

Introduction

On June 26, 2015, Justice Anthony Kennedy wrote the majority opinion in a landmark gay-marriage case, *Obergefell v. Hodges*, for the US Supreme Court. “The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights,” he wrote. “In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” In ringing language, he concluded, “The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”¹

The four dissenters made clear their vociferous opposition. Quoting in part from *Federalist* No. 78, Chief Justice Roberts said, “But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise ‘neither force nor will but merely judgment.’” According to Chief Justice Roberts, the majority’s opinion was “an act of will,” which would transform the marriage laws of “more than half the states” and alter “a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”²

Apparently, the members of the Supreme Court think they comprise an institution that has the ability to consolidate and centralize authority, shifting decision-making power from the states to the federal government. Yet it also maintains the right to contract central state authority by leaving power with the states or invalidating federal laws. In *Obergefell*, the Court extended the protections of the Fourteenth Amendment, requiring all fifty states to recognize a marriage between two people of the same sex that was legally licensed and performed in another state: “The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.

It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.³ This action is nothing new: requiring that states do something because the federal government mandates it typifies the expansion of central state authority. The Court has taken such actions persistently over time and across most, if not all, issue areas—in railroad regulation, taxation, abortion rights, and healthcare, to name a few.⁴

The language of federal authority is at the very root of American constitutional law, all of which addresses questions about the federal government's reach. The judiciary's central responsibility is to determine the boundaries of this authority. As it does so, it expands and contracts federal power. This is the basic pattern of constitutional development. Shaping the federal government in this way places the Court at the center of American state-building. In other words, the Supreme Court will always crucially influence American political development. The interesting question is when, where, and how the Court has influenced federal authority over time. Until now, we have not systematically studied this across constitutional issues and across American history. If we better understood these patterns of expansion and restriction, we could then better understand the constitutional underpinnings of changes in the American state.

Expansion of the reach of federal power often encounters resistance at the state level. After *Obergefell*, Rowan County Clerk Kim Davis refused to issue same-sex marriage licenses to eligible couples in Kentucky, citing her Christian beliefs. When a federal district judge ordered her to comply with the Supreme Court, she still refused and was then jailed for five days. Ultimately, her actions resulted in Kentucky having to pay \$224,000 in legal fees and costs associated with Davis's refusal to comply with an order handed down by a federal judge.⁵ Something similar happened to Alabama's former state Supreme Court chief justice and Republican senatorial candidate, Roy Moore. Moore ordered the state's probate judges to refuse applications for same-sex marriage licenses, which resulted in Alabama's Court of the Judiciary suspending him for the remainder of his term, finding him in violation of the canon of judicial ethics.⁶ Whereas in Kentucky, a federal court ordered a state official to do something, in Alabama, the state itself enforced the federal ruling against its own chief judge who dissented. Such political controversy has often marked the boundary between federal and state authority.

This book charts and interprets the complicated relationship between American constitutional law and changes in federal governmental power from the 1790s to the 1990s. It demonstrates that the Court is an institution that continuously defines and redefines the boundaries of federal authority,

not one that expands or contracts that authority during neat, specific eras. This book moves us away from interpreting constitutional outcomes with respect to “original intent” or “judicial activism,” as liberal or conservative, or “right” or “wrong.” Instead, this book tracks the political outcomes and effects of legal decisions. It looks beyond historical eras and the ideological motivations of individual justices to consider the Court’s overall effect on federal authority.

Constitutional issues involving federalism provide the primary avenue through which the Court advances the federal government; the judiciary thus influences the public’s understanding of the limits of constituent state power. In the less-common cases, when the Court overrules a congressional statute, it restricts federal authority because it has constricted the ability of the federal government to enforce its preferences through that statute.

As evaluated through judicial rulings, federal power has grown dramatically, and has done so across each historical era. Because the limits of federal authority constantly expand and contract, and because its overall strength has varied across time, it makes little sense to dub the federal government at any given point as either strong or weak or big or small (Novak 2015). This enduring pattern of constitutional change challenges an overarching assumption both liberals and conservatives share, which is that the federal government only began to exert significant influence over the lives of citizens in the early twentieth century. To hold this assumption belies the patterns of constitutional change—and their concomitant effect on the federal government.

The US Supreme Court and the Centralization of Federal Authority unearths when the authority of the federal government expands and contracts and what issues prompt these changes. It also contends that political characterizations of the national state miss the nuanced ways both the state and constitutional law have evolved over time. Uncovering when and how the federal state’s authority grew in size and scope ultimately causes us to revise our understanding of American state-building.

As an institution not deeply connected to the democratic will or the power of the purse or sword, the Court has gradually enhanced its own authority and the authority of the coordinate government branches over time. This book argues that (1) there is persistent expansion of federal state authority, and defines such expansion of authority as any Court ruling that invalidates a state law or affirms a federal law; that (2) this expansion happens gradually and incrementally over time, often through invalidating lower-level state laws; and (3) expansion occurs through extending federal authority to make decisions concerning citizens and people.

When the federal judiciary upholds a *state* law, the Court has restricted central state authority. The Court, in effect, has said federal power (i.e., the

Constitution) does not apply to the state-level action before the Court. Likewise, when the federal judiciary strikes down a state law, then the Court has expanded central state authority: the Court, in effect, has said that federal power (i.e., the Constitution, or a superior federal statute) applies to the state-level action before the Court. When the federal judiciary affirms a federal law, then the Court has expanded central state authority, allowing a coordinate branch to extend its reach. And when the judiciary invalidates a federal law, it restricts central state authority because the Court has explicitly impeded a coordinate branch from continuing to exert authority.

Central State Authority Defined

In charting the growth and development of the American state, American Political Development (APD) scholars have often drawn comparisons to European state systems, leading “many scholars to focus on things that did not happen in the United States, such as the absence of strong social democratic movements in the late nineteenth and early twentieth centuries.” With these comparisons, scholars have “reinforce[d] a continuing preoccupation with European experience” and thus overlooked facets of American state formation (Bensel 1990, ix). A burgeoning movement in APD argues that equating the absence of centralized bureaucratic Weberian structures with a weak or absent central state-building “is false and no longer tenable analytically” (King and Lieberman 2008, 371; Bensel 2000; Howard 2007; Brian Balogh 2009; Sparrow 2011; Murakawa 2014).

In this regard, many scholars have too-narrowly defined “central state authority” and “central state building,” seeing it as only the creation of bureaucratic and administrative capacity and movement toward a European Weberian kind of central state, one with strong social welfare and administrative capacities.⁷ Weberian understanding of state authority is simply one way to define the state and its development. While the growth of Weberian structures certainly counts as “central state expansion,” this traditional approach juxtaposes judicial power against the national political branches. The interpretation of judicial decisions summarized above understands central state expansion as an assertion of jurisdiction over some area of government. In this way, jurisdiction and authority are synonymous. One of this book’s chief assumptions is that state-building consists of centralizing, consolidating, expanding, and asserting federal authority, which builds off William Novak’s (1996) understanding of nineteenth-century state development.⁸ Therefore, when the federal judiciary invalidates state-level laws, it expands central state authority. Thus, the term

“central state expansion” means the advancement, growth, and affirmation of federal state authority toward any end.

Note: this book uses “central state,” “federal state,” “American state,” and “federal/national/central government,” interchangeably. They all represent the actions of the highest level of government in the United States. This conception requires one to think about the supervisory role the Court plays as part of the central state in a federal system.

In most federations such as the United States, courts are crucial in that “they can affect centralization and decentralization directly by ruling on the constitutional distribution or powers and indirectly by ruling on social issues, individual rights, economic affairs, and other matters” (Aroney and Kincaid 2017, 3). Indeed these types of governments typically require written constitutions, which invites judicial interpretation, so this book is primarily interested in uncovering whether the Supreme Court, through its interpretation, centralizes federal authority (fostering a “unitary” state) or whether the Court tends toward supporting constituent states (contributing toward a “federalist” state).

The American Constitution marked the origin of modern federalism because it combined both a traditional “confederal” understanding and a national or unitary understanding, described by James Madison as a “compound republic” (Ball 2007, 253).⁹ This national understanding, embodied in what the framers called the “general” government, gave significant authority to the general government: to raise an army, levy taxes, regulate trade and businesses, and prosecute citizens who violated federal law. These newfound powers required a federal court system with strong judicial review precisely because the framers lacked “the political ability to displace states’ courts” and recognized “the liabilities of relying only on the states’ courts to adjudicate federal matters” (Aroney and Kincaid 2017, 8). While the power of judicial review during the Early Republic era, as Alexis de Tocqueville remarked, was “the only power peculiar to an American judge,” this power is found in nearly 83 percent of the world’s constitutions (Aroney and Kincaid 2017, 8).

Therefore, a crucial part of state-building in federal systems is the development of constitutional judicial review. So part of American state-building rests on the Supreme Court’s use of judicial review to centralize federal authority. However, the centralizing tendency of the Court’s decisions does not always build the state in the European sense; nevertheless, the Court’s centralization constitutes an accretion of federal power unique to federally designed countries. Centralization always means some sort of growth of federal authority, but it does not always translate into “state-building” in the European sense. Still, this book views centralization and state-building as synonymous because centralization contributes to a nation-state’s capacity to govern.

Debating the Boundaries of Federal Authority

American political development has revealed the growing expansion of the federal government relative to states' autonomy. Congress has become more involved in virtually every policy area, from economics to social realms, while the Court has become central in policing and protecting individual rights. Nevertheless, today, as in periods before, the scope and boundaries of federal power remain a central political debate.

In the United States, political arguments rest on a discourse regarding constitutional rights. While a relatively recent phenomenon,¹⁰ the dominance of rights argumentation necessitates that we understand the shape and trajectory of constitutional rights and authority over time. Conservative critics of the Affordable Care Act (ACA), for example, claimed it reached beyond the constitutional powers of the federal government. Indeed, Republicans calling for a repeal of the ACA were a dime a dozen in the 2014 midterm elections. Similarly, the Senate's nonrenewal of the federal assault weapons ban in 2013 revealed the power of constitutional rhetoric in determining policy. Sen. Charles E. Grassley (R-Iowa) attacked the measure as a "slippery slope of compromising the 2nd Amendment."¹¹ Progressive political thought often invokes the Constitution, too, but in a different way. Some, such as Georgetown law professor Louis Michael Siedeman, encourage constitutional disobedience as a way to remedy federal government dysfunction and congressional gridlock.¹² Both sides of the political aisle see engaging the Constitution (either maintaining or revising our understanding of it) as a panacea for the policy issues facing the United States, because there is no single understanding of what the Constitution means.

Moreover, because reliance on and reverence for the Constitution have defined US political debate, we need to better understand how the Court has shaped our understanding of the Constitution and the limits of federal power. America's reliance on constitutional rhetoric stands in contrast to other Western democratic states, whose constitutions are much younger and, in some cases, unwritten. Indeed, as French sociologist Alexis de Tocqueville opined back in the mid-nineteenth century, many political problems eventually become legal, though not always constitutional, questions in the United States.¹³ The United States has a more extensive constitutional discourse on political power than Western European nation-states, a feature that requires a thorough exploration of constitutional development and its connection to political discourse.

The reason for this unique American discourse has much to do with a written constitution, but it also has to do with the institution of chattel slavery and the rights-claims it produced (Shklar 1998, 111). More specifically, these claims necessitate that the Supreme Court play a vital role in defining the

relationship between the federal government and society. Since this written constitution inscribes all citizens' *federal* rights, each citizen can claim her rights before the judiciary. The Supreme Court, as an institution, has traditionally defined what it means to be a citizen and what counts as legitimate state authority. As such, the study of the Court and its pivotal cases sheds light on far more than jurisprudential changes, because the Court has shaped the rights of peoples and governmental authority more than any other institution. The United States's reliance on a written constitution has enabled the Court to serve this role.

In sum, US political rhetoric suffers from an incomplete understanding of the constitutional changes to the federal state. Contemporary conservative and libertarian political thought concerns itself with limiting federal power, thus creating a smaller federal government. Conservative public intellectuals and politicians bemoan "big government" for many reasons, but chief among them is that big government limits individual rights and freedoms.¹⁴ By contrast, political liberals seek to expand the role of the federal government. Yet neither side of the political debate maintains consistency: conservatives might favor expanding federal power (e.g. for military and defense spending) while liberals sometime seek to maintain state-level autonomy, devolving power from the federal government. Clearly, neither side can agree on where the boundary between federal and state authority lies.

Therefore, I will examine whether, as the federal government has grown in strength and size, civil liberties and governmental protections of these liberties have kept pace. I will also examine how long "big government"—or a powerful, active federal government—has existed in this country. The public—not just conservatives—views big government as an artifact of the twentieth century because the public tends to assess federal power through the limited perspectives of the social-welfare and national-security states. By employing this myopic lens, however, we overlook the myriad aspects of federal government that the Supreme Court advanced and consolidated steadily throughout the years, rather than through momentary bursts of expansion, as punctuated equilibrium models posit. Preoccupied with the size of government, US political debate turns on questions about the constitutional boundaries of the federal government. The rhetoric of "big" versus "small" government, however, misses the nuanced ways in which the federal government has evolved through the Court's constitutional interpretation. That is why it is important to examine precisely where, when, and how the national government constitutionally expanded and narrowed. Understanding these changes will help produce more intelligent political discussion about the role of the federal government in American lives.

The Court's Role in State-Building

Like political parties, presidents, legislators, and bureaucrats, the Supreme Court plays a major role in expanding the American state.¹⁵ To understand the Court's impact on and proclivity toward expanding central state authority, we need to broaden our notion of "development" beyond development toward a European-style welfare state.

A "developed" national state can do other, less egalitarian things. For example, it can protect national marketplaces (Bensel 2000), make war (Sparrow 2011), imprison minorities (Murakawa 2014), and act as a clearinghouse for rent seekers (Mettler 2011). The state can also move toward becoming a European-style welfare state in covert ways (Balogh 2009; Novak 1996; Howard 2007). It is critical to note that levels of government below the federal level can have important social-welfare state functions, such as that of protecting positive rights (Zackin 2013).

Recognizing the impact of the legal branch on the growth of the federal government adds to the literature on how the judiciary contributes to central state growth.¹⁵ It also emphasizes the importance of judges to federal state formation. I make my case not by focusing on institutional changes within the Supreme Court, but by examining the impact of the Court's ideational and constitutional decisions on central-state development and authority over most of its history, from 1789 to 1997. The end date of this book is 1997 because of the inductive method of case selection, which I discuss in chapter 2. I am not alone in arguing that the law and courts have successfully enhanced, and not just constricted, national and state regulatory power (Frymer 2003; Farhang 2010; Novak 1996). I also have company in my view that the federal courts are part of broadening both the national regime and electoral politics through expanding the powers of national governing coalitions (Gillman 2002; Graber 1993; Whittington 2007). But I break new ground in looking at constitutional change over the long term rather than *vis-à-vis* specific critical junctures and moments such as the Founding, Reconstruction, and New Deal eras (Ackerman 1991, 1998). Moreover, I apply traditional understandings of state development—the Weberian definition of state power—to the Court's constitutional output, merging public law and new state research agendas. In this way, this book uses new state frameworks to understand constitutional development, a primarily ideational rather than institutional perspective on the judiciary. I use an agnostic or neutral definition of central state expansion, seeing it as the advancement of federal authority irrespective of ideological or normative aims. Thus, judicial decisions that invalidate state laws expand and centralize federal authority.

Taking an expansive look across American history and across constitutional issues adds important texture to our understanding of the Supreme

Court's role in developing central state authority. This book is the first attempt to illuminate that role by systemically collecting and cataloging the Court's influence on the American federal government across all of US history. In doing so, I return repeatedly to two questions: How has the Court affected central state authority? And when and in what areas of the central state has the Court facilitated state development? These questions are important because, as *Obergefell* demonstrates, the Court continually shapes government authority. Indeed, before *Obergefell*, the Court had first upheld state statutes restricting same-sex marriage and then, beginning with *Lawrence v. Texas* (2003), started to expand central state authority by invalidating laws regulating homosexual conduct. With a more rigorous and systematic examination of Supreme Court decisions, we can develop a stronger foundation on which to assess the Court's influence on American state development.

To uncover this influence, I compile an original database of landmark constitutional decisions spanning from the 1790s to 1990s, which I derived from constitutional law casebooks and treatises published between 1822 and 2010. With these data, I discern patterns of expansion and restriction in constitutional development that historical institutionalist approaches to the Supreme Court do not fully reveal. These patterns support arguments that judges are important state-builders (Forbath 2008), that regime politics have important influence on the Court (Whittington 2007), and that federal courts are significant forces that extend central state power to the periphery (Shapiro 1981; Gillman 2002).

Analyzing the Evolution of Constitutional Law

Constitutional change is the product of persistent contestation over the meaning of the values and institutional powers that the Constitution enshrines. This contestation produces a tension that any fallible institution, like the Court, would have difficulty resolving in an evolving society.

But what does constitutional development look like? That is, *how* has the Court shaped the federal government since 1789? If the Supreme Court turns out to have been an engine for (rather than a bulwark against) the expansion of federal authority, what uses of central state authority has the Court supported? If the Court varies over time in its impact on federal authority—that is, if it at different times restricts and expands that authority—we would expect to see variation in the kind of central state that the Court entrenches during any moment in political development. Rather than impose a teleological, progressive understanding of “the state” on constitutional authority, I recognize that the balance between expansion and restriction may change during different eras and in relation to different models of central state formation. I

set aside consideration of the ideological and political makeup of the Court and simply track the Court's oscillation between restricting and expanding the federal government. In doing so, I explore three things: (1) whether the Court's impact on federal authority has been gradual and accretive or, conversely, has expanded at flashpoints; (2) whether the Court has affected federal power in consistent or inconsistent ways across all constitutional issues; and (3) whether in the aggregate the Court has expanded federal state power.

This systematic approach illuminates three theoretical concerns about constitutional and state development: how strong or weak the early American state was; how the Court affected the modern American state around the turn of the twentieth century; and why it is important to develop a narrative that examines the Court's constitutional development between the typically recognized watershed cases and moments.

These findings and the theoretical claims on which they rest give us a new understanding of the evolution of constitutional law and the American state. I discern patterns in the ways the judicial branch acts—how it expands federal authority when it does so, and how and when it allows states to control civil and political rights. The Court's interpretation of the federal government's authority forms the constitutional foundation for governance. The story of the American state is not necessarily about strong versus weak federal government, but rather about federal versus state power. The contestation over the meaning and authority of the Constitution, at bottom, concerns one question—does the federal government have the authority to regulate whatever issue is before the Court? Through uncovering the national state's constitutional patterns, the judiciary's precise role in building the American federal government can be more fully comprehended.

Methodology and Epistemic Foundations

While I detail the research design in chapter 2 and in the appendices, a brief word on the epistemic foundations of this book's approach remains necessary. This book employs a trans-historical notion of state authority because of the book's chief purpose: an examination of the Supreme Court's role in national state expansion since the founding. As this chapter's opening anecdote about implementing the same-sex marriage ruling suggests, Americans continue to debate the scope of federal authority. Because of this basic fact, the broad developmental patterns surrounding the Court's position on the boundaries of central state authority need to be revealed and examined. The macro perspective of this book has merit because the scope of federal and state-level authority under the Constitution has pervaded political debates since the country's founding.

This macro perspective, in some ways, differs from the more fine-grained, historical approaches of the studies to which this book speaks—historical institutionalist literature on law and courts, and studies concerning the development of American state. In contrast to judicial behavioralist and rational-choice scholars,¹⁷ historical institutionalists are less concerned with the behavior of actors with fixed preferences, and are concerned instead with the behavior of actors who also have historically constituted beliefs involving the norms of their institution.¹⁸ Thus, historical institutionalist studies attempt to illuminate the long-term processes that lead to the construction of both judicial preferences and of the institutions that constrain a judge's preferences.¹⁹ Yet, while this book contributes to these literatures, it does not examine, in the same historical detail as they would, all the explanations and reasons for why the Court behaves as it does. Instead, this book seeks to empirically catalog and systematically describe the Court's broad attitude toward the central state across time, which resembles the work done by judicial behavioralists. Such a goal warrants closer investigation given the centrality of these debates about political boundaries. Through this book, I incorporate APD's concern with how the construction of authority is formed, shaped, and changed over time, but I examine this through the systematic and empirical approach followed by behavioral studies.

Looking Ahead

The primary focus of chapter 1 is to provide the reasoning behind my interpretation of constitutional decisions and their effect on central state authority. Chapter 1 also explains why I believe decisions that overturn state laws concerning liberty rights do in fact expand central state authority.

Chapter 2 provides an overview of the research design and original, historical database compiled for this book, defining key variables used throughout the book. It presents the overall findings and explores the effect of the Supreme Court's constitutional interpretation on central state authority across time and across constitutional issue areas. In this chapter, I offer a detailed overview of the outcomes of the Court's rulings, and I identify which constitutional issues expanded and which restricted federal power.

Chapters 3 to 5 situate these findings to revise conventional understandings of the historical development of the federal state, the varying interpretations of central state strength and weakness by period, and the nature of the major challenges facing the American federal state (as evidenced by the focus and orientation of the Supreme Court during each period). Here, with newly gathered evidence, I add to the literature that sees the Court as more supportive of state-building than is commonly portrayed, and that sees the federal state as building authority across a longer period than is generally thought.

Chapter 3 analyzes constitutional development up to 1864, paying close attention to the framers' constitutional design, which facilitated a judiciary that would largely support federal supremacy and thus tend toward national government expansion. The Constitution's design created inherent tensions that the Supreme Court would have to navigate. Focusing largely on Chief Justice Marshall's and Taney's Courts (1801–1864), this chapter evaluates the judiciary's role in advancing the authority of the early American state and examines the effect of the constitutionally ambiguous design of federalism.

Chapter 4 centers on building a modern national government from 1865 to 1932. This chapter considers the Court's role in the rise of this state and the reduction of state-level sovereignty in the individual rights realm and in commerce and economic decisions. The recurring issue the central state faced during this period was the reduction of state autonomy, and thus, conflicts over competing models of federalism were paramount during this time.

Chapter 5 takes the reader up to the twenty-first century. It explores how the Court's doctrine outlined in chapter 4 helped establish the distinctive administrative and welfare-state apparatuses advanced throughout the twentieth century. This chapter emphasizes development beyond watershed landmark cases and moments²⁰ and demonstrates a shift in the purpose of the central state within and across various periods of development.

Chapter 6 concludes with a discussion of how this book adds to the APD literature, looking beyond the constitutional moments approach and showing the Court to be collaborator in national state expansion. Chapter 6 also reemphasizes my broader definition of state-building and the judiciary's supervisory role over constituent states.

Overall, this book adds to the literature concerning the Court's influence on state growth, looking beyond New Deal efforts to expand federal government powers. My interpretation considers the many ways the justices have acted as state builders and shows how the Court's constitutional interpretation helped construct a powerful national government that has grown steadily over time through constitutional doctrine.