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Book Review: Dimensions of Constitutional Change

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BOOK REVIEW

DIMENSIONS OF CONSTITUTIONAL CHANGE

*Jonathan L. Marshfield**

CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS – SUBNATIONAL PERSPECTIVES. Edited by Michael Burgess and G. Alan Tarr. McGill-Queen's University Press. 2012. Pp. 338.

Constitutional Dynamics in Federal Systems (“*Constitutional Dynamics*”) is an important contribution to the study of federalism and constitutional law. It includes thirteen insightful studies analyzing issues of constitutional change in eleven different political systems from the unique perspective of subnational law and politics.

I. INTRODUCTION

Although comparative constitutional law has grown wildly as a field of study in recent decades,¹ attention is almost always placed on national constitutional law with little mention of subnational issues.² This myopia

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1. See Adam M. Dodek, *A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review*, 47 OSGOODE HALL L.J. 287, 288 (2009) (“The reinvigoration of comparative law in the early 1990s brought with it . . . an exponential growth in comparative constitutional law scholarship.”).

2. See, e.g., NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM* (3d ed. 2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); DONALD P. KOMMERS ET AL., *AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* (2d ed. 2004). Although these texts include chapters discussing federalism and related issues, there have been very few attempts to integrate subnationalism

often results in an oversimplification of constitutional dynamics. Indeed, federal constitutional democracies almost always involve an overarching national constitution that reserves at least some constitutional choices to subnational units.³ This means that in most federal systems, constitutional decision-making occurs at both the national and *subnational* levels. Thus, a more complete and accurate understanding of constitutional law requires careful study of subnational constitutional dynamics as well as the relationship between national and subnational issues.⁴

For example, Nicholas Schmitt explains that in Switzerland, “cantonal constitutions have always been in advance of the Federal Constitution.”⁵ Schmitt further explains that many of the rights provisions in Switzerland’s paradigmatic 1999 Federal Constitution were first introduced and fleshed out by popular amendments and revisions to cantonal constitutions.⁶ Similarly, John J. Dinan explains that some of the most important political changes in the United States, such as the expansion of the suffrage and extension of individual rights, have been achieved in part through popular changes in state constitutional law.⁷ These articles deepen our understanding of how constitutional norms develop by suggesting that meaningful constitutional change can occur from the bottom up, and, significantly, through popular political processes.

into constitutional theory at large. See Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1164-69 (2011) (explaining subnational constitutional theory and the need for integration between subnational constitutional theory and constitutional theory at large).

3. Indeed, as Michael Burgess and G. Alan Tarr observe in their introduction to *Constitutional Dynamics*, “in most federal systems the federal constitution is an ‘incomplete’ framework document, in that it does not prescribe all constitutional processes and arrangements.” Michael Burgess & G. Alan Tarr, *Introduction: Sub-national Constitutionalism and Constitutional Development*, in CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS – SUBNATIONAL PERSPECTIVES 3, 3 (Michael Burgess & G. Alan Tarr, eds., 2012) [hereinafter CONSTITUTIONAL DYNAMICS]; see also Marshfield, *supra* note 2, at n.33; Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS 23 (1982) (explaining how the U.S. Constitution is “incomplete” and necessarily relies on state constitutions to complete the federal system). India, Belgium, and Nigeria are examples of federal systems that do not permit subnational units to adopt their own constitutions, and, consequently, are “complete” without subnational constitutionalism. See Burgess & Tarr, *supra*, at 3.

4. See Burgess & Tarr, *supra* note 3, at 4 (“[S]ub-national constitutions are ‘part and parcel of the total constitutional structure of federal systems and play a vital role in giving the system direction.’” (quoting DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 174 (1987))).

5. Nicolas Schmitt, *New Constitutions for All Swiss Cantons: A Contemporary Challenge*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 140, 161.

6. *Id.*

7. John J. Dinan, *State Constitutions and American Political Development*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 43, 47-55.

Jens Woelk's discussion of Bosnia-Herzegovina provides an intriguing twist on this bottom-up perspective.⁸ Woelk explains that Bosnia-Herzegovina's constitutional structure is primarily the product of international intervention, which forced previously warring groups into a complicated federal system.⁹ Because "the agents of [constitutional] change have mostly been external,"¹⁰ Bosnia-Herzegovina's primary political challenge is getting subnational groups to embrace the legitimacy of Bosnia-Herzegovina's externally imposed system.¹¹ Woelk's bottom-up perspective on Bosnia-Herzegovina challenges our understanding of the relationship between constitutional change and democratic legitimacy by suggesting that top-down constitutional change may sometimes undermine the legitimacy of constitutional outputs.¹² Conversely, the articles addressing Switzerland and the United States suggest that incremental bottom-up constitutional change can sometimes enhance the legitimacy of new constitutional norms.

This "bottom-up" perspective on comparative constitutional law makes *Constitutional Dynamics* a unique and timely contribution. All thirteen articles in *Constitutional Dynamics* focus on a critical question: How do subnational constitutional law and politics affect constitutional development and change within a political system as a whole? Although the contributors approach this question from a variety of different viewpoints, all contributors recognize that constitutional change cannot be fully understood without looking at subnational issues. *Constitutional Dynamics* provides much needed research and insight into this neglected perspective.

Rather than summarizing all of *Constitutional Dynamic's* many contributions, this article focuses on two recurring themes. First, many of the articles in *Constitutional Dynamics* observe that the growth of subnational

8. See Jens Woelk, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 109.

9. *Id.* at 109–11 ("[A] peculiar federal system was established that forced the former warring parties together, made them recognize each other, and provided for some common institutions.").

10. *Id.* at 110.

11. *Id.* at 110–11 ("The challenge for Bosnia-Herzegovina in order to become a sustainable multinational state is therefore reaching consensus and rallying support for this state from within its borders.").

12. Scholars have raised a related point in the context of constitutional change in the United States regarding social issues such as abortion and same-sex marriage. See, e.g., Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions about Backlash*, 120 YALE L.J. 2028, 2074 (2011) ("[T]he Court blundered by issuing a decision that shut down politics, short-circuiting a process of democratic-based legislative change that would have been accorded more legitimacy, even by those members of the public who disagreed with it.").

constitutionalism has coincided with an expansion of mechanisms for direct democracy and popular participation in constitutional reform.¹³ Read together, the articles suggest a strong correlation between subnational constitutionalism and popular involvement in constitutional change.¹⁴ In other words, bottom-up constitutional change frequently originates with popular or majoritarian political processes and institutions.¹⁵ Part I of this article explores the specific evidence presented in *Constitutional Dynamics* of this phenomenon and then offers a few possible explanations for the correlation between subnational constitutionalism and popular political involvement.

Second, *Constitutional Dynamics* suggests that there are at least two recurring pathways of bottom-up constitutional change. Sometimes, bottom-up change occurs when subnational units occupy the constitutional "space"¹⁶

13. Eight of the ten country-specific contributions in *Constitutional Dynamics* address this issue to some degree. See Dinan, *supra* note 7, at 44–47, 55–58; Arthur B. Gunlicks, *Legislative Competences, Budgetary Constraints, and the Reform of Federalism in Germany from the Top Down and the Bottom Up*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 61, 63 ("Another feature of the constitutions in the new *Länder* was direct democracy . . ."); Peter Bußjäger, *Sub-national Constitutions and the Federal Constitution in Austria*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 88, 91–92; Schmitt, *supra* note 5, at 146, 152, 160 (noting that the Swiss cantonal constitutions "are marked by an extension of direct democracy" and that the wave of recent cantonal constitutional revision has "allow[ed] civil society to play a major role in drafting the constitution[s]"); Gerald Baier, *Canada: Federal and Sub-national Constitutional Practices*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 174, 179–80 (noting that provincial-level political groups in Canada have often "identified themselves with a populist or plebiscitary style of democracy . . ."); Stephen Tierney, *Quiet Devolution: Sub-state Autonomy and the Gradual Reconstitution of the United Kingdom*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 195, 212–13 ("[O]ne change that devolution has brought that may have the most dramatic effect on the United Kingdom's constitutional future [is] the use of referendums to effect constitutional change."); Carles Viver, *Spain's Constitution and Statutes of Autonomy: Explaining the Evolution of Political Decentralization*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 218, 218–20, 226; Francesco Palermo, *Italy: A Federal Country without Federalism?*, in CONSTITUTIONAL DYNAMICS, *supra* note 3, at 237, 238–40 (explaining that changes to the amendment procedures for regional autonomy statutes that allow for possible referendum "completely reshaped the constitutional provisions concerning the relations between the national government and the regions.").

14. Gerald Baier's article regarding Canada illustrates this point well. Baier explains that although Canada's federal system does not expressly allow subnational constitutionalism, the groups that have traditionally advocated for greater provincial autonomy have also "identified themselves with a populist or plebiscitary style of democracy . . ." See Baier, *supra* note 13, at 179–80.

15. See Dinan, *supra* note 7, at 55–58 (discussing this phenomenon in the U.S. and assessing various normative criticisms of popular involvement in subnational constitutional change).

16. See generally Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View From the States, Provinces, Regions, Lander and Cantons*, in FEDERALISM,

provided to them by institutionalizing new constitutional norms.¹⁷ Those changes then percolate through the system and eventually result in national changes. In other instances, especially in systems that offer very limited subnational constitutional space, subnational units aggressively instigate bottom-up change by using subnational institutions to cause conflict; either by constitutional litigation or by applying political pressure for reform of the national constitution.¹⁸ Part II of this article examines these two pathways and suggests a few reasons why bottom-up change tends to occur in one of these two ways.

In all, *Constitutional Dynamics* is an important contribution to the study of constitutional theory, federalism, and comparative constitutional law. It deepens our understanding of the processes and dynamics of constitutional change and provides concrete evidence of how subnational political activity can meaningfully affect the evolution and change of constitutional norms. All of the contributors to *Constitutional Dynamics* approach their material with great skill and expertise, and *Constitutional Dynamics* is a treasure trove of valuable insight and information.¹⁹

SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 5 (G. Alan Tarr et al. eds., 2004) (describing the concept of subnational constitutional “space” as the “range of discretion . . . available to component units in a federal system in designing their constitutional arrangements”).

17. John J. Dinan’s discussion of state constitutions in the United States and Nicolas Schmitt’s discussion of cantonal constitutions in Switzerland provide excellent examples of this. See Dinan, *supra* note 7, at 47–55 (discussing how formal amendments to state constitutions have influenced constitutional change in the United States); Schmitt, *supra* note 5, at 160–61 (concluding that cantonal constitutions are usually in advance of changes in Switzerland’s Federal Constitution).

18. Arthur B. Gunlicks’s discussion of recent reforms to Germany’s national constitutional structure and Italy and Spain’s experience with constitutional litigation provide helpful examples of this pathway. See Gunlick, *supra* note 13, at 68–70; Viver, *supra* note 13, at 231–32; Palermo, *supra* note 13, at 246–48 (“[C]onstitutional adjudication has shaped the contours of Italian regionalism much more than constitutional amendments have.”).

19. Perhaps the only mild criticism of *Constitutional Dynamics* is that it is decidedly Western-centric in its focus. The bottom-up perspective explored in *Constitutional Dynamics* can expose much about constitutional systems in Africa and other regions of the world. See Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006); L. Adele Jinaduu, *The Constitutional Situation of the Nigerian States*, 12 PUBLIUS J. FEDERALISM 155, 158–59 (1982); Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT’L L. 585, 621–28 (2008) (discussing South Africa’s constitutional deliberations regarding subnational constitutionalism and the significance of subnational constitutionalism in the delicately negotiated transition from apartheid to democracy). But *Constitutional Dynamics* does not purport to be an encyclopedia and its contribution is not undermined by the unavoidable need to focus on a few specific political systems.

II. SUBNATIONAL CONSTITUTIONALISM AND POPULAR POLITICAL INVOLVEMENT

There is a recurring observation in *Constitutional Dynamics*: across political systems, subnational politics have become a hotbed for popular constitutional involvement and activism.²⁰ Subnational constitutions seem to consistently encourage (and even incite) popular involvement in constitutional law-making and reform. In Switzerland, for example, Nicolas Schmitt observed that the cantons draft new constitutions “every four to five years,” which has resulted in constitutional debate being “a significant element of political and legal discussion in the Swiss cantons for many years.”²¹

This is a meaningful insight when one considers that national constitutions are notoriously difficult to amend or revise through popular political processes.²² For example, since 1987, Denmark, Australia, and Japan have not amended their constitutions at all, and the U.S. and South Korea have each adopted only one amendment.²³ The average amendment rate for all EU countries since 1987 (not including amendments incorporating EU law) is 0.34 amendments per year.²⁴ This represents a relatively static body of constitutional law – at least from the standpoint of popular involvement. Thus, the observations in *Constitutional Dynamics* highlight that subnational constitutions and national constitutions seem to evolve in different ways and through different political processes.²⁵

This section provides an overview of the significant observations and insights included in *Constitutional Dynamics* and then explores a theoretical

20. See *supra* note 13 (listing various references to this correlation in *Constitutional Dynamics*).

21. Schmitt, *supra* note 5, at 141.

22. See John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837, 841-47 (2008); see also Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1600, 1618-19 (2010) (“We know of no subconstitutional system that is more difficult to amend than that of its superstate.”) (emphasis omitted).

23. See Ginsburg & Posner, *supra* note 22, at 1619; see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (explaining through Table C-1 the national amendment rates for 32 different countries).

24. See Ginsburg & Posner, *supra* note 22, at 1619 n.109. The amendment rate for the same countries from before creation of the EU was 0.16 amendments per year. *Id.*

25. See Lutz, *supra* note 23, at 355-70 (arguing that constitutional change is necessary in any system and if amendment procedures are arduous, change will likely occur through judicial review).

framework that potentially describes why subnational politics and popular constitutional involvement appear to be tightly wed.

A. Evidence of a Correlation between Subnational Constitutionalism and Popular Political Involvement

Constitutional Dynamics includes articles addressing a variety of different political systems.²⁶ Some systems, such as the United States, Germany, Austria, and Switzerland are formal federal systems that expressly permit subnational units to adopt their own constitutions.²⁷ Other systems, such as Canada, are formal federal systems but they do not expressly allow subnational units to adopt their own constitutions.²⁸ *Constitutional Dynamics* also includes a fascinating discussion by Stephen Tierney of the United Kingdom, which is not a formal federal system, but which has experienced a significant decentralization of political power brought about in part by bottom-up popular initiatives.²⁹ However, regardless of the formal structure of the political system, there seems to be a strong correlation between subnational constitutionalism (whether formal or informal) and popular political involvement.³⁰

1. Political Systems that Expressly Adopt Subnational Constitutionalism

In federal systems that expressly endorse subnational constitutionalism and allow subnational units to adopt their own constitutions, there is often popular involvement in formal subnational constitutional law-making.³¹

26. In all, *Constitutional Dynamics* included articles addressing: the United States, Germany, Austria, Bosnia-Herzegovina, Switzerland, Belgium, Canada, the United Kingdom, Spain, Italy, and the European Union.

27. See Marshfield, *supra* note 2, at n.33 (listing all systems that expressly permit subnational units to adopt their own constitutions); see also ELAZAR, *supra* note 4, at 177–78.

28. See Marshfield, *supra* note 2, at n.33; see also ELAZAR, *supra* note 4, at 177–78.

29. See Tierney, *supra* note 13, at 195.

30. In the United States, this activity has been described as a “beehive” of political activity. See John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 14 (1988) (“[T]he realm of state constitutional law is a beehive of activity.”).

31. There are currently at least fourteen political systems in the world that permit subnational units to adopt their own constitutions: Argentina, Australia, Austria, Brazil, Ethiopia, Germany, Iraq, Malaysia, Mexico, Russia, South Africa, Switzerland, the United States, and Venezuela. Dinan, *supra* note 22, at 839–40; see also John Dinan, *Patterns and Developments in Subnational Constitutional Amendment Processes* (unpublished paper presented at Symposium: Redefining the Political Order: New Processes for Constitution-Making, Universite Naval, May 15, 2009) (same) available at,

Perhaps the most powerful illustration of this is John J. Dinan's discussion of state constitutional politics in the U.S. federal system.³² Dinan notes that the U.S. Constitution has been amended by popular political processes only twenty-seven times, with a total of thirty-three proposals.³³ This means that constitutional change at the federal level occurs mostly through judicial interpretation, which is largely insulated from popular political input.³⁴ In contrast, since "1776 to the present, the 50 states have held a total of 233 state constitutional conventions; 146 state constitutions have been adopted; and over 6,000 amendments have been enacted to the current documents."³⁵ All of that constitutional change represents significant popular involvement.³⁶ Although Dinan recognizes disadvantages associated with this "state constitutional vitality," he ultimately notes that "the main effect for the federal system has been that groups who are otherwise unable to achieve their goals through federal governmental processes have been advantaged by the flexibility of state constitutional processes."³⁷ In other words, in the U.S. federal system, federal constitutional change is effectively

http://www.fss.ulaval.ca/cms_recherche/upload/chaire_democratique/fichiers/article_dinan_27082009_160838.pdf.

32. See Dinan, *supra* note 7, at 43.

33. *Id.* at 46. This number is somewhat artificial from the standpoint of amendments through ordinary political processes because of the circumstances surrounding the adoption of the Bill of Rights and the Reconstruction Amendments. See Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 396 (1993). The first ten amendments were adopted as part-and-parcel of ratification pursuant to the Massachusetts compromise between the federalists and anti-federalist. See generally D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 73 (1990). Three more of the amendments were imposed on the southern states after the Civil War. *Id.* at 253-339. Thus, in a sense, the Constitution has been amended by the ordinary political processes outlined in Article V only fourteen times in its more than two-century existence.

34. See Lutz, *supra* note 23, at 355-70 (arguing that constitutional change is necessary in any system and if amendment procedures are arduous, change will likely occur through judicial review); Ginsburg & Posner, *supra* note 22, at 1593 (explaining that necessary constitutional change can occur through "informal" amendment by judicial interpretation); see also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY, 17-31 (2006) (recounting how federal constitutional change necessarily occurs through practical judicial decision making because the Federal Constitution is "extremely" hard to amend).

35. See Dinan, *supra* note 7, at 46.

36. *Id.* at 55-58; see generally, JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 29-63 (2005).

37. Dinan, *supra* note 7, at 56.

insulated from popular constitutional involvement (especially for certain groups), but state constitutional change is a “beehive” of popular activity.³⁸

Austria provides a second example of how subnational constitutions and national constitutions seem to evolve in different ways and through different political processes.³⁹ As Peter Bußjäger explains, Austria’s federal system has strong unitary features and the *Länder* have relatively limited subnational constitutional space within which to operate.⁴⁰ However, despite these limitations, Bußjäger notes that since the early 1980s, the *Länder* have introduced a series of constitutional reforms, including “the establishment of more mechanisms for direct democracy,” state policy directives (or “state goals”), fundamental rights, and structural changes designed to control parliamentary power.⁴¹ All of these reforms were done by formal amendment to the *Länder* Constitutions, which generally require a two-thirds majority vote of the *Länder* Parliaments.⁴² Significantly, Bußjäger notes that although popular constitutional change has occurred “step-by-step” at the *Land* level, efforts of popular constitutional reform at the federal level have universally failed.⁴³ In other words, as in the United States, popular involvement in constitutional law-making occurs mostly at the subnational level in Austria.

Switzerland provides a final and particularly interesting example.⁴⁴ Switzerland’s National Constitution requires all twenty-six cantons to adopt their own constitutions.⁴⁵ Significantly, the Federal Constitution and cantonal constitutions are both relatively easy to amend and the amendment procedures for the Federal Constitution and cantonal constitutions are effectively the same.⁴⁶ Moreover, as Nicolas Schmitt points out, Switzerland has a particularly strong tradition of popular involvement in law making in general.⁴⁷ However, notwithstanding Switzerland’s political culture favoring

38. See Kincaid, *supra* note 30, at 14.

39. See Bußjäger, *supra* note 13, at 88.

40. *Id.* at 88 (explaining that “the division of competencies provides relatively few opportunities for *Länder* to enact legislation.”); *id.* at 90 (explaining that “the constitutions of the *Länder* may codify anything insofar as they do not contradict federal constitutional law”).

41. *Id.* at 93–100.

42. See Dinan, *supra* note 22, at 846.

43. Bußjäger, *supra* note 13, at 101, 104.

44. Schmitt, *supra* note 5, at 140.

45. *Id.* at 141.

46. See Dinan, *supra* note 22, at 843 (“At the federal level, constitutional changes can be proposed either by the legislature or through initiative petition and be must ratified by a majority of the people and by voters in a specific majority of cantons. Cantonal constitutions vary in their specific amendment procedures, but they all resemble the federal constitution in permitting amendments to be proposed by initiative petition.”).

47. Schmitt, *supra* note 5, at 146 (stating that direct democracy is “so important in

public involvement and the parity between national and subnational amendment processes, there has been significantly more public involvement in subnational constitutional change than national constitutional change. Indeed, since 1848, Switzerland has had only three national constitutions with a relatively low amendment rate,⁴⁸ but "new cantonal constitutions are drafted every four to five years"⁴⁹ and recent years have seen a "mushrooming" of activity around cantonal constitutions.⁵⁰ Thus, as Schmitt notes, the flurry of cantonal constitution-making in recent years has offered "a unique opportunity to strengthen the bonds between the population and its canton."⁵¹

Switzerland's experience is particularly interesting because it suggests that even in a political system with a culture that promotes public involvement and a national constitution that provides real opportunities for popular constitutional change, most public involvement in constitutional law occurs at the subnational level.⁵² This begs the question of what happens in political systems that do not expressly allow for subnational constitutionalism. *Constitutional Dynamics* provides several important case-studies addressing precisely that scenario.

2. Political Systems that do not Expressly Adopt Subnational Constitutionalism

Many political systems (and even some federal systems) do not expressly endorse subnational constitutionalism and do not allow subnational units to adopt their own constitutions.⁵³ However, the material in *Constitutional*

Switzerland"). Indeed, unlike the federal constitutions in the United States, Russia, and Germany, Switzerland's Federal Constitution provides its own mechanisms for direct democracy. Ginsburg & Posner, *supra* note 22, at 1598.

48. Lutz, *supra* note 23, at 355.

49. Schmitt, *supra* note 5, at 141-42; *see also id.* at Table 6.1 (providing critical data on canton constitutions).

50. *Id.* at 140.

51. *Id.* at 147.

52. Pursuant to the Federal Constitution, the adoption of a new canton constitution and even the slightest amendment to a canton constitution requires a full public referendum in the canton. *Id.* at 152. This "means that any change in the wording of the canton's constitution is at any time fully legitimated by a popular approval." *Id.* at 152.

53. There are currently at least six federal systems that do not permit subnational units to adopt their own constitutions or provide individualized regional autonomy statutes. Those systems are: Belgium, Nigeria, India (with an asymmetrical exception for Kashmir), Comoro Islands, Pakistan, and United Arab Emirates. *See* Marshfield, *supra* note 2, at n.33; ELAZAR, *supra* note 4, at 177-78. Australia, Canada, Italy, and Spain have provided regional autonomy statutes for subnational units. *See* ELAZAR, *supra* note 4, at 177-79.

Dynamics suggests that those structural limitations do not dissipate the energy and demand for popular constitutional involvement. Rather, popular constitutional involvement finds new outlets through mechanisms such as constitutional litigation and informal expression of subnational constitutionalism.

For example, beginning in the 1970s, Italy adopted national legislation that created several ordinary "regional states."⁵⁴ Those "regional autonomy statutes"⁵⁵ operate somewhat like constitutions for their respective states because they "benefit from a special entrenchment that makes it extremely difficult" for a subsequent Parliament to amend them.⁵⁶ However, under the initial scheme, there was no formal mechanism for the affected subnational community to participate in the drafting, ratification, or amendment of the statutes because the statutes were purely an act of the national Parliament.⁵⁷

One might expect that this structure would dissipate regional enthusiasm for self-governance and popular involvement in constitutional issues. However, the opposite seems to be true. As Francesco Palermo explains, following Italy's initial limited experiment with ordinary regional autonomy statutes, some of the regions sought to expand their autonomy by using one of the only avenues available to them for participating in constitutional change: litigation.⁵⁸ Several regions sought to strengthen their powers by challenging national legislation in the Constitutional Court.⁵⁹ As a result, there has been a "permanent increase in the regional powers . . . [that was] very much determined by constitutional adjudication."⁶⁰

Interestingly, in 2001, Italy's National Constitution was amended to provide a process by which the Parliaments in the ordinary regions can participate in the ratification of their own autonomy statutes.⁶¹ As Palermo notes, this and other related amendments "completely reshaped the . . .

54. Italy's decentralization is expressly asymmetrical because it provides two separate sets of rules for "special regions" and "ordinary regions." See Palermo, *supra* note 13, at 238-39. Special regions have slightly more autonomy than ordinary regions. *Id.*

55. *Id.* at 238.

56. *See id.*

57. *See id.* at 239-40, 246.

58. *See id.* at 239 (stating that there has been a "permanent increase in the regional powers . . . [that was] very much determined by constitutional adjudication."); *id.* ("[C]onstitutional litigation was the only instrument regions could use to strengthen their powers.").

59. *See id.*

60. *Id.* One of Palermo's principal conclusions is that "constitutional adjudication has shaped the contours of Italian regionalism much more than constitutional amendments have." *Id.* at 248.

61. *Id.* at 240, 246.

relations between the national government and the regions.”⁶² The ordinary regions now have a constitutionally protected right to participate in the evolution of their constitutional structure through majoritarian institutions.

Stephen Tierney’s discussion of decentralization in the United Kingdom is particularly interesting in this regard.⁶³ The United Kingdom is perhaps the most unlikely of political systems with which to associate subnational constitutionalism and popular constitutional involvement.⁶⁴ This is because Parliamentary Supremacy is a central doctrine in English constitutional law. Parliamentary Supremacy generally provides that Parliament, and only Parliament, can make or unmake law for the United Kingdom.⁶⁵ As a result, English constitutional structure has a standing presumption against decentralization and direct popular involvement in constitutional change.⁶⁶

However, as Tierney explains, since the 1950s, the United Kingdom has experienced an “organic emergence” of bottom-up, popular pressures for decentralization, particularly from Northern Ireland, Scotland, and Wales.⁶⁷ According to Tierney, “sub-state nationalism” in those three territories has effectively leveraged existing administrative institutions to obtain a form of subnational constitutionalism.⁶⁸ For example, beginning in the late 1980s, there was increasing support in Scotland for greater self-governance, including the creation of a Scottish Assembly that could enact laws for Scotland.⁶⁹ Various civic and political actors mobilized an “extra-parliamentary” campaign that produced several detailed documents outlining a decentralization proposal for Scotland.⁷⁰ Ultimately, the national government converted that proposal into a white paper and put it to referendum in Scotland, which the Scottish people approved.⁷¹ Parliament subsequently enacted the Scotland Act of 1998, which essentially adopted the proposal and provided Scotland with a degree of self-governance.⁷²

62. *Id.* at 240.

63. *See* Tierney, *supra* note 13, at 195.

64. *See id.* at 203-06.

65. *Id.* at 203.

66. *See id.* at 203-06.

67. *See id.* at 200.

68. *Id.* at 201 (“[T]his political nationalism was able to present constitutional aspirations that already had an institutional base, in the form of administrative devolution, upon which to draw.”).

69. *Id.*

70. *Id.* at 201.

71. *Id.* at 202.

72. *Id.*

Similar processes occurred in Northern Ireland and, to a lesser extent, in Wales.⁷³

What is most striking about Tierney's discussion is his observation that notwithstanding the continued significance of Parliamentary Supremacy, "devolution has further consolidated the practice of using referendum for major constitutional issues."⁷⁴ Tierney observes that there is now an increased expectation in the United Kingdom that constitutional changes, especially changes related to decentralization, will ultimately be put directly to the people (rather than solely to Parliament) for ratification.⁷⁵ Tierney concludes that this has "created a broader political culture of popular participation in major areas of constitutional reform."⁷⁶ Tierney further concludes that "devolution and the sub-state constitutions it brings with it has had an irreversible impact on the substance of constitutional change at the center, and most likely, the very process by which such change is likely to be effected."⁷⁷ The United Kingdom's experience with decentralization further illustrates that subnational constitutionalism and popular processes of constitutional change tend to go hand-in-hand.⁷⁸

B. Unique Incentives Affecting Subnational Constitutional Change and Politics

The above discussion suggests that there is often greater energy and enthusiasm for *popular* involvement in constitutional politics at the subnational level than at the national level. As a result, constitutional change at the subnational level seems to occur most often through popular or majoritarian political processes rather than judicial interpretation. This section explores several factors that may explain this trend.

In short, it seems likely that subnational constitutionalism and popular political involvement are linked because opportunities for self-governance and self-determination tend to mobilize subnational communities, lower agency costs at the subnational level allow for more fluid constitutional change, and smaller democratic scale provides real incentives for popular involvement in subnational constitutional law.

73. *Id.* at 201-03.

74. *Id.* at 213.

75. *Id.* at 213-14.

76. *Id.*

77. *Id.* at 214.

78. Gerald Baier's piece regarding subnational constitutionalism in Canada also observes that there is a connection between direct democracy and sub-state nationalism. See Baier, *supra* note 13, at 179-180.

1. Self Governance, Self-Determination, and Political Mobilization

The empirical literature on public choice suggests that citizens and groups are more likely to mobilize when the issues involved are significant to them.⁷⁹ This is a very intuitive notion: people are more likely to get involved if they have a real opportunity to influence an issue or outcome that matters to them.⁸⁰

This notion may partially explain the enthusiasm for subnational constitutional politics. As Professor Tarr has argued, the “fundamental purpose of subnational constitution-making” is the exercise of “the basic political right . . . of self-determination—the power to determine the fundamental character, membership, and future course of their political society.”⁸¹ This right presumably matters a great deal to individuals and subnational groups that exist within a larger political community where subnational preferences are diluted and opportunities for self-determination are limited.⁸²

Providing subnational communities with opportunities to govern themselves (even bounded opportunities) seems to have a mobilizing effect. Foundational issues such as individual rights and government structure tend to solicit significant public interest and mobilize grass-roots political participation because they touch on issues of identity and self-governance.⁸³

79. Roderick M. Hills, Jr., *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 221–22 (Anne O’Connell & Dan Farber, eds. 2010) (citing WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)).

80. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1070 (1980) (“[n]o one is likely to participate in the decision-making of an entity of any size unless that participation will make a difference . . .”).

81. See G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective of Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767, 783 (2009). This right is “inevitably limited when nations are constituent members of a larger political entity, but it is not effaced.” *Id.*

82. See Marshfield, *supra* note 2, at 1153–1164 (“Subnational constitutions are derivative of both internal and external political communities. This is true regarding the content of subnational constitutions as well as their democratic legitimacy.”).

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

It is not surprising, therefore, that there seems to be a correlation between popular political involvement and subnational constitutional issues.

2. Reduced Democratic Scale

Another factor that may explain the correlation between popular political involvement and subnational constitutional politics is democratic scale. There is solid evidence that citizen participation tends to increase as jurisdiction size decreases.⁸⁴ The general explanation for this is that people are more likely to participate in political processes that are easy for them to access and involve issues and people that are closer to their every day lives.⁸⁵ In economic terms, people chose to participate in political processes that have low participation costs combined with relatively immediate benefits.⁸⁶

It seems plausible that popular involvement in subnational constitutional politics is partially the result of reduced democratic scale at the subnational level. Individuals seem more likely to get involved in local issues for a variety of reasons: local officials are more accessible, local political issues are more salient, and individual involvement in local politics is more likely to have an impact than involvement in national politics.⁸⁷ Additionally, subnational groups are more likely to have success in smaller jurisdictions simply because there are fewer factions to dilute electoral preferences and the costs for political campaigning are less. All of these factors suggest that there are greater opportunities and real incentives for popular involvement in constitutional politics at the subnational level than at the national level. This may partially explain why there is a correlation between popular political involvement and subnational constitutional issues.

3. Reduced Agency Costs at the Subnational Level

In an important article, Eric Posner and Tom Ginsburg seek to explain why subnational constitutions universally seem to be amended more

84. See Hills, *supra* note 79, at 214-18.

85. *Id.* (citing ROBERT DAHL & EDWARD TUFTE, *SIZE AND DEMOCRACY* 62-65 (1973); Daniel J. Elazar, *Cured by Bigness: Toward a Post-Technocratic Federalism*, in *THE FEDERAL POLITY* (Daniel J. Elazar, ed. 1973)).

86. *Id.*; see Hills, *supra* note 79, at 216 (citing DAHL & TUFTE, *supra* note 85, at 62-65) (“[R]educing the size of constituencies and increasing the number of officials greatly reduces the costs of such activity.”).

87. As Gerald Frug claims, “[no] one is likely to participate in the decision-making of an entity of any size unless that participation will make a difference . . .” Frug, *supra* note 80, at 1070.

frequently than national constitutions.⁸⁸ Indeed, as noted earlier, national constitutions tend to be relatively hard to amend, but subnational constitutions tend to be amended and revised frequently.⁸⁹

Posner and Ginsburg conclude that the fundamental difference between subnational constitutionalism and national constitutionalism is that subnational constitutions involve mitigated agency costs.⁹⁰ That is, the structuring (and restructuring) of national power by means of a constitution involves greater risk of government abuse than does the structuring (and restructuring) of subnational power by means of subnational constitutions.⁹¹

Posner and Ginsburg conclude that agency costs are far greater at the national level because: (1) national constitutions must place limits on theoretically unlimited government power, but subnational constitutions already operate within a legally defined space; (2) there is no effective enforcement mechanism operating above the national constitution, but national government provides an effective monitoring and enforcement mechanism regarding subnational abuses of constitutional space; and (3) subnational units risk losing citizens to neighboring units.⁹²

Because agency costs are reduced at the subnational level, Posner and Ginsburg observe that there is an inevitable disparity in constitutional stability between “states” and “substates.”⁹³ High agency costs mean that national constitutional constraints must be relatively strong, static, and difficult to change.⁹⁴ Subnational constitutions, however, can be relatively more fluid and responsive to public input because agency costs are lower.⁹⁵ The basic intuition is that there are strong incentives for a national constitution to be stable in its creation of core government institutions and protection of essential individual liberties. And, a stable national constitution creates a safe place for subnational units to engage in constitutional experimentation because inappropriate experiments will be corrected by

88. Ginsburg & Posner, *supra* note 22, at 1584.

89. See *supra* notes 22–24 and accompanying text.

90. Ginsburg & Posner, *supra* note 22, at 1584–85.

91. In economic terms, agency costs are defined as: “the sum of (1) the monitoring costs expended by the principal to limit misappropriations by the agent, (2) the bonding expenditures by the agent to demonstrate loyalty, and (3) the residual loss in the form of self-serving behavior on the part of the agent.” Robert F. Weber, *Structural Regulation as Antidote to Complexity Capture*, 49 AM. BUS. L.J. 643, 652 (2012) (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976)).

92. Ginsburg & Posner, *supra* note 22, at 1596–97.

93. *Id.* at 1593–94.

94. *Id.*

95. *Id.*

enforcement of the national constitution's overarching rules.⁹⁶ The important implication of this is that subnational constitutions provide better (and safer) opportunities for public participation than national constitutions.

Posner and Ginsburg's hypothesis has compelling empirical support. In all federal systems that permit subnational constitutionalism, subnational constitutions are easier to amend and amended more frequently than their overarching national constitution.⁹⁷ Moreover, as discussed above, even in systems that do not expressly permit subnational constitutionalism, there is a compelling correlation between subnational constitutional change and popular political involvement.⁹⁸ Thus, reduced agency costs are one factor that may explain the correlation between popular political involvement and subnational constitutional change.

III. PATHWAYS OF BOTTOM-UP CONSTITUTIONAL CHANGE IN FEDERAL SYSTEMS

Another recurring theme in *Constitutional Dynamics* is the way subnational activities can affect constitutional change in the federal system as a whole.⁹⁹ This section examines some of the evidence in *Constitutional Dynamics* and suggests that bottom-up constitutional change seems to occur in at least two different ways. First, bottom-up change can occur when subnational units formally adopt new constitutional laws that percolate through the federal system and result in constitutional change at the national level. This can happen through a variety of different political processes, but the core feature is that subnational institutions introduce a new constitutional output into the federal system, which then has ripple effects (or information externalities) that inform formal constitutional laws elsewhere in the system.

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

97. Dinan, *supra* note 22, at 841-47; Ginsburg & Posner, *supra* note 22, at 1593-94. South Africa represents somewhat of an exception to this rule because only two provinces have adopted constitutions and only the province of the Western Cape has survived review by the Constitutional Court. See Dirk Brand, *The Western Cape Constitution*, 31 RUTGERS L.J. 961, 961 (2000).

98. See Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 800 (1997) (discussing the relationship between agency costs and direct democracy).

99. This is one of the primary focuses of *Constitutional Dynamics*. See Burgess & Tarr, *supra* note 3, at 3-4.

This can be called the “filter” pathway of bottom-up constitutional change. Second, bottom-up change can occur in more direct and conflict-based ways; namely constitutional litigation and/or threats of destabilizing or grid-locking the system as a whole. The core feature of this pathway is that subnational units or groups leverage constitutional change at the national level by using subnational institutions to cause conflict. This can be called the “agitation” pathway of constitutional change.

A. The Filter Pathway of Bottom-Up Constitutional Change

Systems that allow subnational units to adopt and amend their own constitutions provide opportunities for subnational units to contribute to the evolution of constitutional norms in the system as a whole. New developments in constitutional norms benefit from opportunities to be formalized and endorsed by legitimate political institutions.¹⁰⁰ In other words, institutional recognition can facilitate the development of constitutional norms.¹⁰¹ This can occur in at least two ways.

First, institutionalization of a new norm provides an opportunity to test the viability, relevance, and efficacy of the norm at issue. When new constitutional norms are institutionalized, observers can evaluate whether the change is beneficial, whether it is relevant to them, and whether it is practically feasible given their circumstances.¹⁰² Bottom-up constitutional

100. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471, 474–76 (1997) (explaining how law can operate as a norm-shaping tool in the criminal law context); see generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 338–402 (1997).

101. See generally Adam M. Samaha, *Regulating for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1566, 1574–80 (2012) (explaining that expression of norms by legal institutions can have an appearance that can drive the ultimate acceptance and legitimacy of the norm, i.e., the “reality” using Samaha’s term).

102. The micro-economic concept of positive externalities is helpful here. A positive externality occurs when parties receive benefits from an activity that they themselves did not have to pay for. See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 199 (6th ed. 2012) (defining positive externalities as arising from activities that yield benefits to parties who do not pay to receive them); see also Edward L. Glaeser et al., *Growth in Cities*, 100 J. POL. ECON. 1126, 1127–28 (1992) (discussing positive externalities in context of urban dwelling). In this context, a subnational unit generates positive *information* externalities when it adopts a new constitutional norm). That action provides other subnational units and the national government with information regarding the norm that those institutions can use to evaluate the norm, but for which they did not have to pay by implementing the norm themselves (costs associated with implementing a norm include the risk that it is detrimental, resource costs associated with enacting and administering it, and opportunity costs associated with diverting government action from other issues). This is, perhaps, an economic formulation of Justice

change can begin when one subnational unit institutionalizes a change, and, as other subnational units and the national polity learn from that experience, the norm can filter up (and out) until it is institutionalized or rejected at the national level.

Second, institutionalizing constitutional norms can have a socialization effect that facilitates constitutional change.¹⁰³ There can be many barriers to entry for constitutional changes. One barrier may be the illegitimacy that a political culture associates with a particular constitutional change, which frustrates the collective action necessary in a democracy to embrace the new norm.¹⁰⁴ This perception of illegitimacy can be maintained (and likely will be) as long as the norm is not institutionalized.¹⁰⁵ However, once a norm finds an institutional home – in a subnational constitution for example – perceptions can begin to change and this can facilitate broader acceptance of the new norm.¹⁰⁶

Brandeis' famous analogy comparing the United States to a laboratory for legal and social experimentation. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

103. This is related to the idea that norms need to be internalized to become effective. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1690–94 (1996) ("[A] social norm is ineffective in a community and does not exist unless people internalize it.").

104. See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 999 (1995) ("In defending a social meaning, structures of social stigma are already built in, while in attacking a social meaning, one must both overcome the existing structures of social stigma and implement new structures in line with one's desired meaning."); *id.* at 962–90 (exploring how institutionalization of norms through adoption of formal rules can affect the perception of those norms).

105. *Id.* at 999 ("This is not to say that defensive construction [of existing norms] will always succeed, or that offensive [construction of new norms] will always fail, but that defensive construction does not face as severe a collective action problem as does offensive construction.").

106. See generally *id.* at 1009–15 (explaining techniques for changing social meaning that include the technique of "tying," which attempts to change a social norm by associating a new unaccepted norm to an existing accepted institution, thereby causing observers to project the legitimacy of the existing norm onto the new norm); *id.* at 1010 ("Whether negative or positive, tying functions by focusing a meaning—by making an association that clarifies the meaning along some dimension, sometimes by implicitly breaking another link that before existed."); see also McAdams, *supra* note 100, at 400–07 (explaining how law signals consensus regarding its content in a democracy). For example, it is interesting that the Swiss Canton of Fribourg was the first government in the world to constitutionally recognize same-sex marriage, and it was done not by judicial action but by the adoption of a new constitutional provision. See Schmitt, *supra* note 5, at 161. This action may have had a signaling effect that challenged ideas of illegitimacy associated with such constitutional

Constitutional Dynamics provides some compelling examples of the filter pathway. John J. Dinan provides evidence of at least four general categories of changes that state constitutions have facilitated in the United States.¹⁰⁷ First, Dinan notes that the general structure of American government captured in the United States Constitution was greatly influenced by the early state constitutions, which experimented rather wildly with various different structural arrangements.¹⁰⁸ Second, Dinan notes that the Federal Constitution did not originally set a national suffrage requirement.¹⁰⁹ Although many states initially imposed property and tax-paying suffrage requirements, “[s]tate constitution-makers gradually removed these sufferance restrictions and achieved universal white male suffrage by the 1850s, without passage of any federal constitutional amendments.”¹¹⁰ State constitution makers also took the lead in extending the suffrage to African Americans until the Fifteenth Amendment to the United States Constitution was adopted.¹¹¹ Dinan also notes that state constitutions have played a leading role in the expansion of other individual rights and the enactment of public policy reforms.¹¹²

Switzerland provides another stark example of the filter pathway of bottom-up change.¹¹³ As Schmitt observes, cantonal constitutions are very fluid and very responsive to popular input.¹¹⁴ In fact, the cantons adopt new constitutions almost every four to five years.¹¹⁵ This constitutional activity in the cantons has had a profound effect on Switzerland’s Federal Constitution.¹¹⁶ Indeed, Schmitt observes that “cantonal constitutions have always been in advance of the Federal Constitution. For instance, popular rights have often been developed at the cantonal level and then adopted later by the Confederation.”¹¹⁷

provisions.

107. See Dinan, *supra* note 7, at 55.

108. *Id.* at 48; see generally, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 60-94 (2000) (discussing early state constitutional development vis-à-vis the United States Constitution); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 125-562 (1998) (discussing as well early state constitutional development vis-à-vis the U.S. Constitution).

109. See Dinan, *supra* note 7, at 49-50.

110. *Id.* at 50.

111. *Id.*

112. *Id.* at 51-52.

113. See Schmitt, *supra* note 5, at 140.

114. See *id.* at 140-41.

115. See *id.* at 140.

116. See *id.* at 161.

117. See *id.* (“This was also the case for a certain number of rights granted first at the cantonal level and then recognized by the Federal Tribunal and, in the end, enshrined in the

Switzerland also illustrates the socialization function of institutionalizing new constitutional norms at the subnational level. As Schmitt notes, in May 2004, the canton of Fribourg adopted a constitution that was the first in the world to formally recognize same-sex marriage.¹¹⁸ Although there is currently no federal constitutional right to same-sex marriage in Switzerland, in January 2007, the Federal Partnership Act gave same-sex couples many of the same rights provided to heterosexual couples.¹¹⁹

B. The Agitation Pathway of Bottom-Up Constitutional Change

Bottom-up constitutional change can also occur through less formal means. This is particularly true in systems that do not expressly allow subnational units to adopt their own constitutions or do not provide subnational units with much “constitutional space.” In those systems, subnational units are less likely to be at the forefront of institutionalizing new constitutional norms because their legal ability to do so is severely (if not entirely) limited. Nevertheless, bottom-up constitutional change can still occur by other means. Specifically, subnational units can capitalize on opportunities such as constitutional litigation and political campaigning to bring subnational constitutional issues to the forefront of the national agenda. This pathway is fundamentally different from the filter pathway because it involves offensive leveraging or instigation of constitutional change at the national level by subnational units.

Constitutional Dynamics contains several very interesting examples of the agitation pathway of bottom-up constitutional change. In Germany, for example, the *Länder* operates mostly to administer federal laws, with very little law or policy-making authority of their own.¹²⁰ There has been growing discontent in many *Länder* regarding their limited constitutional space within Germany’s federal system.¹²¹ Thus, in the fall of 2003, the Federalism Commission was formed to consider reforms to Germany’s federal system.¹²²

The Federalism Commission was controlled primarily by the *Länder* because the federal government did not have any voting members on the

new 1999 Constitution.”).

118. *Id.* at 161.

119. See generally Kenneth Mck Norrie, *Recognition of Overseas Same-Sex Relationships in New Zealand*, 23 N.Z.U.L.R. 339, 340 (2009).

120. See Gunlicks, *supra* note 13, at 62-63 (“In Germany . . . dual federalism means that the federal executive and legislative branches of government are responsible for most legislation, and that the *Länder* generally administer the laws.”).

121. *Id.* at 68.

122. *Id.* at 69.

commission.¹²³ Although the Commission initially could not reach a consensus regarding reform proposals,¹²⁴ its work was revived in 2005 and a series of reforms were proposed. One of the key proposals was “to redistribute” legislative powers between the central government “to give the *Länder* additional responsibilities and therefore strengthen” their role.¹²⁵ The proposal gave the *Länder* additional law-making authority.¹²⁶ The proposals were ultimately adopted in 2006 and resulted in meaningful expansion of the constitutional space afforded to the *Länder*.¹²⁷ Germany’s experience powerfully illustrates the agitation pathway of bottom-up change because the *Länder* were able to join together and leverage a series of significant changes in Germany’s federal structure.¹²⁸

The United Kingdom presents another example.¹²⁹ As discussed above, although the United Kingdom does not formally recognize subnational constitutionalism and is not a formal federal system, Wales, Northern Ireland, and Scotland were able to mobilize grass-roots support for decentralization of law-making power.¹³⁰ Their efforts resulted in extra-Parliamentary proposals for decentralization that were ultimately adopted by Parliament as national legislation.¹³¹

Spain provides an important illustration of how constitutional litigation by subnational units can effectuate bottom-up constitutional change.¹³² Spain does not formally allow subnational constitutionalism, but it recognizes several “autonomous communities” by national statutes of autonomy for those communities.¹³³ Those statutes operate somewhat like subnational constitutions, but they are ultimately enacted by the national legislature and not directly and independently by the autonomous regions.¹³⁴

123. *Id.*

124. *Id.* at 69–70.

125. *Id.* at 70–71.

126. Specifically, the *Länder* were given additional legislative authority “over a number of environmental matters and in areas such as punishment for crimes, higher-education law . . . and financing of higher-education, retirement and nursing homes, stores-closing hours, restaurants . . . the promotion of public housing, and the salaries and benefits for judges and public employees at the *Land* and local levels.” *Id.* at 73.

127. *Id.* at 71–73.

128. *Id.* at 69 (stating the reform was not a “top-down” exercise).

129. See Tierney, *supra* note 13, at 195.

130. See *id.*

131. *Id.* at 200–03.

132. See Viver, *supra* note 13, at 218.

133. *Id.* at 218–19.

134. *Id.* at 226 (explaining that statutes of autonomy “require the consent of the Spanish Parliament, which has to approve them as its own laws”).

Spain's national constitution authorizes the central government to set the "bases" for regulating various matters that are within the authority of the autonomous regions.¹³⁵ This so-called "framework legislation" is intended to guide the autonomous regions in enacting appropriate subnational legislation.¹³⁶ The Spanish Constitution does not define the scope of the "bases."¹³⁷ As a result, the Spanish Parliament has taken a very broad definition of its own power, which "has profoundly affected the distribution of power between central government . . . and the autonomous communities."¹³⁸ Consequently, the autonomous communities have frequently sued to determine (and defend) the scope of their authority under the Spanish Constitution.¹³⁹

Spain's overall constitutional structure presents another illustration of how the agitation pathway of bottom-up change may operate. The statutes of autonomy are proposed by the autonomous communities, but they must be passed by a simple majority of the Spanish Parliament as national legislation.¹⁴⁰ The Spanish Parliament includes representatives from the autonomous communities.¹⁴¹ This creates a situation where representatives from the autonomous communities can, in effect, sponsor the introduction of new national legislation.¹⁴² Once that legislation is introduced, it becomes another bargaining chip for representatives, which potentially provides them with an opportunity to leverage concessions from other representatives.¹⁴³ In this way, the autonomous communities can indirectly leverage changes at the national level by introducing changes to their own governing statutes.¹⁴⁴

135. *Id.* at 231.

136. *Id.* at 230.

137. *Id.* at 231.

138. *Id.* at 231.

139. *Id.* at 232 ("Spain's Constitutional Court has been called on to settle conflicts between central institutions and the autonomous communities on a number of occasions.").

140. *Id.* at 226.

141. *Id.*

142. *Id.* at 226–27.

143. *Id.* at 227;

[I]f the proposal for reform that they put forward has strong has strong political and popular support, in practice they can exert an important influence on the central institutions' final decision. Indeed, these institutions can block the process if they disagree with the proposed reform, completely or partially, although this may come at a high political price.

Id.

144. *Id.* The structure of Germany's national legislature can also provide opportunities for this sort of leveraging by the *Länder*. See Gunlicks, *supra* note 13, at 69 ("When the *Bundsrat* [(the legislative body that represents the *Länder*)] is used as an instrument of opposition, there is a 'structural break' between the federal state and party competition and a

Italy's experience presents an interesting hybrid agitation pathway of bottom-up constitutional change.¹⁴⁵ Like Spain, Italy has autonomy statutes that govern various autonomous regions.¹⁴⁶ Several of those statutes can be amended by the corresponding regional parliament and those amendments become law unless the national government chooses to challenge the amendment before Italy's Constitutional Court.¹⁴⁷

In 2006, the autonomous region of Sardinia, a large but remote island, created a commission to draft "the new statute on autonomy and sovereignty of the Sardinian people."¹⁴⁸ As Palermo notes, the terminology was "clearly aimed at provoking a debate."¹⁴⁹ The national government immediately challenged the Sardinian law before the Constitutional Court.¹⁵⁰ The Court held that the law was unconstitutional because it claimed to divide Italy's sovereignty between subnational units, which was contrary to the centralized and individual sovereignty established by the Italian Constitution.¹⁵¹ The Sardinian incident is interesting because it represents the enactment of a positive subnational constitutional law for the express purpose of creating a constitutional conflict with the national government.¹⁵² Although the Constitutional Court's ruling did not result in an affirmative change in Italy's constitutional order, it served to further articulate and define the parameters of Italy's decentralization.

IV. CONCLUSION

Constitutional Dynamics is an important contribution to the study of federalism and constitutional theory. This article has attempted to illustrate the depth of its contribution by discussing a few recurring themes. However, the contributors to *Constitutional Dynamics* present with great skill and thoroughness the complexities of constitutional change in federal systems. *Constitutional Dynamics* highlights the importance of studying constitutional issues from a bottom-up perspective and provides invaluable insight and data regarding constitutional change from this essential but neglected perspective.

limitation on the policy-making capacity and ability to act of the federal government.") (emphasis added).

145. Palermo, *supra* note 13, at 246.

146. *Id.*

147. *Id.* at 246.

148. *Id.* at 247 (internal citation omitted).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*