Political Functions and Limitations of Contemporary State Constitutions in the United States

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POLITICAL FUNCTIONS AND LIMITATIONS OF CONTEMPORARY STATE CONSTITUTIONS IN THE UNITED STATES

Jonathan L. Marshfield

ABSTRACT

State constitutions in the United States serve various important political functions that may be relevant and helpful to constitutional designers in other political systems. This paper explores two striking features of contemporary state constitutionalism with an eye towards their value for those considering a written Quebec constitution. First, state constitutionalism is characterized by frequent formal amendment through popular political processes. This has resulted in a form of constitutionalism that often prioritizes swift democratic responsiveness over entrenched prior commitments. Because recent empirical scholarship suggests that this is a broader phenomenon often occurring in federal countries with written subnational constitutions, Quebec reformers should be mindful of how formal amendment under a written constitution can energize popular constitutional politics. Second, state constitutions have not been particularly effective in protecting state political identities or community. In fact, because of frequent amendment and the strong pull of national political parties, the dominant trend in state constitutionalism is convergence on national issues and identities. This should raise questions for Québécois nationalists regarding the real, long-term value of a written provincial constitution.

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INTRODUCTION

The United States has a long history with “layered” constitutionalism. Since the adoption of the Articles of Confederation in 1781, the United States has had a written “national” constitution as well as written constitutions for each of the constituent states.\(^1\) Throughout this long history, state constitutions have evolved in their substance and function.\(^2\) During the revolutionary period, some of the then-colonies used state constitutions to signal independence from Great Britain.\(^3\) In the period before the Civil War and the incorporation of the Bill of Rights, state constitutions were the primary source of law restricting (or failing to restrict) state government intrusion on individual rights.\(^4\) And, during the conservative years of the Burger Court, state constitutions became the focus of efforts to expand individual rights that the United States Supreme Court had restricted under the federal Constitution.\(^5\)

In this essay, I draw attention to two particularly striking features of contemporary state constitutionalism that may be relevant to the broad question of whether subnational\(^6\) units within a federal system should adopt

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\(^4\) Prior to ratification of the Fourteenth Amendment, the states’ constitutional space had been demarcated primarily by US Const art I, s 10, which expressly prohibited the states from doing various things. Regarding individual rights, the only meaningful prohibitions contained in that section relate to bills of attainder, impairment of contract, and titles of nobility (*ibid*). The Fourteenth Amendment fundamentally changed this by explicitly prohibiting the states from making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States; . . . deprive any person of life, liberty, or property, without due process of law; [or] deny to any person within its jurisdiction the equal protection of the laws” (*US Const and XIV*). But see James A Gardner, Interpreting State Constitutions (Chicago: University of Chicago Press, 2005) at 29-36 (recounting confusion in courts’ applications of these doctrines before incorporation).

\(^5\) See AE Dick Howard, “State Courts and Constitutional Rights in the Day of the Burger Court” (1976) 62:5 Va L Rev 873 at 874-79. These are only some of the many mutations of state constitutionalism in the United States over the last two centuries. Indeed, each state constitution has its own unique history that is lost in these broad-brush characterizations.

\(^6\) Throughout this essay, I use the phrase subnational to refer to sub-state jurisdictions within a federal system. I understand that this terminology is awkward in the Canadian
their own written constitutions, and, more specifically, whether Quebec needs a written constitution. Of course, state constitutionalism does not provide an archetype for how subnational constitutionalism should be implemented in any particular federal system, and lessons from state constitutionalism may not translate to other situations. The comparative value of the American experience is surely limited by many factors. Nevertheless, the United States’ long history with state constitutionalism may provide some helpful information for constitutional designers in other systems. With these qualifications and limitations in mind, I focus on two themes in state constitutionalism that may be particularly relevant to the Quebec question.

First, contemporary state constitutionalism is characterized by frequent formal amendment of constitutional texts through popular political processes. This has resulted in a form of constitutionalism that often bypasses representative decision-making and prioritizes swift responsiveness to majoritarian preferences rather than fidelity to entrenched prior commitments. This version of constitutionalism stands in stark contrast to the rigidity of the federal constitutional text and the informal methods of amendment that characterize federal constitutional change. Moreover, recent comparative scholarship suggests that the United States’ experience is not idiosyncratic. In fact, most layered constitutional
systems around the world experience more formal amendment and popular constitutionalism at the subnational level. Constitutional designers should be aware, therefore, that energized popular constitutionalism seems to follow written subnational constitutions.\textsuperscript{11}

Second, state constitutions have a mixed track record as devices for fostering or preserving subnational political identities.\textsuperscript{12} One of the most intuitive reasons for a subnational jurisdiction to adopt a constitution is to express and preserve the political priorities of an identifiable subnational community.\textsuperscript{13} As A.E. Dick Howard, has argued: “no function of a constitution, especially in the American states, is more important than its use in defining a people’s aspirations and fundamental values.”\textsuperscript{14} Yet, state constitutions have done this only sporadically and with limited success. Instead, the dominant trend in state constitutions is for convergence around various national political identities and issues. Although there is evidence that this is the result of unique environmental factors in the United States, there are also good theoretical reasons to believe that subnational constitutions are not especially effective at preserving subnational political communities.\textsuperscript{15}

These two observations may raise important considerations for the Quebec question. First, if written subnational constitutions tend to catalyze pressure for more direct popular involvement in constitutional change, then a written Constitution for Quebec would likely raise interesting legal questions regarding a province’s authority to craft amendment rules that incorporate referendum or public initiative options. Although a written Quebec constitution may enhance pressure for these devices, such changes may run afoul of Canada’s parliamentary tradition and even the Canadian democracy and popular participation in constitutional reform” at 595-96).

\textsuperscript{11} From a normative perspective, frequent formal amendment and popular involvement in constitutional change are not necessarily problematic. See Versteeg & Zackin, supra note 7 at 1699-1705 (arguing for recognition of a constitutional theory that prioritizes flexibility and detailed instructions over long-term stability). It could be a desirable consequence of adopting a subnational constitution.


\textsuperscript{13} See Tarr, supra note 6 at 783.


\textsuperscript{15} See Gardner, supra note 4 at 61-72 (explaining that state populations do not correspond to meaningful political communities); Ginsburg & Posner, supra note 10 at 1620-22 (theorizing that under certain usual conditions subnational constitutions are likely to experience pressure to converge on common themes).
Constitution.\textsuperscript{16} Even if the Canadian Constitution permits Quebec to adopt alternative amendment procedures, Quebec reformers should nevertheless be mindful of how democratic amendment processes might further energize popular constitutional politics.

Second, to the extent the movement for a written Quebec constitution is motivated by Québécois nationalism, proponents should take seriously the limitations on using a written constitution to preserve sub-state political communities. Currently, provincial constitutional change in Quebec seems highly institutionalized and opaque,\textsuperscript{17} which might contribute to its entrenchment and the preservation of a Québécois national identity as the status quo. Codifying Quebec’s constitutional law in a written constitution could have the counter-intuitive result of making it less entrenched, and, consequently, less effective in preserving Quebec’s national identity. This may be an unlikely outcome based on the longstanding cultural and political circumstances in Quebec, but it should inform expectations regarding the efficacy of a written Quebec constitution.

This essay has two major parts. In part one, I explore the stark contrast between the processes of constitutional change under the United States Constitution and methods of change under state constitutions. I also explore likely causes of this contrast and provide a few preliminary thoughts on the relevance of the United States experience for Quebec. In the second part, I explore how state constitutions have performed in fostering subnational political identities and provide a few thoughts on what this might mean for a written Quebec constitution.

I. **State Constitutions Have Facilitated Contemporary Popular Involvement in Constitutional Change**

Although some early written constitutions did not contain procedures for amendment,\textsuperscript{18} all national written constitutions now contain explicit rules for how the constitutional text can be changed.\textsuperscript{19} There are good theoretical and practical reasons for this approach to constitutional change. From a

\textsuperscript{16} See Constitution Act, 1982, s 45, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Constitution Act, 1982] (“the legislature of each province may exclusively make laws amending the constitution of the province.”); Tarr, supra note 6 at 789-91 (discussing potential limitations under Section 45).


\textsuperscript{18} See Tarr, supra note 2 at 62.

practical perspective, empirical research has shown that a constitution is more likely to last if it is subject to regular formal amendment. From a theoretical perspective, amendment rules are useful because they establish an ordered process for resolving conflicts regarding fundamental issues of governance. If we take as our starting point, therefore, that a written constitution is likely to contain rules allowing for its amendment, then important design questions include how those rules will be structured, and, in turn, how the chosen amendment rules will affect constitutional politics.

In this section, I explore whether the United States experience with state constitutions sheds light on this issue. I conclude that when state constitutions are viewed from a comparative perspective, there is good evidence to suggest that written constitutions adopted by subnational units often facilitate popular involvement in constitutional change through frequent formal amendment. Frequent amendment, in turn, often promotes a more populist form of constitutionalism that “privileges democratic responsiveness over fidelity to commitments made in the past.” I conclude with a few brief thoughts on what this might mean for a written Quebec constitution.

A. Characteristics of State Constitutional Change

Constitutional politics in the United States is a story of stark contrasts. At the federal level, constitutional change occurs primarily through informal amendment of a relatively static constitutional text. Although Article V of the Constitution establishes procedures for formal amendment, those procedures are notoriously arduous. Indeed, those who have tried to measure the relative difficulty of amendment rules consistently identify the United States Constitution as having one of the most difficult amendment procedures in the world.

The actual amendment rate (twenty-seven since 1789) is also extremely

20 See Zachary Elkins et al., The Endurance of National Constitutions (New York: Cambridge University Press, 2009) at 7-11, 94-103 (noting that constitutions tend to fail if they are too difficult to amend or extremely easy to amend).
22 Versteeg & Zackin, supra note 7 at 26.
low relative to other constitutional democracies around the world. In the seminal study regarding relative amendability, Donald Lutz found that the average annual amendment rate for constitutional democracies is 2.54 amendments per year. At the time of his study, the amendment rate for the United States Constitution was only 0.13. In addition, both Richard Albert and Darren Latham have observed that the United States amendment rate has been decreasing over time. In other words, formal amendment of the United States Constitution is relatively uncommon, and it is becoming more uncommon with time.

As a result, constitutional change at the federal level occurs mostly through informal amendment. Informal amendment occurs when political actors and institutions effectively modify constitutional rules without altering the constitutional text, and it can happen in a variety of ways. Bruce Ackerman has famously argued that the Constitution is changed informally through “constitutional moments” that are triggered by significant institutional conflict, followed by dialogue and indirect popular endorsement. Informal constitutional change may also occur through “super-statutes” that are elevated over time to “quasi-constitutional” status. Perhaps the most salient process of informal constitutional change is the Supreme Court’s exercise of judicial review. As the final arbiter of constitutional meaning, the Supreme Court can issue binding constitutional decisions that change constitutional rules without any formal change to the Constitution.

One of the main criticisms of informal constitutional change in the

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24 See Albert, supra note 9 at 224-28.
26 Ibid. The current rate is slightly less at 0.12; or one amendment every 8.4 years. See Albert, supra note 9 at 227.
28 See Albert, supra note 9 at 224 (“This decelerating pace of formal amendment is paired with a modern fact of constitutional law in the United States: constitutional change today occurs ‘off the books.’”)
29 See Richard Albert, “Constitutional Disuse or Desuetude: The Case of Article V” (2014) 94: 3 Boston U L Rev 1029 at 1031 (describing informal amendment and listing ways it can occur).
United States – especially through judicial review by the Supreme Court – is that the processes lacks democratic legitimacy and undermines popular sovereignty.\(^{32}\) On this account, Article V is a preferable device for at least some constitutional changes because it establishes processes that are more directly tied to democracy, political accountability, and popular sovereignty.

These critics often point to constitutional changes through judicial review as the strongest example of the democratic deficiencies associated with informal constitutional change. Over time, the Supreme Court has rendered various high-profile decisions that changed binding constitutional rules without any changes to the constitutional text. These changes were decided by nine unelected Justices with minimal political accountability because of their protected life tenure.\(^{33}\) From this perspective, judicial review is a rather undemocratic method of constitutional change that limits opportunities for direct popular involvement in constitutional politics.

Of course, Supreme Court rulings are not self-enforcing. They require the eventual backing of other political institutions to effectuate the Court’s ruling. And most of these institutions – such as the President and Congress – are comprised of democratically elected officials. In this sense, even constitutional changes announced by the Court are at least somewhat connected to democratic processes and popular preferences.

Indeed, defenders of informal constitutional change argue that its legitimacy is ultimately grounded in popular sovereignty.\(^{34}\) Bruce Ackerman’s theory of “constitutional moments”, for example, involves a multi-step process outside of Article V that nevertheless requires indirect popular ratification.\(^{35}\) The process begins with a constitutional impasse between institutions followed by an electoral mandate to address the impasse. It culminates with a “national election to serve as a referendum” on the resolution of the constitutional impasse.\(^{36}\) According to Ackerman, this process is tied to popular sovereignty because “popular sovereignty is not a matter of a single moment; it is a sustained process that passes through a series of stages - from the signaling phase through the culminating acts of

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\(^{33}\) See ibid at 123-39.


\(^{35}\) See Ackerman, *supra* note 30 at 1762.

\(^{36}\) Ibid; see Gerken, *supra* note 34 at 934 (describing Ackerman’s theory).
popular decision to consolidation.”

Similarly, according to David Strauss, “the people rule not through discrete, climatic, political acts like formal constitutional amendments, but in a different way – often simply through the way they run their nonpolitical lives, sometimes combined with sustained political activity spread over a generation or more.”

Even if we accept these accounts of informal amendment, they present only an indirect and protracted connection to democratic processes and popular politics. Indeed, Heather Gerken has defended informal amendment processes precisely because they promote gradual change through deliberative processes. One virtue of informal amendment, according to Gerken, is that it is not “encapsulated in a thin textual reference” adopted by a particular group of people locked in a particular moment. Informal amendment, according to Gerken, involves “repeat encounters with a similar problem over time.”

Regardless of whether one agrees with the normative bases for informal constitutional change, most scholars recognize that, as an empirical matter, federal Constitution change occurs primarily through informal processes. For better or worse, the infrequently of formal amendment has forced constitutional change into informal processes. The result is very few opportunities for immediate popular input regarding constitutional reform.

State constitutions present a stark contrast to this picture. If federal Constitutional change is dominated by protracted processes of informal change, state constitutional change is characterized by frequent and immediate formal amendment. Indeed, states have amended their current constitutions more than 7,495 times and the states have collectively adopted 144 different constitutions. On average, states formally amendment their

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37 Ackerman, supra note 30 at 1807.
39 Gerken, supra note 34 at 935-36 (“change is recorded over time and across factual scenarios”).
40 Ibid at 934-35.
41 Ibid at 936.
42 See e.g. Albert, supra note 9 at 224 (describing this as a “modern fact”).
43 See generally Versteeg & Zackin, supra note 7.
44 See Elmer E Cornwell, Jr et al., State Constitutional Conventions: The Politics of the Revisions Process in Seven States (New York: Praeger Publications, 1975) (“Whereas the Federal Constitution has been adapted to a changing society by a liberal interpretation of the delegated powers contained in that document, states have more often than not resorted to the formal amending procedure and wholesale revision as methods to keep pace with an increasingly complex society” at 5).
45 John Dinan, “State Constitutional Developments in 2015” in Book of the States
constitutions at least once every three years.\textsuperscript{46} Although there is some variety in amendment rates between states, even the most static state constitution (Vermont) is amended at least once every two years on average.\textsuperscript{47}

Moreover, state constitutional amendment rules generally emphasize popular participation in constitutional change.\textsuperscript{48} All states except Delaware require a new constitution to be approved by citizens at a referendum.\textsuperscript{49} Similarly, all states except Delaware require all constitutional amendments to be ratified by public referenda.\textsuperscript{50} Eighteen states permit citizens to bypass government officials altogether and amend their constitutions directly through the public initiative.\textsuperscript{51} Additionally, fourteen state constitutions mandate that there be a regular public referendum on whether the state should hold a constitutional convention to revise or replace the constitution.\textsuperscript{52} Two states even allow voters to call a constitutional convention by initiative.\textsuperscript{53} All of these amendment processes prioritize direct popular involvement in constitutional change in a way that contrasts with constitutional change under the federal Constitution.

Thus, as John Dinan has observed, state constitutional amendment activity reflects a fundamentally different form of constitutionalism than experienced at the federal level.\textsuperscript{54} Under the federal Constitution, popular involvement in constitutional change is protracted, mediated, and severely limited. Indeed, even formal amendment through Article V does not require a public referendum of any kind to ratify amendments. At the state level, however, popular involvement is often direct and immediate. In fact,

\textsuperscript{47} See Dinan, supra note 45 at 9.
\textsuperscript{48} See generally Versteeg & Zackin, supra note 7 at 1677-78.
\textsuperscript{49} G Alan Tarr & Robert F Williams, “Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform” (2005) 36:4 Rutgers LJ 1075 at 1081.
\textsuperscript{50} Ibid.
\textsuperscript{51} See Marshfield, supra note 46 at 488-89. The commitment to popular involvement in constitutional change is also evident in the many procedures that state constitutions include for recalling government officials and electing judges. These procedures are ostensibly designed to reduce agency costs and ensure fidelity between the people’s preferences and the actions of government officials.
\textsuperscript{52} Tarr & Williams, supra note 49 at 1079.
\textsuperscript{53} Ibid at 1081.
\textsuperscript{54} See John Dinan, “‘The Earth Belongs to the Living’: The Development of State Constitutional Amendment and Revision Procedures” (2000) 62:4 Rev of Pol 645 at 645.
state constitutions are frequently criticized because they appear to change on a whim in response to every hot-button issue in American society.\textsuperscript{55} Consequently, state constitutions often reflect contemporary political preferences rather than a set of deep, enduring commitments passed on from prior generations.\textsuperscript{56} They also tend to be very specific in substance and address myriad policy issues that one might consider to be more properly addressed through legislation.\textsuperscript{57} Additionally, it is not uncommon for state amendments to directly invalidate unpopular judicial rulings.\textsuperscript{58}

This populist form of constitutional is not necessarily invalid. Indeed, I have suggested elsewhere that the populist nature of state constitutions balances the formal rigidity of the federal approach and contributes to the overall health of United States constitutionalism.\textsuperscript{59} But the populist nature of state constitutionalism should raise questions for constitutional designers about the likely consequences of having written constitutions for subnational jurisdictions. If the United States experience is mostly the result of idiosyncratic environmental factors, then it may not provide much guidance for constitutional decision-makers in other systems. On the other hand, if state constitutionalism is the result (at least in part) of more universal principles of constitutional design, then it may warrant more careful attention.\textsuperscript{60}

\textbf{B. Explanations for “Popular” State Constitutionalism}

The causes of state constitutionalism’s popular influence have been explored and debated by various scholars. Stephen Griffin, has argued that the states’ “permissive attitude toward constitutional amendment” is a

\textsuperscript{55} See James Gray Pope, “An Approach to State Constitutional Interpretation” (1993) 24:4 Rutgers LJ 985 (describing state constitutions as “a textual foundation that changes with every legislative or popular whim,” at 985). State constitutions have been amended to address pressing but unsettled social issues like marriage equality and affirmative action. They have also been amended to tackle large but controversial policy issues like government healthcare and gun control.

\textsuperscript{56} See Versteeg & Zackin, \textit{supra} note 7 at 1677 (observing that state constitutions tend to “privilege[ ] democratic responsiveness over fidelity to past commitments”).

\textsuperscript{57} See Pope, \textit{supra} note 55 at 985.


\textsuperscript{60} This dichotomy is, of course, an oversimplification of the comparative exercise.
“descendant of Anti-federalist beliefs.” On this account, state constitutionalism grew from the historical conflict during the framing of the United States Constitution between the federalists and anti-federalists. Because the federal Constitution ultimately adopted the federalists’ preference for a rigid, framework-type document, state constitutionalism became the locale for alternative constitutional theories. Christian Fritz, for example, has observed that although the federal Constitution rejected Thomas Jefferson’s vision of periodic constitutional revision, Jefferson’s “vision assumed considerable importance in the intellectual life of state constitution-making.”

John Dinan has offered another historical account. Based on an extraordinary review of the records from most state constitutional convention proceedings, Dinan concludes that states initially maintained very rigid amendment procedures. According to Dinan, it was not until the nineteenth and early twentieth centuries that states began to adopt more flexible amendment rules in response to various concerns. Specifically, Dinan notes that amendment rules were first liberalized during the nineteenth century in order to address entrenched geographic interests that skewed the balance of power in the states. Then, in the twentieth century, states further liberalized amendment procedures to ensure that citizens could “overcome special interests and intransient judges” who “blocked popular social and economic reform measures.” Although Dinan’s account is more nuanced, it nevertheless suggests that state constitutionalism is mostly the result of unique historical factors and does not identify any transferrable principles of constitutional design that might help inform constitution-makers in other places.

There is, however, a comparative account of state constitutionalism that might shed light on its causes in a way that is more useful for constitutional design. In an important article titled “Subconstitutionalism”, Tom Ginsburg and Eric Posner conduct a comparative study of subnational

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62 Ibid at 973.
63 Ibid.
66 Dinan, *supra* note 58 at 650.
67 Ibid at 650-51.
68 Ibid at 650.
constitutions in the United States and other two-tiered constitutional systems (i.e., systems where there is a “superconstitution” that operates above a set of constituent units with separate “subconstitutions”). Ginsburg and Posner explore whether subconstitutions are likely to be designed differently because they are subordinate to superconstitutions. They conclude that subconstitutions are likely to be easier to amend and “weaker” in their ability to constrain majorities than superconstitutions because agency costs are lower at the sub-state level.

Because agency costs are lower for substates, Ginsburg and Posner observe that there is likely a disparity in constitutional stability between “states” and “substates.” High agency costs mean that national constitutional constraints must be relatively strong, static, and difficult to change. Sub-state constitutions, however, can be relatively more fluid and responsive to public input because agency costs are lower.

As I have explained elsewhere, Ginsburg and Posner’s basic intuition is that there are strong incentives for a national constitution to be stable in its creation of core government institutions and protection of essential individual liberties. A stable national constitution, in turn, creates incentives for subnational constitutions to be more responsive to contemporary popular preferences.

Although Ginsburg and Posner note that their empirical analysis is “exploratory”, they see evidence of their theory in the United States, the

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69 See Ginsburg & Posner, supra note 10 at 1584.
70 Ibid at 1584-85.
71 In this context, agency costs refer to the inefficiencies in government resulting from actions taken by government officials that benefit officials at the expense of the public. (Ibid at 1585). Ginsburg and Posner conclude that agency costs are lower at the sub-state level because superconstitutions must place limits on theoretically unlimited government power, but subconstitutions are legally subordinate to their respective superconstitutions. (Ibid at 1596). Moreover, there is no effective enforcement mechanism operating above a superconstitution, but national government provides an effective monitoring and enforcement mechanism regarding sub-state abuses of power. (Ibid at 1596-97). Finally, if sub-states abuse power, they are more likely to lose citizens to neighboring sub-states because mobility within a country is easier than international immigration. (Ibid).
72 Ibid at 1593-94.
73 Ibid.
74 Ibid.
European Union, and Mexico. \textsuperscript{76} They also note that they did not find any “subconstitutional system that is more difficult to amend than that of its superstate.”\textsuperscript{77} Other comparative case-studies have found evidence in Austria and Switzerland of a correlation between subconstitutionalism and popular involvement in constitutional change.\textsuperscript{78}

Another factor that might explain the correlation between popular constitutionalism and subnationalism is democratic scale.\textsuperscript{79} Subnational constitutionalism necessarily involves smaller jurisdictions with fewer participants than the entire national population. Smaller jurisdictions can provide stronger incentives for grass-roots political activity if citizens sense that their participation is more likely to impact the outcome in a smaller jurisdiction. As a corollary, smaller jurisdictions might increase the influence of special interests because they are often more cohesive and therefore easier to capture than larger, more diverse jurisdictions. In either case, decentralizing constitution-making to smaller jurisdictions might create stronger incentives for citizens or organized groups to actively pursue formal amendments at the subnational level. This is especially true when constitutional rules are codified in a written constitution with a clear process for amendment.

Thus, there seems to be good evidence that the populist nature of state constitutionalism in the United States is not simply a result of idiosyncratic historical forces. When subnational units adopt written constitutions that operate under enforceable national constitutional law, it is likely that the subnational constitutions will be weaker in their ability to constrain majorities and more majoritarian in nature.\textsuperscript{80}

\textbf{C. What this Might Mean for a Written Quebec Constitution}

Predicting constitutional outcomes can be a particularly dubious exercise. There are many variables and it is very hard to account for all of them in any single analysis. Political culture, for example, can be hard to identify and articulate, but it can be a powerful influence on how constitutional rules are deployed. Nevertheless, the field of comparative

\textsuperscript{76} Ginsburg \& Posner, \textit{supra} note 10, at 1627.
\textsuperscript{77} Ibid at 1600.
\textsuperscript{78} See Marshfield, \textit{supra} note 10 at 599-602 (summarizing these studies).
\textsuperscript{79} See Marshfield, \textit{supra} note 10 at 607 (exploring this possibility).
\textsuperscript{80} See Dinan, \textit{supra} note 10 at 842 (conducting comparative study of amendment procedures and finding that subnational amendment procedures are usually easier to amend and amended more frequently). But see Versteeg \& Zackin, \textit{supra} note 7 at 1697-99. (resisting this view).
constitutional design aspires to identify reliable and transferable relationships between constitutional rules and outcomes. Thus, it is worth commenting here on what popular state constitutionalism might mean for a written Quebec constitution.

First, as noted above, a written constitution for Quebec would likely require the design of formal amendment rules for that constitution. This would raise the legal question of what discretion Quebec has under the Canadian Constitution to craft its own amendment rules.\footnote{See Tarr, \textit{supra} note 6 at 790-91 (raising this issue).} Section 45 of the \textit{Constitution Act, 1982} provides that “[s]ubject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.”\footnote{Constitution Act, 1982, \textit{supra} note 16.} As Alan Tarr has observed, “by lodging the power of amendment ‘exclusively’ in provincial legislatures, Section 45 may preclude provinces from devising alternative mechanisms” for amendment.\footnote{See Tarr, \textit{supra} note 6 at 790.} However, under the parliamentary tradition, provinces can impose upon themselves “manner and form” requirements that could, at least in theory, include a requirement for ratification by popular referendum.\footnote{Ibid.} Additionally, F.L. Morton has suggested that provincial amendment rules incorporating a referenda requirement would likely be constitutional based on contemporary practice and precedent under the Canadian Constitution.\footnote{See FL Morton, \textit{‘ Provincial Constitutions in Canada” (2004).}}

In any event, a written Quebec constitution would very likely raise this issue under Canadian Constitutional law.

Second, the above evidence suggests that codifying higher law for the province of Quebec could create incentives for relatively flexible and democratically accountable amendment procedures. This, in turn, could incentivize popular participation in constitutional issues and result in constitutional law that “privilege[s] democratic responsiveness” over entrenched counter-majoritarian commitments.\footnote{Versteeg & Zackin, \textit{supra} note 7 at 1677.} The result is likely a constitution that changes often (or at least more often than the national constitution) to reflect the contemporary preferences of the prevailing majority.\footnote{See ibid at 1679-80 (describing state constitutions in this way).}

As noted above, this version of constitutionalism is not necessarily problematic. It does, however, come with a particular set of costs and benefits that constitutional designers should consider and explore. It is not my purpose (nor within my field of expertise) to conduct that analysis here.
regarding Quebec and Canadian constitutionalism. My more modest goal is to flag for those who might pursue a written constitution for Quebec the possibility that it will likely gravitate towards a particular version of constitutionalism; one that is characterized by more frequent popular amendment than experienced under the Canadian Constitution. This might signify a change in the type of constitutionalism currently experienced in Quebec, which I understand to be dominated by representative decision-making and other mediated forms of constitutional change.88

Of course, this is by no means a foregone conclusion. Constitutional change in any system is complex and hard to predict. I understand, for example, that much of Canada’s constitutional law is found in uncodified constitutional conventions that are not subject to formal amendment in any direct way.89 This culture of uncodified constitutional law might affect how Canadians approach constitutional change, even under a written provincial constitution. It could, for example, mitigate the usual incentives towards frequent popular amendment.90 On the other hand, the hydraulics associated with introducing a written constitution into a system dominated by informal methods of constitutional change might catalyze popular energy for formal amendment. In any event, decision-makers considering a written constitution for Quebec should give serious thought to how it might affect the nature of constitutionalism in the province.

II. STATE CONSTITUTIONS DO NOT NECESSARILY ENSURE THE PRESERVATION OF SUBNATIONAL POLITICAL COMMUNITY

Perhaps the most intuitive reason for a subnational unit to adopt a constitution is to preserve an identifiable subnational political community within a larger constitutional system.91 This approach to subnational constitutionalism is common in divided societies that are comprised of geographically clustered political communities.92 Subnational constitutions provide a mechanism for these communities to exercise some degree of political self-determination while remaining under a national constitutional structure. On this view, subnational constitutions help express and preserve

88 See Tarr, supra note 6 at 771.
89 See ibid.
90 See ibid (noting that the “absence of supermajority requirements or popular ratification could, alternatively, simply reflect Canadian political culture, which has shown a distrust of referenda unlimited popular sovereignty”, at 791).
91 See Marshfield, supra note 59 at 1169.
92 Ibid at 1171-22 (describing this model of subnational constitutionalism in Nigeria, South Africa, Iraq, India, Switzerland, and Ethiopia).
the values and identity of a self-aware political community. In this section, I consider the extent to which state constitutions have been successful in expressing or preserving state political identities. I conclude that the evidence is conflicting. A few states have been successful, at times and in limited ways, in using state constitutions to preserve a unique political identity. Most states, however, seem to be characterized by increased convergence with national political identities. In all, the United States experience with written state constitutions suggests that subnational constitutions can facilitate the preservation of political community, but they do not guarantee it.

A. Examples of the Preservation of Unique State Political Identities

State constitutions provide examples of the effective expression and preservation of unique state identity. The Texas and New Mexico constitutions are particularly illustrative, but Alaska, California, Colorado, and New York, provide further examples, among others. I briefly discuss examples from each.

The Texas Constitution contains evidence of a distinct constitutional narrative for the state. As the Supreme Court of Texas has proudly noted, the Texas Constitution “bears the distinction of being the only state constitution that was derived form its own independent, national constitution.” Indeed, as one Texas Judge explained:

Texas was never a territory. We were an independent nation from 1836 to 1846 and we joined the Union then by treaty-one sovereign to another. After joining the Union we carried over the written principle upon which our Country (Texas) was founded into the principles of government of our State. As such we have and we pride ourselves in having our own concepts of what our Constitution means to us.

Texas’s current constitution reflects the state’s proud independent tradition and prioritization of self-governance. The constitution’s opening declares:

Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.

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93 Davenport v Garcia, 834 SW (2d) 4 at 15 (Tex 1992) [Davenport].
94 Osban v State, 726 SW (2d) 107 at 119-20 (Tex Crim App 1986) (Judge Miller, dissenting).
95 Tex Const art I, sec 1.
The Texas Constitution has been at least somewhat effective in preserving this identity. The Supreme Court of Texas and the Texas Court of Criminal Appeals have, on various occasions, relied on the Texas Constitution as a basis for resisting convergence with federal constitutional precedent. \(^{96}\) In *Heitman v. State*, for example, the Texas Court of Criminal Appeals overturned a lower court decision interpreting the Texas Constitution in lockstep with the Fourth Amendment of the United States Constitution. \(^{97}\) The court held that “clearly our own state constitution was not intended by our own founding fathers to mirror that of the federal government.” \(^{98}\) To be sure, the Texas high courts have not always been consistent in their approach, \(^{99}\) but to the extent the Texas constitution embodies the fundamental values and unique political character of Texas, state courts have acknowledged and implemented those priorities from time to time.

New Mexico provides another example. The New Mexico Constitution contains a series of unique provisions designed to protect Spanish-speaking residents. \(^{100}\) Article XII, Section 8, for example, provides:

The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state. \(^{101}\)

Article VII, Section 3, similarly provides that all New Mexicans have a right to “vote, hold office or sit upon juries” that “shall never be restricted, abridged or impaired on account of . . . inability to speak, read, or write the English or Spanish languages.” \(^{102}\)

These provisions reflect a deep and lasting commitment to a bilingual

\(^{96}\) See e.g. *Heitman v. State*, 815 SW (2d) 681 at 690 (Tex Crim App 1991) [*Heitman*]; *Davenport*, *supra* note 93 at 17.

\(^{97}\) *Heitman*, *supra* note 96 at 690.

\(^{98}\) Ibid.

\(^{99}\) See *Gardner*, *supra* note 12 at 789-90 (tracking inconsistencies in Texas high courts’ approaches).


\(^{101}\) NM Const art XII, s 8; see NM Const art XII, s 10 (“Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state”).

\(^{102}\) NM Const art VII, s 3.
and multicultural polity. The provisions we included in the state’s initial constitution drafted in 1910, and were “deemed of sufficient importance to be worthy of special protection” through “extraordinary requirements for amendment.” Ordinarily, amendments to the New Mexico Constitution must be approved by a majority of both legislative chambers and a majority of voters. The provisions related to Spanish-speaking residents, however, must be approved by three-quarters of the legislature and the electorate.

New Mexico courts have been especially sensitive to the values expressed in these provisions. In State v. Samora, the New Mexico Supreme Court considered whether a trial judge violated the state constitution when he dismissed a Spanish-speaking juror “who had difficulty understanding the English language.” In finding that the dismissal was unconstitutional, the court explained that the constitution “unambiguously protects the rights of non-English speakers to serve on our state juries.” The court further explained that “this unique right has been part of our judicial history since our territorial days” and that “New Mexico courts are required to make every reasonable effort to accommodate a potential juror for whom language difficulties present a barrier to participation in court proceedings.”

Other examples of political identity in state constitutions can be found in Alaska, California, Colorado and New York, among others. In Ravin v State, the Alaska Supreme Court famously held that the Alaskan Constitution embodies a unique commitment to “individuality” that allows citizens “to achieve a measure of control over their lifestyles which is now virtually unattainable in many of our sister states.” Similarly, the California Supreme Court, has found that the California Constitution contains a unique commitment to robust and independent protection of individual liberties. The Colorado Supreme Court has held that its

103 See generally Richard H Folmar, Piecemeal Amendment of New Mexico Constitution (Santa Fe: New Mexico Legislative Council Service, 2005) at 8.
104 Ibid.
105 See NM Const art XIX, s 1.
106 Ibid.
108 Ibid. at 332.
109 Ibid.
110 Ravin v State, 537 P (2d) 494 at 503-04 (AK 1975) (interpreting Alaskan constitutional provision protecting individual privacy to allow use of marijuana).
111 See Raven v Deukmejian, 801 P (2d) 1077 at 1088 (Cal 1990) (finding that Cal Const art I, s 24, which states “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution,” demonstrates California’s commitment to the independent adjudication of individual rights issues).
constitution prioritizes direct democracy by establishing a fundamental collective right to referenda, initiatives, and recall procedures. Finally, the New York Court of Appeals has reiterated New York’s unique commitment to freedom of expression and robust free speech protections.

These rulings and constitutional provisions provide some evidence that state constitutions can effectively express and preserve subnational political identities in the states. They are not the whole picture, however.

B. State Constitutions and Constitutional Convergence

Despite the examples discussed above, there is evidence that the dominant trend in state constitutional law is towards convergence. State constitutional designers, for example, have shown an increasing propensity to model new state constitutions after federal provisions or archetype state constitutions (such as the National Municipal League’s Model State Constitution). State constitutions have also increasingly borrowed provisions from each other. This modeling and borrowing has resulted in a greater “degree of uniformity” on both structural and rights issues that reflects a common understanding regarding the nature of American constitutionalism.

As an historical matter, state constitutional convergence seems to have begun in the decades following World War II as the result of pressure to “modernize” state constitutions. New Jersey, Hawaii, and Alaska all adopted constitutions during this period that were modeled heavily after the Municipal League’s Model State Constitution. A study of twentieth-

112 See Bernzen v City of Boulder, 525 P (2d) 416 at 419 (Col 1974).
115 See Tarr, supra note 2 at 153-57; Michael Schwaiger, “Understanding the Unoriginal: Indeterminate Originalism And Independent Interpretation of the Alaska Constitution” (2005) 22:2 Alaska L Rev 293 at 302-03 (providing explanation of how Hawaii and Alaska constitutions were developed based on the Model State Constitution).
117 Ibid at 734.
118 See Tarr, supra note 2 at 12 (“over time state bill of rights have come to more closely resemble federal bill of rights”); Dodson, supra note 114 at 753 (“Yet state constitutional autonomy has not materialized. Instead, all states have declarations of rights that track the federal Bill of Rights, sometimes with a startling degree of mimicry”).
119 See Tarr, supra note 2 at 152-54.
120 Ibid at 153.
century conventions in Rhode Island, New York, New Mexico, Maryland, Arkansas, and Illinois found that proposals in all those states moved closer to the Model State Constitution.\textsuperscript{121} Indeed, as James Gardner has observed, “[b]y the late nineteenth century, American state constitutions largely converged on a common model for structuring the institutions of governance.”\textsuperscript{122}

This is not so say that state constitutions no longer contain idiosyncrasies or unique provisions. The increasing use of the initiative and referendum to amend state constitutions has resulted in many unique state constitutional provisions. In general, however, these changes often reflect popular national trends and sentiments rather than unique state values. Alan Tarr has observed, for example, that following the postwar convergence of state constitutions, many states adopted amendments that reflected broad-based popular skepticism regarding the efficiency and responsiveness of government officials.\textsuperscript{123} Although many states adopted unique language to address these issues, the amendments are more a reflection of a broad populist movement throughout the country than the values of any particular state community.\textsuperscript{124} More recently, the wave of marriage amendments adopted across many states seems to reflect broad-based national political and cultural cleavages rather than any particular state’s identity.\textsuperscript{125}

Studies have also shown that despite persistent pressure on state courts to interpret state constitutions by reference to state-specific values and history, state courts tend to interpret state constitutions by reference to national norms.\textsuperscript{126} As Joseph Blocher has observed, most state courts “bow

\textsuperscript{121} See Cornwell et al., \textit{supra} note 44 at 156-159.


\textsuperscript{123} See Tarr, \textit{supra} note 2 at 157. Citizens amended their constitutions to include recall procedures, term limits, and resolve contentious policy issues (such as gambling, gay rights, and tort reform) that state legislatures had avoided. (Ibid).

\textsuperscript{124} See ibid.


\textsuperscript{126} See Dodson, \textit{supra} note 114 at 725 (“state court interpretations of state constitutions have tended to follow federal court interpretations of the U.S. Constitution”); Lawrence Friedman, “Path Dependence and External Constraints on Independent State Constitutionalism” (2011) 115:4 Penn St L Rev 783 at 783-86; Justin R Long,
to the nationalization of constitutional discourse” and “adopt federal constitutional law as their own.” Thus, in both constitutional drafting and constitutional interpretation there has been a trend towards significant convergence in state constitutionalism, and a reluctance to use state constitutions to express or preserve unique constitutional values within states.

There are various possible explanations for this trend. One explanation is that contemporary state populations do not contain consolidated political communities that share fundamental values or even a common political identity. James Gardner is the most notable proponent of this view. He explains:

The claim that the populations of the various American states today constitute meaningfully distinct peoples with meaningfully distinct characters and values is dealt a serious and probably fatal blow simply by consideration of some of the most glaringly obvious features of modern American society: the ease and frequency of mobility; the dominance of mass media and mass marketing of national scope; and the increasing globalization of economic activity. These factors have made state boundaries extremely porous – indeed, for many purposes, such boundaries have become irrelevant. Gardner acknowledges that American society contains many meaningful sub-communities. He maintains, however, that state boundaries do not track those communities, and, therefore, it “simply makes no sense” to talk about state constitutions as expressing the fundamental values of non-existent groups. The operative communities, according to Gardner, are national in dimension and not confined to particular state boundaries.

Gardner’s explanation is explicitly empirical. State constitutions, he maintains, do not express or preserve state values because there is no state community in the first instance. Although Gardner’s theory may provide a compelling explanation for why contemporary state constitutions have converged, it is largely unhelpful in assessing whether subnational constitutionalism (as an institution) can be effective in fostering or


128 Gardner, supra note 4 at 69.

129 Ibid at 68.

130 Gardner, supra note 12 at 812.

131 Gardner, supra note 4 at 69-72.

132 See ibid at 68.
preserving subnational identities when in fact they exist.

Gardner has, however, articulated a broader theory of subnational constitutionalism that might shed light on that issue. In an important but often overlooked paper titled In Search of Sub-National Constitutionalism, Gardner explores the conditions under which subnational constitutions are likely to become “meaningful players in intergovernmental negotiations concerning rights,” and, in consequence become “meaningful bulwarks of protection against government tyranny.” He identifies three requirements for subnational constitutions to operate effectively in protecting subnational communities: (1) a subnational “populous must come to self-consciousness as a populous, it must understand itself to be a politically district group entitled to exercise some significant degree of self-rule”; (2) “this populous must possess sufficient actual autonomy to undertake the enterprise of meaningful self-governance;” and (3) the polity “must commit itself to self-restraint under the rule of law through the adoption of a constitution.”

Under these conditions, Gardner argues, subnational constitutions may be effective in protecting subnational communities, so long as other external factors do not undermine their utility. Specifically, he notes that if national laws and institutions provide easy and accessible remedies for subnational communities, subnational constitutions are likely to fall by the wayside. Similarly, if supranational and international organizations provide redress for subnational communities, then subnational constitutions are likely to be insignificant.

This broader theory of subnational constitutionalism likely provides a more complete explanation of state constitutional convergence. Not only have many state populations lost any sense of self-consciousness regarding a unique political identity, but federal law has significantly restricted the degree of autonomy available to states. This is in part because of the expansion of federal constitutional rights applied to the states through the Fourteenth Amendment. As federal constitutional protections have grown, state autonomy has shrunk. Additionally, to the extent American society is comprised of culturally district “subcommunities,” those communities have often found more effective protection through the enforcement of federal constitutional rights. All of these forces, combined with the practical reality that citizens do not sort themselves by state boundaries – might explain why

134 Ibid at 327-28.
135 Ibid at 330.
136 Ibid.
state constitutions have failed to assume a meaningful role in protecting subnational communities.

There is, however, a more theoretical hypothesis to explain state constitutional convergence that is based on Tom Ginsburg and Eric Posner’s work. Posner and Ginsburg postulate that subnational constitutions are not particularly effective at resisting pressure for popular constitutional change. Consequently, when majorities shift, subnational constitutions tend to change. To the extent subnational constitutions reflect communal values and identity, therefore, this is often in response to a contemporary majority that has shaped the constitution and not a rigid constitution that has shaped the contemporary majority. In other words, because of their democratic responsiveness, subnational constitutions often change to reflect contemporary political associations rather than preserve pre-existing identities by slowing contemporary changes.

Obviously, shifts in political community and constitutional expression are complex and affected by many variables. The account above is overly simplistic in many respects. There is significant evidence, however, that subnational constitutions provide no guarantees regarding the longevity of political community, and this evidence should inform constitutional designers’ expectations.

C. What this Might Mean for a Written Quebec Constitution

The narrative from state constitutionalism in the United States can be helpful in assessing the likely impact of a written constitution for Quebec. A written constitution is surely not a panacea for a subnational community striving for greater recognition and protection. As Gardner has theorized, the efficacy of a subnational constitution implicates a variety of complex variables. It likely depends on the degree of autonomy provided to Quebec under the Canadian Constitution, and the extent to which the people of Quebec form a self-aware political community with a distinct identity.

Moreover, to the extent a written constitution is motivated by Québécois nationalism, reformers should carefully consider whether Quebec’s current constitutional system is necessarily inferior to a written constitution for their objectives. As Nelson Wiseman has observed, “provincial constitutions barely dwell in the world of the [Canadian] subconscious” and “[t]hey are too opaque, oblique, and inchoate to rouse much interest let alone

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137 Posner & Ginsburg, supra note 10 at 1584-86.

138 This seems to be the conclusion reached by Versteeg and Zackin regarding state constitutions. See Versteeg & Zackin, supra note 7 at 1679-80.
passion. “To the extent this observation remains true, it might contribute
to the current entrenchment and preservation of Québécois nationalism in
Quebec’s political culture. Provincial constitutional change in Quebec
seems dominated by representative decision-making and mediated processes
of informal constitutional change. These processes can have a “slowing”
effect on constitutional change that might benefit existing political
communities. If constitutional law in Quebec is codified in a written
constitution, it creates the possibility that constitutional change will be more
popularized and more volatile. Although this might benefit Québécois
nationalism, it also creates the possibility that the status quo might be more
easily disturbed. From this perspective, a written constitution for Quebec
might create more risk for Québécois nationalism than reward.

Again, this is an oversimplification of the many variables that could
impact the effectiveness of a subnational constitution for Quebec. However,
state constitutionalism and theoretical research regarding subnational
constitutionalism suggests that subnational constitutions may only preserve
subnational identities under particular circumstances. This should at least
be a consideration for those interested in a written Quebec constitution.

CONCLUSION

Drawing comparisons between constitutional systems has many
limitations. My goal here is not to suggest that the Quebec question can be
answered by any particular comparisons to state constitutionalism in the
United States. There is value, however, in studying the experiences of other
constitutional systems before making design choices. My hope is that the
two aspects of state constitutionalism I have discussed here will at least
suggest lines of inquiry relevant to whether Quebec needs a written
constitution.

139 Wiseman, supra note 17 at 275.
140 See Tarr, supra note 6 at 787-90.