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AUTONOMY AND ISOMORPHISM: THE UNFULFILLED PROMISE OF STRUCTURAL AUTONOMY IN AMERICAN STATE CONSTITUTIONS

JAMES A. GARDNER[†]

ABSTRACT

In the American system of federalism, states have almost complete freedom to adopt institutions and practices of internal self-governance that they find best-suited to the needs and preferences of their citizens. Nevertheless, states have not availed themselves of these opportunities: the structural provisions of state constitutions tend to converge strongly with one another and with the U.S. Constitution. This paper examines two important periods of such convergence: the period from 1776 through the first few decades of the nineteenth century, when states were inventing institutions of democratic governance and representation; and the period following the Supreme Court's one person, one vote decisions in the early 1960s, when the Court's destruction of the existing constitutional model created an important opportunity for states to experiment with alternative forms of legislative representation. In the first period, initial innovation and diversity were followed quickly by convergence and isomorphism; and in the second period, no burst of innovation occurred at all. After reviewing studies of institutional isomorphism and policy diffusion from other fields, the paper concludes that the facts best fit explanations based on the resort by constitutional drafters to well-known patterns of non-rational decision-making such as "availability" and "anchoring" heuristics. American state constitutions thus likely display little diversity in their structural provisions not because prevailing models have proven superior to the alternatives, but because imitating the choices of seemingly similar entities is a common way to dispatch cognitively challenging tasks.

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I. INTRODUCTION

In the formal jurisprudence of American federalism, the American states are “sovereign entities.”¹ Their sovereignty makes states “independent and autonomous within their proper sphere of authority,”² and this autonomy in turn means, if it means anything at all, that states have significant leeway to govern themselves as they see fit.³ Because state constitutions are the primary instruments by which states establish and commit themselves to principles of internal self-governance, the legal and political autonomy that states enjoy suggests that a state should, in most circumstances, possess almost complete freedom to adopt a constitution that adequately “defines [its] way of life.”⁴

The reality, of course, is more complex. Federal and state constitutional law are intertwined in numerous ways, and the U.S. Constitution rules out some kinds of arrangements that states might

1. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996).

2. *Printz v. United States*, 521 U.S. 898, 928 (1997).

3. They may not, for example, be forced to adopt and enact the legislative agenda of other sovereigns, but must remain free to enact their own. *See New York v. United States*, 505 U.S. 144 (1992); *Printz*, 521 U.S. at 919 (1997). Also, the people of the states may “choose whom they please to govern them.” *Powell v. McCormack*, 395 U.S. 486, 547 (1969).

4. A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1, 14 (1988).

otherwise wish to constitutionalize. The Fourteenth Amendment, for example, through the incorporation doctrine, establishes a floor of minimum rights guarantees that states may not disregard⁵ (though they may go above the floor by providing stronger or alternative forms of protection).⁶ Under the Supremacy Clause,⁷ state constitutional provisions can be preempted not only by provisions of the U.S. Constitution, but by ordinary legislation enacted by Congress within the scope of its constitutional authority.⁸

The ideal of state autonomy is, however, almost fully realized in one area: the field of internal governmental structure. The assignment and allocation of constitutional power and the creation of institutions and practices of governance are matters committed, for all practical purposes, entirely to the states. The U.S. Constitution places only one constraint on the structure of state power—state governments must be “republican”⁹—but that condition is both easy to satisfy¹⁰ and essentially unenforceable.¹¹ As a result, we might expect state constitutions to express, in truly organic ways, the beliefs and preferences of state polities concerning the best forms and methods of democratic self-governance. In the field of governmental structure and public institutions, then, states have the opportunity to serve as “laboratories of democracy”¹² in the most literal sense, experimenting with forms of

5. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (applying to states the federal constitutional guarantee of a jury trial).

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

7. U.S. CONST. art. VI, cl. 2.

8. *Id.*

9. U.S. CONST. art. IV, § 4.

10. According to Madison, a government is sufficiently “republican” if it “derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.” THE FEDERALIST NO. 39 (James Madison). This is an extremely minimal requirement, one that no American state has ever come close to violating.

11. The Supreme Court has long deemed questions arising under the Guarantee Clause to be nonjusticiable political questions. *See, e.g.*, *Luther v. Borden*, 48 U.S. 34, 42 (1849). Congress may enforce the clause, *id.*, but has never shown the slightest inclination to do so.

12. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”). Although Brandeis was speaking specifically of state experimentation with policy, and as a Progressive may conceivably have intended his comment to refer mainly to the possibilities offered by rational, scientific innovation, his point has over time come to stand for the broader proposition that federalism enables states to conduct policy experiments impelled by democratically expressed preferences of the state populace.

governance, methods of legislative election and representation, the allocation and balancing of governmental powers, and modes of popular participation and oversight.

The most casual inspection of contemporary American state constitutions, however, reveals at a glance that states have not availed themselves of these opportunities. Instead, state constitutions tend to converge strongly with one another and with the U.S. Constitution. This convergence, or isomorphism, has occurred not just in the area of individual rights, in which some degree of national uniformity is easiest to explain, but in the structure of state government institutions—in the nature and configuration of the legislature, the institutionalization of executive power, the kinds of officers that hold power, the qualifications for office-holding, and virtually any other aspect of government structure one might care to name.

This symposium, focusing on the reaction at the state constitutional level to the U.S. Supreme Court's one person, one vote jurisprudence announced in the seminal cases of *Baker v. Carr*¹³ and *Reynolds v. Sims*,¹⁴ provides an ideal opportunity to examine this phenomenon. The rulings in those cases invalidated at a stroke a form of legislative representation in the states that had prevailed since colonial times. In that system, legislators were understood to represent meaningful geographical subcommunities such as counties and towns.¹⁵ In the system ushered in by the Court's apportionment decisions, in contrast, legislators were deemed to represent equipopulous groups of individuals, abstracted from their local communities.¹⁶ This judicial destruction of the existing constitutional model created an important opportunity for states to solve their federal constitutional problem by experimenting with and adopting other forms of legislative representation. Unicameral bodies, at-large or proportional methods of election, and parliamentary systems, to name just a few, might have served, and many of the available options had either been adopted or seriously discussed in at least some states in earlier periods, and were commonplace in foreign jurisdictions.

Yet no such burst of innovation occurred. Instead, all the states almost immediately reconverged on a new system consisting of single-

13. 369 U.S. 186 (1962).

14. 377 U.S. 533 (1964).

15. James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1238 (2002) [hereinafter Gardner, *One Person, One Vote*]; James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 900-04 (2006) [hereinafter Gardner, *Representation Without Party*].

16. "[L]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds*, 377 U.S. at 562.

member districting for both legislative chambers subject to decennial redistricting. An isomorphic equilibrium was disturbed by a huge external shock to the system, yet the states settled almost immediately into a new and not very different isomorphism. Why? The question is especially tantalizing in this context because, as we now know in retrospect, the compliance choices made by the states in the mid-1960s merely substituted one problem for another, trading malapportionment for gerrymandering. Even the slightest amount of experimentation by the states with the design of their democratic institutions would inevitably have hit upon solutions less vulnerable to either of these pathologies.

The balance of this Article is organized as follows. Part I lays out the history of how states have exercised their autonomy in the design of institutions of internal democratic governance. It shows how an early period of constitutional diversity in the structure of government institutions soon yielded to convergence and uniformity, with only occasional exceptions. Part II describes the Court's one person, one vote cases and their impact on state constitutional institutions of democratic representation, and then reviews the minimalist state reaction to these developments and their failure to produce constitutional innovation.

Part III considers a variety of explanations for the structural isomorphism exhibited by state constitutions. Drawing on studies of policy diffusion and institutional isomorphism from sociology, political science, organizational theory, and comparative constitutional law, it examines several kinds of mechanisms capable of producing the observed convergence. These include forms of coercion, such as the external imposition of authority, shared environmental influences, forces of competition, and various cultural and reputational influences. It then takes up mechanisms that look to considerations internal to decision-makers such as processes of learning, rational mimicry, and the use of cognitive heuristics under conditions of bounded rationality, concluding that the last of these is the most promising—though not the only possible—explanation. The Article concludes with some skeptical reflections on how realistic it is to expect states in a federal system to exercise their formal autonomy to adopt forms of democratic self-governance that differ significantly from national and modal subnational norms.

II. TRENDS IN STATE CONSTITUTIONAL STRUCTURE, 1776-1962

The first state constitutions were adopted immediately following the American colonies' declaration of independence from Great Britain.¹⁷ In 1776, seven states—Delaware, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina and Virginia—adopted constitutions. Two additional states—Connecticut and Rhode Island—chose to continue governing themselves under their original royal charters (dating from 1662 and 1663 respectively), which accordingly served as initial constitutions following separation from Great Britain. Georgia, New York, and Vermont adopted their inaugural constitutions in 1777, and Massachusetts filled out the group in 1780, adopting an elaborate constitution, drafted principally by John Adams, that is still in force (though amended many times), and which appears to be the oldest continuously operating constitution in the world.¹⁸

State constitutions during this early period displayed what was, by modern standards, an unusually wide range of variation in the institutional structure of representative government. Some state constitutions created unicameral legislatures while others opted for bicameral bodies. Some constitutions adopted strong forms of separation of powers, while others chose weaker formats. Some states, following the British model, adopted cabinet-style government by creating privy councils to advise the governor, the legislature, or both. Some adopted a council of censors to review public compliance with state constitutional directives. In some states, the legislature chose the governor, while in others the voters chose. Judges under some state constitutions were appointed by the governor, and in others by the legislature.¹⁹ Some states adopted substantial property qualifications for office-holding while others did not.

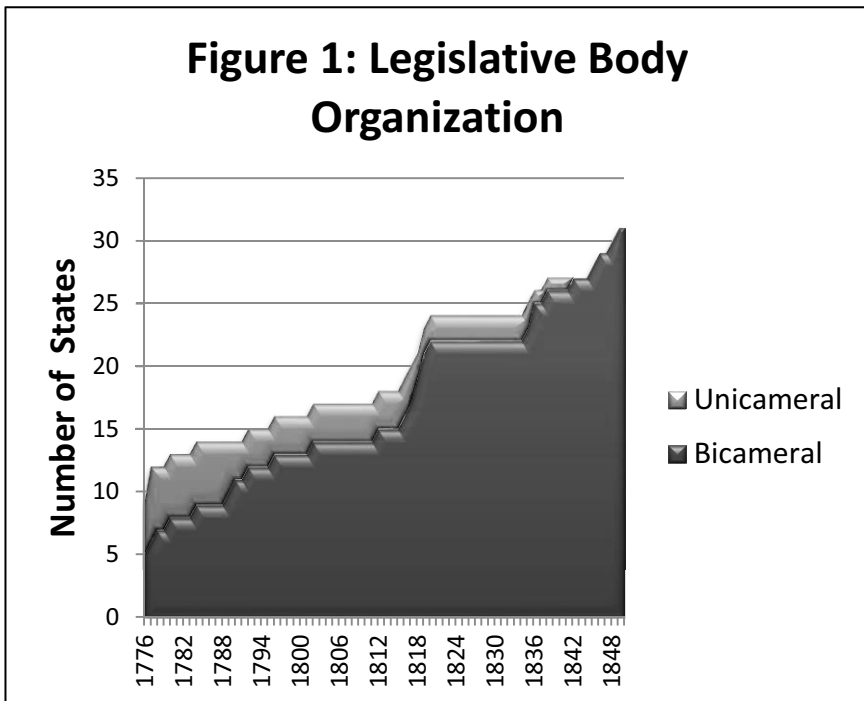
Whatever the metric, however, the degree of variation narrowed rapidly so that by the 1830s or 1840s, American state constitutions had substantially converged on a common set of institutions and constitutional practices of democratic self-governance. Consider, for example, the number of houses comprising the legislature. By 1777, fully

17. All information reported in this part dealing with the period between 1776 and 1902, and all citations to state constitutions from that period, draw upon FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* (Francis N. Thorpe ed., 1909) [hereinafter "THORPE"].

18. JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 11 (2005).

19. PA. CONST. § 20 (1776); *cf.* VA. CONST. ¶ 35 (1776).

one-half of state constitutions had adopted unicameral legislatures.²⁰ Following 1777, however, not a single new state constitution did so; the constitution of every newly admitted state, beginning with Kentucky (1792), Tennessee (1796), and Ohio (1802), adopted bicameralism.²¹ Meanwhile, early partisans of unicameralism quickly abandoned the field. South Carolina switched to bicameralism in 1778, Georgia did so in 1789, Pennsylvania and South Carolina followed suit in 1790, and the last holdout, Vermont, folded its unicameral tent in 1836.²² (See Figure 1.) The one and only deviation from the subsequent 180 years of uniform state legislative bicameralism is Nebraska's 1934 decision to switch to a unicameral legislature.²³



20. Compare unicameral: CONN. CONST. (1662), GA. CONST. (1777), PA. CONST. (1776), R.I. CONST. (1663), S.C. CONST. (1776), VT. CONST. (1777), with bicameral: DEL. CONST. (1776), MD. CONST. (1776), N.J. CONST. (1776), N.Y. CONST. (1777), N.C. CONST. (1776), VA. CONST. (1776).

21. See KY. CONST. art. I, § 3 (1792); TENN. CONST. art. II, § 3 (1796); OHIO CONST. art. I, § 1 (1802).

22. For further discussion of this trend, see JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 137-44 (2006).

23. NEB. CONST. art. III, §1 (1934).

Or consider the institution of the privy council. In Britain, the privy council is a body of close advisors to the monarch. British constitutional practice also has long included another body, the cabinet, comprised of sitting members of Parliament, elected by the majority parliamentary party, headed by the prime minister, and vested functionally with the executive power of the state (formal executive power continues to reside in the monarch). In 1776, one-third of state constitutions (three of nine) created an institution denominated a “privy council,” though because the states rejected monarchical government, and thus unified executive power in a governor, these privy councils more closely resembled the British cabinet than the actual British Privy Council. In Delaware, for example, a four-member privy council was chosen by the legislature, two members by each house, from its own membership.²⁴ In South Carolina, each house chose three members of the legislature to sit in the privy council “to advise the president [governor],”²⁵ and in Virginia an eight-member privy council was chosen by joint ballot of both houses, “either from their own members or from the people at large, to assist in the administration of government.”²⁶ After 1776, however, no constitution of any other state created a privy council, and the three states that had adopted that institution soon abandoned it in subsequent constitutions, South Carolina in 1790, Delaware in 1792, and Virginia in 1830.²⁷

The council of censors suffered a similar fate. The eighteenth-century constitutional office of censor was inspired by the office of the same name established in republican Rome that, according to Livy, “from a trivial origin [taking the census] subsequently grew to exercise jurisdiction over the whole range of our social proprieties.”²⁸ By 1777, seventeen percent (2 of 12) of state constitutions established a council of censors. Under the Pennsylvania Constitution, the council of censors met every seven years “to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution.”²⁹ The council also had power to inquire into the collection and use of public

24. DEL. CONST. art. 8 (1776).

25. S.C. CONST. art. V (1776).

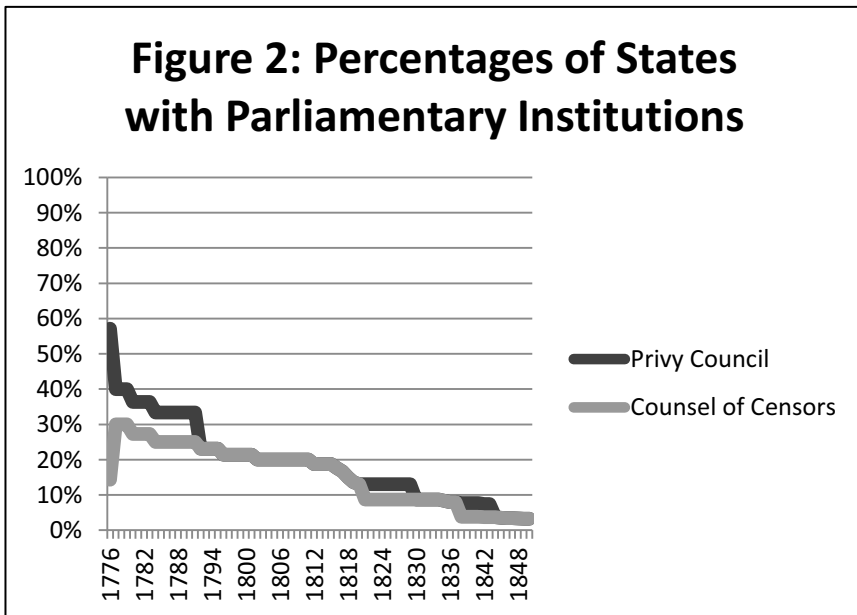
26. VA. CONST. ¶ 31 (1776).

27. S.C. CONST. (1790); DEL. CONST. (1792); VA. CONST. (1830).

28. LIVY, *THE EARLY HISTORY OF ROME* 262 (Aubrey de Sélincourt trans., Penguin Books 1960).

29. PA. CONST. § 47 (1776). For a discussion, see Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *TEMPLE L. REV.* 541 (1989).

funds, to censure officials, to order impeachments, and to recommend the repeal of laws.³⁰ Vermont's provision was similar.³¹ No state constitution adopted after 1777, however, created a council of censors or any organization like it. Meanwhile, Pennsylvania abandoned its council of censors in its constitution of 1790; Vermont's persisted until 1870,³² though few of its recommendations were ever adopted.³³ State convergence on the rejection of these inherited institutions of parliamentary government is displayed graphically in Figure 2.



Much the same story could be told about any number of structural features of state constitutions during the first few decades of the republic. By 1840 or so, state constitutions had converged on a lengthy list of structural choices and norms. Consider, for example, qualifications for holding elected office. When the U.S. Constitution was adopted, constitutionally established property qualifications for office varied considerably. For example, in Virginia, candidates for the lower legislative house had only to be freeholders, whereas North Carolina

30. *Id.*

31. VT. CONST. art. XLIV (1777). Madison argued unsuccessfully at the federal constitutional convention that a council of censors should be adopted by the new U.S. Constitution.

32. VT. CONST. art. XXIV, § 3 (1870); THORPE, *supra* note 17, at 3777.

33. THORPE, *supra* note 17, at 3781.

required a freehold of 100 acres, South Carolina required candidates to possess “five hundred acres of land and ten negroes” or real estate worth 150 pounds, Maryland required 500 pounds, and Vermont imposed no property qualification at all.³⁴ Property requirements for governor ranged similarly. In Virginia freeholders could serve, New Jersey imposed no property qualifications, and South Carolina required the then-staggering sum of ten thousand pounds.³⁵

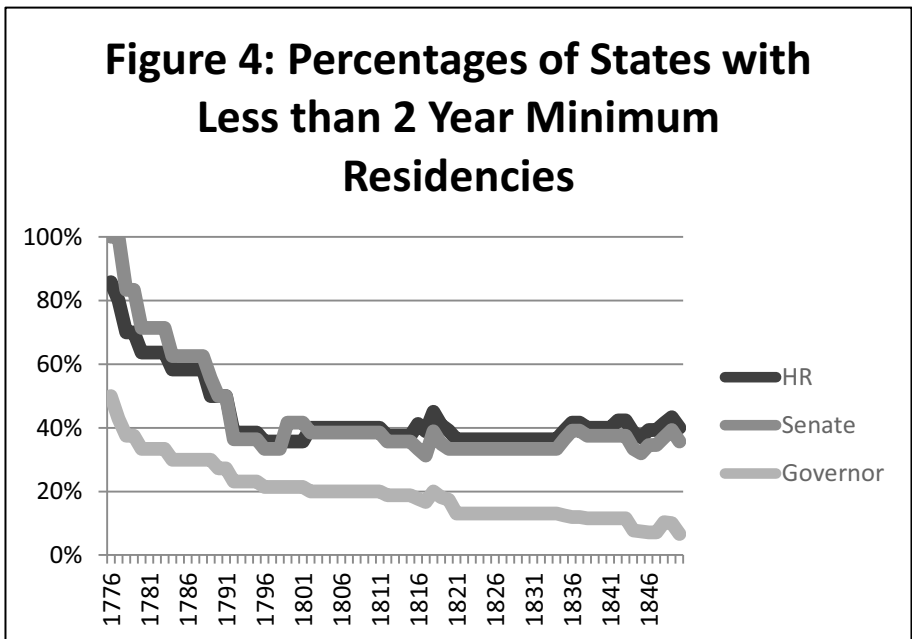
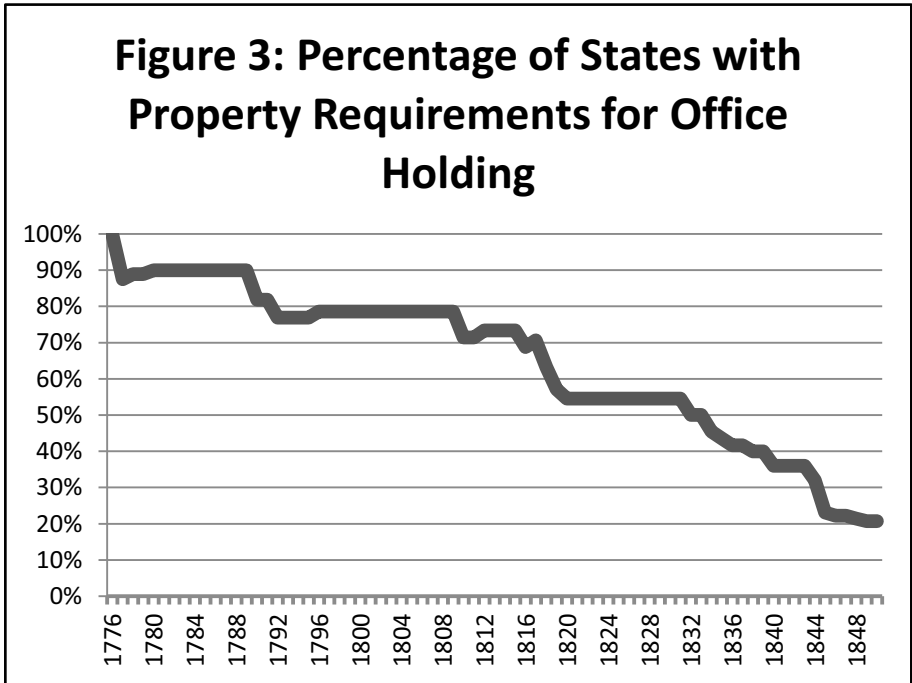
After about 1800, however, states began to relax the severity of property qualifications, and many began to jettison them. By about 1817 the pace of this trend increased, and by 1850 fully half the states had rejected property requirements altogether. (See Figure 3.) A similar pattern occurred with respect to residency requirements. Following independence, the amount of time an individual had to reside in a state before becoming eligible to hold office varied considerably, with extremely short periods of residence (under two years) the modal requirement.³⁶ By 1792, however, a consensus quickly solidified to the effect that office holding, especially for the governorship, should be limited to those who had resided in the state for two years or more.³⁷ (See Figure 4.)

34. VA. CONST. (1776); N.C. CONST., art. VI (1776); S.C. CONST. art. I, § 6 (1790); MD. CONST. art. II (1776); VT. CONST. ch. II, art. VIII.

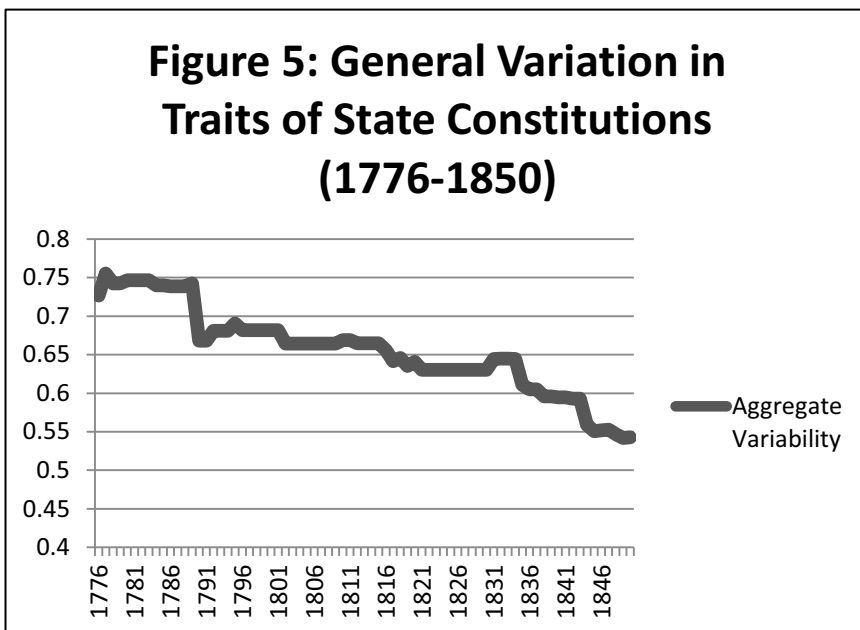
35. VA. CONST. (1776) (I assume here that the governor is generally selected by the legislature from its own members, all of whom must be freeholders); N.J. CONST. art. VII (1776); S.C. CONST. art. 5 (1778). South Carolina’s figure would have limited the governorship to about twenty-five individuals in the state. James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1273 n.275 (1998).

36. See, e.g., GA. CONST. art. VI; N.Y. CONST. art. VII.

37. See, e.g., KY. CONST. art. II, § 4.



While these specific structural variables provide some vivid concrete examples, more important is the overall trend of convergence across the entire panoply of structural features of constitutional governance. To calculate overall variability, we constructed a composite index of variation in nine factors that hold some significance for the way power was structured and distributed in the period between 1776 and 1850: (1) the nature of the executive veto (absolute, absolute subject to override, or suspensory); (2) method of selection of the chief executive (popular vote, selection by legislature, or other); (3) whether multiple office holding was permitted or forbidden; (4) term length for the lower legislative chamber; (5) term length for the upper legislative chamber; (6) executive term length; (7) property qualifications for office holding; (8) whether the legislature was unicameral or bicameral; and (9) whether senators were elected from single-member or multimember districts. Figure 5 shows the overall trend by displaying the average standard deviation on all nine variables. As the chart shows, variability declined steadily over time, reflecting increasing convergence in the constitutional treatment of these variables. The sharpest drops in variability (and thus the strongest trends of convergence) occurred around 1790—almost immediately following adoption of the U.S. Constitution—and between about 1834 and 1845, probably reflecting the impact of Jacksonian ideology.



III. THE REAPPORTIONMENT REVOLUTION AND ITS AFTERMATH

A. *The Judicial Shock to the System*

Today, virtually every state legislator is elected in the same way—from equipopulous single-member districts, the boundaries of which are redrawn every decade to keep population variance as low as possible.³⁸ That was not the case in 1962, when the Supreme Court first took up the question of legislative apportionment. On the contrary, although the states had converged on a prevailing system for electing state legislatures long before the mid-twentieth century, it was a very different system, one in which the basis of representation of state house and senate members often differed significantly, and in which the primary unit of representation was not groups of individuals but localities with fixed boundaries and variable population.³⁹

The roots of American political representation lie in the representation of communities, not individuals. In Maryland in the 1640s, for example, the assembly was constituted by “each community in the colony choosing, by majority rule, a representative who would stand for the whole community . . . [and who] would cast a single vote in the assembly, regardless of the size of the community he represented.”⁴⁰ In colonial Massachusetts, representatives represented towns; in Virginia, plantations, hundreds, or counties; and in the Carolinas, parishes.⁴¹ This system survived the Revolution largely intact. Vermont, for example, in its first constitution of 1777, allocated one representative to each town in the state.⁴² The 1776 constitutions of Virginia and North Carolina provided for an assembly composed of two representatives from every county, and one from each city or borough.⁴³

Throughout the nineteenth century, states retained the practice of electing legislators from units of local government, though as time

38. Under current standards, the population of congressional districts must be absolutely equal, and no exception is made for even de minimis variation. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). *But see* *Tennant v. Jefferson Cnty. Comm’n*, 133 S. Ct. 3, 8 (2012) (suggesting a possible, very slight relaxation of Karcher’s rule requiring no deviation whatsoever). State legislative districts, in contrast, may vary in population by roughly ten percent or so, provided the deviation can be justified by a legitimate state interest such as avoiding splitting local governments or preserving communities of interest. *Brown v. Thomson*, 462 U.S. 835 (1983).

39. *See* Gardner, *Representation Without Party*, *supra* note 15, at 901-02.

40. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 40 (1988).

41. *Id.* at 41.

42. VT. CONST. ch. II, §§ VII, XI (1777).

43. VA. CONST. ¶ 25 (1776); N.C. CONST. art. III (1776).

passed the unit of choice tended to be the county.⁴⁴ Eventually, pressures on legislative size caused by population growth forced many states to substitute the flexible “district” as the preferred unit of representation, but districts were routinely defined in relation to existing units of local government, most often counties.⁴⁵ Inequalities in population between counties or other local jurisdictions were generally handled not by dividing a county or town, but by adjusting the number of representatives to be elected from each locality.⁴⁶ Population disparity was thus addressed not by varying the boundaries of districts, but by varying the size of the legislature.⁴⁷ Indeed, with the exception of the largest counties, which sometimes had to be subdivided to avoid presenting residents with an unmanageably large slate of seats to fill,⁴⁸ state constitutions generally required that counties and other local government units be preserved intact when grouped into districts, even if this resulted in election districts of widely differing populations.⁴⁹

Finally, many states deliberately utilized a “federal plan,” a state-level version of the U.S. Constitution’s structure of representation.⁵⁰ In these jurisdictions, representation in the state house was based primarily on population, but representation in the state senate was, as in the federal model, by territorial subunit, with counties generally substituting for states as the basis of senatorial representation.⁵¹ In sum, by the time the Court decided to enter the “political thicket”⁵² of state-designed systems of legislative representation, it confronted a long-standing, widely shared system in which the predominant basis of representation was territorial, modified only slightly in most states to ameliorate the very worst population disparities.⁵³

44. Gardner, *Representation Without Party*, *supra* note 15, at 901-02.

45. *Id.*

46. *Id.* at 904-08.

47. James A. Gardner, *What is “Fair” Partisan Representation, and How Can It Be Constitutionalized? The Case for a Return to Fixed Election Districts*, 90 MARQ. L. REV. 555, 582-91 (2007).

48. *See, e.g.*, KY. CONST. § 33 (1890) (permitting division of multi-representative counties into districts); MO. CONST. art. IV, § 2 (1865) (requiring such division).

49. Gardner, *Representation Without Party*, *supra* note 15, at 907-08, 916-21.

50. PAUL T. DAVID & RALPH EISENBERG, STATE LEGISLATIVE REDISTRICTING: MAJOR ISSUES IN THE WAKE OF JUDICIAL DECISION 5-13 (1962).

51. *Id.*

52. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., plurality opinion). In *Colegrove*, the Court decided that legislative apportionment presented a non-justiciable political question, a position on which it reversed itself in *Baker v. Carr*. *Baker v. Carr*, 369 U.S. 186 (1962).

53. Gardner, *Representation Without Party*, *supra* note 15, at 930-33.

In a series of rulings issued between 1962 and 1964, the Supreme Court wiped this system of legislative representation from the American political map. The convulsions began in *Baker v. Carr*, where the Court for the first time held malapportionment in legislative representation to present a justiciable legal question.⁵⁴ Two terms later, in *Wesberry v. Sanders*, the Court ruled that gross population disparities among a state's congressional districts violated a federal constitutional principle of one person, one vote.⁵⁵ But the decision that truly delivered the *coup de grâce* to the dominant system of legislative representation was *Reynolds v. Sims*.⁵⁶ There, the Court ruled not only that population inequality of state legislative districts violated the Equal Protection Clause, but that states could not constitutionally emulate the structure of representation established under the U.S. Constitution itself—could not, that is, maintain a state senate in which population is allocated equally among territorial subunits of the state, such as counties, without regard to population.⁵⁷

Indeed, the Court held not only that the existing, consensus model of representation in the states was constitutionally invalid, but that it controverted basic notions of political citizenship. The “fundamental principle of representative government in this country,” the Court said, “is one of equal representation for equal numbers of people, without regard to . . . place of residence.”⁵⁸ It was not enough, then, that citizens might enjoy equal status within the communities in which they lived; their status as citizens was something universal, to be measured against the status of citizens everywhere: “all voters, as citizens of a State, stand in the same relation regardless of where they live.”⁵⁹

The effects of this “reapportionment revolution”⁶⁰ were profound: a historically long-standing view of citizenship as embedded in and given meaning by local community was replaced by a cosmopolitan theory of democracy that treats citizens as largely equivalent and interchangeable, and thus suitable for periodic regrouping and rearrangement as part of a decennial process of redrawing district lines.⁶¹ Moreover, by requiring every legislative chamber to be based on population, the Court essentially destroyed settled justifications for bicameralism, which until

54. *Baker*, 369 U.S. at 208-39.

55. 376 U.S. 1, 7-8 (1964).

56. *Reynolds v. Sims*, 377 U.S. 533 (1964).

57. *Id.* at 568, 571-77.

58. *Id.* at 560-61.

59. *Id.* at 565.

60. See GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* (1966).

61. Gardner, *One Person, One Vote*, *supra* note 15, at 1239-43.

then had rested on the theory that two legislative chambers were useful largely because they offered representation to different kinds of communities, each of which ought to have a voice in the formulation of legislative policy.⁶²

B. The State Non-Response

Although the Court's comprehensive destruction of long-settled forms of legislative representation delivered a massive and disruptive shock to the foundations of American democracy, its action also presented an opportunity. By sweeping away the old system, the Court created an opening for significant rethinking and reform. This opportunity, however, was not seized; instead, states almost immediately reconverged on a solution that changed as little as possible of the discredited prior institutional structure.

Well before the Court tossed it aside, the prevailing system of representation had been frequently criticized. The heavy reliance on counties as the basic unit of representation was well known to be vulnerable to gerrymandering.⁶³ Because state legislatures could create, merge, or eliminate counties at will, legislatures were able to manipulate representation by creating new counties to increase representation in some areas of the state, or more often, to suppress representation in fast-growing areas by refusing to create new counties.⁶⁴ Often backed by

62. This idea has its roots in ancient and medieval notions of "estates" or "mixed government," which viewed the body politic as comprised of functionally very different but nevertheless harmonious groups, each of which contributed something of value to the health of the whole. *See, e.g.*, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-87* ch. 6 (2nd ed. 1998); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS*, 23-57 (1998) (both discussing the evolution in American political thinking of the idea of mixed government). In the American context, an influential formulation was that of the federal founders, who conceived of the House as representing the people and the Senate as representing the states in their corporate capacity. *THE FEDERALIST*, NO. 39, at 244 (James Madison). John Dinan's review of state-level adoption of bicameralism shows that state leaders originally thought a second chamber useful to act as a "deliberative check on the passage of hasty or ill-advised legislation," but this function was best performed when the chambers were "organized in a distinct manner, so as to represent different interests in the lawmaking process." DINAN, *supra* note 22, at 139. Dinan goes on to observe that "the rationale for bicameralism is not as clear or compelling at the state level" to begin with. *Id.*

63. *See, e.g.*, Gardner, *Representation Without Party*, *supra* note 15, at 901-04.

64. Gardner, *Representation without Party*, *supra* note 15, at 892, 921-23. This problem gave rise in some states to substantial movements in the early nineteenth century aimed at relaxing constitutional amending rules so as to allow reformers to bypass the legislature altogether to secure more equitable representation. DINAN, *supra* note 22, at 33-37.

constitutionally entrenched rules of apportionment, legislatures also manipulated representation by placing caps on the number of representatives elected from populous counties and cities, and by employing escalating population ratios for additional representatives that provided rapidly diminishing returns in representation for additional increments of voting population.⁶⁵

Perhaps the leading critique of the structure of American-style territorial representation, and in particular its winner-take-all quality, came from abroad. In the late 1850s, Thomas Hare, a British lawyer and amateur mathematician, developed a system of legislative representation in which legislators would be elected not from pre-defined territorial units, but by self-defined groups of voters, and would occupy seats in the legislature in proportion to their support in the electorate at large.⁶⁶ This system, known as proportional representation (PR), received a tremendous boost from the tireless support of the eminent philosopher John Stuart Mill.⁶⁷ Democracy, Mill wrote, is supposed to be “government of the whole people by the whole people,” yet under the winner-take-all system it consists of government of the whole by “a mere majority of the people, exclusively represented.”⁶⁸ The result, Mill claimed, is “the complete disenfranchisement of minorities.”⁶⁹

Support for PR in Britain spread widely,⁷⁰ and was soon taken up in the United States by some branches of the Progressive movement.⁷¹ Although Progressives were not as successful in implementing PR as they were in achieving other reforms, nevertheless, at its height, PR was used in nearly two dozen American cities during the first half of the

65. Gardner, *Representation Without Party*, *supra* note 15, at 906-07.

66. THOMAS HARE, *TREATISE ON THE ELECTION OF REPRESENTATIVES* (1859).

67. John Stuart Mill, *Considerations on Representative Government* (1861), in *ON LIBERTY AND OTHER ESSAYS* (John Gray ed., 1991).

68. *Id.* at 302.

69. *Id.* at 303.

70. In Great Britain, an organized movement for electoral reform dedicated to instituting PR has existed since the latter part of the nineteenth century. See Patrick Dunleavy & Helen Margetts, *Report of the Independent Commission on the Voting System*, at 6 (October 1998).

71. One of the better-known works by Progressive reformers is GEORGE H. HALLETT, JR., *PROPORTIONAL REPRESENTATION—THE KEY TO DEMOCRACY* (1937). On Progressive support for PR, see KATHLEEN L. BARBER, *PROPORTIONAL REPRESENTATION AND ELECTION REFORM IN OHIO* 34 (1995). Progressivism was internally divided on many issues, and the more common position was to favor forms of at-large representation that exacerbated the problems identified by supporters of PR. For an overview of Progressive ideology and its institutionalization, see James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 *IOWA L. REV.* 87, 114-47 (2000).

twentieth century.⁷² PR was used in New York City school board elections until 2002, and is still used in city council elections in Cambridge, Massachusetts.⁷³ Abroad, some form of PR is used for at least some legislative elections in dozens of countries including Australia, Finland, Germany, Ireland, Israel, The Netherlands, New Zealand, and Switzerland.⁷⁴

Yet another common criticism of the structure of representation in the United States focused on its presidential system, in which executive and legislative power are strictly separated, and the legislature is divided into two houses, each of which must approve any proposed legislative measure. Because legislation requires the concurrence of two different legislative houses and the president, this model has often been said to be undemocratic insofar as it tends to impede the smooth translation of popular will into legislative policy. For similar reasons, it is also often said to be inefficient.⁷⁵ Around the world, the main competitors to presidential systems are parliamentary systems, which generally consist of a single legislative house and an executive branch headed by a prime minister and cabinet, all of whom are drawn from the majority party in the legislature.

Although many aspects of the U.S. Constitution have been highly influential around the world,⁷⁶ its structural features are not among them. Latin American countries that achieved independence during the early nineteenth century were heavily influenced by the U.S. structural device of presidentialism, but otherwise virtually every nation to adopt a constitution in the last sixty years has chosen a parliamentary rather than a presidential system.⁷⁷ Indeed, thirty-four countries that once had a second legislative chamber later abolished it in favor of unicameralism.⁷⁸

72. BARBER, *supra* note 71; CLARENCE GILBERT HOAG & GEORGE HERVEY HALLETT, PROPORTIONAL REPRESENTATION 275 (1926).

73. DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES 10-11 (1993).

74. DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION 71-79 (2001).

75. *Id.*

76. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 764-66 (2012) (pointing out the influence of the U.S. Constitution in areas such as individual rights, judicial review, and the idea of a written constitution).

77. *Id.* at 791-92.

78. Louis Massicotte, *Legislative Unicameralism: A Global Survey and a Few Case Studies*, 7 J. LEGIS. STUDIES 151, 155 (2001).

Presumably, in such cases “bicameralism was tried, [and] found wanting.”⁷⁹

Yet alternatives to presidentialism and bicameralism are not to be found exclusively overseas: alternatives to the federal model are plentiful even in the United States. Under the influence of the Progressive movement, Nebraska adopted a unicameral legislature in 1934,⁸⁰ although its system is not parliamentary in that it retains a separately elected governor with the power to veto legislation.⁸¹ Virtually all local governments in the United States utilize unicameral legislatures, and in many cases they are parliamentary insofar as the chief executive is a sitting member of the council, often its president.⁸²

In sum, by the early 1960s, state legislatures in a mood to reflect upon how to reconstruct a system of legislative representation in light of *Baker*, *Wesberry*, and *Reynolds* had before them a century’s worth of critiques of the prevailing U.S. system. They also had access to numerous alternative models, and the benefit of decades of actual experience in other jurisdictions with these alternatives, creating a body of practical knowledge upon which they might draw. Many of these alternatives could be found domestically, and would have been well known to state legislators or delegates to state constitutional conventions. Any of several kinds of proportional representation would have resolved the one person, one vote problem. A switch to a parliamentary system, or merely to a unicameral legislature, would have done away with the problems posed by state senates representing territorially defined constituencies. Even a return to the earlier prevailing system of fixed election districts and variable legislative size might have addressed satisfactorily the problem of population disparity.

With the mold broken and all states faced with the immediate necessity of profound constitutional reform, the states might have been expected to go back to the drawing board and give serious consideration to other structures of political representation. They did not. So far as I am aware, switching to proportional representation, adopting parliamentarianism, or returning to a variable-size legislature were never discussed in any state constitutional convention convened in the wake of *Reynolds*. Adopting unicameralism was at least discussed during

79. *Id.* For Sandy Levinson’s well-known complaints about minoritarian features of the U.S. Constitution, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

80. For an account, see Massicotte, *supra* note 78, at 160-62.

81. NEB. CONST. art. III, § 1; NEB. CONST. art. IV, §§ 1, 15.

82. OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW 60-68* (3d ed. 2009).

constitutional conventions convened in Connecticut, Hawaii, Illinois, Maryland, Michigan, Montana, New York, North Dakota, Rhode Island, and Tennessee, and proposals for unicameralism ultimately were referred to the voters in Montana and North Dakota, but in no state was unicameralism actually adopted.⁸³ Indeed, the modal response among the states was not even to address the legal deficiencies in their representative structure by constitutional reform, but simply to permit themselves to be ordered by federal courts to cease their use of procedures that violated the U.S. Constitution.⁸⁴ The result in most states was a new prevailing system of legislative representation: a bicameral legislature of fixed size, elected from equipopulous house and senate districts of different extents, accompanied by decennial redrawing of district boundaries to maintain population equality, which by force of federal law became the constitutionally paramount consideration in every jurisdiction.

The story of the structure of internal self-governance established by American state constitutions begins, then, with diversity but ends in uniformity, a uniformity so deeply rooted that not even the most significant external shock delivered to the constitutional structure of the states since the Civil War and the adoption of the Reconstruction Amendments was capable of dislodging it. Yet on the subject of internal governance the states are autonomous; their autonomy in this area in fact exceeds their autonomy in any other field of constitutional endeavor. The Supreme Court's decisions under the Fourteenth Amendment only took the existing model off the table; it did not dictate what might replace it. Nevertheless, states converged immediately on a uniform substitute. How, then, can we square the fact of autonomy with the reality of constitutional isomorphism, a practice that looks for all the world like the very antithesis—even the deliberate renunciation—of autonomy?

In the next part, I examine findings from comparative constitutional law and many other fields, including sociology, political science, and organizational theory, concerning the incidence, causes, and common mechanisms of institutional and constitutional isomorphism. I then apply those findings to the case of American state constitutions to test their explanatory power.

83. DINAN, *supra* note 22, at 173-82.

84. For example, the provisions of the Alabama Constitution that were invalidated in *Reynolds* itself to this day still stand. See ALA. CONST. art. IV, § 50; ALA. CONST. art. IX, §§ 198, 199.

IV. PATHWAYS TO ISOMORPHISM

In a constitutional world dominated by ideological liberalism, in which individual agents are typically assumed to possess free will, autonomy, the capacity to set goals, and the desire to achieve those goals through rational action,⁸⁵ the similarity of important public and private institutions can be surprising. In business, firms organize themselves in similar ways.⁸⁶ Nations adopt similar policies.⁸⁷ In law, courts adopt similar doctrines,⁸⁸ legislatures adopt similar statutes,⁸⁹ and the world's constitutions contain a host of similar provisions.⁹⁰ Policies adopted in one place often spread to nearby places and then further abroad in a pattern that is sometimes likened to "contagion."⁹¹

Scholars who study the phenomena of policy diffusion and institutional isomorphism have identified numerous mechanisms that help explain why formally autonomous, independent, rational, and in relevant respects often highly dissimilar actors might end up nevertheless making precisely the same choices in a variety of domains. These

85. This is, for example, the foundational assumption of mainstream economics, public choice theory, and economic accounts of politics and law. *E.g.*, JAMES W. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 31-36 (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 4-8 (1957); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-4 (2d ed. 1977).

86. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 *AM. SOC. REV.* 147, 148 (1983).

87. Kurt Weyland, *Theories of Policy Diffusion: Lessons from Latin American Pension Reform*, 57 *WORLD POLS.* 262, 263 (2005).

88. Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 *AM. POL. SCI. REV.* 975 (1981).

89. Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 *AM. POL. SCI. REV.* 880 (1969).

90. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004). In a recent working paper, David Landau very usefully warns that much recent work arguing for the convergence of global constitutional norms, especially of human rights, is based on an examination of text alone, and may therefore fail to detect important differences in ground-level practice that undermine the argument for substantive convergence. See David Landau, *Superficial Convergence* (Florida State University working paper, June 2013). I rely here on this body of work subject to that caveat, and note that it applies equally to textual similarities among American subnational constitutions. For an example of how judicial interpretation in different jurisdictions can turn similar text to different applications, see, e.g., Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 *VAND. L. REV.* 1167 (1999) (examining divergent interpretations of state separation of powers provisions).

91. Weyland, *supra* note 87, at 270; Goodman & Jinks, *supra* note 90, at 650.

mechanisms fall generally into two categories. The first category involves the application of external pressure to decision-makers, and includes various forms of outright coercion, as well as softer forms of coercive power such as common environmental influences, forces of competition, and a variety of cultural, communal, and reputational influences. The second category looks internally, to characteristics of the decision-maker. These mechanisms include straightforward learning from others, rational mimicry, and the use of cognitive heuristics under conditions of bounded rationality.

In what follows, I briefly describe each of these mechanisms and examine their potential application in the context of structural provisions of American state constitutions.

A. *External Influences*

1. *Hard Coercion*

The clearest and most obvious reason why decision-makers might adopt the same policies is that some superior force coerces them to do so.⁹² Business firms may assume certain forms of organization or adopt particular policies because the law requires them to do so.⁹³ In the international domain, national constitutions might contain similar provisions so as to implement mutual commitments undertaken in a binding treaty.⁹⁴ Domestically, the constitution of a federal state might require subnational constitutions to contain particular provisions.⁹⁵

This kind of coercive influence does not apply, however, to the decisions about the structure of democratic self-governance that American states make in their own constitutions. Unlike, say, Austria, in which the national constitution requires subnational legislatures to be unicameral,⁹⁶ the U.S. Constitution places no significant or justiciable constraints on the structure of state governments. The Fourteenth

92. Coercion has been identified as a source of policy convergence in many works. See, e.g., DiMaggio and Powell, *supra* note 86, at 150; Weyland, *supra* note 87, at 269; Goodman & Jinks, *supra* note 90; Benedikt Goderis & Mila Versteeg, *The Transnational Origins of Constitutions: An Empirical Investigation* (working paper), available at http://www.law.uchicago.edu/files/files/Versteeg_April2011%5B2%5D.pdf.

93. DiMaggio & Powell, *supra* note 86, at 150.

94. Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 990 (2009).

95. John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837, 854, 857-58 (2008).

96. ÖSTERREICHISCHE BUNDESVERFASSUNG [CONSTITUTION], art. 95 (Austria).

Amendment does apply hard constraints to the structure of state representation, as the one person, one vote cases dramatically revealed,⁹⁷ but it is a negative prohibition that leaves states completely free to structure their governments as they see fit so long as they avoid certain forbidden practices. Moreover, the impact of the Fourteenth Amendment cannot possibly explain the impressive convergence in structure of American state constitutions in the late eighteenth and early nineteenth centuries, before its adoption. The causes of structural isomorphism among American state constitutions must therefore lie elsewhere.

Another factor occasionally invoked to explain this convergence is the influence of Congress over the admission of new states.⁹⁸ Under Article IV, Section 3, Congress has the power to admit new states into the Union.⁹⁹ As a matter of constitutional practice, Congress typically exercised that power by demanding that territories seeking admission adopt a draft constitution and submit it as part of the application process. Congress then reviewed the draft constitution, sometimes making suggestions or demands about its contents as a condition of admission. To the extent that Congress had consistent preferences about the content of state constitutions, and was willing to impose them, the process of applying for admission could have resulted in a significant degree of state constitutional isomorphism.

This explanation also fails to line up with the facts. First, it cannot explain at all the observed isomorphic trends among the original states of the Union, which did not have to apply for admission. Second, there is little evidence that Congress exercised its power to review proposed state constitutions to induce uniformity in governmental structure. For the most part, Congress seemed to be more interested in ensuring that states guarantee individual rights,¹⁰⁰ an understandable concern during the period preceding adoption of the Fourteenth Amendment, during which the only rights citizens held against their own states were those guaranteed under state constitutions.¹⁰¹ The Northwest Ordinance, for example, which established the conditions for admission of Ohio, Indiana, Michigan, Illinois, and Wisconsin, required proposed state constitutions to guarantee religious freedom, trial by jury, due process, and many other rights,¹⁰² but on structural matters required only that state

97. *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

98. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 40-41 (1998).

99. U.S. CONST. art. IV, § 3.

100. TARR, *supra* note 98.

101. *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

102. NORTHWEST ORDINANCE § 14 (1787).

constitutions “provide . . . for the establishment of States, and permanent government therein.”¹⁰³

Third, congressional influence of this type was limited in scope. Under the Supreme Court’s 1911 ruling in *Coyle v. Smith*,¹⁰⁴ any condition Congress attached to a state’s admission was immediately voided upon admission, and at that point the new state, like all other admitted states, was free to amend its constitution in any way it saw fit. In the only significant incident of which I am aware in which the federal government refused to admit a state because of objections to proposed constitutional provisions of a structural nature, President Taft in 1911 vetoed the admission of Arizona on the ground that the proposed state constitution contained a section providing for the recall of judges, a policy decision that in Taft’s view did not provide a degree of judicial independence sufficient to maintain appropriate protection for individual rights.¹⁰⁵ Arizona authorities deleted the provision and resubmitted the application, which was then approved.¹⁰⁶ Almost immediately thereafter, Arizona amended its constitution to restore the judicial recall provision, which remains in the state constitution to this day.¹⁰⁷ Thus, as Alan Tarr has pointedly observed, “[t]he impact of these [federal] mandates should not be overestimated.”¹⁰⁸

2. *Soft Coercion*

Even if decision-makers are not required to adopt similar policies due to binding directives issued by more powerful actors, they may sometimes be subject to informal influences that impel them nonetheless to converge on common outcomes. One of the most common ways in which this occurs is when similarly situated actors react similarly to aspects of a shared environment: “organizational characteristics are modified in the direction of increasing compatibility with environmental characteristics.”¹⁰⁹ Again, this does not seem to apply to the American

103. *Id.* at § 13.

104. 221 U.S. 559 (1911).

105. SPECIAL MESSAGE OF THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT APPROVAL HOUSE JOINT RESOLUTION NO. 14, H.R. DOC. NO. 106 (1911).

106. Cindy Hayostek, *Douglas Delegates to the 1910 Constitutional Convention and Arizona’s Progressive Heritage*, 47(4) J. OF ARIZ. HIST. 347, 347-66 (2006).

107. ARIZ. CONST. art. 8, pt. 1, § 1 (1912).

108. TARR, *supra* note 98, at 41.

109. DiMaggio & Powell, *supra* note 86, at 149; *see also* Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 33, 34 (2005); Michael T. Hannan & John H. Freeman, *The Population Ecology of Organizations*, 82 AM. J. SOC. 929 (1977).

states when it comes to the choice of internal structures of self-governance. It is difficult to see anything about the environment in which states govern themselves that makes bicameralism, presidentialism, winner-take-all elections, or a legislature of fixed size somehow more adaptive than unicameralism, a parliamentary system, proportional representation, or a legislature of variable size. Indeed, judging by the overwhelming rejection of the American model by nations adopting constitutions during the last sixty years, the consensus view appears to be quite the opposite: that the American model is inefficient, democratically unresponsive, and thus maladaptive to modern political conditions, in which the quick and accurate response of political institutions to shifts in public opinion is often viewed as the *sine que non* of democratic accountability.¹¹⁰

Another force of soft coercion that can lead to organizational isomorphism is competition. Within a particular shared environment, organizations may be required to compete with one another for some benefit, and through mechanisms similar to those of evolutionary biology, the process of competition creates pressures on all organizations to adopt only those institutional forms that lead to the greatest competitive success.¹¹¹ In the case of constitutional isomorphism in particular, it has been argued, for example, that competition for foreign capital investment¹¹² and for a highly mobile class of educated worker¹¹³ has resulted in a convergence of national constitutions, especially in the domain of human rights protection.¹¹⁴

Even were it the case that some kind of competitive forces nudge American states into competing with one another on the grounds of constitutionalized human rights,¹¹⁵ it is difficult to see how this mode of influence plays a role in state decisions concerning how to structure their internal processes of self-governance. It seems doubtful that many firms

110. See Law & Versteeg, *supra* note 76.

111. Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399, 403, 418-21 (2011). *But see* Hannan & Freeman, *supra* note 109 (stressing a preference for an analogy to population ecology over the more common analogy to the Darwinian processes of evolutionary biology).

112. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 ILL. L. REV. 201 (2008).

113. David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1328 (2008).

114. Competitive forces are also said to produce convergence at the subconstitutional level of policy. Walker, *supra* note 89, at 898; Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 182 (2004).

115. Tiebout's model would predict this to be the case. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

or individuals derive some kind of consumption value from living under a system of presidentialism or bicameralism. Moreover, even if states did compete for corporate or individual migration on these grounds, it is difficult to see why institutional choices that have been discredited around the globe as inefficient and unresponsive would put states in a stronger competitive position.¹¹⁶ In any event, this mechanism has no ability to explain constitutional convergence during the eighteenth and early nineteenth centuries, a period during which labor and capital were not highly mobile.

A third mechanism of soft external coercion is sometimes called “normative”¹¹⁷ or “reputational,”¹¹⁸ or described as a form of “acculturation.”¹¹⁹ The key factor in this distinctly social form of coercion is the desire of actors for some sort of legitimacy, either in the form of a good reputation within a relevant public, or in virtue of having complied with the norms and customs of the community to which they understand themselves to belong.¹²⁰ Because legitimacy and reputation are conferred by communities of external actors applying shared standards,¹²¹ the quest for legitimacy tends to produce isomorphism.¹²²

116. There is perhaps an outside chance that an inefficient state structure of governance might be deemed an advantage by highly mobile labor and capital investors insofar as it disables the government from regulating, and thus amounts to a kind of de facto deregulation of the business environment, but this does not strike me as very plausible. Madison’s seemingly accurate argument that the states are more susceptible to factional control than the larger national government, THE FEDERALIST NO. 10 (James Madison), seems just as pertinent, and tends to push in the opposite direction, particularly in initiative states, where democratic passions for regulation can bypass legislative gridlock.

117. DiMaggio & Powell, *supra* note 86, at 148, 150; Weyland, *supra* note 87, at 263, 274-75.

118. Simmons & Elkins, *supra* note 114, at 173; Ginsburg et al., *supra* note 112, at 230.

119. Goodman & Jinks, *supra* note 90; Goderis & Versteeg, *supra* note 92. Some of the most far-reaching claims are made by John W. Meyer, John Boli, George M. Thomas, and Francisco O. Ramirez. See John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997) (arguing that a networked world society is responsible in part for many aspects of global social isomorphism such as the construction of national identity and purpose and the legitimization of subnational actors and practices).

120. Weyland, *supra* note 87, at 274-75; Pamela S. Tolbert & Lynne G. Zucker, *Institutional Sources of Change in the Formal Structure of Organizations: The Diffusion of Civil Service Reform, 1880-1935*, 28 ADMIN. SCI. Q. 22, 25-26 (1983); Goodman & Jinks, *supra* note 90, at 647-48, 650; Goderis & Versteeg, *supra* note 92, at 3.

121. David L. Deephouse, *Does Isomorphism Legitimate?* 39 ACAD. OF MGMT. J. 1024, 1025 (1996); see also *id.* at 1026 (“[A]n organization conforming to norms of strategic behavior demonstrates that it is acting in an acceptable manner and social actors should evaluate it as legitimate.”).

The theory of normatively induced isomorphism has strong explanatory power because it provides an account of why some actors adopt prevailing policies or forms of organization that are actually maladaptive in their particular cases. The reason is that conformity is undertaken for reasons having nothing to do with performance. As Tolbert and Zucker explain, when an innovation appears, early adopters are likely to adopt it on its merits—for example, on account of its efficiency.¹²³ Later adoptions, in contrast, may occur for a completely different reason: to confer “societal legitimacy, regardless of their value for the internal functioning of the organization.”¹²⁴ Adoption, at this point in the process, serves primarily a “symbolic” function.¹²⁵

This theory appears to have some bite in explaining the global convergence of *national* constitutions on a core of human rights protections. As Goodman and Jinks explain, “states emulate standardized models of structural organization” in human rights, producing an “extent of isomorphism across states [that] is remarkable.”¹²⁶ Furthermore, in a pattern typical of normative forms of coercion, “the adoption of such constitutional provisions over time does not correlate with local forms of social organization (such as urbanization and national wealth) or with technical capacities of the relevant states.”¹²⁷ Adoption, in other words, is driven by considerations other than the suitability of the policy under consideration for the adopting actor.

On the other hand, the desire for legitimacy or normative validation does not appear to explain very much about isomorphism in the

122. DiMaggio & Powell liken the process to one of “professionalization,” in which a group seeks to define itself through the self-imposition of collectively adopted standards. DiMaggio & Powell, *supra* note 86, at 152. For a concrete example, see Anders R. Villadsen, *Structural Embeddedness of Political Top Executives as Explanation of Policy Isomorphism*, 21 J. PUB. ADMIN. RES. & THEORY 573, 580 (2011) (demonstrating that public officials inhabit social networks in which “[t]here may be considerable pressures for living up to normative expectations as [officials] seek to maintain their status both among their peers and toward the public”). Interestingly, public sector entities such as governments may be even more vulnerable to soft forms of coercion than profit-making organizations operating in the marketplace. Peter Frumkin & Joseph Galaskiewicz, *Institutional Isomorphism and Public Sector Organizations*, 14 J. PUB. ADMIN. RES. & THEORY 283 (2004).

123. Tolbert & Zucker, *supra* note 120, at 26.

124. *Id.*; see also DiMaggio & Powell, *supra* note 86, at 148 (“[A] threshold is reached beyond which adoption provides legitimacy rather than improves performance . . .”).

125. Tolbert & Zucker, *supra* note 120, at 26.

126. Goodman & Jinks, *supra* note 90, at 648. To similar effect, see VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 40-41 (2010).

127. *Id.* at 650. Choudhry refers to this phenomenon as the “migration of constitutional ideas.” Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

structural provisions of American subnational constitutions. It is hard to see how American states might feel legitimation pressures similar to those felt by nations seeking to establish themselves as members of an advanced and, in a sense, prestigious international community. American states are by definition highly legitimate actors within the context of American federalism. On the other hand, to the extent that the model provided by the U.S. Constitution is held in high regard domestically, it is possible that state constitutional conformity to the federal model might provide some measure of legitimacy to states interested in seeking it.¹²⁸ Yet, on the other hand again, states just as often seem to derive reputational advantages from *deviating* from the federal constitutional model as, for example, in the rights domain of gay marriage, and in the structural areas of direct democracy, limitations on incurring debt, and balanced budget requirements. It is thus difficult to discern whether states gain legitimacy by sticking to the federal model of bicameralism and presidentialism, or whether they would suffer reputational harm by adopting what might be perceived (falsely) as wholly “foreign” models of proportional representation, unicameralism, or parliamentarianism. Perhaps the possibility cannot be ruled out.

A final kind of external pressure for conformity can come from interest or professional groups. For example, policy diffusion across the American states may be facilitated by “the efforts of nationally organized interest groups”¹²⁹ or by the efforts of organized professional associations of state officials with common aims.¹³⁰ Globally, the increasing convergence in the content of national constitutions might be due in part to informal coordination among transnational communities of

128. There is no question that the United States Constitution enjoyed a very rapid increase in esteem—an “apotheosis” in Lance Banning’s account, see Lance W. Banning, *Republican Ideology and the Triumph of the Constitution*, 31 WM. & MARY Q. 167, 168 (1974)—shortly following its adoption. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986). The founding, the founders, and their documentary handcraft were in fact often venerated by Americans. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997) (describing the veneration of the Declaration of Independence); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 14 (1998) (“[T]he belief in some kind of transcendent origin of the Constitution obviously contributes to according it utmost devotion.”). Its prestige and the honor in which it is held made the U.S. Constitution influential abroad in earlier periods, and to some extent today. See GEORGE ATHAN BILIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989* (2009). *But see* Law & Versteeg, *supra* note 76 (documenting the decline in influence of the U.S. Constitution, at least as a model to be copied directly).

129. Walker, *supra* note 89, at 891.

130. *Id.* at 894.

judges¹³¹ or lawyers,¹³² who influence each other professionally to arrive at common positions, which members then press in their home nations.

Again, it is hard to see how these kinds of influences would apply to the structural decisions of American state constitutions. There are no nationally organized interest groups for bicameralism and presidentialism, and to the extent groups exist that take positions on such issues, they tend to be reform groups that support alternative arrangements. For example, the National Municipal League, a leading Progressive organization, advocated proportional representation at least into the 1950s.¹³³ Today, groups such as FairVote promote alternative voting systems like PR and instant runoff voting.¹³⁴

It is somewhat more plausible, however, that professional communities of lawyers might play an informal coordinating role in pushing states to conform to the structural patterns of the U.S. Constitution. It seems fair to assume that lawyers play a relatively significant role in most processes of state constitutional drafting. The national focus of most law school curricula, emphasizing heavily study of the U.S. Constitution and omitting almost entirely corresponding study of state constitutions, could induce inadvertently a belief among legal professionals that the federal model of governmental structure is superior to its alternatives.¹³⁵ This in turn could lead lawyers to pressure states to adopt structural provisions resembling those that apply federally.¹³⁶ This explanation, however, seems unable to explain

131. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

132. Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 993-94 (2009).

133. See RICHARD S. CHILDS, CIVIC VICTORIES: THE STORY OF AN UNFINISHED REVOLUTION 242-52 (1952).

134. FAIRVOTE, <http://www.fairvote.org/> (last visited Mar. 18, 2014).

135. The inattention by law schools to state constitutional law has been a topic of complaint for many years, particularly among state judges. See, e.g., Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 405 (1987); Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984). These particular complaints, however, blame legal curricula for the paucity of state constitutional arguments made to courts by practicing lawyers, a very different contention that is less plausible for reasons I have elsewhere explained, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 810-11 (1992).

136. For example, the American Bar Association has long been a vocal advocate for merit selection of judges (rather than judicial elections) as a kind of national "best practice" that ought to be adopted in every jurisdiction. See, e.g., Alfred P. Carlton, Jr., *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, ABA (2003), available at

constitutional structural convergence in earlier periods of American history, when there were no law schools, state law was dominant, and there was little federal constitutional law to speak of.

A final possible source of pressure for convergence is the national political parties. As I have recently argued elsewhere,¹³⁷ national political parties in federal systems serve as conduits not only for the transmission upward of state influence on national policy-making,¹³⁸ but also as conduits for the downward exercise of national influence on state politics and political agendas. To the extent that party politics plays a role in shaping the outcomes of state deliberative proceedings concerning constitutional structure and reform,¹³⁹ it is thus possible that a preference for the federal model might be introduced into state-level deliberations.¹⁴⁰ That is true, however, only if national parties take positions on questions of government structure, which is less obvious, particularly on the federal level, where such questions appear to have been considered closed for a very long time.

<http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf>. I thank Susan Fino for calling this to my attention.

137. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1 (2013). A related argument appears in Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

138. This is the argument made, most notably, by Kramer. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1515-18 (1994); Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 275 (2000).

139. There is much suggestive evidence to this effect in John Dinan's meticulous book on state constitutional conventions. DINAN, *supra* note 22. For example, the role of Progressives at constitutional conventions of the early twentieth century was not merely ideological, but also partisan. See *id.* at 160-71. Similarly, early nineteenth-century resistance in states like North Carolina and Maryland to changes in constitutional amending procedures, and indirectly to constitutional structures of legislative representation, *id.* at 33-34, may well have been entwined with national partisan politics: both states in the 1830s were narrowly divided between Jacksonians and anti-Jacksonians (later Democrats and Whigs), and changes to the state constitutional structure of legislative representation might have had implications for national partisan contestation that would have been obvious to the participants. See KENNETH C. MARTIS, *THE HISTORICAL ATLAS OF POLITICAL PARTIES IN THE UNITED STATES CONGRESS, 1789-1989*, at 92-95 (1989) (mapping partisanship of 1830s congressional districts); MICHAEL J. DUBIN, *PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796-2006*, at 86, 140 (2007) (reporting partisan breakdown and control of state legislatures during the same period).

140. On the other hand, history furnishes numerous instances of the opposite phenomenon, in which state political parties agitated for state constitutional reforms quite different from features found at the federal level—for example, advocacy by Jacksonian Democrats for judicial elections, and advocacy by state Progressives for direct democracy and recall of elected officials.

B. Internal Influences

1. Learning

Not all forces of constitutional and policy convergence are external to decision-makers. Characteristics of decision-makers themselves, and of the decision-making process, may in some circumstances induce different actors to converge on similar or identical decisions. Most obviously, the actions of others can provide decision-makers with information from which they might learn.¹⁴¹ In the best case, policy adoptions by other actors, coupled with experience accumulated under those policies, provide information to observers on “the costs or benefits of a particular policy innovation.”¹⁴² Other decision-makers then make rational choices based on information that they have not, or possibly could not, collect themselves,¹⁴³ engaging ideally in unbiased sifting of data while driven by a desire to maximize their own welfare.¹⁴⁴ Convergence therefore occurs because the policies on which decision-makers converge have shown themselves on the merits to be superior to the alternatives.

In the case of the convergence of American state constitutions on structural features, there appears to be little reason to believe that this kind of rational learning has played any significant role, either in earlier periods or in the period following *Baker*¹⁴⁵ and *Reynolds*.¹⁴⁶ During the earlier period, convergence occurred so quickly that it seems implausible to attribute it to observations of the actual experience of states that originally employed alternative institutional arrangements.¹⁴⁷ During the later period, there is little evidence to suggest that state decision-makers gave serious and deliberate consideration to the experience of other states, foreign nations, local governments, or, where relevant, earlier

141. Simmons & Elkins, *supra* note 114; Weyland, *supra* note 87; Dixon & Posner, *supra* note 111; Elkins & Simmons, *supra* note 109, at 33.

142. Simmons & Elkins, *supra* note 114, at 172.

143. Elkins & Simmons, *supra* note 109, at 42.

144. Weyland, *supra* note 87, at 271.

145. *Baker v. Carr*, 269 U.S. 186 (1962).

146. *Reynolds v. Sims*, 377 U.S. 533 (1964).

147. It is instructive to consider the contrasting data reported by Posner and Sunstein concerning citations by state courts of authority from sister states over time. According to their data, citations to judicial decisions by other states were highest following admission of the state and then declined over a period of many decades, suggesting that newly admitted states engaged in a period of deliberate learning from more established states, but that the need for such consultation diminished as state courts gained experience in governance. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 174 (2006).

experience of their own states with different structures of governance. This is by no means to say that state decision-makers were not trying to act rationally, only that they may not fully have succeeded.

2. *Rational Imitation*

A variant of the rational learning mechanism is a kind of imitation or “mimicry.”¹⁴⁸ Learning shades into mimicry when the decision-maker faced with a policy choice knows only, or principally, that other actors have adopted a certain policy yet lacks information about that policy’s costs, benefits, or actual record of success or failure. Not all forms of mimicry are rational—emulation can arise, as we have seen, from pressures for social conformity¹⁴⁹—but in some cases a decision to adopt policies just because others have done so can be a rational strategy of adaptation. As Elkins and Simmons put the case, “[i]n the situations of the greatest uncertainty, actors may have no other information than the knowledge of whether others have adopted the policy. In this case, individuals may reason that they should take advantage of the accumulated wisdom of past individuals’ decisions.”¹⁵⁰ In particular, organizations may think it wise to model themselves on other organizations that they consider to be successful.¹⁵¹

The strategy of mimicry can therefore be rational, but only under certain conditions. First, it must be likely that other adopters make good decisions for themselves.¹⁵² Second, the environment in which other adopters operate must be sufficiently similar to make their policy decisions relevant.¹⁵³ This will not always be the case.¹⁵⁴ Third, the actors the decision-maker seeks to emulate must in fact be successful—they must, in other words, provide a model worth imitating.¹⁵⁵

In the case of American state constitutions, the evidence of mimicry is clear. The habit of constitutional drafters to consult the constitutions of other states and of the United States is well documented, and the direct

148. Goodman & Jinks, *supra* note 90, at 626; Law, *supra* note 113, at 1286; Elkins & Simmons, *supra* note 109, at 35.

149. Goodman & Jinks, *supra* note 90, at 626.

150. Elkins & Simmons, *supra* note 109, at 43.

151. DiMaggio & Powell, *supra* note 86, at 152.

152. See Posner & Sunstein, *supra* note 147 (arguing that satisfaction of the conditions of the Condorcet Jury Theorem make it rational for jurisdictions to rely on decisions made in other jurisdictions).

153. *Id.* at 148-60.

154. *Id.*; Dixon & Posner, *supra* note 111, at 412.

155. Posner & Sunstein, *supra* note 147, at 174-76.

borrowing of language is frequent and obvious.¹⁵⁶ Drafters thus routinely know the constitutional policy decisions of other states, even if they know nothing else (which appears often to have been the case). The question, then, is whether the observed patterns of mimicry were rational. There are reasons for doubt.

First, the conditions prevailing among the states might have differed in relevant respects. One obvious difference is size. Small states, more vulnerable to factional capture,¹⁵⁷ might have greater need than large states for institutional devices such as bicameralism and strict separation of powers that impede the translation of the popular will into policy.¹⁵⁸ States with politically diverse populations might have greater use for representation-enhancing devices such as proportional representation than states with politically homogeneous populations. State citizenries might differ in their predispositions toward political participation, and in whether that participation tends toward the passionate or the deliberative. Different state populations might have lower tolerances for risk or, conversely, for delay, than populations in other states. These and many other differences of civic life in the states might have counseled in favor of different institutional forms, as political theorists since Aristotle have maintained.¹⁵⁹

Another question is whether the imitated policies were good ones. Of course this depends on what counts as a good policy. Certainly there is a fair argument that the policies structuring legislative representation prior to *Reynolds*¹⁶⁰ were not good. As discussed earlier, criticism from at least some quarters was consistent and long-standing. Single-minded conformity to those policies led to violations of the U.S. Constitution. The tendency of states to preserve as much of those policies as possible following *Reynolds* has led to a disagreeable propensity for gerrymandering. On the other hand, a certain kind of intolerance for risk might have made adoption of the prevailing policy rationally attractive.

156. See, e.g., STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION* 22 (2011) (“The 1802 [Ohio] Constitution derived most of its provisions from the state constitutions of Tennessee, Kentucky, and Pennsylvania The original Ohio and Tennessee Constitutions have fifty sections in common, many of which were exact duplicates Two-thirds of Article III . . . were taken from the Pennsylvania and Kentucky documents In addition, six of the sixteen sections of Ohio’s Bill of Rights came from either the Pennsylvania or Kentucky Constitutions.”); see also, e.g., Linde, *supra* note 135, at 381 (“Oregon’s constitution in 1859 adopted Indiana’s copy of Ohio’s version of sources found in Delaware and elsewhere.”).

157. THE FEDERALIST NO. 10 (James Madison).

158. Rossi, *supra* note 90.

159. See ARISTOTLE, *THE POLITICS* bk. IV, ch. XII (Ernest Barker trans., 1978) (arguing that the ideal constitution for a city depends upon the characteristics of its populace).

160. *Reynolds v. Sims*, 377 U.S. 533 (1964).

None of the U.S. states that employed these forms of representation had collapsed or suffered disasters on account of such policies—though of course the same could be said of Nebraska following its decision to adopt unicameralism, of the thousands of local governments around the country that had long employed unicameral and quasi-parliamentary forms of governance, and of the American cities that have at one time or another used proportional representation.

In the end, the most relevant question may be whether the states that had previously adopted presidentialism, bicameralism, and the other structural features at issue here had made good decisions on their own accounts that made them worthy of imitation. One of the problems with the strategy of mimicry is that it can be subject to a pathology of maladaptive cascades. This occurs when seemingly autonomous decision-makers act in ways that are not in fact independent.¹⁶¹ As Posner and Sunstein explain:

[Actors] who have exactly the same information or views, or simply mimic other [actors], do not, by agreeing on whether the outcome is good or bad, provide additional information about the sense or value of the outcome Hence it is not the case that the probability of a correct judgment by a large number of states is high, simply because many of those states are not offering useful information.¹⁶²

Under these conditions, “information cascades will produce convergence toward one policy choice even in situations in which actors know nothing other than who has adopted what policy.”¹⁶³

3. *Cognitive Heuristics*

Information cascades are not the only circumstance in which institutional isomorphism might result from less than fully rational processes of decision-making. Human rationality is bounded, and one frequently encountered limitation constrains the ability of decision-makers to process large amounts of information. As a result, decision-makers often turn to a variety of heuristics, or rules of thumb, to help

161. Posner & Sunstein, *supra* note 147, at 160.

162. *Id.*

163. Elkins & Simmons, *supra* note 109, at 43. On this type of “belief-mediated social interactions,” see also PETER HEDSTRÖM, *DISSECTING THE SOCIAL: ON THE PRINCIPLES OF ANALYTICAL SOCIOLOGY* 47-51 (2005).

them organize the information they acquire.¹⁶⁴ In a frequently-cited study of the mechanisms of policy diffusion, Kurt Weyland identified three cognitive heuristics, all well-known and established in various social science fields, that fit well with a good deal of evidence concerning policy convergence. The first is an “availability” bias, which predisposes people to rely excessively on information that, for no reason relevant to the decision in question, happens to be readily at hand.¹⁶⁵ The second is a “representativeness” heuristic that “induces people to draw excessively clear, confident, and firm inferences from a precarious base of data.”¹⁶⁶ The third is an “anchoring” bias that causes people to give excessive and unjustified weight to an initial observation.¹⁶⁷

As in Weyland’s study, these phenomena seem to fit well with observed patterns of institutional isomorphism in the structural choices adopted by American state constitutions.¹⁶⁸ Information about what structures of governance other states have adopted is easily and cheaply obtained, and is thus readily “available,” whereas information about foreign jurisdictions or about the comparative performance of different institutions of governance is considerably more difficult to find. This may induce state constitutional drafters to rely heavily or exclusively on information about the adoption decisions made by other American states, and without attending to considerations of actual performance.

Similarly, because the fact of state adoption is easy to verify, decision-makers can easily determine which choices have been made and the direction and extent of any trends in policy adoption. This in turn might induce them to draw excessively confident conclusions about the merits of policies chosen in other jurisdictions. Finally, easily observed choices made in other constitutions—most notably the U.S. Constitution—might well be given undue weight by decision-makers. The alternative would presumably be to give thorough and equally meticulous attention to all decisions made by all jurisdictions, followed by careful consideration of the similarity and relevance of each other

164. Walker, *supra* note 89, at 889; Weyland, *supra* note 87, at 282.

165. Weyland, *supra* note 87, at 283-84.

166. *Id.* at 284.

167. *Id.* at 284-85.

168. There seems to be an antecedent analytic question whether findings about the cognitive processes of individual humans can be applied reliably to the decision-making processes of groups and organizations. Scholars studying policy diffusion and institutional isomorphism proceed as though this is not an issue, so I follow their approach here. *See, e.g.*, Frumkin & Galaskiewicz, *supra* note 122 (demonstrating the susceptibility of governments to normative forces that produce institutional isomorphism).

jurisdiction to the one in question—a far more involved and costly process.

V. CONCLUSION

The isomorphism of American subnational constitutions on structural matters of internal self-governance may be disappointing, but it should not be surprising. The constitutions of subnational units of federal states frequently resemble one another and their national constitutions,¹⁶⁹ and as Susan Rose-Ackerman demonstrated more than thirty years ago, the incentive structures confronting subnational units in federal states are unlikely to generate much innovation or risk-taking.¹⁷⁰ A host of studies from other disciplines and from comparative international constitutional law supply a plethora of explanations for convergence and identify a wide array of mechanisms capable of producing it.

Although some of the most common mechanisms producing convergence in other domains—chief among them coercive mechanisms—seem to have limited application in the domain of American state constitutional law, several of these mechanisms may help explain the observed patterns of structural isomorphism. A desire for legitimacy or reputational benefits might explain convergence if the U.S. Constitution enjoys a very high reputation and states are seeking to emulate its structural features rather than those of other states. In that case, the federal Constitution would serve a kind of coordinating role. In addition, a shared familiarity with and appreciation of the U.S. Constitution among the professional class of lawyers may tend to steer state constitutional decision-making into familiar national templates.

Most promising, however, are a set of mechanisms that look to commonplace non-rational cognitive processes of decision-makers. Information about the constitutional decisions of other states is readily available, certain in content, and prominent. State constitutional drafters may therefore be tempted to take the path of least resistance by giving excessive and undeserved weight to structural decisions made in other state constitutions.

169. DINAN, *supra* note 22; PETER BUBJÄGER, *Sub-national Constitutions and the Federal Constitution in Austria*, in CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES 92 (Michael Burgess & G. Alan Tarr eds., 2012); NICOLAS SCHMITT, *New Constitutions for All Swiss Cantons: A Contemporary Challenge, in Austria*, in CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES 143-44, 147 (Michael Burgess & G. Alan Tarr eds., 2012).

170. Susan Rose-Ackerman, *Risk Taking and Reflection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

For structural reformers, two lessons appear to emerge. First, information about alternatives must be made just as widely and easily available as information about the dominant choices. Second, actual observation of and contact with those alternatives must become more widespread, meaning that alternatives must be adopted in more jurisdictions. Unfortunately, this yields a difficult circularity problem: a condition for successful reform is prior successful reform. This is, however, typical of “tipping point” patterns of policy diffusion,¹⁷¹ and presumably reformers can take encouragement from the fact that innovative policies can diffuse easily and widely once a threshold of adoption is reached.

171. Simmons & Elkins, *supra* note 114, at 174.