

THE ENDURANCE OF STATE CONSTITUTIONS: PRELIMINARY THOUGHTS AND NOTES ON THE NEW HAMPSHIRE CONSTITUTION

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The theme of the *Wayne Law Review's* 2013 symposium was constitutional change—change, in particular, in Michigan, whose constitution this year celebrates its golden anniversary, and to state constitutionalism more generally. Fifty years is a milestone, to be sure, but there are other state constitutions that have endured in something resembling their original form for many more years.¹ The people of New Hampshire, for example, ratified a constitution in 1784 that in its structure and much of its detail has remained unchanged to this day. In this essay, I would like to explore some of the facets of state constitutions that may make them more or less likely to endure—why is it that New Hampshire's constitution has lasted essentially unchanged for more than two centuries, while the people of Michigan saw fit to replace their constitution (for the fourth time) fifty years ago?

To be clear, this essay represents a very preliminary effort to explore these issues, and in a purely anecdotal way—it is much more a thought-experiment than a conclusive study. I take as my framework for thinking about the endurance of state constitutions the one developed by political scientists Zachary Elkins, Tom Ginsburg, and James Melton in their magisterial work, *The Endurance of National Constitutions*²—hereafter, “the *Endurance Framework*.” Some of the elements of that framework, which, as the book's title suggests, focuses on national organic documents, need to be adapted to the state constitutional context and others may have little application in that context. Nonetheless, the work

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1. Indeed, Michigan's immediate prior constitution endured for fifty-five years, from 1908 to 1963. Since achieving statehood in 1835, Michigan has had four constitutions, including the current one. See SUSAN P. FINO, *THE MICHIGAN STATE CONSTITUTION* 6-24 (1996).

2. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

of these scholars gives us a place to begin to think about some of the basic questions surrounding the endurance of state constitutions.

I.

The *Endurance* Framework concerns itself with measuring—and predicting—the likelihood that a particular national constitution will, with amendments both formal and informal, survive once it becomes operational.³ It begins with the premise that constitutions are

bargains that embody agreement among the relevant parties. Whether the parties sustain these bargains depends, in basic terms, on (a) whether the parties feel that they would be better off under different terms; (b) the expected sanctions for breaching the agreement; and (c) whether the existing agreement can be amended easily or otherwise accommodate changes.⁴

The authors are interested in constitutional endurance in the face of external pressures—from cataclysmic events, like war, to destabilizing economic crises—that test the original constitutional bargain.⁵ Replacement may result if the relevant parties deem the costs of amending the constitution to be higher than the costs of revisiting the original bargain.⁶

Constitutions wither and die with great regularity, and Elkins et al. have determined that the likelihood that a constitution will survive a moment of crisis—when an original bargain is tested—turns primarily on design choices.⁷ In other words, survival depends upon the extent to which the framers designed the constitution to accommodate change.⁸ A constitution's endurance is a function of three design features that, in combination, may tend to prolong or shorten its life: inclusion, flexibility and specificity.⁹ Striking the right balance among these features depends, to a large degree, upon local conditions, as well as the rate and type of exogenous and endogenous changes, the fragility and fragmentation of

3. *Id.*

4. *Id.* at 66.

5. *Id.*

6. *See id.* at 74-76 (when, for example, a constitution “lacks internal flexibility that facilitates adjustment to changing conditions”).

7. ELKINS ET AL., *supra* note 2, at 10 (“Our central point is a simple one: design choices matter.”).

8. *Id.* at 11.

9. *Id.* at 8, 66.

the polity, and other similar factors.¹⁰ Further, to the extent that inclusion, flexibility and specificity mutually reinforce one another, they may produce constitutional politics in which important societal groups have a stake in the survival of the constitution and, therefore, work to promote constitutional endurance.¹¹

By “inclusion,” the *Endurance* Framework means the extent of participation and involvement of societal groups in developing, formulating, and maintaining the initial constitutional agreement, and in supporting its ongoing enforcement.¹² Inclusion helps to extend a constitution’s life: the more societal groups that have an interest and a stake in the constitution, the more the constitution is likely to endure; framers and citizens alike will seek to protect the constitution because they have grown attached to it and the constitution’s continued survival will, in turn, engender norms of attachment in society.¹³ Further, when constitutional provisions are publicly formulated and debated, it is more likely that the common knowledge and attachment essential for enforcement will be generated.¹⁴

Inclusion may work to increase the possibility of a constitution’s enforcement in at least two ways: first, by enhancing the visibility of the constitution and demonstrating societal consent—the more available the document is to the public, the more likely members of the public will voice their opinions and consent; and, second, by enhancing the investment citizens have in the document and their attachment to it.¹⁵ Citizens will become more invested if they have opportunities to involve themselves in drafting the document and participating in deliberations about it, in addition to approving it.¹⁶

Elkins et al. maintain that the life expectancy of more-inclusive constitutions significantly exceeds that of less-inclusive ones.¹⁷ For example, constitutions that are subject to public ratification are more likely to survive than those that are not.¹⁸ And constitutions written under occupation, which involve “particularly low levels of inclusion,” have proved to be more unstable than those drafted under conditions favoring inclusion.¹⁹

10. *Id.* at 208.

11. *Id.* at 89.

12. *Id.* at 78.

13. ELKINS ET AL., *supra* note 2, at 78.

14. *Id.*

15. *Id.* at 81.

16. *Id.*

17. *Id.* at 99.

18. *Id.* at 139.

19. ELKINS ET AL., *supra* note 2, at 139.

The second feature of constitutional endurance is flexibility.²⁰ "Flexibility" refers to the capacity of a constitution to adjust over time²¹—that is, the capacity to adapt to the emergence of new social and political forces.²² Flexibility may be accomplished formally through the mechanisms of formal amendment, or informally, through interpretation by the judiciary.²³ It is related to inclusion: flexible constitutions facilitate the inclusion of new groups that will then have a stake in the maintenance of the constitution.²⁴ Elkins et al. have concluded that "a rigid constitution may not allow the inclusion of new social forces or readjustment of the bargain between founding forces as time goes on."²⁵ Of course, too much flexibility can undermine "the very notion of constitutionalism as a set of stable limits on ordinary politics."²⁶ In other words, if completely flexible—as in a parliamentary sovereignty—a constitution may not be considered as a source of "enduring rules that bind the polity together."²⁷ It follows that constitutional endurance requires an appropriate balance between flexibility and formal rigidity.²⁸

The third feature of constitutional endurance is specificity.²⁹ "Specificity refers to the level of detail in the constitution and the scope of topics" it covers.³⁰ A common belief is that a loosely drafted framework constitution is superior to a more specific one—on this view, the United States Constitution has endured because it is not rich in specific details, but leaves such matters to development through political and judicial lawmaking processes.³¹ Nonetheless, constitutional clarity and specificity "may be helpful in providing an incentive for, and facilitating, constitutional enforcement."³² "A clearer, more specified document will more easily generate shared understandings of what it entails."³³ Further, a more detailed constitution with broad scope may endure because it sweeps within its reach a greater number of issues that can and will be regulated.³⁴ Such constitutions provide evidence that the

20. *Id.* at 66.

21. *Id.* at 8.

22. *Id.* at 82.

23. *See id.* at 75.

24. *Id.* at 82.

25. ELKINS ET AL., *supra* note 2, at 82.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 66.

30. *Id.* at 84.

31. ELKINS ET AL., *supra* note 2, at 84.

32. *Id.* at 84-85.

33. *Id.* at 84.

34. *Id.* at 85.

bargainers devoted attention to working out conflicts, rather than relying upon general language subject to future—and potentially perilous—interpretation.³⁵

Elkins et al. have argued that there are three reasons why specificity may lead to constitutional endurance.³⁶ First, to the extent that specificity at the time of drafting anticipates and addresses relevant sources of “downstream pressure on the constitutional text, it may be particularly helpful with regard to solving the problems of hidden information among the bargainers.”³⁷ Second, specificity facilitates endurance because it is costly, and the “greater the investment in a particular constitutional bargain, the less willing parties will be to deviate from it by switching, later, to a new bargain.”³⁸ Finally, “specificity provides an incentive for parties to invest resources in keeping the constitutional text current.”³⁹

Elkins et al. deem a constitution to have expired when it is formally suspended or replaced.⁴⁰ “A replacement is [a] set of revisions that is designated as a ‘new’ constitution, or significant revisions that” are not adopted pursuant to the original document’s express amendment procedure.⁴¹ Even given an inclusive, moderately flexible and specific constitution, numerous environmental factors may threaten a particular constitution’s capacity to endure.⁴² These include: territorial change; diffusion—“the adoption of new constitutions in other countries . . . will [likely] increase the probability of a new constitution in a neighboring country”; regime change; leadership transition; intrastate conflict and consensus; interstate conflict; economic crisis and development; and historical legacies—the stability of constitutions correlates to the average longevity of a country’s previous constitutions.⁴³ Notwithstanding these factors, however, the authors conclude that a constitution’s design features are consequential: “the amendment procedure, detail of the constitution, and a level of inclusiveness all seem to have a decided impact on constitutional endurance,” and “an optimal design can reduce the mortality rate of constitutions significantly.”⁴⁴

35. *Id.*

36. *Id.*

37. ELKINS ET AL., *supra* note 2, at 87.

38. *Id.*

39. *Id.*

40. *Id.* at 126.

41. *Id.*

42. *Id.* at 111-21.

43. ELKINS ET AL., *supra* note 2, at 111-21.

44. *Id.* at 146.

II.

Do the design features of the New Hampshire Constitution account for its longevity? Since 1776, New Hampshire has had two constitutions: the citizens of the Granite State abandoned the original 1776 Constitution in 1784, replacing it with a constitution still in effect today, 229 years later (at this writing).⁴⁵ By the standards of the *Endurance* Framework, that first constitution was not particularly inclusive, flexible, or detailed; the 1784 Constitution, on the other hand, appears inclusive, flexible, and detailed in many of the ways its predecessor was not.⁴⁶ As we consider the fiftieth anniversary of the Michigan Constitution—a long period of time, but not as long as New Hampshire's 1784 Constitution—I examine the design features of each of the Granite State's constitutions and draw some tentative conclusions about how the 1784 Constitution fares under the *Endurance* Framework, and whether the Framework is well-suited to evaluate questions about state constitutional longevity.

A.

Consider, first, inclusion. Elkins et al. notes two critical opportunities for inclusion in the production of a constitution: the deliberation/drafting stage and the approval stage.⁴⁷ There was little opportunity for societal groups to participate in the deliberation, drafting, or approval of the 1776 Constitution.⁴⁸ Even by the standards of the time—which excluded the formal political participation of numerous groups—the effort could not be considered inclusive.⁴⁹ Following the departure of the last royal governor of New Hampshire, John Wentworth, in late summer 1775, the former colonial assembly resolved itself into a house of representatives and, on January 5, 1776, adopted a new constitution which it presented to the people of New Hampshire⁵⁰—not for their approval, but simply as a means of governing the young state until the end of the Revolutionary War.⁵¹

45. SUSAN E. MARSHALL, *THE NEW HAMPSHIRE STATE CONSTITUTION* xiv (2011).

46. *Id.*

47. ELKINS ET AL., *supra* note 2, at 79.

48. MARSHALL, *supra* note 45, at 5.

49. *Id.*

50. *Id.* at 12.

51. See LYNN W. TURNER, *THE NINTH STATE: NEW HAMPSHIRE'S FORMATIVE YEARS* 14 (1983).

The 1776 Constitution was no more flexible or detailed than it was inclusive.⁵² Exceedingly brief—almost an outline—the constitution located all relevant governmental power in the legislature and did not provide for a chief executive—indeed, the legislature maintained the authority to appoint nearly all public and military officers.⁵³ A “Committee of Safety” performed most executive functions and assumed many governmental responsibilities when the legislature was not in session, which was most of the time.⁵⁴ The 1776 Constitution also contained few of the features associated with modern constitutions—no bill of rights, no separate and independent judiciary, and, perhaps most importantly, no means for amendment.⁵⁵ Its framers did not intend this constitution to organize New Hampshire government for the indefinite future, but, rather, to provide for a stable government until the former colonies vanquished the British—or, as its drafters noted in the document itself, until “a Reconciliation between [New Hampshire] and [its] Parent State [could] be Effectuated.”⁵⁶

New Hampshire’s next constitution—the current constitution—was, by contrast, a model of inclusion, flexibility, and detail. Responding to pressure to replace the 1776 Constitution, the New Hampshire legislature in February 1778 voted to hold a convention in June of that year to set out a new system of government.⁵⁷ The idea of a constitutional convention was still relatively novel but growing in popularity; the architect of the Massachusetts Constitution, John Adams, for example, believed the people should “be all consulted” on questions regarding the formation of the governments under which they would live, “to erect the whole building with their own hands, upon the broadest foundation.”⁵⁸ By definition, the convention, an extra-legislative method of deliberating and drafting a constitution, would involve more societal groups than New Hampshire’s previous effort.⁵⁹

To be clear, the convention was in some respects more theoretically than practically inclusive as not all important societal groups in New Hampshire were equally represented.⁶⁰ For instance, towns could send as

52. GEORGE BARSTOW, *THE HISTORY OF NEW HAMPSHIRE, FROM ITS DISCOVERY, IN 1614, TO THE PASSAGE OF THE TOLERATION ACT, IN 1819*, at 248 (2d ed. 1853).

53. *Id.*

54. *Id.*

55. See MARSHALL, *supra* note 45, at 7.

56. N.H. CONST. of 1776.

57. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 341-42 (1st ed. 1969).

58. 3 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 352 (L.H. Butterfield ed., 1961).

59. See MARSHALL, *supra* note 45, at 14.

60. *Id.* at 15.

many delegates to the convention in Concord as they liked, but had to pay the associated expenses, resulting in substantial representation from the wealthier towns surrounding Concord and little from other towns.⁶¹ Indeed, when the convention assembled in June 1778, many western and northern towns—and their respective interests—were scarcely represented.⁶²

Nonetheless, the convention remained committed to an inclusive process: the first draft of the constitution that emerged required a three-fourths vote for adoption.⁶³ And the adoption process, too, was decidedly more inclusive than it had been in 1776, as the people gathered in town meetings to cast votes on the new constitution.⁶⁴ As it happens, they rejected the first draft by a wide margin in June 1779, likely because the document resembled its predecessor too closely.⁶⁵ That draft failed to acknowledge many of the structural criticisms of the prior constitution: it once again featured a powerful legislative body and a chief executive with little real executive authority.⁶⁶

The legislature in 1781 authorized another constitutional convention, to convene on the first Tuesday in June and to remain in session until it had produced an acceptable constitution.⁶⁷ This time, the principal drafters relied extensively upon the work of John Adams and the Massachusetts Constitution of 1780, and the document that emerged from the convention resembled its Massachusetts counterpart, with many features that ultimately would find their way into the United States Constitution, including a bill of rights and a commitment to separation and division of governmental power among three distinct departments.⁶⁸ The new draft proposed a chief executive with some actual authority and provided judges important protections from overreaching by the other governmental departments.⁶⁹ At the same time, it took a step back on inclusion by reducing the electoral margin for adoption from three-fourths to two-thirds of those present and voting.⁷⁰

61. See JERE R. DANIELL, *EXPERIMENT IN REPUBLICANISM: NEW HAMPSHIRE POLITICS AND THE AMERICAN REVOLUTION, 1741-1794*, at 189 (1970).

62. See TURNER, *supra* note 51, at 18.

63. MARSHALL, *supra* note 45, at 17.

64. *Id.* at 18.

65. See TURNER, *supra* note 51, at 19.

66. MARSHALL, *supra* note 45, at 17.

67. *Id.* at 18.

68. *Id.* at 16.

69. *Id.* at 17.

70. *Id.*

The people rejected this draft, too, and a revised draft circulated for ratification in 1782.⁷¹ Meeting once again in June 1783, the convention made significant changes in response to the objections from the towns; the next draft adjusted the role of the chief executive, now called the governor, as well as the scheme of representation.⁷² At last the convention had produced a constitution that would receive the necessary two-thirds approval.⁷³ The constitution took effect on June 2, 1784—just before a recent extension of the 1776 Constitution was about to expire.⁷⁴

More than just an inclusive effort with (literally) years of deliberation and drafting, the 1784 Constitution anticipated the importance of flexibility, requiring by its terms that there be a new constitutional convention every seven years (later changed to every ten).⁷⁵ A number of significant revisions emerged from the 1791 convention, including a more-clearly articulated separation of powers that diminished the authority of the legislature vis-à-vis the executive and judicial branches.⁷⁶ So thorough was the 1791 effort that the people, given the opportunity to vote on the matter, would reject the prospect of a new convention for many decades into the nineteenth century, and no convention would again endorse the number and quality of changes recommended by the 1791 convention.⁷⁷

Conventions fell into disuse in the second half of the twentieth century, as the people ratified a proposal by the 1964 convention to authorize the legislature to propose amendments supported by sixty percent of its membership.⁷⁸ Such amendments would be adopted if favored by two-thirds of the persons voting on the question in the election in which the matter was posed.⁷⁹ As a result of this constitutional change, the constitution became more flexible, as amendment became simpler and more frequent: important societal groups no longer needed to wait seven years for the next convention (or, as later amended, ten years) to press for constitutional change.⁸⁰ This process arguably enhanced inclusiveness, too; as Elkins et al. note, a flexible amendment mechanism

71. See RICHARD FRANCIS UPTON, *REVOLUTIONARY NEW HAMPSHIRE: AN ACCOUNT OF THE SOCIAL AND POLITICAL FORCES UNDERLYING THE TRANSITION FROM ROYAL PROVINCE TO AMERICAN COMMONWEALTH 184-85* (1971).

72. MARSHALL, *supra* note 45, at 18.

73. *Id.*

74. *Id.*

75. N.H. CONST., pt. 2, art. 100, para. (b).

76. MARSHALL, *supra* note 45, at 19.

77. *Id.*

78. N.H. CONST., art. 100, para. (a).

79. N.H. CONST., pt. 2, art. 100, para. (c).

80. See generally *id.*

allows "smaller coalitions ... to effectuate change. This induces smaller groups to try to mobilize for constitutional amendment, giving them, too, a stake in the survival of the document."⁸¹

In addition to flexibility, the 1784 Constitution was more specific than its predecessor in spelling out how exactly the government of New Hampshire should function.⁸² Specificity, according to the *Endurance Framework*, has two dimensions: scope and detail.⁸³ "Scope refers to the breadth of coverage of the constitution, or the number of issues that it chooses to regulate. Detail refers to the precision and elaboration of the provisions of the constitution in any given topic."⁸⁴ Elkins et al. assert that "[m]ore detailed constitutions provide evidence that bargainers spent time in working out conflicts, rather than relying on general language that will be open to interpretation," and that "constitutions that govern a wide scope of activity invite further [societal] investment in amending the text as conditions change."⁸⁵

The *Endurance Framework* contains a long list of the topics a typical national constitution might cover.⁸⁶ These include many matters irrelevant to sub-national constitutions, like provisions relating to naturalizing citizens and in which branch of government the power to declare war shall lie.⁸⁷ Excluding such matters, we are left with a shorter list of topics that comprise the building blocks of governance and the rule of law, namely: does the constitution provide a procedure for amendment? Does it address the makeup of the legislative body? Does it specify who shall execute the laws? For what kind of courts does it provide? Does it address the selection of members of the government? Does it stipulate that public office holders swear to support or abide by the constitution?⁸⁸

As noted above, the 1776 Constitution was relatively slight in respect to both scope and detail; it did not address the myriad of matters related to the basic operation of state government.⁸⁹ The 1784 New Hampshire Constitution, on the other hand, casts a wider net over the intricacies of government, specifically listing the limitations on governmental

81. ELKINS ET AL., *supra* note 2, at 89.

82. MARSHALL, *supra* note 45, at 19.

83. ELKINS ET AL., *supra* note 2, at 103.

84. *Id.*

85. *Id.*

86. *Id.* at app. tbl.2.

87. *Id.*

88. *Id.*

89. See BARSTOW, *supra* note 52 and accompanying text.

authority imposed by individual rights protections,⁹⁰ and describing the responsibilities of each house of the legislature,⁹¹ the governor,⁹² and the judiciary and clerks of court.⁹³ As well, the constitution details such matters as oaths of office⁹⁴ and the rules governing the incompatibility of offices.⁹⁵

And so, relying upon the measures of constitutional endurance endorsed by Elkins et al., it appears that the 1784 New Hampshire Constitution, as compared to its predecessor, resulted from a relatively inclusive process, reflects a greater commitment to flexibility, and is broader in scope and contains greater detail.⁹⁶ For these reasons, it may well fall into the category the *Endurance* Framework authors reserve for those constitutions whose design features coalesce in such a way as to have a “Goldilocks quality”⁹⁷—just the right amount of inclusion, flexibility, and specificity to survive moments of crisis, and to encourage succeeding generations to maintain a substantial investment in a system of governance that they personally did not ratify.⁹⁸ In other words, on first impression, the 1784 New Hampshire Constitution seems to have the right balance to endure, with 229 years of constitutional stability to support that preliminary conclusion.

B.

On closer examination of the New Hampshire Constitution, there may be reason to question the conclusion that it possesses the “Goldilocks quality”—or at least to question whether the *Endurance* Framework is well-suited to evaluating the potential longevity of state constitutions. Those constitutions that, in the view of Elkins et al., have the “Goldilocks quality” are, they conclude, the ones that are essentially *statutory* in nature.⁹⁹ They explain that constitutions endure

90. See, e.g., N.H. CONST., pt. 1, art. 4 (protecting rights of conscience); N.H. CONST., art. 5 (protecting religious freedom); N.H. CONST., art. 11 (protecting free elections); N.H. CONST., art. 15 (protecting rights of the accused).

91. See N.H. CONST., pt. 2, arts. 9-40.

92. N.H. CONST., pt. 2, arts. 41-59.

93. N.H. CONST., pt. 2, arts. 72-82.

94. N.H. CONST., pt. 2, arts. 84-85.

95. See N.H. CONST., pt. 2, arts. 93-95.

96. See MARSHALL, *supra* note 45, at 19.

97. ELKINS ET AL., *supra* note 2, at 208.

98. *Id.* at 19.

99. *Id.* at 211.

when they are more like statutes—flexible, detailed, and infused with self-interest—than the conventional image of constitutions would have it. Constitutions are supposed to be entrenched, to be general, and to embody higher-order principles of moral agreement. But, these features may render the constitution too rigid to adjust to changing conditions, too vague to provide meaningful guidance to subjects, and too high-falutin to induce costly investment by powerful actors in enforcing the terms of the bargain.¹⁰⁰

Courts and legal commentators have recognized a distinction between, on the one hand, provisions that ought to be deemed critical to the functioning of the governmental enterprise that a state constitution describes and organizes, and, on the other hand, the “more statutory type provisions that have constitutional status merely because they were inserted in the state constitution.”¹⁰¹ Perhaps the classic example of a statutory-type provision is the New York Constitution’s specification of the width of ski trails in state-owned parks.¹⁰²

On the whole, the 1784 New Hampshire Constitution does not appear overly statutory; it embraces a considerable array of higher-order principles of moral agreement, with numerous provisions that are, or might be seen, as vague or even “high-falutin.” Part I, Article 1, for example, expresses the foundational principle that “all men are born equally free and independent,”¹⁰³ while Part 2, Article 83 states the duty of “the legislators and magistrates, in all future periods of this government” to, among other things, “cherish the interest of literature

100. *Id.*

101. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 336 (2009); see also James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 1007 (1993) (distinguishing between vital and merely constitutional provisions).

102. N.Y. CONST. art 14, § 1. I am not suggesting that such a provision is not constitutional, just that it can be distinguished from provisions more integral to the functioning of government on a daily basis. On the debate over whether such provisions should be viewed as constitutional, compare James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 819-20 (1992) (suggesting that New York ski trail provision is trivial and not particularly constitutional), with EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 31 (2013) (noting that the history of the ski trail provision shows “that the seemingly mundane details in state constitutions do not reflect the lack of principle in state constitutional politics”). See also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1195 n.388 (1999).

103. N.H. CONST., pt. 1, art. 1.

and the sciences.”¹⁰⁴ As vague or “high-falutin” as these provisions may appear, they have not been viewed historically as mere surplusage, as the litigation surrounding their meaning and force will attest.¹⁰⁵

Further, the New Hampshire Constitution articulates many (though not all) of the responsibilities of, and limitations on, state government at a relatively high level of abstraction. Part 1, Article 37, for example, provides no more guidance on how separation of powers should work in practice than that the three branches of government “[o]ught to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.”¹⁰⁶ Moreover, Part 1, Article 19, which protects individual privacy, turns on the reasonableness of the government’s intrusion.¹⁰⁷ Indeed, most of the individual rights protections contained in the entire first half of the constitution lack the narrowness of purpose and detailed commands typically associated with statutory type provisions.

This is not to say that the New Hampshire Constitution is entirely high principle. Besides the provisions detailing the lawmaking process, many later-enacted amendments represent investments of effort by societal groups to entrench particular values or interests, each apparently aimed at addressing relatively discrete concerns. For instance, Part 2, Article 6-a, adopted in 1938, details the uses to which certain revenues related to motor vehicles may be put;¹⁰⁸ Part 2, Article 6-b, adopted in 1990, details the uses to which lottery revenues may be put;¹⁰⁹ and Part 1, Article 36-a, adopted in 1984, concerns the use of state retirement funds.¹¹⁰

The point is that, on balance, declarations of abstract principle could be seen as dominating the text of the New Hampshire Constitution—especially as compared to more recent state constitutions. Consider, by way of comparison, the Michigan Constitution, which contains a wealth of detail about matters the New Hampshire Constitution barely mentions. For instance, the New Hampshire Constitution has just a handful of provisions concerning local government, while the Michigan Constitution has thirty-four devoted to such topics as the size of

104. N.H. CONST., pt. 2, art. 83.

105. See MARSHALL, *supra* note 45, at 37-38 (discussing cases interpreting equality provision of Part 1, Article 1); *id.* at 197-201 (discussing cases interpreting Part 2, Article 83).

106. N.H. CONST., pt. 1, art. 37.

107. N.H. CONST., pt. 1, art. 19.

108. See N.H. CONST., pt. 2, art. 6-a.

109. See N.H. CONST., pt. 2, art. 6-b.

110. See N.H. CONST., pt. 1, art 36-a.

counties,¹¹¹ the compensation of county officers,¹¹² and the grant of public utility franchises.¹¹³

Of course, commitments to abstract principle, such as those reflected in the New Hampshire Constitution, may engender—and even invite—disputes over meaning; as one commentator has observed in respect to the federal analog of Article 19's privacy protection, the provision "positively invites constructions that change with changing circumstances."¹¹⁴ Despite the strong possibility of disagreements about the meaning of the more abstract part of the original, eighteenth-century bargain, the people of New Hampshire seem content to maintain constitutional flexibility not through new, clarifying amendments, but judicial resolution of such disputes.¹¹⁵

Elkins et al. acknowledge that more-general provisions invite adaptation through judicial interpretation, which enhances flexibility and contributes to endurance.¹¹⁶ "Constitutional review," they note, "can provide the connective tissue that allows a nineteenth century document to adapt to a world with the internet and genetically modified food."¹¹⁷ But they see the most significant difference among national constitutions in this regard as being between those constitutions "that provide for some review (of whatever kind) and those that do not."¹¹⁸ And it remains that, in the end, they would bet on the longevity of constitutions that are statutory—that are open to amendment and contain detailed provisions that are infused with the self-interest of the citizenry, reflecting their belief that constitutional politics is not so different from ordinary politics.¹¹⁹

I mean here to say only that, given that the New Hampshire Constitution is not predominantly statutory, and yet has endured, state constitutional longevity may be a function not just of amenability to popular change and detailed provisions that reflect the self-interest of important societal groups, but of the particular ability, readiness, and

111. MICH. CONST., art. VII, § 3.

112. MICH. CONST., art. VII, § 9.

113. MICH. CONST., art. VII, § 19.

114. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994).

115. See MARSHALL, *supra* note 45, at 80-82 (discussing the meaning of Part I, Article 19).

116. ELKINS ET AL., *supra* note 2, at 106.

117. *Id.* at 108.

118. *Id.* at 109.

119. See *id.* at 211. This is not an uncommon belief. See G. Alan Tarr, *Explaining State Constitutional Change*, 60 WAYNE L. REV. 9, 19 (2014) (noting "[t]here is considerable anecdotal evidence supporting [the] understanding of constitutional politics as ordinary politics").

willingness of the state's courts to implement the constitution's many higher-order and "high falutin" principles. If further study were to demonstrate that recourse to judicial review has played an important part in keeping the New Hampshire Constitution relevant to the people of the state in a changing world, new light might be shed on the role of state courts in bringing continued life to their state constitutions.¹²⁰ Such a conclusion might even suggest that there are ways in which state courts could—or should—more actively involve themselves in cases concerning the implementation of original constitutional bargains, and engage in the kind of deep and considered analysis that will lead either to preservation of the bargain, or a declaration that, in light of changed circumstances, it can no longer be enforced.

Such faith in the judicial resolution of constitutional disputes as the people of New Hampshire seem to have could, of course, represent a cultural affectation: one could argue that the citizens of the original states may, as compared to the citizens of the other states, venerate their constitutions to an extent that deters significant change by amendment. Still, the New Hampshire experience at least indicates that robust judicial interpretation of general and "high-falutin" provisions does not *undermine* the citizenry's investment in the constitution across generations. Such investment may be difficult to evaluate, of course; the *Endurance* Framework authors note that "[i]t is always hard to assess citizens' attachment to the state—or any identity, for that matter—but public opinion data provides at least one window onto such."¹²¹ By the measure of the most recent ballot question on the issue (at this writing), the people of New Hampshire remain quite attached to the 1784 Constitution: in 2012 they overwhelmingly rejected a proposal even to hold a new constitutional convention.¹²²

III.

As I said at the start, I rely upon the *Endurance* Framework merely as a place to begin to think about state constitutional endurance. Considerably more study is required to develop a framework that can be utilized to make the kinds of assessments about the lifespan of state

120. ELKINS ET AL., *supra* note 2, at 72 (discussing "a theory of constitutional review in which the courts resolve problems of uncertainty in the bargaining process").

121. *Id.* at 29.

122. David Brooks, *New Hampshire Constitutional Amendments Lack Two-Thirds Support*, NASHUA TELEGRAPH (Nov. 7, 2012), <http://www.nashuatelegraph.com/news/982668-469/nh-constitutional-amendments-lack-two-thirds-support.html>.

constitutions that the *Endurance* Framework allows us to make about national constitutions. Needless to say, the details of that framework are beyond the scope of this essay; as even a cursory comparison of the provisions of the New Hampshire and Michigan constitutions would show, a framework that addresses state constitutions will also need to reflect as wide a range of constitutional possibility as the *Endurance* Framework does in the context of national constitutions.

At a minimum, though—and given that many state constitutions share core structural components and individual rights protections¹²³—a framework for state constitutions should contemplate the role that a strong commitment to judicial interpretation may play in contributing to longevity. Other state constitutions would likely be considered to be more statutory in nature than the New Hampshire Constitution, and yet have had shorter lifespans. There is, accordingly, much to be mined here that could be of interest to the members of future state constitutional commissions and conventions, especially if they are inclined to endorse a Madisonian, rather than a Jeffersonian, view of constitutional endurance.

123. See James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 34 (2014) (discussing tendency of state constitutions “to converge strongly with one another”).