



Explaining Sub-national Constitutional Space¹

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Every federal system is structured by a federal constitution that divides power, establishes central institutions, prescribes the rules for resolving disputes, safeguards rights, and provides a procedure for its own alteration. In some federal systems, the federal constitution prescribes the political institutions and processes for the country's constituent units as well, thus furnishing the constitutional architecture for the entire federal system.³ This is the case in Belgium and Canada, for example. But in most federal systems, the federal constitution is an "incomplete" framework document in that it does not prescribe all constitutional processes and arrangements. Rather, it leaves "space" in the federal system's constitutional architecture to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act.⁴ However, those federal systems that recognize a place for sub-national constitutions differ markedly in the extent to which the federal constitution is incomplete, that is, in the amount of space that they allocate to constituent units to define their own goals and establish their own governmental institutions

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3. The use of the term "sub-national" is intended to distinguish the constitutions of component units in federal systems from the constitution of the nation state. The author recognizes that many federal systems contain various nationalities, or "nations," within them.

4. Donald S. Lutz, *The United States Constitution as Incomplete Text*, 496 *ANNALS AM. ACAD. POL. & SOC. SCI.* 23, 26 (1988); Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, *PUBLIUS*, Fall 1980, at 101-02.

and processes.⁵ In previous research, I have focused on the range of discretion (“constitutional space”) available to constituent units in designing their constitutional arrangements and on how the boundaries of that space are policed.⁶ In this article, I extend the inquiry into sub-national constitutional space to consider what factors influence the scope of sub-national constitutional space in various federal systems, why sub-national units have occupied or failed to occupy the constitutional space available to them, and what consequences sub-national constitutionalism has had on horizontal and vertical relations within federal systems.⁷

5. Sub-national constitutional space would seem to include, though it might not be limited to, the following:

- a. the power to draft a constitution
- b. the power to amend that constitution
- c. the power to replace that constitution
- d. the power to set goals of government
- f. the power to define the rights that the constituent unit will protect
- g. the power to structure the governmental institutions of the constituent unit, including whether the legislature shall be bicameral or unicameral
- h. the power to define the process by which law is enacted in the constituent unit
- i. the power to create offices
- j. the power to divide powers among the governmental institutions of the constituent unit
- k. the power to determine the mode of selection for public officials of the constituent unit
- l. the power to determine the term of office and the mode of and bases for removal of officials of the constituent unit prior to the completion of their term of office
- m. the power to establish an official language
- n. the power to institute mechanisms of direct democracy
- o. the power to create and structure local government
- p. the power to determine who are citizens of the constituent unit
- q. the power to establish qualifications for voting for officials of the constituent unit

6. See G. Alan Tarr, *Sub-national Constitutional Space: An Agenda for Research* (unpublished paper delivered at the VIIth World Congress of the International Association of Constitutional Law), available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf>.

7. This paper focuses on the legal role of sub-national constitutions as independent sources of law. But this is not their only importance. Sub-national constitutions may serve important political purposes, regardless of the contents of the documents. They may be instruments of conflict management during periods of political stability, and the process of sub-national constitution-making itself may contribute to political socialization. For an insightful discussion of how events in South Africa served these purposes, see Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT'L L. 585-638 (2008). This also occurred in the Sudan. See Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203, 1204-05, 1232-33 (2006).

Sub-national constitutions may also be important as vehicles for making political statements about the character of the federation. See, for example, the quasi-

FACTORS AFFECTING THE SCOPE OF SUB-NATIONAL CONSTITUTIONAL SPACE

If the scope of sub-national constitutional space varies among federal systems (and sometimes even within federal systems), what produces this variation? Several factors might be expected to influence the scope of sub-national constitutional space. The process by which the federal system was created could be one such factor. Scholars distinguish between federal systems that were created by uniting pre-existing political entities, referring to them as aggregative or coming-together federations, and those created by the transformation of a previously unitary political system, referring to them as devolutionary or holding-together federations.⁸ Admittedly, this dichotomy oversimplifies, as there are federations whose formation has involved both aggregative and devolutionary processes. For example, the Swiss Federation was formed by the merger of preexisting political societies, but the subsequent creation of the canton of Jura could be seen as devolutionary. Similarly, the thirteen original states of the United States came together to form a federation, but subsequent states were carved out of the territory of a preexisting federation. Despite these caveats, the distinction remains useful.

One would expect that aggregative federal systems would be likely to allow more sub-national constitutional space than would devolutionary federal systems. In part, this would simply be the product of historical context or pre-coming-together realities. When political units form a federation, they already have in place their own institutions and political practices, and attempts to interfere with them or to prescribe unnecessary uniformities might threaten the process of federation. For example, the drafters of the United States Constitution allowed each state to determine voting qualifications within its borders for federal elections rather than risk opposition to a federal mandate of uniformity in this sensitive area.⁹ In addition, one would expect that the federalizing political units would seek to retain self-rule to the extent consistent with achieving the ends

constitutional Bill 99 enacted by the National Assembly of Quebec in 2000. Sub-national constitutions may also be drafted in order to differentiate the constituent unit from other units within the federation—i.e., as a way of emphasizing asymmetry. Note that this is likely not a comprehensive list of the political functions of sub-national constitutions and sub-national constitution-drafting, and that those who devise a sub-national constitution may be divided as to the purposes the constitution is designed to serve.

8. See RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* (3d ed. 2008); Peter Perenthaler, *Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy*, in *HANDBOOK OF FEDERAL COUNTRIES* 2002 472, 472 (Forum of Federations ed., 2002); Alfred Stephan, *Federalism and Democracy: Beyond the U.S. Model*, *J. DEMOCRACY* 19 (Oct. 1999).

9. U.S. CONST. art. I, § 2.

that of federation. This likewise suggests maintenance of broad constitutional space. Prospective constituent units might also demand concessions expanding or safeguarding sub-national constitutional space as the price for joining the federation. For example, several southern states threatened not to join the American Union unless states were free to determine their own law with regard to slavery. And in Ethiopia, the Oromo Liberation Front agreed to cease armed resistance and join the Ethiopian Federation only after the constituent states were guaranteed the right to secede.¹⁰ Finally, as a matter of constitutional design, aggregative federal systems are more likely to lodge residual powers in the constituent units rather than the federal government, and this may also lead to broader sub-national constitutional space.

One would expect the dynamics to be quite different in devolutionary federations. The national authority would be unlikely to surrender powers beyond those necessary to achieve the ends of federation. Moreover, because constituent units are being created rather than pre-existing, they typically would not have the same ability to make demands about the scope of sub-national constitutional space as would pre-existing political entities. Often they would lack a strong political identity—sometimes intentionally so. When South Africa created its nine provinces, for example, it split the provinces that had constituted the original Union of South Africa, incorporated the homelands established by the apartheid government, and drew provincial boundaries so that most provinces were ethnically heterogeneous, which dissipated the power of ethnically-based political groups.¹¹ Similarly, the states in India did not exist, except as administrative units in a unitary state, until the adoption of the Indian Constitution.¹² Finally, in contrast to aggregative federal systems, devolutionary systems are likely to lodge residual powers in the federal government, thereby circumscribing the powers—including constitution-making powers—of the constituent units.

Another factor that might influence the scope of sub-national

10. See Yonatan Tesfaye Fessha, *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia* 425-31 (June 9, 2008) (unpublished Ph.D. dissertation, University of the Western Cape), available at http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_gen8Srv25Nme4_5952_1262639555.pdf; see also ETH. CONST. art. 39. This right cannot be curtailed even in emergency situations. ETH. CONST. art. 93(4)c.

11. Fessha, *supra* note 10, at 244.

12. Under British colonial rule, India did have some administrative divisions, with the colonial creation of provinces for administrative purposes and the recognition of 562 princely states. See Akhtar Majeed, *Republic of India*, CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES 181-82 (John Kincaid & G. Alan Tarr eds., 2005).

constitutional space is whether the federation has a system of symmetrical or asymmetrical federalism. In a symmetrical federal system, all constituent units have the same powers of self-government, but in an asymmetrical system one or more constituent units are vested with special or greater self-governing powers. Federations typically create asymmetrical arrangements to “take account of the fact that within a state there are significant cultural or societal differences among the constituent units.”¹³ This is particularly important when there are groups who desire a degree of autonomy but are destined to be permanently in the minority at the national level. Incorporating asymmetrical elements may reduce the conflict that this could produce by allowing minorities concentrated in particular constituent units a greater measure of self-rule, thereby wedding them more closely to the federation. This greater self-rule would likely have constitutional dimensions, so recognizing the diversity that led to the asymmetrical arrangement in the first place would usually require extensive sub-national constitutional space. Yet it may be difficult to limit such self-rule to the distinctive constituent units within the federation. Other constituent units might well resent the “privileges” that are given—think, for instance, of the reaction of the Rest of Canada to the claims of Quebec—and demand the same opportunity for self-rule, a conversion from asymmetry to symmetry.¹⁴ But whatever the eventual outcome, one would expect that there would be broader sub-national constitutional space in asymmetrical federations.

A further factor affecting the scope of sub-national constitutional space might be the purposes underlying federation. Some federations—such as Switzerland, Nigeria, and Belgium, as well as quasi-federations such as Spain—were designed to recognize and accommodate the multi-ethnic character of the population and provide space for the expression of diversities. One would expect in such instances that the constituent units would largely correspond with the diversities within the population and that the federation would accord broad constitutional space to the constituent units. This expectation is only partially borne out: although constituent units do mirror the political saliency of ethnicity in the federations, neither Belgium nor Nigeria has sub-national constitutions, and Catalonia and the Basque Country in Spain have only autonomy statutes. Some federations established to accommodate a multi-ethnic population, such as Switzerland, provide broad sub-national constitutional space, but others, such as Malaysia, do not. In those that

13. STEPHEN TIERNEY, *CONSTITUTIONAL LAW AND NATIONAL PLURALISM* 188 (2004).

14. See Eduardo J. Ruiz Vieytez, *Federalism, Sub-national Constitutional Arrangements, and the Protection of Minorities in Spain*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 135, 149 (G. Alan Tarr, et al. eds., 2004).

do not, greater representation in the councils of the federal government often substitutes for self-rule.

Finally, some federations or quasi-federations have been designed to deemphasize the ethnic or religious divisions in the society and replace fragmentation with national solidarity and a common national identity. In such federations, broad sub-national constitutional space may be seen as a threat to national unity, particularly if (as in India) the boundaries of current constituent units reflect the language groupings within the population. Thus, it is hardly surprising that in India and South Africa, two prime examples of multi-ethnic federations committed to forging a common national identity, there is little sub-national constitutional space, and the national governments are authorized to invade even those powers that the federal constitution gives exclusively to the constituent units when necessary to serve the purposes of national economic unity, national security, and the need for national uniformity.¹⁵

Most federations are not focused primarily on dealing with ethnic or religious diversity. Some countries, such as Argentina, Brazil, and the United States, have embraced federalism primarily as a way to govern more effectively large geographic expanses.¹⁶ In such circumstances, one might expect that constituent units would be granted broad constitutional space in order to permit locally appropriate responses to diverse conditions. Other countries, such as Austria and Germany, have embraced federalism as a way to promote administrative efficiency, with the constituent units having primary responsibility for implementing federal policy.¹⁷ James Gardner has argued that this sort of cooperative federalism “is largely incompatible with sub-national constitutionalism,” in that it understands “*Land* governments as agents of the central government in areas of national competence” rather than as polities with their own political identities.¹⁸ Whether or not one agrees with this judgment, one would expect that such federations would emphasize concurrent rather than exclusive powers and accord their constituent units very limited constitutional space.

These expectations are only partially fulfilled. Whereas the American states do have broad constitutional space, the same is not true for constituent units in Argentina and Brazil. In Brazil, despite the marked socioeconomic diversity among the constituent units, the very

15. S. AFR. CONST. 1996, Ch. 4, § 44(2); INDIA CONST. arts. 249-50.

16. One might include Canada in this list, but it would be a controversial inclusion, as Canadians disagree about the basic character and purposes of Canadian federalism.

17. See Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, arts. 102, ¶ 1, & 103, ¶ 1 (Austria).

18. James A. Gardner, *In Search of Sub-National Constitutionalism*, 4 EUR. CONST. L. REV. 325, 333 (2008).

detailed 1988 Constitution and judicial rulings have virtually eliminated state experimentation in constitution-making.¹⁹ On the other hand, although the homogeneity clauses in the German and Austrian constitutions and their emphasis on concurrent powers have limited constitutional experimentation in the *Länder*, they have not foreclosed it. Since the beginning of the 1980s, the Austrian *Länder* have revised their constitutions to incorporate more elements of direct democracy, identify goals for state activity, and expand controls over the use of public funds.²⁰ German *Länder* likewise have adopted constitutional provisions for referenda, and since the late 1980s, they have, following the lead of Schleswig Holstein, also revised their constitutions to identify goals for state activity and expand protections for social rights.²¹ Some of this “constitutionalizing” of policy goals may arguably exceed the constitutional space available to the *Länder*—for example, the protection given by the Brandenburg and Berlin constitutions to “permanent forms of common living arrangements” other than marriage, and Brandenburg’s committing the *Land* to working to return military bases to civilian use.²² Nonetheless, the developments in Austria and Germany suggest that cooperative federalism does not necessarily preclude significant use of sub-national constitutional space.

THE USE OF SUB-NATIONAL CONSTITUTIONAL SPACE

If law defines the formal constraints on sub-national constitutional space, the question remains as to what extent constituent units occupy—or fail to occupy—the constitutional space allotted to them. Four general points should be made at the outset. First, determining whether or not constituent units have made use of the constitutional space available to them is somewhat tricky. To do so, one might look for differences between sub-national constitutions and the federal constitution, as well as for differences among sub-national constitutions within a federal system. Such differences would indicate that the constituent units had in fact considered alternative constitutional arrangements rather than thoughtlessly copying provisions enshrined in the federal constitution or in the constitutions of other constituent units. However, this approach is not foolproof. Constituent units may seriously consider alternatives to

19. Celina Souza, *Federal Republic of Brazil*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 12, at 85.

20. Peter Bussjaeger, *Sub-national Constitutions and the Federal Constitution in Austria: A Case Study*, 6-7 (unpublished paper, on file with author).

21. Arthur B. Gunlicks, *Land Constitutions in Germany*, PUBLIUS, Fall 1998, at 111-12.

22. VERF. BRANDENBURG, arts. 26, ¶ 2 & 40, ¶ 5; *see generally* Gunlicks, *supra* note 21, at 120-24.

what is found in the constitutions of other constituent units or in the federal constitution but conclude that there is no reason to diverge from those models. A constituent unit's identical constitutional arrangement does not necessarily mean the unit has failed to occupy the available constitutional space, because the constitution-makers may have made a conscious choice rather than merely copying what they found.

Second, occupying constitutional space is not an either/or proposition: constituent units may make use of some, but not all, of the space available to them. For example, John Dinan's comparative analysis of institutional innovation in sub-national constitution-making found little divergence from national constitutions with regard to presidentialism and parliamentarism.²³ However, he discovered that sub-national constitutions in several federations were easier to amend than their federal counterparts, that many provided more opportunities for direct democratic participation, and that many had over time instituted unicameral legislatures, despite bicameral federal legislatures.²⁴

Third, constituent units within the same federation may vary in the use they make of the constitutional space available to them, and this variation may occur in both symmetrical and asymmetrical federal systems. The structure of American state constitutions illustrates this. These constitutions differ dramatically in their length and detail—the Alabama Constitution is more than 26 times longer than Vermont's; in their frequency of amendment—the Alabama Constitution has been amended more than 700 times, but the New Hampshire Constitution fewer than 40; in their durability or frequency of revision—Louisiana has had 11 constitutions, but 19 states have had only 1; and in their contents.²⁵

Fourth, political factors—ranging from the prevailing political ideas of the era to the nature of the party system to the level of dominance of a particular party throughout the country to the nature of popular demands upon sub-national governments—ultimately determine the use of sub-national constitutional space. Let us explore these political factors in greater detail.

The willingness of constituent units to occupy the constitutional space allotted to them may turn in part on timing. That is to say, the similarities and differences among sub-national constitutions, as well as their similarity to or divergence from the federal constitution, may reflect the political era in which they were written. Because different sets of

23. John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837, 853-56 (2008).

24. *Id.*

25. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 6-27 (1998); COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 2008 10, table 1.1 (2008).

political ideas tend to be dominant at various points in time, sub-national constitutions are likely to reflect the reigning ideas of the era in which they were written.²⁶ American state constitutions demonstrate this point. During the eighteenth and early nineteenth centuries, Americans viewed state legislatures as voicing the popular will and concentrated power in them.²⁷ Later in the nineteenth and early twentieth centuries, because of public distrust of the fidelity and probity of state legislators, state constitution-makers imposed numerous constitutional restrictions on legislative power, augmented executive and judicial powers, inserted policy pronouncements directly into state constitutions so as to foreclose legislation, and expanded the use of direct democracy.²⁸ During the twentieth century, the concern shifted to enhancing the ability of government to address the new problems confronting the states, and thus state constitutions adopted during that period sought to streamline government and remove barriers to effective action.²⁹ And during the late twentieth century states began to reimpose restrictions on state legislatures, setting limits on the growth of state revenues, requiring super-majorities for tax increases, imposing term limits on legislators, and so on.³⁰ So, the periods in which states adopted their constitutions influenced the constitutions' contents, and this variation itself testifies to states' use of the constitutional space available to them.³¹

This phenomenon is not limited to the United States. Arthur Gunlicks has identified a similar pattern in constitution making in the German *Länder*.³² The *Land* constitutions that preceded the adoption of the German Basic Law tended to include "the whole array of political and social provisions, including basic human rights."³³ Those drafted after the adoption of the Basic Law focused on organizational principles, because social concerns and rights guarantees had already been dealt with in the Basic Law. Finally, the *Länder* constitutions drafted since

26. There is an alternative version of this as well. Sometimes constituent units use their sub-national constitutions to preserve what has been jettisoned at the national level. In the United States, for example, controls over liquor were maintained even after the federal government rejected prohibition with the ratification of the Twenty-first Amendment. In addition, state courts have interpreted state constitutions to maintain substantive due process after its repudiation by the U.S. Supreme Court and has recognized rights claims, such as the requirement of public funding for abortions, after the Supreme Court rejected such claims as a matter of federal constitutional law.

27. See TARR, *supra* note 25, at 82-90.

28. See *id.* at 109-21.

29. See *id.* at 150-57.

30. See *id.* at 157-61.

31. See *id.* at 60-172.

32. See generally Gunlicks, *supra* note 21.

33. Arthur B. Gunlicks, *State (Land) Constitutions in Germany*, 31 RUTGERS L.J. 971, 981 (2000).

1990 have reflected “modern values,” seeking to guide political practice through the inclusion of social rights and state goals.³⁴

Yet, in order for changing political ideas to encourage constituent units to make use of the constitutional space available to them, there must be some time lag between the adoption of the federal constitution and the adoption of its sub-national counterparts in order for a shift in political ideas to take place. In many federations this is simply not the case, either because the federation is of relatively recent origin (e.g., Russia and South Africa) or because the federation has adopted a new constitution in the recent past (e.g., Argentina, Brazil, Nigeria, and Switzerland). Also, insofar as the federal constitution can be revised with relative ease, the federation may itself respond to changing political ideas with constitutional amendments, thereby keeping the federal charter “up-to-date” and reducing the need for sub-national constitutions to take the lead in pioneering new directions. On the other hand, if the federal constitution is substantially more difficult to change than the sub-national constitution, then even if the two constitutions were adopted at the same time, over time their contents are likely to diverge. This may have broader implications as well, as the frequency or infrequency of constitutional change may affect how political actors view the constitutions that are amended or revised. In the United States, for example, the infrequency of formal constitutional change at the national level has imbued the federal Constitution with a sense of untouchability, of being above politics, whereas the frequency of amendment at the state level has encouraged the public to view changes in state constitutions as merely part of “normal politics.”³⁵

A further factor encouraging constituent units to occupy the constitutional space available to them may be regional differences reflecting distinctive political or legal cultures or traditions, sometimes linked to ethnic diversity. Daniel Elazar identified regional differences in political culture in the United States and demonstrated how they have influenced American state constitutions.³⁶ Much greater diversity can be found in many other federations, and this can lead constituent units either to enshrine their residents’ distinctive culture in their constitutions or to provide additional protections to ethnic minorities situated within their borders. These efforts to occupy constitutional space may involve matters such as the official language of the constituent unit, as in Ethiopia, or the language rights of minority populations, as in Germany,

34. Gunlicks, *supra* note 21, at 111-12.

35. See CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS (G. Alan Tarr ed., 1996).

36. DANIEL ELAZAR, EXPLORING FEDERALISM 18-22 (1987); see generally, DANIEL ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed. 1984).

or the rights of native peoples concentrated in the state, as in Mexico.³⁷

Sometimes a single change at the sub-national level may precipitate other changes as well. This is particularly likely when the establishment of new avenues for sub-national constitutional change empowers groups who had previously been stymied. A prime example is the addition of mechanisms of direct democracy to sub-national constitutions. The availability of this new avenue of change may enable groups who were relatively ineffective in other arenas to pursue their objectives, thereby opening up the possibility of a succession of constitutional amendments. More generally, the more numerous the mechanisms for instituting constitutional change, the more likely such change is to occur, and thus the more likely that constituent units will occupy the constitutional space available to them.

Finally, the distribution of political forces within the federation affects the likelihood that constituent units will occupy the political space available to them by creating either incentives or disincentives for political mobilization for sub-national constitutional change. If the party that is in control at the national level is in control within the various constituent units, then it is more likely that constitutional reform will be pursued at the national level or that constituent units will model their constitutions on the federal charter. While the Institutional Revolutionary Party (PRI) held power both nationally and within the Mexican states, centralization of power was the norm, and federalism and sub-national constitutions were largely ignored. Insofar as there was significant constitutional change, it was concentrated at the national level: from 1917-2000, there were 400 amendments to the federal constitution.³⁸ Conversely, if political parties that are in political opposition at the national level control the governments of some constituent units, they will likely make use of that political control to advance their own agenda, and this may include constitutional innovations in the space available to them. Thus, when Progressives gained control of the California government in the early part of the twentieth century, they constitutionalized a number of reforms that were anathema to the more conservative Republicans who dominated the

37. On Ethiopia, see Fessha, *supra* note 10, at 399-406; on Germany and the protection of language rights of minorities within particular *Länder*, see Norman Weiss, *The Protection of Minorities in a Federal State*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 80-83 (G. Alan Tarr, et al. eds., 2004); and on Mexico, where the Oaxaca Constitution extended protections for native people before the federal constitution did, see Juan Marcos Gutiérrez González, *United Mexican States*, in *CONSTITUTIONAL ORIGINAL, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES* 209, 214 (G. Alan Tarr, et al. eds., 2005).

38. Gonzalez, *supra* note 37, at 233.

federal government.³⁹ More recently, faced with a conservative U.S. Supreme Court, American state courts have interpreted their state declarations of rights to provide greater constitutional protections than were available under the federal charter.⁴⁰

It also may be that the existence of strong national political parties discourages distinctive initiatives from constituent units, reducing their interest in occupying the constitutional space available to them. Indeed, some constituent units may make deliberate, rational choices not to occupy fully the space legally allotted to them. South Africa provides a particularly telling example of this. The African National Congress, as a matter of party policy, mandated that the provincial governments it controlled should not draft provincial constitutions; the result has been that only Western Cape Province now has a provincial constitution.⁴¹ One could speculate that, conversely, the existence of regional or ethnically based parties might have the opposite effect.

CONSEQUENCES OF THE USE OF SUB-NATIONAL CONSTITUTIONAL SPACE

Dissenting in *New State Ice Co. v. Liebmann*,⁴² Justice Louis Brandeis of the U.S. Supreme Court noted that “it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, without risk to the rest of the country.”⁴³ Brandeis’s underlying assumption was that a multiplicity of policy experiments would be more likely to discover good public policy than would a single effort. If the experiment in one constituent unit failed, the damage would be confined to a single jurisdiction. But if it succeeded, then other jurisdictions could emulate the successful experiment in their own law and public policy. Brandeis’s depiction of states as the laboratories of democracy has been endlessly repeated by

39. For discussion of these reforms, see SPENCER C. OLIN, JR., CALIFORNIA'S PRODIGAL SONS: HIRAM JOHNSON AND THE PROGRESSIVES 1911-1917 (1968).

40. On this so-called “new judicial federalism,” see G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, PUBLIUS, Spring 1994, at 63-79. For a valuable comparative assessment, see generally Celine Fercot, *Diversity of Constitutional Rights in Federal Systems: A Comparative Analysis of German, American, and Swiss Law*, 4 EUR. CONST. L. REV. 302 (2008).

41. See Rassie Malherbe & Dirk Brand, *South Africa: Sub-National Constitutional Law*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS, CONSTITUTIONAL LAW, SUB-NATIONAL CONSTITUTIONAL LAW 1, 1 (Andre Alen, et al. eds., 2001).

42. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

43. *Id.* at 311. For a discussion of Justice Brandeis’s argument, see A.E. Dick Howard, *Does Federalism Secure or Undermine Rights?*, in FEDERALISM AND RIGHTS 11, 11-25 (Ellis Katz & G. Alan Tarr eds., 1996). On the problematic roots of Justice Brandeis’s idea, see G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, PUBLIUS, Winter 2001, at 37.

proponents of federalism and has spawned a rich literature documenting the diffusion of innovations within federations.⁴⁴ Our inquiry into the consequences of constituent units occupying their sub-national constitutional space can be understood as a sub-category within that literature. Thus, much of what has already been written about policy diffusion in federal systems also applies to the diffusion of sub-national constitutional innovations. Let us highlight a few points about the horizontal and vertical diffusion of sub-national constitutional innovations.

Existing sub-national constitutions serve as models, either positive or negative, for constitution-makers in other constituent units. This is hardly surprising. The practice of drawing upon or copying provisions reflects, in part, a respect for the efforts of earlier constitution-makers. In describing the evolution of American state constitutions, Willard Hurst explained: “There was a sort of *stare decisis* about this making of constitutions; it was altogether natural in a country in which men moved about readily taking with them the learning and institutions of their former homes.”⁴⁵ This willingness to draw upon the experience of other states is enhanced by the recognition that constituent units face common constitutional and policy problems. Particularly, in symmetrical federal systems, the constituent units share the same powers and confront the same policy concerns, and so they tend to be open to what has worked in other constituent units.

Although Brandeis’s focus was on the United States, sub-national constitutional borrowing is not confined to a single country. For example, Peter Quint has documented that similar borrowing occurred as part of sub-national constitution making during German reunification:

Even the most modest of these new state constitutions reflect the lessons of the GDR past and the 1989 revolution, and—with all their similarities to the Basic Law—can still be said to represent a distinctly different, and distinctly eastern, constitutional consciousness. One important question of future constitutional development in Germany is the extent to which the consciousness . . . may ultimately make its way, through constitutional revision or judicial interpretation, into the constitutional consciousness of the

44. For studies focusing on the United States, see Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969); Robert L. Savage, *Diffusion Research Traditions and the Spread of Policy Innovation in a Federal System*, PUBLIUS, Fall 1985, at 1; Virginia Gray, *Competition, Emulation, and Policy Innovation*, in NEW PERSPECTIVES ON AMERICAN POLITICS 230, 230 (Lawrence C. Dodd & Calvin Jillson eds., 1994).

45. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 224-25 (1950).

unified nation and the west itself.⁴⁶

Indeed, there is even evidence that borrowing of constitutional innovations may on occasion extend beyond the borders of a single federation. For example, the initiative and referendum provisions added to the Oregon Constitution in 1902 were based on an idea of direct democracy reflected in the constitutions of the cantons of Switzerland.⁴⁷

Yet if commonalities among constituent units encourage borrowing of constitutional provisions, it seems equally likely that differences among constituent units may discourage such borrowing. Put differently, insofar as conditions and values differ within a federation, it is less likely that constituent units will emulate the sub-national constitutional innovations pioneered in “different” units. Thus, when constituent units are organized to reflect differences within the population of a federation, those differences—and any attempts to give them constitutional expression—may lead to the creation of distinctive constitutional arrangements that are only appropriate within the particular unit. Also, if some constituent units within an asymmetrical federal system have greater constitutional space than do others, then again that will retard the diffusion of constitutional innovations, because some units might not have the authority to follow the path taken by units with greater powers.

When constituent units occupy the constitutional space available to them, this may also affect constitutional politics at the federal level, because the process of imitation and emulation can work vertically as well as horizontally. Our analysis here focuses on the United States, but presumably it has broader application as well. State constitutional provisions played an important part in drafting the United States Constitution, as the framers both borrowed ideas from state constitutions—for example, the President was modeled quite closely on the governor of New York—and rejected state constitutional experiments that they found misguided—for example, the power of citizens to “instruct” their representatives.⁴⁸ State constitutional provisions also influenced the federal Bill of Rights.⁴⁹ And since the founding, both

46. PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 99 (1997). For a survey of judicial interpretations of the new German *Länder* constitutions, see Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 310-21, 325 (1999). See also Igna Markovits, *Reconcilable Differences: On Peter Quint's The Imperfect Union*, 47 AM. J. COMP. L. 189, 194-97, 206-09 (1999).

47. David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System"*, 67 TEMP. L. REV. 947, 950 (1994).

48. See, e.g., Robert F. Williams, *Experience Must Be Our Only Guide: The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403 (1988).

49. Donald Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*,

federal statutes and amendments to the federal Constitution have drawn upon state constitutional models. For example, the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter.⁵⁰ So too were provisions guaranteeing equal protection of the laws, banning poll taxes, and prohibiting the sale or use of alcohol.⁵¹ Thus, one ironic consequence of this, one of the implications of Brandeis's metaphor of the states as laboratories that is less frequently noted, is that states occupying constitutional space with successful innovations may encourage the federal government to adopt those innovations. But by federalizing the issue, it may diminish the scope of sub-national constitutional control.

The American experience also reveals that when states occupy the constitutional space available to them, this can produce active avoidance rather than emulation. This has occurred when states have sought to occupy constitutional space by creating state constitutional rights broader than what was available under the federal Constitution. A recent, highly publicized example involved rulings by state supreme courts in Massachusetts, California, Connecticut, and Iowa recognizing same-sex marriage as mandated by their state constitutions.⁵² Instead of emulation, these rulings prompted actions by other states to prevent the diffusion of these innovations and to preempt similar rulings within their own borders by constitutionally prescribing that marriage is limited to male-female couples.⁵³ The rulings also prompted an unsuccessful effort to define

PUBLIUS, Spring 1992, at 19.

50. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

51. On equal protection, see generally Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990). On poll taxes, see KEYSSAR, *supra* note 50, at 262. On prohibition, see RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920*, 4 (1995).

52. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (this case consisted of six consolidated appeals); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

53. States that have adopted constitutional amendments defining marriage as between one male and one female include: Alabama (ALA. CONST., Amend. 774); Alaska (ALASKA CONST. Art. I, sec. 25); Arizona (ARIZ. CONST., Art. XXX); Arkansas (ARK. CONST., Amend. 83); Colorado (COLO. CONST., Art. II, sec. 31); Florida (FLA. CONST., Art. I, sec. 27); Georgia (GA. CONST., Art. I, sec. 4); Hawaii (HAW. CONST., Art. I, sec. 23); Idaho (IDAHO CONST., Art. III, sec. 28); Kansas (KAN. CONST., Art. XV, sec. 16); Kentucky (KY. CONST., sec. 233A); Louisiana (LA. CONST., Art. XII, sec. 15); Michigan (MICH. CONST., Art. I, sec. 25); Mississippi (MISS. CONST., Art. XIV, sec. 263A); Missouri (MO. CONST., Art. I, sec. 33); Montana (MONT. CONST., Art. XIII, sec. 7); Nebraska (NEB. CONST., Art. I, sec. 29); North Dakota (N.D. CONST., Art. XI, sec. 28);

marriage in the federal Constitution, which was an attempt to federalize the issue not in order to follow the states' lead but in order to circumscribe state constitutional space.⁵⁴

CONCLUSIONS AND FUTURE DIRECTIONS

Constitutions for constituent units that are drafted by those units and that are separate from the federal constitution are a feature of most, though not all, federations. This article is a preliminary synthesis of what we know—and as implied by gaps in the analysis, what we do not yet know—about these sub-national constitutions and their role in federal systems. It identifies those factors that might influence the scope of the constitutional space available to constituent units and the factors that might affect the extent to which constituent units occupy—or fail to occupy—the constitutional space available to them. It also considers how sub-national constitutions both affect and are affected by the federal system of which they are a component.

One tentative conclusion is that the constituent units of federations often fail to occupy fully the constitutional space available to them. They may refrain from developing sub-national constitutions altogether, as in most provinces of South Africa. Even when they do devise constitutions, they may proceed in lockstep with the federal constitution or with the constitutions of other sub-national units, never considering what political arrangements might be most appropriate for their time and circumstances. If this is correct, it suggests that there may be unrealized political opportunities in several federations. Constituent units may provide greater opportunities for groups who are outnumbered nationally to participate in politics, to have their rights recognized, and to advance their common concerns. Contemporary trends point toward expanding recognition and autonomy for groups in multilingual, multicultural, multiethnic and multinational states, sometimes as the only alternative to either political frustration or secession. Sub-national constitutionalism can provide a way to respond to demands for recognition and self-rule.

Beyond that, this article is designed to show that analysis of sub-national constitutions is essential for a full understanding of the constitutional architecture of federal systems and that the sub-national

Ohio (OHIO CONST., Art. XV, sec. 11); Oklahoma (OKLA. CONST., Art. II, sec. 35); Oregon (OR. CONST., Art. XV); South Carolina (S.C. CONST., Art. XVII, sec. 15); South Dakota (S.D. CONST., Art. XXI, sec. 9); Tennessee (TENN. CONST., Art. XI, sec. 18); Texas (TEX. CONST., Art. I, sec. 32); Utah (UTAH CONST., Art. 01); Virginia (VA. CONST., Art. I, sec. 15-A); and Wisconsin (WIS. CONST., Art. XIII, sec. 13).

54. The Federal Marriage Amendment (H.J. Res. 88) was introduced in 2006, but failed to get the two-thirds approval in the House of Representatives necessary for a federal constitutional amendment.

perspective, with its emphasis on state constitutional space, illuminates new aspects of federal constitutionalism. If it has done so, and if it has encouraged further research in comparative sub-national constitutionalism, then it has accomplished its purpose.