



Teaching and Researching Comparative Subnational Constitutional Law

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I. INTRODUCTION

I had the opportunity to teach “Comparative Subnational Constitutional Law” as a five-week seminar in Graz, Austria in May-June of 2009. I admit that I have not yet sought to develop, or even apply, any of the theories being debated in comparative constitutional law circles. Professor Vicki Jackson has suggested four goals of comparative constitutional study: 1) developing a better intellectual understanding of other systems; 2) enhancing the capacity for self-reflection on one’s own system; 3) developing a normative understanding of best practices; and 4) responding to domestic questions that are comparative in nature.¹ All of these seem to apply equally to

* Distinguished Professor of Law, Associate Director, Center for State Constitutional Studies, www.camlaw.rutgers.edu/statecon/. I dedicate this article to my colleagues and students at the University of Graz, Austria. Their law faculty and Rutgers Law School in Camden, New Jersey, have had a faculty exchange program now for over twenty-five years. I express particular thanks to Professor Erwin Bernat, who administers our faculty exchange and to Alexander Brenneis, now a Research Associate at the University of Graz who, as a visiting student at Rutgers, took my course on State Constitutional Law and then served as my Teaching Assistant back in Graz.

1. See Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN. ST. INT’L L. REV. 319 (2010). Ran Hirschl criticized comparative constitutional law scholarship because it is “under-theorized and lacks a coherent methodology.” Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125 (2005). If that is true for comparative constitutional law it must be an even more accurate description of comparative *subnational* constitutional law. Hirschl continued:

I begin by identifying four main types of scholarship labeled as comparative in the field of constitutional law and politics: (1) freestanding, single-country studies mistakenly characterized as comparative only by virtue of dealing with any country other than the author’s own; (2) comparative reference aimed at self-reflection through analogy, distinction, and contrast; (3) comparative research aimed at generating “thick” concepts and thinking tools through multifaceted descriptions; and (4) studies that draw upon controlled comparison and inference-oriented case selection principles in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data. While the study of comparative constitutional law by legal academics has contributed significantly to concept formation and the accumulation of knowledge drawing upon the former three categories of

comparative subnational constitutional law. Believing that there were enough materials now in English (my only language) to put together a set of readings for such a seminar, I gathered up a number of the publications that I have listed in the bibliography at the end of this article. I made these materials available to the students who had registered to take this course in English and found that most of the Austrian law students, like most American law students in the prior generation, were basically unaware of the, albeit relatively limited, legal importance and potential of the subnational constitutions in their country.

In fact, in Austria the constitutions of the *Länder* have not been considered very important, nor is the subnational constitutional space allotted by the Austrian Constitution particularly substantial.² In other words, the Austrian Constitution is more “complete” than many other federal constitutions, in that it specifies a number of the structural elements of the component unit governments within the national constitution itself.³ Consequently, the subnational constitutional space is not very extensive. Still, however, the *Länder* constitutions in Austria have important (potential or possible) legal and political roles, and I thought it would be important to begin with an introduction to those matters.⁴ Rather than comparisons with the state constitutions in the United States, I concluded that a comparative class might be more meaningful if we started with the subnational constitutions of the host country. Discussing the potential of subnational constitutions can be very interesting, as I have discovered in Austria, South Africa,⁵ Brazil, Mexico and Argentina. Analyzing at least some of the preliminary questions quoted below in the context of the subnational constitutions of the host country can lay an effective groundwork or baseline for a selective consideration on some or all of these questions vis-à-vis the subnational constitutions in other countries.

comparative analysis, it has, for the most part, fallen short of advancing knowledge through inference-oriented, controlled comparison.

Id. at 125-26. *But see infra* note 81.

2. For example, a leading book on the Austrian legal system seems not even to mention the constitutions of the *Länder*. See HERBERT HAUSMANINGER, *THE AUSTRIAN LEGAL SYSTEM* (3d ed. 2003).

3. *See infra* notes 14-15 and accompanying text.

4. Peter Bussjäger, *Constitutional Autonomy Versus Centralizing Powers: The Case of Austria*, in MICHAEL BURGESS & G. ALAN TARR, *CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES* (forthcoming 2011).

5. I participated in an extremely interesting discussion with Professor Nico Steytler’s LL.M. students at the University of the Western Cape in Cape Town, South Africa, in 2009, concerning the potential of the provincial constitutions in that country. *See also infra* notes 52-53, 61-62 and accompanying text.

II. BACKGROUND STUDY OF SUBNATIONAL CONSTITUTIONS

Many years ago I wrote an article called *State Constitutional Law: Teaching and Scholarship*.⁶ I have continued my work since then with American state constitutional law, which is a form of comparative constitutional law.⁷ In addition, together with my Rutgers political science colleague, and Director of the Center for State Constitutional Studies, Dr. G. Alan Tarr,⁸ we have initiated a study of “subnational” constitutions in other countries that are organized on the basis of constitutional federalism. This investigation began with a tentative, nonexhaustive set of questions that could be asked about the constitutions of component units in federal countries as a basis for comparative evaluation:

First, what is the theoretical function of subnational constitutions? Do they limit residual governmental power, or grant enumerated powers? Are there records of the debates on adoption, amendment, and revision of such constitutions? Is there anything in the national constitution that mandates certain provisions or matters be contained in the state constitutions? What is the role of popular sovereignty or constituent power in the process of adopting, amending, and revising the subnational constitution, and does constituent power (initiative, referendum, approval of borrowing, etc.) come into play in the operation of governmental systems under the subnational constitutions?

Second, how similar are the subnational constitutions to each other? Is there evidence that provisions in some constitutions have been modeled from others, either within the country or from outside? What have been the processes of evolution of subnational constitutions over the years, both within the subnational polity and, more generally, within each federal system? Are governmental institutions, rights protections, distribution of powers, and other matters different from or similar to those contained in the national constitution? Is there a standard set of matters and issues—a checklist—that should be dealt with in any subnational constitution?

6. Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEG. ED. 243 (1991). See also Jeffrey S. Sutton, *Brennan Lecture: Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165 (2009); Michael E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, 89 B.U. L. REV. 863 (2009).

7. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (2009) [hereinafter *AMERICAN STATE CONSTITUTIONS*]; ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (4th ed. 2006); FRANK P. GRAD & ROBERT F. WILLIAMS, *2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS* (2006).

8. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998).

Which governmental institutions provide authoritative interpretation of the subnational constitutions? Is there a subnational judiciary that interprets the subnational constitution, and, if so, can such interpretations be reviewed by the national judiciary? Were there important proposals put forward during consideration of subnational constitutions that were not adopted and, if so, were they adopted later?

Third, what are the politics of subnational constitutional change? Is the constitution frequently amended or revised, as a normal part of the component unit's politics, or are constitutional politics outside the scope of "normal politics"?

Fourth, how have the federal system's origins as integrative (leaving subnational constitutional space) or as devolutionary (creating subnational constitutional space) affected such issues as whether the component units' constitutions primarily limit or grant power? Have preexisting subnational constitutions served as models or provided experience for drafting the national constitution or for other, more recently admitted or created component units?⁹

We contend that a careful study of the subnational constitutions of component units¹⁰ must proceed, first, from a top-down (or center-periphery) view to determine the quantity and quality of "subnational constitutional space" permitted by the national constitution to the component units.¹¹ This would involve a determination of *legal* or *de jure* questions concerning the competency of component units to enact their own constitutions. We suggest that this space would be either wider or narrower depending on the range of discretion the national constitution provided for component units to adopt their own constitutions. Alan Tarr has provided a perceptive review of the factors that may contribute to either a wider or narrower subnational

9. 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, 13-14 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004).

10. More than a dozen countries organized on the basis of constitutional federalism utilize subnational constitutions. Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments*, 40 *S. TEX. L. REV.* 625, 630 (1999).

11. Williams & Tarr, *supra* note 9, at 4-5. On the question of whether the Australian state constitutions are authorized, or merely recognized and continued, by the federal constitution, see ANNE TWOMEY, *THE CONSTITUTION OF NEW SOUTH WALES* 797-801 (2004). For a survey of recent top-down changes in federal countries, see Nathalie Behnke & Arthur Benz, *The Politics of Constitutional Change Between Reform and Evolution*, 39 *PUBLIUS* 213 (Spring 2009). See also Richard Simeon, *Constitutional Design and Change in Federal Systems: Issues and Questions*, 39 *PUBLIUS* 241 (Spring 2009).

constitutional space within a federal country.¹²

Subnational constitutional space might also be accordion-like, expanding and contracting over the years through changes to the national constitution or judicial interpretation of it. For example, in Austria, the national constitution was amended in 1999 to permit *Länder* constitutions to include audit offices which could examine financial management of *Land* governments, after substantial doubt was expressed over whether such institutions exceeded the allotted subnational constitutional space.¹³ Countries like the United States and Germany provide a fairly wide space in which component units may exercise competency to adopt their own constitutions (their national constitutions are less “complete”).¹⁴ Countries like Mexico, South Africa and Austria, on the other hand, provide only a relatively narrow range of such subnational constitutional competency (their national constitutions are more “complete”). India, except for the special case of the Muslim-majority state of Jammu and Kashmir, does not permit any state constitutional space because all of the structural and other elements of state competency are contained in the national constitution itself.¹⁵ Canada does not have formal, written provincial constitutions.¹⁶

12. G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 115 PENN. ST. L. REV. (forthcoming 2011).

13. Bussjäger, *supra* note 4.

14. Donald Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCIENCE 23, 32 (Mar. 1988):

The Constitution is incomplete because a significant number of questions we can bring to it are not answerable using the one document alone. The general question of what the Founders intended, depending upon the specific topic, almost always takes us beyond the national Constitution for resolution. The prominence of states in 42 separate sections of the Constitution is one reason. Another is that the term “Founders,” given the relationship of the Constitution to the state constitutions, Declaration of Independence, and Articles of Confederation, must include far more than those who attended the Philadelphia convention in 1787.

15. Akhtar Majeed, *Republic of India*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES 180, 188 (John Kincaid & G. Alan Tarr eds., 2005); Arshi Khan, *Federalism and Nonterritorial Minorities in India*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS, *supra* note 9, at 199, 201. See also HARIHAR BHATTACHARYYA, FEDERALISM IN ASIA: INDIA, PAKISTAN AND MALAYSIA 28 (2010) (“Although it is the only State in the Indian Federation to have a Constitution of its own, its Constitution is governed by Article 370 of the Indian Constitution, which does not allow it to establish a theocracy.”).

16. G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767, 770 (2009). See also *id.* at 783-84:

Bill 196, introduced in the Quebec National Assembly in 2007 . . . acknowledges the identity of Quebecers as a French-speaking nation and affirms that “it is the prerogative of the Québec nation to express its identity through the adoption of a Québec Constitution.”

Federal countries bracket their subnational constitutional space in different ways. Subnational constitutional space may have both substantive and procedural elements. In other words, the national constitution may not only specify the areas in which the component units may exercise their constitutionmaking competency and discretion, but also mandate the processes by which that discretion is exercised.

In addition, of course, these matters may be dealt with in the national constitution in either a symmetrical or an asymmetrical manner. Some federal countries, in contrast to the United States, treat their component units differently with respect to their substantive and procedural subnational constitutional space. Interestingly, Franchesio Palermo contends that asymmetry has been increasing in Federal countries.¹⁷ On the other hand, James Gardner and Antoni Abad i Ninet, based on Madisonian views, argue that for an effective federalism where the component units can resist federal power, asymmetry encourages competition *among* component units rather than *between* the component units in common competition with the federal government.¹⁸

We suggest that these questions concerning subnational constitutional space are *legal* in nature, and require a method of federal policing to ensure that the subnational constitutional space is not *exceeded* by the component units, on the one hand, nor is it *invaded* by national authorities on the other hand.¹⁹

Next, however, we opined that if one were to look at the subnational constitutions themselves in a federal country, this would constitute a bottom-up (or periphery-center) analysis. From this point of view, the evaluation would not be a *legal* one, but rather an evaluation of the *political, de facto* choices made by each subnational unit as to how and to what extent to utilize its subnational constitutional space or constitutionmaking competency.²⁰ From this perspective, in virtually all federal countries, a much wider variety of subnational constitutionmaking, or asymmetry, would come into focus. One of our early conclusions, however, was that many component units in federal countries do not fully utilize (a political decision) the subnational constitutional space allotted them as a matter of law under the national

17. Francesco Palermo, *Asymmetries in Constitutional Law—An Introduction*, in *ASYMMETRIES IN CONSTITUTIONAL LAW: RECENT DEVELOPMENTS IN FEDERAL AND REGIONAL SYSTEMS* 11, 12-13 (Franchesio Palermo, Carolin Zwilling & Karl Kössler, eds., 2009).

18. James A. Gardner & Antoni Abad i Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 AM. J. COMP. L. (forthcoming 2011).

19. Williams & Tarr, *supra* note 9, at 7. See *infra* text accompanying notes 66-68.

20. Williams & Tarr, *supra* note 9, at 11.

constitution.²¹ The political explanations of this “underutilization thesis” present a fertile area of research.²²

After Dr. Tarr and I developed this interest in comparative subnational constitutional law, we began to reach out to scholars and practitioners in other federal countries, realizing that there were a number of very knowledgeable individuals who were simply not talking to each other about this topic. We were successful in organizing conferences or meetings in Pretoria, South Africa,²³ Bellagio, Italy,²⁴ Bosen-Bolzano, Italy,²⁵ Athens, Greece,²⁶ and Mexico City,²⁷ where we, with the help of many others, brought together a number of these knowledgeable individuals to build a basis for this new subcategory of comparative constitutional law. We formed an organization called the

21. *Id.* at 14-15; GERARD CARNEY, THE CONSTITUTIONAL SYSTEMS OF THE AUSTRALIAN STATES AND TERRITORIES 29 (2006) (“While the States enjoy the capacity to amend their Constitutions by ordinary legislation, to experiment and to innovate, they have largely neglected to do this.”); Juan Marcos Gutiérrez González, *United Mexican States*, in 1 GLOBAL DIALOGUE ON FEDERALISM: CONSTITUTIONAL ORIGINS, STRUCTURE AND CHANGE IN FEDERAL COUNTRIES 209, 215 (John Kincaid & G. Alan Tarr, eds., 2005) (“Although state constitutions [in Mexico] can create institutions and procedures that are not regulated by the federal Constitution, they usually deal with matters of minor importance, such as simple administrative organization and some alternative legal ways of implementing federal regulations”). See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. (forthcoming 2011):

The nascent comparative literature on subnationalism suggests that constitutive units do not always develop the political space that their constitution-making authority affords them. Rather, commentators observe that “subnational units in federal systems more often underutilize their constitution-making competency than they overutilize it.” Some commentators further argue that because of agency costs, subnational rights may tend to be under-protected or only weakly entrenched in the sense of being subject to easy amendment, reversed by popular referendum, or diluted through legislative backlash.

22. Astrid Lorenz & Werner Reutter, *Subnational Constitutional Politics in a Multilayered System: A Comparative Analysis of Constitutional Politics in the German Länder*, paper delivered at the Workshop on Subnational Constitutions of the World Congress of the International Association of Constitutional Law, Mexico City (Dec. 7, 2010) [hereinafter Workshop].

23. SEMINAR REPORT: SUBNATIONAL CONSTITUTIONAL GOVERNANCE (Konrad-Adenauer-Stiftung 1999).

24. Subnational Constitutions and Federalism: Design & Reform, available at http://camlaw.rutgers.edu/statecon/subnational_1.html.

25. This conference led to the publication of FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS, *supra* note 9.

26. The International Association of Constitutional Law VIIIth World Congress on Constitutional Law, *Workshop II: Subnational Constitutions in Federal Constitutional States*, June 13, 2007, available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/Williams.pdf>.

27. The International Association of Constitutional Law Secretariat, *World Congress Workshop 5 ‘Subnational Constitutions,’* Apr. 11, 2010, available at <http://www.iacl-aidc.org/?p=447>. The workshop on subnational constitutions in Mexico City was extremely interesting and successful and included a number of new, young scholars.

International Association of Subnational Constitutional Law,²⁸ and the International Association of Constitutional Law has now recognized our group as the Research Group on Subnational Constitutions in Federal and Quasi-Federal Constitutional States.²⁹ Dr. Tarr and I coedit a volume of the International Encyclopaedia of Laws on subnational constitutional law.³⁰ Finally, we have utilized the *Rutgers Law Journal Annual Issue On State Constitutional Law*, for which I serve as faculty editor, as one organ to disseminate literature on comparative subnational constitutional law.³¹

III. INTEREST IN, AND REVISION OF, SUBNATIONAL CONSTITUTIONS

In a number of federal countries we have seen a substantial increase in interest in, and revision of, subnational constitutions. Many of the Swiss Cantons have revised their subnational constitutions.³² Peter Bussjäger reports that in Austria, even with its limited subnational constitutional space: “[S]ome observers have also noted a ‘wider self-consciousness’ among the *Länder* to make use of the constitutional space available to them. Coinciding with this was a change in the common understanding of the role of *Länder* constitutions among legal scholars and practitioners.”³³

Peter Quint noted that it was a very important step when the five former East German *Länder* revised their subnational constitutions at the time of German reunification: “Even the most modest of these new state constitutions reflect the lessons of the GDR past and the 1989 revolution, and—with all their similarities to the Basic Law [national constitution]—can still be said to represent a distinctly different, and distinctly eastern constitutional consciousness.”³⁴ Australia has considered the inclusion

28. International Association of Subnational Constitutional Law, <http://camlaw.rutgers.edu/statecon/iascl/> (last visited Feb. 24, 2011).

29. International Association of Constitutional Law, *Subnational Constitutions in Federal and Quasi-Federal Constitutional States*, <http://www.iacl-aicd.org/?p=62> (last visited Feb. 25, 2011).

30. INTERNATIONAL ENCYCLOPAEDIA OF LAWS, CONSTITUTIONAL LAW: SUBNATIONAL CONSTITUTIONAL LAW (1999) (containing detailed monographs on subnational constitutions in South Africa, Australia, Germany, Russia, Argentina, and the United States with others planned in the future).

31. See e.g. 31 RUTGERS L.J. 937 (2000).

32. Nicholas Schmitt, *New Constitutions for All Swiss Cantons: A Contemporary Challenge*, in BURGESS & TARR, *supra* note 4. See also Giovanni Biaggini, *Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Switzerland*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS, *supra* note 9, at 213, 219.

33. Bussjäger, *supra* note 4.

34. PETER E. QUINT, IN PERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION 99 (1997).

of a new state, the Northern Territory, with its attendant state constitutionmaking possibilities.³⁵ Australian comparative constitutional law expert Cheryl Saunders noted, in 2000, that: “A revival of interest in state constitutions in Australia would be consistent with developments elsewhere in the world.”³⁶ Even in the Sudan, at least in the Southern portion, new state constitutions have been adopted in a very important exercise of subnational constitutionmaking.³⁷ An important question is whether component units in federal states *should* utilize their allotted subnational constitutional space.³⁸ Nigeria considered this question in 1977 and decided not even to permit state constitutions to be adopted there because they might prove too “divisive.”³⁹ John Marshfield has provided a detailed consideration to the question of the benefits of permitting subnational constitutions in federal countries, including accommodation of multiple political communities, providing checks and balances to protect liberty and improving the deliberative quality of democracy.⁴⁰

A. *Subnational Identity Constitutionalism*

In some countries the increased interest in the importance of subnational constitutions has led to the assertion of “subnational identity constitutionalism,” often at the urging of local political parties, where “formulas like ‘nation,’ ‘nationality,’ ‘historical nationality,’ ‘national identity’ or ‘historical community’ are used, and many provisions are devoted to the local idioms.”⁴¹ In Spain, for example, there have been

35. Cheryl Saunders, *Australian State Constitutions*, 31 RUTGERS L.J. 999, 999-1000, 1014-18 (2000).

36. *Id.* at 1000. For discussion on Australian state constitutions, see Anne Twomey, *Australia Subnational Constitutional Law*, in VOL. SUB-NAT’L CONST. L. 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS 13 (Roger Blanpain et al. eds., 2004).

37. Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006). It remains to be seen what the effect of the referendum splitting North and South Sudan will have on these state constitutions.

38. On this question in South Africa, see Ralph Lawrence, *Where There’s Political Will There Might Be a Way: Subnational Constitutions and the Birth of Democracy in South Africa*, in SEMINAR REPORT, *supra* note 23, at 87. See also 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 (2008). On the national political influence on this question in South Africa, see Williams, *supra* note 10, at 643.

39. Jonathan Marshfield, *Models of Subnational Constitutionalism*, 115 PENN. ST. L. REV. (forthcoming 2011). See also L. Adele Jinadu, *The Constitutional Situation of the Nigerian States*, PUBLIUS, Winter 1982, at 155, 163-64.

40. Marshfield, *supra* note 39.

41. Giacomo Delledonne & Giuseppe Martinico, *Legal Conflicts and Subnational Constitutionalism*, 41 RUTGERS L.J. (forthcoming 2011). A number of my students in Graz noted this phenomenon.

major adjustments in the “autonomy statutes” (not referred to as “constitutions”) that govern the regional, autonomous communities.⁴² Similar developments have been taking place with Italy’s regional statutes (*Statuti regionali*) which, somewhat like those in Spain, are not called “constitutions,” but share a number of the characteristics of subnational constitutions.⁴³ The Italian Constitutional Court has ruled, as a legal matter, that the regional *statuti* are not “constitutions” and cannot have the legal effect of constitutions.⁴⁴ The Spanish Constitutional Court, in 2010, in a very controversial decision, struck down several provisions, some of which reflected “subnational identity constitutionalism,” of the revised Autonomy Statute of Catalonia.⁴⁵ An important controversy has been taking place in China over the question whether the organic statutes for Hong Kong and Macau may properly be referred to as subnational constitutions.⁴⁶ The High Court in Hong Kong did, in fact, refer to these as “constitutions,” only to be rebuffed by the Standing Committee of the National Peoples Party and forced to clarify its position.⁴⁷ So, the developments in Spain, Italy and China raise the question as to what really counts as a *constitution* at the subnational level, as well as the limits of subnational “constitutional” space.

42. César Colino, *Constitutional Change Without Constitutional Reform: Spanish Federalism and the Revision of Catalonia’s Statute of Autonomy*, 39 *PUBLIUS* 262 (Spring 2009). See also Giuseppe Martinico *The New “Estatutos de autonomia” In Spain: A Brief Overview of the Literature*, 2:1 *PERSPECTIVES ON FEDERALISM R-1* (2010).

43. Giacomo Delledonne & Giuseppe Martinico, *Handle with Care! The Regional Charters and Italian Constitutionalism’s “Grey Zone,”* 5 *EUROPEAN CONST. L. REV.* 218, 219-22 (2009).

44. *Id.* at 223. See also Delledonne & Martinico, *supra* note 41.

45. Delledonne & Martinico, *supra* note 41. Interestingly, it was *other Autonomous Communities* that challenged the provisions of its fellow component unit’s “constitution.” Gardner and Abad i Ninet *supra* note 18. For an analysis of the decision, see Generalitat de Catalunya 2006, *Statute of Autonomy of Catalonia*, <http://www10.gencat.cat/drep/AppJava/cat/ambits/recerca/IEAAngles/dev/02eac.jsp> (last visited Feb. 25, 2011).

46. Han Bing, *The Basic Laws of HK and Macao SARs Aren’t Subnational Constitutions in China*, paper delivered at Workshop on Subnational Constitutions of the World Congress of the International Association of Constitutional Law, Mexico City (Dec. 7, 2010).

47. Wang Zhenjun, *On the Hierarchy of Constitution and Basic Law in the SAR—from the Perspective of Decision of Hong Kong’s “Ng Ka Ling Case,”* paper delivered at the delivered at Workshop on Subnational Constitutions of the World Congress of the International Association of Constitutional Law, Mexico City (Dec. 7, 2010). See generally ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS—PERSPECTIVES OF EVOLUTION: ESSAYS ON MACAU’S AUTONOMY AFTER THE RESUMPTION OF SOVEREIGNTY BY CHINA (Jorge Oliveira & Paulo Cardinal, eds., 2009). Of course, the German national “constitution,” the Basic Law, has intentionally never been referred to as a “constitution.”

IV. THE LIMITS OF SUBNATIONAL CONSTITUTIONS

There are available materials, even just in English, for a study of the borders or limits of subnational constitutional space in a number of federal countries, together with initial comparisons with other federal constitutional systems.

A. *Austria*

For example, in Austria the national Constitutional Court had struck down a provision in the constitution of one of the *Länder*, Vorarlberg, because the subnational constitution purported to authorize a form of direct democracy that would require the Land parliament to enact a statute that it otherwise refused to enact.⁴⁸ This ruling, purportedly based on the requirements of the “Homogeneity Principle” of the Austrian Constitution,⁴⁹ was not based on any explicit limit, relied on a judge-made, implied federal constitutional *limit* on subnational constitutions, and was the subject of substantial academic criticism.⁵⁰ This was a decision that the Austrian students could read for themselves in German, but also study an analysis and criticism published in English by an Austrian professor.⁵¹ This, of course, also enabled me to discuss the case which was an example of federal policing of subnational constitutional space to *contain* it.

B. *South Africa*

There was a similar decision in South Africa, where the South African Constitutional Court rendered a grudging interpretation of the already extremely narrow subnational constitutional space granted to the provinces in the South African Constitution.⁵² Despite the fact that the national constitution permitted the provinces to enact constitutions that varied the “default” provisions in the national constitution for the structure of their legislative and executive branches, the Court struck down a provision in the proposed Western Cape Provincial Constitution

48. Anna Gamper, *Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg*, PUBLIUS, Winter 2003, at 45, 45. In class I asked why Vorarlberg had moved to amend its constitution in this and other ways while other *Länder* had not. The class discussion was quite speculative, but included considerations of party politics and the fact that Vorarlberg borders Germany, Switzerland and Liechtenstein. As noted, there has been significant subnational constitutional activity in Germany and Switzerland.

49. *Id.* at 46-52.

50. *Id.* at 52-57; Bussjäger, *supra* note 4.

51. Gamper, *supra* note 48.

52. *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape*, 1997 (9) BCLR at 1167 (S. Afr.).

that adopted a different electoral system for the provincial legislature. This decision, like the one in Austria, led to significant academic criticism as being too conservative or narrow a federal judicial view of the constitutional space accorded the component units.⁵³

C. *The United States*

To give a comparative, American example of these issues, one might refer to the fairly grudging, narrow interpretation of the power of states to ratify proposed federal constitutional amendments under Article V of the United States Constitution. The United States Supreme Court, even in the absence of any explicit limits on state legislatures contained in Article V, struck down a variety of procedural steps that states inserted in their constitutions before state legislatures may vote to ratify proposed federal constitutional amendments.⁵⁴ Of course, the case of *Bush v. Gore*⁵⁵ comes to mind as an example of an implied limit on state election mechanisms in Presidential elections, partly based on the fact that the Florida Supreme Court relied not only on state statutes (from the legislature) but also alluded to the Florida Constitution.⁵⁶ These could be seen as American examples of the top-down judicial “overenforcement thesis.” Of course, also in the United States, it is common for provisions in state constitutions to be struck down because they have more clearly “exceeded their subnational constitutional space,” or in American constitutional terms, because they violate federal law.⁵⁷

Cases such as those described in Italy, Spain, Austria, South Africa, and China, as well as those in Mexico and the United States,⁵⁸ may begin to form the basis for a top-down, judicial “overenforcement thesis.”

53. Dirk Brand, *The Western Cape Provincial Constitution*, 31 RUTGERS L.J. 961, 966-67 (2000). See also Williams, *supra* note 10, at 654-59; Rassie Malherbe & Dirk Brand, *South Africa Sub-national Constitutional Law*, in VOL. SUB-NAT'L CONST. L. 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS 98-100 (Roger Blanpain et al. eds., 2001).

54. *Hawke v. Smith*, 253 U.S. 221 (1920); *Leser v. Garnett*, 258 U.S. 130 (1922). Several more recent federal court decisions concerned the defeat of the federal Equal Rights Amendment in Florida and Illinois. See *Trombetta v. Florida*, 353 F. Supp. 575 (M.D. Fla. 1973); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975).

55. *Bush v. Gore*, 531 U.S. 98 (2000).

56. See James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U.L. REV. 625 (2001); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 FLA. ST. U.L. REV. 661 (2001).

57. See, e.g. *Romer v. Evans*, 517 U.S. 620 (1996); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Rice v. Cayetano*, 528 U.S. 495 (2000).

58. See *supra* text accompanying note 54. For Mexican examples, see Hector Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1, 10-12 (1998).

where national judicial or other review results in an unnecessarily narrow and grudging view of subnational constitutional space. This may be particularly true with respect to “subnational identity constitutionalism,”⁵⁹ where largely symbolic provisions are struck down. Interestingly, in an important new book Yonathan Fessha argues that such expressions of subnational constitutional identity are very important to a healthy and effective federal system.⁶⁰

D. South Africa

Despite national constitutional authorization, albeit narrow, only two of South Africa’s nine provinces have engaged in subnational constitutionmaking: Western Cape and KwaZulu/Natal. KwaZulu/Natal submitted a provincial constitution that was struck down by the Constitutional Court because it *far exceeded* the allocated subnational constitutional space.⁶¹ Interestingly, however, in the course of these decisions by the South African Constitutional Court, it expressed the view that it would be proper for a Province to include a bill of rights, even providing rights beyond (but not in conflict with) the national constitution, in its provincial constitution.⁶² This is not explicitly authorized. So, just as there may be implied *limits* on subnational constitutional space, as illustrated by the Austrian and earlier South

59. Delledonne & Martinico, *supra* note 41.

60. YONATHAN FESSHA, *ETHNIC DIVERSITY AND FEDERALISM: CONSTITUTION MAKING IN SOUTH AFRICA AND ETHIOPIA* 3 (2010):

The book contends that a multi-ethnic state must somehow recognize the ethnic plurality that characterizes its society. It presents recognition of ethnic diversity as an important institutional principle of a state that seeks to respond to the challenges of ethnic diversity. It advances this argument based on two points. First, an empirical examination of the experiences of multi-ethnic states suggest that states that are predicated on suppressing ethnic diversity have not succeeded in achieving their goal of creating a common national identity. In fact, the empirical evidence suggests that most of these countries are plagued by ethnic-based conflicts. Second, a state cannot remain neutral in so far as ethnic relationships are concerned, although this, admittedly, is the best strategy to build a state that does not create a hierarchical relationship among the different ethnic groups. The upshot of this argument is that the state has no choice but to recognize its multi-ethnic character.

61. Certification of the Constitution of the Province of KwaZulu-Natal, 1996 (Case CCT 15/96, September 6, 1996); Williams, *supra* note 10, at 648-54; Marshfield, *supra* note 38, at 613-20.

62. Williams, *supra* note 10, at 650-51. The Court also ruled that several other, less important matters could be included in provincial constitutions even though not specifically authorized. Delledonne & Martinico, *supra* note 43, at 222-24. In Italy, by contrast, the Constitutional Court ruled that the regional charters could not contain enforceable rights guarantees. *Id.* Stopping short of declaring such provisions unconstitutional, the Court “rescued,” or kept them “alive” by creating a middle ground of “cultural statements.” *Id.*

African examples, there may also be implied *competence* beyond the space explicitly created in the national constitution. To what extent is this true in other federal systems?⁶³

So, even with the slowly-emerging materials that we have available, it is possible to teach effectively the role of legal limits, and lawyers' and academics' argumentation with respect thereto, concerning the federal policing of the borders of the space allocated to component or subnational units to enact constitutions. One additional point, noted earlier, about federal policing of the legal contours of subnational constitutional space should be made: *process* as well as *substance* may be involved. Therefore, in South Africa the national constitution permits provincial (subnational) constitutions to be made only by the provincial parliament, with a two-thirds majority vote of the elected members. When the Province of KwaZulu/Natal purported to adopt a constitution that permitted further constitutional material to be adopted at a later point in time, *by statute*, the Constitutional Court noted this as one of the grounds for refusing to certify the Provincial constitution.⁶⁴

V. INTRUDING ON SUBNATIONAL CONSTITUTIONAL SPACE

As noted, it is not only possible for subnational constitutions to *exceed* their allotted space, but the opposite is also true. The national authorities may *intrude* into protected subnational constitutional space and the legal policing mechanisms must operate here as well. In the words of the Ronald Watts, a leading scholar of federalism:

Federations have varied enormously in the range of powers assigned to each order of government, but common to them all is the *constitutional* guarantee to the subnational governments of noncentralization, i.e., autonomy, in at least some fields of jurisdiction.⁶⁵

Another South African example provides an important lesson. The very narrow subnational constitutional space allocated to the provinces in the South African Constitution permits ("guarantees") them to vary the legislative or executive "structures" provided in the national constitution. The Western Cape Province's constitution specified that the provincial legislature would be composed of forty-two members, but the national election authorities, relying on their federal authority, determined that the

63. In Mexico the Constitution of the state of Oaxaca provided protection for indigenous peoples before the federal Constitution. González, *supra* note 21, at 214.

64. Williams *supra* note 10, at 657.

65. Ronald L. Watts, *Foreword: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 949 (2000).

Western Cape Provincial Parliament should have thirty-nine seats. When this dispute could not be resolved, the Constitutional Court had to step in and protect the Western Cape's utilization of its narrow, albeit legitimate, subnational constitutionmaking space.⁶⁶ In fact, the Constitutional Court had rejected a similar challenge several years earlier when it ruled on the validity of the proposed Western Cape provincial constitution.⁶⁷ An interesting inquiry would be to evaluate the extent that judicial or other *protection* of subnational constitutional space takes place in other federal systems and the types of argument that are made.

Dr. John Dinan, already an expert on American comparative state constitutional law,⁶⁸ has embarked on an important comparative study of subnational constitutions in federal countries.⁶⁹ His study is aimed particularly at the extent to which subnational constitutional structures differ (political decisions about the use of subnational constitutional space) from those of the national constitution of the country. Dinan found that federal countries did not show variance between national and subnational constitutions with respect to presidentialism or parliamentarism. On this issue, subnational constitutions almost always mirror the national constitution. He continued:

However, in three other areas, subnational constitution-makers have departed from their national counterparts in important and patterned ways that suggest distinctive traits of subnational constitutionalism. Although all but a few federations have bicameral national legislatures, unicameralism is increasingly the norm in subnational constitutions. Subnational constitutions are invariably easier to amend than their national counterparts. Subnational constitutions also generally provide more opportunities for direct democracy.⁷⁰

Another comparative approach, of course, would be to see how the subnational constitutions within a country compare to each other, or to evaluate how subnational constitutions within one federal country compare to those in another federal country or countries. Comparative subnational constitutional law research obviously could be expanded to cover many other questions such as whether subnational constitutions provide, or are interpreted to provide, rights guarantees beyond national minimum standards. Céline Fercot has provided an interesting introduction to such analysis, comparing Germany, Switzerland and the

66. *Premiere of the Province of the Western Cape v. Electoral Comm'n.*, 1999 (11) BCLR 1209 (CC) (S. Afr.).

67. Brand, *supra* note 53, at 967-68.

68. JOHN DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

69. John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837 (2009).

70. *Id.* at 841. For Australia, see TWOMEY, *supra* note 11, at 801-02.

United States.⁷¹

This area of subnational constitutional rights protection beyond the national minimum constitutional guarantees is potentially very important.⁷² As noted earlier, the South African Constitutional Court has ruled that South African provincial constitutions may contain rights guarantees beyond those in the national constitution.⁷³ There is at least one example of a judicial ruling in Germany, by a *Land* constitutional court, interpreting language in the *Land* constitution to be more protective than similar language in the national Basic Law as interpreted by the Constitutional Court.⁷⁴ Several of the new state constitutions in Southern Sudan contain womens' rights provisions that do not appear in the national constitution.⁷⁵ This is an important area for both subnational constitutional textual innovation and evolution as well as judicial interpretation.⁷⁶ As John Kincaid observed:

The new judicial federalism, however, suggests a model that would enable rights advocates to continue pressing for vigorous national and even international rights protections, while also embedding in regional constitutions and local charters rights that cannot be embedded in the national constitution, effectively enforced by the national government, or enforced only at minimal levels. Such an arrangement would produce peaks and valleys of rights protection within a nation, but this rugged rights terrain is surely preferable to a flat land of minimal or ineffectual national rights protection. The peak jurisdictions can function, under democratic conditions, as rights leaders for a leveling-up process. In an emerging democracy culturally hostile to women's rights, for example, such an arrangement could embolden at least one subnational jurisdiction to institutionalize women's rights, thus establishing a rights peak visible to the entire society without plunging the nation into civil war or back into reactionary authoritarianism.⁷⁷

71. Céline Fercot, *Diversity of Constitutional Rights in Federal Systems: A Comparative Analysis of German, American and Swiss Law*, 4 EUROPEAN CONST. L. REV. 302 (2008).

72. Williams and Tarr, *supra* note 9, at 15-16. This is, of course, one of the primary features of state constitutional law in the United States. See generally WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 7, at 111-232.

73. *Premiere of the Province of the Western Cape v. Electoral Comm'n.*, 1999 (11) BCLR 1209 (CC) (S. Afr.).

74. Jörn Ipsen, *Relations Between Subnational and Local Governments Structured by Subnational Constitutions*, in SEMINAR REPORT, *supra* note 23, at 59, 64.

75. Murray and Maywald, *supra* note 37, at 1224-25.

76. In Germany, the 1947 constitution of the Free Hanseatic City of Bremen outlawed lockouts even though the Basic Law did not. Delledonne & Martinico, *supra* note 41.

77. John Kincaid, *Foreword: The New Federalism Context of The New Judicial*

VI. USING SUBNATIONAL CONSTITUTIONS AS POLICYMAKING TOOLS TO SUPPLEMENT OR SUPPLANT ORDINARY LAWMAKING

Another interesting area of inquiry might evaluate the extent to which subnational constitutions are utilized, as in the United States, as tools or instruments of policymaking to supplement, or supplant, ordinary lawmaking.⁷⁸ For example, after Mexico's Supreme Court upheld Mexico City's statute legalizing first-trimester abortion, many of the state constitutions in Mexico are being amended to ban abortion altogether. As one journalist observed:

But three months after the Supreme Court upheld Mexico City's law, the state of Morelos amended its own constitution to decree that life begins at conception, granting embryos the same rights and protections as the mothers who carry them. Within a year, 14 more of Mexico's 31 states had passed similar amendments. (Three more are expected to join them soon.) Some of the amendments even outlaw the IUD, a popular birth control method.⁷⁹

In contrast, in Argentina the constitution of Buenos Aires (a capital autonomous region) was amended to protect same sex marriage. Of course, many American states amended their constitutions to ban same-sex marriage, including California's Proposition 8 which overturned the California Supreme Court's decision that a ban on same-sex marriage violated the California Constitution's equality provision.⁸⁰ John Dinan analyzes this use of state constitutional amendments to attain policies that cannot be achieved at the federal level.⁸¹ To what extent have such processes been taking place in other federal countries?

VII. CONCLUSION

Comparative subnational constitutional research is now covering both theoretical aspects⁸² as well as practical lessons from subnational

Federalism, 26 RUTGERS L.J. 913, 946-47 (1995).

78. WILLIAMS, AMERICAN STATE CONSTITUTIONS, *supra* note 7, at 21-25.

79. Mary Cuddehe, *Mexico's Abortion Wars*, THE ATLANTIC, Oct. 29, 2009. See also Ken Ellingwood, *Antiabortion Forces are Sweeping Mexico*, PHIL. INQUIRER, Jan. 10, 2010, at A24.

80. See, e.g. Vikram David Amar, *California Constitutional Conundrums—State Constitutional Quirks Exposed by the Same-Sex Marriage Experience*, 40 RUTGERS L.J. 741 (2009).

81. John Dinan, *Subnational Constitutional Amendment Processes and the Safeguards of Federalism: The U.S. in Comparative Context*, 115 PENN. ST. L. REV. (forthcoming 2011).

82. Tom Ginsberg and Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010); Marshfield, *supra* note 39; G. Alan Tarr, *Explaining Subnational Constitutional Space*, 115 PENN. ST. L. REV. (forthcoming 2011); James A. Gardner, *In Search of Sub-National Constitutionalism*, 4 EUROPEAN CONST. REV. 325 (2008); Robert A. Schapiro,

constitutions in one country to another.⁸³ It still seems clear, however, that the “Renaissance” of comparative constitutional law⁸⁴ has not included much of a focus on subnational constitutions. Subnational constitutional law, however, is here to stay despite globalization⁸⁵ and skepticism about its ability to foster genuine “subnational constitutionalism.”⁸⁶ Still, there have been enough developments in the subfield so that we no longer have to endure what John Henry Merryman called the “Loneliness of the Comparative Lawyer.”⁸⁷ These brief ideas

Foreword: In the Twilight of The Nation-State: Subnational Constitutions in the New World Order, 39 RUTGERS L.J. 801 (2008).

83. Anne Twomey, *Dangerous Democracy: Citizens’ Initiated Referenda in California*, 21 PUBLIC L. REV. 70 (2010) (reviewing direct democracy in California for Australian audience). Alan Tarr’s important book, UNDERSTANDING STATE CONSTITUTIONS has now been translated into Spanish by Daniel A. Barceló Rojas. *COMPRENDIENDO LAS CONSTITUCIONES ESTATALES* (Daniel A. Barceló trans., 2009). See also Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004).

84. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT’L L. 3 (2009).

85. Schapiro, *supra* note 82, at 804, 834-35:

Nation-states are losing their monopoly on international influence, but some need for a framework continues. States and state constitutions are well positioned to fill that gap. States can provide a mediating structure to allow a variety of subnational bodies to participate in governance with less danger of conflict and confusion. States and state constitutions also offer a mechanism to provide political legitimacy within a post-Westphalian regime. As compared with the national political system, the state governmental process provides a means to incorporate international law that is more accountable to the electorate and more likely to ensure the appropriate adaptation of global norms within the domestic system. In this way, states can make the globalizing process more democratic and more authentic.

* * * *

Globalization has led to a proliferation of intersecting legal institutions, thus heightening the need for conceptions of legitimacy and for coordinating structures.

States and state constitutions have a central role in this project of legitimation and coordination. States always have existed in a liminal space, mediating between the national government and the localities. Moreover, states long have functioned as non-Westphalian sovereigns. They are not nation-states, but polities that act within a complex web of legal institutions. Their legitimacy comes not from their identification with the “people” of the state, but through adhering to certain transparent processes and providing numerous means of democratic accountability. States are well suited to provide key nodes of power in the new world order, and an understanding of their role will be critical to responding to the challenges that globalization poses.

86. Gardner, *supra* note 82. Gardner notes that in countries other than the United States factors such as much easier access to constitutional change at the national level, as well as the advent of supranational institutions for rights protection, may actually result in declining importance for subnational constitutions.

87. JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER, AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW* (1999).

illustrate, I believe, the potential for studying subnational constitutions and introducing the topic to law and political science research and teaching here and abroad. I hope that these few examples will stimulate further investigation of this important new and *real* component of comparative constitutional law.

APPENDIX**Bibliography on Comparative Subnational Constitutional Law***

Dirk J. Brand, *Asymmetry In The Federal Systems—Constitutional Arrangements in South Africa*, European Diversity and Autonomy Papers, EDAP 01/2008

Dirk Brand, *The Western Cape Provincial Constitution*, 31 RUTGERS L.J. 961 (2000)

MICHAEL BURGESS AND G. ALAN TARR, CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES (forthcoming 2011)

GERARD CARNEY, THE CONSTITUTIONAL SYSTEMS OF THE AUSTRALIAN STATES AND TERRITORIES (2007)

César Colino, *Constitutional Change Without Constitutional Reform: Spanish Federalism and the Revision of Catalonia's Statute of Autonomy*, 39 PUBLIUS 262 (Spring 2009)

THE CONSTITUTION OF THE FREE STATE OF BEVARIA, THE CONSTITUTION OF LAND BRANDENBURG, THE CONSTITUTION OF LAND SCHLESWIG-HOLTEIN, CONRAD-ADENAUER-STIFTUNG, occasional papers, January 1995

Elmer E. Cornwell, Jr., *The American Constitutional Tradition: Its Impact And Development*, in THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 1, 14-19 (Kermit L. Hall et al. eds., 1981)

Giacomo Delledonne & Giuseppe Martinico, *Handle With Care! The Regional Charters and Italian Constitutionalism's "Grey Zone,"* 5 EUROPEAN CONST. REV. 218 (2009)

Giacomo Delledonne & Giuseppe Martinico, *Legal Conflicts and*

* A number of these entries could be seen as “freestanding, single-country studies mistakenly characterized as comparative only by virtue of dealing with any country other than the author’s own. . . .” Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 126 (2005). Still, Hirschl concedes: “At its best, this type of scholarship serves as a reliable reference for students of constitutional law in given polities. It may also contribute to the mapping and taxonomy of the still under-charted terrain of constitutional law worldwide.” *Id.* at 127.

Subnational Constitutionalism, 42 RUTGERS L.J. (forthcoming 2011)

Giacomo Delledonne and Giuseppe Martinico, *Handle With Care! The Regional Charters And Italian Constitutionalism's "Grey Zone,"* 5 EUROPEAN CONST. REV. 218 (2009)

Ivo D. Duchacek, *State Constitutional Law In Comparative Perspective*, 496 ANALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 128 (March 1988)

FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS (G. Alan Tarr, Robert F. Williams, and Josef Marko, eds, 2004)

Céline Fercot, *Diversity of Constitutional Rights and Federal Systems, A Comparative Analysis of German, American and Swiss Law*, 4 EUROPEAN CONST. L. REV. 302 (2008)

Lawrence Friedman, *Subnational Treasure: Federalism, Subnational Constitutions, and Minority Rights*, 28 SUFFOLK TRANSNAT'L L. REV. 261 (2005)

Anna Gamper, *Homogeneity And Democracy In Austrian Federalism: The Constitutional Court's Ruling On Direct Democracy In Vorarlberg*, PUBLIUS, Winter 2003 at 45, 45-47

James A. Gardner, *Perspectives on Federalism: In Search of Sub-National Constitutionalism*, 4 EUROPEAN CONST. LAW REVIEW 325 (2008)

Tom Ginsburg and Eric A. Posner, *Subconstitutionalism*, 62 STANFORD L. REV. 1583 (2010)

1 GLOBAL DIALOGUE ON FEDERALISM: CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES (John Kincaid and G. Alan Tarr, eds., 2005)

7 GLOBAL DIALOGUE ON FEDERALISM: DIVERSITY AND UNITY IN FEDERAL SYSTEMS (Luis Moreno and César Colino, eds., 2008)

Ken Gormley, *Exploring A European Union Constitution: Unexpected Lessons From The American Experience*, 35 RUTGERS L.J. 69 (2003)

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

HANDBOOK OF FEDERAL COUNTRIES, 2002 (Ann L. Griffiths, ed., (2002)

INTERNATIONAL ENCYCLOPAEDIA OF LAWS, CONSTITUTIONAL LAW, SUB-NATIONAL CONSTITUTIONAL LAW VOLUME (1999) (detailed monographs on subnational constitutions in Argentina, Russia, United States, Australia, Germany, and South Africa)

Ralph Lawrence, *Where There's Political Will, There Might Be A Way: Subnational Constitutions and the Birth of Democracy In South Africa*, in SEMINAR REPORT: SUBNATIONAL CONSTITUTIONAL GOVERNANCE 87 (Konrad-Adenauer-Stiftung 1999)

R.D. LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES (5th Ed. 1991)

MELISSA MAGLIANA, THE AUTONOMOUS PROVIDENCE OF SOUTH TYROL: A MODEL OF SELF-GOVERNANCE (2000)

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 (2008)

Johnathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. (forthcoming 2011)

Giuseppe Martinico, *The new "Estatutos de autonomia" in Spain: a brief overview of the literature*, 2 PERSPECTIVES IN FEDERALISM R-1 (Issue No. 1 2010)

James T. McHugh, *The Quebec Constitution*, 28 QUEBEC STUDIES 3 (1999)

Christina Murray and Catherine Maywald, *Subnational Constitution-Making In Southern Sudan*, 37 RUTGERS L.J. 1203 (2006)

FRANCESCO PALERMO, CAROLIN ZWILLING AND KARL KÖSSLER, ASYMMETRIES IN CONSTITUTIONAL LAW: RECENT DEVELOPMENTS IN FEDERAL AND REGIONAL SYSTEMS (European Academy of Bozen/Bolzano 2009)

PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* ch. 9 (1997)

Tsegaye Regassa, *Sub-National Constitutions in Ethiopia: Towards Entrenching Constitutionalism at the State Level*, 3 MIZAN L. REV. 33 (March 2009)

Cheryl Saunders, *Australian State Constitutions*, 31 RUTGERS L.J. 999 (2000)

BRADLEY SELWAY, *THE CONSTITUTION OF SOUTH AUSTRALIA* (1997)

Christian Starck, *The Constitutions of The New Germän Länder and Their Origin: A Comparative Analysis*, Conrad-Adenauer-Stiftung, Occasional Paper, June, 1995 (includes an English translation of the Constitution of Mecklenburg-Western Pomerania)

G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767 (2009)

G. Alan Tarr, *Explaining Subnational Constitutional Space*, 115 PENN. ST. L. REV. (forthcoming 2011)

James A. Thomson, *Review Essay: State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059 (1989)

Alexei Trochev, *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*, 38 LAW & SOCIETY REV. 513 (2004)

ANNE TWOMEY, *THE CONSTITUTION OF NEW SOUTH WALES* (2004)

Ronald L. Watts, *Foreword: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941 (2000)

RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* (2d ed. 1999)

Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625 (1999)