



Models of Subnational Constitutionalism

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## INTRODUCTION

In 1977, a group of Nigerian constitution makers asked an astute question. Following a gruesome civil war, Nigeria began the task of crafting a federal constitutional democracy.<sup>1</sup> Although the constitutional delegates agreed on a decentralization of political power, they nevertheless asked a separate question: should the Nigeria states be permitted to adopt their own constitutions?<sup>2</sup> The proceedings from the 1977 Constituent Assembly show that the delegates gave careful consideration to that question as a distinct institutional choice.<sup>3</sup> They decided that although Nigeria was committed to a federal arrangement, the states should not be permitted to adopt their own constitutions.<sup>4</sup> State constitutionalism, they concluded, had proven too “divisive”<sup>5</sup> during

1. See generally DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 602-13 (1985) (recounting the history of Nigeria’s Two Republics between 1960 and 1983). The 1979 Nigerian Constitution was the result of a two-stage process that began with the Constitutional Drafting Committee and ended with the document’s adoption by the Constituent Assembly. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 176-77 (1987) (explaining the Nigerian constitution-making process).

2. See PROCEEDINGS OF THE CONSTITUENT ASSEMBLY, vol. 1, Nov. 16, 1977, at 782-83. The constitutional delegates identified two justifications for retaining a federal structure. First, federalism was a means of accommodating multiple ethnic groups within the federation. See L. Adele Jinaduu, *The Constitutional Situation of the Nigerian States*, 12 *PUBLIUS* 155, 158-59 (1982). Second, decentralization of government agencies and services was intended to facilitate public access to those goods. *Id.*

3. See PROCEEDINGS OF THE CONSTITUENT ASSEMBLY, *supra* note 3, at 782-83 (“The third feature of the Draft Constitution is that we have no State Constitution[s]. . . . If you look at the 1963 Constitution, you will find that each Region or each state has got its own constitution, but that method has been abolished.”).

4. See REPORT OF THE CONSTITUTIONAL DRAFTING COMMITTEE, vol 1, at iv (1977) (“We have adopted the . . . method of having one instrument containing the constitution of the Federation and for every state.”).

5. PROCEEDINGS OF THE CONSTITUENT ASSEMBLY, vol. 1, Nov. 16, 1977, at 782-83.

Nigeria's prior constitutional regime, and it "was inimical to the unity of the country."<sup>6</sup>

The Nigerian experience begs a deeper question that theorists have largely neglected. Although scholars and constitution-makers have developed various theories regarding the utilities of federalism,<sup>7</sup> they have not separately considered how subnational constitutions can uniquely serve (or undermine) those same purposes. Nor have they searched for any independent purposes that subnational constitutionalism may serve. In short, theorists have largely failed to consider the independent normative justifications for introducing subnational constitutionalism into federal systems. As the Nigerian experience illustrates, that theoretical question is not without serious practical consequences.<sup>8</sup>

This Article takes up that important but neglected question. The goal is to move towards a systematization and critical analysis of possible justifications for introducing subnational constitutionalism into federal systems. The Article first offers a description of subnational constitutionalism that is derived from rational-choice theories of political institutions and a survey of the world's federal systems.<sup>9</sup> It concludes that subnational constitutionalism is best described as a series of rules (both formal and informal) that protect and define the authority of subnational units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation.<sup>10</sup> Building upon that working description, the Article argues that there are at least three coherent justifications for subnational constitutionalism. First, it can deepen a federal system's

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6. Jinaduu, *supra* note 2, at 163-65 (discussing the committee's deliberations and conclusions regarding state constitutionalism); see ELAZAR, *supra* note 1, at 176 ("The 1979 federal constitution was designed to restore civilian rule to Nigeria.").

7. See generally Donald L. Horowitz, *The Many Uses of Federalism*, 55 *DRAKE L. REV.* 953 (2007). Federalism can, among other things, promote government efficiency, accommodate group pluralism, and provide checks-and-balances that can protect against tyranny. See *infra* notes 73-76 and accompanying text.

8. See Jinaduu, *supra* note 2, at 165 (analyzing whether the removal of subnational constitutionalism from Nigeria's federal structure actually served to unify the country or whether unification may have been better served by allowing the Nigerian states "some symbols of independence, such as separate constitutions of their own. . ."). South Africa presents another contemporary example where constitution makers separately considered whether and how subnational constitutionalism should be incorporated into the system's federal structure. 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, 621-29 (2008) (discussing South Africa's constitutional deliberations regarding subnational constitutionalism and the significance of subnational constitutionalism in the delicately negotiated transition from apartheid to democracy).

9. See discussion *infra* Part I.

10. See discussion *infra* Part I.A.

ability to accommodate multiple political communities within a single constitutional regime.<sup>11</sup> Second, it can uniquely contribute to federalism's liberty-protecting, check-and-balances function.<sup>12</sup> Third, the Article argues that scholars have largely overlooked the possibility that subnational constitutionalism can improve the deliberative quality of democracy within subnational units and the federal system as a whole.<sup>13</sup>

Modeling subnational constitutionalism in this way is valuable for at least two reasons. First, it contributes to the study and practice of institutional design.<sup>14</sup> As Nigeria's experience illustrates, contemporary constitution makers are faced with myriad institutional choices that can have important societal repercussions. By modeling plausible consequences associated with subnational constitutionalism, scholars can help to inform those significant choices.<sup>15</sup> Second, an institutional perspective on subnational constitutionalism advances the study of subnational constitutional theory. Subnational constitutions are too frequently analyzed through the lens of generic constitutional theories that assume single-constitution systems.<sup>16</sup> In order to capitalize on the great value of subnational constitutionalism, scholars must engage it as a distinct institutional phenomenon that demands its own theoretical inquiry.<sup>17</sup> That inquiry should include the study of predictable

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11. See discussion *infra* Part III.A.

12. See discussion *infra* Part III.B.

13. See discussion *infra* Part IV.

14. See Horowitz, *supra* note 7, at 953-55 (discussing in general terms the practice and study of "constitutional design"). As used here, "institutional design" refers to the purposeful and prospective task of designing political arrangements in view of their expected consequences. *Id.* This task is frequently associated with rational-choice theories of political institutions. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992) (describing the rational-choice based "positive political theory" approach to political institutions). Noteworthy examples of legal scholarship in this field include DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* (1991); Daniel J. Elazar, *The Use of Federalism in the Reconstruction of the Ex-Soviet Republics*, in *FEDERALISM AND THE WAY TO PEACE* 73, 73 (1994); Daniel J. Elazar, *Can Federal Arrangements Serve the Cause of Middle East Peace?*, in *FEDERALISM AND THE WAY TO PEACE* 95, 95 (1994). Rational-choice theories of political institutions are frequently traced to the theoretical work of economist Douglass C. North. See generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

15. See, e.g., HOROWITZ, *supra* note 14, at 124-231 (offering various institutional design suggestions to deal with problems South Africa faced during its transition from apartheid to democracy).

16. See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* 15-18 (2005) (making this point vis-à-vis U.S. constitutional theory and state constitutional theory).

17. See generally Daniel J. Elazar, *State Constitutional Design in the United States and other Federal Systems*, 12 *PUBLIUS* 1, 1-3 (1982) (suggesting some theoretical questions unique to subnational constitutionalism).

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consequences associated with decentralizing responsibility for structuring and limiting subnational power.

This Article has four parts. Part I presents and defends an institutional description of subnational constitutionalism. Part II explores the implications of that definition for subnational constitutional theory and federal theory. Part III discusses two commonly recognized justifications for subnational constitutionalism. Part IV argues that one overlooked justification for subnational constitutionalism is that it can improve the deliberative quality of democracy within federal systems. Because scholars have largely overlooked the deliberative capacities of subnational constitutionalism, the Article devotes significant time to developing and analyzing the potential for subnational constitutionalism to contribute to the deliberative quality of federal constitutional democracies. Part IV also includes a brief comment on the role of state constitutions within the U.S. federal system.

#### I. TOWARD AN INSTITUTIONAL DESCRIPTION OF SUBNATIONAL CONSTITUTIONALISM

What is subnational constitutionalism? This question has gone almost unnoticed in the study of subnational constitutional law, but it is the necessary starting point for any theoretical investigation regarding the normative justifications for subnational constitutionalism.<sup>18</sup> The goal of this section is to accurately describe subnational constitutionalism from both the theoretical standpoint of positive political theory and the reality of the world's federal systems.

##### A. *Institutions, Federalism, and Subnational Constitutionalism*

Generally speaking, in the context of positive political theory, political scientists use “institution” to refer to “the relatively durable

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18. Research revealed only two instances where this question is directly addressed. See G. Alan Tarr, *Subnational Constitutional Space: An Agenda for Research* (June 2007) (unpublished paper delivered at the World Congress of the International Association of Constitutional Law, Athens, Greece, 2007, on file with the Rutgers Law Journal) available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf>; Cheryl Saunders, *The Relationship Between National and Subnational Constitutions*, in *SUBNATIONAL CONSTITUTIONAL GOVERNANCE* 11, 11 (Gretchen Carpenter ed., 1999). Tom Ginsburg and Eric A. Posner address a related issue in their recent article, *Subconstitutionalism*, but their methodology is to identify a series of conditions pursuant to which their agency model of “subconstitutionalism” holds true. See Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 *STAN. L. REV.* 1583, 1585 (2010) (“We use a simple theory that makes a single assumption that distinguishes subconstitutions (that is, the constitutions of substates) from ordinary constitutions: that the superior state in the two-tiered system reduces agency costs that would otherwise exist in the subordinate state.”).

structures and processes of political decisionmaking. . . . Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction”<sup>19</sup> In consequence they structure incentives in human exchange, whether political, social, or economic.”<sup>20</sup> Institutions can be formal, such as legal codes, or informal, such as social customs, mores, and traditions.<sup>21</sup>

The crucial point is that institutions channel and structure human behavior.<sup>22</sup> This can happen in a variety of ways. Institutions can create negative incentives for particular actions by issuing prohibitions backed by appreciable consequences.<sup>23</sup> Conversely, they can create affirmative incentives for desirable behaviors.<sup>24</sup> Institutions can also affect decisions by issuing rules that adjust costs relevant to decision making.<sup>25</sup>

This approach to societal outcomes is useful for the study of legal arrangements because it provides a tool for forecasting likely social consequences associated with specific constitutional arrangements.<sup>26</sup> By identifying and analyzing the behavioral incentives and the menu of choices that constitutional rules will produce, it is possible to construct coherent models of institutional design.<sup>27</sup> That is, we can theorize regarding whether particular constitutional rules will likely produce specified normatively desirable outcomes.<sup>28</sup>

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19. Daryl J. Levinson, *Parchment Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 681 (2011) (citations omitted); see generally Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 SAN DIEGO L. REV. 523, 537-38 (2000) (describing positive political theory and rational-choice theories of institutional politics); Farber & Frickey, *supra* note 14, at 462 (same).

20. NORTH, *supra* note 14, at 3-4; see also Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1176 (2003) (applying institutional analysis).

21. NORTH, *supra* note 14, at 3-4.

22. This does not mean that institutions are static and fixed. In reality, political institutions are “fluid and constructed.” Rodriguez, *supra* note 19, at 537-38. They nevertheless provide form to and create incentives that channel human decision making. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 2-4 (2004) (exploring the significance of the “temporal dimensions of social life for our understanding of important political outcomes”).

23. See generally NORTH, *supra* note 14, at 3-69 (discussing the ways in which institutions can affect behavior).

24. *Id.*

25. See Rodriguez, *supra* note 19, at 537-38.

26. See Farber & Frickey, *supra* note 14, 463-71 (discussing application of positive political theory models to legal issues).

27. The well-documented criticism of this approach is that it makes various assumptions regarding human nature and choice. See Herbert Simon, *Rationality in Psychology and Economics*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 25, 25-40 (Hogarth & Reder eds., 1986).

28. See e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”*: A Theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1448 (1995) (constructing “a rational actor model along the lines developed by

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Within this paradigm, federalism can accurately be described as a set of rules (both formal and informal) that maintain a political system that divides power between various levels of government.<sup>29</sup> This theoretical paradigm also suggests a coherent description of subnational constitutionalism. It is best described as a set of rules (both formal and informal) that protect and define the authority of subnational units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation.<sup>30</sup>

As a political institution, federalism concerns the rules that divide power between levels of government. Subnational constitutionalism, on the other hand, concerns those particular rules that relate to the subnational units' ability to structure and limit their own power.<sup>31</sup> Subnational constitutionalism is therefore derivative of federalism because it cannot exist without a federal division of political power. It is nevertheless institutionally distinct from federalism because it concerns a separate set of rules directed to a different set of political choices.

Thus, from the standpoint of institutional design, the architecture of a federal system involves at least three analytically distinct institutional choices. First, constitution makers must determine whether it is appropriate or desirable to divide power between levels of government; i.e., whether to adopt a federal rather than a unitary structure. Second, they must determine which government competencies should be assigned to each level of government. Third, they must determine what degree of independence (if any) subnational units should have in structuring and

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positive political theory" that "exploits the . . . assumption that institutional design and structure have profound effects on the way purposive, self-interested government institutions interact.").

29. See ELAZAR, *supra* note 1, at 33-38 (describing federalism as a system of rules that retains a decentralized and diffuse organization of political power); Horowitz, *supra* note 7, at 958 (describing federalism as "the existence of substate territorial units holding some governmental power that the central government does not hold").

30. In a sense, all federal systems contain subnational constitutions because subnational power must be organized (or "constituted") in some way. Saunders, *supra* note 18, at 26; Ronald L. Watts, *States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L. J. 941, 951-52 (2000). However, as explained below, subnational constitutionalism as a distinct institutional phenomenon occurring within the world's federal systems is narrower. See discussion *infra* Part I.B (discussing legal characteristics of subnational constitutionalism). It concerns the authority of subnational units to structure and limit their own power.

31. Although subnational constitutionalism is not usually articulated in this way, the Argentinean Constitution contains a particularly astute description. It declares that the provinces shall adopt constitutions that "determine their own local institutions and are governed by them" and provide for the election of "their governors, legislators, and other provincial officers, without intervention of the federal government." Art. 122, CONSTITUCIÓN NACIONAL (Arg.); see generally Watts, *supra* note 30, at 951-52 (cataloging the various sources of authority within federal regimes for subnational units to adopt their own constitutions).

limiting their assigned powers; i.e., whether to incorporate subnational constitutionalism.<sup>32</sup> Conceptualizing the relationship between subnational constitutionalism and federalism in this way is a first step towards a coherent analysis of the independent normative justifications for introducing subnational constitutionalism into federal systems.

### *B. Legal Characteristics of Subnational Constitutionalism*

The above theoretical description finds support in the reality of the world's federal systems. A survey of those systems reveals more concrete legal parameters that circumscribe subnational constitutionalism as a distinct institutional phenomenon: (1) subnational units must have independence regarding some fundamental content such as government structure and individual rights; (2) subnational constitutions must be entrenched and supreme relative to other forms of subnational law; and (3) subnational constitutions must be endorsed by their respective subnational communities.<sup>33</sup>

#### 1. Contingent Fundamental Content

A federal system allows for subnational constitutionalism only if it permits subnational units some discretion in framing and/or limiting subnational government. That is, the rules of the federal regime must

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32. These three steps can be further divided into additional institutional choices that may give rise to a variety of creative institutional arrangements. The point here is not to provide a comprehensive algorithm for federal design, but to clearly disentangle the decision to adopt federalism from the decision to adopt subnational constitutionalism.

33. The methodology here is primarily descriptive. There are approximately twenty formally federal systems in the world. See ELAZAR, *supra* note 1, at 177-78 (listing federal countries as of 1987; updated to include Iraq and South Africa); see John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L. J. 837, 839 (2008) (updating Elazar's 1987 list). Of these twenty systems, fourteen permit subnational units to adopt constitutions. See ELAZAR, *supra* note 1, at 177-78; see also Dinan, *supra*, at 839. Those fourteen systems are: Argentina, Australia, Austria, Brazil, Ethiopia, Germany, Iraq, Malaysia, Mexico, Russia, South Africa, Switzerland, the United States, and Venezuela. Dinan, *supra*, at 839-40; see also John Dinan, *Patterns and Developments in Subnational Constitutional Amendment Processes* (May 15, 2009) (unpublished paper presented at Symposium: Redefining the Political Order: New Processes for Constitution-Making, Universite Naval) available at [http://www.democratie.chaire.ulaval.ca/Upload/article\\_dinan\\_27082009\\_160838.pdf](http://www.democratie.chaire.ulaval.ca/Upload/article_dinan_27082009_160838.pdf) [hereinafter *Patterns and Developments*]. The description of subnational constitutionalism offered here accurately reflects subnational constitutionalism as it exists in those systems. The Article does not make a normative claim that all of the characteristics describe here are necessary conditions of subnational constitutionalism. Rather, the claim is that within the world's federal systems there is an identifiable institutional phenomenon that can appropriately be called subnational constitutionalism. This institutional phenomenon is characterized by the features described here.



permit subnational units to address fundamental issues such as government structure and/or individual rights.

However, subnational constitutions are by definition substantively contingent. All federal constitutional democracies have an overarching constitutional structure that captures the people's choices regarding the appropriate allocation of powers between the various levels of government.<sup>34</sup> Subnational constitutions operate within this legally defined "space," which is circumscribed by the national constitution.<sup>35</sup> The national constitution determines exactly what "range of discretion . . . is available to the component units in a federal system in designing their constitutional arrangements. . . ."<sup>36</sup> Subnational constitutions are therefore second-order institutions in that their scope of substantive content and the realm of permissible constitutional choices available to subnational communities are legally constrained by the national constitution.<sup>37</sup> In this sense, the content of subnational

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34. See Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 205 (1990) ("As a system of divided powers, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law."). Koen Lenaerts has identified two kinds of federal systems: integrative federalism and devolutionary federalism. He distinguishes the two models as follows:

*Integrative federalism* refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government with direct operation on the people inside its sphere of powers is pursued under respect of the powers of the component entities, at least to the extent that the use by the latter of these powers does not revert into divisiveness.

. . .

*Devolutionary federalism*, on the contrary, refers to a constitutional order that redistributes the powers of a previously unitary State among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal concern is to organize diversity in unity.

*Id.* at 206. The description here does not exclude either of these two models. Although those models develop differently, they both ultimately result in an overarching national constitution that defines the scope of "constitutional space" afforded to subnational units. Nor does the description require that the overarching constitutional arrangement be contained in a single constitutional text. Federations such as Austria maintain subnational constitutionalism based on a federal constitution that is comprised of various constitutional acts. See Anna Gamper, *Austrian Federalism and the Protection of Minorities*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 55, 55 (G. Alan Tarr et al., eds. 2004) (describing Austria's federal arrangement).

35. Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View From the States, Provinces, Regions, Länder and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 3-25 (G. Alan Tarr et al. eds., 2004) (describing the substantive legal "space" afforded subnational constitutions in different federal systems).

36. *Id.* at 5.

37. See Watts, *supra* note 30, at 954 ("[I]ssues of the scope of jurisdiction of subnational governments and their interrelationship with the national or federal government have always been defined in the national or federal constitution. . . .").

constitutions is contingent on the rules of the particular federal regime within which they reside.

Thus, the “constitutional space” allotted to subnational units regarding fundamental content takes various forms. Some federal regimes, for example, allow subnational units to establish legislative and executive branches, but prohibit subnational units from creating their own judiciary.<sup>38</sup> Many federal regimes impose specific structural and procedural parameters within which subnational units must operate when designing their institutions.<sup>39</sup> Federal regimes may also establish default structural provisions for all subnational governments, but allow subnational units to adopt their own constitutions that deviate from those default provisions if they choose.<sup>40</sup> It is also common for federal regimes to establish certain national minimum standards regarding individual rights, but permit subnational units to provide greater protection above this minimum standard.<sup>41</sup> Furthermore, the rules regarding subnational constitutional space need not be the same for all subnational units.

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38. *Id.*

39. Brazil is a good example of this. Its national constitution provides many particulars regarding legislative and executive structure and procedure. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] art. 27 (Braz.) (“The term of the State Representatives is four years, and they are subject to the provisions of this Constitution regarding the electoral system, inviolability, immunities, compensation, loss of office, leave of absence, impairments, and enlisting into the Armed Forces.”); C.F. art. 28 (“The election of the State Governor and Vice Governor, for a term of office of four years, is held ninety days before the end of their predecessors’ term of office, and they take office on January 1st of the subsequent year, observing, otherwise, the provisions of Article 77.”).

40. South Africa presents the only active example of this arrangement. South Africa’s national constitution provides “full particulars” regarding all necessary provincial government institutions. I.M. RATENBACH & E.F.J. MALHERBE, CONSTITUTIONAL LAW 244 n. 22 (4th ed. 2004); *see In re Certification of the Constitution of the Western Cape* 1997 (9) BCLR 1167 (CC) at para. 15 (S. Afr.) (“[The national constitution] provides a complete blueprint for the regulation of government within provinces which provides adequately for the establishment and functioning of provincial legislatures and executives.”). The provinces may nevertheless adopt their own constitutions that deviate, to a very limited degree, from the national constitution’s default design. *See Marshfield, supra* note 8, at 591-95 (describing the provinces’ limited constitutional space). The South African Constitutional Court has held that provincial constitutions may alter provincial institutions and may, in principle, contain a bill of rights. *See* Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa’s Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625, 638-40 (1999) (describing Constitutional Court’s rulings).

41. The Austrian Constitution, for example, expressly provides that states may “not impose more stringent conditions for suffrage and electoral eligibility than the electoral regulations for the House of Representatives.” BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] Art. 95; *see* Robert F. Williams, *Comparative State Constitutional Law: A Research Agenda on Subnational Constitutions in Federal Systems*, in LAW IN MOTION 339 (Roger Blanpain, ed. 1996) (discussing this phenomenon generally).

Asymmetrical federal arrangements can tailor subnational constitutional space to particular subnational units.<sup>42</sup>

The purpose here is not to catalogue those variations but simply to note that subnational constitutional space must permit subnational units some discretion regarding fundamental content.<sup>43</sup> A federal system that establishes subnational government institutions and does not permit subnational units to alter or limit those institutions in any way does not provide for subnational constitutionalism. Of the fourteen federal systems that currently permit subnational units to adopt constitutions,<sup>44</sup> all of those systems give some degree of discretion to their subnational units regarding fundamental content.<sup>45</sup>

## 2. Entrenchment and Supremacy

Some form of entrenchment is necessary to distinguish subnational constitutions from legislation. This is implicit in the use of a written instrument to structure and limit government authority.<sup>46</sup> A definitional component of constitutionalism is that sovereignty resides with the

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42. See generally Horowitz, *supra* note 7, at 959 (discussing asymmetrical federalism). India provides a classic example of an asymmetrical subnational constitutional federal system because it permits only one state, Kashmir, to adopt a written constitution. See INDIA CONST. arts. 168-212 (describing the competencies of India's states); see also Elazar, *supra* note 17, at 9 (describing India's structural arrangement). Malaysia and South Africa provide additional examples. Malaysia's national constitution provides, among other asymmetrical allowances, that two states (Sabah and Sarawak), may make law regarding substantive areas prohibited to other states. See MALAYSIA CONST. Art. 95B. South Africa's 1993 Interim National Constitution provided that all provinces could "provide for the institution, role, authority and status of a traditional monarch," but required that the province of KwaZulu-Natal specifically adopt a constitution that provided for the recognition of the "Zulu Monarch." S. AFR. (INTERIM) CONST., 1993 § 160(3)(b).

43. See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91-96 (8th ed. 1927) (listing the essential content of a state constitution within the U.S. federal system); Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968) (same).

44. Those fourteen systems are: Argentina, Australia, Austria, Brazil, Ethiopia, Germany, Iraq, Malaysia, Mexico, Russia, South Africa, Switzerland, the United States, and Venezuela. Dinan, *supra* note 33, at 839-40.

45. Some systems, such as South Africa, permit subnational units only minimal "space" regarding subnational constitutions. See *infra* notes 63-72 and accompanying text. Other systems, such as the United States and Germany, provide subnational units with a great degree of discretion regarding constitutional issues. See *infra* notes 110-18 and accompanying text. In any event, all fourteen systems provide some degree of discretion regarding their subnational units' ability to organize and/or limit their subnational power.

46. See CASS R. SUNSTEIN, DESIGNING DEMOCRACY 97-105 (2001) (discussing entrenchment's role vis-à-vis constitutionalism); Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 375-76 (2003) (same).

people and that government representatives are agents subject to the trust agreement created by the people.<sup>47</sup> The consequence of this is that the trust agreement must be entrenched beyond the ordinary authority of government officials. In order to constrain the regular activities of government officials, the trust agreement must be changeable only by special and more arduous procedures.<sup>48</sup> A corollary of this is that constitutional law must be supreme.<sup>49</sup> Ordinary legislation or any other form of law that contradicts the constitution must be invalid.

Although subnational power is always contingent upon the overarching national constitution, the decision to allow subnational units some discretion in structuring and limiting that power implies that a suitable instrument is available for the task. To the degree that federal regimes allow subnational units to structure their delegated power by use of a subnational constitution, the constitution must be entrenchable and supreme. Subnational constitutions must be entrenched beyond the ordinary authority of the government officials and institutions that they constitute. If subnational constitutions are not entrenchable and supreme, they cease to be effective restraints on subnational authority, and, consequently, cease to be constitutions.

Again, mechanisms for entrenchment may vary. Some federal regimes impose universal top-down entrenchment standards.<sup>50</sup> Other regimes may simply protect the subnational units' rights to develop their own entrenchment mechanisms.<sup>51</sup> Whatever the rules, the point is that

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47. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 3-5 (1991) ("a written constitution is like a trust agreement. It specifies what powers the trustees are to have and it endows these agents with certain authority delegated by the settler who created the trust.").

48. See John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 418-29 (2003) (discussing purposes of entrenchment).

49. Constitutionalism is necessarily connected with the rule of law, which requires that government itself be subject to law. The supremacy of constitutional law is designed to realize this ideal. See Harvey Wheeler, *The Foundations of Constitutionalism*, 8 LOY. L.A. L. REV. 507, 508 (1975).

50. Austria's arrangement is an example. See BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] Art. 99(2) ("A State constitutional law can be passed only in the presence of half the members of the State Parliament and with a two thirds majority of the votes cast"). South Africa's national constitution also provides a universal entrenchment standard. S. AFR. CONST. 1996 § 142. (provincial constitutions can only be amended by a two-thirds majority of the provincial legislature). See generally Dinan, *supra* note 33, at 846 (discussing amendment procedures of subnational constitutions in world's federal systems).

51. The U.S. is a good example of this. The U.S. Supreme Court has traditionally defended the authority of the states to determine their own institutional arrangements. *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight States"). Federal courts have refused to subject state constitutional amendment rules and procedures to searching

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subnational constitutions must be insulated from the ordinary political process, so that the organs of government they establish are not entitled to change their own powers in the ordinary course of their official duties.

### 3. Community Endorsement

Subnational constitutions are derivative of both internal and external political communities. This is true regarding the content of subnational constitutions as well as their democratic legitimacy. As an external presence, the national political community defines the substantive space within which a subnational community can move when constituting itself. It determines, for example, what individual rights a subnational community can constitutionalize, and may impose some limitations on how subnational units design government institutions. Thus, subnational constitutions derive in part from the authority and preferences of the national community and in part from the authority and preferences of their corresponding subnational communities.<sup>52</sup>

By granting subnational communities some discretion regarding how subnational power will be organized and limited, a federal regime inevitably vests subnational communities with a degree of self-governance.<sup>53</sup> Subnational constitutions are, by definition, intended to reflect some degree of local input regarding the structure of subnational authority. A federal regime that does not allow for subnational input regarding the structuring of subnational authority, does not allow for genuine subnational constitutionalism.

One can imagine, for example, a national authority that crafts particularized constitutions for subnational units without any direct input from the subnational community. Under the description of subnational constitutionalism proposed here, those documents would not qualify as

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review. See, e.g., *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005). As a result, the states have developed a variety of different mechanisms and procedures for constitutional change. See THE BOOK OF THE STATES 14-19 (listing all amendment procedures for all states). But see Erwin Chemerisnky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 880 (1994) (arguing that the Supreme Court should review certain state law-making procedures under the Federal Constitution).

52. See Saunders, *supra* note 18, at 26 (“No subnational constitution is completely uncontrolled. . . . [S]ubnational constitutions therefore draw on the authority of the people organized nationally, as well as the authority of the people of the subnational community.”). This duality is inherent in the nature of federal arrangements. See ELAZAR, *supra* note 1, at 12 (defining federalism as a system of “self-rule plus shared rule”).

53. See ELAZAR, *supra* note 1, at 107-09 (explaining that decentralization of any substantive powers invariably implicates self-governance of subnational units); see generally VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM: CONSTITUTING A SELF-GOVERNING SOCIETY (1991) (exploring role of state authority in achieving self-governance for U.S. as whole).

subnational constitutions because they are entirely derivative of the national community. Although they are “constitutional” in the sense that they structure subnational authority, they are not “subnational” because they do not derive any content or portion of their legitimacy from the input or endorsement of their respective subnational communities.

Community endorsement may or may not involve direct popular input from subnational communities. Representative input may suffice so long as the relevant officials represent the particular interests of the subnational community. However, line-drawing is especially hard in this regard. Some federal regimes organize subnational governments by enacting “regional autonomy statutes” for subnational units.<sup>54</sup> These statutes are ultimately approved by national institutions, which may include representatives from the affected subnational unit.<sup>55</sup> Unless those representatives are given exceptional authority regarding those statutes—by means of some sort of region-based veto for example—it would seem that simply casting a vote in the national body does not amount to a satisfactory level of local input, and these statutes would not qualify as genuine—or at least pure—subnational constitutions.<sup>56</sup>

## II. SUBNATIONAL CONSTITUTIONAL THEORY

Before exploring possible justification for introducing subnational constitutionalism into federal systems, it is necessary to disentangle subnational constitutionalism (as described above) from two related but distinct concepts: constitutionalism and federalism. The goal of this section is to demonstrate that the justifications for constitutionalism and federalism do not necessarily provide coherent explanations for why federal systems would choose to also incorporate subnational constitutionalism. In other words, current theories of constitutionalism and federalism provide incomplete justifications for subnational constitutionalism. It is important, therefore, that theorists engage subnational constitutionalism as a distinct institution that requires its own theoretical justifications.

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54. See Tarr, *supra* note 18, at 5 (discussing Spain’s “autonomy statutes” and Italy’s Statuti); see also ANDY SMITH & PAUL HEYWOOD, REGIONAL GOVERNMENT IN FRANCE AND SPAIN 22-30 (2000) (discussing complexities of Spain’s autonomy statutes and suggesting that local input plays a large role in their content). Canada has a similar system for organizing provincial authority. See G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L. J. 767, 771-73 (2009).

55. SMITH & HEYWOOD, *supra* note 54, at 22-30.

56. See Saunders, *supra* note 18, at 27 (discussing the implications of nominal subnational input for genuine subnational constitutionalism).

A. *Constitutional Theory and Subnational Constitutionalism*

In one sense, subnational constitutions serve the same purpose as any constitution: they are a legal instrument useful for limiting and structuring government power.<sup>57</sup> However, within federal constitutional democracies, the choice regarding whether and how to incorporate subnational constitutionalism is not a choice between constitutional governance and some other political regime. Even those federal systems that reject subnational constitutionalism use their national constitution to limit and structure subnational power.<sup>58</sup> Subnational constitutionalism therefore needs to be justified by reasons independent of the general justifications for constitutionalism. It demands an independent theoretical inquiry that seeks to answer the question: what are the normative justifications for decentralizing responsibility for structuring and limiting subnational power?

It is important not to oversimplify that question. The great variety of arrangements (and possibilities) regarding the scope and structure of subnational constitutional space suggests that subnational constitutionalism can be channeled toward dramatically different roles from regime to regime.<sup>59</sup> Indeed, some regimes may provide subnational units with very limited constitutional space, allowing those units discretion in only a handful of carefully selected constitutional issues.<sup>60</sup> Other regimes may allow subnational units significant discretion regarding a wide range of constitutional issues constrained only by a handful of carefully crafted limits.<sup>61</sup> Thus, although socio-political conditions will certainly affect the role that subnational constitutionalism assumes, the top-down task of crafting subnational constitutional space determines what sort of political choices are available to subnational units in the first instance, and, consequently, the roles that subnational

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57. See BOBBITT, *supra* note 47, at 3-5.

58. These five systems are India, Pakistan, Nigeria, the United Arab Emirates, and the Comoro Islands. See ELAZAR, *supra* note 1, at 178.

59. See Elazar, *supra* note 17, at 2 (noting that an important question in the study of subnational constitutional law is: "What is the contemporary and future significance of constitute state constitutions and constitution making, given the present and likely future condition of the federal systems in which they function?").

60. Malaysia, Brazil, and South Africa provide good examples of federal regimes that provide very narrowly tailored constitutional space to their constituent units. See G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 115 Penn St. L. Rev. (forthcoming 2011) (discussing limited subnational constitutional space in Malaysia and Brazil); Marshfield, *supra* note 8, at 591-95 (discussing the limited subnational constitutional space in South Africa).

61. The United States provides an obvious example. Germany and Austria provide other examples of federal systems where subnational units have significant constitutional space. See Tarr, *supra* note 60, at 3-4.

constitutionalism can assume within a particular federal regime.<sup>62</sup> Or, in the terms of positive political theory, subnational constitutionalism can facilitate dramatically different social outcomes from regime to regime because the malleability of subnational constitutional space can create very different incentive structures from regime to regime.

Consider the differences between state constitutions in the U.S. federal system and provincial constitutions in South Africa. Within the U.S., state constitutions are necessary because although the federal constitution presumes the existence of state government, it makes no provision for its establishment.<sup>63</sup> Additionally, because the 10<sup>th</sup> Amendment reserves all residual authority to the states, state law represents a significant and necessary corpus of law within the U.S.<sup>64</sup> State constitutions are therefore needed to set up the institutions necessary for, among other things, the creation, interpretation, and enforcement of state law.<sup>65</sup> As a result, state constitutions are an undeniably important source of positive law within the checks-and-balance scheme of American federalism because the federal constitution does not provide comprehensive limits on state authority.<sup>66</sup>

In contrast, provincial constitutions are not necessary in South Africa because the national constitution establishes and comprehensively limits provincial government institutions.<sup>67</sup> Provinces may choose to adopt constitutions that provide for the status of traditional leadership and deviate from the national constitution's default structural provisions in insignificant ways.<sup>68</sup> Because of this very limited constitutional space, provincial constitutions are not a meaningful source of independently enforceable constitutional rights.<sup>69</sup> Yet, two provinces chose to adopt

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62. See *id.* at 4-5 (noting that “law defines the formal constraints on sub-national constitutional space” and “political factors . . . ultimately determine the use of subnational constitutional space.”).

63. See generally Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS 23 (1982) (explaining how the U.S. Constitution is “incomplete”).

64. *Id.*

65. See Grad, *supra* note 43, at 928-29 (explaining necessary content of state constitutions in light of U.S. Constitution's incompleteness).

66. State constitutions are necessary to provide specific constraints on state government action, and they have also developed into a meaningful source of individual rights. See Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984) (discussing state constitutionalism in the U.S.).

67. See S. AFR. CONST. 1996 § 142. The South African Constitution establishes provincial executives and legislatures, but permits the provinces to adopt their own constitutions that diverge from the national constitution's default institutional provisions. See DIRK BRAND & RASSIE MALHERBE, *South Africa: Sub-national Constitutional Law*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS 1, 13-27, 75-115 (A. Alen et al. eds., 2001).

68. S. AFR. CONST. 1996 § 143.

69. See generally Stuart Woolman, *Provincial Constitutions*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 21-i, 21-1 to -20 (Michael Bishop et al. eds., 2d ed. 2005)



constitutions.<sup>70</sup> In 1996, KwaZulu-Natal adopted a constitution primarily for the purpose of recognizing the Zulu monarch.<sup>71</sup> In 1998, the Western Cape, the only other province with significant opposition support, adopted a constitution, as a means of demonstrating a degree of independence from the majority party.<sup>72</sup> Thus, provincial constitutions have proven valuable as a means of allowing subnational communities to formalize their unique political identities.

In short, subnational constitutionalism cannot be justified by reference to the general justifications for constitutional governance, nor does it serve an archetypal function across all federal systems. Rather, it demands an independent theoretical inquiry that explores the various normative goals that it may serve across federal systems and accounts for the different purposes that subnational constitutionalism can serve depending on the rules of the federal regime within which it exists.

### B. *Federal Theory and Subnational Constitutionalism*

Legal scholars, political scientists, and economists have articulated various justifications for federalism. It may, for example, promote efficient provision of government services,<sup>73</sup> protect group pluralism,<sup>74</sup> promote democratic participation,<sup>75</sup> or protect against government

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(discussing the legal status of provincial constitutions within South Africa's structural framework and concluding that provincial constitutions "will never amount to more than window dressing"). This does not mean that they are not meaningful political institutions within South Africa's federal system. See George E. Devenish, *The Making and Significance of the Draft Kwazulu-Natal Constitution*, 1999 Y.B. AFRICAN LAW 47, 505-06 (discussing the immense political significance of provincial constitutions); Marshfield, *supra* note 8, at 621-38 (discussing the institutional significance of provincial constitutionalism during the negotiated transition to democracy). It simply means that their function is other than operating as a meaningful source of positive law that contributes to federalism's checks-and-balances function.

70. See Brand & Malherbe, *supra* note 67, at 86-115 (discussing KwaZulu-Natal and Western Cape Constitutions).

71. See Devenish, *supra* note 69, at 505-06. The KwaZulu-Natal constitution was eventually invalidated by the Constitutional Court because various provisions not related to the Zulu Monarch were ultra vires. See *In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* (11) BCLR 1419 (CC) para. 2 (S. Afr.).

72. Dirk Brand, *The Western Cape Constitution*, 31 RUTGERS L.J. 961, 961, 966 (2000); see also Jonathan L. Marshfield, *Federalism and Political Competition in Emerging Democracies*, 10 WASH. U. GLOBAL STUD. L. REV. (forthcoming 2011) (discussing role of Western Cape constitution as a means of fostering political competition in a one-party dominated political arena).

73. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416-24 (1956); see Jinaduu, *supra* note 2, at 159 (discussing this as a justification for the 1979 Nigerian Constitution).

74. See Horowitz, *supra* note 7, at 953; Jinaduu, *supra* note 2, at 159 (discussing this as a justification for the 1979 Nigerian Constitution).

75. See ELAZAR, *supra* note 1, at 84 ("federalism in its broadest sense is presented as a form of justice—emphasizing liberty and citizen participation in governance").

tyranny.<sup>76</sup> Each of those theories offers an account of how assigning certain political competencies to different levels of government can aid a society in achieving a specified normatively desirable outcome. Those theories do not, however, necessarily explain why a regime may choose to allow subnational units some discretion in how those powers will be organized and further limited. The justifications for delegating power to subnational units (the justifications for federalism) are not necessarily the same as the justifications for allowing subnational units discretion concerning the organization and limits of that power (the justifications for subnational constitutionalism).<sup>77</sup>

For example, if a federal system operates principally to promote government efficiency,<sup>78</sup> it may be inefficient to allow each subnational unit significant discretion in determining how to organize subnational power. A lack of institutional uniformity may increase costs and further complicate governmental structure; thus reducing efficiency.<sup>79</sup> A different federal system may be designed to accommodate cultural or ethnic pluralism.<sup>80</sup> In that case, allowing subnational units to structure their own institutions may be an important means of accommodating group pluralism by promoting self-determination.<sup>81</sup> A third hypothetical system may value efficiency and group pluralism. In an attempt to preserve efficiency, such a regime may provide subnational units with very little discretion regarding the structure of subnational government, but, in an effort to accommodate group pluralism, it may grant subnational units significant discretion regarding morally laden issues such as individual rights.

The point is simply that it is not sound reasoning to equate the justifications for federalism with the justifications for subnational constitutionalism. In trying to understand the complexities of federal systems, it is important that we evaluate the justifications for devolving political power to subnational units as well as any independent or cross-

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76. See THE FEDERALIST NO. 5, at 318 (James Madison).

77. In a recent paper, Professor Tarr notes that the “purposes underlying” the creation of a federation are not accurate indicators of how federal systems craft their subnational constitutional space. See Tarr, *supra* note 60, at 3-4. This is further evidence of the fact that subnational constitutionalism is a distinct institutional phenomenon that requires its own justifications.

78. Germany and Austria are good examples of this. See BUNDESVERFASSUNGSGESETZ [B-VG] [Constitution] Art. 102(1) & 103(1); Tarr, *supra* note 60, at 3-4 (noting that Germany and Austria are structured this way).

79. See Tarr, *supra* note 60, at 4 (concluding that because federalism in Germany and Austria is designed to promote administrative efficiency, “one would expect that such federations would emphasize concurrent rather than exclusive powers and accord their constituent units very limited constitutional space.”).

80. Nigeria, Iraq, and South Africa provide examples of this sort.

81. See Tarr, *supra* note 60, at 3.

cutting justifications for allowing subnational units to organize and limit that power. A theory of federalism that ignores the independent role that subnational constitutions can play is analytically incomplete. Subnational constitutionalism warrants its own theoretical inquiry.

### III. TWO PREVAILING CONCEPTIONS OF SUBNATIONAL CONSTITUTIONALISM

Theorists have yet to directly engage subnational constitutional theory as described above. Nevertheless, the literature discussing the role of state constitutions within the U.S. federal system as well as the growing body of literature discussing comparative subnational constitutional law hint at two normative justifications for subnational constitutionalism.<sup>82</sup>

#### A. *The Demos Model of Subnational Constitutionalism*

Perhaps the most intuitive justification for subnational constitutionalism is that it can allow for consolidated subnational communities to achieve a degree of political self-determination.<sup>83</sup> This model is most applicable to federal systems that are made up of geographically clustered subnational political communities, each of which is characterized by a tractable political *demos*. Subnational constitutions ensure that although these diverse federal communities are united under one national constitution, they are still able to exercise “the most basic political right . . . the right to self-determination.”<sup>84</sup> The right to self-determination includes “the power to determine the fundamental character, membership, and future course of [the community’s] political society.”<sup>85</sup> Subnational constitutionalism ensures that although the right

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82. These models are not intended to be mutually exclusive. That is, each federal system does not fall exclusively into one model. Different federal systems may bear characteristics of several different models all at once or during different periods in time. The models are presented separately for theoretical purposes only.

83. Professor Tarr provides a very clear statement of this position. See Tarr, *supra* note 54, at 783 (“Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination—the power to determine the fundamental character, membership, and future course of their political society.”).

84. *Id.* According to Professor Tarr, the right to group “self-determination” is “the fundamental purpose of subnational constitution-making.” *Id.* Professor Tarr characterizes other purposes for subnational constitutionalism as “instrumental.” He concludes that “these instrumental purposes pale in comparison with the fundamental purpose of constitution-making.” *Id.* This characterization of subnational constitutionalism is at odds with the view presented here, which is thoroughly instrumentalist. This Article takes the position that the use of subnational constitutionalism to promote group self-determination is simply one of many instrumental functions that subnational constitutionalism can perform.

85. *Id.*

to self-determination is “inevitably limited when nations are constituent members of a larger political entity, . . . it is not effaced.”<sup>86</sup>

Under this model, the institutional function of subnational constitutions within the federal system is to express and preserve the identity of consolidated subnational polities.<sup>87</sup> It is important to recognize that this model is grounded in more than thin principles of self-governance, which can be achieved by simply decentralizing policy-making and administrative power to local government. This model is concerned not only with the ability of subnational polities to govern themselves, but with their ability to determine *how* they will govern themselves; to determine, to a degree, how they will be constituted as political communities.

The effectiveness of using subnational constitutionalism to achieve political self-determination would seem to be directly proportional to the degree of relevant independence each subnational community has in customizing its government structure.<sup>88</sup> That is, the model is most effective when: (1) the federal system is characterized by highly salient subnational political communities that track the territorial boundaries demarcating subnational units; and (2) the federal system affords subnational units independence regarding substantive issues relevant to the political identity of subnational political communities.<sup>89</sup> Thus, this

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86. *Id.*

87. The normative assumption in this model is that group self-determination is a good in itself. That norm appears to be grounded in a Lockean conception of state legitimacy. See GARDNER, *supra* note 16, at 59-61 (discussing the connection between this model and Lockean political theory). Ethiopia’s federal system illustrates this superbly. The federal constitution includes the right of consolidated political groups within existing subnational units to apply for statehood. ETHIOPIAN CONST. art. 47(3) (1994). The Constitution recognizes “[t]he right of any Nation, Nationality or People to form its own state” pursuant to certain procedural requirements. *Id.*

88. There are obvious limitations to this model. See Tarr, *supra* note 54, at 783-84 (discussing limitations on right to self-determination inherent in federal system). First, within any federal system, self-determination is a matter of degree because subnational units do not have complete autonomy. See Saunders, *supra* note 18, at 26 (“No subnational constitution is completely uncontrolled.”). Nevertheless, subnational constitutionalism makes some degree of self-determination possible within a unified federal system. Second, political identity is a blurry concept. People may view themselves vis-à-vis a multiplicity of politically relevant relationships. See FRANCIS B. NYAMNJOH, *AFRICA’S MEDIA, DEMOCRACY AND THE POLITICS OF BELONGING* 25-28 (2005) (describing the complex fabric of political relevant communal relationships that characterize most African societies). Within any federal system, the salience of geographically clustered subnational political communities will be a matter of degree.

89. This is where socio-political variables become interrelated with the issue of institutional design. A federal system that wishes to use subnational constitutionalism as a means of accommodating subnational group self-determination, must ensure that it crafts subnational constitutional space that corresponds to issues relevant to the groups involved. In South Africa, for example, although the provinces are not permitted to include a meaningful bill of rights in their constitutions, they are permitted to provide for

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model invariably requires that subnational units have the independence necessary to entrench meaningful portions of their “fundamental values,” most likely by adopting customized rights provisions and recognizing traditional leadership, language, and nationhood.

The obvious tension in this model is between granting subnational units adequate space for self-determination without destroying the unity of the overall federal regime.<sup>90</sup> From the standpoint of positive political theory, subnational constitutionalism may be a valuable tool in maintaining that delicate balance because it can reduce the costs to self-determination that subnational polities must pay when joining a federal system. A federal system that allows for subnational constitutionalism provides an additional layer of independence for subnational polities, which can provide additional incentives for those communities to embrace a federal system.<sup>91</sup>

This model finds obvious application in ethnically divided federal systems. The Nigerian federal arrangement that existed between 1960 and 1966 (the First Republic) provides a helpful example.<sup>92</sup> During the First Republic, Nigeria was divided into three regions, each of which was controlled by a different ethnic majority.<sup>93</sup> Integral to the federal scheme was the fact that each region had the authority to adopt its own constitution.<sup>94</sup> This was considered an important aspect of independence for the dominant ethnic groups.<sup>95</sup> Indeed, after the First Republic fell apart on account of conflict between the competing ethnic groups, the next set of Nigerian constitution makers were emphatic that subnational units not have the authority to adopt their own constitutions.<sup>96</sup> They

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the “institution, role, status, and authority” of a “traditional monarch.” S. AFR. CONST. 1996 § 143. While this constitutional competency may seem only symbolic, it is incredibly important for the self-determination of the Zulu nation. *See generally* COURTNEY JUNG, *THEN I WAS BLACK: SOUTH AFRICAN POLITICAL IDENTITIES IN TRANSITION* 40-75 (2000) (discussing significance of Zulu monarch). Thus, even though South Africa’s subnational constitutional space is rather limited, it effectively operates under the *demos* model because it was carefully crafted to correspond to the groups involved.

90. Tarr, *supra* note 54, at 783-84.

91. *See* Marshfield, *supra* note 8, at 621-28 (discussing how subnational constitutionalism helped to consolidate South Africa’s democracy in this way during the transition from apartheid to democracy).

92. *See generally* Rotimi T. Suberu, *Institutions, Political Culture, and Constitutionalism in Nigeria*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 197, 197-218 (Daniel P. Franklin & Michael J. Baun eds., 1995) (providing helpful summary of constitutional structure during First and Second Nigerian Republics).

93. *See* HOROWITZ, *supra* note 1, at 603.

94. *See* Jinadu, *supra* note 2, at 163-64.

95. *Id.*

96. *Id.* at 164.

concluded that subnational constitutions were “divisive.”<sup>97</sup> Nigeria’s democratic future, they argued, depended on each citizen viewing himself primarily as a Nigerian, and the “existence of state constitutions was inimical to the unity of the country.”<sup>98</sup> Tellingly, the federal constitution of the Second Nigerian Republic (1979-83) maintained significant decentralization of political power to subnational units, but expressly prohibited subnational units from adopting their own constitutions.<sup>99</sup>

The Nigerian experience simply illustrates the capacity of subnational constitutions to realize the norm of group self-determination; even when group self-determination is destructive to the unity and stability of the overall federal system. Group self-determination represents one coherent account of why a federal system may introduce subnational constitutions into the federal structure.

### *B. The Federalist Model of Subnational Constitutionalism*

The *demos* model is most appropriate where federal regimes are comprised of geographically consolidated subnational polities. Subnational constitutions may, however, be desirable even in more homogenous federal regimes. The federalist model starts with the normative assumption that to protect individual liberty, government powers must not be consolidated in the same hands, but must be divided among institutions and levels of government.<sup>100</sup> By dividing powers, institutions and levels of government have incentives to monitor and check each other’s abuses of power. In this way, a federal system can help to ensure that constitutional restrictions on governmental power are

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97. *Id.* (quoting statement by Chief R.O.A. Akinjide as recorded in the PROCEEDINGS OF THE CONSTITUENT ASSEMBLY, vol. 1, Nov. 16, 1977, at 782-83).

98. Jindau, *supra* note 2, at 165 (citing REPORT OF THE CONSTITUTIONAL DRAFTING COMMITTEE, vol 1, at iv).

99. Jindau, *supra* note 2, at 163. Other examples of this model include Iraq, Malaysia, Switzerland, India’s constitutional allotment for Kashmir, Ethiopia, and South Africa. *See generally* Tarr, *supra* note 60, at 3 (discussing federal systems created for the purpose of pluralism); *see* Ashley S. Deeks and Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L. J. 1 (2007) (discussing Iraq’s federal structure).

100. This model of subnational constitutionalism is most completely developed by Professor Gardner in the context of state constitutionalism within the United States. *See* GARDNER, *supra* note 16, at 80-143. As discussed in Part IV.C, the federalist model does not seem to provide a complete account of state constitutionalism. Nevertheless, Professor Gardner’s exposition of the theoretical relationship between federalism’s liberty-protecting role and state constitutionalism provides another coherent justification for subnational constitutionalism.

realized and individual liberty protected. This, of course, is simply a recantation of Madison's classic justification of American federalism.<sup>101</sup>

The federalist model contends that subnational constitutions can perform three unique functions in this checks-and-balances scheme. First, because subnational constitutions are entrenched and supreme, citizens can protect themselves against subnational government tyranny by enacting individual rights protections that may not be provided by the national constitution. Although these provisions will not likely restrain the actions of the national government, they provide an effective means of checking otherwise permissible subnational government action.<sup>102</sup>

Second, subnational constitutionalism can allow subnational units to organize and reorganize their institutions in ways that will be most efficient, less corrupt, and more supportive of liberty. This includes structuring institutions so that they are less likely to infringe on negative rights, but it also includes the structuring of institutions so that they are effective in protecting and administering any positive liberties that a subnational unit may recognize and pursue.<sup>103</sup>

Third, subnational constitutions can provide judges with an independent means of protecting individuals against excessive state action. In a layered constitutional system where both national and subnational constitutions contain individual rights guarantees, judges can develop independent bodies of constitutional law.<sup>104</sup> For example, if a court were to narrowly construe a national constitutional rights provision, that precedent is not necessarily binding or even persuasive regarding the meaning of an applicable subnational constitutional provision that remains within the system's subnational constitutional space.<sup>105</sup> In this way, subnational constitutions can provide a "double source"<sup>106</sup> of protections against undesirable government action.

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101. See THE FEDERALIST NOS. 46, 47, 51 (James Madison). The normative assumption in this model is that individual "liberty" is a good in itself.

102. See Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS 98 (1988) (characterizing state constitutions in this way); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) (same).

103. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (discussing how state constitutions play a central role in the protection of positive rights within the U.S. federal system).

104. See Williams, *supra* note 66, at 353 (discussing this function vis-à-vis state constitutionalism in the U.S.).

105. *Id.* Obviously jurisdictional rules will likely limit the reach and significance of rulings based on subnational constitutions. The point, however, is that by allowing subnational units to adopt positive law that is supreme and entrenched, federal systems provide a further mechanism for checking government authority.

106. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

It would seem that the federalist model operates most effectively when subnational units are permitted to establish their own judiciaries with ultimate authority for interpreting subnational constitutions.<sup>107</sup> This sort of subnational constitutional space would presumably encourage subnational judges to interpret their own constitutions independently from any analogous national laws that may not provide optimal individual protections.<sup>108</sup> The model can operate effectively under an integrated judiciary, however, if the judiciary enjoys “effective autonomy and integrity” from the national government.<sup>109</sup>

Germany provides a helpful example of this model.<sup>110</sup> Germany consists of sixteen subnational units called *Länder*.<sup>111</sup> Each of these has its own written constitution, parliament, judiciary, and executive.<sup>112</sup> Germany’s national constitution (the Basic Law) contains a general anti-discrimination clause that prohibits discrimination based on, among other things, religion, homeland, or place of origin.<sup>113</sup> Nevertheless, five of the *Länder* have adopted more stringent constitutional guarantees for recognized minorities.<sup>114</sup> These subnational constitutional guarantees ensure that the *Länder* provide equal educational, cultural, vocational, and political opportunities for minorities.<sup>115</sup> Significantly, similar provisions have been proposed as amendments to the Basic Law, but those proposals were rejected by the federal parliament.<sup>116</sup>

In addition to those additional rights protections, the *Länder* have used their constitutions to make various structural changes aimed at making government more responsive and accountable. They have amended their constitutions to include provisions allowing for public

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107. See Watts, *supra* note 30, at 956 (discussing affect of consolidated judiciary on subnational units’ ability to develop independent bodies of constitutional law).

108. *Id.*

109. *Id.*

110. See generally Michael J. Baun, *The Federal Republic of Germany*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 79, 79-97 (Daniel P. Franklin & Michael J. Baun eds., 1995) (describing Germany’s basic constitutional institutions). The United States is another obvious example. See *infra* Part IV.C.2 (discussing the federalist model and state constitutionalism).

111. See Norman Weiss, *The Protection of Minorities in a Federal State: The Case of Germany*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 73, 75 (G. Alan Tarr, et al. eds. 2004).

112. *Id.* The *Länder*’s judicial competencies are complex. The *Länder* courts have limited jurisdiction regarding individual rights issues and all *Länder* decisions are ultimately reviewed by one of the two highest federal courts. See JOHN MERRYMAN, ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 565 (1994) (providing summary of Germany’s court structure).

113. Weiss, *supra* note 111, at 78.

114. *Id.* at 80-83.

115. *Id.*

116. *Id.* at 77-78.



referenda and to list specific “goals for state activity.”<sup>117</sup> Thus, the *Länder* constitutions continue to provide an independent means of protecting liberty by developing relevant individual rights and ensuring that government institutions are accountable and efficient.<sup>118</sup>

#### IV. TOWARD A DELIBERATIVE DEMOCRACY MODEL OF SUBNATIONAL CONSTITUTIONALISM

This section argues for a third model of subnational constitutionalism. It does not contend that the *demos* or federalist models are wrong as theoretical possibilities. Rather, the claim is that based on the institutional description of subnational constitutionalism defended above, subnational constitutionalism is uniquely suited to serve a third, independent purpose: it can promote political deliberation and participation within subnational units and the federal system as a whole.

On this view, subnational constitutions need not be justified as a reflection of an underlying subnational polity (*demos* model) or an additional mechanism for checking government authority (federalist model). Instead, subnational constitutions can be viewed as a mechanism for encouraging and formalizing popular input in an ongoing multi-dimensional constitutional deliberation. The section first discusses the normative claims underlying the deliberative democracy tradition and then explores how subnational constitutionalism can promote those principles.

##### A. *Deliberative Ideals and Civic Republicanism*

Contemporary theories of deliberative democracy are linked to a civic republican approach to politics. Civic republicanism has many variations and “there is no unitary approach that can be described as republican.”<sup>119</sup> Republican ideals are most frequently traced to

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117. Tarr, *supra* note 60, at 9; see also Arthur B. Gunlicks, *Land Constitutions in Germany*, 28 *PUBLIUS* 105 (1998).

118. *Id.*

119. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L. J.* 1539, 1547 (1988) (providing detailed description of civic republican principles). There is much literature discussing the civic republican tradition and deliberative democracy. A few important examples include Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17, 17-34 (Alan Hamlin & Philip Pettit, eds. 1989); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* (1991); AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT* 12 (1996) (providing a list of important authorities on deliberative democracy); Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *YALE L.J.* 1623 (1988).

Aristotle.<sup>120</sup> Classic republicanism emphasized the contextualization of individual citizens. All citizens are “fundamentally situated” within communities, organizations, and cultures.<sup>121</sup> The relationship between individuals and institutions is reflexive. Institutions influence individuals, and individuals shape and mold institutions. Civic republicanism is addressed to defining the role that the state should play in mediating this powerful interaction between individual and community.<sup>122</sup>

Contemporary republican theories are perhaps best understood by contrasting them with their antonym: liberalism.<sup>123</sup> Liberalism prioritizes the preservation and realization of individual interests. It views the state as a neutral mediator between competing individual interests. Thus, citizens participate politically by voicing and pursuing their own self-interest, and politics is viewed as a competition between those interests. The competition is resolved by allowing representative interest-groups to compete for political power. The state operates as a neutral mediator and, in order to maximize individual liberty, societal conflicts are resolved by aggregating “self-regarding” preferences.<sup>124</sup> Thus, on a liberal view, a properly functioning political system is one that achieves a power-equilibrium between competing interest-groups. This equilibrium is reflected in legislation or other popular outputs that accurately reflect the balance of power between competing interests.<sup>125</sup>

Civic republicanism views politics and the role of the state from a different perspective. It asserts that politics is primarily about the realization of some “common good.” Politics is not simply the aggregation of individual self-interests. It is about what is best for society as a whole. Individual political participation involves a sense of stewardship for society and not simply the registering of private self-interest. Politics, therefore, is about locating and pursuing a conception of

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120. See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 HARV. SUP. CT. REV. 341, 401 (1985) (discussing Aristotle and the civic republican tradition).

121. S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B. U. L. REV. 685, 704 (1991).

122. *Id.*

123. *But see* Sunstein, *supra* note 119, at 1566-77 (arguing that liberalism and republicanism are not mutually exclusive and that they are opposites only if liberalism is presented as caricature of its true nature).

124. See Hoke, *supra* note 121, at 705 (citing A. CAWSON, CORPORATISM AND POLITICAL THEORY 16 (1986) as an example of liberal political theory); see also BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10-12 (1980).

125. Sunstein, *supra* note 119, at 1542-43. Liberalism has at least two normative virtues or justifications. First, it respects individual preferences by requiring government to remain neutral and not directly engage in preference-formation. Second, and related to the first, it constructs significant hurdles to government oppression by demanding that individual preferences be represented and actualized in government policy. *Id.*

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what is collectively best for society through the process of public deliberation. This process is reflexive in the sense that it refines government policy by elucidating the common good and it simultaneously tutors citizens in necessary civic virtues.

Civic republicanism is nevertheless grounded on individual liberty. The public good is ascertained by tapping and channeling individual knowledge, expertise, and preferences. In this way, individuals realize their freedom because they achieve self-governance by deliberating over their conception of the public good. At the same time, the community's best interests are also realized through a rich and dynamic deliberative process.

This theoretical foundation gives rise to at least three fundamental commitments that characterize most deliberative approaches to politics: public deliberation, citizen participation, and political equality.<sup>126</sup>

### 1. Public Deliberation

Civic republicanism prioritizes political deliberation over perhaps any other ideal. Deliberation has a two-part significance for republicanism. First, it can elucidate the public good by bringing diverse perspectives, expertise, and knowledge to bear on what is best for society as a whole. Second, it can contribute to social cohesion and individual development by forcing citizens to critically evaluate their self-interested preferences in light of competing preferences and the collective good. It brings the promise not only of "better government, but also of better citizens and healthier communities."<sup>127</sup>

Deliberation, as envisioned by republicanism, promotes good governance because it rejects the idea that the aggregation of private preferences necessarily reflects what is best for society as a whole or that all preferences are good. A major problem with liberalism is the reality that the aggregation of preferences may not represent what is best for society<sup>128</sup> and that some preferences, such as discriminatory preferences, are objectively bad.<sup>129</sup> Liberalism does not allow for political processes to correct these failures. As Professor Sunstein notes, liberalism is

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126. These commitments roughly track the four republican principles that Sunstein describes. See Sunstein, *supra* note 119, at 1548-58.

127. Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 154 (2008).

128. See John Ferejohn, *Instituting Deliberative Democracy*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 75, 82 (Ian Shapiro & Stephen Macedo eds., 2000) ("with sufficient preference diversity, the aggregative model will generally produce arbitrary collective choices").

129. See Sunstein, *supra* note 119, at 1544 (describing discriminatory preferences as "objectionable because of their effects in subordinating a social group").

“indifferent among preferences, so long as force and fraud are not involved.”<sup>130</sup>

Republicanism proposes a solution to these failures by prioritizing public deliberation.<sup>131</sup> Whereas aggregation of individual preferences can occur in isolation and does not require critical discussion or review of what is best for society, a system that promotes public deliberation will foster critical review of individual preferences and discussion of shared norms.<sup>132</sup> Republicanism seeks to encourage “stakeholders” to come together and share their competing ideas and perspectives.<sup>133</sup> This process is believed to draw out otherwise elusive common values and help to identify norms that transcend self-interest.<sup>134</sup> Deliberative processes can also subject objectionable preferences to critical public evaluation based on those transcendent norms, rather than simply registering objectionable norms on equal terms with desirable preferences.<sup>135</sup>

It is important to note that deliberative ideals are not necessarily inconsistent with representative government.<sup>136</sup> Although, as discussed below, deliberative ideals prize direct citizen participation, deliberation between representatives can serve some of the same purposes.<sup>137</sup> The crucial point is that deliberative bodies must be inclusive and adequately reflect all reasonable viewpoints within society. If representative bodies

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130. *Id.*

131. Some theorists question whether deliberation is a viable solution to the problems created by aggregation. *See, e.g.*, Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 *POL. THEORY* 277, 278 (1994) (stating that “we also are deeply skeptical about whether deliberation of the sort that Dewey and other, more contemporary, theorists envision can remedy the problems they attribute to aggregative democratic institutions”).

132. *See* Sunstein, *supra* note 119, at 1575 n.201 (“differences of opinion and jarring of parties can promote deliberation”) (internal citations and quotation marks omitted).

133. Parlow, *supra* note 127, at 153.

134. *See id.* at 153-54 (stating “deliberation may reveal . . . norms greater than self-interest: the public good”).

135. *See* Sunstein, *supra* note 119, at 1575 n.201. This is not to say that republicanism holds to a single substantive public good or that all social conflicts can be resolved through deliberation. Republicanism should not be associated with a determinate vision of the public good. The public good is contingent upon the needs of the underlying political community.

136. *See* Ferejohn, *supra* note 128, at 79, 96-98 (division of labor is consistent with deliberative democracy); Sunstein, *supra* note 119, at 1585-89; *cf.* Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *YALE L.J.* 1651, 1656 n.24 (1988) (republicanism promotes dialogue by dispersing authority); Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 *U. PA. L. REV.* 1567 (1988) (evaluating proposals that aim to promote the public interest).

137. *See* Ferejohn, *supra* note 128, at 96-98. One purpose that representation may not be able to serve is direct education and development of the citizenry, which is a distinct republican value. *See id.* at 97.

are so constituted, deliberations between representatives will similarly converge on consensus regarding the common good.<sup>138</sup>

## 2. Citizen Participation

Republicanism prioritizes widespread and meaningful political participation by citizens. Ideally, this means more than just voting.<sup>139</sup> Republicanism aims for citizens to be directly engaged in politics, but constructive participation can occur through formal and informal political institutions.

Republicanism values citizen participation for at least three reasons. First, it ensures the legitimacy of the deliberative process. Because deliberation is aimed at reaching consensus regarding the common good, it is essential that all interests and viewpoints be heard. Widespread participation is the best way to ensure that no voice is excluded and that the deliberative process has captured all viewpoints and expertise. Citizen participation is also essential to the deliberative process when representatives are involved because it serves to limit agency costs by “monitor[ing] the behavior of representatives in order to limit the risks of factionalism and self-interested representation.”<sup>140</sup> An unengaged citizenry only enhances agency problems inherent in the representative system.

Second, citizen participation also helps to educate the citizenry and enhance communities. Open deliberation forces participants to confront different ideas and perspectives and to offer justifications for their own perspectives that others can accept.<sup>141</sup> This in turn can develop participants’ abilities to empathize with competing view points, critically evaluate their own views, and foster a desire for consensus rather than domination.<sup>142</sup> Communities are consequently strengthened because all participants have some degree of ownership in political outputs. In that sense, republicanism views political deliberation by citizens and representatives as an inherent public good.<sup>143</sup>

A third, and often overlooked, reason for valuing widespread participation is that it can fuel deliberation.<sup>144</sup> As Madison famously observed, the more “factions” that exist within a polity, the more difficult

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138. *See id.* at 96-98.

139. *See* Brest, *supra* note 119, at 1623; Hoke, *supra* note 121, at 709.

140. Sunstein, *supra* note 119, at 1556.

141. *See* Ferejohn, *supra* note 128, at 85-86.

142. As noted above, one weakness with representative deliberative democracy is that it will not necessarily contribute to the education and socialization of individual citizens. *See id.* at 97.

143. *See* Hoke, *supra* note 121, at 690 n.19 (listing theorists who endorse this view).

144. *See* Sunstein, *supra* note 119, at 1575 n.201.

it is for any one faction to gain absolute control.<sup>145</sup> The inability of any one group to gain control means that groups will have to work towards agreement. That is, they will have to engage in deliberation regarding their respective viewpoints and search for shared norms. Thus, if we assume that increased participation will result in a greater diversity of viewpoints and interest-groups, the higher the levels of participation, the greater the incentives for even self-interested factions to engage in constructive deliberation.<sup>146</sup>

### 3. Political Equality

Republicanism demands that all citizens and groups are able to participate in the political process equally. The republican vision of deliberation as a refining process for political outputs depends on political equality. The virtues of public deliberation are short-circuited if all viewpoints and members are not able to contribute to the discussion. This means that the deliberative process must be structured such that minority viewpoints can have a meaningful voice in the discussion.<sup>147</sup> It also means that, contrary to traditional conceptions of republicanism, the ideology is compatible with, and perhaps dependent upon, a commitment to cultural pluralism.<sup>148</sup> A complete representation of all viewpoints is necessary for the deliberative process to awaken the community to the “true needs of the collective whole.”<sup>149</sup>

#### *B. Deliberative Ideals and Subnational Constitutionalism*

The overall normative claim of deliberative democrats is that a community of active political participants deliberating over solutions to social problems is better than a political system that simply generates authoritative outputs by aggregating individual expressions of self-

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145. THE FEDERALIST NO. 10 (James Madison). Madison argued that larger populations are less susceptible to majoritarian abuse because they will inevitably contain a diversity of factions that will prevent one dominant majority from oppressing minorities. *See id.* The assumption underlying Madison’s argument is that the more viewpoints or factions that have a voice in the political arena, the harder it will be for one voice to squelch out all others. *See id.*

146. *See* Parlow, *supra* note 127, at 156 (discussing how “interest-groups” can actually be good for civic republicanism).

147. *See* Sunstein, *supra* note 119, at 1585-88 (concluding that equality is the primary concern for institutional design because providing access to all groups will result in a constructive deliberation that will converge on the common good).

148. *See* Hoke, *supra* note 121, at 707.

149. Parlow, *supra* note 127, at 155.

interest.<sup>150</sup> Deliberative democracy is nevertheless an ideal. Some conflicts will not be resolvable by deliberation, and government action will nevertheless be necessary.<sup>151</sup> Some viewpoints will, perhaps, need to be excluded from the conversation.<sup>152</sup> Thus, as a practical matter, deliberative democrats are not concerned with the deliberative purity of any particular regime. They are realistically concerned only with “how much of the full-blown deliberative ideal can be accomplished or encouraged by suitably designed institutions.”<sup>153</sup> The all important practical question for a regime that values deliberative ideals is how to design political institutions that will provide incentives for political participation and constructive deliberation.

The claim here is that federal systems that provide for subnational constitutionalism can afford better incentives for political participation and constructive deliberation than federal systems that do not provide for subnational constitutionalism. Subnational constitutionalism can promote deliberative ideals in two ways. First, it can ensure that popular constitutional opinions are not excluded from the evolution of constitutional norms. Second, it can provide independent incentives for public political participation and reduce costs associated with political participation.

### 1. Public Deliberation and Constitutional Content

Proponents of deliberative democracy have noted that a major challenge facing constitutional democracies is the limited opportunities that these systems generally provide for public deliberation and participation regarding constitutional issues.<sup>154</sup> This is not only an empirical problem. It represents an ideological conflict between constitutionalism and deliberative democracy.<sup>155</sup> Constitutionalism is

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150. See, e.g., Hoke, *supra* note 121, at 690 n.19; Ferejohn, *supra* note 128, at 75; Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence, and Mediating Institutions*, 36 AM. BUS. L.J. 391, 397 (1999).

151. See Ferejohn, *supra* note 128, at 75-82 (discussing need for institutions that force communities to make timely decisions in an efficient manner).

152. See Sunstein, *supra* note 119 (arguing that some viewpoints are properly excluded because they do not offer public-regarding justifications); Ferejohn, *supra* note 128, at 77 (arguing that only “reasonable” views should be allowed in the dialogue).

153. Ferejohn, *supra* note 128, at 76.

154. See, e.g., CHRISTOPHER F. ZURN, *DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW* 265 (2007); John J. Worley, *Deliberative Constitutionalism*, 2009 BYU L. REV. 431 (2009).

155. See Worley, *supra* note 154, at 431-34 (considering whether constitutionalism and deliberative democracy can be reconciled); Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. & PUB. AFF. 371, 417 (2000) (suggesting the tension between constitutionalism and deliberative democracy requires additional clarification).

often described as being “committed to the idea that individuals have certain rights—freedom of speech and religion, equality before the law, a right to own private property, and so on—that lie beyond the scope of legitimate government action.”<sup>156</sup> Yet, the core of the deliberative ideal is that political conflicts should be resolved by public deliberation that results in reasoned consensus.<sup>157</sup> This includes moral conflicts regarding which rights should receive constitutional protection and the scope of those rights.<sup>158</sup> Similarly, constitutionalism recognizes that institutions must be stable, predictable, and entrenched beyond the realm of ordinary political deliberation. Deliberative democracy, on the other hand, asserts that policy decisions as well as the best procedures and institutional arrangements for making those policy decisions should be subject to deliberation.<sup>159</sup>

One solution to this apparent contradiction is to point to the fact that deliberative democracy recognizes that rights related to equal political access are fundamental to the deliberative process and should be beyond the realm of political deliberation.<sup>160</sup> This solution does not resolve the whole conflict, however, because there are many rights commonly accepted as fundamental that do not have a tight nexus with equal political participation.<sup>161</sup> Similarly, although deliberative democrats may accept that the organs and processes of government must be relatively stable in order for government to function efficiently, they contend that

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156. See Worley, *supra* note 154, at 454-55; see *id.* at 432 n.3 (listing RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 23-24 (1996) and LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 4 (1985), as examples of this version of constitutionalism).

157. See Worley, *supra* note 154, at 432.

158. See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 41-43 (2004) (explaining why deliberation is the preferred means for resolving moral conflict).

159. See Worley, *supra* note 154, at 431 (noting disagreement among democratic theorists regarding the “legal, political, and social institutions those [democratic] ideals require”); GUTMANN & THOMPSON, *supra* note 158, at 132 (“Deliberative democracy does not seek a foundational principle or set of principles that, in advance of actual political activity, determines whether a procedure or law is justified. Instead, it adopts a dynamic conception of political justification, in which change over time is an essential feature of justifiable principles.”).

160. See, e.g., Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990); see Hoke, *supra* note 121, at 707 n.96 (providing further examples of republican theorists that “embrace political equality as a prerequisite for substantive and procedural fairness.”). As Sunstein has noted, republican arguments that political equality is fundamental to the political process bear striking resemblance to arguments by procedural democrats, such as John H. Ely. See Sunstein, *supra* note 119, at 1552 n.63 (citing JOHN H. ELY, *DEMOCRACY AND DISTRUST* (2002)).

161. See Worley, *supra* note 154, at 464.



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deliberation regarding public institutions can foster improvements to institutional design.<sup>162</sup>

There have been many theoretical attempts to resolve this conflict.<sup>163</sup> This Article does not enter that theoretical debate. Rather, it argues that subnational constitutionalism offers a valuable practical compromise to this problem. Subnational constitutionalism offers the possibility of proliferating local access to public deliberation regarding constitutional issues without compromising the idea of pre-legal fundamental rights or necessary institutional stability.

Constitutionalism is an impediment to public deliberation because it effectively removes constitutional issues from public political processes.<sup>164</sup> This problem is exasperated in federal systems that do not allow for subnational constitutionalism. Although constitutional amendment at any level generally requires public input, national constitutions tend to be far more static and difficult to amend than subnational constitutions.<sup>165</sup> This is not merely a coincidence. Incentives for national constitutional stability are strong.

In a recent article, Eric Posner and Tom Ginsburg conclude that the fundamental difference between subnational constitutionalism and national constitutionalism is that subnational constitutions involve mitigated agency costs.<sup>166</sup> Posner and Ginsburg conclude that agency costs are far greater at the national level because: (1) national constitutions must place limits on theoretically unlimited government power, but subnational constitutions already operate within a legally defined space; (2) there is no effective enforcement mechanism operating above the national constitution, but national government provides effective monitoring and enforcement mechanisms regarding subnational abuses; and (3) subnational units risk losing citizens to neighboring units.<sup>167</sup>

Because agency costs are reduced at the subnational level, Posner and Ginsburg conclude that there is an inevitable disparity in constitutional stability between “states” and “substates.”<sup>168</sup> High agency costs mean that national constitutional constraints must be relatively strong, static, and difficult to change.<sup>169</sup> Subnational constitutions, however, can be more fluid and responsive to public input because

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162. See GUTMANN & THOMPSON, *supra* note 158, at 132.

163. See Worley, *supra* note 154, at 433 n.6 (listing authorities).

164. See *id.* at 431-34.

165. See Dinan, *supra* note 34, at 841-47.

166. See Ginsburg & Posner, *supra* note 18, at 1584-85.

167. See *id.* at 1596-97.

168. See *id.* at 1593-94.

169. *Id.*

agency costs are lower.<sup>170</sup> The basic intuition is that there are strong incentives for a national constitution to be stable in its creation of core government institutions and protection of essential individual liberties. Furthermore, a stable national constitution creates a safe place for subnational units to engage in constitutional experimentation because inappropriate experiments will be corrected by enforcement of the national constitution's overarching rules.<sup>171</sup>

Posner and Ginsburg's hypothesis has compelling empirical support. In all federal systems that permit subnational constitutionalism, subnational constitutions are easier to amend<sup>172</sup> and amended more frequently than their overarching national constitution.<sup>173</sup>

The important implication of this hypothesis is that within federal systems governed only by a national constitution, incentives for stability and high agency costs will result in arduous amendment procedures.<sup>174</sup> This will result in necessary constitutional change occurring primarily through judicial interpretation of the national constitution.<sup>175</sup> That sort of "informal amendment" through judicial interpretation effectively forecloses recurring and meaningful public access to the processes of constitutional change. Thus, in a single-constitution federal system, public access points regarding constitutional change are essentially non-existent. In other words, participation costs regarding constitutional change in a single-constitution federal regime are infinite.

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170. *Id.*

171. See Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 475 (1993) (concluding regarding U.S. federal system that "[O]ur federalism permits vigorous popular democracy to operate in the states because the Federal Constitution places checks on majoritarian excesses.").

172. See Ginsburg & Posner, *supra* note 18, at 1600 ("Available evidence seems consistent with this conjecture. We know of no subconstitutional system that is more difficult to amend than that of its superstate").

173. See Dinan, *supra* note 33, at 841-43 (discussing ease of amendment and amendment rates in subnational units). South Africa represents somewhat of an exception to this rule because only two provinces have adopted constitutions and only the province of the Western Cape has survived review by the Constitutional Court.

174. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, AM. POL. SCI. REV., Jun. 1994, 355, 355-70 (arguing that constitutional change is necessary in any system and if amendment procedures are arduous, change will likely occur through judicial review); see Ginsburg & Posner, *supra* note 18, at 1600 ("Informal amendment takes place when political norms change, or courts (possibly responding to political pressures) "interpret" or construct the constitution so as to bring it in line with policy preferences. If our theory is correct, a state that becomes a substate will weaken its de jure amendment procedures. But this weakening could also take place in a de facto sense, if the courts and political culture become more willing to ignore rigid constitutional constraints, in which case the de jure rules might be left undisturbed.").

175. Lutz, *supra* note 174, at 355-70.

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A federal system that incorporates subnational constitutionalism, however, can accommodate varying degrees of constitutional stability. Subnational constitutionalism ensures that at least some constitutional issues can be subject to more public mechanisms of constitutional revision. It creates the possibility that the national constitution will be rigid and subject to revision through procedures that invite less public deliberation, such as judicial review, while subnational constitutions can be more fluid, easily amended, and will invite more frequent public deliberation regarding constitutional content.

Consider how these principles might actually play out in practice. The substantive and democratic contingency of subnational constitutions allows federal regimes to constitutionalize those rights that the national community can identify as fundamental and beyond the realm of legitimate government action. Those rights presumably represent the bare minimum protections that the national community as a whole can agree on. In a dual-constitutional federal system, unsettled or unanticipated rights that are not included in the national constitution need not be left exclusively to future judicial interpretation of the national constitution, but can be placed within the “constitutional space” of the subnational units. Subnational constitutional law operates as a “safe” environment for public input regarding rights because the society’s core values remain relatively static and protected by the national constitution.

Regarding government structure, although the national government must settle on stable institutions and cannot allow the structure of those institutions to be constantly debated and revised, national institutional stability can make subnational instability less pressing. National constitutions can ensure that certain core functions are channeled through stable national institutions. They can also institute legal parameters regarding the degree of institutional variance that subnational units can explore. Those measures can create a safe arena for subnational units to experiment with reasonable deviation from federal institutional designs.

In these ways, subnational constitutionalism can promote at least three types of deliberation. First, it can facilitate direct public deliberation regarding unsettled rights and improved structural arrangements because each subnational unit will have the opportunity to make its own constitutional decisions regarding those issues. Second, it can promote a form of deliberation between subnational units as each unit takes a particular position regarding issues within their constitutional space. Subnational units can, according to civic republican assumptions, learn from each other’s experiences. That new data can inform the internal debate within each subnational unit and provide the catalyst for

constitutional progress.<sup>176</sup> Third, they can promote a constructive system-wide dialogue between the public and the political branches of government on one hand, and the judiciary on the other hand. Subnational constitutionalism allows the public direct access to the processes of identifying and defining rights and organizing and restructuring government. Those public inputs can inform judicial review of those issues and vice-versa.

This deliberative model developed here represents one constructive practical compromise regarding the conflict between constitutionalism and republican ideals. Constitutional ideals remain intact because certain basic rights and structural parameters are outside the bounds of any government action. Deliberative ideals remain intact because unsettled rights and institutional arrangements are not finally decided at the national level, but are left to public deliberation within and between subnational units. In this way, subnational constitutionalism can make a federal regime a safer place to deliberate because not all constitutional issues will be open to public discussion.<sup>177</sup> At the same time, it can make a federal regime more deliberative because some constitutional issues will remain within the realm of public political choice.

## 2. Subnational Constitutionalism and Incentives for Public Participation

Proponents of deliberative democracy recognize that public deliberation is more likely to occur if citizens have meaningful and relatively cheap points of access to the political process.<sup>178</sup> The basic idea is to increase opportunities for cheap public input regarding

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176. This second scenario draws on Justice Brandeis' "laboratory of the states" analogy. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Roderick M. Hills, Jr., *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 207-33 (Anne O'Connell & Dan Farber eds., Edward Elgar Publishing 2010) (explaining Justice Brandeis' theory in terms of information sharing).

177. Posner and Ginsburg's agency model of subconstitutions provides additional insight here. They suggest that the fundamental difference between subnational constitutionalism and national constitutionalism is that subnational constitutions operate under the protection of the national constitution. Ginsburg & Posner, *supra* note 18, at 1583-85. Applying agency theory, Posner and Ginsburg conclude that agency costs are far greater at the national level because there is no effective enforcement mechanism operating above the national constitution. *Id.* Subnational constitutional space, however, is directly enforced in domestic courts. This means that subnational constitutions need not be as static or "conservative" in their content as the national constitution because abuses of power are subject to an effective correction mechanism, i.e. judicial review. *Id.*; see also Witte, *supra* note 171, at 475.

178. See Parlow, *supra* note 127, at 156; Fitts, *supra* note 136, at 1656.

meaningful issues.<sup>179</sup> Institutions should be designed to “proliferate the points of access to government.”<sup>180</sup> In this regard, subnational constitutionalism can uniquely facilitate public deliberation in at least the following ways.

a. Democratic Scale and Political Participation

The political science literature discussing the relationship between jurisdiction size and public participation is vast and contested.<sup>181</sup> However, there is solid evidence that citizen participation tends to increase as jurisdiction size decreases.<sup>182</sup> What is striking about the literature from a republican perspective is that voting rates do not seem to significantly increase as jurisdiction size decreases.<sup>183</sup> Rather, as jurisdiction size decreases, citizens tend to engage in “thicker” kinds of public participation—such as contacting officials, attending hearings, or even running for public office.<sup>184</sup> Leading studies have concluded that these thicker forms of participation are not limited to extremely small political communities such as towns or counties. Eric Oliver, for example, has found that thicker participation increases even in larger communities of up to one million people.<sup>185</sup> Another study found that in the U.S., citizens are more likely to contact their elected state representative than their federal representative.<sup>186</sup>

The general explanation for this increase in thicker participation is that “reducing the size of constituencies and increasing the number of officials greatly reduces the costs of such activity.”<sup>187</sup> A further

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179. A separate issue facing deliberative theorists is access to political information. See Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 CHI.-KENT L. REV. 181, 185-87 (1990) (“A central point here, highly congenial to the republican tradition, is that preferences are shifting and endogenous rather than exogenous—endogenous to, or a function of, current information, consumption patterns, legal rules, and social pressures most generally.”). The concern here is with opportunities for the public to engage the political system.

180. Sunstein, *supra* note 119, at 1586 (greater access is valuable because it increases “the ability of diverse groups to influence policy, multiplies perspectives in government, and improves deliberative capacities.”).

181. Hills, *supra* note 1766, at 219-32.

182. *Id.* at 221-25.

183. *Id.* at 223.

184. *Id.*

185. *Id.* (citing ERIC J. OLIVER, *DEMOCRACY IN SUBURBIA* 42-52 (2001)); see also ROBERT DAHL & EDWARD TUFTE, *SIZE AND DEMOCRACY* 62-65 (1973) (similar finding regarding smaller communities in Sweden).

186. Hills, *supra* note 176, at 223 (citing SIDNEY VERBA, ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1994)).

187. Hills, *supra* note 176, at 223 (citing DALH & TUFTE, *supra* note 185; Daniel J. Elazar, *Cured by Bigness: Toward a Post-Technocratic Federalism*, in *THE FEDERAL POLITY* 272, 273 (Daniel J. Elazar, ed. 1973)).

explanation is that citizens tend to feel more “efficacious and knowledgeable when engaging in thick participation in smaller jurisdictions, and they are more likely to be recruited by neighbors and generally participate in mobilizing networks in smaller jurisdictions.”<sup>188</sup>

From a republican perspective, this evidence suggests that decentralization increases not only the quantity of participation, but also the quality. In smaller jurisdictions, citizens appear more likely to contact representatives regarding policy-specific concerns and participate directly in public forums.<sup>189</sup> This increased issue-specific participation makes richer public deliberation possible not only between citizens, but also between representatives. Greater citizen communication with representatives presumably reduces agency costs associated with representation. As representatives become more informed of their constituency’s issue-specific view points, they are better equipped to voice those concerns and less able to ignore them. Increased interaction of this sort can facilitate a more informed and inclusive public deliberation even at the representative level.<sup>190</sup> The implications of this for subnational constitutionalism should be clear: by decentralizing constitutional issues, a federal regime is able to facilitate both a higher quality and quantity of public deliberation regarding those important issues.<sup>191</sup>

b. Real Power and Incentives for Participation

Notwithstanding reduced participation costs, constructive deliberation will not occur unless citizens and their representatives are motivated to engage in meaningful deliberation.<sup>192</sup> The poor voting rates in the U.S. illustrate this point powerfully.<sup>193</sup> The costs of voting in the U.S. are relatively nominal, yet the instrumental incentives to vote are weak. The chances of a single vote materially affecting any election, yet alone a particular substantive policy, are miniscule. The result is low

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188. Hills, *supra* note 176, at 223 (citing OLIVER, *supra* note 185, at 61-65).

189. Hills, *supra* note 176, at 223 (citing SIDNEY VERBA, ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1994)).

190. Indeed, there is evidence that representative bodies for smaller jurisdictions have a higher proportion of minority representatives than larger jurisdictions. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8-9 (1988) (presenting and analyzing evidence).

191. See generally Rapaczynski, *supra* note 120, at 402-05 (discussing evidence regarding size and participation in state government).

192. Hills, *supra* note 176, at 225.

193. See Steven L. Winter, *When Self-Governance is a Game*, 67 BROOK. L. REV. 1171, 1202 (2002) (“Throughout most of the twentieth century, voting rates in the United States were much lower than in almost all other advanced democracies.”).

voter turn out. Those who vote apparently do so for non-instrumental reasons such a moral belief in voting as a civic duty.

As the voting phenomenon in the U.S. illustrates, the challenge of institutional design is to provide cheap access to forms of political participation that the public will be motivated to take advantage of. One familiar strategy is to ensure that the public's political access points concern important issues and that deliberating bodies have real power to decide those issues.<sup>194</sup> As Gerald Frug, a prominent local government scholar, claims, "no one is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference. . . ."<sup>195</sup> There is empirical support for this postulate. Citizens are more likely to mobilize when the issues involved are significant to them and their participation will make a difference.<sup>196</sup> There are at least three ways that subnational constitutionalism may help to mobilize political participation in this way.<sup>197</sup>

First, constitutional issues, especially issues regarding individual rights, tend to solicit significant public interest and mobilize grassroots political participation. Disputes over rights issues tend to mobilize citizen-based groups rather than industry-based groups because they generally implicate moral, cultural, or religious preferences.<sup>198</sup> Additionally, citizen-based groups rely on political strategies that aim to mobilize large numbers of citizens from diverse ideological backgrounds around a single issue.<sup>199</sup> They do this through grassroots mediums such as

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194. Parlow, *supra* note 127, at 174 n. 151.

195. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1070 (1980).

196. Hills, *supra* note 176, at 228-29 (citing WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)).

197. Providing subnational units with meaningful constitutional authority presents a now familiar problem for deliberative constitutionalism: how can authority for fundamental issues such as institutional design and individual rights be devolved to cheap points of political access without undermining the essential benefits of constitutionalism itself? Again, subnational constitutionalism provides a practical solution to the tension between constitutional and deliberative ideals. If deliberation regarding constitutional issues is inherently valuable, then the introduction of subnational constitutions into a federal system capitalizes on the participatory benefits of decentralization by allowing subnational units to engage certain constitutional issues without comprising the overall stability of the federal system.

198. See Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J. L. & PUB. POL'Y 295 (presenting significant data regarding direct democracy initiatives in the U.S., including data regarding signature campaigns and other grassroots forms of political activity); see also Elizabeth Garret & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, in *THE BATTLE OF CITIZEN LAWMAKING* 73, 73 (M. Dane Waters, ed. 2001) (concluding that special interest do not ultimately control direct democracy in state politics).

199. Hills, *supra* note 176, at 224 (citing Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001)).

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creating local organizational chapters, public demonstrations, and letter-writing campaigns. This suggests that unlike more technical legislative or administrative matters, rights issues are particularly likely to mobilize citizen participation. By devolving some rights issues to subnational units, federal regimes give these subnational units real power to decide important issues, which sets the stage for greater public participation.<sup>200</sup>

Second, entrenchment and supremacy provide independent incentives for greater public participation. Entrenchment and supremacy mean that the stakes are high when constitutional revision or amendment is involved. Regardless of the subject matter of a proposed amendment or provision, the fact that a constitutional provision will be beyond the reach of ordinary politics provides a strong incentive for all parties with an interest in a proposed provision to make sure that their voice is heard. It also means that if a constitutional amendment were a realistic possibility for a particular group or interest, they would be more likely to pursue this option than other forms of political participation that could ultimately be nullified by constitutional amendment. Furthermore, the fact that subnational constitutions must be endorsed by their respective subnational communities, and not simply thrust upon them by the national community, means that there will be some smaller, presumably more accessible, forum available for subnational opinions to be voiced regarding constitutional revision.

Third, a separate strategy for fostering citizen participation is based on the assumption that citizens are mobilized by rival parties or interests.<sup>201</sup> The idea is that diversity can facilitate participation. This assumption appears to be supported by the evidence. J. Eric Oliver has found that, within local politics, higher levels of racial or economic diversity will result in “thicker” forms of political participation.<sup>202</sup> However, subnational constitutionalism does not necessarily lend itself to this strategy. The determinate fact is demographical: whether subnational communities are sufficiently diverse to trigger dialogue between groups and foster participation. It is tempting to believe that constitutional issues, especially rights issues, can be divisive enough to

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200. Structural matters may be less politically controversial than rights issues. They are nevertheless incredibly important because they establish or alter the framework within which government will operate. There is evidence that these issues are also likely to solicit meaningful public participation. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (University Press of Kansas 2009) (2006) (reviewing state constitutional debates regarding important structural issues); Michael B. Berkman & Christopher Reenock, *Incremental Consolidation and Comprehensive Reorganization of American State Executive Branches*, *AM. J. POL. SCI.*, Oct. 2004, pp 796-812 (discussing major campaigns within states to re-organize executive branches).

201. Hills, *supra* note 176, at 226.

202. *Id.* at 227 (citing OLIVER, *supra* note 185).



draw out diversity from otherwise sleepy homogeneous populations. But, this ultimately depends on the configuration of the underlying subnational communities and the conventional wisdom is that smaller jurisdictions tend to be less diverse.<sup>203</sup> Nevertheless, because subnational constitutionalism can reduce participation and agency costs, if the subnational population is sufficiently diverse, participation may be more likely within subnational communities than national communities.<sup>204</sup>

C. *A Brief Comment on State Constitutionalism in the U.S. Federal System*

There is remarkably little literature discussing the normative justifications for state constitutionalism within the U.S. federal system.<sup>205</sup> To the degree that state constitutionalism is evaluated from a normative perspective, the scholarship closely tracks the *demos* and federalist models discussed earlier. However, as explained below, those explanations are incomplete in various respects, and a deliberative model of subnational constitutionalism may be a step towards a more complete account of contemporary state constitutionalism in the U.S. federal system.

1. The Demos Model and State Constitutionalism

Various scholars have attempted to “wrap” state constitutionalism “in the mantle of state autonomy.”<sup>206</sup> This scholarship contends that the federal system is structured to preserve semi-autonomous state polities with the authority to separately constitute themselves.<sup>207</sup> On this view, state constitutions are independent sources of fundamental law that derive legitimacy from their corresponding state polities.<sup>208</sup> State

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203. Hills, *supra* note 176, at 226 (discussing relationship between scale and diversity).

204. *Id.*

205. Two of the few direct treatments of this question can be found in John Kincaid, *State Constitutions in a Federal System*, 496 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, 16-18 (Mar. 1988) and Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: THE JOURNAL OF FEDERALISM 27, 31-33 (1982). Professor Gardner also addresses the issue. See GARDNER, *supra* note 16, 121-43.

206. Earl M. Maltz, *The Political Dynamics of the New Judicial Federalism*, 2 EMERGING ISSUES IN ST. CONST. L. 233, 233-34 (1989) (citing Ronald K.L. Collins, *The Once ‘New Judicial Federalism’ and its Critics*, 64 WASH. L. REV. 5, 15 (1989), and Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida’s ‘Forced Linkage’ Experiment*, 39 FLA. L. REV. 653, 679 (1987), as examples of this sort of scholarship).

207. Maltz, *supra* note 26, at 233-34.

208. See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 396-404 (1998) (summarizing this position). Chief Judge Judith

constitutions are understood as analogous to constitutions of sovereign nations in that their legitimacy derives from fifty unique polities with certain fundamental commitments expressed in their corresponding constitutions.<sup>209</sup>

The *demos* model is an incomplete explanation of the role of state constitutionalism in the U.S. federal system. First, scholars note that the *demos* model fundamentally misconstrues the nature of American federalism because it assumes that American federalism represents the confederation of independent sovereigns.<sup>210</sup> Most scholars reject this “compact” theory of American federalism.<sup>211</sup> They note that the Union under the Federal Constitution was the creation of a single polity with the decentralization of residential powers to the states as subordinate units.<sup>212</sup> It was expressly intended to create one American “People.”<sup>213</sup> Thus, as the argument goes, American federalism was not intended to preserve the rights of subnational groups to realize self-determination through state constitutions.

Although it is true that American federalism is not properly characterized as a confederation of independent states, that point alone is an unconvincing critique of the *demos* model of state constitutionalism. Within any federal system, subnational group self-determination is a matter of degree. The fact that the Federal Constitution creates one national “people” does not preclude the coexistence of subnational political identities—of varying degrees of salience—that find expression in state constitutions.<sup>214</sup>

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Kaye of the New York Court of Appeals is often associated with this position. See Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 423 (1987).

209. See GARDNER, *supra* note 16, 56-72 (summarizing this position).

210. See GARDNER, *supra* note 16, at 60, n.17. This assumption may have been understandable early in the nation's founding. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 71 (Penguin 2003) (“in a word, there exist twenty-four small sovereign nation states which link together to form the body of the Union.”).

211. See Akil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425 (1987).

212. *Id.* at 1450.

213. As Amar concludes:

It is tempting here simply to invoke the Constitution's famous first seven words—“We the People of the United States”—and be done with it. For at first blush, they seem to furnish irrefutable proof that the sovereignty of one united People, instead of thirteen distinct Peoples, provided the new foundation of the Federalist Constitution. The temptation is all the greater because of the (quite literal) primacy of these words in the text itself, their centrality in the minds of both pro- and anti-ratification leaders in the various state conventions, and their prominence in the early landmark opinions of the Supreme Court.

*Id.*

214. See *supra* note 88 (discussing the saliency of subnational political identity as a matter of degree within federal systems).

There is, however, a more convincing critique of the *demos* model. Various scholars have noted that the nature of American political culture has changed such that there are no longer meaningful subnational polities or associations underlying state constitutions.<sup>215</sup> Contemporary American society is simply too transient and nationalistic to support the “romantic” visions of vibrant subnationalism associated with the *demos* model.<sup>216</sup> This empirical argument has largely carried the day. Most theorists recognize that even though certain regions retain some cultural uniqueness, state boundaries no longer track cultural communities that are sufficiently consolidated to justify state constitutionalism exclusively under the *demos* model.<sup>217</sup>

## 2. The Federalist Model and State Constitutionalism

Because the *demos* model presents an incomplete normative justification for state constitutionalism, scholars have offered alternative theories. Most notably, Professors James Gardner and Paul Kahn have developed theories of state constitutionalism that can be characterized as variants of the federalist model discussed above.

According to Kahn, American federalism is intended to preserve a diversity of courts with authority to interpret the fundamental principles “of American constitutionalism.”<sup>218</sup> On Kahn’s view, state constitutions serve a federalist function because they provide the pretext for insulating state constitutional decisions from federal preemption; thus preserving a diversity of judicial opinions regarding the meaning of core constitutional principles.<sup>219</sup> Kahn expressly rejects that a state community’s input, rather than the input of its judges, contributes to the evolution of “American Constitutionalism.”<sup>220</sup>

Professor Gardner developed a more complicated theory of state constitutionalism. Like Kahn, he asserts that state constitutions should not be viewed as isolated and independent sources of constitutional law.<sup>221</sup> Gardner contends that “all American constitutions are drawn

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215. See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 66-72 (2007).

216. *Id.* at 61-62 (2007) (discussing empirical difficulties with this version of state constitutionalism).

217. *Id.* at 52-62; but see BILL BISHOP, *THE BIG SORT* 5-10 (2008) (concluding that local American communities tend to sort themselves along identifiable political lines).

218. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993).

219. *Id.* at 1156.

220. *Id.* (“State constitutionalism should not . . . splinter the debate over the possibilities of the rule of law into a Babel of fifty different communities.”)

221. *Id.* at 1160 (“To rest state constitutionalism on an idea of the state as an already defined historical community, with a text that can be interpreted to reflect the unique

from the same set of universal principles of constitutional self-governance.<sup>222</sup> According to Gardner, the *demos* model is in error because it adopts a positivist<sup>223</sup> approach to state constitutions that is incompatible with this universalist understanding of American constitutionalism.<sup>224</sup>

In keeping with this universalist understating, Gardner views state constitutions as serving two purposes. First, as a legal matter, they are necessary to establish and limit state government power.<sup>225</sup> Second, because federalism is intended to empower state government to act as a check on national authority, state constitutions must empower state government officials and institutions to act as “agents of federalism” that will seek to counteract national abuses of power on behalf of all Americans.<sup>226</sup> Gardner claims that this Madisonian vision of American federalism requires that state governments assume an obligation to use their authority on behalf of all Americans as a means of protecting against national abuses.<sup>227</sup> According to Gardner, because each state constitution does not correspond to a specific and unique polis, state constitutions are best viewed as instruments for state judges to use in pushing back on national abuses.<sup>228</sup>

On the whole, the federalist model presents a more compelling account of contemporary state constitutionalism than the *demos* model. American federalism is certainly designed to serve a liberty-protecting, checks-and-balances function, and state constitutions can play an important role in that regard. However, Gardner and Kahn’s theories are unconvincing because they discredit state constitutional texts as meaningful sources of constitutional law.<sup>229</sup>

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political identity of members of that community, is to try to build a serious legal doctrine on what may be no more than an anachronism or romantic myth.”).

222. James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*: 4 ROGER WILLIAMS U. L. REV. 109, 117 (1998).

223. Gardner defines positivists as “the Austinian notion that law, far from being some body of general principles upon which courts and legislators draw, is better understood as the specific commands of specific sovereigns.” *Id.* at 121.

224. *Id.* at 128.

225. Gardner, *supra* note 16, at 123-32.

226. *Id.* (“State power exists for the benefit of the people of the state, to be sure, and state constitutions exist in part to translate the state polity’s wishes into a satisfying plan of state-level government. But state power also exists for the benefit of the people of the nation, and it plays a potentially significant role in securing their liberty. . . . My welfare, in other words, depends not only your shared national constitution and on my state constitution, but also to some extent on your state constitution as well. State constitutions are thus linked in a web of constitutional relations created by the national system of federalism.”).

227. *Id.* at 122.

228. Gardner, *supra* note 16, at 123-32.

229. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 822 (1992) (concluding that state constitutions are merely product of

One of the most striking characteristics of contemporary state constitutionalism is the “beehive” of political activity that swarms around state constitutional change.<sup>230</sup> State constitutions are amended frequently.<sup>231</sup> More importantly, many amendments are not frivolous in content. Citizens frequently amend state constitutions with the express purpose of interjecting on weighty issues such as the scope of “equal protection,” “due process,” and “probable cause” as well as important structural issues like the scope of judicial review, executive veto authority, and agency rule-making authority.<sup>232</sup> These amendments sometimes restrain government action, but they frequently endorse intrusive state action.<sup>233</sup>

Gardner and Kahn nevertheless discredit state constitutional politics because of a normative assumption that “fundamental law” should not develop in piecemeal through popular political processes.<sup>234</sup> But this assumption should be questioned. As argued above, subnational constitutions are second-order political institutions. They operate within

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random political interjections and not a principled political tradition that “deserves” to be deemed “constitutional.”); Kahn, *supra* note 218, at 1156 (“State constitutionalism should not . . . splinter the debate over the possibilities of the rule of law into a Babel of fifty different communities. That, however, is exactly the effect of the doctrine of unique state sources.”).

230. John Kincaid, *State Constitutions in the Federal System*, AM. ACADEMY OF POL. & SOC. SCI., Mar. 1998, at 14 (“the realm of state constitutional law is a beehive of activity”).

231. See generally Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984). The states have collectively submitted 10,105 proposed amendments to voters regarding currently operative state constitutions, translating into an average of almost four proposed amendments per election year. THE BOOK OF THE STATES 12-13 (2009) (Table 1.1). This number (10,105) does not include the estimated 772 amendments to the Alabama constitution that are exclusively local in nature. See *id.* Voters have approved 6,645 amendments to their current state constitutions, translating into an average of over 133 amendments per state constitution. *Id.* Again, this number (6,645) does not include local amendments to the Alabama constitution.

232. See generally THE BOOK OF THE STATES 6 (2009) (Table B) (cataloging amendments by substantive category).

233. See Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 178 (1987) (surveying constitutional amendments in the criminal procedure context and concluding that they can be fairly characterized as both expanding and contracting rights protections).

234. See Gardner, *supra* note 229, at 822 (“state constitutions are hard-pressed to generate epics to give them meaning. When we turn upon state constitutions the narrative devices we use to create constitutional meaning on the federal level, we find state constitutions wanting. The stories to which they lend themselves are not stories of principle and integrity, but stories of expediency and compromise at best, foolishness and inconstancy at worst. And the poverty of state constitutional discourse merely reflects the limited narrative possibilities that state constitutions offer. . . .”); Kahn, *supra* note 218, at 1156 (“State constitutionalism should not . . . splinter the debate over the possibilities of the rule of law into a Babel of fifty different communities. That, however, is exactly the effect of the doctrine of unique state sources.”).

a legally defined and enforceable space created by the overarching national constitution.<sup>235</sup> Thus, there is no obvious reason to require state constitutions to be as immutable, comprehensive, and counter-majoritarian as the Federal Constitution. In fact, because state constitutions are legally constrained by federal law, they can be very responsive to popular input without compromising the core commitments of “American constitutionalism” embodied in the Federal Constitution.<sup>236</sup> In short, there is no obvious reason to demand that state constitutions originate and develop through the same kind of processes as the federal constitution.

### 3. Toward a Deliberative Democracy Justification of State Constitutionalism

The deliberative model of subnational constitutionalism discussed above may offer a more compelling account of contemporary state constitutionalism. First, a deliberative model of state constitutionalism provides a normative justification for valuing state constitutions as platforms for popular constitutional opinions. At the federal level, constitutional change is essentially insulated from popular input because the Federal Constitution is impossibly hard to amend.<sup>237</sup> Consequently, state constitutions provide perhaps the only opportunity within the U.S. federal system for popular constitutional law making. In other words, state constitutions ensure that the popular voice is not excluded from the evolution of constitutional content. Thus, from a deliberative democracy viewpoint, one virtue of American federalism is that it allows for localized popular participation in the evolution of constitutional content without compromising core constitutional commitments.

Second, a cursory review of contemporary state constitutionalism suggests that it may in fact provide incentives for popular political participation and constitutional deliberation. The high amendment and revision rate for state constitutions suggests that they provide frequent and affordable opportunities for public input and debate regarding constitutional issues.<sup>238</sup> Recent empirical research also suggests that state constitutional amendment procedures, which almost universally

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235. See *supra* Parts I.B.1 and IV.B.1.

236. See Witte, *supra* note 171, at 475 (concluding that “our federalism permits vigorous popular democracy to operate in the states because the Federal Constitution places checks on majoritarian excesses”).

237. See Lutz, *supra* note 174, at 355-70 (arguing that necessary constitutional change at the federal level occurs through judicial interpretation because amendment procedures are arduous).

238. See *supra* note 231 (discussing state constitutional amendment rates).

require public ratification,<sup>239</sup> may in fact provide meaningful incentives for grassroots political mobilization.<sup>240</sup> Moreover, as the recent debate regarding same-sex marriage illustrates, state constitutionalism can contribute to intra-state political dialogue between citizens and groups, as well as a deeper nation-wide institutional dialogue between the judiciary and popular government institutions.<sup>241</sup> In sum, state constitutions seem to contribute a great deal to the deliberative and participatory quality of American democracy.

Thus, the deliberative model of subnational constitutionalism constructed above may provide a crucial step in accurately understanding contemporary state constitutionalism. It may be most accurate to characterize state constitutions as the ever-evolving work product of fifty decentralized but interconnected deliberative groups. State boundaries matter because they ensure that constitutional debate and participation can occur at a more local level; not because state boundaries correspond to distinct subnational polities with shared norms (*demos* model). State constitutional texts matter because they provide a vehicle for incorporating popular constitutional opinions into the evolution of constitutional content.

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239. In Delaware, the legislature may amend the constitution without a popular referendum on proposed amendments. See DE. CONST. art. XVI, § 1.

240. See, e.g., Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700 (2001) (conducting empirical study regarding ballot initiatives and voter turnout and concluding that ballot measures increase voter turnout<sup>240</sup>). Unfortunately, the available empirical research does not distinguish between legislative ballot initiatives, amendment initiatives, and amendment by legislative proposal. *Id.*; see also Tolbert, et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 29 AM. POL. RESEARCH 625, 627-28 (2001). Nevertheless, the general empirical finding that ballot measures increase voter turnout suggests that allow for constitutional change through referendum and initiative has a positive impact on political participation.

241. In November 2008, after the California Supreme Court ruled that the state's marriage statute unconstitutionally limited marriage to heterosexual couples, see *In re Marriage Cases*, 183 P.3d 384 (2008), opponents of same-sex marriage mobilized to secure a constitutional amendment (Proposition 8) limiting marriage to heterosexual couples. See generally Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337 (2010) (discussing the history of Proposition 8). Proponents of same-sex marriage quickly challenged the proposition in both state and federal court, but they also began the process of mobilizing grass-roots support for a constitutional amendment that would repeal Proposition 8. See Steven Mikulan, *Overturing Proposition 8 in 2010 or 2012*, LA WEEKLY, Jul. 30, 2009, available at <http://blogs.laweekly.com/ladaily/election/overturing-proposition-8-now/> (discussing the efforts to obtain support for the proposition). The result of this back-and-forth has been a heated political debate regarding same-sex marriage that has captured the attention of Californians and even the nation.

## CONCLUSION

In order to capitalize on the great utility of subnational constitutionalism, scholars must move past narrow conceptions that unnecessarily limit the institution's diverse functionality. The goal of this Article is to expound an institutional approach to subnational constitutionalism that will facilitate further exploration of the institution's utility. In so doing, the Article argues that one important but overlooked utility of subnational constitutionalism is its ability to contribute to the deliberative quality of democracy within federal regimes.