent variable.[201] The data was sorted into one-year bins and five-year bins,[202] yielding the following eight bivariate linear regressions.

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[201] Since this section only claims there is a positive and significant association between two variables, the dissertation uses a simple bivariate linear regression to test this association. This is not a causal prediction, so the regression does not include control variables. Subsequent case studies trace this causal process. Pearson correlation tests also affirm the regression results, revealing a moderate to strong positive correlation between federal amendment proposals and total proposed state constitutions (0.43), unratified state constitutions (0.64), and ratified state amendments (0.76), for five year bins. See Table 18 in the appendix.

[202] There are several arguments against using one-year bins alone. Members of Congress propose more federal constitutional amendments in the first year than the second year of a given Congress, inflating variation between individual years. See Figure 9 in the appendix demonstrating this. Similarly, many state legislative sessions last more than a year. Finally, proposal and ratification of a federal amendment or state constitution takes several years, and so we should expect a lag between the variables. The dissertation compensates for these issues by smoothing the data by sorting it into five-year bins.

State	1: Fed. Pro. 1yr	2: Fed. Pro. 1yr	3: Fed. Pro. 1yr	4: Fed. Pro. 1yr	5: Fed. Pro. 5yr	6: Fed. Pro. 5yr	7: Fed. Pro. 5yr	8: Fed. Pro. 5yr
Total Const. Proposals	12.13* (2.704)				18.65* (5.792)			
Unratified Const. Proposals		27.19* (3.654)				39.07* (6.926)		
Ratified Const. Proposals			-2.921 (5.093)				-4.639 (11.91)	
Ratified Amendments				0.577* (0.108)				0.0005 (0.0004)
Constant	34.20* (6.635)	27.46* (5.967)	53.67* (6.246)	30.613* (7.699)	105.2 (57.69)	74.68 (45.10)	250.8* (56.61)	0.280 (0.145)
Observations	228	228	228	196	50	50	50	42

Table 3: Association between Federal Amendment Proposals and State Constitutional Proposals, 1791-2014.
Standard errors in parentheses. * p<0.01

There is not a statistically significant relationship between the number of federal proposals and ratified state constitutions, shown in columns 3 and 7. However, columns 1-2 and 4-6 show that there is a positive and statistically significant relationship for the total number of state constitutions proposed, for the number of partly or fully unratified state constitutions, and for the number of ratified state amendments.[203] That is, it is highly unlikely that there is no association between these measures of federal and state constitutional reform. This supports the prediction of a positive, significant association between attempted federal and state constitutional reform.

Figure 3 demonstrates this association over time, focusing on the number of proposed federal amendments and proposed state constitutions. This shows that federal and state proposals are positively associated, increasing together after the 1787 Constitutional Convention, during and after the Civil War, and through the civil rights movement of the 1960s. These three moments were the high points for attempted state

[203] The theory makes an assertion about the statistical significance and direction of the association between state and federal proposals, and as such, the magnitude of the coefficients for each regression is less important. Note also there is not a statistically significant relationship between federal and state amendments (column 8).

constitutional revision.[204] Relatedly, after some national partisan realignments,[205] state constitutional replacement jumps.[206]

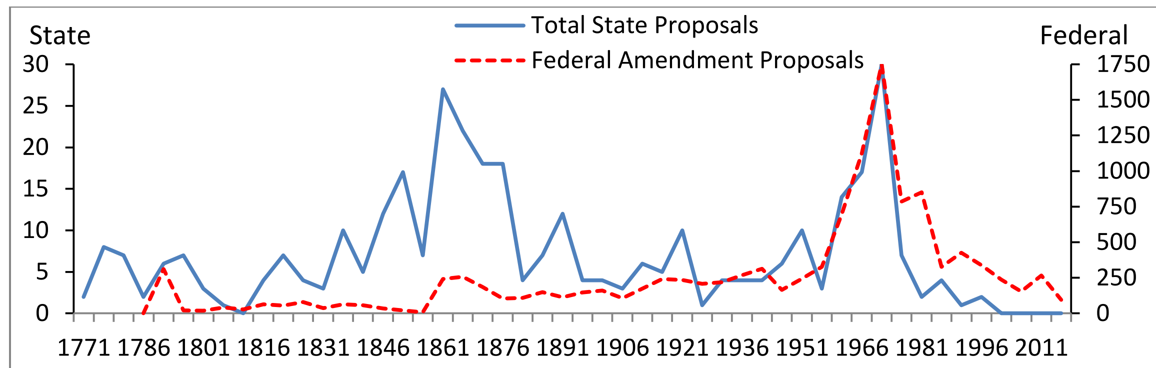

Figure 3: Proposed Federal Amendments and State Constitutions by Five-Year Bins, 1791-2014.

Figure 4 shows the rolling correlation between the number of federal and state proposals for 1787 to 1995.[207] The correlation between the number of state and federal proposals shows distinct and sustained plateaus around the Civil War and the civil rights

[204] For some five-year intervals, the number of proposed state constitutions exceeds the overall mean for five-year intervals (7.08), and several sequential intervals exceed the mean by at least a standard deviation (6.83). These sequential intervals occur during the founding, Civil War, and civil rights movement. For example, between the Civil War's start in 1861 and Reconstruction's end in 1877, the states proposed 74 constitutions, almost a fifth of the total proposed in American history, with fifteen in 1861 alone. Equally important is the number of proposals weighted by the number of existing states. For example, between 1787 and 1791, the fourteen states proposed six constitutions, while between 1912 and 1916, also a five-year span, the United States saw also six proposals, but these were diluted across forty-eight states. This pattern of periodic peaks holds, even when weighted by the increasing number of states over the course of American history, suggesting that national expansion does not drive this pattern in state constitutional revision. See the appendix for time series plots and tables showing periods of increased state constitutional revision.

[205] Scholars like V.O. Key and Walter Dean Burnham suggest that parties periodically splinter over divisive issues and reorganize as new parties, culminating in a critical election. See Key, "A Theory of Critical Elections"; Burnham, *Critical Elections*; William N. Chambers and Walter Dean Burnham, eds., *American Party Systems: Stages of Political Development* (New York: Oxford University Press, 1975); Sundquist, *Dynamics of the Party System*. For a critique of this field, see Key, "Secular Realignment and the Party System"; Carmines and Stimson, *Issue Evolution*; Mayhew, *Electoral Realignments*.

[206] During the Revolution, Civil War, and civil rights movement state revision exceeded expected levels. These three realignments took 49 years total, only a fifth of American constitutional history. Yet nearly half of all state constitutions were proposed and ratified in these three moments. A quarter of American state constitutions were proposed or ratified during the Civil War crisis alone.

[207] Correlation is measured by rolling twenty-year intervals, sorted by start year. Each twenty-year span has relatively few observations. As such, this is only an approximate measure of association.

movement.[208] During these two periods, attempts at federal and state revision simultaneously spiked, explaining the increased association. Correlation also increased during the 1980s and 1990s, as the number of federal and state proposals declined together.[209] Similarly, the number of federal amendments is associated over time with the number of unratified and ratified state constitutions, and with ratified state amendments, as shown by Figure 10 and Figure 11 in the appendix.

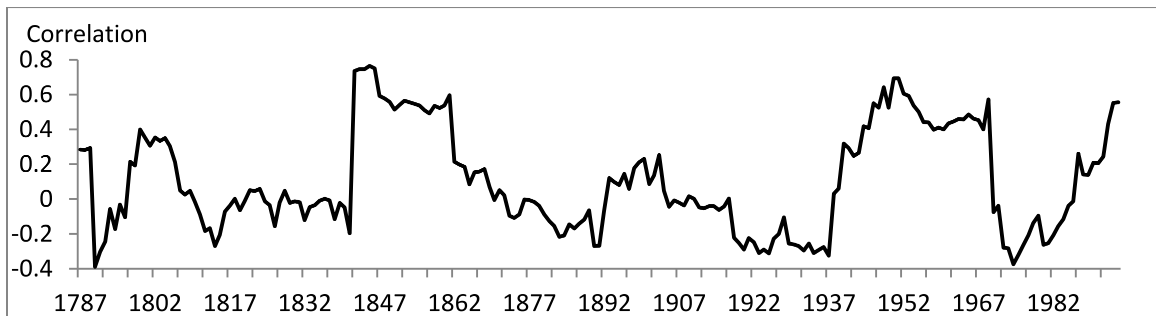

Figure 4: Correlation between Proposed Federal Amendment Proposals and State Constitutions by Rolling Twenty-Year Intervals, 1787-1995.

As mentioned, of the 11,797 proposed federal amendments, only twenty-seven (0.002%) have been ratified. But the states have passed 146 of the 354 proposed state constitutions (41%). Perhaps unsurprisingly, the number of state constitutions proposed is closely positively associated with the number of state constitutions ratified, with a gradual decline after the progressive era when states introduced unelected expert constitutional commissions that could propose but not ratify new documents.[210]

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[208] Jacob Cohen defines weak correlations between social science variables as those around 0.1, moderate around 0.3, and strong around 0.5 Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* (Lawrence Erlbaum Associates, 1988), 79–81.

[209] They also diverge periodically, though for shorter periods. This occurred in the 1890s when Congress incorporated many Western states with new constitutions, but proposed relatively few federal amendments, and during the Great Depression and after the civil rights movement, the two nadirs of state constitutional revision.

[210] Correlation between the number of proposed and ratified state constitutions is high (0.76), and tracks very closely both before Reconstruction (0.90 for 1776 to 1876) and after (0.62 for 1876 to 2016). The proportion of constitutions ratified decreases during the 1960s with the widespread adoption of commissions. After the 1990s the proportion flat-lines, as states recently have neither proposed nor ratified

In sum, the number of federal amendment proposals is positively and significantly associated with the number of proposed state constitutions, unratified state constitutions, and state constitutional amendments. That is, when Congress proposes more federal amendments, the states often propose more state constitutions and amendments. Many of these state proposals pass, while very few federal amendment proposals do. This tentatively supports the dissertation's claim of *joint resolution*, in which the states and Congress together propose constitutional reform, and that usually the states alone achieve reform.

There are a few shortcomings of this test. This does not confirm or deny the claim of *preemptive resolution* in which the states quiet calls for federal amendment. This is best observed through case-by-case process tracing. Additionally, during the founding, Civil War, and civil rights periods, the states did not avert federal amendment,[211] but rather addressed and helped resolve the same controversies facing the national government. For example, between 1788 and 1800, most proposals for federal amendments and for state constitutions addressed rights provisions and the structure of government.[212] Between 1860 and 1870, most federal proposals concerned slavery and suffrage,[213] as did many proposed state constitutions, especially in the South.[214] And

new constitutions. See Figure 10 in the appendix for the number of state constitutions proposed and ratified.

[211] Multiple federal amendments were ratified during the Founding (10), Civil War (3), and civil rights era (4).

[212] See Edward Dumbauld, "State Precedents for the Bill of Rights," *Journal of Public Law* 7 (1958): 323; Wood, *The Creation of the American Republic, 1776-1787*; Lutz, *Popular Consent and Popular Control*; Donald S. Lutz, "The State Constitutional Pedigree of the U.S. Bill of Rights," *Publius: The Journal of Federalism* 22, no. 2 (March 20, 1992): 19–45; Kruman, *Between Authority and Liberty*; Adams, *The First American Constitutions*; John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, Second (Santa Barbara: ABC-CLIO, 2003), 540–41.

[213] Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 544–45.

[214] Ralph A. Wooster, *The Secession Conventions of the South* (Princeton University Press, 1962); Michael Perman, *The Road to Redemption: Southern Politics, 1869-1879* (Chapel Hill: University of North

between 1960 and 1970, many proposed federal amendments and state constitutions addressed electoral district apportionment, voting rights, and equal rights provisions.[215] Even when the states do not avert federal reform, they can aid in resolving national constitutional crises. Finally, note that this association supports the dissertation's causal story, but alone cannot affirm it. And as explained, these proposal measures alone cannot identify significant state or federal constitutional change, and can only offer provisional evidence for the dissertation's theory. This requires case studies, elaborated in the following chapters.

So far this section has compared the number of proposals for state constitutions and federal amendments. How do state proposal rates relate to congressional or Supreme Court politics? This dissertation suggests that Congress and the Supreme Court often defer national constitutional controversies to the states. When congressional interparty polarization is high, we might expect members of Congress will be unable to compromise to resolve national controversies, and will instead defer conflict to the states. Polarization should be positively associated with attempts at state revision. The evidence for this is limited. The correlation between interparty polarization and the number of state constitutional proposals, though moderate, is negative for the House (-0.37), and weaker for the Senate (-0.21).[216]

Carolina, 1984); Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (University of Chicago Press, 2004).

[215] Tarr, *Understanding State Constitutions*, 153–57; Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 552–53.

[216] Polarization for each chamber is measured as the interparty difference in means on the first dimension of Poole and Rosenthal's DW-NOMINATE scores. For these correlations, state proposal data is sorted into two-year bins to match the two-year length of each meeting of Congress, as observed in Poole and Rosenthal's data. Data is for 1879 to 2013. See Figure 12 in the appendix for a time series plot comparing polarization and state proposals.

We might expect when the Supreme Court is burdened with more cases, it will push some of these issues on the states, such that caseload and attempts at state replacement should be correlated. Evidence suggests this is not so. The correlation between the Supreme Court caseload and the total number of state proposals is weak (0.08).[217] This disjunction is particularly pronounced in the late twentieth century. When Earl Warren became Chief Justice in 1953, the Court docket caseload was 1,463 cases. When he retired in 1969, it was 4,202. In 2013, it was 8,580.[218] Since the end of the Warren Court, the states have proposed only twenty-one new constitutions and ratified eight, a relative decline, and have instead favored piecemeal amendment.[219] This is not to suggest that the modern Supreme Court has displaced the states as the main site for resolving national constitutional disputes. Rather, piecemeal state amendments and state court decisions act as a parallel track to the federal judiciary for resolving national disputes. Sometimes the states move prior to the federal courts, cuing the federal courts' rulings. Again, recall that in legalizing same-sex marriage in *Obergefell v. Hodges* (2015),[220] the Supreme Court deferred to prior changes in public opinion and state constitutional reform.

III. Trends in Federal and State Revision

This section concludes this chapter, disaggregating trends in attempted federal amendment by topic and then trends in state constitutional revision first by procedure,

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[217] Correlation is for 1879-2013.

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

[219] See Figure 13 in the appendix for a time series plot comparing the Supreme Court caseload and attempts at state constitutional replacement.

[220] See *Obergefell v. Hodges*, 576 U.S. ___ (2015).

then by region, and finally by era, previewing subsequent chapters. Proposals for federal amendments cluster around specific issue areas. To code proposed federal amendments by issue area, this dissertation derives a list of twenty-four common amendment topics from a similar list by John R. Vile,[221] combined with and checked against a list of the most frequent terms appearing across all amendment descriptions in the NARA dataset.[222] Search terms were generated for each topic,[223] and amendments with descriptions including these terms are coded as matching the topic, for up to two topics per amendment.[224] Of the 11,797 proposed amendments, 10,324 (88%) match at least one topic.[225]

The following time series plots disaggregate proposed amendments by topic. Note that some issues like congressional powers are perennial, steady topics for reform, while other topics, like prohibition, peak and decline. The latter pattern is particularly common for topics in the 1960s and 1970s, as members of Congress proposed federal amendments

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[221] Vile's list catches a few topics, like banking, that appear relatively infrequently in the NARA dataset, but are nevertheless important to American constitutional development. In developing his *Encyclopedia*, Vile listed topics with as much "completeness as possible, but with no pretense to absolute accuracy." Vile, *Encyclopedia of Constitutional Amendments*, Appendix D.

[222] The National Archives and Records Administration amendment catalog includes for each proposed amendment a brief description taken often exactly from the aforementioned congressional catalogs of proposed amendments. For many amendments this official description, though perhaps not the full amendment text, may be the best summary available. This dissertation identifies the most common words to appear across all descriptions, excluding words like "of" and "the" not related to policy issues, duplicates of words like "right" and "rights", and words appearing less than fifty times across all 11,861 proposals, yielding a list of the most common policy-related words.

[223] See Table 10 in the appendix for a list of topics, search terms, and their frequency. Skimming amendment matches for a search term confirms that search terms are narrow enough to usually exclude false positive matches for a topic.

[224] Only two topics are coded per amendment, such that if amendments consistently matched for more than two terms, these additional matches could possibly be excluded, resulting in a systematic undercounting of amendments matching these additional topics. But because of the brevity of NARA's amendment descriptions, almost no amendments matched for more than two search terms. This dissertation confirmed this by comparing the number of amendment descriptions including a given term to the number of amendments coded for that same term. For all topics, these were exactly or almost exactly equal, showing that this coding method does not systematically exclude any topics it aims to code.

[225] Further, 4,287 proposals match for two. Of the 1,471 amendment proposals not matching for any topic, the dissertation searched for most frequently-occurring words. No word appearing more than fifty times had policy significance (i.e. many words were propositions like "of"), suggesting the search does not systematically fail to code these remaining amendment proposals.

to override Warren and Burger Court decisions on school prayer, state legislative apportionment, abortion, and school busing. Note also that fifteen of twenty five topic areas including 5,646 amendment matches are coded as topics that are expressly concurrent constitutional powers.[226] That is, about half of proposed federal amendments relate to issues that could also be regulated by state constitutional reform. These plots, demonstrating the main issues for attempted federal amendment in each era, preview and guide the case selection for national constitutional issues and controversies to study in subsequent chapters.

[226] Note that this count of fifteen is conservative, as the remaining ten topics could be interpreted to concen concurrent powers. Note also that an amendment can match for up to two topics, such that this cunt of amendment matches is likely greater than the absolute number of amendments.

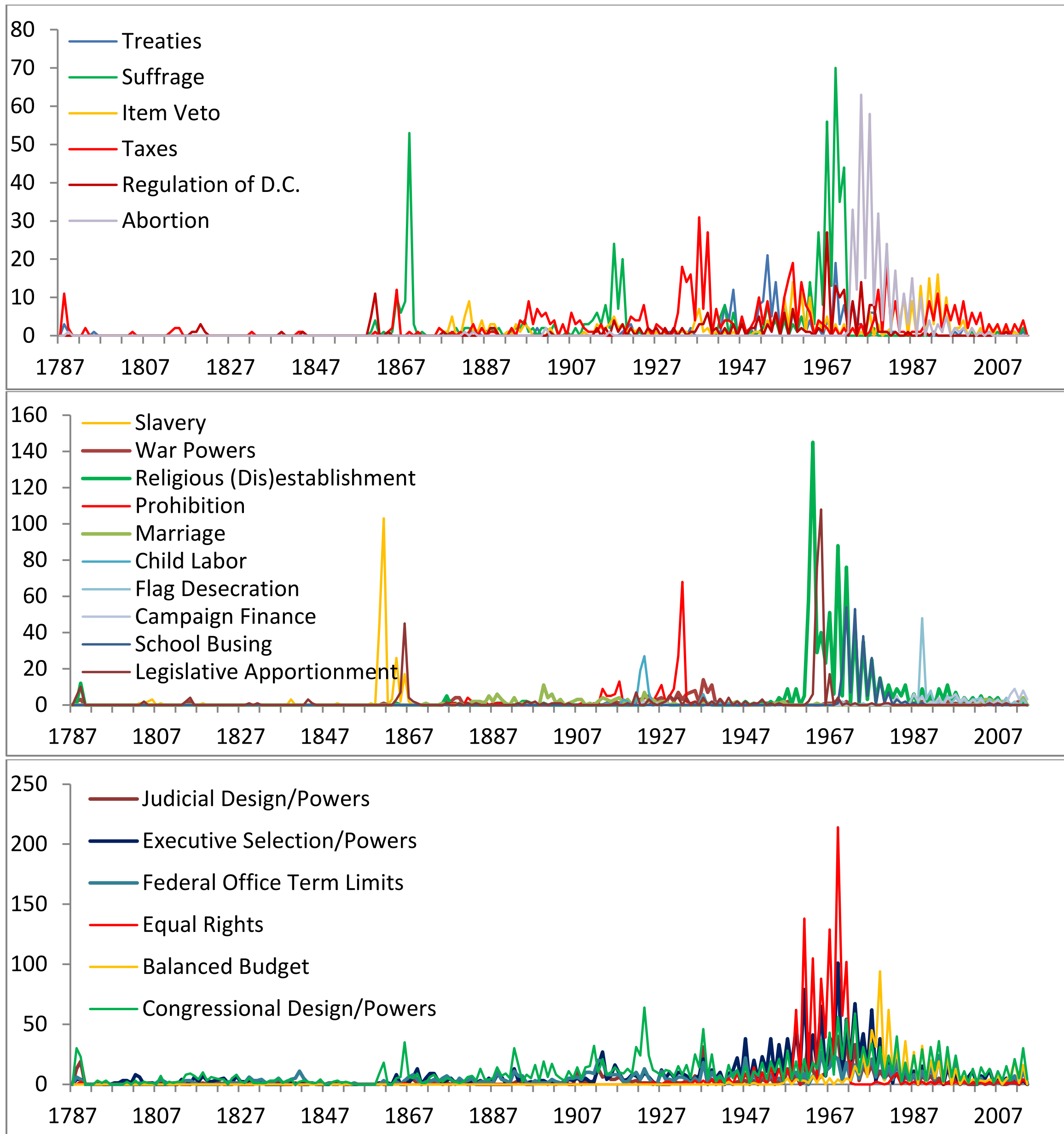

Figure 5: Proposed Federal Amendments by Topic Area, 1788-2014

Turning now to attempted state revision, the state constitutions, unlike the federal Constitution, allow multiple procedures for constitutional replacement or amendment. All American state constitutions have been proposed or ratified by three types of bodies:

constitutional commissions, legislatures, and constitutional conventions.[227] State revision rates vary by procedure, as seen in Table 4.[228]

	Convention		Commission		Legislature		Total	
	Count	Pct.	Count	Pct.	Count	Pct.	Count	Pct.
Ratified	135	92	4	3	7	5	146	100
Without popular vote	46	94	0	0	3	6	49	100
With popular vote	89	92	4	4	4	4	97	100
Unratified	115	55	72	35	21	10	208	100
Voters reject part, approve part	38	81	9	19	0	0	47	100
Voters reject whole	32	82	5	13	2	5	39	100
Whole rejected without vote	7	21	20	61	6	18	33	100
No data	38	43	38	43	13	15	89	100
Total	250	71	76	21	28	8	354	100

Table 4: Methods and Outcomes of American State Constitutional Change, 1776-2017.

The preferred method of revision has changed over time. During the Revolution and founding, temporary mobs, committees of safety and correspondence, and insurrectionary provincial congresses called for or reassembled as state constitutional conventions.[229] But during the Jacksonian era, professional parties organized within the state legislatures and called overtly partisan legislative committees and conventions to draft constitutions. Progressives later tried to replace these with piecemeal amendments

[227] There are three minor caveats to this classification. First, in October 1776, the Connecticut legislature passed a statute making the state's 1662 colonial charter the state constitution. Rhode Island's legislature resolved in May 1776 to declare independence from Great Britain while maintaining its colonial charter. See Adams, *The First American Constitutions*, 64–66. These documents were drafted by a colonial government but ratified by an American state legislature, and are exceptions to this tripartite classification. Second, Pennsylvania's 1776 Constitution, replaced in 1790, potentially allowed constitutional replacement by a special Council of Censors. Vermont's 1777 Constitution, modeled on the 1776 Pennsylvania Constitution, did the same, as did subsequent Vermont constitutions until the mid-nineteenth century. However, in practice, these bodies passed piecemeal revisions rather than wholesale constitutional replacements. Finally, in some cases all three kinds of constitution-making bodies (legislatures, conventions, and commissions) have had to submit their proposals to the state's governor, legislature, or voters.

[228] Additionally, older states tend to propose and ratify more constitutions – perhaps unsurprisingly, state age correlates closely with the number of constitutions proposed (0.55) and ratified (0.59). State age is measured as the number of years in the Union. See the appendix for Figure 18 on state age and rates of attempted and successful constitutional revision. Ratified constitutions vary considerably in age. The average state constitution lasts 64 years without replacement. But many exceed this. Vermont's Constitution dates to 1793, New Hampshire's to 1784, and Massachusetts' – the world's oldest standing written constitution – to 1780. Conversely, South Carolina's 1776 Constitution survived only two years, and the 1778 South Carolina Constitution yielded to five more constitutions.

[229] Unlike legislatures, which represented parochial, temporary interests, these special conventions could claim to represent the common will and could frame constitutions to bind the whole polity.

passed by constitutional initiatives, referenda, and apolitical, appointed expert commissions. These unelected commissions, drawn by governors and legislatures, studied existing constitutions and sometimes proposed new ones, but lacking popular authorization, could not ratify these proposals, deferring the ratification to future conventions and legislatures. Legislatures could accept or reject a commission's proposals piecemeal, and consequently almost all commissions resulted in partial amendment rather than wholesale constitutional replacement.[230] When *Baker v. Carr* (1962) called for apolitical reapportionment of legislative districts,[231] legislators again selected commissioners, preferring appointed commissions to conventions of popularly elected, autonomous delegates. Accordingly, commissions eclipsed conventions in the mid-twentieth century. The rise in commissions, as well as the natural aging of constitutions, led to an increase in the number of ratified amendments in the twentieth century.[232] Figure 6 summarizes these trends.

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[230] Florida is the sole state that allows a commission to submit a proposed constitution directly to voters. The state used this method to pass its 1968 Constitution. Three other ratified constitutions were drafted almost entirely by commission. These are Georgia's 1945 Constitution, Georgia's 1976 Constitution, which essentially reorganized the 1945 Constitution, and Virginia's 1970 Constitution. Note that some "preparatory" commissions can set the organization and agenda for subsequent constitutional conventions. Even if these commissions do not directly result in a proposed constitution, they are influential in the state constitution-making process. For more on the history and authority of constitutional commissions, see Sturm, *Thirty Years of State Constitution-Making, 1938-1968*, 33–49; Sturm, "The Development of American State Constitutions," 84–86.

[231] *Baker v. Carr*, 369 U.S. 186 (1962).

[232] See Figure 11 in the appendix for a time series plot of the number of ratified state constitutional amendments.

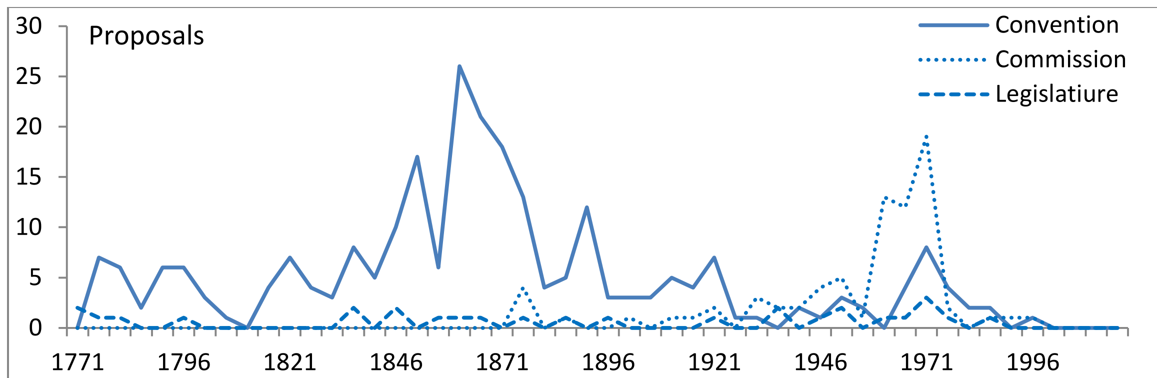

Figure 6: Modes of State Constitutional Proposal, 1776-2017.

Constitutional revision and design also vary regionally.[233] State framers have generally disfavored the federal model, instead referring to compendia of previous state constitutions.[234] Between 1781 and 1894, over seventy editions of state constitutional compilations were printed, and these were used in nearly every nineteenth century convention.[235] Most often, framers borrowed from recently-drafted documents and neighboring states, so constitutions tend to resemble their neighbors in design and duration,[236] resulting in five distinct regional constitutional cultures. Each region has a distinct tradition of constitutional design and revision.[237]

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[233] Nineteen states have had a single constitution, while Louisiana has had eleven. The average number of constitutions ratified by each state is three. But not every proposal is successful, and some states have seen many more unsuccessful proposals than others. For maps indicating the number of constitutions proposed and ratified by each state, see Figure 16 in the appendix.

[234] Dinan, "Court-Constraining Amendments and the State Constitutional Tradition," 14–16; Tarr, *Understanding State Constitutions*, 98–99.

[235] Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West," *Rutgers Law Journal* 25 (1994): 975–78.

[236] Tarr, *Understanding State Constitutions*, 98–99.

[237] For yearly rates of state constitutional proposals and ratification in each region, see Figure 15 in the appendix.

Region	Constitutions				States
	Proposals	Pct.	Ratified	Pct.	
New England	56	16	13	9	CT MA ME NH RI VT
Mid-Atlantic	73	21	33	23	DE IL IN MD NJ NY OH PA WI MI
South	123	35	72	49	AL AR FL GA KY LA MS NC SC TN TX VA WV
Great Plains	39	11	17	12	IA KS MN MO ND NE OK SD
West	63	18	11	8	AK AZ CA CO HI ID MT NM NV OR UT WA WY
Total	354		146		

Table 5: American States and Rates of Constitutional Proposal and Ratification by Region, 1776-2017.

New England constitutions, like the federal document, are brief, old, and widely venerated. John Adams drafted Massachusetts' 1780 document, the world's oldest written constitution, which became a model for subsequent New England constitutions.[238] These documents include broad provisions on morality,[239] due process, and equality.[240] In contrast, early Mid-Atlantic conventions drafted longer documents, like Pennsylvania's 1776 and 1790 Constitutions, which avoided morality legislation, allowing cultural pluralism and pursuit of private economic ends.[241] Virginian and Pennsylvanian farmers

[238] The Massachusetts Constitution's tripartite government inspired delegates to New Hampshire's 1784 Convention. See Wood, *The Creation of the American Republic, 1776-1787*, 339–43. The Massachusetts document, with Connecticut's 1818 Constitution, inspired Maine framers in 1819. See Marshall J. Tinkle, *The Maine State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1992), 1–6; Tarr, *Understanding State Constitutions*, 98. The short constitutions of Vermont, Rhode Island, and Connecticut too resemble the Massachusetts document. See Massachusetts Constitution of 1780, Article III.

[239] Like many New England states, Massachusetts' Constitution established a commonwealth with shared "piety, religion, and morality," backed by temperance and lottery legislation. See the 1780 Massachusetts Declaration of Rights, Article III.

[240] For example, in 1783 Massachusetts' Supreme Judicial Court used the state due process clause to abolish slavery, as did later New England courts and legislatures. Vermont's 1777 Declaration of Rights, Chapter I, Section 1 was the nation's first state law banning slavery. Massachusetts' 1783 *Jennison* case abolishing slavery was reported in 1867 as *Commonwealth v. Jennison*, Rec. I783, fol. 85. See William O'Brien, "Did the Jennison Case Outlaw Slavery in Massachusetts?," *The William and Mary Quarterly*, Third Series, 17, no. 2 (April 1, 1960): 220, doi:10.2307/1943353. Initially lacking constitutional equality and due process protections, Connecticut and Rhode Island provided for gradual emancipation by statute in 1784. Two years later, New Hampshire's legislature interpreted the state due process clause to ban slavery. Maine entered the Union as a free state in 1819. See Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (University of Chicago Press, 1967), 105–8, 116–17; David Menschel, "Abolition without Deliverance: The Law of Connecticut Slavery 1784-1848," *The Yale Law Journal* 111, no. 1 (October 1, 2001): 164 n3, doi:10.2307/797518; Gregory Ablavsky, "Making Indians 'White': The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy," *University of Pennsylvania Law Review* 159, no. 5 (April 1, 2011): 1501–2.

[241] Like Pennsylvania's 1776 and 1790 delegates, many Mid-Atlantic framers brokered compromises between Englishmen and Scots-Irish and Germans immigrants, between Protestants and Catholics, and between urban and rural settlers, creating longer documents.

settled Ohio, comprising seventeen of the thirty-five delegates to the first Ohio convention in 1802, drawing heavily on the Pennsylvania 1790 Constitution.[242] From Ohio, Jacksonian frontiersmen spread the Mid-Atlantic model through the Great Lakes region to Indiana in 1816, Illinois in 1818, Michigan in 1835, and Wisconsin in 1848.[243]

Southern framers drafted distinctively long, quasi-statutory constitutions to reconcile white planters and small farmers while systematically excluding blacks. Virginia's 1776 Constitution was the first regional model, and George Nicholas, who drafted the document, presided over the 1792 Kentucky Convention.[244] From Virginia and Kentucky the model diffused through the antebellum South.[245] The Civil War, Reconstruction, and Jim Crow yielded a slew of constitutions in the mid-nineteenth and twentieth centuries.[246] Of the eighteen states to ratify four or more constitutions, twelve are Southern, and Southern states account for half of the states with an average

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[242] It also reflected the as well as the 1796 Tennessee Constitution and 1799 Kentucky Constitution. See Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide* (Greenwood Press, 2004), 2–4, 7–8, 10, 15–16.

[243] Ohio and Kentucky offered models for delegates to Indiana's 1816 Convention. Illinois framers, like Ohio's and Indiana's, drew elements of its 1818 Constitution from the Northwest Ordinance, including Article VI, abolishing slavery, though Illinois allowed de facto slavery until 1845. Michigan framers too borrowed from the Ordinance, but also New York and Connecticut's constitutions. Similarly, Wisconsin settlers too came from New York and New England. See Paul Finkelman, "Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois," *Journal of the Early Republic* 9, no. 1 (1989): 21–51, doi:10.2307/3123523; Susan P. Fino, *The Michigan State Constitution: A Reference Guide*, annotated edition edition (Westport, CT: Greenwood Press, 1996), 4–8; Jack Stark, *The Wisconsin State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1997), 4–8; Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY: M.E. Sharpe, 2001), 58–80.

[244] Seventy-five of the 107 sections of the Kentucky Constitution of 1792 were derived, sometimes verbatim, from the Pennsylvania 1790 Constitution. See Robert F. Ireland, *The Kentucky State Constitution: A Reference Guide* (Westport, Conn: Greenwood Press, 1999), 2.

[245] Delegates to Louisiana's 1812 Convention merged the French civil code with elements of Kentucky's 1799 Constitution. Virginia's 1776 Constitution was also a model for the 1776 North Carolina Constitution. Tennessee, carved from North Carolina's Appalachian claims, in turn drew on the North Carolina document in 1796. And from the Tennessee and Kentucky Constitutions came the Mississippi Constitution of 1817, which inspired framers in Alabama in 1819 and Arkansas in 1836. See Lewis L. Laska, *The Tennessee State Constitution: A Reference Guide* (New York: Greenwood Press, 1990), 2–7; Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* (New York: Greenwood Press, 1991), 2–3; John W. Winkle, *The Mississippi State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), 2–5; Tarr, *Understanding State Constitutions*, 129.

[246] Only with the Jim Crow constitutions of the 1880s and 1890s did Southerners find relative constitutional stability. See Figure 15 in the appendix for an account of Southern constitutional revision.

constitutional duration below the national average.[247] This regular turnover likely dulled Southerners' sense of constitutional veneration.[248]

Great Plains constitutions, framed in the Populist and Progressive eras,[249] allow piecemeal popular initiatives and referenda, which has almost entirely preempted wholesale constitutional replacement.[250] Similarly, Western constitutions have endured through partial amendment. California's 1849 Convention was the first in the West, and a model for Oregon in 1857 and Nevada in 1864.[251] And Wyoming framers in 1889 looked to the work of nearby Coloradans, Idahoans, Montanans, and North Dakotans.[252] Many Western and Rocky Mountain state constitutions dealt with the same resource concerns over soil aridity, mineral extraction, and water allocation, and with political concerns over labor, railroads and corporations, Mormonism, and federal authority.[253]

Finally, consider revision in each era in greater detail. At the behest of the Continental Congress, the states ratified twelve constitutions between 1776 and 1778. Many of these were quickly drafted as expressly temporary instruments to declare independence from Great Britain and structure government, legal rights, and national

[247] In twenty-six states, the average constitutional duration was below the national average. Thirteen of these states are Southern.
[248] According to a 2014 survey, of the thirteen Southern states, in ten, the average of respondents' admiration for their constitution was below the national average. Texas, Florida, and West Virginia were the exception. See Stephanopoulos and Versteeg, "The Contours of Constitutional Approval," 21–25.
[249] All but three of the seventeen constitutions of the states in the Great Plains region were ratified between 1846 and 1907. Note also Minnesota's first framers in 1857 drew on the Northwest Ordinance, but the state entered the Union with the Great Plains states, and thus is categorized with them, rather than the original and older Old Northwest states. See Mary Jane Morrison, *The Minnesota State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2002), 3–5.
[250] Regional constitutional stability is fairly high, with only two states revising their constitutions more than once.
[251] California delegates drew on conventions in Michigan in 1835, New York in 1846, and Iowa. Oregonians looked also to conventions in Ohio (1849), Maine, Indiana, and Iowa. Idahoans used California's 1849 and 1878 Constitutions. See David Schuman, "The Creation of the Oregon Constitution," *Oregon Law Review* 74 (1995): 611; Fritz, "American Constitutional Tradition Revisited," 975–84.
[252] They also referred to recent constitutions framed in Pennsylvania and Illinois. Tarr, *Understanding State Constitutions*, 98.
[253] Gordon Morris Bakken, *Rocky Mountain Constitution-Making, 1850-1912* (Greenwood Press, 1987); Bridges, "Managing the Periphery in the Gilded Age."

sovereignty during the Revolution.[254] During the 1790s, many states, including Pennsylvania, Vermont, and Georgia, replaced these temporary constitutions, conforming to the federal model. The era produced twenty-five constitutions of average duration,[255] roughly a sixth of those ratified in American history.

The federal Constitution deferred suffrage regulation to the states, so Jeffersonian state legislatures and conventions revised their constitutions to extend near-universal suffrage to white males. This state-level revision tripled the electorate,[256] facilitating Jackson's landslide 1828 victory, the collapse of the reigning Democratic-Republicans, and the rise of the Democratic and Whig parties. Between 1828 and 1861, states proposed sixty-six new constitutions and ratified twenty-eight.[257] Twenty-one of these were Southern or Mid-Atlantic states that were grappling with slavery, postponing the slavery crisis and helping preserving the Jacksonian party system.

Eventually, state constitutional revision exacerbated sectionalism.[258] Southern states seceded by redrafting their constitutions in 1861. These gave way to new, egalitarian Reconstruction state constitutions in 1864 and another set three years later,[259]

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[254] In 1776, Pennsylvanians drafted a unicameral system with a weak executive and broad rights and participation. Vermont and Georgia imitated this design the following year. At John Adams' behest, the Virginia Constitutional Convention of 1776 drafted a more conservative model, pitting a governor against an upper and lower house, as in Britain, and against an independent judiciary. Adams replicated this design in Massachusetts in 1780, which became the model for the New Hampshire Constitution of 1784, and the national Constitution of 1787.

[255] On average, a constitution framed in this era lasted sixty years. Ten constitutions from the Revolution and the founding era lasted less than twenty-five years. All but three of these were the initial, experimental state constitutions framed between 1776 and 1778.

[256] Richard P. McCormick, "New Perspectives on Jacksonian Politics," *The American Historical Review* 65, no. 2 (January 1, 1960): 288–301, doi:10.2307/1842870.

[257] State constitutions framed in this era were not especially durable, lasting an average of fifty-three years. Most constitutions framed in this era lasted less than fifty years, nine lasted twenty-five years or less, while only five lasted more than a century.

[258] Northerners and Westerners passed antislavery state constitutions and elected Republicans, unbalancing the House and Electoral College and exacerbating Southern anxieties that a dominant North would abolish slavery in the territories or states.

[259] The twenty-two Reconstruction constitutions were exceptionally inclusive documents, framed by majority or plurality black conventions, enfranchising black voters at yet-unseen levels that would not be

which quieted debates around the framing and ratification of the federal Reconstruction Amendments. As the era ended, Midwestern populists in Nebraska in 1870, Illinois in1870, and Missouri in 1875 revised and replaced their constitutions to constrain corporations. Midwestern Populist and Western Progressive territories faced strict federal oversight in drafting constitutions for admission to the Union, much like their ex-Confederate counterparts. Though only a quarter century, this period yielded fifty-two constitutions, a third of the total ratified in American history.[260]

In the 1880s and 1890s, Populist, Progressive, and Western states protected economic and positive rights, well before the Progressive federal amendments of 1913-1920. Southern Redeemers also constitutionalized Jim Crow in this era. Most of these Jim Crow constitutions were passed in the late 1880 and early 1890s, as Southern Democrats organized locally before sweeping Congress in 1892 and scoring *Plessy v. Ferguson* (1896).[261] Virginia's 1902 Constitution, for example, repudiated the biracial partisan order built under the state's 1869 Constitution.

This led to a national lull in state constitutional replacement in the interwar years. Between 1924 and 1945, only two states replaced their constitutions.[262] There are three reasons for this. First, by 1912 all of the territories within the continental United States

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matched for another century. For example, Virginia's 1869 Reconstruction Constitution, was backed a racially inclusive order, including the Readjuster coalition between blacks and poor whites. Conversely, many Reconstruction constitutions disenfranchised and alienated local ex-Confederates who caucused with Northern moderates to repeal these constitutions and retrench the old constitutional order. The Reconstruction constitutions lasted an average of thirty years, and only fourteen years when discounting the outlying constitutions of North Carolina (1868), Tennessee (1870), and Arkansas (1874).

[260] On average, a constitution framed in this era lasted fifty-three years. Twenty-eight of these constitutions lasted less than twenty-five years. Of these, eighteen were Southern Reconstruction constitutions.

[261] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[262] These were Louisiana (1921), Missouri (1945), and Georgia (1945).

had achieved statehood.[263] Second, Progressive innovations like the referendum, initiative, and expert constitutional commission superseded wholesale replacement by convention. Third, Southern constitutions ossified in the interwar years. The handful of Southern states had accounted for over half of the constitutional replacement in antebellum, Civil War, and Reconstruction America.[264] But with the end of Reconstruction, Redeemers and ex-Confederates entrenched their power through durable state constitutions and statutes that disenfranchised Republican, black, and biracial state coalitions.[265] This new, white, solidly-Democratic electorate locked Southern states under Democratic control for generations. Southern legislatures, insulated from interparty competition, called no new conventions and Southern state constitutional replacement flat-lined.[266] The South, once the hotbed of constitutional replacement,[267] was now quiet, and aggregate American state constitutional replacement declined. Additionally, with the Great Depression, Democrats swept Congress and the White House, regulating state

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[263] Progressive and eugenicist congressmen were wary of granting statehood to the handful of territories outside the continental United States, particularly to those seized during the Spanish-American War, arguing their populations were unsuited to American liberal constitutionalism. Similarly, in the *Insular Cases* (1901), the Supreme Court selectively extended rights under the national Constitution to these populations

[264] Southern states accounted for a major part of nineteenth-century revision. Between 1826 and 1906, the thirteen Southern states framed 48 of America's 87 state constitutions (55%), and drafted 67 of the total 137 proposed constitutions (39%).

[265] Virginia's 1902 Constitution, which disenfranchised the biracial populist Readjustors, exemplifies this trend.

[266] Between Virginia's 1902 Constitution and the Civil Rights movement of the 1960s, only two Southern states replaced their constitutions. These were Louisiana in 1913 and 1921 and Georgia in 1945. Florida broke this lull by replacing its constitution in 1968. Jim Crow constitutions became firmly entrenched for generations. Though there was intraparty legislative competition and extralegal rioting in the South, these conflicts did not lead to extralegal, popular state constitutional conventions, as they had in the late eighteenth and early nineteenth century. Perhaps this was because by the late nineteenth century, Southern states had developed powerful police forces and mobs to punish extralegal mobbing.

[267] For example, Alabama's 1901 Constitution is still in force. It has at least 892 amendments. National Democratic leaders like capitulated to Jim Crow constitutionalism, for fear of splitting the party. Wilson advanced the Jim Crow program in the federal government and Franklin Roosevelt left the Redeemer state constitutions untouched.

commerce and welfare programs, sometimes to the exclusion of the states.[268] But in other cases, the states retained constitutional authority over welfare programs.[269]

Finally, in the 1960s all three federal branches aggressively intervened in state regulation of education, criminal justice, and voting and apportionment law.[270] Between 1960 and 1977, states attempted to replace their constitutions at levels unseen since Reconstruction. Ten states ratified new constitutions, though only five of these were states were Southern, suggesting perhaps that Civil Rights-era concerns plagued Northern and Western constitutions. And during the 1960s and 1970s, every region in the United States saw a spike in proposals for a new state constitution.[271] Relatedly, *Baker v. Carr* (1962) forced widespread state legislative redistricting. Across the Sunbelt, conservatives organized municipalities and states around constitutional amendments, laying the

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[268] The New Deal Congress first passed the National Industrial Recovery Act (NIRA) and Agricultural Adjustment Act (AAA) of 1933. Four of the Supreme Court's reactionary Republican appointees – Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter – led the court to strike down the NIRA as an overextension of federal commerce powers in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), and the AAA as an invasion of traditional state powers in *United States v. Butler,* 297 U.S. 1 (1936). But after Roosevelt threated to pack the Court with sympathetic justices, the Court capitulated, recognizing federal commerce power to regulate intrastate economic production in *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U.S. 1 (1937), and in *Wickard v. Filburn,* 317 U.S. 111 (1942). The importance of Roosevelt's threat is a matter of debate. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) is often read as the Court's capitulation to Roosevelt's court packing threat, the famous "switch in time that saved nine." However, it is not clear that Roosevelt's plan influenced the justices' meetings on this case, nor is it clear the threat influenced subsequent cases on New Deal programs. In the *NLRB* case, Butler, McReynolds, Sutherland, and Van Devanter still opposed federal authority to establish the NLRB, and none of the four allowed expansion of federal commerce power in *Wickard*, as all four had retired.

[269] In *Steward Machine Company v. Davis* (1937), the Court upheld the Social Security Act of 1935, arguing the Act recognized and enabled states' preexisting welfare statutes and positive constitutional rights, balancing national authority and devolution. And in *Home Building & Loan Association v. Blaisdell* (1934), the Court deferred to a Minnesota statute granting beleaguered lessees a two-year moratorium extension on home loan payments, one of many such state laws and constitutional provisions. See *Steward Machine Company v. Davis,* 301 U.S. 548 (1937) and *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934).

[270] On federal intervention in state education policy and desegregation, see *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), Cooper *v. Aaron,* 358 U.S. 1 (1958), the Elementary and Secondary Education Act of 1965, and *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968). On criminal justice, see *Mapp v. Ohio,* 367 U.S. 643 (1961), *Miranda v. Arizona,* 384 U.S. 436 (1966), and *Duncan v. Louisiana*, 391 U.S. 145 (1968). On redistricting, see for example *Baker v. Carr,* 369 U.S. 186 (1962), *Reynolds v. Sims,* 377 U.S. 533 (1964), and the 1965 Voting Rights Act.

[271] See Figure 15 in the appendix.

groundwork for Reagan's 1980 election. These culture wars still affect state constitutional revision, making study of the state constitutions as timely as ever.

The gradual backlash to Civil Rights-era reforms also began with the states. Local grassroots organizing for Goldwater and Nixon in the Sunbelt states eventually realigned national partisan politics and vaulted Reagan into the White House.[272] The contemporary national parties, now trapped by legislative gridlock, defer to the states on contentious issues like regulation of abortion, capital punishment, gun control, drug control, and voting and elections. Facing many disparate and narrow issues, the states have turned to specialized amendments, rather than wholesale constitutional replacement – Rhode Island was the last state to replace its constitution, in 1986. These many state amendments and cases still influence national constitutional politics. For example, thirty-six states had legalized same-sex marriage by amendment or federal or state ruling before the Supreme Court followed suit in *Obergefell v. Hodges* (2015).[273] Subsequent chapters further explain these patterns by era, beginning with the American Revolution.

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[272] Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton University Press, 2002); Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton University Press, 2006).

[273] See *Obergefell v. Hodges*, 576 U.S. ___ (2015).

Part II: Constitutional Development

CHAPTER 4: THE FOUNDING ERA, 1760-1799

"It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."

Alexander Hamilton, 1787[274]

In the mid-eighteenth century, American colonists contested British slave law, frontier regulation, and understandings of legislative sovereignty. Their petitions for constitutional reform unanswered, colonists revolted, proposing thirty-four new state constitutions between 1776 and 1799 and ratifying twenty-four, a fifth of the total ratified in American history. The national constitutional order was equally unstable, as Americans ratified the Articles of Confederation in 1781 and the federal Constitution in 1788. Congress saw 310 federal amendments proposed in its first two-year session, far exceeding the antebellum average of twenty-three per session,[275] and ratified ten proposals as the Bill of Rights in 1791, adding the Eleventh Amendment in 1795, accounting for nearly half of all federal amendments to date.

What explains this state and federal constitutional instability? The Revolution was a moment of crisis. Colonists scrambled to declare independence and form war governments by ratifying fifteen constitutions between 1776 and 1780. The collapse of the Articles and the ratification of the 1787 Constitution pushed the states to propose another fourteen new constitutions to match the federal model by 1799. Opening *The Federalist*, Alexander Hamilton recognized the risk that Americans would "depend, for their political constitutions, on accident and force."

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[274] Hamilton, Madison, and Jay, *The Federalist*, 1.
[275] Between 1787 and 1860, Congress saw on average 11.74 federal amendment proposals per year.

But Americans were not victims of circumstance. In May 1776, the Continental Congress deferred constitutional framing to the state conventions, which rejected British oversight and constitutional custom.[276] In the four years after Congress' May resolutions, fourteen states had called as many conventions, in what Gordon Wood calls "the most creative and significant period of constitutionalism in modern Western history."[277] State framers designed constitutions deliberately, using a growing pamphlet literature on English Whig mixed constitutions, ancient Saxon democracy, Roman republicanism, and Greek confederations. In May 1776, Carter Braxton reminded the delegates to Virginia's Constitutional Convention that "Various are the opinions of men on this subject," allowing "all the candor and deliberation due to its importance."[278] State conventions proceeded thoughtfully and purposefully. Massachusetts, for example, took four years to design and ratify its first constitution.

In resolving controversies over slavery, the frontier, and legislative sovereignty and design, state framers preempted these debates at the federal Convention. As James Wilson noted and later Hamilton put it, federal framers could now go about "establishing

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[276] Wood, *The Creation of the American Republic, 1776-1787*, 127–29; Kruman, *Between Authority and Liberty*, 1–4, 15–20. But for the colonial framers' reliance on English constitutionalism, See Ibid., 7–14.
[277] New Hampshire and South Carolina had two conventions each, while Connecticut and Rhode Island retained their colonial charters with a few modifications, and thus had no constitutional conventions. Between 1776 and 1780, each other state had a single convention. Gordon S. Wood, "Foreword: State Constitution-Making In the American Revolution," *Rutgers Law Journal* 24 (1993 1992): 911.
[278] Similarly, delegates to Pennsylvania's June 1776 Provincial Conference reminded the state's voters of "the privilege of choosing Deputies to form a Government under which you are to live." "Provincial Conference," in *The Proceedings Relative to Calling the Conventions of 1776 and 1790: The Minutes of the Convention That Formed the Present Constitution of Pennsylvania, Together with the Charter to William Penn, the Constitutions of 1776 and 1790, and a View of the Proceedings of the Convention of 1776, and the Council of Censors* (John S. Wiestling, 1776); Carter Braxton, "An Address to the Convention of the Colony and Ancient Dominion of Virginia; on the Subject of Government in General, and Recommending a Particular Form to Their Consideration," in *The Founders' Constitution: Major Themes*, ed. Philip B. Kurland and Ralph Lerner (Indianapolis, Ind: Liberty Fund, 1776), 670.

good government from reflection and choice."[279] John Dickinson and George Mason similarly instructed federal delegates to rely on prior state constitutions' legislative design and rights provisions.[280] In sum, state constitutional design quieted national constitutional controversies, tempering the instability of the emerging national constitutional order. In sum, while Revolution led to significant state and national constitutional revision, state framing helped stabilize national constitutionalism.

This chapter proceeds chronologically in three parts, first introducing colonial debates in the 1760s over Parliamentary sovereignty, slavery, and frontier regulation, which escalated into rebellion. Second, the chapter shows how the Continental Congress in 1776 deferred these questions to the state constitutional conventions, which limited state legislative sovereignty through bicameralism and gubernatorial and judicial oversight, reapportioned legislatures to appease frontiersmen, and settled on diverse slavery regulation. Finally, delegates to the 1787 Philadelphia Convention imitated these state legislative designs and avoided the difficult slavery question by deferring to existing state regulations.

I. The Colonial Era and Revolution, 1760-1776

On the eve of the American Revolution, Edmund Burke reflected on the collapse of Britain's colonial administration. Addressing the House of Commons, he called Americans

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[279] At the federal Convention, James Wilson reminded the drafters Americans were "the first instance of a people assembled to weigh deliberately and calmly, and to decide leisurely and peaceably, upon the form of government by which they will bind themselves and their posterity." James Wilson, *The Substance of a Speech Delivered by James Wilson, Esq.: Explanatory of the General Principles of the Proposed Fœderal Constitution; ... in the Convention of the State of Pennsylvania, ... 24 Nov. 1787* (Philadelphia: Thomas Bradford, 1787), 5.
[280] Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. II (New Haven: Yale University Press, 1911), 278, 582–83.

> a people who are still, as it were, but in the gristle, and not yet hardened into the bone of manhood. When I contemplate these things; when I know that the Colonies in general owe little or nothing to any care of ours, and that they are not squeezed into this happy form by the constraints of watchful and suspicious government, but that, through a wise and salutary neglect, a generous nature has been suffered to take her own way to perfection.[281]

Salutary neglect was the rule of British administration.[282] Far removed from the Crown and Parliament, Americans grew accustomed to liberty.[283]

Colonists' resistance to active British administration provoked constitutional conflict, which colonists addressed three ways. First, they sometimes used judicial arbitration. But ordinary colonists knew that biased local elites controlled colonial courts. So when they felt they did not get a fair shake, colonists rioted. When rioting escalated into the Revolutionary War in 1775, colonists found a third, untested means of constitutional reform, framing new constitutions and governments for their colonies.[284] Colonists thus relied on diverse and conflicting sources of constitutional authority and change. This in turn prevented colonists from resolving controversies over slavery, the frontier, and legislative sovereignty and taxation. This section first outlines these three

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[281] Edmund Burke, "Speech on Conciliation with America," in *The Works of the Right Honorable Edmund Burke: With a Biographical and Critical Introduction by Henry Rogers*, ed. Henry Rogers, vol. I (London: Henry G. Bohn, 1775), 186.

[282] The embattled Stuart Crown often ignored the colonies, as did Robert Walpole's Parliament, concerned with the European continent in the eighteenth century.

[283] "In this Character of the Americans, a love of Freedom is the predominating feature which marks and distinguishes the whole," Burke wrote, "and as an ardent is always a jealous affection, your Colonies become suspicious, restive, and untractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for." Thus When James II dissolved the New England charters and governments in 1686 and installed his own deputy, Edmund Andros, New Englanders revolted and cast off British authority. Only with the conciliatory government of William and Mary did neglect gradually resume and the riots calm. See Burke, "Speech on Conciliation with America," 186.

[284] Two weeks after Lexington and Concord, Massachusetts' revolutionary Provincial Council moved to restructure its government. In the next year, four other colonies drafted new constitutions, each declaring independence from Great Britain. In July 1776, the Second Continental Congress too declared formal separation, ending the colonial era.

controversies, and then explains how these escalated into war, forcing the beleaguered Continental Congress to push these issues on the new states.

A. Colonial Constitutional Controversies

In 1606, King James I chartered the Virginia Company to settle the Chesapeake, establish plantations, and spread Christianity. Colonists landed at Jamestown the following year, then settling across the eastern seaboard.[285] After wresting control of the Delaware from the Dutch in 1667, England held the North American coast from Massachusetts to Florida,[286] and the Crown quickly issued charters splitting the fifteen hundred miles of coastline into manageable colonies.[287] Proprietary charters established

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[285] Food shortages, disease, and the first few hard winters killed all but sixty of the three hundred settlers, but after 1610, the hardy survivors ventured from their fort at Jamestown, building villages with homes, schools, churches, farms, and plantations. The first Africans arrived aboard a Dutch warship in 1619, bound as slaves or servants. Native Americans of the Powhatan Confederacy overran the nearby village at Henricus in 1622, killing a quarter of the colony's settlers, but with immigration, the colony rebounded. Two years later, Charles I assumed the throne, married a Catholic, and reformed the Church of England on Catholic principles. This alienated Puritans, who fled to by the thousands to found Massachusetts. Whole families and villages uprooted to New England, taking with them the English common law tradition of profuse legal writing. They drafted compacts to govern their villages, and recorded births, marriages, deaths, and with each, the transfer of property. As in England, property gave status as a freeman and the right to participate in local government. Charles asserted his royal prerogative over the Massachusetts Bay and Plymouth colonies with charters in 1629. The colonists grew in number, attacking the Pequots in 1637, the Narragansetts in 1643, and the Wampanoags in the devastating King Philip's War of 1675-6, crippling New England's Indian population.

[286] The English spread until they abutted Dutch settlements along the Hudson River. The embattled Dutch also clashed with Swedes to the south, claiming the Swedish Fort Christina at the mouth of the Delaware in 1655. Their success was brief. Dutch holdings separated New England from Maryland, chartered in 1632, and Virginia. English marines overran the tiny wooden Dutch fort in 1664, and the Netherlands ceded its North American claims three years later, connecting the northern and southern English colonies.

[287] Connecticut was chartered in 1662, Rhode Island and the Carolinas in 1663, New Jersey in 1664, and New York was carved from Dutch holdings the same year. Pennsylvania's proprietary charter followed in 1681, granting William Penn and his heirs "full and absolute power, licence and authoritie" over the colony's land, "to time hereafter forever." Penn assumed the governorship and strong-armed the colony's legislators, who stripped some of his power with a new charter the following year. By 1701, Pennsylvania settled on a final, stable charter, detaching three southern counties which chartered the Delaware Colony. A compromise between the Penn dynasty and wealthy legislators, the 1701 Charter served both groups by disenfranchising the colony's poor and landless. Thirty-one years later, James Oglethorpe petitioned the Privy Council to charter the final colony, Georgia. Under the Charter, Georgia would be run by a dozen trustees, who "shall and may have perpetual succession." See the 1681 Charter for the Province of Pennsylvania and the 1732 Charter of Georgia. New England colonies hewed to their old charters and local councils – in Massachusetts, town meetings and an assembly counteracted the elite-run courts. By 1750,

new governments exclusively for a few of the Crown's allies.[288] Some colonial proprietors, governors, or trustees held power indefinitely,[289] voting was often reserved for freemen, disenfranchising those who were dependent on others or had little property and material stake in their community.[290] Colonists clashed with their governing elites and with the Crown, particularly when James II revoked several colonial charters in 1686.[291] William and Mary ended these revolts by issuing restoring standing charters and

only Massachusetts, Rhode Island, Connecticut, Pennsylvania, and Maryland had written charters, while the other colonies relied on customary constitutions.

[288] For example, the 1606 Virginia Charter, imitating the corporate charters of contemporary London firms, gave the Company a monopoly over trade and the use of force. Note however the Massachusetts Bay and Plymouth Charters of 1629 formally recognized an existing network of democratic town meetings

[289] Maryland's 1632 Charter granted the colony's lands to the "Baron of Baltimore, his Heirs and Assigns, forever." Similarly, the 1669 Fundamental Constitutions of Carolina granted to the colony's proprietors "the sacred and unalterable form and rule of government of Carolina forever." This constitution, drafted by Locke and the Third Earl of Shaftesbury, was only partially implemented.

[290] Colonial laws disenfranchised lacking property – the poor and landless, servants, women, slaves, and transients – but also Jews, Catholics, blacks, and Indians, who might serve an authority besides the Protestant Crown. The Carolina Charter of 1669, for example, rejected "numerous democracy." Though note that even Pennsylvania's 1681 Charter, which granted Penn primary authority, admitted "Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws." And in Virginia after 1736, men with multiple landholdings could vote once for each estate. Keyssar, *The Right to Vote*, 5–6.

[291] To Stuart-era lawyers, Ireland and the American colonies were outside the English realm, and their charters were subject to royal revocation or revision with little Parliamentary oversight. Therefore, in 1678 the English Lords of Trade acted within their constitutional right in calling to reform Massachusetts' noncompliant charter government "from the very Root." Charles II revoked the colony's governor and charter in 1684, removed Pennsylvania's governor the following year, and moved to do the same in Maryland. After Charles' death, James II reassembled the Lords as a new Board of Trade to enforce the Navigation Acts and shepherd American trade to English ports. James also united the Jerseys, New York, and the increasingly autonomous New England colonies as the Dominion of New England under Edmund Andros. Andros centralized power, suspended charter liberties, and enforced the unpopular Acts with new customs officers. Within two years, James had proceeded against every charter of every American settlement, including the governments of Bermuda and Jamaica. When Parliament ousted James II, ordinary colonists arrested Andros and his council in the 1689 Boston Revolt, New York farmers deposed Lieutenant Governor Francis Nicholson in Leisler's Rebellion, and Puritan Marylanders overthrew their Catholic royal governor in Coode's Rebellion. Philip S. Haffenden, "The Crown and the Colonial Charters, 1675-1688: Part I," *The William and Mary Quarterly*, Third Series, 15, no. 3 (July 1, 1958): 299–308, doi:10.2307/1915619; Philip S. Haffenden, "The Crown and the Colonial Charters, 1675-1688: Part II," *The William and Mary Quarterly*, Third Series, 15, no. 4 (October 1, 1958): 456–66, doi:10.2307/2936901; Jack P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (University Press of Virginia, 1994), 29–34, 47–51.

issuing a new one to Massachusetts Bay in 1691.[292] Only after 1721, when Robert Walpole became Prime Minister, did the colonies return to salutary neglect.

In the mid-eighteenth century, demographic changes forced new controversies over the status of slaves, the regulation of the frontier, and the extent of legislative sovereignty. Abolition was a thorny issue. As plantations spread up the fertile Chesapeake, around 1640 the assemblies of Virginia and Maryland legally distinguished slaves from indentured servants, protecting the latter with finite contracts and payment in clothes and provisions.[293] After white servants revolted in Bacon's Rebellion in 1676,[294] planters turned to black and Indian slaves, abandoning Indian slavery in the 1700s.[295] On

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[292] But in 1697 the Crown appointed the Earl of Bellomont the governor of New York, New Hampshire, and Massachusetts, provoking colonial resistance.

[293] These laws were written to attract poor white Englishmen, and many bachelors from the Thames Valley immigrated to work as servants for a few years in shops or fields. They flocked to the tobacco plantations of the Carolinas and the Chesapeake, over half to Maryland alone. Disease, starvation, and labor killed most. Few lived to twenty, and fewer to forty. This quick turnover increased demand for English servants, and many of these newcomers, vulnerable to colonial diseases, also died. Rocketing demand exhausted the supply of English immigrant laborers, which by the century's end dwindled three percent each year [293]. Unrest also discouraged indentured labor in the Chesapeake. Frontier farmers in Virginia and the Carolinas might own their land and labor, but they clashed with resident Indians. Winthrop D. Jordan, "Enslavement of Negroes in America to 1700," in *Colonial America: Essays in Politics and Social Development*, ed. Stanley Nider Katz (Little, Brown, 1976), 230–33.

[294] In 1676, Susquehannock tribesmen attacked settlements in Maryland and Virginia. Nathaniel Bacon rallied a militia of several hundred indentured servants and farmers, and at least eighty black slaves who he promised freedom. After Virginia's Governor Berkeley's refused to commission a formal militia to fight the Indians, Bacon's mob marched on the capital at Jamestown, protesting the policy and the Governor's nepotism. At gunpoint, Berkeley again refused, before the assembly capitulated. Triumphant, the mob torched the capital and slaughtered a group of Pamunkey Indians. Wary of poor whites, Virginia plantation owners abandoned white indentured labor. Smith, *Civic Ideals*, 61, 66.

[295] Europe demanded more tidewater tobacco, and by the 1680s, rice grown in the coastal swamps of South Carolina and modern Georgia. The tobacco trade enriched Virginia's planters, public officials, and even its fledgling college. In 1661 Virginia formally established black chattel slavery, and Maryland did the same the following year. Charleston supplied the Carolinas with African slaves, and starting in the 1670s, with Native American slaves captured in war, or forced into servitude by the courts or their families. In this period, South Carolina's Indian slave population grew to 50,000, eclipsing the number of black slaves. After 1682, Virginia's House of Burgesses classed Indians not as indentured servants, but as slaves, akin to blacks. But Indians could escape and seek shelter with surrounding tribes. After costly wars against the Tuscarora and Yamasee tribes between 1715-18, white Carolinians shifted primarily to purchasing blacks, who could be bought in bulk, at will. Indian slavery declined, though it persisted in all of the colonies. Meanwhile, African slave ships fed ports across the fertile, flat Southeastern coast, and the slave population boomed. Four years after Bacon's Rebellion, less than eight percent of the total Chesapeake population was enslaved. By 1710, the percentage tripled. Bernard Bailyn, *The Peopling of British North America: An*

the eve of the Revolution, only five percent of Northern colonists were enslaved, but slavery was central to the Northern economy.[296] Most colonial legislatures denied full citizenship to persons with African appearance or physiology, disempowering free and enslaved blacks across generations.[297]

In contrast, Britons did not rely solely on chattel slavery, and turned slowly against the system in the mid-eighteenth century.[298] The abolitionists Thomas Clarkson and William Wilberforce brought antislavery petitions to Parliament, and Granville Sharp advised the 1772 *Somerset* decision limiting slavery in Britain.[299] The *Somerset* ruling condemned colonial slavery as an affront to natural law, worrying Southern slaveholders

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Introduction (New York: Knopf Doubleday Publishing Group, 1986), 100–102; Smith, *Civic Ideals*, 59, 521 n53; Ablavsky, "Making Indians 'White,'" 1466–71.

[296] Agricultural slaves were concentrated east of Manhattan, on Connecticut's tobacco plantations, and in Rhode Island's Narragansett region. Most Northern slaves were domestics. In the mid-eighteenth century, a fifth of Boston households owned at least one slave. In New York City, the proportion was about half, with a fifth of the total population and a quarter of the city's working-age males enslaved. And refineries in these Northern port cities processed sugar from Caribbean slaves into rum and molasses for European markets. Merchants reaped the profits, using them to build public institutions, including America's first universities. Edward Countryman, *The American Revolution* (Macmillan, 1985), 51; Nash, *The Unknown American Revolution*, 32–33; Craig Steven Wilder, *Ebony and Ivy: Race, Slavery, and the Troubled History of America's Universities* (Bloomsbury Publishing USA, 2013).

[297] Note New York's 1702 Act for Regulating Slaves was comparable to Virginia's 1702 and South Carolina's 1740 laws, and Pennsylvania's 1726 Act for Better Regulating Negroes in the Province was similarly harsh to free blacks. Countryman, *The American Revolution*, 34–37; Smith, *Civic Ideals*, 63–67; Howard Gillman and Mark A. Graber, *The Complete American Constitutionalism, Volume One: Introduction and the Colonial Era* (Oxford University Press, 2015), 409–26.

[298] British Quakers protested that slavery humans violated humans' inherent divinity, while Scottish moral sense philosophers attributed to civilized man a tendency to sympathy and an abhorrence to slavery. Inspired by both schools, the English abolitionist Thomas Clarkson leafleted and preached on slaves' ordeals, stirring his listeners' compassion and disgust. These moral suasionists were remarkably successful. By 1792, as many as 400,000 Britons had signed 519 antislavery petitions. John R. Oldfield, *Popular Politics and British Anti-Slavery: The Mobilisation of Public Opinion Against the Slave Trade, 1787-1807* (Manchester University Press, 1995), 5–7; Michael E. Woods, "A Theory of Moral Outrage: Indignation and Eighteenth-Century British Abolitionism," *Slavery & Abolition* 0, no. 0 (September 26, 2014): 5–7, doi:10.1080/0144039X.2014.963393.

[299] In *Somerset*, Lord Mansfield ruled slavery might be allowed under flawed positive laws, but not under the higher natural law. Where positive slavery law was unclear or contradictory, Mansfield ruled judges ought to decide in favor of higher law and liberty. Given Britain's conflicting laws regulating slavery, Mansfield ruled that slaves could not be removed from Great Britain without the liberty of *habeas corpus* review. British precedent since *Smith v. Brown and Cooper* (1702) allowed colonial slavery, and each of the American colonies clearly and consistently legalized slavery, preventing Mansfield from abolishing or modifying colonial slave laws. *Somerset v Stewart* (1772) 98 ER 499 and *Smith v. Brown and Cooper*, 90 Eng. Rep. 1172 (1702). On *Somerset*'s relation to *Smith*, see Gillman and Graber, *The Complete American Constitutionalism, Volume One*, 406–9.

and emboldening some slaves.[300] Further, Northern slave law was relatively ambiguous and contradictory, inviting British and Northern judges to rule in favor of liberty and *habeas corpus*, preventing the return of runaways from the South and perhaps allowing the abolition throughout the colonies.

Abolitionism found an audience in America. Many of Philadelphia's Quaker merchants were invested in the slave trade, but a few joined Clarkson in establishing a local antislavery chapter. Granville Sharp printed his pamphlets in Boston and Philadelphia, and corresponded with Anthony Benezet, a firebrand Quaker abolitionist, and Benjamin Rush, a professor at the College of Philadelphia. Rush in turn petitioned the Crown to disband the slaveholding Royal African Company in 1773.[301] Across the colonies liberal pamphleteers attacked monarchy by arguing men were naturally free and equal. And republican writers revived Roman, Florentine, and English arguments for liberty from domination, levelling them against both monarchy and chattel slavery.[302] As war loomed in 1775, Virginia's loyalist Governor Dunmore promised liberty to rebel-owned slaves and indentured servants and indentured servants in exchange for service in the Royal Army, and three years later Rhode Island offered freedom to slaves joining the

[300] Shortly after *Somerset* decision, several Virginia slaves made for England rather than try their luck in the colony's courts. Nash, *The Unknown American Revolution*, 21–23.
[301] James Wilson, Rush's colleague at the College and a fellow Edinburg alumnus, taught the moral sense theory of Francis Hutcheson, David Hume, and Adam Smith, and in 1768, students at the College held a public debate on the morality and legality of slavery. William M. Wiecek, "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *The University of Chicago Law Review* 42, no. 1 (October 1, 1974): 114–15; Nash, *The Unknown American Revolution*, 63.
[302] Jefferson's draft Declaration intertwined liberal and republican strands, complaining the Crown had seized Africans as slaves and vetoed colonists' antislavery petitions, violating both groups' liberty, and worse, incited slaves to revolt.

Continental Army.[303] This worried Southern planters who had spent decades suppressing armed slave revolts and developing detailed codes to control free and enslaved blacks.

Frontier expansion also split colonists from the Crown and their legislatures. As in feudal England, social life in a Mid-Atlantic proprietary colony or Southern plantation colony was hierarchical, dominated by a few dynasties which preserved their seats through charter privileges, primogeniture, entail, and intermarriage.[304] In the smaller New England colonies, arable land was scarce and grand estates few, but so were the chances to own land and gain accompanying political and suffrage rights.[305] For free white male colonists in the mid-eighteenth century, land and freedom lay west across the Appalachians,[306] so families streamed west.[307]

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[303] Rhode Island could afford the bargain – slaves were roughly a tenth of its population at midcentury. Wood, *The Radicalism of the American Revolution*, 51.

[304] With at least fifty acres of farmland, a free Pennsylvanian male twenty-one or older could vote. But since the 1681 Charter, much of Pennsylvania's land belonged to the Penns and a few others, who leased it to disenfranchised tenant farmers. In New York, dynasties like the Livingstons, Van Renssalaers, and Beekmans controlled tenant estates of hundreds of thousands of acres. In Maryland, Virginia, and the Carolinas, slaves and indentured servants worked tobacco fields for wealthy planters.

[305] Families in New England and along the Atlantic seaboard split farms as they were bequeathed, with a double portion to the first son. Over generations, this left smaller divisions and less land. With less land, farmers could not afford to leave land fallow to recuperate after harvesting, the soil failed, and so did farmers. After 1750, many Massachusetts farmers would leave at least one son landless. In the town of Chebacco, Massachusetts, nearly half of all sons failed to inherit land. Countryman, *The American Revolution*, 9–14; Wood, *The Radicalism of the American Revolution*, 42–48; Nash, *The Unknown American Revolution*, 72–73.

[306] Land did not grant freedom to all. Indentured servants farmed without immediate reward, and black and Indian slaves had no prospect of freedom and property in the land they worked. Under the English practice of coverture, daughters were legally subjects of their fathers, and wives of their husbands, unable to own property, sue, or draft wills or contracts. A tenth of women owned property by divorce or widowing, and in some colonies, could vote, but rarely did. And some immigration was involuntary. England sent fifty thousand felons, and additional prisoners of war, condemned to unfree labor in Maryland and Virginia.

[307] From Connecticut, Yankees pushed to the Wyoming Valley in northeastern Pennsylvania, skirmishing with local whites, while Pennsylvanians followed Virginians to North Carolina, doubling the colony's population, and North Carolinians crossed the mountains to modern Kentucky, seceding from the colonial government. Europeans came too. Enticed by shipping company advertisements promising land and social mobility, groups of German families paid bulk rates to travel from the Palatinate up the Rhine to Rotterdam, then to England, spreading between the foothills west of Philadelphia. After the Irish droughts of the 1710s, Irishmen fled to the Appalachians, intermarrying in the 1740s with Scotsmen escaping the collapse of the clan system. This immigration of 120,000 Scots-Irish and 90,000 Germans dwarfed the original migration of some 20,000 Puritans to Massachusetts. Bailyn, *The Peopling of British North America*, 13–36, 121; Wood, *The Radicalism of the American Revolution*, 49; Smith, *Civic Ideals*, 67–69.

Settlers crossing the Appalachians found the land claimed by Indians and the French.[308] To Protestant colonists, roving Indians failed to enclose and tame the earth as God intended, losing their right to it.[309] Frontiersmen sought to organize militias to displace Native Americans, but old, inflexible colonial laws reserved to governors or assemblies the power to appoint and salary militia officers. And in colonies like Pennsylvania, North Carolina, and South Carolina, these laws concentrated legislative districts and the franchise in wealthy eastern counties.[310] Without county status, western territories struggled to organize militias and forts, and without legislative representation, they could not fund new defense and infrastructure projects. So frontiersmen rioted. They publicly protested the colonial charters' voting and apportionment schemes – disenfranchised Pennsylvanians mobbed polling places at least five times between 1739 and 1755, and marched on the colonial Assembly twice.[311] In 1763, the Crown granted the newly-captured Ohio River Valley to French Catholics and outlawed trans-

[308] The Iroquois, or Haudenosaunee, peoples spread from the Hudson west to the Catskills and Adirondacks. A confederation of five tribes – the Cayuga, Mohawk, Oneida, Onondaga, and Seneca – the Iroquois shared a language and government, conquering tribes to the south, from the Susquehanna in the east to the steep western Alleghenies. The Alleghenies ran south into the Blue Ridge and the Cherokees, on the edge of Virginia and the Carolinas. These tribes worked and roamed the Appalachians and Ohio River valley, alongside French trappers, traders, and troops.

[309] Expansion promised freedom and harmonized with many settlers' Christian and English Whig beliefs. Writing in 1682, Locke doubted that in "uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a thousand acres" could match "ten acres of equally fertile land do in Devonshire, where they are well cultivated." Never mind that Native Americans better cultivated the land than the first colonists. Smith, *Civic Ideals*, 61; John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (Yale University Press, 2003).

[310] Eastern elite families in the colonial assemblies refused to dilute their power by parceling the western periphery into new counties and legislative seats. Between 1725 and the American Revolution, over 70 percent of New Jersey legislators were related to previous legislators. Wood, *The Radicalism of the American Revolution*, 48.

[311] These rallies predate the conventional story of popular constitutionalism, which normally begins with the Stamp Act protests of 1765.

Appalachian migration,[312] frustrating Protestant settlers and overriding land claims by Massachusetts, Connecticut, and Virginia.[313]

Then came the last and worst crisis for British rule. Under salutary neglect, Parliament's Navigation Act tariffs lay dormant until the French and Indian War burdened Britain with costly new frontier garrisons and warships.[314] To raise funds, Prime Minister George Grenville levied the 1765 Stamp Act on purchases as big as a plantation or as small as a pair of dice, thus taxing colonists of all classes, and required payment in pounds sterling, which few colonists carried.[315] Americans rich and poor rioted, pilloried tax and customs officials, boycotted British goods, and refused to pay the tax.[316]

The crisis hinged on a question of legislative sovereignty in constitutional matters. Many Americans believed a tax law was legitimate only if it was passed by the representatives of the people taxed.[317] Colonists lacked specific delegates to the House of

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[312] Parliament passed the Quebec Act of 1774. Extending the new Province of Quebec south along the Ohio and west to the Mississippi, the British created a heaven for oppressed Catholics, alienating Protestant colonists. Since the early eighteenth century, every British colony had suppressed Catholicism, including Maryland, once a Catholic haven, and Rhode Island and Pennsylvania, traditional places of religious freedom.

[313] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press of Harvard University Press, 1967), 118; Smith, *Civic Ideals*, 57.

[314] A century before, Parliament had passed the Navigation Acts, coaxing the colonies' growing trade to British ports through naval escorts while discouraging foreign trade through taxes. But Britain had neglected the Acts since the Glorious Revolution and Robert Walpole's 1721 appointment as Prime Minister. The few officials enforcing the Acts in America could be bribed to ignore the taxes, and American juries refused to convict the few smugglers who were caught. Countryman, *The American Revolution*, 10–11.

[315] The Stamp Act taxed colonists who needed their documents or sales notarized, and charged the judges of the vice-admiralty courts to convict smugglers and the Royal Navy to search ships. Similarly, the 1764 Sugar Act taxed on the colonial molasses trade.

[316] Bailyn, *The Ideological Origins of the American Revolution*, 99–104.

[317] In 1688, England's Parliament ousted James II, affirming Whig theories that sovereignty lay in Parliament. Englishmen and colonists were represented in the House of Commons, but the people themselves did not hold sovereign power. Colonists largely accepted Parliament's authority, save for the power to levy taxes, which were gifts from the people, written into law by their representatives in the House of Commons. On colonists' initial capitulation to parliamentary sovereignty, see Jack P. Greene, *The Constitutional Origins of the American Revolution* (Cambridge University Press, 2011), 75–79.

Commons, invalidating the Stamp Act, but Grenville's deputy Thomas Whately concocted the idea of virtual representation, claiming all Members of Parliament represented all of Britain and its colonies.[318] This gave Parliament broad sovereignty over legislative and constitutional affairs. American pamphleteers did not buy it.[319] Colonists did elect representatives to the colonial assemblies, which passed legitimate taxes, but Parliament overruled these laws. Two months after the Stamp Act, Patrick Henry proposed seven resolutions to Virginia's House of Burgesses abrogating the Acts.[320] Several months later the Virginia legislature affirmed that laws of "internal Polity and Taxation" required colonists' consent. Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Maryland, and South Carolina issued similar declarations. In October, nine colonies dispatched delegates to the Stamp Act Congress in New York,

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[318] Grenville's speech to Parliament proposing the 1764 Sugar Act admitted enforcement of the Acts had little precedent, threatening colonial unrest. Still, he received universal applause from his audience. Countryman, *The American Revolution*, 41–52; Smith, *Civic Ideals*, 70–86.

[319] In an October 1765 pamphlet, the Marylander Daniel Dulany declared Whately's scheme "a cob-web spread to catch the unwary, and intangle the weak." A few years later, Pennsylvania's John Dickinson wrote that without American delegates, the Commons could not represent the American people's taxation powers. Daniel Dulany, "Considerations on the Propriety of Imposing Taxes in the British Colonies, For the Purpose of Raising a Revenue, by Act of Parliament," in *Tracts of the American Revolution, 1763-1776*, ed. Merrill Jensen (Bobbs-Merrill, 1967); John Dickinson, "Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies," in *Tracts of the American Revolution, 1763-1776*, ed. Merrill Jensen (Bobbs-Merrill, 1967); Merrill Jensen, "Introduction: The Pamphlet Writers and Their Times," in *Tracts of the American Revolution, 1763-1776* (Bobbs-Merrill, 1967), xl–xli, xxix–xxxii; Countryman, *The American Revolution*, 65–69.

[320] Henry asserted Virginia's "two royal charters, granted by King James I" had regulated taxation "without interruption" for a century, "constantly recognized by the kings and people of Great Britain." Through the charters and decades of custom, colonists delegated taxation authority to their colonial representatives, who knew "what taxes the people are able to bear." Henry merely wanted to maintain colonists' customary British freedom under the charters. If unchallenged, Grenville's law would assume constitutional precedent, overturning a century of popular sovereignty over colonial taxes. Henry's last resolution added a radical stipulation. He claimed colonists had been governed by laws of "internal policy and taxation, as are derived from their own consent." Parliament's laws over the colonies' "internal policy" also required consent and representation. John Henry, "Virginia Stamp Act Resolutions," in *Journals of the House of Burgesses of Virginia, 1770-1772*, ed. John Pendleton Kennedy (Richmond, Va.: The Colonial Press, E. Waddey Co., 1906).

which affirmed Virginia's resolutions, extending colonists' legislative power past taxation, to all matters of domestic legislation.[321]

Grenville resigned four months later, and Parliament repealed the Acts.[322] But in 1773 Parliament heavily taxed colonial tea merchants while exempting the failing East India Company. Colonists again rioted. This time, Parliament did not retreat. The 1774 Coercive Acts enforced the Tea Act by blockading Boston's port, shuttering the Massachusetts government, stationing British troops in unoccupied buildings, and extraditing the Acts' violators to Britain for trial. As Parliament intended, the Acts forced a crisis.[323] Dulany, Dickinson, and Henry claimed their right to resist the Acts by citing English common law, the colonial charters, and their own British ancestry.[324] And by 1774, many of the members of the First Continental Congress appealed not only to English rights, but also to a natural or republican right to revolt.[325] War loomed.

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[321] Countryman, *The American Revolution*, 50–52, 63–64; Greene, *The Constitutional Origins of the American Revolution*, 67–88.

[322] The following year, Parliament's Declaratory Act claimed authority over America "in all cases whatsoever," from tax law to regular legislation. Chancellor of the Exchequer Charles Townshend exercised this power with a tax on paint, glass, lead, paper, and tea entering colonial harbors. But newly appointed customs agents failed to collect the taxes, and Parliament repealed the Townshend Acts in 1770.

[323] Bailyn, *The Ideological Origins of the American Revolution*, 118–19, 128; Countryman, *The American Revolution*, 52–56.

[324] The planter Landon Carter was more explicit, claiming colonists ought to be "solely governed and taxed by Laws made with the Consent of the Majority of their own Representatives, according to an Englishman's inherent Birthright." But American Indians, women, blacks, and the poor were denied many liberties promised by the charters, and had few legal grounds for protesting the taxes. And if English blood granted English rights, even fewer colonists could protest. Implicitly, Englishmen alone could rebel and reconstitute the body politic, limiting citizenship. Smith, *Civic Ideals*, 72–77; Greene, *The Constitutional Origins of the American Revolution*, 82.

[325] New Hampshire's John Sullivan wrote Massachusetts' written charter was "only a confirmation of those Liberties which the God of nature had given." Dispirited by the Stamp Act, Richard Bland argued "we can receive no Light from the Laws of the Kingdom, or from ancient History." Only natural law remained legitimate, granting a natural right to rebel. Citing Locke, Bland asserted subjects "have a natural Right to quit the Society of which they are Members, and to retire into another country…if they unite, and by common Consent take Possession of a new Country, and form themselves into a political Society, they become a sovereign State." Claims to republican self-governance relied on a small polity capable of local meeting and deliberation, necessarily excluding some. Richard Bland, "An Inquiry into the Rights of the British Colonies," in *Tracts of the American Revolution, 1763-1776*, ed. Merrill Jensen (Bobbs-Merrill, 1967), 112, 116; Smith, *Civic Ideals*, 77–86; Neil L. York, "The First Continental Congress and the

B. Escalation and Rebellion

Entering the Revolution, Americans debated abolition, the regulation of the frontier, and the nature of taxation and legislative sovereignty. Each was a constitutional question.[326] Americans tackled these issues through three methods: popular resistance, judicial review, and constitutional framing, in each of the states simultaneously. Ultimately, these diverse, clashing methods exacerbated the era's constitutional disputes.

The first method, popular constitutional reform, or "popular constitutionalism," had roots in seventeenth century colonial politics,[327] particularly in rebellions against the repeal of the colonial charters by James II in 1686.[328] After 1720, Prime Minister Robert

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Problem of American Rights," *The Pennsylvania Magazine of History and Biography* 122, no. 4 (October 1, 1998): 366; Greene, *The Constitutional Origins of the American Revolution*, 88–90.

[326] Common to all three issues was the question of rights and citizenship. Rights gave citizenship. If a law violated one's natural, individual, republican, or customary rights, one could invalidate the law. Invalidating a law changed the body of English law, and thus the English constitution. And in this new era of popular sovereignty, revising the English constitution, the colonial charter, or the state constitution was an exercise of citizenship. Tracing rights to Saxon ancestry or English common law limited rights and citizenship to British males. Vague, uncodified liberal and republican rights could belong to humanity universally, expanding the right to revolt, and enlarging the bounds of constitutional citizenship. Further, when a right was denied, natural justice allowed the people to assemble in common protest, constituting itself. During the Revolution, rights claims opened a new path to citizenship in the state and American polities.

[327] Since English conquest in 1664, New Yorkers had resisted English rule, and in 1673, an English colonist named Samuel Hopkins engineered the Dutch Navy's briefly successful seizure of New York. Two years later, Nathaniel Bacon rallied poor Virginia farmers and slaves, promising the former legal recognition to call a militia, and the latter freedom. Bacon's posse contested Governor William Berkeley's harsh frontier and slavery regulations, aiming to broaden Virginian citizenship and reconstitute the polity.

[328] James II revoked the charters of the New England colonies, merging them under the governorship of Edmund Andros, and proceeded against the powerful, unruly proprietary governments of William Penn in Pennsylvania and Lord Baltimore in Maryland. At James' behest, Andros seized administration over all land in his new Dominion of New England, dissolved the colonial assemblies, and conformed Puritan marriage practices to Anglican law. Perhaps most offensive to Massachusetts Puritans, on May 1, 1687, Andros' government planted a maypole in Charlestown, inciting the townspeople to dance. New Englanders rebelled. Connecticut colonists challenged James' writ revoking their charter, before submitting in 1687. In early 1689, word reached the colonies that Parliament had ousted James II for William and Mary. On April 18, Bostonians seized a royal heavy frigate, then Andros' officials, and then Andros himself, finally dispatching emissaries to request that William and Mary restore their 1630 Charter and accompanying liberties. British troops were few and remote, posted west of the big coastal cities to deter French and Spanish invasion from the Mississippi, or on the vulnerable Caribbean islands, and could not contain the rebellion. Later the following month, in Leisler's Rebellion New York farmers seized and torched New York City's fort, looted Manhattan, dispossessed officeholders and the wealthy, and overthrew Andros' deputy Francis Nicholson. When Maryland's Catholic governor requested the colony's militia turn in their guns, John Coode led fellow Protestants to rebel for fear of persecution by Catholics

Walpole dispatched new, conciliatory governors, returning some colonies to salutary neglect.[329] Still, farmers, frontiersmen, and urban mechanics rioted against their colonial charters and local governments.[330] Suffrage exclusion was a perennial point of contention, particularly for disenfranchised white males.[331] In New York, Hudson River Valley tenant farmers rioted when their wealthy landlords changed lease terms in 1765.[332]

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and Indians. Coode and the colony's Protestant elite assembled a new legislature, and with the Crown's blessings, appointed a new governor. Haffenden, "The Crown and the Colonial Charters, 1675-1688," October 1, 1958, 456–59; Jack M. Sosin, *English America and the Revolution of Sixteen Eighty-Eight: Royal Administration and the Structure of Provincial Government* (University of Nebraska Press, 1985), 76–80, 153–56; Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788*, 1990, 44; Brendan McConville, *The King's Three Faces: The Rise & Fall of Royal America, 1688-1776* (University of North Carolina Press, 2007), 29–39.

[329] For example, William Gooch, appointed in 1727, presided over two decades of relative stability in Virginia. Other colonies still chafed under British rule. In 1722 and 1729, Parliament passed the White Pines Acts, claiming these tall trees to hew masts for the growing Royal Navy, depleting New England's lumber supply. In 1734, thirty citizens of Exeter, New Hampshire blocked royal deputies from claiming cut lumber. Colonists in Connecticut and Massachusetts seized royal lumber and attacked royal forest surveyors, claiming the Acts had vacated provisions in their charter without their consent. Pauline Maier, "Popular Uprisings and Civil Authority in Eighteenth-Century America," in *Colonial America: Essays in Politics and Social Development*, ed. Stanley Nider Katz (Little, Brown, 1976), 428–29.

[330] In September 1745, roughly 150 New Jersey farmers freed Samuel Baldwin, who had been imprisoned for harvesting the colonial governor's lumber. When the governor ordered the mob's organizers arrested, a second mob, twice as large, guarded the leaders. Two years later another agrarian mob broke its leaders from jail. The legislature responded by banning mobbing, to little effect. By 1748, New Jersey farmers had established their own elected militia, jail and courts, and tax system, seizing sovereignty and executive authority over the colony's backwoods. Across the Delaware, elites in Pennsylvania's legislature used a provision of the 1701 Charter to disenfranchise poor Philadelphians, who mobbed polling places half a dozen times between 1739 and 1755. In 1763, frontier farmers organized as the "Paxton Boys" and marched on Philadelphia, demanding legislative reapportionment and militias to dispossess frontier Indians. The legislature responded with a Riot Act the following year, prohibiting mobbing, and refused for over a decade to grant the westerners' demands. Connecticut had passed a similar mobbing act in 1722, and Massachusetts in 1751, suggesting colonial legislatures were wary of these groups seizing the executive prerogative. Ibid., 428–48; Nash, *The Unknown American Revolution*, 2–8.

[331] For example, in the City of Philadelphia in 1775, only a tenth of male taxpayers could raise the fifty pounds required to vote. In Pennsylvania's rural Cumberland County, many freemen held the fifty acres of land needed for suffrage, but the county held half as many seats as urban Philadelphia. Philadelphians protested franchise laws, while a hundred miles west, farmers marched against malapportionment. By McKinley's count, the Philadelphia franchise extended to only 335 of the city's 3,452 male taxpayers. Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* (Philadelphia: University of Pennsylvania Press, 1905), 284–92.

[332] A few dynasties like the Livingstons and Van Rensselaers owned and leased the Valley's land to small farmers at arbitrarily increasing rates. These families also controlled New York's courts and county governments, leaving the farmers little legal recourse. When, in 1765, the manager of Philipse Manor cut tenants' longstanding leases to one to three-year terms, William Prendergast led a tenants' revolt. The governor called for Prendergast's arrest, making him a folk hero. Three hundred farmers joined him, capturing the King's Bridge north of Manhattan, where they were dispersed by the city militia and regular troops. Prendergast was captured. Justice Robert R. Livingston, scion of the wealthy Livingston and

Southern colonies too faced free and slave agrarian revolts.[333] And Northern abolitionists printed, leafleted, and rallied to change the laws of their colonies.[334]

The 1764 Sugar Act and 1765 Stamp Act spurred riots against the Crown and Parliament.[335] Colonists abrogated the Acts with mobs and grand juries freeing those arrested under the Acts. Failing this, a mob might publicly humiliate an official who enforced the Acts, or might block collection of taxes, as Bostonians famously did by destroying a tea shipment taxed under the Tea Act.[336] As riots gave way to war, patriots overthrew their local governments.[337]

These colonial mobs engaged in constitutional politics in a few senses. They revised legal practices and thus revised the English customary constitution, which existed through practice and action as much as through written law. Additionally, in checking governors, legislatures, kings, and Parliament, these mobs helped balance government, an

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Beekman families, ordered Prendergast's execution, but no citizens volunteered to aid the city sheriff, and the Governor grudgingly reprieved Prendergast. Nash, *The Unknown American Revolution*, 72–87.

[333] The Regulators of Appalachian North Carolina repeatedly attempted their own governments in the 1760s. Slaves reconstituted their polities by fleeing their captivity to establish their own frontier encampments or join Indian settlements. Slaves revolted in New York City in 1712 and 1741, in South Carolina's 1739 Stono Rebellion, and again in Charleston twenty years later. South Carolina answered the Stono Rebellion with the 1740 Slave Law, allowing lawmen to execute rebel slaves without trial. This, and similar Southern slave codes, limited many slaves to private acts of resistance like arson, or poisoning or attacking overseers. Similarly, New York responded to the 1712 New York City rebellion by requiring slaveholders post a two-hundred pound bond to manumit slaves, decreasing the free slave population in the colony. The colony's governor also pushed to increase more indentured servants in place of slaves. Edgar J. McManus, *A History of Negro Slavery in New York* (Syracuse University Press, 1970), 142–50; Peter H. Wood, "Black Resistance and Rebellion in Eighteenth-Century South Carolina," in *Colonial America: Essays in Politics and Social Development*, ed. Stanley Nider Katz (Little, Brown, 1976), 454–74.

[334] During the Stamp Act crisis, the town meetings of Worcester and Boston petitioned the Massachusetts legislature to prohibit the importation and purchase of slaves. The Quaker Yearly Meetings of Philadelphia, New Jersey, and Delaware became centers for abolitionist organizing, dispatching John Woolman in 1757 to turn Virginians against their colony's slave laws. Nash, *The Unknown American Revolution*, 39–43, 62–65.

[335] Maier, "Popular Uprisings and Civil Authority in Eighteenth-Century America"; Kramer, *The People Themselves*; Frank, *Constituent Moments*; Beaumont, *The Civic Constitution*.

[336] Kramer, *The People Themselves*, 18–34.

[337] And in 1775, nearly a thousand slaves joined Virginia Governor Dunmore's loyalist forces in trying to overthrow the colony's rebel government at Williamsburg. Northern slaves too turned loyalist. Their petitions for freedom unanswered, slaves from Bristol and Worcester, Massachusetts joined a loyalist militia the same year. Nash, *The Unknown American Revolution*, 157–66.

essential part of Whig constitutionalism. Finally, colonial mobs momentarily assumed executive prerogative to enforce or abrogate charters and statutes. In an era of plural governors, proprietors, and trustees, and later, of rotating executive councils, it was normal for the executive power to belong to a plural, ad hoc group.[338]

Judicial reform offered a second method to address controversies over slavery, frontier regulation, and taxation and representation.[339] Slaves and abolitionists, desperate for success where they could find it, looked to the judiciary. Northern and Southern judges diverged. Several slaves freedom won suits in eastern Massachusetts, where the 1691 Charter promised all colonists "all liberties and Immunities of free and natural subjects."[340] In contrast, Southern legislatures curtailed the grounds for blacks to make freedom suits.[341] And within months of *Somerset*, a Virginia court freed twelve Indian

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[338] Similarly, under the era's contractarian theories, natural individuals could only hold overawing, executive power when they combined their private powers as a group. Under Lockean teachings, individuals, so long as they did not violate the group's rules, could leave at will. So for colonists, a plural, shifting, popular executive was a part of English constitutional custom and a properly-functioning government. Further, these large mobs, necessarily plural and diverse, could claim to represent the common good, and thus assume executive prerogative, a power usually granted only in service to the common good of the people.

[339] Note that in this era, all citizens, including judges and jurors, might deem a law or practice unconstitutional and abrogate it. Larry Kramer explains "no one, at any time, seems ever to have considered bringing these constitutional disputes before a judge to have them settled… underscor[ing] the absence of anything resembling modern judicial review before the Declaration of Independence." Kramer, *The People Themselves*, 38.

[340] In 1766, Jenny Slew sued for her freedom in Salem, as did an enslaved sailor named Boston in the Nantucket Court of Common Pleas. And nine years later in Newbury, a local jury awarded Caesar Hendrick freedom and eighteen pounds in reparations from his owner. The courts also passed loyalist slaveholders' confiscated property to slaves. In 1781, Anthony Vassall of Cambridge successfully petitioned the legislature for reparations from his loyalist master's seized property. Several years later, an elderly Medford slave named Belinda followed his example, drafting a legislative petition. Like many colonial legislatures, Massachusetts' assembly, called the Great and General Court, adjudicated private judicial disputes, much as Parliament had in England. Since state courts had no special prerogative for constitutional review, slaves looked to the legislature for freedom. Stories of Belinda's childhood seizure from Africa, her successful case, and her repeated petitions, circulated as far south as New Jersey, perhaps because they were sensational and exceptional. Between 1765 and the end of the Revolution, Massachusetts heard only eighteen freedom suits from its slave population of over five thousand. George Henry Moore, *Notes on the History of Slavery in Massachusetts* (D. Appleton & Company, 1866), 51; Wiecek, "Somerset," 117; Nash, *The Unknown American Revolution*, 124–25.

[341] In 1662, Virginia General Assembly required a plaintiff prove descent from a free woman, which usually meant petitioners had to establish white ancestry. Later the Assembly narrowed the grounds for

slaves, arguing their matrilineal Indian ancestry made them legally white, narrowing the grounds on which blacks could sue for freedom.[342] Since each colony elaborated its legal relationship to Great Britain differently,[343] *Somerset*'s colonial judges interpreted the brief, ambiguous *dictum* in diverse and conflicting ways.[344] Northern judges cited *Somerset* to protect runaways' *habeas corpus* rights and to argue Northern abolition and privileges and immunities provisions freed resident runaways, preventing their return south. Conversely, Mansfield's ruling admitted that Somerset, when he resided in Virginia, was a slave under the colony's positive law. Clashing readings of *Somerset* threatened sectional tension over fugitive slaves.

Colonial courts also grappled with the rights and land claims of frontiersmen, tenant farmers, and Indians. Legal apprenticeship was expensive, so judges often came from and ruled for a circle of wealthy families, breeding resentment among colonists.[345] With few sheriffs and justices of the peace to enforce rulings, patrician judges' used their stature, social authority, and knowledge of local traditions to eke out compliance.[346]

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manumitting slaves, allowing the courts to seize and sell illegally-manumitted slaves. Michael L. Nicholls, "'The Squint of Freedom': African-American Freedom Suits in Post-revolutionary Virginia," *Slavery & Abolition* 20 (August 1, 1999): 48, doi:10.1080/01440399908575277; Ablavsky, "Making Indians 'White,'" 1476–78.

[342] See *Robin v. Hardaway,* 1 Jeff. 109 (Va. Gen. Ct. 1772). Note that colonial Virginia and Maryland statutes also terminologically distinguished blacks and Indians. Jordan, "Enslavement of Negroes in America to 1700," 258–68; Ablavsky, "Making Indians 'White,'" 1458–1501.

[343] For example, New England was a hotbed of constitutional dispute during the reign of James II, while Virginia and the Carolinas were not. On the history of this contestation, see Greene, *Peripheries and Center*; Greene, *Negotiated Authorities*.

[344] Wiecek, "Somerset," 113.

[345] In Virginia, sitting justices advised the governor's nominations, keeping the courts a closed cabal. And in 1766, New York's Justice Livingston, himself a planter, sentenced the rebel tenant farmer Prendergast to be publicly mutilated alive and then drawn and quartered. When Daniel Nimham, a sachem of the Wappinger tribe, sued the same Hudson Valley planter families to reclaim his ancestral lands, the New York Council, staffed by judges from these families, dismissed his case, sentenced him guilty of high misdemeanors, and jailed his lawyer. Countryman, *The American Revolution*, 32; Nash, *The Unknown American Revolution*, 79–82.

[346] Wood, *The Radicalism of the American Revolution*, 71–72, 81–82.

As the Navigation Act taxes prompted smuggling and consequent searches by law officers, colonists took their search warrant disputes to court. When the Massachusetts Superior Court issued general search warrants to customs officer Charles Paxton, sixty-three Boston merchants challenged the Court's overly-broad writs in *Paxton's Case* (1761).[347] Representing the merchants, the young firebrand attorneys James Otis and Oxenbridge Thatcher argued that these writs violated the merchants' common law privacy rights, and that consequently a 1662 Parliamentary statute authorizing these general warrants was unconstitutional.[348] As customs officials ransacked merchants' homes and stores, rebellious colonists seized Otis and Thatcher's arguments for privacy rights and against Parliament's authority to enforce the Navigation Acts. Samuel Adams, watching Otis' rousing speech at Boston's State House, recalled "Then and there the child independence was there born."[349]

Rather than resolving disputes, colonial courts became sites of new controversies. In ruling against Otis and Thatcher and for the Crown, Massachusetts' Chief Justice drew

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[347] English courts had long granted damages to victims of wrongful search and seizure, unless the officer carried a warrant. In *Wilkes v. Wood,* 98 Eng. Rep. 489, 498--99 C.P. (1763), John Wilkes, a populist, anti-monarchical Member of Parliament and hero to American radicals, sued the Crown's deputy John Wood for trespass, successfully arguing the Crown had no power to grant Wood's general search warrant. Two years later, in *Entick v. Carrington,* EWHC KB J98 (1765), Chief Judge Camden outlawed searches for papers, but allowed warrants for particular goods. Goods could conceivably be the stolen property of another person, so that the possessor would not have a right to keep or conceal them, or have a right to privacy from searches. Consequently, customs officials and sheriffs could use a warrant to search specifically for the goods of a merchant accused of tariff evasion or smuggling.

[348] Not only did Otis and Thatcher claim common law privacy rights trumped the Massachusetts courts and Parliament, but they also attacked Parliament's authority to pass laws to enforce the Navigation Acts. Thomas Hutchinson, the Chief Justice of the Massachusetts Superior Court, rejected the arguments and allowed the general writs. See *Paxton's Case*, Quincy's Mass. Rep., 51 (1761). John R. Vile, "Paxton's Case (Mass. 1761)," in *Encyclopedia of the Fourth Amendment*, ed. David L. Hudson and John R. Vile (CQ Press, 2012), 491; Gillman and Graber, *The Complete American Constitutionalism, Volume One*, 485–92.

[349] John Adams, "Letter to William Tudor, March 29, 1817," in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. X (Boston: Little, Brown, 1817), 248.

charges of nepotism.[350] George III bolstered these accusations by withdrawing colonial judges' life tenure,[351] appointing judges at will. And when colonial juries refused to condemn violators of the Navigation Acts, the Crown forced these trials into the English Vice-Admiralty Courts where the court's single Crown-appointed judge could punish defendants, leaving no clear right of appeal.[352]

Frustrated with the judiciary, colonists rallied to thwart searches by sheriffs and customs officials. On August 14, 1765, Bostonian ransacked and torched the houses of Chief Justice Thomas Hutchinson and the Stamp Collector Andrew Oliver, forcing Oliver's resignation.[353] Rhode Islanders circumvented the courts' seizure by burning the *Liberty* in 1769, shelled the customs ship *St. John*, and in 1772, burned the Royal Navy's schooner *Gaspee*.[354] As Massachusetts spiraled into war, patriots assembled in Cambridge to write a new state constitution, requiring "a special designation of the persons or objects of search, arrest, or seizure" and assembling a new judiciary.[355]

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[350] Otis' allies at the *Boston Gazette* attacked Hutchinson for corruption – four of his immediate family members served in the Massachusetts courts, and one in the government. Nash, *The Unknown American Revolution*, 21–23.

[351] English judges held life tenure to prevent bias, but after the legislature of Pennsylvania and courts of New York passed similar measures between 1759 and 1760, George III revoked them, appointing all colonial judges. Governors and judges in Massachusetts, New Jersey, and North Carolina refused or resisted these royal appointments, which were paid through nonconsensual colonial taxes.

[352] Bailyn, *The Ideological Origins of the American Revolution*, 74–75, 105–9; Countryman, *The American Revolution*, 43, 59; Kramer, *The People Themselves*, 35–39.

[353] Several months later, a mob of forty rescued from customs inspectors the cargo of the sloop *Polly*, docked in Dighton, Massachusetts. Another group blocked officials from inspecting Boston merchant Daniel Malcolm's house for goods. In June of 1768, customs agents seized John Hancock's sloop *Liberty* for loading cargo without prior notice. Bostonians rioted against the selective enforcement of the Navigation Acts against Hancock, a noted patriot. The following fall, the Crown sued Hancock for smuggling Madeira wine on the *Liberty*, in violation of the 1764 Sugar Act. John Adams, representing Hancock in the Admiralty Courts, claimed Hancock could not be punished under a tax to which he never consented. The Crown dropped the charges, but kept and converted the *Liberty* into a customs enforcement ship.

[354] David S. Lovejoy, "Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776," *The William and Mary Quarterly*, Third Series, 16, no. 4 (October 1, 1959): 478–82, doi:10.2307/1920215; Maier, "Popular Uprisings and Civil Authority in Eighteenth-Century America," 429–32; Greene, *The Constitutional Origins of the American Revolution*, 140–41.

[355] See the Massachusetts Bill of Rights Article XIV and Constitution of 1780 Ch. III.

Colonists in every major city protested the Stamp Act, often tarring and feathering or drowning customs agents, and patriots in every colony redrafted or abandoned their colonial charters.[356]

Constitutional framing was the third and final means colonists used to address these controversies. In March 1774, Parliament passed the Coercive Acts, dissolving Massachusetts' unruly legislature and closing Boston's port. The colony's legislature reassembled as an independent Provincial Congress, and rural townspeople called for independence and reinstatement of the 1629 Massachusetts Charter. With the news of Massachusetts' rebellion, the other colonies' legislatures and revolutionary committees dispatched delegates to Philadelphia to meet as the First Continental Congress on September 6, 1774. Through 1775, colonists ousted their royal governors,[357] shuttered their legislatures and courts,[358] and abrogated their royal charters and customary constitutions. By 1776, only the insurrectionary Johnathan Trumbull of Connecticut

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[356] Note, however, that North Carolinians treated a resigning customs agent to toasts and cheers. Beaumont, *The Civic Constitution*, 56–57.

[357] On May 26, 1774, Virginia's Governor Dunmore dissolved the House of Burgesses, closing the county courts the following month. Patriot legislators reassembled as the Provincial Convention in August, calling volunteers into a regular army. The following April, Dunmore, alarmed at the insurrections at Lexington and Concord, snuck fifteen and a half barrels of gunpowder from Williamsburg's magazine by cover of night. Days later, Patrick Henry rallied the Hanover County militia for a march on the capital, and Dunmore, fearing a plot on his life, escaped to the British warship *Fowey* anchored nearby in the James River, and began drafting his proclamation for slave revolt against their insurrectionist owners. Governor Josiah Martin of North Carolina sought to defend his capital at Newbern with six cannon, but after townspeople stole them in April 1775, he fled to nearby Fort Johnson. New Hampshire's Governor John Wentworth escaped a mob, sheltering in a royal fort in Portsmouth harbor, and Governor William Tryon of New York conducted business form a royal warship in October, 1775. Allan Nevins, *The American States: During and after the Revolution 1775-1789* (New York, 1927), 75–83; Countryman, *The American Revolution*, 119–21; Adams, *The First American Constitutions*, 26–27; Nash, *The Unknown American Revolution*, 159–60, 194–99.

[358] In July 1774, citizens of Pittsfield, Massachusetts, hearing that Parliament was preparing to revoke their colonial charter, mobbed the Berkshire County Courthouse, blocking royal judges from meeting. Worcester citizens forced the public resignations of their county judges the following month, and in Salem, citizens gathered to appoint delegates to a provincial patriot convention. Several weeks later, nearly five thousand rural militiamen descended again on rural Worcester to dissolve the county government. As the legislature joined the provincial committees in resisting Parliament's Massachusetts Government Act, Military Governor Thomas Gage fled, realizing rebellion was not far off. And in New York and Pennsylvania, small farmers descended on their colonial capitals, demanding the resignation of their governors. Countryman, *The American Revolution*, 113–19; Nash, *The Unknown American Revolution*, 178–82.

retained his post as governor. Temporary provincial congresses, conventions, and committees of safety and correspondence assumed control of many colonies, but lacked the skill and the legal authority to govern and to fend off British troops.

Virginia, New Hampshire, and South Carolina, all lacking governors, looked to the beleaguered Continental Congress for advice.[359] On May 16, 1775, Massachusetts' Provincial Congress requested from the Second Continental Congress instructions on replacing the colony's royal governor and assembly.[360] As Massachusetts militiamen reinforced the heights at Bunker Hill on June 9th, Congress answered Massachusetts' plea with instructions to modify and reinstate the abrogated Massachusetts Charter of 1691.[361] In November, Congress allowed New Hampshire and South Carolina to draft constitutions, and in December, granted Virginia the same liberty.[362] With Congress' blessing, New Jersey's constitutional convention assembled on May 26, 1776, drafting a constitution over the next month. From Philadelphia, the Continental Congress watched as New Jersey, Maryland, and North Carolina called independent legislatures and courts.

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[359] Delegates to the Second Continental Congress had scarce assembled at Philadelphia when they heard that British troops had fired on Massachusetts regulars at Lexington and Concord. A week later they learned that rogue New Englanders under Ethan Allen and Benedict Arnold had overwhelmed British troops at Fort Ticonderoga in northern New York.

[360] Joseph Warren, John Adams' friend and the President of Massachusetts' Provincial Congress, requested the Continental Congress either draft a model constitution for all colonies or allow Massachusetts to draft its own. Warren's letter was read to Congress on June 2nd, and the following day, Congress deferred the issue to a private subcommittee led by Richard Henry Lee. Five days later the Committee of the Whole considered Lee's committee's recommendation that Massachusetts reinstate its 1691 Charter and assemble and independent government. On this subcommittee sat Thomas Johnson, James Wilson, John Jay, John Rutledge, and Richard Henry Lee. Worthington Chauncey Ford, ed., *Journals of the Continental Congress: 1774-1789*, vol. II (Washington: U.S. Government Printing Office, 1905), 79.

[361] The request initially went ignored – Congress was still organizing the new Continental Army under Washington this first week.

[362] Wood, *The Creation of the American Republic, 1776-1787*, 130–32; Pauline Maier, *American Scripture: Making the Declaration of Independence* (Knopf Doubleday Publishing Group, 1997), 8–14; Kruman, *Between Authority and Liberty*, 20.

By April 1776, Georgia assembled an independent legislature and executive, and North Carolina formally declared separation from Great Britain.[363]

These first state conventions met under duress, declaring independence and forming wartime governments,[364] framing constitutions long on revolutionary bluster and short on detail.[365] New Hampshire and South Carolina's expressly temporary constitutions rebranded their colonial legislature as the state legislature, but failed to clarify its lawmaking authority to Parliament or to the people of the state. These documents declared independence, but on the instructions of the Continental Congress, concluded by appealing to Great Britain for reconciliation.[366] Despite their brevity, these first state constitutions were novel for expressly listing and limiting the powers of government.[367]

In early 1776 little was clear. After almost two centuries of largely uninterrupted salutary neglect, the colonies had rejected British rule in the courts, the streets, and in constitutional convention. The constitutions of New Hampshire, South Carolina,

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[363] Nevins, *The American States*, 89–95, 108–16; Wood, *The Creation of the American Republic, 1776-1787*, 130; Adams, *The First American Constitutions*, 54–57.

[364] New Hampshire's emergency congress met for barely two weeks, concluding on January 5, 1776, then appointed itself the state legislature, and continued to modify the constitution using statutes. South Carolina's provincial assembly, operating without a governor and facing domestic insurrection, passed a constitution on March 26, 1776 and another on March 19, 1778. The beleaguered Virginia Provincial Convention passed a state constitution as if it were ordinary legislation on June 29, 1776, as did New Jersey's congress three days later. Save for South Carolina's, each lasted less than eight weeks and none of the conventions submitted their work for popular review. Nevins, *The American States*, 125–27; Wood, *The Creation of the American Republic, 1776-1787*, 306–10; Adams, *The First American Constitutions*, 68–72.

[365] The South Carolina convention drafted a preamble cataloguing abuses by the Crown, Parliament, and the absentee colonial governors and courts. The preamble condemned Virginia's Dunmore, who had "proclaimed freedom to servants and slaves," Massachusetts' Governor Gage, under whom "peaceable, helpless, and unarmed people were wantonly robbed and murdered," and South Carolina's Governor Campbell, who "dissolved the general assembly of this colony…[and] withdrew himself from the colony." Guilty too were the colony's "the judges of courts of law [who] here have refused to exercise their respective functions."

[366] Kruman, *Between Authority and Liberty*, 16; Adams, *The First American Constitutions*, 54–57.

[367] Past Anglo-Americans understood their constitution as an informal accretion of royal and parliamentary practices, laws, and charters. These four new constitutions were explicit pacts, with terms for amendment and dissolution. Greene, *Negotiated Authorities*, 27–28.

Virginia, and New Jersey expressly repudiated British rule. But these were revolutionary documents – novel, explicitly temporary, and written to repudiate authority, not to permanently establish it. The sovereignty of these new governments would be tested on the fields at Trenton, Saratoga, and Yorktown and defined at the coming state and national constitutional conventions. So too would be standing controversies over slavery, the frontier, and legislative sovereignty and taxation powers.

C. Congressional Deference to the State Constitutional Conventions

The beleaguered Continental Congress initially failed to address these controversies. While the Southern and New England colonies facing invasion had declared independence, the Congress split over the question of independence. John Adams, frustrated with the Boston crisis, sought a congressional declaration of independence as early as 1774. But blocked by other congressmen,[368] Adams soon realized that "the delegates here, and other persons from various parts are unanimously very sanguine that if Boston and the Massachusetts can possibly steer a middle course…the exertions of the colonies will procure a total change of measures and full redress for us."[369] Congress was initially less prepared for independence, Adams saw,

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[368] Working in a subcommittee of the First Continental Congress, John Adams quietly drafted a bill, the Declaration and Resolves, listing grievances against Parliament and George III. The measure passed on October 14, 1774, but the final draft redacted some of Adams' insurrectionary language, including a provision that would have recognized each colony's right to an independent legislature. The first resolution of the original draft held "That the power of making laws for ordering or regulating the internal polity of these Colonies, is, within the limits of each Colony, respectively and exclusively vested in the Provincial Legislature of each colony." The first resolution of final draft redacted any mention of colony legislatures. John Adams, "Letter to Timothy Pickering, August 6, 1822," in *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. II (Boston: Little, Brown, 1822), 535–42; Worthington Chauncey Ford, ed., *Journals of the Continental Congress: 1774-1789*, vol. I (Washington: U.S. Government Printing Office, 1904), 63–74.
[369] John Adams, "Letter to Joseph Palmer, September 26, 1774," in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. I (Boston: Little, Brown, 1774), 154–55; Adams, *The First American Constitutions*, 51.

than were his Massachusetts neighbors under British occupation.[370] John Dickinson of Pennsylvania and James Duane of New York emerged as leaders of Congress' conciliatory majority faction.[371] Like many of the faction's moderate delegates, they represented the middle colonies, which were still relatively insulated from the war.[372] The Second Congress, hamstrung by unanimity requirements and overwhelmed with immediate wartime problems, repeatedly shying from declaring independence.[373]

Increasingly preoccupied Bostonians' hardship under British blockade,[374] Adams hatched a plan to circumvent Congress' Dickinson-Duane faction and push America to independence. Late one evening in January 1776, Adams met with George Wythe, an elder Virginia congressman and jurist, to discuss the coming state constitutional conventions. Nearly forty years later, Adams recalled the meeting in exact detail. Wythe,

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[370] John Adams' second cousin and fellow Bay Stater Samuel Adams agreed that Congress saw Massachusetts as too "intemperate and rash." Maier, *American Scripture*, 6.

[371] John Rutledge interrupted the Committee of the Whole on May 16th to propose separation from Great Britain, but found little support. On June 26th, Jefferson and John Dickinson, both outspoken critics of Parliament, began compiling colonists' grievances into the Declaration on Taking Up Arms.[371] Dickinson redacted some of Jefferson's insurrectionary language and the measure passed on July 6th. Two days later, Dickinson sent the conciliatory Olive Branch Petition to Lord Dartmouth, the King's Secretary for the American Colonies. Awaiting the Crown's reply, Congress issued at least three more proclamations against Great Britain that summer, each shying from independence. Ibid., 17–25.

[372] Thomas Jefferson, "Notes of Proceedings in the Continental Congress, 7 June to 1 August 1776," in *The Papers of Thomas Jefferson: 1760-1776*, ed. Julian P. Boyd, vol. I (Princeton: Princeton University Press, 1776), 309; Adams, *The First American Constitutions*, 57.

[373] As rogue patriot militiamen clashed with royal troops at Lexington and Concord, Ticonderoga, and Bunker Hill in May and June of 1775, the Congress scrambled to organize American troops into the Continental Army. In the following months, Congress' five dozen delegates met in ad hoc committees, six days a week, from early morning until dinner, borrowing and printing money, regulating the mail, and bargaining with Indians and loyalists. Congress, like the New England state assemblies, also worked as a court of last resort, arbitrating disputes over wartime property seizures, and as an executive, overseeing the treasury and Army and even mundane administrative issues like the salary of the congressional doorkeeper. Resolutions passed only with unanimous consent from the diverse state delegations, requiring days of backroom canvassing. Maier, *American Scripture*, 8–17.

[374] He had come to Congress in May 1775 worried with the "poor People of Boston, imprisoned within the Walls of their City by a British Army." Confiding to his journal, he wrote the delegates to Congress "knew not to what Plunder or Massacres or Cruelties [Bostonians] might be exposed." He decided that Congress ought to resolve the crisis by recommending "to the People of all the States to institute Governments for themselves… then to inform Great Britain We were willing to enter into Negotiations with them for the redress of all Grievances, and a restoration of Harmony between the two Countries." John Adams, "Diary," in *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. II (Boston: Little, Brown, 1775), 406–7.

he wrote, agreed “upon the necessity of independence…observing that the greatest obstacle in the way of a declaration of it was the difficulty of agreeing upon a government for our future regulation.” The states, and their congressional delegates, each had different plans for government, deadlocking the Continental Congress. But the state committees and legislatures were smaller and more harmonious. Here, Adams saw a chance at progress. The colonies might individually draft constitutions declaring independence, circumventing the conciliatory, deadlocked Congress. “I replied,” Adams remembered, “that each colony should form a government for itself, as a free and independent State.” An impressed Wythe asked “what plan would you institute or advise for any of the States?” Unsure, Adams deferred the question, later penning a plan in a letter to Wythe. From this he redrafted his plans for the state constitutions into a pamphlet, the *Thoughts on Government*, which he forwarded to Wythe. Wythe offered it to another Virginian, Richard Henry Lee, who had it printed in Philadelphia in April and circulated to fellow members on the fourth day of Virginia’s Convention. Within days of this, Adams sent a similar plan to his fellow congressman Jonathan Dickinson Sergeant for Sergeant’s use in New Jersey’s Constitutional Convention.[375]

But in early May 1776, only New Hampshire, South Carolina, Virginia, and New Jersey had called conventions. On May 4th, Rhode Island cut ties with the Crown, but avoided drafting a constitution to replace its colonial charter.[376] Adams felt he needed to coax the other states to independence.[377] He pressed for a congressional resolution

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[375] John Adams, “Letter to John Taylor, April 9, 1814,” in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams (Boston: Little, Brown, 1814), 94–96.
[376] Wood, *The Creation of the American Republic, 1776-1787*, 131.
[377] Confiding to fellow congressman Patrick Henry, Adams wrote “It has ever appeared to me, that the natural Course and order of Things, was this—for every Colony to institute a Government—for all the Colonies to confederate, and define the Limits of the Continental Constitution—then to declare the

requesting the remaining colonies call constitutional conventions, but on March 13th Congress' conciliatory majority defeated the measure.[378] In the following weeks, Adams set to bargaining with other members. Seconded by Lee, on May 10th Adams introduced to the Committee of the Whole a new resolution, only a single sentence long, calling on the colonies' revolutionary committees and assemblies to declare independence by drafting new governments.[379] The resolution passed. Assembling a private subcommittee with Edward Rutledge and Richard Henry Lee, Adams added a strategically vague and brief preamble to the resolution declaring that "the exercise of every kind of authority under the crown should be totally suppressed." After two days of heated debate, the resolutions narrowly passed on the morning of May 15th, with six to seven colonies voting in support, four against, including Duane's New York delegation, and one to two abstaining.[380] Adams felt America had declared independence.

Lee had cleverly isolated the issue of state constitutional design to his June 1775 subcommittee, as had Adams in May 1776. By drafting their resolutions in private subcommittees, they initially avoided debating the Dickinson-Duane faction in the

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Colonies a sovereign State, or a Number of confederated Sovereign States—and last of all to form Treaties with foreign Powers. But I fear We cannot proceed systematically, and that We Shall be obliged to declare ourselves independant States before We confederate, and indeed before all the Colonies have established their Governments." John Adams, "Letter to Patrick Henry, June 3, 1776," in *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. IX (Boston: Little, Brown, 1776), 386–87.

[378] Worthington Chauncey Ford, ed., *Journals of the Continental Congress 1774-1789*, vol. IV (U.S. Government Printing Office, 1906), 199–201; Adams, *The First American Constitutions*, 58.

[379] The resolution made by the Committee of the Whole: "Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general." John Adams, *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. III (Boston: Little, Brown, 1851), 44–45; Ford, *Journals of the Continental Congress 1774-1789*, IV:342.

[380] Ford, *Journals of the Continental Congress 1774-1789*, IV:357–58; Nevins, *The American States*, 125–26; Wood, *The Creation of the American Republic, 1776-1787*, 131–32; Kruman, *Between Authority and Liberty*, 20; Maier, *American Scripture*, 37–38.

Committee of the Whole, which Adams had called the "greatest obstacle in the way of a declaration."[381] A defeated Duane attacked Adams, calling his resolution "a Machine for the fabrication of independence," to which Adams happily agreed.[382] The rising fervor for independence no doubt helped Adams' May 10th and 15th, 1776 resolutions' gain a majority of Congress, as did the resolutions' brevity, which kept them short, vague, and agreeable.

Adams kept the resolutions short to push them through Congress, but this brevity had the unexpected consequence of empowering the states. The May resolutions deferred to the states on the design of government, and the regulation of slavery, the frontier, and every other constitutional matter. This was an exceptional devolution of authority – thus far, every colony to draft a new constitution had first asked Congress' permission. Adams had allowed all remaining colonial conventions to draft their new governments, and solve America's gravest crisis on their own, without congressional oversight.[383] New Jersey first answered the call with a convention on May 26th, drafting a constitution and declaration of independence. Pennsylvania's Provincial Conference, meeting from June 18th to 25th, also declared separation from Great Britain, calling a constitutional convention.

Trailing the states, the Continental Congress gradually turned toward independence. George III had snubbed Congress' Olive Branch Petition in September 1775, Lord Dunmore had freed Virginia's loyalist slaves the following month, and Paine's *Common Sense*, published in January 1776, had pushed delegates toward

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[381] Adams, "Letter to John Taylor, April 9, 1814," 95.
[382] Adams, *The Works of John Adams, Second President of the United States*, III:45–46; Adams, *The First American Constitutions*, 59.
[383] For nearly another century, proponents of states' rights pointed to Adams' sweeping delegation of power. Maier, *American Scripture*, 94; Adams, *The First American Constitutions*, 47.

separation.[384] On June 7th, 1776, Richard Henry Lee, backed by Adams and Wythe, asked Congress to follow Virginia in formally declaring independence.[385] Four days later, Congress delegated the Declaration's drafting to Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston, dubbed "the Committee of Five."[386]

Prior state constitutional framing aided the drafting of the Declaration. In exactly imitating previous state declarations of independence, the Committee made a national Declaration that was more palatable to moderate congressmen. Adams, Jefferson, and Franklin, the document's primary authors, relied on their prior experience drafting local constitutions and declarations of independence.[387] Charged with composing the first draft of the Declaration,[388] Jefferson drew heavily on his proposed Virginia Constitution,[389] as

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[384] Maier, *American Scripture*, 25–34.
[385] Dickinson, Wilson, and other middle-colony delegates attacked the measure as imprudent, and so Lee's measure was postponed, until the delegates of New York, New Jersey, Pennsylvania, Delaware, and Maryland were willing to vote for independence.
[386] The Committee deputized Jefferson to draft the Declaration. Jefferson, "Notes of Proceedings in the Continental Congress, 7 June to 1 August 1776," 309–15.
[387] Since May 1775, Adams had advised Joseph Warren, the president of Massachusetts' Provincial Convention, on whether the colony should draft a new constitution. Adams also aided George Wythe, Richard Henry Lee, and Patrick Henry in drafting the Virginia Constitution, and advised Jonathan Dickinson Sergeant on framing the New Jersey Constitution. Adams closely followed the New Hampshire and South Carolina conventions as well. While serving on the Committee of Five, Franklin led Pennsylvania's Provincial Conference, which on June 24, 1776, called for a new, independent state constitution, faulting George III for stirring slave and Indian revolts, deploying mercenaries, ignoring colonists' petitions, and acting in violation of "the principles of the British constitution, and of the laws of justice and humanity." "Provincial Conference," 42–43; Adams, "Letter to John Taylor, April 9, 1814," 94–96; Nevins, *The American States*, 122–25; Kevin R. C. Gutzman, *Virginia's American Revolution: From Dominion to Republic, 1776-1840* (Lexington Books, 2007), 24–27; Harlow Giles Unger, *Lion of Liberty: Patrick Henry and the Call to a New Nation* (Da Capo Press, 2011), 113–16.
[388] Jefferson assembled his "original Rough draught" from early passages he had earlier submitted to the Committee of Five. Adams and Franklin later edited the draft. Maier, *American Scripture*, 101.
[389] While serving in Congress in Philadelphia, Jefferson drafted a constitution for Virginia, which he then sent to Edmund Pendleton, President of Virginia's Constitutional Convention. On June 29th, the Convention ratified a constitution including much of Jefferson's preamble, cataloguing twenty grievances against George III. While the Virginians were deliberating, Jefferson incorporated eighteen of these grievances, largely unmodified, into his draft of the Declaration. Excluded from the Declaration's final draft was Jefferson's original abolition provision and the claim that George III had abdicated power "By answering our repeated petitions for redress with a repetition of injuries: And finally, by abandoning the helm of government and declaring us out of his allegiance and protection." Language from the Virginia bill's first

he later admitted.[390] The Committee of Five and the state convention delegates mailed each other, read the same pamphlets, and faced the same hardships under British rule.[391] Consequently, the national Declaration of Independence closely resembled those printed in the first four state constitutions. Thirty-two of the Declaration's thirty-eight provisions appeared previously in some form in a state constitution.[392] Four provisions were common to at least five of the six documents, including objections to the Crown's dissolution of the colonial legislatures, deploying standing armies, blocking colonial trade, and making war against colonists.[393] After Congress' Declaration, seven state

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and third section reappeared in the opening of the Declaration, as did other sections. In total, twenty-seven of the thirty independence provisions in the Virginia Constitution of 1776 reappeared in the Declaration. Julian P. Boyd, "Editorial Note: The Declaration of Independence," in *The Papers of Thomas Jefferson: 1760-1776*, ed. Julian P. Boyd, vol. I (Princeton: Princeton University Press, 1950), 413–17; Julian P. Boyd, "Editorial Note: The Virginia Constitution," in *The Papers of Thomas Jefferson: 1760-1776*, ed. Julian P. Boyd, vol. I (Princeton: Princeton University Press, 1950), 239–37.

[390] Jefferson wrote: "The fact is, that the [Virginia Constitution's] preamble was prior in composition to the Declaration; and both having the same object, of justifying our separation from Great Britain, *they used necessarily the same materials, and hence their similitude.*" Thomas Jefferson, "Letter to Augustus B. Woodward, August 25, 1825," in *The Works of Thomas Jefferson Volume 2*, ed. Paul Leicester Ford (New York, NY: G.P. Putnam's Sons, 1825), 160. Pauline Maier argues the preamble to the Virginia Constitution of 1776 in turn came from the English Declaration of Rights. Maier, *American Scripture*, 126. For an extended discussion of Jefferson's drafting of the Declaration of Independence, see Ibid., 97–153.

[391] Jefferson later recalled the tenor of the Committee of Five, and of the era: "All American whigs thought alike on these subjects… This was the object of the Declaration of Independence…. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c." Thomas Jefferson, "Letter to Henry Lee, May 8, 1825," in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 12 (New York, NY: G.P. Putnam's Sons, 1825), 408.

[392] See Table 14 in the appendix on these provisions.

[393] New Hampshire's conciliatory 1776 Convention delegates listed only ten grievances, objecting mainly to the seizure of property and impediment to trade under the Navigation Acts, and to George III's suspension of the colony's governor, legislature, and courts, asking for a restoration of English rights and peace with Britain. New Jersey's Convention also listed only ten grounds for independence, and like New Hampshire's, closed by appealing to conciliation. South Carolina's 1776 Constitution catalogued grievances against George III with the same vitriol as the Declaration, and fifteen of South Carolina's complaints reappeared in the Declaration. Both Virginia and South Carolina's constitutions anticipated the Declaration's complaint George III instigated revolt among "the merciless Indian savages."

constitutional conventions followed, imitating the national Declaration.[394] State and national framers collaborated and together met the challenge of declaring independence.

The Declaration's meaning changes when read through the state constitutions. Consider the Declaration's infamous silence on slavery. Jefferson's first draft of the Declaration condemned George III, who had "prostituted his Negative for Suppressing every legislative Attempt to prohibit or to restrain an execrable Commerce" in slaves.[395] When the Committee of the Whole debated Jefferson's draft on July 2nd and 3rd, Georgians and South Carolinians and Northerners representing slave merchants rejected the clause,[396] and the Committee of Five cut the provision. Generations of scholars have mourned this deletion.[397]

But Jefferson's redacted clause, drawn from the Virginia Constitution of 1776, [398] defended the state legislatures' constitutional right to control the slave trade. These nonimportation laws let white plantation hold owners a monopoly on slave labor and

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[394] These state declarations drew on Congress' Declaration. New York copied the Congressional Declaration verbatim. The following states listed grounds for independence and dissolution of government in their constitutions: Pennsylvania (1776), Maryland (1776), North Carolina (1776), Georgia (1777), New York (1777), Vermont (1777), and Massachusetts (1780). For a discussion of the state and local declarations see Maier, *American Scripture*, 47–96.

[395] The clause added the royal slave trade violated the "most sacred Rights of Life and Liberty in the Persons of a distant People who never offended him." For the full clause see Thomas Jefferson, *The Papers of Thomas Jefferson: 1760-1776*, ed. Julian P. Boyd, vol. I (Princeton: Princeton University Press, 1950), 420 n10.

[396] Jefferson, "Notes of Proceedings in the Continental Congress, 7 June to 1 August 1776," 314–15; Carl Lotus Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Harcourt, Brace, 1922), 171–72; Maier, *American Scripture*, 146–47.

[397] For example, Gary Nash calls it "the most important deletion of Jefferson's draft." For similar accounts, see Boyd, "Editorial Note: The Virginia Constitution," 414; Michael Rogin, "The Two Declarations of American Independence," *Representations* 55 (July 1, 1996): 14–15, doi:10.2307/3043733; Don Edward Fehrenbacher, *The Slaveholding Republic: An Account of the United States Governments Relations to Slavery*, ed. Ward M. McAfee (New York: Oxford University Press, 2001), 17; Nash, *The Unknown American Revolution*, 208–9; Beaumont, *The Civic Constitution*, 61.

[398] Jefferson's provision, as passed in the Virginia Constitution of 1776, argued George III had lost authority over the colony "By prompting our negroes to rise in arms against us, those very negroes whom, by an inhuman use of his negative, he hath refused us permission to exclude by law." Jefferson originally drafted this complaint in his *Summery View of the Rights of British America*. See Maier, *American Scripture*, 112–13.

limit and control the growth of rebellious slave populations.[399] The newly-independent Virginia legislature passed a 1778 nonimportation act and a 1793 act prohibiting immigration by free blacks.[400] Similarly, Delaware's 1776 Constitutional Convention simultaneously declared the state's independence from the Crown and right to abolish the royal slave trade, but maintained slavery in Delaware.[401] Jefferson's redacted clause, like its author, was ambivalent about liberty. It loftily proclaimed freedom for black slaves, but tacitly protected states' rights to keep slaves.[402] Accordingly, the Declaration cannot be understood only through the Committee of Five's notes or scrapped provisions, but must be read as a response to state and local constitutional experimentation.

II. Local Responses, 1776-1787

Prompted by Adams' May resolutions, the state framers drafted new constitutions regulating legislative sovereignty, the frontier, and slavery. Separation from Great Britain prevented tyranny by Parliament, but not by the colonial and state legislatures, which too might overextend their constitutional authority. Framers responded by forbidding state legislators from making or amending constitutions. By the constitutional conventions of

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[399] Many of the sponsors of colonial Virginia's nonimportation bill were themselves wealthy slaveholders who stood to benefit from such a law, and were upset when blocked by their royal governor. See Ibid., 265 n33. John Adams later speculated that the Georgia and South Carolina delegates were not opposed to Jefferson's nonimportation argument – they may even have supported it – but rather rejected his lofty antislavery "tone and flights of oratory." Adams, "Letter to Timothy Pickering, August 6, 1822," 514; Maier, *American Scripture*, 122.

[400] Historian Robert McColley writes: "By removing foreign competition, Virginia could hope to maintain attractive prices for slaves, and could also expect enough of them to be carried out of the state to maintain a safe proportion between the races of the Old Dominion…the laws against slave importation were by no means intended to attack, or even criticize, the holding of slaves itself." Robert McColley, *Slavery and Jeffersonian Virginia* (Champaign: University of Illinois Press, 1964), 164–67; Nicholls, "'The Squint of Freedom,'" 51, 54–55.

[401] See Article 26 of the Delaware Constitution. Note that Pennsylvania also considered such an act in 1778, before passing one in 1785, but faced less pressure from slave revolts than did Southern colonies.

[402] It is not clear whether Jefferson intended to protect states' rights to regulate slavery. In his 1775 "Address to the Inhabitants of Great Britain," his Declaration of Causes and Necessity of Taking Up Arms, and his *Summary View*, Jefferson condemned injuries to blacks and slaves under royal government. The extent to which Jefferson genuinely sympathized with African Americans, who he considered physiologically inferior to whites, is debatable. Jefferson, *The Papers of Thomas Jefferson*, I:419 n1.

the 1770s and 1780s, concerns over taxation and Parliamentary supremacy transformed into broader questions of designing checks on the legislature. Pennsylvanians proposed a unicameral legislature constrained by frequent popular elections, while in Virginia and Massachusetts framers checked the lower house with an upper house, a gubernatorial veto, and independent courts. By the 1790s, framers universally accepted the latter model, resolving national debate over legislative design. On frontier matters, revolution abrogated the 1763 Proclamation forbidding western migration, and in scrapping their elitist colonial legislatures, state framers reapportioned districts to better represent westerners. However, framers in all states maintained old, contentious property qualifications on the franchise. Finally, Northern courts and legislatures accepted gradual emancipation, while Southerners legally reinforced slavery. This section of the chapter explores first how state framers limited legislatures' constitutional authority, second, how they reapportioned and checked the legislature, and third, how they regulated slavery.

A. Separating Legislative and Constitutional Authority

Across the states, constitutional framers forbade legislators from engaging in constitutional reform. Accordingly, between 1776 and 1784, all but two states adopted their constitution through a special session or constitutional convention, on the assumption that constitutional sovereignty lay not in the legislature, but in the united people, represented by their delegates in convention.[403] There was some truth to this populist claim. After the Continental Congress declared independence and assumed management of the War, local revolutionary committees shifted their focus from wartime

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[403] Rhode Island and Connecticut kept their colonial charters and did not call conventions. In Pennsylvania, Delaware, and Virginia, the state constitutional conventions doubled as temporary legislatures, replacing the dissolved colonial legislatures, which had relied on the Crown and thus stayed loyal. New Hampshire, Georgia, New York, and Vermont called special legislative sessions to draft new constitutions.

governance to calling popular elections for convention delegates. These conventions proceeded slowly and deliberately, submitting draft constitutions to public revision and approval. In seizing the power to make and amend constitutions and submitting these to popular review, these conventions assuaged colonists' anxieties over legislative tyranny or detachment.

After the Declaration, at least seven states rejected legislative sovereignty in constitutional matters, instead calling special, popular elections to pick delegates for their constitutional conventions. As provincial conferences abolished colonial suffrage requirements, many Americans went to the polls for the first time. Pennsylvanians moved first. On May 7, 1776, Philadelphians heard reports a British warship was bearing royal marines to the city. Within hours of Adams' May 15th resolution, Philadelphia patriots began organizing a preliminary meeting to call a constitutional convention to declare independence, much to the dismay of loyalists like John Dickinson and James Wilson.[404] Five days later, a crowd of four thousand ordinary Philadelphians, pressed together in the rain, heard a reading of the resolution and erupted in cheers, tossing their hats. Pennsylvania's aristocratic legislature would rule no more. The next day, Philadelphia's Committee of Observation announced a Provincial Conference would assemble to call a convention. Nearly every day a new rally or pamphlet or article declared Philadelphians' authority to draft a new constitution. The following morning, May 22nd, William Bradford, a Philadelphia militiaman and printer of the *Pennsylvania Journal*, republished the May 15th resolution and this dialogue:

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[404] Nevins, *The American States*, 107, 129; Wood, *The Creation of the American Republic, 1776-1787*, 332.

Q. Who ought to form a new Constitution?
A. The people.
Q. Should the officers of the old constitution be entrusted with the power of the making of a new one when it becomes necessary?
A. No. Bodies of men have the same selfish attachments as individuals, and they will be claiming powers and prerogatives inconsistent with the liberties of the people.

The dialogue appeared in at least one other Philadelphia paper, and an anonymous four-page pamphlet, *The Alarm* argued the state legislature could not draft a constitution. The state would have to call a special election for delegates.[405]

Pennsylvanians were the first to strip the legislature of constitutional sovereignty. The colony's loyalist legislators initially refused to draft a new, separatist constitution. But even after the Assembly grudgingly allowed a vote for independence on June 8th, Philadelphians refused a constitutional convention called by the legislature. Rediscovering populist English Whig pamphlet literature, Revolutionary Pennsylvanians felt that after their state declared independence, authority reverted to the people of Pennsylvania, who passed it to their representatives in the constitutional conventions.[406] Thus the *Pennsylvania Journal* called for delegates of the middling sort, who would "regard not the person of the rich, nor despise the state of the poor," and at "moment the constitution is framed, [would] descend into the common paths of life" and abdicate their authority. Pennsylvania's populists met again at Carpenter's Hall in Philadelphia for the

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[405] The dialogue and quotes appeared in the May 16, 1776 edition of the *Pennsylvania Evening Post* and the May 22nd *Pennsylvania Journal*. For the quotes and details on the printing of the *Post*, *Journal*, and "The Alarm; or, an Address to the People of Pennsylvania on the Late Resolve of Congress", see Williams, "State Constitutions of the Founding Decade," 552; Kruman, *Between Authority and Liberty*, 25; Adams, *The First American Constitutions*, 61; John W. Carter, "Religion and State Constitution Making" (Catholic University of America, 2009), 133; John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, vol. IV (Charlottesville, Va: University of Virginia Press, 2009), 274.
[406] For example, Locke's *Second Treatise*, reprinted in Boston in 1773, which argued that revolution broke the social contract, returning constitutional authority to its original authors, the people. Prior to this, Locke had been read only rarely in the colonies, usually for his "Letter Concerning Toleration" and "Essay Concerning Human Understanding." His republished *Treatises* could not nearly match the influence of Paine's *Common Sense*. John Dunn, *Political Obligation in Its Historical Context: Essays in Political Theory* (Cambridge: Cambridge University Press, 1980), 53.

Provincial Conference on June 18th, resolving the following day "That it is necessary that a provincial convention be called by this conference, for the express purpose of forming a new government in this province, on the authority of the people only."[407] Since the convention represented the people's united will,[408] it could only engage in the general act of constitution-making, and not in particular legislation.[409]

This populism was not merely rhetorical. Conference delegates decided that free males over twenty-one and with a year of residency could vote for delegates to the coming Constitutional Convention, and reapportionment of Convention delegates would give a voice to long-neglected western frontier counties. The proportion of freemen eligible to vote increased from fifty to ninety percent, and the elections vaulted Appalachian farmers and urban tradesmen into the Convention. On August 2nd, the Convention printed and distributed a draft constitution. For four weeks, Pennsylvanians debated the constitutions in town meetings, newspapers, and pamphlets, sending edits to the Convention, which incorporated the revisions into the final draft approved on September 27th. On dissolving, the Convention transferred authority over constitutional

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[407] "Provincial Conference," 38. Conference delegates took popular authority so seriously that they redrafted their original notes, capitalizing every mention of "the People." This was likely done by the Secretary, John Morris, his assistant clerk, Jacob Garrigues, or Timothy Matlack, the temporary secretary. For edits to the original draft, see "Pennsylvania Provincial Conference of Committees Minutes," (#Am.289) at the Historical Society of Pennsylvania.

[408] For example, the framers of the Commonwealth of Pennsylvania declared "the people have a right, by *common* consent" to change government, and that "the *community* hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government." Pennsylvania Constitution of 1776, Preamble and Article V. Emphasis added.

[409] As Gordon Wood concludes, it was in Pennsylvanian "where the distinction between constitutional and legislative law was most sharply appreciated." Wood, *The Creation of the American Republic, 1776-1787*, 308, 333–40. Note Rousseau also argues conventions can represent the general will, and that the general will cannot make laws with particular aims. See *On the Social Contract*, I.5, II.4, III.1.

revision not to the legislature but to a newly-designed Council of Censors, chosen from the people's representatives.[410]

Pennsylvania's populist process proliferated. With elite legislators excluded from the state conventions by loyalty oaths or prohibitions on dual office holding, many state framers were small farmers, backcountry lawyers, printers, merchants, and shopkeepers.[411] Imitating Pennsylvania, other states distinguished constitution-making from lawmaking by calling special elections for convention delegates.[412] On July 27, 1776 Delaware's legislature refused to engage in constitution-making, instead scheduling special elections to select delegates to the state constitutional convention.[413] Provincial congresses in New York, New Jersey, Maryland, and North Carolina also expressly instructed convention delegates to represent the common will by avoiding legislating, a necessarily narrow and self-interested activity. To secure popular sovereignty, many state constitutions allowed the people to check legislators with frequent elections, open legislative sessions, and publication and public review of proposed bills. And Maryland and North Carolina delegates printed and distributed their proposed constitution for a

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[410] Kruman, *Between Authority and Liberty*, 24–28; Maier, *American Scripture*, 66; Adams, *The First American Constitutions*, 74–77.

[411] Nevins, *The American States*, 134. But note that Pennsylvania's Provincial Conference required voters selecting delegates, and the delegates themselves, take loyalty oaths to the new state. This excluded royalists and the colony's Quaker elite, which refused oaths on principle. Still excluded from the franchise were many women, slaves, non-Protestants, and the very poor. In most states, the public could not vote to ratify a proposed constitution. Of the thirty-four conventions between 1776 and 1799, only Massachusetts' 1778 and 1780 Conventions and New Hampshire's 1784 Convention submitted their work for a vote of public approval, though Pennsylvania's 1776 Convention distributed a draft constitution to public debate.

[412] Note however, the separatist legislatures of Connecticut and Rhode Island used statutes to recognize their existing colonial charters as the state constitutions. See Adams, *The First American Constitutions*, 64–66. At least since the revolt against the 1686 Dominion of New England, New England colonists had understood their charters and legislatures to shield them from monarchical tyranny. Nevins, against Wood, Kruman, and Adams, argues the conventions frequently engaged in legislation. See Nevins, *The American States*, 136–37.

[413] Thomas McKean, as president of Pennsylvania's Provincial Conference, had proposed the state's special elections, was elected to serve in the Delaware Constitutional Convention in September, where he reminded fellow delegates to serve the common interest and avoid parochial lawmaking.

two-week period of pubic consideration.[414] State constitutional convention delegates appeased frontiersmen by extending them the vote and lawmaking authority for the first time, and by ousting or weakening elitist eastern legislators.[415]

Massachusetts citizens were exceptionally clear in limiting legislative sovereignty. On September 17, 1776, the Massachusetts legislature issued a circular letter to the state's town meetings, requesting authority to draft a constitution. Twenty-three of the ninety-seven towns objected to some element of the plan.[416] Instead, the legislature held special elections for delegates a new legislative session, which drafted a constitution. The state called all men over twenty-one to vote on the proposed constitution, the first such election in America. In March 1778, Massachusetts voters resoundingly rejected the legislature's constitutional plan 9,972 to 2,083. Finally, the legislature capitulated in June 1779, calling a constitutional convention "with the sole purpose of framing a constitution." The Convention drafted a new proposal that voters accepted two years later. In 1784, New Hampshire replaced its emergency constitution, imitating Massachusetts' plan for popular elections.[417]

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[414] Nevins, *The American States*, 127–32; Wood, *The Creation of the American Republic, 1776-1787*, 328–33; Kruman, *Between Authority and Liberty*, 20–24, 28–33; Adams, *The First American Constitutions*, 72–85.

[415] Hardscrabble farmers from the North Carolina highlands, resenting the colony's genteel tidewater planter government, armed themselves and organized as the separatist Regulator Movement, drafting a provisional government in 1769. In August 1784, they adopted a constitution and formed the state of Franklin in modern Tennessee. Even further west, a coalition of log cabin villages joined together to repel Indian attacks and expand their holdings. They dubbed themselves the Watauga Association, calling a special convention to draft a constitution in the fall of 1785. Scots-Irish settlers along the Ohio River, ling underrepresented in the Pennsylvania's assembly, petitioned Congress for statehood as the new province of Westsylvania. But the Congress, unwilling to arbitrate Virginia and Pennsylvania's competing claims to the Ohio, ignored the request. Kentucky and Vermont also pushed for congressional recognition, but were rebuffed. Nevins, *The American States*, 664–71.

[416] The village of Norton suggested that town meetings advise a special convention distinct from the legislature, which Concord and Lexington seconded, and Pittsfield, a farming town on the state's western periphery, required that the convention submit its work to a popular vote

[417] Nevins, *The American States*, 175–81; Wood, *The Creation of the American Republic, 1776-1787*, 339–43; Kruman, *Between Authority and Liberty*, 30–33; Adams, *The First American Constitutions*, 83–90.

Framers also forbade the legislature from amending the constitution. The first framers expected constitutional change to occur through extralegal popular revolution, rather than through legislative revision. Eleven state conventions invoked their right to rebel and draft a new constitution, and four formally recognized this popular authority in their bills of rights.[418] Accordingly, initially only three states specified a formal, legal process for amendment by convention.[419] Framers felt legislators represented narrow, parochial interests, and thus could not amend or reinterpret a constitution, which embodied the common good. Georgia, Delaware, and New Jersey framers expressly stripped the power of the state legislature to amend or contradict the ratified constitution.[420] Pennsylvania also prohibited legislative amendment, which it passed to Georgia and Vermont.[421] Maryland allowed the legislature to amend the 1776 Constitution only if the amendment represented a united popular will, indicated by a two-thirds majority in both houses over two years.[422] And when South Carolina's legislature attempted to frame a new constitution, Governor John Rutledge resigned in protest and his replacement refused to take office.[423] Massachusetts' 1780 Constitution prohibited all political branches from revising the constitution through "orders, laws, statutes, and ordinances, directions and instructions," providing instead for an eventual popular referendum for constitutional replacement, a provision New Hampshire borrowed in

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[418] These were the conventions of New Hampshire (1776), South Carolina (1776), Virginia (1776), New Jersey (1776), Pennsylvania (1776), Maryland (1776), North Carolina (1776), Georgia (1777), New York (1777), Vermont (1777), and Massachusetts (1780). Adams, *The First American Constitutions*, 134–36.
[419] The Constitutions of South Carolina and New Jersey were two of the first four, framed quickly and under duress, with the intention they would soon be replaced. Thus, amendment was a less pressing concern for the framers of these expressly temporary documents. Framers in New York, New Jersey, Virginia, North Carolina, and South Carolina refused to specify the legal process for constitutional amendment. Vile, *The Constitutional Amending Process in American Political Thought*, 25.
[420] Delaware and New Jersey specifically prohibited the legislature from amending provisions on rights and on legislative powers, perhaps reflecting a growing fear of majoritarian tyranny.
[421] See the Pennsylvania Constitution of 1776, Frame of Government, Section 9.
[422] See the Maryland Constitution of 1776, Article LIX.
[423] Kruman, *Between Authority and Liberty*, 53–57; Adams, *The First American Constitutions*, 136–42.

1784.[424] Elsewhere, framers proposed a gubernatorial veto or an independent revision council as a counterweight to the legislature.[425] For example, Pennsylvania's Council of Censors met septennially to affirm that no legislative statutes had violated the people's will as represented at the 1776 Convention.[426]

The state conventions clarified questions of legislative sovereignty and suffrage that had dogged the colonies under British rule. Colonists united in Farmers rejected legislative sovereignty and distinguished it from constitutional authority. All of the provincial congresses and constitutional conventions expressly refused to serve as a standing government, and after drafting a constitution, each of the initial state conventions dissolved.[427] Underlying this self-imposed brevity was the assumption that only a rare, momentary emergency could unite the people to a common interest, making it possible to legally represent the whole people, the aim of constitution-making.[428] In contrast, ordinary legislation, serving narrower private interests, was done by standing

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[424] Massachusetts' 1780 Constitution called for a referendum in 1795, while New Hampshire's 1784 Constitution required one every seven years. See the Massachusetts Constitution of 1780, Frame of Government, Chapter I, Section I, Article IV and Chapter VI, Article X and the New Hampshire Constitution of 1784, Form of Government, Section 2.

[425] Adams, *The First American Constitutions*, 267–69.

[426] Similarly, Virginia's 1776 Constitution, drafted in part by Jefferson, called for "frequent recurrence to fundamental principles," though this phrase did not appear in Jefferson's original draft. After the Pennsylvania Council reauthorized the Constitution in 1783, legislators rallied for abolition of the Council and Constitution, arguing that ongoing legislative amendment would more closely track the shifting popular will. In 1790, Pennsylvania's anti-Constitutionalists scored a convention that revised amendment procedures. See the Virginia Constitution of 1776, Bill of Rights, Section 15. Kruman, *Between Authority and Liberty*, 57–59.

[427] Note however in Virginia, after Governor Dunmore dissolved the House of Burgesses, legislators reassembled as the standing Provincial Convention, which in turn, called the state's 1776 Constitutional Convention. In Pennsylvania the loyalist legislature dissolved in June 1776, leaving government to the state Constitutional Convention assembled that summer. A similar situation occurred in Delaware.

[428] Since authority only reverted to the people during rare breaches of the social contract, popular assemblies were necessarily short and infrequent, though not opposed to making durable constitutions. Paradoxically, because constitutions were designed to durably constrain ordinary politics, and could not be made through ordinary legislative politics, they could only be framed in fleeting emergencies. Constitution-making was necessarily brief, while constitutions were necessarily durable. Here was born the great dilemma in constitutionalism, for constitutions claimed to represent the popular will, but the people were almost always restrained from revising their constitutions.

bodies. Additionally, as states called conventions, many ordinary American freemen turned to the polls and to deliberative meetings for the first time. In selecting delegates and in writing constitutions, the people could claim authority over all law, refuting Parliamentary claims that popular authority extended only to tax law.

B. Legislative Design

Still, the states did not ban their standing legislatures outright. It now fell to state constitutional drafters to check and equitably reapportion the legislature. In mid-1776, state framers split between two legislative designs. Pennsylvania framed a unicameral legislature checked by frequent popular elections, while Virginia and Massachusetts reverted to the English Whig plan to check the lower house with an aristocratic upper house and a gubernatorial veto. By the late 1780s the state framers settled on the latter model, which promised stronger, gubernatorial and judicial constraints. This model assuaged framers' worries of legislative detachment, resolving the national question over legislative sovereignty and design.

Pennsylvania pioneered the unicameral model. For centuries, Pennsylvania's colonial legislature, the Assembly, had maintained statutory and charter provisions disempowering the urban poor and western settlers.[429] In 1775 under charter rule, only

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[429] Under the 1681 Charter, William Penn governed the colony, appointing judges and a lieutenant governor, all of whom were subject to English law and a veto by the English monarch and Privy Council. Landing in the colony the following year, Penn drafted a new charter promising Pennsylvanians an elected bicameral legislature, claiming "Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion." But Penn exercised disproportionate authority as the colony's governor and proprietor, alienating voters who elected legislators to block his agenda. He ceded some authority with a 1683 Charter, and when New York's Governor Benjamin Fletcher assumed military control of the colony between 1692 and 1694, the legislature's lower house, called the General Assembly, seized more power under a new 1696 Charter. Asserting its authority to pass a new constitution on behalf of Pennsylvanians, the General Assembly forced a final compromise, the 1701 Charter of Privileges, which would govern Pennsylvania until independence. This Charter downsized the Council and granted the Governor's power of appointment to the Assembly, which effectively became the colony's government. The Charter also limited the vote to

147 of Philadelphia County's 6,941 taxable males were wealthy enough to vote.[430] As Philadelphia's poor population boomed in the 1750s and 1760s,[431] these citizens mobbed, interrupting Philadelphia elections, casting multiple illegal ballots, and harassing wealthy voters with clubs and stones. Rowdy Pennsylvanians mobbed polling places in Philadelphia in 1705 and 1742, Chester County in 1739, Lancaster County in 1749, York County in 1750, and Bucks County in 1752. The following year the Assembly dispatched constables with lists of taxpayers to elections to expel ineligible voters, stifling the protests.[432] Moreover, while western frontier counties rapidly grew in the mid-eighteenth century, [433] the colonial legislature largely refused to revise the 1701 Charter to grant westerners new seats.[434] The malapportionment issue came to a head during the French

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any Protestant male over twenty-one with two years residency and fifty acres of land or fifty pounds of property. This provision dated to the 1696 Frame of Government of Pennsylvania.See the Preface to the 1682 Frame of Government of Pennsylvania. J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (Philadelphia: University of Pennsylvania Press, 1936), 8–9; Theodore Thayer, *Pennsylvania Politics and the Growth of Democracy: 1740 - 1776* (Pennsylvania Historical and Museum Commission, 1953), 3–5.

[430] A "taxable" male payed an estate and poll tax. Note these provisions were lax relative to other colonies, and the landholding requirement allowed many small farmers to vote. See Thayer, *Pennsylvania Politics and the Growth of Democracy*, 6. In Philadelphia County in 1776, 743 of the 1455 taxable males could vote under the landholding provision. McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America*, 287–88; Selsam, *The Pennsylvania Constitution of 1776*, 33.

[431] Between 1750 and 1773, the proportion of Philadelphia's workforce bound to slavery or servitude decreased from fifty to thirteen percent. In this same period, the percentage of the poor in the City of Philadelphia multiplied eightfold, packing the city's poorhouses. Nearly nine of ten Philadelphia merchants were former artisans living hand to mouth, and a third of them might face bankruptcy [431]. In 1775, only 335 of the 3,452 male taxpayers in the City of Philadelphia had enough property to vote, a much lower proportion than in a similar city like New York. And unlike the city governments of New York or Boston, the leaders of the Corporation of the City of Philadelphia did not face public meetings or elections.

[432] McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America*, 284–85, 290–92; Countryman, *The American Revolution*, 117.

[433] The colony, once limited to Philadelphia and adjacent Chester and Bucks counties in the southeast, expanded in the mid-eighteenth century. Three groups emerged. Under the 1701 Charter's property requirements, only Philadelphia's Quaker elite participated in elections and the Assembly. Moravian, Schwenkfelder, Mennonite, and Dunker Germans seeking religious freedom, settled Lancaster, Berks, and Northampton counties to the immediate west. And after Ireland faced a series of droughts between 1715 and 1720 and after the Scottish clan system collapsed in the 1740s, a wave of Irish and Scottish Presbyterians immigrated to Lancaster and the western agrarian frontier. Rosalind L. Branning, *Pennsylvania Constitutional Development* (University of Pittsburgh Press, 2004), 9–16; Selsam, *The Pennsylvania Constitution of 1776*, 4–8.

[434] The 1701 Charter specified the three easternmost counties elect four legislators each, but not how to apportion representation to new counties. The Quaker-dominated Assembly grudgingly granted German

and Indian War, when westerners unsuccessfully petitioned the legislature to form militias and build forts,[435] eventually rioting and marching on the legislature in 1763 before being dispersed by royal troops.[436] The Assembly responded with only token reapportionment.[437]

The Stamp Act and Coercive Acts spurred westerners and progressive Philadelphians to form the Committee of Correspondence of Philadelphia, challenging the loyalist Assembly.[438] At the behest of the Committee, revolutionary delegates from nearly all Pennsylvania counties converged on Philadelphia for a brief, initial insurrectionary Provincial Convention in late January of 1775.[439] On May 22, 1776, a

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settlers Lancaster County in 1729 and York County in 1747. Peripheral Berks, Northampton, and Cumberland Counties received a total of five seats, but easterners refused to incorporate more western counties, and the three eastern counties kept a twenty-six to ten legislative majority. Selsam, *The Pennsylvania Constitution of 1776*, 31–35.

[435] A provision from the 1681 Charter reserved to the governor and his deputies the authority to "to levy, muster and traine all sorts of men" against "the incursions as well of the Savages." And Eastern Quaker legislators, insulated from and morally opposed to war, refused western petitions to fund militias and forts. Ibid., 18–36.

[436] In November 1755, an unarmed mob of 300 to 700 German frontiersmen, led by a tavern keeper named John Hambright, descended on Philadelphia to petition the Assembly. Several days later, the Assembly passed a supply bill funding western troops. Ten months after the War's end in 1763, in December 1763, Scots-Irish frontiersmen from Paxton Township organized a militia, dubbing themselves the "Paxton Boys," and began slaughtering Indians. They marched on Philadelphia, intending to overrun a Conestoga Indian safe house and declare their grievances against the Assembly. Stopping at Germantown on Philadelphia's outskirts they announced their frustration with the Assembly's government under the 1701 Charter, until they were dispersed by royal troops. Several months later, two Paxton leaders submitted a formal petition, the *Remonstrance*, requesting redesign of the Governorship and Assembly. Within a week, the colony's governor dismissed them. Philadelphia pamphleteers rightly traced the Paxton Boys' rebellion to Presbyterian and Scots-Irish resistance to the Crown during the English Civil War – the march enacted popular elements of the English constitutional tradition. Ibid., 39–42; James H. Hutson, *Pennsylvania Politics 1746-1770: The Movement for Royal Government and Its Consequences* (Princeton University Press, 1972), 24–28, 96–98, 103–5.

[437] The Assembly incorporated three new frontier counties in 1771, adding five western legislators, and the following year it relaxed taxes on westerners and funded to western canals and turnpikes. But the Assembly had passed a law two years before requiring representatives reside in their district, keeping frontier representatives away from Philadelphia, maintaining eastern dominance. Selsam, *The Pennsylvania Constitution of 1776*, 35; Thayer, *Pennsylvania Politics and the Growth of Democracy*, 127–39.

[438] The Assembly also submitted a resolution against the Stamp Act on September 21, 1765, but this likely reflected wealthy merchants' opposition to royal taxes, rather than a push for popular self-government.

[439] With fifty-seven Philadelphia delegates and fifty from the outlying counties, the Convention rolls roughly reflected the colony's population distribution. Delegates hailed from every county, save for distant Bedford and Westmoreland and loyalist Bucks County. The Provisional Convention's opening resolutions affirmed the Continental Congress' call for resistance by organizing new committees and boycotts and

Philadelphia meeting affirmed the Continental Congress' May 10th and 15th resolutions requesting new state constitutions. Then on June 18th, dozens of western delegates attended the statewide Provincial Conference of Committees to dictate the process for electing delegates to a convention to draft a new constitution.[440] Consequently, the Constitutional Convention fielded a relatively egalitarian distribution of delegates,[441] many of whom were also ideologically committed to direct democracy and the unicameral legislative design.[442]

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distributing goods. But "the real objective was to familiarize the people with the necessity of subverting the old charter and establishing a new constitution." Selsam, *The Pennsylvania Constitution of 1776*, 71.

[440] While eastern counties controlled nearly-three quarters of the state legislature, they comprised only half of the 108 delegates to the Conference. By the author's count from the original Conference minutes, the rolls by county are as follows. The four oldest Pennsylvania counties fielded 54 delegates: City of Philadelphia, 25, Philadelphia County, 11, Bucks, 11, Chester, 13, Lancaster, 9. The seven newer counties also sent 54 delegates: Berks, 10, Northampton, 6, York, 9, Cumberland, 10, Bedford, 3, Northumberland, 5, Westmoreland, 2. The delegates were men of humble background, nearly all captains, majors, or colonels in the Continental Army, joined by a few country lawyers, and several scholars, including Benjamin Franklin and Benjamin Rush. The Conference's first motion was to unanimously uphold the Continental Congress' May 15th resolution, and declare the colony's royal government illegitimate. Two days later, the Conference allowed all taxpaying free males over twenty-one and with a year of residency to elect delegates to the Constitutional Convention. With property and apportionment restrictions lifted, the proportion of freemen eligible to vote increased from fifty to ninety percent, guaranteeing a more populist constitutional convention. Further, the Conference excluded from the election those who would not forswear allegiance to the crown, targeting wealthy eastern loyalists, as well as Quaker elites, who refused oaths. A unanimous resolution also required a similar oath for convention delegates. The pledge required delegates to "profess faith in God the Father, & in Jesus Christ his eternal son, the true God, & in the Holy Spirit," excluding faithful Unitarian Christians as well as non-Christians. Kruman, *Between Authority and Liberty*, 26; Maier, *American Scripture*, 66.

[441] A June 21 resolution by the Conference required at the Convention "equal representation for each County." Thus each county, plus the City of Philadelphia, dispatched four delegates to the state's Constitutional Convention. Western delegates outnumbered those from the City of Philadelphia and the three eastern counties thirty-two to sixteen, and many of the Philadelphia delegates were radicals opposed to the Assembly. Theodore Thayer writes: "When one considers the composition of the Constitutional Convention, it becomes apparent that almost any procedure adopted in choosing a drafting committee would have given it a radical majority…the opposition could do little more than register its protest." And Rosalind Branning affirms that the imbalance of delegates at the Convention "marks the transfer of power from the people whose ancestors were the original settlers under William Penn to the newer elements in the recently settled regions, together with their political allies." Thayer, *Pennsylvania Politics and the Growth of Democracy*, 184, 191; Branning, *Pennsylvania Constitutional Development*, 9–16.

[442] As Gary Nash asserts, Pennsylvania's new "constitution drafters rejected three of the most honored elements of English republican thought" – bicameralism, executive independence, and property-based suffrage. Pennsylvania's framers instead imitated the ancient Saxons and Romans. The Saxons governed England through the local "tithing," the egalitarian, deliberative village meeting in which all men of age held stake. Tithings annually elected a common, unicameral legislature, and retained the right to revoke their delegates. An anonymous 1776 pamphlet printed in Philadelphia, *The Genuine Principles of the Ancient Saxon, or English Constitution* introduced many Pennsylvanians to unicameralism, popular checks

Two coalitions emerged in the Constitutional Convention. John Dickinson's populist faction joined the Convention, abandoning the Assembly, which collapsed in the summer of 1776, unable to reach quorum.[443] Against them, conservative Convention delegates sought to preserve the Assembly's aristocratic tradition and maintain mixed, multi-branch government.[444] Thanks to Philadelphia's revolutionary tenor, the radical party prevailed, designing a directly-elected, powerful unicameral legislature, with equitable apportionment for westerners.[445] The people, the true seat of sovereignty, would regularly check the legislature with yearly elections and term limits.[446] Legislators would debate publicly, submit their minutes and laws for public review and amendment, pledge

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on the legislature, and manhood suffrage. Paine's *Common Sense*, printed in January 1776, also inclined delegates toward unicameralism and regular election. Additionally, echoing the Roman model, Pennsylvanian framers proposed a Council of Censors to monitor the legislature and executive. Some delegates adopted a radical strain of republicanism, emphasizing the Lockean right to popular revolt. These reformers merged republican "Whig sentiments similar to those expressed in the Declaration of Independence and…guarantees of personal liberty and of Anglo-Saxon judicial procedures." Selsam, *The Pennsylvania Constitution of 1776*, 71, 118; Wood, *The Creation of the American Republic, 1776-1787*, 226–32; Branning, *Pennsylvania Constitutional Development*, 14; Nash, *The Unknown American Revolution*, 273–74.

[443] The popular, or radical, party was led by wealthy Presbyterian Philadelphia radicals, including George Bryan, James Cameron, James Cannon, and Franklin, the Convention's president. Despite their wealth, as Thayer puts it, their minds were unfettered by "traditional concepts concerning the proper form of civil government," including mixed government. Instead they had a "tendency to approve the democratic aspirations of the common man." Consequently, they allied with the west's "motley throng of backwoods farmers and country politicians," and a handful of populist German delegates from the middle counties. A few wayward Philadelphia Quakers like Timothy Matlack joined the radicals. Matlack was a westerner in spirit, prone to horse racing, cock fighting, and the occasional stint in jail, which cost him membership in the Quaker Society of Friends. Paul Leicester Ford, "The Adoption of the Pennsylvania Constitution of 1776," *Political Science Quarterly* 10, no. 3 (September 1, 1895): 432–34, doi:10.2307/2139954; Thayer, *Pennsylvania Politics and the Growth of Democracy*, 182–86.

[444] Most conservative leaders like George Ross, George Clymer, and James Smith came from wealthy Philadelphia families. A Quaker leader in the Assembly, Ross was presiding officer in the Convention. Clymer admired Montesquieu's separation of powers and the moderate Whig theory of mixed government. And per Thayer, Smith "feared an unrestrained democracy…The end product of [the Convention], he concluded, was forcing upon Pennsylvania a thoroughgoing democratic 'Agrarian constitution." Thayer, *Pennsylvania Politics and the Growth of Democracy*, 187–90.

[445] Ben Franklin, George Bryan, and James Cameron proposed the unicameral legislature as the Constitution's centerpiece, and the locus of institutional power in the state. The description of the legislature took the first third of the 1776 printing of the document for public consideration. See the Pennsylvania Constitution of 1776, Section 1, 5-17.

[446] Legislators sat for one-year terms, serving no more than four terms in seven years, and no more than four years consecutively. See the Pennsylvania Constitution of 1776, Section 8.

loyalty to the people of Pennsylvania.[447] They could not amend the Constitution, which the Preamble established as the written popular will. "Demophilius," the pseudonymous author of a popular pamphlet on Saxon democracy, praised this measure for separating the legislature's statutory authority from constitutional authority, which lay in "*the hands of* THE PEOPLE."[448] "Here we see a regular process," Thomas Paine added, "a Government issuing out of a Constitution, formed by the people in their original character, and that Constitution serving not only as an authority, but as a law of control to the Government."[449] Sovereignty lay in the people's will and Constitution, rather than the legislature, which would be closely checked.[450]

The people closely controlled the legislature, which controlled the other, weaker branches. The legislature selected an executive council of nine, with a president and vice president, to meet at the same time and place as the legislature.[451] The Executive Council appointed a judiciary, which served at the legislature's pleasure for seven-year non-renewable terms.[452] Legislators could impeach judges and executive councilmen, who lacked veto power.[453]

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[447] See the Pennsylvania Constitution of 1776, Section 10, 13-15.
[448] Quoted in Selsam, *The Pennsylvania Constitution of 1776*, 435.
[449] Thomas Paine, *Common Sense, The Rights of Man and Other Essential Writings of Thomas Paine* (New York: Signet Classics, 2003), 297.
[450] Selsam suggests the Pennsylvania legislature, "through the enlarged franchise, was the people's – and the people were supreme." Selsam, *The Pennsylvania Constitution of 1776*, 187.
[451] In the first draft, legislators selected all members of the council. Delegates' most radical provisions stripped the executive of its traditional enforcement powers. The President commanded Pennsylvania's armed forces, but only with the regular approval of the assembled Council, which through revision was enlarged to twelve members elected from the state's eleven counties and Philadelphia. Each member served a three-year term, rotating so that only four members would be elected at the same time, preventing factions. Scattered across the counties, the Executive Council could meet only rarely to authorize military actions, preventing the overbearing executive that emerged under the early colonial charters. Other states, recalling Whig anti-monarchism and their own authoritarian and inept colonial governors, also limited their executives, but Pennsylvania's was the weakest, largely an honorary office. See the Pennsylvania Constitution of 1776, Section 20. Bailyn, *The Ideological Origins of the American Revolution*, 72–79.
[452] Without the power of judicial review, the branch could only arbitrate contracts and disputes. Judges, like legislators, were salaried, so that independently-wealthy aristocrats would not be the only ones attracted to office. See the Pennsylvania Constitution of 1776, Section 17 on salaries for legislators and Section 26 for

Further, the delegates framed a Council of Censors to interpret and guard the Constitution, the written will of the people, from the ambitions of the legislature.[454] If elected officials failed in "their duties as guardians of the people," the Council could impeach them, and repeal the laws inconsistent with the Constitution and the people's will. And, for "the rights and happiness of the people," the Council could call a new convention to abolish the legislature or executive entirely, and form a new popular government.[455]

Finally, the Constitution allowed broad political participation and equitable legislative apportionment, benefiting poor urban and frontier voters. Suffrage extended to every free male taxpayer, twenty-one or older, with at least a year of residence.[456] According to Gary Nash, this "created the most liberal franchise known in the Western world to that date."[457] The document also served Pennsylvania's poor with a host of redistributive social welfare provisions.[458] And appeasing frontiersmen, the Constitution

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judges. After public review, delegates removed a provision from the proposed Section 25 allowing the legislature to create courts at will.

[453] See the Pennsylvania Constitution of 1776, Section 22.

[454] Derived from Roman example, this Council of twenty-four was directly elected by each county, plus Philadelphia, every seven years.

[455] See the Pennsylvania Constitution of 1776, Section 47. Note the people of Pennsylvania could not call a convention, which Shaeffer suggests framers intended to check populism John N. Shaeffer, "Public Consideration of the 1776 Pennsylvania Constitution," *The Pennsylvania Magazine of History and Biography* 98, no. 4 (October 1, 1974): 437.

[456] See the Pennsylvania Constitution of 1776, Section 17.

[457] No longer disenfranchised by property qualifications, the urban poor exercised electoral power proportionate to their population. Foreigners could own property, after a year, could assume the rights of a freeman, and after two years, could vote. Nash, *The Unknown American Revolution*, 268–77; Wood, *The Creation of the American Republic, 1776-1787*, 169.

[458] The Pennsylvania Constitution of 1776 established and subsidized public schools in each county, limited tuition, and established a university, the modern Dickinson College. Delegates exempted debtors from imprisonment if they attempted to repay loans, and required reasonable bail for those who could not. Criminal prisoners were also exempted from excessive bail. Note, though, that non-capital crimes were punishable by work in labor houses. There was no property qualification to run for office. Finally, lands, commons, and game were provided for the public to hunt, affirming Pennsylvania's claim to be a commonwealth. A provision of the Bill of Rights, later retracted, sought land redistribution to the poor. No other state passed a similar provision, and perhaps none have since. The clause held: "an enormous proportion of property vested in a few individuals is dangerous to the rights, and destructive of the common

promised to arm and train freemen, and allowed them to elect their own officers to organize militias.[459]

Pennsylvania was the first state to require public revision of a proposed constitution,[460] and after public meetings, petitions, pamphlets, and newspaper commentary, Pennsylvania's framers redrafted two-thirds of the original provisions.[461] Delegates also added a concession, Section 15, that the legislature could not pass a proposed law until the next session, letting the public review the proposal. The Convention deferred to the public to apportion legislative districts. Laymen reviewing the constitution proposed districts proportional to the taxable population, reapportioned every seven years in accord with census returns, assuring parity in representation between urban elites and growing Appalachian counties.[462] The public also seized from the legislature the power of electing executive councilmen.[463] After review, delegates

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happiness, of mankind; and therefore every free state hath a right by its laws to discourage the possession of such property." See the Pennsylvania Constitution of 1776, Section 28-9, 43. Selsam, *The Pennsylvania Constitution of 1776*, 192, 202–4; Thayer, *Pennsylvania Politics and the Growth of Democracy*, 192–96.

[459] See the Pennsylvania Constitution of 1776, Section 5.

[460] On September 5, 1776, the Convention submitted the Constitution for public review, printing 400 copies of the document for distribution. By September 18, the proposed Constitution appeared in three newspapers. Relatedly, "Demophilius" had proposed this measure only two months earlier. Oddly, a September 25 newspaper commentary also under the name "Demophilius" argued Pennsylvania's new electorate of rural, uneducated farmers would select inept representatives. Against the unicameral Saxon model, the commentary argued for a council of educated legislators to check the lower house. Shaeffer, "Public Consideration of the 1776 Pennsylvania Constitution," 416, 432.

[461] Delegates initially required voters take a loyalty oath, excluding Quaker elites, but dropped the provision after public review. The final draft of Section 6: "Every freemen of the full age of twenty-one Years, having resided in this state for the space of one whole Year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector: Provided always, that sons of freeholders of the age of twenty-one years shall be intitled to vote although they have not paid taxes." This clause allowed Pennsylvania officials to exclude potential voters who were not freemen. Note the original added a provision, proposed by the convention, which granted "the rights of an elector on taking an oath or affirmation of fidelity to the Common-Wealth, if required." However, an original provision requiring legislators pledge loyalty (§10) survived public review. For the original proposal, see "The proposed plan or frame of government for the commonwealth or state of Pennsylvania : printed for consideration," Rare Book and Manuscript Library – Rare Book Collection, Van Pelt Library, University of Pennsylvania.

[462] The proposed Constitution required only voting by district (see the original Section 17). The rest was framed in response to public review. See Section 17 of the final draft.

[463] Compare the original Section 18 to the final draft's Section 19.

prefaced the Constitution with a preamble and bill of rights.[464] On September 28th, the Convention ratified the 1776 Constitution.

Five states imitated Pennsylvania's institutional, apportionment, and rights provisions.[465] Timothy Matlack, Thomas Young, and James Cannon, all radicals in the Pennsylvanian Convention, evidently sent their plan to the conventions of Vermont and Georgia.[466] In an open letter, Young cited Congress' May 15th resolution, he called on them to exercise their "supreme constituent power" – evidently the first use of this phrase – and draft a new constitution, modeled on Pennsylvania's.[467] On July 8, 1777, the Vermont Convention ratified a constitution almost identical to Pennsylvania's, including a unicameral legislature, limited executive, yearly public review of legislation, and

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[464] The preamble opened by claiming George III violated Pennsylvanians' natural rights to safety and self-government, forcing the colonists to rebel and found a new government on popular consent. The Convention first drafted a bill of rights on July 25, but did not include it in the publicly-circulated proposal. After public review, the final draft included a Declaration of Rights which protected life, liberty, property, happiness, and safety, religious free exercise and non-establishment, popular control of the police and government and a legal right to rebellion, and a right to vote. Other provisions prohibited taking property or forcing militia service without consent, trial without charge or council, warrantless search and seizure, and criminal and civil trial without jury. The conclusion recognized a right to free speech, to bear arms, to virtuous representatives, to move between counties and states, and to assembly. See the 1776 Declaration of Rights of the Inhabitants of the Commonwealth or State of Pennsylvania, Articles I--XVI. Fifteen years later, the federal framers adopted parts of nine of the Pennsylvania's Declaration's sixteen articles into the federal Bill of Rights.

[465] The influence of Pennsylvania's 1776 Constitution was not limited to the United States. Thomas Paine, an Englishman in Philadelphia, commended the Constitution in *The Rights of Man*. Franklin traveled France distributing copies of the Constitution, including to French intellectuals like Anne-Robert-Jacques Turgot, the Duke de la Rochefoucauld, and Condorcet. As the French Revolution loomed, the Girondist leader Jacques Pierre Brissot circulated a French printing of the Constitution with accompanying essays, which was later translated into Italian. And a German edition, "Die Regierungsverfassung der Republik Pennsylvanien," was published in 1776. Not far behind Franklin was John Adams, an opponent of Pennsylvania's majoritarian democracy, who tried to turn Europeans, and later, Americans, against the 1776 Constitution. J. Paul Selsam and Joseph G. Rayback, "French Comment on the Pennsylvania Constitution of 1776," *The Pennsylvania Magazine of History and Biography* 76, no. 3 (July 1, 1952): 311–25; Williams, "State Constitutions of the Founding Decade," 563.

[466] John Adams, "Autobiography," in *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. II (Boston: Little, Brown, 1775), 508.

[467] Thomas Young, "To the Inhabitants of Vermont, a Free and Independent Stae, Bounding on the River Connecticut and Lake Champlain, April 11, 1777," in *Publications of the Colonial Society of Massachusetts: Transations, 1906-1907*, vol. IX (Boston: The Colonial Society of Massachusetts, 1777), 44–46; Adams, *The First American Constitutions*, 63.

regular public review of the Constitution.[468] The Georgia Convention, meeting by night in a tavern, followed Pennsylvania establishing a unicameral legislature and secret balloting, and elected nearly all civil officers annually.[469] Maryland established a mixed government, including an upper house, but elected both houses annually.[470] Under an early draft constitution, modeled on those of Pennsylvania and Vermont, legislation faced public, not gubernatorial, review. Following the Georgian model, citizens regularly elected all public officials.[471] North Carolina's Convention also seems to have borrowed elements of Pennsylvania's bill of rights. Finally, Pennsylvanians like the Philadelphia radical Thomas McKean influenced the Delaware Convention, which adopted elements of the Pennsylvania and Maryland bills of rights.[472]

Philadelphia's rising spirit of democratic unicameralism unnerved John Adams. Thomas Paine printed *Common Sense* in January 1776, which Adams condemned "as flowing from simple ignorance, and a mere desire to please the democratic party, in Philadelphia, at whose head were Mr. Matlack, Mr. Cannon, and Dr. Young," the framers of Pennsylvania's Constitution. He added: "I dreaded the effect so popular [a] pamphlet

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[468] Beginning with a sweeping bill of rights, the Vermont Constitution granted universal manhood suffrage, abolished slavery, and even redistributed land to small farmers. See the Vermont Constitution of 1777, e.g. Declaration of Rights, Article I, and Frame of Government, Section II, XIII-IV, XVI-XIX. Nash, *The Unknown American Revolution*, 280–84.

[469] See the Georgia Constitution of 1777, Article II. In April 1776, Georgia's Provincial Council drafted "Rules and Regulations of the Colony of Georgia." These rules maintained laws made under the colonial Assembly, and thus do not qualify as a state constitution. Moreover, they were explicitly a "temporary expedient be fallen upon to curb the lawless and protect the peaceable," and not as durable as a constitution. Wood, *The Creation of the American Republic, 1776-1787*, 148 n40, 150, 226 n41.

[470] See the Maryland Constitution of 1776, Article I-II.

[471] Further, taxation was proportional to wealth, debt was limited, and the franchise was broad, a concession to armed disenfranchised citizens in five counties. Ultimately the Convention rejected these provisions, maintaining colonial restrictions on suffrage.

[472] Adams, *The First American Constitutions*, 73, 78–80.

might have among the people, and determined to do all in my power to counteract the effect of it."[473]

The following April Adams penned his *Thoughts on Government*, arguing Americans should maintain their tradition of Whig balanced government.[474] He proposed bicameralism, limiting popular participation to annual elections, and constraining the people's lower house with an upper house and a gubernatorial veto.[475] Over the summer of 1776, Adams aggressively promoted his pamphlet among state framers.[476] He started with Virginia,[477] where local aristocrats sought an upper house to check a popular majority.[478] The distribution of power in Virginia, and in other states, hung in the

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[473] Addams however added that Paine's "arguments in favor of independence I liked very well." Adams, "Autobiography," 507. He had pushed his May 10 and 15, 1776 resolutions through a subcommittee, rather than the Committee of the Whole, worrying that the latter might recommend unicameral governments for the states. Adams, *The First American Constitutions*, 54.

[474] He stated "it will be safest to proceed in all established modes, to which the people have been familiarized by habit." John Adams, "Thoughts on Government," in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. IV (Boston: Little, Brown, 1776), 195; Nevins, *The American States*, 124; Wood, *The Creation of the American Republic, 1776-1787*, 131, 134, 208, 579; Adams, *The First American Constitutions*, 118–22.

[475] Note that Adams' plan placed the state executive within the legislature, following the custom of Parliament, and that he equivocated on the extent of veto power, perhaps recalling Massachusetts' authoritarian royal governor Gage. Wood, *The Creation of the American Republic, 1776-1787*, 141.

[476] Adams so thoroughly prompted the treatise that the historian Gordon Wood dubbed it "the most influential pamphlet in the early constitution-making period." Ibid., 203.

[477] As Virginia prepared to call a convention, Adams instructed Richard Henry Lee that Virginians ought to introduce an independent executive and judiciary to check their legislature: "It is by ballancing each of these Powers against the other two, that the Effort in humane Nature towards Tyranny, can alone be checked and restrained and any degree of Freedom preserved in the Constitution." Lee spread the letter, and with his colleague George Wythe – also a friend of Adams – printed and disseminated Adams' final draft of the *Thoughts*. Adams first sent the *Thoughts* to his Virginian confidante Patrick Henry, who reprinted it in Williamsburg's *Virginia Gazette* on May 10th for other members of the state Constitutional Convention. John Adams, "Letter to Richard Henry Lee, November 15, 1775," in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. IV (Boston: Little, Brown, 1775).

[478] Carter Braxton, scion of Virginia's Carter dynasty, penned for his fellow Convention delegates "An Address to the Convention of the Colony and Ancient Dominion of Virginia." Braxton's aristocratic leaning surprised even Adams. Warning against "a reckless spirit of innovation" by "advocates of popular governments" and the consequent "tumult and riot incident to simple democracy," Braxton's proposal limited lower house elections to every third year, life tenure in the upper house, and urged delegates to retain their English laws and customs, including a strong executive and upper house. Braxton's pamphlet derided Adams' *Thoughts* as too trusting of democracy and public virtue. In a June 3rd letter to Patrick Henry, Adams rebutted Braxton's proposal for triennial legislative elections, scoffing that Braxton's "little

balance.[479] Drawing on the writings of Adams, Lee, Jefferson, and the English Whigs, Virginia delegates adopted a conservative tripartite scheme, establishing an upper house to represent the state's gentry and check the lower house.[480] The bicameral legislature would in turn select a Governor and Privy Council, imitating Parliament.[481] Judges, though appointed by the legislature, held life tenure, conditional on good behavior, making Virginia the first state to introduce and independent judiciary. A prohibition on plural office holding helped ensure separation of powers. Framers maintained the colonial requirement that voters hold fifty acres of land, on the English Whig assumption that landed property gave its owner an enduring, perhaps inherited, material interest in the common welfare of the state, and the material independence to vote without coercion.[482] Malapportionment kept power in eastern counties, leaving unresolved questions of

pamphlet…will make no fortune in the world. It is too absurd to be considered twice." Richard Henry Lee offered his own "Government Scheme" in the *Gazette*, reiterating Adams' plan and calling for an upper house and a supreme court to check the people's house. While serving in Congress, Jefferson also developed a tripartite plan of government, which he sent the Virginia Convention. Braxton, "An Address to the Convention of the Colony and Ancient Dominion of Virginia; on the Subject of Government in General, and Recommending a Particular Form to Their Consideration," 670–72; John Adams, *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. IX (Boston: Little, Brown, 1854), 837; Nevins, *The American States*, 122–25, 145–46; Gutzman, *Virginia's American Revolution*, 24–27; Unger, *Lion of Liberty*, 113–16.

[479] As Robert Williams writes, "What was at stake was how new state governments would be structured and which groups in society would have the dominant policy-making role under the new governments." Williams, "State Constitutions of the Founding Decade," 544.

[480] See the Virginia Constitution of 1776, Bill of Rights, Section 3. Since the upper house was elected, Virginian democrats hoped it too could be a people's house. Kruman, *Between Authority and Liberty*, 141–44.

[481] The legislature was the state's dominant branch, electing delegates to the Continental Congress, state judges, the Secretary of State, and the Attorney General. The executive lacked a veto on the legislature. Ibid., 41, 91, 11–21.

[482] Section 6 of Virginia's 1776 Constitution: "all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage." With the forced dispossession of frontier Indians, land became cheap and plentiful, allowing a broad franchise. This property requirement also closed a path to suffrage for women, who under coverture had few chances to own property, and perhaps to free blacks and Indians. See Adams, *The First American Constitutions*, 204–5.

frontiersmen's rights.[483] As Alan Nevins concludes, Virginia's "Constitution tended to perpetuate the old oligarchy of rich Tidewater planters."[484]

Building on the era's moderate Whig sentiment,[485] Adams' separation of powers model spread to at least four other conventions, each of which imitated parts of his plan.[486] Many other state framers checked the lower house by ensconcing their aristocrats in an upper house. South Carolina's William Henry Drayton, for example, proposed state senators be not elected, but appointed for life from the state's wealthiest families.[487] The fever for mixed government peaked in Massachusetts in September 1779. John Adams proposed a tripartite scheme with a bicameral legislature, including a Senate to represent the state's propertied classes, a powerful, veto-equipped governor elected by the people, an independent, tenured judiciary, and a bill of rights.[488] In a state recently freed from the

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[483] While the electorate was broad, it was not equitably represented. The Convention delegates maintained colonial malapportionment, such that small eastern counties, like larger, growing western ones, elected two seats to the House of Delegates, much to the frustration of democrats like Jefferson. In contrast, Pennsylvania's 1776 Constitution redrew districts every seven years to incorporate growing frontier counties, and reapportioned districts by taxable population, rather than by voting population. On different models of apportionment, see Williams, "State Constitutions of the Founding Decade," 569–74.

[484] Nevins, *The American States*, 146–48; Wood, *The Creation of the American Republic, 1776-1787*, 156; Kruman, *Between Authority and Liberty*, 41, 91, 117; Adams, *The First American Constitutions*, 234, 237–40, 265–66.

[485] English Whigs pamphleteers advocated bicameral legislature and written bill of rights to check the Crown. American framers read these tracts in every state save South Carolina, stripped the executive's legislative authority. Many governors were elected annually, by the legislature, and all were supervised by a special legislative council. Appointment and treaty-making devolved to the legislatures. Juries and written bills of rights checked governors. Bailyn, *The Ideological Origins of the American Revolution*, 22–160.

[486] The North Carolina legislature requested Adam's writings, which he sent to John Penn, a fellow congressman. Penn served in the North Carolina Convention that December, which switched from a unicameral model to one of checks and balances. That November, Maryland's Convention passed a constitutional provision declaring that "the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other." Consulting Adams' pamphlet, New York followed suit in April 1777. As this dissertation later explains, Adams also implemented his model in Massachusetts. See the North Carolina Constitution of 1776, Declaration of Rights, Section IV, the Maryland Constitution of 1776, Declaration of Rights, Section VI, and the New York of 1777, Sections II-III. Adams, "Autobiography," 508; Wood, *The Creation of the American Republic, 1776-1787*, 150–61; Williams, "State Constitutions of the Founding Decade," 561–74; Kruman, *Between Authority and Liberty*, 109–30; Adams, *The First American Constitutions*, 254–73.

[487] Wood, *The Creation of the American Republic, 1776-1787*, 206–22.

[488] The drafting of a bill of rights and structure of government was left to a subcommittee of James Bowdoin, Samuel Adams, and John Adams, who lead the group.

overbearing Governor Gage, Adams' plan for a gubernatorial veto was contentious. No convention had so empowered a governor. But Adams defended governor as a dispassionate check on a tyrannical legislature, and the Convention passed his plan, with the stipulation that a two-thirds legislative majority override the veto.[489] Four years later, New Hampshire called a convention, replacing its temporary 1776 Constitution with one modeled on Massachusetts'.

Eventually Pennsylvania pamphleteers turned memories of Parliamentary tyranny against their powerful state legislature. A polemicist called "Associator" in 1777 derided the Pennsylvania Constitution as a plan "full of whimsies – a government with only one legislative branch, which has never yet failed to end in tyranny." Conservatives called for a new constitution with a strong executive and bicameral legislature, one that they felt better represented the natural, tripartite division of society. As the theory of mixed, Whig government eclipsed that of direct, Saxon democracy, Pennsylvania's ideology drifted toward that of the other, more moderate states, and in 1790 Pennsylvanians scrapped their old constitution for a tripartite scheme.[490]

Harnessing arguments for judicial independence and that constitutions trumped ordinary legislation, state judges began interpreting constitutions to overrule legislative

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[489] See the Massachusetts Constitution of 1780, Frame of Government, Chapter I, Section I, Article II. Nevins, *The American States*, 178–81; Wood, *The Creation of the American Republic, 1776-1787*, 218, 558–59, 576–77; Kruman, *Between Authority and Liberty*, 125–26; Adams, *The First American Constitutions*, 88–90.

[490] British troops threatened Philadelphia's storehouses and armories, but Pennsylvania's weak Executive Council, scattered around the state, was unable to meet to move the provisions. The Republican Party, long opponents of the 1776 Constitution, printed a host of pamphlets decrying the new government. Drawing on Whig arguments, they asserted that the dominance of a single branch of government was tyranny. For the quote by "Associator" – likely James Wilson or Benjamin Rush – see Wood, *The Creation of the American Republic, 1776-1787*, 233–37; Eric Nelson, *The Royalist Revolution: Monarchy and the American Founding* (Cambridge: Harvard University Press, 2014), 164, 313n72. See also Selsam, *The Pennsylvania Constitution of 1776*, 205–46; Robert Levere Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Harrisburg : Pennsylvania Historical Commission, 1942), 27–38; Nash, *The Unknown American Revolution*, 277–80.

statutes, checking the legislatures. For example, in *Commonwealth v. Caton* (1782), three prisoners appealed to the state courts to void their sentencing under a state statute which they claimed violated the Virginia Constitution. State legislators tried to steer the case into a special joint legislative-judicial committee, and then a legislative council of revision. Nevertheless, the Court of Appeals convened, assumed the authority to "declare an Act of the Legislature void because it was repugnant to the Act for the Constitution of Government," and ultimately upheld the 1776 statute.[491] Edmund Randolph lauded the courts for shielding the Virginia Constitution from narrowly-interested legislators.[492] Similarly, in *Rutgers v. Waddington* (1784), judges on the Mayor's Court of New York City held the New York Trespass Act of 1783, prohibiting military appropriations of property, violated the 1777 state Constitution, which incorporated a common law principle allowing military appropriation of abandoned property. In response, the *New York Packet* attacked the act of constitutional review by judges "who are independent of the people." In *Trevett v. Weeden* (1786), attorney James Varnum convinced Rhode Island Supreme Court judges to overturn a statute that stripped the constitutional rights of trial by jury and appeal from merchants who refused to accept paper money as legal

[491] The prisoners, accused of treasonous aid to the British, stayed their execution at the last moment by presenting a pardon by the state's House of Delegates. They then petitioned the state Court of Appeals that Virginia's 1776 Treason Act, requiring both legislative houses approve a pardon, violated the state Constitution, which granted the pardoning power to the House of Delegates alone. See *Commonwealth v. Caton,* 8 Va. (4 Call.) 5 (1782). The original case was reported as the *Case of the Prisoners*. Virginia's 1776 Constitution promised a "separate and distinct" judiciary, granting judges life tenure on good behavior, but never expressly armed judges with judicial review. See the 1776 Constitution of Virginia, Section 3. William Michael Treanor, "Case of the Prisoners and the Origins of Judicial Review," *University of Pennsylvania Law Review* 143 (1994): 491–505.

[492] Since the Virginia's Provincial Convention, essentially a standing legislature, drafted the Virginia Constitution, the Constitution was much closer to ordinary legislation than higher law, contrary to Randolph's claims. For this reason, Jefferson argued the 1776 Constitution was no more than an ordinary statute, with no special claim to constitutional legitimacy. Thomas Jefferson, "Notes on the State of Virginia," in *Thomas Jefferson : Writings*, ed. Merrill D. Peterson (New York, N.Y: Library of America, 1785), 246–51; Treanor, "Case of the Prisoners and the Origins of Judicial Review," 514–15.

tender.[493] After the decision, the legislature interrogated and reprimanded the judges, replacing all but one with paper money advocates the following term.[494] North Carolina's James Iredell, representing the plaintiff in *Bayard v. Singleton* (1787) argued that the American Revolution repudiated the British theory of parliamentary sovereignty,[495] persuading the Court of Conference of North Carolina to uphold the state Constitution's promise of trial by jury, and vacate a legislative statute stripping this right. But Richard Dobbs Spaight, a champion of legislative supremacy, replied these judges could not represent the people's will.[496] By the late 1780s, judiciaries in only five states had asserted a right to judicial review with mixed success.

The state framers also accepted the Whig argument, propounded by Adams and others,[497] that property allowed the material and intellectual independence needed to vote freely. Consequently, all states imposed property requirements on the franchise. Some framers required voters have some minimum wealth. This was the case at Maryland's 1776 Convention, where wealthy planters, wary of growing agitation by local farmers,

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[493] The statute, Varnum successfully argued, violated the state's standing 1663 Charter.
[494] John Hampden Dougherty, *Power of Federal Judiciary over Legislation: Its Origin, the Power to Set Aside Laws, Boundaries of the Power, Judicial Independence, Existing Evils and Remedies* (New York: G.P. Putnam's Sons, 1912), 28–31; Wood, *The Creation of the American Republic, 1776-1787*, 457–60.
[495] *Bayard v. Singleton,* 1 NC (1 Mar.) 42 (1787).
[496] Dougherty, *Power of Federal Judiciary Over Legislation*, 31–34; Wood, *The Creation of the American Republic, 1776-1787*, 460–67; Treanor, "Case of the Prisoners and the Origins of Judicial Review," 499–500.
[497] In May 1776, John Adams wrote to James Sullivan, a framer of the Massachusetts Constitution, arguing that "Power always follows Property. This I believe to be as infallible a Maxim, in Politicks, as, that Action and Re-action are equal, is in Mechanicks." Here Adams cited James Harrington, the English Whig writer. Accordingly, those lacking property, like the poor and landless, servants, women, and slaves depended on others for their livelihood and their political views, and were not trusted to vote independently. Adams concluded that "very few Men, who have no Property…talk and vote as they are directed by Some Man of Property, who has attached their Minds to his Interest." Further a broad franchise "tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell," undoing the careful class balance established under tripartite Whig government. Adams however sought a broad and equitable distribution of property, allowing a broad franchise. See John Adams, "Letter to James Sullivan, May 26, 1776," in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. IX (Boston: Little, Brown, 1776), 375–78. Similarly, many states required officeholders meet a certain level of wealth, lest they be unduly influenced by others. For a list of these rules, see Kruman, *Between Authority and Liberty*, 315–27.

defeated a proposed inclusive franchise measure, instead restricting the franchise to the wealthiest half of property owners and reducing the frequency of elections.[498] Agitation at New York's 1777 Convention cut freehold qualifications in half – in New York City, nearly all freemen could vote – but in Duchess and Westchester counties, the seats of the state's landholding Hudson river dynasties, the restrictions were tighter, and in some rural New York counties, only a third of freemen could vote. By Jefferson's count, less than half of Virginians could vote under the 1776 Constitution. In the Carolinas and Georgia, the proportion varied from half to three-quarters [499]. Other states' requirements were less stringent.[500] Overall, property qualifications disenfranchised a quarter to half of free American males.[501]

By the mid-1780s, Americans had rejected Pennsylvania's populist legislative design for mixed government, legislative reapportionment, and property qualifications on the vote. Adams' May 1776 resolutions allowed the state conventions to design governments, and gradually a consensus emerged around institutional checks on the legislature, resolving longstanding concerns over legislative detachment. The decentralized states had resolved the United States' first and perhaps greatest constitutional controversy.

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[498] Nash, *The Unknown American Revolution*, 284–88.
[499] Adams, *The First American Constitutions*, 202–5.
[500] Though the proportion of free males voting in Pennsylvania is uncertain, the state passed exceptionally lax voting qualifications, awarding the vote to freemen, freeholders, or taxpayers, depending on the election. See Ibid., 204, 320. Lax constitutional and statutory voting requirements in New Hampshire, Massachusetts, Connecticut, and Rhode Island allowed roughly two-thirds to three-quarters of each state's free male population to vote. Vermont's 1777 Constitution was the only one to eschew any property requirements, though this document was not recognized by the Continental Congress. Kruman, *Between Authority and Liberty*, 90–98.
[501] Kruman, *Between Authority and Liberty*, 87–90; Adams, *The First American Constitutions*, 196–202.

C. Slavery and the First State Constitutions

Adams' May 1776 resolutions deferred all major constitutional questions, including regulation of slavery, to the states. Colonial framers largely dodged the slavery question. Several state declarations of independence called for liberation from slavish subjection under the Crown,[502] and accordingly framers in eight states constitutionally protected life, liberty, property, and happiness, [503] and in seven recognized the natural equality of men.[504] But Vermont was alone in explicitly abolishing slavery.[505] All other state conventions deferred the slavery question to the political branches.

Southern and Northern state courts and legislatures continued on their divergent paths. The Northern states all moved toward abolition. Between 1777 and 1804, every state north of the Mason-Dixon Line began abolishing slavery,[506] often citing the state constitution's due process clause. New Englanders did so quickly. Vermont's courts upheld at least two freedom suits made under the 1777 Constitution's due process

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[502] For example, see the Maryland Constitution of 1776, Declaration of Rights &c, Article IV: "The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."

[503] These states are Virginia, Pennsylvania, Delaware, Maryland, Massachusetts, New Hampshire, Vermont, and North Carolina. Save for Vermont, this list is from Lutz, "The State Constitutional Pedigree of the U.S. Bill of Rights." Some states also passed bills as statutes. See Kruman, *Between Authority and Liberty*, 37; Kramer, *The People Themselves*, 269 n26. Though the national Constitution's later phrasing of "due process of law" did not appear in any of these early clauses, the state clauses protected what are now called substantive due process rights to life, liberty, and property under law. Accordingly, this dissertation calls the state clauses "due process" clauses. Massachusetts promised right to life, liberty, property, and happiness "according to standing laws," and Maryland according to "law of the land." Maryland's clause was a nearly-exact imitation of Section 39 of the Magna Charta. See the Massachusetts Constitution of 1780, Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts, Article X, the Maryland Constitution of 1776, Declaration of Rights &c, Article XXI.

[504] For equality clauses, see Pennsylvania (1776), Virginia (1776), Vermont (1777), New York (1777) (quoting the Declaration's preamble), Massachusetts (1780), New Hampshire (1784), and Vermont (1786). All of these state constitutions also included a clause protecting life, liberty, property, and happiness. Maryland (1776) alone had a due process clause but no recognition of natural equality. This list includes only constitutions ratified between 1776 and 1787.

[505] See the Vermont Constitution of 1777, Declaration of Rights, Article I.

[506] Menschel, "Abolition without Deliverance," 163.

clause.[507] In 1779, at least nineteen New Hampshire slaves petitioned for their freedom before the state legislature, which in 1786 declared the state due process clause to clearly abolish slavery,[508] and by 1800, the state recorded only eight slaves.[509] Importantly, by explicitly extending due process liberty to all persons, including slaves, Massachusetts, Vermont, and New Hampshire became legal refuges for fugitive slaves, and would remain so until the Civil War.[510] Connecticut and Rhode Island retained their colonial charters, which lacked equality and due process clauses, and abolition here came slowly.[511]

Between 1765 and 1783 Massachusetts courts heard at least eighteen freedom suits by slaves,[512] culminating in *Commonwealth v. Jennison* (1783), the first judicial abolition of slavery in America. The case was the last of three freedom suits surrounding

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[507] Nash, *The Unknown American Revolution*, 282 n22.
[508] Zilversmit, *The First Emancipation*, 116–17; Menschel, "Abolition without Deliverance," 164 n3.
[509] Lois E. Horton, "From Class to Race in Early America: Northern Post-Emancipation Racial Reconstruction," *Journal of the Early Republic* 19, no. 4 (December 1, 1999): 638, doi:10.2307/3125136.
[510] Hence the 1850 Fugitive Slave Act was exceptionally controversial in Massachusetts and Vermont, as a later chapter explains.
[511] Connecticut, with its tobacco plantations, had a slave population of five thousand in 1775. The state legislature manumitted enslaved black patriot servicemen and in 1784 passed the Gradual Abolition Act, freeing children of slaves after twenty-five years of indentured servitude. The recorded slave population dwindled to 310 in 1810, though formal abolition did not come to Connecticut until 1848. Rhode Island recorded 4,373 slaves in 1775, concentrated around the Narragansett plantations. The state manumitted also blacks serving in the Continental Army in 1778, and the following year, prohibited the sale of a slave without his consent. The legislature finally passed a 1784 act freeing all children of slaves, but not currently-enslaved people. A quarter century later, just over a hundred slaves remained in the state. Zilversmit, *The First Emancipation*, 105–8; Horton, "From Class to Race in Early America," 639.
[512] In 1781, Anthony Vassall of Cambridge successfully petitioned the legislature for reparations from his loyalist master's seized property. Several years later, an elderly Medford slave named Belinda followed his example, drafting a legislative petition. Like many colonial legislatures, Massachusetts' assembly, called the Great and General Court, adjudicated private judicial disputes, much as Parliament had in England. Since state courts had no special prerogative for constitutional review, slaves looked to the legislature for freedom. Stories of Belinda's childhood seizure from Africa, her successful case, and her repeated petitions, circulated as far south as New Jersey, perhaps because they were sensational and exceptional. Massachusetts had five thousand slaves and only eighteen freedom suits in this period. Moore, *Notes on the History of Slavery in Massachusetts*, 51; Wiecek, "Somerset," 117; Morton J. Horwitz, "A Historiography of the People Themselves and Popular Constitutionalism," *Chicago-Kent Law Review* 81 (2006): 816; Nash, *The Unknown American Revolution*, 124–25; Roy E. Finkenbine, "Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts," *The William and Mary Quarterly*, Third Series, 64, no. 1 (January 1, 2007): 99–104.

a young Massachusetts slave, Quock Walker. In the spring of 1781, Walker fled his master, Nathaniel Jennison, but Jennison soon recaptured Walker and beat him with a cane. Walker sued in the Inferior Court of Common Pleas, winning fifty pounds in damages, but had to appeal to the Supreme Judicial Court to compel Jennison to pay. It is not clear if Jennison did pay, for in January 1782, he appealed to the Massachusetts legislature, where the issue stalled. Jennison then successfully sued John and Seth Caldwell, who had harbored Walker.[513] The Supreme Judicial Court overturned the Caldwells' conviction, hinting that 1780 Constitution's Article I, protecting men's "lives and liberties," required abolition.[514] Then, in September, Massachusetts indicted Jennison for beating Walker. Chief Justice William Cushing charged the jury to affirm that "the idea of slavery is inconsistent with our own conduct and Constitution." The jury accepted Cushing's claim, abolishing slavery in Massachusetts. By 1790, the national census found no slaves in Massachusetts.[515] Following *Jennison,* legislators abolished slavery by citing the state constitution's due process provision.[516]

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[513] The Caldwells, likely the sons of Walker's previous owner James Caldwell, seem to have put the fugitive Walker to work, perhaps as a slave.

[514] It is possible Cushing ruled only to fulfill Jennison's earlier promise of freedom for Walker, in which case this decision did not free other slaves. Either way, it seems not to have been widely read until 1867. See O'Brien, "Did the Jennison Case Outlaw Slavery in Massachusetts?"; Ablavsky, "Making Indians 'White,'" 1501 n252. Note also the 1781 case *Brom and Bett v. Ashley*, in which a Berkshire County, Massachusetts municipal court ruled the 1780 Constitution freed the slaves Brom and Mum Bett.

[515] Note according to Menschel some unrecorded slaves may have remained in the state. Menschel, "Abolition without Deliverance," 164 n3. Even after the case, Jennison, who had now lost Walker and another nine slaves, petitioned the legislature to overturn the Court's reading of the Constitution's due process clause. Again the legislature stalled. The House and Senate split over Jennison's petition, and abolition became the law of the state. See also O'Brien, "Did the Jennison Case Outlaw Slavery in Massachusetts?," 219–38; Ablavsky, "Making Indians 'White,'" 1501.

[516] In 1777, Massachusetts' legislature rejected emancipation for fear of alienating Southern colonies. But after Massachusetts' 1778 Convention shied from drafting a bill of rights, the Hardwick town meeting demanded a provision formally stating that "All men, whites and blacks, are born free and equal." The Blandford meeting demanded an abolition clause and a vote for blacks. Sutton wanted universal suffrage for propertied males, and Boothbay protested the treatment of blacks and Indians. The 1780 Convention considered disenfranchising blacks, but ultimately extended equality protections to "All men," and due process to "Every individual of the society." But it was not until a 1783 bill affirming *Commonwealth v. Jennison* (1783), that Massachusetts abolished slavery. The *Jennison* decision was not recorded until an

Mid-Atlantic states, split between abolitionists and slaveholders, settled on gradual legislative emancipation. In 1780, Pennsylvania's was the first legislature to abolish slavery,[517] albeit through very gradual abolition.[518] New Jersey imitated parts of the Pennsylvania law in 1785.[519] After rejecting an antislavery clause, New York's constitutional framers expressly deferred abolition to their legislature,[520] which passed

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1867 decision, which referenced the case as *Commonwealth v. Jennison*, Rec. I783, fol. 85. The Massachusetts Senate did not pass the bill, perhaps because *Jennison* had resolved the matter. See O'Brien, "Did the Jennison Case Outlaw Slavery in Massachusetts?," 220, 240n60; Kruman, *Between Authority and Liberty*, 106–7; Adams, *The First American Constitutions*, 181–83; Ablavsky, "Making Indians 'White,'" 1501–2.

[517] The colony's 1775 Provincial Convention urged abolition, but slavery and abolition are not mentioned in the minutes of the 1776 Constitutional Convention. The Convention excluded Quakers who would not take loyalty oaths, including the devout Quakers who were the backbone of Philadelphia's abolitionist movement. George Bryan and Ben Franklin, likely sponsors of the 1780 abolition bill, seem not to have spoken on abolition while leading the 1776 Convention. The legislature considered a 1778 nonimportation proposal, but grappling with an inflation crisis, it abandoned the bill. George Bryan of the Executive Council proposed abolition in February 1779, which the legislature considered several months later. The proposed bill freed imported slaves, given a period of seven to twenty-eight years of indenture, and freed the children of slaves after twenty-eight years of indentured servitude. Slaveholding western legislators exempted current slaves from emancipation, and the bill passed thirty-four to twenty-one, the first time an elected body abolished slavery. The preamble, drafted by Thomas Paine, rejected legislation based on "difference in feature or complexion," declaring God "extended equally his care and protection to all." Accordingly, Pennsylvania slaves would receive the "common blessings that they were by nature entitled." The Act also blamed the Crown for the international slave trade, banning further importation. See Zilversmit, *The First Emancipation*, 125–26; Nash, *The Unknown American Revolution*, 324. Note the author's archival research suggests John Dickinson had drafted a similar bill for gradual emancipation in Pennsylvania in 1776, stating every "Negro or Mulatto shall be and is hereby declared to be free and to all intents and purposes", given the slave had reached the age of eighteen or twenty-one. See R. R. Logan collection of John Dickinson papers: Series 1. b. Political, 1774-1808, Box 3, Folder 19, at the Historical Society of Pennsylvania. For the act as it passed, see Pennsylvania's Act for the Gradual Abolition of Slavery.

[518] But the bill offered no protection for fugitive slaves or those traveling with masters from slave states, and did not extend equality clause protections to slaves, though a 1788 amendment to the bill protected fugitives. Pennsylvanian slaveholders refused to register their slaves for emancipation, and conservative representatives, sweeping the legislature in October 1780, unsuccessfully attempted to repeal the bill's promise of abolition. Emancipation came slowly. The state's population dropped from around ten thousand at the bill's passage in 1780, to 795 in 1810, though total emancipation did not occur until 1847. Horton, "From Class to Race in Early America," 639; Nash, *The Unknown American Revolution*, 323–27.

[519] In 1780, the *New Jersey Gazette* reprinted the Pennsylvania Act, and the New Jersey legislature heard three antislavery petitions. But the state constitution lacked equality and due process clauses, and the legislature's proslavery faction killed the proposals. The state passed 1785 nonimportation bill with some grounds for manumission, but overall, the state was hostile to abolition, Zilversmit, *The First Emancipation*, 141–46, 152–53.

[520] Gouveneur Morris, leading the antislavery majority at New York's 1777 Constitutional Convention, proposed a resolution that "the rights of human nature and the principles of our holy religion, loudly call upon us to dispense the blessings of freedom to all mankind." Given widespread opposition, Morris struck this antislavery language and the resolution passed thirty-one to five two days later. The revised resolution deferred to "future Legislatures of the State of New-York, to take the most effective measures, consistent

manumission and gradual abolition statutes in 1781, 1788, and 1799, though as in Pennsylvania, full abolition would not come until the 1840s.[521]

Southern states maintained slavery through the 1780s and 1790s. Maryland and Delaware constitutionally impeded abolition,[522] and the Carolinas' constitutions reserved due process protections to freemen, preempting slaves' freedom suits or legislative freedom petitions on due process grounds.[523] In 1782, South Carolina's legislature promised "one grown negro," confiscated from loyalist estates, to every militiaman who would serve ten months against the British, and "three large and one small negro" to every officer recruited.[524]

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with the public safety, and the private property of individuals, for abolishing domestic slavery with the same, so that in future ages, every human being who breathes the air of the state shall enjoy the privileges of a freeman." In recognizing slaveholders' property rights, the resolution required gradual compensated emancipation or manumission. Ibid., 139–40. For the vote rolls, see "Journal of the Provincial Convention," in *Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New-York 1775-1776-1777.*, vol. I (Albany: Thurlow Weed, 1842), 887–89. Note also the similarity of this language to contemporary interpretations of *Somerset*.

[521] In 1781 the legislature manumitted slaves who served in the armed forces, and in 1785, Aaron Burr proposed immediate and unconditional statewide abolition. The Assembly rejected his bill thirty-three to thirteen, but a plan to emancipate at birth all children of slaves passed thirty-six to eleven. However, opposed Assemblymen attached riders prohibiting blacks from court testimony, intermarriage with whites, office-holding, and voting. The state Senate struck down all provisions but the last. The state Council of Revision, which oversaw legislative and constitutional revisions, still rejected the bill, claiming the disenfranchisement rider violated the 1777 Constitution's equality clause, even though emancipation suited the "spirit and letter of the Constitution." The Council included three state Supreme Court justices, the Governor, and the state Chancellor, Robert Livingston, who penned the argument against the 1785 bill. For Livingston's full opinion, see John P. Kaminski, *A Necessary Evil?: Slavery and the Debate Over the Constitution* (Rowman & Littlefield, 1995), 31–32. A 1788 statute relaxed limits on manumission, and following agitation by John Jay and the state Manumission Society, in 1799 the legislature freed all male children of slaves after twenty-eight years of indenture, and females after twenty-five. Few were freed under the gradualist act, and the state slave population remained steady around fifteen thousand, as slaveholders chose to sell away newly-acquired slaves rather than eventually manumit them. Full abolition would not occur until 1841. McManus, *A History of Negro Slavery in New York*, 161–79; Kaminski, *A Necessary Evil?*, 31; Horton, "From Class to Race in Early America," 639.

[522] Delaware's 1776 Constitution prohibited slave importation and freed any imported slaves on their arrival, granting the state's slave-owners a monopoly on the local slave trade. Maryland allowed broader manumission, but the 1776 Constitution denied slaves the due process right to life, liberty, and property. See the Delaware Constitution of 1776, Article 26 and the Maryland Constitution of 1776, Article XXI.

[523] See the North Carolina Constitution of 1776, Article XII, and the South Carolina Constitution of 1778, Article XLI.

[524] For slaves in the Carolinas and Georgia, defection to the British promised a more comfortable servitude, and slaves largely avoided petitions to the new state governments. Countryman, *The American Revolution*, 165, 239–40; Nash, *The Unknown American Revolution*, 327–29.

Virginians too embraced slavery. Virginia newspapers circulated Mansfield's antislavery *Somerset* decision, black slaves earned their freedom as loyalist and patriot soldiers, and though slaves lacked due process rights,[525] the state's courts took several Indian and black freedom suits.[526] However the legislature passed statutes in 1778, 1789, 1795, and 1806 narrowing slaves' rights to sue for their freedom.[527] And in *Hudgins v. Wrights* (1806), Virginia jurist George Wythe extended due process protections to Indians, but not to blacks.[528] Further, Mansfield's decision upheld Virginia's positive

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[525] Jefferson's draft Declaration of Rights recognized "That all men are by nature equally free and independent," holding a right to life and liberty. But at the Convention, Edmund Pendleton added that these rights came not from nature, but from entering "into a state of society." Since Virginia slaves were not full citizens, not fully entered into Virginia society, they were not guaranteed a right to life and liberty, precluding freedom suits. Gutzman, *Virginia's American Revolution*, 27.

[526] In *Robin v. Hardaway*, twelve Virginia petitioners won their freedom by establishing that they were descended from Indian women who were free under a 1705 statute. The petitioners were incorrect about the date – St. George Tucker later found a 1691 copy of the law. The precedent was largely forgotten, but in at least three cases between 1787 and 1793, the state Supreme Court of Appeals again used this statute to free Indian petitioners who established matrilineal Indian descent. See *Robin v. Hardaway,* 1 Jeff. 109 (Va. Gen. Ct. 1772), *Hannah v. Davis* (1787), *Jenkins v. Tom* (1792), and *Coleman v. Dick & Pat* (1793). Ablavsky, "Making Indians 'White,'" 1490–91.

[527] A 1662 law held descendants of a free woman were also free, but few black Virginian slaves could prove a free matrilineal ancestor. However, there were a few loopholes. Slaves imported from another state with lax slave laws might establish free maternal ancestry – in 1800, a Norfolk jury freed Phene Phillips on these grounds. After the legislature banned the importation of slaves for resale in 1778, illegally-imported slaves could sue for their freedom, though a 1793 statute closed this exception to slaves imported from Africa and the West Indies. The 1778 act required any person importing slaves to swear not to resell the slaves within ten days of entering the state. Since slave-owners might miss this deadline, a 1789 act extended the window to sixty days, narrowing the grounds for slaves' freedom suits. At least five African-American slaves used the loophole in 1797. In 1795, the legislature forbid the state's abolitionist groups from representing slaves outside their local court district, and in 1806, it outlawed freedom suits by illegally-imported slaves who had resided in Virginia for a year. Some slaves could also sue owners who had reneged on promises of freedom by manumission, which was made easier under a 1782 law, but this was still difficult. See McColley, *Slavery and Jeffersonian Virginia*, 164–67; Nicholls, "'The Squint of Freedom,'" 50–57.

[528] In 1806, Indian slaves set to be transported from Virginia sued for their freedom in *Hudgins v. Wrights*, claiming that as Indians, they were legally "persons perfectly *white*," and hence free. See *Hudgins v. Wrights*, 11 Va. (1 Hen. 8c M.) 134, 139 (1806). George Wythe, sitting on Richmond's Court of Chancery granted their freedom on constitutional grounds, citing the first article of the Virginia Bill of Rights' protection of "life and Liberty." But on appeal, St. George Tucker of the state Supreme Court stripped this constitutional protection. Indian freedom, and according citizenship, was a statutory right, not a constitutional one. Similarly, contemporary Native Americans hold national citizenship not through the Fourteenth Amendment, but through the 1924 Indian Citizenship Act. Tucker also granted the Indians freedom on physiological grounds, asserting that petitioners with Indian characteristics like straight, black hair should be assumed to have matrilineal Indian descent, and thus be free. Tucker's precedent excluded black slaves and Indians from a constitutional right to liberty and citizenship, and helped legally bind

proslavery laws, and the state courts cited a growing body of statutes prohibiting freedom suits by African-Americans. In 1786 the legislature eased manumission rules and allowed slave-holders to free young and mentally-able slaves, but twenty years later, amended the act, requiring free slaves leave the state, lest they mix with the local white population.[529]

Constitutional decentralization on the slavery issue yielded two distinct, stable regional approaches to slavery.[530] Like their colonial predecessors, state judges interpreted Mansfield's short, vague, and flexible *Somerset* decision in irreconcilable ways. Northern judges cited Mansfield's claims that slavery violated natural law and that positive law, including Northern manumission and antislavery statutes and constitutional rights provisions, granted fugitive slaves a *habeas corpus* right against seizure.[531] Conversely, Southern judges cited Mansfield's affirmation of Virginia's positive proslavery law, and eventually, reinterpreted *Somerset* to argue abolition only held where explicitly required by positive law, suggesting slavery might be legal in incoming territories.[532] While the North and South diverged over slave law, interstate disputes over slavery mobility were few.[533]

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slavery to African physiology. Wiecek, "Somerset," 123–24; Adams, *The First American Constitutions*, 183; Ablavsky, "Making Indians 'White,'" 1487–94.

[529] The Assembly passed a 1778 nonimportation law, allowing some imported slaves grounds for freedom suits and appeasing abolitionists, but the law also gave slaveholders a monopoly over the colony's black slave population. Virginia's domestic slave population was growing without importation, so much so that the law tempered the booming population, allowing whites to maintain control of the state with less fear of revolt. A 1793 statute prohibited immigration by free African-Americans. McColley, *Slavery and Jeffersonian Virginia*, 163–67; Nicholls, "'The Squint of Freedom,'" 55; Adams, *The First American Constitutions*, 183–84; Finkelman, *Slavery and the Founders*, 31–32; Ablavsky, "Making Indians 'White,'" 1501–5.

[530] This split also applied to black citizenship to some degree. Since slaves depended on others for their wellbeing, state framers did not trust slaves to act as independent voters or citizens. Consequently, slaves did not have franchise or citizenship rights. Conversely, propertied freemen, including blacks, could vote in every state at the founding. But Southern states like Virginia reduced their free black population, their black electorate dwindled. Kruman, *Between Authority and Liberty*, 106–7.

[531] As late as 1848, Free Soilers adopted the *Jennison* argument to claim Southern state constitutions had outlawed slavery. Wiecek, "Somerset," 125.

[532] For example, in 1797 Maryland's Luther Martin dismissed Mansfield's enthusiasm for liberty. See *Mahoney v. Ashton,* 4 H. & Mc H. 295, 1799 WL 397 (Md. Gen. Ct. 1799). However, at the 1787

III. National Responses: The Confederation Era and Convention, 1787-1799

This final section explains how prior state constitutional revision quieted two pivotal debates at the federal Convention. Since the states had settled on a bicameral tripartite system, federal delegates, many of them former state framers, adopted this plan immediately and with little debate. Further, federal framers deferred to the states' divergent slave policies rather than impose a uniform federal slave law.

Framers in at least seven states declared their governments sovereign and independent not only from Parliament, but also from the Continental Congress.[534] Delaware's 1776 Convention, the first assembled after the Declaration of Independence, stated "the people of this State have the sole exclusive and inherent Right of governing and regulating the internal Police of the same." Similarly, Massachusetts' framers declared authority over all police powers, to the exclusion of Congress, save for the few powers "expressly delegated" to the Continental Congress.[535]

These sovereignty claims defanged the Continental Congress. The Articles of Confederation, ratified in 1781, charged Congress with the common defense, [536] but recognized the states' sovereignty over nearly every other subject, including all affairs

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Constitutional Convention, Martin argued for a national ban on the slave trade, deeming slavery "inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution." Farrand, *The Records of the Federal Convention of 1787*, 1911, II:364; Wiecek, "Somerset," 128.

[533] At least relative to the 1840s and 1850s.

[534] These governments were sovereign to the extent they worked within the state constitutions, which embodied the popular will, the ultimate seat of sovereignty.

[535] Pennsylvania and Maryland adopted Delaware's wording, and North Carolina imitated Delaware's claim the people were sovereign over the state's "internal government and police," which Georgia in turn copied the following year. New York also drafted a similar clause. See the 1776 Delaware Declaration of Rights, Section 4, the 1776 North Carolina Declaration of Rights, Section II, and the Massachusetts Constitution of 1780, Part I, Article IV. Adams, *The First American Constitutions*, 133–34.

[536] Congress was responsible for the "common defense, the security of their liberties, and their mutual and general welfare," and formally recognized Congress' existing foreign policy, trade, and war powers, including treaty-making with Indians. The Articles also established a system of weights, currency, and a post office.

under the broad, nebulous label of regulating the "internal police."[537] Congress could not compel states' financial contributions or regulate their commerce.[538] Congressional apportionment was similarly contentious.[539] Further, questions over frontier regulation reemerged,[540] as states made conflicting western land claims,[541] and unrecognized frontier republics unsuccessfully petitioned for congressional recognition.[542] Finally, amendments to the Articles required unanimous approval so that no sovereign state would be bound to a constitutional provision it had not approved,[543] preventing revision of the flawed system. The document was therefore no more than a "firm league of

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[537] Adams, *The First American Constitutions*, 276–81, 286–87.

[538] States cooperated only when it served their interest. Since Congress was saddled with Dutch and French wartime debt, this was a serious problem. See Wood, *The Creation of the American Republic, 1776-1787*, 354–63; Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (University of Pennsylvania Press, 1983); Jack N. Rakove, "The First Phases of American Federalism," in *Comparative Constitutional Federalism: Europe and America*, ed. Mark V. Tushnet (Westport, CT: Greenwood Press, 1990); Keith L. Dougherty, *Collective Action under the Articles of Confederation* (New York: Cambridge University Press, 2001); Richard Beeman, *The Penguin Guide to the United States Constitution: A Fully Annotated Declaration of Independence, U.S. Constitution and Amendments, and Selections from The Federalist Papers* (New York: Penguin, 2010), 133–43.

[539] National representation was contentious. Each state delegation held a single, equal congressional vote, to the frustration of delegations from populous states like Massachusetts and Pennsylvania, and ones with the potential for western expansion, like Virginia. Slaveholding states did not count their slave population when contributing to the national army and treasury.

[540] Adams, *The First American Constitutions*, 281–85. Related to this was the difficult question of Indian regulation. Gregory Ablavsky, "The Savage Constitution," *Duke Law Journal* 63 (2014): 999.

[541] Under Article IX, Congress could resolve territorial disputes between existing states, which it did in 1782 to resolve a conflict between Pennsylvania and Connecticut over the Wyoming Valley of northeastern Pennsylvania.

[542] On June 30, 1777, the Continental Congress rejected Vermont's petition to send delegates to Congress, resolving that the states never specifically granted Congress the authority to recognize Vermont. Unwilling to alienate the Virginia delegation, members of the Continental Congress also rebuffed appeals from the Appalachian territories of Westsylvania and Kentucky. Virginia eventually ceded its claims, and on October 10, 1780, Congress claimed authority over all western lands and the right to organize "distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states," leading to the Northwest Ordinance of 1787, dividing the Ohio River Valley and Great Lakes regions into territories. Worthington Chauncey Ford, *Journals of the Continental Congress, 1774-1789*, vol. VIII (Washington: U.S. Government Printing Office, 1907), 508–11; Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774-1789*, vol. XVIII (Washington: U.S. Government Printing Office, 1910), 915–16.

[543] See the Articles of Confederation, Article XIII. Vile, *The Constitutional Amending Process in American Political Thought*, 25–26.

friendship" between the states.[544] The Articles' constitutional legitimacy was also suspect, as the Continental Congress, a standing legislature, lacked constitution-making authority, and moreover, had never been expressly authorized to draft the Articles.[545] In limiting legislators' constitutional prerogative, state framers had also undermined the Congress.

In response, delegates eventually assembled in Philadelphia for the national Constitutional Convention on May 14, 1787.[546] All thirteen original states, save for Rhode Island, were represented, and up to half of the fifty-five delegates were former state framers.[547] By relying on prior state constitutional design, the federal framers preempted debate on institutional design and slavery, two of the era's most contentious topics.

Delegates immediately and with little debate adopted the states' tripartite institutional design. Waiting for a quorum in mid-May, James Madison, author of Virginia's tripartite 1776 Constitution, began quietly conferring with Gouverneur Morris

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[544] The Articles thus explicitly affirmed constitutional sovereignty lay with the states. In a provision nearly identical to Massachusetts' sovereignty clause, the Articles acknowledged "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." See the Articles of Confederation, Article II. Note the original draft of the Articles that John Dickinson reported to the Continental Congress on July 12, 1776, read "Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation," potentially allowing national intervention in state police powers. See Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774-1789*, vol. V (U.S. Government Printing Office, 1906), 547. Congress dropped this language. For Dickinson's early drafts and notes on the Articles, see the R. R. Logan collection of John Dickinson papers: Series 1. b. Political, 1774-1808, Box 3, Folders 20-1 and Box 4, Folder 22, at the Historical Society of Pennsylvania.

[545] Most Americans deferred constitution-making to temporary conventions.

[546] After a smattering of frontier rebellions and years of campaigning by nationalists like Alexander Hamilton, five state delegations convened for four days in Annapolis in 1786, listing the failings of the Articles and calling for another, larger meeting. Beeman, *The Penguin Guide to the United States Constitution*, 145–50.

[547] Williams, citing at least five other scholars, estimates a third to a half of the federal delegates had already framed state constitutions. See Robert F. Williams, "Experience Must Be Our Only Guide: The State Constitutional Experience of the Framers of the Federal Constitution," *Hastings Constitutional Law Quarterly* 15 (1988 1987): 403; Williams, "State Constitutions of the Founding Decade," 542–43.

and James Wilson of Pennsylvania, opponents of the Pennsylvania Constitution.[548] When a quorum assembled, delegates to the Philadelphia Convention met again on May 25th and 28th, turning first, as the state conventions had, to the question of institutional design. On May 29th, Madison and Edmund Randolph proposed a tripartite national government, modeled on the Virginia Constitution they had drafted together eleven years earlier. Wilson and Morris backed Madison's plan, as did the Pennsylvanian John Dickinson, another opponent of the Pennsylvania model. Reflecting on the federal Convention, Dickinson argued that "government must never be lodged in a single body," but rather in "a number of great departments… three or four of these are competent in number."[549] On May 30th, only the fourth day of meeting, the Committee of the Whole resolved in favor of the widely-accepted tripartite design.[550] Prior state framing helped delegates quickly settle this essential question.

Framers also rejected unicameralism. After several weeks of debate over proportional representation,[551] on June 15th, delegates from small and enclosed states rallied around the New Jersey plan penned by William Paterson, which promised equal representation per state in a unicameral legislature. But recalling the deadlocked unicameral Pennsylvania legislature and Continental Congress, delegates settled instead

[548] Note also Wilson had long advocated mixed government, later penning a defense of the system in his "Lectures on Law." George Clymer, another opponent of the Pennsylvania model, served with Wilson at the federal Convention.
[549] John Dickinson, "Letter IV, April 19, 1788," in *Pamphlets on the Constitution of the United States: Published During Its Discussion by the People, 1787-1788*, ed. Paul Leicester Ford (Brooklyn, NY, 1788), 181–82; Wood, *The Creation of the American Republic, 1776-1787*, 604.
[550] The resolution held: "that it is the opinion of this Committee that a national government ought to be established consisting of a supreme Legislative, Judiciary, and Executive." Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. I (New Haven: Yale University Press, 1911), 30–31.
[551] Proportional representation benefitted larger states, growing states, and those states with unbounded western borders and the prospect of expansion. Massachusetts, Pennsylvania, Virginia, and North Carolina alone accounted for half the national population, and the latter two states expected their slave and immigrant populations to keep growing. David Brian Robertson, *The Constitution and America's Destiny* (Cambridge University Press, 2005), 40–45.

on the Connecticut Compromise of July 16th, incorporating the New Jersey plan's chamber as the upper house in a bicameral scheme.[552] This closed debate on unicameralism. As Robert Williams states, "One of the earliest—and most resolute—decisions of the Convention was in favor of bicameralism…There was no real controversy over this point."[553]

Morris and Wilson engineered a strong national executive. By June 4th, delegates agreed the president would be unitary, and like Massachusetts' executive, could veto legislation.[554] As Willi Paul Adams concludes, "The presidential system at the federal level can be ascribed much more to the beliefs of the authors of the first state constitutions" than to any other source.[555]

Judicial review, still being debated at the state level, did not take hold in the federal Convention. Several federal delegates had promoted judicial review in the state courts. William Davie did so in North Carolina's *Bayard v. Singleton* in 1787, as had delegates John Francis Mercer, John Blair, and George Wythe in Virginia's *Commonwealth v. Caton* in 1782. Edmund Randolph served in the latter case as Virginia's Attorney General, sending his arguments for judicial review to James Madison.[556] But only five states had attempted judicial review, and it was new and

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[552] For example, see James Wilson's objection to the New Jersey plan: "The government is implemented [?] in an improper manner – legislative Authority single – executive divided…It provides not effectively for the true Ends of Government. The legislature and executive Power are too feeble and dependent – They and the judicial Power are too confined." See James Wilson Papers (#0721), Box 1, Volumes 2-4, Folder 2, pp.58-9 at the Historical Society of Pennsylvania.
[553] Williams, "State Constitutions of the Founding Decade," 577.
[554] Delegates rejected other state designs, like an executive council or direct gubernatorial elections. Instead, the unitary president would be elected by delegations representing the states. Robertson, *The Constitution and America's Destiny*, 152–57; Beeman, *The Penguin Guide to the United States Constitution*, 157–58.
[555] Adams, *The First American Constitutions*, 289.
[556] Similarly, Alexander Hamilton in *Federalist* 78 defended the proposed Constitution's independent judiciary as the protector of the people's will as enumerated in the Constitution. James Wilson made the same argument in his "Lectures on Law." John Marshall, who had observed Randolph's arguments in

contentious in all of them. New Yorkers and North Carolinians, including Richard Dobbs Spaight, now a North Carolina delegate to the Convention, had chastised their judges for overruling the popularly-elected legislature, and Rhode Island legislators fired four justices who had attempted judicial review. Judicial review was attractive to some delegates, but still an untested and divisive idea.

Since Northern and Southern framers had happily diverged over slavery, few delegates would likely consent to a uniform national slave law. As Madison wrote, "the great division of interests in the U. States… did not lie between large & small States: it lay between the Northern & Southern."[557] On May 30th, the Convention debated the Virginia Plan for legislative apportionment by "free inhabitants." Fearing an early debate over apportionment of free and slave votes would split the nascent Convention, Madison cut the language, hoping to postpone the slavery debate.[558] The framers subsequently avoided explicitly mentioning slaves or implying that the federal Constitution allowed slavery,[559] largely deferring to existing state regulation.

Convention debates over slavery yielded only three major clauses. State framers, imitating the British model, had used an upper house to represent their state's aristocracy and property, including property in slaves. On June 11th, Rutledge and Pierce Butler proposed national legislative representation also remained proportionate to property in slaves. Charles Pinckney split with his South Carolina delegation, instead proposing slaves receive partial representation as population, counting as three-fifths of a vote.

Commonwealth v. Caton, would expand these arguments in *Marbury* over twenty years later. Wood, *The Creation of the American Republic, 1776-1787*, 462–63; William Michael Treanor, "Judicial Review before 'Marbury,'" *Stanford Law Review* 58, no. 2 (November 1, 2005): 496–97, 554–57.

[557] Farrand, *The Records of the Federal Convention of 1787*, 1911, I:486.

[558] Finkelman, *Slavery and the Founders*, 11.

[559] Slavery troubled some delegates on moral grounds. On August 25th, Madison declared he "thought it wrong to admit in the Constitution the idea that there could be property in men…slaves are not like merchandise, consumed &c." Farrand, *The Records of the Federal Convention of 1787*, 1911, II:417.

James Wilson backed this more moderate proposal, which the Convention applied to House representation on July 12th, adopting the same three-fifths proportion for determining each state's tax burden on August 21st.[560]

The day after the Convention adopted the three-fifths compromise, the Continental Congress passed the Northwest Ordinance, prohibiting slavery in states formed from the Northwest Territory. On August 29th and 30th, delegates settled on the process for admission of a new state into the union, requiring only that the proposed constitution be republican in nature. The Convention did not specify whether other territories would draft free or proslavery constitutions, leaving this controversy to future congresses, courts, and presidents.

Further controversy lay with the domestic mobility of slaves. Northern judges could cite *Somerset* to claim that their state's positive law abolition provisions, privileges and immunities clauses, and personal liberty laws freed a runaway, preventing his return,[561] while Southern judges could cite *Somerset*'s deference to the positive proslavery laws of Virginia. The same day they scrapped Rutledge's tariff plan, delegates passed the Fugitive Slave Clause, requiring runaways be returned to their home state, protecting Southern slaveholders' monopoly on slaves. Still, delegates did not charge specific federal or state agents with enforcement, maintaining the status quo of nonintervention.[562]

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[560] Countryman, *The American Revolution*, 189–91; David Brian Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking* (New York: Oxford University Press, 2013), 178–205.

[561] For example, in 1788, the Pennsylvania legislature amended its 1780 gradual emancipation act to penalize any Pennsylvanian who took "any negro or mulatto, from any part or parts of this state, to any other place or places whatsoever, with the design and intention of selling and disposing" that person. See 1788 Amendment to the 1780 Gradual Abolition Act, Sec. VII.

[562] Slaveholders, backed by federalist delegates wary of the Articles' failures, secured broad national powers. On July 17th, Roger Sherman proposed a clause explicitly prohibiting the national government

The slave trade proved less contentious. Neither Northerners nor Southerners relied on the trade to maintain local slavery,[563] such that eleven states heavily taxed or outright abolished the trade,[564] yielding bisectional agreement on nonimportation. But rogue South Carolinians and Georgians in the Continental Congress had used the Congress' unanimity requirement to block a national nonimportation provision in 1776.[565] The 1787 Philadelphia Convention gave Northern and Southern delegates the chance to finally establish a uniform federal nonimportation policy. On August 22nd, George Mason warned the federal Convention that the nation's growing slave population threatened revolt, and accordingly, it was "essential in every point of view that the government should have to power to prevent the increase of slavery."[566] But John Rutledge represented South Carolina's robust slave importation business, and proposed any international commercial treaty pass a two-thirds vote in both houses. This would

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from interfering "with the Government of the individual states in any matters of internal police which respect the Govt. of such states only, and wherein the General welfare of the U. States is not concerned." Southern delegates, favoring broad national powers to protect slavery, defeated the provision and a similar one on September 15th, guaranteeing "no State shall without its consent be affected in its internal police." To some Southerners, Sherman's explicit protections of state police powers seemed merely weak "parchment barriers." Farrand, *The Records of the Federal Convention of 1787*, 1911, II:25, 629–30; Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006), 101–6.

[563] Some Northern framers opposed the slave trade on moral grounds, and Southern legislatures and constitutional conventions had prohibited slave importation to give their slaveholders a monopoly over the supply of slaves and to temper the growing Southern slave surplus, preempting slave revolts. For example, as mentioned, Virginia's colonial House of Burgesses had attempted to pass a nonimportation law giving local slaveholders, many of whom sponsored the bill, a monopoly over the slave trade. Jefferson submitted such a provision to George Mason, President of Virginia's 1776 Constitutional Convention, who added it to state Constitution, and Virginia passed nonimportation statutes in 1778 and 1793. McColley, *Slavery and Jeffersonian Virginia*, 164–67; Maier, *American Scripture*, 265 n33; Nicholls, "'The Squint of Freedom,'" 51, 54–55; Finkelman, *Slavery and the Founders*, 22–32.

[564] Adams, *The First American Constitutions*, 178–80.

[565] This was Jefferson's nonimportation clause in the original Declaration, and as such, was as much a rhetorical flourish as a policy provision. Jefferson, "Notes of Proceedings in the Continental Congress, 7 June to 1 August 1776," 314–15; Becker, *The Declaration of Independence*, 171–72; Maier, *American Scripture*, 146–47.

[566] This quote is Madison's recollection of his original speech. James Madison, "The Journal of the Constitutional Convention, Part II," in *The Writings of James Madison, Comprising His Public Papers and His Provate Correspondence, Including Numerous Letters and Documents Now for the First Time Printed*, ed. Gaillard Hunt, vol. IV (New York: G.P. Putnam's Sons, 1787), 266–67; McColley, *Slavery and Jeffersonian Virginia*, 167.

thwart tariffs on slaves, boosting the South Carolinian slave trade, but also blocked tariffs on manufactured goods, gutting the protectionist policies New England industrialists wanted. On August 25th, New Englanders capitulated, allowing slave importation until 1808 under the terms of the Importation Clause,[567] and the Convention rejected the rest of Rutledge's tariff plan four days later.[568]

As before, the states called conventions to ratify the proposed Constitution. Imitating the state constitutional conventions, the ratification conventions were temporary representations of popular authority, distinct from the states' standing legislatures.[569] New Hampshire's convention cast the ninth vote to approve the Constitution on June 21, 1788, allowing nationwide ratification of the new Constitution. Following the Convention, Georgia, Pennsylvania, South Carolina, Delaware, and Vermont replaced their constitutions to match the federal model. Though the Constitution's Guarantee Clause only requires of states "a republican form of government," since 1787, states have almost invariably chosen bicameral tripartite governments.

State framers resolved questions on institutional design and slavery, preempting these debates at the Philadelphia Convention. Most scholars rely on Convention records to recount how delegates bargained,[570] for example, focusing on the bicameral

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[567] See Article I, Section 9, Clause 1.

[568] Robertson, *The Constitution and America's Destiny*, 177–81; Robertson, *The Original Compromise*, 185–89.

[569] On May 16,' 1776, the *Pennsylvania Evening Post* printed a dialogue arguing that self-interested, parochial state legislators could not represent the people's common will at the state constitutional convention. Delegates would have to be selected by special election. In anticipation of the Massachusetts convention to ratify the Constitution, the *Boston Gazette* reprinted the dialogue on November 19, 1787. The *Maryland Gazette* of Baltimore also published the dialogue on December 21, 1787. See Footnote 405 and Kaminski et al., *The Documentary History of the Ratification of the Constitution*, IV:274–76.

[570] See for example George Bancroft, *History of the Formation of the Constitution of the United States of America* (New York: D. Appleton & Company, 1882); Charles Austin Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan, 1921); Robertson, *The Constitution and America's Destiny*; Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (Random House Publishing Group, 2009); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the*

Connecticut Compromise.[571] But this misses how prior state framing made bicameralism a near certainty, foreclosing the option of unicameralism long before federal delegates even met. Similarly, most scholars assert federal delegates like James Wilson centralized power and introduced a strong executive as a reaction to the Articles' failure. But this centralization, particularly in Wilson's case, was also a rejection of weak, decentralized executive design at the state level. In studying federal Convention records but ignoring state conventions, scholars may miss how previous state framers' choices silently preempted certain Convention debates.[572] To ignore state constitutionalism, is to misunderstand decisions at the federal Convention.

The era's final constitutional debate concerned formalizing rights. By 1787, eight states already had bills of rights,[573] leading George Mason, framer of Virginia's bill, to propose combining them into a federal bill late in the Convention.[574] Weary delegates unanimously refused, and during ratification federalists argued the state bills made a

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Constitution (New York: Knopf Doubleday Publishing Group, 2010); Robertson, *The Original Compromise*.

[571] Relying on Madison's minutes or Farrand's *Records*, the textbook story teaches bicameralism with proportional and state-based representation, as the slowly brokered "Great Compromise" between large states delegates, led by Madison of Virginia, and small states delegates, led by Roger Sherman of Connecticut. See for example thorough accounts like William H. Riker, "The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice," *The American Political Science Review* 78, no. 1 (March 1, 1984): 1–16, doi:10.2307/1961245; Frances E Lee, *Sizing up the Senate: The Unequal Consequences of Equal Representation* (Chicago: University of Chicago Press, 1999); Robertson, *The Constitution and America's Destiny*; Robertson, *The Original Compromise*.

[572] A handful of historians debate the states' influence on the federal Constitution. Most influential is Gordon Wood, but see also Adams, Kruman, Lutz, Miller, Nash, and Onuf. Regrettably these insightful histories neither venture a broader causal model nor speculate beyond the founding era. Adams, *The First American Constitutions*; Kruman, *Between Authority and Liberty*; Lutz, "The State Constitutional Pedigree of the U.S. Bill of Rights"; Joshua Miller, *The Rise and Fall of Democracy in Early America, 1630-1789: The Legacy for Contemporary Politics* (Penn State Press, 1999); Nash, *The Unknown American Revolution*; Onuf, "State Politics and Republican Virtue: Religion, Education, and Morality in Early American Federalism"; Wood, *The Creation of the American Republic, 1776-1787*; Wood, "Foreword."

[573] These were Virginia, Pennsylvania, Maryland, Delaware, North Carolina, Massachusetts, New Hampshire, and Vermont. Some bills passed as legislative statutes. See Kramer, *The People Themselves*, 269n26.

[574] Farrand, *The Records of the Federal Convention of 1787*, 1911, II:582–83, 587–88; Beeman, *The Penguin Guide to the United States Constitution*, 161–63.

national one redundant,[575] deferring the issue to Congress. Between 1788 and 1799, Congress heard 345 proposals for federal amendments, 311 of these in the first two-year session. Most of these initial proposals were rights provisions drawn exactly from the state constitutions and bills.[576] These proposed federal amendments protected free speech and press, free exercise, keeping arms, trial rights, prohibited quartering of troops and certain searches, and reserved non-delegated powers to the states, and were eventually combined and ratified as the federal Bill of Rights.

In conclusion, during the Revolution and founding, every state reauthorized or replaced its colonial charter, resulting in two dozen new state constitutions. These helped resolve longstanding debates over legislative sovereignty and design, slavery, and frontier regulation, preempting these debates during the framing and ratification of the Constitution and Bill of Rights. Even in this tumultuous period, state constitutional revision quieted national controversies. Yet some, like slavery and consolidation of the frontier, would later reemerge in the antebellum era, as the next chapter explains.

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[575] See Federalist 84. Hamilton, Madison, and Jay, *The Federalist*; Beeman, *The Penguin Guide to the United States Constitution*, 162.

[576] Dumbauld, "State Precedents for the Bill of Rights"; Wood, *The Creation of the American Republic, 1776-1787*; Williams, "Experience Must Be Our Only Guide"; Lutz, "The State Constitutional Pedigree of the U.S. Bill of Rights"; Adams, *The First American Constitutions*.

CHAPTER 5: THE ANTEBELLUM ERA, 1800-1849

"The Constitution had not destroyed the individuality of the states, and all bodies, of whatsoever sort, have a secret instinct leading them toward independence. That instinct is especially pronounced in such a country as America, where every village is a sort of republic accustomed to rule itself."

Alexis de Tocqueville, 1835[577]

Antebellum Americans debated expanding suffrage and reforming elections, abolishing slavery, and establishing a national bank. Congressmen proposed hundreds of federal amendments on these topics, some proposed by presidents, and federal courts intervened to expand and contract federal authority. Despite these attempts to revise the federal Constitution, only a single federal amendment passed. In contrast, the states proposed dozens of new state constitutions and hundreds of state constitutional amendments. Thus the question for this chapter – why, in the tumultuous antebellum era, was the national Constitution so stable while the state constitutions were so unstable? This chapter argues state constitutional reform resolved national controversies over elections, slavery, and banking, preempting national constitutional reform. Antebellum state constitutional revision stabilized the federal Constitution.

I. Trends in State and Federal Constitutionalism, 1800-49

In the antebellum era, state constitutional reform far outpaced federal amendment. Between 1800 and 1849, the states proposed fifty-three new constitutions, ratifying twenty-seven.[578] While Revolutionary state framers had avoided amendment,[579]

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[577] Tocqueville, *Democracy in America*, 386.

[578] On average, a state constitution ratified between 1800 and 1849 lasted only 52.6 years. While proposals were spread evenly across the states and territories, ratifications were not. New Englanders rejected all but three constitutional proposals, instead gradually elaborating their existing constitutions through judicial and legislative review and amendment. The vast and sparsely colonized Great Plains and Western territories generally did not call conventions or ratify new constitutions. So most constitutional ratification occurred where whites were settling in large numbers and organized new states, along the Mississippi and Ohio

antebellum Americans proposed hundreds of state constitutional amendments,[580] ratifying least 201,[581] mainly to older New England and Southern constitutions. [582] These numbers are all the more impressive given there were relatively few states in this era.[583] In contrast, of the 476 federal amendments proposed before Congress, only the Twelfth Amendment passed. Why did antebellum Americans frequently amend and replace their state constitutions while leaving the federal Constitution almost untouched?

Rivers. Of the twenty-seven constitutions ratified, fifteen were initial constitutions that organized new states, and all but two of these fifteen were drafted by Southern or Old Northwest and Mid-Atlantic states. For the full list and map of constitutions proposed and ratified between 1800 and 1850, see Figure 17 in the appendix.

[579] Between 1776 and 1800, states mainly revised their constitutions through conventions, rather than amendments. This was partly an issue of expediency, as the Revolutionary-era constitutions were framed quickly, under duress, and haphazardly, sometimes resulting in contentious, experimental designs that required wholesale replacement by convention. Revision by convention, rather than legislative amendment, was also an ideological choice. Conventions in New York, New Jersey, Virginia, North Carolina, and South Carolina refused to specify a process for constitutional amendment on the grounds that the power of constitutional revision belonged solely to the whole people and their representatives assembled in convention, rather than partisan, narrowly-interested legislators. For example, the 1776 conventions of Delaware and New Jersey forbade the legislature from amending rights provisions.

[580] As the zeal for revolution faded, Americans began delegating constitutional reform to standing, permanent legislatures. Six of the seven states admitted to the Union between 1800 and 1828 required voters approve legislative amendments or convention proposals. In response to Jacksonian populism and state legislators' complicity in the economic panic of 1837, framers allowed voters pass statutes and amendments by referenda, such that seven of the nine states admitted between 1828 and 1860 allowed constitutional referenda. The need for amendment was perhaps greater for the aging constitutions of the existing states, but eighteen of the twenty-four older states opted for revision by convention. Amendments in these states were fewer and less significant, though six of the older states passed important amendments between 1828 and 1860. See Dealey, *Growth of American State Constitutions*, 45–49; Sturm, "The Development of American State Constitutions," 66.

[581] This data is derived from John Wallis' State Constitutions Project. The Rise of Modern Constitutionalism database suggests that between 1800 and 1849 the states proposed 205 amendments while only ratifying 134. In either case, the states ratified far more amendments than were made to the federal Constitution. Also recall that not all state amendments are equally important. For example, New Hampshire's 1792 Constitutional Convention passed a single six-thousand-word amendment with seventy-one articles, all but replacing the state's 1784 Constitution. Conversely, North Carolina effectively replaced its constitution in 1835 by passing thirty-seven separate amendments. See Wallis, "The NBER - Maryland State Constitutions Project"; Dippel, "The Rise of Modern Constitutionalism, 1776 - 1849."

[582] Further, six Southern states had a tradition of frequent constitutional revision dating to colonial civil law systems under French, Spanish, or Mexican government. Ten states were settled by France, Spain, or Mexico and had developed civil law systems at the time of the Revolution. These are states Alabama, Arizona, Arkansas, California, Florida, Louisiana, Mississippi, Missouri, New Mexico, and Texas. For more on this, see Berkowitz and Clay, "American Civil Law Origins." Citizens of the Northwest Territory earned statehood by ratifying constitutions, which, newly-drafted, needed few repairs by amendment.

[583] By 1849, there were only thirty-four states.

There are a few familiar explanations of the federal Constitution's stability. First, Article V's supermajority requirements may have blocked proposed federal amendments. But in in the Jeffersonian era there were fewer states – only sixteen in 1800 – and thus fewer potential vetoes. Further, backlash to the Federalists' Alien and Sedition Acts and widespread support for states' rights swept Jeffersonians into both houses of Congress and the White House. With Monroe's 1816 election, the Democratic-Republicans controlled thirty of forty-two Senate seats, 146 of 185 House seats, clearing the necessary two-thirds to propose an amendment, and held many state legislatures, paving the way for ratification.[584] Yet puzzlingly, the unchallenged Democratic-Republicans did not entrench their power through federal amendment or a second constitutional convention.

As David E. Kyvig asserts, growing veneration for the founders and their Constitution may have discouraged congressmen, state legislators, and ordinary Americans from reforming the federal document.[585] A 1796 schoolbook introduced children to their Constitution in words "made level to the lowest capacities." The book,

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[584] Between 1800 and 1806, Democratic-Republicans and their allies captured both houses in eight of ten legislatures for which this dissertation has data, and took the other two not long after. Democratic Republicans captured from Federalists both houses of the legislature in New York (1800-2), Pennsylvania (1801), New Jersey (1801-2), Vermont (unicameral legislature) (1802), New Hampshire (1805), Massachusetts (1806), and held both houses in Maryland (1800-1) and Rhode Island (1801). Democratic-Republicans or their allies eventually took Connecticut (1817-18) and Delaware (1822). Data is from Michael J. Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006* (McFarland, 2007). Dubin does not have data on legislative party balance in the remaining state of Georgia, Kentucky, Ohio, North Carolina, South Carolina, Tennessee, or Virginia. Also note that national political controversy was not the only cause of partisan turnover in the state legislatures. States with greater social mobility were more likely to have interparty competition. These were often western states with more land, and accordingly in Jeffersonian America, more voters, as well as states like Pennsylvania, which harbored multiple ethnic groups capable of participating in politics. Hence not every state hosted two parties in at the turn of the nineteenth century. See Paul Goodman, "The First American Party System," in *The American Party System: Stages of Political Development*, ed. William N. Chambers and Walter Dean Burnham (New York: Oxford University Press, 1967), 65–72.

[585] Kyvig explains: "Contributing to the limited use of amendment during the first half of the nineteenth century was a widespread, though hardly universal, feeling that once the Bill of Rights had been added, the Constitution provided an adequate structure of government." See Kyvig, *Explicit and Authentic Acts*, 110.

small enough to carry in a breast pocket, dissuaded readers from revising the work of the founders, which it called

> "The greatest [constitution] by far that any people ever had; and it can scarcely be expected that any ever should be greater. It was formed in an age when the principles of liberty were well understood; [the federal framers] had all the examples of former ages and governments before them, their beauties and defects; they sat down in a state of profound peace, and had full leisure to form the most perfect constitution that the nature of things would admit of."[586]

But the antebellum Constitution was not so widely venerated. The secrecy of the 1787 Convention and the extralegal ratification process tarnished the Constitution for Anti-Federalists,[587] and for some later Jeffersonians and Federalists.[588] In 1828, the South Carolina legislature attempted to nullify Congress' constitutionally-guaranteed tariff-making power, and in 1845, the abolitionist William Lloyd Garrison burned a copy of the Constitution at a Framingham rally of the Massachusetts Anti-Slavery Society. By the late antebellum era, state and federal legislators cited compact and nullification theory in calling for amendment or replacement of the ailing Constitution.

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[586] Repudiating the Revolutionary generation's rowdy spirit, the book instructed "no riots, mobs, nor tumultuous proceedings are necessary, to gain what we can much easier obtain by legal, peaceable, and constitutional means." The text also predicted the Constitution would endure through "a vast majority of the enlightened citizens of these states, examining, approving, and consenting to it." The work concluded by appealing that "these noble principles should be early impressed upon the minds of the rising generation...which will tend to promote union, peace, happiness, and submission." See Elhanan Winchester, *A Plain Political Catechism: Intended for the Use of Schools, in the United States of America: Wherein the Great Principles of Liberty, and of the Federal Government, Are Laid Down and Explained, by Way of Question and Answer. Made Level to the Lowest Capacities. By Elhanan Winchester* (Greenfield, MA: T. Dickman, 1796), 11–12, 59–62. The book was accessed through the Rare Book and Manuscript Library – Rare Book Collection, Van Pelt Library, University of Pennsylvania. An inscription shows this particular copy came in 1803 to a young man named Kenny Stevens.

[587] John Fiske, *The Critical Period of American History, 1783-1789* (Boston: Houghton, Mifflin, 1892), 339–40.

[588] After the disputed presidential election of 1800, Jeffersonians considered scrapping the Constitution through a second convention, and even Federalists at the 1814-5 Hartford Convention contemplated secession, proposing instead to redesign the Constitution through eight amendments. Russell L. Caplan, *Constitutional Brinksmanship : Amending the Constitution by National Convention: Amending the Constitution by National Convention* (New York: Oxford University Press, 1988), 42–46; Kyvig, *Explicit and Authentic Acts*, 120–21.

Alternately, John Marshall and subsequent justices may have reinterpreted the Constitution, easing it into new contexts and preempting amendment. But after the 1803 *Marbury* decision, the Supreme Court would not again use judicial review to overturn a congressional statute until *Dred Scott* in 1857. Rather, the Marshall Court overturned state legislation, helping explain why many antebellum constitutional controversies were focused at the state level.

There are a few possible explanations for the states' frequent revision. First, some state legislatures could easily propose and pass amendments or new constitutions.[589] But in other states, early framers set higher barriers to legislative amendment and replacement, perhaps thwarting revision.[590] Further, given how often elites and reformers circumvented formal rules for constitutional revision,[591] these rules cannot alone explain the states' frequent constitutional upheavals. Nor can procedural rules explain why antebellum reformers sought change in the first place. As Donald Lutz concludes "the

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[589] For example, Article IV of Maryland's 1776 Declaration of Rights recognized a popular right to "to reform the old or establish a new government," and Article X encouraged frequent legislative amendment: "That, for redress of grievances, and for amending, strengthening and preserving the laws, the Legislature ought to be frequently convened." Most amendments could pass with a simple majority, but under Article LIX, they had to be approved by two sequential legislative sessions. Thus Maryland was able to pass ten amendments in 1837.

[590] Revolutionary-era state constitutional convention delegates, worried state legislators were self-interested, often expressly impeded legislators from proposing a convention or amendment, discouraging frequent state constitutional revision. New York's 1777 Constitution, for example, did not allow amendment. In 1822, New York voters approved a new constitution that failed to provide a mechanism for calling future conventions. Even newer state constitutions, like Indiana's 1816 document, did not address amendment procedure. The Indiana document required that every twelve years citizens vote on whether to hold a constitutional convention. See the Indiana Constitution of 1816, Article VIII. See also Dealey, *Growth of American State Constitutions*, 41; William P. McLauchlan, *The Indiana State Constitution: A Reference Guide* (Greenwood Press, 1996), 4.

[591] Reformers often skirted or ignored the legal procedure for revision. Per James Dealey's estimation, only eight of the eighteen states replacing their constitutions between 1828 and 1860 actually followed the constitutionally-sanctioned procedure for calling a convention. And by the Jacksonian era, local elites had captured many state legislatures, constitutionally entrenching their power with quasi-legal constitutional reforms, and blocking subsequent populist attempts at legal constitutional revision. For example, referenda ostensibly allowed voters to circumvent the legislature in drafting laws, but Jacksonian legislators could often override these ballot measures. And in Rhode Island and Virginia, malapportionment handed the state legislature to conservative planters, who rigged the selection of constitutional convention delegates to over-represent their own districts.

first state constitutions were not used legalistically the way Americans use constitutions today… political conflicts were not susceptible to resolutions on the basis of the precise wording of a constitution."[592]

One might speculate that antebellum Americans had little veneration for their state constitutions, and thus fewer qualms with state constitutional revision. But in an era when the distant, fledgling national government commanded little authority, and its Constitution earned little respect, many Americans revered their state constitutions. Thomas Paine recalled that the Pennsylvania Constitution was

> "the political Bible of the state. Scarcely a family was without it. Every member of the Government had a copy; and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed Constitution out of their pocket, and read the chapter with which such matter in debate was connected.[593]

The state constitutions regulated the mundane elements of most Americans' lives, including their schooling, their religious and moral habits, their commerce and employment, and their marriage and family life, and so these documents held citizens' attention and investment.

This chapter instead asserts that state constitutional replacement outpaced federal reform because of the decentralization of constitutional conflicts. The antebellum Congress split over the regulation of suffrage, slavery, and banking and finance. These issues internally divided the Democratic-Republicans, and later the Democrats and the Whigs. Rather than confront these divisive controversies, congressmen deferred them to

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[592] Dealey, *Growth of American State Constitutions*, 45–50; George Parkinson, "Antebellum State Constitution-Making: Retention, Circumvention, Revision" (University of Wisconsin--Madison, 1972), 1–13; Tarr, *Understanding State Constitutions*, 102–5; Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 61–63; Donald S. Lutz, "Political Participation in Eighteenth-Century America," in *Toward a Usable Past: Liberty Under State Constitutions*, ed. Paul Finkelman and Stephen E. Gottlieb (University of Georgia Press, 2009), 21.

[593] Thomas Paine, "The Rights of Man," in *Common Sense, The Rights of Man and Other Essential Writings of Thomas Paine* (New York: Signet Classics, 1791), 297.

the states. State legislators and constitutional convention delegates revised their constitutions to extend suffrage to nearly all adult white males, to preserve slavery south of the Ohio River and abolish it to the north, and to create a system of locally-regulated banks and infrastructure corporations. This helps explain the era's high rate of state constitutional revision.[594] Congress accepted these reforms. Between 1800 and 1849, congressmen did not pass any national amendments regulating suffrage, slavery, or banking and finance, and following the states' revisions, congressmen largely avoided even proposing national amendments to regulate these issues. National controversies prompted state constitutional revision, preempting national constitutional change.

This chapter proceeds in three steps. First, the chapter explains how presidents, Congress, and the Supreme Court deferred to the states on national controversies over suffrage and elections, territorial slavery, and chartering banks. Second, the chapter argues that prior to 1828 the states preempted and resolved national controversies over slavery and elections and suffrage. Finally, the chapter argues that after 1828, the states resolved the banking question while struggling territorial slavery debates.

II. Constitutional Controversies at 1800

Several constitutional controversies gripped the early republic. Between 1800 and 1849, congressmen proposed 476 amendments, clustered around several topics,[595]

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[594] Territorial expansion and the incorporation of new states accounts for some of these new constitutions. But this cannot explain why some new states amended their newly-drafted constitutions, or why old states replaced or amended previous constitutions.

[595] To generate a list of the most common proposed amendment topics for 1800-49, this dissertation first identifies policy-related words to appear at least ten times across all descriptions of proposed amendments for 1800-49 in the NARA dataset, excluding duplicate words and words like "of" and "the" not related to policy issues. A second list of common terms is created by reading descriptions all 476 proposals in this era compiled by Ames. These two are then merged and checked against Vile's list of most common topics by year. See Ames, *The Proposed Amendments*, 324–53; Vile, *Encyclopedia of Constitutional Amendments*, Appendix D.

primarily on the regulation of Congress (142), the presidency (83), the judiciary (25), finance and taxes (57), and slavery (19).[596] Note that the latter two categories concern concurrent powers subject to regulation by state constitutional reform, and as did some topics in the former categories, such as the selection of presidential electors (48), of the president (65), and of congressional representatives by district (34). That is, many of the issues that threatened to destabilize the federal Constitution were also subject to state constitutional regulation.[597]

These counts cannot reveal an amendment's congressional support or doctrinal impact and can systematically miss issues excluded from the congressional agenda. Therefore this section explores three antebellum constitutional controversies in greater detail. The first concerns the balance of state and national economic authority. The brief Tenth Amendment did not expressly delineate the states' legal, economic, and police powers,[598] leaving Justice James Wilson in *Chisholm v. Georgia* (1793) to reject Georgia's claim to legal immunity to a private citizen's suit.[599] Jeffersonian senators were

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[596] Note these are approximate counts. Some individual amendments may match for multiple search terms and be included in multiple topic counts. See Table 11 in the appendix for a division of these topics into common subtopics and counts. Note also these counts are minimums, as they do not include amendments that do not match the search terms but may still be relevant to the topic. For example, the NARA description excludes the term "executive" for some amendments which according to Ames concern executive selection, suggesting this is a conservative count for the number of amendments dealing with the executive branch.

[597] Jeffersonian and Jacksonian congressmen proposed few federal amendments directly intervening in the states' regulatory authority and police powers; however, as noted, many of the proposed amendments touching on selection federal officials were subject to state constitutional regulation.

[598] In 1791, Congress passed the Tenth Amendment reserving to the states powers not delegated to the federal government, but this did not explicitly define or protect states' police powers. The Guarantee Clause, requiring states draft republican governments, and the Supremacy Clause, proclaiming the supremacy of federal law over state law, did not clarify this issue either. See Article IV, Section 4, Clause 1 and Article VI.

[599] In South Carolina, Alexander Chisholm, the executor of clothier Robert Farquhar's estate, sued Georgia for undelivered payment for clothes Farquhar supplied to Georgia during the Revolutionary War. Article III, Section 2 of the Constitution referred suits "between a State and Citizens of another State" to the federal judiciary. Georgia alleged it was a sovereign government, and that Article III, Section 2 allowed the state to act as plaintiff in a suit against a private citizen, but did not require it appear as a defendant. Dismissing Georgia's sovereignty claims, Justice James Wilson admitted that the states' citizens may have

upset that the Federalist Wilson favored Alexander Chisholm, a private merchant, over Georgia's state sovereignty rights, and so two days after the ruling proposed an amendment overriding the decision.[600] Months later the Eleventh Amendment passed after a day's debate in each chamber, granting states sovereign immunity from private suits. And three years after the Amendment, the Virginia and Kentucky legislatures affirmed that the states had compacted to form the Constitution and should remained arbiters in constitutional disputes.[601]

While the Amendment and Virginia and Kentucky Resolutions helped clarify the states' legal authority, the federal Constitution was ambiguous on the extent of state and federal economic powers.[602] Banking authority soon became a point of contention. To finance the young nation's mounting debt, Treasury Secretary Alexander Hamilton proposed the First Congress authorize a federal mint, taxation system, and national bank. Fisher Ames, Theodore Sedgwick, and Johnathan Trumbull rallied congressmen to pass Hamilton's mint and taxation plans.[603] But the Constitution did not expressly empower

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delegated sovereignty to their state constitutions, but added that these citizens also ratified the national Constitution, granting federal courts authority over interstate disputes. Wilson thus firmly concluded "As to the purposes of the Union, Georgia is NOT a Sovereign State." See *Chisholm v. Georgia,* 2 U.S. 419, 457 (1793).

[600] As Robert G. McCloskey writes, after *Chisholm* the "larger question of the nature of the Union was postponed for the more devious talents of Marshall to cope with." Robert G. McCloskey, *The American Supreme Court* (University of Chicago Press, 2004), 22.

[601] In 1798, Congress, now in Federalist hands, passed the Alien and Sedition Acts, imprisoning Jeffersonian printers and disenfranchising immigrants. Virginia and Kentucky legislators responded with resolutions, drafted by Madison and Jefferson, nullifying the Acts. Jefferson's Kentucky Resolution declared the states formed the Constitution, were bound by the "certain definite powers" delegated to the Constitution, and that in cases of dispute, the national government could not be the "exclusive or final judge of the extent of the powers delegated to itself." With the dissolution of the compact, "each party has an equal right to judge for itself" in resolving the controversy. This challenged the national branches' exclusive authority to interpret the Constitution.

[602] But see Article I, Section 8, Clause 1, granting Congress the power to "lay and collect Taxes, Duties, Imposts and Excises."

[603] Congressmen initially frowned on political factions, instead clustering into advocates and opponents of strong national government, a division familiar from the Constitution's ratification debates. When bills concerning national powers reached the First Congress' Committee of the Whole, Federalists and Anti-Federalists clashed, but without party structure or discipline, neither group could rally around a

Congress to establish a national bank, which might also muscle out fledging state banks.[604] Thus the Virginians Madison, Jefferson, and Edmund Randolph, all opposed to broad federal powers and constitutional readings, allied with George Clinton and Aaron Burr of New York, uniting the nation's Democratic-Republican societies and presses against Hamilton's bank plan.[605] Despite this, Congress chartered the bank of the United States in 1791. The bitter presidential election of 1796 internally divided many states, with established local elites often assuming the Federalist label – by the late 1790s, New England Federalists like Ames, Sedgwick, and Trumbull caucused with prominent families in Delaware and South Carolina, becoming a national party.[606] Congressmen split into two intersectional parties, one supporting the Bank and the other opposing it, each trying to entrench its position, together proposing a dozen federal constitutional amendments on national banking powers.[607]

With the Constitution still silent on banking authority, states too claimed this power. States and localities had long engaged in self-financing. Neglected by Parliament and sometimes by their own legislatures,[608] colonial counties, cities, and rural villages

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compromise. Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (Berkeley: University of California Press, 1969), 40–86.

[604] Eric Lomazoff, "Turning (Into) 'The Great Regulating Wheel': The Conversion of the Bank of the United States, 1791–1811," *Studies in American Political Development*, 2012, 4–5.

[605] As Jefferson put it "To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no linger susceptible to any definition. The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution." Thomas Jefferson, "Letter to James Madison, September 6, 1789," in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford, vol. VI (New York: G.P. Putnam's Sons, 1791), 198; Aldrich, *Why Parties?*, 70–83.

[606] Goodman, "The First American Party System," 63–85.

[607] In the winter of 1793-4, the Senate debated three proposed amendments excluding bankers from Congress. The re-chartering of the Bank of the United States brought eight proposals on congressional authority to establish a bank between 1813 and 1821. Ames, *The Proposed Amendments*, 29–30.

[608] Parliament excluded the colonial legislatures from levying import taxes, and under colonial Whig theory, taxes were a revocable gift from the people, rather than an unconditional legislative power. Parliament's harsh Stamp Act further turned colonists against taxation. Countryman, *The American Revolution*, 41–52.

funded their own infrastructure and public works projects through lotteries.[609] Between 1766 and 1775, Rhode Island alone authorized forty-three lotteries.[610] But with independence, state legislators formalized and expanded their authority to raise revenues through taxes and banks. By 1791, Boston, New York, Philadelphia, and Baltimore all hosted state banks, each of which competed with a corresponding local branch of the national Bank.[611] Albany opened a state bank the following year, and in 1793 Pennsylvania opened a second state bank in Philadelphia, hoping to raise state revenue to through stock sale rather than taxation. When Hamilton threatened to plant a national Bank branch in Virginia, Jefferson and the state legislature proposed competing banks in Alexandria and Richmond to better respond to yeoman farmers' credit needs. Twenty-three banks were chartered between 1792 and 1800, and with President Jefferson's blessing,[612] uncounted more opened in the following decade, such that by 1811, each state had established at least one bank. Accordingly, each senator represented a state bank that competed with the national one,[613] keeping alive congressional opposition to the national Bank, such that by the 1810s, congressmen still proposed federal constitutional amendments to block the institution's re-chartering.[614]

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[609] Driven by individual self-interest and communal, republican spirit, citizens bought tickets funding infrastructure projects and semi-public institutions like Boston's Faneuil Hall and Harvard College, Yale College, the College of New Jersey, and King's College. Lotteries thus cleverly let citizens collectively solve the problem of providing public goods.

[610] Charles T. Clotfelter and Philip J. Cook, *Selling Hope: State Lotteries in America* (Cambridge: Harvard University Press, 1989), 34–35.

[611] Note the Bank of the United States was headquartered in Philadelphia.

[612] Hofstadter, *The Idea of a Party System*, 168–71.

[613] Lomazoff, "Turning (Into) 'The Great Regulating Wheel,'" 4–14.

[614] Moreover, untried state clauses threatened to clash with federal constitutional limits on states' legal and economic power. See for example the Contracts Clause in Article I, Section 10, Clause 1.

Territorial slavery presented a second issue. The 1787 Northwest Ordinance abolished territorial slavery north of the Ohio River,[615] while the 1789 North Carolina Cession Act forbade territorial abolition south of the River,[616] promising a balanced Senate. Territorial slaves would count as three-fifths of a person for the purposes of national taxation and representation,[617] inflating the number of congressmen and Electoral College votes south of the Ohio.[618] Some convention delegates expected whites to quickly settle these fertile new states, further increasing the Southern delegation.[619] But Northerners knew they could use the Senate to check a Southern House and veto a Southern president.[620] And any congressional statute, including slavery regulation, would

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[615] On July 13, 1787, the Continental Congress passed the Northwest Ordinance, requiring subsequent congresses split the Northwest Territory, bounded on the south by the Ohio River, into free states. Southern congressmen unanimously backed the Ordinance, expecting Southerners would settle these new states and tip Congress toward the South. Of the bill's five drafters, three were Southerners – Richard Henry Lee and Edward Carrington of Virginia, and John Kean of South Carolina. Seeing that the Ordinance's abolition of slavery did not extend south of the Ohio, in subsequent months, the legislatures of the Carolinas and Georgia prepared to cede to Congress their territorial claims south of the Ohio.

[616] Congress' 1789 North Carolina Cession Act, which led to the creation of the Southwest Territory and then the slave state of Tennessee, respected a stipulation in North Carolina's cession that forbade abolition in the region, assuring Southerners that slavery would spread west to Mississippi. The 1789 North Carolina Cession Act held "*Provided always* that no regulations made or to be made by Congress shall tend to emancipate Slaves." Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* 81, no. 2 (1966): 225–33, doi:10.2307/2147971; Onuf, *The Origins of the Federal Republic*, 169–71; John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007), 10.

[617] Article I, Section 9, Clause 4 applied this three-fifths formula to any future capitation taxes.

[618] On July 5th, Congressman Manasseh Cutler, author of the Ordinance, arrived in Philadelphia to advise key Convention delegates, including Madison, Rutledge, Hamilton, and Mason. Delegates likely referred to Cutler's Ordinance in drafting the Three-Fifths and Fugitive Slave Clauses, suggesting the Ordinance and Clauses should be read as parts of the same constitutional bargain. Lynd, "The Compromise of 1787," 243–50; Finkelman, *Slavery and the Founders*, 21–22.

[619] Smith, *Civic Ideals*, 133–34; Finkelman, *Slavery and the Founders*, 10–21, 37–39; Graber, *Dred Scott*, 91–93, 102–3.

[620] On June 30th, Madison proposed making this balance explicit by representing slaves in one house but not the other. "By this arrangement," Madison wrote, "the Southern Scale would have the advantage in one House, and the Northern in the other." Farrand, *The Records of the Federal Convention of 1787*, 1911, I:486–87.The Convention rejected the proposal. Finkelman, *Slavery and the Founders*, 14–15.

require bisectional support, as would any amendment changing the terms of the compromise.[621]

This peace lasted nearly twenty years, with free states formed north of the Ohio and slave ones south, until Jefferson's 1804 Louisiana Purchase pushed American jurisdiction west across the Mississippi, past the Ohio's dividing line. Federal framers, dodging the slavery controversy, had not expressly specified whether congressional authority extended to regulating slavery in new territories.[622] Further, the eastern states had abolished or affirmed slavery without congressional interference, suggesting new western states might do the same. Congressmen were now unsure of the boundary and the balance of free and slave states and congressional seats, opening the bisectional compact to renegotiation by constitutional amendment. Between 1803 and 1808 congressmen proposed eight amendments banning slave importation,[623] and another eight stripping Southern states' extra slave votes and tax duties,[624] threatening the bisectional balance. All failed. And congressmen avoided proposing amendments on the divisive question of territorial slavery,[625] leaving this pivotal national issue to territorial legislators.

Finally there was the issue of election and suffrage law. Colonial and early state legislatures established property and taxpaying qualifications that disenfranchised

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[621] As Graber notes, the delegates "were more concerned with devising institutions that would facilitate bisectional agreements on slavery policy than with determining the substance of those arguments in advance." See Finkelman, *Slavery and the Founders*, 8; Graber, *Dred Scott*, 96.
[622] Congress assumed this power in abolishing slavery in Old Northwestern territories and allowing slavery in the Southwest Territory. But there was no explicit guarantee Congress could do so in the new, western territories. The Territories Clause let Congress "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." See Article IV, Section 3, Clause 2.
[623] The Importation Clause forbade importation of foreign slaves after 1808, satisfying Northern abolitionist delegates and Southern delegates who wanted to protect their domestic slave trade. See Article I, Section 9, Clause 1.
[624] The latter amendments, proposed by New Englanders to weaken the South, were roundly defeated. Ames, *The Proposed Amendments*, 45–46.
[625] An 1818 amendment banning slavery failed, as did a more modest 1845 amendment banning slavery only in the District of Columbia.

women, slaves, transients, the urban poor, and tenant farmers. In late July 1787, federal Convention delegates briefly debated national franchise reform before delegating this question to the overburdened Committee of Detail, which rejected a uniform federal property requirement. The Convention again rejected reform in August, [626] settling instead on three clauses that reaffirmed the states' traditional authority over elections. The Elections Clause allowed state legislatures to regulate the "Times, Places and Manner of holding elections for Senators and Representatives," subject to Congressional override.[627] Second, people qualified to vote for candidates for the state's lower house also qualified to vote for candidates for the national House of Representatives.[628] And the Guarantee Clause required, without any elaboration, "a Republican Form of Government" for each state.[629] The Constitution was otherwise silent on suffrage qualifications, including those for state office, and congressmen refrained from proposing any amendments on the topic. As Alexander Keyssar concludes, "By making the franchise in national elections dependent on state suffrage laws, the authors of the Constitution compromised their substantive disagreements to solve a potentially explosive political problem."[630] As white, male tenant farmers and urban laborers began rallying against their disenfranchisement, this problem fell to the state legislatures.

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[626] In early August, Gouverneur Morris and James Madison argued a freehold requirement would grant the vote to small, independent farmers, while the tradesmen Nathaniel Gorham of Boston and Benjamin Franklin of Philadelphia replied that this rule unfairly disenfranchised city dwellers. On August 8th, Madison pleaded delegates drop the divisive question of suffrage rights, lest they alienate each other and the citizens of the states. He warned "the people have been accustomed to this right in various parts of America, and will never allow it to be abridged. We must consult their rooted practices if we expect their concurrence in our propositions." Farrand, *The Records of the Federal Convention of 1787*, 1911, II:216.
[627] See Article I, Section 4, Clause I.
[628] See Article I, Section 2, Clause I.
[629] See Article IV, Section 4.
[630] Keyssar, *The Right to Vote*, 21–24; Lutz, "Political Participation in Eighteenth-Century America," 20–21; Beaumont, *The Civic Constitution*, 89–91.

The Elections Clause, deferring election regulation to the states, resulted in conflicting state laws for the selection of House members and for presidential electors. Different states elected House members by district,[631] by general ticket,[632] and by two-stage election,[633] much to the frustration of congressmen, who sought a consistent system. In 1800, John Nicholas proposed a national amendment for election by district, and similar district proposals came in 1802 and 1813, followed by twenty-two amendment proposals between 1816 and 1826. Three passed the Senate before failing in the House.[634] Congress' authority to unilaterally regulate these elections was itself suspect, and state ratification conventions in 1788 proposed eight amendments to prevent congressional interference, but these and a few subsequent proposals failed, leaving authority split.[635] Relatedly, congressmen grew frustrated with states' inconsistent schemes to pick presidential electors by district vote, by general ticket, or by legislature, particularly when deadlocked legislatures failed to pick electors. Allegations of House interference in the 1824 presidential election reignited demands for a selection by popular vote. Between 1800 and 1849, Congress fielded at least sixty-five amendments on presidential elections,[636] and forty-five for selection of electors by district, at least four of which passed the Senate with broad support,[637] and six for popular election of the

[631] Massachusetts, Virginia, New York, Maryland, South Carolina.
[632] New Hampshire, Pennsylvania, New Jersey, Georgia.
[633] In Connecticut a preliminary election then narrowed the field by a third, from which a second election selected a representative.
[634] In total, between 1800 and 1849, Congress saw at least thirty-four proposals for electing representatives by district. See Table 11 Table 1in the appendix.
[635] Ames, *The Proposed Amendments*, 28–29, 56–58.
[636] A few proposals between 1797 and 1803 concerned the selection of the president and vice president, resulting in the Twelfth Amendment in 1804.
[637] Ames puts the total count at forty-two, with four passing the Senate. Ames, *The Proposed Amendments*, 80–84, 113.

president,[638] among other methods.[639] Like the selection of House members, this issue threatened to destabilize the national Constitution, but was also being regulated the state legislatures.

III. Constitutional Conflict and Resolution, 1800-1828

A. Constitutional Decentralization

Presidents, Congress, and the Supreme Court delegated these three matters to the states. Presidents left suffrage law to the state constitutional conventions. John Adams focused his suffrage reform efforts on Massachusetts' 1821 Constitutional Convention, to which he was a delegate.[640] Thomas Jefferson supported expanding the franchise through state constitutional reform,[641] and while Madison sought a national freehold qualification,[642] he admitted in *The Federalist* "One uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention," instead leaving the issue to be "fixed by the State Constitutions."[643] Jeffersonian congressmen too shied from tinkering with state suffrage laws, and early congressional interventions into territorial suffrage, though expressly constitutional,[644] were few. These tended to expand the white male vote. After Ohio's 1802 Convention allowed an exemption of taxpaying requirements, Congress scrapped property

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[638] Ames suggests there were closer to ten. Ibid., 87–88.
[639] Ibid., 89–123.
[640] He declared "Power always follows Property," such that the property-less were not sufficiently independent to vote. Adams, "Letter to James Sullivan, May 26, 1776," 375–78; Keyssar, *The Right to Vote*, 11, 27.
[641] In 1776, Jefferson proposed granting many Virginian males fifty acres, hoping a propertied electorate would think and vote independently, and a generation later, endorsed an 1816 movement to reform the Virginia Constitution to grant universal white male suffrage. Wood, *The Radicalism of the American Revolution*, 178–79; Keyssar, *The Right to Vote*, 10, 36–37.
[642] Keyssar, *The Right to Vote*, 11–12, 22–24.
[643] Hamilton, Madison, and Jay, *The Federalist*, 256.
[644] Article IV gave Congress authority over territorial franchise rules. See Article IV, Clause 2.

requirements for the neighboring Indiana Territory, and did the same in the southwestern territories. Similarly, the congressional acts authorizing the Ohio and Indiana constitutional conventions allowed white male taxpayers with a year of residence to vote for state convention delegates. Congress abandoned these taxpaying requirements for convention elections in Illinois in 1818, Michigan in 1835, and Wisconsin in1846.[645]

Territorial slavery was more divisive. Southern congressmen pushed to open new western territories to Southern trade and settlers, aiming to win seats in the House and Electoral College and unbalance the bisectional accord.[646] The issue came to a head when Indiana settlers convened at their territorial capital of Vincennes in 1802,[647] and, hoping to encourage Southern emigration, requested Congress modify Article VI of the Northwest Ordinance to allow slave importation for ten years.[648] A House committee split between the Virginian John Randolph and a Northern bloc rebuffed the petition, but a subsequent Southern committee accepted it in 1804, only to be defeated by floor votes in 1804 and 1806.[649] Ignoring Congress and the Northwest Ordinance, Indiana's

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[645] Keyssar, *The Right to Vote*, 30.

[646] Finkelman, *Slavery and the Founders*, 40, 60–64; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 43–45.

[647] After Congress halved the Northwest Territory into an eastern Ohio Territory and western Indiana Territory, Indiana Territorial Governor William Henry Harrison organized this appeal.

[648] Article VI of the Northwest Ordinance abolished slavery in the Territory, but in vague terms that Congress might ignore. In the Continental Congress' last hours debating the 1787 Ordinance, Massachusetts Congressman Nathan Dane affixed to the Ordinance Article VI, mandating "There shall be neither slavery nor involuntary servitude in the said Territories." Since Southern congressmen took this as a tacit acceptance of slavery south of the Ohio, Article VI passed without protest or debate, and Congress never elaborated how Article VI would be enforced. Illegally-bound slaves usually lacked means to appeal their cases in court. Other Ordinance clauses condoned slavery, specifying that some Old Northwest residents would be "free inhabitants," and implying some would not. Article II forbade taking residents' "liberty or property" and required the territorial courts respect any previous "private contracts or engagements" potentially including the purchase of a slave made in another state. Article VI did require the return of runaways. Donald L. Robinson, *Slavery in the Structure of American Politics, 1765-1820* (New York: Harcourt Brace Jovanovich, 1971), 381–84; Fehrenbacher, *The Slaveholding Republic*, 254–55; Finkelman, *Slavery and the Founders*, 37–51.

[649] Similarly, in 1796, 1799, and 1800, Congress rejected proslavery petitions from settlers of the Indiana Territory. Finkelman, *Slavery and the Founders*, 60–65; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 103–13.

Territorial Governor William Henry Harrison redrafted a slave code from his home state of Virginia and forced it through the territorial legislature.[650] As slaveholders streamed into Indiana, Congress refused to repeal or enforce Article VI of the Ordinance, avoiding the issue. Thus, per John Craig Hammond, "the battle between slavery and freedom in Indiana shifted from Congress back to Indiana itself."[651]

Congress also refused to intervene in southwestern territorial slavery. Congressmen, unable to coerce distant Appalachian settlers to emancipate their slaves, capitulated to North Carolina's proslavery 1789 Cession Act,[652] and in March 1798, Secretary of State Timothy Pickering recommended Congress maintain slavery in the Mississippi Territory, for fear abolition would push local slaveholders to defect to Britain. When Maine's antislavery Federalist representative George Thatcher proposed abolition in the Territory, condemnation was widespread. South Carolina Federalists Robert Goodloe Harper and John Rutledge, Jr. rallied their party against Thatcher's amendment,[653] which failed against bipartisan support,[654] garnering only twelve votes in the House. Both congressional parties upheld the existing patchwork of local slavery

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[650] Finkelman, "Evading the Ordinance," 30–33; ibid., 64–72.
[651] Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 3, 110.
[652] As Hammond notes, "Congress's willingness to accept North Carolina's conditions and quickly establish a government for the Southwest reflected the weakness of the federal government in its western borderlands." Fehrenbacher, *The Slaveholding Republic*, 256; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 11.
[653] "In the Northwestern Territory," Harper argued, "the regulation forbidding slavery was a very proper one, as the people inhabiting that part of the country were from parts where slavery did not prevail." But to extend abolition to Mississippi would strike "at the habits and customs of the people" of the Mississippi Territory.
[654] Antislavery Republicans Albert Gallatin and Joseph Varnum spoke in Thatcher's favor, but they too were rebuffed.

regulations. As John Nicholas concluded, it "was not for them to make a particular spot of country more happy than all the rest."[655]

Following Jefferson's 1804 Louisiana Purchase, Congress reaffirmed its policy nonintervention.[656] Questions of implementing the treaty and of territorial slavery fell to the Senate,[657] where Federalist James Hillhouse of Connecticut proposed abolishing the domestic and international slave trade within the Louisiana Territory and emancipating male slaves at the latest at age twenty-two and females at nineteen. The moderate Federalist senators Timothy Pickering and John Quincy Adams rallied with Democratic-Republican Southerners to defeat the latter provision, but the importation prohibition stood, provoking an angry, seditious petition from Louisiana slaveholders.[658] In response, Southern congressmen led Congress to quietly let these antislavery provisions expire the following year.[659] And as Federalists lost congressional seats in the 1810s,[660] calls for

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[655] Fehrenbacher, *The Slaveholding Republic*, 258; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 13–29; *The Debates and Proceedings in the Congress of the United States: Fifth Congress, Second Session* (Washington: Gales and Seaton, 1851), 1306–11.

[656] When Robert Livingston and James Monroe reported from Paris that Napoleon might sell French Louisiana, Jefferson seized the opportunity, hoping the purchase would allow the diffusion of slaves from overstocked eastern plantations, where slave mutiny loomed, to new western territories and states. But Jefferson's immediate concern was whether he had the constitutional authority to make the purchase. Federalists senators doubted it, as did Jefferson, who feared reading his own constitutional powers too liberally. On the advice of Treasury Secretary Albert Gallatin, Jefferson interpreted the purchase as an executive power under the Constitution's Treaty Clause, and ratified the purchase treaty. See Article II, Section 2, Clause 2. Skowronek, *The Politics Presidents Make*, 78–79.

[657] Sanford Levinson and Bartholomew Sparrow, "Introduction," in *The Louisiana Purchase and American Expansion, 1803-1898*, ed. Sanford Levinson and Bartholomew Sparrow (Lanham, MD: Rowman & Littlefield Publishers, 2005), 9–13.

[658] Surprisingly, Southern Democratic-Republicans voted against the emancipation provision but for the provision banning the slave trade in Louisiana. Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 45.

[659] See *The Debates and Proceedings in the Congress of the United States: Eighth Congress, First Session* (Washington: Gales and Seaton, 1852), 238–44; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 30–54.

[660] Democratic-Republican congressmen passed the 1807 Embargo Act, crippling New England merchants, who flocked to the Federalist Party. By 1814, war with the British had discredited the Federalists, who won few elections outside New England. Northeastern Federalists worried proslavery Southerners would settle the new Louisiana Purchase, overloading Congress with slave states, promising Southern control of national politics. The Massachusetts Federalist Congressman Josiah Quincy tried unsuccessfully to block the admission of the state of Louisiana in 1811. With the admission of the state of Louisiana, the

territorial abolition subsided. As Donald Fehrenbacher puts it, Congress used "the hands-off strategy later called 'nonintervention.' The effect, especially in view of slavery's pervious existence there, was a tacit federal sanction of the institution everywhere west of the Mississippi."[661]

Similarly, presidents and Congress refused to enforce the contentious Fugitive Slave Clause across the states,[662] instead deferring to local law enforcement. When Pennsylvania abolitionists clashed with proslavery Virginians over an escaped fugitive in May 1788, [663] Pennsylvania Governor Thomas Mifflin appealed to President Washington, who, on the advice of Attorney General Edmund Randolph, avoided the issue, as would subsequent presidents.[664] Congressmen grappled over the issue for two years, debating one House bill and three Senate bills before settling on the 1793 Fugitive Laborer Act,[665] asking governors to accept each other's extradition requests, as required by the federal Fugitive Slave Clause, satisfying Southerners, but did not force federal agents, governors, or state courts to comply, satisfying Northerners. Later attempts to amend the Act failed

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Democratic-Republican House reorganized land west of the Mississippi under the Missouri Territory, soundly defeating a proposal by Pennsylvania Democratic-Republican Abner Lacock to prohibit territorial citizens from importing slaves. This deference dodged conflict between congressmen and between congress and proslavery territorial citizens. Fehrenbacher, *The Slaveholding Republic*, 260–61; Graber, *Dred Scott*, 118–19; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 57–58.

[661] Fehrenbacher, *The Slaveholding Republic*, 260.

[662] A fugitive might live under a free state's constitutional and statutory protections, but through the Fugitive Slave Clause, could be extradited to a state in which slavery was constitutionally or statutorily legal.

[663] The Fugitive Slave Clause was tested when John Davis, a Virginian slave living in Pennsylvania, was recaptured by three Virginians. Three years later, the Pennsylvania Abolition Society pressured Pennsylvania Governor Mifflin to request Virginia extradite the slavecatchers for violating a 1780 state emancipation statute. Virginia's Attorney General James Innes refused, asserting the slavecatchers actions were authorized by the Fugitive Slave Clause and Virginia's proslavery laws. See Pennsylvania's 1780 Act for the Gradual Abolition of Slavery.

[664] Subsequent executives enforced the clause in the District of Columbia, the territories, and requested fugitives' return from Spanish Florida, Mexico, Canada, and some Indian tribes, but did not interfere with the states' enforcement. Fehrenbacher, *The Slaveholding Republic*, 214.

[665] The Act passed forty-eight to seven, with bisectional support.

to gain bisectional support.[666] Deference to state governors and judges remained the status quo.[667]

While the early Supreme Court rarely debated slavery or franchise regulation, after seizing the power of judicial review in *Marbury v. Madison*, the Marshall Court began overturning state statutes and constitutional provisions that regulated commerce and contracts.[668] In *Fletcher v. Peck* (1810),[669] Marshall asserted the Constitution's Contracts Clause forbade newly-elected Georgia legislators from invalidating a contract their predecessors had drafted with the Yazoo Land Company.[670] Nine years later he directly answered the banking debate in *McCulloch v. Maryland*, interpreting the Necessary and Proper Clause to affirm federal power to charter a national bank.[671]

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[666] In 1801, Northern representatives defeated a proposed amendment to the Act fining employers hiring blacks who did not carry a certificate of freedom. In 1817, a bill to compel Northern governors and judges to enforce the Act passed the House and Senate, but died during reconciliation. Fehrenbacher, *The Slaveholding Republic*, 205–14; Finkelman, *Slavery and the Founders*, 81–104.

[667] The Privileges and Immunities Clause presented a related but latent issue. The Clause required states recognize the rights a nonresident visitor held in his home state, potentially obligating free states to recognize the rights of slaveholders visiting from slave states, and slave states to recognize the rights of free state blacks. Congress avoided proposing amendments on this issue. See Article IV, Section 2, Clause 1.

[668] By Marshall's 1803 *Marbury v. Madison,* 5 U.S. 137 (1803) ruling, the states had already developed judicial review. As a young law student in Williamsburg, John Marshall studied under George Wythe, who had helped design the state's independent judicial branch in conjunction with John Adams. Marshall was also in the audience when Virginia's Attorney General Edmund Randolph convinced George Wythe and John Blair, now sitting on the state Court of Appeals, to overturn a state statute for violating the state constitution. The case, *Commonwealth v. Caton,* 8 Va. (4 Call.) 5 (1782), seems to have inspired Marshall's idea of judicial review. Adams, "Letter to John Taylor, April 9, 1814," 94–96; Treanor, "Judicial Review before 'Marbury,'" 554–57.

[669] In 1796, Georgians discovered the state legislature had sold to the Yazoo Land Company Indian lands in exchange for bribes. Voters ousted the old legislators for new ones, who promptly repealed the act and redistributed the land, including a tract Robert Fletcher had bought from John Peck. Fletcher sued Peck, claiming Peck never held legitimate title to the land. See *Fletcher v. Peck,* 10 U.S. 87 (1810).

[670] Marshall explained: "Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own [constitution]. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." *Fletcher v. Peck,* 10 U.S. 136 (1810). For a similar North Carolina Supreme Court precedent made five years earlier, see *University v. Foy*, 5 N.C. 58 (N.C. 1805). See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

[671] See Article I, Section 8, Clause 18.

Marshall also interpreted the Clause in this case to constrain a state's economic powers, repudiating the Maryland legislature's attempt to levy a crippling fine a local branch of the Second Bank of the United States,[672] and by extension, overturning similar fines passed by five other states.[673] Over the next two years, Jeffersonian congressmen replied with four proposals for a national amendment to override *McCulloch* by prohibiting further congressional national Bank charters, but all failed.[674] Marshall further cemented federal economic authority in *Gibbons v. Ogden* (1824), holding that a federal statute overrode a conflicting state law regulating interstate steamship traffic.[675] With *Fletcher*, *McCulloch*, and *Gibbons*, Marshall established three separate and independent routes to limit state legislatures' economic regulatory powers.

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[672] With the Federalists' collapse, some mercantile voters and congressmen defected to the Democratic-Republicans, urging President James Madison to charter the Second Bank of the United States, a private bank supported by federal funds. Jeffersonian legislators in Maryland, representing farmers and working men against the speculators and banks, forced the Bank to buy Maryland-stamped currency or face an overwhelming $15,000 yearly fine on the Baltimore office of the bank. The Baltimore office's chief cashier James McCulloch contested the Maryland law. Tennessee, Georgia, North Carolina, Kentucky, and Ohio pushed harsher fines on the national Bank, threatening its existence. Bray Hammond, "The Bank Cases," in *Quarrels That Have Shaped the Constitution.*, ed. John A. Garraty (New York: Harper & Row, 1964), 30–33.

[673] Marshall declared it "the duty of the Court to construe the constitutional powers of the national government liberally," through the Necessary and Proper Clause, "and to mould [these powers] so as to effectuate its great objects" of national economic development. Marshall upheld Madison's chartering of the Bank for the sake of economic development, and rejected the Maryland legislature's tax, which risked destroying the Bank and impeding the goal of the Constitution. *McCulloch v. Maryland,* 17 U.S. 96 (1819). As Keith Whittington notes "*McCulloch* was decidedly activist, but this activism was directed against the states on behalf of the national constitutional regime." Whittington, *Political Foundations of Judicial Supremacy*, 111.

[674] Walter Lowrie, a Democratic-Republican senator from Pennsylvania, declared in Congress: "In proportion as the capital of a moneyed institution is increased, its branches extended, and its direction removed from the body of the people, so also will be increased its power and inclination to do evil and to tyrannize." Lowrie thus proposed an amendment limiting a national bank's charter to the District of Columbia. See *The Debates and Proceedings in the Congress of the United States: Sixth Congress, First Session* (Washington: Gales and Seaton, 1855), 70; Ames, *The Proposed Amendments*, 255–57.

[675] Thomas Gibbons asserted his coasting license to operate steamships between Elizabethtown, New Jersey and New York City, granted under a 1793 congressional statute, trumped a New York statute allowing Aaron Ogden a monopoly over regional steamship traffic. See *Gibbons v. Ogden*, 22 U.S. 1 (1824). The question for the Marshall Court was whether the state and federal governments could have concurrent jurisdiction over interstate commerce, and if so, whether in this case Congress' regulation overruled New York's. While Justice William Johnson's concurrence granted the federal government exclusive interstate commerce powers, Marshall's majority opinion held merely that federal law overrode this New York law. See Article I, Section 8, Clause 3.

The early Marshall Court also extended federal judicial authority to the exclusion of the states. In *Martin v. Hunter's Lessee* (1816), Spencer Roane of the Virginia Supreme Court forced a confrontation with the Marshall Court, which in response seized jurisdiction over cases originating in the state courts.[676] Five years later, in *Cohens v. Virginia* (1821), Marshall again reversed Roane. Roane refused the right of the Cohen brothers, who had illegally sold lottery tickets in Virginia, to appeal to the U.S. Supreme Court, claiming Virginia's police powers granted the state sole jurisdiction over criminal cases.[677] Marshall rejected Roane's claim, arguing the Cohens' appeal concerned federal law, thus extending federal jurisdiction to criminal cases originating in state courts and chipping at states' traditional police powers.

But the early Court left other major constitutional disputes to the states. In *Calder v. Bull* (1798), the Court was forced to decide, among other questions, whether a Connecticut statute violated the state's Constitution. In response, Justice Chase threw out the case, ruling that the Supreme Court could not decide any cases relating solely to state law.[678] This let state courts decide most disputes over state statutes and constitutions.[679]

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[676] *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Denny Martin, heir to land seized by Virginia from the loyalist Lord Fairfax, sued Hunter's Lessee for return of the land under the 1783 Treaty of Paris and 1794 Jay Treaty. Roane ruled the Virginia Supreme Court had jurisdiction over cases originating within their state to the exclusion of the federal Supreme Court. Marshall, having purchased some of the disputed land, recused himself. His ally, the Federalist Joseph Story ruled the Constitution granted the federal courts appellate jurisdiction over civil cases originating in the state courts, overriding Roane's protests. Story cited Art. III Sec. 2 and Art. VI.

[677] *Cohens v. Virginia*, 19 U.S. 264 (1821).

[678] The Connecticut legislature had affirmed both the statute and the constitutional provision, and both laws were within the states' traditional authority over inheritance and property law. Overruling either law risked intervening in the states' legal prerogatives. Justice Samuel Chase dodged this dilemma by holding the Court lacked authority over constitutional disputes within a state that did not relate to federal law. He wrote "this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution (or law) in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its acts of assembly, and usages, and customs. I should think, that the courts of Connecticut are the proper tribunals to decide, whether laws, contrary to the constitution thereof, are void." Chase's decision diffused the potential conflict, excluding the Supreme Court from most matters of state constitutional politics. *Calder v. Bull*, 3 U.S. 386 (1798).

The Marshall Court accordingly deferred electoral and slavery regulation to the states, and, save for the *Cohens* decision, largely respected the states' traditional police powers.

Marshall's deference may have preempted conflict between the Federalist Court and Jeffersonian White House and Congress. While Jeffersonians tried to control the Court, first by impeaching the Federalist Justice Chase, and then by appointing Jeffersonian justices, Marshall still dominated Court deliberations, relegated to the minority in only eight of the thousand cases he heard.[680] By respecting the states' traditional authority over slavery, elections, and police powers, the Federalist Marshall Court avoided direct conflict with hostile Jeffersonian executives and congressmen, shielding the young Court. The rise of the Marshall Court reflects not only Marshall's clever reasoning in cases like *Marbury*, and not only the waning of executive power towards the end of the Era of Good Feelings, but also the Court's relationship with the states. Deference to the states prevented national inter-branch conflict, helping make the Supreme Court and independent, equal federal branch. It also pushed many controversial issues to the states, decreasing pressures for federal constitutional revision.

B. Jeffersonian State Constitutional Revision

This deference and national partisan trends destabilized state constitutionalism. With the election of 1800, Jeffersonians swept both congressional houses, the White House, and many of the state legislatures. For example, in South Carolina in 1800, an alliance of Appalachian frontiersmen and Charleston mechanics and shopkeepers ejected Federalists in favor of a Democratic-Republican governor and legislature. In turn these

[679] However, the Supremacy Clause held the federal Constitution and statutes trumped state constitutions and statutes, giving litigants grounds to appeal to federal courts on state constitutional matters clashing with federal law.

[680] John A. Garraty, ed., *Quarrels That Have Shaped the Constitution.* (New York: Harper & Row, 1964), 11.

Democratic-Republicans increased the number of local elections, opened the farming upcountry to banking and the slave trade, and amended the state Constitution in 1808 to equitably reapportion the legislature, and again in 1810 to repeal taxpaying qualifications on the franchise.[681] This was a common pattern,[682] and many of these legislative switches incited constitutional replacement. Between 1800 and 1849, the states proposed at least 205 constitutional amendments,[683] and thirty-one constitutions to replace previous documents.[684] Of the twenty-two constitutional proposals for which this dissertation has data on legislative party balance, fifteen occurred within three sessions of a switch in legislative control,[685] and the proposals defying this trend were exceptional.[686] In the

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[681] Tidewater Federalist gentry had controlled state politics, limiting the number of legislative seats representing upcountry farmers. See South Carolina Constitution of 1790, Article I, Section 3, Article I, Section 4, Amendment 1 of 1808, Section 7, Amendment 2 of 1808, Section 9, Amendment 3 of 1808, and Amendment 4 of 1810.

[682] Connecticut, however, did not face the same tension between genteel planters and small farmers and so weathered the Jeffersonian revolution. The state remained in Federalist hands until the Republican-aligned Toleration Party captured the lower house in 1817 and the upper house the following year. At the behest of town meetings, the Toleration Party called a constitutional convention, disestablishing the church and allowing taxpayers and militiamen exemptions from the state's property requirement on the vote. See the Connecticut Constitution of 1818, Article I, Sections 3-4 and Article VI, Section 2. Goodman, "The First American Party System," 77–81; Wesley W. Horton, *The Connecticut State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), 5–14; Dubin, *Party Affiliations in the State Legislatures*, 33–34; Cole Blease Graham, *The South Carolina State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2007), 13–16.

[683] This estimate, from the Rise of Modern Constitutionalism dataset, exceeds the more conservative count made by John Wallis.

[684] The era's twenty-two other proposals were made to incorporate new states into the Union.

[685] The data is derived from Dubin, *Party Affiliations in the State Legislatures*. Dubin's data is missing observations for nine of these thirty-one cases. See Table 19 in the appendix on state constitutional replacement and change in partisan control of state Legislatures, 1800-49. The table indicates whether there was a change in partisan control of the legislature three sessions *before* the proposal of a constitution. A cutoff of three sessions recognizes that legislators may need several sessions to move a proposal to a vote, and in some cases are constitutionally required to postpone a vote until subsequent sessions. See, for example, Article LIX of the Maryland Constitution of 1776, requiring proposed amendments be approved by two sequential legislative sessions. Additionally, issues that cut across party lines and internally divide both parties can force realignments. Split from their own party, legislators may bargain with opponents to pass a constitution before formally switching parties. That is, the legislature's formal party balance may also shift slightly *after* a constitutional proposal. Thus this dissertation looks for shifts in partisan control within three sessions after the proposal of a new constitution. A post-ratification change in legislative party balance may also reflect gerrymandering or redistricting mandated by the new constitution. So there is some endogeneity between constitutional revision and partisan balance. See also Sundquist, *Dynamics of the Party System*.

antebellum era, attempts at state constitutional replacement almost always were associated with shifts in state coalition politics.[687] And these new Jeffersonian state legislators and framers had broad prerogatives to regulate slavery, suffrage and elections, and banking and finance.

State convention delegates, legislators, and judges, confronted with regulating slavery, maintained the bisectional consensus. The older, eastern states continued their previous policies.[688] In New England, only Vermont's Constitution mentioned or abolished slavery, but the courts and legislatures of Vermont, Massachusetts, and New Hampshire promised liberty to all persons, including slaves.[689] Rhode Island and Connecticut joined New York, New Jersey, Pennsylvania, and to some degree, Maryland, on the path to gradual emancipation by statute.[690] But courts in Virginia, the Carolinas, and Georgia still largely refused to extend constitutional rights to slaves and blacks, and in 1832, the Virginia legislature defeated a proposal for gradual emancipation.[691]

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[686] Three of the proposals that did not accompany a shift in legislative control occurred during and after Rhode Island's Dorr War of 1841-2, when the state lacked a single legitimate legislature. Vermont too is also a unique case – between 1776 and 1850, the state's constitutions required a council of censors make septennial proposals for a new state constitution, regardless of partisan balance. After 1790, Vermont was the only state to enforce this practice. Pennsylvania's 1776 Constitution and New York's 1777 Constitution allowed for meetings by a similar council, but these constitutions were soon replaced.

[687] Note, however that this dissertation does not note cases where changes in legislative control were not followed by an attempt at constitutional replacement.

[688] Between 1800 and 1820, each state in the Union kept its existing constitution, with many states affirming their constitutional slavery regulations by statute and court decision. The possible exception is Connecticut, which in 1818 replaced the 1662 Charter that governed the state. Delegates to Connecticut's 1818 Convention seem not to have debated slavery. Wesley W. Horton, "Annotated Debates of the 1818 Constitutional Convention," *Connecticut Bar Journal* 65 (1991).

[689] See the Vermont Constitutions of 1777, 1786, and 1793, Chapter 1, Section 1.

[690] New York and Pennsylvania passed personal liberty laws protecting the legal rights of free blacks and punishing slavecatchers who seized freemen, as did the new states of Ohio, and Indiana. Rhode Island eventually banned slavery. See the Rhode Island Constitution of 1842, Article I, Section 4, and also the failed "Landholder's Constitution" of 1842, Article I, Section 19.

[691] Graber, *Dred Scott*, 128.

All nineteen constitutional provisions on slavery passed between 1800 and 1820 were drafted in new frontier states or territories,[692] where the federal government exercised little power and state framers had broad discretion. Framers in Old Northwest states reaffirmed abolition north of the Ohio under the bisectional consensus. In 1800, Democratic-Republican candidates in Cincinnati and in Ross County warned Ohio voters that slavery would bring plantations and a Federalist aristocracy. Swept into office with Jefferson's election that year, Democratic-Republicans dominated Ohio's Constitutional Convention of 1802, where they held majorities on all eight committees and marginalized the proslavery Federalist Governor Arthur St. Clair. Delegates adopted the Northwest Ordinance's Article VI into the state constitution, but allowed indentured servitude for black apprentices, and forbade blacks from voting, office-holding, military service, and legal testimony against whites.[693] Indiana's territorial legislature repealed proslavery territorial statutes and outlawed black indenture in 1810. The state's 1816 Convention passed a constitution, modeled on Ohio's Constitution and Article VI, with an unamendable ban on slavery, though the Constitution allowed continued indenture of existing servants, and forbade blacks from militia service.[694] Slavery in Indiana waned. By 1830 the federal census listed only three slaves in the state,[695] and later reforms

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[692] See Table 16 in the appendix.

[693] The Constitution also declared "no alteration of this constitution shall ever take place so as to introduce slavery or involuntary servitude into this State." See the Ohio Constitution of 1802, Article VII, Section 5 and Article VIII, Section 2. Steinglass and Scarselli, *The Ohio State Constitution*, 1–13; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 76–95.

[694] See the Indiana Constitution of 1816, Article VII, Article VIII, Section 1 and Article IX, Section 7. The state Supreme Court twice upheld the slavery ban four years later, and slaveholders fled west. See *State v. Lasselle*, 1 Blackf. (Ind.) 122 (1821) and *In re Mary Clark, a Woman of Color*, 1 Blackf. (Ind.) 122 (1822).

[695] In 1800, 5.3% of Indianans and 45.3% of Indianan blacks were enslaved. By 1820, the proportion decreased to 1% and 13.3% respectively. Robinson, *Slavery in the Structure of American Politics, 1765-1820*, 404; McLauchlan, *The Indiana State Constitution*, 1–5; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 113–23.

forbade free blacks from immigrating.[696] Facing pressure from Northern antislavery congressmen, framers of the 1818 Illinois Constitution almost exactly imitated Ohio's abolition clause,[697] and six years later Governor Edward Coles led Illinois voters to soundly reject a constitutional convention to redact the clause.[698] But to attract Southern settlers, Illinois framers tacitly endorsed slavery.[699] Over a thousand blacks, mainly slaves and servants, lived in the state at the 1818 Constitution's passage, and formal abolition did not come until the late 1840s.[700]

This constitutional revision pleased congressmen and legislators in other states. Ohio, Indiana, and Illinois conventions formally upheld the Ordinance's abolition requirement and its promise to return fugitive slaves, curbing conflict with slaveholders in bordering Kentucky and Virginia. With slavery waning in the Old Northwest,[701] antislavery congressmen were appeased – the firebrand James Talmadge was a lonely congressional voice of opposition to Illinois' 1818 Constitution. Slavery was, as Hammond writes, "by default, a local question. Consequently, slavery entered local

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[696] The state's 1851 Constitution forbade blacks from immigrating and fined resident blacks for engaging in contract, using profits from these fines to pay blacks to leave the state. See Indiana Constitution of 1851, Article XIII.

[697] Even so, Congressman James Tallmadge, Jr. of New York led thirty-three Northern House members against Illinois' admission to the Union, asserting the state constitution condoned slavery. The Democratic-Republican House quelled Talmadge's revolt, maintaining deference to local voters. Fehrenbacher, *The Slaveholding Republic*, 263.

[698] Finkelman, *Slavery and the Founders*, 38–9, 208n6.

[699] The 1818 Constitution let a person in "state of perfect freedom" indenture himself after "a bona-fide consideration", including any "negro or mulatto" undertaking an apprenticeship. A man was eligible for indenture at twenty-one years old and a woman at eighteen. The legislature also passed harsh slave codes. The Constitution further granted slaveholders a seven-year grace period before slavery was expressly abolished, and allowed the indenture of servants' children. See the Illinois Constitution of 1818 Article VI, Section 1-3.

[700] An 1845 state Supreme Court decision, *Jarrot v. Jarrot*, 2 Gilman 1 (1845), abolished slavery, affirmed by the 1848 Illinois Constitutional Convention, which also outlawed immigration of free and enslaved blacks. At least three Illinois slavery cases predated this one. See also the Illinois Constitution of 1848, Art. XIII, Sec. 16 and Art. XIV. Finkelman, "Evading the Ordinance"; Finkelman, *Slavery and the Founders*, 58–80, 221; Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), 150–55.

[701] By 1820, only 14.3% of blacks in the Old Northwest were enslaved, and these slaves accounted for 1% of the total regional population.

politics in western states and territories far more frequently and intensely than it did national politics prior to 1819."[702]

States south of the Ohio allowed slavery, maintaining the consensus. In 1790, seventeen percent of Kentucky's population was enslaved, enough that Congress, which governed the region under the 1790 Southwest Ordinance, left the institution intact. When a group of seven Protestant ministers proposed abolition at the state's 1792 Convention, the Convention's proslavery majority prohibited the legislature from freeing a slave without compensation or the owner's consent.[703] Tennessee's 1796 Convention also followed the 1776 North Carolina Constitution and 1790 Southwest Ordinance in allowing slavery within the borders of the state, but granted the vote to all freeholders or residents over twenty-one, including blacks.[704] Similarly, Louisiana's territorial legislature passed a slave code, and in 1807, forbade manumission and compensated emancipation.[705] The state's 1812 Convention borrowed many provisions from Kentucky's 1799 Constitution, but curiously redacted all explicit references to slavery.[706] Five years later, Mississippians drafted their own constitution, borrowing heavily from the constitutions of Kentucky and Tennessee, but allowing the legislature to emancipate

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[702] Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 1–8.

[703] The state's second convention, in 1799, renewed this provision and expressly stripped "negroes, mulattoes, and Indians" of the vote. See the Kentucky Constitution of 1792, Article IX and the Kentucky Constitution of 1799, Article II, Section 8. Robinson, *Slavery in the Structure of American Politics, 1765-1820*, 385–86, 404; Ireland, *The Kentucky State Constitution*, 1–5; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 2.

[704] See the Tennessee Constitution of 1796, Article I, Section 26 and Article III, Section 1. Laska, *The Tennessee State Constitution*, 2–7.

[705] Fehrenbacher, *The Slaveholding Republic*, 261.

[706] See the Louisiana of 1812, Article II, Section 8 and Article III, Section 4. Delegates to the 1812 Convention further entrenched the state's planter class with property and tax requirements on the franchise and the requirement a gubernatorial candidate hold an impressive five thousand dollars in landed estate. See the Louisiana of 1812, Article II, Section 8 and Article III, Section 4. Hargrave, *The Louisiana State Constitution*, 2–3.

slaves for "distinguished service" to the state, with compensation paid to the owner.[707] In sum, between 1800 and 1828, the state conventions elaborated the bisectional bargain struck at the Convention. With the question of territorial abolition settled for the time, the issue presented little national controversy.

The states also took up suffrage and electoral reform. Revolutionary-era state framers, worried that tenant farmers and the urban poor were not materially invested in their community or wealthy enough to think and vote independently, conditioned voting and office-holding on private property ownership and taxpaying.[708] All thirteen original states passed property or taxpaying requirements,[709] disenfranchising women, blacks, Indians, and white male tenant farmers, transients, and urban workers.[710]

But with the rise of urban manufacturing, mechanics, workingmen, shopkeepers, and immigrants rallied for labor and suffrage reform. Baltimore mobs pushed the Maryland legislature to reject property requirements in 1801. In Milwaukee, German and Irish immigrants organized to claim the franchise. And in Richmond, disenfranchised protestors presented the 1829 state convention with a formal petition. Small farmers

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[707] The Constitution also promised slaves courts for trial. See the Mississippi Constitution of 1817, Article V, Section 6 and Article VI. Winkle, *The Mississippi State Constitution*, 2–5.
[708] Keyssar, *The Right to Vote*, 5.
[709] Wood, *The Creation of the American Republic, 1776-1787*; Lutz, *Popular Consent and Popular Control*; Kruman, *Between Authority and Liberty*; Adams, *The First American Constitutions*.
[710] Ascriptive civic philosophies reinforced this exclusion. Smith, *Civic Ideals*, 40–86. Delegates to Maryland's 1776 Convention, worried by recent agrarian riots, restricted the franchise to the wealthiest half of property owners. In 1775 in Philadelphia, property requirements limited the franchise to a tenth of male taxpayers. Philadelphia's franchise restrictions were unusually harsh for a colonial city. McKinley calculates only 335 of the city's 3,452 male taxpayers could vote. Pennsylvania's 1776 constitutional convention repudiated this colonial statute by enfranchising freemen who paid a minimal tax. Similarly lax requirements in New Hampshire, Massachusetts, Connecticut, and Rhode Island enfranchised two-thirds to three-quarters of freemen. A few radicals, including Ethan Allen of Vermont, rejected property qualifications outright, on the grounds that government by consent, and voting, was a natural right, or a right earned as compensation for Revolutionary War service. Vermont alone eschewed property requirements entirely. McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America*, 284–92; Kruman, *Between Authority and Liberty*, 87–90; Keyssar, *The Right to Vote*, 12–19; Adams, *The First American Constitutions*, 196–202; Nash, *The Unknown American Revolution*, 284–88.

across the country faced similar disenfranchisement. A muster of 1,000 Shenandoah County, Virginia militiamen found that 700 lacked the vote.[711] New York had long excluded tenant farmers,[712] particularly those in Westchester and Duchess Counties on the east Hudson,[713] such that by 1821, only seventy-eight percent of adult male New Yorkers could vote for assemblymen, and only thirty-nine percent for the governor or senators.[714] In 1839, the Hudson Valley's tenant farmers revolted and formed roving militias, attacking sheriffs, threatening to burn cities and estates, and skirmishing with the state militia.[715]

Antebellum state framers were amenable to franchise reform. From Massachusetts to Illinois to Virginia and Alabama, convention delegates argued enfranchised militiamen were more loyal, obedient, and in the South, better able to stop slave revolts. Thanks to Congress' liberal enabling acts to admit a territory to the Union, in some territories, male taxpayers with a year of residence could vote for delegates to a territory's constitutional convention. This new generation of convention delegates and state legislators worked as

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[711] In Loudon County to the north, 1,000 of 1,200 were disenfranchised. Keyssar, *The Right to Vote*, 34–37.
[712] In the Hudson River Valley, a cabal of planter dynasties like the Livingstons and Van Rensselaers leased land to tenant farmers. When, in 1765, the manager of a large manor arbitrarily cut leases from a three to one-year term, William Prendergast organized a hundred fellow farmers to march on Manhattan, where Prendergast was captured. Justice Robert R. Livingston sentenced Prendergast to death, but citizens protested the execution, securing Prendergast's release. A decade later, Livingston led the state's 1777 Constitutional Convention to restrict the vote for state assemblymen to those who held twenty pounds in freehold or rented a tenement valued at forty shillings, enfranchising only 70.7 percent of the heads of families and 60 percent of white males. Adult males with at least a hundred pounds in freehold – only 28.9 percent of the total – could vote for state senators or governor. See the New York Constitution of 1777, Article VII and X. Countryman, *The American Revolution*, 9–14; Nash, *The Unknown American Revolution*, 72–87.
[713] Peter J. Gallie, *The New York State Constitution: A Reference Guide* (New York: Greenwood Press, 1991), 1–10; Peter J. Gallie, *Ordered Liberty: A Constitutional History of New York* (New York: Fordham University Press, 1995), 9–94; Keyssar, *The Right to Vote*, 228; Adams, *The First American Constitutions*, 202–5.
[714] Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 56.
[715] Edward Potts Cheyney, *The Anti-Rent Agitation in the State of New York, 1839-1846* (Philadelphia: Porter & Coates, 1887).

village lawyers, farmers, mechanics, and shopkeepers, and felt independent employment – not property wealth – allowed independent voting,[716] arguing for franchise expansion.

Martin Van Buren was one such delegate.[717] In 1821, he attended the New York Constitutional Convention, organizing delegates against a proposal for freehold qualification of 250 dollars in state elections. Defeating the amendment would double the state electorate, enfranchising 75,000 new freeholders, mainly "mechanics, professional men, and small landholders… constituting the bone, pith, and muscle of the population of the State."[718] The Convention enfranchised all white males who served in the military or paid taxes, though free black males had to hold a prohibitively high 250 dollars in taxable property.[719] Along the Hudson and around Albany, hotbeds of tenant farmer agitation, Van Buren found a mass political base, turning sporadic rural unrest into a statewide machine dubbed the Albany Regency. Van Buren's men nearly unseated the patrician Governor DeWitt Clinton in 1820, boosting Van Buren to the Unites States Senate in

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[716] However, these Jacksonian framers maintained the republican belief that material and economic freedom allowed political freedom. Keyssar, *The Right to Vote*, 30, 37–39.

[717] The son of a tavern keeper, Van Buren hailed from the rural village of Kinderhook, New York. He left school at fifteen to clerk for a backcountry lawyer, practiced law independently, won a state senate seat in 1813 at the age of thirty-three, and three years later rose to state Attorney General. Hofstadter, *The Idea of a Party System*, 212–26.

[718] For Van Buren, free labor guaranteed the material independence that qualified one to vote. But this disqualified those who did not own their labor – women, slaves, and perhaps Indians and aliens. The vote would go only to men, "who have wives and children to protect and support." Note also Van Buren opposed a motion to enfranchise highway workers, who he worried would defer to their employers, asserting that in this case, "The people were not prepared for universal suffrage." Martin Van Buren, "Mr. Van Buren Against the Property Qualification for the Right of Suffrage," in *The Extra Globe, Containing Political Discussions, Documentary Proofs, &C.*, ed. Francis Preston Blair and Amos Kendall, vol. IV (Washington: The Globe, 1820), 190–92; Nathaniel Hazeltine Carter and William Leete Stone, *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York: Containing All the Official Documents, Relating to the Subject, and Other Valuable Matter* (Albany: E. amd E. Hosford, 1821), 190–92; Keyssar, *The Right to Vote*, 45; Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 56–57.

[719] See the New York Constitution of 1821, Article II, Section 1. Smith, *Civic Ideals*, 172.

1821. In response Clinton capitulated and sponsored a successful constitutional amendment removing tax and service requirements on the franchise in 1826.[720]

In the 1820s and 1830s, these workingmen seized state legislatures and conventions. Democrats and Whigs competed to expand their base by enfranchising new groups, repealing property qualifications.[721] Delaware eliminated constitutional property qualifications in 1792,[722] Maryland in 1802,[723] Massachusetts in 1821, and New York in 1826.[724] For new western territories, enfranchisement also promised more settlers and quicker admission to the Union. Kentucky's 1792 Convention extended the vote to all male residents older than twenty-seven, including blacks and Indians.[725] Delegates to the 1796 Tennessee Convention put only a token freehold requirement on the white male franchise.[726] Five of the next eight states admitted enfranchised almost all white males.[727] White males twenty-one or older could vote under Indiana's 1816 Constitution after a year of residence in the state, while Alabama's 1819 Constitution lowered the

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[720] Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 58.
[721] There were opponents of franchise expansion. In an 1817 letter to James Madison, John Adams confided "The questions concerning Universal Suffrage, and those concerning the necessary limitations of the Power of Suffrage, are among the most difficult. It is hard to Say, that every man has not an equal right. But, admit this equal Right, and equal Power, and an immediate Revolution would ensue." Three years later, at the Massachusetts' Constitutional Convention, Adams argued to maintain property limitations, but Massachusetts repealed the limits the following year, granting the vote to all adult males who were taxpaying resident citizens. John Adams, "Letter to James Madison, June 17, 1817," in *The Works of John Adams, Second President of the United States: With a Life of the Author, Notes and Illustrations*, ed. Charles Francis Adams, vol. X (Boston: Little, Brown, 1817), 267–68; Smith, *Civic Ideals*, 172; Keyssar, *The Right to Vote*, 271.
[722] See the Delaware Constitution of 1792, Article IV, Section 1 (which maintained a taxpaying requirement).
[723] See the Maryland Constitution of 1776, Article II, Amendment 7 of 1802.
[724] See the New York Constitution of 1821, Article II, Section 1, Amendment 2 of 1826.
[725] The 1799 Kentucky Constitutional Convention later excluded the latter two groups. See the Kentucky Constitution of 1792, Article I, Section 11 and the Kentucky Constitution of 1799, Article II, Section 8. Ireland, *The Kentucky State Constitution*, 1–5.
[726] See the Tennessee Constitution of 1796, Article III, Section 1.
[727] Smith, *Civic Ideals*, 171.

requirement to three months.[728] Hence, while the number of states nearly doubled between 1790 and 1830, the number of states with property requirements actually decreased. Most suffrage reform was complete by the 1820s, allowing Andrew Jackson to campaign and win in 1828 on a workingmen's platform. Between 1830 and 1855, the few states maintaining property qualifications repealed these laws.[729] Since enfranchisement might also draw immigrants to a state and boost the state's tax revenues and land values, many new western states further relaxed constitutional suffrage restrictions.[730]

Year	1776	1790	1800	1810	1820	1830	1840	1850	1855
States in Union	13	13	16	17	23	24	26	31	31
States with Property Requirements	13	10	10	9	9	8	7	4	3
Percent of States with Prop. Req.s	100	77	63	53	39	33	27	13	10

Table 6: States with Property Requirements on the Franchise.
Data from Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 336.

States relaxed other restrictions on the franchise and participation. By 1855, only six states maintained taxpaying qualifications for voters, down from a peak of twelve. Through the 1830s, Democratic legislators enfranchised resident aliens.[731] State legislators and framers also scrapped municipal franchise restrictions, liberalized office-

[728] See the Indiana Constitution of 1816, Article VI, Section 1 and the Alabama Constitution of 1819, Article III, Section 5.
[729] On capturing the governorship, Democrats enfranchised North Carolina's landless poor in 1850. An influx of Anglo-American immigrants to Louisiana pushed the legislature, long controlled by French planters under the conservative 1812 Constitution, to call a convention. The state's 1845 Convention scrapped property and taxpaying requirements to extend the vote to all adults over twenty-one with two years of state residency, reapportioned the legislature, and increased the number of elected offices. See the Louisiana Constitution of 1845, Title II, Articles 8 and 10. Hargrave, *The Louisiana State Constitution*, 1–5.
[730] Delegates to Illinois' 1847 Constitutional Convention proposed loosening the state's franchise restrictions to increase immigration and repay the state's loans
[731] Delaware, South Carolina, Indiana, and Michigan reduced residency requirements on the franchise. After Pennsylvania Whigs passed an 1836 Registry Act to temper the Democratic vote, Democrats halved residency requirements at the state's 1837 Constitutional Convention, hoping to attract new immigrant voters. Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 59.

holding requirements and religious tests, and established judicial elections.[732] Of the seven states admitted between 1800 and 1828, six allowed voters to approve amendments or conventions by referenda.[733] And across the country, state legislators and framers reapportioned legislative districts to equitably represent these new voters.[734]

This electoral reform occurred almost entirely through state constitutional revision. Between 1790 and 1855, at least fifty-nine state-level legal provisions elaborated or repudiated property and taxpaying qualifications. Of these, forty-six were constitutional provisions and thirteen were statutory, and even these few statutory provisions had a quasi-constitutional function in bounding the polity.[735] Framers also entrenched these franchise regulations in the state constitutions to prevent partisan legislators from disenfranchising their opponents' base.[736] Similarly, to preempt gerrymandering by legislators, state framers often entrenched apportionment rules in the constitutional text. Attempts to correct malapportionment usually meant calling a

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[732] When the Connecticut Convention of 1818 replaced the state's outmoded colonial charter and broadened the franchise, it also provided for annual elections, legislative amendment and election of judges, and amendment by referendum. See the Connecticut Constitution of 1818, Article 6 and Article 11, Section 1. Sturm, "The Development of American State Constitutions," 63–66; Keyssar, *The Right to Vote*, 29–32, 50–52.

[733] Missouri was the lone exception. By referendum, Massachusetts voters legalized the constitutional referendum process three years later. Dealey, *Growth of American State Constitutions*, 42–46.

[734] G. Alan Tarr, *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* (Westport, CT: Greenwood Press, 1996), 102–5.

[735] . In drafting these constitutional compacts, framers determined who belonged to the community and had citizenship rights, including the franchise. See the 1776 Virginia Constitution, Section 3: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." See also Section 6: "all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage." For a list of state franchise regulations in force between 1790 and 1855, see Keyssar, *The Right to Vote*, 330–35. Not all of these provisions were drafted between 1790 and 1855.

[736] Jonas Platt reminded New York's 1821 Convention that "the qualifications of voters should be fixed with precision by the constitution, and that nothing should be left to the legislature. That department of the government was fluctuating, and liable to high party excitement." Carter and Stone, *Reports of the Proceedings and Debates of the Convention of 1821 Assembled for the Purpose of Amending the Constitution of the State of New York*, 278.

convention.[737] In sum, by the Jacksonian era state framers had revised their constitutions to expand the franchise.[738]

State constitutional guarantees of white male suffrage appeased riotous farmers, workingmen, and militiamen. Mass suffrage let parties herd these new voters to the polls and to party caucuses, parades, rallies, and barbecues. Party identification absorbed and tempered class identification, perhaps preempting national labor agitation.[739] Thanks to state reforms, many small farmers now vented their discontent at the polls by voting Democrat. Rowdiness became rote and routinized. In frontier states, the guarantee of

[737] North Carolina did this by amendment. John V. Orth, *The North Carolina State Constitution: With History and Commentary* (Chapel Hill: University of North Carolina Press, 1993), 8–11; Tarr, *Understanding State Constitutions*, 103.

[738] Van Buren captured the nation's spirit in his speech to New York' 1821 Convention. Attacking the aforementioned proposed amendment limiting the vote to men with 250 dollars in freehold property, Van Buren declared "in none of [the Southern] Constitutions, nor in those of any state in the Union, except North Carolina, was such a provision as that proposed by the amendment to be found. In the Constitution of the Union, too, which has been in operation long enough to test the correctness and soundness of its principles, there was no excessive freehold representation." Van Buren, "Mr. Van Buren Against the Property Qualification for the Right of Suffrage," 190–92.

[739] Suffrage and malapportionment reform appeased small farmers and urban mechanics, allowing mass parties to absorb these groups. Moreover, state framers and legislators mandated winner-take-all districts, creating a two-party system that muscled out organized class-based third parties like New York's radical Working Men's Party, which was coopted by the state's growing Whig Party. The movement, as Sean Wilentz writes, "had been reclaimed by more conventional politicians; after 1832 the consolidation of a new brand of establishment politics, under the aegis of the Democrats and the emerging Whigs, would preclude the rise of anything like the Working Men's movement for twenty years." Contrast this to Europe, where exclusion of urban laborers prompted the organization of workingman's parties. Admittedly, this is not the sole explanation for America's lack of partisan organizing by class. For example, Alexander Keyssar asserts colonial American planters substituted slave labor for peasant labor, and hence never faced the peasant revolts and class organizing that forced western European nations to pass national suffrage reform in the nineteenth century. For a broad discussion of this phenomenon and question, see Eric Foner, "Why Is There No Socialism in the United States?," *History Workshop*, no. 17 (April 1, 1984): 57–80; Wilentz, *Chants Democratic*, 213; Keyssar, *The Right to Vote*, 70.

legal recognition might have preempted settlers from mobilizing in the first place.[740] In sum, most states broadened the white male franchise and saw relative peace.[741]

Admittedly, when reform came, it was not always peaceful. Under Rhode Island's antiquated constitution,[742] the state's southern rural districts, comprising a third of the state's population, elected a majority of the state's legislators, mainly rural planters, who exempted themselves from taxes and refused to reapportion districts toward growing cities. These same planters repeatedly renewed freehold qualifications from 1762 that disenfranchised a majority of voters, including Providence's recent Irish immigrant textile workers.[743] In the 1820s, a carpenter named Seth Luther began stumping the state calling for constitutional reform. After legislators rebuffed five attempts to revise the Constitution,[744] in 1840, voters installed a new cohort of Whig legislators who called a

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[740] Alabama's founding 1819 Constitution exemplifies the frontier democracy for white males. For the connection between the frontier and democracy, see Frederick Jackson Turner, *The Frontier in American History* (Mineola, NY: Dover Publications, 1920). Contrast Alabama to neighboring Louisiana, which, due to longstanding Mississippi trade routes, had an established French planter class which, when framing the state's founding 1812 Constitution, legally excluded poor whites. Note also that through the 1820s and 1830s, turnout in frontier states did not reach levels seen in the east. McCormick, "New Perspectives on Jacksonian Politics," 297–98.

[741] This is not a causal claim that franchise reform and appeasement alone guaranteed constitutional stability. Other stories are also possible. In many older eastern states, a history of successful legal constitutional reforms, including but not limited to suffrage reform, might have dissuaded citizens from extralegal violence, stabilizing a state's constitutional politics. And most frontier states were sparsely settled by whites, precluding the longstanding class grievances, legal repression, and urban mobilizing that led some poor eastern farmers and mechanics to extralegal violence.

[742] The Constitution, modified from the 1663 charter, assigned seats in the lower house two to a town, regardless of population. The large cities of Providence, Portsmouth, and Warwick held four seats, and Newport, six, though this was still not proportionate to their population. William M. Wiecek, "'A Peculiar Conservatism' and the Dorr Rebellion: Constitutional Clash in Jacksonian America," *The American Journal of Legal History* 22, no. 3 (July 1, 1978): 241, doi:10.2307/845183.

[743] The state conditioned voting on holding 134 dollars in real estate, inheriting a freehold, or renting property for at least seven dollars. Legislators in 1811 refused a bill to relax franchise restrictions, and in 1817 tabled a call for a convention.

[744] The legislature offered in February, 1821 to call a convention, but refused to address the suffrage issue, so Providence voters defeated the proposition. Three years later voters approved a convention, but delegates were selected under the standing malapportionment scheme and they maintained malapportionment and suffrage restrictions, and even scrapped the clause enfranchising the sons of freemen. Voters rejected this proposed 1824 constitution. Five years later the legislature rejected an appeal by Providence residents for suffrage expansion. And an 1834 convention dissolved for lack of quorum, leaving apportionment and suffrage laws untouched. Arthur May Mowry, *The Dorr War: Or, The*

sixth constitutional convention in February 1841. Still skeptical of legislative reform, the populist Rhode Island Suffrage Association, backed by the ousted Democrats, called a competing, extralegal "People's Convention" staffed by urban workers and led by the radical Democrat Thomas Dorr, which reversed franchise exclusions and malapportionment.[745] Voters approved the People's Constitution over the legislature's constitution, and the radical faction elected a separatist legislature and Dorr as their governor. In early May 1842, Dorr assembled a company of several thousand militiamen and laborers and marched on Providence, where he and his legislature were inaugurated. President Tyler rebuffed Governor Samuel King's request for federal troops to thwart Dorr,[746] and Congress too refused to intervene.[747] In the early hours of May 18th, Dorr rallied four hundred supporters to storm the arsenal at Providence. Church bells across the city called loyalist militiamen to defend the arsenal, which Dorr, joined by Luther, prepared to shell. But Dorr's cannons failed to fire, and his troops retreated to the rural town of Chepachet. The separatist legislature dissolved, and with a thousand-dollar bounty on his head, Dorr fled the state. The following year, a new convention extended

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Constitutional Struggle in Rhode Island (Providence: Preston & Rounds, 1901), 28–38; Dealey, *Growth of American State Constitutions*, 42, 49–50; Tarr, *Understanding State Constitutions*, 102; Keyssar, *The Right to Vote*, 71–76, 333.

[745] The People's Convention expanded the franchise to all white males with a year of residency and reapportioned districts to reflect population growth in Providence and the state's northern mill towns.

[746] Tyler rejected that "an exigency [would] arise which the unaided power of the State could not meet." John Tyler, "Letter to Samuel King, May 7, 1842," in *A Compilation of the Messages and Papers of the Presidents: Prepared Under the Direction of the Joint Committee on Printing, of the House and Senate, Pursuant to an Act of the Fifty-Second Congress of the United States*, vol. V (Bureau of National Literature, 1842), 2146–47.

[747] Similarly, Taney's Supreme Court refused to judge the legitimacy of the arrest of Martin Luther, a Dorr supporter, deeming this a political question best left to the political branches. In effect, this affirmed the decisions by Tyler and Congress to defer to Rhode Islanders to resolve their controversy. See *Luther v. Borden*, 48 U.S. 1 (1849). Mowry, *The Dorr War*, 268.

the vote to all males who paid a token tax, including blacks, restoring peace to Rhode Island.[748]

Rhode Island shows the danger of withholding the vote from mobilized, armed, angry white Jacksonian men. Other states saw the same tensions over class, the vote, and malapportionment,[749] and could have faced Rhode Island's fate.[750] There were exceptions. Virginians peacefully submitted to franchise restrictions,[751] Louisiana refused reform until an 1845 convention, and North Carolina legislators and convention delegates appeased Appalachian farmers with token reapportionment and franchise expansion.[752] Conversely, suffrage expansion did not always guarantee stability. Anglo-Americans in

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[748] However, the 1843 Constitution as recorded in Joseph Wallis' State Constitutions Project maintains the state's original property qualification until repealed by a 1950 amendment. See the Rhode Island Constitution of 1843, Article II, Section 1. See Wallis, "The NBER - Maryland State Constitutions Project." Malapportionment too remained a point of contention. Wiecek, "'A Peculiar Conservatism' and the Dorr Rebellion," 240–45; Keyssar, *The Right to Vote*, 71–76, 333; Patrick T. Conley and Robert Flanders, *The Rhode Island State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2007); Erik J. Chaput, *The People's Martyr: Thomas Wilson Dorr and His 1842 Rhode Island Rebellion* (Lawrence, Kansas: University Press of Kansas, 2013), 119–81.

[749] Since Rhode Island's textile mills were the nation's first, by the 1820s, the state's labor movement was older and stronger than most, but so much so as to make the state an unrepresentative case for studying reform movements. Immigrants streamed into Massachusetts and Connecticut textile mills and New York factories, where they agitated for labor and suffrage reform. Malapportionment, held over from the colonial era, wracked Virginia politics. Wiecek, "'A Peculiar Conservatism' and the Dorr Rebellion," 240; Keyssar, *The Right to Vote*, 70–71, 76.

[750] As Keyssar concludes, there is "little reason to think that other industrializing states would have avoided similar conflict and tumult – culminating in similarly restrictive suffrage laws – had they delayed franchise reform another generation or more." Keyssar, *The Right to Vote*, 76.

[751] Appalachian small farmers called an extralegal convention in Staunton, Virginia in 1816 to repeal franchise restrictions and a malapportionment scheme that benefitted eastern tidewater planter counties. The legislature passed piecemeal token reform until a popular vote forced a convention in 1829. But legislators granted four representatives for each county. Since the tidewater held a disproportionate number of counties, genteel eastern Jeffersonians dominated the convention, maintaining malapportionment and instituting a complex system of leasing and home-owning requirements on the franchise that kept a third of white males from the polls. A few provisions appeased voters along the Blue Ridge Mountains, who remained loyal to Virginia, splitting them from their more radical western Allegheny counterparts. The reform movement splintered, and tidewater counties continued to dominate the state senate, even after an 1850 Convention. Despite generations of malapportionment and suffrage restrictions, most Virginians lived happily under their conservative constitutions. Far westerners would only receive equal apportionment on seceding from Virginia to form West Virginia in 1863. Smith, *Civic Ideals*, 173; Robert M. Bastress, *The West Virginia State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1995), 3–9.

[752] Framers in these states further appeased white small farmers by stripping civil rights from free blacks, who these farmers may have seen as an economic threat. Early in the nineteenth century, state legislators and convention delegates in these states laid the groundwork for later Jim Crow laws. Hargrave, *The Louisiana State Constitution*, 1–5; Orth, *The North Carolina State Constitution*, 2–10.

California, New Mexico, and Texas granted broad suffrage to white males, but still faced domestic turmoil, forming separatist governments to split from Mexico.[753] After 1801, Maryland refused property and taxpaying qualifications but maintained malapportionment, leading a reform party to consider armed revolt.[754] And in 1838, a narrow and corrupt Democratic victory in the Pennsylvania gubernatorial election led the deposed Whig governor to rally militiamen to seize the state armory, despite the state's liberal franchise laws.[755] But again, these are the exceptions. Between 1800 and 1850 most states reformed their constitutions to repeal taxpaying and property qualifications,[756] and most of these states had stable constitutional politics.[757]

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[753] Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, *The California State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), 1–9; Chuck Smith, *The New Mexico State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1996), 2–4; Janice C. May, *The Texas State Constitution* (New York: Oxford University Press, 2011), 9–14.
[754] Jameson, *A Treatise on Constitutional Conventions*, 216; Dealey, *Growth of American State Constitutions*, 49.
[755] William Henry Egle and Joseph Ritner, "The Buckshot War," *The Pennsylvania Magazine of History and Biography* 23, no. 2 (1899): 137–56; Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914*, 49; Richard P. McCormick, "Political Development and the Second Party System," in *The American Party System: Stages of Political Development*, ed. William N. Chambers and Walter Dean Burnham (New York: Oxford University Press, 1967), 134–47, 154–66.
[756] See Table 7. This table only accounts for residency requirements as they relate to taxpaying and property requirements. It does not list standalone residency requirements, though compared to taxpaying and property requirements, these were fairly rare.
[757] Table 7 considers a state's constitutional politics unstable if it faced prolonged constitutional agitation by white males via riots, militia mobilizing, or extralegal constitutional conventions. Antebellum slaves, blacks, and abolitionists also rioted and revolted, but these groups more often protested black slavery, not black disenfranchisement. And at the very end of the antebellum era, women began rallying for suffrage. But between 1800 and 1850, most legal and extralegal organizing around suffrage reform was undertaken by white males. Hence, this study of this era concerns instability caused by white men. Hargrave, *The Louisiana State Constitution*, 1–5; Orth, *The North Carolina State Constitution*, 2–10; Tarr, *Understanding State Constitutions*, 105.

Stable Constitutional Politics Strict Qualifications	Lax or No Qualifications
LA 1812: requires voters own property, pay taxes in the last six months, or have purchased federal land NC 1823(F), 1833(L), 1835 (F, A): 1835 amendments require 50 acres to vote for Senate, taxpaying for Governor and House vote NY 1801(F), 1804(S): 1801 Convention maintains 1777 requirement for a 20 pound freehold or rental of a tenement for 40 shillings per yearly ; 1804 statute changes the tenement requirement to $25 per year VA 1804(S), 1816(F), 1829, 1850: 1804 statute maintains 1762 requirement of 25 cleared acres or 50 acres total; 1830 Convention adds exception enfranchising some leasing land; 1850 Convention repeals property requirements	AL 1819: no qualifications AR 1836: no qualifications CT 1818, 1845(A): 1818 convention maintains lax 1796 statutory requirement voters own $134 in property or a freehold worth $7 per year, exempts taxpayers and militiamen from property qualifications; 1845 amendment repeals property and tax qualifications DE 1831: 1831 Convention maintains 1792 amendment enfranchising anyone who paying taxes within the last six months, with exceptions FL 1838: no qualifications GA 1833(F), 1839(F): maintains 1798 Constitution's provision enfranchising anyone paying taxes within the last year IA 1846(F), 1848: no qualifications IL 1818, 1848: no qualifications IN 1816: no qualifications KY 1850: no qualifications LA 1845: no qualifications MA 1821(F, A): 1821 amendment enfranchises anyone paying taxes within last two years unless exempt from taxes, repeals 1780 property qualification requiring 3 pounds in annual income or 60 pounds in estate for Senate vote ME 1819: no qualifications MI 1835, 1850(F): no qualifications MO 1820, 1845(F): no qualifications MS 1817, 1832: in 1817 requires taxpaying or militia service; drops this requirement at 1832 Convention NH 1847(S), 1850(F): 1792 provision disenfranchises those who opt out of tax payment; 1847 statute enfranchises them after a year of tax payment NJ 1807(S), 1844: 1807 statute enfranchises those worth 50 pounds and all taxpayers; 1844 convention repeals this NY 1821, 1826(A): in 1821 drops property requirement for whites, keeps $250 requirement for blacks, institutes taxpaying requirement, with exceptions for militiamen, firemen, and resident highway workers; subsequent conventions maintain this OH 1802: enfranchises taxpayers, exempting resident highway workers OR 1843(F), 1845(F): no qualifications SC 1810(A): 1810 amendment repeals 1790 tax qualification, maintains 50 acre freehold from 1790 Constitution TN 1835: repeals freehold 1796 qualification VT 1814(F), 1822(F), 1828(F), 1836(F), 1843(F), 1850(F): no qualifications WI 1846(F), 1848: no qualifications
Unstable Constitutional Politics Strict Qualifications	**Lax or No Qualifications**
RI 1824(F), 1834(F), 1841(F), 1842: failed conventions maintain 1762 statute requiring a freehold worth 40 pounds or 40 shillings per year, with exceptions for freeholders' sons; 1842 Convention requires $134 in real estate or $7 in yearly rentals, with exceptions	CA 1849: no qualifications MD 1801(S), 1850(F): 1802 amendment repeals 1776 freehold qualification of fifty acres or thirty pounds in value; no tax qualifications NM 1848(F), 1849(F), 1850(F): no qualifications NY 1837(F), 1846: maintains 1821 qualifications PA 1833(F), 1838: maintains 1970 provision enfranchising those paying taxes in the last two years with minor exemptions TX 1836(F), 1845: no qualifications

Table 7: State-Level Outcomes of Attempts at Regulation of Property and Tax Qualifications on the Franchise, 1800-50.

Franchise regulations listed above are passed by constitutional convention, unless noted as a legislative constitutional amendment (A) or statute (S). Also included are failed conventions (F) and legislative committees (L) that proposed but did not ratify a new constitution to displace standing franchise regulations. These standing regulations, made by a previous legislature or convention, are listed after the failed convention or committee. For details on the stability of constitutional politics in each state, see Table 20 in the appendix.

This state constitutional revision helped preempt Congress from proposing a national amendment regulating suffrage. Between 1800 and 1849, members of Congress proposed at least 476 amendments to the federal Constitution. Not one directly addressed suffrage qualifications.[758] This was not for lack of congressional authority, as Congress could have overturned local and state constitutional election law through a single federal amendment, as it later would through the Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.[759] Rather, antebellum congressmen continued to respect the states' traditional authority over franchise law, perhaps in part because the states so competently and thoroughly addressed the issue. Further, antebellum suffrage movements, concerned with local questions of labor, apportionment, and enfranchisement, did not bridge states or regions, preventing the rise of a single national campaign for an amendment.[760]

In restricting the franchise to white males, state framers also helped settle and define the extent of antebellum citizenship.[761] With industrialization and land shortages pushing white men into urban wage labor, state framers abandoned prohibitive property

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[758] Ames' summary mentions no antebellum proposals for a suffrage amendment, nor does Kyvig's study, which asserts the antebellum Congress avoided the suffrage issue. Ames, *The Proposed Amendments*; Kyvig, *Explicit and Authentic Acts*, 386–87.
[759] During debates over the Fifteenth Amendment, congressmen proposed repealing state-level property, gender, age, and racial franchise restrictions. Kyvig, *Explicit and Authentic Acts*, 178.
[760] However, in responding to local movements, state framers might borrow a provision from a neighboring or recently-framed constitution or from a compendium of state constitutions, and convention debates frequently referred to other states' constitutions. Tarr, *Understanding State Constitutions*, 99.
[761] Voting and citizenship were not identical – one could be a non-voting citizen as a free black, woman, transient, child, and sometimes as an immigrant, slave, or Indian. But in the era of Jacksonian mass democracy, voting marked complete citizenship. Repudiating universalistic Revolutionary-era natural rights language, antebellum state framers expressly described voting as a civil right or privilege. The franchise was, in the words of John Kennedy of New York's 1846 Convention "not a natural right," but "a privilege, a franchise, a civil right," conditioned on "mature age and sex." Sherman Crosswell and R. Sutton, *Debates and Proceedings in the New-York State Convention, for the Revision of the Constitution* (Albany: The Albany Argus, 1846), 783. The vote was reserved to full members of the political community, usually exclusively white male citizens. Scalia, *America's Jeffersonian Experiment*, 58–62.

and tax qualifications, instead asserting that independent labor allowed the material independence needed to vote.[762] This disenfranchised dependent laborers like women and slaves, and some free blacks, Indians, and aliens. But other free blacks, Indians, and resident aliens were wage laborers and potential voters. Framers in some states closed this loophole by asserting that blacks, Indians, and immigrants, like women and children, lacked the mental and moral capacities for citizenship and thus the vote.[763] For example, delegates to Maine's 1819 Convention excluded Indians from the state polity and vote, but included free blacks in both.[764] New York, Massachusetts, Connecticut, Vermont, Maryland, and Virginia, which had granted the vote to any inhabitant, revised their constitutions to enfranchise only citizens, excluding aliens, as did every new state constitution drafted between 1800 and 1840, save Illinois.'[765] Free blacks lost the vote in Connecticut, North Carolina and Tennessee in 1835, and Pennsylvania in 1839,[766] and in New Jersey in 1844, which in 1807 repealed the nation's only provision to allow female

[762] Keyssar, *The Right to Vote*, 46–48.
[763] The relationship between voting and citizenship varied by party. Jacksonians sought to guard America's agrarian virtue from the industrial revolution and reformist Whigs, and thus Democrats took a binary approach to civic inclusion. As Watson explains, "For Jacksonians, equality was absolute and indivisible. If a man was entitled to some privileges of citizenship, he was entitled to all of them, and there could be no intermediate classes of partially enfranchised or semi-equal citizens." Democrats granted white males full citizenship, including German and Irish immigrants. Since a "true Jacksonian Democrat was master of his own house, shop, or farm," women, who Democrats felt relied on men, were excluded from the vote. Whigs relied on the same white male constituency as the Democrats, but had a more nuanced idea of citizenship, excluding some white male immigrants from the vote. Some Whigs also championed Indians' legal challenges to Jackson's removal policy. Northern Whigs could also attack the House's "gag rule" banning debate on abolition, for, unlike Democrats, they did not believe in the virtue of Southern planters. Finally, years before the Seneca Falls convention, Whigs made concessions to women on issues like temperance, hoping women would urge their husbands to the polls. Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York: Hill and Wang, 1990), 59–69; Smith, *Civic Ideals*, 165–242; Keyssar, *The Right to Vote*, 44–45.
[764] Indians not paying taxes did not receive the vote. See the Maine Constitution of 1819, Article II, Section 1. Smith, *Civic Ideals*, 172.
[765] Keyssar, *The Right to Vote*, 32–33.
[766] Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 52–55.

suffrage.[767] By 1860, only the New England states still allowed free blacks to vote without qualification.[768]

The states also resolved congressional disputes over selecting presidents, presidential electors, and selecting members of the federal House by district. Congress heard at least sixty-five, forty-eight, and thirty-four amendment proposals for these topics respectively,[769] such that election regulation was the most common topic for amendments proposed in Congress for thirty of the fifty years after 1800.[770] As noted, in the 1810s and 1820s Congress heard dozens of amendment proposals for electing federal representatives by district, three of which passed the Senate. But the states gradually settled on a single-member district system, to Congress' satisfaction. After New Jersey failed elect a general ticket slate of representatives, congressional Whigs pushed to nationalize the system of election by districts. Since all but six of the twenty-six states had already adopted single-member districts, the district proposal passed by congressional statute in 1842.[771] Congress largely refrained from intervening in House elections again until the Reconstruction. As Herman Ames summarizes, "The desire for local representation gradually led to the general adoption by the States of the district

[767] See the Pennsylvania Constitution of 1839, Article III, Section 1, the North Constitution of 1819, Article I, Section 3, Amendment 10 of 1835, the Tennessee Constitution of 1835, Article IV, Section 1, and the New Jersey Constitution of 1844, Article II, Section 1.
[768] The exception in New England is Connecticut, which excluded free blacks from the polls. A 1846 New York referendum allowed free blacks to vote given they held $250 in freehold estate, which few did. Henretta, "The Rise of 'Democratic-Republicanism:' Political Rights in New York and the Several States, 1800-1915," 52–55; Tarr, *Understanding State Constitutions*, 105–7.
[769] These counts are not exclusive, and are derived from coding the NARA dataset as described in an earlier chapter. This coding likely systematically undercounts proposals concerning executive selection, as explained earlier, and as such is a conservative estimate.
[770] Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 540–59.
[771] Following the Act Georgia, Mississippi, Missouri, and New Hampshire continued to use at-large elections. Tory Mast, "The History of Single-Member Districts for Congress: Seeking Fair Representation Before Full Representation," Voting and Democracy Report (Fair Vote Program for Representative Government, 1995).

system of electing their Congressmen, and caused the introduction of amendments on this question to cease."[772]

The disputed election of 1824 reignited debates over electing the president. Presidential electors in 1824 split between four candidates, granting a plurality of the Electoral College vote to Andrew Jackson, the popular vote winner. Since no candidate garnered a majority, the House intervened, with Speaker Henry Clay rallying congressmen to John Quincy Adams, allegedly in exchange for appointment as Secretary of State.[773] Backlash was swift. Following Adams' election, congressmen proposed at least twenty-two constitutional amendments to guarantee selection of the president by popular vote, as well as amendments to standardize the selection of electors by general ticket, by districts, or by legislature, to abolish the Electoral College, and to prevent the election from devolving on the House.[774] The issue quickly overwhelmed Congress' constitutional agenda. Between 1824 and Jackson's election in 1828, Congress heard sixty-four amendment proposals, forty-five of which concerned executive selection.[775]

While none of these congressional proposals cleared Article V's supermajority threshold, the states' lower barriers to statutory and constitutional reform allowed experimentation. Most states selected electors by legislature, by district, or by general ticket, often changing their method when new parties took power. Massachusetts alone

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[772] Hermann Von Holst, *The Constitutional and Political History of the United States*, trans. John Lalor, vol. II (Chicago: Callaghan and Company, 1888), 336–40; Ames, *The Proposed Amendments*, 56–58.
[773] Evidence such a bargain occurred is spotty. Jon Meacham, *American Lion: Andrew Jackson in the White House* (Random House Publishing Group, 2008), 44–45.
[774] After the alleged corrupt bargain, Congress heard proposals to standardize the process of filling Electoral College vacancies and heard at least nine amendment proposals preventing the president from appointing an elector to office. Jackson proposed a similar amendment in his 1829 State of the Union address. Ames, *The Proposed Amendments*, 21, 82, 85, 87–88, 106–7, 112, 122.
[775] For a list of each, see Ibid., 339–43.

switched its practice for selecting electors between every election from 1796 and 1820.[776] But partisan deadlock over switching methods occasionally kept states from picking electors. State legislators looked for a consistent practice, converging on the general ticket method. In 1789 Pennsylvania united its electors onto the same general ticket to maximize the state's electoral impact. In 1812, only nine of eighteen states in the Union allowed direct election of presidential electors. But by the 1820s three of the other five most populous states imitated Pennsylvania, with small states following, such that by 1824, twelve states used the general ticket system. States also opted to select these tickets by popular vote, so that by 1832, all but two of the twenty-four states selected electors by a general ticket and popular vote.[777]

This state-level reform alleviated congressional fear of an undemocratic presidential election. Congressmen proposed fewer amendments on the topic – only twenty-seven of the total sixty-five between 1832 and 1836 – none of which passed. By the middle of the century, congressmen almost entirely abandoned the issue.[778] As Herman Ames notes, thanks to the states, "after 1832, the method of choosing electors had become nearly uniform throughout the country without the resort to an amendment to the Constitution."[779] State reform quieted the most contentious national constitutional issue of the 1820s, shaping the presidency and preempting Congress from shaping presidential elections.[780] The states established a general ticket system that still endures, creating swing states and affecting presidential campaigns, and in allowing a popular vote

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[776] The state switched between selection by district, joint ballot, general ticket, legislature, and district. Ibid., 85n2.
[777] This tripled the eligible electorate for presidential elections. Ibid., 86n3; Aldrich, *Why Parties?*, 102–29.
[778] Between 1850 and 1877, Congress fielded only twenty-two amendment proposals on the topic, as noted in the next chapter.
[779] Ames, *The Proposed Amendments*, 85–86.
[780] The states also precluded aforementioned congressional proposals to select the president, as well as odd proposals like selecting the president by lot.

for in presidential elections, inaugurated Jacksonian democracy and the plebiscitary presidency.

IV. Constitutional Conflict and Resolution, 1828-1849

A. Constitutional Decentralization

In 1828 Van Buren engineered a mass interstate coalition, increasing presidential election turnout, [781] to elect Jackson to the White House.[782] Crowds of all classes swarmed to Jackson's inauguration in March 1829.[783] The spirit had not yet died in December, when Jackson offered his first State of the Union Address, calling for a

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[781] In 1824, 26.9% of the electorate voted. In 1828, with a new Democratic machine united behind Jackson, turnout jumped to 57.6%. The average difference in state-level vote share in 1828 was 36%. Adams captured New England, while Jackson beat Adams with 90% of the Tennessee vote share. McCormick, "Political Development and the Second Party System," 98–102; William N. Chambers, "Party Development and the American Mainstream," in *The American Party System: Stages of Political Development*, ed. William N. Chambers and Walter Dean Burnham (New York: Oxford University Press, 1967), 12.

[782] After the success of anti-Adams congressional candidates in the 1826 elections, Martin Van Buren allied with Jackson, another self-made senator and the following year began planning a national electoral network to unseat John Quincy Adams in 1828. Van Buren joined his Albany Regency to Thomas Ritchie's Richmond Junto, a populist machine in Virginia, where franchise restrictions had recently been loosened, creating the nation's first intersectional mass party, the Jacksonian Democrats. This interstate alliance mobilized newly-enfranchised white male voters with a national network of provincial politicians, and Jackson handily beat Adams in 1828, doubling Adams' votes in the Electoral College. Gordon Wood avers Van Buren "brought together large numbers of ordinary people in order to counter the family influence and personal connection of Federalist gentry." Richard Hofstadter affirms, Van Buren's "men were middle class or lower class, often self-made men… Three of them…were the sons of tavernkeepers, and the others characteristically went from farms to small-town law offices." They "were considerably more interested than their predecessors in organization, considerably less fixed in their views of issues, considerably less ideological" than their predecessors." Even Joel Silbey, who portrays Van Buren's deputies as aristocrats, admits they sought election rather than principle. Wood, *The Radicalism of the American Revolution*, 299; Hofstadter, *The Idea of a Party System*, 213, 241; Joel H. Silbey, *The American Political Nation, 1838-1893* (Stanford: Stanford University Press, 1991), 118–24.

[783] The following February Jackson arrived in Washington in a humble two-horse carriage. A single slave followed Jackson's carriage, though he owned many more. Days later, Justice Story recalled a raucous White House post-inauguration ball: "After this ceremony was over, the president went to the palace to receive company, and there he was visited by immense crowds of all sorts of people, from the highest and most polished down to the most vulgar and gross in the nation. I never saw such a mixture. The reign of King "Mob" seemed triumphant." Joseph Story, "Letter to Sarah Story, March 7, 1829," in *The Constitutional and Political History of the United States*, ed. Hermann Von Holst, trans. John Lalor, vol. II (Chicago: Callaghan and Company, 1829), 11; Meacham, *American Lion*, 49–50.

constitutional amendment to guarantee the popular vote in presidential elections.[784] In the 1830s, the Whigs copied Van Buren's model, organizing as an intersectional party and by 1840 the average difference in state-level vote share dropped to eleven percent as both parties gained footholds in states across the country.[785]

While state constitutional revision and Jackson's landslide election largely quieted debate over enfranchising adult white males, slavery and state sovereignty still divided the national parties. The admission of Missouri reignited the slavery crisis. The House in 1800 and 1812 encouraged slaveholders to immigrate to the Missouri Territory,[786] until in April 1818 New Hampshire representative Arthur Livermore proposed a federal amendment banning slavery in any territory admitted to the Union.[787] The House rejected the proposal, but the following March James Tallmadge, Jr. rallied congressmen around a new proposal excluding additional slaves from Missouri and freeing at the age of twenty-five all slaves born after the state's admission.[788] A few days later, John W. Taylor, a fellow New Yorker, proposed banning slavery in the Arkansas Territory. The stakes were high for antislavery congressmen. Missouri's admission as a slave state threatened to bolster slavery in neighboring Illinois and perhaps revive it in

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[784] Jackson argued that when "the election must devolve on the House of Representatives, where it is obvious the will of the people may not be always ascertained, or, if ascertained, may not be regarded… policy requires that as few impediments as possible should exist to the free operation of the public will."

[785] McCormick notes "The campaign of 1840 brought the second American party system at last to fruition… there had in fact occurred a nationalization of institutional forms and political styles. There was also a nationalization of political identities. Voters everywhere would respond to candidates and issues as Whigs or Democrats." McCormick, "Political Development and the Second Party System," 102.

[786] Under the 1800 Harrison Land Act, the federal government helped incoming settlers finance Missouri land purchases, attracting middling slaveholders who could not buy expensive southeastern land. In 1812, the Democratic-Republican House had defeated a motion to prohibit the entrance of slaves to the new Missouri Territory, tacitly preserving Missouri slavery, which grew as slaveholders fled neighboring Illinois' antislavery 1818 Constitution.

[787] *The Debates and Proceedings in the Congress of the United States: Fifteenth Congress, First Session* (Washington: Gales and Seaton, 1854), 1675–76.

[788] Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 55–75, 150–67.

Indiana.[789] Proslavery congressmen feared Talmadge's proposal would cordon slave states and congressional seats to the southeast. Further, Tallmadge justified the amendment by claiming that the Constitution's Guarantee Clause, requiring each state have a "republican government," forbade proslavery state constitutions, potentially invalidating slavery nationwide.[790] Over Missouri, there was little bisectional agreement – Northerners voted nine to one for Tallmadge's amendment to the Missouri bill, while Southerners coalesced against it. The issue cut across both congressional parties, threatening the constitutional status quo.[791]

But in December 1819, Northern congressmen admitted Alabama under a proslavery constitution,[792] signaling proslavery state law did not violate the Guarantee Clause, tacitly accepting Southern and Missouri slavery. Congress then admitted the free state of Maine alongside the slave state of Missouri, and abolished slavery in states admitted north of the 36º 30' latitude line, preserving it in those below, extending the bisectional line.[793] Southerners approved the plan, expecting Northerners would struggle to settle the barren Great Plains, while Southern migration would quickly create southwestern slave states and congressmen. Northerners accepted the plan rather than alienate secessionist Southerners.[794] Congress would regulate territorial slavery and

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[789] Ibid., 3.
[790] Fehrenbacher, *The Slaveholding Republic*, 263; Graber, *Dred Scott*, 120–23; Matthew Mason, *Slavery and Politics in the Early American Republic* (Chapel Hill: University of North Carolina Press, 2006), 177–212.
[791] Previously, Northern moderates had silenced the abolitionists within their party and caucused with Southerners. Recall how Federalist Senators Timothy Pickering and John Quincy Adams of Massachusetts defeated Connecticut Federalist James Hillhouse's proposal for abolition in the Louisiana Territory in 1804.
[792] See the Alabama Constitution of 1819, Slavery Article.
[793] Fehrenbacher, *The Slaveholding Republic*, 264–66.
[794] Graber, *Dred Scott*, 123–25.

refuse statehood to any territory violating the Compromise.[795] But were a state north of the line to allow slavery or one south to abolish it, Congress and the executive would have weak constitutional grounds to reverse the decision.[796] The Missouri Compromise depended on the states' cooperation.

Leaders in both parties silenced and delayed abolitionists. Starting in 1832, the Democratic Party required all presidential and vice-presidential candidates claim two-thirds of convention delegates to receive the party's nomination, requiring compromise with both Southern and Northern delegates. Three years later, Jackson ordered the federal post to impound abolitionist printing, and refused Texas' 1836 statehood petition until it was paired with a free state's. And in 1835, free-state Democratic congressmen joined their slave-state counterparts in instituting a gag rule to table antislavery petitions.[797] Free-state Democrats voted for the measure sixty-one to fourteen, and voted seventy-five to five for a separate resolution preventing interference with slavery in the District of Columbia.[798] This effectively kept slavery a local concern.[799]

As party leaders attempted to quiet abolitionists in the 1830s, they reopened the bank debate. Between 1800 and 1830, America doubled in territory, adding eight new states on the frontier, and nearly tripled in population. For example, in 1800, four years

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[795] During the Missouri crisis, Congressman Rufus King cited Article IV, Section 3 to argue Congress' authority over the territories extended to regulating slavery. John W. Taylor argued the Non-Importation Clause of Article I, Section 9 allowed Congress to prohibit slave importation into the territories. And through the antebellum era, Congress put conditions on approving the territories' statehood petitions. Dealey, *Growth of American State Constitutions*, 50; Fehrenbacher, *The Slaveholding Republic*, 264.

[796] Adopting Tallmadge's claim that slavery violated republican government, a radical antislavery president might intervene in a new proslavery state's politics by citing the guarantee of republican government under Article IV, Section 4. Congress might regulate slavery in new western states by statute, citing the Supremacy Clause of Article VI.

[797] Fehrenbacher, *The Slaveholding Republic*, 266.

[798] Sundquist, *Dynamics of the Party System*, 50–53.

[799] Free-state Whigs voted against the gag rule 43-1, pointing to an early split between antislavery and "cotton" Whigs. Ibid., 53–55.

after its founding, Tennessee held 105,000 residents, increasing to 682,000 in 1830.[800] Mills and factories drew rural and foreign immigrants to booming eastern cities.[801] State and national legislators proposed canals, turnpikes, roads, and railways to link these eastern cities to each other and to raw goods like Appalachian coal and Southern cotton. Across the frontier legislators scrambled to authorize roads and canals to draw more settlers west and send raw commodities to eastern mills and to interlink rural villages.

Turnpikes, canals, and railways stretched great distances, and thus were built slowly, with little prospect of immediate profit. Congress could sell federal land and pass tariffs to subsidize these private projects, but tariffs were contentious, and none more so than John Quincy Adams' Tariff of 1828, which protected Northern industries, to Southerners' frustration. When Jackson upheld the Tariff, Virginia, Mississippi, and North Carolina contested the tariff's constitutionality, Georgia, Alabama, and South Carolina proposed a national constitutional convention to amend the Constitution to prohibit regionally-biased tariffs, and Jackson's Vice President John C. Calhoun anonymously penned the South Carolina legislature's "Exposition" arguing for tariff nullification.[802] On December 10, 1832 Jackson answered with the "Proclamation to the People of South Carolina."[803] Jackson stated that the constitutional compact irrevocably bound the states, warning that "if force was applied to oppose the execution of the laws, that it must be repelled by force." South Carolina radicals resentfully retreated, but the balance of state and national economic authority remained unresolved.

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[800] Laska, *The Tennessee State Constitution*, 7.

[801] New York's population grew from 60,000 to 202,000, Philadelphia from 41,000 to 80,000, Baltimore from 26,000 to 80,000, and Boston from 25,000 to 61,000. See "Population of 33 Urban Places: 1800" (United States Bureau of the Census, June 15, 1998); "Population of 90 Urban Places: 1830" (United States Bureau of the Census, June 15, 1998).

[802] Ames, *The Proposed Amendments*, 161n5, 168, 250-1.

[803] Andrew Jackson, "Proclamation to the People of South Carolina," in *The Political Register*, vol. I (Washington: Duff Green, 1832), 115.

Infrastructure companies instead turned to state and local banks loans for capital. Since 1816, these local banks had followed lending rules set by the Second Bank of the United States. Frontier farmers and workingmen relied on infrastructure development and thus on the policies of the distant, elite-run Second Bank headquartered in Philadelphia. Already unpopular with populist Democratic-Republicans, the Bank issued enough paper currency to exacerbate inflation, contributing to panic of 1819 and the foreclosure of many loans on small farms. Democratic-Republicans attacked the Bank's constitutionality. Walter Lowrie of Pennsylvania proposed a national amendment to prohibit chartering of a bank outside the District of Columbia, effectively gutting the bank. The legislatures of Tennessee, Ohio, Indiana, and Illinois backed the measure, and other Indianans and Pennsylvanians proposed similar constitutional amendments the following year.[804]

Jackson began dismantling the nation's system of centralized finance. On taking office in 1829, he vetoed congressional funding bills, which he felt invaded state authority. And in 1832, when his opponents attempted to renew the Bank's charter, Jackson, aided by Attorney General Roger B. Taney, successfully vetoed the Bank's renewal on constitutional grounds. The following year the Georgia legislature called for an amendment to distribute a federal surplus raised under the Tariff of 1833, and two years later, Calhoun proposed a pair of amendments to pass the surplus to the states.[805] Congress answered with an 1836 bill distributing the funds directly to local banks, ending

[804] Ames, *The Proposed Amendments*, 255–57.
[805] See *The Congressional Globe: Twenty-Third Congress, Second Session* (Washington: John C. Rives, 1835), 150.

congressional debate over the surplus and the Bank.[806] Financial devolution quieted congressional debates on national banking powers.

Marshall was in a bind. Jackson effectively reversed *McCulloch* with his bank veto, and he pointedly refused to enforce Marshall's *Worcester v. Georgia* (1832) decision,[807] on states' rights grounds.[808] A keen student of inter-branch politics since his *Marbury* decision, Marshall likely realized he would not win a direct confrontation with Jackson and the House's solid Democratic majority.[809]

So Marshall strategically deferred economic regulation to the states, where defeat was less certain. In *Willson v. Black-Bird Creek Marsh Co.* (1829), Marshall affirmed the Delaware legislature's police power to charter a dam company to dry a marsh that threatened public health, even though closing the marsh impeded interstate commerce.[810]

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[806] Ames, *The Proposed Amendments*, 250, 257; Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* (Princeton: Princeton University Press, 1957), 326–457.

[807] Marshall overturned the arrest of Samuel Worcester, an itinerant New England preacher who had violated a Georgia statute forbidding assistance to local Cherokees. In siding with Georgia, Jackson reaffirmed his states-rights sympathies to Marshall. See *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).

[808] Jackson's commitment to states' rights undergirded his Indian removal program. He introduced the Indian Removal Act in his first State of the Union. Citing the Constitution's Article IV, he posited states have sovereignty within their borders, precluding independent Indian nations in Georgia or Alabama. He explained "If the General Government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union against her consent, much less could it allow a foreign and independent government to establish itself there." Thus, he permitted Georgian and Alabaman Indians to retain their territory so long as they submitted to state laws and assimilated with whites. Should they seek to preserve their culture, he offered land beyond the Mississippi, emphasizing "emigration should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land."

[809] Congressional Democrats uniformly backed Jackson's plan that the states remove Indians and use their lands for economic development. Senate Democrats rallied to the Indian Removal Act, while anti-Jacksonians Theodore Frelinghuysen and Peleg Sprague offered vocal but inadequate opposition and the bill passed twenty-eight to nineteen. Occasional House Democrats opposed passage, while anti-Jacksonians unified against the bill. However, Van Buren strong-armed enough Democrats to ensure success, and the bill passed 102 to 97. Polarization increased with subsequent votes on Indian treaties. Fred S. Rolater, "The American Indian and the Origin of the Second American Party System," *The Wisconsin Magazine of History* 76, no. 3 (April 1, 1993): 197; Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (University of Oklahoma Press, 2002), 109–11.

[810] In upholding the charter, Marshall thus affirmed a suit brought by the dam company against Thompson Willson, who disassembled part of the dam while piloting a sloop under a federal shipping license. See *Willson v. Black-Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245 (1829).

Then, in *Barron v. Baltimore* (1833), Marshall asserted the Bill of Rights did not bind Maryland from interfering in the private business of Baltimore resident John Barron.[811]

On Marshall's death, Taney became Chief Justice, issuing a triad of decisions dramatically expanding the states' banking and incorporation powers. In *Charles River Bridge v. Warren Bridge* (1837), Taney ruled that the state legislatures had broad powers to charter and constrain a corporation, while a corporation could not use its charter to constrain a state legislature without that legislature's explicit blessing.[812] And in *Mayor of New York v. Miln* (1837), the Taney Court upheld a New York's use of state police powers to require passenger ships publish passenger lists and pay a tax funding immigrant processing facilities, even though this state statute may have impeded interstate commerce.[813] Finally, in *Briscoe v. Bank of Commonwealth of Kentucky* (1837), Taney affirmed Jackson's decentralized banking scheme,[814] holding states could charter banks despite the federal Constitution's stipulation the states not issue credit.[815] In *Willson*, *Miln*, *Charles River Bridge*, and *Briscoe*, the Court, Congress, and the White House together upheld the state legislatures' authority to charter corporations and banks.

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[811] Marshall dismissed the suit from Barron, who claimed that the City of Baltimore, in dumping the excess loose rocks from a road construction project near his wharf, had made the waters near the wharf too shallow for ships to draft and dock. Barron claimed this diminished the wharf's value, a violation of the federal Takings Clause. See *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833).
[812] The Charles River Bridge Company, owners of a toll bridge across Boston's Charles River, sued the proprietors of the Warren Bridge which the Massachusetts legislature had chartered as a free bridge across the Charles. The Charles River Bridge Company claimed that in forming a competing company, the state legislature had interfered with its original contract for the Charles Bridge, violating the federal Contract Clause. But Taney read the Clause narrowly, asserting that since the Charles River Bridge Company's original charter had no promise of exclusive rights to bridge the river, the state legislature had acted constitutionally. See *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).
[813] See *Mayor of New York v. Miln*, 36 U.S. 102 (1837).
[814] Hammond, *Banks and Politics in America*, 563–72.
[815] *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257 (1837). For the prohibition on state credit, see the U.S. Constitution Article I, Section 10.

B. Jacksonian State Constitutional Revision

State legislators used their new constitutional authority to charter infrastructure ventures. Spurred by the mercantilist desire to protect unprofitable public projects, by the promise of eventual returns on their investments, and by outright corruption, state legislators established and funded private corporations and banks to build roads, turnpikes, bridges, canals, and railways. The number of banks in the United States boomed from four hundred to six hundred between 1833 and 1836 and bank liability skyrocketed, particularly in the west, where bank note issues increased by 100 percent, and in the South, were they increased by 120 percent.[816]

Financial regulations were lax in the early 1830s. For example, Michigan's 1835 Convention almost entirely failed to regulate corporations.[817] Lobbyists swarmed the Michigan legislature, and railroads and banks were chartered without personal liability clauses, leaving investors no recourse if these businesses failed. A clause requiring the state government make costly internal improvements nearly bankrupted the booming state.[818] In neighboring Ohio, legislators allowed banks to be chartered with little hard currency reserves, subsidized private infrastructure ventures under the 1837 Loan Act, and granted these companies tax breaks. Increased spending and corporate tax cuts inflated the state's annual deficit to nearly twenty million dollars, which legislators covered with heavy taxes on personal and real property, irritating voters.[819]

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[816] Hammond, *Banks and Politics in America*, 451–53.
[817] The document stipulated only that an act of incorporation be approved by two thirds of both legislative houses. See the Michigan Constitution of 1835, Article III, Section 43.
[818] Fino, *The Michigan State Constitution*, 1–8.
[819] Steinglass and Scarselli, *The Ohio State Constitution*, 16–17. But note that in Tennessee a rash of special legislation led delegates to the state's 1834 Convention to forbid legislators from suspending any general law for the benefit of a private party and from granting immunities to any citizen which could not apply to all citizens. Laska, *The Tennessee State Constitution*, 9.

Then, in March of 1837, a decline in cotton prices brought the failure of Herman Briggs and Company, a major New Orleans cotton firm. A panic in New Orleans ensued, leading to the collapse of other local firms, and then ones in New York. British lenders, worried that American banks had overextended themselves, called in their loans.[820] This sparked a nationwide panic. In Ohio, runs drained the shallow reserves of local banks, which collapsed. Newly insolvent banks lacked capital to lend to existing infrastructure ventures, which too folded, leaving taxpayers to cover their losses.[821]

Voters, ruined by land and infrastructure speculation, called constitutional conventions to constrain corporations and state legislators in the late 1830s. For example, Florida's 1839 Convention devoted a fourteen-section article to bank regulation, prohibiting election of candidates who had worked for a bank within the previous year, limiting legislators' authority to issue debt and charter corporations, and requiring public oversight of corporations.[822] At least nineteen documents regulated the printing and circulation of currency, and twelve more imposed reserve requirements on banks.[823] Delegates to California's 1849 Convention passed a similar currency provision and prohibited state legislators from chartering special banks.[824] Many state framers followed

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[820] Hammond, *Banks and Politics in America*, 451–99.
[821] Steinglass and Scarselli, *The Ohio State Constitution*, 16–17.
[822] See the Florida Constitution of 1839, Article VI, Section 3 and Article XIII, Sections 1-14. Talbot D'Alemberte, *The Florida State Constitution: A Reference Guide* (New York: Greenwood Press, 1991), 1–5.
[823] See Table 15 in the appendix. For example, in 1846, Iowa's framers required corporate and bank charters be approved by voters, last no more than twenty years, and be subject to legislative repeal, forbade the chartering of banks to print money, and forbade the chartering of banks to print money. See the Iowa Constitution of 1846, Article I, Section 12, Article IX, Section 5-8, 10-1, 13, Article X, Section 1- 3. Jack Stark, *The Iowa State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1998), 1–5.
[824] Many of the California framers were young, recent transplants who distrusted the eastern legislators that had allowed the panic of 1837. See the California Constitution of 1849, Article IV, Section 33-6, Article VIII, and Article XI, Section 10. Grodin, Massey, and Cunningham, *The California State Constitution*, 1–9.

California, particularly in the West.[825] And the first Midwestern constitutions, all drafted after the panic, each included at least five banking and finance regulations, exceeding the national antebellum mean of two per document.[826]

Framers aggressively constrained legislators' borrowing and lending powers. Delegates to New York's 1846 Convention limited legislators' power to issue debt,[827] and every other constitution ratified after 1845 included a similar clause.[828] New York's new, comprehensive document tripled its predecessor in word count, and with more regulations, constitutions grew longer. Michigan's 1835 Constitution, drafted on the eve of the panic, had only one provision on corporate regulation, but was replaced by an 1850 Constitution that dedicated two articles and at least thirty clauses to the topic.[829] Indianans scrapped their 1816 Constitution for an 1851 document with at least thirteen

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[825] Some Western states drafted several constitutions before settling on regulations. New Mexico's 1846 Organic Law and proposed 1849 Constitution seemed to have no corporate or banking regulations, though the 1850 Constitution regulated banks through and corporations through Article IX, Section 8-11 and 22. Oregon's 1843 and 1845 Organic Laws were similarly lax, but were replaced by the 1857 Constitution, which limited legislators' authority to charter corporations, delegate printing of currency, and issue state debt. See the Oregon Constitution of 1857, Article I, Section 19, Article XI, Section 1-10. Texas too seems not to have introduced comprehensive regulations until its 1845 Constitution. On bank regulation, see also the Minnesota Constitution of 1857, Article VIII and Kansas' Lecompton Constitution of 1857 Article XII, Section 1-7, Article IX, Section 3-4. Kansas' 1855 Topeka, 1858 Leavenworth, and 1859 Wyandotte constitutions were similarly comprehensive.
[826] See Table 15 in the appendix. The one exception is Missouri's 1820 Constitution, which included only two regulations.
[827] New York passed no direct taxes between 1826 and 1842, but through loans financed an elaborate public works system, including the Erie Canal. The state soon exhausted its treasury and credit, and in 1846, New Yorkers voted 213,257 to 33,860 to revise the state's 1822 Constitution. Convention delegates scrapped all but eleven of the previous constitution's clauses, building an elaborate system of constitutional checks on legislators, adding provisions keeping legislators from granting specials charters or incurring debt without public approval, forcing legislators to repay canal debt, and creating an independent Canal Board to oversee future projects. See the New York Constitution of 1846, Article V, Section 5, Article VII.
[828] Relatedly, each of the thirty-one antebellum state debt regulations was drafted after 1830. This only counts regulations in un-amended proposed constitutions. Including statutes and constitutional amendments, the number may be greater. See Table 15 in the appendix and Tarr, *Understanding State Constitutions*, 111–13.
[829] See the Michigan Constitution of 1835, Article III, Section 43 and the Michigan Constitution of 1850, Articles XIV-XV.

sections regulating banks, corporations, and debt.[830] In a few states, legislators even passed constitutional amendments to constrain themselves.[831]

Framers also used elections as a constraint. In New York, nearly all judicial, administrative, and local offices were now elected, and senators were elected from small single-member districts every two years, rather than four.[832] Other states did the same,[833] and voters gained new power, using referenda, frequent elections, conventions, and amendments to constrain corporations, recall judges, and prohibit legislators from granting corporations special privileges, risky loans, and immunity to liability,[834] suggesting Jacksonian democracy was in part a pragmatic response to the financial crisis.

These state constitutional revisions quieted national controversy over banking. While banking began as a congressional issue, with congressmen proposing a dozen federal constitutional amendments around the 1816 Second Bank chartering and 1832 re-chartering debates, thanks to Jackson's devolution and the panic of 1837, state constitutional bank regulations increased in the 1830s and 1840s.[835] Thirty-eight of the fifty-two state constitutions or organic laws proposed after 1830 regulated debt, banking,

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[830] See the Indiana Constitution of 1851, Article I, Section 22, Article XI, Section 1-7, 11-13, Article X, Section 5-6. By contrast, the state's previous constitution seemed to have only two sections on the topic. See the Indiana Constitution of 1816, Article I, Section 17, and Article X, Section 1.

[831] An 1846 amendment to Arkansas' 1836 Constitution forbade the incorporation of new banks, and in 1847, Maine legislators passed an amendment limiting the state's authority to take on debt. See the Arkansas Constitution of 1836, Amendment 1, Article I of 1846 and the Maine Constitution of 1819, Article IX, Section 1, Amendment 14 of 1847. Tinkle, *The Maine State Constitution*, 7; Kay Collett Goss, *The Arkansas State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), 1–3.

[832] See the New York Constitution of 1846, Article III, Section 2. Gallie, *The New York State Constitution*, 1–14; Gallie, *Ordered Liberty*, 9–116.

[833] For example, in 1835, Tennessee instituted judicial elections to check the legislature, and after local road and turnpike projects failed, Kentucky delegates required the legislature submit to voters all non-emergency loans over 500,000 dollars. Laska, *The Tennessee State Constitution*, 7–9; Ireland, *The Kentucky State Constitution*, 6–8.

[834] Dinan, *The American State Constitutional Tradition*, 9, 67–76.

[835] At least thirty-eight state constitutions regulated incorporation, thirty-one of which were drafted after 1830. Another thirty included similar oversight mechanisms, twenty-six of which were drafted after 1830. At least four others included office-holding limitations. See Table 15 in the appendix.

or incorporation. Similarly, all but sixteen of the total 157 antebellum corporate regulations and debtors' protections were drafted after 1830.[836] State regulations crested roughly ten years after the panic,[837] though every constitution ratified between the panic of 1837 and 1860 constrained banks and lending, save for Kentucky's 1850 document.[838] In contrast, Congress proposed only three constitutional amendments on banking and corporations between 1837 and 1860.[839] In 1840, dissatisfaction over the panic of 1837 swept Whigs into the White House and both houses of Congress. Yet congressional Whigs neither chartered a third Bank nor proposed a national constitutional amendment to centralize banking powers.[840] This was partly because the states' voters and convention delegates had already developed a comprehensive local system of bank regulations.

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[836] These 157 regulations exclude at least 45 antebellum debtors' protections. This was the first type of debt regulation – sixteen of the provisions date to the eighteenth century – and also the most common, particularly after 1830. For example, in 1846, Wisconsin's first constitutional convention proposed preventing the seizure of debtors' homes and banning banks outright, but voters rejected the document. Two years later, voters instead approved a constitution forbidding imprisonment for debt but allowing lenders to seize debtors' homes, limited by the "privilege of the debtor to enjoy the necessary comforts of life." See the Wisconsin Constitution of 1848, Article I, Section 16-7. In 1852, Wisconsin voters approved a referendum instituting banks within the state, but subject to careful regulation. Stark, *The Wisconsin State Constitution*, 4–8. See Table 15 in the appendix.

[837] This suggests that state constitutions can adjust to exogenous shocks relatively quickly, especially compared to the federal Constitution.

[838] In total, off the 107 state and territorial constitutions and organic laws drafted between 1776 and 1860, sixty-eight regulated banking, debt and finance. This population includes all state and territorial constitutions and organic laws drafted between 1776 and 1860 as listed in the Rise of Modern Constitutionalism database. This database is a compendium of proposed constitutional documents, including American state constitutions. See the appendix for Table 15 listing these 107 documents and their banking and corporate regulations. Note that this population includes some observations, including constitutions of failed American states, that are not listed in the dissertation's dataset, and note that the dissertation dataset includes some constitutional proposals that never resulted in documents and thus are excluded from the Rise of Modern Constitutionalism database. However, the two datasets are fairly similar.

[839] As the panic spread in March 1837, a select congressional committee proposed prohibiting the states from incorporating a bank to issue paper notes. The amendment failed, as did a similar one proposed by Representative Rice Garland of Louisiana, and another proposed by an 1840 select committee. Ames, *The Proposed Amendments*, 257–58.

[840] Ibid., 250.

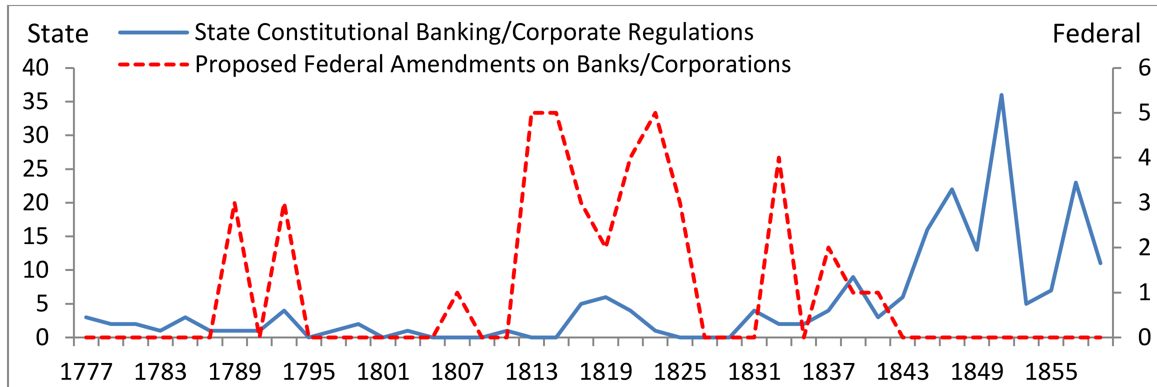

Figure 7: State and Federal Constitutional Banking Regulations, 1776-1860.
For these federal and regulations see respectively Table 12 and Table 15 in the appendix.

On matters of territorial slavery, the states preserved the Missouri Compromise. South of the Ohio River and Missouri's 36º 30' parallel, every newly-admitted state preserved slavery within its borders,[841] while territories north of these lines abolished slavery, letting Congress pair each new slave state with a free one, keeping the House and Electoral College balanced. When the Arkansas Territory in 1833 petitioned for a territorial census as a prelude to statehood, Congress stalled for two years until admitting Michigan as a free state. Arkansas' 1836 Constitution subsequently recognized slavery, forbade emancipation without the owner's consent, and limited voting and office-holding in the legislature to white males, and charged the legislature with controlling the slave trade.[842] Florida's Constitution, framed two years later, also prohibited legislators from emancipating slaves, allowing them to control the influx of free and enslaved people of color into the state.[843] These state constitutional prohibitions on emancipation promised a durably proslavery South and a balanced, stable national constitutional regime. Congress thus recognized Florida's Constitution in 1844, when Iowa accepted congressional limits

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[841] By the ratification of Mississippi's 1831 Constitution, all but three Southern states constitutionally recognized slavery. The exceptions are Louisiana and the Carolinas.
[842] See the Arkansas Constitution of 1836, Article II, Section 21, Article IV, Section 2, 4, 6, 25, Article IX, Section 1. Goss, *The Arkansas State Constitution*, 1–3.
[843] See the Florida Constitution of 1846, Article XVI, Section 1-3. D'Alemberte, *The Florida State Constitution*, 1–5.

on its boundaries and could be admitted as a free state.[844] Wisconsin entered the Union as a free state four years later.[845]

In the far West, only Texas constitutionally protected slavery.[846] Delegates to New Mexico's 1849 Convention, embroiled in a border dispute with Texas, rejected the Texan model's proslavery clauses.[847] President Zachary Taylor, eager to consolidate territory newly seized from Mexico, urged Congress to swiftly admit New Mexico as a free state. But after Taylor's unexpected death, Millard Fillmore assumed the presidency and submitted without comment New Mexico's statehood request, where it died in the Senate.[848] The framers of California's 1849 Constitution banned slavery with little debate, fearing recent white immigrants would lose jobs to cheap slave labor, and that slaves might intermix with local whites.[849] Congress admitted California the following year. To the northwest, Oregon's Organic Laws of 1843 and 1845 prohibited slavery. The state legislature affirmed this by statute, but also outlawed free or enslaved blacks from entering the territory, under punishment of whipping.[850] This differed slave state

[844] Stark, *The Iowa State Constitution*, 1–5.
[845] See the proposed Wisconsin Constitution of 1846 Article XVI, Section 2 and the ratified Wisconsin Constitution of 1848 Article I, Section 2.
[846] Texans also forbade legislators emancipate slaves without compensation or block their importation. However, the 1845 Constitution also prohibited legislators from stripping slaves' rights to jury trial and obligated slaveholders to feed and clothe their slaves. See the Texas Constitution of 1845, Article III, Section 1-3. Similarly, Texas' 1836 Constitution had prohibited forced emancipation and regulated immigration of slaves. See the Texas Constitution of 1836, Article VI, General, Section 9.
[847] The Constitution made no reference to slavery, though it limited the vote and office-holding to the white male population, which also determined legislative district apportionment. See the New Mexico Constitution of 1849, Article II, Sections 3, 4, 6, 8.
[848] Smith, *The New Mexico State Constitution*, 2–4.
[849] See the California Constitution of 1849, Article I, Section 18.Grodin, Massey, and Cunningham, *The California State Constitution*, 1–9.
[850] See the Oregon Organic Law of 1843, Article I, Section 4 and Oregon Organic Law of 1845, Article I, Section 4. Schuman, "The Creation of the Oregon Constitution," 611–17.

constitutions, fourteen of which required slaves, as valuable property, be treated hospitably,[851] and eleven of which guaranteed slaves' jury trial rights.[852]

Thanks to these state clauses, there was little controversy in the state or national legislatures over constitutional regulation of slavery in the 1830s and 1840s. States drafted relatively few clauses on slavery.[853] Northern state framers avoided the slavery issue or addressed it with a single clause, while Southerners framed comprehensive state constitutional slavery provisions to prevent local emancipation and preserve a proslavery South. Save for a triad of unsuccessful abolition amendments proposed by John Quincy Adams in 1839,[854] Congress entirely avoided proposing amendments on the topic.

In conclusion, both the state and federal legislatures faced constitutional controversies over suffrage and electoral regulation, territorial slavery, and banking powers. Congress proposed relatively few federal amendments expressly constraining states' constitutional powers,[855] instead proposing amendments on concurrent constitutional powers,[856] which were also subject to state constitutional regulation. State constitutional revision quieted these issues, preempting federal constitutional reform.

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[851] Slave state constitutions, often framed by slaveholders, protected slaveholders' property in slaves by outlawing uncompensated emancipation and physical harm to slaves. See Table 16 in the appendix.
[852] This jury trial right usually extended to only a petit jury. See Table 16 in the appendix.
[853] Between 1776 and 1860, state framers drafted only ninety-six slavery regulations. In contrast, the states constrained legislators and corporations with at least 202 detailed constitutional banking and debt regulations. This count of slavery and banking regulations does not include amendments. See Table 16 in the appendix. This data is from the Rise of Modern Constitutionalism database. As explained in Footnote 838 this database differs slightly but not significantly from the one created for this dissertation.
[854] Adams' amendments would have abolished hereditary slavery in 1842, forbade the admission of slave states after 1845, and prohibited slavery and the slave trade in the District of Columbia. Ames, *The Proposed Amendments*, 193.
[855] Congressman Hall of North Carolina proposed an 1829 amendment for defining national and state authority, and South Carolina's 1832 tariff nullification brought four proposals between 1832 and 1833 for resolving disputes between the federal and state governments. And as noted, proposed amendments in 1837, 1838, and 1840 would have regulated state banks that issued notes. Amendments proposed in 1839 would have refused admission to proslavery territories and abolished hereditary slavery within the states. An 1842 proposal would have regulated state legislatures' nomination powers.
[856] As stated, following the disputed election of 1800, congressmen proposed alternate means to select presidential electors. Jefferson's contentious 1807 Embargo Act led congressmen to propose amendments

This pattern played out across all three issues. Jeffersonian congressmen, executives, and courts deferred to the states' traditional authority to regulate elections. State legislators and framers caved to white males' demands for enfranchisement, repealing state constitutional property and taxpaying qualifications and beginning mass democracy in America. Congress deferred to these state regulations, largely avoided the topic of electoral reform. Similarly, as Congress proposed federal amendments on the selection of House members and of presidential electors, the states settled on single-member House districts and general ticket popular selection of electors. By the 1830s, beleaguered congressmen accepted these systems, abandoning attempts to revise the federal Constitution. These antebellum state reforms still fundamentally structure the modern House, binding members to their district and encouraging particularistic policymaking, and modern presidential campaigns, which are now popular contests in which candidates compete over the general ticket votes of swing states. That is, state constitutional reform helped establish the current, stable constitutional design of the House and presidency.

States also helped resolve banking controversies. In the 1830s, Jackson and congressional Democrats encouraged state legislators and framers to constitutionally charter and fund banks and infrastructure corporations. Marshall too deferred to the states rather than confront Jackson's coalition, demonstrating how devolution can preempt inter-branch conflict. But with the panic of 1837, bank runs drained the shallow reserves of these banks, and corporations collapsed, often passing their losses to small investors.

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regulating embargoes, the national Bank, taxes, and funding for internal improvements. When congressional leadership handed John Quincy Adams the 1824 election, members responded with proposals for direct election of the president or his electors. The Jacksonian congresses proposed several means to distribute the national surplus before Jackson settled on his system of decentralized banks.

Popular outrage led to a wave of state constitutional provisions constraining legislators, bankers, and corporate employers. The result was a stable locally-run and locally-regulated system of banks, such that congressmen stopped proposing amendments to the federal Constitution.

Finally, tensions simmered over territorial slavery. Jeffersonian congressmen abolished slavery north of the Ohio River and tacitly allowed it below, but could not enforce these laws in the distant territories. Territorial voters kept the bisectional accord through state constitutional revision, abolishing slavery in Ohio, Indiana, and Illinois, and allowing it in Kentucky, Tennessee, Louisiana, and Mississippi. With the Compromise of 1820, the states extended the accord line across the Mississippi in cooperation with the executive and Congress, which almost entirely avoided proposing federal constitutional reform on the issue. However, in the 1850s the line blurred as it extended west, and Northerners reevaluated their tolerance for territorial slavery and the Fugitive Slave Clause. This promised conflict.

CHAPTER 6: THE CIVIL WAR AND RECONSTRUCTION, 1850-77

"What we wanted, and what we now labored to obtain, was a constitution free from the narrow, selfish, and senseless limitation of the word *white*."

Frederick Douglass, on state constitutional framing, 1893[857]

In the mid-nineteenth century, Americans faced constitutional crises over territorial slavery, fugitive slaves' rights, black citizenship, and state sovereignty. By 1850, the populous free states had grown to a majority in the House and Electoral College. Proslavery congressmen passed the 1850 Compromise and 1854 Kansas-Nebraska Act to let Western states adopt slavery, increasing slave state congressional seats. But this devolution backfired. Western constitutional framers consistently rejected plantation slavery, constricting slavery and slave states to the southeast, making Southerners a permanent national minority. Frustrated with the 1850 Fugitive Slave Act, Northern states invoked state sovereignty in refusing to return Southern runaway slaves. Southern firebrands rebelled, ending the antebellum constitutional order.

Union victory brought Reconstruction through state constitutional revision. Rather than dictating the terms of Reconstruction through a new national constitution or a host of new amendments, Congress passed only three federal amendments, two of them quite brief, relying instead on statutes that forced the states to revise their constitutions and elaborate in detail the postwar constitutional order. Southern blacks and Northern carpetbaggers drafted state constitutions to outlaw slavery, grant blacks citizenship, disenfranchise ex-Confederates, and recognize the national government's sovereignty. These documents expounded and enforced the brief national Reconstruction Amendments, formulating a new if still intensely contested and fragile settlement of

[857] Frederick Douglass, "Life and Times of Frederick Douglass," in *Autobiographies* (Library of America, 1893), 666.

slavery, citizenship, and state sovereignty. Even as Congress and the president expanded their constitutional powers, they relied on the states to resolve many of the era's constitutional questions.[858]

I. Trends in State and Federal Constitutionalism, 1850-77

In most eras of American history, Americans have revised the state constitutions far more frequently than the federal Constitution. But during the Civil War and Reconstruction, both the state and federal constitutions saw unprecedented revision. The number of state constitutions proposed each year skyrocketed, and exceeded the 1791-1877 yearly mean by at least a standard deviation for much of the Civil War and Reconstruction.[859] In 1861 alone the states proposed fifteen new constitutions. In total, between 1850 and 1877, the states proposed 104 new constitutions and ratified fifty-two, more than any other era before or after.[860] Even when weighted by the increasing number of states, attempted state constitutional replacement still increased significantly around the Civil War, suggesting this instability was not driven solely by westward expansion.[861] Similarly, the number of state constitutional amendments spiked during the Civil War and Reconstruction.[862]

Attempts to revise the federal Constitution also peaked. During and after the Civil War, congressmen proposed a slew of amendments, exceeding the 1791-1877 yearly

[858] In mentioning the "Constitution," "Congress," "White House," and "Supreme Court," this chapter refers to the Union institutions, and not their Confederate counterparts, unless otherwise noted.
[859] Specifically in 1850, 1851, 1857, 1861, 1864-5, 1868, and 1875.
[860] Of the era's 104 proposed state constitutions, forty-seven were Southern. Another twenty-one were Midwestern or Western. See in the appendix for a United States map indicating the number of constitutions proposed in each state.
[861] Between 1791 and 1877, the number of states in the Union nearly tripled from fourteen to thirty-eight, inflating the rate of antebellum constitutional replacement. But attempted replacement exceeded the 1791-1877 weighted yearly mean in almost exactly the same years as the unweighted yearly mean – in 1850-3, 1857, 1859, 1861-76, and by at least a standard deviation in 1850-1, 1857, 1859, 1861, 1864-5, 1868, and 1875.
[862] See Figure 14 for the number of state constitutional amendments proposed each year for 1789-1877.

mean by at least a standard deviation during and after the Civil War.[863] In total, between 1850 and 1877, Congress saw 834 proposals for federal constitutional amendments. Three of these passed – the Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) – fundamentally revising the federal Constitution in favor of freedom and civic equality for African Americans, and eventually for other groups.

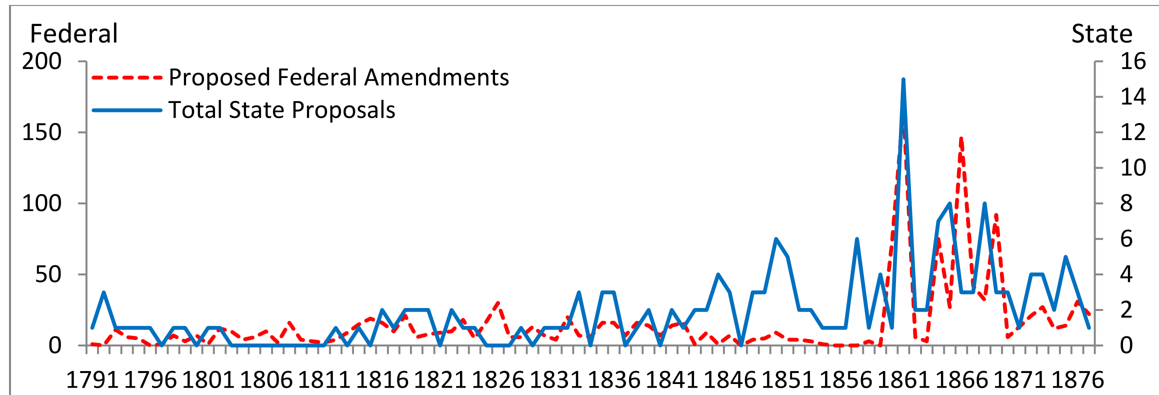

Figure 8: Proposals for State Constitutions and for Federal Constitutional Amendments, 1791-1877.

Reinterpretations of the federal Constitution proliferated alongside calls for amendment. With Congress deadlocked over slavery, Justice Roger B. Taney in *Dred Scott* reversed decades of judicial non-intervention in slavery, firmly establishing territorial slavery and rejecting black citizenship.[864] And when Congress in 1850 forced Northerners to recapture fugitive slaves, abolitionists like William Lloyd Garrison and Ralph Waldo Emerson reinterpreted the Constitution as an irredeemably proslavery document.[865] Southerners radicals worried Free-Soil and Republican congressmen would

[863] Specifically, proposals exceeded the mean by at least a standard deviation in 1860-1, 1864, 1866, and 1869. Proposal rates exceeded the 1791-1877 yearly mean in 1860-1, 1864-9, 1872-3, and 1876-7.
[864] *Dred Scott v. Sandford*, 60 U.S. 393 (1857). As later explained, the *Prigg* decision anticipated elements of *Dre Scott*.
[865] Garrison in 1833 questioned the Constitution's morality but accepted its legitimacy. But by 1845, he and his colleague Wendell Phillips rightly derided the Constitution as a covenant with slaveholders, which they felt was illegitimate. On Emerson, see George Kateb, "Self-Reliance, Politics, and Society," in *A Political Companion to Ralph Waldo Emerson*, ed. Alan M. Levine and Daniel S. Malachuk (The University Press of Kentucky, 2011); James H. Read, "The Limits of Self-Reliance: Emerson, Slavery, and Abolition," in *A Political Companion to Ralph Waldo Emerson*, ed. Alan M. Levine and Daniel S. Malachuk (The University Press of Kentucky, 2011).

ban territorial slavery, reconceived the Constitution as a revocable compact, some abandoning the Constitution outright in favor of the Declaration's invocation to rebellion.

Demonstrating that the state and national constitutions faced intense and joint revision, spurs another question – why? Why did the era's debates over slavery, states' rights, and citizenship force revision at *both* levels of government? This national constitutional revision is even more unusual compared to the constitutionalism of the Jacksonian era, when the states resolved controversies over suffrage, slavery, and financial regulation, preempting federal constitutional reform. What made the Civil War era different?

There are a few possible explanations for the era's unprecedented federal and state constitutional instability. Federal amendment rates are easily explained. Between 1850 and 1859, Democrats, Whigs, and Republicans split Congress, with no party garnering the two-thirds supermajority needed to affirm a proposed amendment. Congressmen proposed only twenty-four amendments in these years, all of which failed. But in 1861, aided by the withdrawal of Southern Democrats, Republicans captured over two-thirds of both congressional houses and by 1864 controlled twenty of the twenty-five Union state legislatures,[866] clearing the Article V amendment threshold. The Republican Congress subsequently proposed 421 amendments between 1864 and 1870, passing three which dramatically transformed federal civil rights.

In contrast, state constitutions' flexibility, specificity, or unpopularity may partly explain this unprecedented state constitutional revision. Compared to the federal Constitution, the state constitutions had fairly low thresholds on amendment or replacement. But these thresholds were consistently low throughout the nineteenth

[866] Dubin, *Party Affiliations in the State Legislatures*, 10.

century, and cannot alone explain the sudden uptick in state constitutional revision in the 1860s.[867] Alternately, over-specificity may explain state constitutional revision. Jacksonian state legislators encouraged bank speculation, spurring the panic of 1837 and subsequent lengthy, technical state constitutional clauses closely constraining banks, corporations, and state legislators. These specific, particularistic provisions may have eventually grown outmoded, requiring replacement.[868] But again, this cannot explain the abrupt revision increase in the 1860s. Alternately, this legislative corruption, economic panic, and regular constitutional reform may have dulled Americans' respect for or interest in their states and constitutions, encouraging further state constitutional reform. But antebellum Americans likely venerated their state governments and constitutions,[869] suggesting they would be hesitant to reform the state documents.

More generally, explaining state and federal constitutional revision in isolation is misguided, for the two were inextricably tied. In the 1850s, Stephen Douglas and Lewis Cass promoted popular sovereignty, deferring the slavery question to the states and territories, just as prior congressmen had in 1787 and 1820. But this familiar tactic backfired in the 1850s as Western state framers rejected slavery, increasing free state dominance Congress and the Electoral College. State constitutional revision suddenly failed as a venting mechanism, now exacerbating the slavery crisis. When antislavery Republicans seized Congress and the White House in 1860, Southerners rebelled by

[867] Note that some states failed to specify a revision procedure, and at least twenty-seven nineteenth-century state constitutions were drafted without explicit legal authority.
[868] In general, specific, lengthy state constitutions tend to have more contentious provisions and shorter lives. May, "Constitutional Amendment and Revision Revisited," 164–70; Lutz, "Toward a Theory of Constitutional Amendment," 357–59.
[869] As Tocqueville explained, an individual American state "represents a definite number of familiar things which are dear to those living there. It is identified with the soil, with the right to property, the family, memories of the past, activities of the present, dreams for the future. Patriotism, which is most often nothing but an extension of individual egoism, therefore remains attached to the state." Tocqueville, *Democracy in America*, 367.

drafting new state constitutions, which granted Republicans an overwhelming majority in the Union, allowing the Reconstruction Amendments and the Reconstruction Acts which forced the drafting of new antislavery Southern state constitutions. These postwar state constitutional framers worked in cooperation with Congress to build the Reconstruction constitutional order that endures to this day.

This chapter explains the era's constitutional tumult through the interplay of state and national constitutional politics. The two move in tandem, suggesting Congress and the state conventions together addressed the era's constitutional crises. For example, note that state revision rates spiked during moments of congressional contention in this era.[870] The chapter first recounts the constitutional controversies of the 1850s, explaining how the federal deference to the states unexpectedly exacerbated these issues. Then the chapter recounts how Southerners attempted to resolve these issues through secession and consequent state constitutional reform. The chapter's last section shows how Reconstruction state constitutions established abolition, equal protection, and universal male enfranchisement, often prior to and in more detail than did the federal Reconstruction amendments. These state constitutional conventions formally resolved the era's major questions. The Reconstruction constitutional order was drafted not just by Congress, but also by the states.

[870] See Figure 8. Note also attempted state constitutional replacement exceeded both the 1791-1877 yearly mean by at least a standard deviation in 1850, 1851, 1857, 1861, 1864-5, 1868, and 1875 – all significant junctures in congressional and Supreme Court constitutional politics. In 1861, every Confederate State replaced its constitution in order to reject the federal Constitution. These states revised their constitutions again between 1864 and 1865 under Lincoln's and Johnson's terms for Reconstruction. States exceeded their yearly mean in 1868, many revising their constitutions under the terms of the 1867 Reconstruction Act. Finally, state constitutional revision increased again in 1875, as some Southern states repealed their Reconstruction reforms.

II. Constitutional Controversies at 1850

Between 1850 and 1877, proposed federal constitutional amendments clustered around several issues.[871] Of the 834 amendment proposals, most dealt with slavery (199), including proposals abolishing slavery (59), and addressing fugitive slaves (44), territorial slavery (36), and slavery in the District of Columbia (31). Postwar proposals focused on congressional design (131), including postwar reapportionment (113), on suffrage expansions for African Americans and exclusions for ex-Confederates (89), and on extension of civil rights (37) and citizenship (21). Executive design and powers remained a perennial topic (71).[872] See Table 11 in the appendix for counts of proposals by topic.[873] Note also that many of the era's proposed amendments concerned concurrent powers subject to state constitutional reform, including amendments regulating slavery and suffrage and apportioning congressional districts, which alone account for half of the era's proposals. In short, during the mid-nineteenth century the states were poised to resolve the nation's main constitutional controversies.

Between 1850 and 1860, Congress used statutes to address controversies over territorial slavery and blacks' interstate movement and citizenship. Territorial slavery was a longstanding issue. Statutory compromises in 1787 and 1820 balanced the House and

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[871] To generate a list of the most common proposed amendment topics for 1850-77, this dissertation first identifies policy-related words to appear at least twenty times across descriptions of all 834 proposed amendments for 1850-77 in the NARA dataset, excluding duplicate words and words like "of" and "the" not related to policy issues. A second list of common terms is created by skimming descriptions the 834 proposals in this era compiled by Ames. These two are then merged and checked against Vile's list of most common topics by year. See Ames, *The Proposed Amendments*, 324–53; Vile, *Encyclopedia of Constitutional Amendments*, Appendix D.

[872] Note however that only twenty-two dealt with the selection of the executive, a substantial decrease after states largely resolved the issue in the antebellum era. See the previous chapter. Note also this figure is a minimum.

[873] Note these are approximate counts. Some individual amendments may match for multiple search terms and be included in multiple topic counts. Note also these counts are minimums, as they do not include amendments that do not match the search terms but may still be relevant to the topic. For example, in 1850 David Disney proposed an amendment protecting the local governments' sovereignty. Although not explicit, this amendment was intended to protect slavery. Ames, *The Proposed Amendments*, 353.

Electoral College between free and slave states, such that Northerners and Southerners alike accepted the pact. Between 1836 and 1856, each party nominated a president from one section and a vice president from the other, in hopes of capturing and representing both regions.[874] Thus in an 1833 open letter to the London *Patriot*, Massachusetts abolitionist William Lloyd Garrison grudgingly affirmed the Constitution's legitimacy, declaring the slavery question was "not a constitutional controversy, but one affecting conscience." Even the radical Garrison was willing to "recognise the compact" of the Constitution.[875] And as a South Carolina congressman, John C. Calhoun trusted that these compromises would maintain Southern control of the presidency and the House, championing a powerful national Congress and Union in order to preserve slavery.[876] Jackson obliged, impounding abolitionist mailings in 1835, and the following year the House implemented a gag rule tabling antislavery petitions.

[874] In 1787, a near-unanimous coalition of Northern and Southern delegates to the Continental Congress passed the Northwest Ordinance, mandating Congress form free states north of the Ohio River and implicitly allowing slave states to the south. This promised that congressional seats and subsequent slavery legislation would be balanced between the two regions. The Missouri Compromise extended the line across the Mississippi along the 36º 30' parallel, preserving the bisectional accord in Congress, as each slave state would enter the Union with a paired free one. Lynd, "The Compromise of 1787," 225–33, 238–43; Graber, *Dred Scott*, 12–13, 91–93, 102–3, 115–26; Aldrich, *Why Parties?*, 134–38.

[875] To Garrison, this shared national shame over slavery required union and a nationwide constitutional solution to the slavery crisis: "the guilt of slavery is national, its danger is national, and the obligation to remove it is national." Thus Garrisonians canvassed and leafletted the North and South on three-month tours, hoping to persuade or shame Americans into abolition. But in this same letter, Garrison derided the Constitution, which condoned slavery, as "a compact formed at the sacrifice of the bodies and souls of millions of our race… and according to the law of God, null and void." For Garrison, the Constitution was legitimate as positive law, but not as moral law. William Lloyd Garrison, "Letter to the Editor of the London Patriot, August 6, 1833," in *The Letters of William Lloyd Garrison: I Will Be Heard, 1822-1835*, ed. Walter McIntosh Merrill, vol. I (Cambridge: Harvard University Press, 1833), 248–49; Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Univ of North Carolina Press, 2002), 152–59.

[876] See Article I, Section 2, Clause 3. However, Calhoun anonymously wrote the South Carolina legislature's "Exposition" of 1828, defending nullification of the 1828 Tariff. Graber, *Dred Scott*, 115–18.

But antislavery delegates to California's 1849 Constitutional Convention refused to split the state into a free northern and proslavery southern half,[877] potentially increasing the Senate free-state majority to six seats, threatening the compromise. Further, early industrialization and rising immigration had inflated the population of Northern cities, and canals, turnpikes, roads, and railways funneled settlers into the free territories of the Old Northwest, which quickly reached the 60,000 inhabitants required to apply for statehood. By 1850, free states in total controlled 169 of the 290 Electoral College votes, enough to unilaterally select the president, and held 147 of the 237 House seats.[878] That same year, New Mexico proposed an antislavery state constitution, a wall against southwestern expansion of slavery threatening to cordon slavery to the southeastern states and block Southern recapture of the Electoral College and House.[879]

Congress tilted not only Northern, but also toward a Free Soil platform, which included prohibitions on slavery in the District of Columbia and the territories, on the interstate transportation of slaves, and on federal officials from recapturing fugitives.[880] After Polk pushed Congress to admit Texas as a slave state, in 1846 Pennsylvania representative and later Free Soiler David Wilmot proposed using the Territories Clause

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[877] Grodin, Massey, and Cunningham, *The California State Constitution*, 3–9; Fehrenbacher, *The Slaveholding Republic*, 271–73.

[878] By 1850, New York had a population of roughly three million and thirty-six Electoral College votes, and Pennsylvania and Ohio roughly two million each and twenty-six, and twenty-three votes respectively, while Virginia, the largest slave state, had just over a million inhabitants and only seventeen votes. See "United States Resident Population by State: 1790 - 1990," *New Jersey Department of Labor and Workforce Development*, n.d.

[879] Graber, *Dred Scott*, 126–30; Aldrich, *Why Parties?*, 132–33.

[880] Frustrated with Congress' gag rule, antislavery societies elected Liberty Party candidates to legislatures in Massachusetts and Maine in 1842, and rallied the New York vote against Henry Clay in the 1844 presidential election, aiding James Polk's victory. The Liberty Party then caucused with anti-patronage reformers and "Barnburner" abolitionist New York Democrats to form the Free Soil Party. By 1848, Congress' Free Soil cohort had grown to thirteen. Free Soilers stopped short only of abolishing slavery within an existing state.

to ban slavery in all territories seized during the Mexican-American War.[881] The Wilmot Proviso passed the Northern-dominated House with no concessions to slaveholding states, threatening the bisection accord, before failing in the more balanced Senate.[882]

The territorial slavery controversy pushed some to secessionism. Calhoun answered the Wilmot Proviso with resolutions requiring territorial slavery, but these failed against free-state majorities in both houses.[883] In a March 1850 Senate speech, he declared the result of Northern population growth was to give the "Northern section a predominance in every department of the government." Hence, "as it now stands, one section has the exclusive power of controlling the government, which leaves the other without any adequate means of protecting itself against its encroachment and oppression."[884] Southerners considered secession, and Southern legislators ordered the burning, impounding and censoring of antislavery literature.[885] In response to this and the lynching of abolitionists,[886] Northern antislavery advocates also radicalized, recognizing they could not talk Southern citizens or congressmen into abolition. In 1844, Garrison rejected the Constitution's legitimacy,[887] explaining his change of heart in an 1845 letter

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[881] See Article IV, Section 3, Clause 2. Fehrenbacher, *The Slaveholding Republic*, 266–68.
[882] Sundquist, *Dynamics of the Party System*, 50–65; Silbey, *The American Political Nation, 1838-1893*, 125–40; Smith, *Civic Ideals*, 246–49; Graber, *Dred Scott*, 130–35.
[883] Fehrenbacher, *The Slaveholding Republic*, 268.
[884] He specified the North controlled "the two elements which constitute the federal government: a majority of States, and a majority of their population, estimated in federal numbers. Whatever section concentrates the two in itself possesses the control of the entire government." John Caldwell Calhoun, "Speech on the Slavery Question, Delivered in the Senate, March 4, 1850," in *Speeches of John C. Calhoun Delivered in the House of Representatives and in the Senate of the United States*, ed. Richard Kenner Crallé (New York: D. Appleton and Company, 1850), 544–46.
[885] Graber, *Dred Scott*, 128.
[886] In 1837, a proslavery Illinois mob lynched Elijah Lovejoy, an abolitionist printer, shocking Northerners, and in 1846, the prominent abolitionist speaker Charles Turner Torrey died in a Maryland prison.
[887] Wiecek, "Somerset," 119; Smith, *Civic Ideals*, 247.

damning the Constitution as a "covenant with death and an agreement with hell."[888] He repeated this phrase in a Framingham rally of the Massachusetts Anti-Slavery Society that same year, brandishing a burning copy of the Constitution.

Democratic Party leaders tried to quiet the territorial slavery issue by pushing it from Congress back on the territories. In 1848, Lewis Cass, the Democratic presidential nominee, proposed that the Territories Clause let Congress regulate only the territories' public lands, requiring Western territorial legislatures and state constitutional conventions to address slavery without congressional oversight. Cass promised Northern audiences that the territorial constitutional conventions would ban slavery, and convinced Southern audiences that the conventions would preserve it, satisfying both crowds. On losing the 1848 election, Cass passed the platform to fellow Democrat Stephen A. Douglas who, with the aid of Daniel Webster, shepherded through the House and Senate a series of bills together dubbed the Compromise of 1850. Congress admitted California as a free state and allowed the legislatures and constitutional conventions of New Mexico and Utah to regulate slavery as they wished.[889]

Douglas' "popular sovereignty" plan for devolution initially satisfied both sections. In the same bill, Northerners and Southerners saw divergent outcomes in the territories.[890] Proslavery congressmen trusted that southwesterners would adopt

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[888] William Lloyd Garrison, "Letter to Samuel J. May, July 17, 1845," in *Letters of William Lloyd Garrison: 1841-1849*, ed. Walter McIntosh Merrill, vol. III (Cambridge: Harvard University Press, 1845), 303; Mason, *Slavery and Politics in the Early American Republic*, 228–32.

[889] With the stipulation that a legal challenge to these regulations could be appealed to the United States Supreme Court

[890] Southerners supported the plan for reasons beyond territorial slavery. For example, Southern legislatures cited the plan, which expanded states' authority over slavery, to silence local abolitionist petitions. The Maryland legislature resolved "That Congress has no power under the Constitution to interfere with or control the domestic institutions of the several States, and that such States are the proper and sole judges of every thing appertain-ing to their own affairs," to the exclusion of the "Abolitionists and others… [whose petitions] are calculated to lead to the most alarming and dangerous consequences." These resolutions were

plantation and mining slavery and would elect proslavery congressmen. North Carolina representative Thomas Lanier Clingman, recalling newspaper articles and conversations with Westerners, expected the Colorado River would "produce sugar, cotton, rice, and tropical fruits &c." In describing California, he added "Gold mines are known to exist there… Wherever gold mines exist, especially surface, alluvial, or deposit mines, slave labor can be employed to greatest advantage."[891] Northerners and some abolitionists backed popular sovereignty, predicting slavery would not flourish in the dry southwest. The Democrat John McClernand of Illinois supported the Compromise, claiming "God and nature have traced an immutable material law in the lofty mountains and arid deserts of that Territory, forever prohibiting African slavery within its limits… Slavery does not, nor can it, as I think, exist in Utah or New Mexico."[892] Moreover, antislavery congressmen trusted that southwesterners would maintain Mexican laws abolishing local slavery.[893] Douglas' plan passed the House and Senate with bisectional support, partly because it did not require antislavery or proslavery congressmen to abandon their position and compromise.

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submitted to the Virginia governor in 1844, but other states frequently referred the same text to the House Committee on Territories, and the Democratic party incorporated this text into its national platform in 1856. *Journal of the House of Delegates of Virginia* (Richmond: Samuel Sheperd, 1844), 66; Charles E. Schamel et al., eds., *Guide to the Records of the United States House of Representatives at the National Archives, 1789-1989* (National Archives and Records Administration, 1989), 189.

[891] Similarly, a May 24, 1850 letter from the Academy of Natural Sciences of Philadelphia to the Senate Committee on Territories promised the southwestern territories held "mines of the precious metals and of other valuable mineral productions… [and] valuable woods and other vegetable productions." Note that in this August 31, 1850 speech Clingman opposed the 1850 Compromise. See the National Archives and Record Administration, Center for Legislative Archives, Record SEN 31A-H22 Senate Committee on Territories. *The Congressional Globe: Thirty-First Congress, First Session*, vol. XXI Part II (Washington: John C. Rives, 1850), 1698.

[892] McClernand advocated the Compromise for the sake of Union, rather than abolition. He had opposed the Wilmot Proviso, fearing it would divide the nation. Ibid., XXI Part II:1700.

[893] Some proslavery Whigs, seeing California as inhospitable to slavery, worried splitting the state would yield two free states, and thus they joined antislavery Northerners in admitting California as a single free state. Sundquist, *Dynamics of the Party System*, 68–70; Graber, *Dred Scott*, 151–53.

This devolution temporarily quieted the territorial slavery question, preserving the Constitution. As Representative Boyd of Kentucky argued, this was the plan's strength: "I am earnestly and in good faith seeking to test the sense of the House upon the doctrine of non-intervention. I want to see that principle carried out – I want to see it carried out in good faith. I wish to see peace restored to the country. I am for the Union. I am for the Constitution as it is – I want no amendment to it."[894] Boyd got his wish. Between 1850 and 1859, Congress, divided by section and united for popular sovereignty, proposed only twenty-four federal constitutional amendments, only two of which would have directly regulated territorial slavery, none of which passed.[895] Devolution solved the short-term dispute in Congress, but let both sections maintain irreconcilable platforms on Western slavery, promising eventual conflict.[896]

The rights of fugitive slaves presented a second controversy. The brief federal Constitution's Fugitive Slave Clause allowed the return of fugitive slaves,[897] but failed to charge federal or state actors with enforcement. Moreover, the Clause stated people could be held in servitude in a state, "under the laws thereof," but not under a uniform federal law. Rather than placing the Clause with Article I congressional powers or Article II

[894] See *The Congressional Globe, Volume 21, Part 2*, XXI Part II:1697.

[895] In 1850, Representative John Daniel of North Carolina proposed an amendment to ban the abolition of slavery. In 1858, an amendment was proposed to recognize the right to own slaves in the territories. Representative David Disney of Ohio proposed a pair of 1850 amendments asserting "that the people of every community have an inherent right to form their own domestic laws and to establish their own local government when they do not conflict with the Constitution." This would have cemented popular sovereignty in the federal Constitution Ibid., XXI Part II:1349; *The Congressional Globe: Thirty-First Congress, First Session*, vol. XXI-Part I (Washington: John C. Rives, 1850), 228, 276; Ames, *The Proposed Amendments*, 192.

[896] As the historian Donald Fehrenbacher concludes, the "enigma of Cass' popular sovereignty – which confusingly translated into either Calhoun's constitutional position effectively protecting slavery in the territories up until statehood *or* a possible instrument to kill slavery during the territorial stage well before any application for statehood – was built into the very structure of the settlement." Fehrenbacher, *The Slaveholding Republic*, 268–73.

[897] The Clause specified that a runaway to a free state was not freed "in consequence of any law or regulation therein," and could be forcibly returned. See Article IV, Section 2, Clause 3. Similarly, Congress' 1793 Fugitive Slave Act authorized private slavecatchers, but left enforcement to the states.

executive powers, the federal framers placed it among the state powers and responsibilities of Article IV, acknowledging the states' traditional authority over fugitive law.[898]

States quickly diverged by section. New England state legislatures, courts, and constitutional conventions promised life and liberty to all persons within their borders, free and slave. Similarly, Northern states passed personal liberty laws punishing slavecatchers who seized free blacks,[899] and Northern congressmen defeated an 1801 bill to limit these personal liberty laws and an 1817 bill compelling Northern governors and judges to enforce the 1793 Fugitive Slave Act.[900] In contrast, Louisiana's antebellum territorial governor William C. C. Claiborne had coerced Mexico to agree to return slaves who fled to Texas.[901]

This divergence opened national controversies under the Privileges and Immunities Clause. Beginning in the 1820s, slave state legislatures, fearing slave insurrection, stripped visiting free-state blacks of the liberties they enjoyed through their home state's constitution.[902] This created an interstate conflict of laws and likely violated the federal Privileges and Immunities Clause, which required a state grant a visitor at

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[898] Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution," *The American Journal of Legal History* 36, no. 4 (1992): 471, doi:10.2307/845555; Fehrenbacher, *The Slaveholding Republic*; Graber, *Dred Scott*, 84.
[899] In 1808, the New York legislature specified harsh penalties for such slavecatchers, and Ohio followed suit seven years later. Pennsylvania in 1826 passed a law punishing warrantless private seizures of slaves and constraining the authority of state sheriffs and magistrates to enforce the 1793 federal Act. Indiana's 1816 and 1824 personal liberty laws guaranteed alleged fugitives a jury hearing.
[900] Fehrenbacher, *The Slaveholding Republic*, 205–14; Finkelman, *Slavery and the Founders*, 81–104.
[901] Fehrenbacher, *The Slaveholding Republic*, 213–19, 261.
[902] After Denmark Vesey's failed slave revolt, South Carolina legislators regulated the movement of local free blacks and free black sailors on shore leave from Northern ships. The 1822 law allowed the detention and potentially the enslavement of free Northerners and foreigners, drawing the Supreme Court's disapproval, which the South Carolina legislature ignored. North Carolina, Georgia, Florida, Alabama, Louisiana, and Texas soon passed similar laws. Meacham, *American Lion*, 53; Edlie L. Wong, *Neither Fugitive nor Free: Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* (NYU Press, 2009), 183–239.

least the basic rights he enjoyed in his home state.[903] Conversely, free states that had allowed whites to travel with slaves under "sojourner laws" began repealing these laws in the late antebellum era, arguably violating slaveholders' federal Privileges and Immunities rights.[904] For example, in *Commonwealth v. Aves*, the Massachusetts' Supreme Court held visiting slaves could appeal for their freedom under the state's Constitution.[905] Connecticut quickly followed suit, citing *Aves* in a decision freeing a slave brought from Georgia.[906] Between the 1836 *Aves* ruling and 1860, courts in every state considered the *Aves* precedent, and all but five Northern states accepted it.[907]

These state violations of federal Privileges and Immunities rights spurred two cases in which the Supreme Court partly maintained state authority. In *Groves v. Slaughter* (1841), Justice Smith Thompson implicitly limited the Court's authority over

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[903] See Article IV, Section 2, Clause 2.

[904] This also may have violated the Full Faith and Credit Clause, which required states recognize the constitutions and judicial proceedings of other states. See Article IV, Section 1.

[905] In *Aves,* Med, a six-year-old slave, accompanied her mistress Mary Slater from New Orleans to Massachusetts, where Slater transferred Med to her father, Thomas Aves. The Boston Female Anti-Slavery Society requested a writ of habeas corpus to inquire Aves' right to hold Med. Massachusetts Supreme Court Chief Justice Lemuel Shaw held that "all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer; that this rule applies as well to blacks as whites." Citing *Somerset*, Shaw noted slavery regulation was a matter of local positive law, such that in a free state, slaves could "become free, not so much because any alteration is made in their *status*, or condition, as because there is no law which will warrant [enslavement], but there are laws, if they choose to avail themselves of them, which prohibit, their forcible detention or forcible removal." Shaw added that the Massachusetts constitution's equality clause allowed Med to refuse to return to Louisiana with Aves and Slater. But the state equality clause did not preempt the federal Fugitive Slave Clause or the 1793 Fugitive Slave Act, precluding freedom suits by fugitives. Note the Massachusetts Supreme Court precedents for *Commonwealth v. Aves* in *Commonwealth v. Griffith*, 19 Mass. 11; 2 Pick. 22 (1823), holding federal officers could seize a fugitive without producing a warrant, and in *In re Francisco*, 9 Am. Jur. 490 (1833), in which Shaw offered freedom to a slave boy brought to Massachusetts. See *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836). *Somerset v Stewart* (1772) 98 ER 499, and the Massachusetts Declaration of Rights, Article I. Wiecek, "Somerset," 132–33; Finkelman, *An Imperfect Union*, 101–25.

[906] See *Jackson v. Bulloch,* 12 Conn. 38 (1837). Connecticut's Chief Justice Thomas Williams held the state's bill of rights' equality provision was "limited to those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or be represented in it." See Jackson v. Bulloch 12 Conn. 43 (1837). Thus Williams grounded slaves' liberty on a 1774 and a 1784 statute and on the state's due process protections. See the Connecticut Constitution of 1818, Article I, Section 9. Horton, *The Connecticut State Constitution*, 21; Finkelman, *An Imperfect Union*, 127–30.

[907] The exceptions were New Jersey, Illinois, Indiana, California, Oregon, all of which already limited blacks' rights. Finkelman, *An Imperfect Union*, 127.

the interstate movement of slaves,[908] and in a concurring opinion Roger B. Taney explicitly stripped this power from the Court and Congress,[909] leaving the matter to the states. This let proslavery and antislavery state legislators to continue to regulate blacks' interstate movement as they pleased.[910]

In *Prigg v. Pennsylvania* (1842),[911] Justice Joseph Story struck down a Pennsylvania personal liberty law, ruling that the federal government, not the states, regulated and enforced the return of fugitives under the 1793 Fugitive Slave Act. Accordingly, free states could not impede federal enforcement of the Act.[912] The case

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[908] In *Groves,* slaveholders appealed to the Supreme Court to use the federal Commerce Clause to strike down Mississippi's constitutional prohibition on interstate slave sales. The question required the Court either to use federal commerce powers to invalidate a state constitutional slave law, alienating Southerners, or to uphold the state clause and potentially establish a precedent for federal intervention in the interstate slave trade, alienating Southerners. The Court chose neither. Instead, Thompson's strategically brief majority opinion held that since the Mississippi legislature had not implemented the clause by statute, it held no force, and could neither be violated nor conflict with the federal Commerce Clause. Even the unabashedly antislavery Justice John McClean concurred with Thompson's majority opinion. See *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), the Mississippi Constitution of 1832, Article IX, Section 2, and the federal Constitution Article I, Section 8, Clause 3. Maltz, "Slavery, Federalism, and the Structure of the Constitution," 471–73.

[909] Taney claimed: "the power over this subject is exclusively with the several states, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits, from another state, either for sale, or for any other purpose, and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories, and the action of the several states upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce or by virtue of any power conferred by the Constitution of the United States." *Groves v. Slaughter*, 40 U.S. (15 Pet.) 508 (1841). See 40 U.S. (15 Pet.) 503-8 (1841).

[910] Smith, *Civic Ideals*, 259–60.

[911] In 1788, the Pennsylvania legislature amended the state's 1780 abolition act to penalize Pennsylvanians for removing their slaves from the state. The federal Constitution's Fugitive Slave Clause allowed the seizure of runaways in Pennsylvania, seemingly overriding the 1788 Amendment, but in 1826, the Pennsylvania legislature revived the Amendment's prohibition on seizing blacks. Sixteen years later, slaveholders challenged the law. Margaret Morgan, a slave, had been informally emancipated by her owner, John Ashmore, allowing her to move to Pennsylvania. Ashmore's heirs sent Edward Prigg to recapture her and return her to Maryland, prompting Prigg's conviction under the 1826 Pennsylvania law. See the 1788 Amendment to the 1780 Gradual Abolition Act, Section II-VII and *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

[912] Story delcared: "it cannot be that the state legislatures have a right to interfere and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose" 41 U.S. 617-8 (1842). Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* 25, no. 1 (1979): 9–10, doi:10.1353/cwh.1979.0030.

was on balance an important doctrinal victory for advocates of slavery and broad national powers.[913]

But despite Story's bold nationalist rhetoric, the collective *Prigg* opinions deferred much to the states. Story's ruling left Congress to enact fugitive slave policy, and in the absence of congressional action, states were likely to continue their divergent courses.[914] Further, Story ruled free-state citizens and officials could not be compelled to recapture slaves. He reasoned the Fugitive Slave Clause:

> does not point out any state functionaries, or any state action, to carry its provisions into effect . The States cannot, therefore, be compelled to enforce them, and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the National Government, nowhere delegated or entrusted to them by the Constitution.[915]

The antislavery Justice McClean argued that slave law was a police power reserved to the states, recognizing "in the State a power to guard and protect its own jurisdiction and the peace of its citizens."[916] Even Taney's proslavery concurrence, clashing with Story, devolved enforcement to the states, noting that by placing the Fugitive Slave Clause in Article IV, the federal framers intended it as a state power, rather than an Article I

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[913] Smith, *Civic Ideals*, 260–61; Fehrenbacher, *The Slaveholding Republic*, 219–30.

[914] For scholarly accounts affirming this reading of *Prigg*, see Norman L. Rosenberg, "Personal Liberty Laws and Sectional Crisis: 1850-1861," *Civil War History* 17, no. 1 (1971): 27–28; Finkelman, "Prigg v. Pennsylvania and Northern State Courts," 14–15; Finkelman, *An Imperfect Union*, 132; Maltz, "Slavery, Federalism, and the Structure of the Constitution," 473–80; Paul Finkelman, "Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story's Judicial Nationalism," *The Supreme Court Review* 1994 (1994): 247–94; Finkelman, *Slavery and the Founders*, 91.

[915] *Prigg v. Pennsylvania*, 41 U.S. 615-6 (1842). Story further elaborated this position by narrowly reading federal slavery powers as those specifically required by the Constitution's text: "the National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive,' as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."

[916] *Prigg v. Pennsylvania*, 41 U.S. 670-2 (1842).

congressional power.[917] Antislavery and proslavery justices agreed on non-intervention,[918] and McClean and Taney's concurrences paved the way for Northern states' rights arguments. This mix of nationalist and states-rights opinions, and consequent congressional inaction, let the states reinterpret the decision to allow non-enforcement of the Fugitive Slave Clause and the 1793 Fugitive Act and boldly pass new personal liberty laws.

In response congressional Democrats proposed the 1850 Fugitive Slave Act forcing federal and state officials and citizens to return runaways.[919] A united South passed the Act over piecemeal Northern resistance,[920] gutting Northern personal liberty laws. Assuming the power granted by Story's *Prigg* ruling, Congress then laid the issue to rest. Between 1850 and 1859, Congress proposed only one federal amendment touching on slave mobility, recognizing a right to property in slaves.[921] The question remained whether Northern officials and citizens would cooperate.

These disputes over blacks' movement rights fit in a broader dispute over black citizenship. While egalitarians like William Lloyd Garrison, Frederick Douglass, and Martin Delany argued for black citizenship,[922] biological racists challenged this claim. Caving to white students' demands, Harvard expelled Delany and two other black

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[917] 41 U.S. 626-34 (1842). Note, however, that Taney felt free states were obligated to aid slaveholders recapture their fugitives, and felt that Congress could force state officials to aid in this recapture. Finkelman, "Prigg v. Pennsylvania and Northern State Courts," 19–20.
[918] Graber, *Dred Scott*, 18.
[919] The 1850 Act mandated federal marshals capture alleged fugitive slaves, receiving two dollars for capturing a slave and one for a freeman, and allowed federal commissioners or their appointees to rally bystanders as a *posse comitatus* and recapture fugitives. Commissioners could also judge an alleged fugitive's case without hearing testimony from the fugitive.
[920] Smith, *Civic Ideals*, 261–63; Fehrenbacher, *The Slaveholding Republic*, 225–32.
[921] Ames, *The Proposed Amendments*, 193.
[922] Taking the existing Constitution "null and void before God," in 1844 Garrison used Christian principles to advocate black citizenship. In an 1852 speech, his colleague Frederick Douglass proposed reading the Constitution through the egalitarian principles in the Declaration, and that same year, Martin Delany argued blacks' uncompensated labor entitled them to suffrage and citizenship.

medical students, and hired Louis Agassiz, whose embryology studies concluded that blacks' and Native Americans' fetal development halted too early to allow the mental capacity for citizenship.[923] And in 1839, Agassiz's Philadelphia colleague Samuel George Morton first published *Crania Americana*, asserting that blacks' and Native Americans' lower cranial volumes indicated weaker mental faculties. The work, expanded by coauthor and fellow University of Pennsylvania graduate Josiah T. Nott, received wide circulation through the country,[924] affirming state-level prohibitions on blacks' citizenship, suffrage, and education rights. These clashed with somewhat more egalitarian Northern citizenship laws, creating more national Privileges and Immunities conflicts.

In *Strader v. Graham* (1851), the federal Supreme Court refused to intervene in this state regulation. Jacob Strader owned a steamboat that transported three of Christopher Graham's slaves from Kentucky to Ohio, where they escaped for Canada. Graham sued to recover the cost of his loss property, and won in the Kentucky judicial system.[925] Though Strader appealed under interstate jurisdiction, the Supreme Court unanimously declined that it had jurisdiction over the case, deferring to the state courts.[926] Additionally, the defendants had claimed that the slaves had gained their

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[923] Ralph Waldo Emerson, Agassiz's friend and hunting companion, adopted these theories, and like many other abolitionists, Emerson doubted blacks and Native Americans were suited to modern society. In his journals, Emerson lauded Agassiz's embryo studies, musing in an 1838 entry: "the negro is older than [the Indian], & they older than the white man. The negro is preAdamite." Two years later, he repeated: "The negro must be very old & belongs, one would say, to the fossil formations." But, ever inconsistent, Emerson in a public 1854 speech held "The plea in the mouth of a slaveholder that the negro is an inferior race sounds very oddly in my ear." Ralph Waldo Emerson, "The Fugitive Slave Law," in *The Selected Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 1854), 872; Ralph Waldo Emerson, *Journals and Miscellaneous Notebooks of Ralph Waldo Emerson, Volume VII: 1838-1842* (Cambridge: Harvard University Press, 1969), 74, 84, 393.

[924] See also Nott's *Types of Mankind.* Smith, *Civic Ideals*, 203–4, 246–53.

[925] Jacob Strader and James Gorman owned the steamboat, piloted by John Armstrong, which the slaves used to reach Ohio. Graham named Strader, Gorman, and Armstrong in his suit. See *Strader v. Graham*, 51 U.S. 82 (1851).

[926] Strader's appeal noted his steamboat had transported the slaves across state lines, placing the case in federal jurisdiction.

freedom on entering Ohio, under Article VI of the Northwest Ordinance. In his majority opinion, Taney rejected this too, asserting that on granting statehood, Congress relinquished authority to regulate slavery within a state,[927] leaving the states to regulate blacks' freedom and citizenship rights.[928]

Finally, slavery disputes reignited the nullification controversy. When California's admission tipped the Senate to a six seat free state majority, Southerners lost hope of regaining the Senate, and so considered alternate means to block Free Soil legislation. Calhoun and others revived compact theory, arguing the states were temporally and legally prior to the Union and could negate national law by nullification, constitutional convention, and even secession. Similarly, Northern legislatures, courts, and governors passed and upheld new personal liberty laws to expressly nullify the 1850 Fugitive Slave Act. These alienated congressional moderates like Representative David Disney of Ohio, who in 1850 proposed a federal amendment allowing states and territories to pass slave laws, only "when they do not conflict with the Constitution."[929]

In sum, in 1850, Congress faced crises over territorial slavery and fugitive slaves. As it had in 1820 and 1837, Congress deferred the territorial slavery issue to the states and territories. But now this backfired, so that by the mid-1850s, the states had established clashing proslavery and antislavery constitutional orders. Rather than authorizing only one order, Congress and the federal courts read the national

[927] Ralph Waldo Emerson, Agassiz's friend and hunting companion, adopted these theories, and like many other abolitionists, Emerson doubted blacks and Native Americans were suited to modern society. 51 U.S. 94 (1851).
[928] However, Taney rejected the states' authority to override "duties and obligations imposed on them, by the Constitution of the United States," including the duty to return fugitives. *Strader v. Graham*, 51 U.S. 93 (1851). Wiecek, "Somerset," 137–38; Smith, *Civic Ideals*, 260.
[929] See *The Congressional Globe, Volume 21, Part 1*, XXI-Part I:228, 276.

Constitution's ambiguous slavery and citizenship clauses to allow both.[930] The Constitution and courts had failed their role as neutral arbiter in interstate disputes.

III. Escalation and the Civil War, 1850-65

A. State Constitutionalism and the Slavery Crisis

Devolution worsened the era's conflicts. Southwesterners rejected slavery, inflating the free state majority and exacerbating the territorial slavery controversy. Utahans did not legalize slavery in their 1849 or 1856 territorial constitutions, and New Mexicans, burdened with the Mexican-Indian Taos Uprising of 1847 and a border dispute with Texas, failed to recognize slavery in their 1848 and 1849 territorial constitutions.[931] An 1850 New Mexico Constitution outlawing slavery failed to be adopted.[932] Laws aside, plantation slavery never succeeded in these vast, dry territories.[933] In 1860, Utah and New

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[930] As Mark Graber writes, "The various materials for making constitutional arguments before the Civil War were, unsurprisingly, as conflicted about slavery as was the general polity. What Americans needed – and what constitutional law had no capacity to provide – was the political consensus necessary for a decisive choice to be made between the more egalitarian and more racist strands of the antebellum American constitutional tradition." Graber, *Dred Scott*, 86.

[931] However, New Mexico's 1846 Organic Law distinguished between free and unfree male citizens. See the Organic Law of the Territory of New Mexico Territory of 1846, Article III, Section 4, holding "No person shall be eligible to the legislative council who shall not have attained to the age of thirty years; who shall not be a free male citizen of the territory of New Mexico," and similarly, Section 6 and 8. While Breting and Garcia suggest the document, also called the "Kearny Code" after the territorial governor Stephen Watts Kearny, led to "the articulation of an unequivocal antislavery provision," this author could not find such a provision. In his history of the state, Chuck Smith makes no reference to such a clause. Smith, *The New Mexico State Constitution*, 2; John Bretting and F. Chris Garcia, "New Mexico's Constitution" Promoting Pluralism in La Tierra Encantada," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 745.

[932] See the failed New Mexico Constitution of 1850, Article I, Declaration of Rights, Section 1. Note also that slavery was affirmed by statute in Utah in 1852 and New Mexico in 1859. Smith, *The New Mexico State Constitution*, 2–5; Carol E. Hoffecker and Barbara E. Benson, "Festina Lente: The Development of Constitutionalism in Delaware," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 743–47; Robert W. Larson, *New Mexico's Quest for Statehood, 1846-1912* (University of New Mexico Press, 2013), 13–40.

[933] But note that under the old Mexican government, small-scale peonage slavery had existed in the southwest.

Mexico held twenty-nine and zero slaves respectively, blocking slavery's westward roll.[934]

Nor did slavery find a foothold on the west coast. Miners' advocates from California's northern half dominated the territory's 1849 Convention. Fearing slavery would undercut miners' wages and allow racial intermixing, delegates banned the institution with little debate,[935] preempting slave labor in California's northern mines and southern farms. Morton McCarver, Oliver M. Wozencraft, and James McHall Jones, all born or adopted Kentuckians, proposed outlawing the immigration of free and enslaved blacks, but the Convention dropped the clause, worrying egalitarian congressmen would block California's admission to the Union.[936] California would be free. The Convention's Committee on Boundaries then proposed pushing California's eastern border across the Sierra Nevada to the Utah Territory, and the northern border to the Oregon Territory, excluding slavery from much of the west. Winfield S. Sherwood, an immigrant from New York, predicted these expansive borders would end the national slavery controversy, declaring:

"if the Union is to be cut asunder by this one question, we shall regret it for years, that having it in our power, with no cost to ourselves, we did not settle it forever. It is this that governs my vote, and not any desire that I have to embrace that territory within our limits as a State. I want to see [the territorial slavery debate] forever kept out of the halls of Congress."[937]

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[934] Fehrenbacher, *The Slaveholding Republic*, 273; Graber, *Dred Scott*, 43.
[935] The original draft did not mention slavery, but delegate W.E. Shannon imported Section 23 of the 1846 Iowa Constitution, banning slavery. See the California Constitution of 1849, Article I, Section 18.
[936] Gordon Lloyd, "The 1849 California Constitution: An Extraordinary Achievement by Dedicated, Ordinary People," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 717–18; David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840-1890* (University of California Press, 1992), 127–30.
[937] John Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (Washington: Printed by John T. Towers, 1850), 420.

The Virginian Charles T. Botts, better attuned to the Southern mind, presciently warned Sherwood of opposition from "the extreme faction of the South, headed by Mr. Calhoun," but also from "the wise and moderate men of the North" who feared so provoking Southern firebrands.[938] Like Sherwood, Botts hoped to frame a state constitution to resolve national tensions. The Convention settled on Sherwood's expansive borders, and on September 9, 1850, Congress brought a free California into the Union under Douglas' Compromise.[939] To the north, Oregon's 1843 and 1845 Organic Laws banned slavery, and legislative statutes penned by Morton McCarver threatened whipping for any African American, free or slave, who attempted to enter the territory.[940] The 1850 Compromise's deference to local custom had yielded an anti-black, antislavery West, halting the spread of slavery, worrying Southerners.

Southern hopes that the northern Great Plains were too frigid for white settlement too were dashed.[941] White settlers flooded Iowa, abolishing slavery in their 1846 and 1857 Constitutions by drawing on the Northwest Ordinance's abolition clause.[942] The 1848 Convention in neighboring Wisconsin banned slavery and enfranchised African Americans, but only given voters' and legislators' eventual approval.[943] And in the Old Northwest where slavery had lingered since colonial days, an 1848 constitutional

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[938] Ibid., 421; Johnson, *Founding the Far West*, 114–15, 130–37.
[939] Grodin, Massey, and Cunningham, *The California State Constitution*, 3–9; Lloyd, "The 1849 California Constitution: An Extraordinary Achievement by Dedicated, Ordinary People," 723–24.
[940] See the Oregon Organic Law of 1843, Article I, Section 4 and Oregon Organic Law of 1845, Article I, Section 4. Schuman, "The Creation of the Oregon Constitution," 611–17.
[941] Graber, *Dred Scott*, 127.
[942] See the Iowa Constitution of 1846, Article II, Section 23 and the Iowa Constitution of 1857, Article I, Section 23. Stark, *The Iowa State Constitution*, 65–66.
[943] See the Wisconsin Constitution of 1848, Article I, Section 2 and Article III, Section 1, Clause 4. An 1846 referendum to allow blacks to vote had failed 15,415 to 7,664. Stark, *The Wisconsin State Constitution*, 4–8; John Zumbrunnen, "Wisconsin: Rejection, Ratification, and the Evolution of a People," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 472–73.

convention cemented abolition in Illinois, as did one in Michigan two years later, and one in Indiana the year after that.[944]

Still, popular sovereignty was so rhetorically vague and palatable that both Northern and Southern congressmen supported it again, now through the 1854 Kansas-Nebraska Act. The Act, promoted by Douglas and the Missouri senator David Atchison, repealed the Missouri Compromise's prohibition on slavery above 36º 30' parallel. Atchison hoped this would draw new settlers from the slaveholding counties of western Missouri into eastern Kansas, while Congress' Northern Democrats expected Kansas to be inhospitable to slavery and to become a free state.[945] With the 36º 30' line repealed, slavery in the all territories would be decided by territorial voters, legislatures, and constitutional conventions.

Again, devolution backfired. Northerners rejected the Act. The House Committee on the Territories received petitions against the Act from all but three of the free states, and from only two slave states.[946] Northern Whigs, persuaded against slavery by the recent trial of the fugitive Anthony Burns and the publication of *Uncle Tom's Cabin*, abandoned their party's Southern wing, joining Free Soilers and rebranding themselves as Republicans. In 1856 they nominated the free state antislavery candidates John C. Fremont of California and William Dayton of New Jersey, rejecting the tradition of

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944 See the Illinois Constitution of 1848 Article XIII, Section 16, the Michigan Constitution of 1850, Article XVIII, Section 11 and the Indiana Constitution of 1851, Article I, Section 37.

945 William W. Freehling, "The Louisiana Purchase and the Coming of the Civil War," in *The Louisiana Purchase and American Expansion, 1803-1898*, ed. Sanford Levinson and Bartholomew Sparrow (Lanham, MD: Rowman & Littlefield Publishers, 2005), 75–81; Graber, *Dred Scott*, 155–58.

946 See the National Archives and Record Administration, Center for Legislative Archives, Record HR 33A – G23.11, 24.1-6 House of Representatives Committee on the Territories. The records seem not to include petitions from the free states of Pennsylvania, Iowa, and California. They include petitions from Delaware, and a single petition from North Carolina, both slave states.

bisectional presidential tickets.[947] Seventy percent of Northern Democratic congressmen supporting the Kansas-Nebraska Act lost their seats in 1854, decimating the Party's Northern wing.[948] Republicans were now largely antislavery Northerners and Democrats largely proslavery Southerners, deadlocked over the slavery question.[949]

Kansans, faced with resolving this national question, wrangled over the state's constitution and future. The politics were dirty, then violent. Missouri Senator David Atchison led his constituents across the Mississippi on Kansas' election day, where their votes installed a proslavery territorial legislature.[950] Excluded from the legislature, abolitionists Kansas formed a shadow government under the antislavery Topeka Constitution of 1855.[951] Proslavery forces then sacked the abolitionist stronghold of Lawrence, for which John Brown executed local slaveholders.[952] The conflagration spread to the Unites States Senate where the South Carolinian Preston Brooks caned Charles Sumner of Massachusetts for a lurid speech implicating Atchison and Brooks' cousin in the Kansas crisis. The Northern-leaning House answered by accepting the antislavery Topeka Constitution, but Southern senators blocked the measure. Kansas' proslavery legislature and voters, backed by President James Buchanan, instead proposed

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[947] Sundquist, *Dynamics of the Party System*, 75; Mason, *Slavery and Politics in the Early American Republic*, 213–19.
[948] Fehrenbacher, *The Slaveholding Republic*, 272–80; Graber, *Dred Scott*, 154–59.
[949] James Sundquist summarizes this sectional realignment: "Whigs gave way in the North to a new party free of taint on the burning [slavery] question and, in the South, to the hegemony of an equally uncompromising Democratic party that had become the eager defender of the regional position. At that point the new line of cleavage was in place, a new system of party confrontation was established." Sundquist, *Dynamics of the Party System*, 74–98; Aldrich, *Why Parties?*, 138–59. However, the elections of 1857 returned some Northern Democrats to state office. Graber, *Dred Scott*, 40.
[950] Freehling, "The Louisiana Purchase and the Coming of the Civil War," 77.
[951] See Kansas' Topeka Constitution of 1855, Article I, Section 6 and 21.
[952] John Brown and his followers, armed with swords and with Sharps Rifles sent by Massachusetts abolitionists, executed five slaveholders at Pottawatomie Creek. Brown's men rallied again at Osawatomie, and proslavery men killed five free soilers at Marais de Cygnes.

the 1857 Lecompton Constitution, legalizing Kansas slavery.[953] To appease their riled constituents, surviving Northern Democrats made a stand, rejecting the Lecompton bill and a slave code for the territories, splitting with the Party's Southern majority.[954] Quarantining the free soil issue in Kansas had not cured the controversy, but rather incubated it and then spread it back to Congress.[955]

Other Westerners and Midwesterners also rejected slavery. In 1855, New England transplants established Minnesota's antislavery Republican Party, and two years later, the state's first constitutional convention abolished slavery.[956] Of the sixty delegates to 1857 Oregon Constitutional Convention, roughly forty-five were Democrats and twenty-seven hailed from slave states, submitting to voters proposed clauses establishing slavery and prohibiting black immigration. Voters approved the Constitution and the clause limiting black immigration, but rejected the proslavery clause 7,727 to 2,645. Oregon would have no black citizens, free or slave. Over Southern opposition, a free soil Oregon entered the

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[953] See Kansas' Lecompton Constitution of 1857, Article VII, Section 2-4 and Article XV, Schedule, Section 14.

[954] Graber, *Dred Scott*, 40–41, 164.

[955] While a paralyzed Congress mulled the 1857 proposal, Kansas voters installed a free-state majority in their legislature, which called a convention in Leavenworth to revise the original antislavery Constitution. The nation's eyes now on Kansas, a divided Congress ignored the contentious Leavenworth proposal. Kansans made a fourth and final constitution. The 1859 Wyandot Convention adopted the old constitution's abolition clause, but tabled divisive provisions integrating public schools and abrogating the Fugitive Slave Act. Suffrage was reserved to whites, and this relatively moderate document finally cleared a free soil Senate two years later. The 1859 document, difficult to amend, entrenched Republican power in Kansas. The Wyandot Convention was split between thirty-five Republicans, all but one from south of the Kansas River, and seventeen Democrats, all but one from the River's north. The Republican majority drafted the state's boundaries and institutions to exclude Democrats, who boycotted the proposed document. It passed anyway, handing the state to Republicans for almost a century. See Kansas' Leavenworth Constitution of 1857, Article I, Section 6 and Kansas' Wyandot Constitution of 1859, Article I, Section 6 and Article V, Section 1. Francis Howard Heller, *The Kansas State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1992), 3–8; Francis Howard Heller and Paul D. Schumaker, "The Kansas Constitution: Conservative Politics through Republican Dominance," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 490–91, 496–97.

[956] See the Minnesota Constitution of 1857, Article I, Section 2.Barbara Allen, "Framing Government for a Frontier Commonwealth: The Minnesota Constitution(s)," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 509–20.

Union in 1859.[957] And in April 1860, thirty-two settlers of the New Mexico Territory met in Tucson to draft a constitution for the separatist provisional government of Arizona, but failed to establish slavery.[958]

Douglas' 1850 and 1854 Acts briefly united congressmen around the palatable, familiar rhetoric of democracy, localism, and bisectional compromise. While this balancing tactic worked in 1787 and 1820, in the 1850s it backfired. Of the twenty-nine constitutions proposed between 1850 and 1859, only three endorsing slavery were ratified,[959] increasing the free state majority and Southern anxieties. This happened for several reasons. Westerners rejected slavery, fearing black immigration and knowing plantation slavery would fail on arid southwestern land. Additionally, federal land claims had reached the Pacific, preventing Southerners from retaking Congress by claiming new proslavery territories.[960] Finally, Northern voters and representatives turned against slavery. Controlling both the House and Senate, after 1854 these free state congressmen had little reason to broker another costly compromise and risk voter backlash.[961]

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[957] See the Oregon Constitution of 1857, Article XVII, Schedule, Sections 1-4. Schuman, "The Creation of the Oregon Constitution"; Howard Leichter, "Oregon's Constitution: A Political Richter Scale," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 756–80; Johnson, *Founding the Far West*, 180–81, 278–79.

[958] The 1860 Arizona convention implicitly recognized slavery, but the provisional government never formed, the southwest remained free. See the 1860 Provisional Constitution of the Territory of Arizona, Article III, Census, Section 1, allowing the census representation of slaves. The document is otherwise silent on slavery. Arizona would not become an organized federal territory until 1863. See also "LATE FROM ARIZONA.; A Provisional Government Convention in Session--Constitution Adopted--Election of a Governor--Two Days' Proceedings Entire.," *The New York Times*, April 26, 1860, sec. News; *The Constitution and Schedule of the Provisional Government of the Territory of Arizona, and the Proceedings of the Convention Held at Tucson* (Tucson: J. Howard Wells, 1860).

[959] See the Virginia Constitution of 1850, Article IV, Section 2-3, 19, 21, 36, the Kentucky Constitution of 1850, Article X, Section 1, 3, and the Maryland Constitution of 1851, Article III, Section 42. In 1852 Louisiana ratified a new constitution which did not expressly recognize slavery. The following seven free states ratified constitutions in this period: Michigan (1850), Indiana (1851), Ohio (1851), Iowa (1857), Minnesota (1857), Oregon (1857), and Kansas (1859).

[960] Though some radicals proposed seizing more Mexican and Central American land by filibuster.

[961] In 1858, Northern Democrats were less concerned with resolving the Kansas issue and the nation's territorial crisis than with staying in office.

Immediate electoral worries eclipsed long-term concerns over Union and constitutional consensus.

State constitutional reform and reinterpretation also worsened the national fugitive slave controversy. Northern state officials reinterpreted *Prigg* to allow state noncompliance with federal fugitive law. New York's governor and courts took this reading of *Prigg*,[962] as did Pennsylvania's legislature.[963] Pennsylvania's courts quickly affirmed that the state's personal liberty law did not violate *Prigg*,[964] and allowed the state to emancipate visiting slaves.[965] Vermont immediately answered *Prigg* with an 1843 law fining and imprisoning any state official who detained a fugitive, Rhode Island in 1842 constitutionally forbade slavery and the following year let expire a 1774 sojourner law,[966] and Connecticut's legislature in 1848 abolished all slavery and slave sales.[967]

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[962] Reversing Story's nationalist rhetoric in *Prigg,* New York's Governor William Seward instructed the state legislature that *Prigg* did not overrule the state's 1840 personal liberty laws guarantying alleged fugitives a jury trial and letting the governor appoint agents to rescue captured free blacks. In 1846 the state Court of Oyer and Terminer cited *Prigg* in releasing a slave seized under Georgia law in New York, adding that the federal Full Faith and Credit Clause did not bind New York officials to enforce the law of slave states. An 1840 act See "An Act to extend the right of trial by jury," Act of May 6, 1840, *Laws of New York*, Chap. 225, 174, and "An Act more effectually to protect the free citizens of this state from being kidnapped or reduced to slavery," Act of May 14, 1840, *Laws of New York*, Chap. 225, 319. Also see *In re George Kirk*, 1 Parker Cr. R. (N.Y.) 67 (1846) and Article IV, Section 1 of the federal Constitution.

[963] The Pennsylvania legislature responded to *Prigg* by passing an 1847 act preventing state jailers and judges from detaining an alleged fugitive. Under the law, slaves traveling the state with their owners received their freedom and the right to judicial appeal. See "An Act to prevent kidnapping, preserve the public peace, prohibit the exercise of certain powers heretofore exercised by judges, justice of the peace, aldermen and jailors in this commonwealth, and to repeal certain slave laws," *Pennsylvania Session Laws*, 1847, 206-08, No. 159.

[964] In *Commonwealth v. Auld*, 4 Pa. L.J. (Pa.) 515 (1850), slavecatcher Martin C. Auld captured Alexander Burns, who was born in Pennsylvania after his enslaved mother escaped from Maryland. Auld was then indicted for kidnapping under Pennsylvania's 1847 act, which he appealed was unconstitutional under Fugitive Slave Clause via *Prigg*. Justice Frederick Watts of the Court of Quarter Sessions of Cumberland County rejected that the Fugitive Slave Clause and *Prigg* applied to Burns, who was not a fugitive, but was born free in Pennsylvania. Thus Watts maintained the 1847 law over a challenge it clashed with *Prigg*. Finkelman, *An Imperfect Union*, 138–39.

[965] See *In re Lewis Pierce*, 1 W. Legal Observer (Pa.) 14 (1849) and *Kauffman v. Oliver*, 10 Pa. St. 514 (1849), both of which followed the same tack as *Commonwealth v. Aves*, citing *Somerset* to uphold local regulation of slavery. Also see *Passmore Williamson's Case*, 26 Pa. St. 9 (1855). Ibid., 131–45; Fehrenbacher, *The Slaveholding Republic*, 221–5, 412–3n58; Smith, *Civic Ideals*, 261.

[966] See "An Act, for the Protection of Personal Liberty," *Vermont Session Laws*, 1843, Chap. 15 and the 1843 Rhode Island Constitution, Article I, Section 4.

After the 1850 Compromise, free state legislatures and courts protected their personal liberty laws by nullifying the new Fugitive Slave Act. Massachusetts led the charge with personal liberty law proposals in 1851 and 1852. In 1854 Bostonians mobbed federal marshals to free the alleged fugitive Anthony Burns, and the following year, the state legislature passed a comprehensive personal liberty law. Still unsatisfied, Worcester citizens rallied to a disunion convention in 1857.[968] Similarly, within weeks of the passage of the 1850 Fugitive Slave Act, Vermont's legislature let state attorneys appeal for a writ of *habeas corpus* for alleged fugitives,[969] passed two resolutions rejecting federal authority over slavery, and sent these to Congress and every governor. President Millard Fillmore reportedly threatened military intervention against Vermont, but recanted,[970] and Vermont passed additional personal liberty laws in 1854 and 1858.[971]

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[967] Connecticut Revised Statutes, 1849, Tit. LI. Rosenberg, "Liberty Laws," 25–34; Finkelman, "Prigg v. Pennsylvania and Northern State Courts"; Finkelman, *An Imperfect Union*, 130–31.

[968] In 1843 the Massachusetts legislature forbade state officials from jailing alleged fugitives. Ralph Waldo Emerson recalled with pride how Massachusetts had voided the 1793 Act: "Slavery in Virginia or Carolina was like Slavery in Africa or the Feejees, for me. There was an old fugitive law, but it had become, or was fast becoming, a dead letter, and, by the genius and laws of Massachusetts, inoperative." But after Webster's 1850 Fugitive Slave Act enlisted Bay Staters to recapture alleged fugitives, Emerson in an 1854 address urged fellow citizens to resist the Act and oust Webster. Frederick Douglass' 1852 address was blunter: "The only way to make the Fugitive Slave Law a dead letter is to make half a dozen or more dead kidnappers." Emerson's colleague John Greenleaf Whittier agreed: "So far as that law is concerned, I am a nullifier. By no act or countenance or consent of mine shall that law be enforced in *Massachusetts.*" John Greenleaf Whittier, "Letter to 'The Bay State,' October 4th, 1850," in *Whittier Correspondence from the Oak Knoll Collections, 1830-1892*, ed. John Albree (Salem, Massachusetts: Essex Book and Print Club, 1850), 113–14; Frederick Douglass, "The Fugitive Slave Law," in *The Essential Douglass: Selected Writings and Speeches*, ed. Nicholas Buccola (Indianapolis: Hackett Publishing, 1852), 72; Emerson, "The Fugitive Slave Law," 862–67; Horace K. Houston, "Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law," *The New England Quarterly* 77, no. 2 (2004): 254n3, 256-61; Rosenberg, "Liberty Laws," 28, 31–33; Jane H. Pease and William H. Pease, "Confrontation and Abolition in the 1850s," *The Journal of American History* 58, no. 4 (March 1, 1972): 923–37, doi:10.2307/1917851.

[969] This was largely symbolic. Vermont had abolished slavery through the 1777 Constitution's Declaration of Rights, Chapter I, Section 1. In 1786, the legislature banned the transportation and sale of slaves in the state, and the 1790 Census found only sixteen slaves in Vermont. William C. Hill, *The Vermont State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1992), 27–29.

[970] Houston, "Another Nullification Crisis," 261–71.

[971] Rosenberg, "Liberty Laws," 32.

A slew of personal liberty laws followed. Illinois' Supreme Court in 1852 ruled that in disputed cases fugitives should be presumed free,[972] Connecticut passed an 1855 liberty law, and in 1857 freed all slaves entering the state.[973] That same year, the New Hampshire and Maine legislatures freed any slave involuntarily entering the state, the Michigan and Ohio legislatures adopted personal liberty laws, and Ohio's Supreme Court freed any slave entering the state by citing *Somerset*.[974] Finally, Wisconsin's courts bullishly abrogated the 1850 Fugitive Act.[975] In *In re Booth and Rycraft*, Wisconsin Justice Abram Smith repeatedly cited Jefferson to explain that the "respective states and the people thereof were the source from which the federal government has derived all its powers, and remain sovereign and independent only in so far as they have delegated or relinquished powers an attributes incident to complete sovereignty." Since the state's Constitution guaranteed Wisconsinites' liberty and *habeas corpus* rights, Smith freed

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[972] See *Hone v. Ammons*, 14 Ill. 29 (1852). Illinois' 1818 Constitutional Convention essentially banned slavery in the state – see Illinois Constitution of 1818 Article VI, Section 1-3. And in *Jarrot v. Jarrot*, 2 Gilman 1 (1845), the state Supreme Court closed a loophole allowing the descendants of French settlers to keep slaves Finkelman, *An Imperfect Union*, 150–55; Finkelman, *Slavery and the Founders*, 221., which was affirmed in the Illinois Constitution of 1848 Article XIII, Section 16.

[973] Connecticut's 1848 and 1857 statutes affirmed the state courts' 1837 *Jackson v. Bulloch* decision to extend state constitutional due process protections to visiting slaves. The state's 1818 Constitution was otherwise silent on slavery.

[974] See *Anderson v. Poindexter*, 6 Ohio St. 623 (1857). However, in *Ex parte Bushnell, Ex Parte Langston*, 9 Ohio St. 77 (1859), the Ohio courts cited the 1850 Fugitive Slave Act to uphold the detention of Langston and Bushnell, abolitionists who had allegedly aided fugitives' escape. Rosenberg, "Liberty Laws," 25–34; Wiecek, "Somerset," 136; Finkelman, "Prigg v. Pennsylvania and Northern State Courts," 21; Finkelman, *An Imperfect Union*, 130–31, 177–78.

[975] Benammi Garland of Missouri tracked his escaped slave Joshua Glover to Racine, Wisconsin, where he had jailed Glover under the Act the previous day. Racine's mayor doubted the legality of Garland's seizure, and arrested Garland and issued a writ of *habeas corpus* to eventually bring Glover before a judge. On March 11, 1854, free soil agitators Sherman Booth and John Rycraft led a mob to break Glover from jail, allowing his escape. A federal marshal then arrested Booth and Rycraft under the Act for rescuing Glover. Booth and Rycraft were convicted and imprisoned, appealing to the Wisconsin Supreme Court for a writ of *habeas corpus*. Booth's initial arrest was made without a warrant, leading the Wisconsin Supreme Court to order his release in *In re Booth*, 3 Wis. 1 (1854). After a second arrest, now under warrant, the Court in *Ex parte Booth*, 3 Wis. 145 (1854) refused to release him on the grounds he should stand trial in federal court. See also *In re Booth and Rycraft*, 3 Wis.157 (1855). Finkelman, "Prigg v. Pennsylvania and Northern State Courts," 22; Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Washington: Library of Congress, 1985), 119–23; Maltz, "Slavery, Federalism, and the Structure of the Constitution," 494–95; Smith, *Civic Ideals*, 262–63.

Sherman Booth and John Rycraft, who had been imprisoned under the 1850 Act for aiding a fugitive.[976]

Southerners threatened secession. Southern state courts rejected *Somerset* and its Northern progeny protecting fugitives.[977] The secessionist Georgia senator Robert Toombs saw in the liberty laws a plan to void Southerners' constitutional property rights and "to exterminate slavery by abrogating by State laws that portion of the Constitution which provides for the return of fugitive slaves."[978] James Buchanan appealed to the Northern "State legislatures [to] repeal their unconstitutional and obnoxious enactments. Unless this shall be done without unnecessary delay, it is impossible for any human power to save the Union."[979] Chief Justice Taney overruled the Wisconsin courts in 1859, and in 1860 Unionist presidential candidates Abraham Lincoln and John Bell pushed for repeal of the liberty laws, but with little success, as Northern Republican governors held the line.[980]

The blame for this dissensus lay with Northerners' assertive reinterpretation of the *Prigg* decision, which disempowered and riled Southern slaveholders. Appeasing Southerners and bringing stability required a firm, nationalized approach to fugitive law. But *Prigg*, backed by *Strader*, created a patchwork of clashing state statutes and constitutional provisions, destabilizing national constitutional politics. The 1850 Fugitive

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[976] Justice Edward Whiton affirmed this, holding the state's liberty protections overrode the Fugitive Slave Act. The third justice, Samuel Crawford, rejected not only the Act's legitimacy, but also his own authority to void the Act. See *In re Booth and Rycraft*, 3 Wis.157-8, 190-5 (1855). H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War*, 1 edition (Athens, Ohio: Ohio University Press, 2007), 112–34.
[977] Wiecek, "Somerset," 137; Finkelman, *An Imperfect Union*, 181–235.
[978] Robert Augustus Toombs, "Letter to E.B. Pullin and Others, December 13, 1860," in *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*, ed. Ulrich B. Phillips (Washington: Government Printing Office, 1860), 519–22.
[979] James Buchanan, *Message from the President of the United States to the Two Houses of Congress at the Commencement of the Second Session of the Thirty-Sixth Congress* (Washington: George W. Bowman, 1860), 6–7.
[980] See *Ableman v. Booth*, 62 U.S. 506 (1859). Rosenberg, "Liberty Laws," 40–43.

Act came too late, only affirmed Northerners' commitment to their reactionary liberty laws, inflaming the controversy.

Across the Union, Northern and Southern legislatures together restricted black citizenship, resolving this national question. All Southern legislatures, worried free blacks might foment slave revolt, limited free blacks' citizenship, often legally treating them as slaves.[981] To thwart integration, Southern legislatures and governors largely ignored state constitutional promises requiring they fund public education,[982] and every Southern state except Tennessee outlawed the instruction of slaves.[983] Northern states forced blacks into segregated, underfunded charity schools,[984] which the Massachusetts Supreme Court upheld in R*oberts v. City of Boston*.[985] Similarly, almost all Northern legislatures excluded blacks from voting or holding higher office.[986] Frontier legislatures were no better. Oregonian and Californian legislators stripped black citizenship rights to

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[981] State black codes classified any person with any black ancestry as fully black, and, with the exception of Louisiana, every Southern state presumed every black person to be a slave unless he or she could produce a registration certificate. Even on proving freedom, free blacks might be prohibited from publicly assembling, entering some Southern states, or remaining in others. And free blacks deemed unproductive could be coerced back into labor. In 1852, Illinois' legislature looked to preempt slave mobility disputes by barring entry to free blacks. The statue also excluded slaveholders entering with slaves, unless travelling to another state. Finkelman, *Slavery in the Courtroom*, 154.

[982] Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South*, 26–27.

[983] In Louisiana, Georgia, Virginia, the Carolinas, and Alabama, prohibitions on black literacy education forced black educators to work furtively through churches.

[984] Native Americans also relied on religious schools, as did Catholics, who withdrew from public schools which taught the Protestant King James Bible.

[985] Benjamin Roberts, an African American, tried to send his daughter Sarah to the school nearest his house, which only enrolled whites. After the school refused to admit her, Roberts sued under the Massachusetts Constitution's equality clause. But Massachusetts Chief Justice Lemuel Shaw ruled against Roberts, asserting that states could stratify citizenship, per *Crandall*, segregating schools by gender or class given facilities were equal in quality. The state's Free Soil Party eventually captured the legislature and repealed the law in 1855, but *Roberts* stood as a precedent for racial segregation of public institutions. See the Massachusetts Declaration of Rights, Article I and *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850). Smith, *Civic Ideals*, 219–20, 256–57; Eric Foner, *A Short History of Reconstruction* (New York: Harper & Row, 1990), 43.

[986] Blacks held the franchise in Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, and also in New York, though with a prohibitive qualification of $250 in freehold estate. James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978), 323–24; Smith, *Civic Ideals*, 215, 253–54.

discourage black immigration,[987] despite congressional objections.[988] Similarly, Illinois' and Indiana's Constitutions outlawed black immigration to the state, and Indiana fined resident blacks, using these funds to resettle blacks elsewhere.[989]

State courts settled on a patchwork of decisions withdrawing some or all citizenship rights for blacks. While New England courts extended equality and due process clause protections to African Americans, Connecticut and Pennsylvania courts denied that blacks held federal birthright citizenship.[990] But North Carolina, one of the last Southern states to allow black voting, granted free blacks birthright citizenship in *State v. Manuel* in 1838.[991] Kentucky, Virginia, and Alabama courts also granted birthright citizenship to the children of slaves in the process of gaining their freedom, as

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[987] California's 1849 framers nearly excluded blacks from entering the state, and framers of Oregon's 1857 Constitution, fearing being undersold by cheap black or Chinese mining and agricultural labor, forbade black immigration under threat of corporeal punishment. Oregonians also excluded black, mixed-race, and Chinese citizens from owning property, working mining claims, entering contracts, bringing lawsuits, and voting. See the Oregon Constitution of 1857, Article I, Section 35, Article II, Section 6, Article XIV, Miscellaneous, Section 8, and Article XVII, Schedule, Section 4. The latter article gave Oregon voters the right to institute slavery. Johnson, *Founding the Far West*, 127-30-81; Smith, *Civic Ideals*, 254–55; Tarr, *Understanding State Constitutions*, 106; Leichter, "Oregon's Constitution: A Political Richter Scale," 756–80; Lloyd, "The 1849 California Constitution: An Extraordinary Achievement by Dedicated, Ordinary People," 717–18.

[988] Representatives Henry L. Dawes and John A. Bingham moved to block Oregon's admission to the Union for violating the federal Guarantee and Privileges and Immunities Clauses, but the state was nevertheless admitted under the unmodified 1857 Constitution. See *The Congressional Globe: Thirty-Fifth Congress, Second Session*, vol. I (Washington: John C. Rives, 1859), 974–75, 984; Maltz, "Slavery, Federalism, and the Structure of the Constitution," 484.

[989] See the Illinois Constitution of 1848, Article XIV and the Indiana Constitution of 1851, Article XIII, Section 1-3.

[990] Prudence Crandall appealed a Connecticut statute banning her charity school for blacks on the grounds the statute violated the federal Privileges and Immunities rights of her out-of-state students. But the state Chief Justice David Daggett replied Crandall's students never held birthright citizenship, voiding their claims. The Connecticut Supreme Court of Errors dodged the issue by later reversing Daggett on a factual technicality, but Pennsylvania's Chief Justice revived Connecticut's arguments against black citizenship in an 1837 case. See *Crandall v. State of Connecticut, 10 Conn. 339 (1834)*. For the reversal, see *Colchester v. Lyme*, 13 Conn. 274 (1834). For the Pennsylvania case, see *Hobbs v. Fogg*, 6 Watts 533 (1837), in which Pennsylvania Chief Justice John B. Gibson distinguished between blacks' freedom from slavery and the full complement of political rights belonging to a freeman. Kettner, *The Development of American Citizenship, 1608-1870*, 316; Smith, *Civic Ideals*, 255–56.

[991] Citing English common law, Judge William Gaston argued "Slaves manumitted here become freemen – and therefore if born within North Carolina are citizens of North Carolina – and all free persons born within the State are born citizens of the state." *State v. Manuel*, 25 Devereaux & Battle's Law 20 (1838). North Carolina later revoked birthright citizenship, declaring blacks partial citizens in cases in *State v. Newsome*, 5 Iredell 250-4 (1844) and *State v. Jowers*, 11 Iredell 555 (1850).

did the Louisiana Supreme Court, which added that long-term residence in a free territory freed a plaintiff not born in a slave state or territory. Free blacks now existed neither as aliens nor full citizens, but as an intermediate "degraded race" or "third class" in the state. Tennessee's Chief Justice John Catron similarly asserted that the state's manumission policy affirmed blacks' partially inferior citizenship status.[992] And in Kentucky, the Court of Appeals justified free black's partial citizenship by noting that free black men, removed by statute from the privileges and immunities granted to white men, could not be full citizens.[993]

Federal courts repeatedly rebuffed blacks' challenges to these laws, sequestering the issue at the state level. The federal Attorneys General usually accepted Attorney General William Wirt's 1821 instruction that blacks not receive federal Privileges and Immunities citizenship. Affirming the states' policy of intermediate citizenship, Attorney General Hugh Legare deemed blacks mere "denizens" in 1843.[994] In *Strader v. Graham* the Supreme Court rejected appeals under the Commerce Clause, signaling it had little interest in interfering with the states' traditional prerogative to regulate citizenship. And since state legislatures often mirrored the citizenship law of neighboring states, cross-border tensions were rare, giving fewer opportunities for suits. In minimizing interstate disputes and settling on nationwide restrictions on black citizenship, the states kept this national issue quiet.[995]

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[992] *Fisher's Negroes v. Dabs*, 14 Tenn., 6 Yerger 119-31 (1834).
[993] Deep South courts were more direct – a Mississippi court cited Daggett in a pair of 1859 cases constraining black citizenship rights. Mississippi granted free blacks any rights, save those explicitly denied or likely to incite slave revolt. See *Shaw v. Brown*, 35 Miss. 246, 320 (1858). This was challenged in *Heirn v. Bridault*, 37 Miss. 224 (1859) and *Mitchell v. Wells*, 37 Miss. 260 (1859). Kettner, *The Development of American Citizenship, 1608-1870*, 316–21; Smith, *Civic Ideals*, 257–58.
[994] Kettner, *The Development of American Citizenship, 1608-1870*, 324; Smith, *Civic Ideals*, 258.
[995] Northern legislatures restricted blacks' citizenship rights, suggesting that Northerners' objection to the 1850 Fugitive Act was not primarily over blacks' maltreatment, but rather that the Act overrode Northern

In May 1856, Democratic Party leaders asked the Supreme Court to silence Free-Soil Republicans by affirming popular sovereignty.[996] The Court took the issues of black citizenship and territorial slavery in *Dred Scott*.[997] Dred Scott, a slave, appealed for his freedom to the Supreme Court. Taney dismissed the case for lack of jurisdiction, not by citing Missouri's prior rejection of Scott's citizenship and standing under the widely-accepted *Strader v. Graham* ruling, but rather by controversially asserted that no black person, free or slave, held federal birthright citizenship and according judicial standing. Taney claimed birthright citizenship came to those granted the civic privileges limited to whites or to those descended from the nation's white founders, and that federal naturalization citizenship could not apply to native-born blacks.[998] This preempted free black litigants from appealing state laws on federal Privileges and Immunities grounds, affirming the states' diverse schemes for partial citizenship for free blacks.[999] This could

personal liberty laws. That is, the fugitive slave crisis was for Northerners primarily an issue over states' rights, not blacks' rights. It seems that many Northerners were content with stripping blacks' rights, so long as it was on Northern terms. Thus many Northerners happily accepted a national regime limiting black citizenship.

[996] The request came from Senator Judah P. Benjamin of Louisiana, backed by Cass, Douglas, and James Buchanan. Fehrenbacher, *The Slaveholding Republic*, 280–81.

[997] In 1833, John Emerson transported Dred Scott, born a slave likely in Virginia, to the free state of Illinois and territory of Wisconsin, where Scott lived as a free servant before Emerson took him to the slave state of Missouri. After Emerson's death, his widow sued to possess Scott, which the Missouri Supreme Court granted in *Scott v. Emerson*, 15 Mo. 576 (1852), citing *Strader v. Graham* to establish slavery "reattached" on reentering a slave state or territory. The Court thus denied that Illinois and Wisconsin's liberty laws, or Massachusetts precedent of *Commonwealth v. Aves*, held any force over slaves in Missouri. Emerson's widow then transferred Scott to her brother, John Sanford of New York, who Scott sued for freedom, now in federal courts under interstate jurisdiction. The federal district court affirmed not only Scott's enslavement under the Missouri Supreme Court's ruling, but also that it had jurisdiction to hear slaves' appeals, potentially opening the federal courts as a venue for slaves, as federal citizens, to challenge Southern and fugitive slave laws, upending the 1850 Compromise. See *Dred Scott v. Sandford,* 60 U.S. 393 (1857).

[998] See *Dred Scott v. Sandford,* 60 U.S. 403-30 (1857). Taney asserted incorrectly that blacks did not have state citizenship at the founding and incongruously added that black slaves imported from abroad were ineligible for naturalization. Against Taney, Justice Curtis' dissent cited early state constitutional provisions and cases granting blacks citizenship rights – see *Dred Scott v. Sandford,* 60 U.S. 472-4 (1857). Smith, *Civic Ideals*, 265–68; Graber, *Dred Scott*, 20.

[999] Taney did not defer all citizenship regulation to the states, but instead asserted that the state and federal governments could not interfere with each other's citizenship law. See *Dred Scott v. Sandford,* 60 U.S. 405-6 (1857).

have settled that case, but Taney added that the Territories Clause extended congressional authority only to territory under federal jurisdiction at the 1787 ratification of the Constitution, invalidating the later Compromises of 1820 and 1850, reopening all Western territories to slavery.[1000] Further still, he declared congressional abolition would violate the Fifth Amendment due process rights of slaveholders to claim property in slaves.[1001]

In ruling against black federal citizenship, Taney effectively overrode the stable status quo of diverse state-level laws for partial black citizenship. Specifically, Taney affirmed slaveholders' Fifth Amendment right to travel the nation with their slaves, voiding all Northern personal liberty laws and state constitutional due process and equality protections for slaves.[1002] Free states considered nullifying Taney's decisions. New Hampshire replied by freeing visiting slaves and Maine by granting fugitives a defense attorney.[1003] Some newspapers warned the Taney Court would expand slaveholders' Fifth Amendment rights to allow slavery in Northern states. Citing the Virginia and Kentucky Resolutions, the New York legislature invoked its right to nullify such a federal law. Moderate Republicans voided Taney's ruling on the territories, suggesting that since Scott lacked citizenship and standing to sue, the Court had no

[1000] See *Dred Scott v. Sandford,* 60 U.S. 430-53 (1857). Taney allowed Congress to continue regulating the territories to prepare them for statehood, so long as this did not extend to regulating slavery.
[1001] Though the federal Fifth Amendment did not bind the states, Taney's opinion might have encouraged appeals to a right to property in slaves under state constitutional due process protections. Taney also saw the Importation Clause to affirm a right to property in slaves. See *Dred Scott v. Sandford,* 60 U.S. 411 (1857). Wiecek, "Somerset," 138; Maltz, "Slavery, Federalism, and the Structure of the Constitution," 480–88; Smith, *Civic Ideals*, 263–71; Don Edward Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 2001); Fehrenbacher, *The Slaveholding Republic*, 281–83; Graber, *Dred Scott*, 18–20.
[1002] Maltz, "Slavery, Federalism, and the Structure of the Constitution," 488–89.
[1003] Rosenberg, "Liberty Laws," 36.

jurisdiction over his case, making the decision a nonbinding *obiter dictum*.[1004] Similarly, Wisconsin courts ignored Taney's *Ableman v. Booth* decision to re-imprison the abolitionist Sherman Booth and Wisconsinites freed Booth and elected his attorney, Byron Paine, to the state Supreme Court.[1005] Few of these Northern states granted blacks full citizenship, suggesting their objection was not over Taney's repeal of black citizenship, but rather his overriding Northern state statutes. That is, the controversy was more over states' rights to abolition than blacks' rights to equality.[1006]

As Northern states radicalized, in November 1860 Republicans captured thirty-one of fifty Senate seats and 108 of 183 House seats, bringing the antislavery congressional majority Southerners had long feared. With Democrats divided between candidates, Lincoln took the White House with only forty percent of the popular vote, drawing on antislavery voters and Northerners exasperated with the Buchanan administration's corruption, proslavery Kansas platform, and mismanagement in the face of an economic panic.[1007] Proslavery Southerners saw they had little chance of regaining the Congress or presidency. They seceded and readied for war.

B. State Constitutionalism during the Civil War

Congressmen scrambled to save the Union. Congress had long used statutes to devolve slave law, but in the 1850s the states failed to resolve the nation's slavery question, so Congress now sought resolution through federal constitutional amendment. The number of proposed federal amendments skyrocketed, jumping from twenty-four total between 1850 and 1859 to seventy-two in 1860, to 167 the following year. This

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[1004] Fehrenbacher, *The Slaveholding Republic*, 281–83.
[1005] See *Ableman v. Booth*, 62 U.S. 506 (1859). Finkelman, *Slavery in the Courtroom*, 119–23; Fehrenbacher, *The Slaveholding Republic*, 239–40, 290.
[1006] Northerners objected to the 1850 Fugitive Slave Act for same reasons. See Footnote 995.
[1007] Graber, *Dred Scott*, 159.

included dozens of proposals on abolition, fugitive slaves, territorial slavery, the rights to own and travel with slaves, and on the slave trade.[1008] For the first time, Congress seriously considered answering the slavery question by amending the federal Constitution.

Most amendments proposed in the winter of 1860-1 attempted reconciliation with the South. On November 9, 1860 President Buchanan considered a second federal convention, and on the 3rd of the following month he suggested constitutional amendments overturning Northern personal liberty laws and protecting slavery in the states and territories. Ten days later, Georgia's Robert Toombs urged Southern congressman to back a similar amendment overriding the liberty laws. As Buchanan and Toombs' proposals failed, John Crittenden offered amendments allowing popular sovereignty, compensated emancipation for runaways, and prohibiting Congress from abolishing slavery. These too were rejected. Of the hundreds of proposals offered in the coming months, a few others gained traction, but ultimately all failed.[1009]

On December 20th, South Carolina seceded and withdrew from Congress, exaggerating Congress' Northern majority. The other six deep South states followed in January and February, sending delegates to Montgomery, Alabama to draft a provisional constitution, which was replaced by a permanent constitution the next month. Following

[1008] See Table 11 in the appendix.
[1009] Stephen Douglas later proposed protecting the interstate slave trade. Jefferson Davis offered an amendment recognizing a right to property in slaves, and Thomas Corwin sought to keep the federal government from interfering with slavery within an existing state. The Corwin Amendment, initially backed by Lincoln, was ratified by only three states. In separate proposals, Thomas Florence and Garrett Davis recognized Taney's *Dred Scott* ruling against black federal citizenship. See Buchanan, *Message from the President of the United States to the Two Houses of Congress*, 6–7; Toombs, "Letter to E.B. Pullin and Others, December 13, 1860," 519–22; Ames, *The Proposed Amendments*, 194–95; Livingston, *Federalism and Constitutional Change*, 203; Rosenberg, "Liberty Laws," 40–43; Caplan, *Constitutional Brinksmanship*, 55; Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 72, 412–17.

the April attack on Fort Sumter, the six border states joined the Confederacy, ratifying the Confederate Constitution over the summer. Lincoln, now president, rejected peace by federal amendment, and federal congressmen, burdened with the War and unwilling to reconcile with rebels, proposed only nine constitutional amendments between 1862 and 1863, a precipitous decline given that congressmen had proposed nearly that many on a single December day in 1860.[1010] Federal troops now shouldered the Union's fate.[1011]

The new Confederate Constitution gave the Confederate states broad power to elaborate their nascent constitutional order.[1012] Delegates convened in each state to ratify the Confederate Constitution, and while waiting on ratification, began legislating and raising funds, troops, and supplies.[1013] Most ratified new state constitutions within a year,[1014] maintaining provisions for slavery and disenfranchising women and nonwhites. Some framers, no longer obligated by free blacks' federal Privileges and Immunities

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[1010] That day was December 12th. Congress may have proposed more that day, but the exact dates for many 1860 proposals are unavailable. Note also that in 1862 Lincoln proposed to Congress a scheme for compensated emancipation and Garret Davis of Kentucky proposed a peace convention in Louisville in 1863. Ames, *The Proposed Amendments*, 211; Caplan, *Constitutional Brinksmanship*, 56; Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 412.
[1011] Dealey, *Growth of American State Constitutions*, 56–60; Caplan, *Constitutional Brinksmanship*, 55.
[1012] The Confederate Constitution was drawn almost exactly from its federal predecessor, save that it affirmed slavery, compact theory, and state sovereignty and sovereign immunity. See the Confederate Constitution's Preamble and Article III, Section 2, Clause 1. New clauses restricted the Confederate Congress from interfering in the amendment process and in states' commercial and economic authority. Article I, Section 8, Clauses 1 and 3 forbade the Confederate Congress from passing tariffs or making appropriations for internal improvements, affirming the Jacksonian policy of deference to the states on improvements. The document's Privileges and Immunities also allowed slaveholders to transport slaves across state lines unimpeded. See Article IV, Section 2, Clause 1. For the amending process, see Article V. But note the document required the Confederate Congress establish slavery in new territories, precluding a popular sovereignty platform. See Article IV, Section 3, Clause 3. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South*, 63.
[1013] Dealey, *Growth of American State Constitutions*, 60.
[1014] There were exceptions. Kentucky and Missouri secessionists proposed constitutions in 1861, but Union troops backed the states' Unionist governments, and the proposals were never ratified. Mississippi, North Carolina, Tennessee, and Virginia rejected proposed constitutions for their prior ones. North Carolina, for example, settled on secession through limited constitutional amendments. And Mississippi's and Louisiana's 1861 constitutions were essentially identical to their predecessors. Hargrave, *The Louisiana State Constitution*, 7; Winkle, *The Mississippi State Constitution*, 7; John V. Orth, *The North Carolina State Constitution: A Reference Guide*, 2 edition (Westport, CT: Greenwood Press, 1993), 11–12.

rights, now constitutionally restricted the immigration of free and enslaved blacks.[1015] And state framers for the first time declared their states sovereign nations, with attendant explicit rights to nullification, interposition, and secession.[1016]

The documents did not last long. The historian Frank Owsley asserted that this constitutional decentralization doomed the Confederate war effort and national and state constitutions.[1017] But even a centralized constitutional system might have died in infancy against overwhelming and fast-advancing Union armies.[1018] Given the Confederate Constitution lasted merely four years, one can only speculate how this decentralization might have affected its endurance in peacetime.

As Northern armies toppled Confederate governments, Lincoln began Reconstruction through state constitutional revision. He tested early Reconstruction plans by moving to readmit any Confederate state that drafted an antislavery constitution backed by ten percent of the state's 1860 voting population. Under the plan, Lincoln pushed Louisiana's Union Governor Michael Hahn to admit blacks to the state's 1864 convention. Delegates, all backcountry and working white men, made New Orleans the capital and thanks to reapportionment, the new seat of power, weakening planter counties. Public workers won a nine-hour day and a minimum wage, slavery was

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[1015] South Carolina granted slaves a limited right to a petit jury and prescribed punishment for those who maliciously harmed slaves. See the South Carolina Constitution of 1861, Article III, Section 5 and Slavery Article. See also the Alabama Constitution of 1861, Article I, Section 1 and Slavery Article, the Florida Constitution of 1861, Article I, Section 1, Article IV, Section 27, Article XV, Sections 1-2 and Ordinances Article, Section 5. Note however that Louisiana's 1861 Constitution did not explicitly mention slavery.

[1016] Many state constitutions opened with the state's secession ordinance. For example, Florida's held "all political connection between her and the government of said States ought to be and the same is hereby totally annulled and said Union of States dissolved, and the State of Florida is hereby declared a sovereign and independent Nation." See the Florida Constitution of 1861, Ordinance of Secession.

[1017] Frank L. Owsley, *State Rights in the Confederacy* (Chicago: University Of Chicago Press, 1925).

[1018] The Confederate Constitution's new government took force in early 1862, shortly after Ulysses Grant seized Confederate Forts Henry and Donelson and only a year before the crippling losses at Gettysburg and of Vicksburg and the Mississippi. A year later in Virginia Grant effectively ended the War.

abolished, and progressive taxes supported public schools, though blacks got no vote.[1019] Arkansas called a convention under the ten percent plan, and within a day of meeting, a committee of thirteen passed a new constitution abolishing slavery and protecting blacks' property rights.[1020] Across the Mississippi, Tennessee's military governor Andrew Johnson called a loyalist convention to propose amendments outlawing slavery and property in humans and allowing the legislature to disenfranchise ex-Confederates, which pro-Union voters ratified in 1865.[1021]

Congress also initially experimented with Reconstruction through state constitutional design on the Confederacy's periphery. When western Virginia farmers assembled and drafted a proslavery constitution for the new loyalist state of West Virginia, Senator Charles Sumner conditioned the state's admission on abolition, and West Virginians capitulated.[1022] Prodded by Union occupation, in 1864 Marylanders representing western farm counties narrowly ratified a new constitution freeing slaves

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[1019] Finally, the delegates, consummate Louisianans, funneled $9,400 to purchase themselves liquor and cigars. See the Louisiana Constitution of 1864, Title I, Article 1-2, Title III, Article 7, Title IX, Article 135, and Title XI. Foner, *A Short History of Reconstruction*, 21–23; Hargrave, *The Louisiana State Constitution*, 7–8; Amy Gossett, "The Louisiana Experience: Culture, Clashes, and Codification," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 311–12.

[1020] See the Arkansas Constitution of 1864, Article V. Goss, *The Arkansas State Constitution*, 4–6; Franklyn C. Niles, "Change and Continuity in Arkansas Politics after the 1874 Arkansas State Constitutional Convention," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 254.

[1021] Dealey, *Growth of American State Constitutions*, 61–62; Laska, *The Tennessee State Constitution*, 12–14; Lewis L. Laska, "The Tennessee Constitution: An Unlikely Path toward Conservatism," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 359.

[1022] In Virginia, western farmers had long resented the state's tidewater slaveholding aristocracy, and in 1861, two-thirds of Virginia's western delegates voted unsuccessfully against secession. Weeks later, they convened to propose a new constitution as an independent state, affirming federal supremacy and by later amendment disenfranchising Confederate sympathizers. Far westerners moved to immediately abolish slavery, but proslavery delegates blocked the measure, and the Convention submitted the unchanged document to Congress. See the West Virginia Constitution of 1863, Article I, Section 1 and Article XI, Section 7. A handful of loyalist Virginians meeting in Alexandria the following year drafted another antislavery Virginia constitution, though this one never saw ratification. Bastress, *The West Virginia State Constitution*, 10–15; Robert E. DiClerico, "The West Virginia Constitution: Securing the Popular Interest," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 216–20.

without compensation and enfranchising Union soldiers. Reapportionment shifted legislative power away from Chesapeake planters, and provisions for debt forgiveness and tax-funded public education supported poor whites. But blacks remained disenfranchised in the state, precluding interracial organizing.[1023] In 1864 Congress prepared for Southern reconstruction by forcing the new Nevada Territory to draft a constitution, including clauses rejecting slavery and Mormonism. But suffrage was reserved to whites and subject to a poll tax.[1024] Soon Congress turned its efforts to the Confederacy. In late 1864, Union troops advancing across Georgia and Virginia dismembered the remaining Confederate state governments, closing the Southern constitutional experiment.

IV. Reconstruction through State Constitutional Revision, 1865-77

Federal armies marched on Atlanta and Richmond, pillaging plantations and freeing slaves. Weary Confederates accepted abolition, ending debates over fugitive slaves and territorial slavery. The Union survived, now disburdened of slavery, thanks not to legislators' reflection and choice but to accident and force on the fields at Antietam, Gettysburg, and Vicksburg.[1025]

Yet other controversies remained. Abolition, once the states' prerogative, now fell to separate, untested plans posed by Lincoln and Congress. Congress also debated whether to readmit ex-Confederate states as equal states in the Union or as conquered

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[1023] See the Maryland Constitution of 1864, Declaration of Rights, Article 24, Article III, Section 43 and Article VIII. Foner, *A Short History of Reconstruction*, 18–19.
[1024] See the Nevada Constitution of 1864 Preliminary Ordinance and Article II, Sections 1 and 7.
[1025] Congress' Confiscation Acts and Lincoln's Emancipation Proclamation affirmed Union armies' powers to emancipate slaves, but these acts only gained force through the armies' victories.

alien nations to be dissolved into new congressionally-administered territories.[1026] Also unclear was whether to allow ex-Confederates to vote and hold office. And as four million Southern blacks earned freedom, old questions of black citizenship resurfaced. Early Reconstruction constitutions prohibited black voting, office-holding, and jury service, frustrating Lincoln and the radical Republicans from expanding their voting base. Freemen's economic and social rights, still undefined, were similarly contentious.[1027]

With Union troops pressing south and ex-Confederates excluded from Congress, emboldened Northern congressmen addressed Reconstruction's controversies with hundreds of amendment proposals. The federal Constitution entered a period of unprecedented instability. Congress, which had proposed only twenty-four amendments in the decade before the War, now proposed 421 amendments between 1864 and 1870. Congressmen proposed dozens of amendments for emancipation, reapportioning Congress, payment of rebel debt, and for expanding blacks' citizenship, suffrage, and civil rights while limiting ex-Confederates' rights.[1028] Seven proposals passed at least one house, including the three revolutionary Reconstruction Amendments.[1029]

[1026] On the House floor on June 13, 1864 Ohio Democrat Samuel Cox declared the Union was a compact which Southern states could exit and reenter without losing sovereignty and attendant rights and police powers. New York's Fernando Wood argued the same on May 3rd. However, the following day George Boutwell of Massachusetts replied that the Southern states, in exiting the Union, had ceased to exist. The radical Pennsylvanian Thaddeus Stevens asserted that the ex-Confederates states ought to be treated as conquered alien territories. *The Congressional Globe: Thirty-Eighth Congress, First Session* (Washington: John C. Rives, 1864), 2075, 2078–80, 2102–3, 2917–18.

[1027] Foner, *A Short History of Reconstruction*, 30–34.

[1028] See Table 11 in the appendix for a count of these topics by year.

[1029] In May 1864 Ohio Democrat George Pendleton summarized the Radical Republican Party as "revolutionary. It seeks to use [legislative] powers to destroy the Government, to change its form, to change its spirit. It seeks under the forms of law to make a new Government, a new Union, to ingraft upon it new principles, new theories…It is in rebellion against the Constitution." The other four failed amendments concerned Confederate War debt, congressional representation, suffrage, and selection of presidential electors. *The Congressional Globe*, 1864, 2105; Ames, *The Proposed Amendments*, 23.

Abolition came first. In January of 1864 Senator Charles Sumner proposed an amendment granting slaves freedom and equal protection before the law.[1030] The following month the Senate Judiciary Committee accepted Sumner's proposal but redacted the equality provision, leaving blacks' citizenship unresolved. Debate resumed on April 5th when Kentucky's senators offered opposed amendments for compensated emancipation and prohibiting black citizenship and office-holding.[1031] Other amendments against black citizenship and for gradual compensated emancipation threatened to delay abolition for generations.[1032] On April 8th the Senate passed the Thirteenth Amendment, a brief two-sentence amendment clarifying little. The first section required abolition without compensation. The Amendment's novel and contentious second section let Congress back the Amendment with legislation protecting black citizenship, potentially overriding state law.[1033] States' rights Democrats in the House blocked the Amendment, which failed passage by thirteen votes, and South Carolinian and Alabamian state legislators soon attacked the proposal. After the House vote, little was clear. In April 1864 Congress had not answered whether emancipation would come immediately, with

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[1030] Sumner's was not the first proposal. In December 1863 the House heard a pair of proposed abolition amendments, as did the Senate the following month, including Sumner's amendment.

[1031] For these proposals by Garrett Davis and Lazarus Powell see. *The Congressional Globe*, 1864, 1419–24.

[1032] Three days later Delaware's Willard Saulsbury presented a twenty-section amendment stripping black citizenship and requiring Congress reimburse each state up to a hundred dollars per emancipation. A similar 1862 proposal by Lincoln allowed states until 1900 to complete compensated emancipation. At least five amendments proposed in 1864 forbade black citizenship and office-holding.

[1033] Senator Sumner's clearer proposed amendment, rejected by the Judiciary Committee, stated "All persons are equal before the law, so that no person can hold another a slave," granting Congress necessary and proper powers to enforce black citizenship. Smith, *Civic Ideals*, 282–83; Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861 to 1866* (New York: Fordham Univ Press, 2000), 126, 140.

compensation, or through the states, or whether free blacks in the North and South could expect federal citizenship.[1034]

As the War closed, an overwhelmed Congress deferred much of Reconstruction to Southern state constitutional conventions. There were several reasons for this. First, in early May of 1864 Congress, later backed by the Supreme Court, decided not to dissolve the ex-Confederate states, but to readmit them to the Union.[1035] Consequently, ratification of the Thirteenth Amendment, requiring three-fourths of the Union's states, waited on the readmission of the Southern states through new constitutional conventions.[1036] Additionally, through readmission the Southern states regained nearly exclusive Tenth Amendment authority over blacks' citizenship, education, marriage, and suffrage. Republican congressmen, hoping to cement freemen's social, economic, and educational rights, now relied on state constitutional framers.[1037] Finally, Lincoln's ten percent plan

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[1034] Ames, *The Proposed Amendments*, 212–18; Michael P. Zuckert, "Completing the Constitution: The Thirteenth Amendment," *Constitutional Commentary* 4 (1987): 259–84; Kyvig, *Explicit and Authentic Acts*, 159–61; Smith, *Civic Ideals*, 282–83; Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 450; Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (New York: New York University Press, 2004), 37–48.

[1035] The Court held the Union was "composed of indestructible states" in *Texas v. White*, 74 U.S. 700 (1869).

[1036] During debates over the Wade-Davis Bill, Pennsylvania's William Kelley declared that the defeated Confederate states were now territories awaiting federal recognition and thus were unnecessary for ratifying the Thirteenth Amendment under Article V. But Representative Fernando Wood, citing Jefferson and Madison's compact theory, replied that the Southern states were "distinct political communities with their own State constitutions and forms of government deriving authority from the people," existing with or without federal recognition. Since the Southern states still existed and had voluntarily reentered the Union, the Thirteenth Amendment required their ratification. In turn the states would need new constitutions. When the House passed the Amendment on January 31, 1865, Alexander Coffroth of Pennsylvania affirmed that the Amendment would need the support of the ex-Confederate states. That summer Johnson and his Secretary of State William Seward agreed that ratification required the Southern states. *The Congressional Globe*, 1864, 2075, 2078–80; *The Congressional Globe: Thirty-Eighth Congress, Second Session* (Washington: F. & J. Rives, 1865), 523; Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge University Press, 2001), 227–33.

[1037] For example, in May of 1864 Representative William Allison warned that without land and education, Southern blacks would face "a system of wages-slavery as much to be deplored as chattel-slavery. This class [of former slaveholders] will seek to take advantage of the ignorant slave suddenly made free, and will require of him excessive labor, with inadequate compensation." Allison noted the Freedmen's Bureau might aid former slaves, but the Bureau still could not constitutionally interfere in the states' authority over black education, marriage, citizenship, and suffrage. *The Congressional Globe*, 1864, 2115.

showed congressmen that Unionist state constitutional framers could exclude ex-Confederates and decisively settle disputes over citizenship, states' rights, and slavery in favor of blacks and Republicans.[1038]

Two weeks after the Senate passed the Thirteenth Amendment, both houses passed the Wade-Davis Bill, deferring the bulk of constitutional Reconstruction to Unionist state constitutional conventions. These congressional requirements were more demanding than Lincoln's ten percent plan.[1039] Worried his tenuous Louisiana government would not meet the Bill's requirements, Lincoln quietly pocket-vetoed the Bill.[1040]

After the House rejected abolition, Congress moved on to hundreds of other amendment proposals, leaving unchallenged Southern Republicans to quickly reform their state constitutions to abolish slavery without compensation. West Virginia's Constitution outlawed slavery in 1863, and Arkansas, Nevada, Louisiana, and Maryland did so the following year. In 1865 Tennessee, Alabama, Georgia, Missouri, South Carolina, and Florida's constitutions emancipated slaves. Georgia's required the legislature grant people of color special protection by law, and Florida's granted blacks an ostensibly full complement of rights, including the right to testify in trials.[1041] Most of

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[1038] Representative Fernando Beaman encouraged Congress to imitate Lincoln's plan, calling it "a beacon-light by which we may be led out of the labyrinth in which we have been groping." Ibid., 1246.
[1039] The Bill proclaimed black equality, prohibited high-ranking ex-Confederate officeholders and soldiers from electing or serving as delegates, and delayed a state's convention until a majority of whites proclaimed loyalty to the federal Constitution. Ibid., 2105–7.
[1040] Foner, *A Short History of Reconstruction*, 28–29.
[1041] See the Alabama Constitution of 1865, Article I, Section 34 and Article IV, Section 31, the Georgia Constitution of 1865, Article I, Section 20 and Article II, Section 5, the Missouri Constitution of 1865, Article I, Section 2, and the Florida Constitution of 1864, Article XVI, Section 1-3. Note the Georgia Constitution disenfranchised blacks, the Florida Constitution excluded blacks from voting or serving in office or on juries, and the Alabama Constitution prohibited interracial marriage. See also Rebecca Mae Salokar, "Florida: Defining and Redefining Citizenship and Community," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 271–72.

the South had settled on immediate uncompensated emancipation through state constitutional revision.

These state clauses quieted House debate over abolition and compensation. In January 1865, the House's newly-elected Republican supermajority pushed a vote on the proposed Thirteenth Amendment. States' rights Democrats now praised the Amendment's first section for upholding the state abolition clauses. Moreover, these state clauses preempted Congress from aggressively implementing abolition under the Amendment's second section, assuaging Democrats' worries. Democrats who earlier opposed the Amendment now supported it. As Pennsylvania Democrat Alexander Coffroth put it:

> "In June last my objection to this amendment was that it was taking away the property of people of the States that remained true to the Union… Since that time Missouri and Maryland have abolished slavery by their own action, and the Governor of Kentucky in his message recommends to the Legislature of that State gradual emancipation. The same objection which was then urged against this amendment cannot now be urged."[1042]

States' rights Democrats now appeased, they joined House Republicans to pass the Amendment, sending it to the states for ratification. Congressmen largely stopped proposing amendments on abolition and compensation emancipation.[1043]

The state abolition clauses also preempted controversies during the ratification of the Thirteenth Amendment. By the Amendment's ratification, nearly every state had already voluntarily abolished slavery,[1044] such that state legislators accepted the

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[1042] Similarly, Anson Herrick, a New York Democrat, stated "at the last session of Congress I voted against this resolution… The people by a large majority …fully indorsed the policy of the Administration on the slavery issue, and I am now disposed to bow in submission to that popular decree." *The Congressional Globe*, 1865, 523–25.

[1043] Note however that between March and June 1866 Northern congressmen proposed ten amendments prohibiting compensation.

[1044] At least thirty of the thirty-six states emancipated slaves by state constitutional provision, statute, or judicial ruling, and framers in the remaining six states were pushing for constitutional abolition clauses.

redundant, uncontroversial federal Amendment.[1045] Seventeen legislatures ratified the Amendment in the first month alone. Longstanding New England abolition provisions "kept the amendment from emerging there as a controversial issue," securing immediate ratification in New England, per Michael Vorenberg.[1046] The federal abolition clause reaffirmed the newer state clauses.[1047] For example, Unionist governments in Louisiana, Tennessee, Arkansas, Missouri, Maryland, Virginia, and Nevada, having recently abolished slavery, ratified the Amendment within weeks, many unanimously. Framers in the unreconstructed deep South postponed ratification votes until their states formed permanent legislatures in late 1865.[1048] Across the Union, state constitutional revision quieted debate over immediate uncompensated abolition, easing the Amendment's

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These six states abolished slavery as follows. First, Delaware forbade international slave trading in 1831, leaving only eight percent of the state's black population enslaved by 1860, allowing the state to consider compensated emancipation in 1862. However, rural legislators blocked abolition until overruled by the Thirteenth Amendment. Second, Virginia's loyalist 1864 convention drafted a clause abolishing slavery save for punishment, though the 1864 Constitution never took force. See Virginia's Constitution of 1864, Article IV, Section 19. Third, Kentucky's Constitution of 1850, Article XIII, Section 3 forbade abolition until it was superseded by the federal Thirteenth Amendment. And fourth, North Carolina did not constitutionally abolish slavery until 1868. See the North Carolina Constitution of 1868, Article I, Section 33. Fifth, Mississippi's failed 1865 convention proposed abolition, which ultimately came through military occupation, affirmed under the Mississippi Constitution of 1869, Article I, Section 19. Finally, Texas' 1866 Constitution, Article VIII, Section 1 abolished slavery, affirming the federal amendment. Tennessee, a seventh case, proposed an abolition amendment in 1865, which was ratified on February 22, 1866, after the state ratified the Thirteenth Amendment. See Table 17 in the appendix for a list of Southern abolition clauses. Winkle, *The Mississippi State Constitution*, 7–9; Patience Essah, *A House Divided: Slavery and Emancipation in Delaware, 1638-1865* (Charlottesville: University of Virginia Press, 1996), xiv, 36; Hoffecker and Benson, "Festina Lente: The Development of Constitutionalism in Delaware," 177.

[1045] As noted in Footnote 1044, some ex-Confederate states passed state abolition clauses in tandem with the federal Amendment. For example, Mississippi's Governor William Sharkey used the Amendment's impending national ratification to push his state's convention to abolish slavery. The convention obliged, but the state legislature refused to ratify the federal Amendment, deeming it redundant given the state's abolition clause. Ackerman, *We the People*, II:141–44; Vorenberg, *Final Freedom*, 228.

[1046] Vorenberg, *Final Freedom*, 212.

[1047] However Delaware's legislature rejected the Amendment, as did Kentucky's, fearing congressional overreach under the second clause. Legislators in Ohio and Indiana expressed the same worry. Ibid., 216–20.

[1048] Johnson and Seward won the support of deep South conventions by promising that the Amendment's second section would not enfranchise blacks. Legislatures in South Carolina, Florida, Alabama, Louisiana, and Mississippi ratified the Amendment on this condition. Simeon Davison Fess, *Ratification of the Constitution and Amendments by the States*, Senate Document 240 (Washington: Government Printing Office, 1931), 4; Vorenberg, *Final Freedom*, 212, 216–33; Tsesis, *The Thirteenth Amendment and American Freedom*, 48.

ratification.[1049] In sum, the Amendment did not expressly require Congress force abolition on the states, as some scholars claim,[1050] but rather deferred to the states' existing abolition clauses.[1051]

Oddly, the Thirteenth Amendment helped preserve a type of slavery some states had banned. Prior to the Amendment, only half of Southern states allowed convict slavery.[1052] But in February 1864 Senate Judiciary Committee Chairman Lyman Trumbull proposed a clause allowing slavery "as a punishment for crime whereof the party shall have been duly convicted," and the clause passed the Senate with little debate.[1053] Subsequently and perhaps thanks to the Amendment, four more Southern states passed clauses for convict slavery,[1054] much to the frustration of antislavery

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[1049] After ratifying the Amendment, Illinois Republicans reinterpreted their state constitution to expand blacks' civil rights.

[1050] The Amendment's second section invited congressional enforcement, which David Kyvig calls "a dramatic intrusion into state authority." Kyvig, *Explicit and Authentic Acts*, 156. Note also the Amendment's critics in Congress shared this worry. However, as Michael Zuckert notes, save for the radical Republicans, the Amendment's framers likely intended the section to apply only to enforcing abolition, which the states had already affirmed. Similarly, Sections 12 and 13 of the Wade-Davis Bill, also drafted by the Thirty-Eighth Congress, limited Congress to freeing any blacks who might have been unconstitutionally re-enslaved. Zuckert, "Completing the Constitution," 272–73; Tsesis, *The Thirteenth Amendment and American Freedom*, 39–40.

[1051] For the argument that the Amendment's first section upheld state abolition clauses, see Jacobus tenBroek, *Equal under Law: The Antislavery Origins of the Fourteenth Amendment* (Collier Books, 1965).

[1052] At the Amendment's ratification, nine of the sixteen ex-Confederate or ex-slave states constitutionally allowed convict slavery. See Table 17 in the appendix.

[1053] On April 8th, Sumner railed against Trumbull's provision, but Trumbull pushed the Senate to pass the Amendment, loophole included, later that day. See *The Congressional Globe*, 1864, 1487–88. Trumbull derived the loophole from the Missouri Compromise bill and the Northwest Ordinance. The Ordinance's abolition clause and convict labor loophole inspired a host of state constitutional clauses and Representative John B. Henderson's December 1864 federal amendment proposal. In 1787 Massachusetts Congressman Nathan Dane framed the Ordinance's abolition clause quickly, and the Confederation Congress passed it with little attention to the convict slavery provision. See the Northwest Ordinance of 1787, Article VI and the Thirteenth Amendment, Section 1. Robinson, *Slavery in the Structure of American Politics, 1765-1820*, 381–84; Kyvig, *Explicit and Authentic Acts*, 160–61; Belz, *A New Birth of Freedom*, 115; Fehrenbacher, *The Slaveholding Republic*, 254–55; Finkelman, *Slavery and the Founders*, 37–51; Raja Raghunath, "A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison," *William & Mary Bill of Rights Journal* 18 (2010 2009): 419–21.

[1054] For state constitutional establishment of convict enslavement before the Thirteenth Amendment, see for example the Georgia Constitution of 1865, Article I, Section 20 and the Missouri Constitution of 1865, Article I, Section 2.

congressmen.[1055] In affirming these state clauses, Trumbull widened the convict slavery loophole, closed by a few previous state framers,[1056] letting Southern prisons lease convict laborers to private parties. The state and federal provisions harmonized, likely preempting controversy over convict slavery, with the unanticipated and likely unintended consequence of retrenching agricultural slavery. Thus to study the federal Amendment without the accompanying state clauses is to misunderstand the federal clause's enforcement.

Following Lincoln's assassination in April 1865, Andrew Johnson assumed the presidency. Johnson, a repentant former slaveholder and Tennessee Democrat and a strict constructionist, found no explicit justification for federal interference in state constitutionalism.[1057] A provision re-enfranchising ex-Confederates holding less than $20,000 in taxable property sent a mix of moderate ex-Confederate and Unionist white yeomen to state conventions in Mississippi, Alabama, Florida, Georgia, and the Carolinas in the summer of 1865. These delegates repealed property qualifications on office-holding and reapportioned legislative seats away from lowland planter counties, but maintained antebellum prohibitions on black voting and citizenship. That autumn deep South states elected ex-Confederates to Congress and the state legislatures, which in Mississippi and South Carolina forced free blacks into contracted plantation labor under

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[1055] As Representative John Farnsworth put it: "Yet we find those states now reducing these men again to slavery as punishment for crime, and declaring every little petty offense the black man may commit that he shall be sold into bondage." *The Congressional Globe: Thirty-Ninth Congress, First Session* (Washington: F. & J. Rives, 1866), 383.

[1056] The Illinois Constitution of 1818, Article XIII, Section 16, derived from the Northwest Ordinance's Article VI, allowed convict slavery, but the state's 1848 convention abandoned the clause. Most other Old Northwest states maintained a convict slavery clause. See the Minnesota Constitution of 1857, Article I, Section 2 and the Minnesota Constitution of 1974, Article I, Section 2, Michigan Constitution of 1835, Article XIII, the Michigan Constitution of 1964, Article IV, Section 45, the Indiana Constitution of 1851, Article I, Section 37, the Wisconsin Constitution of 1848, Article I, Section 2, and the Ohio Constitution of 1851, Article I, Section 6.

[1057] In contrast to Lincoln, Johnson asked only that the still unreconstructed deep South states repudiate slavery and secession.

punishment of jailing or fine.[1058] Other Southern states soon switched to facially race-neutral laws coercing blacks into agricultural apprenticeships and labor.[1059]

Dissatisfied with these six deep South constitutions of 1865, congressional Republicans first refused to seat Southern representatives and then proposed the Civil Rights Act of 1866. The Act expanded blacks' rights to litigate and negotiate labor contracts in the North and South, but did not expand their broader political and electoral privileges, which remained the states' prerogative. [1060] As Lyman Trumbull explained, "the granting of civil rights does not, and never did in this country, carry with it rights, or, more properly speaking, political privileges…The right to vote and hold office in the States depends upon the legislation of the various States."[1061] Even so, congressional Democrats took the Act as federal overreach, replying that *Dred Scott* outlawed black birthright citizenship, and Johnson vetoed the Act, which survived only thanks to a congressional override. However, Johnson successfully vetoed an appropriations bill supporting free blacks through the Freedmen's Bureau.[1062]

In June 1866 Congress' Joint Committee on Reconstruction circumvented Johnson's veto by calling for a second round of state constitutional conventions. The Committee, led by Thaddeus Stevens and William Pitt Fessenden, had several aims. First, in deferring black enfranchisement to new state constitutional conventions, Republicans

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[1058] At the instruction of General Daniel Sickles, South Carolina then repealed its black codes.
[1059] Foner, *A Short History of Reconstruction*, 86–100; Kyvig, *Explicit and Authentic Acts*, 163–64; Vorenberg, *Final Freedom*, 227; Valelly, *The Two Reconstructions*, 26–28.
[1060] The Act granted federal citizenship to all "persons born in the United States," including blacks, let federal courts remove Thirteenth Amendment litigation from the state courts, and excluded from citizenship Indians not taxed and those subject to a foreign power.
[1061] *The Congressional Globe*, 1866, 1757.
[1062] Foner, *A Short History of Reconstruction*, 108–14; Smith, *Civic Ideals*, 305–8.

avoided direct conflict with Democrats and Johnson's yeoman state governments.[1063] Johnson, bound to a states' rights platform, had been outmaneuvered, and in his 1866 annual message to Congress praised the plan for promising Southern states eventual congressional representation. Second, waiting on these conventions, congressional Republicans could keep refusing to seat Southerners, perhaps in the meantime passing a federal amendment for black citizenship.[1064] Finally, some radical Republican congressmen wanted to protect blacks' state citizenship, voting rights, education, and economic and marriage rights. All of these fell under the states' police powers, a centuries-old authority that most Republicans, including Trumbull, placed beyond the reach of Congress and the 1866 Civil Rights Act.[1065] Protecting a full complement of black social rights required deference to the states.

The Joint Committee also proposed the Fourteenth Amendment to entrench their federal civil rights platform and to complement these state reforms. Thaddeus Stevens revived successful House amendment proposals to repudiate Confederate War debt and reapportion representatives,[1066] bundling these with provisions promising birthright federal and state citizenship and forbidding compensated emancipation, office-holding by ex-Confederates, and state infringement on federal due process, equal protection, and

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[1063] As the Committee's Majority Report explained "your committee is not disposed to criticize the President's action in assuming the power exercised by him in this regard. The [state] convention, when assembled, should frame a constitution of government, which should be submitted to the people for adoption."

[1064] Similarly, Trumbull noted this would allow Congress to pass further civil rights legislation. *The Congressional Globe*, 1866, 1756–57. But, as the Majority Report admitted, once "a state thus organized claims representation in Congress, the election of representatives should be provided for by law." Edward McPherson, ed., "Majority Report of the Joint Committee on Reconstruction," in *A Political Manual for 1866: Including a Classified Summary of the Important Executive, Legislative, and Politico-Military Facts of the Period* (Washington: Philp & Solomons, 1866), 89.

[1065] As Eric Foner concludes, the Act "honored the traditional presumption that the primary responsibility for law enforcement lay with the states." Foner, *A Short History of Reconstruction*, 111.

[1066] These had passed the House but not the Senate. *The Congressional Globe*, 1866, 14; Ames, *The Proposed Amendments*, 23, 371, 373.

privileges and immunities rights.[1067] Congressmen had already proposed dozens of amendments on each of these issues,[1068] which Stevens united into a single omnibus proposal. This Amendment carried nearly the whole Republican's constitutional agenda.

Stevens' amendment was designed to work in tandem with state constitutional reform. Southern state framers had already repudiated Confederate War debt, forbade compensated emancipation and office-holding by ex-Confederates, and were extending equal protection and suffrage rights.[1069] Further, the Joint Committee hesitated to interfere in state constitutionalism. The Committee's Majority Report clarified that Fourteenth Amendment's reapportionment provision "would be gentle and persuasive" on the states, as committee members doubted "whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject." Further, the Committee was skeptical that "the States would consent to surrender a power they had always exercised, and to which they were attached."[1070] Finally, in exchange for Southerners' ratification, the Committee considered an enabling act immediately recognizing each Southern state, but instead settled on piecemeal restoration through the state conventions.[1071] If the Committee's Majority Report and the Amendment's Section 2, promising compliant Southerners statehood and congressional representation, was a carrot, the rest of the Fourteenth

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[1067] Stevens reported the Fourteenth Amendment on April 30, 1866. Under the Amendment's second section, states disenfranchising adult males in federal elections would lose seats in Congress and the Electoral College, backed by congressional enforcement. Reverdy Johnson, the Committee's lone Democratic senator, unsuccessfully attempted to redact the Amendment's Privileges and Immunities Clause. Ames, *The Proposed Amendments*, 219–26, 247–50.
[1068] See Table 11 in the appendix.
[1069] See Table 17 in the appendix.
[1070] McPherson, "Majority Report of the Joint Committee on Reconstruction," 88. Suffragettes like Elizabeth Cady Stanton and Susan B. Anthony opposed the measure, the first ratified to explicitly condone an all-male franchise, but were largely ignored. Representative James Brooks' proposed amendment granting the franchise regardless of sex failed in 1869. *The Congressional Globe: Fortieth Congress, Third Session* (Washington: F. & J. Rives and George A. Bailey, 1869), 561.
[1071] Foner, *A Short History of Reconstruction*, 114–17; Kyvig, *Explicit and Authentic Acts*, 165–70.

Amendment was the stick.[1072] Deference to the states and the Fourteenth Amendment were drafted jointly, so that neither worked without the other.

The Amendment passed the House on May 11, 1866 after only three days' debate, and passed the Senate three weeks later after revisions to the first section. Johnson replied that Congress, in excluding Southerners, had failed quorum, invalidating the Amendment. Unable to veto the proposal, he urged states to reject it.[1073] Delaware, Maryland, and Kentucky obliged, and in the winter of 1866-7, all eleven ex-Confederate states, save Tennessee, refused ratification. Republicans were incensed. Charles Sumner proposed coercing the states into ratification and state constitutional reform under the Thirteenth Amendment's Section 2 and the Guarantee Clause.[1074] But Northern states ratified the Amendment, and when critics replied that Sumner's plan and a broad reading of the Guarantee Clause allowed enfranchising women and children across the Union, moderate Republicans balked.[1075] Instead Congress intervened only in the South. The Reconstruction Acts of 1867 enfranchised Southern blacks, disenfranchised ex-Confederates, and imposed military rule on Southern states until they ratified the Fourteenth Amendment and accompanying new state constitutions.[1076] In mid-1867, the

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[1072] In floor debates in 1871, John Bingham, one of the Amendment's authors, suggested he intended the Amendment's first section to incorporate the full Bill of Rights against the states. However, other Republicans argued the Amendment only applied temporarily to noncompliant states, leaving the framers' intent unclear. Kyvig, *Explicit and Authentic Acts*, 168; Smith, *Civic Ideals*, 310–11; Beaumont, *The Civic Constitution*, 159.
[1073] Kyvig, *Explicit and Authentic Acts*, 170; Valelly, *The Two Reconstructions*, 30–32.
[1074] According to Sumner, "There is no clause which gives to Congress such supreme power over the States as that clause" *The Congressional Globe: Fortieth Congress, First Session* (Washington, 1867), 614.
[1075] Pennsylvania's Republican Representative John Broomall made this argument. *The Congressional Globe: Thirty-Ninth Congress, Second Session*, vol. I (Washington, 1867), 350–51.
[1076] Further, Congress and Secretary Seward refused to let New Jersey and Ohio reverse their ratifications, even though they let Southern legislatures reverse their rejections. This, and the Reconstruction Acts, were likely illegitimate under a narrow reading of Article V. Kyvig, *Explicit and Authentic Acts*, 174–75; Ackerman, *We the People*, II:110–13.

Army organized voter registration, elections, state constitutional and ratification conventions.[1077]

Congress' Joint Committee Report and Reconstruction Acts pushed on the states controversies over black citizenship and ex-Confederate debt and rights. This destabilized state constitutionalism, prompting a second set of Southern constitutions which now granted blacks citizenship and equal protection, often exceeding the minimum mandated by the Fourteenth Amendment.[1078] For example, under Army coercion,[1079] Georgians in 1865 incorporated the text of the Fourteenth Amendment into Georgia's bill of rights and additionally granted blacks the vote and free public schooling.[1080] Other Southern states elected blacks and Northern carpetbaggers, mainly Republicans, to so-called "black and tan" conventions, over the protestations and boycotts of unreconstructed whites. African Americans comprised about a third of the delegates across the South.[1081] Of the forty-six delegates to Florida's 1868 Convention, eighteen were African Americans and forty-three were Republicans, who together designed a new government that quickly ratified the Fourteenth Amendment.[1082] Arkansas' 1868 Convention of seventy-five delegates included sixty Republicans, of whom eight were African Americans, and established universal male suffrage, free and unsegregated public schools, and equal protection for all

[1077] Dealey, *Growth of American State Constitutions*, 63–66; Valelly, *The Two Reconstructions*, 41–44.
[1078] For example, states could confer state citizenship on resident aliens not granted citizenship by the Fourteenth Amendment. Smith, *Civic Ideals*, 308.
[1079] When Georgians refused to ratify the Fourteenth Amendment in late 1866, Army officers repudiated the state's 1865 Constitution and arranged the election of Northerners to the state's 1867 constitutional convention.
[1080] See the Georgia Constitution of 1868, Article I, Section 2, Article II, Section 2, and Article VI, Section 1. Melvin B. Hill, *The Georgia State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1994), 7–10; Melvin B. Hill and Laverne Williamson Hill, "Georgia: Tectonic Plates Shifting," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 290.
[1081] Williams, *The Law of American State Constitutions*, 91.
[1082] D'Alemberte, *The Florida State Constitution*, 6–7; Salokar, "Florida: Defining and Redefining Citizenship and Community," 272.

races.[1083] Louisiana's radical convention, held the same year, awarded state citizenship by birthright and naturalization regardless of race or previous servitude, required officeholders by oath publicly affirm racial equality, and forbade racial discrimination in state, parish or municipally-licensed public places, including schools, and the 1879 Convention funded a university in New Orleans for black students.[1084] Conventions in Mississippi, Alabama, North Carolina, and Virginia ratified similarly egalitarian state constitutions.[1085]

These state conventions, prompting the election of new legislators and the drafting of new egalitarian clauses, eased the Fourteenth Amendment's passage. Before ratification of the Amendment, at least ten of the sixteen ex-Confederate or slaveholding states had already ratified similar state constitutional equality clauses, and two more followed in the next two years.[1086] Since many Southerners already lived under an equality clause, they likely had fewer grounds to challenge the proposed federal Equal Protection Clause.

[1083] See the Arkansas Constitution of 1868, Article I, Section 3 and Article VII, Section 2 and 5. Free and unsegregated schools had likely already been authorized under the Arkansas Constitution of 1864, Article VIII, Section 1. Goss, *The Arkansas State Constitution*, 6–7; Niles, "Change and Continuity in Arkansas Politics after the 1874 Arkansas State Constitutional Convention," 254–55.

[1084] See the Louisiana Constitution of 1868, Title I, Articles 2 and 13,Title VI, Article 98 and 100, and Title VII, Article 135, and the Louisiana Constitution of 1879, Article 231. Schools were again segregated under the Louisiana Constitution of 1898, Article 248. Tarr, *Understanding State Constitutions*, 97; Hargrave, *The Louisiana State Constitution*, 8–9.

[1085] Mississippi established citizenship for all residents, civic equality between men, and race-blind public schooling, as did Alabama. See the Mississippi Constitution of 1869, Article VII, Section 3 and Article VIII. Congress also forced an 1868 convention in North Carolina, staffed in large part by blacks and Northerners, which declared equality between men and provided for public schooling, with no provision for segregation. See the North Carolina Constitution of 1868, Article I, Section 1 and Article IX. Note an 1876 amendment to Article IX, Section 2 required "the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination made in favor of, or to the prejudice of, either race." Virginia's 1869 Convention, ending the second wave, also guaranteed the equal protection of the laws and free public education. See the Virginia Constitution of 1870, Article I, Section 20 and Article VIII, Section 1.

[1086] See Table 17 in the appendix.

Further, these state clauses helped elaborate the federal one. Like most Southern constitutional provisions, the state equality clauses were long and detailed, and unlike prior Revolutionary-era state declarations of individuals' natural equality, the new equality clauses obligated state enforcement.[1087] For example, following Congress' instructions, Georgia's 1868 Convention drafted a constitution mandating birthright citizenship and equal protection, to be backed by legislation, as did Alabama's.[1088] Moreover, these provisions complemented other clauses that drew on states' exclusive police powers to allow blacks state citizenship, fair working hours, fair wages, free integrated schooling, interracial marriage, voting privileges, office-holding rights, and militia service.[1089] For example, through the state's police powers, Louisiana's 1864 Convention granted workers limited hours and a minimum wage, an authority unavailable to Congress. Many Southern state constitutions also stripped ex-Confederates' citizenship and voting rights,[1090] affirming the Fourteenth Amendment's Section 3. Congress could not have expounded the contentious Fourteenth Amendment or built a black, Republican Southern coalition without accompanying state constitutional revision.

[1087] Consider Virginia's original, Lockean equality clause, first drafted by George Mason in the 1776 Declaration of Rights and included in the 1870 Constitution: "That all men are by nature equally free and independent." In contrast, the second equal protection clause drafted in 1870 guaranteed equality as an enforceable citizenship right: "That all citizens of the state are hereby declared to possess equal civil and political rights and public privileges." See the Virginia Constitution of 1870, Article I, Section 20.

[1088] See the Georgia Constitution of 1865, Article II, Section 5, the Georgia Constitution of 1868, Article I Section 2, and the Alabama Constitution of 1868, Article I, Section 2. Hill, *The Georgia State Constitution*, 7–10.

[1089] However, many state legislatures defied their constitutions by passing statutes segregating schools. Southern blacks soon established temporary schools in houses, churches, billiard halls, and eventually in dedicated schoolhouses. Foner, *A Short History of Reconstruction*, 43–44; Williams, *The Law of American State Constitutions*, 91.

[1090] States instituted loyalty oaths, targeting those who had served the Confederacy in office or in arms. Constitutionally excluded from the vote, from office-holding, and from state conventions, many of these unreconstructed Southerners were silenced, preempting or postponing debates over black citizenship and state sovereignty. And congressionally-mandated loyalty oaths, far from overriding state authority, revealed how much Congress relied on the state governments to maintain the Republican coalition. But note that some Southerners understood universal manhood suffrage under their constitutions to enfranchise ex-Confederates, and that in 1867, the U. S. Supreme Court struck down loyalty oaths in *Cummings v. Missouri* (71 U.S. 277). Tarr, *Understanding State Constitutions*, 107.

Unionist state constitutional framers did not extend their police powers so far as to advocate compact theory or nullification. Lincoln and Congress rejected compact theory's claim that the states predated the Union,[1091] as did Reconstruction state framers. North Carolina's 1868 Convention recognized the supremacy of the federal Constitution and rejected a right to secession.[1092] Similarly, Louisiana's 1868 Constitution voided the state's secession act and constitution, declared "citizens of this State owe allegiance to the United States; and this allegiance is paramount to that which they owe to the State," and required state officeholders swear allegiance to the federal Constitution and laws.[1093] These clauses helped quiet the old nullification question.

While most Southern constitutions expressly enfranchised blacks by 1868,[1094] the federal Constitution did not.[1095] This undermined the constitutionality of Congress'

[1091] In his July 4, 1861 address, Lincoln reimagined the Declaration of Independence not as a compact between sovereign states, but as the act of union that created the states. He speculated that the colonies, by the Declaration's "mutual pledge," made the Union, which then converted the colonies to states. The Union was temporally and legally prior to the states: "The Union, and not [the states] separately, procured independence, and their liberty…The Union is older than any of the states and, in fact, it created them as States…Not one of them ever had a state constitution independent of the Union." Since the states did not predate the Union, they could not have compacted to form it, and could not revoke or modify it. See Abraham Lincoln, "Message to Congress in Special Session, July 4, 1861," in *Abraham Lincoln: Selected Speeches and Writings* (New York: Library of America, 1861), 309–10. There are two problems with Lincoln's view. First, the Declaration's "mutual pledge" was not a bond between the states, but between the document's signers, immediately prefacing their signatures. Second, against Lincoln's claim that "Not one of [the states] ever had a State constitution, independent of the Union," four states drafted constitutions *before* the Continental Congress declared a union of states on July 4, 1776. These four states were New Hampshire (January 5, 1776), South Carolina (May 26, 1776), Virginia (June 29, 1776), and New Jersey (July 2, 1776). Lincoln claimed these four constitutions were "dependent on, and preparatory to, coming into the Union." While the framers of these four state constitutions expected and needed eventual military union, they did not need union for constitutional or legal legitimacy. For legitimacy, these first state framers looked to the authorization of the people of their respective states. Hence, legally and constitutionally, these states predate the Union which Lincoln traces to the Declaration.

[1092] See the North Carolina Constitution of 1868, Article I, Section 4-5.

[1093] See the Louisiana Constitution of 1868, Title I, Article 2 and 13.

[1094] Note that these Southern states were the exception, as other states had already disenfranchised blacks. In 1865 only six states in the Union, five of them in New England, allowed blacks to vote, and only five on equal terms, leaving only six percent of the nation's black population enfranchised. Beaumont, *The Civic Constitution*, 159.

[1095] Sumner was an outlier in arguing the Guarantee Clause and the Thirteenth Amendment's second section let Congress enfranchise blacks in the states. The Fourteenth Amendment, Section 2 let Congress sanction states for restricting the franchise, but did not allow direct congressional intervention in franchise

Reconstruction Acts enfranchising Southern blacks.[1096] Further, abolition vacated the Three-Fifths Clause, granting Southern blacks and states even greater representation in the House and Electoral College and greater national importance. Republicans therefore offered federal amendments to legitimize and entrench the Reconstruction Acts and Southern state franchise clauses. Prior to the War, congressmen did not propose a single franchise amendment, but between 1866 and 1869, they offered at least seventy-eight.[1097] In 1868 Republicans renewed their congressional majority, offering more suffrage amendment proposals, one of which passed the House. The Senate proposed an alternate provision, spurring a protracted reconciliation battle, ending with a bare-bones compromise in the last days of the final session of the Fortieth Congress. The brief Fifteenth Amendment only protected American citizens' rights to vote regardless of race or previous enslavement, as enforced by Congress. Unlike other proposals, it did not prohibit restrictions based on property, origin, intelligence or literacy, gender, or ones on office-holding.[1098]

State constitutional revision paved the way for ratification, preempting controversies over the Amendment. When the Fifteenth Amendment was ratified, every Southern state had reformed their franchise laws and at least eleven of the sixteen ex-

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law. Note also that on the eve of war in 1861 Steven Douglas, John Crittenden, and George Pugh proposed five amendments to appease Southerners by disenfranchising blacks, the first major congressional foray into a suffrage amendment. Ames, *The Proposed Amendments*, 226.

[1096] As noted, radicals like Thaddeus Stevens sought to treat the ex-Confederate states as territories subject to congressional oversight, including franchise regulation, under the Territories Clause. However, by 1867 all of the ex-Confederate states had been readmitted to the Union, weakening this position. Congress did use this authority to propose enfranchising Montana blacks, and enfranchised African Americans in the District of Columbia under the District Clause. See Article I, Section 8, Clause 17. Kyvig, *Explicit and Authentic Acts*, 176–77.

[1097] In 1866, Congress roundly rejected ten proposals to enfranchise blacks, including an ornately-worded resolution by Sumner promising black enfranchisement and the end of aristocracy and oligarchy. Six more failed the following year.

[1098] Ames, *The Proposed Amendments*, 229–35; Kyvig, *Explicit and Authentic Acts*, 176–81; Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002*, 188–89.

Confederate and ex-slave states had already enfranchised black men, almost all through constitutional reform.[1099] Universal manhood suffrage was already the constitutional status quo in the South. [1100] Some Northern states repealed racial franchise restrictions just before the Amendment's passage, while others did so by ratifying the federal Amendment.[1101] A dozen states across the North and deep South approved the Amendment within a month, with another five following that spring.[1102] Serious legal controversies were limited to the border states like West Virginia, [1103] which had avoided

[1099] Between the passage of the Military Reconstruction Act in March of 1867 and the year's end, every Southern state but one revised its suffrage laws. Texas had enfranchised all citizens in 1866. See Table 17 in the appendix for state constitutional franchise provisions. Kyvig, *Explicit and Authentic Acts*, 173.

[1100] For example, Georgia and North Carolina allowed universal manhood suffrage in 1868, the later without property qualification. See the Georgia Constitution of 1868, Article II, Section 2 and the North Carolina Constitution of 1868, Article I, Section 22 and Article VI, Section 1. Georgia's clause reversed black disenfranchisement under the state's 1865 Constitution, Article V, Section 1. See also Table 17 in the appendix. Note that Virginia's Constitution was ratified the same year as the Fifteenth Amendment, but drafted the year before. Tennessee's Constitution was not ratified until 1870, but the state had already enfranchised black men by statute three years earlier. Hill, *The Georgia State Constitution*, 7–10.

[1101] Referenda in Connecticut, Minnesota, Wisconsin, the Colorado Territory, and the District of Columbia in 1865 showed Republican support for enfranchising blacks. In 1868, Minnesotans passed an amendment removing the stipulation that voters be white. Michiganders did the same the following year via amendment. But Voters in the Democratic strongholds of Ohio and New Jersey refused reforms enfranchising blacks in 1867. And racial disenfranchisement survived in Kansas until 1918 and Oregon until 1926. Kyvig, *Explicit and Authentic Acts*, 177–78; Allen, "Framing Government for a Frontier Commonwealth: The Minnesota Constitution(s)," 522; David Houghton, "Michigan: Four Constitutions, Four New Beginnings," in *The Constitutionalism of American States*, ed. George E. Connor and Christopher W. Hammons (Columbia: University of Missouri Press, 2008), 444; Heller and Schumaker, "The Kansas Constitution: Conservative Politics through Republican Dominance," 498; Leichter, "Oregon's Constitution: A Political Richter Scale," 760.

[1102] Virginia, Mississippi, Georgia and Texas ratified the Amendment to end military rule. Livingston, *Federalism and Constitutional Change*, 205; Kyvig, *Explicit and Authentic Acts*, 181–82.

[1103] In West Virginia, radical Republicans passed an 1866 state amendment stripping the vote and property rights from increasingly angry ex-Confederates. But on taking office, the moderate Republican governor William Stevenson urged ratifying the Fifteenth Amendment in order to enfranchise ex-Confederates. After a federal judge backed Stevenson, voters elected Democrats to the governorship, legislature, and congressional seats, passing an amendment enfranchising ex-Confederates. Two years later ex-Confederates, led by Virginia's Confederate lieutenant governor, held a second constitutional convention, forbidding loyalty oath requirements and nearly disenfranchising blacks. Cleverly, state framers had turned the Fifteenth Amendment against Congress' intent, toward redeeming the antebellum constitutional order. Thus, to study the Fifteenth Amendment without corresponding state constitutional provisions is to misunderstand the Amendment. See the West Virginia Constitution of 1872, Article III, Section11, Article IV, Section 5, and Article VI, Section 43. Bastress, *The West Virginia State Constitution*, 15–21; DiClerico, "The West Virginia Constitution: Securing the Popular Interest," 216–20.

constitutional reconstruction.[1104] Delegates to Tennessee's 1870 Convention, many of them ex-Confederates, opposed the Fifteenth Amendment and black suffrage, but capitulated as other states moved the Amendment to ratification.[1105] As delegate Henry R. Gibson put it: "universal suffrage will be the *supreme law* of the land, whether Tennessee *participates* in such ratification or not."[1106]

The Fifteenth Amendment was Congress' last attempt at constitutional reconstruction. In 1870 Congress proposed only six amendments, and yearly number of amendment proposals would stay within a few dozen until the Great Depression and New Deal. Federal troops largely withdrew from the South in 1877, depriving Congress of a means of enforcement against intransigent Southerners, closing this chapter of the Reconstruction. The fate of Reconstruction, and the Southern black vote, fell to the new state governments.[1107]

Some Reconstruction scholars assert Lincoln and the Thirty-Eight and Thirty-Ninth Congresses forced a civil rights agenda on intransigent ex-Confederate states.[1108] But this misses how black and Republican state framers paved the way for

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[1104] Kentucky, a loyalist state, had avoided constitutional reconstruction, and thus only enfranchised blacks with the Fifteenth Amendment's passage. Still, delegates passed a poll tax over intense debate, which was only levied in 1890 as the state formalized Jim Crow. Delaware refused ratification, and neighboring Maryland instituted a prohibitively high property qualification for blacks in 1870. And Missouri voters defeated an 1868 amendment enfranchising blacks only to accept the Fifteenth Amendment two years later. Isidor Loeb, *Constitutions and Constitutional Conventions in Missouri* (State Historical Society of Missouri, 1920), 20; Tarr, *Understanding State Constitutions*, 107; Ireland, *The Kentucky State Constitution*, 8.

[1105] The state had already enfranchised blacks by statute in 1867. Laska, "The Tennessee Constitution: An Unlikely Path toward Conservatism," 360.

[1106] See the Tennessee Constitution of 1870, Article IV, Section 1. See also *Journal of the Proceedings of the Convention of Delegates Elected by the People of Tennessee, to Amend, Revise, Or Form and Make a New Constitution, for the State* (Nashville: Jones, Purvis & Company, 1870), 303; Laska, *The Tennessee State Constitution*, 14–18.

[1107] Rollback of egalitarian provisions began in the mid-1870s, a prelude to Jim Crow. Dealey, *Growth of American State Constitutions*, 83.

[1108] For example, David Kyvig asserts "Defense of states' rights remained a concern in many quarters during the effort to devise new constitutional provisions. Once the new amendments were ratified, they were interpreted in ways that preserved state power even at the expense of [blacks'] civil rights." Kyvig, *Explicit and Authentic Acts*, 155.

Reconstruction. After 1865, almost every Southern and ex-Confederate state constitution included clauses for abolition, equal protection, and universal male suffrage, and almost all of these clauses passed before or with their federal counterparts. These provisions aided the passage and ratification of the Reconstruction Amendments, and after ratification, elaborated these poorly-defined new amendments. In cooperating with Lincoln and congressional Republicans, state framers harmonized state and national constitutional law on abolition and black citizenship, quieting controversies around Reconstruction. The Union-imposed state governments helped form and stabilize the new postwar constitutional order. This closed the first era of American constitutional development.

CONCLUSION

"Turn the eyes upside down, by looking at the landscape through your legs, and how agreeable is the picture, though you have seen it any time these twenty years!"

Ralph Waldo Emerson, 1836[1109]

Scholars of American constitutionalism myopically focus on the federal Constitution, overlooking the states. But almost all American constitutional revision and amendment happens at the state level. This state revision resolves national constitutional controversies, preventing national inter-branch conflict and constitutional amendment. One cannot understand the development of national institutions or the Constitution without studying the states. This inverts the old and familiar picture of American constitutionalism, revealing how the states drive national constitutional development.

This dissertation develops this claim in two parts. The first part theorizes that the states guide and stabilize national constitutionalism. The first chapter recounts the common, separate explanations of national constitutional stability and state constitutional instability. The second chapter revises these by proposing that state constitutional instability secures national stability, and the third chapter explains how to observe state and federal constitutional reform.

The second part of the dissertation defends the contention that state constitutional revision stabilizes the federal Constitution. The fourth chapter shows that Revolutionary-era state constitutional framing settled national debates over slavery, frontier regulation, and legislative sovereignty and unicameralism, quieting these issues at the federal Convention. And in imitating the state constitutions, these federal delegates made the

[1109] Ralph Waldo Emerson, "Nature," in *The Selected Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 1836), 28.

proposed Constitution palatable to state legislatures and ratifying conventions, easing its passage.

The states stabilized the young Constitution. As the fifth chapter shows, Northern state framers abolished slavery and Southern ones protected it, maintaining a peaceful bisectional compromise and preventing congressional intervention or a national amendment on slavery. Similarly, while Jeffersonian congressmen proposed national amendments regulating elections, state framers enfranchised almost all adult white males and selected House members by single districts and presidential electors by popularly-selected general ticket, shaping the election and subsequent incentives of presidents and House members. Congress accepted this outcome and stopped proposing amendments on electoral regulation. And after the states passed comprehensive constitutional provisions regulating local banks, the antebellum Congress too abandoned proposals for a federal amendment to establish a national bank.

The sixth chapter recounts the collapse of the bisectional slavery compromise, the Civil War, and consequent federal and state constitutional reform. Reconstruction state constitutional conventions resolved national debates over abolition and black citizenship and enfranchisement, helping congressmen design and pass the later Reconstruction Amendments and ensuring swift ratification by the states. These many detailed state clauses elaborated, buttressed, and harmonized with the brief and ambiguous federal Reconstruction Amendments. State constitutionalism guided America through the Reconstruction and into the postwar order.

There are a few limitations to this dissertation and directions for future work. The study ends with Reconstruction, when Confederate states ceded the power to nullify and

interpret the federal Constitution. One might object that subsequent states lost the legal authority to mediate national constitutional development. While the states did lose some legal authority to nullify national constitutional provisions, they still maintain their more subtle political role in resolving national controversies. Continuing this study from the Reconstruction to the present can demonstrate this. Similarly, ending in 1877, this dissertation is limited in the constitutional issues it covers. An extension can explain how subsequent state constitutional framing resolved national questions over female suffrage, polygamy, prohibition, economic and labor rights, the New Deal, the equal rights amendment, and same sex marriage. Finally, while this dissertation disaggregates proposed federal amendments by topic area, it does not collect and catalogue the state amendments or provisions. A later study can fill this gap.

In conclusion, there are three lessons from this dissertation. The first is for political scientists and public law scholars. Most American constitutional reform happens at the state level. The states have proposed hundreds of constitutions and ratified thousands of amendments, while the federal government has ratified a single constitution with only twenty-seven amendments. Yet scholars focus on the federal document to the exclusion of the states, and so miss almost all of American constitutional reform. More importantly, state constitutionalism often quiets national constitutional debates. Accordingly, national constitutional conflict or stability that scholars trace to the national institutions or actors may instead be caused by the states. To understand how an individual branch relates to the Constitution, one must study the state constitutions. Relatedly, since branches strategically defer issues to the states to prevent or to force inter-branch conflict, one cannot understand interaction between the national branches

without studying the states. Finally, states help determine timing and scope of national partisan and constitutional realignments and keep some issues from reaching the national branches. To study only the national branches is to systematically miss major issues in American constitutionalism. In sum, since most accounts ignore the states, they cannot explain what they claim to explain. As a field, American constitutional development is fundamentally flawed. This dissertation offers a provisional, partial solution.

The second lesson is for political and constitutional theorists. Constitutions face a dilemma. Many constitutions claim popular authorization, but also impose supermajority requirements for amendment, blocking some democratically authorized reforms. Similarly, America's federal Constitution claims authorization by the American people, but only members of Congress, state legislators, and constitutional convention delegates can vote on proposed amendments, excluding almost all Americans from the reform process. Moreover, ratification deadlines and Article V's supermajority requirements block almost all proposed federal amendments, including many with broad, democratic support. The Constitution lacks popular legitimacy.

But the state constitutions respond to democratic reforms. Americans revise their state constitutions through initiatives, referenda, legislative amendments, legislative conventions, popular conventions, and extralegal popular tactics. Conventions, for example, have ranged from summits between august former presidents and federal framers to nighttime meetings of farmers and pioneers in frontier taverns. Further, all contemporary state constitutions and most previous ones set lower bars to reform than does the federal constitution. The state constitutions are more legitimate than their

inflexible federal counterpart, and so improve the democratic legitimacy of the American constitutional system.

The last lesson is for citizens. Visit the National Archives. The original Constitution stands in an altar in the Archives' rotunda, surrounded by a press of bodies – boy scouts, schoolchildren, and tourists, arms extended to touch the altar. For many visitors, this is humbling. It should not be. The American Constitution blocks the democratic will. But the state constitutions invite popular reform. Through the states, Americans can achieve their democratic aspirations. The challenge to citizens is to realize this through state constitutional reform.

Appendix A: Attempted State Constitutional Replacement

St	Year	P	O	R	V	Dr	S	St	Year	P	O	R	V	Dr	S	St	Year	P	O	R	V	Dr	S
AK	1956	1	1	1	1	60		LA	1898	1	8	1	0	3		NY	1846	1	3	1	1	48	
AL	1819	1	1	1	0	42		LA	1913	1	9	1	0	8		NY	1867	1	4	0	1		1
AL	1861	1	2	1	0	4		LA	1921	1	10	1	0	24		NY	1872	2	4	0	1		1
AL	1865	1	3	1	0	3		LA	1974	1	11	1	1	41		NY	1875	2	4	0	4		1
AL	1868	1	4	1	1	7		LA	1992	1	12	0	2		4	NY	1894	1	4	1	1	122	
AL	1875	1	5	1	1	26		MA	1778	1	1	0	2		1	NY	1915	1	5	0	2		1
AL	1901	1	6	1	1	114		MA	1780	1	1	1	1	236		NY	1921	1	5	0	2		1
AL	1969	2	7	0	4		1	MA	1820	1	2	0	1		1	NY	1938	1	5	0	1		1
AR	1836	1	1	1	0	25		MA	1853	1	2	0	2		1	NY	1957	2	5	0	4		3
AR	1861	1	2	1	0	3		MA	1917	1	2	0	4		1	NY	1958	2	5	0	4		3
AR	1864	1	3	1	1	4		MD	1776	1	1	1	0	74		NY	1959	2	5	0	4		3
AR	1868	1	4	1	1	6		MD	1792	3	2	0	4		3	NY	1967	1	5	0	4		5
AR	1874	1	5	1	1	142		MD	1850	1	2	1	1	14		OH	1802	1	1	1	0	49	
AR	1917	1	6	0	2		3	MD	1864	1	3	1	1	3		OH	1851	1	2	1	1	165	
AR	1967	2	6	0	3		1	MD	1867	1	4	1	1	149		OH	1873	1	3	0	2		1
AR	1969	1	6	0	2		3	MD	1965	2	5	0	4		5	OH	1912	1	3	0	1		1
AR	1979	1	6	0	2		3	MD	1967	1	5	0	2		1	OK	1907	1	1	1	1	109	
AZ	1860	1	1	0	4		2	ME	1819	1	1	1	1	197		OK	1968	2	2	0	4		5
AZ	1891	1	1	0	1		3	ME	1949	3	2	0	4		1	OR	1843	3	1	0	4		4
AZ	1911	1	1	1	1	105		ME	1961	2	2	0	4		1	OR	1845	3	1	0	4		4
CA	1849	1	1	1	1	30		ME	1965	3	2	0	4		1	OR	1857	1	1	1	1	159	
CA	1853	3	2	0	4		3	MI	1835	1	1	1	1	15		OR	1955	2	2	0	4		3
CA	1857	3	2	0	4		3	MI	1850	1	2	1	1	58		OR	1962	2	2	0	4		3
CA	1874	3	4	0	4		3	MI	1867	1	3	0	2		1	OR	1969	2	2	0	2		4
CA	1879	1	2	1	1	137		MI	1873	2	3	0	2		1	PA	1776	1	1	1	0	14	
CA	1893	3	3	0	4		3	MI	1908	1	3	1	1	55		PA	1790	1	2	1	0	48	
CA	1930	2	3	0	3		3	MI	1938	2	4	0	3		1	PA	1833	3	3	0	4		3
CA	1933	3	3	0	3		1	MI	1942	2	4	0	3		1	PA	1838	1	3	1	1	35	
CA	1947	3	3	0	4		3	MI	1963	1	4	1	1	53		PA	1873	1	4	1	1	95	
CA	1959	2	3	0	4		5	MN	1857	1	1	1	1	159		PA	1920	2	5	0	4		3
CA	1963	2	3	0	4		5	MN	1948	2	2	0	3		5	PA	1963	2	5	0	4		5
CA	1976	2	3	0	1		1	MN	1948	2	2	0	4		3	PA	1968	1	5	1	1	48	
CO	1859	1	1	0	2		1	MN	1971	2	2	0	4		1	RI	1663	3	1	1	1	179	
CO	1859	1	1	0	1		1	MO	1820	1	1	1	0	45		RI	1824	1	2	0	2		1
CO	1864	1	1	0	2		1	MO	1845	1	2	0	2		3	RI	1841	1	2	0	1		1
CO	1865	1	1	0	1		1	MO	1861	1	2	0	4		3	RI	1841	1	2	0	4		1
CO	1876	1	1	1	1	140		MO	1865	1	2	1	1	10		RI	1842	1	2	1	1	144	
CT	1662	3	1	1	0	156		MO	1875	1	3	1	1	70		RI	1882	3	3	0	3		1
CT	1818	1	2	1	1	147		MO	1922	1	4	0	2		3	RI	1898	2	3	0	2		1
CT	1902	1	3	0	2		1	MO	1945	1	4	1	1	71		RI	1915	2	3	0	3		1
CT	1965	1	3	1	1	51		MS	1817	1	1	1	0	15		RI	1962	2	3	0	4		1
DE	1776	1	1	1	0	16		MS	1832	1	2	1	0	37		RI	1964	1	3	0	2		1
DE	1792	1	2	1	0	39		MS	1851	1	3	0	4		4	RI	1986	1	3	1	1	30	
DE	1831	1	3	1	0	66		MS	1861	1	3	0	4		3	SC	1776	3	1	1	0	2	
DE	1852	1	4	0	2		1	MS	1865	1	3	0	4		3	SC	1778	3	2	1	0	12	

St	Year	P	O	R	V	Dr	S	St	Year	P	O	R	V	Dr	S	St	Year	P	O	R	V	Dr	S
DE	1897	1	4	1	0	119		MS	1868	1	3	0	2		1	SC	1790	1	3	1	0	71	
DE	1969	2	5	0	3		1	MS	1869	1	3	1	1	21		SC	1861	1	4	1	0	4	
FL	1839	1	1	1	1	22		MS	1890	1	4	1	0	126		SC	1865	1	5	1	0	3	
FL	1861	1	2	1	0	4		MS	1986	2	5	0	3		1	SC	1868	1	6	1	1	1	
FL	1865	1	3	1	0	3		MT	1866	1	1	0	0		1	SC	1895	1	7	1	0	120	
FL	1868	1	4	1	1	18		MT	1884	1	1	0	1		1	SC	1948	2	8	0	4		5
FL	1886	1	5	1	1	82		MT	1889	1	1	1	1	83		SC	1966	2	8	0	1		1
FL	1957	3	6	0	4		3	MT	1967	3	2	0	3		1	SC	1969	2	8	0	1		5
FL	1958	2	6	0	4		3	MT	1969	2	2	0	3		1	SD	1883	1	1	0	1		1
FL	1965	2	6	0	4		5	MT	1972	1	2	1	1	44		SD	1885	1	1	0	1		1
FL	1968	2	6	1	1	47		NC	1776	1	1	1	0	92		SD	1889	1	1	1	1	127	
GA	1777	1	1	1	0	12		NC	1823	1	2	0	4		4	SD	1969	2	2	0	3		1
GA	1788	1	2	0	4		4	NC	1833	3	2	0	4		4	TN	1796	1	1	1	0	39	
GA	1789	1	2	1	0	9		NC	1835	1	2	0	1		1	TN	1835	1	2	1	1	35	
GA	1789	1	2	0	1		1	NC	1861	1	2	0	4		4	TN	1870	1	3	1	1	146	
GA	1795	1	3	0	1		1	NC	1865	1	2	0	2		1	TN	1945	2	4	0	4		5
GA	1798	1	3	1	0	63		NC	1868	1	2	1	1	102		TN	1861	1	3	0	4		3
GA	1833	1	4	0	4		3	NC	1875	1	3	0	3		1	TX	1836	1	1	0	1		1
GA	1839	1	4	0	4		3	NC	1932	2	3	0	4		3	TX	1845	1	1	1	1	16	
GA	1861	1	4	1	1	4		NC	1959	2	3	0	4		3	TX	1861	1	2	1	1	5	
GA	1865	1	5	1	0	3		NC	1968	2	3	0	4		4	TX	1866	1	3	1	1	3	
GA	1868	1	6	1	1	0		NC	1970	3	3	1	1	46		TX	1869	1	4	1	1	7	
GA	1877	1	7	1	1	2		ND	1889	1	1	1	1	127		TX	1876	1	5	1	1	140	
GA	1945	2	8	1	1	2		ND	1971	1	2	0	2		4	TX	1959	2	6	0	3		1
GA	1964	2	9	0	3		1	NE	1864	1	1	0	3		1	TX	1968	2	6	0	1		1
GA	1969	2	9	0	3		1	NE	1866	3	1	1	1	9		TX	1973	3	6	0	3		5
GA	1976	2	9	1	1	6		NE	1871	1	2	0	2		1	TX	1974	1	6	0	2		1
GA	1982	3	10	1	1	33		NE	1875	1	2	1	1	141		UT	1849	1	1	0	4		1
HI	1950	1	1	1	1	66		NE	1919	1	3	0	1		1	UT	1856	1	1	0	4		1
HI	1968	1	2	0	1		1	NE	1995	2	4	0	3		1	UT	1862	1	1	0	4		1
HI	1978	1	2	0	1		1	NH	1776	1	1	1	0	8		UT	1872	1	1	0	4		1
IA	1844	1	1	0	2		1	NH	1778	1	2	0	1		1	UT	1882	1	1	0	4		1
IA	1846	1	1	1	1	11		NH	1784	1	2	1	1	232		UT	1887	1	1	0	3		1
IA	1857	1	2	1	1	159		NH	1791	1	3	0	1		1	UT	1895	1	1	1	1	121	
ID	1889	1	1	1	1	127		NH	1850	1	3	0	1		1	VA	1776	1	1	1	0	54	
ID	1918	3	2	0	2		1	NH	1876	1	3	0	1		1	VA	1816	1	2	0	1		1
ID	1965	2	2	0	4		5	NH	1889	1	3	0	1		1	VA	1830	1	2	1	1	21	
ID	1968	3	2	0	2		1	NH	1902	1	3	0	1		1	VA	1851	1	3	1	1	18	
IL	1818	1	1	1	0	30		NH	1912	1	3	0	1		1	VA	1861	1	4	0	2		1
IL	1848	1	2	1	1	22		NH	1918	1	3	0	1		1	VA	1864	1	4	0	1		1
IL	1862	1	3	0	2		1	NH	1930	1	3	0	1		1	VA	1869	1	4	1	1	33	
IL	1870	1	3	1	1	100		NH	1938	1	3	0	1		1	VA	1902	1	5	1	0	68	
IL	1920	1	4	0	2		1	NH	1948	1	3	0	1		1	VA	1970	2	6	1	1	45	
IL	1934	3	4	0	3		1	NH	1956	1	3	0	1		1	VT	1777	1	1	1	0	9	
IL	1967	2	4	0	4		5	NH	1964	1	3	0	1		1	VT	1786	1	2	1	0	7	
IL	1970	1	4	1	1	46		NH	1974	1	3	0	1		1	VT	1793	1	3	1	0	223	
IN	1816	1	1	1	0	35		NH	1984	1	3	0	1		1	VT	1814	1	4	0	4		3
IN	1851	1	2	1	1	165		NJ	1776	1	1	1	0	68		VT	1822	1	4	0	4		3
IN	1967	2	3	0	4		5	NJ	1844	1	2	1	1	103		VT	1828	1	4	0	4		3
KS	1855	1	1	0	4		1	NJ	1873	2	3	0	3		1	VT	1836	1	4	0	4		3
KS	1857	1	1	0	4		1	NJ	1882	2	3	0	3		1	VT	1843	1	4	0	4		3
KS	1858	1	1	0	4		1	NJ	1942	2	3	0	3		1	VT	1850	1	4	0	4		3

St	Year	P	O	R	V	Dr	S	St	Year	P	O	R	V	Dr	S	St	Year	P	O	R	V	Dr	S
KS	1859	1	1	1	1	157		NJ	1944	3	3	0	3		1	VT	1857	1	4	0	4		3
KS	1957	2	2	0	3		1	NJ	1947	1	3	1	1	69		VT	1870	1	4	0	4		3
KS	1961	2	2	0	1		1	NJ	1947	2	3	0	2		5	VT	1910	2	4	0	4		3
KS	1968	2	2	0	1		1	NM	1848	1	1	0	4		4	VT	1920	2	4	0	4		3
KY	1792	1	1	1	0	7		NM	1849	1	1	0	4		4	VT	1931	2	4	0	4		3
KY	1794	1	2	0	4		3	NM	1850	1	1	0	1		1	VT	1940	2	4	0	4		3
KY	1799	1	2	1	0	51		NM	1872	1	1	0	2		4	WA	1878	1	1	0	4		3
KY	1850	1	3	1	1	41		NM	1889	1	1	0	2		1	WA	1889	1	1	1	1	127	
KY	1861	1	4	0	4		3	NM	1907	1	1	0	4		4	WA	1935	2	2	0	4		3
KY	1891	1	4	1	1	125		NM	1911	1	1	1	1	105		WA	1968	2	2	0	3		4
KY	1950	2	5	0	4		5	NM	1963	2	2	0	4		5	WI	1846	1	1	0	2		1
KY	1960	2	5	0	4		5	NM	1969	1	2	0	1		1	WI	1848	1	1	1	1	168	
KY	1966	2	5	0	2		1	NM	1969	2	2	0	1		5	WI	1960	2	2	0	4		5
KY	1987	2	5	0	1		1	NV	1851	1	1	0	3		1	WI	1964	2	2	0	3		1
LA	1812	1	1	1	0	33		NV	1854	1	1	0	3		1	WV	1861	1	1	0	3		1
LA	1845	1	2	1	1	7		NV	1859	1	1	0	3		1	WV	1861	1	1	0	1		1
LA	1852	1	3	1	1	9		NV	1863	1	1	0	2		1	WV	1863	1	1	1	1	9	
LA	1861	1	4	1	0	3		NV	1864	1	1	1	1	152		WV	1872	1	2	1	1	144	
LA	1864	1	5	1	1	4		NY	1777	1	1	1	0	45		WV	1929	2	3	0	4		1
LA	1868	1	6	1	1	0		NY	1801	1	2	0	0		1	WV	1957	2	3	0	4		5
LA	1879	1	7	1	1	7		NY	1822	1	2	1	1	24		WY	1889	1	1	1	1	127	

Table 8: Proposals for State Constitutions, 1776-2017.

State	Year	Pro.	Order	Source	State	Year	Pro.	Order	Source	State	Year	Pro.	Order	Source
CT	1965	2	3	5	NH	1963	2	3	5	TN	1959	1	4	1
CT	1968	2	3	5	NJ	1966	1	4	4	TN	1965	1	4	1
FL	1955	2	6	5	NY	1837	2	3	1	TN	1971	1	4	1
IL	1965	2	4	5	NY	1890	2	4	3	TN	1977	1	4	1
IL	1969	1	4	5	OH	1969	2	3	5	UT	1969	2	2	5
KS	1963	2	2	3	OK	1969	2	2	5	VA	1927	2	6	1
MA	1967	2	2	1	PA	1959	2	5	3	VA	1945	1	6	1
MI	1960	2	4	5	PA	1967	2	5	5	VA	1956	1	6	4
MI	1961	2	4	5	RI	1944	1	3	1	VT	1950	2	4	3
MI	1961	2	4	5	RI	1951	1	3	1	VT	1959	2	2	5
MN	1962	2	2	5	RI	1955	1	3	1	VT	1968	2	2	5
MO	1961	2	5	5	RI	1958	1	3	1	WA	1965	2	2	5
NC	1913	2	3	3	RI	1973	1	3	1	WI	1973	2	2	1
NE	1969	2	4	1	TN	1953	1	4	1					

Table 9: Excluded State Constitutional Conventions and Committees, 1776-2017.

For Procedure (P/Pro.), 1 indicates proposal by convention, 2, by commission, and 3, by legislature.
For Order (O), 1 indicates the proposal was the state's first, 2, the second, etc.
For Ratification (R), 0 indicates the proposal was not fully ratified, and 1, that it was fully ratified.
For Vote (V), 0 indicates ratification without vote, 1, voters approve ratification, 2, voters reject ratification, 3, no ratification and no ratification vote, 4, source does not specify.
Duration (Dr) is the duration of a ratified constitution in years.
For Source (S), 1 indicates source was the *Reference Guides to the State Constitutions of the United States*, 2, a primary source, 3, Cynthia E. Browne, ed., *State Constitutional Conventions from Independence to the Completion of the Present Union, 1776-1959: A Bibliography* (Westport, CT: Greenwood Press, 1973)., 4, another source, and 5, from Albert L. Sturm, *Thirty Years of State Constitution-Making, 1938-1968: With an Epilogue: Developments During 1969* (National Municipal League, 1970).

Appendix B: Time Series Plots

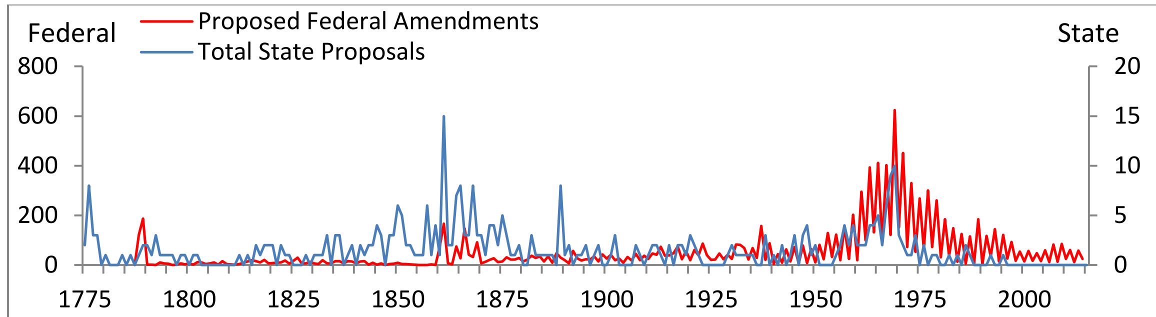


Figure 9: Rates of Proposals for Federal Amendments and State Constitutions, 1775-2017.

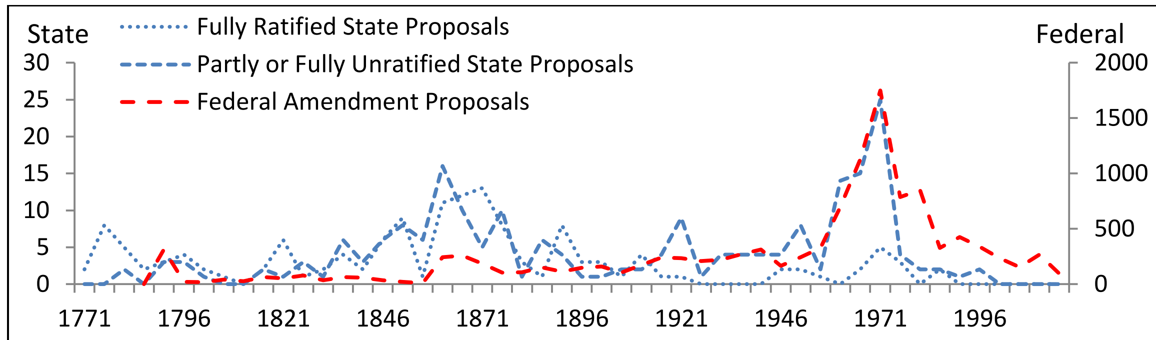


Figure 10: Proposed Federal Amendments, Unratified and Ratified State Constitutions, 1775-2017.

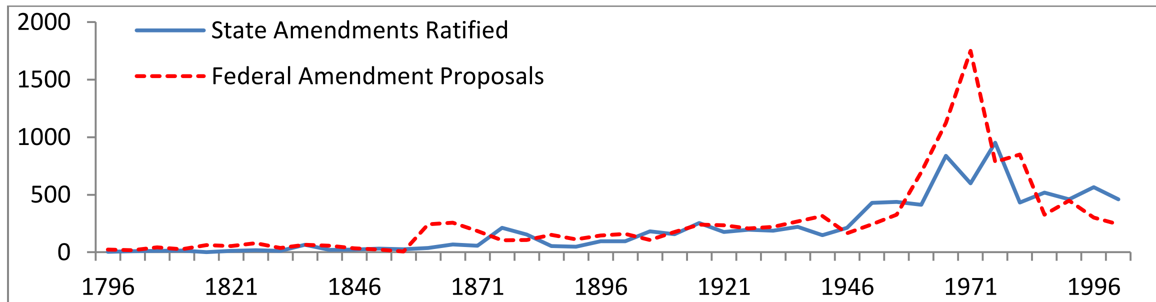


Figure 11: Proposed Federal Amendments and Ratified State Amendments, 1775-2017.

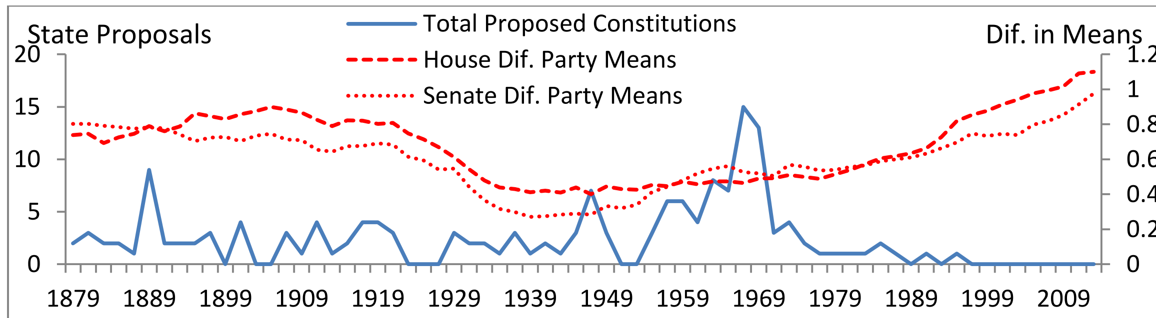


Figure 12: Congressional Polarization and State Constitutional Revision by Two-Year Bins, 1879-2013. Polarization data from Poole and Rosenthal.

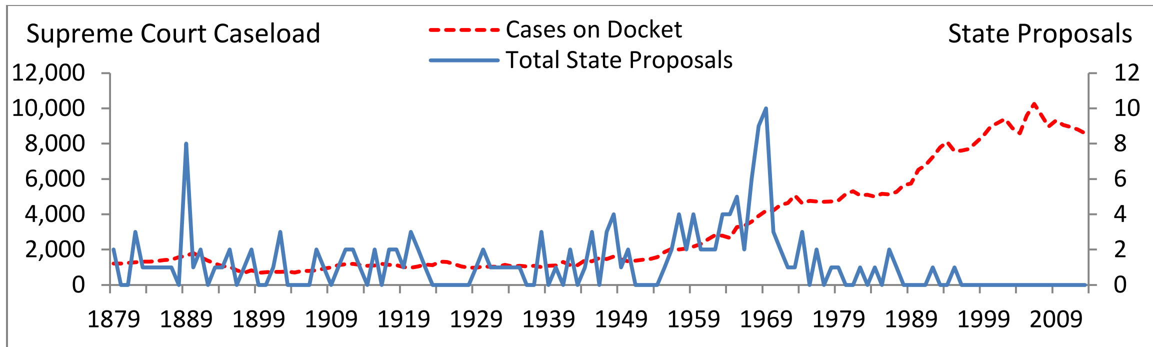


Figure 13: State Constitutional Replacement and U.S. Supreme Court Caseload, 1859-2013.
Data from Federal Judiciary Center. Caseload in number of cases.

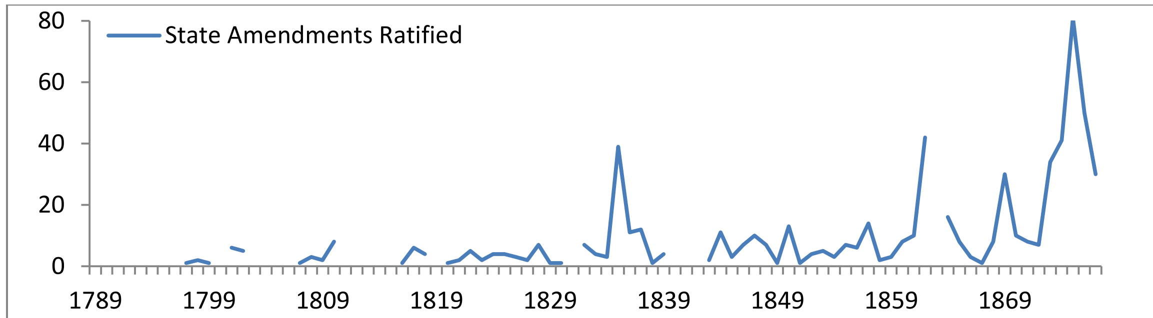


Figure 14: State Constitutional Amendments Ratified, 1789-1877.

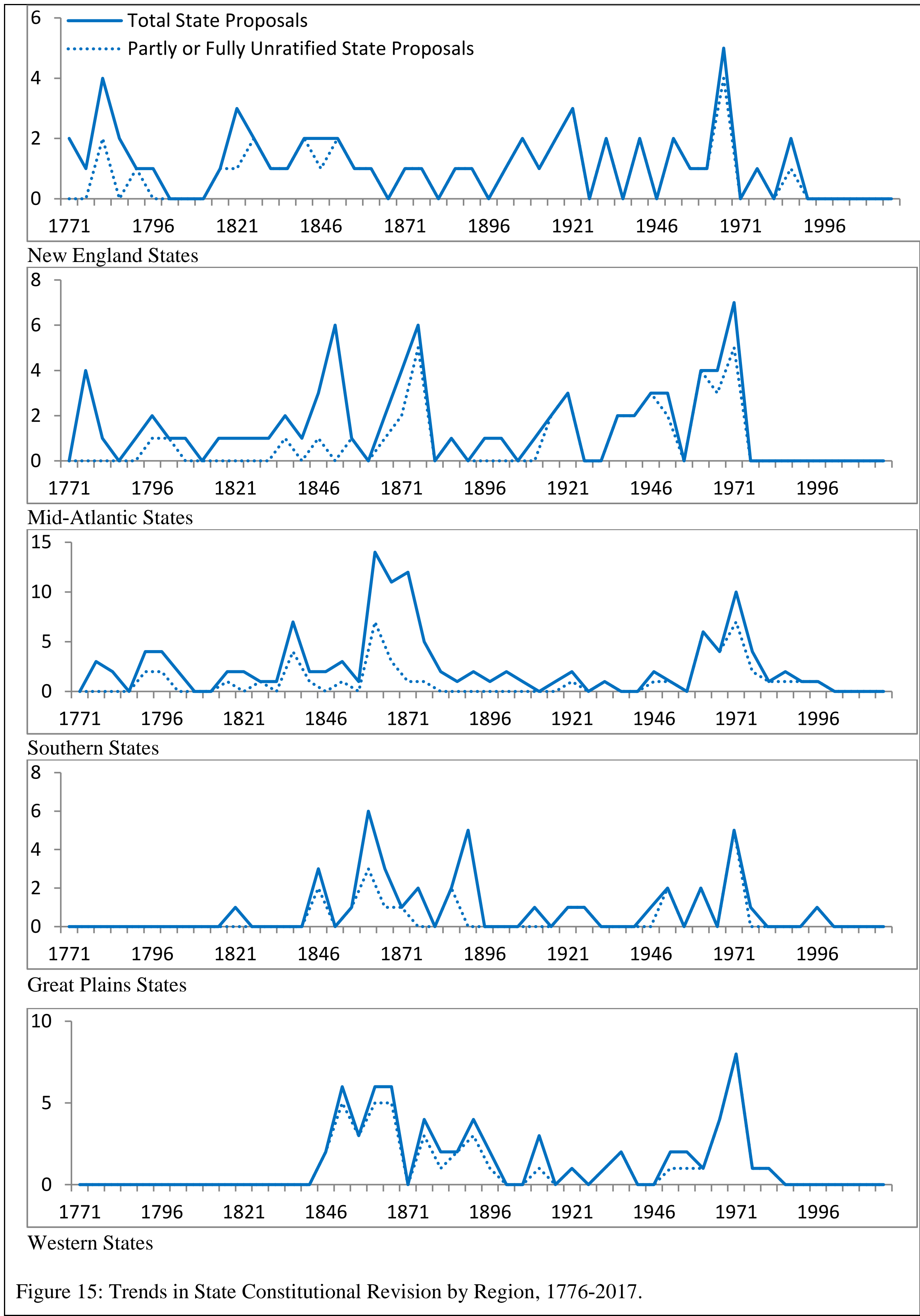
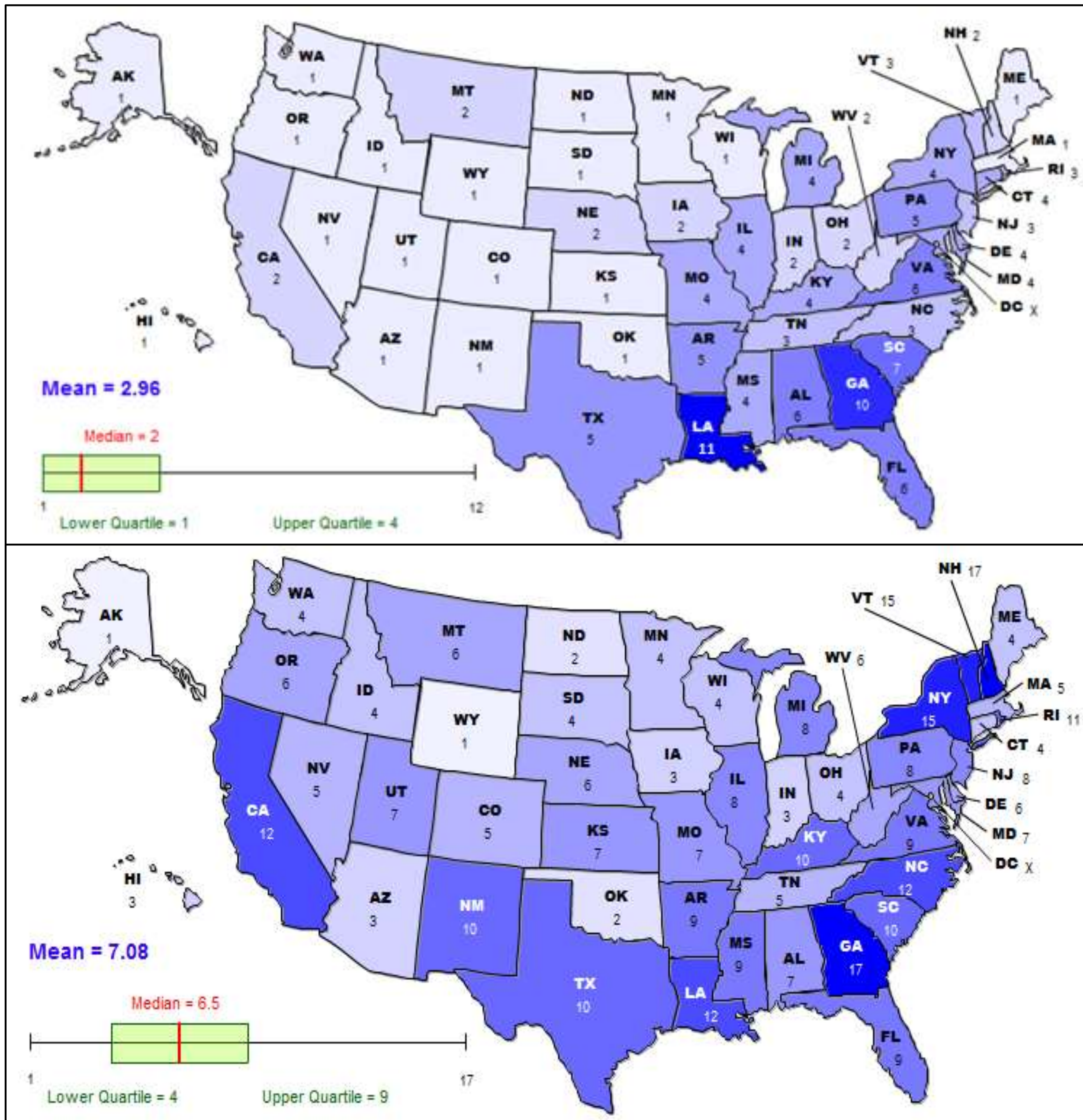


Figure 15: Trends in State Constitutional Revision by Region, 1776-2017.

Appendix C: Maps



The above map indicates the number of ratified state constitutions and the below map indicates the number of proposed constitutions per state. Darker shading indicates a greater number of ratified

Figure 16: Geographic Distribution State Constitutions, 1776-2017.

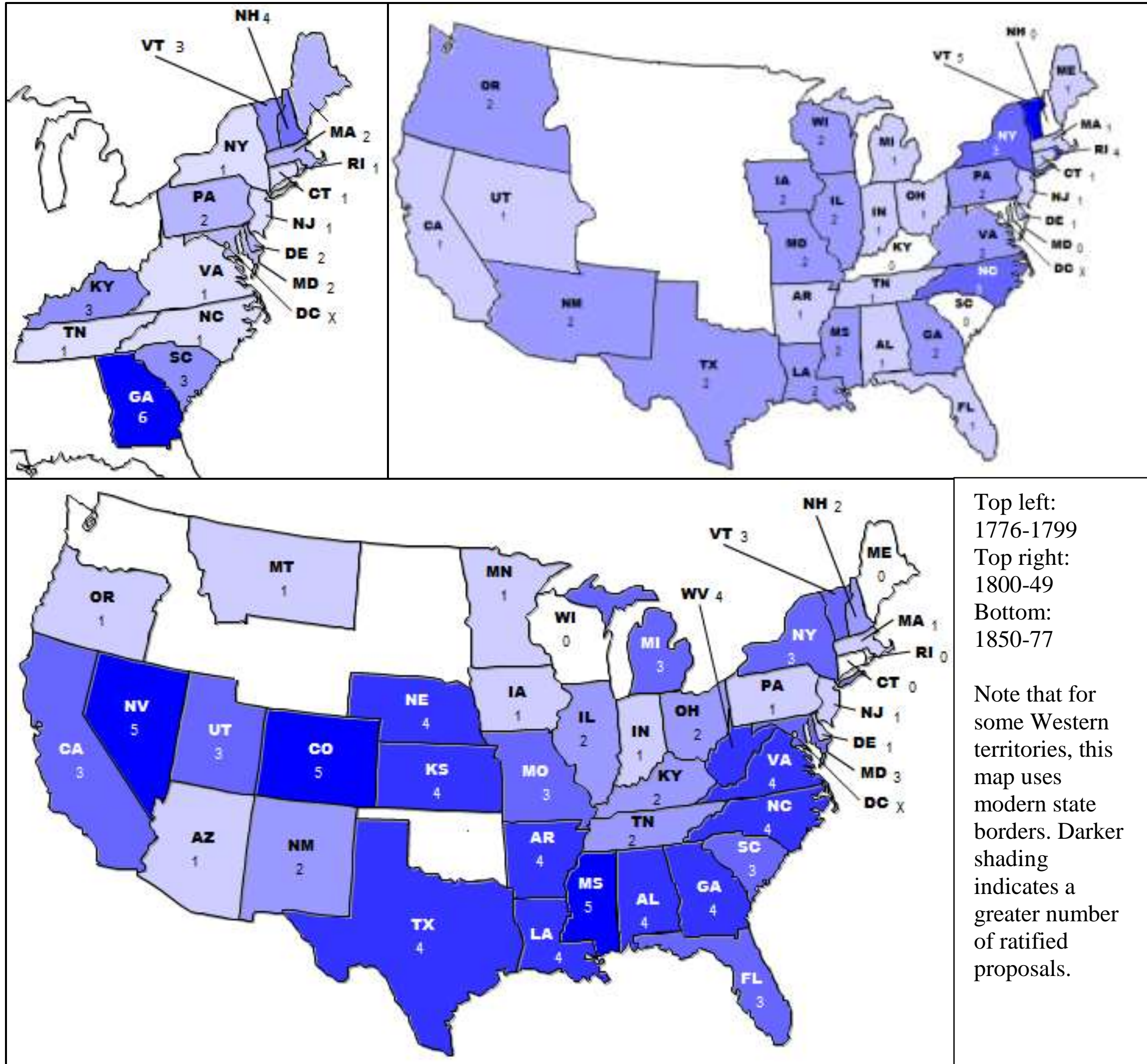


Figure 17: Geographic Distribution of Attempts to Draft New State Constitutions, 1776-1877.

Appendix D: Proposed Federal and State Constitutional Provisions by Topic

Topic	Search Term(s)	Count	Concurrent Power?
Judicial Design/Powers	"Jud", "Court"	689	No
Congressional Design/Powers	"Congress", "Senat", "Representatives"	2274	No
Executive Selection/Powers	"Elector", "President", "Executive"	1800	No
Federal Office Term Limits	"Term"	1060	No
Slavery	"Slave"	213	Yes
Treaties	"Treat"	221	No
War Powers	"War"	168	No
Suffrage	"Suffrage", "Franchise", "Right to Vote"	549	Yes
Equal Rights	"Equal Rights"	1137	Yes
Religious (Dis)establishment/Prayer	"Relig", "God", "Christ", "Prayer"	838	Yes
Item Veto	"Item"	304	No
Prohibition	"Alcohol", "Liquor", "Eighteenth Amendment"	210	Yes
Marriage	"Marriage", "Polygamy"	151	Yes
Taxes	"Tax"	584	Yes
Child Labor	"Child Labor", "Employment"	73	Yes
Legislative Apportionment	"Apportionment"	385	Yes
Regulation of D.C.	"Columbia"	232	No
School Busing	"Busing", "Assignment", " Freedom of Choice", "School"	235	Yes
Abortion	"Abortion", "Life"	336	Yes
Flag Desecration	"Flag"	106	Yes
Balanced Budget	"Budget"	644	No
Campaign Finance	"Expenditure", "Contribution"	99	Yes

Table 10: Proposed Federal Amendments by Topic Area, 1788-2014.
Note: "Count" indicates count of proposals matching search term(s). These are approximate counts. An individual amendment can match for multiple search terms and thus topics, such that these categories are not exclusive of each other. Because of the coding method used, these are minimum counts.

Issue	Years	Search Terms	Count
	1800-49		
Congress	1800-40s	"Congress", "Senat", "Representatives"	142
Representatives Chosen by District	1800-20s	"District"	34
Apportionment	1800s, 1840s	"Apportion"	7
Exclusion from Executive Office	1810-30s	"Exclude"	23
Term Limits	1810s	Term	9
Recall of Congressmen	1800s	"Recall"	4
Compensation	1810s	"Compen"	7
Executive	1800-40s	"Elector", "President", "Executive"	83
Choice of President/Executive	1810-30s	"Choice"	65
Selecting Electors	1810-30s	"Elector"	48
Direct Election	1820s	"Direct"	6
Term Limits	1820-40s	"Term"	5
Veto	1830s	"Veto"	12
Election not to Devolve on Congress	1820s	"Congress"	5
Judiciary	1800-40s	"Jud", "Court"	25
Removal	1810s	"Removal"	11
Term Limits	1830-40s	"Term"	8
Finance	1800-40s		57
Banks	1810-30s	"Bank"	21
Internal Improvements	1810-20s	"Improvements"	22
Tax	1810s, 1840s	"Tax"	9
Embargo	1810s	"Embargo"	5
Slavery	1800-40s	"Slave", "Color"	19
	1850-77		
Congress		"Congress", "Senat", "Representatives"	131
Apportionment	1864-9	"Apportion"	113
Election of Senators by the People	1850-2, 72-4	"People"	22
Executive		"Elector", "President", "Executive"	71
Choice of President/Executive	1864-77	"Choice"	22
Term Limits	1864-7, 71-7	"Term"	16
Veto	1872-7	"Veto"	10
Judiciary		"Jud", "Court"	22
Term Limits	1851-2, 67-9	"Term Limits"	9
Slavery		"Slave"	199
Slavery Prohibited	1860-7	"Prohibit"	59
Fugitive Slaves	1860-4	"Fugitive"	44
Territorial Slavery	1860-4	"Territor"	36
Property in Slaves Protected	1860-1	"Property"	7
Slave Trade	1860-1, 64	"Trade"	31
Slavery in District of Columbia	1860-1, 64	"District"	17
Compensated Emancipation	1861, 64-6	"Compen"	19
Free-Slave State Division Line	1861	"Division"	4
Travel with Slaves	1860-1, 64	"Travel"	6
Admission of Territories	1860-1, 64	"Admission"	19
Citizenship	1867	"Citizen"	21
Civil Rights	1865-9	"Civil"	37
Suffrage	1866-70	"Suffrage", "Franchise", "Right to Vote"	89
Payment of Rebel Debt	1865-73	"Debt"	28
Taxes	1861-76	"Tax"	21
Religious (Dis)establishment	1876	"Relig", "God", "Christ", "Prayer"	7

Note that "Count" indicates the number of proposed amendments matching the search term(s). Proposed amendments matching general topics are then sorted by matching subtopic search terms. An individual amendment can match for multiple search terms and thus topics, such that these categories are not exclusive of each other. Because of the coding method used, these are minimum counts.

Table 11: Proposed Federal Amendments by Topic Area, 1800-77.

Year	Sponsor	State	Amendment Topic	Year	Sponsor	State	Amendment Topic
1788			Limit US credit	1819	Lowrie	PA	Establishing a national bank
1788			No congressional law on state currency	1820	Noble	IN	Establishing a national bank
1788			Limit US credit	1820	Baldwin	PA	Establishing a national bank
1793			Bankers ineligible for Congress	1820	Trimble	OH	Establishing a national bank
1793			Bankers ineligible for Congress	1821	Dickerson	NJ	Establishing a national bank
1793			Bankers ineligible for Congress	1822	Walworth	NY	Bankruptcy, effect of State acts
1806	Jefferson		Internal improvements	1822	Monroe		Internal improvements
1813	Jackson	VA	Establishing a national bank	1822	Talbot	KY	Internal improvements
1813			Establishing a national bank	1823	Reid	GA	Internal improvements
1813			Internal improvements, roads	1823	Smith	MD	Internal improvements
1813			Internal improvements, roads	1824	Van Buren	NY	Internal improvements
1813			Internal improvements, canals	1825	Bailey	MA	Internal improvements
1814	Jackson	VA	Establishing a national bank	1825	Van Buren	NY	Internal improvements
1814			Internal improvements, roads	1832			Chartering of bank
1814	Jackson	VA	Internal improvements, canals	1832			Internal improvements
1814	Jackson	VA	Establishing a national bank	1832			Internal improvements
1815	Madison		Internal improvements	1832			Internal improvements
1816	Madison		Internal improvements	1836			Issuing of bank notes
1817			Internal improvements	1837			State bank paper
1817	Barbour	VA	Internal improvements	1838	Garland	LA	State bank notes
1819			Establishing a national bank	1840	Buchanan	PA	State bank notes prohibited

Table 12: Proposed Federal Amendments to Regulate Banking and Internal Improvements, 1788-1860.

Year	Sponsor	State	Amendment Topic
1788			Abolition of the slave trade
1803			Importation of slaves prohibited
1804			Importation of slaves prohibited
1805	Varnum	MA	Importation of slaves prohibited
1805			Importation of slaves prohibited
1806	Oliver	VT	Importation of slaves prohibited
1806	Tennoy	NH	Importation of slaves prohibited
1806	Wright	MD	Importation of slaves prohibited
1808	Maclay	PA	Importation of slaves punishable
1818	Livermore	NH	Slavery prohibited
1839			Hereditary slavery abolished after 1842
1839			No slave state to be admitted
1839	Adams	MA	Slavery abolished after 1845 in D.C.
1850	Daniel	NC	To prevent the abolition of slavery
1858			Recognition of the right of property in slaves
1858			Territorial slavery protected

Table 13: Proposed Federal Amendments to Regulate Slavery, 1788-1859.

Document	NH	SC	VA1	VA2	NJ	US1	S2
Preamble							
Law of nature and nature's God						X	X
Natural equality				1		X	X
Rights to life, liberty, happiness, and/or property	X	X		1		X	X
Government by consent				2	X	X	X
Right to alter and abolish government				3	X	X	X
Right to institute new government	X			3	X	X	X
Abolition after long train of abuses					X	X	X
Grievances against the Crown							
Refused assent to laws						X	X
Forbade governors to pass laws	X		X	X		X	X
Refused legislative representation			X	6, X		X	X
Called colonial legislatures at inconvenient times and places							X
Dissolved colonial legislatures	X	X	X	X		X	X
Refused elections; legislative power for the people; colonies vulnerable			X	X	X	X	X
Refused colonies' authority over naturalization and land			X	X		X	X
Refused laws establishing judiciary powers						X	X
Controlled judges' salaries and tenure	X					X	X
Established new officers						X	X
Established standing armies without colonial legislative consent	X	X	X	13, X		X	X
Rendered military power superior to civil power		X	X	13, X		X	X
Subjected colonists to foreign law			X	X		X	X
Quartered troops among colonists			X	X		X	X
Protected troops and officers from colonial trial						X	X
Cut colonial trade with foreign nations or each other	X	X	X	6, X		X	X
Imposed taxes without consent		X	X	X		X	X
Refused colonists trial by jury			X	8, 11, X		X	X
Required trial in Britain for colonists		X	X	8, X		X	X
Passed Quebec Act of 1774		X					X
Abolished or altered colonial charters		X				X	X
Suspended colonial legislatures			X	X		X	X
Abdicated government by declaring war against colonists				X		X	X
Made war against colonists' seas, coasts, and towns	X	X	X	X	X	X	X
Hired foreign mercenaries against colonists			X	X		X	X
Imprisoned or impressed colonists into military service		X					X
Incited domestic insurrection and Indian revolt		X	X	X		X	X
Incited domestic insurrection by promising reward			X	X		X	
Prohibited abolition of slavery and encouraged slave revolt		X	X	X		X	
Conclusion							
Petitions to the Crown unanswered		X	X	X		X	X
Petitions to the British people unanswered		X				X	X
Necessity of rebellion		X				X	X
Colonies declared independent			X	X		X	X
Colonists never accepted Parliamentary supremacy						X	
Renunciation of ties to the British			X	X	X	X	
Not Included in US Declaration							
Suspension of laws requires popular consent				7			
Frequent recurrence to fundamental principles				15			
Appeal to English constitutional rights	X				X		
Appeal to reconciliation with Britain	X	X			X		
Objection to George III's asserting Parliamentary supremacy					X		
Objection to the Boston Port Act of 1774		X					
Objection to governors' withdrawing civil officers		X					
Objection to royal judges refusing to hear suits		X					
Total Provisions	10	20	22	30	10	39	38
Number of Provisions Reiterated in US Declaration	8	15	19	27	6	35	38

Note:
The interpretation of some provisions is ambiguous, so this categorization necessarily partly reflects the author's own interpretation of the provisions' meanings. The table is not a comprehensive list of rights listed under these state constitutions, but only those rights that the constitutions explicitly claim were violated under British rule. Provisions are listed by the order they appear in the Declaration, with the section number when applicable.

Note on Abbreviations:
NH – 1776 New Hampshire Constitution (drafted Dec. 21 1775 – Jan. 5, 1776)
SC – 1776 South Carolina Constitution (drafted Feb. – May 26, 1776)
VA1 and VA2 – first two drafts of the 1776 Virginia Constitution (drafted May 6 – June 29, 1776)
NJ – 1776 New Jersey Constitution (drafted May 26 – July 2, 1776)
USD1 and USD2 – first two drafts of the United States Declaration of Independence (June 11 – July 2, 1776)

Table 14: State and National Declarations of Independence

Year	St.	Rat	Bank Reserves	Limits on Incorporation	Currency Regulation	Limits on State Debt	Liability & Loss	Debtors' Rights	Bankers in Office	Oversight for Banks
1819	AL	Yes	Bank Art., Sec. 1	Bank Art., Sec. 1	Bank Art., Sec. 1		Bank Art., Sec. 1			
1836	AR	Yes		Bank Art., Sec. 1			Bank Art., Sec. 1	Art. VII, Sec. 1		
1860	AZ	No								
1849	CA	Yes		Art. IV, Sec. 34	Art. IV, Sec. 34, 35	Art. VIII, Art. XI, Sec. 10	Art. IV, Sec. 36	Art. I, Sec. 15		
1818	CT	Yes								
1776	DE	Yes								
1792	DE	Yes						Art. VI, Sec. 10		
1831	DE	Yes		Art. II, Sec. 17				Art VI., Sec. 17		
1776	DE	Yes								
1817	FL	No								
1812	FL	No								
1810	FL	No						Art. VII. Sec. 14		
1839	FL	Yes	Art. XIII, Sec. 6	Art. XIII, Sec. 1-5, 12-3	Art. XIII, Sec. 8		Art. XIII, Sec. 7, 10		Art. V, Sec. 3	Art. XII, Sec. 11, 14
1776	GA	No								
1777	GA	Yes								
1789	GA	Yes						Art. IV, Sec. 7		
1798	GA	Yes						Art. IV, Sec. 7		
1844	IA	No		Art. IX, Sec. 1-6		Art. VII, Sec.1, Art. IX, Sec. 7	Art. IX, Sec. 1, 7	Art. II, Sec. 18	Art. IV, Sec. 23	Art. IX, Sec. 1
1846	IA	Yes		Art. IX, Sec. 2	Art. IX, Sec. 1	Art. VIII, sec. 1, Art. IX, Sec. 2	Art. IX, Sec. 2	Art. II, Sec. 19	Art. IV, Sec. 23	
1857	IA	Yes	Art. VII, Sec. 8	Art. VIII, Sec. 1, 5	Art. VIII, Sec. 7-8, 11	Art. VI, Art. VIII, Sec. 3-4	Art. VIII, Sec. 3, 9			Art. XVII, Sec. 12
1818	IL	Yes		Art. VII, Sec. 21				Art. VIII, Sec. 15		
1848	IL	Yes		Art. III, Sec. 35, Art. X, Sec. 1, 5	Art. X, Sec. 4	Art. III, Sec. 37, Art. X, Sec. 3	Art. X, Sec.2-4			
1816	IN	Yes	Art. X, Sec. 1	Art. X, Sec. 1				Art. I, Sec. 17		
1851	IN	Yes	Art. XI, Sec. 7	Art. XI, Sec. 1-4, 13	Art. XI, Sec. 3, 5	Art. X, Sec. 5-6, Art. XI, Sec. 12	Art. XI, Sec. 5-6	Art. I, Sec. 22		Art. XI, Sec. 11
1858	KS	No		Art. XIV, Sec. 1, Art. XVII, Sec. 1	Art. XVII, Sec. 2-5, 7	Art. X, Art. XI, Sec. 5, Art. XIV, Sec. 5-6	Art XIV, Sec. 2, Art. XVII, Sec. 5	Art. I Sec. 15		Art. XVII, Sec. 9
1857	KS	No		Art. XII, Sec. 1, 4	Art. XII, Sec. 4	Art. IX, Sec. 3-4, Art. XII, Sec. 3, 7	Art. XII, Sec. 6			Art. XII, Sec. 5
1855	KS	No	Art. XVII, Sec. 2, 4	Art. XIII, Art. XVII, Sec. 1	Art. XVII, Sec. 4-5	Art. IX, Art. XVII, Sec. 8	Art. XVII, Sec. 3	Art. I Sec. 15		Art. XVII, Sec. 7, 9
1859	KS	Yes	Art. XIII, Sec. 2-4	Art. XIII, Sec. 1	Art. XIII, Sec. 2, 4, 6-7	Art. X, Finance, Sec. 7, Art. XIII, Sec. 5				Art. XIII, Sec. 8-9
1792	KY	Yes						Art. XI, Sec. 17		
1799	KY	Yes						Art. X, Sec. 17		

Year	St.	Rat	Bank Reserves	Limits on Incorporation	Currency Regulation	Limits on State Debt	Liability & Loss	Debtors' Rights	Bankers in Office	Oversight for Banks
1850	KY	Yes								
1812	LA	Yes								
1845	LA	Yes		Art. 122-5		Art. 113-4, 121				
1852	LA	Yes	Art. 119	Art. 109	Art. 118-9	Art. 108-11	Art. 120-1			
1778	MA	No		Art. XII, Sec. 2						
1780	MA	Yes								
1792	MD	No								
1776	MD	Yes								
1851	MD	Yes		Art. III, Sec. 45, 47		Art. III, Sec. 22	Art. III, Sec. 45	Art. III, Sec. 39, 44		Art. III, Sec. 45
1776	MD	Yes								
1780	ME	No						Art. XIV		
1819	ME	Yes								
1835	MI	Yes								
1850	MI	Yes	Art. XV, Sec. 4	Art. XV, Sec. 1, 8	Art. XV, Sec. 4	Art. XIV	Art. XV, Sec. 3, 7	Art. VI, Sec. 33	Art. III, Legislative, Sec. 30	Art. XV, Sec. 10
1857	MN	Yes	Art. IX, Sec. 13	Art. X, Sec. 2	Art. IX, Sec. 13	Art. IX, Sec. 5-7, 10	Art. IX, Sec. 8, 13, Art. X, Sec. 1, 3	Art. I, Sec. 12		Art. IX, Sec. 11
1846	MO	No		Art. VIII, Sec. 1	Art. VIII, Sec. 1, 3	Art. III, Sec. 31, Art. VIII, Sec. 2	Art. VIII, Sec. 2	Art. XI, Sec. 17		Art. VIII, Sec. 2, 4
1820	MO	Yes	Art. VIII	Art. VIII				Art. XIII, Sec. 17		
1817	MS	Yes		Art. VI, Gen., Sec. 9				Art. I, Sec. 18		
1831	MS	Yes				Art. VII, Sec. 9		Art. I, Sec. 18		
1823	NC	No						Sec. 34		
1835	NC	No								
1776	NC	No								
1776	NC	Yes						Sec. 39		
1779	NH	No								
1781	NH	No						Part II, House		
1782	NH	No						Part II, House		
1851	NH	No		Part II, Art. 41		Part II, Art. 11-2		Part II, Art. 25		Part II, Art. 41, 80
1832	NH	No								
1776	NH	Yes								
1784	NH	Yes						Part II, House		
1792	NH	Yes						Part II, House		
1776	NJ	Yes								
1844	NJ	Yes		Art. IV, Sec. 7, Cl. 8		Art. IV, Sec. 6, Cl. 3-4		Art. I, Sec. 17		Art. IV, Sec. 6, Cl. 3-4, Sec. 7, Cl. 8
1846	NM	No								
1849	NM	No								
1850	NM	No		Art. IX, Sec. 8-		Art. IX, Sec. 11,				Art. IX, Sec. 10

Year	St.	Rat	Bank Reserves	Limits on Incorporation	Currency Regulation	Limits on State Debt	Liability & Loss	Debtors' Rights	Bankers in Office	Oversight for Banks
				10		22				
1777	NY	Yes								
1821	NY	Yes		Art. VII, Sec. 9						
1846	NY	Yes		Art. VII, Sec. 1, 4, 9	Art. VII, Sec. 4-7	Art. VII	Art. VII, Art. VII, Sec. 2, 8			
1802	OH	Yes						Art. VIII, Sec. 15		
1851	OH	Yes		Art. XIII, Sec. 1-2		Art. VIII, Art. XII, Sec. 3, 6	Art. XIII, Sec. 3	Art. I, Sec. 15		Art. XIII, Sec. 2, 7
1843	OR	No								
1845	OR	No								
1857	OR	Yes		Art. XI, Sec. 1-2	Art. XI, Sec. 1	Art. IX, Sec. 2, Art. XI, Sec. 6-10	Art. XI, Sec. 3, 5	Art. I, Sec. 19		
1776	PA	Yes						Ch. II, Sec. 28		
1790	PA	Yes						Art. IX, Sec. 16		
1838	PA	Yes		Art. I, Sec. 25				Art. VIII, Sec. 16		Art. I, Sec. 25
1824	RI	No								
1841	RI	No								
1842	RI	No				Art. IV, Sec. 13		Art. I, Sec. 7		Art. IV, Sec. 10
1841	RI	No		Art. IX, Sec. 9		Art. IX, Sec. 7				Art. IX, Sec. 9, 11
1790	RI	No								
1842	RI	Yes		Art. IV, Sec. 17		Art. IV, Sec. 13		Art. I, Sec. 16		
1776	SC	Yes								
1778	SC	Yes						Art. 41		
1790	SC	Yes								
1785	TN	No						Sec. 30		
1784	TN	No						Dec. of Rights, Sec. 39		
1796	TN	Yes								Art. XI, Sec. 18
1834	TN	Yes								Art. I, Sec. 18
1833	TX	No		Art. 30						Art. 15
1827	TX	No								
1835	TX	No				Art. 3				
1836	TX	No								Art. VI, Dec. of Rights, Sec. 12
1840	TX	No								
1845	TX	Yes		Art. VII, Sec. 30-2	Art. VII, Sec. 32	Art. VII, Sec. 31, 3				Art. I, Sec. 14, Art. VII, Sec. 22
1849	UT	No								
1856	UT	No								
1776	VA	No								
1776	VA	Yes								
1830	VA	Yes								
1850	VA	Yes				Art. IV, Sec. 26-	Art. IV, Sec.		Art. IV, Sec. 7	Art. IV, Sec.

Year	St.	Rat	Bank Reserves	Limits on Incorporation	Currency Regulation	Limits on State Debt	Liability & Loss	Debtors' Rights	Bankers in Office	Oversight for Banks
						31	28			26-7
1777	VT	Yes								Ch. 2, Sec. 25
1786	VT	Yes								Ch. 2, Sec. 30
1793	VT	Yes								Ch. 2, Sec. 33
1846	WI	No		Art. X, Sec. 1-2, 5, Art. XI, Sec. 1	Art. X, Sec. 3, 6	Art. XI, Sec. 2, Art. XII	Art. XII	Art. XVI, Sec. 16		Art. X, Sec. 7
1848	WI	Yes	Art. I, Sec. 1, 4			Art. VIII, Sec. 3-4, 6-10, Art. XI, Sec. 3		Art. I, Sec. 16-7		Art. I, Sec. 5
Total Regulations			12	38	19	31	22	45	5	30
Pct. of Documents with Regulation			11.2	35.5	17.8	29.0	20.6	42.1	4.7	28.0

Table 15: State Constitutional Banking, Corporate, and Debt Regulations, 1776-1860.
This table lists regulations to state constitutions prior to any amendment, and does not include regulations made by amendment. Similar clauses in the same document are classed as a single regulation. For "Ratified," "Yes" indicates the document was ratified as a new state constitution, and "No," that it was not. Note on abbreviations: DE 1776 is the 1776 Delaware Declaration of Rights, FL 1810 and 1812 are respectively the 1810 Constitution of East Florida and 1812 Constitution of West Florida, GA 1776 is a colonial statute, MD 1776 is the 1776 Maryland Declaration of Rights, ME 1780 is the 1780 constitution of the failed state of New Ireland in modern Maine, NC 1776 is the 1776 North Carolina Declaration of Rights, NH 1832 is the 1832 constitution of the failed state of the Indian Stream Republic in modern New Hampshire, RI 1790 is the 1790 Rhode Island Declaration of Rights, TX 1827 and TX 1840 respectively refer to the constitutions of the failed states of Coahuila & Texas and Rio Grande in modern Texas, TN 1784 and TN 1785 respectively refer to the constitutions of the failed states of Franklin and Frankland in modern Tennessee, and VA 1776 is the 1776 Virginia Declaration of Rights.

Year	St.	Rat.	No Forced Emancipation	Slaves' Jury Rights	Outlawing Harming Slaves	Taxing and Representing Slaves	Slave Immigration	Abolishing Slavery
1819	AL	Yes	Slavery Article, Sec.1	Slavery Article, Sec.2	Slavery Art., Sec. 3			
1836	AR	Yes	Eman. Art., Sec. 1	Art. IV, Sec. 25	Art. IV, Sec. 25		Art. IV, Sec. 23, Art. VII, Eman., Sec. 1	
1860	AZ	No				Cen. Art. Sec. 1		
1849	CA	Yes						Art. I, Sec. 18
1776	DE	Yes					Art. 26	Art. 26
1839	FL	Yes	Art. XVI, Sec. 1			Art. IX, Sec. 1	Art. XVI, Sec. 2-4	
1810	FL	No	Art. V, Sec. 1	Art. V, Sec. 2	Art. V, Sec. 1		Art. V, Sec. 1	
1789	GA	Yes	Art. IV, Sec. 11		Art. IV, Sec. 12		Art. IV, Sec. 11	
1798	GA	Yes			Art. IV, Sec. 12		Art. IV, Sec. 11	
1844	IA	No						Art. II, Sec. 22
1846	IA	Yes						Art. II, Sec. 23
1857	IA	Yes						Art. I, Sec. 23
1818	IL	Yes					Art. VI, Sec. 2	Art. VI, Sec. 1, 3
1848	IL	Yes					Art. XIV	Art. XIII, Sec. 16
1816	IN	Yes						Art. VIII, Art. XI, Sec. 7
1851	IN	Yes					Art. XIII, Sec. 1	Art. I, Sec. 37
1858	KS	No						Art. I, Sec. 6
1857	KS	No	Art. VII, Sec. 2, Art. XV, Sched., Sec. 14	Art. VII, Sec. 3	Art. VII, Sec. 4		Art. VII, Sec. 2	
1855	KS	No					Art. I, Sec. 21	Art. I, Sec. 6
1859	KS	Yes						Art. I, Sec. 6
1792	KY	Yes	Art. VII, Sec. 1		Art. VII, Sec. 1		Art. VII, Sec. 1	
1799	KY	Yes	Art. VII, Sec. 1	Art. VII, Sec. 2	Art. VII, Sec. 1		Art. VII, Sec. 1	
1850	KY	Yes	Art. X, Sec. 1	Art. X, Sec. 3	Art. X, Sec. 1		Art. X, Sec. 1	
1851	MD	Yes	Art. III, Sec. 42					
1780	ME	No						Dec. of Rights, Art. I
1835	MI	Yes						Art. XI, Sec. 1
1850	MI	Yes						Art. XVIII, Sec. 11
1857	MN	Yes						Art. I, Sec. 2
1820	MO	Yes	Art. III, Sec. 26	Art. III, Sec. 27	Art. III, Sec. 26, 28		Art. III, Sec. 26	
1846	MO	No	Art. III, Sec. 26	Art. III, Sec. 29	Art. III, Sec. 28, 30		Art. III, Sec. 26-8	
1817	MS	Yes	Art. VI, Slaves, Sec. 1	Art. V, Sec. 7, Art. VI, Slaves, Sec. 2	Art. VI, Slaves, Sec. 1		Art. VI, Slaves, Sec. 1	
1831	MS	Yes	Art. IX, Sec. 1	Art. IX, Sec. 3	Art. IX, Sec. 1		Art. IX, Sec. 1-2	
1850	NM	No						Art. I, Sec. 1
1802	OH	Yes						Art. VII, Sec. 5, Art. VIII, Sec. 2
1857	OR	Yes						Art. I, Sec. 4
1845	OR	No						Art. I, Sec. 4
1842	RI	Yes						Art. I., Sec. 4
1842	RI	No						Art. I, Sec. 19
1796	TN	Yes				Art. I, Sec. 26		
1834	TN	Yes	Art. II, Sec. 31			Art. II, Sec. 28		

Year	St.	Rat.	No Forced Emancipation	Slaves' Jury Rights	Outlawing Harming Slaves	Taxing and Representing Slaves	Slave Immigration	Abolishing Slavery
1845	TX	Yes	Art. VIII, Sec. 1	Art. VIII, Sec. 2	Art. VIII, Sec. 1, 3		Art. VIII, Sec. 1	
1836	TX	No	Art. VI, General, Sec. 9				Art. VI, General, Sec. 9	
1850	VA	Yes	Art. IV, Sec. 21			Art. IV, Sec. 2-3, 36	Art. IV, Sec. 19	
1777	VT	Yes						Ch. 1, Sec. 1
1786	VT	Yes						Ch. 1, Sec. 1
1793	VT	Yes						Ch. 1, Art. 1
1846	WI	No						Art. XVI, Sec. 2
1848	WI	Yes						Art. I, Sec. 2
Total Regulations			18	11	14	5	21	27

Table 16: State Constitutional Slavery Regulations, 1776-1860.
This table lists regulations to state constitutions prior to any amendment, and does not include regulations made by amendment. Similar clauses in the same document are classed as a single regulation. For "Ratified," "Yes" indicates the document was ratified as a new state constitution, and "No," that it was not. Note on abbreviations: FL 1810 is the 1810 Constitution of East Florida, ME 1780 is the 1780 constitution of the failed state of New Ireland in modern Maine, and TX 1836 is Texas' interim 1836 Constitution.

State	Slavery Abolished	Year	Convict Slavery Legal	Year	Equality/Equal Protection	Year	Universal Male Franchise	Year
AL	Art. I, Sec. 34	1865	Art. I, Sec. 34	1865	Art. I, Sec. 1-2	1867	Art VII, Sec. 2	1867
AR	Art. V, Sec. I	1864	Art. V, Sec. I	1864	Art. I, Sec. 3	1868	Art. VIII, Sec. 2	1868
DE								
FL	Art. XVI, Sec. 1	1865	Art. XVI, Sec. 1	1865	Dec. of Rights, Sec. 1	1868	Ordinance, Sec. 6	1868
GA	Art. I, Sec. 20	1865	Art. I, Sec. 20	1865	Art. I, Sec. 2	1868	Art. II, Sec. 1	1868
KY					Art. XIII, Section 1	1850		
LA	Title I, Art. 1	1864	Title I, Art. 1	1864	Title I, Art. 1-2	1868	Title VI, Art. 98	1868
MD	Dec. of Rights, Art. 24	1864	Dec. of Rights, Art. 24	1864	Dec. of Rights, Art. 1	1864		
MO	Art. I, Sec. 2	1865	Art. I, Sec. 2	1865				
MS	Art. I, Sec, 19	1869	Art. I, Sec, 19	1869	Art. VII, Sec. 3	1869	Art. VII, Sec. 2	1869
NC	Art. I, Sec. 33	1868	Art. I, Sec. 33	1868	Art. I, Sec. 1	1868	Art. VI, Sec. 1	1868
SC	Art. IV, Sec. 11	1865	Art. IV, Sec. 11	1865	Art. I, Sec 39	1868	Art. VIII, Sec. 8	1868
TN	Art. I, Sec. 33	1870	Art. I, Sec. 33	1870			Art. I, Sec. 5, Art. IV, Sec. 1	1870
TX	Art. VIII, Sec, 1	1866	Art. VIII, Sec, 1	1866	Art. I, Sec. 2	1866	Art. I, Sec. 16	1866
VA	Art. I, Sec. 19	1870	Art. I, Sec. 19	1870	Art. I, Sec. 1, 20	1870	Art. III, Sec. 1	1870
WV	Art. XI, Sec. 7	1863						

Table 17: Abolition, Equal Protection, and Enfranchisement in Ex-Confederate and Slaveholding States, 1865-70.
Note: Tennessee's 1866 amendment to Art. I, Sec. 1 abolished slavery except for convict slavery.

Appendix E: Miscellaneous

State	1: Fed. Pro. 1yr	2: Fed. Pro. 1yr	3: Fed. Pro. 1yr	4: Fed. Pro. 1yr	5: Fed. Pro. 5yr	6: Fed. Pro. 5yr	7: Fed. Pro. 5yr	8: Fed. Pro. 5yr
Total Const. Proposals	0.29				0.43			
Unratified Const. Proposals		0.44				0.64		
Ratified Const. Proposals			-0.038				-0.062	
Ratified Amendments				0.36				0.76
Observations	228	228	228	196	50	50	50	42

Table 18: Correlation between Proposed Federal Amendments and State Constitutions, 1791-2014.

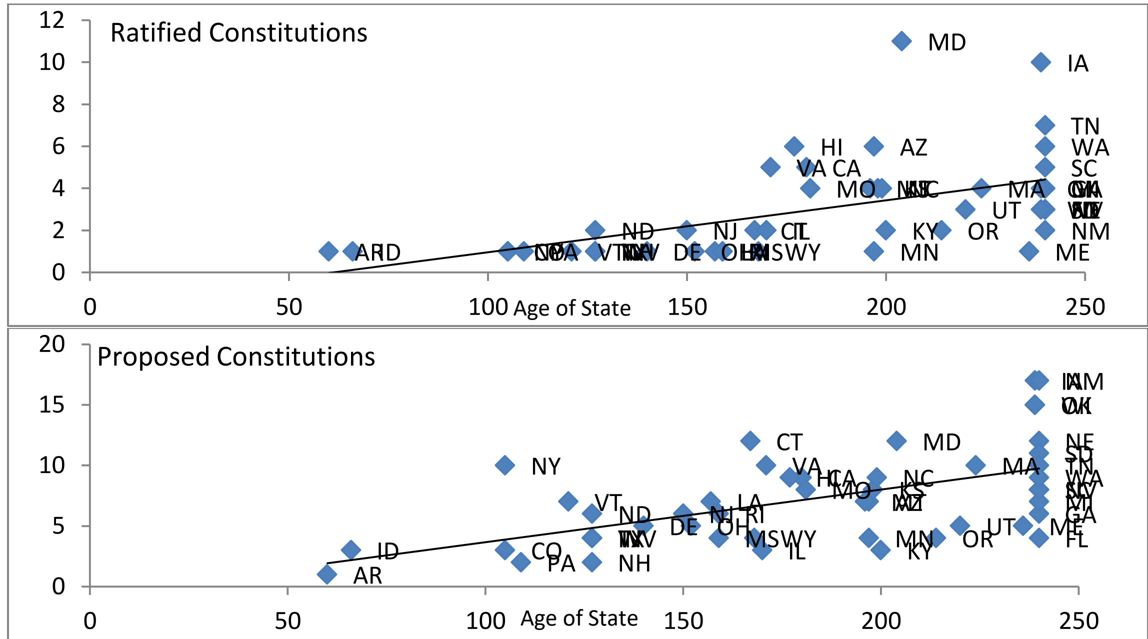


Figure 18: State Age and Constitutional Turnover, 1776-2017.

Figure 19: State Constitutional Approval and Stability, by State.

For approval data, see Stephanopoulos and Versteeg. State constitutional approval is measured on a ten-point scale, which is clustered around the national mean (6.7) because the study's authors use a multilevel regression and poststratification technique. See Nicholas Stephanopoulos and Mila Versteeg, "The Contours of Constitutional Approval," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 18, 2015), 21–22, http://papers.ssrn.com/abstract=2646773. For each state, Stephanopoulos and Versteeg give an average approval range of 0.1, which in this figure is rounded down to the nearest tenth of a point (i.e. Mississippi's score is rounded down from 6.4 – 6.5 to 6.4). Data excludes Alaska and Hawaii.

State	Year	Rat	Upper House	D/DR		Party: F/NR/W		Party: Other	Lower House	Party: D/DR		Party: F/NR/W		Party: Other
CT	1818	Yes	1817	T	0	F	12		1816	T	90	F	111	
			1818	T	7	F	5		1817	T	105	F	96	
DE	1831	Yes												
GA	1833	No	ND						ND					
	1839	No	1838	U	50	SR	37		1837	U	88	SR	103	
			1839	U	28	SR	46	1	1838	U	96	SR	76	
IL	1848	Yes							1852	D	56	W	18	1
									1854	D	34	W	41	
LA	1845	Yes	1842	D	8	W	9		1844	D	26	W	34	
			1844	D	9	W	8		1846	D	55	W	43	
MA	1820	No	1822	DR	9	F	31		1819	DR	161	F	231	16
			1823	DR	24	F	16		1820	DR	64	F	87	42
MO	1845	No												
MS	1832	Yes	ND						ND					
NC	1823	No	ND						ND					
	1833	No	ND						ND					
	1835	No	1835	D	33	W	30	2	1836	D	62	W	58	
			1836	D	24	W	26		1840	D	54	W	66	
NJ	1844	Yes	1843	D	12	W	6		1843	D	35	W	23	
			1844	D	6	W	13		1844	D	18	W	40	
NY	1801	No	1801	DR	21	F	22		1799	DR	34	F	43	31
			1802	DR	21	F	11		1800	DR	67	F	39	1
	1822	Yes	1821	BK	13	CL	18	1	1819	BK	58	CL	30	34
			1822	BK	32	CL	0		1820	BK	71	CL	33	22
	1837	No	1838	D	18	W	14		1836	D	90	W	38	
			1839	D	12	W	20		1837	D	28	W	100	
	1846	Yes	1846	D	21	W	10	1	1845	D	74	W	51	2
			1847	D	8	W	24		1846	D	52	W	76	
PA	1833	No							1834	D	62	W	11	27
									1835	D	28	AM	72	
	1838	Yes	1838	D	15	W	18		1835	D	28	W	72	
			1839	D	17	W	16		1836	D	72	W	7	21
RI	1824	No	ND						ND					
	1841 (x2)	No												
	1842	Yes												
TN	1835	Yes	1835	D	7	W	18		1835	D	25	W	46	4
			1837	D	14	W	11		1837	D	42	W	33	
VA	1816	No	ND						ND					
	1830	Yes	ND						ND					
VT	1814	No	N/A						1812	DR	124	F	85	
									1813	DR	104	F	108	
	1822	No	N/A						ND					
	1828	No	N/A						ND					
	1836	No												
	1843	No												

Note on Abbreviations:
"DR" – Democratic-Republicans
"D" – Democrats
"F" – Federalists
"NR" – National Republicans
"W" – Whigs
"T" – Toleration Party
"U" – Union Party
"SR" – Southern Rights Party
"BK" – Bucktail
"CL" – Clintonian
"AM" – Anti-Masonic
"O" – Other.

Table 19: State Constitutional Replacement and Change in Partisan Control of State Legislatures, 1800-49.
Note: This figure lists all thirty-one attempts to replace a standing state constitution between 1800 and 1840. The figure also lists whether the state legislature shifted control three sessions before or after an attempted constitutional replacement, and if so, the figure lists the years and magnitude of that shift. Control of the legislature shifts when a party or inter-party coalition loses a simple majority. Columns list the vote share of the Democratic-Republican Party, its successor, the Democratic Party, measured against the Federalists, National Republicans, Whigs, or an allied local party. Note on coding: For "Order," 1 indicates the proposal was the state's first, 2, the second, and so on. "ND" indicates the data for these years is not available from the data compiled by Michael Dubin. "N/A" indicates the state was unicameral. All proposals were made by constitutional conventions, save for legislative proposals by Pennsylvania and North Carolina in 1833.

State	Stability of Constitutional Politics around and after Constitutional Convention(s) or Amendments(s)
AL	1819, stable: sparse settlement by whites and little party organization at state's founding
AR	1836, stable: sparse settlement by whites and little conflict at the state's founding
CA	1849, unstable: in 1836 and 1845, separatist Californians elect extralegal governments to secede from Mexico; a balance of delegates from the state's diverse regions and ethnic groups assures a moderate convention and constitution
CT	1818, 1845(A), stable: the Republican-aligned Toleration Party captures the legislature from Federalists in 1818 on a platform of religious disestablishment and franchise expansion; Connecticut is a single party state from 1776 until the 1830s
DE	1831, stable: Federalist control 1796-1820 and peaceful elections and power sharing through the Jacksonian era
FL	1838, stable: state has a dispersed, unorganized population of only 50,000, of which 20,000 are slaves excluded from political participation
GA	1833(F), 1838(F), stable: legislature calls two failed conventions, but otherwise little agitation for constitutional reform
IA	1844(F), 1846, stable: Iowans push for constitutional reform peacefully, resulting in a convention in 1857
IL	1818, 1848, stable: tension between French slaveholders and recent, antislavery settlers is resolved by allowing limited de facto slavery
IN	1816, stable: tension between French slaveholders and recent, antislavery settlers dissipates as slaveholders free slaves or move to neighboring Illinois
KY	1850, stable: legislature regularly submits constitutional questions to voters via referenda
LA	1812, 1845 stable: French planters disenfranchise white small farmers at the 1812 Convention, but after increased settlement by small farmers, the 1845 Convention repeals these restrictions
MA	1821(F, A), stable: tension between western small farmers and eastern towns is largely resolved by aggregating the opinions of town meetings and by a series of constitutional amendments
MD	1802(A), unstable: malapportionment over-represents eastern shore planters, underrepresenting Baltimore, and the state approaches revolution, forcing reform in 1837; renewed discord forces the legislature to call a convention in 1850
ME	1819, stable: separation from Massachusetts appeases Maine separatists, and subsequent intrastate political conflict does not implicate the Maine Constitution
MI	1835, 1850(F), stable: state is sparsely populated by farmers, who make up a majority of the state's fairly inclusive convention
MO	1820, 1845(F), stable: Jacksonians quickly organize the state; by 1840, a stable two-party system has emerged
MS	1817, 1832, stable: after movements for repeal for suffrage expansion and judicial elections, the legislature capitulates and calls a peaceful convention
NC	1823(F), 1833(L), 1835 (F, A), stable: reapportionment appeases dissatisfied western voters
NH	1847(S), 1850(F), stable: conflict is channeled by parties into elections; Jacksonians control the state from 1827 until the 1850s
NJ	1807(S), 1844, stable: the state is small and homogenous, avoiding the tension between easterners and frontiersmen that upset other states
NM	1848(F), 1849(F), 1850(F), unstable: state is divided between Anglo-American settlers, Spanish-Mexicans, and Indians; the latter two rebel against the former in the failed 1847 Taos Revolt
NY	1801(F), 1804(S), 1821, 1826(A), 1837(F), 1846, stable/unstable: small western farmers and New York City workingmen organize, but are appeased by ongoing statutory and constitutional reform; along the Hudson, tenant farmers rebel in 1839, leading to the 1846 Convention
OH	1802, stable: class divisions in Ohio's frontier society are weak and are resolved through political and legal means
OR	1843(F), 1845(F), stable: the federal government resolves border disputes with Great Britain; most intrastate conflict is co-opted by parties
PA	1833(F), 1838, unstable: tax policies result in the Whiskey Rebellion (1794) and Frie's Rebellion (1800), and a disputed election leads to armed mobilizing and the Buckshot War (1838); otherwise, state mobilizing occurs through mass parties
RI	1824(F), 1834(F), 1841(F), 1842, unstable: longstanding resentment over malapportionment and suffrage restriction lead to a separatist "People's Constitution" and legislature in the Dorr War
SC	1810(A), stable: tensions between costal planters and upcountry small farmers are resolved when the former take the legislature in 1800 and reform suffrage and apportionment law
TN	1835, stable: main constitutional contention is over judicial design, which seems not to align with class or race tensions
TX	1836(F), 1845: in 1836 Anglo-American Texans revolt and secede from Mexico, joining the Union in 1845
VA	1804(S), 1816(F), 1829, 1850: token reforms appease Blue Ridge farmers, keeping the state legislature under the control of eastern counties
VT	1814(F), 1822(F), 1828(F), 1836(F), 1843(F), 1850(F): constitutional revision comes through the combination of meetings of the state Council of Censors and state conventions
WI	1846(F), 1848, stable: conventions are the main site of constitutional change in early Wisconsin

Table 20: State Constitutional Politics and Instability, 1800-50.

Note: Years indicate a successful convention, unless designated as the year of an amendment (A) or of a failed convention (F) or legislative committee (L) that did not ratify an entirely new constitution. A state's constitutional politics is considered unstable if it saw regular constitutional agitation by white males via extralegal riots, militia mobilizing, or illegal constitutional conventions. Sources: *Oxford Commentaries on the State Constitutions of the United States*, Paul Goodman, "The First American Party System," in *The American Party System: Stages of Political Development*, ed. William N. Chambers and Walter Dean Burnham (New York: Oxford University Press, 1967); Richard P. McCormick, "Political Development and the Second Party System," in *The American Party System: Stages of Political Development*, ed. William N. Chambers and Walter Dean Burnham (New York: Oxford University Press, 1967).

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