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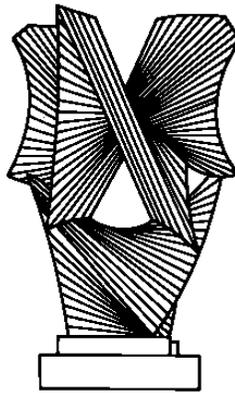
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## Subconstitutionalism

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# SUBCONSTITUTIONALISM

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*Abstract. Subconstitutionalism refers to two-tiered constitutional systems where a superior state and a group of subordinate states exercise overlapping control of a single population. Federalism is a familiar version of subconstitutionalism but scholarship on federalism focuses on the design of the superior state's constitution. Our focus is the design of the subordinate state's constitution. Our question is, how does the constitution of an independent state change when it becomes subordinate to another state in a federalist or related subconstitutional system? Applying agency theory, we argue that because the superior state reduces agency costs as between the subordinate state's government and its population, and because constitutional limits are best justified as means for reducing agency costs, it follows that subordinate state constitutions, or subconstitutions, should impose weaker restrictions on government (such as separation of powers), weaker rights protections, and weaker amendment procedures. We discuss evidence from the American states, the European Union, and the federalist systems of other countries.*

## Introduction

Many nation states have a two-tiered constitutional structure that establishes a superior state and a group of subordinate states that exercise overlapping control of a single population. The superior state (or what we will sometimes call the “superstate”) has a constitution (a “superconstitution”) and the subordinate states (“substates”) have their own constitutions (subconstitutions). We call this constitutional arrangement “subnational constitutionalism” or (for short) “subconstitutionalism.”

Americans understand subconstitutionalism as federalism. The national government controls the superstate; each of the fifty states is a substate. Constitutions exist at both levels. Other states, including Germany, Australia, Austria, Argentina, Brazil, Switzerland, Mexico, Russia, Venezuela, Malaysia, and Canada, also have federalist or quasi-federalist systems with two-tiered constitutional structures.<sup>1</sup> The

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<sup>1</sup> South Africa allows its provinces to adopt constitutions, subject to approval by the Constitutional Court, but so far only one province, the Western Cape, has successfully done so. See Constitution of the Western Cape, available at: [http://www.capegateway.gov.za/Text/2003/wcape\\_constitution\\_english.pdf](http://www.capegateway.gov.za/Text/2003/wcape_constitution_english.pdf). The Constitutional Court failed to certify the constitution of Kwazulu-Natal. In India, only Kashmir has its own constitution. Russia's complicated federal structure involves six different types of subnational units, only some of which (republics and arguably oblasts) have the authority to adopt subnational constitutions.

integration of Europe has produced a quasi-federalist system. EU members have retained their constitutions even as they increasingly submit to a European government with its own constitution.

When scholars discuss federalism and related forms of decentralization, they typically focus on the constitution of the superstate—the source of the federal structure—and ignore the constitutional aspects of the substates’ organization. The justification for federalism is (in modern terms) that some public goods are better supplied at a local level than at a national level because the economies of scale for those goods are not that large, and people can better monitor their government at the local level.<sup>2</sup> This justification is orthogonal to the question of the *design* of the substate’s constitution. To be sure, it implies that the substates must be quasi-independent on some policy dimensions; if they are not, and the superstate ultimately determines local policy, then the system is not federalist. But beyond this minimal level of constitutionalism, many design choices can be made. A subconstitution could contain many rights, or few; it could have a strong system of separation of powers or none at all; it could itself be federalist or not; and it could be easy to amend or hard to amend.

Our interest is the relationship between the superconstitution and the design of the subconstitution. A number of hypotheses are possible. At one extreme, there might be nothing special about subconstitutionalism: the constitutions of substates might reflect the same policy judgments that determine the design of the constitutions of ordinary states. At the other extreme, subconstitutions could have distinctive features. For example, perhaps subconstitutions always mirror the superconstitution. No state in the United States has a parliament. All have three branches of government, modeled after the U.S. Constitution. But there is also a great deal of variation: in the types and number of rights; the procedures for amendment; and the independence of the judiciary, for example.

To our knowledge, none of the work in the voluminous literature on constitutional design directly addresses this topic. Our contribution is to draw attention to the topic and provide a theoretical framework to address it. We use a simple theory that makes a single

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Robert F. Williams and G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons*, in G. Alan Tarr, Robert F. Williams, and Josef Marko, eds., *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 3, 6(2004). Other countries that might be said to exhibit subconstitutionalism include Spain and Italy, both of which have recently given powers to provincial governments and have “autonomy statutes” issued by the national government that function as constitutions in some respects. Ethiopia is sometimes considered a federalism. F. L. Morton, *Provincial Constitutions of Canada*, working paper (2004) but excluded from other definitions. See also Thomas O. Hueglin & Alan Fenna, *COMPARATIVE FEDERALISM: A SYSTEMATIC INQUIRY* 56-67 (2006) (listing federalist states).

<sup>2</sup> For example, a public good such as bus service may best be produced at a local level because information is easily available on routing, traffic and other relevant parameters. Other public goods may be better produced at a higher level. A road or train system, for example, involves coordination among numerous localities and so might be better produced at the level of the region. Finally, some public goods are best produced at the national level: national defense is a paradigmatic example. Producing public goods at the wrong level can lead to wasteful duplication, as might occur if each coastal sub-unit had to have its own navy or each city had to produce its own portion of a highway.

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. Hence, all else equal, a subconstitution need not be designed to reduce agency costs in the way that an ordinary constitution is.

Consider a simple example. The U.S. Constitution guarantees a republican form of government for the states. Suppose, then, that the populations of the states can expect the national government to intervene if their republican institutions fail. If this is so, it is less urgent to establish subconstitutions that have strong rules that limit government. By contrast, no foreign states will intervene if the U.S. government loses its republican character; so the U.S. Constitution will need to impose stronger limits on the national government.

If this example can be generalized, it suggests that substates will have weaker limits on government than superstates do. Substates should have weaker government structures (such as separation of powers and federalism), weaker rights, or lowers hurdles to amendment. In the balance of this paper, we lay out the theoretical case and discuss some evidence. Part I describes the economic theory of constitutionalism on which we rely. Part II applies this theory to subconstitutionalism. Parts III and IV discuss evidence from the American states and the European Union. For the sake of brevity, we will not discuss subconstitutionalism in foreign countries such as Germany and Canada in any detail; however, we will refer to some general patterns in those countries. Part V considers implications and extensions.

## **I. Constitutional Theory and the Control of Agency Costs**

To understand subconstitutionalism, we must first understand constitutionalism more broadly. This section reviews the literature on constitutions, focusing on features relevant to our account of subconstitutionalism. We follow the rational choice approach of considering institutions in terms of their functions, rather than their values. We define a constitution as a set of rules, superior to ordinary law, that formally bind actors in a political system. Constitutions are typically, though not always, formally entrenched in the sense of being difficult to change. They usually prescribe the process of making ordinary law and define the institutions of government. And they sometimes contain a set of limitations about what that government cannot do, in the form of lists of rights. While there are exceptions, these core features of constitutions are now found in virtually every national constitution in the world.

As the above description demonstrates, ideas of entrenchment are central to the notion of constitutions. Constitutions are *higher law*. Their production is associated with founding moments or critical junctures of the state's history. At such points, the ordinary politics of self-interest are sometimes believed to give way to a higher motivation in which fundamental principles are considered and debated. Constitutions are also ascribed

a role in forming the polity and creating a shared identity out of disparate parts, thereby contributing to the foundations of the state.

Why have a constitution? From a rationalist perspective, constitutions are political bargains among important groups in society. They are produced in a negotiating process, and will endure to the extent that powerful groups maintain an interest in their continued operation. These may be political parties, ethnic groups, social classes or any other group which has the power to upset the constitutional bargain. The constitution distributes benefits among relevant actors, and also serves to empower and control the agents that produce those benefits. It is this last feature, agency control, that is at the heart of constitutionalism and the main subject of our analysis.

### A. Theory

We can begin by imagining a pre-constitutional universe in which each individual participates directly in decision-making about public goods.<sup>3</sup> This would involve extensive discussion and consideration of alternatives before the group made a policy choice on any given matter. Such a system, however morally attractive, faces severe problems of transaction costs and accordingly could operate only on a very limited scale. Constitutions facilitate the hiring of representatives—a government—to make decisions about public goods on behalf of the people or other principals. This creates a problem of agency, in which the people must ensure that government acts in accordance with its instructions.

The relationship between principal and agent is a well-known concept in social science literatures on institutional design.<sup>4</sup> Agency costs may arise whenever a principal hires an agent to perform a given specialized task. Because the principal does not have the same level of information as the agent, there is a risk that the agent might not perform actions in accordance with the interest of the principal. This might be because the agent is acting on behalf of her own interest, or else is captured by (that is, acting on behalf of) a third party. A central task of institutional design is to ameliorate agency costs by aligning the incentives of the agent with those of the principal. Mechanisms for reducing agency costs include devices to screen agents before hiring, to monitor their performance, and to discipline those who do not follow the principal's instructions.

Even before it was formulated in terms of modern economics, the problem of agency costs in the constitutional context was identified by the founding fathers. James Madison conceived democratic constitutions as arrangements in which the people are the

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<sup>3</sup> James Buchanan and Gordon Tullock. *THE CALCULUS OF CONSENT* (1962).

<sup>4</sup> See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FINAN. ECON.* 305 (1976); Eric A. Posner, *Agency Models in Law and Economics*, in *CHICAGO LECTURES IN LAW AND ECONOMICS* (2000); Timothy Besley, *PRINCIPLED AGENTS: THE POLITICAL ECONOMY OF GOOD GOVERNMENT* (2006).

principal and the government the agent.<sup>5</sup> The constitution provides an enduring structure through which the people can govern themselves. The difficulty for Madison, and much subsequent constitutional theory, was to ensure that politicians in representative government would faithfully reflect the interests of the citizenry. Concerned that politicians motivated by ambition might seek to aggrandize their power, Madison suggested that the problem could be ameliorated through careful institutional design.<sup>6</sup> Periodic elections, for example, were an important means of ensuring the loyalty of agents.<sup>7</sup> Checks and balances also ensured that no government branch could abuse the citizens, at least not without cooperation from other branches.

But this solution faced another problem. Checks and balances had the effect of shifting the decision rule toward supermajority, making government more difficult. This exacerbated the power of blocking minorities, in which smaller groups can prevent useful changes to the status quo. At an extreme, giving each individual a veto over every policy would be a sure recipe for gridlock and constitutional inefficacy.

As Buchanan and Tullock put it, the problem of constitutional design is to specify the decision criteria for different types of problems so as to minimize the costs of decision-making (such as negotiation and information acquisition) while maximizing consent over issues that affect any individual in the group (which reduces the chance of what they call “exploitation,” by which they mean transfers from some people to other people).<sup>8</sup> As we move from core interests toward peripheral ones, we should expect decision rules to relax. Thus rights, which represent core interests, are usually protected by a constitution that requires a supermajority to amend. Peripheral interests are the realm of ordinary politics and majoritarian legislative processes.

Another concern of Madison was the fear that, in a diverse republic, one part of the principal might “capture” the government and cause it to act against the interest of the broader people. This was the famous problem of faction, and can also be seen as a type of agency cost or exploitation cost. Madison’s solution to the problem of faction was to expand the size of the republic.<sup>9</sup> By creating an ever more diverse set of interests and a larger republic, it minimized the risk that any one faction would be able to capture government.<sup>10</sup> It also freed representatives from factional pressures in his view,

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<sup>5</sup> Bernard Grofman and Donald Wittman, *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* (1989).

<sup>6</sup> Federalist 51 (“ambition must be made to counteract ambition”).

<sup>7</sup> Federalist 51 (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”)

<sup>8</sup> Buchanan and Tullock *supra* note 3.

<sup>9</sup> Federalist 10.

<sup>10</sup> To be sure, Madison’s thinking was more subtle than this. He also seemed concerned that at times the people—the ultimate principal in the political system—would demand action on behalf of their short term interests rather than longer one. Madison’s design also sought to insulate representatives from the people to overcome short-term thinking. The longer terms in the Senate for example, were thought to better identify with the long-term public interest, even if in contemporary terms we might see them as extending agency slack. See Randall Strahan, *Personal Motives, Constitutional Forms, and the Public Good: James Madison*

facilitating their deliberation over the public good, and thus making them better agents for the citizenry as a whole.

Modern theory is more skeptical about the ability of pluralism to minimize the dangers of faction.<sup>11</sup> Interest groups may seek to take over the government, or else influence the agents to distort policies away from the optimal public good. These efforts expended by groups to capture government for their own benefit are a waste of social resources known as rent-seeking.<sup>12</sup>

What is the principal to do once government is captured by a wayward agent? This question implicates the problem of constitutional enforcement. The central problem here is that there is, in most cases, no external enforcer of the constitutional bargain.<sup>13</sup> In a democracy, the people themselves must enforce the constitution—even a supreme court decision saying that government has violated the constitution will mean nothing if the government can ignore it. Only if the people punish their wayward agents will constitutions be effective. The difficulty is that the people, being a large and diverse group, face collective action problems in organizing to enforce the terms of the constitutional bargain. They may find it difficult to agree on when a violation has actually occurred. Politicians can exploit differences of opinion among the people to avoid constitutional rules. Transparency and monitoring facilitate constitutional enforcement by making violations sufficiently clear that the people can coordinate their responses to alleged infractions of the rules.

In short, constitutional design must provide decision rules to maximize consent over core matters, while facilitating the creation of public goods by government agents. It must ameliorate the risk of capture. And it must provide sufficient transparency to facilitate enforcement against wayward agents.

## B. Implications

Since the idea of limiting agents was built into the very concept of the modern constitution, it is hardly surprising that many constitutional institutions have been

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*on Leadership*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 63, 84-89 (Samuel Kernell ed., 2003) (Madison's principal-agent theory).

<sup>11</sup> MANCUR OLSON, *LOGIC OF COLLECTIVE ACTION* (1964). Group organization is costly, and there is no guarantee that groups will form simply because common interests are identified and aligned. This meant that some groups would have an easier time organizing than others; in particular, small groups with intensely held interests might find it easier to organize than large, more diffuse groups in which each individual member has a relatively low stake, such as consumer and taxpayer groups. Thus the problem of faction could not simply be solved through pluralism or adding more groups to the mix.

<sup>12</sup> Anne O. Krueger, *The Political Economy of the Rent Seeking Society*, 64 AM. ECON. REV. 291 (1974); Gordon Tullock, *The Welfare Costs of the Tariffs, Monopolies and Theft*, 5 WESTERN ECON. J. 224 (1967). Rent-seeking occurs when actors seek wealth through manipulating the economic environment rather than from generating new wealth.

<sup>13</sup> Russell Hardin, *Why a Constitution?* in Bernard Grofman and Donald Wittman, eds., *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM*, 100-120 (1987); Barry Weingast, *Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

analyzed as devices to control agency costs. This section considers the roles of government structure, rights, and amendment rules from an agency cost perspective.

## 1. Government Structure

The design of government will have significant effects on the motivations of government agents. As an initial matter, the rules for selecting government actors will facilitate some level of screening of agents. In democracies, this is typically accomplished through elections, whereby the people can evaluate alternative potential agents and choose those deemed most likely to accomplish the goals. From an agency perspective, periodic renewal of the mandate of the agents is useful to ensure proper performance.

Besides screening, the structure of government itself can affect the ability of agents to “slack off” or otherwise fail to work toward the interests of the principal. One approach to minimize agency costs is to make government action difficult. Bicameralism and the requirement of executive approval of legislation, for example, both make law more difficult to pass, *ceteris paribus*. This ensures that a larger range of interests will be reflected in government policy, minimizing the possibility of dominance by any one agent. Similarly, the separation of powers makes it harder for one group to control all the branches of government, and hence reduces the risk of wayward agents. More broadly, separating powers means that each serves as the monitor of the other powers, minimizing the risk than anyone can deviate too far from the interests of the principal.<sup>14</sup> The price for this system is the risk of gridlock: if cooperation among the branches breaks down, government cannot implement policies that promote the public interest.

Another feature of the separation of powers ensures that actors who write laws do not implement or decide disputes under them, lessening the risk of self-dealing. The Emoluments clause of the U.S. Constitution, for example, prohibits a member of Congress from taking a government position that had been created or received a pay raise during the period for which the lawmaker was elected. This provision (which received brief public attention when Senator Clinton became Secretary of State, requiring rescission of a pay raise for that office) is clearly designed to prevent legislators from creating jobs for themselves.<sup>15</sup>

Judicial review provides a distinct device for monitoring. As Alexander Hamilton recognized, courts reduce agency costs by ensuring that violations will be exposed and punished.<sup>16</sup> Courts provide a forum in which those hurt by government can bring bad actions to the attention of others, serving as “fire alarms” to inform the principal of

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<sup>14</sup> See Torsten Persson, Gerard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163 (1997); and for skepticism, Geoffrey Brennan & Alan Hamlin, *A Revisionist View of the Separation of Powers*, 6 J. THEORETICAL POL. 345 (1994).

<sup>15</sup> See Adrian Vermeule, *Mechanisms of Democracy* 30-54 (2007).

<sup>16</sup> Federalist 78 (Hamilton), in *The Federalist Papers* [edition] at 464, 467 (judicial review of the constitutionality of laws protects “intention of the people” from “intention of their agents”).

agency slippage.<sup>17</sup> Modern constitutions create an array of other monitoring devices, including ombudsmen, human rights commissions, and counter-corruption commissions, to complement the role of the judiciary in monitoring government. All of these devices facilitate monitoring and enforcement by the principal of government agents—assuming that judges and other monitors act in the public interest rather than in their own private interests.

Federalism, and decentralization more broadly, is another device for reducing agency costs, of particular relevance for our inquiry. When there are many citizens subject to a government, their ability to monitor their agent is subject to a collective action problem. Each individual may be unwilling to bear the costs of monitoring government agents because she will not internalize all the costs of doing so. By locating the institutions to produce public goods at the lowest possible level, the creation of sub-governments reduces the monitoring problem and thus mitigates agency problems.

Federalism has another virtue from the perspective of agency control. In a polity with multiple governments and freedom of movement, governments will compete with each other to attract residents and their associated tax revenue.<sup>18</sup> Citizens will be able to choose among jurisdictions for residence. This competition may reduce the amount of agency slack.<sup>19</sup> We will return to exit and competition below. Finally, the presence of multiple governments makes each the monitor of the others, helping to bring constitutional violations to the attention of the polity. One of the rationales of federalism in the United States has always been to defend the citizens from encroachments by the national government.<sup>20</sup>

## 2. Rights

Rights can be interpreted as devices to reduce agency costs. There is a risk that government, once empowered, will overstep its assigned role. For example, the majority might seek to restrict political competition so as to stay in power by limiting speech that was critical of the government. Since political competition is itself necessary to align the interests of government and governed, this risk may be especially severe. Many constitutional rights, such as those protecting speech and association, have long been

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<sup>17</sup> Mathew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AMERICAN JOURNAL OF POLITICAL SCIENCE 16 (1984).

<sup>18</sup> William Riker, FEDERALISM (1964); Ludwig Van den Hauwe, *Public Choice, Constitutional Political Economy and Law and Economics*, in Boudewijn Bouckaert and Gerrit De Geest (eds), ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME I: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS, 603, 621 (2001); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>19</sup> Richard Epstein, *Exit Rights Under Federalism*, 55 L. CONTEMP. PROBLEMS 147 (1992); Robert P. Inman and Daniel L. Rubinfeld, *The Political Economy of Federalism*, in Dennis C. Mueller (ed.), PERSPECTIVES ON PUBLIC CHOICE 73-105 (1997).

<sup>20</sup> Examples in the U.S. context include the frequent use of lawsuits by states to challenge federal regulatory authority, the Virginia and Kentucky Resolutions of 1798, and the Nullification Crisis of 1832 in which South Carolina resisted the collection of a new tariff by raising a small army. See James A. Gardner, INTERPRETING STATE CONSTITUTIONS 87-98 (2005).

thought to be motivated by the need to preserve political competition. Providing a right has the effect of shifting the decision rule from majority toward unanimity for certain core interests of individuals.

Rights that protect minorities can also be interpreted from an agency cost perspective. The principal includes all the people, but there is a risk that a portion of the principal will capture government. If this sub-group is itself a majority, it can exploit the minority, which will have no recourse to the normal operations of democratic politics. Rules that protect minorities will thus be important parts of democratic constitutions.<sup>21</sup>

Criminal procedure rights are especially amenable to agency analysis. The public hires politicians to run the government, and these politicians hire other agents—including bureaucrats, police, and other law enforcement officials—to run the day to day operations of government. . . Particularly because government has the monopoly on the legitimate use of force, it is important to ensure that the government exercise that coercive power only in circumstances that warrant it. An extensive set of criminal procedures governing investigation, arrest, charge and trial is one way to ensure that the government has indeed restricted itself to “real” crimes that the principal wants punished—and doesn’t use law enforcement against political opponents, members of unpopular groups, and other innocents.

Property rights also fit the agency perspective. Government takings of private property pose a special threat. Representatives might be tempted to take private property and use it to the benefit of their own supporters. By ensuring that the government will compensate property owners for their full market value, the possibility of such government capture is reduced.<sup>22</sup> Furthermore, public use requirements mean that, at a minimum, governments will need to find a plausible public reason for the taking.

More generally, rights serve to control the agency of government by directing it toward particular and limited ends. If government cannot interfere with certain aspects of individual behavior not amenable to change, such as religious beliefs, government will instead focus on tasks for which the polity hires it, such as the generation of public goods. Thus rights serve to channel agents toward generating public goods. They also reduce the stakes of government, making it less likely that citizens will feel their core interests are threatened.<sup>23</sup>

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<sup>21</sup> John Hart Ely, *DEMOCRACY AND DISTRUST* (1984).

<sup>22</sup> Robert Cooter, *THE STRATEGIC CONSTITUTION* (2000); Maxwell Stearns and Todd Zywicki, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS* (2009); Saul Levmore, *Just Compensation and Just Politics*, 22 *CONN. L. REV.* 285 (1990); William Fischel, *A Constitutional Choice Model of Compensation for Takings*, 9 *Int’l Rev. L. Econ.* 115 (1989).but see Daryl Levinson, *Making Governments Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 *U. Chicago L. Rev.* 345 (2004)

<sup>23</sup> Weingast, *supra* note 13.

### 3. Amendment

The very notion of a constitution implies some fixed, relatively enduring structures to organize politics. But constitutions exist in a world of change, and so need to have some flexibility in order to endure. Exogenous change can trigger demand for adjustment in the constitutional rules. The problem is that the agents, if given power to manipulate the structure of government and rights on their own, might seek to entrench their own power and remain in office. Thus, the optimal threshold for amendment balances the need for change in response to exogenous developments, and the interest in preventing the government from entrenching its power.<sup>24</sup>

A high threshold for amendment helps ensure that changes to the fundamental structures are accomplished only with the approval of the principal, or a large component thereof. Entrenchment facilitates the notion that the principal retains control over the fundamental matters of policymaking and structures of governance, while leaving “ordinary” policymaking to the agents.

Various techniques for constitutional amendment make sense from this perspective. One set of procedures found in many democracies is to ensure that amendments are adopted only upon approval of two or more successive legislatures. Intervening elections allow the principal—the people—to evaluate and approve the changes proposed by the agent-legislators. Another device commonly found is to involve the people directly in approving amendments through referendum. The American system of requiring approval by the several states ensures that amendments are adopted only when they are supported by a sustained national coalition, an implicit temporal requirement.

Subjects covered by the constitution vary in terms of their importance and the risk of agency costs they present, and so might require tailored amendment rules.<sup>25</sup> Some constitutions implicitly adopt the ideal of varying the decision rule across issues through relative levels of entrenchment. Just as those rules characterized as constitutional are typically entrenched relative to normal legislation, so too some constitutional rules may be entrenched more than others. For example, in the United States Constitution, Article V provides that no state may be deprived of equal representation in the Senate without its agreement. This provision sets the decision threshold on this issue at unanimity, entrenching the representative scheme in the Senate far more strongly than the representative scheme in the House. India’s constitution has a varied level of amendment thresholds depending on the issue.<sup>26</sup>

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<sup>24</sup> For a recent discussion, see Rosalind Dixon and Richard Holden, *On the Difficulty of Amending the US Constitution via Article V: The Effect of Voting Rule Inflation*, NBER Working Paper on file with authors.

<sup>25</sup> Buchanan and Tullock, *supra* note 3.

<sup>26</sup> Gary Jacobsohn, *THE WHEEL OF LAW* (2004).

## C. Conclusion

We have argued that the need to reduce agency costs drives many features of constitutions. To be sure there are other functions of constitutions that do not perfectly fit into the agency cost story.<sup>27</sup> Constitutions do many different things in different societies. For our purposes, however, the agency theory does much of the work necessary to understand subconstitutionalism.

## II. Subconstitutional Effects

### A. Theory

Constitutional design at the superstate level and constitutional design at the substate level interact. Our focus is constitutional design at the substate level; we treat the superstate's constitution as exogenous. One way to think about this relationship is to imagine that a freestanding state submits to the authority of another state and hence becomes a substate (the other state becomes a superstate). The other state could be an already existing state, or it could be constructed out of the union of a group of states. This is roughly what happened when the American states ratified the U.S. Constitution. At that time, they belonged to a confederation but retained full sovereignty. The U.S. Constitution created a superstate that consisted of the thirteen former states, along with a national government for that superstate. Other unions have featured similar transformations--such as the union of German-speaking states that created the German Empire in 1871, and the union of Italian states, which took place over the course of the nineteenth century. Australian colonies retained their constitutions after their populations voted to approve the Commonwealth Constitution in a series of referenda between 1898 and 1900. The union of England and Scotland in 1707 formally created a new state, the United Kingdom of Great Britain. Scotland retained some sovereignty (for example, the Scottish legal system was retained), and so could be considered a substate of a new superstate that was really a successor of England. During the last half century, a gradual unification of European countries has taken place. In 1957, Belgium, France, Germany, Italy, Luxembourg and the Netherlands formed the European Economic Community, which implemented a customs union and certain common economic policies. As the

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<sup>27</sup> Other rationalist theories of constitutionalism include the idea of precommitment, a device to impose intertemporal constraints on action. See, e.g., Stephen Holmes, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988); Cass Sunstein, *WHAT CONSTITUTIONS DO* (2000); Jon Elster, *ULYSSES AND THE SIRENS* (1984); but see Jon Elster, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS* (2000) (revisiting the Ulysses analogy and finding it wanting.) Another view of constitutional rights focuses on distributional problems. Eric Rasmusen, *The Economics of Desecration* 27 *J. LEGAL STUD.* 245 (1998) [discussing *Texas v. Johnson*, 491 U.S. 397 (1989) as addressing the distributional problem between those who desecrate the flag and those who venerate the flag].

years passed, two things happened. The union “deepened” in the sense that its governance institutions became stronger and obtained authority over additional policy areas, and the union expanded so that today it has 27 members. No one would say that the EU is a “state” but it clearly has many state-like attributes—including courts, legislative institutions, an executive, and a bureaucracy. Although one can, for convenience, date the emergence of this quasi-state to 1986, when the Single European Act created the European Union, it is more accurate to say that the quasi-state emerged gradually over a period of time, and is still emerging. The Lisbon Treaty, finally ratified in 2009 after various setbacks, may well be another important marker in the gradual evolution in the direction of the state. In the meantime, the member states have gradually lost some of their sovereignty to this emerging (quasi-)superstate.

Why would an ordinary state become a substate? The optimal size of states varies with a number of factors, including economies of scale and internal heterogeneity.<sup>28</sup> Economies of scale depend in part on the international environment. In some eras, it will be better to have a large state to share the costs of defending ones border; in other eras, a small state will have advantages in policy flexibility.<sup>29</sup> Joining into a superstate arrangement allows substates to benefit from some economies of scale, but retain some control over other issues where there is not such benefit from scale. Retaining a substate constitution allows the population to avoid agency costs associated from the national scale, such as being forced to make transfers to subpopulations in other substates because they lose in the national political process.

We ask, How might the optimal constitutional design of a state change as it moves from being a “regular” state to a substate in a larger union? To answer the question, we make three stylized assumptions about the consequences of the transformation from regular state to substate. First, the substate loses powers to the superstate. For example, American state governments lost the power to enter treaties and launch wars to the national government. Second, the substate must submit to some form of monitoring and control by the superstate. For example, in the United States, the national government has the duty to maintain the “republican form of government” in the states; in addition, the states may not engage in actions that violate certain rights that their citizens enjoy under the national constitution. Third, the substate’s borders are opened, at least to some extent, and it will have to compete with other substates in the new union for people, capital, business, and other movables. As we will discuss later, every union is different, and so the extent to which the substate loses powers to the superstate, must submit to monitoring and control, and must compete with other substates, depends on the

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<sup>28</sup> David Lake and Angela O’Mahoney. 2004. *The Incredible Shrinking State: Explaining the Territorial Size of Countries* 48 J. CONFL. RES. 699(2004); Alberto, Alberto and Enrico Spolaore, *THE SIZE OF NATIONS* (2003).

<sup>29</sup> In general, we observe the size of states shrinking over time, in large part because international free trade and a benevolent security environment reduce the disutility of remaining small. Lake and Mahoney, *supra*.

particulars of the unification as embodied in the superstate's constitution. For now, we will abstract from these complexities.

The combined effect of these changes in status from regular state to substate is to mitigate agency costs within the substate.<sup>30</sup> There are several reasons for this. First, the stakes are lower. Because the substate loses powers to the superstate, it has less ability to harm its citizens by adopting policies adverse to their interests.<sup>31</sup> Second, information is improved. The superstate monitors the substate and can bring to the citizens' attention bad behavior of the substates' government; and because the substate has less to do, citizens should find it easier to monitor its behavior (though they also have less incentive to do so). Third, the substate risks losing citizens (and business and capital) to other substates if it adopts bad policies.

To the extent that agency costs decline when regular states become substates, the value of constitutional restrictions (in the substate) also declines. Thus, in the three areas we examine—government structure, rights, and amendment—the rules should become weaker, that is, easier to change or in other ways less likely to constrain the government. Separation of powers should become less pronounced (and simple majoritarianism should become more common); rights should erode; and amendment should become easier and more frequent. This process could take place formally or through changes in informal understandings or constitutional norms. Because the public and political agents believe that the superstate will reduce agency costs, they feel less need to conform to constitutional rules at the substate level. Further, substate constitutional rules should converge—in the sense that they will become weaker and, in the end, merely duplicate superstate constitutional rules or (what is the same thing) go into desuetude.<sup>32</sup>

This argument assumes that constitutional design reflects the public interest. It is possible, of course, that the process of designing a constitution can be captured by private interests or in other ways itself reflect agency problems. We will address this issue in due course. For now, we will assume that constitutional design reflects the public interest.

## B. Government Structure

States can be more or less centralized. In France, for example, provincial governments exist but they derive their power from the center, and the center can take that power back. In the United States and Germany, provincial governments maintain a degree of autonomy. Federalism is just a term for a certain type of decentralization. As noted earlier, federalism (or decentralization) has some standard justifications. In a federal state, power can be assigned to the government unit that best reflects the tradeoff

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<sup>30</sup> We do not address agency costs that result from the relationship between the populations of the substates and the new national government of the union.

<sup>31</sup> Technically, agency costs may be just as severe, in the sense that the public may have no less trouble monitoring and sanctioning the government. What we mean is that because the government loses powers, it can do less harm to the public, so that the constitution becomes a less important institution.

<sup>32</sup> There are other possible reasons for convergence, such as learning, as we discuss *infra* in Part V.

between monitoring costs and scale economies in particular issue areas. Competition between the center and the provincial governments, and among the provincial governments, can yield better outcomes. And the lower-level governments may be able to ensure that the national government does not abuse its powers.

What happens (or should happen) to a federal state when it becomes a substate? This is not an academic question: Germany, for example, is a federal state, which has been undergoing gradual transformation to substate status in the European Union. From an agency cost perspective, the answer is that the substate's federalist structure should erode, as that state itself becomes a part of a (national) federal structure. Monitoring by the superstate, and jurisdictional competition with other substates, impose discipline on the substate's government, and thus render the agency-cost-reduction function of federalism less important. In addition, because the substate yields some of its power to the superstate, members of the public will have less substate action to monitor, which should make it easier for them to monitor the actions that the substate continues to undertake. In sum, when a state becomes a substate, the federalist structures within the original state should weaken as it takes substate status.

A similar point can be made about separation of powers. In states with separation of powers, the government is divided into multiple agents that compete for the approval of the public and must cooperate in order to implement policy. It is possible that competition improves incentives to act in the public's interest; the requirement of cooperation minimizes the risk of purely redistributive policy. At the same time, the separation of powers also introduces frictions and potentially gridlock: because more agents, with different constituencies, must approve policy changes, those policy changes are less likely to occur. If a state's agency costs decline when it becomes a substate, then the benefits of separation of powers will decline, while the costs will remain the same. Accordingly, separation of powers constraints in the substate can be dropped or weakened.

These points can be put in the more general form described in Part I.<sup>33</sup> Voting rules can be understood to reflect a tradeoff between decision costs and exploitation costs.<sup>34</sup> At one extreme, a dictator can make decisions cheaply but will also transfer resources from the public to himself or his supporters. At the other extreme, a unanimity rule will ensure that all laws benefit all people but imposes extremely high decision costs. A majoritarian rule or a supermajoritarian rule short of unanimity trades off these costs. Thus, a population would consent to one of these intermediary rules in order to minimize the sum of decision costs and exploitation costs. In the present setting, the question is whether substate status reduces exploitation costs in the same way that it reduces agency costs. The answer is plausibly yes. Superstate monitoring and jurisdictional competition should reduce the incentive and ability of the government to shift resources from one

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<sup>33</sup> See *supra* text at note 8.

<sup>34</sup> Buchanan & Tullock, *supra* note 3.

group to another because the target group can either complain to the superstate or leave the substate. It is straightforward that if substate status reduces exploitation costs, then one would predict voting rules to become weaker (that is, farther from unanimity). This change could manifest itself in many ways, including a weakening of separation of powers (which can create de facto supermajoritarian rules), and the elimination of parliamentary rules such as cloture which require supermajorities.

Direct democracy provisions are typically majoritarian, and frequently found at the sub-state level. In Russia and the United States for example, there are no structures for direct democracy at the federal level, but some of the substates do have such provisions. All of the German *Länder* provide for a popular initiative, though there is no equivalent at the national level.<sup>35</sup> And in both Switzerland and Austria, provisions for direct democracy are more extensive at the substate level than at the federal level.

Another feature of subconstitutional governance that is majoritarian is unicameralism. Most super-states provide for bicameral legislatures, which have long been understood to give minorities the ability to block legislation, and thus serve a supermajoritarian function.<sup>36</sup> Sub-states, however, typically have unicameral legislatures, which are majoritarian. Indeed, one 2001 study found only 73 bicameral state legislatures out of some 450 worldwide, and the trend is toward eliminating second chambers.<sup>37</sup>

### C. Rights

Rights protect individuals from government overreaching--at the behest of a majority or some powerful group. Rights, in essence, eliminate certain policy instruments that the government might otherwise use. For example, rights to criminal procedure help ensure that the government does not use its police powers to repress political opposition.

If substate status reduces agency costs, then it will become less necessary for the substate to uphold its own system of rights. For example, if the superstate or its courts ensure that the substate government does not repress political opposition, then the population of the substate might think it less necessary to insist that the substate government respect the existing rights in the substate. Because politically motivated prosecutions will be rarer, rights to criminal procedure are less important; they can be weakened so that the substate government is less hampered in its pursuit of regular criminals. Similarly, if the superstate guarantees rights to abortion or gay marriage or free speech, then the substate need not guarantee these rights; its citizens will enjoy these rights regardless of the policies chosen by the substate.

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<sup>35</sup> Dinan, *Patterns of Subnational Constitution-Making in Federal Countries*, Paper for World Congress of the International Association of Constitutional Law (June 11-15, 2007) at 8-11.

<sup>36</sup> Venezuela is apparently the only federal state with a unicameral parliament. Dinan, *id.* at 16.

<sup>37</sup> Louis Massicotte, *Legislative Unicameralism: A Global Survey and a Few Case Studies*, 7 J. LEGISLATIVE STUD. 151 (2001)

There are some competing considerations. First, substate rights might increase to protect against encroachments by the superstate. Second, weaker incentives to monitor substate governments might create more interest group activity at the substate level. Sometimes this takes the form of special interest rights claims, which would increase the overall level of rights protection. Thus a “weakening” of the constraints on entrenching rights will lead to more (but less deeply entrenched) rights.

#### D. Amendment

Procedural limits on amendment ensure that the government does not change the rules of the game to favor particular interests—the government’s supporters, for example, or a majority at the expense of a minority—or entrench itself by throwing up barriers to political competition by opponents. Separation of powers and rights do not provide protection if they can be easily changed through amendment. If, as we have argued, substate status reduces agency costs, then limitations on amendment should be dropped or weakened. The government cannot improve its position by amending the substate constitution because of the discipline imposed by the superstate and jurisdictional competition. Even if the government eliminates all substate rights, citizens will continue to be protected by their rights under the superstate’s constitution and policy. This is an illustration of the general argument above that a decline in risk of exploitation can be accompanied by a weakening of voting rules.

As is well known, constitutional amendment can take place both formally and informally. Formal amendment occurs through compliance with the amendment procedures in the constitution. 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.

Available evidence seems consistent with this conjecture. We know of no sub-constitutional system that is *more* difficult to amend than that of its super-state. Sub-state constitutions in Brazil, Malaysia and Switzerland use amendment mechanisms similar to those of the national constitution, while those in Austria, Australia, Germany, Mexico, Russia and Venezuela have at least one procedure that is easier.<sup>38</sup> In Australia, Canada and Venezuela, most changes at the sub-state level can be achieved with a majority vote.

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<sup>38</sup> John Dinan, *Patterns of Subnational Constitution-Making in Federal Countries*, Paper for World Congress of the International Association of Constitutional Law (June 11-15, 2007) at 6. See also See F.L. Morton, *Provincial Constitutions in Canada*, working paper (2004). In Australia entrenchment is weak (requiring either parliamentary consent or, sometimes, referenda) and, like in the United States, provincial constitutions are amended much more frequently than the national constitution. See John Waugh, *Australia’s State Constitutions, Reform and the Republic*, 3 *AGENDA* 59 (1996).

A corollary of the idea that individual provisions of a subconstitution will be less entrenched than those of a regular constitution is that the subconstitution as a whole may be less entrenched against wholesale revision through the calling of constitutional conventions. Subconstitutions may include provisions for their own revision, which is defined as a set of wholesale amendments that may lead to a new constitution. The combination of easy amendment and the possibility of revision means that subconstitutions are closer to ordinary statutes than are superstate constitutions. They occupy an intermediate category.

#### E. Summary

The greater the subordination of the substate to the superstate, and the greater the degree of jurisdictional competition, the weaker will be the constitutional rules of the substate. These weaker rules could be manifested solely in weak amendment procedures but could also appear as weak provisions regarding structure and rights.

As we noted above, subordination is a matter of degree, and it could be reflected in different institutional arrangements. The substate might lose few or many powers to the superstate. It will be subjected to more or less monitoring by the superstate, depending on whether the superstate has the right to void substate laws or not, and to what degree; whether the superstate has its own court system with direct enforcement powers (as in the United States) or only has a right to hear petitions from the judgments of the substates' courts (as in the European Union). And much depends on the number of substates and the degree of competition among them, which in turn depends on the extent to which people, capital, goods, and businesses can cross borders.

We should briefly consider some countervailing pressures that might cause substates to adopt stricter constitutional rules. One straightforward implication of our analysis is that if a superstate already exists but loses power over the substates, then the existing substates should respond by adopting greater constitutional restrictions in their own constitutions. Another possibility is one we have excluded so far: that the superstate might act abusively, in violation of its own constitution. Suppose, for example, that a substate population predicts that the superstate will favor one particular interest in the substate rather than perform its function (as we assume) of merely reducing agency costs. In such a case, other members of the population might fear that the favored interest will become powerful as a result of the support of the superstate, and use its power to influence the government in the substate in a way that hurts the public. To forestall this event, the population might agree to constitutional restrictions that weaken the government of its own substate. Finally, as we noted in Part C, as the substate constitution becomes weaker, it may become an arena of interest-group competition, leading to efforts by interest groups to constitutionalized their goals in the rights provisions of constitutions. So subconstitutionalism could lead to more rights (albeit less entrenched) at the subconstitutional level rather than fewer.

In short, we hypothesize that substate constitutions will have weaker government structures and rights, and will have weaker rules for amendment. Note that a constitution is weak in our sense—that is, mitigates agency problems less rather than more—if it has weak structure and rights *or* weak amendment rules (or both). Apparently strong structure and rights do not reduce agency costs if they can be easily changed.<sup>39</sup> We now turn to evidence from U.S. states, the European Union and the international sphere to evaluate these conjectures.

### III. American States

The theory of subconstitutionalism has several implications for the study of U.S. state constitutions, which form a paradigmatic example of the relationship between superstate and substate. U.S. state constitutions exhibit many of the features that we identify as subconstitutional. As the relationship with the federal government has become more subconstitutional, state constitutional practice has changed in profound ways that have been often noted, but seldom explained. We associate subconstitutionalism in the U.S. with greater majoritarianism, weaker rights, and more frequent amendment.

#### A. Government Structure

The U.S. Constitution requires that states establish a republican form of government. If, hypothetically, Arnold Schwarzenegger were to end elections in California and declare himself governor for life, the federal government would likely intervene. The federal government has also required substates to adopt the very form of having a constitution in the first place. When states have sought to join the union, the federal Congress has typically required adoption of a constitution prior to statehood, though not specified the scope of the document.<sup>40</sup> But it is likely that a state proposing to join the United States with a dictatorial subconstitution would not be admitted.

Because of the super-state guarantees of democratic governance, structural constraints on state governments are of less importance. Consider separation of powers. State governmental processes are more majoritarian and less super-majoritarian than the federal system. For example, most states allow for legislation or constitutional amendment by initiative and/or referendum, both of which are majoritarian instruments.<sup>41</sup> Minorities probably have less protection under such systems than they do under representative processes. Indeed, where a state constitution can be amended by majority, as in California, the result is an agglomeration of interest group activity at the

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<sup>39</sup> However, a government that is weak because of a structure might have trouble proposing amendments in the first place; if so, structure differs crucially from rights. A strong government might easily change rights if constitutional amendment is easy; a weak government might not be able to do the same.

<sup>40</sup> Eric Biber, *The Price of Admission: Causes, Effects and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119 (2004)

<sup>41</sup> For a detailed list, see <http://www.iandrinstitute.org/>

constitutional level, so that the constitution substitutes for ordinary legislation. Such substitutions are *not* much of a constraint on state government, but this does not matter because of super-state monitoring.

The structure of state legislatures is also more majoritarian than that of the national government. One state legislature (that of Nebraska) is unicameral, and the rest are bicameral like the federal congress. But unlike the federal senate, which explicitly over-represents smaller states, bicameral state legislatures feature two houses composed on the basis of population. The only difference between state “houses of representatives” and “senates” is the size of their respective districts. Thus the federal constitution over-represents the smallest units, while state constitutions treat each person the same in terms of representation. In this way, federalist structures impose weaker constraints on the state governments than they do on the national government.

Another example of weaker constraints on state governments is that few states give their judiciaries the independence enjoyed by the federal courts in the national government. Only three states—Massachusetts, New Hampshire, and Rhode Island—give judges lifetime tenure. In all other states, judges have terms. In most states, judges also face elections, either to obtain or retain office.<sup>42</sup> In many of these election systems, judges run as partisans of a particular political party. The effect of short terms, election and partisanship is to make judges more vulnerable to political pressure. The advantage of these systems is that judges face negative consequences if they slack off or abuse their positions. The disadvantage is that political pressure can cause judges to rule against unpopular minorities and individuals, and otherwise fail to act impartially. In the national system, the implicit judgment is that the risk of judicial malfeasance is the price that must be paid so that judges are free to constrain political agents who would otherwise abuse their power. At the state level, this price need not be paid if the national government reduces agency costs of state government.

## B. Rights

State constitutions contain lists of rights guaranteed to citizens. The federal constitution, of course, also provides for certain guarantees in the form of rights, most of which have been “incorporated” to be binding against the states as well. State constitutions independently provide for many of these rights, often adopting the same language as that in the federal constitution, such as due process and equal protection.<sup>43</sup> In some cases, state judges have interpreted these rights to provide for more protection than that afforded by the federal judiciary. Beyond these rights, however, states provide for additional

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<sup>42</sup> Norman L. Greene, *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949 (2005); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in State Courts*, 33 J. LEG. STUD. 431 (2004).

<sup>43</sup> Gardner, *supra* n. 20

rights, ranging from a right to fish<sup>44</sup> to a right to education.<sup>45</sup> Some twenty states prohibit discrimination on the basis of sex; by contrast, the Equal Rights Amendment failed to gain passage at the federal level.<sup>46</sup> Some states have “positive” rights, such as a right to education and to welfare, that are not found at the federal level.<sup>47</sup> Some states also extend rights provisions to explicitly cover private as well as governmental action.<sup>48</sup>

The process of incorporation can be considered as a raising of the federal floor for substates over time. Prior to incorporation, the protections of the Bill of Rights were not effectively guaranteed against states, which held primary regulatory power in many important areas. Beginning in the 1940s, however, the Supreme Court began to incorporate the Bill of Rights as part of the due process clause of the 14<sup>th</sup> amendment.<sup>49</sup> In the early 1960s, the Court incorporated the Establishment Clause, the right to counsel, the rights of free speech, assembly, and petition, and the right against unreasonable searches and seizures to apply to state governments, and at this point there are very few exceptions.<sup>50</sup>

The presence of a federal floor means that the stakes of state constitutions are lower than those of the federal one. The federal government bears some of the monitoring costs of state governments that would otherwise be borne by citizens. This may lead citizens to ignore the contents of the state constitution, for it is unable to interfere with the core interests of citizens. Indeed, one study found that only 52 percent of respondents were even aware their state *had* a constitution.<sup>51</sup> To some degree, this means that the domain of state constitutions is more subject to manipulation by interest groups, a common complaint among observers of state constitutional practice.

Our prediction is that the reduction in agency costs at the level of the state may lead to efforts to *reduce* some rights protections. One area in which we observe this is criminal procedure, conventionally justified as a way of reducing agency costs associated with government actors. On occasion states have attempted to ensure that constitutional protections against unreasonable search and seizure do not exclude too much evidence, and we also observe a recent trend toward victim’s rights at the state level, which can be

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<sup>44</sup> California Constitution. Art. 1 Sec. 25

<sup>45</sup> See discussion in Gardner, *supra* n. 21.

<sup>46</sup> Jeffrey Shaman, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 54 (2008).

<sup>47</sup> E.g. Constitution of Massachusetts, Amendment XLVII (right to food and shelter in time of emergency); Constitution of Alabama Art. IV, Sec. 88 (right to adequate maintenance of the poor).

<sup>48</sup> New Jersey Constitution, Art I para 19 (right to collective bargaining); *Hill v. NCAA*, 865 P. 2d 633 (Cal. 1994).

<sup>49</sup> *Adamson v California* (332 U.S. 46 (1947)). The notion of incorporation is sometimes traced to *Twining v. New Jersey* (268 U.S. 652 (1925)).

<sup>50</sup> The major exceptions are the 2nd and 3rd Amendments, the grand jury indictment clause of the 5th Amendment, and the 7th Amendment.

<sup>51</sup> Advisory Commission on Intergovernmental Relations, *Changing Public Attitudes on Government and Taxes 1991* (1991) quoted in G. Alan Tarr, *Introduction*, 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 1, 4 (G. . ALAN TARR AND ROBERT F. WILLIAMS, EDS. 2006)

seen as a reduction in protections for criminal defendants.<sup>52</sup> The State of Florida has a constitutional provision preventing state officials from granting citizens rights against unreasonable search and seizure *above* the federal floor of the Fourth Amendment.<sup>53</sup> One prominent commentator expresses surprise that there have been few serious proposals to augment the rights of the accused, notwithstanding that state and local governments carry out the vast majority of criminal investigations.<sup>54</sup> From our perspective, this is hardly surprising since the federal floor already resolves many of the agency cost problems associated with criminal procedure.

At the same time, it is undeniable that state courts also raised the floor of certain rights beyond the level specified in the federal constitution. Some authors speak of a “golden age of state constitutional law” when state judges actively developed rights jurisprudence after the decline of the Warren Court.<sup>55</sup> During the 1970s and 1980s, state judges have interpreted their own constitutions to expand the rights of privacy, liberty, and equality. They have created rights to same-sex marriage,<sup>56</sup> to refuse medical treatment,<sup>57</sup> and asserted that public school financing based on local property taxes violates principles of equality.<sup>58</sup>

One might think that this expansion of rights at the state level undercuts our claim that subconstitutional rights will be weaker than those in national constitutions. Yet a closer look at these rights suggests that they are frequently more weakly entrenched than rights at the national level. In some instances, voters have acted to repeal judicially created rights. In California and Hawaii, the electorate successfully sought to overturn rulings that mandated gay marriage.<sup>59</sup> Similarly, state court rulings requiring equalized school financing have met with significant resistance.<sup>60</sup> Furthermore, at times state voters have sought to punish judges who expand state rights higher than the federal floor, such as in the famous recall of Chief Justice Rose Bird and Judge Joseph Grodin in California over their liberal death penalty jurisprudence.<sup>61</sup> It seems that efforts to expand rights beyond the floor set by the federal constitution are sometimes susceptible to backlash.

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<sup>52</sup> Robert F. Williams, *Rights* in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 7, 17 (G. ALAN TARR AND ROBERT F. WILLIAMS, EDs. 2006) (discussing Michigan amendments in 1930s and 1950s).

<sup>53</sup> Art. I Sec. 12. See Gardner, *supra* n. 20 at 127.

<sup>54</sup> Robert F. Williams, *Rights* in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 7, 17 (G. ALAN TARR AND ROBERT F. WILLIAMS, EDs. 2006) (“surprisingly few serious proposals to add to or change these ‘rights of the accused’”)

<sup>55</sup> Shaman, *supra* note 46.

<sup>56</sup> Shaman, *supra* note 46, at 230-31.

<sup>57</sup> Shaman, *supra* note 46, at 230-31. Cases cited include *Rasmussen by Mitchell v. Fleming*, 741 P.2d 674 (Ariz. 1987); *In re Caulk*, 480 A. 2d 93, 94 (N.H. 1984); *Conservatorship of Drabick*, 200 Cal. App. 3d 185 (Cal. 1988).

<sup>58</sup> *Serrano v. Priest I*, 487 P.2d. 1241 (Cal. 1971); *Serrano v. Priest I*, 557 P.2d. 929 (Cal. 1976); *Robinson v. Cahill*, 303 A. 2d 273 (1973).

<sup>59</sup> A similar effort was initiated but failed in Massachusetts after *Goodbridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003).

<sup>60</sup> Shaman, *supra* note 46, at 247

<sup>61</sup> Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 329 n.161 (2008)

Such rights are likely to endure only when they are in fact consistent with majority preferences in the state, and such preferences differ across the country.

Even more important, state constitutions are relatively easy to amend, as we discuss in the next section. This means that constitutional rights in states are more akin to statutory rights than to constitutional constraints. They reflect the play of interests at any given time—they are the outcome of normal politics rather than a constraint on normal politics. In contrast, the difficulty of amending the federal constitution ensures that judicially created rights endure and hence impose stronger constraints on government.

### C. Amendment

We have argued that subconstitutions will be more flexible than constitutions, though perhaps not as flexible as an ordinary law. U.S. State practice provides much evidence for this. State constitution amendment procedures are less restrictive than those of the federal government.<sup>62</sup> Many involve popular referendum, often at the instigation of state legislators, and one-third of states utilize the popular initiative.<sup>63</sup> A number of state constitutions (11) require a simple legislative majority to propose a constitutional amendment; six require a majority vote in two consecutive sessions, nine require a 3/5 vote, and only a minority of state constitutions (20) require at least a 2/3 vote, as is required in Congress at the federal level.<sup>64</sup> Of course, even a 2/3 vote at a state level is not nearly as difficult as the federal amendment procedure, which imposes the additional requirement of ratification by 3/4 of the state legislatures. No analogous requirement exists in the states. The most difficult state constitutions to amend are either those of the four states that require a 2/3 vote twice, or that of Delaware, in which a 3/4 majority in the legislature is required. Neither of these procedures is *more* difficult than that of the federal constitution.<sup>65</sup>

Predictably, different procedures at the two levels of government have resulted in different rates of amendment. The Federal Constitution has been amended only in 17 instances for 27 total provisions. State constitutions have been amended an average of over a hundred times each, a rate of annual amendment 9.5 times higher than the federal government.<sup>66</sup> States have also replaced their constitutions with some frequency, so that

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<sup>62</sup> Bruce E. Cain and Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 Texas L. Rev. 1517, 1524 (2009).

<sup>63</sup> Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 360 (1994).

<sup>64</sup> Lutz, *supra*, at 361.

<sup>65</sup> Lutz finds that requiring a legislature to pass an amendment proposal twice has little effect on the difficulty of adoption. *Id.* He also produces an index of amendment difficulty, which takes value 3.60 for Delaware and has value 5.10 for the easiest method at the federal level. *Id.* at 362.

<sup>66</sup> Lutz, *supra*, at 367.

each has been governed by an average of three documents.<sup>67</sup> Only eighteen of the fifty states still have their original constitution.<sup>68</sup>

Subconstitutional amendment is more specific in character than federal amendment, sometimes providing specific benefits to particular interest groups. This has led state constitutions to become significantly longer than the federal document, and has prompted criticism that they are excessively detailed and in need of reform.<sup>69</sup> This is hardly surprising given the effect of increasing the federal floor over time. This increase has reduced the cost of monitoring, but also the incentive to monitor state governments. We would predict an increased level of amendment with incorporation, much of it driven by special interests.

To evaluate whether state amendment patterns have been affected by the changing federal-state relationship, we examine the effect of incorporation on amendment rates.<sup>70</sup> For each state, we provide in Table 1 the rate of amendment from its founding up until 1940; the rate for the period 1941-1970, when most of the bill of rights was incorporated against the states; and the rate after 1971. Our unit of analysis is the state-year, so that all amendments within a single year are amalgamated into one observation. This reduces the distortion associated with diverse amendment practices in states. The amendment rate thus provides the percentage of years in which the state constitution was amended for any given period.

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<sup>67</sup> G. Alan Tarr, *Introduction to 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 1, 2 (G. ALAN TARR AND ROBERT F. WILLIAMS, EDs. 2006); see also Lutz, *supra* n. 63, at 367.

<sup>68</sup> Bruce E. Cain and Roger G. Noll, *supra* note 62 at 1520 (Amendments are increasing in frequency and specificity, while revisions are more infrequent).

<sup>69</sup> [describe how detailed the amendments are, giving some examples]

<sup>70</sup> This approach could be extended. States have lost sovereignty at other periods of U.S. history, notably at the time of ratification of the U.S. Constitution, and after the Civil War. We predict (or “retrodict”) that rate of amendment of the state constitutions increased after each event.

**Table 1: Amendments per Year for U.S. States**

State	Amendment rate to 1940	Amendment rate 1941–70	Amendment rate 1970–2005
Alaska			0.31
Arizona	0.41	0.5	0.4
Arkansas	0.19	0.33	0.4
California	0.5	0.53	
Colorado	0.34	0.53	0.63
Connecticut		0.2	0.29
Delaware	0.23	0.5	0.61
Florida			0.42
Hawaii			0.25
Idaho	0.31	0.41	0.37
Iowa	0.11	0.21	0.26
Kansas	0.28	0.41	0.29
Kentucky	0.1	0.21	0.31
Louisiana			0.58
Maine	0.02	0.33	0.4
Maryland	0.24	0.3	0
Massachusetts	0.2	0.21	0.2
Michigan		0.28	
Mississippi	0.2	0.4	0.46
Montana			0.34
Nebraska	0.17	0.37	0.46
Nevada	0.23	0.43	0.51
New Hampshire	0.05	0.28	0.22
New Jersey		0.43	0.51
New Mexico	0.34	0.5	0.51
New York	0.5	0.6	0.43
North Carolina			0.34
North Dakota	0.4	0.4	0.51
Ohio	0.22	0.67	0.69
Oklahoma	0.12	0.5	0.63
Oregon	0.26	0.5	0.66
Pennsylvania			0.4
Rhode Island			0.2
South Carolina	0.44	0.53	0.43
South Dakota	0.33	0.4	0.43
Texas	0.42	0.73	0.83
Utah	0.22	0.3	0.43
Vermont	0.05	0.07	0.14
Virginia			0.45
Washington	0.23	0.4	0.62
West Virginia	0.17	0.37	0.29
Wisconsin	0.28	0.57	0.51

Source: Data from Rosalind Dixon and Richard Holden, *supra* n. 24.

Consistent with our theory we observe increasing amendment rates in most states. For states for which we have data, no state has a rate of amendment before 1940 that exceeds the rate of amendment thereafter, and only one state, North Dakota, has a rate before 1940 that equals the rate for the period of incorporation, 1941-1970. Most states exhibit increasing rates after the process of incorporation was largely completed. Statistical tests show that these differences are statistically significant.<sup>71</sup>

Besides amendment, state constitutions also provide for the possibility of their own replacement, unlike the federal constitution. In many states, constitutional revision can be periodically initiated by the legislature. In others, a referendum is called at a set period asking voters if they would like to revise the state constitution through a constitutional convention. Both methods have led to constitutional overhaul in the form of revision.

We characterize total revision as involving the constitutional principal—the people—renegotiating the basic bargain, while ordinary amendment involves lesser change and may be more susceptible to interest group pressures. Because revision involves higher stakes, it is likely to involve more careful monitoring of the legislative agents who actually conduct the negotiation. This theory helps to illuminate a heretofore puzzling feature of state constitutional change. Scholars observe that, since the 1960s, the number of revisions has declined dramatically, while amendments are increasing in frequency. This is consistent with the theory of subconstitutionalism. As the federal floor has risen with incorporation, the incentives to monitor state agents have declined. This means that more interest group activity can take place, in the form of constitutional amendments, while total overhauls have declined—the people have little incentive to call for them. It is easier for interest groups to work through the amendment process, particularly in states in which the constitution can be amended through initiative processes, than to accomplish their goals in a constitutional convention, which is likely to involve greater degrees of public monitoring and more multidimensional tradeoffs in negotiation.<sup>72</sup> Interest groups are better at blocking revisions than achieving narrowly designed policies through them.<sup>73</sup>

#### **IV. The European Union**

The European Union is not exactly a state, and is probably best regarded as a quasi-state that falls somewhere between an actual state and a confederation of states linked by treaties. We might therefore regard the EU as a quasi-superstate and EU members as quasi-substates. Whether or not the EU is a state, it does have a constitution. In judicial decisions and legal commentary, authors refer to the basic treaties that created the EU, and subsequent judicial decisions that interpret those treaties, as establishing constitutional norms—despite the rejection by voters in France and the Netherlands of a

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<sup>71</sup> ANOVA results: [right now limited to the 28 states for which info on all three periods is available.]

<sup>72</sup> Cain and Noll, *supra* note 62. But see Elisabeth R. Gerber, *Interest Group Influence in the California Initiative Process* (Public Policy Inst. Of California, 1998)

<sup>73</sup> Cain and Noll, *supra* note 62, at 1528-31.

draft constitution, which was subsequently abandoned.<sup>74</sup> Because the EU has a constitution, and all EU member states have constitutions, it is appropriate to regard those member state constitutions as subconstitutions.

If this assumption is correct, then Europe is a laboratory for testing our hypotheses. The gradual constitutionalization of Europe should have caused a weakening of government structures and rights in the member state subconstitutions and an increase in amendment of subconstitutions. However, because Europe has not fully integrated, and cannot be regarded as a state, these subconstitutional effects should be less pronounced than they are in an integrated union such as the United States or any other nation state.

#### A. Government Structure

Most European countries have conventional parliamentary systems; a few, such as France and Portugal, have hybrid systems that include parliamentary and presidential elements. The distinguishing feature of a parliamentary system is that the parliament formally has both legislative and executive powers but the actual executive power resides in the hands of the prime minister (and his cabinet) who controls the bureaucracy. Unlike a president, the prime minister is elected by the legislature and serves at its pleasure. Typically, a prime minister is selected by either the party with a majority of seats in parliament (as in the UK) or a coalition of parties that together form a majority (as in most other European countries). If the prime minister's party or coalition loses confidence in him, he must call for an election.

Although the parliamentary system does not feature the formal separation of executive and legislature, checks and balances nonetheless do exist. Parliament, often led by the party out of power, may scrutinize the prime minister's actions and mobilize public pressure when the government's policy deviates from the interests of the public. The threat of a no-confidence vote keeps the government in line.

It is conventional wisdom that the parliament of EU member states have lost power as a result of the development of European institutions. As Philipp Kiiver puts it,

Conventionally, the national parliaments are seen as the losers of European integration, having underestimated the European dimension and having allowed the governments to escape effective democratic accountability. Since the Council [of Europe] as such is indeed not accountable to the European parliament, the only formal accountability link there remains the individual ministers' reliance on parliamentary confidence at home. Most national parliaments, however, are widely

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<sup>74</sup> At the time of this writing, the Lisbon treaty has just been ratified. Though not styled a constitution in the same sense that the European Constitution was, the treaty has very similar provisions and was regarded as a quasi-constitutional document.

perceived to be rather modest and ineffective in exercising scrutiny over their ministers concerning European policy.<sup>75</sup>

The Council of Europe is the main decision-making body for the EU. It consists of the prime ministers of the member states. Yet the parliaments of the member states do not have the capacity to supervise the prime ministers' participation in the Council.

There are several reasons for this.<sup>76</sup> The EU's legislative programs are ambitious and technical. The prime minister can rely on the national bureaucracy's expertise; the parliament can keep apprised of developments in European law only with difficulty. Further, because the prime minister can be outvoted in the Council in a range of matters, the parliament may not be able to exercise control over legislative outcomes even if it manages to keep tight rein on the prime minister. For this reason, parliament has weaker incentives to monitor European affairs and the European policy of the prime minister than other aspects of the prime minister's performance, where the parliament's position can reliably affect outcomes. Although technically the parliament has another chance to exert control when directives are handed down, in reality they must either follow those directives and enact the necessary legislation or put the nation at risk of legal action for violating European law.

The upshot is that national parliaments have lost power to the executive in the realm of European affairs. They cannot exercise their checking function as effectively as in the past. Kiiver and others present these developments as unintended consequences of integration, but another perspective is that they are the natural consequence of the reduction of agency costs. Because EU law has limited the discretion of national governments, the supervisory functions of national parliaments have become less important, and are therefore in less demand among the public.

Federalism presents a more complex picture. Recall that we predicted that the federalist structures of states should weaken when they become substates. This happened with Germany. The German *Länder* have lost power over the last decades, and one plausible explanation is the strengthening of European institutions.<sup>77</sup> If European institutions reduce agency costs at the national level, then federalism *within* Germany is no longer as important for serving that purpose. However, in other EU members national governments have lost power to subunits. Italy, Spain, and the UK were not federalist states, but in recent years the center has yielded power to the provinces, creating quasi-federalist systems. In these settings, the explanation is likely that national governments have become less important because the EU supra-national government can supply many

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<sup>75</sup> Philipp Kiiver, *The National Parliaments in an Enlarged Europe and the Constitutional Treaty* 85, 87-88, in *THE CONSTITUTION FOR EUROPE AND AN ENLARGED UNION: UNITY IN DIVERSITY?* (Kirstyn Inglis & Andrea Ott eds. 2005).

<sup>76</sup> We follow Kiiver, *supra*, at 88-89.

<sup>77</sup> Ulrich Karpen, *Subnational Constitutionalism in Germany*, undated, available at <http://www.camlaw.rutgers.edu/statecon/subpapers/karpen.pdf> (last accessed December 14, 2009).

of the public goods that were traditionally supplied by the national governments.<sup>78</sup> We can reconcile these apparently contradictory trends with the following observation. The optimal scale of government is not always clear. In Germany, a very homogenous state, it may be the case that the optimal scale of the subunit is national; in the other countries, it may be that the optimal scale of the subunit is provincial. If this hypothesis is correct, European countries are going through a transition. At the endpoint, the relevant subconstitutional government will be either national or provincial but there will not be federalist systems within the substates. England, Wales, Scotland, and Germany will be peer EU member states in a two-tier federalist system after unnecessary United Kingdom and German *Länder* vanish. However, we are far from this point, and may never reach it; our point is that the apparently divergent trends observed today are not inconsistent with our thesis. We return to this argument in Part V.B.

## B. Rights

The effect of subconstitutionalism on rights in Europe has been less straightforward. Until recently, not all European countries provided constitutional protections of rights and even those that did provide such protections did not offer strong forms of judicial review. In addition, European constitutions do not put up significant hurdles to amendment of the constitution in response to adverse judicial rulings. So judicial rulings that interpreted legislation so as to avoid violating written or judge-made rights could be easily changed through legislation or constitutional amendment. Europe lacked the strong “rights culture” that has existed in the United States. This has begun to change.

The impetus for change did *not* initially come from the EU or EU-related institutions. The Rome treaty and the other treaties that created the European Union lacked a statement of rights. Nonetheless, the European Court of Justice gradually recognized a set of judge-made “fundamental human rights.” Later European treaties endorsed this position, noting that the Union is “founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”<sup>79</sup> In 2000, member states agreed to the Charter of Fundamental Rights which, however, was made judicially unenforceable. The effort to incorporate the Charter into a European Constitution failed in 2005. Only in 2009, with the Lisbon Treaty, has the Charter become judicially enforceable (for most member states).

The main impetus of the change lies elsewhere. All of the EU member states are members of the European Convention of Human Rights of 1950. The ECHR contains a

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<sup>78</sup> A related trend is the simultaneous push for regional representation at the European level. In 1994, the EU established the Committee of Regions to represent subnational units. This demonstrates the flexibility of subconstitutionalism, as previously rigid constitutional boundaries may give way to units of different geographic scope in response to demands for public goods.

<sup>79</sup> Amsterdam Treaty, art. 6.

standard list of rights. People who believe that states have violated their rights can petition the European Court of Human Rights for relief. The Court is not an EU institution; it is a separate institution and has members (such as Russia) which are not member states of the EU. Proposals for the EU to join the ECHR as an independent member have failed. Nonetheless, the European Court of Justice has drawn on the ECHR in developing the judge-made European fundamental rights.

Many European countries have incorporated the ECHR into their domestic law, in many cases giving it higher-law status, so that it could not be abrogated by later-enacted statutes. In these countries (including Belgium, France, the Netherlands, Switzerland, and the UK), the Convention serves as a “shadow constitution.”<sup>80</sup> In other states, such as Norway and Sweden, constitutional bills of rights have “been modeled on the ECHR.”<sup>81</sup> In still other states, such as Germany and Ireland, the ECHR has supplemented already entrenched bills of rights.<sup>82</sup>

The reasons for these changes are in dispute. Ran Hirschl, for example, argues that European elites have strengthened rights in order to limit the ability of the masses to implement policies through democratic mechanisms.<sup>83</sup> Other explanations are possible. The collapse of the Soviet model may have enhanced the prestige of the American style of liberal democracy with strong judicially protected rights. Or perhaps rights protections have evolved as parliamentary supervision of the executive has eroded.

The strengthening of rights in European member states is in tension with our thesis that subconstitutional status should result in the weakening of constitutional rights in substates. But there are forces in the opposite direction.

First, rights in the superstate constitution, the constitution of the EU, remain quite weak—at least as of today.<sup>84</sup> European citizens cannot directly ask European courts to protect their rights—these courts can take jurisdiction only as a result of referrals by national courts, and in disputes involving member states, or member states and European institutions. The growth of the power of European institutions, unaccompanied by significant entrenchment of rights at the European level, may have made people worry about the risks to their liberties. They have fallen back on their national courts to protect their rights and those courts have responded to this demand.<sup>85</sup>

Second, the constitutions of European countries are (with some exceptions) easy to change, unlike the U.S. constitution.<sup>86</sup> The rights culture of the United States has only

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<sup>80</sup> Helen Keller & Alec Stone Sweet, *A EUROPE OF RIGHTS* 686 (2008).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Ran Hirschl, *JURISTOCRACY* (2004).

<sup>84</sup> The Lisbon Treaty of 2009 may change this.

<sup>85</sup> See, e.g., Maastricht Case, 89 BVerfGE 155 (1993), where the Federal Constitutional Court said that, as a condition of transfer of powers from Germany to European institutions, those institutions must satisfy German constitutional principles.

<sup>86</sup> Lutz, *supra* n. 63, at 369 (no European country has an amendment process as difficult as that of the U.S.)

recently spread to Europe, and so the initial effort has been to strengthen rights. Given that they remain weak, at least by American standards, Europeans may well believe that the rights need to be further strengthened even if the emergency of the European superstate has reduced agency costs at the national level.

Perhaps recognizing the difficulty of creating pan-European rights that are satisfactory to all, EU members have demanded that national rights systems be strengthened. This process was closely connected to enlargement. As the EU became more integrated and successful, an increasing number of states clamored to join the club. The EU had to decide on criteria for admission, and ultimately insisted that new members adopt European-style economic and political norms. The Copenhagen conditions for entry include “a functioning market economy” and “stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.”<sup>87</sup> Most states with functioning market economies, in the sense meant by the EU, rely on powerful and independent judiciaries that protect contract and property rights. Democracy, the rule of law, human rights, and protection of minorities also usually require an independent judiciary that enforces rights—voting rights, procedural rights, human rights, and rights against discrimination. States with strong economic and political incentives for joining the EU have therefore undertaken significant reforms to strengthen rights and judicial independence along the lines indicated by the Copenhagen conditions.<sup>88</sup> Twelve Eastern European states plus Malta have undergone these reforms, at least to some degree, and have gained membership. Other states, notably Turkey, have undertaken significant reforms in the hope that membership would be forthcoming.<sup>89</sup>

In sum, although the reduction in agency costs should have resulted in the erosion of rights protections in EU member states’ subconstitutions, numerous countervailing forces prevented this from happening. The most important, in our view, are the worries about abuse of power by the European superstate, and the independent development of a rights culture in Europe.

### C. Amendment

Our theory also suggests that when states become substates, the rate of amendment of their (sub)constitutions should increase. To test this hypothesis, we gathered data on constitutional amendment in EU member states. We examine only those amendments that do not themselves directly implement the EU treaties. Some countries have to amend their constitutions to empower domestic authorities to implement EU law, but these type of amendments do not directly relate to our hypothesis, so we set them aside. For example, we do not include French constitutional amendments of 1998 adopted

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<sup>87</sup> Copenhagen conditions, 1993.

<sup>88</sup> For a discussion, see, e.g., Karen E. Smith, in Cremona, *The Enlargement of the European Union*.

<sup>89</sup> Arat, at 97 (“more than one-third of the original text of the Constitution was amended” to bring it into compliance with the Copenhagen conditions since 1999).

to comply with the new Schengen rules on asylum, freedom of movement, and the European Monetary Union. We do, however, include France’s 2008 amendments, which strengthened parliament and modified the jurisdiction of the constitutional court. We do not include the various Irish amendments implementing the European treaties.<sup>90</sup>

**Table 2: Amendments Per Year before and after EU “Constitution” (through 2008)**

Country	Year of Constitution	Year of EU Accession if Not Original EU Member	Rate of Amendment: Birth of Constitution through 1986	Rate of Amendment: 1987–2008
France	1958		0.18	0.45
Italy	1947		0.08	0.45
Austria	1920		0.55	0.73
Belgium	1831		0.08	0.68
Denmark	1953		0.00	0.00
Germany	1949		0.50	0.50
Greece	1975	1981	0.09	0.09
Ireland	1937	1973	0.14	0.27
Luxembourg	1868		0.05	0.36
Netherlands	1848		0.09	0.23
Portugal	1976	1986	0.10	0.27
Spain	1978	1986	0.00	0.05

Source: Authors’ calculations with data from the Comparative Constitutions Project<sup>91</sup>

This table presents the rate of amendment—the number of amendments per year—before and after the Single European Act came into force in 1987. The SEA created the European Union and thus can be treated roughly as the beginning of European constitutionalism. The sample includes only those countries that had acceded to the European Communities before 1987, and excludes the United Kingdom which lacks a written constitution. The numerator is constitution-years in which an amendment occurred, and so multiple amendments per year are counted as a single amendment instance.<sup>92</sup> In this sense the statistic slightly understates the frequency of amendments. The overall finding is one of increased amendment after the passage of the SEU. Every country save Denmark (which seems never to amend the constitution at all) and Germany show a higher rate of amendment frequency, and the mean overall rates of amendment before and after 1987 are statistically different.<sup>93</sup>

<sup>90</sup> The Third, Tenth, Eleventh, Eighteenth, Twenty-Sixth and Twenty-Eighth Amendments.

<sup>91</sup> Raw data on file with authors. See generally Comparative Constitutions Project at [www.comparativeconstitutionsproject.org](http://www.comparativeconstitutionsproject.org)

<sup>92</sup> We take this approach because countries differ in their conventions of bundling amendments within a single legislative session. Some countries will bundle discrete topics within a single amendment, while others will pass distinct amendments for each provision of the constitution amended. Treating the country-year as the unit of analysis reduces the noise introduced from this variation.

<sup>93</sup> A simple t-test ( $p < .002$ ) confirms that the mean rate of amendment before 1987 (0.16) is lower than the mean rate for 1987-2008 (0.34).

To provide a comparative perspective, consider the seven non-European countries that are members of the OECD. Since 1987 two such countries (Australia, Japan) have not amended their constitutions at all; two (the U.S. and South Korea) have adopted a single amendment (which in the South Korean case was essentially a new constitution associated with the end of military rule.) Only one such country, Mexico (0.76), has an amendment rate above the median of the EU countries, and it has frequently amended its constitution since 1917.<sup>94</sup> Two other countries, Canada (0.33) and Turkey (0.33), are comparable to the EU countries but did not exhibit such dramatic increases in their amendment rates as did the Europeans.<sup>95</sup>

Many of the amendments adopted by the member states concern adjustments in government structure, demonstrating the greater flexibility associated with subconstitutionalism. Austria, for example, has adjusted its federal-state balance several times in the last decade.<sup>96</sup> In 2008, France adopted the most significant set of amendments to the 1958 constitution to date. The proposal was explicitly designed to weaken separation of powers between the executive and legislature, in that it overturned a ban, in place since 1875, on the president addressing the parliament. The bill also expanded the jurisdiction of the constitutional court, which is somewhat contrary to our theory in that it expands the ability of citizens to enforce rights.<sup>97</sup> Perhaps the latter development simply reflects a secular trend toward establishing constitutional courts, or perhaps the idea is that the court will help to protect French citizens from encroachments under European law.

Relatively few of the amendments adopted by European “sub-states” involve rights. In 1994, for example, the German constitution was amended to provide for affirmative action for women and environmental protection.<sup>98</sup> But only five of the 27 total amendments adopted since 1986 have affected the rights provisions of the German constitution. Some sub-state amendments have concerned a relaxing of rights. In 1996, the Irish voters approved an amendment relaxing criminal procedure rights, allowing courts to refuse bail if they believed a suspect would commit another crime,<sup>99</sup> The seventeenth amendment enhanced the secrecy of cabinet meetings, and the twenty-fourth amendment restricted the right to Irish citizenship.

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<sup>94</sup> We count amendments in 48 of 69 years from 1918-86, for an overall rate of .70, so the rate has not increased dramatically since 1987, even though Mexico underwent democratization in the period.

<sup>95</sup> Turkey might be considered a European state for purposes of this analysis, since many of its amendments involved efforts to demonstrate compatibility with the EU. Since the founding of modern Turkey in 1923, it has had four constitutions, amended in a total of twenty different years. The amendment rate from 1924-86 was 0.22 (excluding years in which a new constitution was adopted.) Canada’s amendment rate from 1867-1986 was 0.19.

<sup>96</sup> See Constitution of Austria amended through 2004, on file with the Comparative Constitutions Project.

<sup>97</sup> A Belgian amendment to its constitution in 2003 also renamed the country’s court of arbitration as a constitutional court.

<sup>98</sup> Art. 3 (women); Art. 20a (environment).

<sup>99</sup> Constitution of Ireland, Sixteenth Amendment.

## V. Implications and Extensions

### A. Convergence and Learning

Increasing attention has been given in recent years to the topic of constitutional convergence. A number of scholars believe that states will adopt similar constitutional norms as a result of globalization and related phenomena.<sup>100</sup> David Law, for example, argues that as barriers to capital movement erode, states modify their constitutions so as to attract capital. Because investors want protection from expropriation, states will strengthen property rights and judicial protection. On this theory, competition between states results in strong rights and convergence.<sup>101</sup>

Our theory is also consistent with convergence but proposes a different mechanism. When states become substates, their protection of rights should become weaker. Weakening of rights implies convergence because the distinctive rights systems of different states become less pronounced and important. To see why, imagine that state X has strong abortion rights but no speech rights, and state Y has no abortion rights but strong speech rights. If the rights of both states weaken, then X will have weak abortion rights (while still no speech rights), and Y will have weak speech rights (but still no abortion rights). At the extreme, X loses its abortion rights, Y loses speech rights, and the states' rights systems become identical. Thus, while our theory, like Law's, implies that rights converge, our theory suggests they converge through weakening, while Law's implies that they converge through strengthening.

What accounts for this difference? The two settings are not identical: Law focuses on the pure case of jurisdictional competition when borders become more porous; we consider the case where there is also a superstate that binds together the subunits. However, this is not the source of the different predictions. Law's theory fails to acknowledge that competition provides a *substitute* for constitutional restrictions, rendering the latter less necessary for reducing agency costs than they are in the absence of competition. If competition reduces agency costs, it is not as necessary for constitutional law to reduce agency costs. States know that if they expropriate investments, capital will flee. With such a strong policy reason not to expropriate investments, states have no reason to introduce constitutional reform and investors have no reason to insist on it. Indeed, states generally try to attract foreign investors by entering treaties that provide for property rights protections and dispute resolution, not by amending their constitutions. In short, Law provides an explanation for why *policy* should converge but not for why *constitutional norms* should converge.

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<sup>100</sup> Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 Va. J. Int'l L. 985 (2009); Daniel Farber, *Rights as Signals*, 31 J. LEG. STUD. 83 (2002).

<sup>101</sup> See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U.L. REV. 1277 (2008); see also David S. Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652 (2005)

Constitutional convergence could take place in other ways. It has long been known that states imitate the institutions of other states. Many innovations in state constitutional law began in one state and were adopted by others: examples include the initiative, referendum, and the election of state judges. This process may reflect a kind of learning: reformers in one state might try to draw inspiration for institutional reform by examining the institutions of other states that are regarded as successful.<sup>102</sup> It is possible that a substate can learn more easily and effectively from another substate, than a regular state can learn from another regular state. If, for example, migration quickly homogenizes substates, then institutions can be more easily imitated without producing unwanted consequences.

Substates might also imitate the constitutions of their superstate. In the United States, for example, states that originally permitted established churches gradually introduced prohibitions that mimicked the first amendment ban on an established church at the national level. The very idea of an amendment process had not been adopted in all states at the time of the founding, but subsequently spread to all states.<sup>103</sup> It is possible that substates mimic the superstate's constitution for the same reason that they mimic the constitutions of other substates: that success breeds imitation; if a rule works at the national level, it may work at the local level as well.

In addition, subconstitutionalism may facilitate what might be called vertical convergence through learning, whereby the constitution of the superstate might move in the direction of its substates. As is well known, the founders of the U.S. Constitution were influenced by the constitutions of their states, which in some cases they had participated in the drafting of. The Virginia Bill of Rights was a model for the first ten amendments to the U.S. Constitution. Other state-level innovations, such as a directly elected upper house of the legislature, universal male suffrage, and (later) voting rights for women, spread to the federal constitution.<sup>104</sup>

State constitutional interpretation in the United States also reflects learning. State courts frequently cite opinions from other state courts, as well as the federal courts, in interpreting the subconstitution. For example, Article I Sec 12 clause 1 of the New York Constitution, adopted in 1938, is identical to the Fourth Amendment of the U.S. Constitution. Notwithstanding a lack of a clear theory, the New York court have treated the clause as incorporating subsequent federal jurisprudence.<sup>105</sup> In a perhaps more puzzling example, the state constitution of Delaware contained no express protection for freedom of speech until 2003, yet Delaware courts frequently construed a clause

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<sup>102</sup> Eric Posner & Cass Sunstein, *The Law of Other States*. 59 STANFORD L. REV. 131 (2006).

<sup>103</sup> Lutz, *supra* note 64.

<sup>104</sup> Learning does not always result in parallel change or convergence, however. Over one-third of states explicitly guarantee equality for women, but the Equal Rights Amendment failed to be adopted in the federal constitution. Similarly, several states guarantee disability rights. Robert F. Williams, *Rights* in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 7, 13 (G. ALAN TARR AND ROBERT F. WILLIAMS, EDS. 2006).

<sup>105</sup> Gardner, *supra* note 20 at 2-6.

protecting the freedom of the press as encompassing a more general speech right, notwithstanding a complete lack of textual basis.<sup>106</sup> In doing so they relied heavily on U.S. Supreme Court cases. This pattern of relying on federal law to interpret state documents extends to separation of powers matters as well, such as the Rhode Island's Supreme Court's adoption of *INS v. Chadha* at the state level.<sup>107</sup> Borrowing is frequent notwithstanding different structures of state governments and the fact that the federal floor is not applicable in areas of government structure.<sup>108</sup>

A final mechanism of convergence is migration. Suppose that constitutions reflect people's values and that the opening of borders typically accompanies a state's transformation into a substate. As migration increases, populations will become more homogenous, and over time people will support constitutional amendments that reflect their more homogenous values. Of course, migration need not homogenize. People might instead find themselves attracted to substate populations with their values. As a result, sorting would occur, and substate populations would end up different from each other, rather than similar to each other.<sup>109</sup> Constitutional divergence would follow.

## B. Moving from Unitary Constitutionalism to Subconstitutionalism

Our analysis has proceeded by considering a hypothetical independent state that joins a larger constitutional order and thus becomes subconstitutional. This was the experience of the American colonies that formed the United States and the member states of the European Union. In both cases, the historical arc has been toward greater power for the superstate, a process of centralization. In other circumstances, however, subconstitutionalism may emerge from a process of decentralization of a previously unitary state. For example, the United Kingdom has witnessed constitutional reform in which Scotland and Wales have taken on more power relative to England.<sup>110</sup> In Belgium, the regions of Wallonia and Flanders have become stronger over time, and are seeking further power. Spain has empowered autonomous regions through delegations from the national parliament. And in Italy, 2001 constitutional amendments reflected the culmination of a long trend toward administrative devolution, in which certain powers were transferred from the center to the regions, with core powers being left to center.<sup>111</sup> Some of these newly empowered subnational units have their own constitutions; others, such as those in the British Isles or Spain, do not.<sup>112</sup>

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<sup>106</sup> Gardner, *supra* note 20 at 8.

<sup>107</sup> In re Advisory from the Governor, 633 A. 2d. 664, 674 (R.I. 1993) discussed in Gardner, *supra* n. 20, at 10.

<sup>108</sup> Christopher Berry and Jacob Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (direct election of multiple executives at state levels.)

<sup>109</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>110</sup> Scotland Act 1998; Government of Wales Act 1998.

<sup>111</sup> Further attempts to devolve welfare state policy to the regions, however, were defeated in a 2006 constitutional referendum.

<sup>112</sup> See Hueglin & Fenna, *supra* at 138-42.

Devolutionary subconstitutionalism involves the creation of, or strengthening of, subconstitutions. This process might seem to be in tension with our thesis that subconstitutions are weaker than regular constitutions. However, as we noted in our discussion of the EU, the tension is illusory. Relative to the rules governing the prior administrative units that existed within a unitary state, the introduction of subconstitutions involves entrenchment. But relative to the constitution of the unitary state itself, subconstitutions feature greater levels of flexibility. Administrative units in a unitary state do not always have independent legislative power, much less a discrete zone of policy-making in which they can legislate exclusively.

### C. Subconstitutionalism and Democratization: The Case of Mexico

Mexico is an interesting case in which devolutionary subconstitutionalism has emerged as a result of democratization. Mexican states have long had their own constitutions, but these were of relatively limited import during the long period of one-party dominance by the PRI. Beginning in the late 1980s, and accelerating when democratization commenced in 1994, Mexico began to decentralize important policy matters to the states. Decentralization was in the interest of both the opposition parties, and the PRI, which retained control of many state governments even after it lost at the national level. Mexican states began to take their constitutions more seriously and state level rules became more important. As the stakes of state constitutions have risen from zero, we observe that they have become an important locus for policies adopted through constitutional amendment. For example, a recent spate of amendments has focused on whether abortion is legal in particular states.<sup>113</sup> Other amendments concern both rights (the rights of indigenous peoples, a prohibition of the death penalty) and government structure, such as the creation of new electoral courts and judicial councils to appoint judges. In some sense, this can be seen as a strengthening of devices to monitor agents at the state level. Yet, because they are subconstitutional, these protections are less entrenched and subject to more frequent amendment than the comparable provisions at the federal level. Table 3 indicates how rates of amendment also increased for Mexican states during the period of democratization.

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<sup>113</sup> Catholic News Agency, *Twelve Mexican States Now Protect Right to Life in their Constitutions*, available at <http://www.catholicnewsagency.com/new.php?n=16083> (last accessed December 14, 2009)

**Table 3: Amendments per Year before and after Democratization (through 2009)**

State	Rate of Amendment: Birth of Constitution through 1993	Rate of Amendment: 1994–2008
Aguas Calientes	.58	.75
Baja California	.34	1
Baja California Sur	.95	1
Campeche	.05	.44
Chiapas	.10	.88
Chihuahua	.25	.75
Colima	.26	.75
Coahuila	.44	.75
Durango	.42	.75
Estado de México	.54	.71
Guanajuato	.47	.69
Guerrero	.58	.67
Hidalgo	.57	.69
Jalisco	.37	.75
Michoacán	.37	.81
Morelos	.40	.62
Nayarit	.49	.81
Nuevo León	.48	1
Oaxaca	.46	.81
Pueblo	.25	.69
Querétaro	.41	.56
Quintana Roo	.69	.94
San Luis Potosi	.25	.81
Sinaloa	.69	.63
Sonora	.55	.63
Tabasco	.43	.87
Tamaulipas	.63	.94
Tlaxcala	.31	.75
Veracruz	.46	.67
Yucatán	.52	.50
Zacatecas	.28	.94

Source: Data on file with authors. A difference in means test confirms the difference is statistically significant:  $P(T \leq t) = 4.94E-10$ ,  $t = -8.72$ .

Some countries seem to be moving toward subconstitutionalism through processes of decentralization. Consider the Italian example. Most of the current Italian regions began as administrative districts within the 1947 constitutional scheme. Five were special regions that had secured higher levels of power and entrenchment because of linguistic and cultural differences, but the others were not designated as regions until 1970 through special statutes. In 2001, all the regions were given legislative power in the Italian constitution. While the regions do not yet have subconstitutions, they seem to be moving in that direction.

We reiterate that we do not predict that all governments with subconstitutions will converge on a particular balance of power between superstate and substate. Instead, it is likely that the appropriate level of government at which to generate public goods varies with exogenous factors such as economies of scale. But a general feature of subconstitutions is that they are less important as devices for agency control, hence weaker and more flexible. .

## Conclusion

The overall pattern is that subconstitutions are weaker and more comprehensive than regular constitutions.<sup>114</sup> They are easier to amend or revise—in this way closer to legislation, although, of course, they supersede the statutory law of the substates. This lack of entrenchment explains the subconstitutions' greater comprehensiveness: because they are easier to change, they can be revised to address changing circumstances and needs.

At the same time, the basic elements of subconstitutions—including government structure and rights—tend to converge. Generally speaking, countries with presidential systems for the national government do not have parliamentary systems in the substates, and vice versa.<sup>115</sup> One exception is South Africa. The national government and all the provincial governments but one are parliamentary systems; the other provincial government is a kingdom (!). But this reflects unusual historical circumstances and in any event the efforts of that province to formalize its monarchical system in a constitution have met with resistance from South Africa's constitutional court, suggesting that the homogenizing dynamics in subconstitutional systems are in effect.<sup>116</sup>

We argue that agency cost theory explains why subconstitutions are weaker than regular constitutions. Because the superstate can reduce agency costs in the substate, constitutional structures in the substate are less important than they would otherwise be. The reason is that every constitution reflects a tradeoff between two concerns: that only strict and entrenched constitutional rules can prevent the government from abusing its power; and that strict and entrenched constitutional rules prevent the government from implementing needed policies. When the superstate can be expected to limit abuse by the government of the substate, then the population of that substate can loosen subconstitutional constraints, enabling their government to implement policy changes that

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<sup>114</sup> Germany seems to be the major exception to this pattern. Perhaps it is no coincidence that German Länder are losing power to the national government and the EU. See Ulrich Karpen, *Subnational Constitutionalism in Germany*, undated, available at <http://www.camlaw.rutgers.edu/statecon/subpapers/karpen.pdf> (last accessed December 14, 2009).

<sup>115</sup> U.S. and Argentinean States, for example, have followed their respective federal models of a separately elected chief executive, rather than a parliamentary system. This is so notwithstanding formal discretion to choose alternative forms. This discretion is lacking in some other federalisms such as Brazil, Venezuela and Mexico, in which the national constitution dictates the form of state government.

<sup>116</sup> Certification of the Constitution of the Province of KwaZulu-Natal, Constitutional Court of South Africa, 6 September 1996.

are needed. As subconstitutional constraints weaken, they naturally converge toward zero. At the same time, learning and migration may impose further homogenizing pressures.

We have only scratched the surface of a complex topic. We have for the most part assumed a benevolent superstate and thus failed to address the possibility that subnational populations may demand strong subnational constitutions as a way of strengthening their substate so that it can stand up to a rapacious superstate. We have said little about how interest groups might affect our analysis. And our empirical analysis is only exploratory. More research on other federalist states—including Germany, Mexico, Venezuela, Brazil, Switzerland, Australia, Canada, and several others—would be useful.

Another topic of research is the relationship between international organizations and national constitutions. A number of scholars argue that a kind of “world constitution” has been evolving, by which they mean a set of constraints on national governments that are embodied in human rights treaties, the UN charter, and other international legal materials.<sup>117</sup> Although we are skeptical of this claim, it is worth thinking about how the development of a world constitution would affect national constitutions. Indeed, some scholars have already argued that certain international organizations to which the United States belongs threaten traditional constitutional understandings because, for those organizations to work as intended, it is necessary for the United States to delegate substantial powers to them. To the extent that American courts and legal institutions enforce the judgments of those organizations, Americans could be deprived of constitutional protections.<sup>118</sup> These critics fear that the weakening and homogenizing patterns of subconstitutionalism could take place at the global level.

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<sup>117</sup> E.g., Anne Peters and Klaus Armingeon, *Introduction—Global Constitutionalism from an Interdisciplinary Perspective*, 16 *INDIANA J. GLOBAL LEG. STUD.* 385 (2009); Jeffrey L. Dunoff and Joel Trachtman, eds., *RULING THE WORLD: CONSTITUTIONALISM INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (2009); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 *J. Int’l Econ. L.* 19 (2000); Bardo Fassbender, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* (2009).

<sup>118</sup> See, e.g., Jeremy Rabkin, *LAW WITHOUT NATIONS* (2007).

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