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Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design

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This article highlights a gap between a great deal of constitutional theory and a great deal of the practice of democratic constitution-making. Drawing on data from democratic national and state constitutions, we challenge the consensus among constitutional theorists that a central purpose of constitutionalism is the entrenchment (the fortification against future change) of broad principles. The empirical reality is that the majority of democratic constitutions today are subject to frequent revision, and are therefore ill-equipped to facilitate the entrenchment of their contents. To explore the logic of these unentrenched documents, we identify the historical periods in which different geographic regions moved away from highly entrenched constitutions, and we examine the political contexts of these transformations. We find that, in each context, constitution-makers were attempting to limit the discretion of constitutional interpreters and implementers by drafting highly specific texts and by updating them in response to continually changing circumstances.

INTRODUCTION

One of the central problems of constitutionalism is how to establish and simultaneously control a government. As James Madison expressed in Federalist 51, "you must first enable the government to control the governed; and in the next place oblige it to control itself."[1] Many familiar constitutional features are tools to oblige government to control itself; frequent elections, separation of powers, explicit limitations on government's scope and authority are several of the most prominent examples. In order to maintain, not merely establish, a democratic polity, however, these institutional features alone are insufficient. If members of government, or the temporary majorities whom they represent, can subvert the very mechanisms designed to keep them in check, they can exceed the bounds on their authority without repercussions.

A dominant theme of the constitutional theory literature is that successful constitutions must not only constrain those in power, but must do so over long time horizons, establishing constraints durable enough to bind across generations. This "entrenchment function" (Young 2008), the ability to create "temporally extended commitments" (Rubenfeld 2008, 73) is often described as a defining feature and central goal of constitutionalism (Waluchow 2012). By entrenching commitments, constitutions serve as a mechanism for overcoming the inconsistency of preferences over time. One particularly famous metaphor describing this entrenchment function likens constitutional provisions to the ropes that bound Ulysses to the mast of his ship, that is, self-imposed restraints to ensure that we cannot yield to the dangerous temptations we foresee in our future (Elster 1979). Waldron likewise describes constitutions as "[p]recautions that responsible rights-holders have taken against their own imperfections" (Waldron 1999, 258). Similarly, economic historians have attributed the origins of modern constitutionalism to monarchs or other elite rulers that attempted to make their commitments more credible by entrenching them. These elites developed constitutionalism as way to confirm the durability of the concessions they were making to maintain the support of essential members of their political coalitions (Acemoglu and Robinson 2001; North and Weingast 1989).

Constitutional entrenchment has also been described as a mechanism for permanently removing some questions from the political agenda, thereby creating a stable set of rules that allows people to conduct politics in the presence of disagreement (Holmes 1995; Sunstein 1991). This type of long-term constitutional entrenchment may also allow political parties to form new democracies by reassuring each political faction that the loser in any given battle will never be able to lose too badly (Ginsburg 2003). Though all of these theories describe different benefits of constitutional entrenchment, each identifies the intention to entrench (a policy, principle, or bargain) as the animating purpose of constitutionalism.

Members of the U.S. Supreme Court (even those with very different political positions) have also expressed the view that entrenchment is the central

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[1] "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments." *The Federalist 51*, 1788 (James Madison).

purpose of constitutionalism. According to Justice Scalia (1997, 40) the "whole purpose [of a constitution] is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away." Justice Brennan (1991, 4) likewise notes: "[i]n my view, it is crucial to the durability and efficacy of a charter of personal liberties that it not be subject to easy alteration or suspension . . . robust entrenchment forbidding compromise or requiring supermajoritarian approval for amendments seems to me best."

As Justice Brennan's recommendation suggests, a stable, or entrenched, text is (almost by definition) necessary for a written constitution to entrench its contents. As Whittington (2015, 16) explains, "[t]he objective of intertemporal binding suggests the need for deeply entrenched constitutions that are very hard for anyone to change over time." After all, a text that is often modified can do little to create durable constraints or make constitutional guarantees appear credible well into the future (Cooter 2000, 62–3). Thus, constitutional theorists generally distinguish constitutional documents from ordinary law by their relative rigidity (Eskridge and Ferejohn 2001; Waluchow 2012). Such rigidity can be built into the constitution's design through formal amendment procedures that are more demanding than those of ordinary laws (Lutz 1994).[2]

Entrenched constitutions are typically constructed as spare frameworks, rather than detailed policy directives, since highly specific documents are unlikely to remain relevant over long time horizons (Hammons 1999). As a result, along with rigidity, "generality and abstraction" are also widely considered to be defining features of written constitutions (Marmor 2007, 91–4). Highly specific constitutions, by contrast, are often dismissed as insufficiently majestic, or constitutional, in nature (Gardner 1992, 819–20; Howard 1968, 866; Kahana 2013). As Justice Marshall famously remarked "only [the Constitution's] great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of those objects themselves," since anything else would "partake of the prolixity of a legal code."[3] Others have suggested that specificity indicates that constitution drafters were less concerned with constraining those in power (Ginsburg and Posner 2010) or that it actually imposes harm on majorities (Nardi and Tsebelis 2014).

The model of an entrenched and spare document, which changes meaning primarily through judicial interpretation, successfully describes the U.S. Constitution. However, it does a poor job of depicting most other national democratic constitutions, or even U.S. state constitutions. As we will demonstrate, specific and unentrenched constitutions developed over the course of the nineteenth and twentieth centuries, and are now the dominant form of constitutionalism across the globe, and within the U.S. states. We argue that these polities' flexible and detailed constitutional texts embody an alternative model of constitutionalism. Rather than entrenching constraints through spare and stable texts, these constitutions provide officeholders—judges, legislatures and executives—with specific and frequently modified instructions. Although these flexible constitutions do not entrench commitments over long time horizons, we argue that they are nonetheless attempts to constrain the exercise of political power by leaving empowered actors with fewer choices about which policies to pursue.

Entrenched/spare and unentrenched/specific constitutions can be understood as two different solutions to the same problem: enabling people to control their government. Those who conceptualize constitutionalism as a form of contracting describe the people as a "principal," which, in creating a representative government, has employed "agents" to better realize its ends.[4] This formulation highlights the fact that agents are often in the position to pursue their own interests over that of the principal. Stable constitutional documents can be seen as attempts to solve this "principal-agent" problem by entrenching durable constraints on agents who, left unchecked, would amend the constitution to reflect their own interest (Aghion and Bolton 2003; Buchanan and Tulloch 1962; Ginsburg and Posner 2010; Persson et al. 1997). We argue here that specific constitutions are also attempts to solve this principal-agent problem, not by circumscribing the agent's actions through fixed constitutional boundaries (entrenchment), but by limiting the latitude within which agents operate (through specificity) and relaxing the rigidity of the constitutional boundaries (increasing flexibility) to accommodate constitutions' increased scope and detail. One might describe this design strategy as "constitutional micromanagement."

In the past decade, scholars have highlighted a variety of trends in constitutional development that, taken together, suggest the ascendance of constitutional micromanagement. Dixon (2014), for instance, has emphasized that few modern constitutions are the spare frameworks portrayed in a great deal of constitutional theory. In fact, most national constitutions contain a wealth of socioeconomic rights and other highly specific policy provisions (Jung, Hirschl, and Rosevear 2014; Versteeg and Zackin 2014). Elkins, Ginsburg, and Melton (2009) have demonstrated that national constitutions are also remarkably flexible: only half survive more than 19 years before they are replaced and most are amended frequently in between. Scholars of U.S. state constitutions have demonstrated that most state

[2] Of course, textual stability does not necessarily ensure political stability, since constitutional texts can be ignored or interpreted in wholly new ways. Indeed, the vast literature devoted to distinguishing legitimate from illegitimate sources of interpretive change (e.g., Ackerman 1991; Balkin 2011; Dworkin 1978; Whittington 1999) reflects a concern that inflexible and broadly phrased constitutional constraints are vulnerable to those who interpret and apply them. If entirely new meanings are made of old texts, then even a rigid text cannot protect the commitments it aimed to entrench. The anxiety among normative theorists over changes in judicial interpretation, therefore, is yet an additional testament to the central place of the entrenchment function within constitutional theory.

[3] *McCulloch v. Maryland,* 17 U.S.(4 Wheat) 316 (1819).

[4] Of course, "the principal" and "the people" are abstractions. The extent to which different democratic constitutions reflect a genuine consensus among the citizenry remains an open question.

constitutions are similarly flexible and specific (Bridges 2015; Dinan 2006; Hammons 2009; Tarr 1998; Versteeg and Zackin 2014). These studies all point to a gap between entrenchment-based constitutional theories and modern constitutional practices. Normative theorists have also suggested departures from the entrenched constitution (Gardbaum 2013; Jackson 2008; Tushnet 2008). Gardbaum (2013, 2) advances a normative theory in which detailed and flexible constitutions help to constrain officeholders, particularly judges. He describes the rise of a "new commonwealth model of constitutionalism," in which the constitution remains flexible enough for the legislature to pass an amendment when it wishes to reverse a judicial holding (Gardbaum 2013, 31). Thus far, however, these different observations have not been synthesized into a single theory of constitutional design.

Using longitudinal data from every democratic country and the U.S. states from the late eighteenth century to today, along with regional case studies, we demonstrate that constitutional drafters increasingly chose specificity over entrenchment as a means to constrain the exercise of political power. In doing so, they embarked on a developmental path that was very different from the course of federal constitutional development in the United States. Scholars of American constitutional development have documented the country's long journey toward judicial supremacy over federal constitutional meanings (Gillman 2002; Graber 1993; Whittington 2007), but in other democratic polities, both within and outside the United States, constitution-makers have attempted to restrict the latitude of judiciaries, and even legislatures, in interpreting and applying constitutional documents. The result has been a new model of constitutional design, one that has yet to be fully recognized in constitutional theory.

TWO MODELS OF CONSTITUTIONAL DESIGN

The Entrenched Constitution

Entrenchment, or rigidity, may allow constitutional texts to establish enduring authority over governmental activities. As people come to believe that these constitutional boundaries will remain in place, they may then establish political and economic arrangements premised upon them, creating incentives for the actors involved to continue to preserve these original boundaries (Hardin 1999; Levinson 2011). Constitutional courts may then emerge from these larger political and economic structures and participate in the enforcement (and further entrenchment) of the constitutional commitments upon which these institutions were founded (Hardin 1999; Hirschl 2004; Law 2009).

Importantly, entrenchment discourages the inclusion of highly specific policy choices in constitutional documents, since specific policies are unlikely to remain appropriate or popular in the face of changing economic and social conditions. Another reason that entrenchment works against constitutional specificity is that it is generally easier for diverse groups to agree on broad standards or principles than on specific policies (Lerner 2011). We might expect this difficulty to be heightened if those agreements will be difficult to revise (Hardin 1999, 84). Entrenched constitutions, therefore, tend to be narrow in scope, describing only the basic structures of government, the powers entrusted to it, and the rights it cannot violate. They also tend to exclude detailed or technical instructions, employing broad statements of principle in lieu of comprehensive policies.

Entrenched constitutional documents are relatively robust against the possibility that, once in power, political actors may attempt to relax the constitutional constraints placed upon them by amending the document. Thus, procedural requirements that make the constitution harder to amend may help to reduce the cost of monitoring these actors (Fusaro and Oliver 2011, 4; Levinson 2011, 679). By requiring amendments to be passed by supermajority, or by requiring the involvement of subnational units, constitution-makers can ensure that amendment is an extraordinary affair. Informal norms dictating infrequent amendment can further serve to defend a constitutional text from agents' attempts to revise it (Ginsburg and Melton 2014; Levinson 1995).

The entrenched and spare constitution makes it harder for both office holders and contemporary majorities to amend the constitution in their favor, but this design strategy imposes other costs. First, constitutional interpreters, including legislatures, executives, and courts, may choose from a vast array of policy choices, and claim that almost any are consistent with the spare constitution's broadly phrased guarantees. As a result, spare texts endow the constitutional interpreters with significant room to make, and potentially change, constitutional meanings. Scholars of the American politics have long emphasized the ability of judges, in particular, to set national policy by determining the Constitution's meaning (Dahl 1957). This invitation for unelected Supreme Court Justices to substitute their own political convictions for those of democratic majorities may, at least in the short term, pose significant problems for democratic self-governance (Bickel 1962).

A second set of costs associated with entrenched constitutions is that elites can use entrenched documents to secure (or entrench) their privilege (Schwartzberg 2013). Beard (1913) famously described the U.S. Constitution, for instance, as a means through which the propertied few entrenched their material advantages against the democratic forces that might have attempted economic redistribution. Parenti (2011, 8) echoed this critique, dubbing the Philadelphia Convention "a debate of haves versus haves in which each group sought safeguards within the new Constitution for its particular concerns." Hirschl's (2004) comparative research has also demonstrated that elites create constitutions when they fear the strength of their opponents and want to entrench their hegemony against emerging democratic majorities.

In addition to the possibility that political elites may use entrenched constitutions for anti-democratic

purposes, the very practice of intergenerational binding raises questions about whether entrenched documents really allow people to control their government. It is difficult to characterize very old and rigid texts as a set of instructions from the existing people, or to justify the authority of the long-dead framing and ratifying generation over those living in the present. A generation that has had little say over a constitution's text therefore can hardly be said to be acting as a principal. This normative critique of entrenched constitutions is most famously associated with Thomas Jefferson,[5] but many theorists have grappled with this so-called "dead hand problem" (Eisgruber 2001; Ely 1980; Raz 2009).

As an empirical matter, moreover, effective intergenerational binding through a rigid text may be unworkable. Scholars of both American and comparative constitutionalism have shown that when constitutional documents are sufficiently difficult to change, political development often occurs outside and around the formal constitution (Contiades and Fotiadou 2013; Fusaro and Oliver 2011; Griffin 1996, 28–9; Klug 2015; Levinson 1995). Change may occur through the introduction of new legislation (Eskridge and Ferejohn 2001), new conventions (Albert 2015), or simply because entrenched provisions have been rendered obsolete (Albert 2014; Schauer 1995). Even when judiciaries attempt to block such extratextual changes, ruling elites can typically overcome these decisions, sooner or later, by revising the composition of the judicial branch (Balkin and Levinson 2001; Dahl 1957; Levinson 1995).

The Specific Constitution

While constitutional theory has focused on entrenchment, many real-world constitution-makers have found a different solution to some of the agency problems in constitutional design: specificity. By placing a broad range of detailed policies directly in a constitutional text, constitution-makers can attempt to constrain the exercise of political power. In other words, the principal can use a constitutional text to tell its agents exactly what to do and not do. The resulting constitutions tend to emphasize rules over standards, attempting to define much of the content of law *ex ante* rather than allowing it to be defined by its interpreters *ex post* (Kaplow 1992). Since these specific rules leave less room for interpretative disagreement, they can facilitate political coordination to support their own enforcement (Hadfield and Weingast 2013; Weingast 1997). It is relatively easy to agree when a government has violated a detailed instruction and to mobilize opposition around that blatant violation.

A high degree of specificity requires constitutional texts to become unentrenched. While specific provisions might seem attractive at the time of founding, they can quickly grow outdated. Thus, highly specific constitutions typically require frequent updating. Furthermore, if constitutions are updated frequently, this flexibility may encourage people pursue constitutional change in their efforts to advance particular policy goals (Elkins, Ginsburg, and Melton 2009, 89). Perhaps more fundamentally, some degree of flexibility is a central part of a constitutional strategy that envisions continuous control over constitutional agents, since flexibility is required for contemporary majorities to correct governmental policies through textual constitutional instructions. Indeed, one of the striking findings presented in our next section is that specificity and flexibility are highly correlated with one another and appeared to have increased together in democratic constitutions.

Specific and unentrenched constitutions mitigate some of the agency costs and normative problems associated with entrenched documents. First, their flexibility allows them to avoid the "dead-hand" problem, since the living generation clearly acts as the principal in its frequent revision of the constitutional text. Second, constitutional detail can guard against judiciaries' tendency to cater to a small elite by providing policy-oriented instructions to judges about how to (and how not to) interpret the constitution (Dinan 2007). In some cases, these constitutions have become more specific as democratic majorities have added detailed provisions in response to judicial interpretations with which they disagreed (Dixon and Landau 2015; Lupia et al. 2010; Zackin 2013). Third, specific and unentrenched constitutions limit the discretion of those responsible for implementing the constitution. By increasing the scope of constitutional mandates (i.e., including mandates on a wider array of policy issues), citizens can also dictate exactly which policies executives and legislatures must enact and which they must refrain from enacting in manifold areas of governance. Including detail on these policies also allows the principal to exert further control over its agents by including explicit instructions about how they are to carry out their responsibilities. As we will demonstrate below, constitutions have often become more specific because democratizing forces insisted on the inclusion of explicit commitments to particular redistributive policies.

While specific and flexible constitutions reduce some of the agency costs associated with highly entrenched constitutions, they introduce others. Perhaps most troublingly, they are vulnerable to the very actors they purport to control (Bánkuti et al. 2012). There exists a fine line between the principal adjusting the agent's marching orders, and the agent enshrining its own interests. Thus, a flexible constitution may be more vulnerable to amendment in ways that undermine a polity's democratic character. What is more, constitutions that are sensitive to democratic pressures might be unable to safeguard minority group protections that were enshrined in the constitution at the time of drafting. Where constitutional systems respond readily to majoritarian pressures minority rights can be easily violated (Ely 1980).

There are also other potential downsides of specific and flexible constitutions. First, because these constitutions envision an ongoing constitutional micromanagement, they impose significant costs associated with

[5] Letter from Thomas Jefferson to James Madison (Sept 6, 1789) in *The Papers of Thomas Jefferson*. Ed. Julian P. Boyd, et al., 15: 392–7. Princeton, NJ: Princeton University Press.

the monitoring of office holders. There are also costs associated with the frequent revisions necessary to ensure that the constitution's highly specific text will remain relevant, especially when those revisions require legislative action or referenda. Second, it is not clear that the strategy is actually successful in practice (Dixon 2014). Specificity is certainly no guarantee of compliance with drafters' intentions. In fact, since the early twentieth century, legal realists have emphasized the indeterminacy of legal rules (Llewellyn 1930), and some scholars believe that judiciaries are unlikely to enforce positive rights against the government (Cross 2001). While specificity often represents an attempt to curb judicial discretion, some have suggested that constitutions that are too specific may enhance discretion by requiring judges to balance the competing values that these constitutions contain (Posner 2013).

Our goal is not to argue that specific and flexible constitutions are normatively superior to entrenched constitutions. We simply seek to demonstrate that the specific and flexible constitutions currently populating the globe are not simply failures to achieve brevity and entrenchment, but represent a plausible alternative solution to some of the agency problems associated with constitutional design.

EMPIRICAL EXPLORATION OF CONSTITUTIONAL MODELS

We draw on quantitative data from democratic constitutions (drafted from the early nineteenth century to today) to determine which design strategies particular constitutions embody. Our analysis includes the entire universe of democratic national constitutions and all U.S. state constitutions.[6] We include state constitutions in our analysis because these documents share many similarities with the constitutions of democratic countries other than the U.S. (Gardbaum 2008; Versteeg and Zackin 2014). Like most foreign constitutions, state constitutions tend to be highly specific, to grant plenary rather than enumerated powers, to be amended or replaced frequently, and to be fairly unfamiliar to their publics. Indeed, as we will elaborate on in the next section, state constitutions illustrate the design logic of specific and flexible constitutions rather well.

Measuring Entrenchment and Specificity

There are different ways to measure a constitution's degree of entrenchment. Individual constitutions lie somewhere along a continuum from highly entrenched and unchangeable to extremely flexible, and within a single constitution, some provisions may be more entrenched than others. It is not entirely clear how best to determine a constitution's place along this axis. Some studies assess flexibility according to the formal amendment rules of the constitutions (La Porta et al. 2004; Lijphart 1999; Lorenz 2005; Lutz 1994), others count the number of times the constitution has been amended (Ginsburg and Posner 2010), or the frequency with which a single polity adopts entirely new constitutions (Elkins, Ginsburg, and Melton 2009).

To describe the level of entrenchment of constitutional texts, we calculate each constitution's *entrenchment score,* which we define as the total number of years a democratic polity has existed divided by the total number of years in which it witnessed constitutional change (either through replacement or amendment). The resulting measure captures the average number of years that a polity has gone between constitutional revisions. In constructing this entrenchment score, we do not distinguish between amendment and replacement because this distinction is often not a meaningful one: some polities have employed the formal amendment process to overhaul their entire constitutions, while the promulgation of a "new" constitution sometimes reflects no significant differences in content (Arato 2014).[7] Thus, we consider both types of textual changes' evidence of flexibility. The measure does not rely on formal amendment rules because these rules are mediated so dramatically by political norms (Ginsburg and Melton 2014; Klug 2015). For instance, the Japanese constitution, which is widely considered one of the world's most entrenched, contains the same formal amendment rule as most U.S. state constitutions, which are generally understood to be highly flexible. Finally, since our purpose is to reveal how readily those living under a democratic constitution modify its text, our measure excludes nontextual change.

To describe constitutions' *specificity,* we simply calculate the number of words they contain. Specificity, however, comes in different forms. A constitution may be specific because it describes many different topics. Many democratic constitutions cover a wide range of topics, including matters such as fiscal policy and economic development, the management of natural resources, animals, matters of cultural significance, and citizen character. This type of specificity is often described as *scope* (Ginsburg 2010). To capture the scope of democratic constitutions, we calculate the number of unique words in each constitutional text, on the premise that a larger number of unique words reflects the constitution's inclusion of a larger number of unique issues.[8]

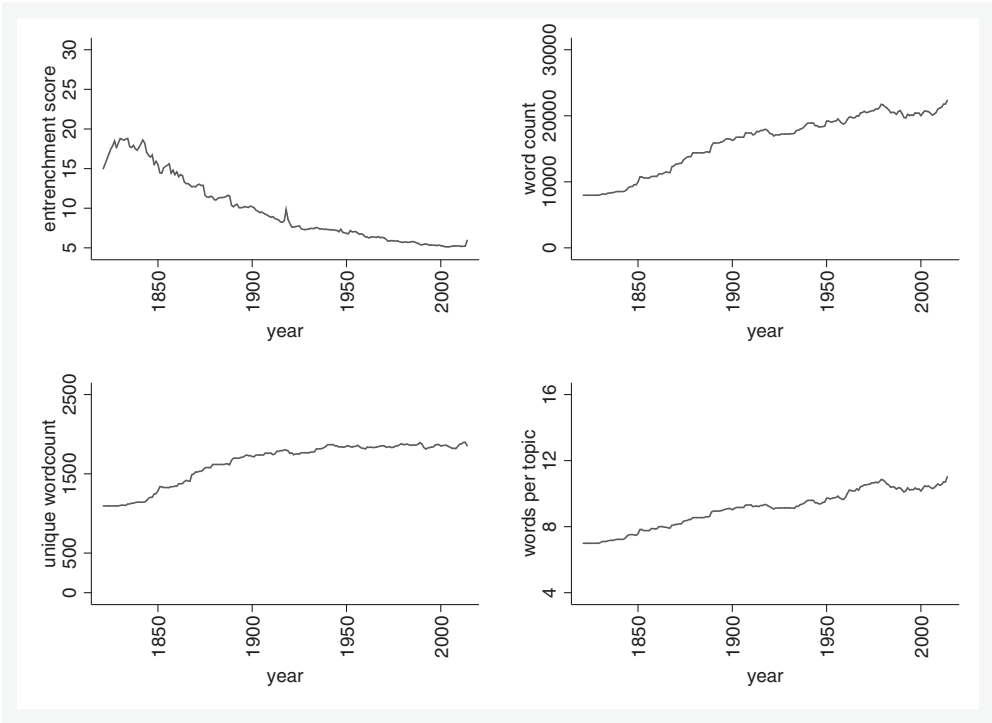
A second form of specificity is extent to which each topic is discussed (Elkins, Ginsburg, and Melton 2009). We refer to this form of specificity as *detail*. To measure

[6] Existing studies have shown that authoritarian constitutions possess a distinct logic, and are generally short and ambiguous (Ginsburg and Simpser 2013). We treat countries with a polity2 score of higher than 5 as democratic.

[7] To illustrate, Chile's 1980 constitution has never been replaced since the fall of the Pinochet regime, and yet has been changed radically through amendment (Arato 2014). Conversely, Louisiana's 1861 constitution was exactly the same as the 1852 constitution, except for its replacing the words "United States" with "Confederate States" throughout.

[8] Elkins, Ginsburg, and Melton (2009, 104) capture specificity by counting how many of a predetermined list of topics are covered in a constitution. The downside of this measure is that it is limited to a set of fairly common set of topics (92 topics), and thus does not capture those constitutions widest in scope because they cover topics not on the list. The correlation between our unique word count measure and the existing scope measure is 0.59.

FIGURE 1a. Democratic Countries and U.S. States



a constitution's detail, we divide the total word count of the constitution by its number of unique words, thus creating a proxy for how many words are spent on each unique topic.[9] It is important to note that scope and detail are closely related concepts. For instance, imagine a constitution that grants all citizens a right to education, but subsequently adds provisions on teachers' pay or the content of the curriculum. These provisions could be regarded as a larger number of topics covered in the constitution (increasing its scope), but could also be viewed as a more exhaustive treatment of the general topic of education (increasing its detail). Because we have measured constitutional scope according to the number of unique words in a constitution, we treat all of these additional policies as an expansion of scope, rather than detail.

Historical Trajectory

The historical data we have collected suggest that, over the past two centuries, democratic constitutions have become less entrenched, while their specificity has increased. Figure 1a shows the historical trajectory of all democratic constitutions, including both democratic national constitutions and state constitutions. Panel 1 demonstrates that constitutions of democratic polities have become less entrenched over time as witnessed by their declining entrenchment scores.[10] Panel 2 depicts the average word count of these constitutions (as measured at the time of their adoption) and reveals that democratic constitutions have grown in specificity.[11] Panel 3 depicts the growth in the scope of these constitutions as captured by their unique word count over time.[12] Panel 4 depicts their increase in their detail as captured by the number of words they spend on each topic. Overall, Figure 1a depicts a large-scale shift away from sparseness and entrenchment, towards flexibility and specificity. For comparison, Figure 1b depicts the same information for democratic countries only (excluding state constitutions) and reveals the same trends.

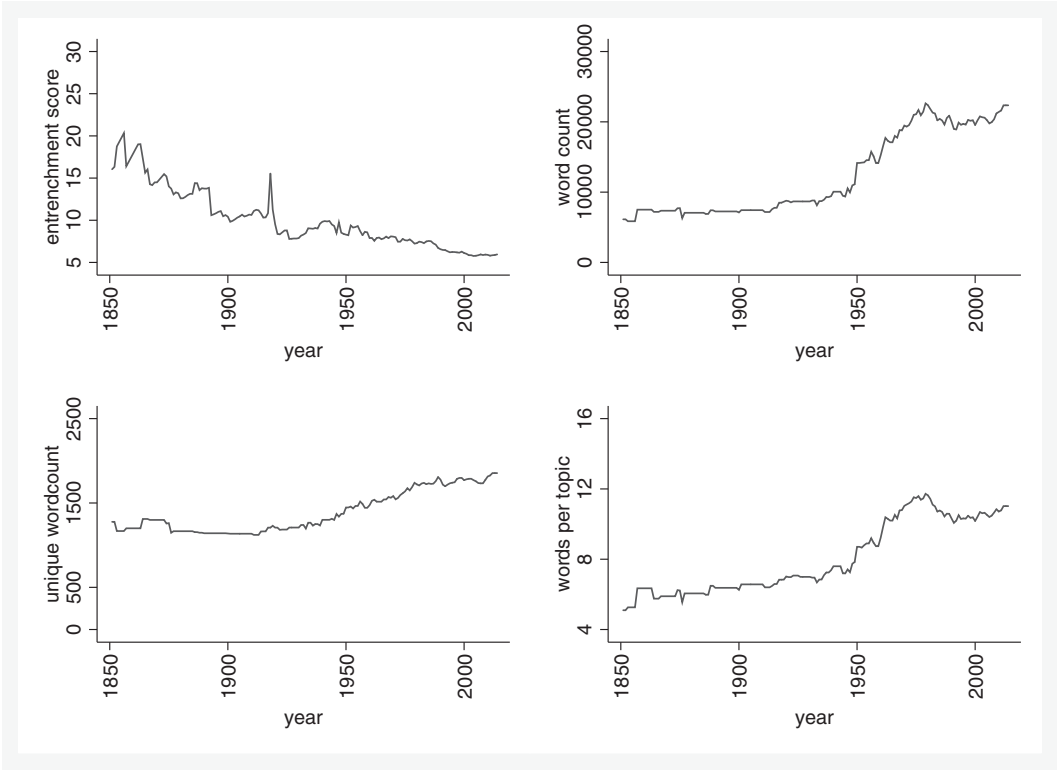
[9] Elkins, Ginsburg, and Melton (2009) measure detail as the constitution's total word count divided by the number of topics (out of 92) it deals with. The correlation between their measure and ours is 0.92.

[10] The amendment and replacement data for state constitutions comes from Dixon and Holden (2012), and is available for 44 states. The data are current as of 2005. We expanded the coverage of their dataset by using the NBER State Constitutions database. The same data for national constitutions comes from the Comparative Constitutions Project (CCP) and is current as of 2014. To capture the historical changes in entrenchment, we calculate the number of years a polity has been in existence and divide it by the total number of revisions (either amendment or replacement) it has undergone at that point in time.

[11] The historical texts of national constitutions at the time of their adoption were provided by Comparative Constitutions Project; the state constitutional texts were collected by the UVA Law Library. We calculate the number of words in each constitution at the time of adoption using the "tm" package in R and assign this to all subsequent years, until a new constitution is adopted. We do so because constitutional texts that incorporate all subsequent amendments are not systematically available.

[12] We first "stem" our data to remove common stop words, after which we estimate the number of unique words using the tm package in R. We thank Adam Chilton for sharing R code for this.

FIGURE 1b. Democratic Countries Only



Current Constitutions

A systematic comparison of the flexibility and specificity of democratic constitutions in force today reflects a remarkable gap between constitutional theory and practice. Although most accounts of constitutional governance suggest that written constitutions are defined in large part by their stability, the average entrenchment score across all democratic polities is 5.3, which means that the average democratic polity revises its constitution (through either amendment or replacement) roughly every 5 years. India, Georgia (the country), Louisiana, Austria, New Zealand, Germany, Malawi, Texas, and Mexico have revised their constitutional documents the most frequently at least every two years on average. For comparison, the U.S. Constitution has an entrenchment score of 13.3, having been revised on only 16 occasions over the course of its 226-year history. Along with Japan, Denmark, Paraguay, and Vermont it is the most entrenched democratic constitution in the world. For most democracies, however, frequent textual change is part and parcel of ordinary constitutional politics.

Not only are most democratic constitutions not particularly well entrenched, they are not particularly spare either. Instead of limiting themselves to the broad outlines of government's structures and citizens' rights, they contain highly specific provisions on a wide range of topics. Indeed, the median state constitution is 27,647 words. National constitutions are comparably verbose. On average, the constitutions of democratic nations contain 24,559 words. By contrast, the U.S. Constitution, which is generally described as a model of spare constitutional design, contains 7,644 words, only a quarter of the length of the global average.[13] The limited scope of the U.S. Constitution is captured by the fact that it contains a mere 1,119 unique words. By contrast, the average democratic constitution today contains 2,217 unique words, while the median democratic constitution contains 2,087 unique words. The average state constitution contains 2,560 unique words. On the far end of the spectrum, Alabama's constitution contains 5,840 unique words, while Brazil's constitution includes 5,073 unique words and Missouri's contains 4,480. Notably, each of these constitutions stands out for the wide range of topics it deals with, such as Alabama's provisions on catfish, cattle, poultry, swine, sheep, and goats; Brazil's provisions on the end-of-year-bonus for rural workers; and Missouri's recent amendment on the right to farm. It is these unique topics that are presumably captured by the unique word measure. The relative lack of detail of the U.S. Constitution is captured by the fact that it contains a mere 6.8 words per topic. By contrast, the average democratic constitution spends 11.9 words on each unique topic. The most detailed constitution is that of Alabama, with

[13] The word counts are based on the texts of all state constitutions currently in force (as collected by the UVA Law Library) and the text of all current democratic national constitutions, which we obtained from the Constitute website.

65.9 words per topic, followed by India (28.2 words), and Malaysia (21.1 words).

Constitutional specificity and flexibility appear to go hand in hand. One way to measure the degree to which specificity and flexibility are connected is to simply calculate the correlation between the number of words in the current constitution and the total number of amendments that this same document has witnessed. The correlation between these two measures is 0.535, indicating that longer constitutions have undergone more textual changes.[14]

THE ORIGINS OF UNENTRENCHED CONSTITUTIONS

Our quantitative data reveal that, over the past two centuries, the form of democratic constitutions has undergone a dramatic shift. In this section, we show that, in many parts of the world, this shift arose from a deliberate choice on the part of constitution-makers to employ specificity as a means of controlling their governments. We do so by disaggregating the worldwide data, and identifying the timing of the shift in distinct groups of democratic polities: (1) the U.S. states, (2) continental Europe, and (3) Latin America. Drawing on the primary and secondary literature on constitutional developments in these regions, we show that the shift away from entrenchment coincided with pressure for increased democratization and increased resistance to judicial supremacy. We present evidence that those who wrote flexible, specific constitutions were very much concerned with solving the principal-agent problem, but were employing specificity, rather than entrenchment, as their primary instrument of constraining their governments/agents. More specific constitutions required more frequent revision, but constitutions were also rendered more malleable in the hopes that they would better serve as a vehicle for popular control of government. In each case, therefore, the increase in constitutional specificity was accompanied by an increase in flexibility, and this specific, flexible model of constitutional design was a conscious solution to the perception that democratic governments had become (or might become) unresponsive.

Our approach in this section is necessarily inductive and impressionistic. It does not purport to explain every instance of constitutional design, and since we only examine constitutional groupings that underwent this shift, we cannot test a hypothesis about its causes. Nonetheless, by identifying critical periods of constitutional change in distinct groups of constitutions, we can develop an account of how unentrenched constitutions were designed to operate.

U.S. State Constitutions

In the U.S. states, the shift away from entrenched, spare constitutions to flexible and detailed documents began in the mid-nineteenth century. Figure 2 depicts the historical development of U.S. state constitutions' average entrenchment score, while Figure 3 depicts the average word count. The left-hand panels of both figures are based on all states for which we have data, while the right-hand panels are based on those states that have continuously been in our sample since 1815 for each of these measures. Shifts depicted in the right-hand panels do not result from new states entering the sample. Figure 3 shows that the increase in state constitutions' flexibility first occurs in the late 1830s while the increase in specificity occurs around the same time. Our specificity data depicted by the solid lines in Figure 3 understate the growth of states constitutions, since subsequent constitutional amendments are excluded from our analysis. To give a fuller sense of the dramatic increase in specificity, the dotted lines in Figure 3 show the average word count for state constitutions when including subsequent amendments.[15]

As many scholars of U.S. state constitutions have noted, detailed instructions were constitutionalized as part of a nationwide, nineteenth-century movement to enhance popular control over policymaking (Dinan 2006; Dinan 2007; Fritz 1994; Tarr 1998; Versteeg and Zackin 2014; Zackin 2013). Over the course of the nineteenth century, the drafters of U.S. state constitutions also adopted increasingly flexible constitutions. In part, this increased flexibility may have been necessitated by the documents' mounting detail, but state constitutional drafters also redesigned constitutions to be more flexible so that they could better serve as vehicles of democratic control over courts and legislatures (Dinan 2006, 62–3; Fritz 1994).

The original impetus to include detailed policy instructions in state constitutions is often traced to the economic crisis of 1839, which revealed the fiscal blunders that many state legislatures had made, and motivated a wave of constitutional change designed to prevent legislatures from repeating these mistakes (Tarr 1998, 112). Earlier in the decade, state legislatures had invested heavily in the canals, railroads, and banks, and had financed these investments not through taxation, but through indebtedness. When the economic boom of the 1830s ended with an equally dramatic bust, these schemes proved disastrous. Many heavily indebted states were forced to default on their interest payments, while others only narrowly avoided default. These crises triggered widespread calls to ensure that legislatures would be barred from this type of boom-time policymaking. Between 1842 and 1852, 10 of the 11 states that held constitutional conventions wrote procedural restrictions on the way that states could issue debt directly into their constitutions (Wallis 2005, 219).

Throughout the second half of the nineteenth century and into the twentieth, agrarian reformers and advocates of organized labor pursued constitutional

[14] Note that for state constitutions, this undercounts the total number of amendments, since the amendment data are available only until 2005.

[15] We obtained state constitutional texts with their amendments from the NBER State Constitutions Project. This database includes all the subsequent amendments for 38 state constitutions. The dotted lines are thus based on a smaller sample of states than the solid lines.

FIGURE 2. Average Entrenchment Scores of State Constitutions

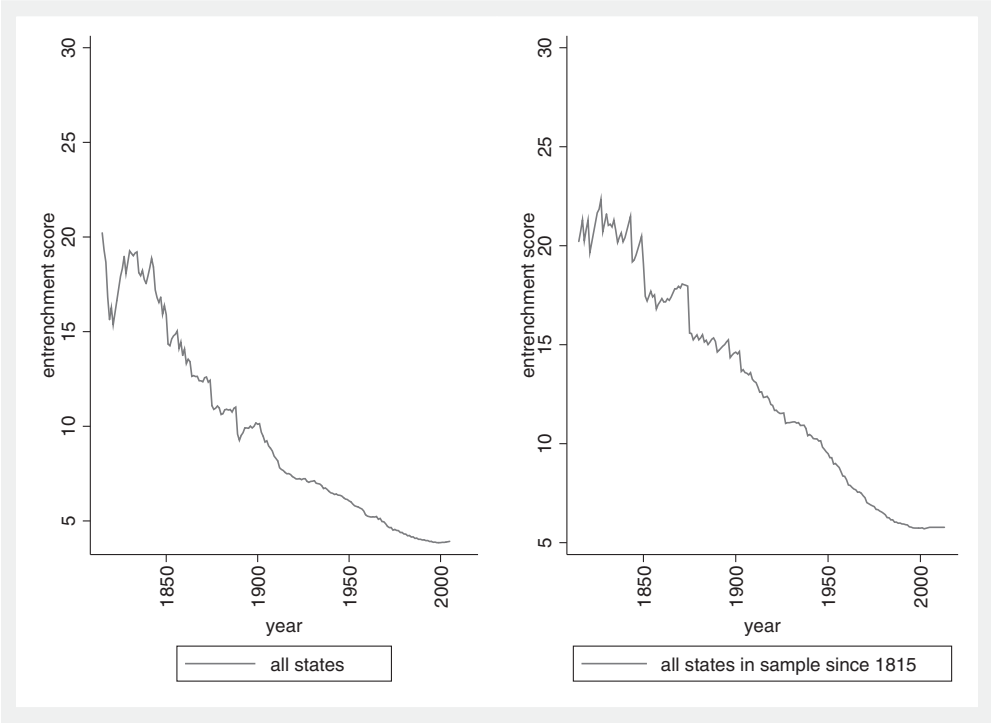
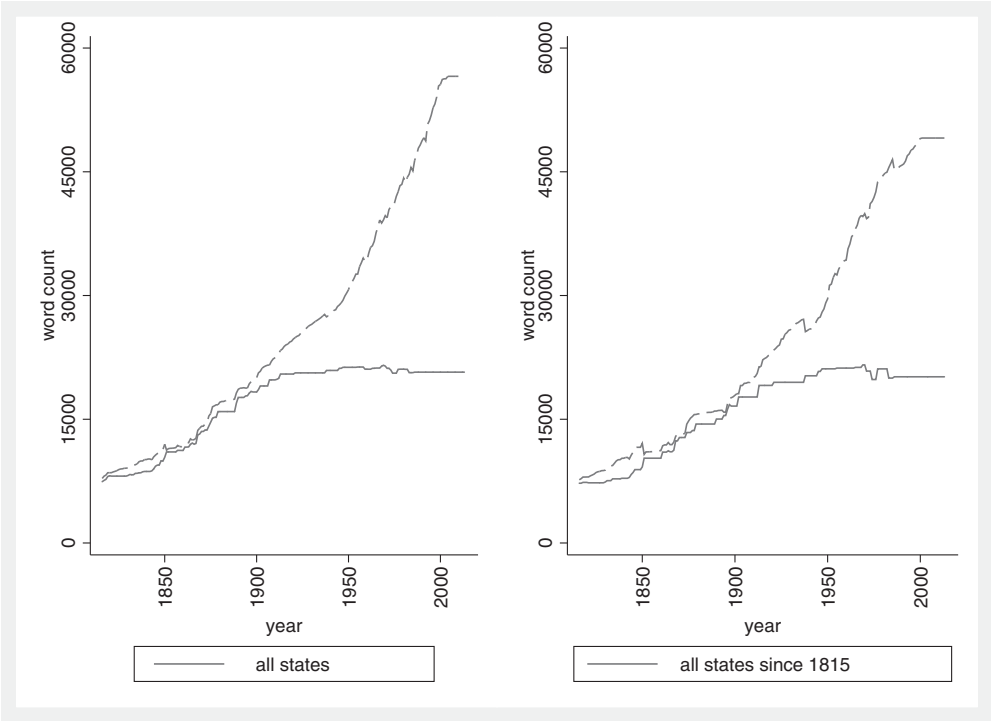


FIGURE 3. Average Word Count of State Constitutions (solid lines denote constitutional texts as adopted, the dotted lines take account of subsequent amendments)



specificity for a similar purpose: to preempt particular policy choices and to force state governments into enacting new slates of popular policies. Agrarian populists, for instance, used constitutions to establish state oversight and regulation of railroad operations, increasing the scope of these documents (Buck 1913, 195–8). In many states, labor unions employed a similar strategy, pursuing the insertion of specific labor regulations directly into constitutional documents (Zackin 2013, 106–45). In its endorsement of a constitutional provision establishing an eight-hour workday, for instance, the *Montana Labor News* explained that the state had already regulated the working hours in a number of industries, but that to ensure democratic control over these policies, it was also necessary to add an eight-hour provision to the state constitution: "[a]ll of these 8-hour laws may be destroyed by the corporations unless you pass this 8-hour amendment. Usually, the courts function in the interests of the corporations; so does the legislature."[16] This embrace of constitutional specificity reflected the recognition that judges and legislatures can exert enormous influence over public policy and that highly specific constitutions can curtail the discretion of these agents.

As the twentieth century dawned, it became increasingly apparent that judges were not neutral monitors, overseeing government officials on behalf of the people, but were themselves consequential policymakers. Progressive reformers realized that specific constitutional provisions could check judicial power over the policymaking process by explicitly identifying particular policies as constitutionally permissible. This insight generated a wave of court-constraining constitutional provisions, designed to prevent state courts from invalidating legislation on subjects related to maximum working hours, minimum wages, collective bargaining, workers' compensation, and other social welfare programs (Dinan 2007).

Contemporaneous observers described enhanced constitutional detail a reflection of drafters' desires to exert control over those who would later interpret and apply their constitutions. An 1892 article in the *Harvard Law Review* described newly written state constitutions as products of the pervasive belief that "the agents of the people, whether legislative, executive, or judicial, are not to be trusted; so that it is necessary to enter into the most minute particulars as to what they shall not do" (Eaton 1892, 121). Critics of this new form of constitutionalism recognized that greater specificity reflected a distrust of office holders, and admonished constitutional drafters to avoid constitutionalizing detailed policies. One famous jurist, for instance, addressed North Dakota's constitutional convention with this advice: "[d]on't in your Constitution-making legislate too much . . . . You have got to trust somebody in the future and it is right and proper that each department of government should be trusted to perform its legitimate function" (cited in Leahy 2003).

As we have seen, however, these calls to preserve spare constitutional documents went largely unheeded.

Successive waves of constitutional drafters not only embraced specificity, but also sought to make state constitutions increasingly flexible so that they could better respond to majoritarian pressure. Since the founding era, some of the state constitutions had provided for periodic referenda to determine whether the state should call for a new constitutional convention to replace the existing constitution (Dinan 2006, 45–6). Throughout the nineteenth century, constitutional drafters further liberalized the amendment procedures in their constitutions, arguing that rigorous amendment procedures were antidemocratic. Some states eliminated the requirement that amendments be passed by successive sessions of state legislatures while others dispensed with the need for a supermajority of the legislature to pass a constitutional amendment. By the end of the twentieth century, four states had even abandoned both restrictions on amendments (Dinan 2006, 41–5). The beginning of the twentieth century witnessed yet further unentrenchment of state constitutions, with the addition of amendment procedures that allowed electoral majorities to amend constitutions through the initiative and referendum. This increase in flexibility was also understood as a way to render these constitutions more responsive to democratic demands and changing economic conditions (Dinan 2006, 63). One champion of the initiative and referendum explained "The initiative and referendum puts the absolute control of affairs into the hands of the people and keeps it there."[17] In fact, like constitutional specificity, demands for amendment through initiative and referendum were, in part, reactions to unpopular judicial rulings. Thus, these proposals to adopt the initiative and referendum were often coupled with appeals to equip electoral majorities with the power of direct judicial recall. The debates that ensued reveal that the framers of state constitutions over the course of the nineteenth and early twentieth centuries consciously rejected the model of entrenched, spare constitutional documents in their attempts to secure enhanced popular control over policy (Dinan 2006, 62–3; Fritz 1994).

Continental Europe

The constitutions of continental Europe have also grown longer and more flexible over time.[18] Figure 4 depicts the historical development of the entrenchment scores, while Figure 5 depicts the average specificity, as captured by the total word count at the time of adoption. The left-hand panels of both figures are based on all countries for which we have data, while the right-hand panels are based on those countries that have

[16] "All These Laws Will Be in Danger If the Eight Hour Amendment is Defeated by the People November 3." *Montana Labor News*, Butte: October 29, 1936, 1.

[17] *Michigan Union Advocate*, August 9, 1907, p. 2.

[18] Our sample of continental European countries includes both Eastern and Western European countries, but excludes the former Soviet Republics.

FIGURE 4. Average Entrenchment Scores of Continental European Constitutions

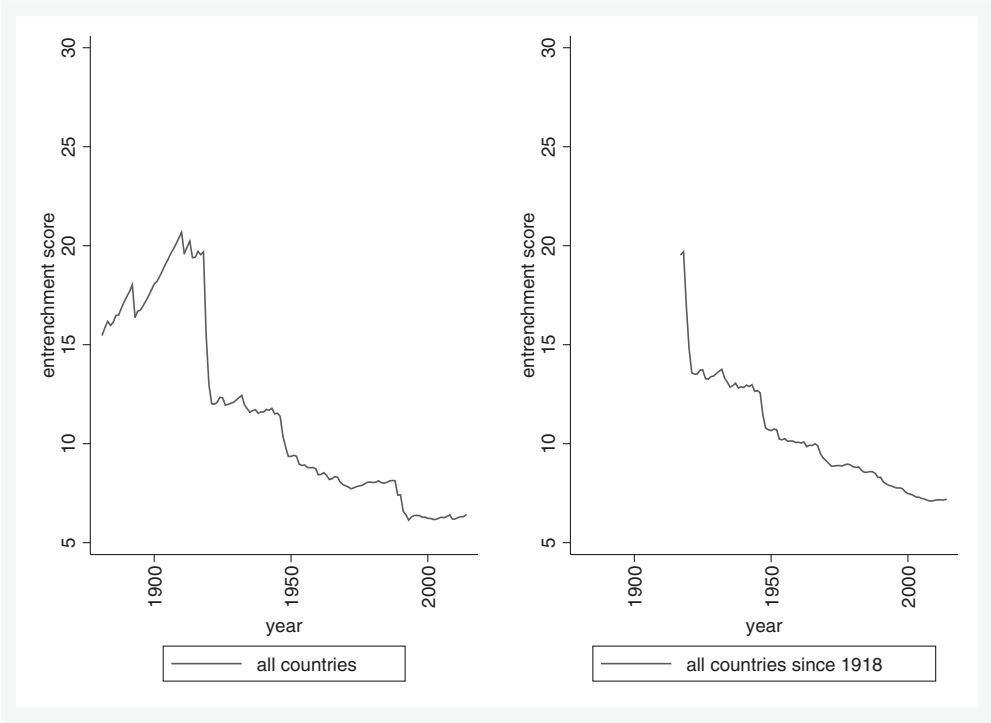
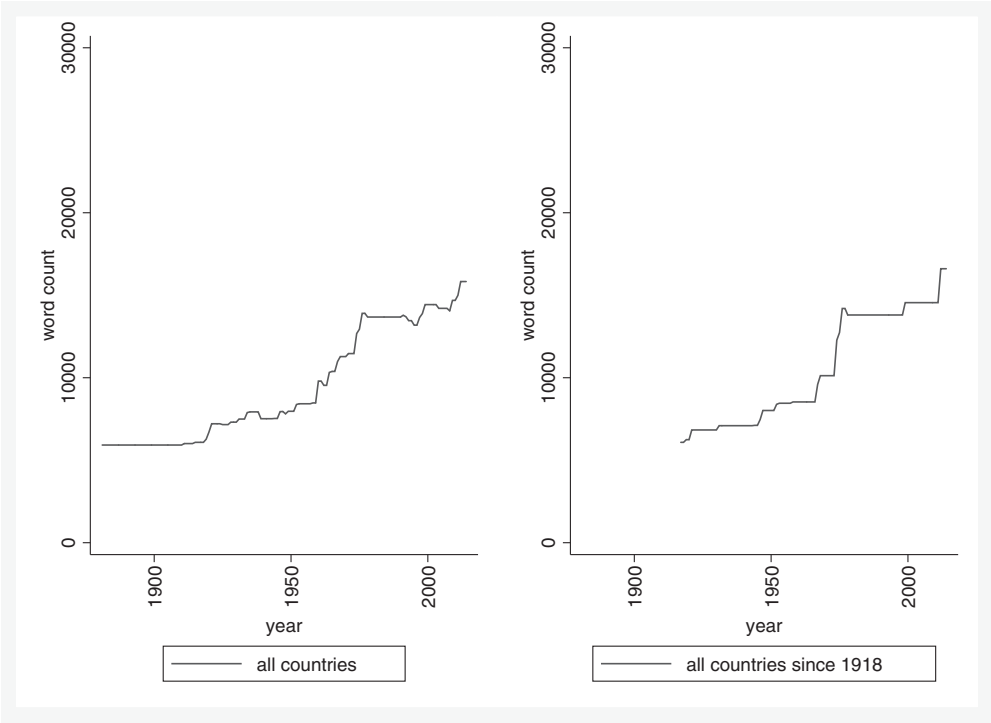


FIGURE 5. Average Word Count of Continental European Constitutions



continuously been in our sample since 1918.[19] Figure 4 shows that the unentrenchment of continental European constitutions began in the 1920s. Figure 5 shows that their increase in specificity also began at the same time, and underwent a more dramatic increase around 1960.

Although relatively elite political actors drafted most European constitutions, their shift from entrenched and spare to specific and flexible documents still seems to have been motivated (at least in part) by a desire to render government more responsive and accountable to democratizing forces. After World War I, ruling European elites extended the franchise to all citizens when the working classes, who had paid the heaviest price for the war, demanded political recognition (Lesaffer 2009, 495). Constitutional changes were often required simply to expand suffrage, accounting in part for a decrease in constitutional entrenchment. However, in an effort to assure people that they would be able to exert more direct control over government, constitutional drafters also added many detailed policy provisions addressing working class demands. Against the backdrop of the Bolshevik Revolution of 1917, many ruling elites wrote new constitutions and/or new constitutional provisions that addressed working class demands for enhanced control over government and for particular welfare-oriented policies. Perhaps most famous are the socioeconomic policies enshrined in the Weimar constitution of 1919. Yet, between 1914 and 1933, 11 other European countries also adopted constitutional education rights, social welfare policies, and/or workers' rights.

This dynamic rendered many European constitutions less entrenched. The author of one 1922 study of newly drafted (central) European constitutions argued that class-based movements had rendered European constitutions more flexible, explaining that the new documents were "sufficiently elastic to enable revolutions to be met half way" (McBain 1922, 157). He went on to note that these documents were not only malleable enough to accommodate working-class demands, but also highly specific. "All of the new constitutions are, of course, definite written documents. Some lacunae are apparent and some obscurities will doubtless cause difficulty, but the attempt has been made to meet all probable contingencies" (McBain 1922, 155). In the same year, another political scientist, studying the constitutions of Poland, Czechoslovakia, and the Kingdom of the Serbs, Croates, and Slovenes, observed that in these new constiutitons, "provision is made for many of the conventional or statutory practices, methods and principles by means of which the older nations have sought to adapt their governments to the ever-changing needs of modern life" (Ralston 1922, 227). Thus, even before WWII, European constitutions had begun to include "statutory practices" that recognized the "ever-changing needs" of industrial societies. Popular pressure (coupled with elite fears of Bolshevism) resulted in more specific and flexible constitutions.

Europe's detailed constitutions were not only designed to control legislatures, but also to subject courts to popular control. Even as they endowed courts with the power to nullify legislation, Europe's constitutional drafters quite clearly sought to cabin the policymaking potential of these new institutions (Fehrejohn 2002, 58; Sweet 2003). Rather than asking judges to interpret ambiguous statements of broad principles the European approach to judicial review has been to increase the specificity of their constitutional texts.

The Austrian Constitution of 1920 exemplifies this use of specificity to curtail judicial discretion. The document is not only very detailed, but also very flexible. The legal philosopher Hans Kelsen is generally recognized as the principal architect of the document, and we can consult Kelsen's own writings to investigate the logic of his design choices. The document established a specialized constitutional court with the power of judicial review, but the design of Kelsen's constitution was informed by the observation that constitutional adjudication is inherently political in nature. In annulling unconstitutional statutes, Kelsen believed that the Court would become a kind of "negative legislature" (Kelsen 1929, 1506), one that, like the positive legislature, would require firm checks on its authority. He therefore designed the court as a separate body, distinct from the ordinary judiciary, whose members had to be elected in a manner that takes account of the court's political nature (Kelsen 1929, 1508). In addition, Kelsen employed constitutional specificity to curb judicial discretion. He noted that:

> the norms to be applied by a constitutional court, especially those which determine the content of future statutes, like the provisions concerning the basic rights, must not be formulated too broadly and must not operate with vague slogans like 'freedom,' 'equality,' and 'justice,' and so forth. Otherwise there is a danger of a politically highly inappropriate shift in power, not intended by the constitution, from the parliament to some other institution external to it . . . (Kelsen 1931, 1550).

Indeed, the document that Kelsen drafted for Austria was notably "clear in language" (Stelzer 2011, 17, 21), and includes "provisions that in many other countries would not considered to be constitutional laws" (Stelzer 2011, 22).

Although the intellectual movement to create constitutional courts empowered to nullify legislation emerged in Europe in the 1920s (Shwartz 1999), judicial review only became a widespread constitutional feature in Europe in the 1960s. As Figure 5 demonstrates, continental European constitutions underwent a strong increase in detail during this exact period. Thus, while the first wave of increased flexibility and specificity in Europe might have been directed at legislatures, the increase in the wake of World War II was likely directed at least in part towards Europe's new constitutional courts.

[19] In order to keep our sample size constant, we do not drop countries from this sample when they become less democratic during the world wars.

Europe witnessed another wave of national constitution making in the 1990s as the countries of Central and Eastern Europe transitioned to democracy. These countries also drafted highly specific constitutional documents, replete with substantive policy commitments. Unlike the postwar constitutions of Western Europe, this detail does not seem to have been targeted at constraining courts, but like the constitutional detail of the early twentieth century, at controlling legislatures. As Kim Scheppele has explained, in countries with a history of democratic-looking procedures, but authoritarian governments, constitutional drafters sought to secure their countries' democratic futures not through procedural frameworks, but through substantive constitutional guarantees: "These new constitutions provide[d] answers to questions that are in older constitutional democracies given by legislation . . . Thick [or detailed] constitutions take a great many policy choices out of the hands of the remodeled political institutions, and lodge them instead in a higher law" (Scheppele 2006, 38). Constitutions in this region, therefore, continued the European trend of drafting highly specific constitutional documents. Indeed, if we compare the length of the former Soviet Republic's 1989 constitution to that of the Russian constitution as of 2013, we see that it increased from 8,734 to 11,138 words.

Latin America

Like in the U.S. states and Europe, Latin America's constitutional development reflects the region's particular political history. Most Latin American countries became stable democracies only in the 1980s. Under shifting authoritarian governments, Latin American constitutions were replaced frequently, often to mark changes in political leadership (Negretto 2014, 9). Thus, throughout much of the nineteenth and twentieth centuries, the flexibility of Latin American constitutions reflected the existence of political instability, rather than direct democracy. Nonetheless, we believe that several shifts away from entrenchment and toward specificity in Latin American constitutions were, at least partially, responses to democratic pressure for increased control over policymaking.

Figure 6 depicts the historical development of the entrenchment scores; Figure 7 depicts the historical development of the specificity of Latin America's constitutions. The left-hand panels are again based on all countries for which we have data, while the right-hand panels are based on a stable sample of all countries for which we have had data since 1860. Figure 6 shows that entrenchment scores have always been lower in Latin America than in Europe or the U.S. states, which presumably reflects the authoritarian instability. However, Figures 6 and 7 depict a marked decrease in entrenchment scores and an increase in specificity in the 1930s. They also reveal a further increase in flexibility and specificity in the 1980s.

The first shift away from entrenchment was, at least in part, a response to popular demands. The early twentieth century witnessed a wave of radicalism and pressure for democratization (Gargarella 2013, 91–102). These movements were reflected in the addition of elaborate social policies to Latin American constitutions (Gargarella 2013, 106). Mexico's constitution of 1917 illustrates this dynamic. A product of the Mexican Revolution, this document included specific protections for laborers, including maximum working hours, minimum wages, and the right to strike. It also mandated agrarian/land reform specifying that "necessary measures shall be taken to divide up large, landed estates," and explicitly subordinated private property rights to the public interest. The advocates of these specific provisions insisted that those who would later implement the constitution could not be trusted to legislate on behalf of laborers. One delegate to the constitutional convention explained, "I think our Magna Carta ought to be more explicit on this point . . . who will guarantee us that the new Congress will be composed of revolutionaries? Who will guarantee us that . . . the government . . . will not tend toward conservatism?" (quoted in Niemeyer 1974, 108).

Beginning with Mexico, Latin American countries began to include a range of socioeconomic rights in their constitutions. By 1945, one political scientist noted that "virtually statutory detail concerning all aspects of labor regulation, prohibition of monopolies, restriction of the competition of foreign labor, social security, and provision for the educational advancement of the working classes are typical of the bold imagination shown by Latin American Constitution-makers . . . in the past quarter-century" (Fitzgibbon 1945). By 1950, no less than 15 countries in the region had reformed their constitutions to add such policies. Despite the democratic pressures that led to these provisions, Latin American governments were typically characterized by long periods of authoritarian rule throughout much of the century that followed.

When many Latin American countries transitioned to democracy in the 1980s, they ratified new, and even more detailed, constitutions. Many of the changes during this period, particularly in Andean countries, involved the creation of "more inclusive rules for electing presidents and legislatures" (Lalander 2012; Negretto 2014, 2). The constitutions of Bolivia and Ecuador, for instance, contain provisions devoted to "popular participation/transparency" and "social control" of the government (Lalander 2012, 188). During the 1980s and 1990s, and in the face of sweeping neoliberal economic reforms and in the wake of human rights atrocities, many Latin American constitutions also included enhanced slates of rights (Gargarella 2013, 151; Rodríguez-Garavito 2011, Sikkink 2011).

This increase in constitutional specificity necessitated decreased entrenchment. For instance, Arantes and Couto (2012) argue that the many explicit policies in the Brazilian constitution forced the legislature to pursue constitutional amendments as part of the legislative process. They note that "the more a constitution embodies public policies, the longer the text is; the longer the text is, the more it forces governments to govern by means of constitutional amendments and the more a constitution is amended, the longer it becomes

FIGURE 6. Average Entrenchment Scores of Latin American Constitutions

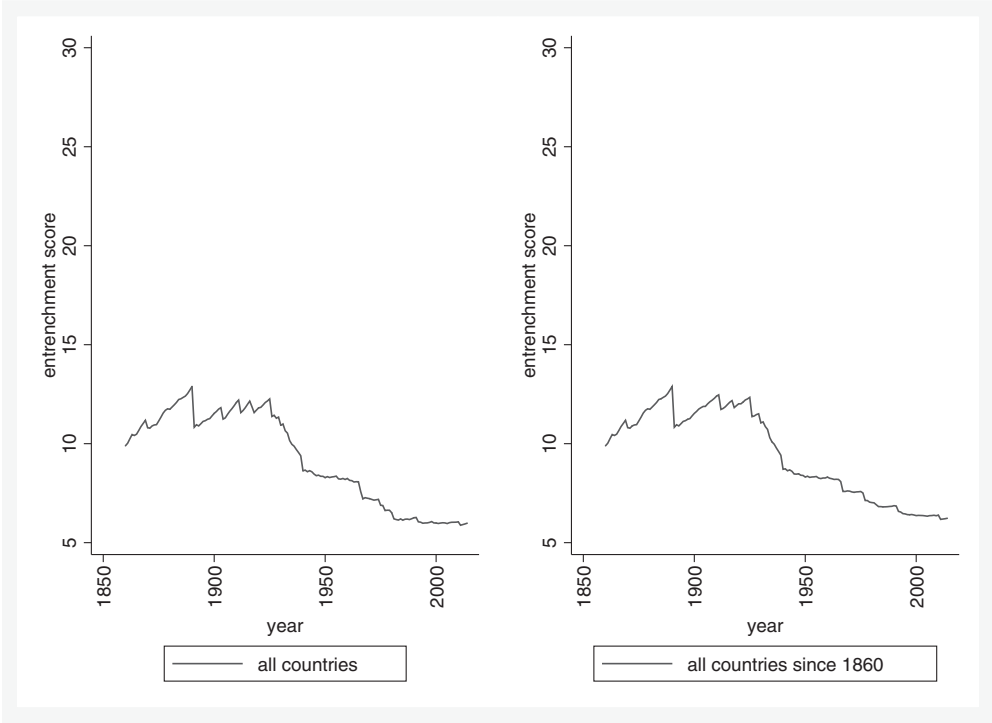
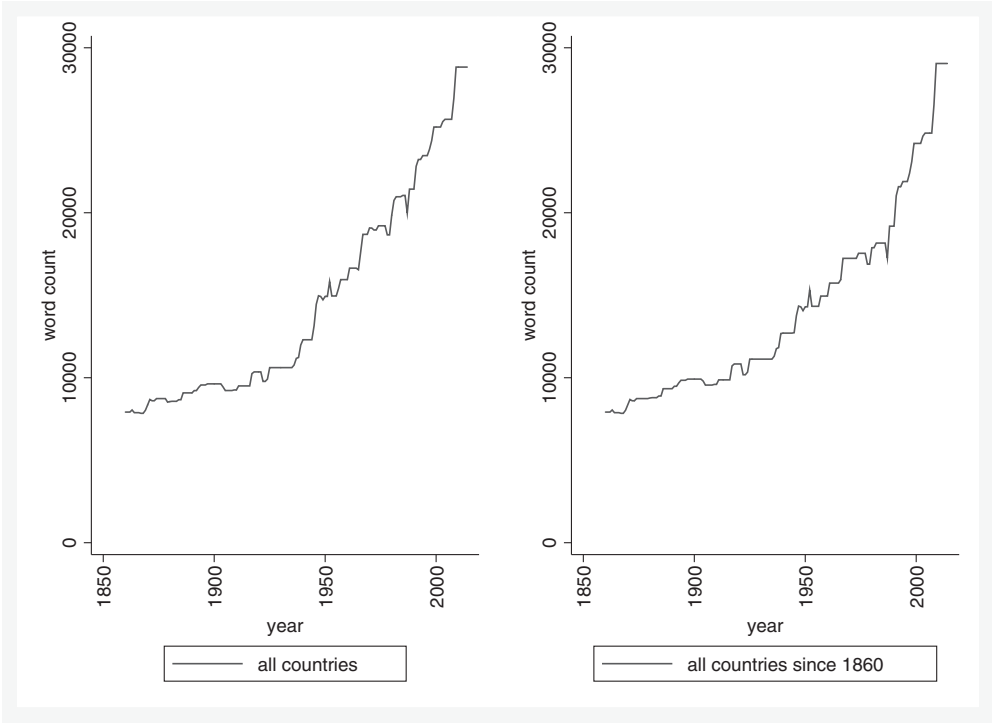


FIGURE 7. Average Word Counts of Latin American Constitutions



which tends to trigger the same cycle all over again" (Arantes and Couto 2012, 214).

Finally, the policymaking power of increasingly independent constitutional courts may also account for the increase in the specificity and flexibility of Latin American constitutions. As countries transitioned to democracy, international financial institutions promoted the creation of independent judiciaries, capable of protecting private property rights, and many features of Latin American politics have now been "judicialized" (Angell, Schjolden, and Sieder 2005, 1). As courts have expanded their influence over policymaking, legislatures have sometimes responded by "implement[ing] formal constitutional changes precisely to confirm or reject judicial rulings" (Negretto 2014, 6). For example, several twenty-first century amendments to the Columbian constitution, addressing policies like the criminalization of drug possession and the mechanics of the civil service system, were designed to overturn the high court's interpretation of the constitution (Dixon and Landau 2015, 16–7). In fact, since 1991, every presidential administration has proposed amending the constitution in response to a judicial ruling (Rodríguez-Raga 2011, 85).

It is possible to understand this legislative override of judicial decisions as the democratic exercise of the popular will over an elite and unrepresentative court. However, the normative significance of such court-constraining amendments is open to debate (Dixon and Landau 2015, 1–5; Gloppen, Gargarella, and Skaar 2004). As in the post-Soviet transitions from autocracy to democracy, many constitution-makers viewed independent judiciaries as watchdogs, who could help to maintain fragile new democracies by checking the other branches of government (Issacharoff 2015). Read in this light, constitutional amendments aimed at constraining the power of Latin America courts may appear less like popular constitutional interpretations and more like retaliation by legislative and executive branches chafing at their constitutional restraints (Kapizweski and Taylor 2013, 807–8).

CONCLUSION

We have argued here that the familiar model of constitutions as highly entrenched and spare documents captures neither the form nor function of many present-day democratic constitutions. Our goal in this article is to begin to close the gap between so much of existing constitutional theory and today's actual constitutional practices. The clearest implication of our findings is that constitutional scholars should no longer define constitutional success in terms of the stability (or majesty) of a single constitutional text. Instead, we argue that these features address some of the hazards associated with democratic constitutionalism, but create others.

Ultimately, all constitutional drafters face the paradox that majority rule both defines and threatens democracy. Entrenched constitutional texts may be robust to attempts to undermine constitutional constraints through formal revision, but such documents often allow for markedly antidemocratic governance. Specific constitutions grew out of a desire for tighter democratic control over policymaking, but as a result, they are likely to be far worse at hindering office-holders or tyrannical majorities who attempt to revise them. It is perhaps fortunate, therefore, that the actual practice of constitutional drafting does not require a dichotomous choice between the two models we have described. In fact, many national constitution-makers have inserted eternity clauses, declaring certain basic constitutional principles unamendable, while leaving the rest of the constitution more flexible. By some estimates, forty percent of existing national constitutions employ this strategy (Roznai 2013). Others have adopted tiered amendment procedures, rendering some provisions subject to higher amendment thresholds than others (Dixon and Landau, 2016, 1). These hybrid designs may enable democratic majorities to exert enhanced control over some areas of policymaking, while also allowing constitutions (and judiciaries) to protect fundamental rights from majority factions.

Further research is necessary to determine whether features like eternity clauses and tiered amendment procedures stemmed from drafters' conscious attempts to overcome the problems associated with each model of constitutionalism. More generally, constitutional scholars may want to investigate the conditions under which popular distrust in government actually results in increasingly specific constitutions. Future studies might ask, for example, whether fear of a powerful judiciary is largely responsible for the global shift away from entrenched documents, or how frequently these shifts are associated with democratization or with movements' demands for increased provision of public goods. Constitutional scholars might also seek to identify other factors that cause a polity to embrace specificity. For instance, one might test the hypothesis that homogenous communities are more likely than divided societies to adopt specific constitutions (Lerner 2011), or inquire about the influence of supranational structures on the entrenchment of constitutional documents (Ginsburg and Posner 2010).

Finally, our inquiry into the design logic of specific and flexible constitutions has normative implications for the process of constitutional drafting. We have focused exclusively on the origins and logic of unentrenched constitutions. Consequently, this research does not allow us to evaluate the postadoption effects of this design. However, our analysis does suggest that, since unentrenched constitutions are intended to promote tighter control of the citizenry over the policymaking process, it is particularly important to attend to the processes through which these constitutions are written and revised. It is certainly far from straightforward to locate a "people" or identify its "will." However, if unentrenched constitutions are to promote democratic control over officeholders through frequently updated, specific instructions, then these instructions must issue from recognizably democratic sources. The drafting and revision procedures for unentrenched constitutions should, therefore, be rendered as inclusive and representative as possible. Indeed,

recent scholarship suggests that a higher degree of citizen participation in constitutional drafting might produce more inclusive constitutional documents (Ginsburg et al. 2009), and does correlate with higher measures of democracy after a constitution's adoption (Eisenstadt et al. 2015). We have been living in a brave new world of un-entrenched constitutions for quite some time. To ask meaningful and relevant questions about it, constitutional theory must fully register this transformation.

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