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ARTICLE

Constitutional Recency and Support for Judicial Review

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Abstract
Under what conditions are people more likely to support judicial invalidation of legislative acts? We theorize that constitutional recency confers greater democratic legitimacy on constitutional provisions, reducing concerns that judges may use dated language to impose their own will on a living majority. Exploiting differences among US state constitutions, we show in a pre-registered vignette experiment and conjoint analysis that Americans are more supportive of judicial review and original intent interpretation when presented with a younger constitutional provision or constitution. These results imply that Americans might alter their approach to the US Constitution if it were changed as easily and as often as a typical state constitution.

Keywords: Judicial Review; US Constitution; Originalism; Public Opinion; Experiments; Democracy

The US Constitution has received only 15 amendments in the past 200 years, leaving it silent on abortion, assault-style firearms, marriage, corporate personhood, affirmative action, campaign finance, environmental protection, and other modern issues. These omissions provoke fierce debate about the proper application of an eighteenth century document to twenty-first century problems, dividing judges and even the public into originalist and living Constitution camps (Greene, Persily, and Ansolabehere 2011). Following a series of controversial decisions, public approval of the US Supreme Court recently reached a historic low (Jones 2022). Public frustration with judicial review is thought to reflect concern about judges exploiting dated language to thwart living majorities (Bickel 1986).[1] This logic implies a hypothesis:

[1]Empirically, judges (both elected and appointed) behave as if the public disapproves of counter-majoritarian decision-making (Clark 2009; Epstein and Martin 2010; Hall and Ura 2015; Kastellec 2016). In addition, aggregate confidence in courts and individual willingness to accept judicial outcomes decreases when courts exercise more judicial review (Caldeira 1986; Crabtree and Nelson 2019).

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We should expect higher support for judicial invalidations that rely on recently adopted constitutional provisions than for invalidations that rely on dated provisions. After all, relying on recent provisions enables judges to more credibly claim that they are merely enforcing the terms of a legitimate higher-order political contract.

Since all major provisions of the US Constitution are over half a century old, this hypothesis is untestable unless we look beyond that singular document. We therefore present a pre-registered[2] study that leverages diversity among state constitutions. State constitutions are relatively youthful due to a mix of frequent amendments and occasional replacements (Dinan 2018). State constitutions are so easily changed, in fact, that a legislature's failure to update a particular provision signals tacit endorsement of it (Kincaid 1988), so that even older provisions may claim the living generation's authority. As a result, interpretive disputes seldom reach with equal force into state constitutional discourse (Tarr 1991) – at least among the attorneys, scholars, and judges engaged in that discourse. In short, we argue that the recency of state constitutions (relative to the US Constitution) reduces concerns about counter-majoritarianism and thereby promotes greater acceptance of judicial review.

Our study's centerpiece is a vignette experiment wherein a nationally representative sample reacts to a state supreme court's invalidation of a policy, and in which we randomly vary the adoption year of the critical state constitutional provision. Respondents show greater support for judicial invalidation – even if it overturns a policy they support – when the decision is rooted in a state constitutional provision adopted in the twenty-first century rather than the nineteenth. This is our central finding, and it holds fascinating implications for how the American public might view the US Supreme Court differently if it were interpreting a younger or more frequently amended Constitution.

To explore underlying mechanisms, our pre-registered study also includes a conjoint analysis examining more variables and outcomes, albeit more tentatively. This analysis examines features of state constitutions as a whole rather than of specific provisions – and we find that the age of the constitution has less impact on support for judicial review than the age of a specific provision did. The conjoint analysis also considers respondents' judicial philosophies. After all, youthful state constitutions mute interpretive disputes among legal elites, apparently by increasing the legitimacy of original intent jurisprudence (Christiansen 2017; Farinacci-Fernós 2020; Tarr 1991). Though Americans have sincere attachments to originalist or living interpretation of the US Constitution (Krewson and Owens 2021), we find that our respondents, like legal elites, adapt their views when presented with state constitutions of varying ages. That is, our respondents show greater support for original intent interpretation when presented with a younger constitution, which may help explain the results of our vignette experiment.

Theoretically, this study provides a new way of thinking about an old question: why do Americans support judicial review? As Bickel (1986) recognized long ago, there is no way around the fact that the exercise of judicial review is an exercise in counter-majoritarianism. When the Court strikes down legislation, nine unelected,

[2]We pre-registered our hypotheses, design, and analytic approach in the EGAP registry hosted by the Open Science Foundation. We have swapped the numbering of hypotheses H1 and H2 for clarity. The content of the pre-registration may be found in our supplement or at https://osf.io/w4k6j/?view_only=795bdde1bffb46d3b88e78c092a03874.

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life-tenured judges thwart democracy. Why do "the people" allow it? For the first time, our innovative study allows us to see how the nature of the document being used to strike down legislation matters. Apparently, whether a body of judges is elected or not (see Crabtree and Nelson 2019) is less important than whether the document being invoked is old or new. By manipulating state constitutions, we gain insight into the importance of a constitution's age that is otherwise unavailable through a study invoking the US Constitution alone. Though theoretical, our contribution addresses a fundamental question in political science regarding the sustainability of judicial review in a constitutional democracy.

Normatively, our findings are consistent with a broader argument for more frequent amendment of the US Constitution (cf. Levinson 2006). Respondents have more favorable views of state constitutions with higher amendment rates or more recent adoption (Brown and Pope 2018); our analysis contributes by finding greater support for judicial review when respondents are presented with a younger constitutional provision. Perhaps Americans would change their approach to the US Constitution if it were changed as easily and often as a typical state constitution.[3]

Theory

Infrequent amendment of the US Constitution has prompted development of diverse interpretive philosophies as judges seek to apply a document from a foreign era to modern disputes. While the public may not fully appreciate the legal community's nuanced distinctions between originalism and textualism (cf. Bork 2009; Scalia 2018) or between living constitutionalism and purposivism (cf. Ackerman 2006; Breyer 2006), the public does grasp the general distinction between originalism and living constitutionalism loosely defined (Greene, Persily, and Ansolabehere 2011; Krewson and Owens 2021). As popularly understood – and, therefore, as used in this article – originalism assumes that the US Constitution's writers chose their words carefully, placing the burden on the amendment process rather than on judges to update that language to meet modern needs; by contrast, living constitutionalism seeks each provision's implicit purpose, then applies that purpose to modern circumstances consistent with the living generation's sensibilities.[4]

Though the public lacks detailed political knowledge (Converse 1964), Americans do have general views about the US Constitution (Levinson 1988; Stephenopoulos and Versteeg 2016; Zink and Dawes 2016; Brown and Pope 2018; Dawes and Zink 2021) and its proper interpretation (Greene, Persily, and Ansolabehere 2011). Greene, Persily, and Ansolabehere (2011) find that public support for originalism is explained by variables which underlie justifications for originalism among jurists. For example, people who say judges should "strictly follow the law no matter what people in the country may want" are more likely to identify as originalist, even

[3]Of course, more frequent amendments to the Constitution may have other unintended effects, especially if veneration for the Constitution (Brown and Pope 2018) and the social tie created by it (Powell 1985; Amar 2000; 2012) are a product of its age. Thus, while we are confident in our empirical conclusions, we avoid taking a normative stance.

[4]Of course, there are methods of legal interpretation beyond originalism and living constitutionalism. As we discuss, however, these two philosophies are directly tied to the age of a constitution, and we believe a constitution's age is directly related to support for judicial review. Thus, other legal methods are theoretically irrelevant for our purposes.

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controlling for demographic and political characteristics. As they note, their findings "by and large conform to what we would expect of respondents who are engaging the questions in a serious and relatively informed manner… . [I]t parallels the divide within *professional* constitutional discourse among lawyers, judges, and academic commentators" (411, emphasis in original).[5]

When people evaluate judges, only a judge's ideology clearly explains more variation in support than whether a judge is originalist or espouses living constitutionalism. Judicial philosophy is *more important* than a judge's personality, religion, age, race, or sex (Krewson and Owens 2021, 2022). Like most political matters, judicial philosophy correlates with partisanship: Republicans lean toward originalism while Democrats lean toward living constitutionalism (Krewson and Owens 2021).[6] Nevertheless, judicial philosophy has an independent effect on how people evaluate court decisions, even after accounting for partisanship and diverse other considerations (Krewson and Owens 2022; Rivero and Stone 2023).[7] Simply put, disputes between originalist and living interpretations of the US Constitution divide not only judges but the public, and the public's philosophical differences appear to be at least somewhat sincere.

Meanwhile, two fundamental differences between state constitutions and the US Constitution mute interpretive disputes at the state level. First, and most importantly, state constitutions undergo such frequent amendment and even replacement that they tend to accommodate legislators' statutory interests, reducing the interpretive burden on state judges (Brown 2018; Dinan 2018; Marshfield 2018). The median state constitution receives more amendments in 20 years than the US Constitution has had in 200, and every state constitution has been amended more recently than the US Constitution (Brown 2023). Most states have replaced their constitution entirely – often more than once – so that the median state constitution is roughly half the age of the US Constitution.[8] Unlike the US Constitution, state constitutions directly address modern concerns – especially in states with the highest amendment rates, where the legislature's failure to propose a modernizing amendment implies acceptance of the status quo (Kincaid 1988, 13; but see Brady 2021).

[5]Judicial philosophy – especially discussion of originalism and living constitutionalism – is a dominant topic during confirmation hearings, and major news and polling outlets consistently survey Americans regarding their support for these two philosophies (see Krewson and Owens 2021). Rivero and Stone report that "all 28 front-page *New York Times* stories on constitutional Supreme Court cases from 2010 to 2014 described the reasoning behind the decision given by the justices," and "roughly 25 percent of all Senator press releases and 20 percent of network news transcripts about Supreme Court nominees directly reference a principle of judging" (2023, 3–4).

[6]Rivero and Stone (2023) find greater support for original intent and original meaning among knowledgeable conservatives than among knowledgeable liberals. For their measure closest to living constitutionalism (whether a decision is "consistent with current public opinion") they find an ideological gap independent of respondent knowledge. They refer to originalism as a "traditional" legal principle and to variations of living constitutionalism as "non-traditional."

[7]People also evaluate courts and judges based on their policy views, their legal expectations, and their perceptions of procedural fairness (Gibson, Caldeira, and Spence 2005; Zink, Spriggs, and Scott 2009; Gibson and Caldeira 2011; Zilis 2015; Cann and Yates 2016; Tyler 2021), considerations accounted for in the study cited.

[8]Nineteen states retain their original constitution, nine are on their second, and the remaining twenty-two have had three or more. At the extreme, Louisiana is on its eleventh. The median state constitution was adopted in 1890; one quarter have been adopted since 1959. See Dinan (2006) and Brown (2023).

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Second, when difficult state constitutional questions do arise, state judges have ready access to source materials shedding light on original intentions. Many state archives retain full transcripts of their constitutional conventions (Baum and Fritz 2000; Dinan 2006). By contrast, we have no transcript of the federal convention except Madison's notes – apparently heavily massaged (Bilder 2015). In addition, the amendments that occur so frequently in the states leave a paper trail of legislative hearings, voter pamphlets, and other informational materials (Dinan 2018; see also Salvucci 1997; Gilbert 2012).

For these reasons, "the critique of federal original-intent jurisprudence does not apply … with equal force" to state jurisprudence (Tarr 1991, 851; see also Williams 2009, 318–19). Instead, original intent jurisprudence reigns as "the primary canon of [state] constitutional interpretation," applied consistently in nearly every state for over two centuries (Christiansen 2017, 341). State constitutional change occurs through a "democratic, public, participatory, popular, and socially transcendental" process, legitimizing this reliance on original intent (Farinacci-Fernós 2020, 23).[9] These differences between state and federal jurisprudence demonstrate that interpretive philosophies reflect an interaction between an individual's prior political attitudes and core constitutional features like the age or changeability of a constitution's provisions.

This emphasis on interpretive attitudes risks losing the forest for the trees, however. Judicial philosophy is merely a means to an end, after all: the final judicial decision. Thus, taking the next logical step, we might expect the same conditions that mute interpretive disputes in the states – in short, the relative youthfulness of state constitutional provisions – to also mute concerns over judicial review more generally. State and federal judges have claimed the authority to strike down legislative acts as unconstitutional since the nation's founding (Prakash and Yoo 2003).[10] Judicial review is not definitionally anti-democratic, of course. Indeed, judicial review may enhance democracy by mitigating the crucial principle-agent problem of popular sovereignty, revealing government misbehavior, and coordinating the public's ability to respond effectively (Law 2008). In practice, the US Supreme Court's willingness to exercise this authority reflects extralegal factors like public support (Vanberg 2001; Ura and Wohlfarth 2010; but see Ura and Wohlfarth 2022), particularly relative to the popularity of the president (Gardner and Thrower 2023), and of Congress (Merrill, Conway, and Ura 2017; see also Bassok 2013). Similar findings exist at the state level (Kastellec 2016; Langer 2002), where we also observe that state supreme court invalidations are less frequent in states with higher amendment rates (Brown 2018; 2023; Marshfield 2018). All this makes sense: since courts cannot enforce their rulings, judges who fear executive non-implementation (Hall 2014; Gardner and Thrower 2023) or retaliatory legislation (Clark 2009) exhibit self-restraint.

[9]Farinacci-Fernós (2020, 1) calls this interpretive approach "original explication" rather than originalism, since it focuses on "outwardly-uttered expressions of the framers of the democratically-elected drafting body during public deliberations, as authoritative."

[10]Of course, not all countries follow this model. Canada and Israel allow for legislative overrides of judicial review (Stephanopoulos 2005). The United Kingdom treats exercises of judicial review as suggestive, with courts able to rule that a law is incompatible with protected rights under the Human Rights Act but not being able to require Parliament to look into the issue (Renwick et al. 2022). Debate over the value and role of judicial review in the US – at both the federal and state levels – continues to rage (Berry, Bannon, and Keith 2021; Bowie 2021).

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Given that judicial review hinges critically on public support, it is striking how little we know about the origins of public support for judicial review. Traditionally, the primary concern regarding judicial review has been that unelected judges may substitute their will for that of elected bodies that can claim popular mandates (Bickel 1986; Rogers and Ura 2020). As it turns out, however, citizens are "no more likely to accept the use of judicial review by an appointed court than an elected court" (Crabtree and Nelson 2019, 287), casting significant doubt on this received wisdom. There must therefore be more that motivates American skepticism of judicial review.

This observation leads us back to the relative youthfulness of state constitutions. When, as in many states, judicial review is based on a more recently updated constitution, it strengthens the case that invalidation merely enforces a higher-order social contract rather than substituting the court's will for the legislature's. In our argument, whether judges are appointed or elected matters less than whether the documents they interpret bear the living generation's fingerprints. Again, legal elites are aware of the differences between the US Constitution and state constitutions, leading to the dominance of original intent jurisprudence in state constitutional discourse and reducing controversy over the use of judicial review. Our core prediction is that common citizens will respond similarly as legal elites if only they are informed of how state constitutions differ, so that respondents presented with a younger constitutional provision will manifest more support for judicial review than respondents presented with an older one.[11]

To this point, we have spoken of constitutional youthfulness as an abstract theoretical concept. In practice, we have in mind the age of a specific constitutional provision. To a lesser extent, we also consider the overall age or amendment rate of a constitution as a whole. With these operationalizations in mind, we arrive at these (pre-registered) hypotheses:

H1: Respondents will show greater support for judicial invalidation of state legislation under state constitutional authority when informed of the state constitution's democratic features – that is, of its (a) relatively higher amendment rate, (b) more recent amendment activity, or (c) relatively recent adoption.

H2: Respondents will show greater support for originalist interpretation of a state constitution (or reduced support for a living interpretation) under the same circumstances.

As described more fully in the next section, we test these hypotheses with a vignette experiment focused on H1c and conjoint analysis that evaluates both hypotheses. With an eye on competing explanations, we test a few additional

[11]Americans are largely ignorant of state constitutions, with only half or so aware their state has a constitution and only a fifth correctly guessing that their state constitution receives more amendments than the US Constitution (Brown and Pope 2018). Our design leverages this ignorance; after all, if respondents were already experts on their state constitutions, then presenting randomly selected respondents with information about these documents would yield no results, since their attitudes would already take account of this information. By providing information about actual state constitutions in our conjoint analysis, we can examine important, realistic counterfactuals about the effects of constitutional recency on support for judicial review.

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hypotheses, also pre-registered. To be clear, we have not developed a strong theoretical foundation for these ancillary hypotheses; we include them only to provide an explicit test of the most likely confounders. Recognizing, for example, that respondent support for judicial invalidation of a particular statute may hinge on the statute's general popularity, we test this hypothesis:

H3: Respondent support for judicial invalidation of a specific state law will have an inverse relationship with how easily that law passed out of the state legislature.

We consider the possibility that respondent judicial philosophy is merely an instrumental means to a partisan or policy end by testing two additional hypotheses:

H4: Respondents will show greater support for originalist interpretation of a state constitution from a state with a similar partisan lean as their own, particularly with a younger or more frequently/recently amended constitution.

H5: Respondents will show greater support for judicial invalidation of a policy they personally oppose.

Design

In August 2022, we recruited a nationally representative sample of 1,978 American adults using Lucid (cf. Coppock and McClellan 2019), removing those who failed attention checks.[12] Complete question wording appears in a supplement. We first asked respondents about their agreement with seven policies, with four framed in a conservative direction, and three in a liberal direction. After several intervening questions, one of these policies was randomly selected to appear in our vignette experiment at the end of the survey. We next collected respondent demographics.

Prior to any manipulation, we then collected respondent views about the US Constitution. To familiarize them with the format used in our subsequent conjoint experiment, we displayed a table showing six facts about the US Constitution: the year it was written (1787), the year of its last amendment (1992), its length (fifteen pages), its number of amendments (twenty-seven), its focus (structuring government), and the country's partisan lean (competitive).[13] Using a seven-point scale, we asked respondents about their agreement with two separate statements about interpretation of the US Constitution: "Judges should interpret the United States Constitution as generally understood at the time the constitutional provisions were written" (to measure support for originalism), and "Judges should interpret the United States Constitution as generally understood according to current views and sensibilities" (to measure support for living constitutionalism). To measure support for invalidation we asked, "How much would you approve of judges using the United States Constitution to strike down state laws?" Finally, to gauge views of

[12]Respondents who failed to correctly answer one of two attention check questions (832) were immediately removed from the survey and replaced by newly recruited respondents, so that attention check failures would not influence our survey's representativeness. Put differently, we screened 2,810 individuals before settling on our final pool of 1,978.

[13]Length calculations assume 550 words per page.

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	State Constitution 1	US Constitution
Year constitution established	1868	1787
Year of last amendment	2010	1992
Length of constitution	142 pages	15 pages
Number of times amended	85 times	27 times
Focus of constitution	Structuring government	Structuring government
Partisan leaning of state	Republican	Competitive

Figure 1. Illustration from Instrument.

the US Constitution, we measured respondent agreement with four statements drawn from past research (Brown and Pope 2018; Dawes and Zink 2021): "The creators of the US Constitution were looking out for themselves," "The US Constitution should be amended more often," "The US Constitution is outdated," and "The US Constitution was written by visionary people," each on a five-point scale.

Respondents then read these instructions: "As you may know, every state has its own constitution. Some states have replaced their constitution from time to time, while others have kept a single constitution since statehood. State constitutions vary in their length and their amendment rate. They also vary in whether they focus on erecting government structures rather than establishing specific laws and policies. On the next few screens, we will briefly describe a few hypothetical state constitutions and ask for your reaction. You will consider 4 different state constitutions." We then presented a conjoint experiment, iterated four times (Hainmueller et al. 2014). Each time, respondents saw a table like the one used earlier, but with an additional column providing information about a hypothetical state constitution. An example appears in Figure 1.

Values for each hypothetical state constitution were drawn randomly from a realistic range reflecting actual state constitutions. "Year constitution established" was one of 1780, 1868, 1890, 1949, or 1986; "year of last amendment" was 2000, 2005, 2010, 2015, or 2020; "length of constitution" was 16, 30, 50, 85, or 142 pages; "frequency of amendment" was 16, 30, 50, 85, or 142 times; "focus of constitution" was "structuring government" or "making policy"; and "partisan lean of state" was "Republican," "Democratic," or "Competitive."[14] Below each table, respondents answered the same questions they answered previously about the US Constitution, but about the state constitution before them. We use this conjoint experiment to assess H1, H2, and H4.

After this conjoint experiment, we concluded with our vignette experiment: "We would like to ask you about a recent controversy in an American state. Last year, this state enacted a law [*policy description piped in*]. This law passed [*easily, with over 70%*

[14]With two exceptions, these ranges align roughly with the 5th, 25th, 50th, 75th, and 95th percentiles of actual state constitutions. For "year of last amendment," we widened the range to create a more meaningful treatment. For "frequency of amendment," the intended values were 13, 54, 126, 172, and 237. These were inadvertently replaced with the values given here, but the intended values are close enough to those used that we have no validity concerns.

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of state lawmakers voting in favor OR *narrowly, with barely 50% of state lawmakers voting in favor*]. A few months ago, this state's highest court struck down this law, saying that it violates a provision of the state constitution that was ratified in [*1896* OR *2016*]. In general, is it appropriate for a court to strike down a law in this sort of situation?" The policy description piped into the vignette aligned with one of the policies we asked about at the beginning of the instrument, enabling us to consider the respondent's agreement or disagreement with the policy in question. Randomly selecting one of several possible policies should cause idiosyncrasies associated with any particular policy to average out. Moreover, placing the vignette experiment after the four iterations of the conjoint analysis meant that respondents first had the opportunity to gain some sense for how state constitutions vary along these dimensions. We use this vignette experiment to assess H1, H3, and H5.

Results of vignette experiment

Our vignette experiment considers the age of a specific constitutional provision, creating a direct but challenging test of our theory that a constitution's youthfulness can reduce concerns about judicial review. We asked respondents to evaluate a state court's invalidation of a specific state statute (from 1, "very inappropriate," to 4, "very appropriate") after presenting a vignette varying along the following dimensions. First, whether the statute passed easily (coded 0) or narrowly (coded 1) through the state legislature. Second, whether the state court relied on a constitutional provision from 2016 (coded 0) or from 1896 (coded 1). And third, the respondent's previously measured agreement with the particular policy that was piped into the questionnaire (from 1, "strongly oppose," to 6, "strongly support").

Ordinary least squares regression confirms – unsurprisingly, and consistent with H5 – that respondents show more support for judicial invalidation of a policy they personally oppose ($p < 0.01$). More to the point, we also observe that respondents are more favorable toward judicial invalidation – even invalidating a policy they support – when the court relies on a more recently adopted provision ($p < 0.01$), consistent with H1.[15] Incidentally, we find no effect of legislative divisiveness, contrary to H3 ($p = 0.64$). Figure 2 plots predicted values and 95% confidence intervals over the observed range of policy agreement, with separate lines for newer (dark) and older (light) constitutional provisions. (Full results appear in the supplement, along with pre-registered alternative specifications such as ordered probit.)

Changing from a new to an old constitutional provision has the same estimated effect as moving 1.26 points along the 6-point policy agreement scale – substantively, a very large estimated effect that suggests Americans may react strongly to the age of the specific constitutional provision underlying a judicial invalidation. Judicial review apparently has greater legitimacy when rooted in a recently adopted – and thus more democratic – constitutional provision.

[15]The coefficients differ with $p = 0.02$ at the left end of the agreement scale and $p = 0.01$ at the right end, with more significant differences in between. H1b pertains to how recently the constitution was amended, and H1c to how recently it was replaced. The vignette experiment does not specify whether the provision was added by amendment or by constitutional replacement, so this result could reasonably be interpreted in terms of either sub-hypothesis. We do not test H1a (dealing with frequency of amendment) in the vignette, though we address it in the conjoint.

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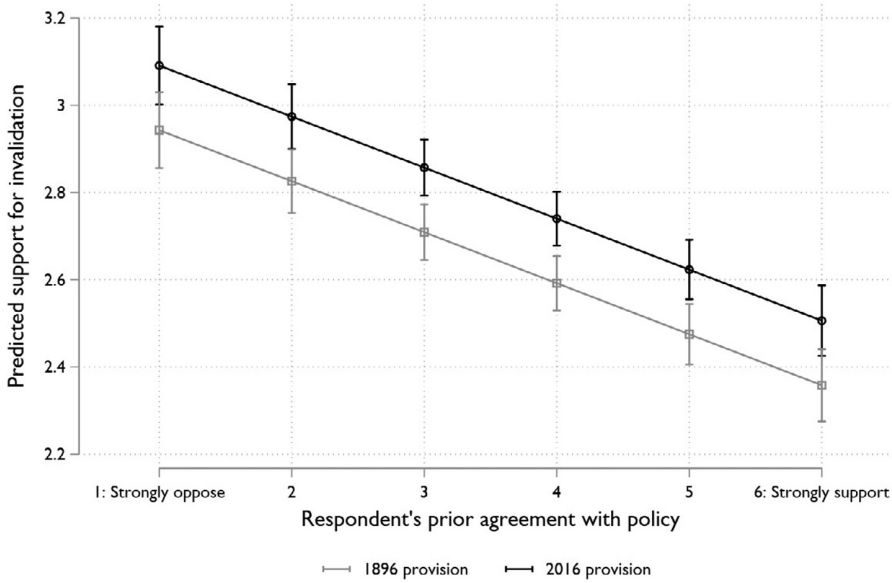


Figure 2. Results of Vignette Experiment.

Results of conjoint analysis

We now turn to our more exploratory conjoint analysis. Unlike the vignette experiment, the conjoint analysis examines features of state constitutions as a whole rather than features of a specific constitutional provision. This generality leads us to expect somewhat weaker effects. This part of our analysis considers two dependent variables: respondents' support for judicial review (to test H1) and respondents' support for original intent interpretation relative to a living interpretation (to test H2).

We begin with descriptive information about these dependent variables, beginning with our measure of support for judicial review. Using a 5-point scale from "strongly disapprove" to "strongly approve," we asked respondents whether they would approve of a court using a particular constitution to strike down a state law. When evaluating the US Constitution, 30% of Democrats and 28% of Republicans disapproved of judicial invalidation, while 34% of Democrats and 41% of Republicans approved – relatively minor partisan differences. When evaluating state constitutions (averaging across the four iterations of the conjoint analysis), 29% of Democrats and 30% of Republicans disapproved of judicial invalidation, while 45% of both Democrats and Republicans approved.[16] Thus, at a broad level, we see more acceptance of

[16]The attentive reader will discern that 38% chose the neutral option about invalidation under the US Constitution and 28% did so for invalidation under state constitutions. Tellingly, 18% of respondents gave the neutral response to all five invalidation questions – that is, the question about the US Constitution and all four iterations of the conjoint. There is no way to tell whether these 18% sincerely have no opinion or whether they faked their way through the questionnaire to earn some quick money, so we proffer no analysis of these respondents. Either way, their presence in the sample does not threaten our conclusion; to the contrary, respondents who mark neutral options throughout the questionnaire bias our estimates toward zero, lending greater confidence to results that nevertheless attain significance.

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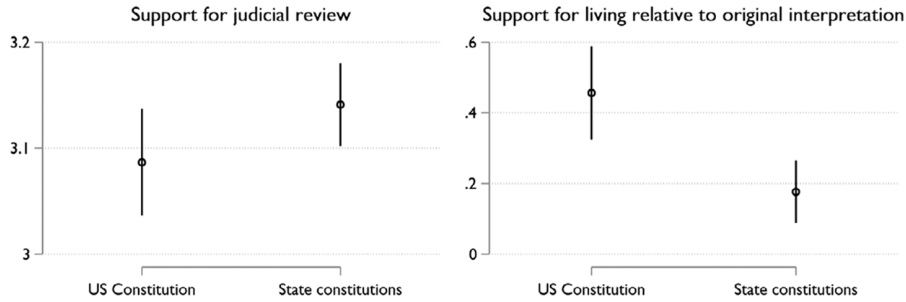


Figure 3. Overall Support for Dependent Variables, Comparing US Versus State Constitutions.

judicial invalidation in the context of state constitutions, among both Republican and Democratic respondents.

For our other dependent variable, we constructed a measure of respondent judicial philosophy from two questions. For the US Constitution and for each state constitution in the conjoint analysis, we included one item gauging support for an originalist interpretation and another gauging support for a living interpretation. With responses to both items spanning a 7-point scale, subtracting the former from the latter yields a 13-point net score, with positive net scores indicating greater support for a living approach, and negative scores indicating greater support for an originalist approach. For the US Constitution, average scores on this 13-point scale land at 1.63 for Democrats and −1.12 for Republicans; more intuitively, 57% of Democrats favored a living interpretation (with 27% neutral and 16% favoring an originalist interpretation), and 48% of Republicans favored originalist interpretation (with 27% neutral and 25% favoring a living interpretation). Averaged across the four iterations of our conjoint analysis of state constitutions, average scores were 0.76 for Democrats and −0.73 for Republicans; 52% of Democrats favored a living interpretation (with 24% neutral and 23% favoring originalist interpretation), and 46% of Republicans favored an originalist interpretation (with 21% neutral and 33% favoring a living interpretation). These patterns are consistent with past research showing a strong correlation between judicial philosophy and partisanship (Krewson and Owens 2021).

Figure 3 plots the mean values and 95% confidence intervals for these dependent variables. On average, respondents showed greater support for judicial review when evaluating state constitutions in the four iterations of the conjoint analysis than when evaluating the US Constitution ($p = 0.02$ two-tailed).[17] Similarly, respondents showed reduced support for a living interpretation (relative to an originalist interpretation) when evaluating state constitutions than when evaluating the US Constitution ($p < 0.01$ two-tailed). These significant differences are broadly consistent with H1 and H2, since the average state constitution in the conjoint analysis was adopted more recently, amended more often, and amended more recently than the US Constitution. However, we cannot tell from this level of analysis which feature of state constitutions drove this result. We now turn to an analysis to uncover the various features of state constitutions potentially driving these results.

[17]To clarify, we compare each respondent's support for invalidation under the US Constitution to each respondent's average response across the four iterations of the conjoint.

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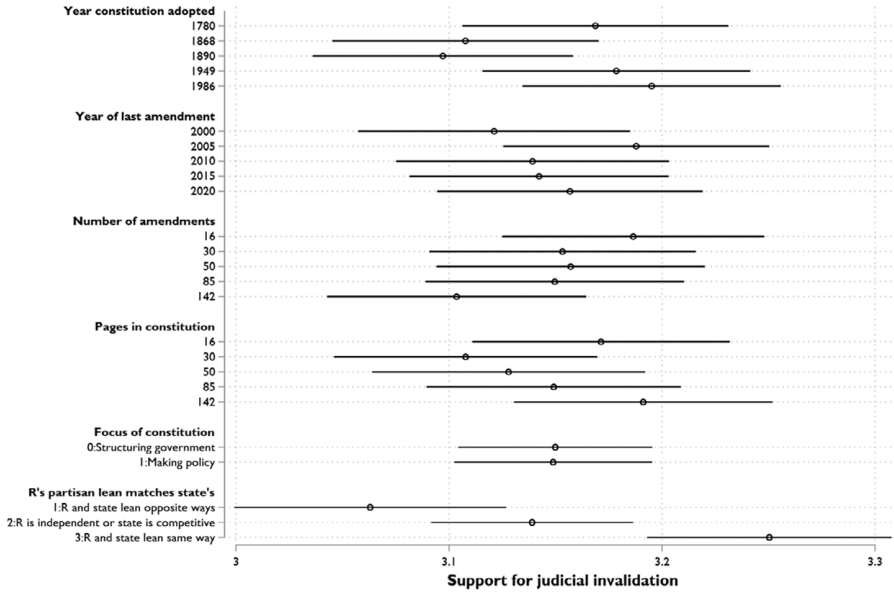


Figure 4. Support for Judicial Invalidation (Estimated Marginal Means).

H1 predicts greater support for judicial invalidation when respondents are presented with a state constitution featuring higher amendment rates (H1a), more recent amendment (H1b), or more recent constitutional adoption (H1c). In Figure 4, horizontal lines depict 95% confidence intervals around marginal means, treating each component in the analysis as a categorical variable. (Because respondents participated in four iterations of the conjoint experiment, standard errors are clustered by respondent throughout.) We do not find support for H1a. To the contrary, support for invalidation appears superficially to fall rather than rise with increased amendment rates. However, the effect is driven by evaluations of a constitution with 142 amendments — the only category to differ significantly ($p = 0.03$) from respondents evaluating a constitution with sixteen amendments — and may therefore be a fluke. Nor do we find support for H1b; the marginal means vary little by year of last amendment, perhaps reflecting the narrow range of years that we tested.

H1c is more interesting. Respondents show much greater support for invalidation when evaluating a twentieth century than nineteenth century state constitution. Relative to respondents evaluating an 1868 constitution, for example, support for judicial review was much higher among those evaluating a 1949 ($p = 0.03$) or 1986 ($p < 0.01$) constitution.[18] If we had not included a condition for constitutions adopted in 1780, we would have seen these results as consistent with H1c and concluded that

[18]Substantively, the difference in average marginal component effects for 1868 and 1986 constitutions is 0.09, approximately one-sixth of the within-respondent standard deviation and one-tenth of the between-respondent standard deviation on the dependent variable. It is unsurprising that this effect is substantively smaller than in the vignette experiment, since it examines the age of the constitution as a whole rather than of a critical provision.

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support for invalidation rises with younger constitutions. As it turns out, however, respondents presented with a 1780 constitution supported judicial review as strongly as those presented with a twentieth century constitution. We suspect that 1780 may have unintentionally primed respondents to think about the US founding, however. There is precedent for this admittedly post-hoc hunch; Brown and Pope (2018) report that respondents' views of the US Constitution have more to do with patriotic support for America's founding narrative than for the Constitution itself, and we may have invoked a similar response by including this date. Regardless, when paired with the results of our vignette experiment, we can confidently say that respondents show greater support for judicial review when presented with a twentieth century than nineteenth century constitution.

Though we made no prediction about a relationship between partisanship and support for invalidation, we observe in passing that respondents show much greater support for judicial invalidation when their partisanship aligns with the state's partisan lean. Apparently, respondents believe that judicial invalidation is more likely to involve a cooperative court reigning in a wayward legislature than an activist court preventing a popular legislature from following a voter mandate (Law 2008; Rogers and Ura 2020). These findings may be worthy of future study.

We turn now to respondents' preferred judicial philosophy. Using the same approach as the previous figure, Figure 5 plots marginal means for our second dependent variable, where higher scores indicate support for a living interpretation and lower scores indicate support for originalism. The effect of a constitution's age is much clearer here than in the previous figure. Respondents presented with a state constitution adopted in 1986 had an average score 0.30 points lower ($p < 0.01$) than respondents presented with a constitution adopted in 1780 — the largest effect by far of any comparison in Figure 5. More generally, we find a statistically significant linear

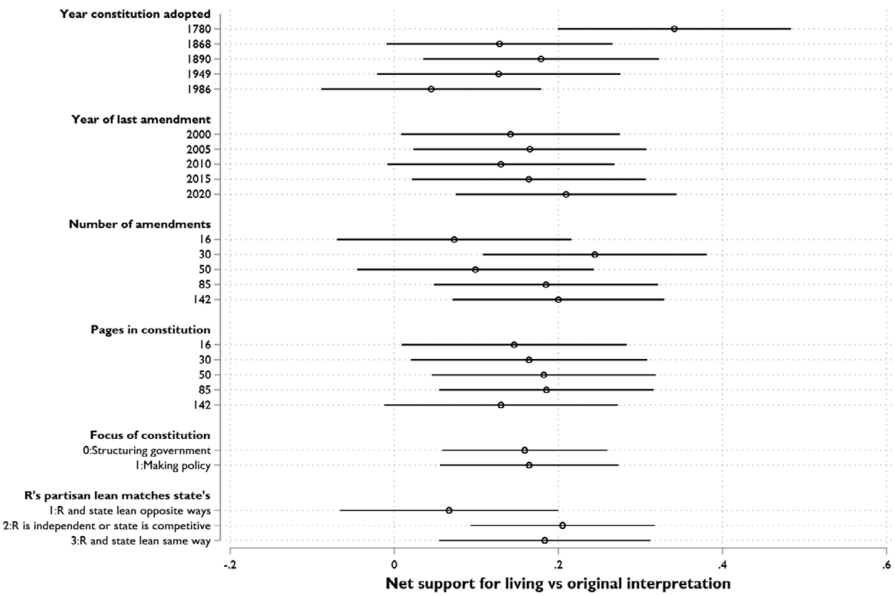


Figure 5. Support for Living or Original Interpretation (Estimated Marginal Means).

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relationship ($p < 0.01$) when constitution age is modeled as a continuous variable using ordinary least squares regression, controlling for the other components shown in Figure 5.[19] The younger the constitution, the more our respondents favor an originalist interpretation.

H2 predicts that respondents will show greater support for originalist interpretation when informed of a state constitution's (a) higher amendment rate, (b) more recent amendment activity, or (c) relatively recent adoption. These significant results for constitution age are consistent with H2c. We do not observe meaningful effects for amendment rates (H2a) or amendment recency (H2b),[20] nor do we observe effects for components inserted as controls — the constitution's length or substantive focus. In an ancillary hypothesis (H4), we predicted greater support for originalism when the respondent's partisanship aligned with the state's lean, but we do not observe this relationship.[21]

In summary, this conjoint analysis provides evidence that respondents favor a more originalist interpretation as a constitution grows younger. We also find that respondents show more support for judicial invalidation when presented with a twentieth century than a nineteenth century constitution, though a constitution from 1780 produces counterintuitive results. These findings are consistent with H1c and H2c and support our broader argument about the differences between the US Constitution and a typical state constitution We do not find support for our predictions about amendment frequency (H1a and H2a) or recency (H1b and H2b).

Conclusion

The interpretive disputes that dominate federal constitutional politics do not arise with the same intensity in state constitutional discourse. State constitutions are so easily and frequently updated that there is less need to argue about what a provision from the age of horses, muskets, and slavery means in the twenty-first century. Instead, original intent analysis dominates state constitutional discourse. Though disputes over interpretation of the US Constitution and judicial review have reached the American public, most Americans are only dimly aware that states have their own constitutions — and even less aware that the legal community approaches state constitutions differently than the US Constitution. The vignette experiment and conjoint analysis reported here exploit that ignorance, presenting respondents with realistic scenarios to see whether new information about state constitutions can affect

[19]Our pre-registered analysis plan called for several alternative specifications and robustness checks, including ordinary least squares and ordered probit analysis. These tests, reported in a supplement, yield the same general results as those reported here. The supplement also presents separate analysis of support for originalism and support for a living approach, as opposed to the combined variable used here.

[20]Amendment rates and the recency of amendment rates may matter on their own, but in the context of tradeoffs (which is what a conjoint forces people to consider) clearly respondents see the year a constitution was adopted as the most relevant factor for determining their preferred philosophy. Of course, if we asked about a specific policy and there were recent amendments directly related to that policy, amendment recency would have greater significance, as shown in the vignette experiment above.

[21]H4 also implied an interaction between this variable and constitution age, amendment recency, or amendment frequency. We do not find that these constitutional variables have stronger estimated effects among respondents whose partisanship aligns with the states than among other respondents.

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respondents' stated views about judicial review and the appropriate means of interpreting a constitution.

Our vignette experiment shows that respondents grow more supportive of judicial review when the court's decision rests on a younger constitutional provision. Judicial review has long been tied to the counter-majoritarian difficulty of an unelected court overturning the people's will (Bickel 1986). However, research conducted at the state level shows that electing judges does not boost support for judicial review, suggesting a need to look elsewhere to understand the conditions that affect the popular legitimacy of judicial review (Crabtree and Nelson 2019). Our finding linking judicial review to constitutional change is therefore a potentially significant contribution, reminding us that constitutions themselves matter in shaping support for judicial review. Respondents show more support for judicial invalidation when the state constitution is sufficiently democratic that its provisions remain in line with the living generation's sensibilities.

Our conjoint analysis links this finding to malleable judicial philosophies. Respondents grow more comfortable with originalist interpretation when presented with a constitution that is more easily kept in line with current sensibilities. Scholars have long understood that interpretive disputes fade at the state level (Tarr 1991); our analysis more firmly links this interpretive difference to the changeable nature of state constitutions.

Previous work on constitutional veneration has shown that Americans are more likely to agree that an older constitution was "written by visionary people," but also that such a constitution is "outdated" (Brown and Pope 2018) — findings we replicate in the supplement, incidentally, using data from our vignette experiment. Our interest here lies not in constitutional veneration, however, but interpretation and application of state constitutions — and when it comes to the constitutions that American courts rely on, our findings strongly suggest that Americans would rather see courts work with a practical, modern constitution than a venerated but inflexible one (cf. Versteeg and Zackin 2016). Popular support for judicial review may have less to do with individual judges than with the nature of the documents they interpret. More generally, these findings hint at how Americans might change their approach to the US Constitution if it were updated more easily or more often.

It is striking how little scholars know about the origins of public support for judicial review (Crabtree and Nelson 2019). While a single study cannot definitively resolve this question, our research design and analysis provide strong causal evidence of constitutional recency as a potential mechanism. Still, there is much for future research to unpack about why constitution age matters. Perhaps respondents would worry less about originalist interpretation of an old provision if we informed them that its historical context and legislative intent were clear, for example. Perhaps updating the constitution only enhances support for judicial review and originalism if people trust the federal justices to act fairly and neutrally. Perhaps the differences between state and federal constitutions are so fundamental that our findings do not port to the federal context. Or perhaps the age of the constitution is less connected to majoritarianism than our theory presumes.

More generally, the literature will benefit from studies using diverse methods to examine these potential mechanisms. After all, our experimental approach boasts strong internal validity, but limited external validity. We rely here on experimentation so that we can gain a limited glimpse into how Americans might react to judicial review with a different US Constitution, but our findings are only one contribution to

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an incremental literature. In short, further research on constitutional recency and its potential for explaining public support for judicial review is essential. Judicial review hinges critically on public support (Bickel 1986; Rogers and Ura 2020), whether at the state or federal level. Our research points a path forward for understanding the determinants of such support.

Supplementary material. The supplementary material for this article can be found at http://doi.org/10.1017/jlc.2024.18.

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