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The Contours of Constitutional Approval

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THE CONTOURS OF CONSTITUTIONAL APPROVAL

NICHOLAS O. STEPHANOPOULOS
MILA VERSTEEG*

ABSTRACT

Scholars and judges agree on the importance of constitutional approval—that is, people's subjective support for their constitution. The Supreme Court has asserted that it owes its very legitimacy to popular backing for its decisions. Academic luminaries have concurred, while also connecting constitutional approval to constitutional compliance and durability, as well as the easing of the countermajoritarian difficulty.

Until now, though, no information has been available on either the levels or the causes of constitutional support. In this Article, we rectify this shortcoming by presenting the results of a nationally representative survey that we conducted in late 2014. The survey asked respondents about their approval of the federal Constitution and of their state constitution, and about several potential bases for support. We also supplemented the survey by coding dozens of features of state constitutions. This coding allows us to test hypotheses about the relationship between constitutional content and constitutional backing.

What we find is illuminating. First, people highly approve of their constitutions—the federal charter more so than its state counterparts. Second, approval is unrelated to what constitutions say; it does not budge as their provisions become more or less congruent with respondents' preferences. Third, approval is only weakly linked to respondents' demographic attributes. And fourth, the most potent drivers of approval are constitutional familiarity and pride in one's state or country. To know it—and to be proud of it—is to love it.

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These results unsettle several literatures. They mean that people form opinions about constitutions differently than about other institutions. They also mean that comparativists may be going down a blind alley as they focus ever more intently on constitutional design. But perhaps our study's clearest implication is for leaders who value popular support for their constitution. Our advice to them is to forget about constitutional change, and instead to try to build the public's knowledge and appreciation of the charter. Constitutional approval, like statecraft, is ultimately a project of soulcraft.

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INTRODUCTION

Justice Kennedy concluded his opinion with a flourish in a landmark 2005 case. "Over time, from one generation to the next," he declared, "the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people."[1] But has it? Do Americans actually feel "high respect" and "veneration" for their federal Constitution? And if so, what about their *other* constitutions—the charters that structure the governments of the fifty states? Do Americans prize them too?

Justice Kennedy also offered an intriguing explanation for the support (allegedly) enjoyed by the federal Constitution. Its "doctrines and guarantees"—federalism, the separation of powers, the Bill of Rights, and so on—are "essential to our present-day self-definition and national identity."[2] "Not the least of the reasons we honor the Constitution, then, is because we know it to be our own."[3] But is this, in fact, why we honor it? Does our allegiance stem from its congruence with our values, or from something else entirely? And even if Justice Kennedy is right about the cause of *federal* constitutional approval, does his claim hold for the states as well?

In this Article, we begin to answer these questions. We do so not just because they are prompted by Justice Kennedy's ruminations, but also because support for the constitution is a critical—and critically understudied—concept. Luminaries from the bench and academia have argued that it is a key driver of constitutional legitimacy: that is, the loyalty a charter commands from its constituents. These observers also have linked it to constitutional compliance, durability, and status as law, as well as the easing of the countermajoritarian difficulty.[4] But to date, no one has tried to *measure* it, to determine what the levels and causes of constitutional approval actually are. This empirical project is the linchpin of this Article.

Our methodology is straightforward.[5] To find out whether and why people support their constitutions, we simply asked them. In October

1. Roper v. Simmons, 543 U.S. 551, 578 (2005).
2. *Id.*
3. *Id.*
4. *See infra* Part I (providing background on theory and empirics of institutional approval).
5. *See infra* Part II (explaining methodology).

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2014, we carried out a nationally representative survey with roughly 2,000 respondents, two questions of which were to what extent people approve of the federal Constitution and of their state constitution. The survey also included questions about an array of potential bases for support: demographic attributes (gender, age, race, education, and income), civic knowledge (about the constitution specifically and the news generally), and institutional attitudes (toward one's state, country, and party).

In isolation, though, the survey would have been unable to test some of the most salient hypotheses about constitutional approval—such as Justice Kennedy's claim that it follows from consistency with people's preferences. We therefore supplemented the survey by coding many of the features of the fifty state constitutions. We tracked whether or not they contain twenty-nine substantive provisions, as well as their age, length, and amendment frequency. The latter three variables slide directly into our analyses, while we pair the former with questions from our poll to create a measure of congruence. That is, we compare the provisions that each respondent *wants* in her state constitution with the provisions actually *in* the document, and so determine how closely it reflects her views.

We find, first, that Americans generally back their constitutions, though to different extents at the federal and state levels. The federal Constitution achieves an average approval score of 7.8 out of 10, while state constitutions earn a somewhat lower rating of 6.7. Constitutional support also does not vary much geographically. The federal Constitution is most popular in Idaho and least popular in Vermont, while Wyoming residents are happiest with their state constitution and Mississippians are least pleased with theirs. None of these state-level averages diverges very far from the national mean.[6]

But the *existence* of constitutional approval is less interesting than its *explanations*. To identify them, we build regression models in stages for both federal and state constitutional support.[7] We add, in turn, each of our five sets of hypotheses, involving (1) demographic attributes, (2) civic knowledge, (3) institutional attitudes, (4) constitutional congruence, and (5) non-substantive constitutional features. (The last two of these apply only at the state level since there is only one federal Constitution, and so no federal constitutional variation.)

Perhaps our most surprising finding, in light of Justice Kennedy's (and others') predictions, is that how closely a constitution corresponds to a

6. *See infra* Part III (providing descriptive exploration of constitutional approval).
7. *See infra* Part IV (providing explanatory analysis of constitutional approval).

respondent's preferences essentially has no impact on her approval of the document. Congruence fails to rise to statistical significance in any of our models, and varying it from its minimum to its maximum barely budges support. Our results for non-substantive constitutional features are equally unimpressive. Our respondents appear entirely unmoved by their charters' age, length, and amendment frequency.

The demographic story is somewhat more complicated. Gender, education, income, and most racial categories either fail to attain significance, or have small and inconsistent effects on approval. But older respondents reliably rate their constitutions more favorably than their younger peers. And unique among racial groups, African Americans consistently are less constitutionally satisfied, even controlling for other demographic and socioeconomic factors. America's familiar black-white cleavage thus extends to people's sentiments toward their charters.

A clearer picture emerges for civic knowledge and institutional attitudes. At both the federal and state levels, respondents who are more familiar with their constitutions, and who follow current events more closely, are more supportive of the documents. Similarly, at both levels, respondents who are prouder of where they live are stauncher constitutional advocates. In fact, the results for constitutional knowledge and jurisdictional pride are the most robust generated by our models. As these variables go from their minimums to their maximums, about a *three-point* spike in approval ensues (on a ten-point scale).

The most important implication of our findings is that constitutional support cannot be won through constitutional refinement. Since neither charters' substantive content nor their non-substantive features influence approval, constitutional design is effectively useless as a tool for increasing public backing for the document. This is a sobering truth for constitutional drafters, many of whom hope that their handiworks will reshape society in fundamental ways. Constitutions may have all kinds of consequences, but contra Justice Kennedy, earning the people's "high respect" and "veneration" is not one of them.[8]

Another insight from our analysis is more sanguine. Leaders who want their constituents to back their constitution are *not* powerless to bring about this outcome. But the right strategy is not to tweak the document to make it more attractive, but rather to boost people's familiarity with it and to swell their pride in their state or country. How can this be done? This is not the place for detailed prescriptions, but civic education, in the form of

8. *Roper*, 543 U.S. at 578.

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classes, marketing campaigns, and the like, is an intuitive way to inform the public. These techniques may also foster civic pride, but here the sounder option may be actually to compile a record worth being proud of. A well-run jurisdiction is its own reward—and if it results in higher constitutional approval, so much the better.

Our findings confirm in some respects, but challenge in others, several distinct literatures.[9] The first is normative constitutional theory, several of whose leading lights contend that popular support for the constitution is necessary for the document to achieve legitimacy, compliance, durability, and binding legal status. These scholars should celebrate our results, which show that constitutional backing is high and so imply that key constitutional values indeed are being realized. But these observers may be taken aback by our conclusion that constitutional approval is unrelated to constitutional content, which contradicts their widely held view that charters must be just in order to be popularly accepted.

The second literature, sounding more in political science than in law, examines the reasons for *other* institutions' approval (especially the Supreme Court and Congress). For the most part, it holds that knowledge and congruence are crucial factors while demography is not. We arrive at similar judgments as to knowledge and demography in the constitutional context. But to reiterate, however relevant it may be in other areas that policies correspond to people's preferences, it is immaterial to support in ours.

The third area is the study of comparative constitutional design. Historically, it has focused on the impact of different drafting choices on outcomes such as compliance, durability, growth, and yes, public backing. More recently, though, attention has shifted from constitutional substance to the process of constitutional ratification. Our results throw cold water on the notion that public opinion toward the constitution can be influenced by what the document says. But they dovetail nicely with the growing emphasis on ratification procedure. If people are more involved in the constitution's drafting and entry into law, they also may become more familiar with it and prouder of their own pivotal role. And these factors, again, are the primary drivers of constitutional approval.

The fourth and final literature is the sociological analysis of nationalism and its consequences. These consequences are usually thought to be mixed—positive when nationalism takes the form of patriotism, but negative when it transmutes into an assertion of national superiority. Our

9. *See infra* Part V (discussing implications of findings).

result that jurisdictional pride boosts support for the constitution reveals another favorable aspect of patriotism, one that has not been documented by any studies to date.

The Article unfolds as follows. In Part I, we discuss the existing work on the causes and consequences of constitutional approval. While there is ample theoretical scholarship, the available empirics deal almost exclusively with other institutions. Next, in Part II, we explain our methodology. We describe the nationwide survey we conducted as well as our coding of state constitutions. Parts III and IV then form the Article's analytical core. Part III offers a descriptive account of constitutional backing, while Part IV constructs our federal and state regression models. Lastly, in Part V, we comment on the implications of our findings. We address how they relate to other literatures, what policy reforms they entail, and how they could be bolstered by further research.

One more introductory point: Because this is the first study to assess constitutional support empirically, our analysis is necessarily provisional. We are sure there are ways to refine our measurements of both support and its potential causes. It also is possible our conclusions would change if we examined different time periods or countries. Nevertheless, we think there is substantial value to this project. A subject of great qualitative interest now—finally—has been opened to quantitative exploration.

I. BACKGROUND

Constitutional approval is not a self-explanatory concept. It is not obvious, at first glance, what it is, why it matters, or what produces it. So, in this Part, we comment briefly on the meaning, the consequences, and the causes of public support for the Constitution. We draw first from theoretical literatures in law and social science, and then from recent empirical work on the approval of *other* governmental institutions.

A. Theory

1. Meaning

Half a century ago, David Easton distinguished between two kinds of political support that people may give.[10] The first, *specific support*, refers to "the satisfactions that members of a system feel they obtain from the . . .

10. *See* DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 273 (1965); David Easton, *A Re-Assessment of the Concept of Popular Support*, 5 BRIT. J. POL. SCI. 435, 437, 444 (1975).

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outputs and performance of the political authorities."[11] It refers, that is, to people's approval of an institution's actual policies and operation. The second, *diffuse support*, "consists of a 'reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed.'"[12] It is people's willingness to comply with policies they dislike due to faith in the body promulgating the policies. It is essentially a synonym for institutional legitimacy.

Easton's framework is ubiquitous in the scholarship on public attitudes toward the branches of government.[13] And under it, there is no doubt that our variable of interest, constitutional approval, is closer to specific support than to diffuse support.[14] When people are asked how strongly they approve of their constitution, they are prompted to consider and then to rate their current views of the document. They are *not* induced to reflect on whether they still would adhere to its commands if they thought them unjust, or whether they would like to scrap it and start afresh. Constitutional approval, like equivalent questions about judicial, legislative, and executive branch approval, thus taps people's opinions on constitutional performance. It does not capture their feelings on constitutional legitimacy.[15]

So defined, as a measure of specific support for the constitution, why does constitutional approval matter? One possibility is that it is an intrinsic good, a value that is desirable for its own sake. Perhaps, in a constitutional democracy, we simply think that people should deem their charter worthy of respect and admiration. This is the position that Sandy Levinson takes in his classic work on "constitutional faith," a concept that straddles the

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11. Easton, *supra* note 10, at 437.

12. *Id.* at 444 (quoting EASTON, *supra* note 10, at 273).

13. *See, e.g.*, GERHARD LOEWENBERG & SAMUEL C. PATTERSON, COMPARING LEGISLATURES 285–86 (1979); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2614 (2003) (noting that Easton's framework has been used "[f]or at least the last forty years"); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 356 (2003); Marc J. Hetherington, *The Political Relevance of Political Trust*, 92 AM. POL. SCI. REV. 791, 792 (1998).

14. We say closer, rather than identical, to specific support because we can imagine survey questions that tap specific support even more directly. For example, "How much do you approve of the specific provisions in your state's constitution?" or "How satisfied are you with the performance of your state's constitution?"

15. *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 638, 642 (1992) (arguing, in a study of support for the Supreme Court, that specific support is best captured by "whether the subject is satisfied or dissatisfied with the outputs of the institution," while diffuse support is best captured by "tough questions about [people's] willingness to accept, make, or countenance major changes in . . . how the high bench functions"); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 348 (1998) (same).

line between specific and diffuse support.[16] "Is not the central question," Levinson asks, "whether, after reflection, we can genuinely . . . declare and celebrate our status as Americans 'attached to the principles of the Constitution'?"[17]

Well, it may or may not be the central question. For one thing, as Levinson himself recognizes, too much constitutional approval may not be a good thing.[18] It may signify that people are ignorant of the document's shortcomings, unaware of its obsolete provisions, ethical compromises, and flawed notions of governance. For another, excessive approval may cause people to become too wedded to the constitution as it currently stands, too resistant to proposals to amend or replace it. Love that makes us blind is not love we should applaud.

2. *Consequences*

Furthermore, support for the constitution may matter less for its own sake, and more because it gives rise to *other* deeply important values. Chief among these is constitutional legitimacy—or, in Easton's terms, diffuse support for the constitution. On at least two memorable occasions, Supreme Court Justices have argued that this is precisely why public approval of the Court's decisions is essential; without it, the Court's legitimacy would be severely undermined. In *Baker v. Carr*, the 1962 case that launched the reapportionment revolution, Justice Frankfurter asserted that "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[19] He worried (needlessly, it turns out) that the public would oppose the Court's foray into the "political thicket,"[20] thus tarnishing the Court's reputation.

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16. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Sanford Levinson, *Pledging Faith in the Civil Religion; or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113 (1987).

17. Levinson, *supra* note 16, at 116 (quoting 8 U.S.C. § 1451(c) (1982)); *see also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 105 (2011) ("Within our legal culture the idea of fidelity to the Constitution is seen as pretty much an unquestioned good."). Levinson used to have a complicated kind of constitutional faith, but he now has rejected the federal Constitution as fundamentally undemocratic. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

18. *See infra* note 228 and accompanying text.

19. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

20. Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion). Frankfurter's worry was needless because the one person, one vote principle that the Court announced quickly won wide acceptance. The Court's intervention thus did not diminish but rather enhanced its legitimacy.

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Likewise, in *Planned Parenthood v. Casey*, the 1992 case that entrenched *Roe v. Wade* as the law of the land, Justices O'Connor, Kennedy, and Souter declared that the Court's "legitimacy" is a "product of . . . the people's acceptance of the Judiciary as fit to determine what the Nation's law means."[21] The Justices feared that if the Court reversed *Roe* "under fire" from *Roe*'s critics, a "loss of confidence" would follow that the Court makes its decisions based on law rather than "political pressure."[22] This loss of confidence, in turn, "would subvert the Court's legitimacy beyond any serious question."[23] The Court's authority would fall in tandem with its public support.

The Justices, though, are not the only ones to have speculated about a link between approval and legitimacy. So too have scholars in constitutional law, legal philosophy, and political science. In constitutional law, Jack Balkin, Richard Fallon, Frederick Schauer, and David Strauss all have contended that the Constitution's legitimacy stems from its continuing endorsement by the public.[24] As Fallon has put it, "The Constitution is law not because it was lawfully ratified . . . but because it is accepted as authoritative."[25]

In legal philosophy, similarly, positivists like H.L.A. Hart and Brian Leiter have asserted that a norm counts as *law* if there is "general acceptance of or acquiescence in" its legally binding status.[26] Under this approach, the social fact that a constitution is widely supported makes it

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21. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (joint opinion).

22. *Id.* at 867.

23. *Id.*; *see also id.* at 868 (noting that, for elected branches, "diminished legitimacy may be restored . . . . [by] a new mandate from the voters").

24. *See* Jack M. Balkin, *The Distribution of Political Faith*, 71 MD. L. REV. 1144, 1145 (2012); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1803–06 (2005); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 52 (1994) (arguing that "ultimate validity . . . of the Constitution" comes from "the raw empirical fact of political acceptance"); David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1861 (2005) ("[T]he Constitution owes its legitimacy to the fact of general popular acceptance . . . ."). Legal scholars have also suggested that constitutional approval is a proxy for constitutional success. *See* Helene Landemore, *What Is a Good Constitution? Assessing the Crowd-Sourced Constitutional Proposal in the Icelandic Experiment*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 71, 79 (Tom Ginsburg & Aziz Huq eds., 2016 forthcoming) ("A great constitution would thus be one that is beautifully written and likely to generate emotions such as love and admiration among its own people and beyond, among current and future generations.").

25. Fallon, *supra* note 24, at 1805.

26. H.L.A. HART, THE CONCEPT OF LAW 108 (2d ed. 1994); *see also, e.g.*, Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1039 (2008) ("[L]aw must be grounded in social facts . . . ."); Brian Leiter, *Postivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1141 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)) ("What counts as law in any particular society is fundamentally a matter of social fact.").

more likely that its provisions are treated as compulsory by the public. And in political science, Gregory Caldeira, James Gibson, and others have theorized that courts' diffuse support is tied to their specific support.[27] The concepts are not perfectly correlated—indeed, Easton's contribution was to tease them apart—but "[o]ver the long-term, the two types of support should be related (and may converge)."[28]

A second value to which constitutional approval may be connected is constitutional compliance. When people mostly back their charters, they may be more prone to obey them, and to insist that their governments abide by them too. In previous work, one of us has documented the startling degree of *non*compliance that characterizes many countries' constitutions.[29] Finding ways to improve enforcement is thus a priority—and an intuitive means to this end is persuading people to support their constitutions more strongly. Randy Barnett has made the point nicely: "[S]ome form of general acquiescence is necessary for any constitution to be implemented . . . ."[30] Analogously, in his work on "rights revolutions" that induce governments to respect constitutional rights, Charles Epp has suggested that they are most likely to succeed if there exists a "broad support structure in civil society."[31] This support structure, in turn, arises due to widespread public backing for the constitution.[32]

Third, constitutional approval could lessen the countermajoritarian difficulty: the worry that courts are behaving undemocratically when they

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27. *See, e.g.*, James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1127 (1992); Gibson et al., *supra* note 15, at 344 (referring to "the conventional (U.S.) hypothes[is] that . . . specific and diffuse support are connected, but not too strongly"); Dean Jaros & Robert Roper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. Q. 85, 87 (1980).

28. Gibson et al., *supra* note 13, at 356.

29. *See* David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 897–912 (2013).

30. Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 125 (2003).

31. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 5 (1998) (also suggesting that a "rights revolution" requires "a significant degree of organized collective action," as well as "financing, organizational support, and willing and able lawyers"); *see also* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 125–55 (2009) (finding that human rights conventions enjoy greater compliance when they are backed by political activists and civil society groups); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 950 (2005) ("[Human rights treaties'] ratification is more beneficial the stronger a country's civil society, that is, the more its citizens participate in international NGOs."); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 251–52 (1997) (suggesting that in order for people to mobilize to enforce a constitution, they need to approve of it sufficiently).

32. *See* EPP, *supra* note 31, at 5.

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strike down popularly enacted laws.[33] This worry is exacerbated when a constitution is disliked by the public; then courts not only nullify legislation that navigated the usual democratic channels, but do so in the name of a document whose standing is open to doubt. In contrast, if a constitution is broadly supported, then aggressive judicial activity on its behalf may be less troublesome. Then the activity may seem like the realization of the people's deepest public values, not their frustration.[34] A claim of this kind is at the heart of Bruce Ackerman's prominent theory of "constitutional moments."[35] The reason why these moments deserve to be judicially enforced is that they, not ordinary legislation, boast the closer connection to the people's true aspirations for their society.

Lastly, constitutional approval may promote constitutional durability. A popular constitution may be more likely to stand the test of time, to resist successfully efforts to replace it with another charter. This durability argument dates back to Madison, who remarked in *The Federalist* that, without "veneration" for the Constitution, "perhaps the wisest and freest governments would not possess the requisite stability."[36] It also has been advanced by contemporary scholars like Rosalind Dixon and Tom Ginsburg, who have speculated that "[t]he lower the level of popular support for a constitution, the more vulnerable a constitution will . . . be to whole-scale replacement."[37] It is worth noting, though, that constitutional longevity is not an unalloyed good. Madison's great rival and friend, Jefferson, famously argued that the dead should not govern the living, and thus that no constitution should survive for more than a generation.[38]

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33. *See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (final chapter of an elaborate five-part series on the countermajoritarian difficulty).

34. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 417 (1998) (describing Alexander Bickel's position that "the legitimacy of judicial review derived from the eventual congruence of the judicial decision with the views of the citizens").

35. This theory has been developed in several installments, the most recent of which is found in 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

36. THE FEDERALIST NO. 49 (James Madison).

37. Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636, 645 (2011); *see also, e.g.*, Troy E. Smith, *Divided* Publius*: Democracy, Federalism, and the Cultivation of Public Sentiment*, 69 REV. POL. 568, 571 (2007) ("[A]n enduring system also require[s] cultivating and maintaining favorable public sentiment for the Constitution's institutions and checks on power.").

38. *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392, 396 (Julian P. Boyd ed., 1958) [hereinafter Jefferson Letter] (stating that "the earth belongs in usufruct to the living" and that "[e]very constitution then, and every law, naturally expires at the end of 19 years"). Interestingly, the actual durability of countries' and U.S. states' constitutions corresponds almost perfectly to the Jeffersonian model. *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 129 (2009) (reporting that the "median survival

To be clear, these are all hypotheses, not statements of fact. Constitutional approval may bring about greater legitimacy, compliance, longevity, and so on—or it may not. Later in this Part,[39] we survey the (quite limited) empirical evidence on its consequences. But for now, our point is only that many scholars *believe*, rightly or wrongly, that it yields significant benefits. This is enough, in our view, to justify our present examination. Next, we turn from the consequences of constitutional approval to the causes. They matter too because, depending on which are correct, very different prescriptions may follow for constitutional designers and governmental leaders.

3. Causes

First, people's demographic attributes may affect their support for the constitution. People who have prospered under its regime—whites, men, the wealthy, the well-educated—may back it more strongly than their less fortunate peers. Conversely, the disadvantaged may be more loyal to the constitution if they believe that it espouses a message of dignity and equality. In the words of Christine Kelleher and Jennifer Wolak, "It is . . . possible that confidence in state institutions is driven more by individual demographic differences than contextual differences in state institutions."[40]

Second, constitutional approval may stem from constitutional knowledge. Those who are more informed about the constitution may be "exposed to a series of legitimizing messages focused on the symbols of justice," thus increasing their affection for it.[41] Maybe "to know it is to love it," in the pithy phrase of Caldeira and Gibson.[42] Or maybe not. Perhaps those who are more educated about the constitution also are more conscious of its deficiencies, of the ways it has failed to fulfill its promises. Then familiarity may breed contempt, not admiration.

Third, constitutional approval may reflect people's attitudes toward *other* institutions. For instance, those who are prouder of their state or

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time" of a constitution is nineteen years); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1671 (2014).

39. *See infra* Part I.B.

40. Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RES. Q. 707, 711 (2007).

41. Gibson et al., *supra* note 15, at 345 (discussing courts rather than constitutions).

42. James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 436–37 (2009) (also referring to courts rather than constitutions).

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country also may be more attached to the constitution that structures its public affairs. Analogously, if a particular party emphasizes devotion to the constitution, this party's members may profess higher levels of constitutional support. "[C]itizens' basic affect toward governmental institutions will extend to their evaluations of the [constitution]," according to Robert Durr, Andrew Martin, and Christina Wolbrecht.[43]

Fourth, people may support the constitution because its substantive content corresponds to their preferences. People may hold opinions as to which provisions should be included in (and excluded from) the constitution, and they may back it to the extent it is congruent with their views. Balkin has made this argument succinctly (if disapprovingly). "Many people may be reasonably comfortable with the status quo . . . . For such people, constitutional faith is not particularly difficult . . . ."[44] Their approval flows from their constitutional contentment.

And fifth, people may favor the constitution because of its key *non-substantive* features—its age, length, amendment frequency, ratification process, and so on. In Madison's view, "veneration" is a property that "time bestows on every thing;"[45] constitutional approval, that is, arises from constitutional longevity. Similarly, Ginsburg and his coauthors have noted the common "claim that participatory design processes," in which people are involved in charters' drafting and approval, "generate constitutions with higher levels of . . . popular support."[46] Furthermore, people may prefer a longer constitution because it is able to address more issues they care about in greater detail.[47] Or their taste may run to a more easily amendable charter because it can adapt more readily to changing societal circumstances.[48]

Once again, these are only hypotheses. Below, we summarize the existing empirical work on why people approve of constitutions and other governmental institutions. It also is true that many more explanations for

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43. Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 772 (2000) (referring to the Supreme Court).

44. Balkin, *supra* note 24, at 1145; *see also* Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 962 (2012) (arguing that constitutional "love" is tied to whether "one benefits mightily from the status quo it tends to entrench").

45. THE FEDERALIST NO. 49 (James Madison).

46. Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 215 (2009) (also noting that this claim has been "subject to only limited study").

47. *See* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1169 (2014) (finding that constitutions containing more rights are more congruent with public opinion).

48. *See* Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Towards an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV (forthcoming 2016), http://ssrn.com/abstract=2780494 (describing constitutional flexibility as deliberate design strategy for constitutional drafters that want to maximize popular control over government).

constitutional support *could* be posited: judicial decisions, economic trends, elite opinions, mass polarization, etc. But we are confident we have identified the main causal claims in the theoretical literature (and the ones most relevant to constitutions specifically rather than institutions generally).[49] These claims therefore occupy much of our attention in the rest of the Article.

B. Empirics

Unfortunately, almost nothing is known about the specific subject of constitutional approval. Major American surveys (such as the American National Election Studies, the General Social Survey, and the National Annenberg Election Survey) do not ask about it.[50] Nor do most important foreign surveys (such as the Eurobarometer, the Latinobarómeter, and the World Values Survey). In fact, the only poll we have found that (sometimes) includes a germane question is the Afrobarometer. In three of its five rounds, it asked respondents whether they agree or disagree with the statement, "Our constitution expresses the values and hopes of the [country's] people."[51] As far as we can tell, only one academic paper, by Devra Moehler and Staffan Lindberg, has taken advantage of the resulting data.[52] Moehler also has surveyed Ugandans on whether they support their most recent constitution.[53]

Fortunately, this is not the end of the story. Many American polls routinely ask people about their approval of *other* governmental institutions: the Supreme Court, Congress, the President, state governments, and so on. Many scholars also rigorously investigate the consequences and causes of approval of these bodies. Their findings are

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49. *Cf.* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 43 (2009) (arriving at a similar list of "important sources of support" for Supreme Court after scanning "[e]arlier research").

50. A 2011 survey by Time Magazine has enquired whether people support a new constitutional convention. *See* William D. Blake & Sanford V. Levinson, The Limits of Veneration: Public Support for a New Constitutional Convention 16–24 (Oct. 2, 2015) (unpublished manuscript), http://ssrn.com/abstract=2668891 (analyzing the survey data and exploring the predictors of support for a new constitutional convention).

51. The Afrobarometer codebooks are available online. Archive of Survey Results, AFROBAROMETER, http://www.afrobarometer.org/data/merged-data (last visited Mar. 1, 2015). It was the first three of the Afrobarometer's rounds that asked this question. The first round and portions of the second round used "aspirations" instead of "hopes."

52. *See* Devra C. Moehler & Staffan I. Lindberg, *Narrowing the Legitimacy Gap: Turnovers as a Cause of Democratic Consolidation*, 71 J. POL. 1448, 1453 (2009).

53. *See* Devra C. Moehler, *Participation and Support for the Constitution in Uganda*, 44 J. MOD. AFR. STUD. 275, 284–86 (2006).

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not directly applicable to this project, so we do not dwell on them at great length. But they do illuminate many of the factors that might be linked to constitutional approval, thus setting the stage for our own examination.

Beginning with the consequences of institutional approval, only one of them, institutional legitimacy, has been assessed empirically. Most of the relevant work has concluded that specific support for courts is a statistically significant predictor of diffuse support for them.[54] A noteworthy study by Vanessa Baird, Caldeira, and Gibson, for instance, found that specific support is related to diffuse support for the national high court in nineteen out of twenty countries (Russia being the lone exception).[55] Similarly, the most recent article on the topic, by Gibson and Michael Nelson, showed that performance satisfaction is tied to institutional support for the U.S. Supreme Court even controlling for a host of other variables.[56] These results validate the predictions of Easton's theoretical model. As the model anticipates, diffuse support arises—in part but not exclusively—from specific support.[57]

Turning to the causes of institutional approval, people's demographic attributes, first, are not especially influential. Moehler found that support for the Ugandan constitution does not vary significantly by respondents' gender, age, education, or wealth.[58] Caldeira and Gibson detected only "[t]rivial bivariate correlations . . . between Court attitudes and gender and age," though African Americans are less likely to back the Court.[59] According to David Jones and Monika McDermott, "definitive evidence remains elusive" as to "whether or not socioeconomic status affects public approval of Congress."[60] And the coefficients for gender, age, and

54. In addition to the studies cited below, see GIBSON & CALDEIRA, *supra* note 49, at 43 ("[A] relationship between approval of performance and policy outputs (specific support) and institutional loyalty is typically found in research on public attitudes."); Lori Hausegger & Troy Riddell, *The Changing Nature of Public Support for the Supreme Court of Canada*, 37 CAN. J. POL. SCI. 23, 25 (2004) ("Several studies have discovered a strong relationship between respondents' evaluations of particular decisions or policies of the Court and their general attitudes towards the Court itself."); and John M. Scheb II & William Lyons, *Diffuse Support, Specific Support and Attentiveness: Components of the Public's Assessment of the Supreme Court*, 27 SE. POL. REV. 765, 770 tbl.2 (1999).

55. *See* Gibson et al., *supra* note 15, at 351–52.

56. *See* James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 169 (2015).

57. For earlier studies finding only a weak connection between specific and diffuse support, see Caldeira & Gibson, *supra* note 15, at 651 (analyzing mass public); Gibson & Caldeira, *supra* note 27, at 1131 (analyzing blacks); and Jaros & Roper, *supra* note 27, at 103 (analyzing college students).

58. *See* Moehler, *supra* note 53, at 290 tbl.1.

59. GIBSON & CALDEIRA, *supra* note 49, at 58–60.

60. David R. Jones & Monika L. McDermott, *Ideological Distance from the Majority Party and Public Approval of Congress*, 27 LEGIS. STUD. Q. 245, 247 (2002); *see also id.* at 254 tbl.1 (also finding no effect of income on congressional approval); Jeffery J. Mondak et al., *Does Familiarity*

education are insignificant in most of Kelleher and Wolak's models of state governmental approval, though blacks again are less supportive of all three branches.[61] At least in this area, demography does not seem to be destiny (except possibly for African Americans).

Second, the impact of knowledge about the institution varies by the body at issue. As to the Court, Caldeira, Gibson, and others have found consistently that people who are more informed about it also support it more strongly.[62] "[A] considerable body of earlier research" establishes that "as knowledge of the Supreme Court increases, so too does loyalty toward the institution."[63] But as to Congress, knowledge is related *negatively* to approval. John Hibbing and Elizabeth Theiss-Morse,[64] Jones and McDermott,[65] and Jeffery Mondak and his coauthors,[66] all have determined that "Americans who know Congress the best like it the least."[67] (Though Mondak and his coauthors have explained that this may be because high-knowledge and low-knowledge people assess Congress differently, not because knowledge directly affects approval.[68])

Third, people's attitudes toward other institutions, and toward government generally, usually influence their opinion of any particular institution. Ugandans who support their country's ruling party tend to back their constitution.[69] Americans who think government takes their views

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Breed Contempt? The Impact of Information on Mass Attitudes Toward Congress, 51 AM. J. POL. SCI. 34, 41 tbl.4 (2007) (finding no effect of gender or education, but negative effect of age, on congressional approval); Samuel C. Patterson et al., *Citizens' Orientations Toward Legislatures: Congress and the State Legislature*, 45 W. POL. Q. 315, 324 tbl.2 (1992) (finding no effect of education, income, or race on congressional or state legislative approval).

61. *See* Kelleher & Wolak, *supra* note 40, at 714 tbl.2, 716 tbl.3, 717 tbl.4; *see also* John R. Hibbing & Elizabeth Theiss-Morse, *Process Preferences and American Politics: What the People Want Government to Be*, 95 AM. POL. SCI. REV. 145, 150, 151 tbl.1 (2001) (finding that no demographic attributes significantly influence overall governmental approval).

62. *See* GIBSON & CALDEIRA, *supra* note 49, at 53 (referring primarily to diffuse support); Gibson & Caldeira, *supra* note 42, at 438 (same); Gibson et al., *supra* note 15, at 352 (same); Gibson & Nelson, *supra* note 56, at 169 (same).

63. GIBSON & CALDEIRA, *supra* note 49, at 53; *see also* Moehler, *supra* note 53, at 290 tbl.1 (finding a link between Ugandan constitutional approval and following public affairs, but no link for exposure to news on radio, exposure to newspapers, or exposure to news meetings).

64. *See* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995); JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK (2002).

65. *See* Jones & McDermott, *supra* note 60, at 254 tbl.1 (finding that interest in politics negatively affects congressional approval).

66. *See* Mondak et al., *supra* note 60, at 41–42.

67. *Id.* at 34.

68. *See id.* at 42–47 (showing that high-knowledge people assess Congress based on policy congruence while low-knowledge people's evaluations are driven by their views of the President).

69. *See* Moehler, *supra* note 53, at 291 tbl.1.

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into account, and who adhere to broad democratic values, approve of the Court at higher rates.[70] And respondents who trust government to do the right thing are more likely to evaluate Congress's performance positively.[71] However, the evidence is mixed as to whether support for one governmental branch is linked to support for the other branches. Some studies find that it is,[72] while others conclude to the contrary.[73]

Fourth, the literature is nearly unanimous that people approve more strongly of bodies whose policy outputs are more congruent with their preferences. As to the Court, Durr, Martin, and Wolbrecht found that the more its decisions diverge ideologically from the public's views, the less the public supports it.[74] Likewise, Brandon Bartels and Christopher Johnston showed that respondents' ideological disagreement with the Court is linked to reduced backing for it.[75] And as to Congress, Jones and McDermott,[76] Mondak and his coauthors,[77] and Mark Ramirez[78] determined that its approval declines, respectively, as respondents' ideological distance from the majority party grows, as people perceive that their views are worse represented, and as it deviates further from the public mood. This connection between approval and policy congruence is the closest this body of scholarship comes to a consensus.

And fifth, relatively little is known about what we earlier called the non-substantive features of institutions. In her Ugandan study, Moehler

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70. *See* GIBSON & CALDEIRA, *supra* note 49, at 59–60 (referring primarily to diffuse support); Gibson & Caldeira, *supra* note 42, at 438 (same); Gibson & Nelson, *supra* note 56, at 169 (same); Marc J. Hetherington & Joseph L. Smith, *Issue Preferences and Evaluations of the U.S. Supreme Court*, 71 PUB. OPINION Q. 40, 56 tbl.3 (2007) (same).

71. *See* Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 PUB. OPINION Q. 239, 250 tbl.2 (2000) (but also finding that trust in government is unrelated to presidential approval); Patterson et al., *supra* note 60, at 324 tbl.2; Mark D. Ramirez, *The Policy Origins of Congressional Approval*, 75 J. POL. 198, 204 tbl.2 (2013).

72. *See, e.g.*, Jones & McDermott, *supra* note 60, at 255 tbl.1 (finding a link between presidential and congressional approval); Matthew J. Lebo, *Divided Government, United Approval: The Dynamics of Congressional and Presidential Approval*, 35 CONGRESS & PRESIDENCY 1, 10 tbl.2, 12 tbl.3 (2008) (same); Mondak et al., *supra* note 60, at 41 tbl.4 (same).

73. *See, e.g.*, Chanley et al., *supra* note 71, at 250 tbl.2 (finding no link between presidential and congressional approval); Durr et al., *supra* note 43, at 773 (finding that presidential and congressional approval are unrelated to Court approval); Patterson et al., *supra* note 60, at 324 tbl.2 (finding no link between executive and legislative approval).

74. *See* Durr et al., *supra* note 43, at 773.

75. *See* Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 192 (2013); *see also* Gibson & Nelson, *supra* note 56, at 165 (pointing out that while Bartels and Johnston claim they are studying Supreme Court legitimacy, "the measure used . . . is contaminated with specific support variance").

76. *See* Jones & McDermott, *supra* note 60, at 254 tbl.1, 258.

77. *See* Mondak et al., *supra* note 60, at 41 tbl.4.

78. *See* Ramirez, *supra* note 71, at 204 tbl.2.

found that more extensive participation in the process of constitutional ratification did not result in greater backing for the document.[79] In their analysis of national high courts, Baird, Caldeira, and Gibson showed that "[t]here is a very strong relationship . . . between the age of the court and the level of satisfaction with its outputs."[80] And in their work on American state governments, Kelleher and Wolak determined that legislative professionalism and the voter initiative reduce legislative support while term limits increase it, that the gubernatorial recall has no effect on gubernatorial support, and that the type of judicial election is unrelated to judicial support.[81]

Much more could be said about the literature on institutional approval, which is impressively rich and varied. But for present purposes, there are two essential points. First, the literature barely addresses constitutional approval—and overlooks U.S. constitutions entirely. Our poll is the very first to ask Americans how strongly they back their state and federal charters. And second, the literature does suggest an array of consequences and causes of constitutional approval. The potentially significant consequences are why we think support for the constitution is worth studying, while the hypothesized causes guide much of our analysis of the concept. It is to this analysis that we now turn.

II. METHODOLOGY

Our main tool for exploring whether and why people back their constitutions is a nationally representative survey that we carried out in October 2014. The survey asked Americans about their support for their federal and state charters, as well as a host of other issues that might influence approval levels. The survey also focused on state constitutions because their considerable variation makes them an ideal laboratory for studying the impact of constitutional design. While there is only one federal Constitution, state constitutions diverge widely in their substantive content, in their non-substantive features, and in the populations they aim to govern. They thus enable us to test many more hypotheses about constitutional approval than does the federal Constitution alone.

Another advantage of our emphasis on state constitutions is that our results for them may be more generalizable to constitutions around the globe. It is true that subnational constitutions tend to be more obscure than

79. *See* Moehler, *supra* note 53, at 290 tbl.1.
80. *See* Gibson et al., *supra* note 15, at 355.
81. *See* Kelleher & Wolak, *supra* note 40, at 714 tbl.2, 716 tbl.3.

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their national counterparts,[82] and that they do not need to address certain issues covered by the higher-level charters.[83] However, as one of us has recently shown, American state constitutions actually are more similar to foreign countries' constitutions than is the U.S. federal Constitution.[84] Like most foreign constitutions, state charters tend to be long and detailed, to grant plenary rather than limited powers, to be amended or replaced frequently, and to be fairly unfamiliar to their publics.[85] Judged by these characteristics, it is the U.S. federal Constitution that is the true outlier on the international stage.[86] So while we study its backing as well, it is our state-level findings that may be more applicable to constitutions worldwide.

A. Survey Design

To determine the levels and causes of constitutional approval, we designed and then administered a nationally representative online survey.[87] The survey was conducted by Survey Sampling International (SSI), a firm that specializes in online polling research. SSI distributed our survey to a panel of respondents that was nationally representative in terms of gender, age, race/ethnicity, and census region (Northeast, Midwest, South, and West).[88] To build the panel, SSI used relationships with partnership organizations through which respondents had agreed to participate in online polls. For example, some respondents signed up through United Airlines, and were rewarded with frequent flyer miles. Others signed up

82. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 2 n.4 (1998) (reporting a 1991 survey finding that "52 percent of respondents knew that their state had its own constitution, 11 percent believed that it did not, and 37 percent did not know or gave no answer").

83. *See* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1585–86 (2010) (arguing that drafters of subnational constitutions are less concerned with reducing agency costs, resulting in "weaker government structures . . . , weaker rights, or lower[] hurdles to amendment").

84. *See* Versteeg & Zackin, *supra* note 38, at 1652 ("[W]hen state constitutions are included in characterizations of American constitutionalism, it becomes clear that Americans have participated in forms of constitutional politics that look very similar to those in the rest of the world.").

85. *See id.* at 1652–99; *see also* STEPHEN BROOKS, AMERICAN EXCEPTIONALISM IN THE AGE OF OBAMA 93 (2013) (citing survey research that Canadians are more familiar with the American constitution than with their own).

86. *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

87. The survey was approved by the Institutional Review Board of the University of Virginia.

88. The distribution of respondents was as follows: (1) *Gender:* Male: 48.3%; Female: 51.7%; (2) *Age:* 18–24: 13.1%; 25–34: 17.5%; 35–44: 17.5%; 45–54: 19.2%; 55–64: 15.6%; 65+: 17.2%; (3) *Race/Ethnicity:* White: 69.0%; Hispanic: 13.6%; Black: 11.2%; Asian: 4.3%; Other: 1.9%; and (4) *Census Region:* Northeast: 18%; Midwest: 22%; South: 37%; West: 23%.

through iPad applications, and were rewarded with iTunes dollars. While the rewards varied, all respondents received compensation of about fifty cents per five minutes of survey time. The survey was online for two weeks in October 2014. In total, 2215 people took the poll, which is a large enough sample for us to draw inferences about the national population as a whole.[89]

The survey is included in its entirety as Appendix A, so rather than reproduce all of the questions here, we direct interested readers to the end of the Article. The survey began by asking respondents to identify basic information about themselves, such as their gender, age, race/ethnicity,[90] state of residence, education level,[91] and household income.[92] After soliciting this demographic data, the survey provided a short introduction to state law, state constitutions, and the federal Constitution. The purpose of this introduction, which is excerpted below, was to better acquaint respondents with the documents they would then be asked about:

> As you may know, each state has its own constitution, which takes precedence over other kinds of state law such as statutes and regulations. If ordinary state law conflicts with the state constitution, it is the state constitution that has to be followed. State constitutions cannot contradict the federal United States Constitution, but they can provide additional protections and cover additional areas.
>
> State legislators often face a choice between including policies in the state constitution or in ordinary state law. There are several differences between these options. First, when policies are placed in the state constitution, they are *harder to change* in the future. Amending a state constitution is always more difficult than amending a regular state law. Second, policies that are in the state constitution are often considered *more "fundamental"* than policies in ordinary state law. States commonly include policies that they see as especially important in the state constitution. And third, policies

89. However, not all respondents completed all of the questions; only 2056 respondents completed the survey entirely. We also excluded respondents from Washington, D.C., Puerto Rico, and foreign countries, as we have no information on their constitutions, leaving us with a usable sample of 2046.

90. Like the census, we asked separately whether the respondent is Hispanic.

91. We offered ten possible education levels, and later aggregated all responses indicating education beyond a master's degree.

92. We offered six income ranges, the lowest of which was less than $30,000, and the highest of which was greater than $500,000.

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> that are in the state constitution *can be used by courts to invalidate* policies that are in ordinary state law. In other words, if ordinary state law violates the state constitution, the ordinary state law must be struck down.

Following this passage, the survey presented respondents with a list of twenty-nine substantive policies along with brief explanations of what their adoption would entail. For example, the "right to unionize" "would allow workers to join unions even when their employers object to their membership." The "obligation to establish a state university" "would create an obligation for the state to fund a state university that is available to admitted residents at a subsidized rate." The "right to gender equality" "would ensure that women are treated as equal to men by the state." And the "prohibition of the death penalty" "would ensure that the death penalty is never imposed, even for the worst crimes." Again, the full list of policies and explanations is available in Appendix A.

We formed this list by perusing the texts of current state constitutions in search of provisions that (1) represent substantive policy choices; and (2) are found in multiple state charters but *not* in the federal Constitution. On the one hand, we wanted to identify provisions that are actually plausible elements of state constitutions. On the other, we did not want to include provisions that are also present in the federal Constitution, since their greater familiarity could induce respondents to support including them in state constitutions irrespective of their merits. Based on these guidelines, we compiled policies in the areas of employment, education, welfare, marriage, criminal justice, the environment, and several others. We also had two experts on state constitutional law inspect our list, and are grateful for their feedback.[93]

For all of these policies, the survey asked respondents whether they would like to see them included in their state's constitution. The answers to these questions are our core measure of people's substantive constitutional preferences. However, one potential concern with this approach is that people might conflate their *constitutional* with their *ordinary legal* preferences. In other words, they might respond based on whether they approve of the policy generally, not whether they want it enshrined in their constitution specifically.[94] To mitigate this risk, the

93. These were Doug Spencer, a law professor at the University of Connecticut, and Emily Zackin, a political scientist at Johns Hopkins University. *Cf.* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

94. *See* Versteeg, *supra* note 47, at 1154 (discussing this problem).

survey first asked respondents, for the same twenty-nine provisions, whether they would like to see them included in their state's regular laws. Only after respondents answered these questions were they asked whether they would like to see the provisions incorporated into their state's constitution. The aim here was to encourage people to separate their constitutional from their ordinary legal preferences, and to take into account the ways in which constitutions differ from conventional legislation.

The survey next asked respondents to assess, on a scale from one to ten, how strongly they approve of the federal Constitution and of their state's constitution. (The survey also asked about support for state *law*, again in order to prompt people to distinguish between their constitutional and non-constitutional attitudes.) These questions capture constitutional (and statutory) backing, and generate the dependent variables for all of our models. Their wording also is essentially identical to prior polls of other institutions' approval, thus increasing our confidence in the questions' validity and facilitating inter-institutional comparisons.[95] However, unlike those other polls, these questions have never been posed before, and so their answers are of particular interest.

The survey further included items that inquired about respondents' constitutional and civic knowledge, as well as their partisanship and patriotism. These items all correspond to additional hypotheses about the sources of constitutional approval, and they were drafted as follows: Three questions asked respondents to rate their (self-professed) familiarity with the federal Constitution, their state constitution, and their state's laws on a scale from one to five. Two questions asked respondents how closely they (claim to) follow the national and local news, with possible responses ranging from "not closely at all" to "very closely." Two more questions asked respondents how proud they are, on a ten-point scale, to live in the United States and in their particular state. And a final question asked respondents about the political party to which they belong (Democratic, Republican, independent, or other).

The survey ended with two quizzes that tried to test whether respondents read our explanations carefully and understood our questions. Specifically, we asked (1) whether state constitutions are easier or harder to amend than ordinary state law; and (2) whether state constitutions are

95. *See generally* Part I.B (discussing these polls' findings).

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more or less fundamental than ordinary state law. Respondents who gave wrong answers to both questions were removed from our sample.[96]

B. Congruence Scores

By themselves, the survey responses allow us to evaluate some but not all of our hypotheses about constitutional approval. One claim we *cannot* assess on this basis alone is the proposition that people prefer constitutions whose substantive content more accurately reflects their preferences. To test this hypothesis, we need a measure of congruence that compares people's constitutional views with the documents' operative provisions, and then determines how close the fit is.

The survey itself captured respondents' preferences because it asked them, for twenty-nine policies, whether they would like to see the measures included in their state's constitution. The missing piece is thus the actual content of each charter, the provisions it in fact happens to enshrine. To obtain this information, two research assistants coded all fifty state constitutions and recorded whether each of the twenty-nine policies is present in each document. The assistants agreed in their judgments in the vast majority of cases, and all discrepancies were resolved by the authors.[97]

Our basic coding rule was that, for a provision to count as included, the constitution must explicitly *require* the state to carry out the policy. When the constitution merely provides that the state "may" do something, or "shall have the power" to do something, we did not mark the policy as present.[98] Our coding also was based only on the state constitution's text, and did not take into account judicial interpretations of the language. We believe this approach is appropriate because, unlike the federal

96. A total of sixty-nine respondents gave wrong answers to both questions. These respondents did not differ significantly in any demographic category from those who gave at least one correct answer. Unfortunately, a substantial portion of respondents misunderstood our question on the difficulty/ease of state constitutional amendment. Twenty-eight percent of all respondents answered this question incorrectly. We did not want to exclude all of these respondents because doing so would have substantially reduced our sample size.

97. The inter-coder reliability is 0.92. That is, out of 1950 coding decisions, the coders disagreed on 165, which were subsequently resolved by the authors. Most of these 165 disagreements concerned provisions relating to debtors, which proved to be difficult to code.

98. For example, we excluded Montana ("The legislature *may provide* such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need"), MONT. CONST. art. XII, § 3, cl. 3 (emphasis added), and Nebraska ("Laws *may be enacted* regulating the hours and conditions of employment of women and children, and securing to such employees a proper minimum wage"). NEB. CONST. art. XV, § 8 (emphasis added). This approach is consistent with Versteeg & Zackin, *supra* note 38, at 1684–85.

Constitution, state constitutions are long and detailed documents that are subject to frequent revision. As a result, there are fewer opportunities for courts to interpret many of their provisions.[99]

We calculated respondents' congruence scores by pairing their constitutional preferences with our coding of their states' constitutions. That is, each score represents the proportion of a respondent's preferred policies that are actually found in her state's constitution. We consider there to be congruence both when a respondent supports a given policy and this policy *is* included in her constitution, and when a respondent opposes a policy and it is *not* included. The resulting scores thus have a theoretical range of zero (none of the respondent's preferences are incorporated) to one (all of the respondent's preferences are enshrined).

C. Non-Substantive Features

A final hypothesis the survey itself cannot address is the possibility that constitutions' non-substantive features—in particular, their age, length, and amendment frequency—influence constitutional approval. We therefore collected data on these characteristics from a number of sources. Westlaw and the Green Papers, among other resources, list when all state constitutions were adopted; with this information it is trivial to calculate each charter's current age.[100] One of us previously determined the total number of words in each state constitution, and we reuse those figures here.[101] Lastly, *The Book of the States* documents the total number of amendments to each state constitution since its adoption.[102]

III. DESCRIPTIVE EXPLORATION

Having perhaps taxed our readers' patience with this long buildup, we are now in a position to present our findings on constitutional approval. Our presentation in this Part is mostly descriptive; we first identify the levels of federal and state constitutional support, and then explore how they vary along several dimensions. In the next Part we turn from description to explanation. We build regression models in stages for federal and state constitutional backing, thus illuminating several of the

99. *See* Versteeg & Zackin, *supra* note 38, at 1699–1703.

100. *See Constitutions of the Several States*, THE GREEN PAPERS, http://www.thegreenpapers.com/slg/constitution.phtml [https://perma.cc/64GZ-R2HD] (last visited Mar. 1, 2015).

101. *See* Versteeg & Zackin, *supra* note 38, at 1655.

102. *See* AUDREY WALL, COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES (2012), http://knowledgecenter.csg.org/kc/content/book-states-2012-chapter-1-state-constitutions.

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factors responsible for them. In both Parts, we consider the same five sets of hypotheses in the same order, involving (1) demographic attributes, (2) civic knowledge, (3) institutional attitudes, (4) constitutional congruence, and (5) non-substantive constitutional features.

A. Overall Levels

We begin with the overall levels and distributions of constitutional approval. By and large, Americans strongly back their federal Constitution. Its average approval score is 7.8 out of 10, and its median score is even higher at 9. As the dotted density curve in Figure 1 indicates, a full 20% of respondents give it the maximum approval score of 10, while only about 5% rate it below 5. In partial contrast, the average approval score for *state* constitutions is 6.7 out of 10, and the median score is 8—noticeably, though not dramatically, lower. As the solid density curve in Figure 1 shows, only about 8% of respondents award their state charter the maximum score of 10, while more than 10% rank it below 5. It thus is fair to conclude that state constitutions are somewhat less popular than their federal counterpart. (Though popularity, of course, is not the same as merit. As we observed earlier, it is possible for constitutions to be *too* admired given their actual design and performance.[103])

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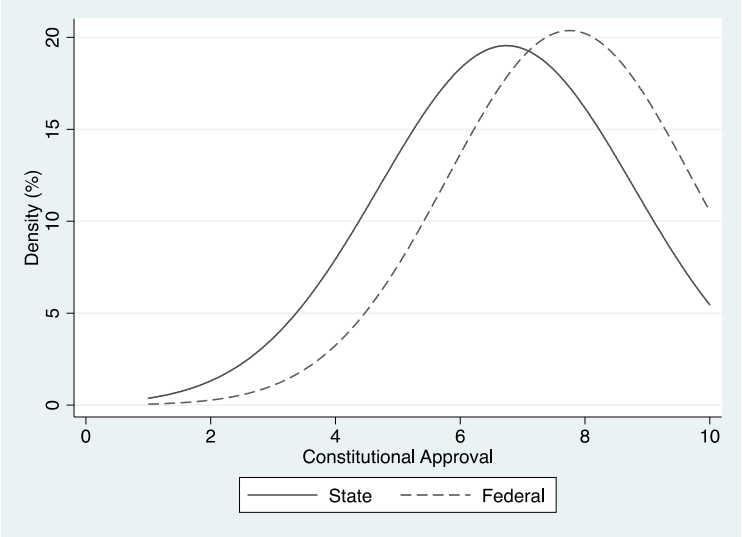
103. *See infra* note 228 and accompanying text. We also note that we did not ask respondents if they had recently moved to either America or their state. It is possible that constitutional approval varies based on how long a respondent has lived in her current location.

FIGURE 1: FEDERAL AND STATE CONSTITUTIONAL APPROVAL DISTRIBUTIONS



B. Geography and Demography

We next consider how constitutional approval varies geographically and demographically. The two maps in Figure 2 depict the average approval scores in each state for the federal Constitution and the state constitution. They reveal that, in most states, support is in line with the national average, but that there are a few modest exceptions. Specifically, average federal constitutional approval falls below 7.5 in Massachusetts, New York, and Vermont (all liberal northeastern states), while it exceeds 7.8 in Alabama, Idaho, Mississippi, Montana, Nebraska, Oklahoma, South Dakota, and Utah (all conservative southern and western states). Similarly, average state constitutional approval is less than 6.6 in Alabama, Georgia, Mississippi, South Carolina, and Utah (mostly conservative southern states), and more than 6.8 in Arizona, Kansas, Nebraska, New Hampshire, North Dakota, South Dakota, West Virginia, and Wyoming (mostly conservative western states).

We also note that these state-level estimates were not produced through crude disaggregation (that is, simply calculating averages for each state's respondents), but rather through a more sophisticated technique

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known as multilevel regression and poststratification (MRP), which we describe briefly in the margin.[104] MRP is considerably more accurate than disaggregation when (as here) the samples in each state are relatively small. In these circumstances, though, MRP also tends to produce more tightly bounded estimates because it uses information from the entire country to estimate public opinion in each state. This feature of MRP explains why the states' constitutional approval scores are all relatively close to one another. The limited state-specific information is outweighed by the greater volume of national data.

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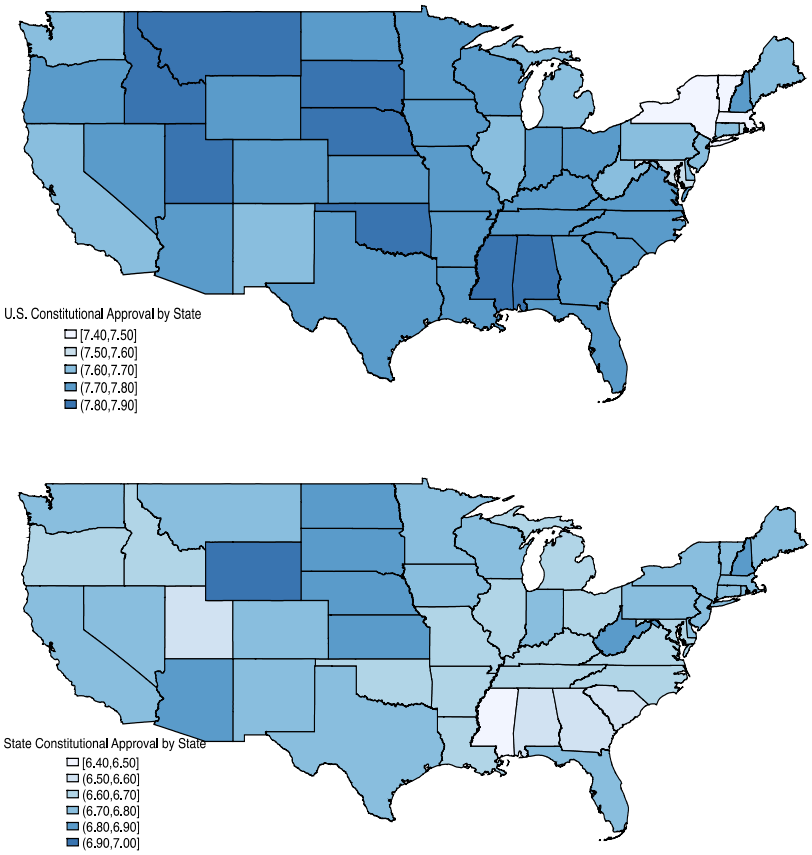
104. MRP models respondent opinion as a function of both individual- and state-level characteristics, thus producing an opinion estimate for each of many demographic "types" in each state. The average opinion for the state then can be computed by weighing the opinion of each type by the U.S. census estimate for the frequency of the type in the state's population. MRP has been validated repeatedly in the academic literature and has been shown to produce more accurate estimates than disaggregation. *See, e.g.*, ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS (2007); Yair Ghitza & Andrew Gelman, *Deep Interactions with MRP: Election Turnout and Voting Patterns Among Small Electoral Subgroups*, 57 AM. J. POL. SCI. 762 (2013); Jeffrey R. Lax & Justin H. Phillips, *How Should We Estimate Public Opinion in the States?*, 53 AM. J. POL. SCI.107 (2009). More information on how we modeled respondents' constitutional preferences through MRP is available from the authors upon request.

FIGURE 2: MEAN FEDERAL AND STATE CONSTITUTIONAL APPROVAL BY STATE



Shifting to demographics, Figure 3 shows how constitutional approval differs by race, gender, education, income, and age. The dots in each chart represent the means for the various groups, while the vertical lines represent the 95% confidence intervals around the means. When the confidence intervals for groups do not overlap, the differences between the groups' means are statistically significant.[105]

105. Note, however, that even when the confidence intervals do overlap, the differences between the groups' means might still be statistically significant. *See* Andrea Knezevic, *Overlapping Confidence Intervals and Statistical Significance*, STATNEWS (Cornell Univ. Statistical Consulting Grp., Ithaca, N.Y.), Oct. 2008.

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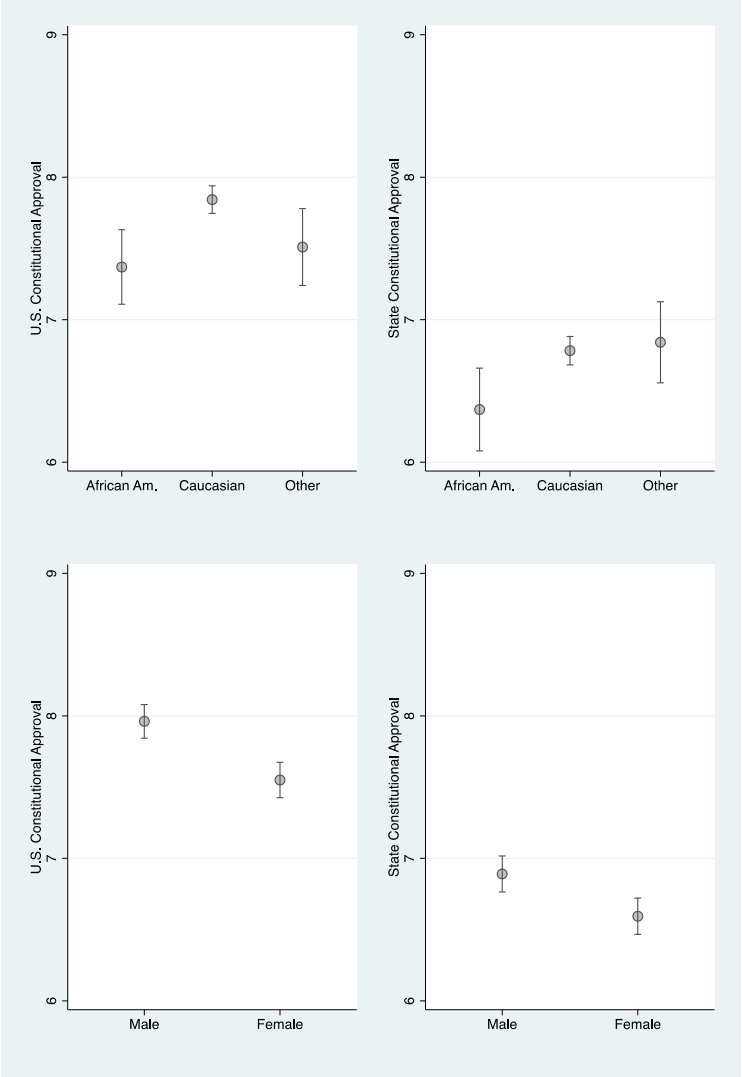
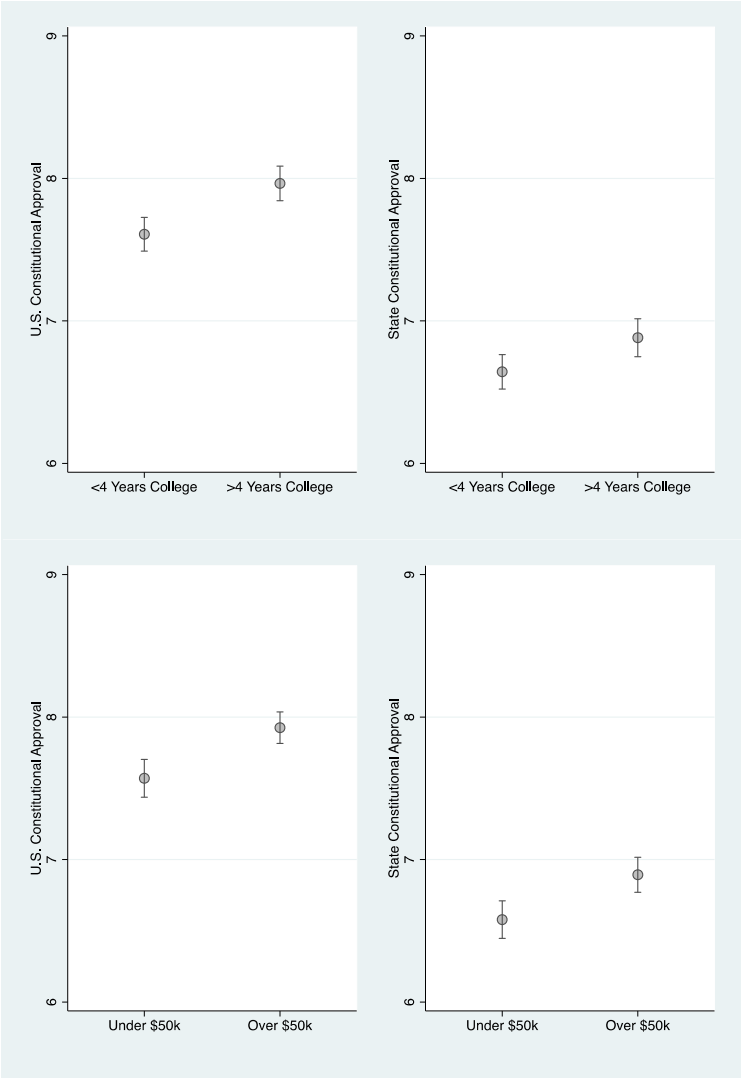
As to race, African Americans' approval scores are lower than those of Caucasians and other groups (Asian Americans, Pacific Islanders, and Native Americans).[106] As to gender, men's approval scores are higher than women's. As to education, the approval scores of respondents with at least four years of college are higher than those of people with less schooling. As to income, the approval scores of respondents whose households make at least $50,000 per year are higher than those of less well-compensated people. And as to age, the approval scores of respondents over thirty-five are higher than those of their younger peers. In many cases, however, these differences are relatively small and, as we show in the next Part, not statistically significant once other variables are incorporated into the analysis.

106. Following the census, Hispanics are not treated as a different racial group. In our survey, people were first asked whether they are Hispanic, after which they could indicate whether they are Caucasian, African American, Asian, Pacific Islander, or Other. For ease of presentation, we aggregate Asians, Pacific Islanders, Native Americans, and those who identify as Other. We did not find any meaningful differences between these groups. We also found that there was almost no gap between the average approval of Hispanics and non-Hispanics.

FIGURES 3: MEAN FEDERAL AND STATE CONSTITUTIONAL APPROVAL BY DEMOGRAPHIC ATTRIBUTES




U.S. Constitutional Approval
6
7
8
9
<4 Years College
>4 Years College
State Constitutional Approval
6
7
8
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<4 Years College
>4 Years College
U.S. Constitutional Approval
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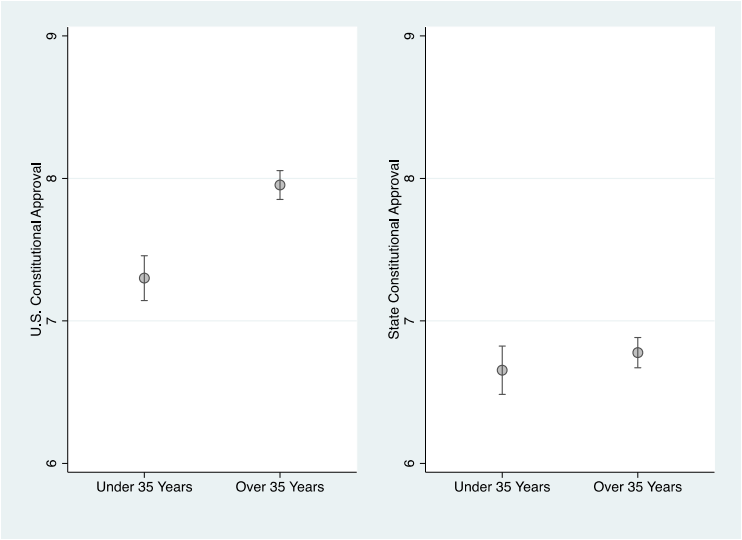

C. Civic Knowledge

Proceeding to respondents' civic knowledge, Figure 4 plots average approval scores for different levels of federal and state constitutional familiarity, along with their 95% confidence intervals. It indicates that those who (think they) know their charters better also back them more strongly. In particular, respondents who rate their knowledge of the federal Constitution as 1 out of 5 have an average approval score of 4.1, while those who claim their knowledge is a perfect 5 have an average score of 9.0. Likewise, respondents who assess their knowledge of their state constitution as 1 have an average approval score of 4.5, while those who assert maximum knowledge have an average score of 8.7.

While these results suggest that constitutional familiarity and approval are intertwined, some caution is in order. Our questions did not test respondents' *actual* knowledge of either the federal Constitution or their state charters. It is possible that the relationship between genuine knowledge and approval is quite different. It is also possible that respondents believe they are familiar with their constitutions because they support them, or that both support and professed familiarity stem from the same general positive attitude toward the documents. Unfortunately, our

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research design does not allow us to probe further these psychological aspects of respondents' answers.[107]

However, our survey responses *do* allow us to say a bit more about individuals who claim intimate familiarity with their constitutions. Respondents who rate their knowledge of their state constitution as 4 or 5 are better educated than other subjects (45% versus 37% with at least four years of college), younger (median age of 42 versus 49), wealthier (58% versus 46% with household income above $50,000), more liberal (38% versus 31% with left-of-center views), more likely to be Democrats (47% versus 39%), and more likely to be male (57% versus 45%).[108] There are similar differences between respondents who rank their knowledge of the federal Constitution as 4 or 5 and other subjects.[109] Also notably, purportedly higher-knowledge respondents do *not* score any better on our quizzes than their ostensibly lower-knowledge peers. In fact, they score worse in one case, with 42% of higher-state-knowledge subjects wrongly stating that state constitutions are easier to amend than ordinary state law versus 20% of lower-state-knowledge respondents.[110] These figures hint (but do not prove) that a gap may exist between professed and actual understanding of the constitution. They thus confirm the need to take our findings about constitutional knowledge with a grain of salt—and to study the concept further in the future.

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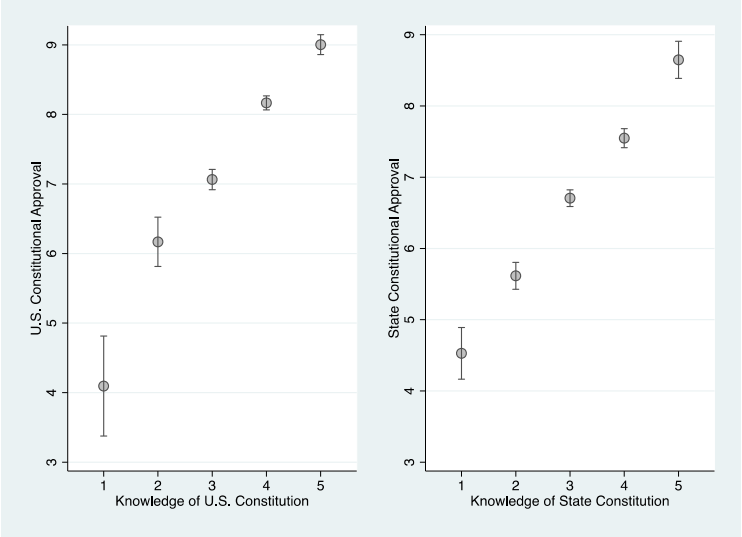
107. Nor does the academic literature, which has focused almost exclusively on actual (as opposed to professed) political knowledge, shed any insight on this point. *Cf.* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996).

108. There are not significant racial differences between the two groups, as 75% of higher-knowledge respondents and 79% of lower-knowledge respondents identify as white.

109. Specifically, respondents who rate their knowledge of the federal Constitution as 4 or 5 are better educated than other subjects (45% versus 33% with at least four years of college), wealthier (56% versus 43% with household income above $50,000), more liberal (36% versus 29% with left-of-center views), and more likely to be male (56% versus 40%). However, they are not appreciably younger (median age of forty-six versus forty-eight) or more likely to be Democrats (42% versus 41%).

110. In all other cases, the two groups score about equally well on the quizzes. Twenty-nine percent of higher-federal-knowledge respondents and 26% of lower-federal-knowledge respondents wrongly think that state constitutions are easier to amend than ordinary state law. And 13% of higher-state-knowledge respondents, 15% of lower-state-knowledge respondents, 12% of higher-federal-knowledge respondents, and 19% of lower-federal-knowledge respondents wrongly think that state constitutions are less fundamental than ordinary state law.

FIGURE 4: MEAN FEDERAL AND STATE CONSTITUTIONAL APPROVAL BY SELF-REPORTED CONSTITUTIONAL KNOWLEDGE



Constitutional knowledge, though, is not the only form of familiarity that appears to be related to constitutional approval. The same is true for knowledge of public affairs more generally. Figure 5 displays average federal and state constitutional approval scores, along with their 95% confidence intervals, for different levels of familiarity with the national and local news, respectively. Possible responses range from following the news "very closely" to "not closely at all." At the federal level, those most attentive to the news have an average approval score of 8.4, while those least attentive have an average score of 5.8. The same pattern holds at the state level: the most avid local newshounds have an average approval score of 7.3, compared to 5.2 for those who do not follow the local news at all. These findings further suggest that knowledge is connected to approval—albeit with the same caveat as before about actual and claimed observation of the news not being the same.

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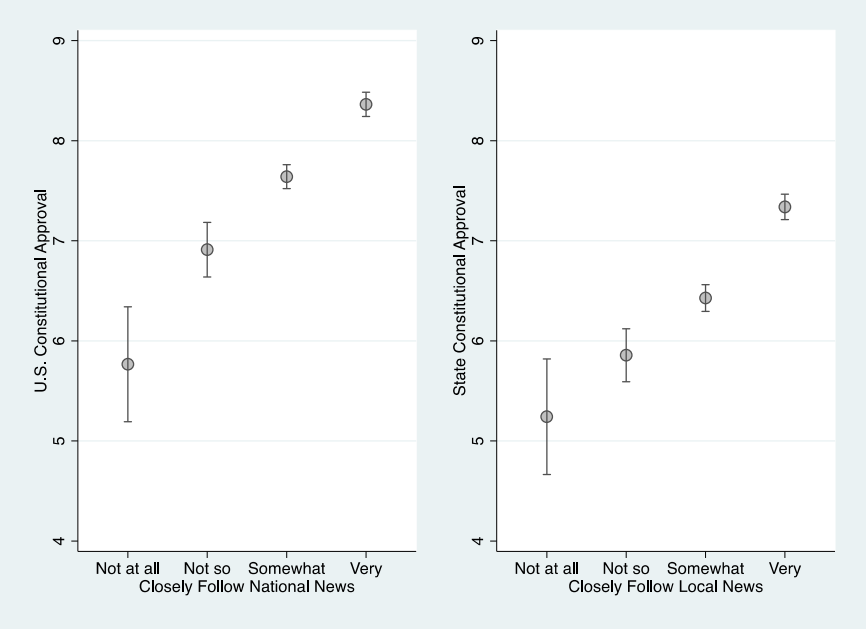
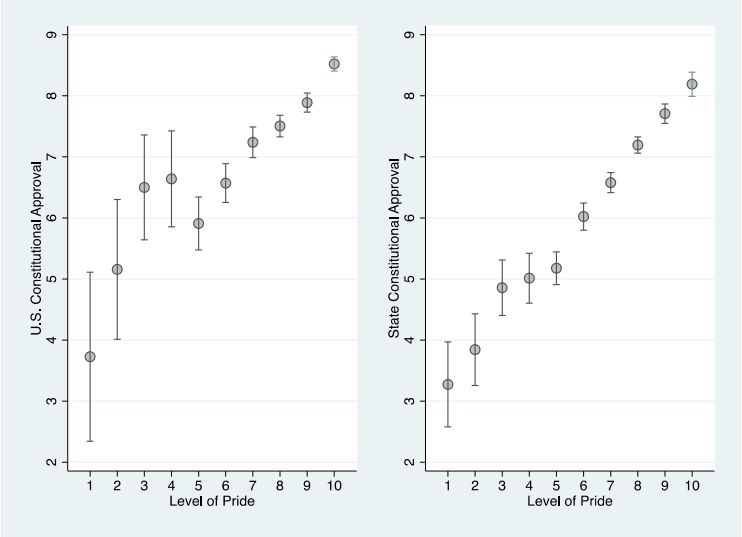
FIGURE 5: MEAN FEDERAL AND STATE CONSTITUTIONAL APPROVAL BY SELF-REPORTED FOLLOWING OF NATIONAL AND LOCAL NEWS



D. Institutional Attitudes

The final characteristics of respondents themselves (as opposed to their constitutions) for which we have information are their general institutional attitudes: that is, their feelings toward their country, state, and party. Figure 6 plots average federal and state constitutional approval scores, along with their 95% confidence intervals, for different levels of national and state pride, respectively. It shows that approval and jurisdictional pride are closely correlated. At the federal level, people who rate their national pride as 1 out of 10 have an average approval score of 3.8, while those who are maximally proud of their country have an average score of 8.5. Similarly, at the state level, people who are least proud of their state have an average approval score of 3.3, while those who are most proud have an average score of 8.2. Jurisdictional pride thus seems as strongly related to constitutional approval as either of the knowledge variables we considered above.

FIGURE 6: MEAN FEDERAL AND STATE CONSTITUTIONAL APPROVAL BY JURISDICTIONAL PRIDE



Our results for party affiliation are also notable, though not quite as stark. Figure 7 displays average federal and state constitutional approval scores, along with their 95% confidence intervals, for Democrats, Republicans, and independents. At both levels, Republicans are stauncher constitutional supporters than other parties' members. Their average federal approval score is 8.1, compared to 7.8 for Democrats and 7.5 for independents. Likewise, their average state approval score is 7.1, compared to 6.8 for Democrats and 6.4 for independents.[111] These differences are larger than most of the demographic gaps we identified earlier. But they are substantially smaller than the variations by civic knowledge and institutional pride.

111. The category of independents also includes the forty-nine respondents who identified their party affiliation as "other."

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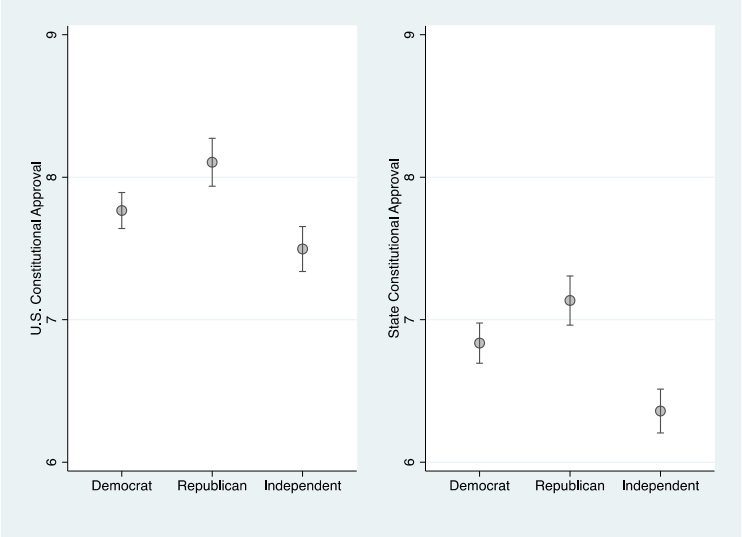
FIGURE 7: MEAN FEDERAL AND STATE CONSTITUTIONAL APPROVAL BY PARTISAN AFFILIATION



E. Constitutional Congruence

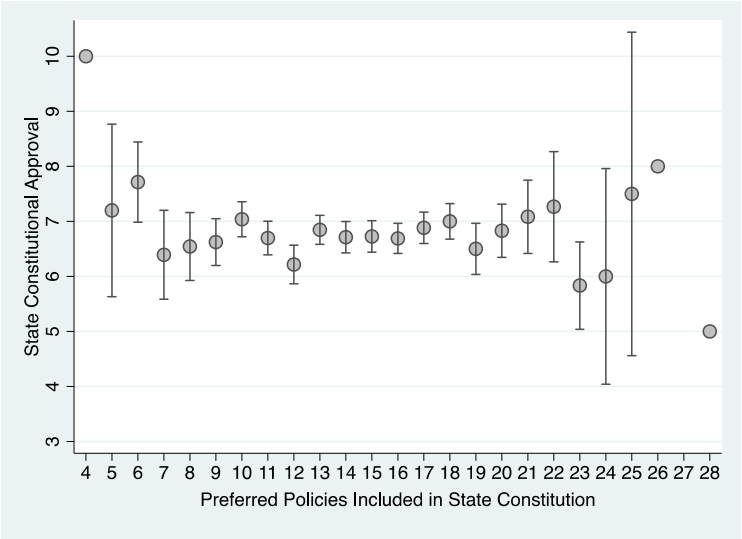
We now turn to factors that involve not just respondents' own attributes but also those of their constitutions. Again, these factors are available solely at the state level since, at the federal level, there is only one constitution and so no possibility of comparison. Starting with constitutional congruence, we explained above that we calculated it by comparing respondents' preferences on twenty-nine constitutional policies with the provisions actually present in their states' charters.[112] The resulting congruence scores range from 0.14 (4 out of 29 preferred policies included in the constitution) to 0.97 (28 out of 29 preferred policies included).[113] This wide spectrum is itself quite interesting, as it indicates that state constitutional law differs greatly in its fit with people's views.

112. *See supra* Part II.B.

113. When calculating the congruence scores we found that respondents' answers often are different for inclusion in state law than for inclusion in the state constitution. In almost all cases, respondents are more likely to say they want a policy included in state law than to say they want it to be constitutionally protected. This suggests that respondents did actually separate their constitutional from their ordinary legal preferences, as we had hoped they would. The one notable exception is the prohibition of the death penalty: 42% of respondents want to constitutionally ban it, while only 38%

Figure 8 plots average state constitutional approval scores, along with their 95% confidence intervals, for each level of congruence (displayed here as the raw number of each respondent's preferred policies that are constitutionally enshrined, and varying from 4/29 to 28/29). Strikingly, and unlike the results in Figures 5 to 7, Figure 8 does *not* reveal an ascending pattern with approval positively related to congruence. Instead, many respondents whose constitutional preferences are barely satisfied still rate their charter favorably, while many respondents whose constitutional views are largely heeded still do not support their charter very strongly. For most levels of congruence, the average level of approval stays roughly constant and seems impervious to variations in fit. While this analysis does not control for other possible causes of constitutional approval, it does hint that congruence may not be as closely tied to it as the theoretical literature asserts.

FIGURE 8: MEAN STATE CONSTITUTIONAL APPROVAL BY CONSTITUTIONAL CONGRUENCE



want to ban it via regular state law. This suggests that people think of prohibiting the death penalty as a truly constitutional issue.

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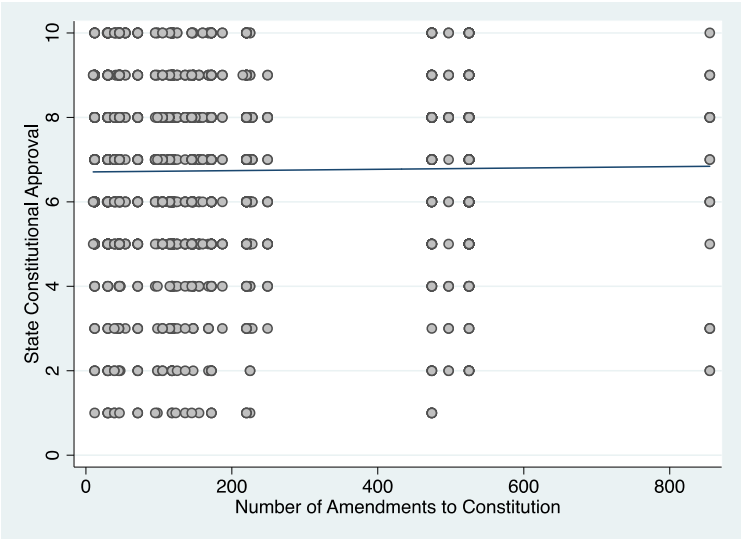
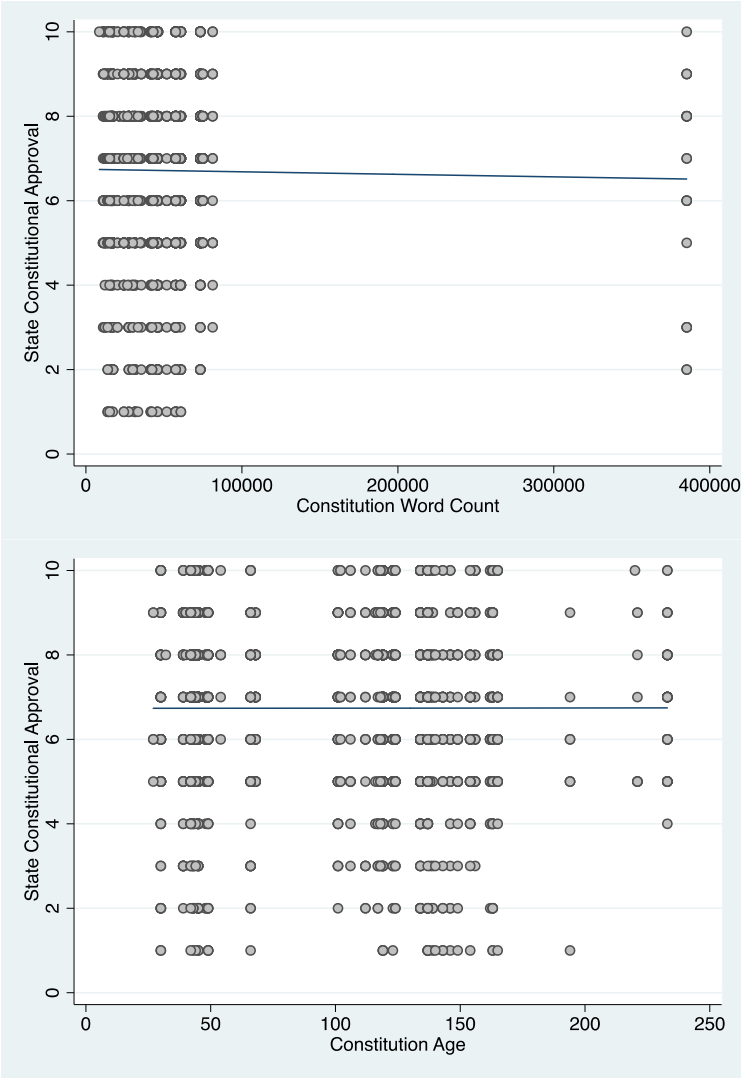
F. Non-Substantive Features

Our other constitutional variables relate not to the charters' actual content but rather to their key non-substantive features: their age (in years), length (in words), and amendment frequency (in number). As these are all continuous state-level variables, we cannot display them using the same sorts of charts we have used until now. Instead, Figure 9 plots respondents' state constitutional approval scores against these non-substantive features, with best fit lines included as well. These scatter plots reveal no discernible pattern in the data, and thus suggest that there is essentially no relationship between approval and constitutional age, length, or amendment frequency. In fact, the correlations between approval and these variables are just 0.004, -0.002, and 0.002, respectively. Again, this analysis does not hold constant any other drivers of approval, but it certainly lends no support to the notion that people's constitutional attitudes are shaped by their charters' non-substantive dimensions.

FIGURE 9: STATE CONSTITUTIONAL APPROVAL VERSUS NON-SUBSTANTIVE CONSTITUTIONAL FEATURES





IV. EXPLANATORY ANALYSIS

To this point, our exploration of the data has been entirely descriptive. We have shown how federal and state constitutional approval scores vary along several notable dimensions, including geography, demography, and self-reported knowledge and attitudes. While this sort of analysis helps to detect patterns in the data, it does not take into account various confounding factors. For example, people who are more constitutionally

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knowledgeable might also follow the news more closely, making it unclear which factor is more associated with constitutional approval once we control for the other. Similarly, race, income, and education might be interrelated in ways that make it impossible to draw reliable conclusions from statistics for a single attribute in isolation.

To assess the causes of constitutional approval more rigorously, we therefore turn to regression analysis. Unlike descriptive exploration, regression analysis enables us to determine the impact of different variables while holding other variables constant. To illustrate, we can evaluate how constitutional knowledge affects constitutional approval while controlling for the correlation between knowledge and attentiveness to the news. Likewise, we can discern the link between race and approval notwithstanding the many ties between race and other demographic characteristics.

However, it is important to acknowledge the limitations of this method. The basic advantage of regression analysis is that it allows us to hold other variables constant—but not *all* other variables can be controlled for. In particular, it is possible that there exist factors, either personal or constitutional, that are correlated with both our independent variables and constitutional approval, but that are omitted from our models. These factors could be the actual drivers of constitutional backing, but we would not be able to observe their impact since they are excluded from our calculations. The possible existence of these omitted variables limits our ability to make causal claims. Nevertheless, regression analysis does at least shed light on the plausibility of different hypotheses, and so launches the systematic study of support for constitutions.

We begin below with base models of federal and state constitutional approval that include only demographic attributes. We then build up these models in stages, adding in turn civic knowledge, institutional attitudes, and in the state model, constitutional congruence and non-substantive constitutional features. In all regressions, the dependent variables are respondents' stated support for the federal Constitution or their state constitution. Even though these variables are on a ten-point scale, and so ordinal in nature, we use simple linear (OLS) regression models because their results are easier to interpret.[114] We also confirm the robustness of

114. An additional advantage of OLS models is that we can include state fixed effects, which allow us to hold constant differences across states. Fixed effects estimation is not possible in an ordered probit model that takes into account the ordinal nature of the dependent variable. Specifically, the incidental parameters problem causes coefficients to be biased. *See* James J. Heckman, *The Incidental Parameters Problem and the Problem of Initial Conditions in Estimating a Discrete Time-*

our findings by using ordered probit models that are suited to ordinal data. Furthermore, since there likely exist significant differences between states (after all, each state has its own constitution), we include separate dummy variables for all states. This technique, known as fixed effects estimation, controls for all interstate variations due to politics, economics, demography, or culture.[115] Lastly, since answers from respondents in the same state might be correlated with one another, we use robust standard errors clustered at the state level, thus allowing for serial correlation between same-state respondents.

A. Demographic Attributes

As just noted, our base models of federal and state constitutional approval include only the demographic attributes asked about by our survey. These are: (1) a binary variable for gender (0 if female, 1 if male); (2) a continuous variable for age (in years); (3) two binary variables for race, one indicating whether the respondent is African American, the other whether she belongs to another minority group (Asian American, Pacific Islander, or Native American); (4) an ordinal variable for education, ranging from less than high school to a doctorate or its equivalent; and (5) an ordinal variable for income, ranging from below $30,000 to above $500,000.[116]

The two panels in Figure 10 graphically depict the results of these models (federal on the left, state on the right). For each variable, the point represents the best estimate of its coefficient's value—that is, the impact of a one-unit shift in the variable on constitutional approval, holding the other variables constant. The lines to either side of each point denote the 95% confidence interval for the coefficient's value. We can say with 95% certainty that the coefficient's true value falls within this range. And the stars above each point illustrate how confident we are that the coefficient's true value is different from zero. Three stars (***) indicate confidence at the 99% level, two stars (**) confidence at the 95% level, and one star (*) confidence at the 90% level.

In the federal model, being male, older, better educated, and wealthier all are associated with increased constitutional approval. The findings for

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Discrete Data Stochastic Process, *in* STRUCTURAL ANALYSIS OF DISCRETE DATA 179 (Charles F. Manski & Daniel L. McFadden eds., 1981).

115. In the ordered probit models that we use as a robustness check, we calculate state-specific intercepts by calculating a random effects model.

116. The survey questions can be found in their entirety in Appendix A.

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gender, age, and education are especially clear, rising to statistical significance at the 99% level. Men support the federal Constitution by roughly 0.35 points more than women. A nineteen-year increase in age (the span famously identified by Thomas Jefferson as the duration of a constitutional generation[117]) results in about a 0.5-point rise in backing. And a one-level increase in education produces an approval boost of 0.1 points or so. On the other hand, being African American is linked to a substantial *decrease* in constitutional support. Blacks back the federal Constitution by roughly 0.25 points less than whites. And membership in other racial minority groups is statistically unrelated to approval.[118]

The results at the state level are extremely similar. Men, older people, and wealthier people again support their constitutions more strongly (though the coefficients for gender and age are not quite as large as at the federal level). And African Americans again are less constitutionally satisfied (by an even larger margin than before). The only notable difference between the analyses is that education does not have a significant impact on backing in the state model. Demographics, then, play an almost identical role in explaining federal and state constitutional approval. People's attitudes toward both of their charters are shaped in equivalent fashion by their key personal characteristics.[119]

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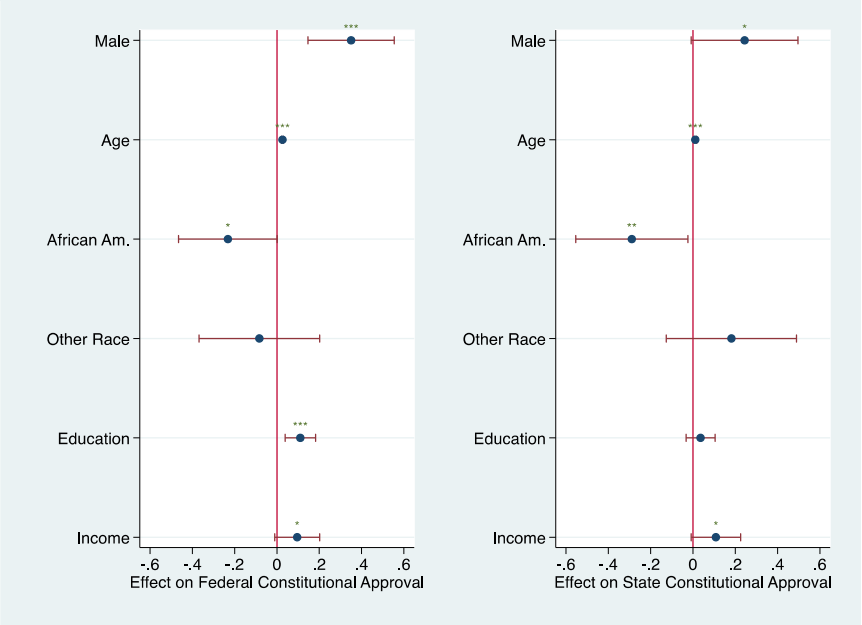
117. *See* Jefferson Letter, *supra* note 38, at 393–94 (calculating that eighteen years and eight months is the length of a generation, and concluding that "19 years is the term beyond which neither the representatives of a nation, nor even the whole nation itself assembled, can validly extend a debt").

118. The full results of all of the OLS models are available in Appendix B. For robustness, we also estimated ordered probit models with random effects. The full results of all of these models are available in Appendix C. Here, we find that the output of the ordered probit model is about the same as that of the OLS regression. The sole exception is income, which is no longer statistically significant. *See infra* apps. B & C.

119. The results of the OLS model are almost perfectly confirmed by the corresponding ordered probit model. *See infra* apps. B & C.

FIGURE 10: EXPLANATIONS FOR CONSTITUTIONAL APPROVAL: DEMOGRAPHIC ATTRIBUTES



B. Civic Knowledge

Of course, the base models include only respondents' demographic attributes, but we also want to test several additional hypotheses about constitutional approval. So we now begin to add in stages more variables to the models, beginning here with the ones related to civic knowledge. Specifically, we now add (6) respondents' self-reported familiarity with the federal Constitution and their state constitution, on a five-point scale; and (7) how closely respondents follow the national and local news, ranging from "not closely at all" to "very closely." We also note that, to save space and avoid confusion, we only discuss the results for the *newly added* variables in each of the intermediate models we construct. While the insertion of these variables affects the coefficients for the variables already present in the models, we save our discussion of *all* of the potential causes of constitutional approval until we arrive at the final federal and state models. Again, the final federal model includes only respondent-specific factors, while the final state model includes constitutional features too.

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At the federal level, as Figure 11 indicates, self-reported familiarity with the federal Constitution and attentiveness to the national news are strongly associated with constitutional approval. Both variables are statistically significant at the 99% level, and their coefficients are substantively large as well. A one-point increase in constitutional familiarity results in almost a one-point rise in constitutional support. Similarly, a one-level increase in attentiveness to the national news (e.g., from "not so closely" to "somewhat closely") produces about a 0.25-point bump in backing. These results, which control for all of the demographic attributes already included in the models, are quite substantial. Civic knowledge seems clearly related to federal constitutional approval.[120]

As Figure 11 also reveals, the same is true at the state level. Self-reported familiarity with the state constitution and attentiveness to the local news both are significantly linked, at the 99% level, to state constitutional support. A one-point increase in constitutional familiarity again results in almost a one-point rise in constitutional backing. Likewise, a one-level increase in local news attentiveness again produces about a 0.3-point spike in approval. These findings mean that civic knowledge, like demography, is connected in very similar ways to people's attitudes toward both of their charters. Knowledge and approval appear to go hand in hand no matter which constitution is at issue.[121]

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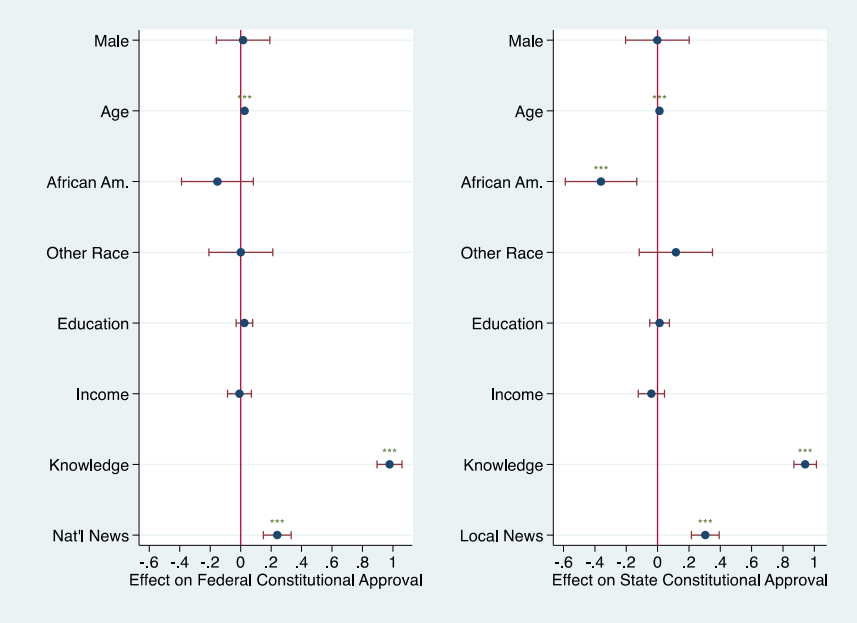
120. The results of the OLS model are largely confirmed by the corresponding ordered probit model. The only difference is that the African American coefficient is statistically significant in the latter model. *See infra* apps. B & C.

121. The results of the OLS model are almost perfectly confirmed by the corresponding ordered probit model. *See infra* apps. B & C.

FIGURE 11: EXPLANATIONS FOR CONSTITUTIONAL APPROVAL: CIVIC KNOWLEDGE



C. Institutional Attitudes

The next group of variables we add to our models involve respondents' institutional attitudes. In particular, we add (8) respondents' pride in living in the United States and in their state, on a ten-point scale; and (9) two binary variables for partisan affiliation, one indicating whether the respondent is a Republican, the other whether she is a Democrat. As these are the final variables available at the federal level, we also comment on the coefficients of all of the *other* variables in the federal model. But we reserve our discussion of all of the state-level coefficients until we have constructed the final state model in Part IV.E.

As Figure 12 shows, pride in one's country is powerfully linked to federal constitutional approval. The variable is significant at the 99% level, and a one-point increase in national pride results in roughly a 0.3-point rise in constitutional support. However, partisan affiliation is unrelated to backing. Controlling for all other variables, both Republicans and Democrats are no more likely than independents to approve of the federal Constitution.

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As this is the final federal model, how do all of the other variables perform here? Both civic knowledge variables (federal constitutional familiarity and national news attentiveness) continue to have a strong positive impact on constitutional support. Several of the demographic variables also have the same signs and significance as in the original model. Older and better educated people still back the Constitution more strongly, and African Americans still are less satisfied with it. However, neither gender nor income is significant in the final model. Evidently, their effects on approval dissipate once other relevant variables are taken into account.[122]

As Figure 12 further illustrates, state pride is a potent driver of state constitutional support too. The variable is significant at the 99% level, and a one-point increase in it results in about a 0.45-point rise in constitutional backing. But unlike in the federal model, Republican affiliation is significant at the 99% level as well. Controlling for all other variables, Republicans approve of their state constitution by about 0.3 points more than independents. This represents one of the most striking differences between the federal and state models. Partisanship is entangled with state constitutional attitudes in a way it is not with feelings toward the federal Constitution.[123]

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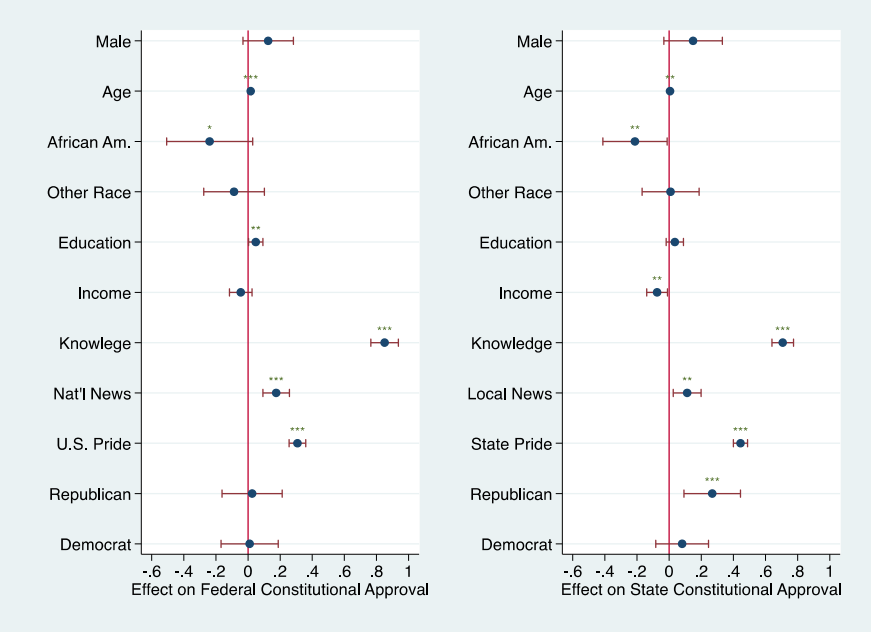
122. The results of the OLS model are largely confirmed by the corresponding ordered probit model. The only differences are that gender and income are statistically significant in the latter model (though only at the 10% level), while education is not. *See infra* apps. B & C.

123. The results of the OLS model are largely confirmed by the corresponding ordered probit model. The only difference is that gender is statistically significant in the latter model (though only at the 10% level). *See infra* apps. B & C.

FIGURE 12: EXPLANATIONS FOR CONSTITUTIONAL APPROVAL: INSTITUTIONAL ATTITUDES



D. Constitutional Congruence

We proceed next to constitutional variables that are available only at the state level, where there exist fifty charters instead of one. We first add to our state model (10) constitutional congruence, that is, the proportion of each respondent's preferred constitutional policies that actually are present in her state's charter. As Figure 13's left panel indicates, congruence fails to rise to statistical significance. Its coefficient also is substantively very small, with the 95% confidence interval hovering around zero and the best estimate being that a one-point increase in congruence produces only a 0.005-point rise in constitutional approval. This finding confirms the picture painted by the earlier descriptive analysis: namely, that congruence and support are essentially unrelated in the state constitutional context.[124]

124. The results of the OLS model are largely confirmed by the corresponding ordered probit model. The only difference is that gender is statistically significant in the latter model (though only at the 10% level). *See infra* apps. B & C.

E. Non-Substantive Features

Finally, we examine the key non-substantive features of state constitutions. We add to our state model (11) their age in years; (12) their length in words; and (13) the number of times they have been amended. Because these features vary across states, but *not* across individuals, we also remove the state fixed effects from the model. Instead, we calculate state-specific intercepts, a technique known as random effects estimation that is better suited to this data.[125]

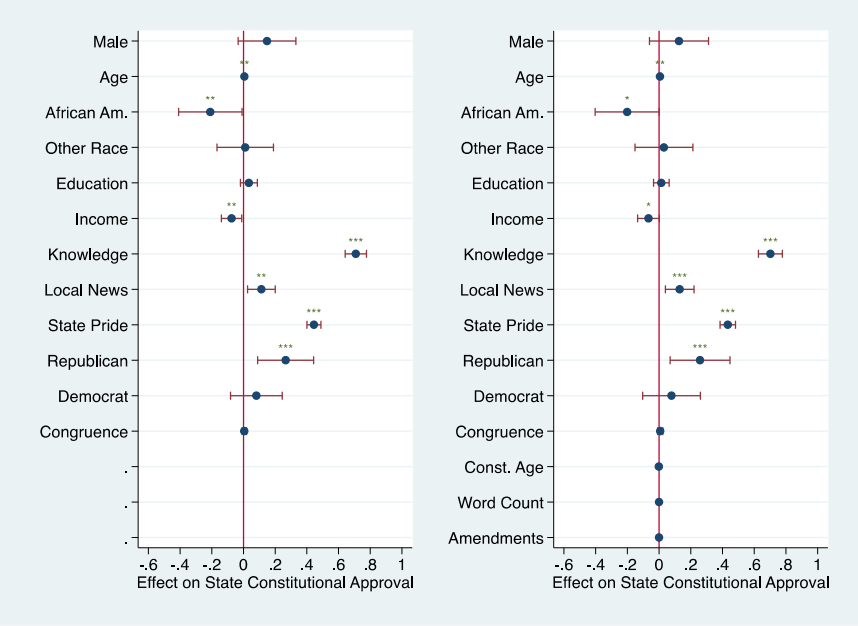
As Figure 13's right panel reveals, none of these non-substantive features rises to statistical significance. In fact, their coefficients and 95% confidence intervals all are virtually indistinguishable from zero. The *largest* coefficient, for constitutional age, is a paltry -0.001.

What about the other variables in this fully assembled state model? Congruence continues to have no significant influence on constitutional approval. The institutional attitude variables (state pride and Republican affiliation) continue to be linked positively to approval. The civic knowledge variables (state constitutional familiarity and local news attentiveness) continue to have positive impacts too. But things are more complicated with the demographic variables. Age still increases constitutional support and African American race still reduces it. Gender, though, is no longer significant in the full model, and income now has a negative rather than a positive relationship with backing for the constitution. Shifts of this sort are precisely why it is important to consider as many relevant variables as possible. Without their inclusion, one might well reach erroneous conclusions about the attitudinal effects of gender and income.[126]

125. We also experimented with an ordinary OLS regression *without* random effects. In this model as well, none of the non-substantive constitutional features are statistically significant predictors of constitutional approval.

126. The results of the OLS model are almost perfectly confirmed by the corresponding ordered probit model. *See infra* apps. B & C.

FIGURE 13: EXPLANATIONS FOR CONSTITUTIONAL APPROVAL: CONSTITUTIONAL CONGRUENCE AND NON-SUBSTANTIVE CONSTITUTIONAL FEATURES



V. DISCUSSION

The results of our empirical analysis have an array of important implications. They validate the existing literature on institutional approval in some respects, but undercut it in others. They suggest a set of startling prescriptions for leaders who want their constituents to be more supportive of their constitutions—above all, not to pay much heed to the documents' actual content. They simultaneously confirm and challenge key claims made by many constitutional scholars, legal philosophers, and sociologists. And they give rise to a promising new research agenda, at the levels of both theory and empirics, for both legal academics and political scientists. These diverse implications are the subject of this Part.

A. Institutional Comparisons

We earlier summarized the scholarship on the causes of approval for institutions *other* than constitutions (in particular the Supreme Court and

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Congress). How do our findings on constitutional approval compare to this scholarship? In brief, they are mostly consistent with respect to people's own characteristics (demographics, knowledge, ideology, and the like), but sharply divergent with respect to institutional features (congruence, age, and so on). This pattern may be attributable to either people's ignorance of their constitution or their tendency to assess it differently from other institutions.

Start with people's demographic attributes. Most prior studies have found that they have little effect on institutional approval.[127] The notable exception is race; African Americans are less supportive of both the Supreme Court and state governments.[128] Similarly, gender, membership in another minority group, education, and income are statistically insignificant in one or both of our full federal and state models.[129] African American race also is significantly (and negatively) related to constitutional approval at both the federal and state levels.[130] The only discrepancy between our results and the existing work is the positive impact that age has on constitutional approval in our models.[131]

This means that demography influences people's constitutional attitudes in much the same way that it affects their views of other institutions—which is to say quite little, except in the case of African American race. A possible explanation for the immateriality of most traits is that they have complex relationships with political ideology,[132] which in turn has a complex relationship with institutional approval. There simply may be too many intervening steps between most traits and institutional approval for the former substantially to shape the latter. But the causal pathway may be more direct for African American race. Perhaps blacks tend to feel poorly treated by American institutions, and so, unmediated by ideology, express greater dissatisfaction with them.[133] Zachary Elkins and John Sides have found that ethnic minorities worldwide are less attached

127. *See supra* notes 58–61 and accompanying text.

128. *See supra* notes 58–61 and accompanying text.

129. Specifically, gender and other race are statistically insignificant in both full models, education is significant in the federal but not the state model, and income is significant in the state but not the federal model. *See infra* app. B.

130. *See infra* app. B.

131. *See infra* app. B.

132. *See* JOHN HALPIN & KARL AGNE, CTR. FOR AM. PROGRESS, STATE OF AMERICAN POLITICAL IDEOLOGY, 2009: A NATIONAL STUDY OF POLITICAL VALUES AND BELIEFS 14 fig.1 (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/03/pdf/political_ideology.pdf (showing interesting patterns of political ideology by demographic group).

133. The opposite story might apply to the elderly. They generally might feel well served by American constitutions, and so approve of them at higher rates.

to their countries than majorities, and the same may be true for American blacks.[134]

Second, the literature is divided as to the effect of institutional knowledge on institutional approval.[135] The relationship appears to be positive for the Court, but negative for Congress.[136] Our findings clearly place constitutions on the side of the Court. In our full models, people who claim greater familiarity with their constitution support it more strongly, at both the federal and state levels.[137] People who follow the news closely are stauncher constitutional advocates too.[138] In fact, these are among the most robust results to emerge from our study.[139]

As before, a caveat must be appended here. Our survey probed people's *professed* levels of constitutional knowledge, so we cannot say how their *actual* knowledge levels are linked to their support for the constitution.[140] But if professed and actual knowledge levels are similar (a big if),[141] it is easy to speculate why judicial and constitutional familiarity would operate equivalently. Just as those who are more exposed to symbols of judicial legitimacy are more inclined to approve of courts,[142] so too those who are better acquainted with constitutions' lofty phrases and aspirations might tend to back them more strongly. Courts and constitutions are allied institutions, so to know them both might be to love them both.

Third, most scholarship finds that people's attitudes toward other institutions (and toward government generally) correlate with their opinion of any particular institution.[143] Consistent with this work, pride in one's state or country is positively related to constitutional approval in both of our full models.[144] Republican affiliation also is positively linked to approval at the state but not the federal level.[145] Jurisdictional pride thus emerges as a more reliable driver of constitutional support than partisanship.

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134. *See* Zachary Elkins & John Sides, *Can Institutions Build Unity in Multiethnic States?*, 101 AM. POL. SCI. REV. 693, 697 tbl.1, 698 (2007).
135. *See supra* notes 62–68 and accompanying text.
136. *See supra* notes 62–68 and accompanying text.
137. *See infra* app. B.
138. *See infra* app. B.
139. *See infra* app. B.
140. *See supra* Part III.C.
141. As noted earlier, higher-knowledge respondents scored no better than lower-knowledge subjects on our two quizzes. *See supra* note 110 and accompanying text.
142. *See supra* notes 62–63 and accompanying text.
143. *See supra* notes 69–73 and accompanying text.
144. *See infra* app. B.
145. *See infra* app. B.

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Our result for jurisdictional pride is unsurprising. Just as people who adhere to broad democratic values, and who trust in government to do the right thing, tend to back other American institutions,[146] so too would we expect people who are proud of their state or country to approve of its foundational document. But our finding for Republican affiliation (at the state level only) requires a different explanation. Perhaps today's Republicans are more prone than their Democratic peers to extolling the virtues of constitutions and urging devotion to them.[147] The recent rise of the Tea Party, a group named for a fabled event at the dawn of the American republic, lends support to this conjecture.[148]

Fourth, the literature is nearly unanimous that policy congruence promotes institutional approval.[149] People more strongly back the Court and Congress when the bodies' holdings and statutes, respectively, more closely correspond to their preferences.[150] However, there is no trace of this relationship in our full state model. People's support for their state constitution is almost entirely unaffected by its level of congruence with their substantive views. Approval barely budges as constitutional fit varies from poor to excellent.[151]

Why is constitutional congruence so much less impactful than judicial or legislative congruence? One possibility is that people know less about constitutions' content (especially at the state level) than they do about the Court's or Congress's outputs.[152] If people have no idea what is *in* their constitution, they also have no way of assessing how well it reflects their preferences. As noted earlier, the facts that self-professed constitutional knowledge has strong demographic drivers, and does not result in better scores on our survey's quizzes, lend support to this hypothesis.[153]

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146. *See supra* notes 70–71 and accompanying text.

147. *See* RNC, *Republican Platform: We the People: A Restoration of Constitutional Government*, GOP, http://www.gop.com/platform/we-the-people [https://perma.cc/VNC6-5CX6] (last visited Mar. 1, 2015) ("We are the party of the Constitution, the solemn compact which . . . . [is] [p]erhaps the greatest political document ever written . . . .").

148. *See* Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. 1807, 1807 (2011) ("More than any political movement in recent memory, the Tea Party movement is centrally focused on the meaning of the Constitution.").

149. *See supra* notes 74–78 and accompanying text.

150. *See supra* notes 74–78 and accompanying text.

151. *See infra* app. B.

152. *See, e.g.*, Press Release, Annenberg Pub. Policy Ctr., New Annenberg Survey Asks: "How Well Do Americans Understand the Constitution?" (Sept. 16, 2011), http://www.annenbergpublicpolicycenter.org/wp-content/uploads/Final-CIVICS-knowledge-release-corrected2.pdf (finding that Americans have low knowledge of the federal Constitution).

153. *See supra* note 110 and accompanying text.

Another answer is that people may lack strong views on what provisions *should* be included in their constitution. In this case, congruence becomes an illusory concept, since it is only made meaningful by the existence of opinions to which policies may (or may not) correspond. Still another explanation is that constitutions may differ from courts and legislatures in ways that make people care less about their substance. Perhaps courts and legislatures are seen as governmental bodies to be judged according to their work product, while constitutions are understood to stand apart from the political fray—to operate on the plane of jurisdictional identity rather than enacted policy.

And fifth, quite little is known about how institutions' non-substantive features influence their approval levels.[154] In fact, only a single study has addressed any of the features covered by our survey, finding that courts' age increases their popular support.[155] Our result for age is to the contrary; in our full state model, older constitutions are no more popular than younger ones.[156] Constitutional length and amendment frequency also are entirely unrelated to constitutional approval.[157]

Limited knowledge again is the most likely reason why these factors are so inconsequential. People who are unfamiliar with their constitutions' age, length, and amendment history—presumably a very large group—cannot take them into account when evaluating the documents. And institutional differences between courts and constitutions may explain why longevity matters for the former but not the latter. Perhaps courts accumulate legitimacy over time, as they announce decisions and parties comply with them, but constitutions have no comparable method for building support. Perhaps, that is, Madison's "veneration" thesis is correct as to courts but not as to constitutions (at least at the state level).[158]

While these variations between constitutions' and other institutions' approval mechanisms are very interesting, readers may be forgiven for wanting us to get to the point. The point, of course, is what our findings mean for constitutional drafters and governmental leaders who agree that constitutional approval is important and would like to increase it. This crucial issue is the next one to which we turn.

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154. *See supra* notes 79–81 and accompanying text.
155. *See* Gibson et al., *supra* note 15, at 355.
156. *See infra* app. B.
157. *See infra* app. B.
158. *See supra* note 36 and accompanying text.

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B. Domestic Prescriptions

We begin on a pessimistic note. The most intuitive way to make people more supportive of their constitution is to make it more worthy of their support. And the most intuitive way to make it more worthy of their support is to make it more consistent with their preferences. But according to our analysis, greater constitutional congruence does *not* yield greater constitutional approval. Approval is detached from congruence, neither rising nor falling as it changes. This is quite a humbling conclusion, in our view. Constitutional architects often think their handiworks have sweeping effects upon the societies they govern.[159] But at least with respect to constitutional backing, the impact of constitutional design is close to nil.

Close to nil is not nil, however. It remains possible that *other* aspects of constitutional design, not explicitly covered by our survey, do influence constitutional support. For instance, people may prefer constitutions that are written in more eloquent language, irrespective of the policies enshrined in the stirring words.[160] Or they may be more receptive to certain fundamental choices than to others (regarding the separation of powers, the inclusion of a bill of rights, and so on), even while being indifferent to more fine-grained matters. We are skeptical of these hypotheses due to the knowledge and sophistication they would require of people. They also strike us as inapplicable to American state constitutions that largely resemble one another in style and substance.[161] But we certainly cannot rule out the possibility that *some* constitutional content makes a difference for constitutional approval.

Moreover, even if content makes no difference, the effect may be liberating rather than humbling for constitutional drafters. Drafters often include or exclude provisions based on their judgments as to how people will respond.[162] Their choices tend to be driven partly by the merits—and partly by the expected public reaction.[163] But if constitutional approval actually is unaffected by constitutional substance, then drafters should feel

159. *See, e.g.*, Ran Hirschl, *The "Design Sciences" and Constitutional "Success,"* 87 TEX. L. REV. 1339, 1339 (2009) ("[Literature on constitutional design] suggests that desirable social and political outcomes may be accomplished through optimal institutional planning and implementation.").

160. *Cf.* MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 199 (1958) ("The words of the Supreme Court, of Congress, and of the Constitution are eloquent instructors.").

161. *See, e.g.*, Ginsburg & Posner, *supra* note 83, at 1596–97, 1620–21 (discussing convergence of "substate" constitutions).

162. *See, e.g.*, Versteeg, *supra* note 47, at 1136 (noting academic consensus that "constitutions should reflect popular values").

163. *See id.*

freer to adopt the policies they think are best. They should not feel as constrained by mass opinion in their efforts to perfect their charters.[164] (Though there is a potential dark side here too: If drafters are set free from people's preferences, they may pursue their own advantage, or that of powerful interest groups, instead of the common good.)

Still another caveat is that constitutional congruence is not irrelevant just because it does not result in greater backing for the document. For one thing, congruence arguably is an intrinsic good in a democracy. We may want constitutional provisions to reflect people's views simply because any other outcome would undermine our commitment to popular sovereignty.[165] For another, our analysis only establishes that congruence does not increase *specific* support for the constitution. It is still possible that it raises *diffuse* support (that is, constitutional legitimacy).[166] It is also possible that congruence is linked to other important democratic values, such as participation, deliberation, or accountability.[167]

Nevertheless, our conclusion with respect to constitutional design is undeniably negative. Whatever else it may be good for, it has little use as a tool for promoting constitutional approval. Our pessimism also extends to the demographic variables we studied. The two variables that reliably are tied to approval—African American race and age—are very difficult for policymakers to vary. Except in the long run, as the makeup of the population shifts, people's race and age are essentially static.[168] At first glance, education and income seem more promising because they are somewhat less fixed. But education is only statistically significant in our full federal model (the less thorough of the two), and its substantive effect is very small. If people could be converted from high school dropouts into holders of doctoral degrees, their support for the federal Constitution would rise by only about 0.3 points.[169] And the link between income and state constitutional approval is actually *negative* (and substantively small

164. Relatedly, they should not hesitate to replace an old constitution with a new one. Constitutional age, like constitutional congruence, is unrelated to constitutional approval in our models. *See infra* app. B.

165. *See supra* notes 16–17 and accompanying text.

166. *See supra* notes 10–15 and accompanying text.

167. *See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 321–22 (2014) ("[T]he alignment approach is attractive because it promotes the achievement of key democratic goals such as accountability, responsiveness, and legitimacy.").

168. *See* JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 2 (2014), http://www.census.gov/prod/2014pubs/p25-1140.pdf. If the aging trend of the American population continues, people might become somewhat more supportive of the federal Constitution in the future.

169. *See infra* app. B.

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to boot).[170] Surely approval is not so vital a goal that its modest improvement justifies people's impoverishment.

If policymakers cannot increase backing for the constitution through either constitutional or demographic change, what *can* they do? One of the most potent levers identified by our analysis is making people more knowledgeable (or at least more inclined to say they are knowledgeable) about their constitution specifically and current affairs generally. Shifting from the lowest to the highest level of constitutional familiarity, in particular, results in about a three-point rise in constitutional approval at both the federal and state levels, even controlling for all other factors.[171]

How, then, to bolster people's constitutional familiarity (of either the actual or averred sorts)? The obvious answer is civic education.[172] Classes could be offered on constitutional law, not just in law schools but also in colleges and secondary schools.[173] Marketing campaigns could be launched to convey to people the core tenets of their charters.[174] There could be contests with prizes for those who display the greatest constitutional knowledge.[175] There could be exams before people receive certain governmental benefits or services.[176] There could be an annual "deliberation day" about the constitution.[177] And so on. The aim of this list is not to be exhaustive, but rather to show that constitutional familiarity is, in principle, open to improvement via governmental policy.[178]

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170. *See infra* app. B.

171. *See infra* app. B.

172. Another, much less plausible option is to vary the factors that are correlated with self-professed constitutional knowledge, such as gender, age, income, education, ideology, and partisan affiliation. *See supra* Section III.C. This option is unrealistic for the same reasons that demographic and socioeconomic variables cannot be used to improve constitutional approval. The variables are related only weakly to the goal, and they are too intrinsically significant to be treated as means to an end.

173. On the state of civic education in American schools, see RICHARD J. COLEY & ANDREW SUM, EDUC. TESTING SERV., FAULT LINES IN OUR DEMOCRACY: CIVIC KNOWLEDGE, VOTING BEHAVIOR, AND CIVIC ENGAGEMENT IN THE UNITED STATES 7–12 (2012), http://www.ets.org/s/research/19386/rsc/pdf/18719_fault_lines_report.pdf [hereinafter FAULT LINES].

174. *See, e.g.*, CIVICS RENEWAL NETWORK, http://civicsrenewalnetwork.org/ (last visited Mar. 1, 2015) (coalition of nonprofit groups dedicated to improving civic knowledge).

175. *Cf.* ICIVICS, https://www.icivics.org/ (last visited Mar. 1, 2015) (civics computer game championed by Sandra Day O'Connor).

176. *See* Rick Rojas & Motoko Rich, *States Move to Make Citizenship Exams a Classroom Aid*, N.Y. TIMES (Jan. 27, 2015), http://www.nytimes.com/2015/01/28/us/states-move-to-make-citizenship-exams-a-classroom-aid.html (noting move by several states toward making high school diploma conditional on passing citizenship exam).

177. *See* BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004).

178. Though we note that these kinds of measures may be less effective with respect to African Americans, whose lower constitutional approval likely stems from a more general alienation from American institutions, not a lack of constitutional knowledge.

Our findings for familiarity also lessen some of the fatalism of our earlier analysis. For example, the most likely explanation why congruence is unrelated to approval is that most people are unaware of their constitutions' content.[179] If they were made more aware (say, through the initiatives suggested above), then the same congruence-approval link that holds for most other institutions might emerge for constitutions too.[180] Similarly, people's education and income are not strongly connected to their support for their constitution. But education and income are correlated with people's constitutional knowledge,[181] which does lead directly to constitutional approval. In other words, knowledge could be the key missing variable that explains why other hypotheses about approval seem to fail.

The second effective lever revealed by our analysis involves people's overall institutional attitudes. Shifting people's jurisdictional pride from its minimum to its maximum produces about the same three-point approval boost, at both the federal and state levels, as varying their self-professed knowledge over an equivalent range.[182] (On the other hand, the impact of switching from non-Republican to Republican affiliation is only about 0.2 points, and accrues only at the state level.[183] It also is hard to recommend partisan conversion as a strategy for increasing constitutional approval.)

The question then becomes how to make people prouder of their state and country. One option again is marketing—but this time focused not on constitutions' content but rather on jurisdictions' attributes and achievements. The hope would be that if governments conveyed more positive messages to their citizens, they would respond with greater loyalty and appreciation.[184] But there is something unseemly (and faintly totalitarian) about this sort of rah-rah advertising.[185] So the better answer is

179. *See supra* note 152 and accompanying text.

180. *Cf.* Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 160, 161–62 tbls.3 & 4 (2012) (finding that state policy congruence is higher for more salient policies).

181. *See supra* Part III.C; *cf.* FAULT LINES, *supra* note 173, at 8 fig.1 (noting demographic differences in civic knowledge scores among secondary school students).

182. *See infra* app. B.

183. *See infra* app. B.

184. A similar logic explains why many countries take international athletic success so seriously. They hope it will promote greater national pride. *See, e.g.*, Ivo van Hilvoorde et al., *How to Influence National Pride? The Olympic Medal Index as a Unifying Narrative*, 45 INT'L REV. SOC. SPORT 87, 88 (2010).

185. *See* Tom W. Smith & Seokho Kim, *National Pride in Comparative Perspective: 1995/96 and 2003/04*, 18 INT'L J. PUB. OPINION RES. 127, 133 (2006) (noting "elements of national superiority and nationalism" present in "general national pride"); *see also Leader Says Athletes' Victories Create*

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that governments that want their citizens to be proud of them should try to compile records worth being proud of. They should enact sound policies, manage the budget and economy wisely, improve people's wellbeing, protect their safety, and so on. Then jurisdictional pride (and constitutional approval) would be the happy side effects of a more successful society.[186]

The highly abstract nature of these recommendations points to an important truth. People's attitudes toward their constitution are largely unrelated to the document itself. Instead, they flow from psychological aspects of citizenship, from the feelings engendered by growing up and living in a particular time and place. This means that constitutional approval is not a project of constitutional design. Rather, like statecraft, it is ultimately a project of soulcraft.[187]

C. Additional Literatures

Shifting audiences from policymakers back to scholars, we next address the implications of our findings for several additional literatures: American constitutional law, legal philosophy, sociology, and comparative constitutional law. Academics in these areas should find much to cheer in our result that constitutional approval is generally high. But they may be disquieted by our further conclusion that approval is unaffected by constitutional content or congruence.

Beginning with American constitutional scholars, we observed earlier that they have linked support for the constitution to an array of deep constitutional values: the charter's legitimacy in the eyes of the public, the likelihood that people will abide by its commands, its durability in the face of social change, its ability to justify countermajoritarian judicial review, and so on.[188] Our study sheds no light on whether these connections are valid; we did not attempt to quantify any of the putative consequences of constitutional backing. But *if* the connections are valid, then our findings are highly encouraging. Since we determined that most people strongly approve of their constitutions—especially at the federal level but also at

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Sense of 'National Pride,' TEHRAN TIMES (Jan. 21, 2015) (linking athletic success and national pride in authoritarian Iran).

186. *See* TOM W. SMITH & LARS JAKKO, GEN. SOC. SURVEY, NATIONAL PRIDE: A CROSS-NATIONAL ANALYSIS 15 (1998) (finding in a survey of national pride that it is "greatest in stable, established, developed democracies" and "lowest in ex-Socialist states, countries riven by ethnic conflict, and nations with war guilt").

187. With apologies to George Will. *Cf.* GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES (1983).

188. *See supra* Part I.A.2.

the state level[189]—it follows that several of the most important goals of any constitutional order are being achieved in contemporary America.

Next, a variant of the same point applies to legal positivists (albeit stripped of its normative valence). As we noted earlier too, positivists believe that if a constitution is widely supported by the public, then it is likely to be treated as legally binding.[190] The document's status as law, that is, stems from its popular acceptance. On this account, given that American constitutions *are* widely supported, it is probable that their legal status is unquestioned. They may be good law or bad law—positivism is agnostic on the merits—but social realities mean they are, in fact, law.

A third area to which our results are relevant is the sociological study of nationalism and its effects. This literature has distinguished between *malign* and *benign* nationalism: respectively, the assertion of national superiority and patriotic pride in one's country.[191] The literature has concluded that while the consequences of malign nationalism are (unsurprisingly) negative, this is not the case for patriotism. For example, malign nationalism is associated with xenophobia, but patriotism has either a negligible link to it or none at all.[192] Similarly, Elkins and Rui de Figueiredo have shown that more patriotic individuals are as likely to appreciate outsiders as the average citizen.[193]

Our findings contribute to this scholarship by revealing another positive aspect of patriotism, one not yet documented by existing studies. This positive aspect, of course, is the higher constitutional approval expressed by people who are prouder of their state or country, which was one of the most robust results of our empirical analysis.[194] It means that not only are more patriotic people not xenophobic or suspicious of outsiders, they also are stauncher advocates of their jurisdictions' foundational charters. This staunch advocacy may not always be

189. *See supra* Part III.A.

190. *See supra* notes 26–28 and accompanying text.

191. *See, e.g.*, Thomas Blank & Peter Schmidt, *National Identity in a United Germany: Nationalism or Patriotism? An Empirical Test with Representative Data*, 24 POL. PSYCHOL. 289, 291–96 (2003) (discussing this distinction).

192. *See, e.g.*, *id.* at 303; Rui J.P. de Figueiredo, Jr. & Zachary Elkins, *Are Patriots Bigots? An Inquiry into the Vices of In-Group Pride*, 47 AM. J. POL. SCI. 171, 176–77 tbl.1 (2003); Qiong Li & Marilynn B. Brewer, *What Does It Mean to Be an American? Patriotism, Nationalism, and American Identity After 9/11*, 25 POL. PSYCHOL. 727 (2004); Rebeca Raijman et al., *What Does a Nation Owe Non-Citizens? National Attachments, Perception of Threat and Attitudes Towards Granting Citizenship Rights in a Comparative Perspective*, 49 INT'L J. COMP. SOC. 195 (2008).

193. *See* de Figueiredo & Elkins, *supra* note 192, at 186.

194. *See supra* Part IV.C. Though we note that our survey did not explicitly distinguish between benign and malign forms of jurisdictional pride.

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advisable, but on balance it seems like another credit in the ledger of patriotic feeling.

Turning to the international stage, lastly, our work has mixed implications for the field of comparative constitutional design. This field has long assumed that the constitutional text is vitally important—that, depending on its exact configuration, certain goals either will or will not be achieved. "[E]very word," Madison once wrote, "decides a question between power and liberty . . . ."[195] Emulating his focus on draftsmanship, modern scholars and policymakers have hotly debated how choices of constitutional language are related to objectives such as economic welfare,[196] stable democracy,[197] the mitigation of conflict in divided societies,[198] and national pride.[199]

While our study addresses a narrower question—the impact of constitutional design on constitutional approval—its conclusions are nevertheless sobering. Constitutional congruence is often seen as a vital issue,[200] but at least in American states, it has no effect on people's support for their constitution. Likewise, the optimal lifespan of a constitution,[201] its optimal length,[202] and how easy it should be to amend,[203] all are issues that have been animatedly discussed in the literature. But none of these features has any impact on U.S. state constitutional approval either. To the extent these results are generalizable internationally, constitutional designers should be alarmed. Several of their preoccupations seem entirely unrelated to one of the key aims of any constitutional regime.

There is another trend in comparative scholarship, though, with which our findings may be more compatible. In recent years, as numerous well-

195. James Madison, *Charters*, NAT'L GAZETTE, Jan. 19, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 191, 191 (Robert A. Rutland et al. eds., 1983).

196. *See, e.g.*, Torsten Persson & Guido Tabellini, The Economic Effects of Constitutions (2003).

197. *See, e.g.*, Cass R. Sunstein, Designing Democracy: What Constitutions Do (2001).

198. *See, e.g.*, Constitutional Design for Divided Societies: Integration or Accomodation? (Sujit Choudhry ed., 2008).

199. *See, e.g.*, Elkins & Sides, *supra* note 134, at 701–06 (studying impact of institutional and constitutional features on national pride in multiethnic societies).

200. *See, e.g.*, Versteeg, *supra* note 47, at 1136.

201. *See, e.g.*, ELKINS ET AL., *supra* note 38, at 1, 12–35 (recounting debate between Jefferson and Madison as to optimal constitutional duration).

202. *See, e.g.*, Versteeg & Zackin, *supra* note 38, at 1658–66 (explaining design logic of longer constitutions).

203. *See, e.g.*, Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994) (discussing design implications of different amendment rules).

written constitutions have failed to live up to their aspirations,[204] observers increasingly have questioned whether there is such a thing as optimal design.[205] This disillusionment has led to a new emphasis on popular participation in constitutional drafting and ratification. Instead of being penned by unaccountable experts, this emerging literature argues, constitutions should be devised by the people themselves in elected assemblies featuring widespread popular involvement.[206] As Richard Solomon, head of the U.S. Institute of Peace, summarizes the claim, "well-conducted processes can . . . contribute to building stable, peaceful states, whereas poorly conducted processes most certainly undercut such efforts."[207] Among the countries that have followed this advice and crafted constitutions through highly participatory processes are South Africa in 1994,[208] Uganda in 1995,[209] Eritrea in 1997,[210] Thailand in 1997,[211]

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204. For example, in recent months it has become clear that the Polish constitution, which was written with genuine aspirations to protect democracy and rights, was unable to prevent the newly elected right-wing government from packing the court with sympathetic judges. *See* Tomasz Tadeusz Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, ICONNECT BLOG (Dec. 6, 2015), http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense [https://perma.cc/RBT8-RGUD]. For an account of the Polish constitution-making process, see MARK BRZEZINSKI, THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND (1998). *See generally* Law & Versteeg, *supra* note 29, at 898–900 (measuring the degree to which constitutions fail to live up to their promises).

205. *See, e.g.*, Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 3, 35 (Michel Rosenfeld ed., 1994) ("Modern constitutionalism cannot be reduced to any particular form or any specific identity or difference.").

206. *See, e.g.*, Louis Aucoin, *Introduction* to FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, at xiii, xiii (Laurel E. Miller ed., 2010) [hereinafter FRAMING THE STATE] (suggesting that there exists "an emerging international norm that constitution-making processes should be democratic, transparent and participatory"); Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 3, 33 (Denis J. Galligan & Mila Versteeg eds., 2013) (describing popular participation as the new "gold standard" in constitutional design).

207. Richard H. Solomon, *Foreword* to FRAMING THE STATE, *supra* note 206, at xi, xi.

208. *See* Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid*, *in* FRAMING THE STATE, *supra* note 206, at 111, 133–39 (recounting widespread, "distinguishing[,]and from a comparative constitutionalist perspective, precedent-setting," popular participation in making of 1994 South African Constitution).

209. *See* Aili Mari Tripp, *The Politics of Constitution Making in Uganda*, *in* FRAMING THE STATE, *supra* note 206, at 158, 165–69.

210. *See* Bereket Habte Selassie, *Constitution Making in Eritrea: A Process-Driven Approach*, *in* FRAMING THE STATE, *supra* note 206, at 57, 61–65.

211. *See* Ginsburg et al., *supra* note 46, at 215; Erik Martinez Kuhonta, *The Paradox of Thailand's 1997 "People's Constitution": Be Careful What You Wish For*, 48 ASIAN SURV. 373 (2008) (describing the process of adopting Thailand's "People's Constitution").

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Ecuador in 2008,[212] Bolivia in 2009,[213] Iceland in 2011,[214] and Ireland in an ongoing effort.[215]

These developments allow us to end this discussion on a more uplifting note. When people are more involved in developing their country's constitution, they are likely to become more familiar with, and prouder of, the document. Submitting ideas to assemblies, appearing personally before these bodies, taking part in focus groups, attending meetings and rallies, commenting on proposals on Facebook and Twitter, and eventually voting on the proposed text—all of these actions encourage people to become more knowledgeable about their constitution, and prouder of their own role in its enactment. To reiterate, two of our study's most important findings are that constitutional knowledge and jurisdictional pride are closely tied to constitutional approval.[216] Accordingly, the new participatory trend, unlike the conventional focus on constitutional design, may in fact increase popular support for the constitution.

D. Future Research

Finally, we offer some suggestions for future research prompted by our study. As we have emphasized, constitutional approval has never been examined previously. So not surprisingly, our survey results raise at least as many questions about the subject as they answer. These questions, in our view, fit into three categories: the consequences of support for the constitution, its drivers' determinants, and its comparative aspects.

Beginning with consequences, legitimacy is the value that most often has been linked to approval in the theoretical and empirical literatures.[217]

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212. *See* Phoebe King, *Neo-Bolivarian Constitutional Design: Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 206, at 366, 378–84.

213. *See id.* at 384–92.

214. *See* Anne Meuwese, *Popular Constitution-Making: The Case of Iceland*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 206, at 469, 476–89. *But see* Thorvaldur Gylfason, *Democracy on Ice: A Post-Mortem of the Icelandic Constitution*, OPENDEMOCRACY (June 19, 2013), https://www.opendemocracy.net/can-europe-make-it/thorvaldur-gylfason/democracy-on-ice-post-mortem-of-icelandic-constitution [https://perma.cc/S7KG-Q62L] (analyzing why Iceland's highly participatory document was not ultimately adopted).

215. *See* Tom Arnold, *Message from the Chairman*, CONVENTION ON THE CONSTITUTION, https://www.constitution.ie [https://perma.cc/YP35-ZXR5] (last visited Mar. 13, 2015) (describing Ireland's Convention on the Constitution as partly "made up of 66 citizens, randomly selected and broadly representative of Irish society").

216. *See supra* Part IV.B.

217. *See supra* notes 24–28, 54–57 and accompanying text.

Our survey did not ask about legitimacy, but it is not hard to think of poll questions that would capture the concept. Notably, in their work on the Supreme Court, Caldeira and Gibson have recommended using a battery of items relating to whether respondents support major changes to the Court's functions.[218] The idea is that if people are willing to back such changes, then they are not very loyal to the Court.[219] Similar questions could be posed with respect to fundamental *constitutional* transformations, thus producing a measure of constitutional legitimacy. This measure, in turn, could be analyzed in tandem with constitutional approval, thereby indicating how (if at all) approval and legitimacy are related.

Other potential consequences of constitutional approval—in particular, constitutional compliance and durability—could be probed without carrying out additional surveys.[220] Metrics of compliance, such as the prevalence of violations of constitutionally protected rights, already exist (especially at the international level).[221] These metrics could be paired with approval data to evaluate whether constitutions are more likely to be followed when they are widely supported. Likewise, scholars have compiled the lifespans of hundreds of national constitutions over the past two centuries.[222] This information also could be joined with approval data to find out whether popular constitutions are enduring too.

Shifting from consequences to causes, our study sheds a good deal of light on the determinants of constitutional approval. But it reveals much less about what *determines* the determinants—that is, why our key independent variables happen to exhibit high or low levels. In some cases, this inquiry is not particularly meaningful. For instance, the drivers of people's demographic attributes presumably are broad social and economic forces that neither can nor should be tinkered with to make people more supportive of their constitutions. Similarly, non-substantive constitutional features, such as age, length, and number of amendments, tend to be the product of drafting preferences and historical quirks. These

218. These items include: whether Justices who consistently reach unpopular decisions should be removed from office, whether the Court should be made less independent, whether the Court should have less authority to decide controversial issues, and whether the Court should be abolished altogether. *See* Caldeira & Gibson, *supra* note 15, at 639–41; Gibson et al., *supra* note 13, at 363–64; Gibson & Caldeira, *supra* note 27, at 1127–30; Gibson & Nelson, *supra* note 56, at 167–68.

219. *See* sources cited *supra* note 218.

220. *See supra* Part I.A (discussing hypothesized effects of constitutional approval).

221. One of us previously has found, using these metrics, that many foreign constitutions exhibit low levels of compliance. *See* Law & Versteeg, *supra* note 29, at 897–912.

222. *See generally* ELKINS ET AL., *supra* note 38.

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factors also are not subject to conscious manipulation for the sake of boosting constitutional approval.

On the other hand, our other three sets of variables (involving constitutional knowledge, attitudes toward government, and constitutional congruence) are neither fixed nor arbitrary. So it would be quite fruitful to explore what influences them—especially the first two, whose connection to constitutional approval is clearer. Among the potential drivers of constitutional knowledge are demographic attributes, education policy, marketing campaigns, and high-profile controversies.[223] It would be reasonably straightforward for a study to test these hypotheses and assess their validity. Analogously, people's attitudes toward government may be the result of demographics, personality traits, marketing, and governmental performance.[224] A study also could tease apart these potential explanations.

With respect to congruence, the crucial issue is not what causes it (since it has such a slight impact on approval), but rather why its impact *is* so slight. Earlier, we posited several possible reasons: people may not know the content of their constitutions, they may not feel strongly about what their constitutions should include, or they may evaluate constitutions differently from other institutions.[225] All of these reasons could be investigated empirically. People could be sorted by their constitutional familiarity, in order to determine whether knowledge mediates the effect of congruence on approval. People also could be sorted by the strength of their constitutional preferences, in case congruence bears on approval only for high-intensity individuals. And people could be asked about their standards for evaluating different institutions, since the congruence-approval link may be strongest for those with the same perspective on constitutions as on courts and legislatures.

Lastly, while all of our suggestions could be implemented with domestic data, we think they would be even more illuminating in comparative perspective. Within the United States, the federal Constitution resolves many crucial matters and thus diminishes the importance of state constitutions. The latter are notable for their substantive and stylistic convergence, as well as for their obscurity relative

223. *See supra* notes 173–77 and accompanying text; *see also supra* Part III.C (reporting some correlations between self-reported constitutional knowledge and demographic and socioeconomic attributes).

224. *See supra* notes 184–86 and accompanying text.

225. *See supra* note 152 and accompanying text.

to their federal counterpart.[226] In the international arena, in contrast, countries' constitutions decide essential issues of freedom, structure, and governance. They also are highly heterogeneous and quite salient to their citizens.

Accordingly, the comparative study of constitutional approval is both significant and likely to yield different conclusions from its domestic analogue. All of the variables we examined might be related in unexpected ways to people's support for national rather than subnational constitutions. Approval itself also might have novel ties to legitimacy, compliance, and durability if they are measured at the country rather than the state level. We therefore urge scholars to extend our analysis internationally. Since a good deal of data already exists on constitutions around the world,[227] the key missing piece is a global survey comparable to our domestic poll. Such a survey undoubtedly would be costly, but it also would yield valuable insights into one of the most critical concepts in comparative constitutional law.

CONCLUSION

In a recent lecture, Sandy Levinson echoed (and extended) Justice Kennedy's musings about constitutional approval. Levinson agreed with Justice Kennedy that Americans admire their federal charter, though his opinion is that "we ridiculously '*over*-venerate' the United States Constitution."[228] Levinson also addressed people's attitudes toward their state charters, speculating that "few, if any, Americans 'venerate' those constitutions in the way they do the national constitution."[229] And like Justice Kennedy, Levinson hypothesized that support for the Constitution is tied to how accurately the document reflects people's preferences and values. "The obvious question is why anyone should 'venerate' a constitution . . . that produces what might be termed 'too many instances' of incongruence . . . ."[230]

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226. *See* Ginsburg & Posner, *supra* note 83, at 1596–97, 1620–21.

227. *See, e.g.*, COMPARATIVE CONSTITUTIONS PROJECT, http://comparativeconstitutionsproject.org/research-design [https://perma.cc/4TK2-94V2] (last visited Mar. 1, 2015) (compiling "data on the formal characteristics of written constitutions, both current and historical, for most independent states since 1789").

228. Sanford Levinson, *Divided Loyalties: The Problem of "Dual Sovereignty" and Constitutional Faith*, 29 TOURO L. REV. 241, 242 (2013) (emphasis added).

229. *Id.*

230. *Id.* at 249.

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Levinson's perspective on the law, of course, is very different from Justice Kennedy's. But both observers share the view that constitutional approval is vitally important—as well as a complete lack of information about it. In this Article, we have taken for granted the significance of public backing for the constitution. But we have sought, for the first time, to assess empirically whether and why people support their charters. What we have found partially confirms and partially rebuts Levinson's and Justice Kennedy's surmises. Yes, Americans admire their federal Constitution, and yes, they admire it more than their state constitutions. But no, this esteem does not come from the documents' congruence with their underlying views. It comes, rather, from Americans' belief in their own constitutional familiarity as well as their pride in their state or country. Ironically, the wellspring of constitutional approval is ultimately non-constitutional.

APPENDIX A: FULL SURVEY

Thank you for considering participating in this study. Please read the following information before continuing.

Purpose of the research study: The purpose of the study is to understand how people think about their state constitution and about international law.

What you will do in the study: If you participate, you will be asked some questions about your background and then some questions about your opinion on some substantive policies and your state constitution.

Time required: The study will require about 15 minutes of your time.

Risks: There are no anticipated risks in this study.

Benefits: There are no benefits to taking the study. The study may help us understand if and how constitutional law reflects popular opinion. If you wish, you can send an email message to the researchers and we will send you a copy of any manuscripts based on the research (or summaries of our results).

Confidentiality: The information that you give in the study will be anonymous, which means that your name will not be collected or linked to the data.

Voluntary participation: Your participation in the study is completely voluntary.

Right to withdraw from the study: You have the right to withdraw from the study at any time prior to submission without penalty.

How to withdraw from the study: If you choose to withdraw, no action is required by you. You simply do not submit the online survey if you wish to withdraw. You may not withdraw after your materials have been submitted because all survey submissions are anonymous.

Payment: You are compensated for taking this survey. The type and amount of compensation depends on your agreement with Survey Sampling (SSI).

If you have questions about the study, contact:

Mila Versteeg, University of Virginia School of Law, 580 Massie Road, Charlottesville, Virginia 22903-1738, (434) 466-8778, versteeg@virginia.edu

If you have questions about your rights in this study (refer to SBS Protocol #2014-0325), contact: Tonya R. Moon, Ph.D., Chair, Institutional Review Board for the Social and Behavioral Sciences, One Morton Dr., Suite 500, University of Virginia, P.O. Box 800392, Charlottesville, VA 22908-0392, (434) 924-5999, irbsbshelp@virginia.edu, www.virginia.edu/vpr/irb/sbs

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First, we'd like to ask you a few questions about yourself:
What is your gender?
Male
Female

What year were you born? (e.g., 1979)
Are you of Hispanic, Latino, or Spanish origin?
Yes
No

What is your race?
Caucasian
African American
Asian
Native American
Pacific Islander
Other (please specify)

Generally speaking, do you think of yourself as a...
Democrat
Republican
Independent
Other (Please specify)

What is the highest educational level or degree that you have obtained?
Less than High School
High School / GED
Some College
2-year College Degree
4-year College Degree
Master's Degree
Ph.D.
J.D.
M.B.A.
Other Professional Degree

What is your household income?
under $30,000
between $30,000 and $50,000
between $50,000 and $100,000
between $100,000 and $200,000
between $200,000 and $500,000
over $500,000

How closely do you follow **national** news**?**
very closely
somewhat closely
not so closely
not closely at all

How closely do you follow **local** news**?**
very closely
somewhat closely
not so closely
not closely at all

State Laws and Constitutions:

As you may know, each state has its own constitution, which takes precedence over other kinds of state law such as statutes and regulations. If ordinary state law conflicts with the state constitution, it is the state constitution that has to be followed. State constitutions cannot contradict the federal United States Constitution, but they can provide additional protections and cover additional areas.

State legislators often face a choice between including policies in the state constitution or in ordinary state law. There are several differences between these options. First, when policies are placed in the state constitution, they are **harder to change** in the future. Amending a state constitution is always more difficult than amending a regular state law. Second, policies that are in the state constitution are often considered **more "fundamental"** than policies in ordinary state law. States commonly include policies that they see as especially important in the state constitution. And third, policies that are in the state constitution **can be used by courts to invalidate** policies that are in ordinary state law. In other words, if ordinary state law violates the state constitution, the ordinary state law must be struck down.

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Which of the following provisions would you like to see included in your state's **laws?** (Note that we're asking here about your state's **laws**, not your state's **constitution**.)

	Yes	No
Right to Unionize: This would allow workers to join unions even when their employers object to their membership.		
Right to a Minimum Wage: This would ensure a minimum hourly wage for all those employed.		
Right to a Maximum Number of Working Hours: This would ensure that an employer can't force an employee to work more than the maximum number of hours, unless the employee chooses to do so voluntarily.		
Right to Workplace Safety: This would require the government to regulate working conditions so that all workers are guaranteed a safe workplace.		
Workplace Liability Provision: This would ensure that employers can be held accountable for accidents that happen in the workplace and that they cannot have employees sign contracts that would release the employer from such accountability.		
Prohibition of "Closed Shop" Policies: This would prohibit employers from hiring members of trade unions only.		
Prohibition of Child Labor: This would ensure that children are not permitted to work.		
Right to Primary Education: This would create an obligation for the state to make state-run primary education (grades K-8) available to all.		
Right to Secondary Education: This would create an obligation for the state to make state-run high-school education available to all.		
Obligation to Establish State University: This would create an obligation for the state to fund a state university that is available to admitted residents at a subsidized rate.		
Rights for the Elderly: This would create an obligation for the state to take measures to care for the elderly.		
Rights for the Poor: This would create an obligation for the state to take measures to care for the poor.		
Rights for the Disabled: This would create an obligation for the state to take measures to care for physically or mentally handicapped persons.		
Prohibition of Same-Sex Marriage: This would ensure that nobody is allowed to marry a partner of the same sex, and would require the government to ban such conduct.		
Prohibition of Polygamy: This would ensure that nobody is allowed to practice polygamy, and would require the government to ban such conduct.		
Right to Gender Equality: This would ensure that women are treated as equal to men by the state.		
Victim Rights: This would ensure that victims have information about criminal proceedings against those who harmed them, would entitle them to apply for compensation, and would give them a limited role in criminal proceedings.		

	Yes	No
Prohibition of the Death Penalty: This would ensure that the death penalty is never imposed, even for the worst crimes. **Right to a Healthy Environment:** This would create an obligation for the state to take measures to protect the natural environment. **Right to Hunt and/or Fish:** This would guarantee state residents the right to hunt and/or fish on state lands and waters. **Protection of Cultural Heritage**: This would require the government to preserve the state's cultural heritage. **Debtors' Rights:** This would ensure that debtors are allowed to keep enough property to live with dignity even if they are bankrupt. **Protection of Pensions of Public Employees and Veterans:** This would require the state to pay pensions to public employees and veterans even when the state is in financial crisis. **Limitations on Gambling and Lotteries**: This would limit lotteries run by private individuals, specify the locations of casinos, and set the taxes to be paid by such casinos. **Protection of English as the Official Language:** This would ensure that English is always available as a language of instruction and for communication with the government. **Right to Information:** This would ensure that people are able to obtain information from the government that concerns them or matters they are involved in. **Right to Happiness**: This would ensure that people are free to pursue personal happiness as they see fit. **Right to Vote**: This would guarantee people the ability to participate in elections.		

Which of the following provisions would you like to see included in your state's **constitution?** (Note that we're asking here about your state's **constitution**, not your state's **laws**.)

	Yes	No
Right to Unionize: This would allow workers to join unions even when their employers object to their membership. **Right to a Minimum Wage:** This would ensure a minimum hourly wage for all those employed. **Right to a Maximum Number of Working Hours:** This would ensure that an employer can't force an employee to work more than the maximum number of hours, unless the employee chooses to do so voluntarily. **Right to Workplace Safety**: This would require the government to regulate working conditions so that all workers are guaranteed a safe workplace. **Workplace Liability Provision:** This would ensure that employers can be held accountable for accidents that happen in the workplace and that they cannot have employees sign contracts that would release the employer from such accountability.		

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	Yes	No
Prohibition of "Closed Shop" Policies: This would prohibit employers from hiring members of trade unions only. **Prohibition of Child Labor:** This would ensure that children are not permitted to work. **Right to Primary Education:** This would create an obligation for the state to make state-run primary education (grades K-8) available to all. **Right to Secondary Education:** This would create an obligation for the state to make state-run high-school education available to all. **Obligation to Establish State University:** This would create an obligation for the state to fund a state university that is available to admitted residents at a subsidized rate. **Rights for the Elderly:** This would create an obligation for the state to take measures to care for the elderly. **Rights for the Poor:** This would create an obligation for the state to take measures to care for the poor. **Rights for the Disabled:** This would create an obligation for the state to take measures to care for physically or mentally handicapped persons. **Prohibition of Same-Sex Marriage:** This would ensure that nobody is allowed to marry a partner of the same sex, and would require the government to ban such conduct. **Prohibition of Polygamy:** This would ensure that nobody is allowed to practice polygamy, and would require the government to ban such conduct. **Right to Gender Equality:** This would ensure that women are treated as equal to men by the state. **Victim Rights:** This would ensure that victims have information about criminal proceedings against those who harmed them, would entitle them to apply for compensation, and would give them a limited role in criminal proceedings. **Prohibition of the Death Penalty**: This would ensure that the death penalty is never imposed, even for the worst crimes. **Right to a Healthy Environment:** This would create an obligation for the state to take measures to protect the natural environment. **Right to Hunt and/or Fish:** This would guarantee state residents the right to hunt and/or fish on state lands and waters. **Protection of Cultural Heritage**: This would require the government to preserve the state's cultural heritage. **Debtors' Rights:** This would ensure that debtors are allowed to keep enough property to live with dignity even if they are bankrupt. **Protection of Pensions of Public Employees and Veterans:** This would require the state to pay pensions to public employees and veterans even when the state is in financial crisis. **Limitations on Gambling and Lotteries**: This would limit lotteries run by private individuals, specify the locations of casinos, and set the taxes to be paid by such casinos. **Protection of English as the Official Language:** This would ensure that English is always available as a language of instruction and for communication with the government.		

	Yes	No
Right to Information: This would ensure that people are able to obtain information from the government that concerns them or matters they are involved in. **Right to Happiness**: This would ensure that people are free to pursue personal happiness as they see fit. **Right to Vote**: This would guarantee people the ability to participate in elections. **Direct Voter Initiative for Constitutional Amendment:** This would allow voters to directly amend the state constitution through a statewide vote, without needing the approval of the legislature.		

In which state do you currently reside?

Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Puerto Rico; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming; I do not reside in the United States.

On a scale from 1 to 10, how proud are you of the state you live in?

Pride **1 2 3 4 5 6 7 8 9 10**

On a scale from 1 to 10, how proud are you to live in the United States?

Pride **1 2 3 4 5 6 7 8 9 10**

On a scale from 1 to 5, how familiar are you with the content of your state's laws?

Knowledge **1 2 3 4 5**

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On a scale from 1 to 5, how familiar are you with the content of your state's constitution?

Knowledge **1** **2** **3** **4** **5**

On a scale from 1 to 5, how familiar are you with the content of the Federal/United States Constitution?

Knowledge **1** **2** **3** **4** **5**

On a scale from 1 to 10, how much do you approve of your state's laws?

Approval **1** **2** **3** **4** **5** **6** **7** **8** **9** **10**

On a scale from 1 to 10, how much do you approve of your state's constitution?

Approval **1** **2** **3** **4** **5** **6** **7** **8** **9** **10**

On a scale from 1 to 10, how much do you approve of the Federal/U.S. Constitution?

Approval **1** **2** **3** **4** **5** **6** **7** **8** **9** **10**

Thank you for answering these questions. You are almost done!

We would now like to ask a few questions about what you have read.

Earlier, you were told that state constitutions:

Are easier to amend than ordinary state law

Are more difficult to amend than state law

You were also told that state constitutions:

Are more fundamental than ordinary state law

Are less fundamental than ordinary state law

APPENDIX B: OLS RESULTS

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Federal	State	Federal	State	Federal	State	State	State
Male	0.3506***	0.2443*	0.0161	-0.0014	0.1253	0.1492	0.1484	0.1255
	(0.101)	(0.126)	(0.087)	(0.101)	(0.078)	(0.090)	(0.090)	(0.095)
Age	0.0261***	0.0111***	0.0261***	0.0124***	0.0165***	0.0059**	0.0059**	0.0057**
	(0.002)	(0.003)	(0.002)	(0.002)	(0.002)	(0.003)	(0.003)	(0.003)
African American	-0.2319*	-0.2889**	-0.1522	-0.3611***	-0.2390*	-0.2127**	-0.2092**	-0.2013*
	(0.116)	(0.132)	(0.117)	(0.114)	(0.133)	(0.099)	(0.100)	(0.103)
Other Race	-0.0832	0.1819	0.0011	0.1170	-0.0869	0.0089	0.0108	0.0304
	(0.142)	(0.153)	(0.104)	(0.116)	(0.094)	(0.088)	(0.089)	(0.093)
Education	0.1105***	0.0361	0.0247	0.0129	0.0482**	0.0357	0.0342	0.0142
	(0.036)	(0.034)	(0.027)	(0.031)	(0.022)	(0.027)	(0.027)	(0.025)
Income	0.0956*	0.1086*	-0.0076	-0.0395	-0.0454	-0.0748**	-0.0749**	-0.0666*
	(0.053)	(0.058)	(0.039)	(0.042)	(0.035)	(0.032)	(0.032)	(0.035)
Constitutional Knowledge			0.9778***	0.9417***	0.8505***	0.7072***	0.7087***	0.7026***
			(0.041)	(0.036)	(0.043)	(0.034)	(0.033)	(0.038)
Follow News			0.2404***	0.3046***	0.1753***	0.1125**	0.1131**	0.1302***
			(0.045)	(0.044)	(0.041)	(0.043)	(0.043)	(0.046)
Pride					0.3079***	0.4447***	0.4444***	0.4335***
					(0.026)	(0.022)	(0.022)	(0.025)
Republican					0.0256	0.2687***	0.2661***	0.2584***
					(0.093)	(0.088)	(0.088)	(0.096)
Democrat					0.0100	0.0811	0.0815	0.0783
					(0.088)	(0.082)	(0.081)	(0.093)
Congruence							0.0051	0.0074
							(0.007)	(0.008)
Constitution Age								-0.0012
								(0.001)
Constitution Length								0.0000
								(0.000)
Amendments								-0.0000
								(0.000)
Constant	5.7544***	5.7192***	2.1289***	2.3168***	0.6167**	0.5560**	0.4904	0.6964*
	(0.244)	(0.291)	(0.250)	(0.286)	(0.256)	(0.272)	(0.309)	(0.362)
Observations	1,968	1,968	1,968	1,968	1,964	1,964	1,964	1,718
R-squared	0.103	0.042	0.353	0.320	0.438	0.528	0.528	

Note: Robust standard errors cluster at state level in parentheses. *** p<0.01, ** p<0.05, * p<0.1

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APPENDIX C: ORDERED PROBIT RESULTS

	(1) Federal	(2) State	(3) Federal	(4) State	(5) Federal	(6) State	(7) State	(8) State
Male	0.1936***	0.1228**	0.0226	0.0040	0.0930*	0.1105*	0.1100*	0.0902
	(0.053)	(0.059)	(0.054)	(0.058)	(0.052)	(0.062)	(0.063)	(0.068)
Age	0.0159***	0.0054***	0.0185***	0.0071***	0.0133***	0.0042**	0.0042**	0.0042**
	(0.001)	(0.002)	(0.001)	(0.001)	(0.001)	(0.002)	(0.002)	(0.002)
African American	-0.1345**	-0.1325**	-0.1468**	-0.2219***	-0.1962***	-0.1475**	-0.1439**	-0.1329*
	(0.055)	(0.054)	(0.061)	(0.054)	(0.076)	(0.065)	(0.065)	(0.071)
Other Race	-0.0536	0.0863	0.0030	0.0688	-0.0504	0.0027	0.0036	0.0333
	(0.078)	(0.079)	(0.072)	(0.071)	(0.064)	(0.065)	(0.065)	(0.071)
Education	0.0472**	0.0163	0.0017	0.0043	0.0195	0.0203	0.0194	0.0073
	(0.019)	(0.016)	(0.017)	(0.018)	(0.016)	(0.020)	(0.020)	(0.021)
Income	0.0352	0.0525*	-0.0193	-0.0294	-0.0481*	-0.0516**	-0.0517**	-0.0511*
	(0.028)	(0.029)	(0.026)	(0.026)	(0.025)	(0.024)	(0.024)	(0.027)
Knowledge			0.6260***	0.5703***	0.5887***	0.5206***	0.5213***	0.5206***
			(0.027)	(0.027)	(0.029)	(0.026)	(0.026)	(0.030)
Follow news			0.1529***	0.1849***	0.1196***	0.0958***	0.0964***	0.1010***
			(0.028)	(0.025)	(0.027)	(0.030)	(0.030)	(0.033)
Pride					0.2028***	0.3037***	0.3036***	0.3053***
					(0.016)	(0.019)	(0.019)	(0.021)
Republican					0.0564	0.2028***	0.2014***	0.2043***
					(0.065)	(0.071)	(0.071)	(0.076)
Democrat					-0.0229	0.0722	0.0716	0.0661
					(0.053)	(0.058)	(0.058)	(0.067)
Congruence							0.0029	0.0032
							(0.005)	(0.006)
Constitution Age								-0.0009
								(0.001)
Constitution Length								0.0000
								(0.000)
Amendments								-0.0000
								(0.000)
Observations	1,968	1,968	1,968	1,968	1,964	1,964	1,964	1,718

Note: Robust standard errors cluster at state level in parentheses. *** p<0.01, ** p<0.05, * p<0.1