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## **Constrained Behavior: Understanding the Entrenchment of Legislative Procedure in American State Constitutional Law**

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**ABSTRACT:** Political analysts have suggested that policy power will begin to shift from the federal government to state governments as gridlock in Congress persists. Therefore, understanding the policymaking process at the state level is more important than ever. Vitally missing from our understanding of policymaking in the states is the role of constitutional provisions. Many state constitutions contain directives that severely limit the ability of the legislature to act. Some of these directives are procedural while others are more substantive. This is relevant because constitutional rules are more difficult for members to alter than chamber rules. In this paper we present a quantitative measure of constitutional restrictiveness and explore the variation in this measure across the fifty state legislatures and the U.S. Congress. We discover that constitutional restrictiveness is largely explained by the historical era in which the most recent constitution has been passed.

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## Introduction

Recent commentaries (e.g. Reich 2013) regarding the implications of persistent Congressional gridlock have suggested that we will see a significant shift in power to the states with regards to solving many of our most significant policy problems. Gaining a better understanding of the politics of the state legislative process should be of increasing interest to us all. Understanding the evolution and development of state legislatures is vital to accomplishing this goal.

Scholars have been long fascinated by the evolution and development of legislatures in the United States. This fascination has focused predominately on the development of the United States Congress. Countless books and journal articles have focused on the development of congressional committee systems (Shepsle 1986; Weingast and Marshall 1988; Baron and Ferejohn 1989; Maass 1983; Gilligan and Krehbiel 1987, 1989, 1990; Krehbiel 1991; Kiewiet and McCubbins 1991; Cox and McCubbins 1993; Maltzman 1997), political party structures (Rohde 1994; Aldrich 1995), leadership (Davidson, Hammond and Smock 1998; Peabody 1967, 1984; Cooper and Brady 1981b; Sinclair 1999; Evans and Oleszek 1999, 2004; Ripley 1967) and procedural rules (Bach and Smith 1988; Sinclair 1994; Krehbiel 1991, 1997; Dion and Huber 1997; Binder and Smith 1997; Binder 1997; Dion 1997). Other works have addressed generally the process of congressional institutionalization (Polsby 1968; Froman 1968; Davidson and Oleszek 1976).

Disproportionately less scholarly attention has been given to the evolution and development of state legislatures. Many of the studies of state legislative evolution and development that do exist were conducted long ago and typically focus on the development of a legislative institution in a single state (Lewis 1952; Rosenthal 1968). More modern

explorations of state legislatures have focused on explaining institutional differences across state legislatures, with little attempt to track institutions over time or determine the evolution of these institutional differences (Rosenthal 1973; 1974; 1997; 2004; 2008; Francis 1989). There have been very few historical treatments of state legislatures that are cross-sectional in nature. Notable examples are Squire and Hamm's (2005) *101 Chambers* and Squire's (2012) *The Evolution of American Legislatures*. Our purpose in this paper is to consider how constitutions impact the ability of legislatures to conduct business and solve policy problems.

### **The Passage of Abortion Restrictions, A Tale of Three States**

Knowing that most efforts to lobby for more restrictive abortion policy at the federal level is futile and largely a waste of resources, the pro-life movement has chosen to focus its resources and efforts on the passage of laws at the state level. A report from the Guttmacher Institute states that in just two years (2011-2013), 205 abortion restrictions were enacted in the states versus 189 during the previous ten years (2001-2010) (Nash et al. 2014). While pro-life advocates naturally will target ideologically conservative states in their efforts to have these laws enacted, they are sometimes enacted with substantial controversy. In the summer of 2013 the legislatures of three states – Texas, Ohio and North Carolina – passed bills that restrict abortion. Each of these three states enacted these bills in very different ways, which were influenced by state constitutional provisions or lack thereof.

#### **Texas – Out in the Open**

Senate Bill No. 5 was introduced during a special session of the Texas legislature in June 2013. Special sessions may only be called by the Governor, who also dictates the agenda of

the session (Article III, Section 40 and Article IV, Section 8 of the Texas State Constitution). The bill would place restrictions on abortion that many asserted would lead to the closing of most of the abortion clinics in the state of Texas. Article III, Section 35 of the Texas state constitution reads:

**SUBJECTS AND TITLES OF BILLS.**(a) No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.

(b) The rules of procedure of each house shall require that the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject. The legislature is solely responsible for determining compliance with the rule.

(c) A law, including a law enacted before the effective date of this subsection, may not be held void on the basis of an insufficient title (Texas State Constitution, 2014).

All bills introduced in the Texas legislature must contain a single subject and that subject must be clearly expressed in the title of the bill. This provision is fairly common in many state constitutions and its purpose is to provide some transparency in the legislative process. As required, this attempt to restrict abortion was introduced and considered as a separate bill. Article III, Section 40 of the Texas Constitution also limits special sessions to 30 days. Senator Wendy Davis (D-Fort Worth) an opponent of the bill successfully filibustered for 13 hours to block passage of the bill (Tumulty and Smith 2013).<sup>1</sup> Her attempt brought national attention to the bill, but the restrictions were ultimately enacted via House Bill No. 2, which was introduced, considered and enacted in a second special session convened by Governor Rick Perry in July 2013.

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<sup>1</sup> Her filibuster lasted until the expiration of the 30-day session at midnight. It should also be noted that the filibuster rules in the Texas State Senate are far more restrictive than those in the U.S. Senate. Texas Senators engaged in a filibuster must speak without taking a break, without straying from the topic under debate and must stand without any assistance (e.g. no sitting or leaning on furniture for support).

The Texas case illustrates one case in which because of the single subject provision in the state constitution, it is very difficult for members of the legislature to enact potentially controversial legislation using procedures that could possibly mask the topic of the legislation. The case also illustrates the possibility that some state constitutional provisions – such as limits on session length – can be used to help a minority slow the progress or block passage of a bill.

#### Ohio – Using the State Budget as Cover

In June 2013, Governor John Kasich signed House Bill 59 into law. In addition to including appropriations for the next two-year budget cycle, the 3,747 page bill included provisions that did everything from change the minimum school year from 182 days to a minimum number of hours, to allow the cable company to disconnect service once a bill is 14 days rather than 45 days late, to determining the housing and care standards for snake owners. Amongst numerous non-budget related provisions were several provisions that placed additional regulations on those seeking and providing abortions (Siegel 2013). It has become common practice in the Ohio Legislature to tuck potentially controversial substantive law adoption/changes into the two-year budget bill in the hopes that they may go unnoticed until after passage (Siegel 2013).

Just like the Texas Constitution, the Ohio Constitution contains a provision that limits bills to a single subject. Article II, Section 15, Part D of the Ohio Constitution reads: “No bill shall contain more than one subject, which shall be clearly expressed in its title.” The many provisions, including those restricting abortion that do not allocate money in the 2013 budget clearly violates this rule. The inclusion of these various provisions in a single bill allows logrolling to be used to guarantee passage of the budget as well as these non-

budget related state laws. Once enacted into law, the only remedy is to challenge the bill in court. Two sets of groups have challenged the budget – the ACLU and ACLU of Ohio have challenged that the parts of the bill restricting abortion violated the Ohio Constitution single-subject rule and the Ohio Civil Service Employees Association and ProgressOhio have challenged that the sections that authorize the privatization and selling of several prisons also violates the single subject rule.

To date no ruling has been made on the October 2013 ACLU suit. In considering the Ohio Civil Service Employees Association and ProgressOhio suit over the privatization of prisons, a Franklin County trial court dismissed the case. However, the Franklin County Court of Appeals found that the legislature did in fact violate the single subject provision and has ordered the trial judge who dismissed the case to undertake an evidentiary hearing to dissect the budget bill line-by-line and strike out any provisions that violate the single subject rule. Ohio Governor Kasich and other state-wide officials are asking the state supreme court to overturn the appellate court decision arguing that it amounts to an unconstitutional judicial line-item veto (Ludlow 2014).

The Ohio case illustrates the strategy of burying the adoption of a potentially unpopular or controversial policy into another unrelated bill regardless of the constitutionality. Public polling suggested that a majority of Ohio voters were not supportive of the abortion regulations attached to the budget bill (Culp-Ressler 2013) and it is likely that a stand-alone bill may have been more difficult to pass.

#### North Carolina – Sneaking it Past the Minority

In North Carolina where there is no constitutional requirement requiring single subject legislation, the July 2013 enactment of Senate Bill 353, the “Motorcycle Safety Act,”

included provisions that abortion clinics in the state of North Carolina must now meet standards similar to surgical centers. The bill also allows health care providers to opt out of performing an abortion if it is against their beliefs and stops government insurance plans from paying for the procedure. The bill as introduced simply induced fines for automobile drivers that cause motorcycle riders to unsafely change lanes. The bill as introduced was 26 lines long. The final version of the bill was 218 lines long. The additional 192 lines were all abortion related policies added as amendments to the original bill.<sup>2</sup> These amendments were added to the bill with no public notice and no public hearing by the state senate. After criticism by North Carolina Governor Pat McCrory for pushing the legislation through in relative secrecy, the state house held a public hearing on the bill once it was under its consideration. Ultimately, the bill was passed and signed into law by Governor McCrory under significant protest from pro-choice groups (Maguire 2013). The state senate had previously attempted to attach the same provisions onto a house bill banning Sharia Law in North Carolina. That bill was withdrawn before the two chambers could work out the differences.

The North Carolina case illustrates how easily a state legislature can pass controversial policy into law absent constitutional rules. Additionally, it illustrates that absent these constitutional provisions, the majority can easily pass legislation in a manner that catches the minority completely off guard

### Three Paths, Same Conclusion

In all three states, the outcome was the same – new laws were passed to increase restrictions on abortion. However, the process through which these laws were adopted

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<sup>2</sup> Interestingly, the abortion related amendments were inserted as Sections 1 through V of the bill, in front of the original motorcycle safety provision, which became Section V.



differed in each state. In Texas, the legislature passed their law without violating any of the provisions of the Texas State Constitution, even if some of these provisions did slow passage down. Members of the Ohio legislature willingly and openly violated their state's single-subject constitutional provision – a provision that the Ohio Judicial Branch has been inconsistent in enforcing. Finally, in North Carolina, the majority party was able to sneak the abortion restrictions into law because the absence of a similar single-subject provision in the Constitution allowed the party to use a seemingly unrelated and innocuous bill as cover.

### **Why Do Constitutional Provisions Matter?**

Although the end result was the same – the adoption of restrictive abortion policies – the three cases above illustrate that institutions – in this case external institutions – can significantly impact the processes via which policy making occurs. Further, these external constraints if not followed can allow for some to question the legality of laws passed (e.g. Ohio case). Further, the state governments control the passage of public policies that directly impact the lives of those that reside within their borders, and we should fully understand the “rules” regarding their formation and passage. As Elazar asserts:

“Thus, the states remain significant determinants of the quality of life of the American people. The way in which each state frames and allocates powers through its constitution reflects certain conceptions of government and understandings of the two faces of politics – power and justice. That is, state constitutions are important determinants of who gets what, when and how in America because they are conceptual and at times, very specific statements of who should get what, when and how (Elazar 1982: 17).”

Hence, it is vital that we come to better understand the constitutional provisions that impact the legislative process.

There are a number of studies that indicate that external institutions have a tremendous impact on the adoption of public policy. Recent studies find that the impact of institutionally based contextual factors associated with legislatures in policy making situations has received systematic attention in existing research. Such factors are seen as creating the “setting”—which provides constraints as well as benefits—within which policy decision making activities take place. In discussing the impacts of context, Goodin and Tilly (2006) identify and describe an array of possible environmental contextual factors that could impact political/governmental phenomena and advocate their use in research. The focus on “constitutionally” based, contextual traits in our research acknowledges the role that we believe the nature of the institutional setting-based variables play. We believe that the nature of the organizational/institutional/contextual setting of the legislature as created by constitutions impact the ability of legislatures to develop policies separately from internal institutions such as chamber rules. A legislature’s particular constitutional traits may severely limit the ability of that legislature to develop the appropriate policy solution to a problem.

Prior research regarding legislative decisions on a wide variety of policy topics has identified a series of factors that affect the nature of policies. Included are factors identified as “institutional” in nature, which refer to various components of the larger context in which these activities take place. A variety of specific concepts including institutional settings (Engeli 2012), institutional conditions (Matsubayashi and Rocha 2012), institutionalized arrangements (Aksoy, 2012; Franchino and Høyland 2008), institutional mechanisms (Martin and Vanberg 2005), institutional contexts (McGrath 2011), institutional rules (Besley and Case 2003), institutional environment (Lindberg, Rasmussen

and Warntjen 2008) and legislative organization (Anzia and Jackman 2012) have been used to describe these variables. Yet, when the nature of these variables is considered, a wide variety of specific factors have been studied. Of importance to this current research is the inclusion of a variety of variables that are usually “constitutional” or “founding document” in origin. For example Aksoy (2012) found that voting rules used to pass legislation (unanimity versus majority voting) as well as the ability to include multiple topics in a single piece of legislation (single topic restriction) affected “logrolling” regarding policies in the EU (550). Similarly, Crisp and Driscoll (2012) found that the use of “position taking” versus “indication” voting (roll-call voting) in two Latin American settings, affected the level of party unity on policy decisions (90-91). Finally, Anzia and Jackman (2012) demonstrated that among U.S. state legislatures, the availability of majority party committee “gate keeping powers” (a non-hearing right and a non-reporting right) affected “majority roll” rates in chamber voting (220-222). The source of these institutions (e.g. constitutionally or external vs. chamber rules or internal) varies extensively across the U.S. states.

The inclusion of such variables in recent policy oriented research and the findings of a positive impact reinforce our belief that the nature of a political system’s constitution effects policymaking.. However, most of these studies are found in the comparative literature rather than the literature on American legislatures. Further, the impact of external institutions, especially those found in state constitutions, has been largely unaccounted for in state public policy studies.

Ignoring the impact of these constitutional powers and limitations has likely limited our ability to properly assess the reaction of legislators to important public policy

problems. First, even though we acknowledge that institutions play an important role in the legislative process, we have focused most of our attention on those institutions (e.g. committees, chamber rules) that exist internally in the legislature. We have illustrated in previous work that state constitutions are ripe with provisions that speak directly to the process by which legislation is enacted – many of which have important implications for guaranteeing government transparency, minority party rights, etc.<sup>3</sup> Our goal in this paper is to quantify some of those provisions in a meaningful way. The next section of this paper will provide a brief descriptive analysis of the breadth of provisions found in the legislative articles of state constitutions that impact the legislative process. We will then introduce a measure – *constitutional restrictiveness* that operationalizes the extent and nature of these provisions that clearly illustrates the substantial variation that exists across states. The final part of the paper will present a theoretical framework for understanding why such differences exist and an analysis testing that framework.

### **Constitutional Restrictiveness of State Legislative Procedure**

Those studying procedures in the United States Congress as well as the state legislatures have largely ignored the role of constitutions.<sup>4</sup> Both the U.S. Constitution and all of the American state constitutions outline the basic structures and processes of governance. However, the nature of how government and the legislative branch are treated in these documents differs significantly, and these differences have real consequences for how the documents will treat legislative power as time progresses. The

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<sup>3</sup> Previous research provides a detailed description of the provisions found in constitutions. See Martorano, Hamm and Hedlund 2009; 2010, 2011, 2014.

<sup>4</sup> There are a few studies on legislative procedures that influence committee system operations that have concluded a few provisions found in state constitutions and statutory law, but admittedly these inclusions are hardly comprehensive of provisions found in state constitutions. See Hamm, Hedlund and Martorano (2001; 2006) and Martorano (2004; 2006).

U.S Constitution is very clear in that the document's intent is to delineate the powers specific to the federal government and leave all other powers to the discretion of the state governments. Thus, the nature of state government power is largely plenary and this plenary nature was clearly reflected in the states' constitutional documents (Tarr 1998, Elazar 1982).

For example, the United States Constitution establishes a bicameral legislative branch, enumerates a small number of specific powers to each branch and sets the terms of office as well as the minimum qualifications necessary for election to each chamber. By and large the document is silent regarding specific "rules" and procedures for the process via which the Congress makes policy. Specifically, the United States Constitution contains only general directives for the operation of the legislative branch. These are:

- The Vice President is president of senate and votes only in ties (Section 3);
- Each chamber will choose its own officers (Section 2,3);
- Congress must meet at least once per year on the 1<sup>st</sup> Monday in December, unless a different day is chosen by law (Section 4);
- Each chamber is the judge of its own elections and qualifications, a majority equals a quorum, the chambers may compel attendance of absent members, each chamber determines its own rules, each chamber must keep a journal, 1/5 present may demand recorded yeas and nays and neither house shall adjourn for more than 3 days without the consent of the other (Section 5);
- Compensation of members will be determined by law (Section 6)
- Revenue bills must originate in house; (Section 7)

Many of the American state constitutions are not as reticent in their outlining of legislative structure and process. While some take a minimalist approach similar to the national document, others are much more explicit in providing detail regarding the structure and functioning of the state's legislature. Figure 1 displays the total number of

provisions found in the legislative articles of each current state constitution as well as the U.S. Constitution related to the legislative process.<sup>5</sup> In reading the legislative article of all 50 state constitutions and the U.S. Constitution, 309 different types of provisions were identified.<sup>6</sup>The states are ranked in the figure from greatest number of provisions where we find sixty-seven in Alabama to least number of provisions where we find eight in New Hampshire. For comparison, the U.S. Constitution contains 12 provisions for the Congress (diagonal bar in the figure).The median number of provisions is 26. Clearly, great variation exists in the number of items that appear in state constitutions.

**[Figure 1 about here]**

The nature of these provisions varies quite a bit as well. We code each provision that we found as either 1) granting the legislature a power; 2) mandating that the legislature act; or 3) restricting or prohibiting the legislature from acting. We assert that a provision can be considered a power if it provides the legislature the ability to act at its discretion. Provisions that state that the legislature “may” or “can” act are treated as powers. In contrast, provisions that state that the legislature “will” or “shall” act are considered mandates. Finally, provisions that state that the legislature “may not,” “must not” or “shall not” are treated as restrictions.

Figures 2, 3 and 4 display the total number of powers, mandates and restrictions found in the constitutions of each state and the U.S. Constitution. The states are ordered by

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<sup>5</sup> Also included are provisions related to the overturning of gubernatorial vetoes. This information is sometimes included in a state’s legislative article as well as the executive article. Oftentimes it is included only in the executive article. For consistency, this information is included for all states regardless of where located in the constitution.

<sup>6</sup> Note that we took a very detailed approach to this first cut at the data. Provisions that set a majority vs. extramajority vote for the same procedure were treated separately. For example, the different requirements for overriding a gubernatorial veto are treated individually. There are four: 1) majority elected; 2) majority present; 3) 2/3 elected and 4) 2/3 present.

the total number of provisions (See Figure 1) from most to least. Figure 2 displays the number of legislative powers found in the constitutions. The most powers granted by the constitution can be found in Georgia with 22 and fewest powers granted are the 4 found in Vermont. The median number of powers is 8. Some examples of standard powers that are mentioned in virtually all constitutions are the ability of the chambers to determine the rules of procedure, elect chamber leaders, and certify the elections and judge the qualifications of the legislature's members. Less standard powers include allowing the legislature of Rhode Island to organize the legislative chambers by law if it chooses. In Washington and Maryland an extraordinary majority vote may allow legislation to be introduced after the deadline to do so.

**[Figure 2 about here]**

Figure 3 displays mandates found in the constitutions. Alabama's constitution contains the most mandates with 25 and New Hampshire's constitution contains the least with 2. The median number of mandates is 10. Some of the most common mandates are the requirement that bills contain a single subject, that chambers keep a journal of their proceedings, and that bills be read on three different days. Less common mandates include Wisconsin's mandate that the legislature must provide for the monthly audit of the state Treasurer and Auditor of Public Accounts; a provision in both California and Massachusetts that requires the legislature to immediately introduce the budget bill and pass it by a certain date, and finally Mississippi's mandates that a committee on local and private legislation must be created to which all bills dealing with local and private matters be referred and requiring the committee to justify why a general law could not apply.

**[Figure 3 about here]**

The number of restrictions is displayed in Figure 4. The Alabama constitution places 25 restrictions on the legislature and the New Hampshire constitution places the fewest, just one. The median number of restrictions is 7. Common restrictions on legislative activity include limits on session length and prohibiting the passage of local or special legislation. In Michigan, the legislature may not pass a rule that prevents a majority elected from discharging a bill from committee consideration. The Texas constitution restricts what tasks legislators can do during the session – the first 30 days are devoted to the introduction of bills, acting on emergency appropriations and confirming recess appointments and emergency governor matters. The second 30 days are for committee hearings, to consider bills and other pending matters, and governor emergency matters. After 60 days, the legislature shall act on bills, pending matters and governor emergency matters.

**[Figure 4 about here]**

One goal of this paper is to develop a measure that conveys both the amount and nature of the provisions found in state constitutions that impact how legislatures conduct their business. These provisions create the context within which legislating occurs. We liken that context to a cage. In some states (e.g. Vermont, New Hampshire, Congress), the cage is quite large and the legislature has quite a bit of freedom to move around and conduct its business in the manner it chooses. In other states (Alabama, Louisiana, Texas), the cage is much smaller and the legislature faces more limits on its ability to act. Figure 5 displays a measure that we call *constitutional restrictiveness*. The measure is calculated by taking powers granted to the legislature in the constitution and subtracting the number of mandates and restrictions:



*Constitutional Restrictiveness = Powers – (Mandates+Restrictions).*

Subtracting mandates and restrictions from powers allows us to better describe the cage in which the legislature operates. Simply assessing the total number of provisions does not accommodate the significant variation that exists regarding the effect of the provisions. Focusing on the numbers of each type of provision in isolation from the others results in incorrect evaluations of the relative power afforded to legislatures in each constitution. For example, the Alabama constitution lists the most restrictions on the legislature as well as the second most powers. If we were to look at each measure separately, we would conclude that Alabama is one of the constitutionally most powerful legislatures, but also one of the most restricted. Alabama also possesses the most constitutional mandates. When you calculate Alabama's constitutional restrictiveness score, Alabama is the most restrictive states with a score of -33 (17 powers – 50 mandates/restrictions). Scholarly treatments of state constitutions have made strong arguments regarding the nature of state constitutions and how they differ from the U.S. Constitution. G. Alan Tarr provides a compelling argument for why mandates should be treated similarly to restrictions in his book *Understanding State Constitutions*, when he writes,

“Furthermore, whereas Marshall viewed grants of power as carrying with them subsidiary powers, what appear as grants of power in state constitutions typically do not operate in that fashion. The state provisions may be included for emphasis, indicating powers that the state government can exercise, without enlarging those powers. Or they may direct state legislatures to exercise powers that they command. Or they may serve to overrule judicial decisions limiting legislative power, to eliminate questions of authority where state power was doubtful, or to indicate exceptions to constitutional provisions on the legislature. **Most often, however, these apparent ‘grants of power’ function as limitations. For in a constitution of plenary legislative powers, an authorization to pursue one course of action may by negative implication serve to preclude pursuing**

**alternative courses that were available in the absence of the ‘grant,’ under familiar legal cannon of *expression uniusest exclusion alterius* (Tarr 1998: 9).”<sup>7</sup>**

**[Figure 5 about here]**

Overall the trend with regards to constitutional restrictiveness is negative. Constitutions mandate and restrict rather than grant power to legislative bodies. This is not at all surprising given that the state constitutions have largely treated the power of state governments as plenary. New Hampshire’s constitutional restrictiveness score of 2 means that it is the only state where the number of powers granted to the legislature surpasses the number of mandates and restrictions imposed on them. In Alaska and Rhode Island, the number of powers and mandates/restrictions result in a constitutional restrictiveness score of 0. Alabama and Louisiana possess high levels of constitutional restrictiveness with mandates and restrictions far outpacing powers in their documents. Median constitutional restrictiveness is -8. What explains the substantial variation that exists across the states? The next section will discuss a theoretical explanation for this variation and proceed to test its applicability. A higher level of restrictiveness may limit the ability of the legislature to solve state problems by effectively cutting off policy alternatives or making it much more difficulty to adopt adequate legislation.

### **The Plenary Nature of State Constitutions and Constitutional Restrictiveness**

The U.S. Constitution clearly delineates the Congress’ legislative powers in Article I, Section 1 and limits the Congress to only those “legislative Powers herein granted.” The Tenth Amendment further limits the federal government by granting the states the power not delegated to the federal government or prohibited to the states. Given the relative brevity of the national document, this granted substantial, non-delineated power to the

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<sup>7</sup> Emphasis added by authors

state governments. The constitutions adopted by the states reflect the vast nature of what was left unwritten in the federal Constitution and largely conceived of state government power as plenary and granted significant plenary powers to the legislative branch in particular (Tarr 1998; Elazar 1982). Tarr explains,

“...state governments have historically been understood to possess plenary legislative powers – that is, those residual legislative powers not ceded to the nation government or prohibited to them by the federal Constitution. As the Kansas Supreme Court has observed: ‘When the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby (Tarr 1998: 7).’”

Elazar also writing about the plenary nature of state governments explains that in comparison to the U.S. Constitution, the state constitutions need to be more comprehensive and explicit about limiting and defining the scope of governmental powers (Elazar 1982).

John Dinan (2009) believes that historically the states have been better at revisiting their constitutions and revising their institutions and governing principles based on past experiences or fundamental shifts in culture, etc. He asserts that constitutional revision and amendment processes at the state level are easier relative to the process of revising or amending the U.S. Constitution, and thus have allowed state governments to evolve in ways that make them more responsive to modern problems.

Finally, Albert Sturm (1982) in his work on state constitutional development identifies five periods of state constitutional development:

1. The First State Constitutions (1776-1780) – These constitutions were marked by the establishment of strong legislatures with significant plenary powers. The new states experience with colonialism under British rule left them distrustful of executive power and the legislative branch benefitted.
2. Early 19<sup>th</sup> Century Developments (1800-1860): This period marked the rise of Jacksonian Democracy. It coupled with public discontent with legislative

corruption<sup>8</sup> led to the diminishment of legislative power and the strengthening of the governor.

3. Civil War, Reconstruction and Its Aftermath (1860-1900): The influences of the Civil War and Reconstruction led to additional constitutional limitations on the legislative branch in the states
4. Beginnings of Reform (1900-1950) – Further limitations on legislatures were adopted in this period as the result of revelations of corruption in public agencies and the Progressive Movement push for more public control of government.
5. Post-1950 – Events like mandatory reapportionment and reform movements that aimed to enhance the capacity of states to govern led to efforts to strengthen the legislative branch.

Sturm makes a very compelling argument for the role that history plays in the development of constitutional traditions. It is clear that the political forces and events of the day likely had a significant impact on the choices made by those designing original state constitutions or determining the changes needed to an existing constitution. This notion that the starting point and subsequent choices regarding institutions are connected is not new. Many scholars have asserted that political institutions and processes are by their nature path dependent and that any attempt to account for phenomenon associated with these institutions and processes must take this path dependency into account (Pierson 2000a, 2000b; Jervis 2000; Thelen 2000; Bridges 2000). Comparative politics scholars studying democratization and the adoption of other governing institutions as well as scholars studying American political development have long acknowledged the importance of path

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<sup>8</sup> The public became disturbed by legislative enactment of excessive special legislation for the benefit of private or sectional interests

dependency in their work (e.g., Lipset and Rokkan 1967; North 1990; Schickler 2001; Skocpol 1992; Collier and Collier 1991; Ertman 1996; Hacker 1998).

We believe that the nature of constitutional restrictiveness as it exists in the current constitutions is largely dependent on the initial starting point of the current constitution. The political conditions and trends influencing the content of constitutions at the time of initial adoption are likely to endure even as time progresses. Therefore, we hypothesize that *constitutional restrictiveness* will be more evident in states that adopted their current constitutions during Sturm's Early 19<sup>th</sup> Century period, the Civil War, Reconstruction and Aftermath period and the Beginnings of Reform Period. During each of these periods the trend was to adopt provisions that limited legislative activity and power. We operationalize Sturm's periods of state constitutional development using four dummy variables: 1) 1800-1859; 2) 1860-1899; 3) 1900-1949 and 4) 1950-2014.<sup>9</sup> State constitutions were coded to reflect the period in which their current document was adopted.

Given the limited number of cases in our data set (51)<sup>10</sup>, we are limited in the number of additional factors we can analyze in our analysis. We include two additional variables that may account in some part for the variation in constitutional restrictiveness across the states. The first is *constitution length*. This variable is measured as the number of words in the constitution and was collected from the 2013 edition of *The Book of the States*. We expect that longer constitutions will contain more provisions and are likely to contain more mandates and restrictions for the legislative branch. The second variable is *Amendment by Initiative*. This is a dummy variable that indicates whether or not the

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<sup>9</sup> The omitted category are constitutions adopted pre-1800.

<sup>10</sup> We include the U.S. Congress as a case

constitution can be amended via the citizen initiative. We anticipate that in states where amendments may originate with the public, there will also be a larger degree of constitutional restrictiveness as citizens are more likely to support provisions that they believe will make government more transparent and curb corruption.

Table 1 presents the results of a number of OLS regression models. We run models accounting for the 1) total number of provisions in the constitution regarding the legislative process; 2) total number of powers granted to the legislature; 3) the total number of mandates imposed; 4) the total number of restrictions imposed; 5) the number of mandates and restrictions imposed and 6) the states' constitutional restrictiveness score.

**[Table 1 about here]**

The time period within in which the most recent constitution was adopted is both a strong and consistent predictor of constitutional restrictiveness and its components. Model I uses the total number of provisions in the constitution and as expected constitutions adopted in each of Sturm's periods contain between 7 and 14 more provisions than those adopted in the first state constitutions period (1776-1799). Additionally, and as expected longer constitutions contain more provisions. The only variable not significant is amendment by initiative. Quite a bit of the variance in total provisions is explained by this model – the R-Square is .6616.

The results for the models analyzing mandates (Model III), restrictions (Model IV) and mandates+restrictions (Model V) are consistent with the Model I – all of the time period variables are statistically significant and in the anticipated direction. In constitutions adopted in each of these eras, we can expect to see on average more

mandates and restrictions on the legislature than in constitutions adopted pre-1800. These models also account for quite a bit of variance as well – with R-Squares of .5242 for the mandates model, .6056 for the restrictions model and .6570 for the model that combines mandates and restrictions. Similar to Model 1, greater constitutional length results in more mandates and restrictions and the ability of the public to initiate the amendment of the constitution has no statistical influence on the number of mandates and restrictions found in the document.

The model accounting for provisions that bestow powers (Model II) on the legislature does not perform as well as the other models. Only two of Sturm's time periods achieve statistical significance – the Civil War, Reconstruction and its Aftermath (1860-1899) and Post-1950 (1950-2014). Both were positive, but the substantive impact of just an additional 2 to 4 powers is smaller than for the other models. As anticipated longer constitutions contain more powers for the legislature and the ability of the public to amend the constitution does not result in any more powers for the legislature in the document. Finally, this model only accounts for about one-third of the variation in the number of constitutional powers granted to the legislature (R-Square = .3326).

Finally, Model VI displays the regression results for the model employing constitutional restrictiveness as the dependent variable. Recall that this variable was constructed by subtracting the number of mandates and restrictions from the number of powers contained in the constitution. Larger negative values indicate that the provisions in the constitution place greater restrictions on the freedom of the legislature to act. Given Sturm's work we anticipate negative relationships between the four time periods and constitutional restrictiveness. The results of Model VI confirm our expectations. In each of

the four periods, the coefficient is statistically significant and negative. In accordance with Sturm's observations as we move through each period, states that adopted constitutions in these periods increasingly restrict the legislature more relative to states that adopted their constitutions pre-1800. Further, although the coefficient is negative, the magnitude of the coefficient (slightly less than the earlier periods) for the post-1950 period indicates that in this era states that adopted constitutions placed fewer restrictions on their legislatures than states adopting constitutions in the earlier periods. Once again, longer constitutions are on the whole more restrictive and the ability of the people to initiate constitutional amendments has no effect. This model accounts for just over half the variation in constitutional restrictiveness with an R-Square of .5398.

The results of the analysis provide substantial support to the notion that history and context likely exert great influence on institutional choice and development. Sturm's four time periods of state constitutional development are consistent and strong predictors of both constitutional restrictiveness on the legislative process as well as the total number of provisions, mandates and restrictions regarding the legislative process. The time periods were slightly less consistent when trying to predict powers regarding the legislative process found in state constitutions. This is likely the case because of the plenary nature of state legislative power in the earliest constitutions. In most states, the legislatures initially existed in a context where they possessed significant power. Subsequent constitutions and amendments were then much more concerned with imposing mandates or restrictions to reign in that power rather than bestow additional powers to the legislative branch.



## **Discussion and Conclusion**

This analysis makes it apparent that many states constitutions treat their legislative branch differently than the U.S. Constitution treats Congress. The general pattern has been for greater detail in state constitutions regarding what the legislature may do, must do and should not do in terms of the legislative process.. Further, state constitutions are far more likely to focus on the must do and should not do over the may do. Considered as a whole, these provisions form a cage that confines state legislatures as they conduct their business. When there are few mandates and restrictions relative to powers, the legislature has been granted a large cage in which to work. In these states, the legislature often possesses wide latitude in the ways in which it can act to resolve the policy problems of the day. When the number of mandates and restrictions imposed far outpaces the number of powers granted, the cage becomes more confining, and the legislature may be lacking adequate tools to address the policy challenges it faces.

Also, this paper accounts for why some state legislature's cages are bigger or smaller than others. We found that history and context are the driving forces. The political forces of the day can account for whether or not states have chosen employ the constitutional document to delineate, mandate and restrict the activity of legislatures. States operating under constitutions adopted in the pre-1800 period have far fewer legislative provisions overall and far fewer mandates and restrictions. This is largely reflective of the distaste for executive rule immediately following the American Revolution. However, both provisions and mandates and restrictions increase as political movements (e.g. the rise of Jacksonian Democracy, Progressive Era, etc.) begin to demand more transparency and less corruption and the legislatures become targets of constitutional provisions. Finally, in the latter

period (Post 1950) there is some attempt to start strengthening legislatures relative to other state government branches.

There are several avenues we intend to explore in future research. The first would be to determine how constitutional restrictiveness influences the structures, processes and outputs of legislatures. Does constitutional restrictiveness impact the types of policies adopted? Does it impact who chooses to serve? Can the concept be used to explain the internal rules that members adopt? Does it affect the efficiency of the legislative process?

Second, in this paper we only considered constitutional provisions found in the legislative article of the constitution that impacted the legislative process. Our earlier research (Martorano, Hamm, Hedlund 2014) found that significant powers, mandates and restrictions on legislative activity can be found in other sections of the constitution. For example sections on taxation and revenue often include many provisions that limit how the legislature can raise revenue and appropriate that revenue. Constitutions also include provisions that grant the legislature differing levels authority regarding the regulation of voting and elections. These are just a few quick examples. In future research, we hope to be able to map these provisions in order to present a more comprehensive description of the cage within which legislatures exist.

Finally, it is our contention that analysis of these legislative constitutional provisions constitutes a vital component to our understanding of the development and functioning of state legislatures. Our current theories of these institutions to date have not taken this part of the story into account. Therefore, our understanding of how state legislatures operate and form public policy are incomplete.

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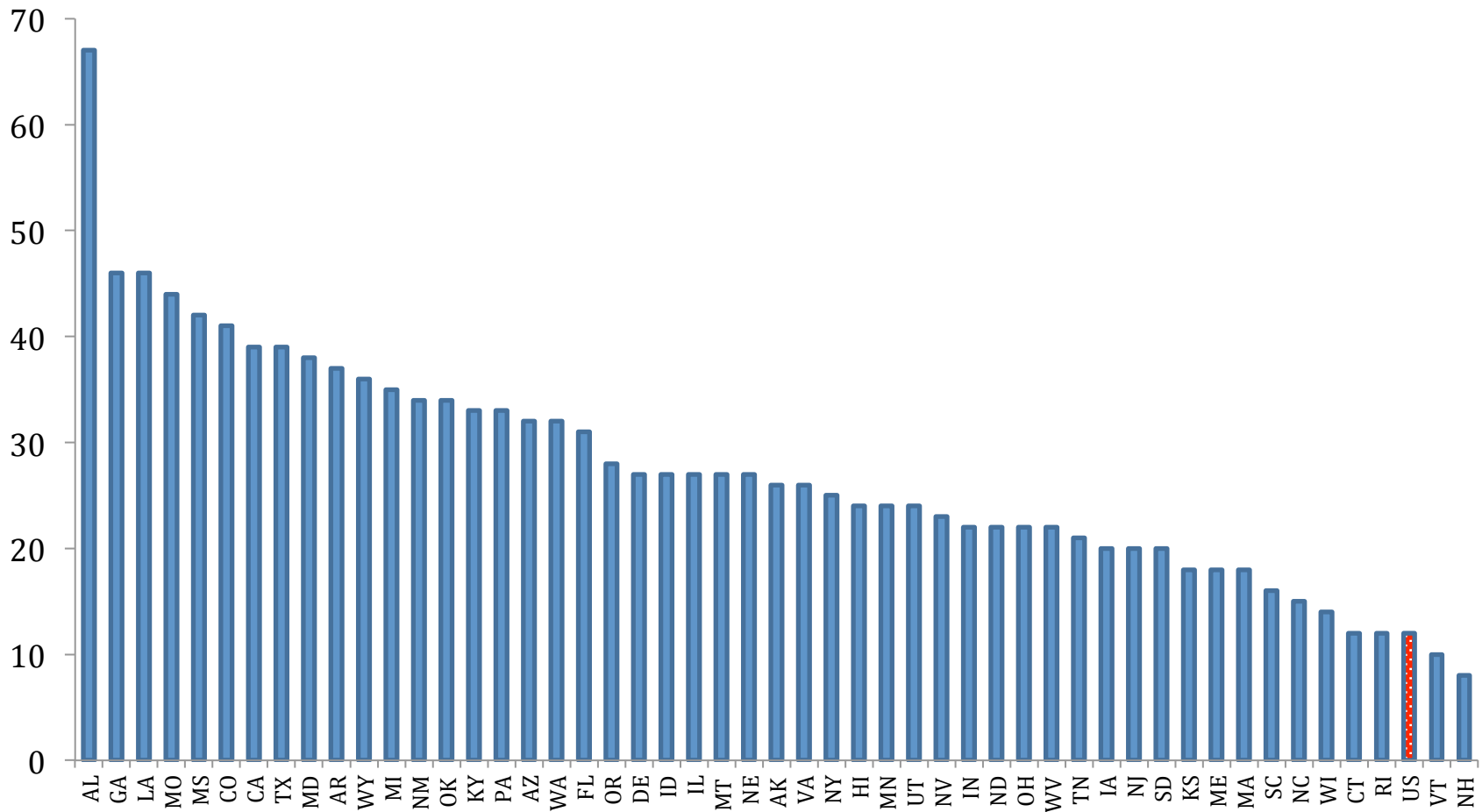
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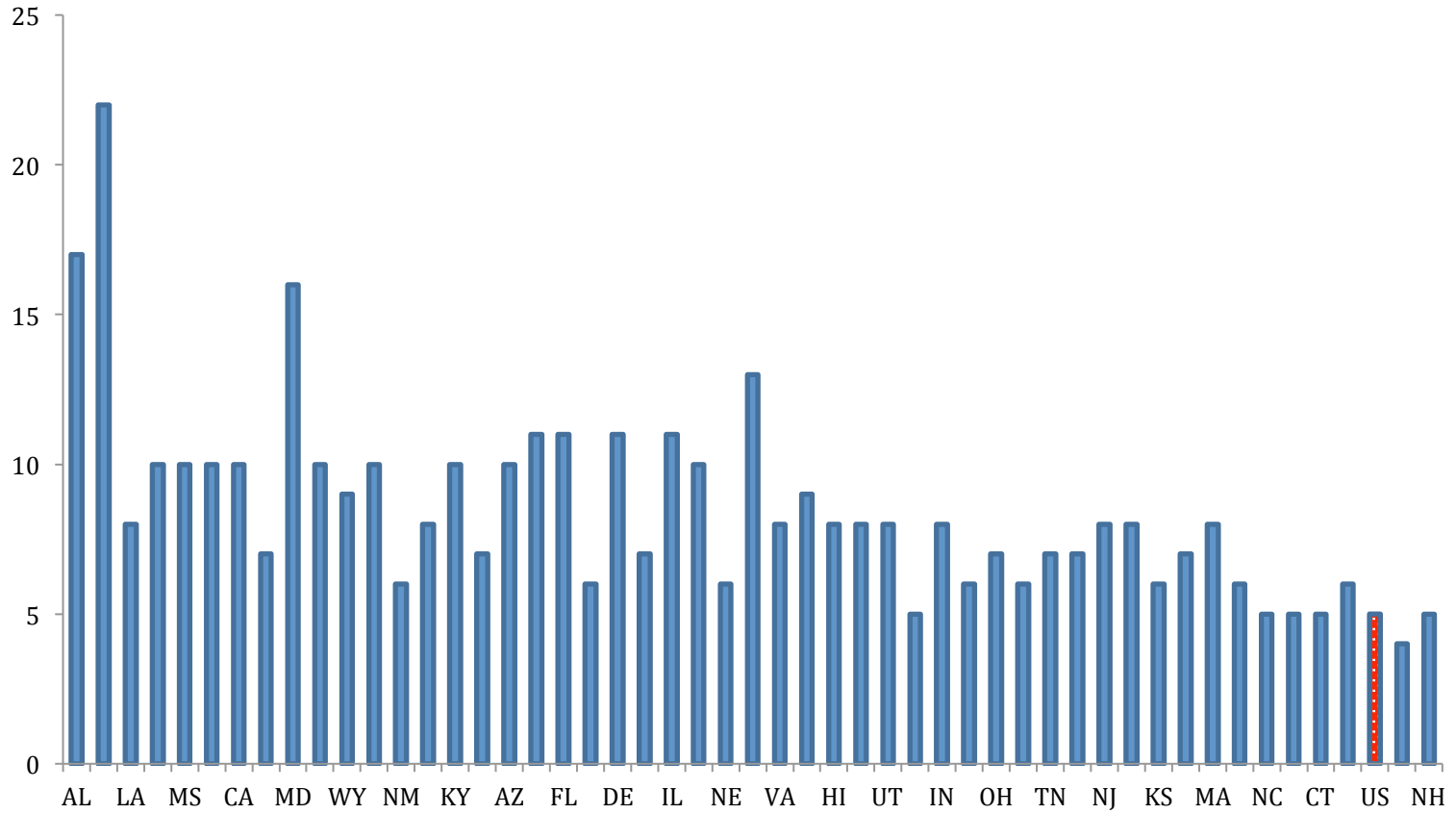
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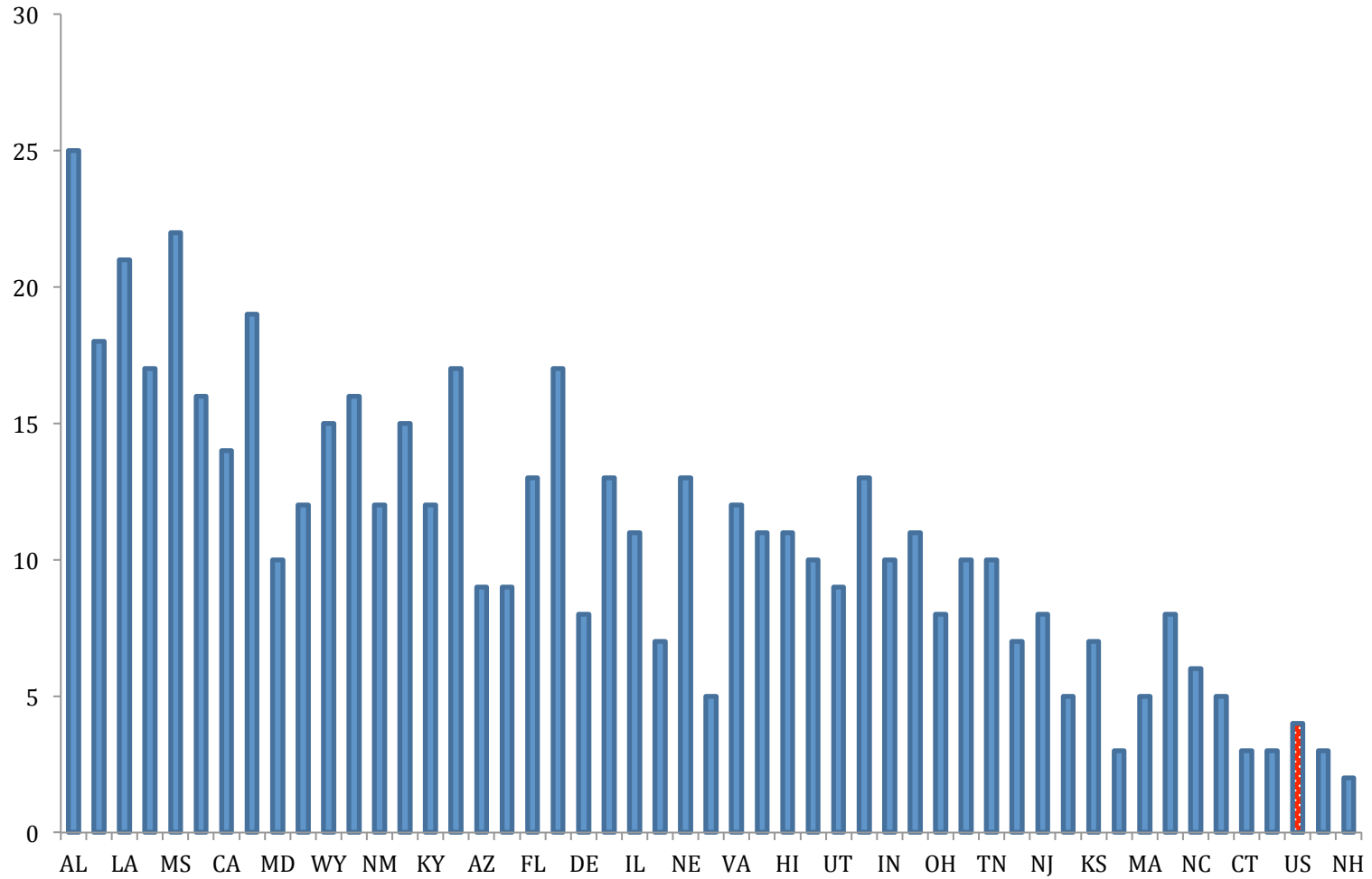
**Figure 1**  
**Total Number of Legislative Process Provisions Found in Current American Constitutions**



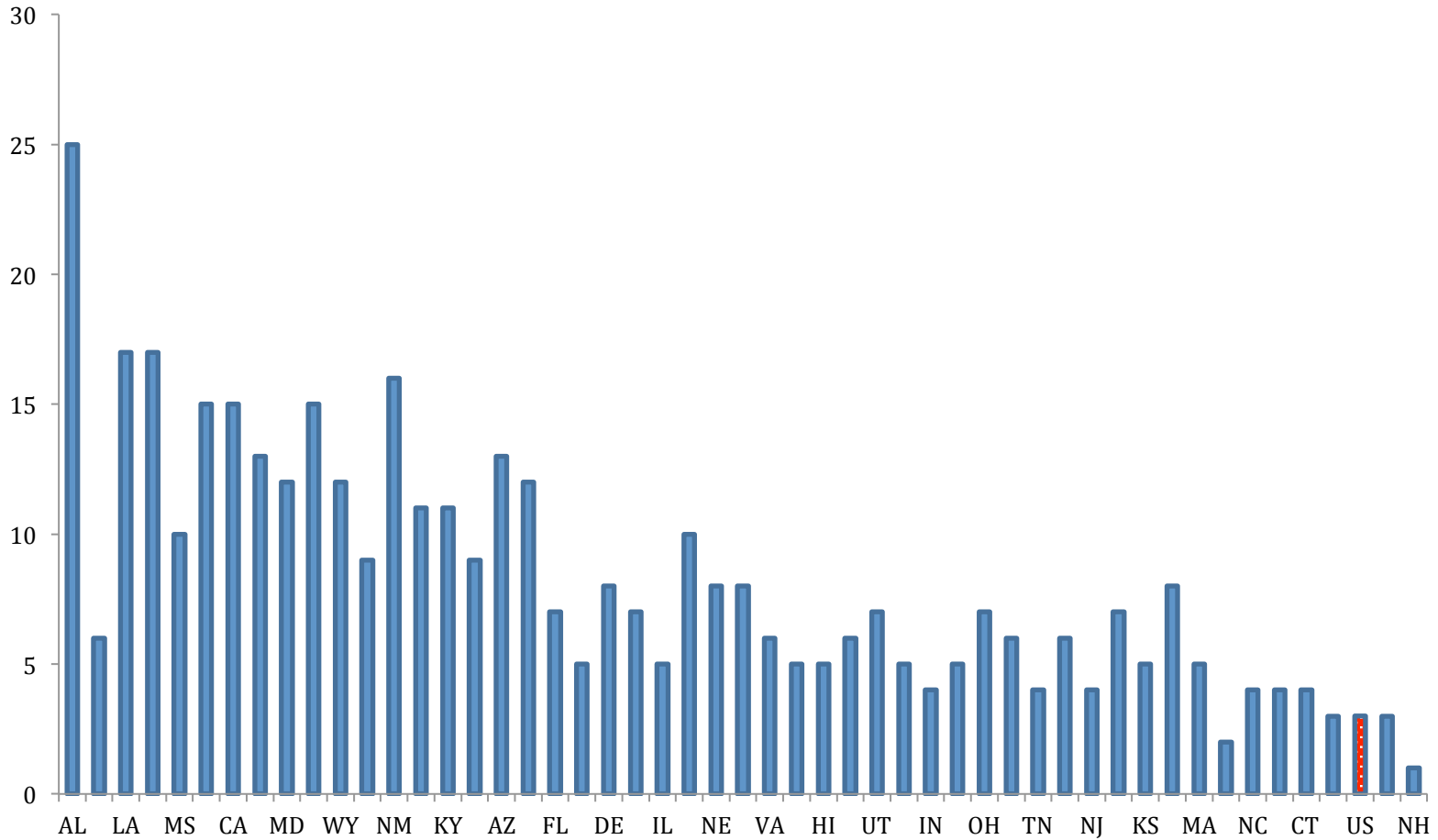
**Figure 2**  
**Number of Powers Regarding the Legislative Process in Current American Constitutions,**  
**in order of most overall Provisions**



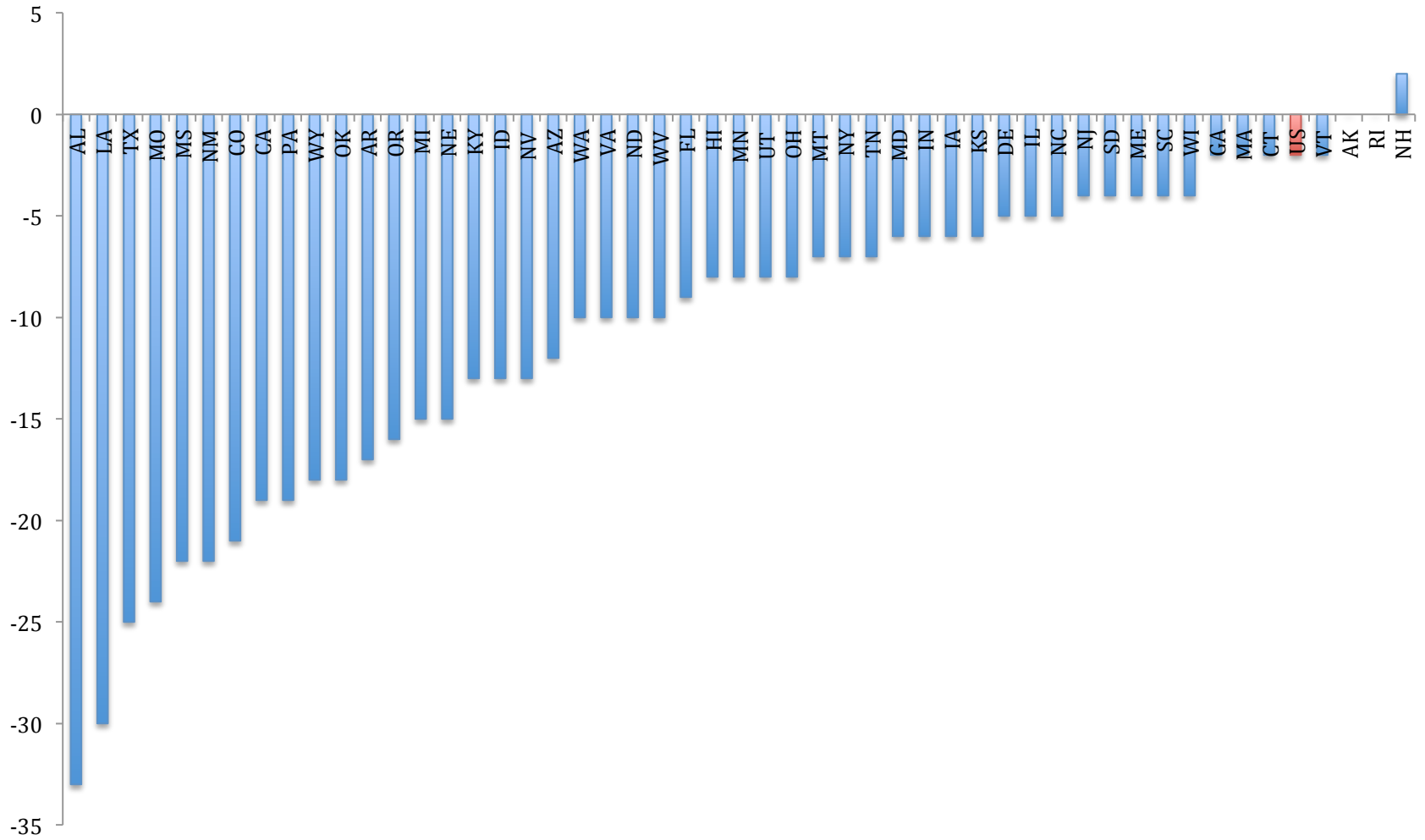
**Figure 3**  
**Number of Mandates Regarding the Legislative Process in Current American Constitutions,**  
**in order of most overall Provisions**



**Figure 4**  
**Number of Restrictions Regarding the Legislative Process in Current American Constitutions,**  
**in order of most overall Provisions**



**Figure 5**  
**Constitutional Restrictiveness of the Legislative Process found in Current American Constitutions**



**Table 1**  
**Explaining Constitutional Restrictiveness and its Components**

<b>Variable</b>	<b>I. Total Provisions</b>	<b>II. Powers</b>	<b>III. Mandates</b>	<b>IV. Restrictions</b>	<b>V. Mandates+ Restrictions</b>	<b>VI. Constitutional Restrictiveness</b>
<b>1800-1859 Period</b>	7.392*** (1.852)	1.123 (.738)	4.126** (1.506)	2.144** (.840)	6.270*** (1.692)	-5.147** (1.840)
<b>1860-1899 Period</b>	14.538*** (1.831)	2.427** (.833)	7.344*** (1.030)	4.768*** (.902)	12.112*** (1.664)	-9.685*** (1.890)
<b>1900-1949 Period</b>	14.211*** (3.296)	1.916 (.995)	5.635*** (1.500)	6.660** (2.443)	12.295*** (3.509)	-10.380** (3.968)
<b>1950-2014 Period</b>	14.851*** (3.021)	4.288** (1.584)	6.877*** (1.654)	3.686** (1.124)	10.563*** (2.386)	-6.275* (2.698)
<b>Length (in words)</b>	.0001*** (.0000)	.00002*** (3.72e-06)	.00005 (.00001)***	.00005*** (.00001)	.0001*** (.0000)	-.00007*** (.0000)
<b>Amend by Initiative</b>	2.701 (1.972)	-.062 (.723)	1.748 (1.210)	1.016 (.956)	2.764 (1.681)	-2.826 (1.676)
<b>Constant</b>	8.967*** (1.159)	5.022*** (.598)	2.097** (.696)	1.849** (.619)	3.946** (1.188)	1.076 (1.481)
<b>N</b>	51	51	51	51	51	51
<b>F-Test</b>	35.72***	35.85***	22.01***	20.93***	26.07***	15.81***
<b>R-Square</b>	.6616	.3326	.5242	.6056	.6570	.5398

OLS Regression; Robust standard errors are in parentheses. \*p<.05, \*\*p<.01, \*\*\*p<.001